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AN ODE TO PROBABLE CAUSE: A BRIEF RESPONSE TO PROFESSORS AMAR AND SLOBOGIN

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It is mighty hard to argue with reasonableness. Faced with a doctrinal area as fraught with confusion as the Fourth Amendment, thoughtful and well-articulated proposals like those put forward by Professors Amar[1] and Slobogin[2] can have an opiate-like effect. After all, a flexible "reasonableness" based Fourth Amendment standard holds forth the promise of both accommodating a wide variety of governmental interests (ranging from classic criminal investigations to drug testing of junior high students) while still being able to address a myriad of concerns about government overstepping (ranging from racially discriminatory *Terry* stops to misuse of high tech surveillance techniques). A "one-size-fits-all" Fourth Amendment reasonableness standard seems to offer the best of all worlds: An ability to have an expansive Fourth Amendment that can be finely calibrated to meet the particularities of any situation.

Let me suggest, however, that when it comes to the Fourth Amendment there can be an unreasonable side to reasonableness, that "more can be less." It is worthwhile remembering that the two watershed cases for the Supreme Court's gradual movement towards an all-encompassing reasonableness balancing test—*Camara v. Municipal Court*[3] and *Terry v. Ohio*[4]—were efforts to make the Fourth Amendment as *expansive* as the Court thought possible under the circumstances. *Camara*, for the first time, brought housing inspections within the ambit of the

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[1] *See* Akhil Reed Amar, Terry *and Fourth Amendment First Principles*, 72 ST. JOHN'S L. REV. 1097 (1998).

[2] *See* Christopher Slobogin, *Let's Not Bury* Terry: *A Call for Rejuvenation of the Proportionality Principle*, 72 ST. JOHN'S L. REV. 1053 (1998).

[3] 387 U.S. 523 (1967).

[4] 392 U.S. 1 (1968).

Amendment,[5] and *Terry* ensured that "stops and frisks" were covered by the Amendment's protections rather than left constitutionally unregulated.[6] In so doing, however, *Camara* twisted the Warrant Clause into a pretzel[7] and *Terry* unwittingly cracked the door for a decline in the role of traditional probable cause.[8] Because these cases created cracks in the foundation of Fourth Amendment safeguards, but out of a noble motive of providing greater protection, I have called them "mischief" cases,[9] a "mischief," I fear, that will be compounded by parts of the proposals put forward today.

To urge caution in embracing a free-floating reasonableness analysis is not to say that the Fourth Amendment must be blindly enslaved to the Warrant Clause and probable cause.[10] The Reasonableness Clause is now an important part of Fourth Amendment analysis and it is unrealistic and, perhaps, unwise to urge a return to the pre-*Terry* days when the Reasonableness Clause largely served as a redundant way of saying a "warrant based on probable cause."[11] One need not be a Fourth Amendment Luddite, however, to believe that if "reasonableness" is to be applied so as to foster the Amendment's values, then certain requirements must still be given primacy within the Fourth Amendment framework. In other words, to acknowledge that the Reasonableness Clause has a role within the Fourth Amendment does not end the inquiry. What government behavior is "reasonable" under the Amendment still must be defined, just as the "equal protection" and "due process" clauses have required further definition so that they can fulfill their purposes and values.

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[5] *See Camara*, 387 U.S. at 538-40.

[6] *See Terry*, 392 U.S. at 28-31.

[7] *See* Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383, 391-401 (1988) (critiquing the *Camara* Court's use of the Warrant Clause as the basis for its decision).

[8] *See id.* at 401-04.

[9] *Id.*

[10] *See, e.g.*, Scott E. Sundby, *"Everyman" 's Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751, 1796-802 (1994) (examining when Fourth Amendment analysis properly can be shifted from Warrant to Reasonableness clauses); *see also* Sundby, *supra* note 7, at 414-27 (proposing a "composite model" of the Fourth Amendment that provides complementary roles for Reasonableness and Warrant clauses).

[11] *See* Sundby, *supra* note 7, at 386-91 (noting how, prior to *Camara* and *Terry*, the Warrant Clause dominated Fourth Amendment jurisprudence).

My limited goal today is to suggest that if one looks at the Fourth Amendment's underlying values, in particular the value of mutual "government-citizen trust,"[12] probable cause should be viewed as a norm for a "reasonable" search or seizure. Consequently, any departures from probable cause should be deemed "reasonable" only as limited exceptions allowed under narrow circumstances. While there are other norms that should be included in defining "reasonableness," I focus on probable cause because it has become the factor most at risk from the rush to reasonableness and from the government's use of advances in technology and surveillance.[13]

The case which gives rise to this Symposium is a good example of how Fourth Amendment analysis can be probable-cause centered and yet allow reasoned departures. Chief Justice Warren's opinion in *Terry* is almost excruciatingly cautious in his effort to explain the Court's departure from a norm of probable cause and to limit the consequences of such a departure. Reduced to its essence, the Chief Justice's holding is a relatively modest one, basically creating a limited right of "self defense" for a police officer who in carrying out her duties comes across someone whom she reasonably believes is armed and dangerous.[14] The problem with *Terry*, therefore, lies not in its very limited upholding of stops and frisks (a holding most of the commentators in this Symposium find acceptable[15]). Rather, *Terry*'s difficulty rests in the long-term consequences it sowed by casting the holding in terms of a broadly framed reasonableness balancing test. For although Chief Justice Warren's cautious opinion suggests that the use of the reasonableness balancing test was meant to be viewed as a narrow departure from the norm of probable cause, we now know that the test has taken on a life of its own.

Thus, I would agree with Professor Amar that there are "two *Terrys*"[16]—one *Terry* that points towards a very open-ended reasonableness approach (Professor Amar's "good *Terry*") and an-

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[12] Sundby, *supra* note 10, at 1785.

[13] *See generally id.* at 1758-63 (examining how technology has affected Fourth Amendment analysis).

[14] Terry v. Ohio, 392 U.S. 1, 29-31 (1968).

[15] For a notable dissenting voice, see Tracey Maclin, Terry v. Ohio's *Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271 (1998).

[16] Amar, *supra* note 1.

other *Terry* that is far more cautious and restrained in recognizing departures from requiring probable cause (the "bad *Terry*").[17] As my prior comments should make evident, though, I believe that Professor Amar has mistaken the faces of the good and evil twins: It is from Chief Justice Warren's cautious and thoughtful efforts to craft a narrow exception and his recognition that such departures carry important consequences that we should draw our guidance.

But why is this? Why should we care whether the Fourth Amendment universe circles around a reasonableness-balancing test or around an analysis with probable cause at its center? The answer largely depends upon how much individual autonomy a person should have over when the government can intrude into their lives. The virtue of the traditional probable cause standard is that the individual citizen maintains control over when the government can intrude. When the probable cause standard applies, so long as the citizen does not act in a manner that gives rise to a "fair probability" that she is engaged in wrongdoing, the government cannot intrude.[18] In this sense, probable cause makes the Fourth Amendment largely self-executing: The government's power to search and seize does not even exist until the citizen behaves in a manner giving rise to a belief that she is engaged in wrongdoing.

A broadly defined reasonableness balancing test, on the other hand, largely places the citizen's Fourth Amendment fate in the hands of others. The citizen's freedom from intrusion now no longer rests upon her behavior—all she wanted was a job promotion[19] or to play sports[20]—but upon factors such as the government's ability to articulate convincing objectives, the capacity of technology to minimize the physical intrusiveness of the invasion, and the calibration of the balancing scales used by the judiciary.[21] The citizen's Fourth Amendment fate no longer is a factual inquiry but a policy debate.[22]

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[17] *Id.*

[18] *See* Sundby, *supra* note 10, at 1799.

[19] *See* National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (upholding drug testing for Customs agents applying for job promotions involving interdiction of drugs, handling of firearms, or access to classified materials).

[20] *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) (upholding the random urinalysis testing of students participating in school athletic programs).

[21] *See* Sundby, *supra* note 10, at 1761-63, 1798.

[22] *See generally id.* at 1798-802.

The difficulty with a reasonableness standard is compounded if the policy inquiry is phrased in the usual Fourth Amendment vernacular of "privacy." Take random drug testing, for example, and how technological advances can dramatically alter the Fourth Amendment equation where the focus is on privacy.[23] While courts have minimized the impact of urinalysis drug testing on individual privacy by suggesting that it differs little from a trip to the doctor's office for a physical,[24] urinalysis still inevitably carries some of the stigma attached to invading the privacy of performing bodily functions.[25] With technological advances, however, drug testing is now possible from a mere snippet of hair,[26] making the "privacy" comparison not even that of a physical at the doctor's office, but of sitting in the barber's chair and chatting about the Red Sox. In such a situation, a reasonableness balancing test which uses privacy as the primary weight for the citizen's interest in the policy decision will obviously list heavily towards the government's interest (preventing illegal drug use) and away from the citizen's interest (nothing more intrusive than the clipping of a hair and perhaps discovery that the test subject is not a true blond).

Viewing the Fourth Amendment as founded only upon privacy as a bedrock value, however, is to ignore that the Amendment is part of a larger constitutional setting.[27] Once placed within a broader context of our whole constitutional system, the Amendment becomes much more than merely a constitutional outpost for individual privacy. Instead, the Amendment also becomes part of the mutually reinforcing consent that flows be-

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[23] For an enlightening view of where surveillance technology is headed and its implications for the Fourth Amendment, see Christopher Slobogin, *Technologically-Assisted Physical Surveillance: The American Bar Association's Tentative Draft Standards*, 10 HARV. J.L. & TECH. 383 (1997).

[24] *See* Skinner v. Railway. Labor Executives' Ass'n, 489 U.S. 602, 627 (1989) (noting that a urine sample gathering procedure is "not unlike similar procedures encountered often in the context of a regular physical examination")

[25] *See id.* at 626 (describing urinalysis as an "excretory function traditionally shielded by great privacy").

[26] *See, e.g.*, Jim O'Connell, *Drug Tests for Congress: Justified or Invasion of Privacy?*, CAPITAL TIMES, January 28, 1997, at A8, *available in* 1997 WL 7050558 (discussing the House of Representatives's possible testing of House members for drug use through the utilization of hair samples).

[27] Professor Amar has been the most influential and creative voice in arguing for an understanding of the Bill of Rights as an integrated part of a greater whole. *See, e.g.*, Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1140 (1991).

tween the citizenry and the government, a form of reciprocal trust: The citizenry gives its consent and trust to the government to be governed and the government, in turn, trusts the citizenry to exercise its liberties responsibly.[28] When looked at from this more panoramic view, the importance of probable cause and individualized suspicion to the Amendment becomes increasingly evident. Probable cause embodies the idea of reciprocal citizen-government trust: The citizenry is obligated to obey the government's laws, but the government may engage in intrusive activity to ensure compliance only once the citizen's behavior gives rise to an objective belief that the trust has been violated.

This idea of trust is why probable cause must be the center of the Fourth Amendment universe rather than, as Professor Amar's proposal would make it, merely one satellite in orbit around a general reasonableness balancing test. This is not to suggest that the probable cause requirement is a panacea for all Fourth Amendment ills, as the problem of pretextual arrests is making increasingly clear;[29] a healthy probable cause requirement will accomplish little unless all of the Fourth Amendment's different facets, such as "reasonable expectation[s] of privacy," are interpreted in accord with the idea of trust of the citizenry.[30] Nor, as already stated,[31] is it to say that every search or seizure must be pursuant to probable cause. It is to say, however, that probable cause should be the Fourth Amendment norm from which departures must be viewed as narrow exceptions that require independent justification.

Intriguingly, while much of Professor Slobogin's development of his "proportionality principle" and his emphasis on privacy as a means of implementing a reasonableness standard gives me pause, his justification hierarchy is, in fact, rather comforting.[32] Indeed, if Professor Slobogin's proposed hierarchy were compared to the justifications which courts currently require for

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[28] *See* Sundby, *supra* note 10, at 1777-85 (developing more fully the historical background and political theory for understanding the Fourth Amendment in terms of reciprocal government-citizen trust).

[29] *See* Timothy P. O'Neill, *Beyond Privacy, Beyond Probable Cause, Beyond the Fourth Amendment: New Strategies for Fighting Pretextual Arrests*, 69 U. COLO. L. REV. 693 (1998) (noting inadequacy of traditional Fourth Amendment "vocabulary" in dealing with issues such as pretextual arrests for traffic violations).

[30] Sundby, *supra* note 10, at 1788-93.

[31] *See supra* notes 10-11 and accompanying text.

[32] Slobogin, *supra* note 2.

many searches, his proposed justification levels for government intrusions would prove to be significantly more stringent. Still worrisome, however, would be whether so many tiers of Fourth Amendment analysis might allow future fudging with the various tiers and assessments of invasiveness, such that the actual implementation of the proportionality standard may not correspond with Professor Slobogin's own sensibilities (with which I generally agree).

Now that some three decades have passed since *Terry* and *Camara* were decided, their most lasting lesson may be a need for a healthy skepticism when "more" is promised in return for a loosening of existing protections. In both *Terry* and *Camara*, the dissents expressed concern that tampering with probable cause, even if in the name of expanded coverage, may eventually provide less rather than more protection.[33] Certainly the dissenters were correct in foreseeing that the decisions would change the nature of Fourth Amendment discourse, as Fourth Amendment analysis increasingly resembles that of an administrative due process inquiry.[34]

But as this Symposium well attests, for better or for worse, *Terry* and *Camara* have become firmly woven into the Fourth Amendment fabric. The challenge now is to ensure that the Fourth Amendment for the next thirty years is capable of preserving its core values in the face of burgeoning regulatory searches, expanding law enforcement surveillance, and technological advances. Can the Fourth Amendment adapt to such a changing world? I believe that the answer is "yes," but only if we do not lose sight of the Amendment's unchanging need of preserving trust between the government and citizenry through basic safeguards like probable cause.

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[33] *See* Terry v. Ohio, 392 U.S. 1, 38-39 (1968) (Douglas, J., dissenting); Camara v. Municipal Court, 387 U.S. 541, 547-55 (1967) (Clark, J., dissenting).

[34] *See* Rosann Greenspan, *Criminal Due Process in the Administrative State*, 14 STUD. IN L. POL. AND SOC'Y 169, 193-202 (1994) (discussing the impact of the Fourth Amendment in administrative search cases).