

# WHAT IS PROBABLE CAUSE, AND WHY SHOULD WE CARE?: THE COSTS, BENEFITS, AND MEANING OF INDIVIDUALIZED SUSPICION

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## I

### INTRODUCTION

In the introductory essay to this symposium, I define probable cause as having four components: one quantitative (How certain must the police be?), one qualitative (How strong must the supporting data sources be?), one temporal (*When* must police and courts make their judgments?), and one moral (Do the police have “individualized suspicion”?).<sup>2</sup> My focus in this article is on the last of these components. “Individualized suspicion,” the United States Supreme Court has suggested, is perhaps *the* most important of the four components of probable cause.<sup>3</sup> That is a position with which I heartily agree. The other three components each play only a supporting role. But individualized suspicion is the beating heart that gives probable cause its vitality.<sup>4</sup>

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1. *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976) (“[I]ndividualized suspicion is usually a prerequisite to a constitutional search or seizure.”).

2. See Andrew E. Taslitz, *Foreword*, 73 *LAW & CONTEMP. PROBS.* i, i–ii (Summer 2010).

3. See *Maryland v. Pringle*, 540 U.S. 366, 372–73 (2003) (“‘The substance of all the definitions of probable cause is a reasonable ground for belief of guilt,’ and that the belief of guilt must be particularized with respect to the person to be searched or seized.”) (quoting *McCarthy v. De Armit*, 99 Pa. 63, 69 (1881), and citing *Ybarra v. Illinois*, 445 U.S. 85 (1979)).

4. See Tracy Maclin, *The Pringle Case’s New Notion of Probable Cause: An Assault on Di Re and the Fourth Amendment*, 2004 *CATO SUP. CT. REV.* 395, 410–12 (summarizing the history of the individualized-suspicion requirement); *id.* at 411 (“It is a fair summary of the history of the Fourth Amendment to say that the provision reflected the Framers’ desire to control the discretion of ordinary

Roughly defined, individualized suspicion is the idea that the state should judge each citizen based upon his own unique actions, character, thoughts, and situation.<sup>5</sup> The state should not base its judgments on stereotypes, assumptions, guilt-by-association, or other generalities.<sup>6</sup> As central as individualized suspicion is to defining probable cause, however, such suspicion also plays a role in cognate concepts, primarily “reasonable suspicion.”<sup>7</sup> Accordingly, fully understanding individualized suspicion requires examining both probable cause and its junior partner, reasonable suspicion. That partner is generally defined as a sort of “probable cause light,” resting on a lower level of certainty and weaker data sources than probable cause, but otherwise retaining its core commitment to individualized treatment.<sup>8</sup> Understanding the Court’s approach to such matters sets the stage for the conceptual discussion that follows.

### A. *Safford Unified School District No. 1 v. Redding*

#### 1. The Tip Behind a Strip Search

One recent example of the Court’s giving serious weight to a commitment to individualized suspicion, even under the less-muscular reasonable-suspicion standard, is *Safford Unified School District No. 1 v. Redding*.<sup>9</sup> There, a middle school’s policies prohibited students possessing, while in school, any prescription or over-the-counter drugs—including ibuprofen—without prior

law enforcement officers and to eliminate governmental intrusions lacking particularized suspicion.”) (emphasis added). See also ANDREW E. TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789–1868 258–59 (2006) (summarizing history’s teachings concerning the individualized-suspicion requirement).

5. Cf. Andrew E. Taslitz, *Myself Alone: Individualizing Justice through Psychological Character Evidence*, 52 MD. L. REV. 1, 3–30 (1993) (explaining the social-science and philosophical literature defining the “individualized justice” principle in substantive and evidentiary criminal law—a principle conceptually indistinguishable from the “individualized suspicion” aspect of probable cause).

6. See TASLITZ, *supra* note 4, at 258–59 (making a similar point); Maclin, *supra* note 4, at 395 (“Americans have rightly believed that an individual should not be judged solely on the basis of the company that he keeps. Fourth Amendment law has embraced a similar norm.”).

7. *Terry v. Ohio*, 392 U.S. 1, 27 (1968), first articulated the “reasonable suspicion” standard and described the standard as to frisks as involving an officer’s having “reason to believe that he is dealing with an armed and dangerous individual” (emphasis added). *Terry* noted as well that “due weight must be given, not to [the officer’s] inchoate and unparticularized suspicion or ‘hunch,’ but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.” *Id.*

8. In *Alabama v. White*, 496 U.S. 325, 330 (1990), the Court explained, reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause. See also *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (remarking that the level of suspicion for reasonable suspicion “is considerably less than proof of wrongdoing by a preponderance of the evidence” and less than a “fair probability that contraband or evidence of a crime will be found”—“fair probability” being the definition of the quantum of evidence necessary to proving probable cause); C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 VAND. L. REV. 1293, 1325 (1982) (summarizing a survey of federal judges quantifying reasonable suspicion as an average certainty of thirty-one percent).

9. 129 S. Ct. 2633 (2009).

permission. That policy was triggered when a male student told Assistant Principal Kerry Wilson that “certain students were bringing drugs and weapons on campus.”<sup>10</sup> The student also said that he had gotten sick after taking some pills that “he got from a classmate.”<sup>11</sup> That boy later gave Wilson a white pill, claiming that he had gotten it from Marissa Glines. The student nurse identified the pill as prescription-strength ibuprofen. Wilson pulled Marissa from her class and showed her a day planner that her teacher had found within Marissa’s reach that contained, among other things, knives and a cigarette. Wilson asked Marissa to empty her pockets and to show the contents of her wallet, which she did. Her doing so revealed two pills—one blue, one white—and a razor blade.

Marissa insisted that she had gotten the ibuprofen from thirteen-year-old Savana Redding but denied knowing anything about the day planner’s contents. Wilson then ordered the school nurse and an administrative assistant to conduct a body search of Marissa. That search included examining her bra and panties, which revealed no further pills.

A week later, Wilson called Savana Redding into his office, where she admitted to owning the day planner but said that “she had lent it to Marissa.”<sup>12</sup> Savana denied knowing anything about the contraband it had contained. Wilson had learned from other staff members that Savana and Marissa were friends and had been “part of an unusually rowdy group at the school’s opening dance in August, during which alcohol and cigarettes were found in the girls’ bathroom.”<sup>13</sup> He and his administrative assistant, Helen Romero, consequently searched Savana’s backpack, with Savana’s consent, to no avail.<sup>14</sup>

At Wilson’s instruction, Romero and the school nurse asked Savana to remove all her clothes down to her bra and panties; Savana complied. Savana again complied when instructed to “pull her bra out and to the side,” to shake it, and to pull out her underpants’ elastic, “thus exposing her breasts and pelvic area to some degree.”<sup>15</sup>

Savana’s mother filed suit against the school district, Wilson, Romero, and the school nurse for violating Savana’s Fourth Amendment rights by conducting a strip search. The District Court for the District of Arizona found the claim meritless, granting the defendants’ motion for summary judgment.<sup>16</sup>

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10. *Id.* at 2640.

11. *Id.*

12. *Id.* at 2641.

13. *Id.*

14. *Id.* at 2638.

15. *Id.*

16. A Ninth Circuit panel affirmed. *Redding v. Safford Unified Sch. Dist. No. 1*, 504 F.3d 828 (9th Cir. 2007). But sitting en banc, the Ninth Circuit reversed, finding a Fourth Amendment violation under law “clearly established” at the time, thus denying qualified immunity and reversing summary judgment as to Wilson, though upholding summary judgment as to other defendants on other grounds. *Redding v. Safford Unified Sch. Dist. No. 1*, 531 F.3d 1071 (9th Cir. 2008) (en banc).

## 2. The Role of Humiliation in Defining the Relevant “Reasonable Suspicion”

The United States Supreme Court found a violation of Savana’s Fourth Amendment rights. The Court relied specifically on its probable-cause jurisprudence, at least concerning how reliable, credible, and specific the information upon which the state relied had to be to establish the necessary individualized suspicion.<sup>17</sup> The Court did note, however, that probable cause requires sufficient proof of a “substantial chance” of discovering evidence of criminality, while the lesser school-searches standard of reasonable suspicion “could as readily be described as a moderate chance of finding evidence of wrongdoing.”<sup>18</sup>

The Court determined whether this standard had been met by dividing the search into two stages: first, the search of Savana’s backpack, outer clothing, and bag; second, the “strip search of Savana.”<sup>19</sup> The Court created this dichotomy because the humiliating nature of the strip search, especially given Savana’s age, was far more intrusive than that of the backpack and related searches, thus requiring separate justification, including separate individualized suspicion to believe that contraband was not simply on her person or property but in her underwear. Indeed, the Court readily found reasonable suspicion for Wilson’s believing that Savana may have had contraband on her person or in her backpack or outer clothing. But the Court found suspicion inadequate to believe either that the contraband posed a serious danger to the students (after all, only small quantities of ibuprofen and related common pain relievers were involved) or “that *Savanna* was carrying pills in her underwear.”<sup>20</sup> As to the latter, the Court carefully distinguished among generalizations about what sorts of students might possess the pills versus specific reasons, rooted in trustworthy evidence, to believe that *this student*, Savana—and not anyone else—had them in her underwear.<sup>21</sup>

## 3. The Inadequacy of Generalizations

The defendants had argued, as a “truth universally acknowledged,” that students often hide contraband in their clothing, including in their underwear, citing several examples of the latter.<sup>22</sup> However, said the Court, the extreme intrusiveness of adolescent strip searches “requires some justification in [specific] suspected facts,” so “general background possibilities fall short . . . .”<sup>23</sup> Accordingly, a “reasonable search that extensive calls for [individualized]

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17. *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2639 (2009).

18. *Id.*

19. *Id.* at 2641 (“The exact label for this final step in the intrusion is not important, though strip search is a fair way to speak of it.”).

20. *Id.* at 2643 (emphasis added).

21. *See id.* at 2643–44.

22. *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2642 (2009).

23. *Id.*

suspicion that it will pay off.”<sup>24</sup> Yet the record included no evidence of the alleged general practice in the Safford Middle School of hiding contraband in underwear.<sup>25</sup> More importantly, explained the Court, “neither [the male student tipster] nor Marissa [had] suggested to Wilson that Savana was [hiding contraband in her underwear], and the preceding search of Marissa that Wilson [had] ordered [had] yielded nothing.”<sup>26</sup> Nor did the nondangerous type of contraband suspected raise the “specter of stashes in intimate places . . . .”<sup>27</sup> Furthermore, noted the Court, Wilson had failed to conduct the sort of additional investigation that might have linked the evidence he already had to Savana’s underwear. For example, Wilson had never asked Marissa *when* she had purportedly received the pills from Savana. Had they been received days before, that would have counted against reasonable suspicion that Savana *currently* had them on her person, “much less in her underwear.”<sup>28</sup> Nor had Wilson asked Marissa where Savana might be hiding the pills.

The Court clearly considered, however, the presence, absence, or nature of a variety of generalizations relevant to its inquiry. But it questioned whether there was hard evidence to support such generalizations. Even more critical to its holding was that generalizations were not enough; there had to be additional case-specific facts that, when combined with the supportable generalizations, established reasonable suspicion to believe that *this suspect, at this time*, hid contraband in *the specific location* of her underwear. Moreover, that underwear-specific suspicion had to be based primarily on her own actions, mental state, and personal history.<sup>29</sup> Furthermore, although the Court found the intrusiveness of the strip search to be a “quantum leap”<sup>30</sup> above that of the backpack and related searches, it did so primarily to justify its two-stage division of the searches. It did not rely on the intrusiveness of the search alone as its rationale. Indeed, having made this division, the Court described its remaining conclusions as turning on the *combination* of the nondangerous nature of the contraband *and* the lack of adequate individualized evidence that the contraband was then in Savana’s underwear:

[W]hat was missing from the suspected facts that pointed to Savana was any indication of danger to the students from the power of the drugs or their quantity, *and* any reason to suppose that Savana was carrying pills in her underwear. We think that the *combination* of these deficiencies was fatal to finding the search reasonable.<sup>31</sup>

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24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *See infra* II.A (defining “individualized suspicion”).

30. *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2643 (2009).

31. *Id.* at 2642–43 (emphasis added).

Moreover, despite the particularly intrusive nature of the strip search,<sup>32</sup> the Court has applied a similarly vigorous approach to individualized suspicion in several other less-troubling circumstances.<sup>33</sup> *Redding* would also suggest that the Court is likely to even more aggressively defend the individualized-suspicion requirement in probable-cause cases because reasonable suspicion is a lesser standard than probable cause. Likewise, the Court might be more aggressive in contexts other than that of the middle-school, in which courts pay a “high degree of deference” to the “educator’s professional judgment.”<sup>34</sup> *Redding* might thus be seen as an exemplar of the Court’s zealous commitment to the individualized-suspicion ideal.

#### B. Cutting Samson’s Hair: The Lapsed Commitment to Individualized Justice

Nevertheless, such a judgment would be flatly wrong. The Court itself has often readily dispensed entirely with an individualized-suspicion mandate. At first, it did this largely in “special needs” or “administrative search” cases, those whose “primary objective programmatic purpose” was other than criminal investigation.<sup>35</sup> Examples include random drug testing for individuals in safety-sensitive jobs, health and safety inspections, and inventory searches.<sup>36</sup> Next, it expanded these “special needs” searches and seizures to contexts that would seem to the layperson to be at least partly criminal investigation but that the Court insisted “primarily” involved other purposes. These searches and seizures included drunk-driving roadblocks, searches of automobile junkyards for stolen property, and even searches of probationers and parolees for contraband (likely resulting in revocation of their probation or parole and prosecution for a new

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32. The Court did suggest at several points that its relatively vigorous examination of evidence of individualized suspicion that contraband was in Savana’s underwear might be attributed to the highly intrusive nature of the strip search. For example, “[W]hen the categorically extreme intrusiveness of a search down to the body of an adolescent requires some justifications in suspected facts, general background possibilities of criminal conduct fall short . . . .” *Redding*, 129 S. Ct. at 2642 (emphasis added). This statement might be read as meaning that when searches of young students are *not* by definition extremely intrusive, mere “general background possibilities”—what I have here called “generalizations”—might be sufficient. *See id.* (“Here, the content of the suspicion failed to match the degree of the intrusion.”).

33. *See, e.g.,* *Richards v. Wisconsin*, 520 U.S. 385 (1987) (requiring reasonable suspicion that knocking and announcing police presence before executing a warrant would be futile or dangerous, or that it would inhibit the effective investigation of the crime).

34. *See Redding*, 129 S. Ct. at 2643.

35. *See* ANDREW E. TASLITZ, MARGARET L. PARIS & LENESE HERBERT, *CONSTITUTIONAL CRIMINAL PROCEDURE* 400–18 (3d ed. 2007) (defining “special needs” and “administrative” searches). Though the definition of “primary objective programmatic purpose” is unclear, and the details of the debate not worth pursuing here, *see* Andrew E. Taslitz, *A Feminist Fourth Amendment?: Consent, Care, Privacy, and Social Meaning in Ferguson v. City of Charleston*, 9 *DUKE J. GENDER L. & POL’Y* 1 (2002), for a stab at its definition.

36. *See* TASLITZ, PARIS & HERBERT, *supra* note 35, at 402–05, 408–18, 442–48 (summarizing case law). The Court has also found one seizure—briefly stopping cars to see if anyone had witnessed a recent hit-and-run—to be administrative, even though its objective was to investigate crime, because the persons stopped were not those suspected of that crime. *See Illinois v. Lidster*, 540 U.S. 419 (2004).

offense) or evidence of other crimes.<sup>37</sup> The Court has also eliminated any individualized-suspicion requirement for some clear criminal searches, such as searches incident to arrest and consent searches,<sup>38</sup> and has repeatedly expanded the arguably watered-down version of individualized suspicion, namely reasonable suspicion, from its roots in *Terry v. Ohio* “stop-and-frisks”<sup>39</sup> to a wide range of other contexts.<sup>40</sup>

Throughout its frequent jettisoning of an individualized-suspicion mandate, the Court has nevertheless often suggested that it has done so only in a few, relatively narrow “exceptions” to an otherwise controlling individualized-suspicion presumption.<sup>41</sup> Recently, however, it has more candidly rejected, or at least diluted, any such presumption. Thus, in *Samson v. California*,<sup>42</sup> an officer searched the person of someone the officer recognized as a parolee. The officer admitted that he entirely lacked any individualized suspicion, but he searched simply because he saw subjection to suspicionless searches for evidence of crime as a condition of parole. The Court upheld the search, though it was clearly done for the purposes of criminal investigation. Justice Thomas, writing for the Court, declared,

The touchstone of the Fourth Amendment is reasonableness, *not* individualized suspicion. Thus, while this Court’s jurisprudence has often recognized that “to accommodate public and private interests some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure,” we have also recognized that the “Fourth Amendment imposes no irreducible requirement of such suspicion . . . .” Therefore, although this Court has only sanctioned suspicionless searches in limited circumstances, namely, programmatic and special needs searches, we have never held that these are the only limited circumstances in which searches absent individualized suspicion could be “reasonable” . . . .<sup>43</sup>

Indeed, continued Justice Thomas, the officer’s search of parolee Samson was reasonable given California’s concerns about “recidivism, public safety, and reintegration of parolees into productive society . . . .”<sup>44</sup> This conclusion, said Justice Thomas, was neither “unprecedented” nor “remarkable.”<sup>45</sup>

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37. See TASLITZ, PARIS & HERBERT, *supra* note 35, at 419–23 (probationers and parolees), 429–31, 436–39 (roadblocks), 407 (“junkyard” search case).

38. See *id.* at 372–79, 448–68 (searches incident to arrest and consent searches).

39. 392 U.S. 1 (1968).

40. See TASLITZ, PARIS & HERBERT, *supra* note 35, at 380–81, 408, 419–20 (explaining, for example, the Court’s holdings extending the reasonable-suspicion inquiry to certain “protective sweeps of residences” for dangerous persons when an arrest is made there, fairly invasive searches of school children’s bodies, and searches of probationers’ and parolees’ homes).

41. See, e.g., *Ferguson v. City of Charleston*, 532 U.S. 67, 80 (2001) (noting individualized suspicion is generally dispensed with only in special needs and related cases); *Chandler v. Miller*, 520 U.S. 305, 309 (1997) (describing the “category of constitutionally permissible suspicionless searches” as “closely guarded”).

42. 547 U.S. 843 (2006).

43. *Id.* at 855 n.4 (citations omitted).

44. *Id.*

45. *Id.*

But Justice Stevens, in a dissent joined by Justices Souter and Breyer, insisted that Thomas's conclusion was indeed unprecedented because "[t]he suspicionless search is the very evil the Fourth Amendment was intended to stamp out."<sup>46</sup> Accordingly, exceptions to its prohibition should be "closely guarded."<sup>47</sup> Moreover, insisted Stevens, "if individualized suspicion is to be jettisoned, it must be replaced with measures to protect against the state actor's unfettered discretion,"<sup>48</sup> measures that Stevens found missing despite the majority's insistence that California law's broadly worded statutory prohibition against "arbitrary, capricious or harassing" searches was sufficient.<sup>49</sup> But Stevens had little confidence that better discretion-limiting means than individualized suspicion were either feasible or wise. Concluded Stevens,

The requirement of individualized suspicion, in all its iterations, is the shield the Framers selected to guard against the evils of arbitrary action, caprice, and harassment. To say that those evils may be averted without that shield is, I fear, to pay lipservice to the end while withdrawing the means.<sup>50</sup>

Finally, said Stevens, such lipservice is counterproductive because searches and seizures lacking individualized suspicion "inflic[t] dignitary harms that arouse strong resentment in parolees and undermine their ability to reintegrate into society."<sup>51</sup>

### C. Lip Service

Yet the Court, as well as lower courts, pays "lip service" in other cases too, insisting that it is retaining and vigorously applying a rule of individualized suspicion while doing no such thing. For example, the Court sometimes finds a small number of generalizations alone sufficient to establish individualized reasonable suspicion, as it infamously did in holding that unprovoked flight from the police in high-crime (generally meaning poor, predominantly racial-minority-populated) areas, but not low-crime ones, alone establishes reasonable suspicion to stop a suspect<sup>52</sup>—generalizations whose accuracy are themselves belied by empirical evidence, at least according to the dissenters in that case and to several commentators.<sup>53</sup> Lower courts seem to have taken this and other holdings of the Court as a signal, repeatedly finding "individualized" reasonable suspicion on the most general of evidence.<sup>54</sup>

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46. *Id.* at 857–58 (Stevens, J., dissenting).

47. *Id.* at 860 (Stevens, J., dissenting).

48. *Samson v. California*, 547 U.S. 843, 860 (2006) (Stevens, J., dissenting).

49. *Id.* at 841 (Stevens, J., dissenting).

50. *Id.* at 866 (Stevens, J., dissenting).

51. *Id.* at 865 (citing the majority opinion, 547 U.S. at 856, and citing *Terry v. Ohio*, 392 U.S. 1, 19, 29 (1968)).

52. *See Illinois v. Wardlow*, 528 U.S. 119 (2000).

53. *See id.* at 126–39 (Stevens, J., dissenting); Andrew E. Taslitz, *Stories of Fourth Amendment Disrespect: From Elian to the Internet*, 70 *FORDHAM L. REV.* 2257, 2294–300 (2002).

54. *See* David A. Harris, *Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality Under Terry v. Ohio*, 72 *ST. JOHN'S L. REV.* 975 (1998).

In the area of probable cause, lower courts often apply somewhat vapid generalizations as universal principles to determine the likely credibility of informants, particularly when informants' stories directly contradict one another, thus ignoring the case-specific adequacy of these generalizations. Thus courts generally assume that citizen (as opposed to criminal) informants and police informants are truthful, that discrepancies within eyewitness's descriptions are unimportant, that putative victims with potential ulterior motives still do not lie, and that private retail-store guards are inherently credible.<sup>55</sup> These same courts generally reject skepticism or the need for further investigation, despite evidence suggesting the wisdom of both.<sup>56</sup>

Likewise, many courts rely increasingly on "constructive probable cause," finding probable cause in hindsight from combining the knowledge of several officers, none of whom individually had reasonable suspicion. Courts construct probable cause even absent case-specific proof that officers ever exchanged the information.<sup>57</sup> Similarly, the Court has recently found individualized probable cause based largely on guilt by association, while insisting it was doing no such thing.<sup>58</sup>

Still another complication arises from the position of some judges and academics (though a minority position among the courts) that probable cause is a variable standard, its meaning changing with a variety of circumstances, including the crime's severity, whether the social harm has occurred or imminently will occur, and a host of other factors.<sup>59</sup> Prominent adherents of this position include Judges Henry Friendly and Richard Posner and academic theorists Joseph Grano, Albert Alschuler, Craig Lerner, and William Stuntz.<sup>60</sup> Although these writers tend to focus on the variability of the quantitative (how convinced must the reasonable officer be?) and qualitative (did that officer rely on sufficiently trustworthy evidence?) aspects of probable cause, the logic of their position would also embrace accepting variability in the degree of required individualization as well.<sup>61</sup>

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55. See Jessica Ward, *Do the Clothes Make the Man?: Implications of a Witness' Status in the Determination of Probable Cause*, 28 *FORDHAM URB. L.J.* 2005 (2001).

56. See *id.*

57. See Simon Stern, *Constructive Knowledge, Probable Cause, and Administrative Decisionmaking*, 82 *NOTRE DAME L. REV.* 1085 (2007).

58. See Maclin, *supra* note 4 (reviewing the case law on guilt by association and concluding that, in a post-*Maryland v. Pringle*, 540 U.S. 366 (2003), world, the Court embraces such guilt). For a discussion of *Pringle's* facts and reasoning, see TASILITZ, PARIS & HERBERT, *supra* note 35, at 189-94.

59. See, e.g., Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 *TEX. L. REV.* 951 (2003).

60. See *Llaguno v. Minge*, 763 F.2d 1560, 1565-66 (7th Cir. 1985) (en banc) (opinion authored by Richard Posner); *United States v. Soyka*, 394 F.2d 443, 452-53 (2d. Cir. 1968) (Friendly, J., dissenting); Albert Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 *U. PITT. L. REV.* 227, 245-56 (1984); Joseph D. Grano, *Probable Cause and Common Sense: A Reply to the Critics of Illinois v. Gates*, 17 *U. MICH. J.L. REFORM* 465, 503-05 (1984); Lerner, *supra* note 59, at 1015-25; William Stuntz, *Local Policing After the Terror*, 111 *YALE L.J.* 2137, 2137-43, 2185 (2002).

61. See Lerner, *supra* note 59, at 1015-21 (summarizing these thinkers' views and adding Lerner's own).

In the pages to come, I will not be challenging the notion that individualized suspicion must sometimes be diluted or even eliminated to serve sound constitutional policy. By constitutional policy, I mean the most desirable way to accommodate the tension among individual interests, state interests, and the safety and security of the People.<sup>62</sup> But I *am* arguing that fiddling with individualized suspicion, if done, must be done candidly, with reluctance and caution, and with full awareness of the costs and benefits involved. Such awareness must extend as well to a careful judgment about whether the costs exceed the benefits and to how to reduce those costs. Cost considerations must, of course, include reducing the opportunity costs of not using, or of substantially weakening, individualized suspicion.

My primary goal in this article, therefore, is to specify the costs and benefits of individualized suspicion, though primarily the benefits because they, unlike the costs, have rarely been closely analyzed. Indeed, the benefits of individualized suspicion are usually recounted at a high level of generality, situated in vague appeals to history, tradition, justice, and state phobia, with little real explanation of what they mean or why we should care.<sup>63</sup> Nevertheless, though the costs of individualized suspicion have been concretely recited elsewhere, I hope to do so here in a slightly different manner than other theorists to highlight their significance more starkly. This article is thus decidedly an exercise in pragmatic constitutionalism, focusing more on the real-world consequences of constitutional rules than on the history, tradition, and precedent often used in constitutional interpretation (though these too play an illustrative role here).<sup>64</sup>

#### D. A Roadmap

Section II of this article examines in more detail just what defines individualized suspicion. Some critics seem to believe that it does not exist, a delusion resting on a false and exaggerated understanding of the distinction between the general and the particular. That is a view I hope to debunk.

Section III explores the benefits of individualized suspicion. Those benefits include error-reduction; individual and group-voice-promotion in political

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62. Cf. 16A AM. JUR. *Const. Law* §467 & nn.12–13 (2010) (describing case law on constitutional free speech as embodying a “constitutional policy” reflecting a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials”); Andrew E. Taslitz, *Search and Seizure History as Conversation: A Reply to Bruce P. Smith*, 6 OHIO ST. J. CRIM. L. 765 (2009) (articulating an extended defense of the roles of history and numerous other data sources in crafting constitutional policy under the Fourth Amendment, a constitutional “conversation” that partly defines American peoplehood).

63. See, e.g., *Chandler v. Miller*, 520 U.S. 305, 318, 322 (1997) (holding that overriding the normal preference for individualized suspicion requires state demonstration of an interest sufficiently “important,” “vital,” and “substantial,” a test not met by a justification that “diminishes personal privacy for a symbol’s sake”).

64. See TASLITZ, PARIS & HERBERT, *supra* note 35, at 7–25 (summarizing the various data sources used in constitutional interpretation).

affairs; encouraging deliberation, transparency, and accountability by law enforcement; avoiding self-fulfilling prophecies; showing respect for persons by honoring what makes each individual unique; discouraging racial bias; and promoting strong, pragmatic rights-cultures.

Section IV starts by briefly outlining the well-known costs of individualized suspicion. Those costs include freeing some of the guilty; undermining crime-deterrence; failing to prevent *imminent* future harm, especially if connected to terrorism; raising the costs of investigation; reducing public safety and governmental legitimacy more generally; and pushing courts to limit the Fourth Amendment's scope to avoid incurring other costs.

Section IV continues by offering guidelines for balancing costs and benefits in individual cases, including ways to reduce the costs of dispensing with or diluting individualized suspicion in its most muscular form when that is deemed workable. Examples analyzed will include an illustrative case involving the Court's reliance on a spurious generalization.

Section V concludes by summarizing what has come before and offering thoughts for the future.

## II

### WHAT IS "INDIVIDUALIZED SUSPICION," AND WHY SHOULD WE CARE?

This section rebuts two broad claims. First, generalities, not particularities, are the hallmark of sound reasoning; particularized analysis is thus an illusion. Second, the benefits of generalizing ordinarily exceed its costs, while the same cannot be said for individualizing. Both rebuttals address "nonspurious"—that is, trustworthy—generalizations, the argument becoming even stronger for spurious or suspect ones. Illustrative pit bulls, big sisters, jealous boyfriends, and Jersey cops will appear along the way. But first one must ask, with more conceptual specificity than scholars have done so far, "Just what is *individualized* suspicion anyway?"

#### A. Defining Individualized Suspicion

"[T]o generalize is to be an idiot. To particularize is the alone distinction of merit."<sup>65</sup>

##### 1. Pit Bulls and the Purported Perils of Particularism

Law professor and philosopher Frederick Schauer has railed against what he calls "particularism." Particularism, as he defines it, is the idea that right decisions turn most importantly on doing what is right for *this* case, *this* person, *this* occasion.<sup>66</sup> "Rightness" here is not only a matter of accuracy but also of morality and justice.<sup>67</sup> Thus, to the pure particularist,

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65. FREDERICK SCHAUER, PROFILES, PROBABILITIES AND STEREOTYPES x (2003) (quoting WILLIAM BLAKE, ANNOTATIONS TO SIR JOSHUA REYNOLD'S DISCOURSES (1808)).

66. *See id.* at ix, 19–20.

67. *See id.*

[a]ll human beings—teenage males who drive cars, ex-convicts, used-car salesmen, Scots, accountants, and everyone else—deserve to be treated as individuals and not simply as members of a group . . . and actuarial decisions about human beings are in most instances morally wrong.<sup>68</sup>

Schauer argues instead for the virtues of generalization, which he sees as pervasive in our decisionmaking, inevitable, and frequently more accurate, and often more just, than the “context[ualism]” of the particularists.<sup>69</sup> Despite this harsh rhetoric, however, Schauer ends up defending a more-modest version of his thesis, and it is this more-modest version that is illuminating here.

Schauer bases much of his thesis on the argument that there is in fact no *conceptual* distinction between the particular and the general. He uses anti-pit-bull ordinances as an example. These ordinances prohibit pit-bull ownership in certain localities on the theory that this breed of dog is far more dangerous to life and limb than other breeds.<sup>70</sup> Pit-bull lovers assail these ordinances as based on an unfair generalization, unfair either because it is untrue or, if often true, because it is not true of *their* pit bulls.<sup>71</sup>

A more particularistic alternative, Schauer posits, would be to put each pit bull in a room with a realistic-looking doll of a seven-year-old child to see whether this particular dog reacts violently.<sup>72</sup> But, says Schauer, the value of this experiment itself turns on a generalization, namely, that a pit bull who is aggressive in everyday, noncontrolled situations with real children will reveal that aggression in controlled experiments with simulated ones.<sup>73</sup> Yet, if that assumption is warranted, it can only be so because we have observed many other pit bulls, under otherwise similar circumstances, who have attacked real children, also consistently doing so with the laboratory imitations.<sup>74</sup> Concludes Schauer,

It turns out, therefore, that even analyses that look individualized are less so than they initially appear, because even individualized analyses are based on aggregate data about the relevance of certain traits. What distinguishes the individualized examination from the so-called profile, therefore, is only the fact that the latter is obvious without closer inspection while the former is not, and that in some, but by no means all, of the cases the individualized analysis will provide a better predictor of the relevant behavior. But what appears to be an individualized analysis is simply an aggregate of stereotypes . . . .<sup>75</sup>

68. *Id.* at 19.

69. *See id.* at 19–21; *see also* WILLIAM JAMES, *PRINCIPLES OF PSYCHOLOGY* 209 (1890) (“[T]he highest ethical life of the mind consists at all times in the breaking of rules which have grown too narrow for the actual case.”).

70. *See* SCHAUER, *supra* note 65, at 55–56.

71. *See id.* at 56–58. *But see* Sallyanne K. Sullivan, *Banning the Pit Bull: Why Breed-Specific Legislation Is Constitutional*, 13 U. DAYTON L. REV. 279 (1988) (praising pit-bull ordinances).

72. *See* SCHAUER, *supra* note 65, at 65–66.

73. *See id.* at 66.

74. *See id.* at 67.

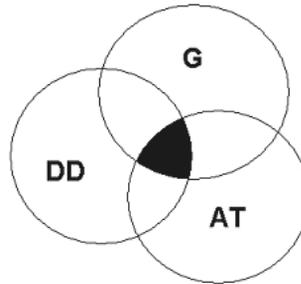
75. *Id.* at 68–69. As Schauer recognizes, however, a broad array of philosophers, lawyers, and feminists vehemently reject his conclusion. *See, e.g.,* Katharine T. Bartlett, *Feminist Legal Methods*, 103

## 2. A Spectrum, Not a Dichotomy

But Schauer makes several important concessions. First, this quote seems to speak of relative *degrees* of generality rather than a dichotomy of generality versus specificity. Thus, he does not say that analyses that look individualized are not so, but rather only that they are “less so” than they at first appear.<sup>76</sup> Second, he later recognizes that “smaller generalizations” are often better predictors than “larger ones.”<sup>77</sup> Although he does not define these terms, his examples suggest that “smaller generalizations” refer to the intersection of many overlapping broader generalizations, thus narrowing the range of individual cases covered by the stereotype (Schauer frequently uses the terms “stereotype” and “generalization” interchangeably). For example, the generalization that “young, non-neutered male pit bulls previously owned by drug dealers, while having a proclivity to growl and having been trained for aggression, are more likely to engage in unprovoked attacks against children” is a small generalization, a “little stereotype.”<sup>78</sup> A Venn diagram might clarify the point:

### KEY:

G: Growling proclivity  
 DD: Drug-dealer-owned  
 AT: Aggression-trained



For clarity, this diagram considers only three of the traits from the pit-bull example—growling proclivity, previously drug-dealer-owned, and aggression-trained. But note that the shaded area, where these three traits intersect, is much smaller than the circles representing each trait alone. In a diagram adding the other traits of breed, gender, being nonneutered, and being young, the shaded area would be smaller still. Schauer agrees that this little stereotype is probably a better predictor of behavior than, and in some sense different from, the bigger ones in isolation.<sup>79</sup> But he sees this difference as one of degree, not kind.<sup>80</sup>

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HARV. L. REV. 829 (1990) (feminist and law professor); *see also* JONATHAN DANCY, *MORAL REASONS* (1993) (philosopher).

76. *See* SCHAUER, *supra* note 65, at 68–69.

77. *See id.* at 68–69, 96 (using “smaller rather than larger” stereotypes language while insisting that stereotypes are sometimes better at predicting than seemingly more-individualized analyses).

78. *Id.* at 68–69.

79. *See id.*; *cf. infra* text accompanying notes 65–75 (summarizing Schauer’s arguments concerning the relative error rates of particulars versus generalities).

80. *See* SCHAUER, *supra* note 65, at 69 (noting that when we engage in a seemingly individualized analysis of a pit bull’s behavior, “we are not doing anything fundamentally different from what we do when we make a prediction based on this dog’s being a pit bull”).

### 3. When Quantitative Differences Become Qualitative

Quantitative differences often thereby become qualitative ones. Height differences, for example, are not differences in kind within a certain range, but, at the extremes, they change our world. The humor in a movie like *Honey, I Shrunk the Kids!*,<sup>81</sup> about a scientist who shrinks himself and his kids to the size of ants, comes precisely from the audience's intuitively recognizing this point. Even focusing just on *physical* differences, the shrunken movie family faces existential threats that the rest of us do not—death by termites, mosquitoes, mice, falling flowers, and ruts in soil. But they also can do things we cannot, such as crawl through keyholes, spy from mouse holes, and fill their bellies happily with crumbs fallen to the floor. Their world even *looks different* than when they were large, for they see skin pores as craters, snowflakes as works of art, grass as skyscrapers.<sup>82</sup> Their social world is radically changed, too. They are invisible to the big people and, if they were visible, they would be treated like lab rats, neither free nor able to safely attend movies, commute to work, or visit libraries as they choose. Their social circle becomes limited to those who can most understand their plight: other very little people.

*a. Dogs who are one-of-a-kind.* Return to the less-fanciful pit-bull example. If hundreds of traits were added into the mix, it would be hard to see an individual pit bull as just a collection of stereotypes. Adding the size of a particular dog's littermates; how he got along with them; who his trainer was; what the training regimen was; whether there were many times that he refused to fight, even upon his master's orders; indeed, all his behaviors and life experiences would be illustrated by not just a very small Venn diagram of a *kind* of pit bull, but rather a pretty good description of one particular pit bull: "Rex." Yet even this unusual, perhaps one-of-a-kind, *combination* of numerous intersecting generalities would not do Rex justice. Rex may display unique, or at least rare, traits that distinguish him from other pit bulls in a way that the intersectionality of generalities simply does not adequately capture.

*b. People who are one-of-a-kind.* The argument is perhaps stronger for human beings, whose complex, ambiguous, contradictory minds and personalities allow for extraordinary combinations of behaviors and traits, and who are arguably even more intensely social than dogs.<sup>83</sup> A human belongs not simply to a pack, breed, or gender, but to churches, political organizations, movie fan clubs, book clubs, ethnicities, high schools, block associations, and varied other groups.<sup>84</sup> Each of us varies in the intensity with which we associate with each type of group, but we define ourselves in part by our group associations, including our workplaces, families, and friends.<sup>85</sup> Simultaneously,

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81. HONEY, I SHRUNK THE KIDS (Buena Vista Pictures 1989).

82. My description of *Honey, I Shrunk the Kids* is not only of what the movie depicted but also of what it *could have* depicted given the movie's premise. The "could have's" are inspired by Jonathan Swift's *Gulliver's Travels*.

we strive for some measure of uniqueness within each group and in distinction from them all.<sup>86</sup> There is significant empirical evidence that we succeed in doing so.<sup>87</sup> In any event, each of us is unique (and this would apply to animals too) because only each person, and no one else, has experienced his own life.

For example, my parents tell me that my big sister, Ellen Nora, then five-and-one-half years old, was scheduled to have her tonsils out when my mother went into labor with me. My dad accompanied my sister to the operating room but explained to her why he had to leave her alone for awhile with the nurse and the doctor. My sister became so stressed by this turn of events that she leaped off the table before her IV could be inserted, bit a huge hole in the nurse's leg, and kicked the surgeon hard in his groin! She then fled. The hospital sued my nearly judgment-proof parents for quite a bit of money. Perhaps others have experienced a similar chain of events (though I suspect very few), but only *this* doctor and *this* nurse had the life experience of being assaulted by my big sister.

Perhaps, as with dogs in many states, my parents should have been subjected to the "one-bite rule"<sup>88</sup>—free from suit for my sister's attack on the nurse but not free from liability for future such attacks. The underlying rationale for such a rule is that once the individual dog (or, here, individual child) has shown violence, that is good *particularized* evidence of *this* dog's (or *this* child's) dangerous proclivities.<sup>89</sup> As the pit bulls' defenders put it, punish "deeds, not breeds."<sup>90</sup>

However, Schauer objects to this argument because it applies only *after* the harm is done.<sup>91</sup> That cost, he argues, is too great; it is better to rely on probabilistic prediction to prevent harms in the first place than to adopt an individualized approach that triggers liability only once someone has suffered.<sup>92</sup>

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83. See generally MICHAEL S. GAZZANIGA, HUMAN: THE SCIENCE BEHIND WHAT MAKES US UNIQUE (2008) (arguing for the uniqueness and complexity, especially the social complexity, of the human animal).

84. See ANDREW E. TASLITZ, RAPE AND THE CULTURE OF THE COURTROOM 134–37 (1999).

85. See *id.* at 135, explaining,

[H]arm to the individual harms the group. We partly define ourselves by our group affiliations. Are we black or white? Jewish or Christian? Republican or Democrat? Our attitudes, beliefs, and assumptions are in part shaped by the groups with which we identify. Gender . . . is certainly at the core of self-identity. Our sense of being 'male' or 'female' and what we believe that means are central to who we are. Although all individuals are unique, some part of how we express ourselves draws on group self-concepts as 'man' or 'woman.'

86. See *infra* text accompanying notes 333–82.

87. See *id.*

88. See J.D. Lee & Barry A. Lindahl, *Liability for Wild and Domestic Animals*, in 4 MODERN TORT LAW: LIABILITY AND LITIGATION § 37:5 (2d ed. 2009).

89. See *id.*

90. Alexandra Stanley, *New York Acts to Lift Pit Bull Controls*, N.Y. TIMES, March 12, 1991, at B1.

91. See SCHAUER, *supra* note 65, at 70.

92. See *id.* at 70–71.

This argument is important for several reasons. Notably, it assumes that individualization is indeed something real and not merely a form of generalization in disguise.<sup>93</sup> Furthermore, it accepts that whether this is a good or a bad thing is a contextual question requiring a balancing of costs and benefits.<sup>94</sup> Finally, his argument reveals that the probative value of more-individualized evidence is nevertheless dependent upon a generalization. In the case of the one-bite rule, that generalization is that an individual's prior actual behavior (whether the individual is dog or human) is a useful (not necessarily perfect or even more likely than not) predictor of future behavior. Yet this judgment still retains a *relatively* individualized quality because it turns on observations of *this individual's* prior behavior rather than assumptions about that behavior based entirely on class membership.

#### 4. Of Character Evidence, Relativity, and Cost-Benefit Analysis

Predicting future behavior based on past behavior is generally a form of character evidence, the argument being that the prior behavior indicates the kind of person (or dog) you are, such persons being more likely to think or act in certain ways.<sup>95</sup> One significant problem with such evidence, however, is that fact finders (such as juries) or other governmental decisionmakers (such as police) may give such evidence, despite its *somewhat* individualized nature, undue weight.<sup>96</sup> Thus decisionmakers might ignore base rates (whether most dogs or persons engage in the behavior at issue at the same, or a lesser, or a greater rate than does this individual).<sup>97</sup> Similarly, evidence that John has engaged in twice as many violent acts as most people is relevant, but only modestly so, if his total lifetime number of violent acts is but two.<sup>98</sup> Additionally, John's violence might be highly contextual, such as being directed only at unfaithful girlfriends.<sup>99</sup> That context raises serious questions about how valuable John's past violence is in predicting future violence in very different situations.

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93. *Id.* at 69–70 (“This alternative does appear to diminish the extent of predictive generalization, for by restricting only those dogs already determined to have committed an attack it eliminates the possibility of over inclusiveness, at least if we continue to assume no mistakes in the process of determining which dogs are guilty.”).

94. *See id.* at 125 (“If it turns out that the coarser (and thus broader) generalization fares better on the benefit-cost analysis, the argument for its representing a case of fundamental injustice is much weaker once we see that the only plausible replacement is a finer (and thus narrower) generalization.”).

95. *See* STEVEN I. FRIEDLAND, PAUL BERGMAN & ANDREW E. TASLITZ, EVIDENCE LAW AND PRACTICE 90–94 (3d ed. 2007).

96. *See id.* at 91.

97. *See* SCHAUER, *supra* note 65, at 94–95, 179, 317 n.16 (defining and illustrating “base rates”).

98. *See* FRIEDLAND, BERGMAN & TASLITZ, *supra* note 95, at 91; Taslitz, *Myself Alone*, *supra* note 5, at 65–72 (analyzing the “predictive power” of character traits).

99. *See* FRIEDLAND, BERGMAN, & TASLITZ, *supra* note 95, at 91, 96 (discussing analogous gang members example).

It is for reasons like this that the law often prohibits use of character evidence at trials.<sup>100</sup> Trials, of course, generally involve proving past wrongful behavior, but most commentators recognize that character is as relevant to proving what happened as to what *will* happen.<sup>101</sup> Nevertheless, this relevance is alone insufficient to justify admissibility. Even if character evidence is more particularized than a highly general stereotype, the law's treatment of the evidence again turns on a careful cost-benefit analysis.<sup>102</sup> Police, like everyday people and judges at trials, must similarly make use of character to judge past guilt or future imminent criminality.<sup>103</sup> Whether, when, and how the law should let them do so will thus likewise be a question of balancing.

Despite the initial vehemence with which Schauer makes his argument, he ultimately concedes that he cannot totally deny the “logical distinction between the particular and the general.”<sup>104</sup> Indeed, he says (and I agree) that nothing is gained by exploring the metaphysical literature on the question. Rather, “the commonsense distinction between a thing and a group of things will suffice.”<sup>105</sup>

But Schauer is probably right that reasoning without some generalizations is impossible. Accordingly, there is a *spectrum* of relative generality versus specificity.<sup>106</sup> The practical question is where, as a matter of wise policy, to place ourselves on that continuum. Ultimately, I disagree with Schauer only in that I see the place chosen on the spectrum as becoming at some point a difference in kind rather than degree.<sup>107</sup> Yet we agree that where we choose to fit on the generality–specificity spectrum is at least partly a question of balancing the costs and benefits of that particular choice.<sup>108</sup> Before examining the relevant costs and benefits involved in the probable-cause and individualized-suspicion determination in criminal cases, I turn, however, to examining the general nature of cost-benefit reasoning about degrees of particularity.

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100. See *id.* at 159–64 (summarizing the character evidence rules in the Federal Rules of Evidence as generally barring evidence of character to prove conduct but containing a variety of exceptions, qualifications, and complexities).

101. See Taslitz, *Myself Alone*, *supra* note 5, at 65–72.

102. See FRIEDLAND, BERGMAN & TASLITZ, *supra* note 95, at 9–94 (summarizing the cost-benefit analysis underlying the character evidence rules).

103. See TASLITZ, PARIS & HERBERT, *supra* note 35, at 199–200 (analyzing Fourth Amendment law concerning the use of character evidence to prove probable cause).

104. SCHAUER, *supra* note 65, at 105–06.

105. See *id.*

106. See Taslitz, *Myself Alone*, *supra* note 5, at 24–30.

107. See SCHAUER, *supra* note 65, at 65–70.

108. See *supra* notes 91–94 and accompanying text.

## B. Why We Should Care

### 1. Nonspurious Generalizations: Some Costs and Benefits

Schauer by no means endorses relying on all generalizations. Rather, the only candidates are “nonspurious” ones.<sup>109</sup> By “nonspurious,” he means empirically supported.<sup>110</sup> Thus, racial profiling relies on spurious stereotypes if the stereotype is wrong, or at least if its “rightness” lacks empirical proof.<sup>111</sup> But to be “right,” a generalization need not be true most of the time, or even more often than not.<sup>112</sup> All that is required is that there be empirical evidence that the assertion is *more* true of one group than another.<sup>113</sup> Spuriousness is thus a comparative concept.<sup>114</sup> Accordingly, if it were true that twenty percent of all white drivers speed on New Jersey highways, but that twenty-five percent of all African American drivers on those highways do so, then an officer’s staking out a stretch of highway traveled primarily by black drivers to maximize his catch of speeders would be relying upon a nonspurious stereotype<sup>115</sup> (even this creates its own problems).<sup>116</sup>

Schauer recognizes that any generalization does “imperfect justice”—that is, it does wrong to those members of the group who do not fit the stereotype.<sup>117</sup> The degree to which it does wrong is its error rate. In the New Jersey highway example above, the error rate for African Americans is seventy-five percent—a very high rate. Of course, in this example, the officer will stop only those African Americans whom he actually *sees* speeding. But that would not be true if the stereotype were, “Twenty-five percent of African American drivers on New Jersey highways *possess cocaine* while driving, though only twenty percent of whites do so.” Cocaine in a glove compartment is visible to the officer only *after* he stops and searches the car. Therefore, if the African American cocaine-user stereotype were relied upon to stop and search African American drivers, seventy-five percent of those stopped would be delayed, frightened, and humiliated, though perfectly innocent—and this would be true even if the stereotype were nonspurious. Error rates are thus one cost to consider in measuring the social value of a stereotype.

Of course, Schauer recognizes, such costs could theoretically be reduced if we have a means for error correction.<sup>118</sup> However, error-correction systems can

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109. See SCHAUER, *supra* note 65, at 7, 11–13.

110. See *id.* at 7.

111. See *id.* at 13, 15–16, 22.

112. See *id.* at 11.

113. See *id.* at 11–13.

114. See *id.* at 11–12.

115. This example is mine but is inspired by a discussion of the New Jersey police in DAVID A. HARRIS, *PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK* 53–60 (2003).

116. See *infra* text accompanying notes 271–72 (discussion of the “ratchet effect”).

117. See SCHAUER, *supra* note 65, at 47.

118. See *id.* at 47–48.

be costly too.<sup>119</sup> Thus, flatly prohibiting commercial airline pilots over age sixty to fly rests on the stereotype that older pilots are less likely to be physically fit than younger ones and consequentially less capable of flying safely.<sup>120</sup> Even if this is a nonspurious stereotype, it may force some perfectly healthy, capable older pilots into retirement, new careers, or unemployment.<sup>121</sup>

One alternative means of error correction would be to subject all pilots over age sixty to a physical. Those who pass could still fly.<sup>122</sup> Paying for physicals, however, costs money.<sup>123</sup> Additionally, the purpose of such a physical is not simply to determine blood pressure or white-blood-cell count but to answer the more ambiguous question, “Is this pilot fit to fly?” To leave such a question to doctors, complains Schauer, is to give them a discretion they perhaps ought not to have.<sup>124</sup> Moreover, the vaguer questions like fitness to fly, turned over to clinical judgment, create their own error rates.<sup>125</sup> One solution is to return to rule-like safeguards, for example, “You are fit to fly if your reaction time is *X*, your eyesight *Y*, and your blood pressure *Z*.” Yet that is to return to generalities and to the imperfect justice they provide.<sup>126</sup>

Indeed, more broadly, Schauer objects to particularism because once we replace generalities—frequently meaning rules—with individualized judgment, someone must make that judgment. If that someone must act uncontrolled by rules, she gains discretion, which we might have reason to fear.<sup>127</sup> Moreover, Schauer insists that even experienced decisionmakers’ choices will often result in higher error rates than will relying upon purely actuarial judgments.<sup>128</sup> His primary examples concern predictions of future dangerousness, such as sentencing and parole decisions for violent criminals, or in release decisions for

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119. *See id.* at 53–54.

120. *See id.* at 124–26.

121. *See id.* at 108–13.

122. *See id.* at 122–23.

123. There are over 42,000 commercial-airline pilots in the United States, *see id.* at 122, and the Federal Aviation Administration (FAA) has at least implicitly concluded that the cost of periodically testing them all far exceeds any benefits, *see id.* at 126.

124. *See* SCHAUER, *supra* note 65. at 122–23 (arguing that individualized medical testing of every commercial-airline pilot would likely still result in significant numbers of false positives and false negatives concerning the ability of each tested pilot to fly safely); *id.* at 53–54 (arguing that all error-correction systems introduce their own error rates and give the correctors discretion that inevitably results in disparities among decisions involving seemingly similar circumstances; such disparities create the appearance of arbitrariness).

125. *See id.* at 53–54, 122–23.

126. An approach in the middle of the generalizing spectrum would be that, rather than testing all pilots, we test only those over a certain age. *See id.* at 127. Yet this approach still is a far stretch from the individualized end of the spectrum and has thus far been rejected by the FAA “as too risky to public safety because the available tests produce too many false negatives and because certain age-related correlates cannot be identified in advance by any existing test.” *Id.* at 128. The FAA’s solution, therefore, has simply been to mandate pilot retirement at age sixty. *See id.* at 108.

127. *See id.* at 53–54, 122–23.

128. *See id.* at 96–97.

the mentally ill.<sup>129</sup> He maintains that the data show the superiority in these areas of actuarial methods over the clinical judgments of psychologists.<sup>130</sup> Yet more-recent research suggests that clinical judgment *combined* with actuarial methods sometimes does an even better job.<sup>131</sup>

Schauer also argues, however, that combining otherwise-valid profiles with race in certain instances increases the predictive power of law-enforcement profiling,<sup>132</sup> though here, once again, other writers read the empirical data as showing that race generally *decreases* profiling's accuracy.<sup>133</sup> Still, the data in *theory* could come out the other way, and Schauer's main point is simply that "generalism" is not always less accurate than particularism.<sup>134</sup> Relative accuracy depends upon the question at issue and the state of our relevant empirical knowledge.<sup>135</sup> Moreover, he asks, is it really better to replace nonspurious profiling with an individual officer's unguided discretion?<sup>136</sup>

## 2. The Problem of Discretion in the "Real World" of the Fourth Amendment

Here Schauer again has a point. Rule-like reasoning will likely constrain police behavior more effectively, all else being equal, than giving police unconstrained discretion.<sup>137</sup> Notably, the Fourth Amendment itself contains no rules.<sup>138</sup> At best, "probable cause" is a mere standard. Rules articulate concrete

129. *See id.*

130. *See id.*, at 96–97.

131. *See* GARY B. MELTON, JOHN PETRILA, NORMAN G. POYTHRESS & CHRISTOPHER A. SLOBOGIN, *PSYCHOLOGICAL EVALUATION FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* (2d ed. 1997); Thomas R. Litwack, *Actuarial Versus Clinical Assessments of Dangerousness*, 7 *PSYCH., PUB. POL'Y, & L.* 409 (2001). Schauer describes these authors as representative of "occasional dissenting voices." SCHAUER, *supra* note 65, at 318 n.19. However, these voices are consistent with the most recent state of the research and are, in any event, the voices I find most persuasive. *See* CHRISTOPHER A. SLOBOGIN, *MINDING JUSTICE: LAWS THAT DEPRIVE PEOPLE WITH MENTAL DISABILITY OF LIFE AND LIBERTY* 111, 312 n.30 (2006).

132. *See* SCHAUER, *supra* note 65, at 169, 181 (at ports of entry, in certain street-level narcotics offenses, and planned terrorist bombings of planes).

133. *See* HARRIS, *supra* note 115, at 73–90. Schauer himself agrees that much racial profiling is also likely spurious, despite his insistence that some racial profiling is likely nonspurious. *See* SCHAUER, *supra* note 65, at 177–81.

134. *See* SCHAUER, *supra* note 65, at 96, 177–81, 189–90.

135. *See id.* at 96, 177–86, 189–90.

136. *See id.* at 173. Schauer observes as well that the visibility of race may, on the other hand, also sometimes give it more salience and thus more weight than it deserves, *see id.* at 188–89, and that there may sometimes be good policy reasons for excluding race as a consideration even when it is nonspurious. *See id.* at 197–98. Moreover, many professionals, including police officers, can err in their judgments simply because of overconfidence in their accuracy and underappreciation of base rates. *See id.* at 318 n.20.

137. *See generally* SAMUEL WALKER, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE, 1950–1990* (1993).

138. The Fourth Amendment speaks in broad, grand language meant more to evoke majesty than effect clarity:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but

factual circumstances that activate them or that are “otherwise determinate in the community.”<sup>139</sup> Standards rely on abstractions containing the underlying goal of the law.<sup>140</sup> Of course, this distinction is not as sharp as it seems, for rules themselves come in degrees of specificity, as do standards, and it may be hard to judge just when the dividing line between a standard and a rule is crossed.<sup>141</sup> Nevertheless, the distinction is a useful and commonsense one. Legal actors need some sort of direction, and greater specificity increases that direction. Accordingly, courts over time may strive in each area of the law, where feasible, to shift standards closer to rules.<sup>142</sup> Even if courts do not intend to do so, the mere growth of precedent addressing the application of standards to an increasingly diverse set of factual circumstances will be read by lawyers seeking guidance for clients as creating an ever more rule-like body of law.<sup>143</sup>

Nevertheless, there are practical limits on this endeavor. No lawgivers, legislative, judicial, or executive, can anticipate every circumstance that may arise within the scope of the problem they want to address.<sup>144</sup> Some critics also argue that courts especially are institutionally ill-equipped, lacking the investigative resources, diversity, and political sensitivity of a legislature to craft highly specific bodies of rules.<sup>145</sup> Additionally, some tasks involve so much variation that it may be infeasible to create sufficiently specific rules to govern every class of conceivable circumstances.<sup>146</sup> Even if we could do so, overly complex rulebooks can themselves become confusing, self-contradictory, and otherwise too hard to apply effectively.<sup>147</sup> Such complexities also raise training

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upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

139. See Mark D. Rosen, *Our Non-uniform Constitution: Geographical Variations of Constitutional Requirements in the Aid of Community*, 77 TEX. L. REV. 1129, 1142 (1999).

140. See *id.*

141. See *id.* at 1142–43. Schauer has himself written an enlightening analysis of the rules-versus-standards distinction. See FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 104 & n.35 (1991).

142. See Rosen, *supra* note 139, at 1142–43.

143. See *id.* at 1143–50.

144. See, e.g., ROBERT J. MARTINEAU & MICHAEL B. SALERNO, *LEGAL, LEGISLATIVE, AND RULE DRAFTING IN PLAIN ENGLISH* 79 (2005) (“When commentators speak of intentional or purposive ambiguity, and especially when they say it may be desirable, what they are talking about is vagueness, leaving it up to administrative agencies or the courts to work out the precise parameters of the term.”).

145. See, e.g., CRAIG BRADLEY, *THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION* (1993).

146. Think about the problem, for example, of drafting legislation governing protecting the confidentiality of telephone calls in a world, not too long past, that had neither heard nor thought of “Skype,” which permits making phone calls via the internet. Moreover, legislation may embrace breadth for political reasons, even when concrete eventualities can be foreseen “as a way of glossing over controversies for which consensus is not reached.” MARTINEAU & SALERNO, *supra* note 144, at 95. This approach is common because “the participants in the legislative process do not easily concede defeat and prefer to declare partial victory.” *Id.*

147. Consider the Internal Revenue Code.

costs. Furthermore, all rules include some things within their governance, excluding others, and we may fear that rules will end up inadvertently excluding some things that the lawgiver would *want* to regulate, thus undermining the lawgiver's broader goals.<sup>148</sup> Granting decisionmakers some measure of discretion is thus frequently unavoidable, often desirable. It once again becomes a policy choice about how much discretion to assign.<sup>149</sup>

The Court has, however, generally been moving away from more rule-like Fourth Amendment precedent toward the more standard-like end of the spectrum in many of the most important areas governing police conduct.<sup>150</sup> Perhaps the most salient example is the Court's overturning the *Aguilar-Spinelli* rule for the determination of informant trustworthiness in making the decision whether there is probable cause.<sup>151</sup> The *Aguilar-Spinelli* rule mandated that magistrates, and thus police, ignore tips that failed to survive a two-pronged test: (1) Was there sufficient evidence of the tipster's credibility (truthfulness)? (2) Was there sufficient evidence that the tipster had a reliable basis for his report?<sup>152</sup> If either prong was not met, the tip could not be considered in the probable-cause determination. Lower courts also developed an extensive body of case law to guide magistrates and police concerning when each prong was met. The rule gave police an incentive to uncover evidence supporting both prongs.

But in *Illinois v. Gates*,<sup>153</sup> the Court replaced this test with a more flexible, standard-like, totality-of-the-circumstances test in which the two *Aguilar-Spinelli* prongs became mere factors: weakness in one former prong could be made up by strength in the other. Any tip, no matter how weak, was at least relevant, in combination with other circumstances, to deciding whether probable cause existed.<sup>154</sup> This more-flexible test, of course, gives the police less guidance but more discretion. The *Gates* Court at least implicitly recognized this consequence but embraced it, expressing fear that the previous rule was undermining police ability to ensure public safety because it was, or at least

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148. See MARTINEAU & SALERNO, *supra* note 144, at 95–96, 109.

149. See *id.*, at 95–96 (noting that legislatures may make the policy choice to leave interpretive discretion in, for example, the hands of administrative agencies or courts).

150. Indeed, leading criminal-procedure scholar Craig Bradley complained about just this problem in a study done some sixteen years ago. See BRADLEY, *supra* note 145. The Court's continuing expansion of police discretion in the years since Bradley first published his book is by now largely undisputed. See, e.g., Tracey Maclin, *United States v. Whren: The Fourth Amendment Problem with Pretextual Traffic Stops*, in WE DISSENT: TALKING BACK TO THE REHNQUIST COURT: EIGHT CASES THAT SUBVERTED CIVIL LIBERTIES AND CIVIL RIGHTS 90, 101 (Michael Avery ed., 2009) (“By allowing police officers to use any traffic violation as a subterfuge to conduct an arbitrary and unjustified narcotics investigation, the Court has given police officers across the nation virtually unchecked discretion to interfere with the liberty and privacy of any motorist.”).

151. See *Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969).

152. See TASLITZ, PARIS & HERBERT, *supra* note 35, at 197–200.

153. 462 U.S. 213 (1983).

154. See *id.* at 230–39; ELLEN PODGOR ET AL., *MASTERING CRIMINAL PROCEDURE: POLICE* 52–58 (2010) (explaining *Gates* and its reasoning and significance).

probably was, allowing too many bad guys to get away with their crimes.<sup>155</sup> That public-safety theme has increasingly pervaded much of the Court's other Fourth Amendment jurisprudence, leading it to expand police discretion through such devices as the "good faith" exception to the exclusionary rule,<sup>156</sup> increasing deference to police expertise and professionalism,<sup>157</sup> expanding the range of the weaker "reasonable suspicion" test over its probable-cause forebear,<sup>158</sup> as well as expanding the number of searches permissible without any suspicion at all.<sup>159</sup>

Whether one applauds or derides this trend, the idea that police face varied circumstances, often needing to act quickly and decisively, sometimes doing so to avert grave danger, does suggest that police must unavoidably retain some level of discretion in their jobs.<sup>160</sup> A computer-like set of "if-then" rules for all police conduct is neither feasible nor wise.<sup>161</sup> The initial question, therefore, is *how much* discretion to give them, not whether to do so at all. Even under the *Aguilar-Spinelli* rule, police had significant discretion to act in a wide range of situations, so long as they paid attention in their investigations to both prongs in the analysis.<sup>162</sup> Moreover, it is perfectly feasible to give police "guidelines," presumptive rules that can be ignored if the police have good, case-specific reasons to do so.<sup>163</sup> That constrains, without handcuffing, police discretion. A

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155. See *Gates*, 462 U.S. at 237–38; PODGOR ET AL., *supra* note 154, at 52–58.

156. See *Herring v. United States*, 129 S. Ct. 695 (2009).

157. See *supra* notes 54–56 and accompanying text.

158. See *supra* notes 52–54 and accompanying text.

159. See *supra* notes 35–41 and accompanying text.

160. Certainly this is the view of many officers, who "feel that their job is so difficult, so dangerous, and so singular that no one who does not also wear the uniform can possibly understand it and that no civilian should sit in judgment of the actions of a police officer." DAVID A. HARRIS, *GOOD COPS: THE CASE FOR PREVENTIVE POLICING* 86–87 (2005). This distrust of civilians is, I believe, fundamentally misplaced. See SAMUEL WALKER, *THE NEW WORLD OF POLICE ACCOUNTABILITY* 8 (2005) ("It is a basic principle of a democratic society that the police should be answerable to the public."). Yet, as a descriptive matter, police do retain, and will vigorously defend, ample discretion. See HARRIS, *supra*, at 131 ("Most officers do nearly all their work unsupervised, only sporadically reporting in to their sergeants or dispatchers and only rarely encountering a supervisory officer on the street."). Continues Harris, "Anything that intrudes on officer autonomy—a policy or directive from the precinct commander or headquarters, a new law, or a court decision—becomes a bone in the throat of the rank-and-file officer." *Id.* at 131–32. As a normative matter, the police's retaining significant discretion is probably a wise thing so long as it is supplemented with mechanisms for guiding that discretion and holding police accountable for its proper exercise. See generally WALKER, *supra*.

161. See HARRIS, *supra* note 160, at 94 ("There is still 'no substitute for judgment. You must be engaged as a supervisor' with your officers. If you are . . . you'll be able to tell which officers with higher-than-average arrests or searches and seizures are doing their jobs properly and which ones are not.") (quoting Pittsburgh, Pennsylvania, Police Commander Linda Barone).

162. See TASLITZ, PARIS & HERBERT, *supra* note 35, at 185–86, 197–200 (describing the many flexible factors to be weighed in deciding whether each *Aguilar-Spinelli* prong has been met).

163. See HARRIS, *supra* note 160, at 94 ("The aim is not to command but to guide generally."). Harris elaborates,

Departmental policies crafted by members of the police department for members of the police department have almost automatic legitimacy among the rank and file who must obey them. They are more likely to be implemented, and more likely to be followed (even when unpopular) than pronouncements on police behavior that come from other institutions, such

still-looser approach does not make guidelines presumptive minima for constitutional behavior, but at least hints to police how they can attain “safe harbors” by structuring what sorts of things they should think about as they do their work.<sup>164</sup> Arguably, that is just what *Gates* does by retaining a reminder to police to investigate and consider all the same evidentiary factors they considered under *Aguilar–Spinelli*, while giving police greater deference should those efforts prove partly unavailing.<sup>165</sup> How much discretion to allow police is a question whose answer depends upon factors that are partly normative (What do constitutional values demand?), partly empirical (Which approach, *Aguilar–Spinelli* or *Gates*, creates stronger incentives for police to do a “better job,” however we define it?). On the normative front, some scholars argue that the central purpose of the Fourth Amendment was aggressively to restrain law-enforcement discretion,<sup>166</sup> while others disagree.<sup>167</sup> On the empirical front, disagreement seems to reign as well.<sup>168</sup>

### 3. The Problem of Imperfect Knowledge

The problem of imperfect knowledge complicates things still further.<sup>169</sup> As Schauer points out, even particularist approaches are not based upon perfect

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as courts or legislative bodies. That is why formal departmental policies concerning accountability and other aspects of preventive policing are essential. Policies describe the contours of proper conduct by setting out the general parameters of how police officers should respond to situations they face repeatedly.

*Id.* at 94; *cf.* WALKER, *supra* note 160, at 31 (noting that court decisions, especially those rooted in constitutional law, can have only a limited impact on police behavior, partly because “so many critical aspects of routine policing fall outside the purview of any court decision defining constitutional standards,” and that, when they do fall within constitutional law’s purview, the Court “lacks the institutional capacity to ensure compliance with its own decisions on a day-to-day basis”). This does not mean, of course, that constitutional law decisions have no impact on police, but it does suggest that the Court is well-advised to craft a regulatory scheme that creates incentives for other institutions to join in the process of implementation. *See* Andrew E. Taslitz, *The Expressive Fourth Amendment: Rethinking the Good Faith Exception to the Exclusionary Rule*, 76 MISS. L.J. 483 (2009) (illustrating one such scheme).

164. *See* Taslitz, *Expressive Fourth Amendment*, *supra* note 163, at 552–75.

165. *See* PODGOR ET. AL., *supra*, note 154, at 21–27.

166. *See* Maclin, *supra* note 150, at 101 (“History shows that the Framers believed that the best way to guard against arbitrary and unjustified governmental intrusions was to control the discretion of law enforcement officers.”).

167. *See* Fabio Arcila Jr., *In the Trenches: Searches and the Misunderstood Common-Law History of Suspicion and Probable Cause*, 10 U. PA. J. CONST. L. 1 (2007) (arguing that magistrates during the post-Revolutionary and immediate post-Fourth Amendment periods largely deferred to law-enforcement judgments concerning probable cause).

168. *Compare* WALKER, *supra* note 160, at 49–51 (arguing that the Court’s modern Fourth Amendment jurisprudence has done much to professionalize police departments), *with* Thomas Y. Davies, *A Hard Look at What We Know (And Still Need to Learn) About the “Costs” of the Exclusionary Rule: The NIJ Study and Other Studies of “Lost” Arrests*, AM. B. FOUND. RES. J. 611 (1983) (summarizing studies, including those critical of the exclusionary rule).

169. *See* RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* 1–25 (2000) (explaining the pervasive problem of imperfect knowledge and the frequent superiority of “local knowledge”).

knowledge.<sup>170</sup> We cannot know everything about another person or the situation facing him. Moreover, police always face some time limits on their decisions—often tight limits.<sup>171</sup> As a practical matter, police can obtain only so much information about a suspect in a reasonable period of time. Imperfect knowledge may increase error rates, perhaps at times beyond the error rates involved in actuarial reasoning.<sup>172</sup>

This criticism seems overstated. First, it is rare that the police have nonspurious generalizations upon which to rely.<sup>173</sup> Perhaps the march of social science will change that one day,<sup>174</sup> but police are largely stuck relying on their common sense, experience, training, and guidelines from superiors. When adequate empirical evidence is available, all four of these sources for police decisionmaking may be improved. But otherwise, proven nonspurious actuarial reasoning just is not an option for most police probable-cause decisions.

The statement that *proven* nonspurious actuarial reasoning is not an option rests on two assumptions, both partly normative, the latter also partly empirical: first, that the burden of proving “nonspuriousness” should be on the state, and second, that proving nonspuriousness requires a sufficient body of sound social-science data. But this proof cannot rest alone on police or lay experience or on common sense. These are two assumptions that Schauer implicitly supports by defining spurious generalizations as those “devoid of . . . empirical foundations.”<sup>175</sup> These assumptions also follow from the position to be defended below that individualized suspicion is one important way for *the state to justify* invading individuals’ privacy, property, and locomotive rights that must otherwise be inviolate.<sup>176</sup> In short, there is a “presumption of liberty.”<sup>177</sup> A

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170. See SCHAUER, *supra* note 65, at 103–04.

171. See HARRIS, *supra* note 160, at 95, 156 (discussing high-speed chases, “[c]hasing crooks,” and responding to 911 emergencies as among the standard tasks of policing).

172. See SCHAUER, *supra* note 65, at 103–04.

173. Here I am talking specifically about such generalizations’ being used in making judgments about probable cause or reasonable suspicion. “Profiles” are often touted as introducing science into the probable-cause and reasonable-suspicion decisions, but in practice, few profiles have empirical support, and most leave police with unfettered discretion while creating the false impression of the opposite. See, e.g., TASLITZ, PARIS & HERBERT, *supra* note 35, at 353–60; Sharon L. Davies, *Profiling Terror*, 1 OHIO ST. J. CRIM. L. 45 (2003).

174. In areas of policing outside the Fourth Amendment, such as eyewitness identifications and interrogations, empirical data supporting nonspurious generalizations is already slowly starting to improve police investigative practices. See AMERICAN BAR ASSOCIATION, *ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY: REPORT OF THE ABA CRIMINAL JUSTICE SECTION’S AD HOC INNOCENCE COMMITTEE TO ENSURE THE INTEGRITY OF THE CRIMINAL PROCESS* (2006). Although these areas are generally governed by the due-process clauses and the Fifth Amendment’s privilege against self-incrimination, the results of these procedures can, of course, help to establish probable cause by providing evidence of the wrongdoer’s identity. See TASLITZ, PARIS & HERBERT, *supra* note 35, at 710–15, 869–76. Some empirically supported, nonspurious generalizations may thus be available to aid police in the individualized-suspicion judgment in those jurisdictions that have fully adopted the new investigative techniques and best practices dictated by these recent developments in cognitive psychology.

175. See SCHAUER, *supra* note 65, at 7.

176. See *infra* text accompanying notes 293–332.

lawyer rejecting either or both of these assumptions might also reject my conclusion (that valid actuarial reasoning thus far is rarely a police option in the probable-cause area). Schauer himself tries to argue that police profiling is at least one area in which adequate *scientific* evidence sometimes supports actuarial reasoning.<sup>178</sup> This may be true of some profiles, but simply is not true for most profiles used in everyday policing.<sup>179</sup>

Yet even if actuarial reasoning in this area can wisely be given a wider scope, that cannot eliminate particularistic police judgments. All legal rules must be applied to facts. Historical “raw” facts, like “Did Jake punch Charley or did someone else do so?” have indisputably true either-or answers.<sup>180</sup> But since we lack time machines, we face grave challenges in finding those facts.<sup>181</sup> Other facts, such as whether an alleged offender in a homicide case acted in cold blood or in self-defense, contain a more interpretive component, making fact-finding still harder.<sup>182</sup> Furthermore, fact-finding requires credibility judgments whenever stories conflict and sufficiency of evidence judgments, whatever the standard for “sufficient” may be.<sup>183</sup> Fact-finders thus exercise judgment in a way that vests them with enormous discretion.<sup>184</sup> But in law enforcement, it is the police who are, in the first instance, the fact-finders. They must decide whether they have enough credible evidence that *this individual* has committed a particular crime to whatever standard of proof controls if they are to have probable cause.<sup>185</sup> Even in a Schauerian world, therefore, the problems of police discretion and of the accuracy of police judgment cannot be eliminated.

If the criminal-procedure provisions of the Bill of Rights as a whole, or the Fourth Amendment itself, express distrust of unconstrained law-enforcement discretion,<sup>186</sup> and if actuarial approaches, even nonspurious ones, cannot fully do that job,<sup>187</sup> then other approaches must be found. Such approaches could aim to improve the quantity and quality of police deliberation (and we do have good social science available about how to minimize the downsides of deliberation,

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177. See generally RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004).

178. See SCHAUER, *supra* note 65, at 3, 6, 22, 68, 126, 155–98.

179. See sources cited *supra* note 173.

180. See Andrew E. Taslitz, *Proving the Unprovable*, 22 CRIM. JUST. 70, 70–76 (2007) (reviewing CHRISTOPHER SLOBOGIN, *PROVING THE UNPROVABLE: THE ROLE OF LAW, SCIENCE, AND SPECULATION IN ADJUDICATING CULPABILITY AND DANGEROUSNESS* (2007)) [hereinafter *Unprovable*]; Andrew E. Taslitz, *A Feminist Approach to Social Science Evidence: Foundations*, 5 MICH. J. GENDER & L. 1, (1998) (providing philosophical support for Slobogin’s position) [hereinafter *A Feminist Approach*].

181. See Taslitz, *Unprovable*, *supra* note 180.

182. See Taslitz, *A Feminist Approach*, *supra* note 180, at 13–46.

183. See *id.* at 37–38 & n.170.

184. See *id.* at 49–57.

185. See TASLITZ, PARIS & HERBERT, *supra* note 35, at 196.

186. See Maclin, *supra* note 4, at 411.

187. See *supra* text accompanying notes 128–31.

which can be many),<sup>188</sup> as well as increasing the transparency and accountability of police decisions and actions.<sup>189</sup> Furthermore, if part of our concern about police is that they act upon imperfect information, we can give them incentives to collect more of the reasonably available information before acting.<sup>190</sup> Probable cause partly embodies just these approaches to constraining police discretion.<sup>191</sup>

#### 4. Countervailing Policy Concerns, Even for Nonspurious Generalizations

Furthermore, as I noted earlier, Schauer himself recognizes that even when nonspurious generalizations are likely to be more accurate than particularistic judgments, there may be good policy reasons to reject actuarial reasoning.<sup>192</sup> Some generalizations may, for example, add to the social stigma of historically disempowered groups.<sup>193</sup> Other generalizations might be mere masks for hostile motives.<sup>194</sup> Though Schauer does not mention them, generalizations can also become self-fulfilling prophecies, changing social reality, rather than reflecting it.<sup>195</sup>

Schauer also argues that we must sometimes replace a socially injurious generalization with a compensatory generalization, rather than a particularistic one, to adequately repair the injury done.<sup>196</sup> For example, gender law might mandate that, unless shown otherwise on a fair test applicable to both sexes, all women must be presumed to have the same upper-body strength as men for employment purposes.<sup>197</sup> That is likely a false generalization, but it creates an opportunity for those women who can do the job while compensating for a history of exaggerating the quantity of upper-body strength needed, as well as a history of failing to assess women's true body strength—both factors having been used as excuses simply to keep women out of the best-paying jobs.<sup>198</sup> Such compensating generalizations may thus in fact promote more-individualized

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188. See Andrew E. Taslitz, *Eyewitness Identification, Democratic Deliberation, and the Politics of Science*, 4 CARDOZO PUB. L. POL'Y, & ETHICS J. 271, 296–323 (2006) (discussing the social science on good deliberation in most contexts, though applying it to prosecutors).

189. See *id.* at 284. Rather than repeat here the detailed supporting analyses of deliberation, transparency, and accountability that I have done elsewhere, see, e.g., *id.* at 296–323; Andrew E. Taslitz, *Racial Auditors and the Fourth Amendment: Data with the Power to Inspire Political Action*, 66 LAW & CONTEMP. PROBS. 221 (Summer 2003), I have interwoven discussion of these benefits into this article's larger discussions of other social advantages of an individualized-suspicion requirement. See *infra* II–IV.

190. See Andrew E. Taslitz, *Police are People Too: Cognitive Obstacles to Police Getting the Individualized Suspicion Judgment Right*, OHIO ST. J. CRIM. L. (forthcoming 2010).

191. *Id.*

192. See SCHAUER, *supra* note 65, at 22–23.

193. See *id.* at 22–23, 35–36, 139, 150–54, 186, 199–200, 217–23.

194. See *id.* at 144.

195. See *infra* text accompanying notes 262–83.

196. See SCHAUER, *supra* note 65, at 151.

197. See *id.* at 143, 147–54.

198. See *id.*

judgments by compelling employers either to accept that all women can presumptively do the job or to individually test both all women and all men to weed out those who truly cannot.<sup>199</sup>

Schauer makes one important final concession: even though most reasoning is to one degree or another probabilistic, there is less justification for reliance on predominantly probabilistic generalization in criminal cases than civil cases.<sup>200</sup> Given unavoidable uncertainty in virtually all decisionmaking, decision theorists argue for the concept of discounting outcomes by the probability that they are mistaken.<sup>201</sup> In mathematical terms, this means multiplying the outcome by the probability that it is right.<sup>202</sup> Yet law generally makes dichotomous decisions—plaintiff wins or loses—rather than allow for probabilistic discounting.<sup>203</sup> Schauer bemoans this limitation in most civil cases but lauds it in criminal cases.<sup>204</sup> Thus, he explains, in criminal cases in which there is only a seventy-percent likelihood of guilt, “even statisticians” would feel discomfort over a guilty verdict.<sup>205</sup> That discomfort stems from the high value our society places on liberty and the consequent gravity of the error in convicting the innocent.<sup>206</sup> More simply put, to convict an offender but discount his sentence by the thirty-percent chance of error is intolerable. For this reason, the principle of expected value is “properly a stranger to the criminal law.”<sup>207</sup> Given that searches and arrests start the criminal process and carry a stigma in many contexts merely for one’s being *suspected* of crime,<sup>208</sup> Schauer’s caution should be taken to heart in the probable-cause determination as well.

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199. *See id.* Schauer also makes a political argument in favor of certain generalizations. Specifically, he insists that a political community—a nation—by definition requires emphasizing generality, namely of shared constitutional norms, goals, and values—over difference and particularity. *See id.* at 278–300. On this point Schauer is partly right (though I see both commonality and difference as essential to nationhood and the supporting system of rights). *See* Andrew E. Taslitz, *Respect and the Fourth Amendment*, 93 J. CRIM. L. & CRIMINOLOGY 15, 70–80 (2003).

200. *See* SCHAUER, *supra* note 65, at 89.

201. *See id.* at 87–93.

202. *See id.* at 87–88.

203. *See id.* at 90.

204. *See id.* at 87–89.

205. *See id.* at 89.

206. *See id.* *See also* BEYOND A REASONABLE DOUBT (Larry King ed., 2006) (collecting essays, many of which argue that this anti-expected-value principle underlies the beyond-a-reasonable-doubt burden of persuasion in criminal cases).

207. *See* SCHAUER, *supra* note 65, at 89.

208. *See* Andrew E. Taslitz, *Wrongly Accused Redux: How Race Contributes to Convicting the Innocent: The Informants Example*, 27 SW. U.L. REV. 1076 (2009).

## III

## THE BENEFITS OF INDIVIDUALIZED SUSPICION

The major social benefits of individualized suspicion—particularly those involving questions of political morality<sup>209</sup>—derive from making such suspicion a prerequisite to invasive police action. An exploration of these social benefits might begin with an examination of procedural and distributive fairness in the context of “fair price theory.”

## A. Fairness

## 1. Terminology and the Relevance of Fair-Price Theory

Individualized suspicion, particularly in the form of probable cause, promotes fairness. The terms “fairness” and “justice” are often used interchangeably<sup>210</sup> and are so used here, for joining in the debate over whether there is a logical distinction between the two terms does little to clarify my argument. By “fairness,” I mean here either being treated in a satisfactory fashion—one meeting expectations—or in a just fashion, that is, a fashion that is justified, meaning that the treatment is done for good reasons, “free of favoritism or bias; impartial . . . just to all parties; equitable . . . consistent with rules, logic or ethics.”<sup>211</sup> This notion of fairness is rooted in social norms, the “consensual rules of a society.”<sup>212</sup>

The first class of social-fairness norms—those involving perceived satisfactory treatment—are sometimes labeled *personal*-fairness norms, with the second class (involving “just” treatment) being labeled *social*-fairness norms.<sup>213</sup> Violations of social-fairness norms produce far more-intense emotional reactions than violation of personal-fairness norms,<sup>214</sup> and the former is stressed here.

209. By “political morality” I mean those moral principles governing how the state should treat its citizens and vice versa. Such principles are normative, are implicit in much constitutional interpretation, and bring with them many practical benefits that flow from enhanced governmental legitimacy. See generally Taslitz, *Respect*, *supra* note 199 (exploring how such principles operate in interpreting the Fourth Amendment). I distinguish the benefits of political morality from another important class of benefits—those enhancing the *accuracy* of police judgments. This latter class of benefits I have touched on thus far and will do so repeatedly again here, but a fuller exploration of them may be found at Taslitz, *Police are People Too*, *supra* note 190.

210. See NORMAN J. FINKEL, NOT FAIR: THE TYPOLOGY OF COMMONSENSE UNFAIRNESS 43–58 (2001).

211. See, e.g., SARAH MAXWELL, THE PRICE IS WRONG: UNDERSTANDING WHAT MAKES A PRICE SEEM FAIR AND THE TRUE COST OF UNFAIR PRICING 6–7 (2008).

212. See MAXWELL, *supra* note 211, at 7. For fuller explanations of the meaning of “social norms”—itself a contested concept—see ERIC A. POSNER, LAW AND SOCIAL NORMS 1–8 (2000). See also Michael Hechter & Karl-Dieter Opp, *Introduction*, in SOCIAL NORMS xi, xiii (Michael Hechter & Karl-Dieter Opp eds., 2001) (“As there is no common definition of social norms, there can be little agreement about how to measure them.”).

213. See MAXWELL, *supra* note 211, at 7.

214. See *id.* at 9.

Social-fairness norms themselves come in two types relevant to this discussion: “distributive fairness,” or the fairness of outcomes, and “procedural fairness,” or the fairness of the *process* by which the outcomes are achieved.<sup>215</sup>

Analyzing the application of these concepts to probable cause here draws on political philosophy and two related strands of social science: the psychology of substantive (distributive) and procedural justice and the economics of fair pricing.<sup>216</sup> The latter strand’s applicability might not be self-evident but turns on analogies to markets and to the idea of a social contract.<sup>217</sup> Many social-contract theories turn on the idea that individuals join in a society to protect themselves from the violence they might do to one another.<sup>218</sup> Society in turn delegates enforcement of the rules that prevent such violence to the state.<sup>219</sup> However, the police are the everyday arm of the state, wielding authority to threaten or use force to maintain order.<sup>220</sup> The state, and thus the police, must in turn be restrained to prevent state violence from becoming a form of oppression akin to that in the war of all against all—a war for whose avoidance the state was originally formed.<sup>221</sup>

As with any contract, each party must give up something to gain something else.<sup>222</sup> Each ordinary citizen can thus in a sense be viewed, from one perspective, as a “buyer” of police services to provide social order and stability.<sup>223</sup> The price paid by each citizen to the state in exchange for such order includes, but is not limited to, taxes.<sup>224</sup> The price also includes exposing one’s self to the *risk* of facing restraints on one’s privacy, liberty, and property by the police under certain circumstances.<sup>225</sup> When those risks become realized—for example, when the police stop a citizen on the street for brief questioning (a “*Terry stop*”),<sup>226</sup> the price that individual pays has risen; now it is not merely the

215. *See id.* at 26.

216. On fair-pricing economics generally, see MAXWELL, *supra* note 211, summarizing the major findings in the field. On the psychology of fairness generally, see HANDBOOK OF JUSTICE RESEARCH IN LAW (Joseph Sanders & V. Lee Hamilton eds. 2001).

217. For a summary of market-based thinking, see CHARLES E. LINDBLOM, *THE MARKET SYSTEM: WHAT IT IS, HOW IT WORKS, AND WHAT TO MAKE OF IT* (2002). For a summary of social-contract-based thinking, see Andrew E. Taslitz, *Plugging into the Fourth Amendment’s Matrix*, 22 CRIM. JUST. 26, 27–29 (2007).

218. *See* TASLITZ, *supra* note 4, at 3.

219. *See id.*

220. *See id.* at 3–4, 79, 243–44, 261.

221. *See id.*

222. This idea is embodied in ordinary contract law in the term “consideration.” *See* Peter A. Alces, *Suretyship and the Statute of Frauds*, ch. 4, in *THE LAW OF SURETYSHIP AND GUARANTY* § 4:2 (2007).

223. *Cf.* *United States v. Mezzanatto*, 513 U.S. 196, 208 (1995) (describing prosecutors as buyers and defense counsel as sellers in a “market for plea bargains”).

224. *See generally* STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* (1999) (defending the theory that taxes are the necessary price for citizenship).

225. Law-and-economics scholars will readily understand the idea that risks and lost opportunities, including to exercise rights, can be understood as costs. *See* WILLIAM D. ROHLF, *INTRODUCTION TO ECONOMIC REASONING* (6th ed. 2005).

226. *See* TASLITZ, PARIS & HERBERT, *supra* note 35, at 317, 332–53 (explaining *Terry stops*).

risk but the reality of lost liberties that that individual incurs. To accept that added price as legitimate, the person stopped must see the price he pays as fair. What factors affect that perception is the subject of fair-price theory.

## 2. Procedural Fairness

There are three core aspects to whether a buyer sees a price as procedurally fair: (1) voice and choice, (2) transparency, and (3) impartiality.<sup>227</sup>

*a. Voice and choice.* “Voice and choice” means that the buyer sees the pricing process as controllable, at least in the sense of having input (“voice”) into how the price is set.<sup>228</sup> One goal of negotiation can be to give the buyer precisely such input and control.<sup>229</sup> However, often there is little, if any, room for direct negotiation.<sup>230</sup> For example, the price of canned beans in a supermarket is usually fixed, the same for all buyers.<sup>231</sup> Even when this is true, however, “choice” can give “voice.” If the buyer is free to buy cheaper beans elsewhere, the buyer can do so, thus sending the message to the more-expensive bean retailer, “Bring down the price, or I will never buy from you again.”<sup>232</sup> If all bean sellers charge equal prices but offer different-quality beans, buying the better beans likewise sends the message to the seller of poor-quality beans, “Do better or lose my business.” If all beans are expensive and poor quality, the buyer can forego beans entirely, spending her money on a different product in protest against the entire bean business.<sup>233</sup>

But a person stopped by an officer and sent the message that he is not free to leave (the very definition of a *Terry* stop)<sup>234</sup> has *at that moment* no choice. He must do as the officer says and, short of moving out of the jurisdiction—an unlikely and high-transaction-cost option<sup>235</sup>—cannot employ a different officer or set of officers to provide public safety. Nor, so long as he resides in America, can he forego entirely the benefits and burdens of having police in the first

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227. See MAXWELL, *supra* note 211, at 73–74.

228. See *id.* at 76–77.

229. See *id.*

230. For a discussion of the benefits of direct means of expressing voice via the legal system whenever feasible, see TASLITZ, *supra* note 84, at 134–51.

231. See MAXWELL, *supra* note 211, at 76 (making a similar point but using college textbooks as an example).

232. See ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970) (exploring when economic actors choose “exit” and when “voice” to get what they want and the connection between the two options).

233. See ROBERT PINDYCK & DANIEL RUBINFELD, *MICROECONOMICS* 102–30, 277–79 (7th ed. 2008).

234. See TASLITZ, PARIS & HERBERT, *supra* note 35, at 332–42.

235. See DAVID D. FRIEDMAN, *LAW’S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS* 26, 36, 39–44, 49, 54–60, 163–64 (2001) (defining “transaction costs” and explaining their significance).

place.<sup>236</sup> Likewise, he may try to “negotiate” his freedom or silence with the officer, but he is largely at the officer’s mercy.<sup>237</sup> The contract here is one of adhesion.<sup>238</sup>

Probable cause, however, potentially gives the citizen some measure of control over whether he must pay the price of actually being stopped. Because the officer needs individualized suspicion, he cannot stop persons randomly. Rather, he must have good reason to believe that *this person* has committed, or is about to commit, a crime.<sup>239</sup> By refraining from criminal conduct or from actions that can be expected to raise suspicions of such conduct, the citizen gains some control over whether he will pay the added price for social safety and security of in fact being stopped by the police.<sup>240</sup> The Court has, of course, sanctioned stops on less than probable cause—on mere reasonable suspicion.<sup>241</sup> But because that lesser standard theoretically retains an individualized-suspicion requirement, hopefully a robust one, the citizen still retains significant control over the size of the risk that his liberties will be infringed by the police. Probable cause and reasonable suspicion thus help to protect citizen autonomy.

This protection will, of course, be imperfect. But imperfection does not render the protection valueless. Moreover, if a citizen believes that police generally do their best to adhere to the individualized-suspicion mandate, he will likely be eager to cooperate when stopped, assuming that answering the officer’s questions will readily dissolve any mistaken suspicions.<sup>242</sup> If the suspicions nevertheless persist, a citizen who has done all he reasonably can to avoid crime and suspicions of it will rightly expect an explanation, and a truly

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236. This observation is true as a practical matter and as part of the American social contract. See TASLITZ, *supra* note 4, at 44, 79, 243–61 (explaining the role of the police in the American social contract).

237. See, e.g., *Hiiibel v. Sixth Judicial Dist. Ct.*, 542 U.S. 177 (2004) (upholding under the Fourth Amendment *Hiiibel*’s arrest for failing to reveal his name to an officer upon request); *Maryland v. Pringle*, 540 U.S. 366 (2003) (upholding arrest for drug possession when cocaine was found hidden behind an upraised armrest in the back seat next to the back-seat passenger, but when there was no evidence that *Pringle*, the front-seat passenger, knew of the cocaine’s presence and when the officer threatened to arrest all three of the car’s occupants unless someone confessed).

238. See BLACK’S LAW DICTIONARY 342 (8th ed. 2004) (defining an “adhesion contract” as one to which a “consumer . . . adheres . . . with little choice about the terms”).

239. There can be “anticipatory” probable cause—probable cause to believe that someone will commit a crime in the future. See *United States v. Grubbs*, 547 U.S. 90 (2006) (recognizing anticipatory probable cause and articulating a test for when it has been met); see also TASLITZ, PARIS & HERBERT, *supra* note 35, at 265–69.

240. See *Jed Rubenfeld, Privacy’s End*, in LAW AND DEMOCRACY IN THE EMPIRE OF FORCE 207, 215–18 (H. Jefferson Powell & James Boyd White eds., 2009) (making a similar argument for the autonomy-enhancing advantages of individualized suspicion).

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

242. See TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS xiii–xvi, 4, 54–57, 82–84, 101, 106–07 (2002) (procedural justice and resulting enhanced governmental legitimacy both contribute to “acceptance,” that is, to voluntary obedience to law); Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153 (2002) (summarizing empirical data demonstrating that people are likely to readily bow to police officer “requests” to consent to a search).

sound system of criminal justice would presumptively compel the officer to do so.<sup>243</sup> If, however, a citizen has sound reason to believe that he is stopped for what category of person he is—a generalization, such as one based on race, ethnicity, or style of speech or dress—rather than for what he has done, he will lose any sense that he ever had serious control over the risk of facing police interference in his life.<sup>244</sup> Nor will he believe that he has any voice concerning the price he must pay. The price he pays for social stability will, therefore, no longer seem fair.<sup>245</sup>

*b. Transparency.* “Transparency” means that the price-setting process is open, rational, and understandable.<sup>246</sup> Ideally, that openness would precede or coincide with payment of the price.<sup>247</sup> But even delayed transparency is better than none.<sup>248</sup> By linking individualized suspicion to publicly open and available remedies, the law ensures that the searched or seized citizen will receive at least a delayed, and sometimes a coinciding, explanation for police action. Thus, if police execute a search warrant, local rules and practices generally require that the subject of the search be served a copy of the warrant *and* the supporting affidavit—which sets forth the reasons for suspecting the individual—at the time of the search.<sup>249</sup> Moreover, whether or not this occurs, the person searched can later obtain the affidavit if accused of a crime or if bringing civil suit against

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243. See TYLER & HUO, *supra* note 242, at 70, 202 (explaining that understanding *why* police officers act as they do promotes motive-based trust, and that stop-and-frisks are perceived as fair when officers give credible reasons for their actions and avoid demeaning the person stopped).

244. See *id.* at 85–86, 163.

245. See Tom R. Tyler, *Racial Profiling, Attributions of Motive, and the Acceptance of Social Authority*, in SOCIAL CONSCIOUSNESS IN LEGAL DECISIONMAKING: PSYCHOLOGICAL PERSPECTIVES 64–66, 70–71 (Richard L. Wiener et al. eds., 2007) (policing decisions seen as unfair because they lack neutrality, consistency, factuality, or dignity, increasing disobedience to law and cooperation with the police).

246. See MAXWELL, *supra* note 211, at 77–78.

247. See *id.*

248. Transparency’s benefits extend beyond promoting perceptions of procedural justice, as law professor David Harris explains:

Without transparency—institutional openness to public scrutiny—real accountability cannot exist, and the lifeblood of transparency is the wide dissemination of information. A government agency that functions in the shadows, without public oversight, is an open invitation for abuse. The more crucial the agency’s mission and the greater its powers, the graver the danger posed by a lack of transparency. Police departments have always resisted this idea, but what will probably most surprise those who work in policing is that disseminating information about their performance can benefit them—in very substantial ways.

HARRIS, *supra* note 160, at 118–19. The benefits for the police include error reduction and enhanced community cooperation. See *id.* at 119–20; see also Taslitz, *supra* note 189, at 284–94 (explaining how transparency promotes a more “honor-based” police organizational culture); Taslitz, *supra* note 188, at 284 (explaining that transparency is a prerequisite to accountability); see generally Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107 (2000) (extolling the virtues of widespread police transparency).

249. See FED. R. CRIM. P. 41.

the police.<sup>250</sup> Affidavits are usually written by the police themselves, less often by prosecutors, in ways that may be readily understandable to many, if not necessarily most, laypeople.<sup>251</sup> In a criminal case, the right to counsel also ensures the availability of a lawyer to explain the affidavit's meaning.<sup>252</sup>

Furthermore, even for warrantless searches and seizures (indeed, for all searches and seizures) in criminal cases, the availability of the suppression hearing, at which the officer's testimony is taken, requires the state to explain its actions.<sup>253</sup> Lawyers again stand ready via cross-examination to prod evasive or ambiguous witnesses into clarifying matters.<sup>254</sup> Transparency similarly promotes accountability because officers and the state face consequences if the reasons they give are poor or perjurious.<sup>255</sup>

*c. Impartiality.* "Impartiality" is the idea that the process of decision should be impersonal and unbiased.<sup>256</sup> A related, though not identical, idea is that persons expect decisionmakers, even when they have the power to inflict punishment on the persons before them, to act with care and concern for those persons, at least in the sense of treating them in a respectful manner, showing concern for their rights, and being committed to making an accurate decision, reached fairly.<sup>257</sup> That expectation likewise includes the sense of entitlement to an honest, factual, evidence-based procedure and outcome.<sup>258</sup>

The objective nature of the probable-cause or reasonable-suspicion decision turns on what a "reasonable" police officer has a right to believe.<sup>259</sup> Surely, no court would openly describe as "reasonable" an officer's beliefs that are based on bias toward a particular group, a venal desire to harm members of that group, or a complete lack of serious or apparently accurate evidence linking the

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250. See FED. R. CRIM. P. 16, 41.

251. See TASLITZ, PARIS & HERBERT, *supra* note 35, at 237–38 (explaining the warrant application process); FED. R. CRIM. P. 41(a) (declaring that a law-enforcement officer or the attorney for the government are authorized to prepare a warrant affidavit).

252. The Sixth Amendment right to counsel applies at all "critical stages" after formal adversarial proceedings have begun. See TASLITZ, PARIS & HERBERT, *supra* note 35, at 869, 885–87 (supporting this proposition and illustrating the active role defense counsel can play at suppression hearings).

253. See *id.* at 226 (noting that for most suppression issues involving warrantless searches or seizures, the prosecution has the burden of proof; failing to meet it with evidence and arguments results in the prosecution's losing the motion).

254. See *id.* at 750–51 (illustrating the process of impeachment at suppression hearings).

255. Unconvincing reasons or incredible stories will lead to loss of the suppression motion, including not only exclusion of the evidence wrongly seized but also likely to include any evidence obtained as the poisonous "fruit" of that tainted constitutional tree. See *id.* at 226. Police lies under oath at such hearings can result in perjury prosecutions. See Christopher Slobogin, *Testifying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037 (1996).

256. See MAXWELL, *supra* note 211, at 79–80.

257. See TYLER & HUO, *supra* note 242, at 58, 80, 83, 163.

258. See *id.* at 162–63.

259. See TASLITZ, PARIS & HERBERT, *supra* note 35, at 194–95.

specific individual stopped to a specific crime or attempt.<sup>260</sup> Nor could an officer's beliefs about an individual's past or impending behavior be deemed "reasonable" if based on assumptions or conjecture.<sup>261</sup> The individualized-suspicion requirement, properly understood, thus helps to promote perceived and actual police impartiality.

### 3. Distributive Fairness

Distributive fairness likewise has at least three core aspects: first, "equity"—the idea that the price charged should reflect the worth of the product (you should "get what you pay for"); second, "equality"—the notion that everyone should be charged the same price; and third, "need"—the recognition that the price should be adjusted for the disadvantaged.<sup>262</sup> These three aspects of distributive fairness are, however, closely related.

*a. Equity.* In the criminal-justice system, equity means in part that the price each citizen pays for the safety of her person or property must be worth the resulting benefit in crime reduction.<sup>263</sup> Yet there is reason to believe that undue reliance on generalizations will often increase, rather than decrease, crime.

Take a simple example. Suppose that the police correctly believe that a group of persons with characteristic *A* is more likely than those with characteristic *B* to commit a certain class of serious crime.<sup>264</sup> Accordingly, police start investigating, stopping, and arresting mostly *As*. In a static, unchanging world, that approach would reduce serious crime. But in the real, dynamic world, *Bs* may learn that police are focusing their resources primarily, or even entirely, on *As*. *Bs* will no longer fear police capture, thus becoming more willing to engage in the serious criminal activity from which they previously

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260. On the other hand, while not labeling such actions and motivations "reasonable"—indeed condemning them, as in *Terry v. Ohio*, 392 U.S. 1, 14–15, 22 (1968)—the Court has held that officers' subjective motivations are *irrelevant* to the Fourth Amendment reasonableness question. See TASILTZ, PARIS & HERBERT, *supra* note 35, at 476–78; Whren v. United States, 517 U.S. 806 (1996). *But see* Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998) (condemning the Court's reasoning in *Whren* and explaining how officer motivations can fit into an "objective" inquiry). Still, the Court is likely to view, at least in its public pronouncements, "reasonable" officer beliefs or actions as those informed by the evidence fairly evaluated by an officer untainted by racial hatred or stereotypes—in short, to embrace the ideal of officer impartiality.

261. See TASILTZ, PARIS & HERBERT, *supra* note 35, at 196–200 (probable cause and reasonable suspicion must be based on trustworthy *evidence* rather than on speculation or unarticulated hunches). My argument here, of course, turns on *both* the existence of an individualized-suspicion mandate *and* the availability of a serious remedy for that mandate, matters determined in a public proceeding. I accordingly see the individualized-suspicion concept's social value as inseparably linked to the availability of remedies via sound adjudicative processes. To gut the remedies or their related processes is thus to simultaneously gut individualized suspicion of much of its meaning and value.

262. See MAXWELL, *supra* note 211, at 73–74.

263. See *id.*

264. This example is a variation on examples, rooted in empirical data and social and economic theory, in BERNARD E. HARCOURT, *AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE* 22–26, 129–39 (2007).

refrained. If there are equal numbers of *As* and *Bs* in a society, and if *Bs* now start committing this class of serious crime at a *higher rate* than did *As*, then the total serious crime in society rises.

Alternatively, if the *Bs*' new rate of serious criminality is equal to or somewhat smaller than the *As*' previous rate but *Bs* are a significantly larger group than *As*, then the total crime in society will again rise. Of course, by police's focusing on *As*, perhaps even imprisoning them, incapacitation effects might *reduce* the rate at which *As* commit serious crime. Whether public safety benefits overall turns partly on whether the total fall in absolute numbers of this crime committed by *As* exceeds the total rise in absolute numbers of this crime committed by *Bs*. Another aspect of this cost-benefit reasoning is whether the enormous added costs in building prisons, supervising parolees, and addressing recidivists whose long incarceration has made it hard for them to function in the free world are worth the benefits. There is strong reason to believe that they are not<sup>265</sup>—especially because alternative methods of crime *prevention* may very well have done better in cost-benefit terms than has mass incapacitation.<sup>266</sup>

The general characteristics most likely to affect arrest and search rates are race and class.<sup>267</sup> Assume, therefore, that the *As* are African Americans with low incomes and the *Bs* are Whites with at least modestly higher incomes. The

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[T]he ordinary incapacitation effects are likely to be relatively small. Generally, they will be washed out by the effect of any change in offending: there is no incapacitation effect if you imprison a recidivist versus an ordinary citizen *once the rates of offending have equalized*. But what if the offending rates do not equalize? What if offenders are entirely irrational and completely unresponsive to policing?

*Id.* at 28.

266. See *id.* at 27–28 (suggesting that the resources spent on mass incarceration could have been “better spent on other crime-fighting practices, such as increased police presence, more drug-treatment programs, free abortions, mandatory military conscription, or other policies”).

267. A recent report on quality-of-life policing in New York City made this point starkly:

The most recent NYPD data confirms that the police disproportionately target New Yorkers of color for stops and frisks. In 2006 alone, the NYPD stopped, questioned, or frisked over 508,540 people, a 500% percent increase over the previous year. Over 80% of those stopped and frisked were Black or Latino (or Latina), even though these groups make up only 53.6% of the NYC population. Only 10% of stops led to summonses or arrests, thereby undermining any claim that racial disparities in stops and frisks are the result of differential rates of involvement in criminal activity rather than race-based policing practices. The numbers of stops are increasing, as well.

Marc Krupanski, Andrea Ritchie, Justice Committee & People's Justice, *Backgrounder on Racial Profiling and Police Brutality Against People of Color in New York City Prepared for the Special Rapporteur on Racism on the Occasion of His 2008 Mission to the US*, available at <http://ccrjustice.org/files/2008%20Report%20on%20NYPD%20Racial%20Profiling%20&%20Brutality%20to%20UN%20SR%20on%20Racism.pdf> (2008). The Rand Committee Corporation, relying on data in the NYPD's electronic database that is not available to the public, reached even bleaker conclusions, finding that 89% of persons stopped by police in 2006 were people of color. Once stopped, 45% of Blacks or Latino (or Latina) suspects were frisked, compared to only 29% of Whites, even though Whites were 70% more likely than Blacks to carry a weapon. See Greg Ridgeway, *Analysis of Racial Disparities in the New York Police Department's Stop, Question, and Frisk Practices*, RAND Corporation (2007).

higher rates of criminality among these African Americans may stem from real or perceived limitations on their job, educational, and other life prospects and on their geographic mobility.<sup>268</sup> If that is so, their rate of crime-commission will be relatively inelastic, meaning it will decline little, if at all, even in the face of increased police commitment of resources to capturing African Americans.

On the other hand, Whites may have resisted crime at an assumed starting point at which they faced the same risk of capture as African Americans precisely because the Whites had greater real or perceived life opportunities relative to Blacks. Under the new regime of profiling Blacks, this last observation, when combined with the new, almost certain freedom of Whites from being identified and punished, suggests a comparatively elastic white offending rate,<sup>269</sup> meaning a much greater increase in white offending rates from a sharp decline in detection relative to the decline in black offending rates from racial profiling. Moreover, Whites, even those on the lower end of the income scale, are still a much larger group than Blacks.<sup>270</sup>

Accordingly, it is likely that racial generalizations will increase the absolute amount of serious white crime more than it will decrease that of serious black crime. From both the black perspective and the overall societal perspective, the use of race-based generalizations is inequitable because the price paid by Blacks' being stopped (most of whom will still be innocent) and arrested, when guilty, will increase rather than decrease crime. The price being paid in diminished liberties is, therefore, not worth the benefits.

*b. Inequality.* Inequality effects can simultaneously magnify the inequitable nature of generalized race-based (even partly or completely subconsciously race-based) policing. Professor Bernard Harcourt makes this

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268. See HARCOURT, *supra* note 264, at 24 (“Whether the different offending rates are due to different socioeconomic backgrounds, to different histories, cultures, or [to] education, nonspurious profiling rests on the accurate assumption that members of one group offend more than those of another, holding everything else constant.”).

269. It is important to stress the importance of *comparative* inelasticities. If rates of crime reduction (elasticity relative to policing) for Blacks are lower than those for Whites, all else being equal, then stopping more Blacks but fewer Whites raises overall crime. See *id.* at 23–24. But this example assumes that, before profiling, black crime rates were indeed higher than white rates, for, without that assumption, profiling rests on a *spurious* association. Yet, argues Harcourt, if poor Blacks at the starting point offend more “because they are socioeconomically more disadvantaged, then it would follow logically that they may also have less elasticity of offending to policing because they have fewer alternative job opportunities.” *Id.* at 24. This is sound, informed speculation, but we currently have no hard data, “no good idea how the elasticities compare.” *Id.* But, insists Harcourt, given informed speculation to the contrary and the high potential individual and social costs of race-based (or other group-based) searches and seizures, there is “no good reason” to assume alternative elasticities and absolute numbers in which profiling is more beneficial than harmful to society as a whole—and this is true even if police initially seem to achieve higher “hit rates” for evidence of criminality by instituting profiling. See *id.* at 24, 123–24.

270. See *id.* at 24 (“Because of the different elasticities and the fact that the profiled are usually small minorities, the raw increase in offending among the nonprofiled group will be greater numerically than the raw decrease in offending of the profiled group.”) (emphasis added).

point by examining the “ratchet effect.”<sup>271</sup> He explains this effect by using a fishing analogy.<sup>272</sup> Suppose that the Mediterranean Sea is filled with bass, but the Atlantic Ocean is sparsely populated by salt-water trout. Fishermen focusing mostly on the Atlantic will have a much smaller catch than those focusing more on the Mediterranean for the same effort. Accordingly, fishermen will eventually move toward fishing only in the Mediterranean, thus catching only bass. The number of bass might, however, diminish over time from all the heavy fishing in the Mediterranean, while the number of trout in the Atlantic might start to rise because no fishermen prowl there for aquatic prey. Yet the dead hand of history, showing fishermen’s relative successes and failures between fishing in one body of water versus the other, will at least slow, and may entirely prevent, the fishermen from recognizing the likely change in relative fish populations. If that change is sufficiently great, the fishermen might now improve their overall catch, at least temporarily, by returning to their earlier fishing patterns. Yet they fail to recognize this new reality.

If Blacks are bass and Whites are trout, and if we add in the relative inelasticity of Blacks, but relative elasticity of Whites to capture rates discussed above, here is what happens: Police (the fishermen) focus more of their search efforts on poor black neighborhoods, fewer on white ones. Police notice a high “success rate” in this strategy, thus, like the fishermen, eventually devoting nearly all resources in trawling black rather than white neighborhoods, taking every successful arrest as an indication of the strategy’s wisdom. But black crime rates stay the same or fall just at the moment when white crime rates and absolute offending levels rise. Police are thus focusing their long-term efforts in the wrong place. Overall crime likely increases from this misappropriation of resources alone but, even if it does not, the black community as a whole and its individual members will rightly perceive that they are charged a higher price in lost liberties to attain purported safety than are Whites. Moreover, the greater relative poverty and limited life opportunities of Blacks relative to Whites violates the “need” principle of distributive justice—the idea that the disadvantaged should pay lower, *not* higher, prices for the same services.<sup>273</sup>

Yet violations of these inequality and need principles have feedback effects on real and perceived lack of equity. As discussed earlier, substantial social science demonstrates that denial of procedural and distributive justice likely has at least two ill effects.<sup>274</sup> Notably, those perceiving themselves as unfairly treated

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271. *See id.* at 147.

272. *See id.* at 147–48. This example is altered slightly for clarity and to use a more savory species of fish.

273. *See* MAXWELL, *supra* note 211, at 74.

274. *Procedural justice* is generally the far more significant contributor to decision acceptance than is distributive justice. *See* TYLER & HUO, *supra* note 242, at 50–51, 54–57. Nevertheless, distributive justice also promotes outcome acceptance. *See id.* Perhaps more importantly, in the law-enforcement context, it is hard to separate out these effects in a practical way, even if their relative contributions can be analyzed statistically. This is so because, for example, the same police behavior—here, racial profiling—can lead to *both* unfair distributive justice and unfair procedural justice or motive-based

are *more likely* to disobey the law again in the future.<sup>275</sup> Perceptions of injustice or unfairness thus increase actual crime rates.<sup>276</sup> Furthermore, communities perceiving their members as ill-treated by the justice system reduce their cooperation with the police in deterring and prosecuting crime.<sup>277</sup> By thus reducing police detection and justice-system punishment rates, fewer of the guilty pay a deserved price for their misconduct, and crime rates may further rise as the guilty see capture and punishment as less likely. At the same time, racially skewed policing practices amplify the public association between blackness and crime, thus further limiting Blacks' life chances, as many studies, including those concerning employment discrimination, have shown.<sup>278</sup> But such life-opportunity limitations are further likely to increase black crime rates.<sup>279</sup>

*c. Spuriousness.* Note that the entire discussion above assumed the accuracy—the nonspurious nature—of the generalizations that police make when initially deciding to rely upon them. But what if these generalizations are spurious? In that case, all the effects just recounted should be far greater. In particular, an increasing percentage of Blacks stopped will be entirely innocent. Stopping the innocent in itself violates deeply rooted perceptions of fairness, apart from concerns about inequality. Two justice-perception researchers put it like this:

People are interested in the message the process used to handle their problem communicates about their standing as full participants in the society. People want to believe that third parties care about their concerns, consider their arguments, and try to be fair to them—*symbols of particularistic attention*.<sup>280</sup>

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trust perceptions, as illustrated above. Moreover, this problem shows why I often prefer the lens of the fair-price-theory economist to the justice psychologist, though they are both close cousins. The economist views equity not simply in terms of favorable outcomes or their distribution but also as getting a good enough outcome *for the price paid*. See *supra* notes 262–62 and accompanying text. The higher civil-liberties price paid by profiled groups must be weighed against the relative benefits they receive from the new style of policing, benefits likely to be seen by them as small, especially given their frequent preference for community-based healing approaches (“restorative justice”) over more militaristic, retributive approaches to the problem of crime. See Andrew E. Taslitz, *Fourth Amendment Federalism and the Political Silencing of the American Poor*, 85 CHICAGO-KENT L. REV. 277, 293–95 (2010). Finally, the policing context seems to me one in which resentments at any sort of injustice are often likely to run high.

275. See Tom R. Tyler, *Afterword*, in TOM R. TYLER, WHY PEOPLE OBEY THE LAW 269, 269–88 (new afterword ed., 2006).

276. See *id.*

277. See *id.*; see generally BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T. OF JUSTICE, UNDERSTANDING COMMUNITY POLICING: A FRAMEWORK FOR ACTION (1994); DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 117–28 (2002) (discussing the damage to minority-group trust and willingness to cooperate with the police and to the criminal-justice system's perceived legitimacy); David A. Harris, *Racial Profiling Revisited: “Just Common Sense in the Fight Against Terror,”* 17 CRIM. JUST. MAGAZINE 36–41, 59 (2002) (summarizing empirical data).

278. See Taslitz, *supra* note 208, at 1118–21 (discussing the “bystander effects”).

279. See *id.*

280. Tom R. Tyler & E. Allan Lind, *Procedural Justice*, in HANDBOOK OF JUSTICE RESEARCH IN LAW 84 (Joseph Sanders & V. Lee Hamilton eds., 2001) (emphasis added).

This observation suggests that part of the benefit of procedural and distributive justice is to convey the sense of *particularistic attention* to each individual's qualities and behavior. But this is precisely one of the purposes of the individualized-suspicion requirement in probable-cause and reasonable-suspicion determinations.<sup>281</sup> If minorities—indeed if anyone—perceive that they have been reasonably treated in a particularistic fashion, they are more likely to accept policing error in the name of some greater good.<sup>282</sup>

This discussion might leave the impression that eliminating race-based generalities alone, rather than other sorts of generalities, would be sufficient to address procedural and distributive fairness concerns. Race certainly provides the starkest example of the problem of overgeneralization. But the problems recounted here occur with many other generalizations as well.<sup>283</sup> The problem is not merely with race but with the generalization process itself.<sup>284</sup>

*d. Retribution.* Finally, the denial of procedural and substantive justice sparks a desire for retribution.<sup>285</sup> This desire is strongest when social rather than personal unfairness is incurred. Personal unfairness occurs when one person or process violates another person's hopes or expectations; but social unfairness occurs when *prescriptive* norms of how persons or institutions should behave—norms that society as a whole embraces as defining right and wrong—are violated.<sup>286</sup> Most of the discussion above concerns violation of just these prescriptive social norms. Such violations communicate the message that the offended individual is not worthy of the protections that shield the rest of the community.<sup>287</sup> That individual's sense of insult may be magnified if she perceives it as extending as well to a group with whom she strongly identifies.<sup>288</sup> Under such circumstances, the group as a whole may likewise take offense from the harm done to the individual.<sup>289</sup> The individual and the group seek societal punishment of the wrongdoer—here, individual police or a police unit or department as a whole—to send the unequivocal message that offender and offended are of equal value, thus entitled to equal protection of social-fairness norms.<sup>290</sup>

If courts or other governmental bodies do not provide the necessary retribution, offended individuals and groups will do so themselves. As a

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281. See *supra* text accompanying notes 3–4, 49–50.

282. See Tyler & Lind, *supra* note 280, at 84 (noting that “particularistic attention” is central to procedural justice).

283. See HARCOURT, *supra* note 264, at 215–23.

284. See *id.* at 215–17.

285. For a more extensive analysis of the concept of retributive justice, see Andrew E. Taslitz, *The Inadequacies of Civil Society: Law's Complementary Role in Regulating Harmful Speech*, 1 MARGINS 305 (2001).

286. See MAXWELL, *supra* note 211, at 75.

287. See Taslitz, *supra* note 199, at 50–58.

288. See *id.*

289. See *id.*

290. See Taslitz, *supra* note 285, at 313–22, 338–39.

practical matter, this may ordinarily be done by shunning (not cooperating with the police) or by complaint.<sup>291</sup> But if these actions fail to elicit a firm government response or are insufficient to invoke outrage over a particularly egregious abuse or longstanding pattern of abuses, retributive anger will not be sated. In such instances, that anger can explode in community protests, aggressive resistance to policing, or even the violence of riots.<sup>292</sup> In this way too, therefore, the individualized-suspicion requirement promotes social stability and physical safety.

## B. Privacy and Its Cousins

### 1. Respect and Privacy Defined and Linked to Individualized Suspicion

Respect as fittingness is the idea that each person is entitled to be treated in accordance with his status concerning some specified attribute.<sup>293</sup> Any lesser treatment is insulting. Human-rights theorists debate what attribute of sameness all humans share. To some theorists it is being made in the image of God, to others it is the capacity to achieve moral goodness, and to still others it is rationality and autonomy—humans' nature as self-directing beings legislating their own life plans.<sup>294</sup> Whatever the quality we all share, that quality entails certain rights or entitlements without which our status as humans is ignored.<sup>295</sup> Freedom of conscience, privacy, the right to own property earned by the sweat of the brow, and freedom of movement are among the rights commonly deemed to belong to every person simply by nature of her humanity.<sup>296</sup> Furthermore, many "fittingness theorists" agree that these sorts of entitlements necessarily

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291. See *supra* text accompanying notes 276–76 (noting reduced citizen willingness to cooperate with the police, a form of "exit" from unfair or ineffective institutions); HIRSCHMAN, *supra* note 232 (explaining when participants in institutions choose "voice" (that is, complaint) over exit as a strategy for seeking correction of those institutions' flaws).

292. See Taslitz, *supra* note 189, at 244–48.

293. See GEOFFREY CUPIT, JUSTICE AS FITTINGNESS 1–2, 15–28 (1996) (describing "respect" and "justice" as part of the same family of concepts, with respect being the broader idea).

294. See JOHN E. COONS & PATRICK M. BRENNAN, BY NATURE EQUAL: THE ANATOMY OF A WESTERN INSIGHT 13, 116–22 (1999) (contrasting moral goodness); see also MICHAEL J. PERRY, THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES 11–41 (1998) (arguing that the idea of human rights is "ineliminably religious"); WILLIAM F. SCHULTZ, IN OUR OWN BEST INTEREST: HOW DEFENDING HUMAN RIGHTS BENEFITS US ALL 17–31 (2001) (offering pragmatic arguments for accepting the ideas of human rights and equality).

295. See Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1697 (1992).

296. See, e.g., JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, & INTENT 13–56, 73–75 (1999) (recognizing privacy, property, and free movement as universal rights); cf. Martha Minow, *Equality and the Bill of Rights*, in THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 118, 118–28 (Michael J. Meyer & William A. Parent eds., 1992) (discussing how human dignity and equality are embraced in the Bill of Rights, especially in the protections of the First Amendment).

imply diversity in life choices.<sup>297</sup> Respect must therefore be shown for the sorts of differences that are central to personal identity.<sup>298</sup> Respect thus requires an appreciation of diversity and uniqueness among sameness. Disrespect, correspondingly, consists of treating another in a manner reasonably understood as inconsistent with equally valuing that other for both the salient ways in which she is like us and the ways in which she is legitimately different from us.

Privacy, properly understood, is part of what defines us as, and enables us to be, unique. Human beings are complex, wearing different masks in different situations.<sup>299</sup> We may, for example, be punctual at work but tardy to parties.<sup>300</sup> No single mask is inauthentic; each represents an aspect of ourselves.<sup>301</sup> Moreover, we value each mask for three reasons. First, it takes time to get to know a person in all his or her fullness, so each of us fears being misjudged by others if they see only a part of us, particularly if it is a part about which we fear they will disapprove.<sup>302</sup> Second, controlling what aspects of our nature we let certain persons see allows us to develop other aspects of our personalities—our on-average way of thinking and behaving—free of their gaze, thus free of pressures toward conformity.<sup>303</sup> That freedom, in turn, allows us to pursue our own unique interests, learning and doing what we want, how we want, within broad limits.<sup>304</sup> Third, because only time and the slow development of trust allow

297. “Fittingness” is an idea that captures an underlying similarity among theorists writing about respect, dignity, insult, and humiliation. See CUPIT, *supra* note 293, at 2–4, 13–23, 46–48, 60–63, 92. I thus refer to them all as “fittingness theorists.” On the importance of diversity in life choices, see Jean Hampton, *Retribution and the Liberal State*, 5 J. CONTEMP. LEGAL ISSUES 117, 140–41 (1994) (defending a “perfectionist liberalism” in which the state must promote “value pluralism,” so that citizens have plenty of options and opportunities to choose from in creating their lives).

298. See Andrew E. Taslitz, *Condemning the Racist Personality: Why the Critics of Hate Crimes Legislation Are Wrong*, 40 B.C. L. REV. 739, 746–65 (1999) (making similar point); see also AVISHAI MARGALIT, *THE DECENT SOCIETY* 135–38, 140–42, 153, 158–61 (1996). Margalit is what I call a “negative” fittingness theorist, focusing on what conduct we must avoid if we do not wish to insult others. See *id.* at 9, 112, 115, 137. Cupit is a “positive” fittingness theorist, focusing on what conduct entitles us to receive respect. See CUPIT, *supra* note 293, at 2–4, 6, 15–18, n.10.

299. See Andrew E. Taslitz, *The Fourth Amendment in the Twenty-First Century: Technology, Privacy, and Human Emotions*, 65 LAW & CONTEMP. PROBS. 125, 152 (Spring 2002).

300. See *id.* at 153.

301. See *id.*; JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* 8–9, 12, 218–19 (2000) (originating the “mask” terminology).

302. See Taslitz, *supra* note 299, at 153–55.

303. See *id.* at 155, 158. As law professor Lawrence Lessig puts it,

We all deserve to live in separate communities. Privacy, or the ability to control data about yourself, supports this desire. It enables these multiple communities and disables the power of one dominant community to norm others into oblivion. Think, for example, about a gay man in an intolerant small town.

LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 152–53 (1999). On the definition of “personality,” see Taslitz, *supra* note 5, at 31–34.

304. See PATRICIA BOLING, *PRIVACY AND THE POLITICS OF THE INTIMATE LIFE* 79 (1996) (“A third reason to respect the individual’s privacy about intimate-life decisions has to do with the need to value and respect diversity. Scrutinizing an individual’s intimate practices and demanding conformity to an implicit standard promotes homogeneity and undercuts and devalues differences. Assuming an

us to reveal increasingly more of ourselves to another, we define the nature and degree of intimacy we have with particular others by the degree to which we reveal information about ourselves to them and by the content of such revelation.<sup>305</sup>

Privacy is thus the creation of metaphorical boundaries that protect us against the risk of being misdefined and judged out of context.<sup>306</sup> Privacy is therefore one way by which we express our need for individualized justice: for being judged for who we really are.<sup>307</sup> Yet privacy also gives us the freedom to choose who we are, to follow our own paths in a way that gives life meaning and permits the development of life-enhancing human relationships and human autonomy. Moreover, because privacy enables us to develop and define our sense of self, we experience invasions of privacy as assaults on our identity.<sup>308</sup> Privacy protects self-definition by giving each of us some control over important information about ourselves, so it is the loss of control, rather than revelation itself, that wounds us.

John Stuart Mill long ago wrote of the importance of being freed from “social tyranny,” the “tyranny of the prevailing opinion and feeling,” which can be “more formidable than many kinds of political oppression” because society itself becomes the tyrant.<sup>309</sup> Said Mill, this sort of social tyranny “maim[s] by compression, like a Chinese lady’s foot, every part of human nature that stands out.”<sup>310</sup>

Privacy theorist and law professor Jed Rubenfeld cautions, however, that a focus solely on privacy in the Fourth Amendment context unduly restricts that Amendment’s scope.<sup>311</sup> Notably, he argues, freedom of movement is also necessary to developing individual uniqueness.<sup>312</sup> If we cannot visit the friends,

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essentialized identity based on intimate affiliations or decisions likewise renders the diversity of people’s experiences invisible and places normalizing pressure on different or dissenting group members.”) *See generally* JUDITH WAGNER DECEW, IN PURSUIT OF PRIVACY: LAW, ETHICS, AND THE RISE OF TECHNOLOGY 66 (1997) (stating that privacy marks a zone of interests beyond the legitimate concerns of others to protect against pressures to conform or to reveal one’s vulnerabilities); FERDINAND DAVID SCHOEMAN, PRIVACY AND SOCIAL FREEDOM (1992) (asserting that freedom from scrutiny and judgment permits us to talk, think, and act in ways that express our unique individual identities).

305. *See, e.g.*, ANITA ALLEN, UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY 52 (1987) (“[T]he exercise of privacy-promoting liberties enhances persons and personal relationships in ways that cannot be ignored by those who feel ethically constrained to treat persons as more than things.”); *see also* ROSEN, *supra* note 301, at 8 (discussing how control over which masks we reveal promotes intimate relationships).

306. *See* ROSEN, *supra* note 301, at 8.

307. *See* Taslitz, *supra* note 5, at 24–30 (defining individualized justice); Taslitz, *supra* note 298, at 746–58 (elaborating on the meaning and significance of individualized justice).

308. *See* Taslitz, *supra* note 299, at 155, 170–71.

309. JOHN STUART MILL, ON LIBERTY 13, 129 (1859; photo reprint, 2002).

310. *See id.* at 13, 129.

311. *See* Rubenfeld, *supra* note 240, at 207, 209–11.

312. *See id.* at 211; *cf.* Tracey Maclin, *The Decline of the Right to Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258 (1990).

neighbors, social or political groups, movies, or libraries we choose without being accosted, that too hampers our ability to make choices, ponder ideas, experience emotions, and exchange information and arguments free from the state's judgment.<sup>313</sup> Furthermore, argues Rubenfeld, privacy's development in the Fourth Amendment sphere should be more robust than in the sphere of our everyday lives because that Amendment creates a *distinctive body of law* governing those who enforce the law, primarily the police.<sup>314</sup> The Amendment, he maintains, must be seen as distinctive because of the government's qualitatively and quantitatively unique and massive ability to intrude, monitor, punish, and regulate individuals' lives relative to the private sector.<sup>315</sup> The Amendment is also distinctive, however, because it grants the government both a right *and* a duty to intrude into individuals' private lives—committing acts that would ordinarily constitute thefts, criminal trespasses, or assaults—that private persons lack.<sup>316</sup> Rubenfeld thus prefers the broader term “personal life” to the narrower term “privacy” to describe the extent of the intrusion.<sup>317</sup>

I would add to Rubenfeld's point about the Fourth Amendment's distinctiveness its communicative, if not necessarily logical, link to the criminal-justice system. That system is the ultimate judge.<sup>318</sup> The material consequences of that judgment, such as imprisonment or death, are far more consequential than those imposed by private parties.<sup>319</sup> Conviction, or even arrest, can diminish future job consequences, kill marriages, strain family ties, leave children temporarily or permanently abandoned, friends lost.<sup>320</sup> Furthermore, conviction in modern American society marks the convicted as an outsider to the political community, a lesser citizen in fact if not formally so in law.<sup>321</sup>

Moreover, the condemnation represented by a conviction is far more extensive than, and of a different nature from, that stemming from lesser wrongs. It is one thing to be blamed by one's spouse, children, friends, or even one's church or neighborhood for letting them down. It is another thing to also

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313. See Rubenfeld, *supra* note 240, at 220–21.

314. See *id.* at 212–14.

315. See *id.* at 214.

316. See *id.*

317. See *id.* at 208–09. Rubenfeld develops his idea of personal life at greater length in Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101 (2008).

318. See Taslitz, *supra* note 285, at 313–55 (comparing the social roles of the civil and criminal-justice systems and concluding that the latter is the ultimate assessor of culpability).

319. See RICHARD G. SINGER, CRIMINAL PROCEDURE II: FROM BAIL TO JAIL 255–300 (2005) (summarizing the sentencing options available in the criminal-justice system).

320. See generally INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Chesney-Lind eds., 2002) (outlining the harms done to the defendant, his family, friends, neighborhood, and society at large that were not part of his announced sentence, but necessarily accompany it).

321. See Taslitz, *supra* note 285, at 356 (“The exclusion of the offender from being a full member of the moral-political community (literal exclusion as well, in the case of imprisonment) has a powerful impact in reaffirming social norms.”).

be entirely blamed by the entire political community, yet that is just what a criminal conviction represents.<sup>322</sup>

So powerful is the condemnatory message of the criminal-justice system that any involvement with it, even well short of conviction, carries a taint. To be arrested, even to be stopped and questioned, absent various Fourth Amendment safeguards, is to risk humiliation and insult, certainly to fear those consequences—or worse.<sup>323</sup>

The individualized-suspicion requirement protects the uniqueness-fostering function of privacy—or, if you prefer, of “personal life”—in several ways. Importantly, police need a significant level of justification for intruding upon privacy.<sup>324</sup> They may not do so on mere conjecture. Moreover, that justification for intrusion must itself respect the individual’s uniqueness, for individualized suspicion must be based on the individual’s actions and behavior.<sup>325</sup> Furthermore, those actions and the self-revelation they involve are generally freely chosen—not the result of state compulsion or demand—thus respecting the individual’s autonomy.<sup>326</sup> Additionally, individualized suspicion may not be assumed or guessed at but rather must result from reliance on a sufficient quality and quantity of evidence to support a reasonable and articulable concern about past or impending criminality *by this person*.<sup>327</sup> This evidentiary barrier is an independent element of procedural justice and an obstacle to too-ready state incursions upon persons’ private worlds.<sup>328</sup> Police do not objectively manifest disrespect toward persons when police stop or search them based on trustworthy evidence of their voluntary (in the sense that it is not state-coerced) revelation of aspects of their selves that justify suspicion of their criminality.<sup>329</sup>

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322. See *id.* at 313–55 (defending this very point but also noting that tortious civil liability, unlike criminal liability, is more about blame being placed by individuals than by the entire community).

323. See, e.g., Taslitz, *supra* note 199, at 33–41 (examining the arrest of a mother in front of her two children for the crime of driving without a seat belt); see also *Atwater v. Lago Vista*, 532 U.S. 318 (2001) (setting forth and analyzing the facts that were the basis for the driving without a seatbelt discussion above); cf. Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997) (discussing the criminal law’s influence on social norms as well as law’s influence more generally).

324. See *supra* text accompanying notes 5–7, 166, 303–07, 317.

325. See *supra* text accompanying notes 5–33, 50.

326. See Rubinfeld, *supra* note 240, at 216–19, 221. For a dystopian vision of the impact of such autonomy invasion taken to the extreme, see Andrew E. Taslitz, *Privacy as Struggle*, 44 SAN DIEGO L. REV. 501 (2007).

327. See *supra* text accompanying notes 5–6; *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (requiring reasonable suspicion to be based upon “specific and articulable” facts). Although the Court generally uses the “specific and articulable” facts language in connection with “reasonable suspicion,” surely those same requirements—but in more robust form—must inhere in the more protective “probable cause standard.”

328. See E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 132 (1988) (“To the extent that procedure includes provisions that assure that decisions will be based on accurate information and on well-informed or expert opinion, procedural fairness will be enhanced.”).

329. See, e.g., TASLITZ, *supra* note 4, at 258–590:

Disrespect is, instead, fairly perceived when the police seem to be acting without an adequate evidentiary basis or upon generalizations or surmise.<sup>330</sup> In such instances, the innocent man feels rightly robbed of the good reputation he has striven to deserve. “Here the belief exists that the ‘not guilty’ should not be punished. Pain and punishment [are] not warranted. In addition, here the individual does the right thing, takes the right precautions, yet pain and punishment strike anyway.”<sup>331</sup> This concept is not a comparative one of inequality but an absolute one of the “good” person “getting unfairly punished”;<sup>332</sup> and, as explained above, unjustified, nonindividualized stops by police are indeed often rightly experienced (and always entitled to be experienced) as akin to punishment, certainly as an infliction of psychic pain rather than mere inconvenience.

## 2. The Drive To Be, and To Be Thought of, As Unique.

*a. Cognitive modules and human uniqueness.* The importance of being, and being thought of as, unique cannot be overstated. It is likely rooted in fundamental aspects of human psychology, though culture may also play a role.<sup>333</sup> Pulitzer Prize finalist Judith Rich Harris synthesized the recent work being done on the human mind by both cognitive scientists and evolutionary psychologists into a persuasive explanation of why each individual is indeed in many ways unique, while also sharing so much with many others.<sup>334</sup> To be sure, Harris recognizes the impact of the usual suspects of individual heredity and the environment in explaining human variation.<sup>335</sup> However, she also finds other powerful individual and social mechanisms at work by which each of us tries to be like others in some ways, different from them in others. These mechanisms are rooted in three systems or “modules” in the brain: the socialization, relationship, and status modules.<sup>336</sup>

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[A]ny unduly group-based suspicions risk treating people like fungible property rather than as unique human beings, a form of treatment meant to die with slavery. On the other hand, the Reconstruction Congress was as concerned with whites’ rights as blacks’. The black experience under slavery underscores the value of the individualized-justice principle to human dignity, but it is a principle that must be revitalized for all persons, regardless of race.

*Id.* at 259; *cf.* Taslitz, *supra* note 208, at 1121–45 (examining how flawed informants’ evidence at the search-warrant stage can lead not only to wrongful arrests but to wrongful convictions).

330. See Taslitz, *supra* note 299, at 158–74 (illustrating how group-based suspicion and reliance on assumption over trustworthy evidence has limited the modern autonomy of gays, the poor, and racial minorities, simultaneously insulting them all).

331. Norman J. Finkel, *But It’s Not Fair!: Commonsense Notions of Unfairness*, 6 PSYCH., PUB. POL’Y, & L. 898, 910 (2000).

332. See *id.* at 910–11.

333. See generally JUDITH RICH HARRIS, NO TWO ALIKE: HUMAN NATURE AND HUMAN INDIVIDUALITY (2006) (defending this proposition).

334. See *id.*

335. See *id.* at 24–26, 40–41.

336. See *id.* at 106–62.

Briefly, the socialization module is the cognitive system that works to make us more like those in our group.<sup>337</sup> Humans have a strong need to belong to a group, finding pleasure in solidarity and acceptance.<sup>338</sup> Group membership can also protect us from groups hostile to our own or from the vicissitudes and isolation of a life lived alone.<sup>339</sup> Part of each person's sense of uniqueness indeed comes from the particular intersection of his multiple group identities, for example, as a young Jewish Northeastern heterosexual Democrat or a mature Christian Southern gay Republican.<sup>340</sup> The socialization system teaches us the rules for being like others in our group.<sup>341</sup>

The relationship system, like the socialization system, likely had important evolutionary advantages but of an almost opposite kind.<sup>342</sup> Despite group identification, there are important differences among individuals, or at least among their relationships with one another.<sup>343</sup> The relationship system allows us to recognize one individual as physically distinct from another and then to understand in as much depth as possible what makes that person's character unique.<sup>344</sup> This second goal turns on our effectiveness as mind readers. If we can better understand what makes another person tick differently, we can more effectively judge how to relate to them, maximizing the benefits of interaction.<sup>345</sup> Mind-reading aids us in determining whether another will help us if we are in need, repay our favors, be a reliable trading partner, have sex with us, be a trustworthy mate, like us or hate us, be gentle with us, or beat us up.<sup>346</sup> The relationship system, unlike the socialization system, is thus "a discriminator, not a generalizer—a splitter, not a lumpers."<sup>347</sup> Furthermore, among the distinctions the system makes are those that give hints about each person's relative

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337. *See id.* at 193–95, 206.

338. *See* TASLITZ, *supra* note 84, at 134–35; ROY BAUMEISTER, *THE CULTURAL ANIMAL: HUMAN NATURE, MEANING, AND SOCIAL LIFE* 377 (2005) (discussing the importance of group-belongingness); DAVID BERREBY, *US AND THEM: UNDERSTANDING YOUR TRIBAL MIND* 16 (2005) (noting that group affiliation is "an absolute requirement for being human").

339. *See* BAUMEISTER, *supra* note 338, at 107–09 (noting that belongingness promotes happiness, mental and physical health, and that "[g]roups can share resources, care for sick members, scare off predators, fight together against enemies, divide tasks so as to improve efficiency, and contribute to survival in many other ways"); *see also id.* at 378 ("People may have evolved to recognize the presence of an enemy group and to seek to form bonds and alliances for their own protection.").

340. *See* Taslitz, *Feminist Approach*, *supra* note 180, at 23 ("[O]ur social identity—our sense of who we are and what we are worth—is intimately bound up with our group memberships."); *see also* TASLITZ, *supra* note 84, at 135 ("Although all individuals are unique, some part of how we express ourselves draws on group self-concepts . . .").

341. *See* HARRIS, *supra* note 312, at 193–95.

342. *See id.* at 161.

343. *See id.* at 8–9 (explaining that, although we exaggerate the consistency in other people's behavior, individual differences—character traits—are real).

344. *See id.* at 169–73.

345. *See id.* at 165, 174–75; BERREBY, *supra* note 338, at 123–25 (describing the importance of gathering information about particular individuals over time to improve our ability to mind-read them).

346. *See* HARRIS, *supra* note 312, at 165.

347. *Id.* at 181.

dominance and submissiveness and overall status *within* the group.<sup>348</sup> This information can be crucial in resolving, or even in avoiding, intra-group conflict.<sup>349</sup> Of course, “mind reading” is a best guess, but we are driven to do our best to guess correctly, and those most often right likely had an evolutionary advantage over others.<sup>350</sup>

The status system leads each of us to want to be *better than*, rather than equal to or similar to, others, or at least to know where we stand in the status hierarchy and how to move within it.<sup>351</sup> Higher status is its own reward but also brings easier access to more community resources.<sup>352</sup> Status inheres in how most other members of the community view you or would view you if they knew you.<sup>353</sup> Accordingly, judging our own status requires a special sort of mind reading—reading what status another assigns to us and why.<sup>354</sup> Status is also multidimensional and varies with context.<sup>355</sup> For example, a lousy athlete has low status on a baseball team. But the same person might have high status as a journalist.<sup>356</sup>

How do these systems work in combination? Our relationship system drives us to mind-read others, both to understand their unique qualities and to determine what they see as our unique qualities. Nevertheless, our status system also drives us to mind-read others to determine what they think about us, more specifically, *what status* they on average assign us.<sup>357</sup> Actual differences in individuals’ talents may often initially be small. But the relationship system drives others to focus on these differences, while the status system prods those others to assign a status to us based on those *perceived* differences.<sup>358</sup> If we adequately understand how others judge us, we will seek to improve our status accordingly. We do this by putting more effort into that which brings us higher status, less effort into that which brings us the opposite.<sup>359</sup> Similarly, we seek out environments in which we can display our high-status talents, avoiding

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348. *See id.*

349. *See id.* (“Obligations must be repaid, duplicity remembered, compatible companions sought out, obnoxious ones avoided, those with higher status deferred to.”).

350. *See id.*

351. *See id.* at 209 (“To compete with one’s groupmates is to strive for status . . . .”); TASLITZ, *supra* note 84, at 134–37 (explaining that different groups have different social statuses, so the status of an individual is inescapably also linked to the status of his group).

352. *See* TASLITZ, *supra* note 84, at 112.

353. *See* ALAIN DE BOTTON, STATUS ANXIETY vi–viii (2004).

354. *See* HARRIS, *supra* note 333, at 224–26.

355. *See id.* at 212.

356. *See id.* at 226; ROBERT W. FULLER, ALL RISE: SOMEBODIES, NOBODIES, AND THE POLITICS OF DIGNITY 15 (2006) (“But, unlike a chicken coop, modern human societies comprise thousands of different hierarchies, and a person at the bottom of one may be at the top of another. The worst bowler on the company team may be the CEO. The college dropout may be a billionaire.”).

357. *See* HARRIS, NO TWO ALIKE, *supra* note 333, at 221, 225.

358. *See id.* at 218.

359. *See* HARRIS, *supra* note 333, at 227, 239, 247.

situations bringing us low status.<sup>360</sup> Here I define “talents” broadly to include personality traits as well as intellectual and physical skills—the whole panoply of potential human thoughts, emotions, and behavior.<sup>361</sup>

For example, if we are perceived as physically weak but admired for our kindness, we might more often choose settings where kindness is valued and work to emphasize what is kind about our behavior. To be sure, we could also choose to go to the gym and bulk up, but our short stature and delicate frame may make it hard for us to get much mileage out of this strategy, and it is, in any event, easier for us to build on what we already see as our strengths. We might have more ability to change other traits, such as being a poor dresser, provided we have the money and a good source of sartorial advice.<sup>362</sup> Our kind behavior reinforces our self-image as kind, even at the subconscious level, as do the rewards we receive in praise and self-satisfaction.<sup>363</sup> Perceptions of our kind nature can also open doors to us that otherwise might be closed where skilled kindness is needed.<sup>364</sup> Social-science research suggests that our efforts to stand out for possessing a trait, such as kindness, tend to take root as longer-lasting aspects of our character if they persist to about age sixteen.<sup>365</sup> In this way the best nurses and schoolteachers are born. Persons who find status in physical strength and aggression, on the other hand, might become the sumo wrestlers and other athletes of the future.

In sum, our relationship system drives us to be seen by others as unique, while our status system drives us to see ourselves as, and to become, unique. Although our relationship system drives us to seek commonalities with others, those others are categorized into groups, and our particular combination of group identities combines with the ways we strive for individual difference to add to our uniqueness.<sup>366</sup> Philosopher William James captured the strength of

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360. *See id.* at 239 (declaring that the status system is social information that a person uses “to plot a long-term strategy that will involve direct competition only in those areas of endeavor in which the individual has a hope of succeeding”).

361. *See id.* at 218–19, 238–40, 247.

362. *Cf. id.* at 239 (emphasizing that individuals use status information to place themselves in situations in which they believe they have the most hope of improving their status by improving their actual or perceived performance).

363. *See* Andrew E. Taslitz, *Willfully Blinded: On Date Rape and Self-Deception*, 28 HARV. J.L. & GENDER 381, 438 (2005).

364. *Cf.* KIERON O’HARA, TRUST: FROM SOCRATES TO SPIN 14 (2004) (“What does trust buy you? It gets you out of a state of uncertainty . . . [I]f someone has promised to help you, and you trust her, then you can plan on that basis.”); *see also* PAUL SEABRIGHT, THE COMPANY OF STRANGERS: A NATURAL HISTORY OF ECONOMIC LIFE 54 (2004) (“[Humans have evolved] through selection for what is sometimes called ‘reciprocity,’ namely, an instinctive inclination to do unto others as they have already done unto you. If others have treated you well, you treat them well in return, but if they have hurt you, you hurt them back. An eye for an eye certainly, but also a gift for a gift.”).

365. *See* HARRIS, *supra* note 333, at 218–19.

366. *See supra* text accompanying notes 342–64. In addition to these forces, of course, genetic tendencies, current environment, life experience, and happenstance all combine to make us uniquely who we are. *See* HARRIS, *supra* note 333, at 238–40, 247.

our need to be seen as, and to become, unique in these too-little-known but apt words:

The first thing the intellect does with an object is to class it along with something else. But any object that is infinitely important to us and awakens our devotion feels to us also as if it must be *sui generis* and unique. Probably a crab would be filled with a sense of personal outrage if it could hear us class it without ado or apology as a crustacean, and thus dispose of it. "I am no such thing," it would say; I am MYSELF, MYSELF *alone*.<sup>367</sup>

*b. Storytelling theory.* Another way to understand the uniqueness drive is through the lens of storytelling theory. A person who is ten years old today will, in twenty years, have different attitudes, beliefs, goals, and desires. He may have fewer organs (missing, for example, a gall bladder), may be fatter or thinner, more or less energetic. Even at the molecular level, the precise molecules constituting his body will have changed. Yet he and others will still think of him as the same person, as "Hank Jones" and not suddenly "Clay Smith."<sup>368</sup>

What explains this sense of individual continuity is the narrative coherence of human lives. We each tell ourselves stories that link the different phases of our lives.<sup>369</sup> Our sense of self consists largely of these stories.<sup>370</sup> "Our plannings, our remembering, even our loving and hating, are guided by narrative plots."<sup>371</sup> Narratives, of course, move through time, having a beginning, middle, and an end.<sup>372</sup> One cannot, therefore, be a person at a single moment in time.<sup>373</sup> To be a person is to be the combination of what you were, are, and will be.<sup>374</sup> The narrative nature of personhood does not make it a fiction. The narrative is who you are.<sup>375</sup>

The hero (or antihero, depending upon the plot) of your own story is also its author: you. Of course, there are common elements to many stories, including

367. See WILLIAM JAMES, *THE VARIETIES OF RELIGIOUS EXPERIENCE* 29–30 (1978) (based on lectures delivered in Edinburgh 1901–1902).

368. See JED RUBENFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* 131–42 (2001).

369. See Taslitz, *A Feminist Approach*, *supra* note 180, at 34–36.

370. See *id.*; JEROME BRUNER, *MAKING STORIES: LAW, LITERATURE, LIFE* 63–89 (2002) (discussing the narrative creation of the self).

371. See Theodore R. Sarbin, *The Narrative as a Root Metaphor for Psychology*, in *NARRATIVE PSYCHOLOGY: THE STORIED NATURE OF HUMAN CONDUCT* 3, 11 (Theodore R. Sarbin ed., 1986).

372. See RUBENFELD, *supra* note 368, at 137; accord BRUNER, *supra* note 370, at 15 ("[W]e know that narrative in all its forms is a dialectic between what was expected and what came to pass.").

373. See RUBENFELD, *supra* note 368, at 137.

374. *Id.*

375. See *id.* Nor does this mean that the narrative can be *based on* fictions. Though our memories are partly constructed, we do try to create a coherent sense of self—an interpretation of who we are—based on our best beliefs about our own experiences as "out there" facts, such as whether we had a dog as a child, what persons attended our Bar-Mitzvah, and what our grades were like in school. See Taslitz, *supra* note 180, at 5–6, 12–34 (distinguishing between "out there" facts and interpretive facts). The same sort of analysis is true with "peoplehood": it is defined by a narrative moving over time but is not therefore a fiction. See RUBENFELD, *supra* note 368, at 45–48, 131–42, 145–51.

common types of plots.<sup>376</sup> But even if this is so, to each individual, her own story, and thus her own sense of self, is unique. Only *she* has experienced the events in the story, no one else. Moreover, only *her* father, mother, sister, brother, friends, employers, colleagues, and acquaintances play a role in the tale. She has a unique relationship, a special history, with each such person. As the leading advocates for understanding the role of individual and group storytelling in macroeconomics put it, “[M]uch of human motivation comes from living through a story of our lives, a story that we tell to ourselves and that creates a framework for motivation.”<sup>377</sup> Yet we also share chapters in that story with others, much of human conversation consisting of the exchange of just such stories.<sup>378</sup>

Being the authors of our own tales, and controlling how and when parts of it unfold to others, are central aspects of human autonomy.<sup>379</sup> When the state treats an individual as but a stereotype, the state rewrites the individual’s story and how it is told, robbing her of her autonomy. An individualized-suspicion requirement minimizes this autonomy invasion, both by recognizing the suspect’s authority to write much of her own tale (that is, judging her character, motivations, and intentions by her voluntary words and actions) and by at least respecting the defining aspect of her story: that she is indeed a unique *individual*. Concerning seizures of the person, such as stops and full-blown arrests, and relying on his idea of “personal life,” constitutional-law professor Jed Rubinfeld captures part of the sense of injury to autonomy that comes from the state’s unwarranted rewriting of the individual suspect’s tale:

Invasions of privacy are intrusions. Seizures are *seclusions*. They do not pry into the detainee’s prior relationships or things. They *take him away from his own life*. Every seizure has this effect to one degree or another. The more complete the victim’s seclusion, the more complete his severance from the places and people he knew, the more complete the destruction of his personal life. An imprisoned man loses his liberty, of course, but he also loses his life—the life he used to lead.<sup>380</sup>

Indeed, continues Rubinfeld, to have a personal life by definition means to have a part of one’s life not belonging to the public or the state. Yet, “[a]n imprisoned man belongs to the state.”<sup>381</sup> Indeed, “[h]is movements are not his own. His time is not his own. His occupations will be directed by his custodians. Seizures of the person attack the very existence of personal life.”<sup>382</sup> But, as Rubinfeld and other commentators have recognized elsewhere, albeit sometimes in slightly different language, what makes a life “personal” to a

376. See RONALD B. TOBIAS, 20 MASTER PLOTS AND HOW TO BUILD THEM iii–iv (1993).

377. GEORGE A. AKERLOF & ROBERT J. SHILLER, ANIMAL SPIRITS: HOW HUMAN PSYCHOLOGY DRIVES THE ECONOMY, AND WHY IT MATTERS FOR GLOBAL CAPITALISM 51 (2009).

378. See *id.*

379. Cf. TYLER COWEN, CREATE YOUR OWN ECONOMY: THE PATH TO PROSPERITY IN A DISORDERED WORLD 31–42 (2009) (discussing the economics of storytelling).

380. See Rubinfeld, *supra* note 240, at 220 (emphasis in original).

381. *Id.*

382. *Id.*

particular individual is the tale he has constructed, his self-defining narrative.<sup>383</sup> The state should rewrite that narrative gingerly and reluctantly, with full respect for the distinctive voice of its author.

*c. Mystery and awe.* The appeal of the particular, especially in the context of law, also has an emotional power that we cannot yet fully explain.<sup>384</sup> Even when relying on a rule—which is but one kind of generalization—the decisionmaker must craft a narrative from localized evidence to conclude that the particular set of facts before her fits the terms of the rule.<sup>385</sup> Engaging with the particular can thus never be avoided. Choosing what aspects of the particular to attend to and how to interpret them likewise requires a combination of active concentration, focused intelligence, and informed intuition.<sup>386</sup>

The *rule of law*, of course, requires rules, that is, generalizations. But rules purport to “appropriate the mystery of the world by forcing each particular under their aegis, denying its particularity.”<sup>387</sup> Yet in practical decisionmaking and to varying degrees, judges cannot in fact deny the particular. They must and will engage with it.<sup>388</sup> One way to undertake this task is candidly, recognizing the necessary tension between the general and the particular, accepting the unavoidable anxiety of struggling with that tension.<sup>389</sup> Another is self-deception, pretending that the rules or generalizations, not the appeal of the individual case, dictate the outcome.<sup>390</sup> Philosopher Zenon Bankowski thus describes rules as a “cowardly way of decisionmaking.”<sup>391</sup> The cowardice, he explains, stems from the false perception “that I no longer have to make up my mind in the encounter with the awesome mystery of the particular before me.”<sup>392</sup> The individualized-suspicion requirement chooses candor over cowardice.

Bankowski and his colleague, James MacLean, indeed see this sort of candor as essential to justice. The two philosophers declare both formal and

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383. See *id.* at 220; Taslitz, *A Feminist Approach*, *supra* note 180, at 18–23, 34–46.

384. See Zenon Bankowski, *In the Judgment Space: The Judge and the Anxiety of the Encounter*, in *THE UNIVERSAL AND THE PARTICULAR IN LEGAL REASONING* 25, 25–26 (Zenon Bankowski & James MacLean eds., 2006).

385. See *id.* at 27–28.

386. See *id.* at 33–34.

387. *Id.* at 32.

388. See John Bell, *The Institutional Constraints on Particularism*, in *THE UNIVERSAL AND THE PARTICULAR IN LEGAL REASONING*, *supra* note 384, at 43 (arguing that accountability in the context of judicial reasoning requires a public statement demonstrating good reasons for a decision rooted in case-specific particulars).

389. See Bankowski, *supra* note 384, at 27–29, 33.

390. Cf. Andrew E. Taslitz, *Interpretive Method and the Federal Rules of Evidence: A Call for a Politically Realistic Hermeneutics*, 32 *HARV. J. LEG.* 329, 399–401 (making a similar point concerning interpreting the Federal Rules of Evidence).

391. See Bankowski, *supra* note 384, at 32.

392. See *id.*

substantive justice to be requirements of total justice.<sup>393</sup> Formal justice aspires toward equal treatment of likes under a regime of equal rules.<sup>394</sup> But substantive justice emphasizes using the *values* embodied in those rules to do justice in the particular case.<sup>395</sup> Reconciling the roles of the latter form of justice with the former requires often treating rules as flexible guides, even sometimes departing from the rules' rigid application.<sup>396</sup> Only doing so, these authors explain, addresses the "real pain and hurt" of the particular case.<sup>397</sup>

Bankowski himself argues that any other approach disrespects the "ontology, mystery, and beauty" of the particular.<sup>398</sup> When applied to a person, however, this idea of the mystery of the particular is more than an assertion of an inarticulable attraction to the particular, more than a mere embrace of it on aesthetic grounds. Rather, it is a way of expressing awe at the infinite value of the individual as unique and irreplaceable, no matter what wrongs he has done—an idea, a *value* deeply rooted in Judeo-Christian teaching.<sup>399</sup> So viewed, Bankowski's language of mystery and awe can be seen as an expression of respect for a deeply rooted American value. In this light, Bankowski's words can be read as encapsulating the prayerful worship of the individual that underlies American justice:

[T]hat you, I, a flower, or any part of the world exists is a mystery. Here then is something that I cannot completely grasp or understand. It is that which gives it its beauty, the fact that it will always be something beyond me. It is this integrity that I must respect and stand in awe of.<sup>400</sup>

Individualized suspicion is the law's expression of that awe. It is a way of educating law enforcement that our society values the individual for herself, a reminder to grant her some minimal measure of respect no matter what we suspect she has done.

*d. Political diversity.* Earlier, I discussed the benefits for the individual of the drive toward developing a unique personality. But promoting human uniqueness, thus human diversity, has broader consequences for political society, not merely for the individual. Central to a healthy democratic polity is

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393. Zenon Bankowski & James MacLean, *Introduction*, in *THE UNIVERSAL AND THE PARTICULAR IN LEGAL REASONING*, *supra* note 384, xi, xii.

394. *See id.* at xii.

395. *See id.*

396. *See id.*

397. *Id.*

398. *See* Bankowski, *supra* note 384, at 31 (relying on the ideas of Ludwig Wittgenstein).

399. *See, e.g.*, MISHNA SANHEDRIN 4:5 ("Therefore was a single man [Adam] only created to teach you that if anyone destroys a single soul from the children of man, Scripture charges him as though he had destroyed a whole world."); *see also* ALAN DERSHOWITZ, *THE GENESIS OF JUSTICE: TEN STORIES OF BIBLICAL INJUSTICE THAT LED TO THE TEN COMMANDMENTS AND MODERN LAW* 55 (2000) ("Even the cost of one killing is incalculable.").

400. *See* Bankowski, *supra* note 384, at 31.

the existence and communication of diverse views.<sup>401</sup> The energetic exchange of such views aids in avoiding error; helps to “create” a public or common good concerning principles of political morality; and encourages a republican citizen character of dissent.<sup>402</sup> A culture of conformity, in this view, is the antithesis of—the death of—democracy.<sup>403</sup>

Once again, John Stuart Mill saw the point, emphasizing the need to “enable resistance to the public demand for uniformity.”<sup>404</sup> “Without such resistance,” he declared, “society will be peopled by creatures of ‘weak feelings’ and ‘weak energies.’”<sup>405</sup> Such weaknesses, he explained, would render persons “dependents” or “subjects” rather than independent citizens.<sup>406</sup> Dependency on government, in Mill’s view, was inconsistent with the British character. “[I]t was,” he said, “men of another stamp that made England what it has been.”<sup>407</sup> Accordingly, he concluded, “men of another stamp will be needed to prevent its decline.”<sup>408</sup>

Variants of Mill’s arguments have been warmly embraced by many academics and at times by courts in the First Amendment free-speech context.<sup>409</sup> But Fourth and First Amendment values and principles are intimately linked.<sup>410</sup> As noted earlier, without privacy and freedom of movement, individual (and group) uniqueness cannot thrive.<sup>411</sup> Likewise, property is necessary to protect and enable privacy and free movement (if all were homeless, none would have privacy; if none had cars or bicycles, few could travel far).<sup>412</sup> Such diversity of character and ideas is essential to diversity of expressed viewpoints.<sup>413</sup> Fourth Amendment interests are a prerequisite to healthy free speech.

401. See KENT GREENAWALT, *FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH* 3–6 (1995).

402. See Taslitz, *Democratic Deliberation*, *supra* note 188, at 284 (discussing error-correction and accountability); see also Andrew E. Taslitz, *The Jury and the Common Good: Fusing the Insights of Modernism and Postmodernism*, in *FOR THE COMMON GOOD: A CRITICAL EXAMINATION OF LAW AND SOCIAL NORMS* 325–27 (Robin Miller ed., 2004) [hereinafter *COMMON GOOD*] (discussing republican theories of “creating” a common good by conversation versus liberal ones of “discovering” that common good); Taslitz, *Racist Personality*, *supra* note 298, at 765–77 (discussing the kind of citizen character required in a sound American conception of a “republic”).

403. See *infra* text accompanying notes 404–06.

404. See Rubinfeld, *supra* note 240, at 216 (describing Mill’s theory).

405. MILL, *supra* note 309, at 125.

406. *Id.* at 126.

407. *Id.* at 216.

408. *Id.*

409. See GREENAWALT, *supra* note 401, at 3–6 (describing Mill as one of the few originators of a school of free-speech thought now widely embraced by scholars and judges).

410. See TASLITZ, *supra* note 4, at 22, 71, 89, 147, 167, 190, 203–07, 226–29, 246, 248, 257, 287 nn.20, 23, 302 n.3, 287 n.23.

411. See *supra* text accompanying notes 293–332.

412. See, e.g., TASLITZ, *supra* note 4, at 207–25.

413. See generally Daniel Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112 (2007) (arguing for a close connection between Fourth Amendment privacy and First Amendment free speech).

Totalitarian societies understand this speech–privacy connection all too well. Taming a people requires instilling the fear in them that all they do and say can be seen and heard. It is no accident that George Orwell’s dystopian novel, *1984*, concerned a world in which “thought police” had access to every person’s home, job, and telephone.<sup>414</sup> More recently, author Margaret Atwood, in her novel, *The Handmaid’s Tale*, conjures up a vision of religious totalitarianism enforced by the virtual absence of privacy for subjugated persons.<sup>415</sup> So pervasively does this contribute to conformity that many of the oppressed not only *behave* as expected but *think* as expected, losing the capacity to be different.<sup>416</sup> Mill himself feared exactly this metaphorical eye. “In our own times, from the highest class . . . down to the lowest,” said Mill, “everyone lives as under the eye of a dreaded and hostile censorship.”<sup>417</sup> That eye and its judgment penetrate everywhere, “leav[ing] fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself.”<sup>418</sup>

In the post-World War II period, American judges themselves saw clearly the spectre of totalitarianism that arose from deprivation of privacy, property, and locomotive rights.<sup>419</sup> In the wake of Hitler’s Germany, the mere *risk* of the state’s invading these rights worried many in the judiciary. What might seemingly start small, as had Nazism, could, if replicated often enough, metastasize into ever-expansive censorship and oppression.

The unmistakable influence of fears of totalitarianism appeared in various Justices’ opinions with regularity throughout the postwar period.<sup>420</sup> In *Johnson v. United States*,<sup>421</sup> for example, Justice Jackson stressed the centrality of the warrant requirement, worrying that “[a]ny other rule would undermine ‘the right of the people to be secure in their persons, houses, papers and effects,’ and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law.”<sup>422</sup> Justice Frankfurter expressed a similar sentiment, arguing in *Wolf v. Colorado*<sup>423</sup> that if the Fourth Amendment, originally applicable only to the federal government, were not read as being incorporated against the states by the Fourteenth Amendment, Americans would need to fear the “knock at the door, whether by day or by night, as a prelude to search, without authority, but solely on the authority of the police.”<sup>424</sup> Totalitarian comparisons were most

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414. See GEORGE ORWELL, *1984* (1950).

415. See MARGARET ATWOOD, *THE HANDMAID’S TALE* (2006).

416. See *id.*

417. See MILL, *supra* note 309, at 21.

418. *Id.* at 13.

419. See generally Margaret Raymond, *Rejecting Totalitarianism: Translating the Guarantees of Constitutional Criminal Procedure*, 76 N.C. L. REV. 1193 (1998).

420. See *id.*

421. 333 U.S. 10 (1948).

422. *Id.* at 17.

423. 338 U.S. 25 (1949), *overruled by* *Mapp v. Ohio* 367 U.S. 643 (1961).

424. *Id.* at 27–28.

passionately used in dissents, expressly decrying majorities' positions as ignoring the importance of "avoiding the dangers of a police state."<sup>425</sup> Appellate-court dissenters like Jerome Frank also went so far as to condemn monitoring radio transmitters because that was reminiscent of Hitler's secret police and Orwell's *1984*.<sup>426</sup> Perhaps the most memorable quote from the Supreme Court's dissenters, however, was this one, again by Justice Jackson:

Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart [as unfettered search and seizure]. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police.<sup>427</sup>

Later, the villain switched from Nazism to Communism, particularly Soviet-style communism.<sup>428</sup> Yet the message remained the same, and faint echoes of it appear in more-recent opinions.<sup>429</sup> Professor Margaret Raymond has traced in detail the rise and fall of antitotalitarian rhetoric; she embraces the wisdom of such rhetoric as essential if the risk of tyranny that prompted the Founders to craft the Fourth Amendment is not to become seen as but a historical oddity—no danger worthy of real concern in contemporary society.<sup>430</sup> The Justices most loudly warning against modern tyranny understood, says Raymond, that "particular police practices, if permitted, will open the door to totalitarianism . . ."<sup>431</sup> Losing the passion that antitotalitarian rhetoric invoked, Raymond wisely warned, reduces any appeal to an ugly twentieth-century past as a mere "rote recitation, part of a list of distant outrages,"<sup>432</sup> ones which the "speaker no longer recalls and can no longer express with the fervor that characterizes the true believer."<sup>433</sup> The risk is therefore run that these appeals, and the Fourth Amendment itself, will become "mere words," sound without fury.

Jed Rubinfeld embraces a similar approach to the Fourth Amendment. Analogizing to Immanuel Kant's idea of determining moral imperatives by exploring their significance if generalized, Rubinfeld asks judges to take into account the effect that their constitutional search and seizure decisions will have

425. *Harris v. United States*, 331 U.S. 145, 171 (1947) (Frankfurter, J., dissenting); see also Raymond, *supra* note 419, at 1205, 1227.

426. See *United States v. On Lee*, 193 F.2d 306, 309, 317 (2d Cir. 1951) (Frank J., dissenting), *aff'd* 343 U.S. 747 (1952).

427. *Brinegar v. United States*, 338 U.S. 160, 180–81 (1949).

428. See Raymond, *supra* note 419, at 1210.

429. See *id.* at 1210–13.

430. See *id.* at 1244–63.

431. *Id.* at 1262.

432. *Id.* at 1263.

433. *Id.*

if their implicit or explicit principles are made widespread.<sup>434</sup> Rubenfeld does not ask what would happen if the principles were made universal, but only what would happen if they were “implemented on a scale broad enough to become part of common people’s knowledge and everyday life.”<sup>435</sup> What matters is not whether the principle has been so implemented, but whether its consequences raise the risk of fostering, in even a small way, a totalitarian culture.<sup>436</sup> For example, current doctrine finds no “privacy” violation in allowing undercover police agents to gain entry to intimate relationships, political groups, and homes.<sup>437</sup> However, argues Rubenfeld, if generalized from the tactic’s being used against drug dealers or suspected terrorists to everyone in all contexts, the result would be a conformist society of fear filled with weak citizens unable to trust family, friends, employers, or even spiritual advisors.<sup>438</sup> That thought experiment suggests to Rubenfeld not a flat ban on undercover agents, but at least some measure of constitutional regulation.<sup>439</sup>

Rubenfeld roots his argument in taking seriously the Fourth Amendment’s declaration that it protects a right of “the People” to be “secure.”<sup>440</sup> Insecurity, to Rubenfeld, results in the fear generated by significant risks of invasions of personal life.<sup>441</sup> A single decision may alone validate state invasion of privacy, locomotive, or property rights for a relatively small class of persons or, even more narrowly, only for the parties then before the court. However, if the principle the case creates is not explicitly cabined, there is no logical limit to its growth.<sup>442</sup> Freedom may erode slowly rather than in a rush, but it will just as

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434. See Rubenfeld, *supra* note 240, at 220–24; IMMANUEL KANT, GROUNDWORK FOR THE METAPHYSICS OF MORALS 37 (Allen W. Wood ed. & trans., 2002) (1785) (“Act only in accordance with that maxim through which you can at the same time will that it become a universal law.”).

435. See Rubenfeld, *supra* note 240, at 222.

436. See *id.* at 222–24.

437. See *id.* For a summary of the Fourth Amendment law on undercover agents, see TASLITZ, PARIS & HERBERT, *supra* note 35, at 118–20, 196–200, 221–24.

438. See Rubenfeld, *supra* note 240, at 223. Rubenfeld remarks,

Were covert informants and police agents to become ubiquitous, a great deal more than a loss of privacy would ensue. The true loss would be born by everyone, including those who were never spied on (therefore suffering no actual governmental invasion of their privacy) and those who stopped saying anything personal to anyone else (therefore never suffering an exposure of anything private). A society with ubiquitous undercover agents is a secret police state. It is a state that deliberately seeks to destroy the security that people enjoy in their personal lives—the confidence that what ones does in personal life belongs to personal life and will not generally be known to public authorities.

*Id.*

439. See *id.* at 223–24.

440. See *id.* at 209–10.

441. See *id.* at 211–18.

442. See *id.* at 220–24.

surely wither away if the state seems to have the power to wound it, even if it has not yet chosen to do so fully.<sup>443</sup>

This insecurity is a harm to the People, not merely to individuals, precisely because it threatens the nature of the political society that the Fourth Amendment aspires for America to become.<sup>444</sup> The collectivity as a whole, not merely its parts, suffers.<sup>445</sup>

The individualized-suspicion requirement plays an important role in this antitotalitarian political culture. By putting up a significant obstacle to invading personal life, it creates an important, albeit not impassable, roadblock to the too-ready state erosion of privacy, property, and free movement.<sup>446</sup> Moreover, it does so by showing respect for individual uniqueness and diversity, the very supports necessary to a diverse, open society of strong-willed citizen voices. These political ramifications matter as much to preserving the individualized-suspicion ideal as do the harms likely to be done to individual persons and groups by the ideal's demise.

#### IV IMPLICATIONS

An awareness of the benefits of the individualized-suspicion requirement make apparent the simple point that such awareness has practical significance as well as theoretical importance. First, the individualized-suspicion requirement should not be tossed overboard in favor of a generalization unless the generalization is at least a nonspurious one; second, if there is a good reason to jettison the requirement, every effort should be made to find alternative means for attaining the benefits that would have obtained had the requirement not been compromised.

That despite its benefits, it sometimes makes sense to modify or eliminate the individualized-suspicion requirement assumes, of course, that the requirement comes with costs—the flipside of the benefits of that requirement. Indeed, there are a variety of such costs. Articulation of these costs, though often not all in one location, is, unlike articulation of the benefits, so ubiquitous in much modern scholarship and case law that little citation is necessary. Plowing this garden tills familiar soil.<sup>447</sup>

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443. Cf. Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003) (exploring the circumstances under which the cumulation of small incursions on rights can lead to a slippery slope in which rights slowly but ultimately substantially erode or die).

444. See *id.* at 210–18; TASLITZ, *supra* note 4, at 3, 4, 44, 55–61, 65, 67, 70–71, 76–83, 89, 177 (discussing the importance of “peoplehood” to understanding the Fourth Amendment).

445. See Rubinfeld, *supra* note 240, at 210–18; TASLITZ, *supra* note 4, at 260–63.

446. See *supra* text accompanying notes 311–30.

447. See, e.g., Kevin Robert Glandon, *Bright Lines on the Road: The Fourth Amendment, the Automatic Companion Rule, the “Automatic Container” Rule, and a New Rule for Drug-or-Firearm-Related Traffic Stop Companion Searches Incident to Lawful Arrest*, 46 AM. CRIM. L. REV. 1267, 1298–99 (2009) (arguing for elimination of any individualized-suspicion requirement for certain drug- or firearm-related traffic stops). *But see* Thomas K. Clancy, *The Role of Individualized Suspicion in*

### A. The Costs of Individualized Suspicion

Requiring individualized suspicion imposes eight potential primary costs. First, precisely because acquiring such suspicion can sometimes be difficult, fewer searches and seizures will occur. But that may mean that more guilty persons escape justice.<sup>448</sup> Of course, the mere existence of the Fourth Amendment necessarily reduces crime-detection effectiveness. If police could break into homes, arrest persons willy-nilly, hold them for long periods of interrogation, all without any need to justify these police actions, doubtless more crime would be discovered and punished. But many more innocent persons would be swept up as well. Still, the costs cannot be ignored, and, in theory, if these costs become sufficiently high, crime could rise to a point at which social stability is threatened, prompting a harsh backlash against robust civil-liberties protections.

Second, and relatedly, if a high enough number of criminals escape justice, specific and general deterrence will falter.<sup>449</sup> Unpunished criminals see no reason not to offend again, and previously law-abiding persons seeing little chance of harsh consequences from wrongdoing may in the future turn to crimes from which they might otherwise have desisted.<sup>450</sup>

Third, in some instances, the time needed for investigation to establish individualized suspicion can have grave consequences. Specifically, as when terrorism is involved, enormous imminent harm can be avoided only by prompt action unsupported by individualized suspicion. In the perhaps-fanciful, ticking-nuclear-time-bomb scenario,<sup>451</sup> police strongly suspect that a nuclear weapon will wipe New York City from the map within an hour. Yet, lacking individualized suspicion, they let millions of Americans die. Real-world scenarios are likely to leave much less at stake, with whether harm is “imminent” being an open question. Nevertheless, all that humans can fairly be expected to do is to make their best judgments in an uncertain world. Even if the harm raised and the certainty of its occurrence are much less—perhaps a threat by kidnappers to kill a single child if ransom is not delivered within an

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*Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483 (1995) (arguing that the state should bear a heavy burden when seeking to depart from the individualized-suspicion mandate). My approach differs from Clancy’s in that I focus on the policy reasons justifying presumptive individualized suspicion, while he focuses on the historical justifications, thus making our visions distinct but complementary. I also explore here in detail the meaning of suspicion’s being “individualized,” a task Clancy does not undertake.

448. This argument—that a reduced number of searches and seizures means freeing the guilty—is but another way of saying that the individualized-suspicion requirement unduly burdens law enforcement. *See, e.g.*, Glandon, *supra* note 447 (analyzing such a burden in certain types of traffic stops).

449. *See* ELLEN PODGOR, PETER J. HENNING & ANDREW E. TASLITZ, *CRIMINAL LAW: CONCEPTS AND PRACTICE* 4–7 (2009) (summarizing the purposes of the criminal law, including the types of deterrence).

450. *See supra* sources cited notes 447–47.

451. *See* ALAN M. DERSHOWITZ, *PREEMPTION: A KNIFE THAT CUTS BOTH WAYS* 128 (2006).

hour—the consequences of delay can involve substantial human pain that cannot be ignored. Civil liberties have their price.

Fourth, unbending application of an individualized-suspicion requirement can dramatically raise the costs of meeting it. For example, police may find themselves with inadequate evidence of probable cause to search a home. They may, however, have some reason to believe that a suspect's cell phone, which he sometimes leaves unguarded on his desk, contains evidence sufficient to give the police the probable cause they are lacking.<sup>452</sup> If an individualized-suspicion requirement bars searching the cell phone, police may never catch the bad guy. On the other hand, if they are free surreptitiously to read his cell phone when it is unguarded, that may give them individualized suspicion sufficient to obtain a search warrant for his home. The choice is therefore not necessarily between individualized suspicion and nothing. Rather, the breadth of the mandate can be varied, sometimes requiring individualized suspicion, sometimes not. An unbending obsession with such suspicion may, therefore, impose significant social costs that a more flexible scheme might reduce.

Fifth, individualized-suspicion mandates impose significant out-of-pocket and opportunity costs. Police must do more investigation.<sup>453</sup> Sometimes this investigation may be modest, perhaps standing on a street corner unobtrusively observing a suspect a few minutes longer. But, other times, the expense in time and money can be far greater, including such things as extended stakeouts, undercover work, covert fingerprinting, DNA testing, and a host of other activities.<sup>454</sup> Moreover, every extra minute that police spend investigating one case that may or may not pan out is a minute subtracted from another potential case or from such crime-preventative activities as building community trust via neighborhood meetings and other community-policing efforts.

Sixth, individualized suspicion may for all practical purposes be impossible to attain in certain settings, at least at a tolerable cost. For example, inspecting homes for fire-code violations would be virtually impossible if such inspections could be done based only upon probable cause.<sup>455</sup> Yet even one resulting serious fire risks spreading, perhaps sacrificing, an entire neighborhood.

Seventh, a too-robust and widespread individualized-suspicion mandate may itself harm the law's legitimacy. If the state cannot protect its citizens' safety—one of the central American ideological justifications for having a state—then how can citizens be expected to accept and defer to state actions in that and other areas?

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452. Cf. SCHAUER, *supra* note 65, at 99–238 (discussing a cell-phone analogy that prompted this example).

453. See Taslitz, *supra* note 190.

454. See generally ROBERT JACKALL, STREET STORIES: THE WORLD OF POLICE DETECTIVES (2005) (describing detectives' investigative techniques in their own words).

455. Cf. TASLITZ, PARIS & HERBERT, *supra* note 35, at 402–03 (discussing fire-marshal “warrants” not based on traditional probable cause).

Eighth, judges fearing just these sorts of costs may dramatically limit the scope of Fourth Amendment protections. They can do so by narrowly defining what constitutes a “search” or a “seizure”—thus narrowing when the Fourth Amendment even applies in the first place—or by diluting those protections that do apply, for example, finding individualized suspicion based upon weak evidence of questionable trustworthiness.

## B. Illustrations

### 1. The Case of the Spurious Generalization

If generalizations are to be used in place of individualized suspicion, all agree that the generalizations should not be spurious ones.<sup>456</sup> Yet a majority of the Supreme Court has shown little interest in seriously examining this question, either ignoring it or simply assuming the generalizations’ nonspurious nature.

In *Illinois v. Wardlow*,<sup>457</sup> the Court held that unprovoked flight from the police is sufficient to establish particularized reasonable suspicion in a high-crime, but not in a low-crime, area. The majority considered such flight “suggestive” of wrongdoing without clearly explaining why.<sup>458</sup> Its implicit logic seems to be this: a high-crime area by definition contains a higher percentage of criminals than does a low-crime area. Furthermore, unprovoked flight—“wherever it occurs—is the consummate act of evasion . . . .”<sup>459</sup> The Court conceded, however, that there may be other, innocent reasons for such flight, and that flight itself is not an illegal activity.<sup>460</sup> Nevertheless, the majority concluded that “*Terry* accepts the risk that officers may stop innocent people.”<sup>461</sup> Apparently, the Court saw that risk as acceptable in a high-crime area because the higher chance of catching the guilty there means both that fewer innocent persons will be caught in the law’s web, and that the probabilities of a significant payoff, namely catching a guilty offender, were worth the “minimal intrusion” costs of a *Terry* stop.<sup>462</sup>

The Court based its analysis of a fair reading of flight’s meaning in the particular location on its own intuition. The Court expressly rejected its competence to do otherwise, declaring that the judiciary does “not have available empirical studies dealing with inferences drawn from suspicious behavior, and . . . cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists.”<sup>463</sup> Accordingly, the determination

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456. See *supra* text accompanying notes 109–35.

457. 528 U.S. 119 (2000).

458. See *id.* at 124.

459. *Id.*

460. See *id.* at 125.

461. *Id.* at 126; *Terry v. Ohio*, 392 U.S. 1 (1968).

462. *Wardlow*, 528 U.S. at 126.

463. *Id.* at 124–25.

of reasonable suspicion must be based on commonsense judgments and inferences about human behavior.<sup>464</sup>

But commonsense judgments can fall short, and “scientific certainty,” whatever the Court means by that phrase, is not necessary. Ample quality social science was available, in a way easily accessible to lawyers, calling into question the accuracy of the Court’s generalization that flight from police in a high-crime area was indicative of consciousness of guilt. Indeed, Justice Stevens, in an opinion concurring in part and dissenting in part, joined by Justices Souter, Ginsburg, and Breyer,<sup>465</sup> relied on just such social-science evidence—evidence to which the majority offered no response.

Justice Stevens reviewed that social science in six separate footnotes, some of them lengthy. These footnotes reviewed, among other matters, the high percentages of African Americans who consider police harassment a serious problem in their own community; the belief by many minorities that field interrogations are conducted in an abusive manner; the high percentages of minority stop-and-frisks that do not result in an arrest; the disproportionate percentage of minority street stops in many major cities; the belief by even substantial percentages of police in at least one major city that its department’s officers exhibit racial bias; the New Jersey Attorney General’s conclusion that racial profiling by troopers on the state’s highways was real, not imagined; and the Massachusetts Attorney General’s conclusion that *Terry* stop-and-frisks were done in a particularly demeaning manner—for example, public strip searches—when aimed at minorities.<sup>466</sup> This ample data, explained Stevens, meant that for some citizens, “particularly minorities and those residing in high-crime areas, there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer’s sudden presence.”<sup>467</sup> Stevens concluded, “For such a person, unprovoked flight is neither ‘aberrant’ nor ‘abnormal.’”<sup>468</sup> Given officers’ own recognition of the problem and support from law-enforcement agencies’ internal investigations of their own practices, Stevens considered “the reasonableness of these beliefs . . . too pervasive to be dismissed as random or rare, and too persuasive to be disparaged as inconclusive or insufficient.”<sup>469</sup> The data was, in short, sufficient to support a “commonsense conclusion” that unprovoked flight can occur for innocent reasons.<sup>470</sup>

Stevens also relied on other social science, case law, and the Bible to buttress the argument that innocent persons may flee from the police, apart

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464. *Id.* at 125.

465. *See id.* at 126 (Stevens, J., concurring in part and dissenting in part).

466. *See id.* at 132–35 & nn.10–11.

467. *Id.* at 132.

468. *Illinois v. Wardlow*, 528 U.S. 119, 132–33 (2000).

469. *Id.* at 133–34.

470. *Id.*

from the location where a stop occurs, for a wealth of innocent reasons: the belief that police presence suggests physical danger from criminals themselves or from an impending police–criminal confrontation, the fear of humiliation by being wrongly associated with a criminal act, or the annoyance or expense of explaining or defending themselves.<sup>471</sup> Stevens conceded that flight can also be consistent with consciousness of guilt of crime.<sup>472</sup> He intended, though, not to banish flight from consideration but rather to make two major points: First, given that flight could support entirely opposite inferences—innocence or guilt—the burden must be on the state to justify the latter inference as the more sensible one; and, second, that a *per se* rule—a generalization about high-crime neighborhoods and flight’s meaning there—could not be justified as a departure from the constitutionally preferable course that the original *Terry* opinion directed—a case-specific assessment of individualized suspicion based upon a thorough analysis of the totality of the circumstances.<sup>473</sup> As Stevens put it,

Given the diversity and frequency of possible motivations for flight, it would be profoundly unwise to endorse either *per se* rule [that flight in a high-crime neighborhood establishes reasonable suspicion alone or that it never matters]. The inference we can reasonably draw about the motivation for a person’s flight, rather, will depend on a number of circumstances. Factors such as the time of day, the number of people in the area, the character of the neighborhood, whether the officer was in uniform, the way the runner was dressed, the direction and speed of the flight, and whether the person’s behavior was otherwise unusual might be relevant in specific cases. This number of variables is surely sufficient to preclude either a bright-line rule that always justifies, or that never justifies, an investigative stop based on the sole fact that flight began after a police officer appeared nearby.<sup>474</sup>

But, concluded Stevens, the record was far too vague, filled with stunning gaps and surprising lapses of officer memory, for the state to meet its burden of meeting Stevens’ totality-of-the-circumstances test for particularized suspicion.<sup>475</sup> Furthermore, even were a generalization to be made based upon the extent of crime occurring in the neighborhood, the better-supported generalization would be quite the opposite of that urged by the state and accepted by the Court:

The State, along with a majority of the Court, relies as well on the assumption that this flight occurred in a high crime area. Even if that assumption is accurate, it is insufficient because even in a high crime neighborhood unprovoked flight does not invariably lead to reasonable suspicion. On the contrary, because many factors providing innocent motivations for unprovoked flight are concentrated in high crime areas, the character of the neighborhood arguably makes an inference of guilt less appropriate, rather than more so. Like unprovoked flight itself, presence in a high crime neighborhood is a fact too generic and susceptible to innocent explanations to satisfy the reasonable suspicion inquiry.<sup>476</sup>

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471. See *id.* at 130–34 & nn.5–6; *Proverbs* 22:3 (King James) (“A shrewd man sees trouble coming and lies low; the simple walk into it and pay the penalty.”).

472. See *Wardlow*, 528 U.S. at 129 (Stevens, J., dissenting).

473. See *id.* at 129–30 & n.4; see also *id.* at 140.

474. *Id.* at 129–30.

475. See *id.* at 137–40.

476. *Id.* at 139.

Schauer himself supports using only nonspurious generalizations, and ones on which the state, not the suspect, bears the burden of persuasion.<sup>477</sup> Stevens' view, not the majority's in *Wardlow*, is thus the sounder one, even for readers accepting the frequent wisdom of relying on generalities. For those who, like myself, are far more skeptical of such reliance, Stevens' embrace of case-specific particularity is wiser still.

## 2. Minimizing Generalization's Harm

The Court has long embraced an "assumption of risk" doctrine, also often called the "third-party doctrine,"<sup>478</sup> which generally renders police's obtaining information that had been voluntarily shared by an individual with a third party devoid of a reasonable expectation of privacy.<sup>479</sup> The practical effect of this doctrine is to free such police conduct from constitutional regulation under the Fourth Amendment.<sup>480</sup>

The American Bar Association (ABA) recently appointed a task force to draft standards regulating government access to third-party records in criminal investigations.<sup>481</sup> That appointment necessarily reflects a judgment that the third-party doctrine is, as a matter of policy, unwise.<sup>482</sup> Yet the task force's draft standards recognize that regulating such access does not necessarily mean barring it, or even imposing probable cause as a routine obstacle to access. Rather, the task force's draft standards create four categories of third-party records. Those categories are "highly protected," "moderately protected," "minimally protected," or "unprotected."<sup>483</sup> The category into which a record falls is based on weighing a variety of factors, including the extent to which the initial information transfer is "reasonably necessary to participate meaningfully in society or is socially beneficial, including free and robust expression"; the "extent to which the information is personal," meaning intimate or likely to cause stigma or embarrassment if disclosed, or "typically disclosed only within one's close social network"; the extent to which the public is aware of the information's accessibility by those outside the third-party entity; and the extent to which the law already restricts accessing or disseminating the information, including by government.<sup>484</sup> Note that these concerns address several, though by no means all, of the justifications for having a sturdy individualized-suspicion

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477. See *supra* text accompanying notes 109–35.

478. See TASLITZ, PARIS & HERBERT, *supra* note 35, at 116–21; Orin Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561 (2009).

479. See *ABA Standards for Criminal Justice: Government Access to Private Records, Draft Version 5.0* 8–10 (2009).

480. See TASLITZ, PARIS & HERBERT, *supra* note 35, at 116–21.

481. See *ABA Standards*, *supra* note 479, at 1–8.

482. See *id.* at 8–10.

483. See *id.* at 11–16, 19–20.

484. See *id.*

requirement, particularly the benefits of privacy in promoting free expression, intimacy, and freedom from stigma.<sup>485</sup>

Absent consent or exigency, the standards vary the degree of justification required for government access to individuals' information held by third-party entities based upon the category of record involved.<sup>486</sup> A warrant based upon probable cause is required for highly protected information; a court order based upon reasonable suspicion to believe that the information in the record is relevant to an investigation is required for moderately protected information (such as financial transactions and balances); a judicial subpoena based upon a judicial determination of a "reasonable possibility" that a record contains information relevant to an investigation is required for minimally protected information (such as utility bills); but unprotected information relevant to an investigation requires no more than an officer's mere request based upon the officer's own belief in a reasonable possibility that the record contains such information.<sup>487</sup>

This sliding scale seeks to accommodate the individual and social interests in protecting the information against legitimate law-enforcement needs. The task force thus concluded that, at least under some circumstances, imposing meaty individualized-suspicion requirements would unduly hamper law enforcement for relatively little social gain.<sup>488</sup> At the same time, the standards recognize that diluted individualized suspicion (reasonable suspicion via a court order) is often preferable to none and that, when that is not so, at least relevancy requirements determined by neutral, independent third parties (the judiciary) are preferable to unguided officer discretion. Retaining judicial involvement, requiring advance justifications, and requiring at least some articulable basis for action retains many of the benefits of the strongest individualized-suspicion requirement (probable cause) while reducing its costs.<sup>489</sup>

But the standards go further, requiring, for example, notice to various persons affected, including for some records notice to the "general public"; imposing auditing, security, integrity, limited access, relatively prompt destruction, and accuracy requirements on government retention and use of seized records or information contained therein; and imposing accountability requirements.<sup>490</sup> Accountability mechanisms include administrative sanctions pursuant to specifically drafted rules, civil liability, criminal liability for serious violations, periodic review, and periodic public reports summarizing search-and-seizure practices. Politically accountable officials are involved in many of the proposed standards' protective mechanisms.<sup>491</sup>

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485. See *supra* text accompanying notes 210–446.

486. See *ABA Standards*, *supra* note 479, at 20.

487. See *id.* at 20.

488. See *id.* at 1–16.

489. See *supra* part III (detailing social benefits of individualized suspicion).

490. See *ABA Standards*, *supra* note 479, at 21–23.

491. See *id.* at 17, 19.

I am not opining on the wisdom of the precise details of the draft, nor do I plan here to offer and defend specific examples of records that I believe should fit in one category of justification or another. But I do approve of the draft's recognition that sometimes the cost of the most powerful individualized-suspicion requirement is too high but that departure from it should be reluctant, gradual, and based upon increasingly pressing need. I also embrace the draft's effort, as it dilutes or eliminates individualized-suspicion requirements, to preserve many of their benefits, including political accountability and voice, limits on police discretion, fair notice, and efforts to minimize individual humiliation and the risks of error.<sup>492</sup> Concerning political accountability, the ABA has gone even farther in a related area, video surveillance of the public, requiring direct citizen participation in periodically monitoring and critiquing government surveillance operations.<sup>493</sup> Of this, too, I strongly approve.

## V

### CONCLUSION

In this article I have sought to clarify the individualized-suspicion requirement's meaning and to develop in some detail several of its most important major social benefits. At the same time, the article recognizes the need at times for the state to dilute or jettison the individualized-suspicion mandate. But, in doing so, the state should be aware of the mandate's purposes—including promoting distributive and procedural fairness; protecting affected persons' and the people's political voice and autonomy; encouraging police transparency and accountability; protecting privacy, individual uniqueness and political diversity; preserving narrative integrity and human dignity; and maintaining the mystery and awe of treating persons as unique and infinitely valuable individuals. Without mandating individualized suspicion, the full panoply of its benefits cannot likely be maintained with appropriate vigor. But every effort should be made to do so.

The ABA's law-reform efforts described above illustrate how this might be accomplished. Moreover, when reliance on generalization is required, as Justice Stevens' *Wardlow* dissent demonstrates, the state should bear the burden at least of proving that the generalization is nonspurious. If both these cautions are heeded, Fourth Amendment and related statutory law and executive search-and-seizure practices will move toward a fairer, more accurate, and more legitimate form while better safeguarding public safety.

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492. *See id.* at 23.

493. *See* TASLITZ, *supra* note 4, at 59–60.