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THE FOURTH AMENDMENT IN THE BALANCE: ACCURATELY SETTING THE SCALES THROUGH THE LEAST INTRUSIVE ALTERNATIVE ANALYSIS

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In interpreting the extent of fourth amendment protection against unreasonable search and seizure, the Supreme Court has moved away from the application of categorical rules, resorting instead, with increasing frequency, to a "general reasonableness" or "balancing" test. In this Article, Professor Strossen criticizes the use of this balancing test in principle due to its inherent subjectivity, its tendency to deprive constitutional rights of the special protection they deserve, and the likelihood that the test will produce inconsistent results. Moreover, she shows that, when implementing the balancing test, courts often inaccurately identify and compare competing interests. Professor Strossen believes, however, that the use of a balancing test in the fourth amendment context is likely to continue. Thus, she urges courts to correct inaccuracies which currently characterize fourth amendment balancing. In particular, she recommends that the fourth amendment balancing test include a "least intrusive alternative" component. After analyzing both theoretical and pragmatic arguments for and against systematically incorporating the least intrusive alternative requirement in fourth amendment balancing, Professor Strossen concludes that adoption of this requirement would render the test, appropriately, more protective of the privacy and liberty interests secured by the fourth amendment. Finally, Professor Strossen suggests tentative procedures and rules for implementing a least instrusive alternative analysis in search and seizure cases, intending to stimulate further scholarly discussion and judicial experimentation concerning her thoughtful proposal.[1]

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[1] Frantz, The First Amendment in the Balance, 71 Yale L.J. 1424, 1439 (1962). As a

INTRODUCTION

In recent Terms, Supreme Court decisions have steadily reduced the scope of the privacy and liberty rights that the fourth amendment protects.[2] Rather than focusing directly on this diminution of substantive fourth amendment rights,[3] this Article focuses on the analytical tool with which, in large measure, the Court has effected the erosion: the so-called general reasonableness or balancing test.[4] Despite the important role

classic critique of the balancing methodology in constitutional adjudication, the Frantz article was an important source of inspiration for this Article.

[2] Although the Court generally identifies the protection of privacy as the fourth amendment's paramount purpose, see, e.g., Katz v. United States, 389 U.S. 347, 351-53 (1967) (defines scope of fourth amendment protection in terms of matters which an individual seeks to preserve as private); Winston v. Lee, 470 U.S. 753, 758 (1985) ("The fourth amendment protects 'expectations of privacy'. . . —the individual's legitimate expectations that in certain places and at certain times he has 'the right to be let alone—the most comprehensive of rights and the right most valued by civilized men,' " (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting))), it has also recognized that the amendment is further intended to protect other interests. See, e.g., *Winston v. Lee*, 470 U.S. at 761-62 (bodily integrity); United States v. Jacobsen, 466 U.S. 109, 113 n.5 (1984) (freedom of movement); Texas v. Brown, 460 U.S. 730, 747 (1983) (Stevens, J., concurring) (possession of property and personal privacy); Schmerber v. California, 384 U.S. 757, 767 (1966) (personal privacy and dignity).

[3] This erosion has been extensively discussed by both scholars and dissenting Justices. See, e.g., LaFave, Supreme Court Report: Nine Key Decisions Expand Authority to Search and Seize, 69 A.B.A. J. 1740 (1983); Wasserstrom, The Incredible Shrinking Fourth Amendment, 21 Am. Crim. L. Rev. 257 (1984); Note, The United States Supreme Court's Erosion of Fourth Amendment Rights: The Trend Continues, 30 S.D.L. Rev. 574 (1985); Note, Defining a Fourth Amendment Search: A Critique of the Supreme Court's Post-Katz Jurisprudence, 61 Wash. L. Rev. 191 (1986). Justices Brennan, Marshall, and Stevens have most regularly criticized the Court's "continuing evisceration of Fourth Amendment protections." United States v. Martinez-Fuerte, 428 U.S. 543, 567 (1976) (Brennan & Marshall, JJ., dissenting). However, Justices Blackmun and Powell have also joined this criticism on occasion. See, e.g., Dow Chem. Co. v. United States, 476 U.S. 227, 244 (1986) (Powell, J., concurring in part and dissenting in part) (joined by Brennan, Marshall, and Blackmun, JJ.) ("The Court's decision marks a drastic reduction in the Fourth Amendment protections previously afforded to private commercial premises . . . ."); United States v. Place, 462 U.S. 696, 721 (1983) (Blackmun, J., dissenting) (joined by Marshall, J.) ("I am concerned . . . with what appears to me to be an emerging tendency on the part of the Court to convert the *Terry* decision [392 U.S. 1 (1968)] into a general statement that the Fourth Amendment requires only that any seizure be reasonable.").

[4] The Court has utilized balancing to analyze a number of issues presented by the fourth amendment. See, e.g., New Jersey v. T.L.O., 469 U.S. 325, 340-41 (1985) (necessity of obtaining warrant); id. at 341-42 (level of suspicion required to initiate searches and seizures of property); INS v. Lopez-Mendoza, 468 U.S. 1032, 1041-50 (1984) (applicability of exclusionary rule); Hudson v. Palmer, 468 U.S. 517, 525-36 (1984) (scope of fourth amendment); United States v. Place, 462 U.S. 696, 706 (1983) (definition of search); *Martinez-Fuerte*, 428 U.S. at 560-61 (level of suspicion required to initiate searches and seizures of persons); Camara v. Municipal Court, 387 U.S. 523, 534-39 (1967) (meaning of probable cause). When this Article refers to fourth amendment balancing, however, it means the method used to resolve the key issue in most fourth amendment cases: whether a search or seizure was properly initiated. See note 20 infra.

that the balancing test has played in the Court's recent assaults on the fourth amendment, this test has received relatively little consideration from either the Court[5] or commentators.[6]

Like all judicially applied tests purporting to determine the enforceability of a constitutional right by weighing the competing individual and societal interests in a given case, the fourth amendment balancing analysis is subject to significant criticisms as a matter of principle.[7] Fourth

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[5] The Court's increasing reliance upon a balancing methodology for resolving a growing range of search and seizure issues has been accompanied by relatively little discussion of either the appropriateness of this methodology in principle or the manner in which it should be implemented. See text accompanying notes 39-48 infra. These issues have received somewhat more attention in dissenting opinions. Justice Brennan provides probably the most thorough discussion of fourth amendment balancing in New Jersey v. T.L.O., 469 U.S. 325, 356-70 (1985) (Brennan, J., concurring in part and dissenting in part) (criticizing fourth amendment balancing both in principle and as implemented).

[6] For scholarly pieces containing some discussion of fourth amendment balancing, see Bacigal, The Fourth Amendment in Flux: The Rise and Fall of Probable Cause, 1979 L.F. 763, 793-803; Greenberg, The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara and See, 61 Calif. L. Rev. 1011, 1047 (1973); Harris, The Supreme Court's Search and Seizure Decisions of the 1982 Term: The Emergence of a New Theory of the Fourth Amendment, 36 Baylor L. Rev. 41, 71-72 (1984); Jacobs & Strossen, Mass Investigations Without Individualized Suspicion: A Constitutional and Policy Critique of Drunk Driving Roadblocks, 18 U.C. Davis L. Rev. 595, 625-32 (1985); Kamisar, Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?, 16 Creighton L. Rev. 565, 646-49, 653 (1983); Preiser, Confrontations Initiated by the Police on Less than Probable Cause, 45 Alb. L. Rev. 57, 74-75 (1980); Wasserstrom, supra note 3, at 261-62, 313-17; Note, The Civil and Criminal Methodologies of the Fourth Amendment, 93 Yale L.J. 1127, 1128-44 (1984).

[7] See text accompanying notes 64-97 infra. For critiques of the balancing methodology in constitutional adjudication outside the fourth amendment context, see Aleinikoff, Constitutional Law in the Age of Balancing, 96 Yale L.J. 943 (1987) (raising general questions concerning form and implications of constitutional balancing); Black, The Bill of Rights, 35 N.Y.U. L. Rev. 865 (1960) (arguing that liberties secured by Bill of Rights cannot justifiably be abridged in deference to public interest); Frantz, supra note 1 (criticizing Court's use of balancing test in first amendment cases); Frantz, Is the First Amendment Law?—A Reply to Professor Mendelson, 51 Calif. L. Rev. 729 (1963) (same); Fried, Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test, 76 Harv. L. Rev. 755, 778 (1963) (providing analysis focused on first amendment, but also applicable to other balancing tests); Kahn, The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell, 97 Yale L.J. 1 (1987) (arguing that Justice Powell's representative balancing approach is not acceptable foundation for judicial review); Tribe, Constitutional Calculus: Equal Justice or Economic Efficiency?, 98 Harv. L. Rev. 592 (1985) (criticizing Supreme Court's increasingly utilitarian approach to legal questions); Note, Less Drastic Means and the First Amendment, 78 Yale L.J. 464, 466-67 (1964) [hereinafter Yale First Amendment Note] (discussing Supreme Court's balancing approach to first amendment issues); Note, Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing, 88 Harv. L. Rev. 1510 (1975) [hereinafter Harvard Due Process Note] (arguing that interest balancing doctrine is inappropriate because it deflates constitutional limits upon total power of government). But see Coffin, Judicial Balancing: The Protean Scales of Justice, 63 N.Y.U. L. Rev. 16 (1988) (arguing that decisions based on general, bright-line rules create danger of cutting off dialogue in legal community, and endorsing instead cautious, incremental decision making, reached by detailed, careful, open balancing); Griswold, Absolute Is in the Dark—A Discussion of the Approach of

amendment rights, like other constitutionally guaranteed individual liberties, should receive the more certain protection resulting from categorical rules rather than the less certain protection resulting from ad hoc balancing.[8]

Beyond the general objections to evaluating fourth amendment claims under any ad hoc balancing test, there are additional objections to the specific manner in which the Supreme Court has implemented fourth amendment balancing. The Court does not accurately identify or compare the relevant competing concerns.[9] It regularly undervalues the fourth amendment interests jeopardized by every search and seizure, while overvaluing the countervailing law enforcement interests.[10] Of particular significance, the Court's fourth amendment balancing analyses have neither systematically evaluated the marginal law enforcement benefits of challenged searches and seizures, nor regularly incorporated the "least intrusive alternative" requirement,[11] which is an integral component of other balancing tests.[12] As applied in other constitutional contexts, this requirement essentially prohibits the government from pursuing a goal through means that intrude upon individual rights if the goal can be advanced through less intrusive, alternative means. This principle reflects "the basic and ethically powerful notion that government should not gratuitously or unnecessarily inflict harm or costs."[13]

A fourth amendment balancing test that does not include the least intrusive alternative analysis relegates fundamental fourth amendment privacy and liberty rights to a status less secure than that enjoyed by other constitutional rights. Indeed, courts have used balancing analyses that do include the least intrusive alternative inquiry to protect certain

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the Supreme Court to Constitutional Questions, 8 Utah L. Rev. 167, 172 (1963) (balancing praised as comprehensive approach by which courts construe constitutional provisions "not merely in a narrow literal sense, but in a living, organic sense"); Henkin, Infallibility Under Law: Constitutional Balancing, 78 Colum. L. Rev. 1022 (1978) (describing advantages and disadvantages of several types of constitutional balancing); Mendelson, The First Amendment and the Judicial Process: A Reply to Mr. Frantz, 17 Vand. L. Rev. 479, 481-85 (1964) (defending balancing as inevitable methodology for resolving not only first amendment cases, but all cases).

[8] See text accompanying notes 56-63 infra.

[9] See text accompanying notes 101-65 infra.

[10] See text accompanying notes 101-55 infra.

[11] See text accompanying notes 160-66 infra. This analysis is also referred to by other, similar names, which usually contain one word from each of the following categories: (a) "less" or "least;" (b) "drastic," "intrusive," or "restrictive;" and (c) "alternative" or "means." Sometimes this analytical approach is referred to as the doctrine of "necessity" or "necessary means."

[12] See text accompanying notes 176-212 infra.

[13] Spece, The Most Effective or Least Restrictive Alternative as the Only Intermediate and Only Means-Focused Review in Due Process and Equal Protection, 33 Vill. L. Rev. 111, 135 (1988).

legal interests of nonconstitutional stature—for example, interests protected by common law tort principles and antitrust statutes.[14] To correct this anomaly, the Article proposes that the least intrusive alternative analysis be systematically incorporated into the fourth amendment balancing test.[15] The Article does not endorse the Court's trend toward increased reliance on balancing to resolve fourth amendment issues, but recognizes that this trend is unlikely to be reversed in the near future.[16] Therefore, it recommends the aforesaid reform of the balancing test—inclusion of a least intrusive alternative requirement—to make it more sensitive to fourth amendment rights.

Part I chronicles the Supreme Court's increasing reliance on a general reasonableness or balancing approach to fourth amendment issues. Part II outlines some major problems inherent in any constitutional balancing test, including the fourth amendment version, as a matter of principle. Part III then criticizes the Supreme Court's implementation of fourth amendment balancing, including its failure to impose a least intrusive alternative requirement.

In Part IV, the Article explores in detail the proposed reform of fourth amendment balancing through inclusion of a least intrusive alternative requirement. Part IVA reviews the widespread enforcement of the least intrusive alternative requirement in constitutional and common law contexts other than the protection of fourth amendment rights. Part IVB examines the Supreme Court's inconsistent rulings concerning a least in-

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[14] See text accompanying notes 199-212 infra.

[15] No previous work has focused upon the potential application of least intrusive alternative analysis to fourth amendment issues generally. However, some pieces concerning various other aspects of fourth amendment jurisprudence contain passages referring to this topic. See Bacigal, supra note 6, at 799-803; Jacobs & Strossen, supra note 6, at 628 n.143, 667-68 & n. 293; LaFave, supra note 3, at 1742-44; LaFave, "Case-By-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma, 1974 Sup. Ct. Rev. 127, 163; Stelzner, The Fourth Amendment: The Reasonableness and Warrant Clauses, 10 New Mex. L. Rev. 33, 48 (1979-80); Wasserstrom, supra note 3, at 369; Note, United States v. Chadwick and the Lesser Intrusion Concept: The Unreasonableness of Being Reasonable, 58 B.U.L. Rev. 436, 452-54 (1978); Comment, Individualized Suspicion in Factory Searches—The "Least Intrusive Alternative," 21 Am. Crim. L. Rev. 403, 420-22 (1984). For a list of works which discuss the least intrusive alternative concept in non-fourth amendment contexts, see note 175 infra.

[16] However, lower federal courts could continue to apply the conventional interpretation of the fourth amendment, see text accompanying notes 19-23 infra, to any types of searches or seizures with respect to which the Supreme Court has not ruled the balancing test to be the sole appropriate measure of constitutionality. Moreover, a state court interpreting its own constitutional counterpart of the fourth amendment may eschew balancing with respect to any type of search or seizure. See Oregon v. Hass, 420 U.S. 714, 719 (1975) ("[A] State is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary under federal constitutional standards.") (emphasis in original); Falk, The State Constitution: A More Than "Adequate" Non-Federal Ground, 61 Calif. L. Rev. 273 (1973) (American federalism does not command that state judges yield to reasoning of federal judges, even when state constitution's provision is similar).

trusive alternative analysis in the fourth amendment context. When addressing the decisions in which the Court has explicitly rejected such a requirement, it details the weaknesses in the Court's asserted rationales. Part IVB also argues that widespread use of the least intrusive alternative requirement in search and seizure decisions by lower federal and state supreme courts supports its systematic application in such decisions by the United States Supreme Court. Part IVC examines the theoretical and practical arguments for and against systematically incorporating the least intrusive alternative requirement into the fourth amendment balancing test, and demonstrates that the arguments favoring such a requirement are more persuasive than the counterarguments. Finally, Part V suggests tentative procedural guidelines and substantive rules for regularly implementing the least intrusive alternative requirement in search and seizure cases.

I

THE SUPREME COURT'S INCREASING USE OF A FOURTH AMENDMENT BALANCING TEST

The fourth amendment provides:

> 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 upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.[17]

Judges and scholars have vigorously debated the appropriate relationship between the amendment's two clauses: the first, or "reasonableness" clause, and the second, or "warrant" clause.[18] Until recently, the "conventional interpretation," widely accepted among judges and scholars, was that the reasonableness clause was defined, at least in part, by the warrant clause.[19] Under this reading, any search or seizure is presumptively unreasonable, and hence unconstitutional, unless it is based

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[17] U.S. Const. amend. IV. The fourth amendment is enforceable against the states pursuant to the due process clause of the fourteenth amendment. Mapp v. Ohio, 367 U.S. 643, 655 (1961). In addition, state constitutions contain provisions similar to the fourth amendment that circumscribe the state's search and seizure powers. See, e.g., Cal. Const. art. I, § 13; N.Y. Const. art. I, § 12. Throughout this Article, references to the fourth amendment should be read to include its state constitutional counterparts.

[18] See Landynski, In Search of Justice Black's Fourth Amendment, 45 Fordham L. Rev. 453, 457 (1976); cases cited at notes 19, 21, 24-27, 29 infra.

[19] See, e.g., United States v. United States District Court, 407 U.S. 297, 315 (1972) (fourth amendment reasonableness "turns, at least in part, on the more specific commands of the warrant clause"); Wasserstrom, supra note 3, at 282 (view that fourth amendment "reasonableness turns on the presence of a validly issued warrant [and] probable cause . . . has come to be regarded as the conventional interpretation of the fourth amendment").

upon a warrant and probable cause.[20] Neither the warrant nor the probable cause requirement may be excused unless the search or seizure fits within one of the few "jealously and carefully drawn"[21] exceptions[22] that the Supreme Court has carved out from each.[23]

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[20] See Wasserstrom, supra note 3, at 282. The fourth amendment requires that a search or seizure be reasonable not only in its inception (there must have been a sufficient basis for initiating it), but also in its execution (it must have been carried out by means which comport with basic notions of fairness and dignity). See Tennessee v. Garner, 471 U.S. 1, 8 (1985). The dispute about whether to apply the conventional interpretation or the chief alternative, the general reasonableness test, see text accompanying notes 24-38 infra, concerns the appropriate standard for evaluating reasonableness in the inception of a search or seizure. However, regardless of whether a search or seizure is deemed under either test to have been reasonable at its inception, it will not survive fourth amendment scrutiny unless it was reasonably executed.

[21] Jones v. United States, 357 U.S. 493, 499 (1958).

[22] The Court has held that the following types of searches or seizures are permissible without a warrant: those conducted under "exigent circumstances," see Carroll v. United States, 267 U.S. 132 (1925) (delay involved in obtaining warrant might well result in loss of evidence); searches incident to arrests, see Chimel v. California, 395 U.S. 752 (1960) (search limited to area immediately surrounding arrestee, to prevent arrestee from obtaining weapon or evidence); searches or seizures to which an authorized party consents, see Schneckloth v. Bustamonte, 412 U.S. 218 (1973); arrests and brief detentions in public places where the crime was committed in the officer's presence, see United States v. Watson, 423 U.S. 411 (1976); and searches of motor vehicles, see United States v. Chadwick, 433 U.S. 1 (1977). But see generally W. LaFave, Search and Seizure § 4.1(a) (2d ed. 1987) (despite Court's repeated statements that warrants are generally required, current doctrine concerning permissible warrantless searches is confused).

The Court has held that the following types of searches or seizures may be conducted without probable cause: "administrative inspections" to enforce housing codes and similar regulatory laws where the inspections are neither personal in nature nor aimed at discovering evidence of a crime, see Camara v. Municipal Court, 387 U.S. 523 (1967); brief "investigative detentions" based upon "reasonable suspicion," see Terry v. Ohio, 392 U.S. 1 (1968); "pat down" searches or "frisks" of *Terry* detainees' outer clothing to determine whether they possess a weapon that might be used against the detaining officer or third party, see id.; brief stops of all vehicles and inspections of all passengers at permanent checkpoints operated by border patrol near the United States border, to check for undocumented aliens, see United States v. Martinez-Fuerte, 428 U.S. 543 (1976); routine "inventory searches" of arrestees' property for administrative purposes, see Colorado v. Bertine, 479 U.S. 367 (1987); see also O'Connor v. Ortega, 480 U.S. 709 (1987) (public employer may search employee's office for work-related reasons, including investigation of alleged employee misconduct, based upon reasonableness standard); New Jersey v. T.L.O., 469 U.S. 325 (1985) (school official may search student upon reasonable grounds for suspecting that search will disclose evidence of violation of law or school rules).

[23] To the extent that a search or seizure must be reasonable both in its inception and in its execution, see note 20 supra, reasonableness constitutes an independent requirement beyond probable cause and a warrant, which concern only the reasonableness of the inception of the search or seizure. This added reasonableness requirement has led the Court to invalidate searches or seizures which were particularly intrusive, even when they were initiated upon probable cause and a warrant or came within well-settled exceptions to these requirements. See, e.g., Winston v. Lee, 470 U.S. 753, 760 (1985) (in prohibiting state from compelling attempted robbery suspect to undergo surgery to remove bullet lodged in his chest, Court stated that "*Schmerber* recognized that the ordinary requirements of the Fourth Amendment would be the threshold requirements for conducting this kind of surgical search and seizure" (citing Schmerber v. California, 384 U.S. 757 (1966))); Tennessee v. Garner, 471 U.S. 1, 8 (1985)

The principal alternative to the "conventional interpretation," the "general reasonableness" theory, holds that the two clauses impose a single, unitary, and overarching standard of reasonableness under which the existence of probable cause or a warrant is simply a constituent factor. According to the classic formulation, this test turns "on the facts or circumstances—the total atmosphere of the case."[24]

Between 1950 and 1969, the Court's rulings permitted warrantless searches or seizures that were deemed to be "reasonable."[25] However, during this period, the Court continued strictly to enforce the fourth amendment's probable cause requirement.[26]

In contrast, in recent years the Court has revived the reasonableness interpretation as an alternative to enforcing the probable cause requirement.[27] Parallel to its growing reliance on balancing tests in other areas of constitutional adjudication,[28] the Court has evaluated an increasing

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(police violate fourth amendment by use of deadly force to seize fleeing suspect).

These cases could also be viewed as imposing a heightened requirement for inception reasonableness with respect to particularly intrusive searches and seizures. It seems to be a semantic distinction if one says, for example, that the state is entitled to seize Garner, but may not shoot him as a means of executing that seizure, or rather is not entitled to initiate its proposed shooting seizure. See, e.g., *Garner*, 471 U.S. at 8 ("[R]easonableness depends on not only when a seizure is made, but also how it is carried out.").

[24] United States v. Rabinowitz, 339 U.S. 56, 66 (1950), overruled by Chimel v. California, 395 U.S. 752, 768 (1969); see Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 394 (1974) (characterizing this test "as the nadir of fourth amendment development").

There is a third possible understanding of the interrelationship between the two clauses, which has received little support from the Supreme Court. Under this approach, each clause imposes separate, independent obligations, so the inception of a search or seizure must not only satisfy the probable cause and warrant requirements (unless either is excused by a specific exception), but also be reasonable. See J. Landynski, Search and Seizure and the Supreme Court 42-43 (1966).

[25] See, e.g., Abel v. United States, 362 U.S. 217, 234-37 (1960); *Rabinowitz*, 339 U.S. at 66.

[26] See Henry v. United States, 361 U.S. 98, 100-02 (1959).

[27] See, e.g., Tennessee v. Garner, 471 U.S. 1, 8 (1985) (" '[T]he balancing of competing interests [is] the key principle of the Fourth Amendment.' " (quoting Michigan v. Summers, 452 U.S. 692, 700 n.12 (1981))); Harris, supra note 6, at 44 ("Today it is no longer useful or accurate to characterize decisions utilizing the pragmatic balancing approach as exceptional. In fact, they form a new and coherent approach to the fourth amendment.").

Interestingly, in one respect the Court used the original general reasonableness test to yield greater protection of fourth amendment rights. It invalidated as "unreasonable" all searches of homes for the sole purpose of obtaining evidence against the resident, even if such searches were based upon probable cause and warrants (or fell within recognized exceptions to these requirements). However, many "mere evidence" searches would have survived review under either the conventional interpretation of the fourth amendment or the current balancing test. See Gouled v. United States, 255 U.S. 298, 309 (1921), overruled by Andresen v. Maryland, 427 U.S. 463 (1976); Warden v. Hayden, 387 U.S. 294, 312 (1967) (Fortas, J., concurring). In contrast, the current reasonableness test generally works to validate searches and seizures which would be held unconstitutional under the conventional interpretation. See note 49 infra.

[28] See generally Aleinikoff, supra note 7 (raising general questions concerning the form and

range of search and seizure issues on this ad hoc basis, according to a utilitarian cost-benefit balancing calculus.[29] Richard Posner has argued that all fourth amendment issues should be resolved through cost-benefit balancing,[30] and Chief Justice Rehnquist has also advocated this view,[31] with the support of several other Supreme Court Justices.[32]

Most of the Justices continue to espouse the conventional interpretation of the fourth amendment with respect to traditional searches and seizures, such as full-scale searches[33] or arrests.[34] However, in recent

implications of constitutional balancing); Tribe, supra note 7 (criticizing Supreme Court's increasing use of utilitarian balancing approach to legal questions).

[29] See, e.g., O'Connor v. Ortega, 107 S. Ct. 1492 (1987) (public employer's search of employee's workplace); New Jersey v. T.L.O., 469 U.S. 325 (1985) (school administrator's search of student's purse). Justice White endorsed a variation on this ad hoc version of the general reasonableness interpretation in Dunaway v. New York, 442 U.S. 200, 219 (1979) (White, J., concurring). Although he said that the "key principle" of the fourth amendment is "reasonableness," which he defined as "the balancing of competing interests," id., Justice White added that this balancing should not be done in an ad hoc, case-by-case fashion, but instead should establish principles generally applicable to categories of cases involving similar facts. Id. at 219-20.

The Court's fourth amendment cases have occasionally employed such "definitional balancing," as it has been labelled in other constitutional contexts, see Aleinikoff, supra note 7, at 948. See, e.g., Terry v. Ohio, 392 U.S. 1 (1968) (limited search of suspect to determine whether he is armed permissible in cases where there is reasonable suspicion that suspect is armed and presently dangerous). However, the Court has confined most of its fourth amendment balancing test decisions to the facts of the particular case.

[30] See Posner, Rethinking the Fourth Amendment, 1981 Sup. Ct. Rev. 49, 74 ("[T]he natural meaning to assign [the fourth amendment's reasonableness] standard is an economic one. A reasonable search is a cost justified search.").

[31] See Florida v. Royer, 460 U.S. 491, 520 (1983) (Rehnquist, J., dissenting) ("Analyzed simply in terms of its 'reasonableness' as that term is used in the Fourth Amendment, the conduct of the investigating officers toward Royer would pass muster with virtually all thoughtful, civilized persons not overly steeped in the mysteries of this Court's Fourth Amendment jurisprudence.").

[32] Chief Justice Burger and Justice O'Connor joined Justice Rehnquist's dissent in *Royer*. Id. at 519 (Rehnquist, J., joined by Burger, C.J., & O'Connor, J., dissenting). Justices Blackmun, Powell, and White joined subsequent opinions authored by Justice Rehnquist which appear to endorse a general reasonableness approach to all fourth amendment issues. See Illinois v. Gates, 462 U.S. 213, 230-31 (1983) (Justice Rehnquist's majority opinion joined by Chief Justice Burger and Justices Blackmun, O'Connor, and Powell); Texas v. Brown, 460 U.S. 730, 732 (1983) (Justice Rehnquist's plurality opinion joined by Chief Justice Burger and Justices O'Connor and White).

[33] See, e.g., Winston v. Lee, 470 U.S. 753, 759 (1985) (fourth amendment "generally protects . . . against official intrusions up to the point where the community's need for evidence surmounts a specified standard, ordinarily 'probable cause' "); New Jersey v. T.L.O., 469 U.S. 325, 363-66 (1985) (Brennan, J., dissenting) (full scale searches reasonable only when conducted pursuant to probable cause). But see O'Connor v. Ortega, 107 S. Ct. 1492 (1987) (public employers may, without probable cause, search workplace areas, with respect to which public employees have reasonable privacy expectation, to retrieve work-related materials or to investigate violations of workplace rules); New Jersey v. T.L.O., 469 U.S. 325, 341-43 (1985) (upholding school administrator's search of student's purse without probable cause, stressing special characteristics of school setting).

[34] See, e.g., Hayes v. Florida, 470 U.S. 811, 814-16 (1985) (nonconsensual transportation to

Terms, the Court consistently has abandoned the conventional reading of the fourth amendment, in favor of the general reasonableness interpretation, when evaluating police interferences with personal liberty or privacy that it viewed as less intrusive than a traditional arrest or search. Examples of these "less intrusive" interferences include on-site "investigative detentions,"[35] and brief preliminary searches, such as a "pat-down" or "frisk."[36] The Court's growing willingness to classify an expanding range of detentions and searches as relatively unintrusive has extended the number and type of police-citizen encounters that are subject to general reasonableness review.[37] The previously accepted view that the fourth amendment balancing analysis should be employed only when the Court has made threshold findings of exceptional circumstances, such as the unusually important nature of the governmental interest, or the unusually minor nature of the intrusion into individual privacy, has increasingly been relegated to concurring or dissenting opinions.[38]

Although the Court has drifted toward reading the fourth amendment as imposing only a reasonableness requirement, it has failed to delineate specific criteria for determining whether a search or seizure is

police station and detention for fingerprinting was sufficiently like arrest to trigger probable cause requirement); Dunaway v. New York, 442 U.S. 200, 216 (1979) (holding that probable cause is required before suspect may be transported to station for involuntary investigative detention).

[35] See, e.g., Brown v. Texas, 443 U.S. 47, 50 (1979) (balancing test is applicable to "seizures that are less intrusive than a traditional arrest").

[36] See, e.g., Terry v. Ohio, 392 U.S. 1, 23-31 (1968) (applying balancing test, Court held that "pat-down" searches of outer clothing for weapons may be based merely on "reasonable suspicion" rather than on probable cause).

[37] Compare United States v. Sharpe, 470 U.S. 675 (1985) (characterizing 20-minute detention as investigative stop and upholding it under balancing test, even though based upon neither probable cause nor warrant) with id. at 711 n.10 (Brennan, J., dissenting) (officer himself said defendant was under "custodial arrest" during entire stop) and Adams v. Williams, 407 U.S. 143, 146 (1972) (describing "reasonable investigatory stop," which could be made without probable cause, as "[a] brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information").

[38] See, e.g., O'Connor v. Ortega, 107 S. Ct. 1492, 1511 (1987) (Blackmun, J., dissenting) ("[O]nly when the practical realities of a particular situation suggest that a government official cannot obtain a warrant based upon probable cause without sacrificing the ultimate goals to which a search would contribute, does the Court turn to a 'balancing' test . . . ."); New Jersey v. T.L.O., 469 U.S. 325, 351-52 (1985) (Blackmun, J., concurring) ("The Court's implication that the balancing test is the rule rather than the exception is troubling . . . ."); id. at 356 (Brennan, J., concurring in part and dissenting in part) ("Only after finding an extraordinary governmental interest of this [exigent] kind do we—or ought we—engage in a balancing test to determine if a warrant should nonetheless be required."); United States v. Sharpe, 470 U.S. 675, 690 (1985) (Marshall, J., concurring in the judgment) ("[An investigative] stop must first be found not unduly intrusive before any balancing of the government's interest against the individual's becomes appropriate.").

reasonable.[39] It has stated only that " 'the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.' "[40]

In its implementation of the balancing test, the Court has considered two types of individual costs resulting from a search or seizure: "objective" or physical intrusiveness, and "subjective" or psychological intrusiveness. The degree of objective intrusiveness of a particular search or seizure depends upon its nature, duration, and scope.[41] The degree of subjective intrusiveness turns upon a hypothetical individual's perception of and reaction to a particular search or seizure.[42] The Court inquires whether a person undergoing the search or seizure would be likely to experience "concern," "fright," "surprise,"[43] "embarrassment,"[44] "anxiety,"[45] or "awe."[46]

The Court's consideration of the governmental interest in a search or seizure has generally consisted of conclusory statements about the societal interest in combating the type of crime at issue.[47] The Court does not systematically evaluate alternative law enforcement strategies for advancing the goals promoted by the challenged measure. Likewise, it does not regularly compare the relative intrusiveness and effectiveness of alternative law enforcement measures, much less insist that the state utilize only the least intrusive measure that effectively advances its goals.[48]

In the proliferating fourth amendment cases which the Court has evaluated through balancing, its rulings consistently have enlarged the government's search and seizure power.[49] As discussed in the following

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[39] See Aleinikoff, supra note 7, at 972; Wasserstrom, supra note 3, at 309.

[40] United States v. Villamonte-Marquez, 462 U.S. 579, 588 (1983) (quoting Delaware v. Prouse, 440 U.S. 648, 654 (1979)).

[41] See United States v. Martinez-Fuerte, 428 U.S. 543, 558 (1976).

[42] See id. ("subjective intrusion" of search or seizure is measured by extent to which it generates "concern or even fright" in person stopped or searched).

[43] Id. at 558-59.

[44] United States v. Ortiz, 422 U.S. 891, 895 (1975).

[45] Delaware v. Prouse, 440 U.S. 648, 657 (1979).

[46] United States v. Villamonte-Marquez, 462 U.S. 579, 589 (1983). For a critique of the Court's subjective intrusiveness concept, see text accompanying notes 115-20 infra.

[47] See, e.g., *Villamonte-Marquez*, 462 U.S. at 591 (upholding Coast Guard's boarding of ships and inspection of documentation without warrant or individualized suspicion, and asserting that such searches and seizures "play an obvious role in ensuring safety on American waterways"); see also text accompanying notes 132-48 infra (discussing Court's broad characterization of societal law enforcement interests at stake in fourth amendment cases).

[48] See text accompanying notes 160-65 infra. The Court has considered these factors in only a few fourth amendment cases. See text accompanying notes 216-57 infra.

[49] See Aleinikoff, supra note 7, at 965 ("Balancing [in fourth amendment cases] has been a vehicle primarily for weakening earlier categorical doctrines restricting governmental power to search and seize."); Greenberg, supra note 6, at 1047 (practical effect of fourth amendment balancing is diminution of civil liberties "largely because courts seem to accept government

two Parts, these results indicate that the scales of the balancing test, as it is both conceived and applied, are initially tilted against constitutional freedoms.

II

CRITIQUE OF THE FOURTH AMENDMENT BALANCING TEST IN PRINCIPLE

A. General Problems with All Constitutional Balancing Tests

All constitutional balancing tests are potentially problematic in three major ways. The first is that, despite the superficially objective appearance of these tests, no objective methodology exists for their implementation.[50] Even if courts could assign some objective value to each of the competing interests involved in a constitutional controversy,[51] it would still be impossible to devise an objective way of aggregating or comparing those incommensurable values. In consequence, the execution of any constitutional balancing analysis permits—indeed, requires—judges to rely upon their personal values.[52] The effect of relegating fundamental rights to the inevitable vicissitudes of individualized, subjective decision making is necessarily to give them little, if any, more judicial protection than would be afforded to interests of a nonconstitutional stature.

That constitutional cost-benefit balancing inherently entails subjective value judgments does not, of course, distinguish it from other modes of judicial decision making.[53] However, the inherently subjective nature

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rationales for reducing citizen protection without close scrutiny"); Wasserstrom, supra note 3, at 262 (Burger Court "has weakened . . . substantive fourth amendment constraints on the police primarily by . . . import[ing] the boundlessly manipulable process of cost-benefit balancing"); Note, supra note 6, at 1130 n.17 ("While it is logically possible to require probable cause or some higher level of justification in a balancing case, the Court has never done this . . . ."). But see note 98 infra (constitutional balancing should not inevitably curtail individual rights).

[50] See Kahn, supra note 7, at 29 ("Balancing suggests a process of reasoning, when in fact there is nothing in [the] argument but a choice among conflicting claims."); Tribe, supra note 7, at 620 ("Part of the allure of . . . cost-benefit calculations is the illusion that . . . hard constitutional choices can be avoided . . . .").

[51] But see, e.g., Harvard Due Process Note, supra note 7, at 1519 (discussing uncertainty of weighing or comparing inherently subjective values such as severity of individual right deprivation or relative importance of governmental interests).

[52] See B. Cardozo, The Growth of the Law 85-86 (1924). Justice Cardozo wrote that:

> In the present state of our knowledge, the estimate of the comparative value of one social interest and another . . . will be shaped for the judge . . . by his experience of life; his understanding of the prevailing canons of justice and morality; his study of the social sciences; at times, in the end, by his intuitions, his guesses, even his ignorance or prejudice.

Id.

[53] See Karst, Legislative Facts in Constitutional Litigation, 1960 Sup. Ct. Rev. 75, 110-11 (Judicial "retreat from choice among values is obviously impossible, for when two or more

of constitutional balancing is particularly troublesome because the veneer of objectivity associated with such an ostensibly quantifiable methodology masks the extent to which it depends upon judicial value judgments. Therefore, the actual subjective bases of judicial decision making may not be given the same degree of scrutiny that they would otherwise receive.

The second general problem with constitutional balancing tests is that they devalue fundamental rights by evaluating potential infringements with a relatively low level of scrutiny. This results from the fact that when an issue is framed in terms of balancing the decreased protection of a constitutional right against the increased protection of some societal interest, judges are required at least to consider, and in many cases to defer to, the conclusions of the other governmental branches. Absent indicia of relative weights apart from the judge's own value system, the determinations of legislative or executive branch officials may quite plausibly become predominant or even dispositive factors in the judicial analysis.[54] Indeed, prominent advocates of constitutional balancing have contended that the judicial branch should defer to the judgments of the other branches, and should presume them to be constitutional.[55]

Whether based upon the judge's own subjective value judgments or upon the judge's deference to the other governmental branches, judicial balancing of individual constitutional rights against societal concerns devalues these rights by depriving them of the special protection they were intended to receive.[56] The fundamental nature of the liberties enshrined

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great principles collide a judge cannot reason to his decision on the basis of one . . . without sacrificing another.").

[54] See Frantz, supra note 1, at 1443-44 (rational legislative branch officials act only after having balanced interests and concluded that those served outweigh those sacrificed; therefore, court which must make same assessment, but without fact-finding resources available to other governmental branches doing so, would rationally defer to other branches).

[55] This view was espoused by Justice Felix Frankfurter, the Court's foremost advocate of constitutional balancing in the first amendment context. See Dennis v. United States, 341 U.S. 494, 539-40 (1951) (Frankfurter, J., concurring). Justice Frankfurter wrote:

> Free speech cases are not an exception to the principle that we are not legislators, that direct policy-making is not our province. How best to reconcile competing interests is the business of legislatures, and the balance they strike is a judgment not to be displaced by ours, but to be respected unless outside the pale of fair judgment.

Id.

Chief Justice Rehnquist has urged the Court to accord the same presumption of constitutionality, which Justice Frankfurter would have accorded to the considered judgments of deliberative legislative bodies, to the on-the-spot discretionary decisions of individual police officers carrying out their duties. See Delaware v. Prouse, 440 U.S. 648, 667 (1979) (Rehnquist, J., dissenting).

[56] It is a core premise of our constitutional structure that the Bill of Rights limits the government's power to pursue policies which undermine individual and minority group rights, even if such policies benefit the majority. See Barron v. Mayor & City Council of Baltimore,

in the Bill of Rights demands that courts subject governmental actions encroaching on them to intensified scrutiny, beyond that applicable to governmental actions encroaching on other, less vital interests. As Justice Jackson declared, "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials . . . ."[57] As scholarly and judicial critics of constitutional balancing have phrased it, the balancing between the individual and societal interests implicated by all cases involving constitutional rights has already been performed by the constitutional Framers.[58] The Bill of Rights itself manifests the Framers' considered judgment that the rights it guarantees presumptively, if not conclusively, outweigh the competing societal concerns in all cases.[59]

These critics of balancing are not necessarily "absolutists" or "literalists," since they may well recognize exceptions to or limitations upon the scope of the Bill of Rights.[60] However, they forcefully contend that any right determined to be within that scope should ipso facto receive judicial protection, regardless of asserted countervailing societal concerns.[61] Constitutional balancing tests all suffer from the defect of failing to provide this high level of protection to fundamental rights.

A third general disadvantage of resolving constitutional cases through ad hoc balancing rather than fixed, categorical rules is that the case-by-case nature of balancing undermines the consistency and predict-

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32 U.S. (7 Pet.) 243, 247-51 (1833); 1 Annals of Congress 448-59 (1789); J. Bryce, The American Commonwealth 312-17 (1924); 3 J. Story, Commentaries on the Constitution of the United States 713-24 (1833); Black, supra note 7, at 866-67. Justice Black wrote:

> The historical and practical purposes of a Bill of Rights, the very use of a written constitution, indigenous to America, the language the Framers used, the kind of three-department government they took pains to set up, all point to the creation of a government which was denied all power to do some things under any and all circumstances, and all power to do other things except precisely in the manner prescribed.

Id.

57 West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

58 See Black, supra note 7, at 879.

59 Id. The Supreme Court has embraced this point specifically in the context of the fourth amendment and consequently has repudiated the notion that the government may routinely avoid complying with the probable cause and warrant requirements because of countervailing societal interests. See, e.g., United States v. Place, 462 U.S. 696, 722 (1983) (Blackmun, J., concurring) ("[T]he [Fourth] Amendment does not leave the reasonableness of most seizures to the judgment of courts or government officers; the Framers of the Amendment balanced the interests involved and decided that a [search] is reasonable only if supported by a judicial warrant based on probable cause."); Dunaway v. New York, 442 U.S. 200, 214 (1979) ("For all but . . . narrowly defined intrusions, the requisite 'balancing' has been performed in centuries of precedent and is embodied in the principle that seizures are 'reasonable' only if supported by probable cause.").

60 See Aleinikoff, supra note 7, at 996; Frantz, supra note 1, at 1440.

61 See, e.g., Aleinikoff, supra note 7, at 996; Frantz, supra note 1, at 1441-49.

ability of judicial rulings.[62] Because of their fact-specific nature, balancing decisions provide relatively little guidance concerning the constitutional implications of other fact patterns.[63]

B. Specific Problems with Balancing in the Fourth Amendment Setting

The three major problems inherent in any constitutional balancing test are especially acute in the fourth amendment context. First, the significant role of personal values in judicial decision making, which arises from the lack of an objective methodology, is particularly pronounced in the fourth amendment setting. As Professor Kamisar has observed, balancing analyses of search and seizure claims necessarily turn upon the values of individual judges, and "perhaps even more so than in the first amendment area, because the crime may be so heinous and the relevance of the evidence so overwhelming."[64]

Any fourth amendment balancing test particularly lends itself to the influence of judicial value judgments in two specific areas. The first concerns the subjective weight assigned to relative deterrent effects under the balancing test. A major asserted benefit following from any crime control effort, including a search or seizure, is the deterrence of future crime. Yet, because it is difficult to measure the deterrent effect of law enforcement efforts,[65] the real question that is addressed in any attempt to assign

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[62] See T. Emerson, The System of Freedom of Expression 16 (1970) ("The ad hoc balancing test is so unstructured that it can hardly be described as a rule of law at all."); Reich, Mr. Justice Black and the Living Constitution, 76 Harv. L. Rev. 673, 737-38 (1963) (balancing opinions "tak[e] little from the past and offer[ ] less for the future; each is a law unto itself").

[63] See Reich, supra note 62, at 737-38. Constitutional balancing thus encourages repetitive litigation centering around the factual differences among generally similar situations, which entails an inefficient allocation of judicial resources. See New Jersey v. T.L.O., 469 U.S. 325, 375 (1985) (Brennan, J., concurring in part and dissenting in part).

For some additional criticisms of constitutional balancing in principle, beyond those discussed in this Article, see Aleinikoff, supra note 7, at 991 (balancing undermines "validating" function of constitutional law—i.e., "the affirmation of background principles and the ratification of changes" in them—and has also had "devastating impact" on constitutional theory); Black, supra note 7, at 878-79 (balancing denies judiciary its constitutional power to evaluate legislation under standards prescribed in Bill of Rights, and thus transforms national government from one of limited legislative powers to one of legislative supremacy); Richards, Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment, 123 U. Pa. L. Rev. 45, 82 (1974) (under contractarian moral theory of first amendment, balancing approach to first amendment issues lacks constitutional validity).

[64] Kamisar, supra note 6, at 649; see also New Jersey v. T.L.O., 469 U.S. 325, 369-70 (1985) (Brennan, J., concurring in part and dissenting in part) (fourth amendment balancing amounts to "brief nods" by Court in direction of neutral utilitarian calculus).

[65] Respected literature in the field of criminology indicates that most criminals do not believe they will be caught, therefore rendering doubtful the purported deterrent effect of severe criminal laws. See F. Zimring & G. Hawkins, Deterrence: The Legal Threat in Crime Control (1973); Dworkin, Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering, 48 Ind. L.J. 329, 333 (1973).

a value to deterrence is not "whether laws do deter, but rather whether conduct ought to be deterred; whether in a state of ignorance the possibility of deterrence is worth the cost of the hopefully deterrent sanction . . . ." [66] The Supreme Court has followed inconsistent approaches in assessing the deterrence benefits ostensibly attributable to various crime control measures. This inconsistency demonstrates the inherently subjective nature of the deterrence element of fourth amendment balancing tests.[67]

A second important component of the Court's fourth amendment balancing test, the subjective intrusiveness concept, is also particularly dependent upon value judgments. Rather than describing the reactions that individuals actually do have to particular types of searches or seizures, it instead describes the reactions that the Justices *think* they have.[68] The Court's evaluations of subjective intrusiveness do not cite any empirical evidence—either specific evidence regarding the reactions of particular individuals, or more generalized evidence such as expert opinions or public opinion surveys.[69] Therefore, although the subjective intrusiveness concept, much like that of cost-benefit balancing, has a veneer of scientific objectivity, it too embodies nothing more than value judgments.

The second major generic problem with constitutional balancing, its tendency to vitiate the rights at issue by subjecting impingements upon them to a low level of scrutiny, also has especially detrimental effects in the fourth amendment setting, for three reasons. The first is that the protection against wrongful search and seizure is fundamental to the American constitutional system.[70] As Justice Brandeis declared in a

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66 Dworkin, supra note 65, at 333.

67 See text accompanying notes 145-52 infra.

68 See, e.g., United States v. Martinez-Fuerte, 428 U.S. 543, 560 (1976) ("[T]he stops [at border crossing checkpoints] should not be frightening or offensive because of their public and relatively routine nature.").

69 This Article does not mean to suggest that the constitutionality of a search or seizure should turn upon value judgments of a cross-section of the public, any more than it should turn upon judicial value judgments. As Justice Brennan cautioned, "Moved by whatever momentary evil has aroused their fears, officials—perhaps even supported by a majority of citizens—may be tempted to conduct searches that sacrifice the liberty of each citizen to assuage the perceived evil." New Jersey v. T.L.O., 469 U.S. 325, 361 (1985) (Brennan, J., concurring in part and dissenting in part).

70 The Supreme Court has deemed fourth amendment rights sufficiently fundamental to be enforceable against states under the fourteenth amendment's due process clause. Mapp v. Ohio, 367 U.S. 643 (1961). Many Supreme Court opinions contain forceful explanations of the special importance of fourth amendment freedoms. See, e.g., Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting). Justice Jackson wrote:

> [Fourth amendment rights] are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Un-

widely cited passage, "[t]he right to be let alone," which the fourth amendment protects, is "the most comprehensive of rights and the right most valued by civilized men."[71] While others may not share Justice Brandeis's view that fourth amendment rights are more valuable than those protected by other constitutional guarantees, it cannot be reasonably contended that they are less so. Historical evidence shows that the Framers specifically intended the fourth amendment to prevent governmental abuses that were a central cause of the Revolution.[72] Moreover, the historical record demonstrates the Framers' awareness that the governmental search and seizure power could be used to suppress free expression.[73] To that extent, the fourth amendment is a crucial instrument for protecting the "preferred freedoms" of speech and press.[74] Alleged violations of fourth amendment rights should thus be subjected to judicial scrutiny which is at least as strict as that applied to alleged violations of other constitutional rights, if not more so.[75] Given the importance of fourth amendment rights, their potential erosion through the balancing test is particularly problematic.

The second reason why infringements upon fourth amendment liberties deserve more intense scrutiny than they receive under a balancing test is that fourth amendment rights are typically asserted by individuals who are unpopular with police, other criminal justice personnel, and the community. The scrupulous protection of fourth amendment liberties in any case redounds to the benefit not only of the individual who is directly involved, but also of everyone else, since we are all subject to the stan-

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controlled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.

Id.; see also McDonald v. United States, 335 U.S. 451, 453 (1948) (fourth amendment rights constitute "one of the unique values of our civilization"); Harris v. United States, 331 U.S. 145, 150 (1947) (fourth amendment rights are the " 'essence of constitutional liberty' " (quoting Gouled v. United States, 225 U.S. 298, 304 (1921))), overruled by Chimel v. California, 395 U.S. 752 (1969).

[71] Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), overruled by Katz v. United States, 389 U.S. 347 (1967).

[72] See, e.g., United States v. Rabinowitz, 339 U.S. 56, 69, 70 (1950) (Frankfurter, J., dissenting) ("It makes all the difference in the world whether one recognizes the central fact about the Fourth Amendment, namely, that it was a safeguard against recurrence of abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution, or one thinks of it as merely a requirement for a piece of paper."), overruled by Chimel v. California, 395 U.S. 752 (1969).

[73] See Marcus v. Search Warrant, 367 U.S. 717, 724-29 (1961) (summarizing history of Bill of Rights).

[74] See text accompanying notes 386-89 infra.

[75] Although other factors are relevant in determining the appropriate standard of judicial review, the nature and importance of the right is of central significance, and is often dispositive. Spece, Justifying Invigorated Scrutiny and the Least Restrictive Alternative as a Superior Form of Intermediate Review: Civil Commitment and the Right to Treatment as a Case Study, 21 Ariz. L. Rev. 1049, 1060-67 (1979); see text accompanying notes 384-85 infra.

dards for police conduct which emerge from individual cases.[76] Although the privacy and liberty rights of all individuals are enhanced by the zealous enforcement of fourth amendment guarantees, these rights are reviewed almost exclusively in criminal cases, where the immediate beneficiary of fourth amendment protections is a suspected or convicted criminal.[77] Because these individuals are unlikely to be looked upon with great sympathy, intense judicial scrutiny is necessary to ensure that their fourth amendment rights—and thus, those of all individuals—are respected.[78]

Finally, the fact that most decisions concerning fourth amendment searches and seizures are made by state and local law enforcement agencies, or by individual police officers, offers further support for the argument that such decisions deserve stricter judicial review than they are given under a balancing analysis. Consistent with basic tenets of democratic theory, it is usually appropriate for courts to accord greater deference to decisions made by more representative, democratically elected bodies.[79] Accordingly, courts should generally subject agency decisions concerning searches and seizures to stricter scrutiny than they would apply to decisions by a state legislature.[80] Moreover, leading constitutional scholars have asserted that no judicial deference at all should be accorded to the numerous search and seizure decisions made only by indi-

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[76] See Brinegar v. United States, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting) ("A search of [the defendant's] car must be regarded as a search of the car of Everyman.").

[77] See Draper v. United States, 358 U.S. 307, 314-15 (1959) (Douglas, J., dissenting). In his dissent in *Draper*, Justice Douglas noted that

> [d]ecisions under the Fourth Amendment . . . have not given the protection to the citizen which the letter and spirit of the Amendment would seem to require. One reason, I think, is that wherever a culprit is caught red-handed, as in leading Fourth Amendment cases, it is difficult to adopt and enforce a rule that would turn him loose. A rule protective of law-abiding citizens is not apt to flourish where its advocates are usually criminals. Yet the rule we fashion is for the innocent and guilty alike.

Id. Individuals who belong to minority groups or who express unpopular ideas may well be subject to the searches and seizures that the fourth amendment is intended to control more frequently than other individuals. This factor, too, weighs in favor of intensified judicial review of alleged fourth amendment violations.

[78] See Spece, supra note 75, at 1061 (certain characteristics of holder of right might indicate that invigorated judicial scrutiny is appropriate); cf. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (Court prescribed "narrower" presumption of constitutionality for legislation which reflects "prejudice against discrete and insular minorities").

[79] See P. Brest, Processes of Constitutional Decisionmaking 982-83 (1975) (it would be "appropriate to accord more weight to policy determinations by a state legislature—a state's chief and most representative policy-making body—than to [determinations by] state and local agencies"); Karst, supra note 53, at 87 (noting that Supreme Court "tends to give a greater presumption of validity to Congressional legislation than to that of the states"). See generally J. Ely, Democracy and Distrust (1980) (enunciating general theory of judicial review of legislative action).

[80] See P. Brest, supra note 79, at 983.

vidual officers.[81]

One characteristic of police agencies and officers that might justify judicial deference to their search and seizure decisions is their law enforcement expertise. However, courts also have significant expertise concerning investigative techniques,[82] and they have more expertise than police officers with respect to the constitutional rights implicated by any search or seizure decision. Moreover, another attribute of law enforcement officers and agencies weighs against judicial deference to their decisions: they are strongly interested in advancing law enforcement goals, and hence might well be inclined to tailor their search and seizure decisions accordingly.[83] For the foregoing reasons, Professor Charles Black urges that reviewing courts should accord the conduct of law enforcement officers "no presumption of constitutionality whatever,"[84] explaining that any less strict standard of judicial review deprives the defendant of "a responsible and competent judgment on the constitutionality of what has been done to him, [and he] never gets a judgment from anybody except his formal adversaries in the criminal process."[85]

In fashioning standards to govern searches and seizures, the courts must bear in mind that these standards "may be exercised by the most unfit and ruthless officers as well as by the fit and responsible."[86] Moreover, because such officers may violate the privacy and liberty rights of

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[81] See, e.g., C. Black, Structure and Relationship in Constitutional Law 78, 89-90 (1969) (due process of law requires active judgment by court or legislature, but not police officer, "on how much of our personal liberty and security we must surrender in the interest of a practicable administration of the criminal law"); Karst, supra note 53, at 87 ("[W]hen there is no judgment by a legislature at all, as in cases of abuse of power by law enforcement officials, there is little justification for any presumption of constitutionality.").

[82] See Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1128 (1969) [hereinafter Harvard Developments Note] ("[W]hen the rights of the criminally accused are at issue, the argument that a court's expertise is as great as that of any other governmental institution . . . doubtless lends a certain attraction to the more active judicial posture which is adopted.").

[83] P. Brest, supra note 79, at 982-83.

[84] C. Black, supra note 81, at 78.

[85] Id. Professor Black further elaborated:

> If [Police] Chief Doe did not in good faith consider the federal constitutional problem, his judgment on it is nonexistent. If he did consider it, his judgment, I think it not too unkind to say, is worthless. When the accused person appeals to the Court on the federal constitutional ground, he is appealing to the very first official authorized or competent—or, for that matter, likely—to consider his claims.

Id. at 89.

[86] Brinegar v. United States, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting); see also Dunaway v. New York, 442 U.S. 200, 213 (1979) ("[T]he protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases, especially when that balance may be done in the first instance by police officers engaged in the 'often competitive enterprise of ferreting out crime.' " (quoting Johnson v. United States, 333 U.S. 10, 14 (1948))).

innocent citizens who have no opportunity for prior judicial review,[87] and limited opportunity for subsequent judicial review,[88] the courts should apply heightened scrutiny in those search and seizure cases that do reach them.[89]

In response to the foregoing considerations which favor strict judicial enforcement of fourth amendment rights, it could be argued that another distinguishing characteristic of the fourth amendment should have the opposite effect. Unlike other constitutional guarantees, fourth amendment rights are expressly qualified by a reasonableness concept. Arguably, this concept calls for the weighing of costs and benefits.[90] A

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[87] See *Brinegar*, 338 U.S. at 182 (contrasting fourth amendment searches and seizures, which unfold quickly and at the whim of police officer, with potential violations of other constitutional rights, against which individual has greater recourse).

[88] Although such post hoc review could occur in civil damages actions against offending police officers or their employers, there are significant practical impediments to these actions. See Schroeder, Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule, 69 Geo. L.J. 1361, 1387-89 (1981) (in addition to governmental immunities, wide range of other legal and practical difficulties impede civil actions for fourth amendment violations).

[89] In resolving fourth amendment cases, the Supreme Court often focuses on the guilt of the particular defendants before it. See, e.g., New York v. Class, 475 U.S. 106, 116 (1986) (in upholding warrantless, suspicionless search of car's interior for Vehicle Identification Number, Court relied upon fact that gun was found protruding from under driver's seat); United States v. Montoya de Hernandez, 473 U.S. 531, 543 (1985) (in upholding warrantless detention of suspected alimentary canal drug smuggler, Court stated that defendant "alone was responsible for much of the duration and discomfort of the seizure"). In contrast, the Court does not expressly take account of the fact that the search and seizure standards it enunciates will be applied by law-breaking officers, as well as law-abiding ones.

This Article maintains that the Court should not allow a particular defendant's guilt to enter into its fourth amendment calculus. See text accompanying note 109 infra. Short of following this prescription, the Court at the very least should not consider fourth amendment claims on the basis of discordant assumptions about the relative innocence or guilt of those conducting the search or seizure as opposed to those who are its victims. To the contrary, in principle, fourth amendment rules should be designed to afford sufficient protection to individual rights in the worst-case scenario: where the person who is searched is innocent of wrongdoing, but the officer who conducts it is "unfit and ruthless." See text accompanying note 86 supra.

The available evidence concerning actual search and seizure scenarios supports this argument. Due to the increasing frequency of mass inspection techniques, such as drunk driving roadblocks, airport screenings, and border area inspections, increasing numbers of innocent persons are subject to searches and seizures. See generally Jacobs & Strossen, supra note 6. Due to recent erosions in the fourth amendment exclusionary rule, the numbers of law enforcement officers who are guilty of fourth amendment violations may also be increasing. Cf. United States v. Leon, 468 U.S. 897, 954 n.13 (1984) (Brennan, J., dissenting) (citing testimony of police officials and prosecutors that strict implementation of exclusionary rule led to increased police compliance with fourth amendment). Thus, the worst-case hypothetical scenario, which the Court should have in mind as a matter of principle, may in actuality be an increasingly common phenomenon.

[90] Even Justice Black, who vigorously opposed balancing in other constitutional contexts, see Black, supra note 7, at 867, apparently viewed balancing as necessary for determining whether a search or seizure complied with the fourth amendment's reasonableness standard. See Rochin v. California, 342 U.S. 165, 176 (1952) (Black, J., concurring).

principal problem with this argument, however, is that it ignores the fourth amendment's warrant clause. Under the "conventional" construction of the fourth amendment,[91] the possibility that balancing may be the appropriate method for determining whether a search or seizure satisfies the relatively open-ended reasonableness requirement is not germane to the argument that it should not be used to determine whether the search or seizure complies with the more specific, self-explanatory probable cause or warrant requirements.[92]

Even if the fourth amendment's reasonableness clause could fairly be viewed without taking account of the warrant and probable cause requirements, balancing could still not be defended as any more necessary or appropriate under the fourth amendment than under other constitutional provisions.[93] The Supreme Court has assessed the "reasonableness" criterion which is implicit in other constitutional provisions under a variety of nonbalancing analyses.[94] Furthermore, equally open-ended standards which are set forth in other constitutional provisions—for example, the fifth and fourteenth amendments' due process clauses—have also been implemented without resorting to cost-benefit balancing.[95]

The third general problem with balancing decisions, the fact-specific approach which provides relatively little advance judicial guidance concerning other fact patterns, also has especially adverse consequences for fourth amendment jurisprudence. Decisions implicating fourth amendment rights are often made by individual law enforcement officials responding to the exigencies of specific, rapidly unfolding situations. Therefore, the judicial enunciation of fixed categorical rules is especially important to promote both law enforcement goals and fourth amendment freedoms.[96] For this reason, the Supreme Court recently criticized

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[91] See text accompanying notes 19-23 supra.

[92] See New Jersey v. T.L.O., 469 U.S. 325, 370 (1985) (Brennan, J., concurring in part and dissenting in part) ("[T]he presence of the word 'unreasonable' in the text of the Fourth Amendment does not grant a shifting majority of this Court the authority to answer *all* Fourth Amendment questions by consulting its momentary vision of the social good.").

[93] See Aleinikoff, supra note 7, at 990 (fourth amendment cases should be resolved on basis of amendment's purpose, scope, and source); id. at 990 n.269 (showing how recent fourth amendment case, which was decided by balancing, could have been resolved through nonbalancing approach with same result).

[94] For example, the Court's so-called substantive due process decisions ascertained whether government regulations were "reasonable" by asking if they were within the state's police power. See, e.g., Lochner v. New York, 198 U.S. 45, 57 (1905).

[95] See Harvard Due Process Note, supra note 7, at 1536-37 (Court's discretionary power in interpreting scope of due process clause does not lead to conclusion that balancing is only method by which such power may be exercised); see also id. at 1540 (judiciary should "use the purpose of the due process clause to ascertain whether an individual has been subjected to procedural unfairness" as alternative to balancing).

[96] See New Jersey v. T.L.O., 469 U.S. 325, 366 (1985) (Brennan, J., concurring in part and dissenting in part). Justice Brennan wrote that:

the use of balancing to resolve whether the fourth amendment applies to searches of open fields, noting that "[t]he ad hoc approach not only makes it difficult for the policeman to discern the scope of his authority; it also creates a danger that constitutional rights will be arbitrarily and inequitably enforced."[97]

The preceding analysis has examined the major problems associated with all constitutional balancing tests, and has discussed why those general problems are particularly acute in the context of the fourth amendment's protection against unlawful searches or seizures. The next Part illustrates how these negative tendencies inherent in the fourth amendment balancing analysis have been exacerbated rather than mitigated through judicial implementation of the analysis.

III

CRITIQUE OF THE FOURTH AMENDMENT BALANCING TEST AS IMPLEMENTED

Given the tendency of constitutional balancing tests to undervalue individual freedoms,[98] some judges and scholars have urged that they

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> The sad result of this uncertainty [caused by applying a fourth amendment balancing test to searches of public school students] may well be that some teachers will be reluctant to conduct searches that are fully permissible and even necessary under the probable cause standard, while others may intrude arbitrarily and unjustifiably on the privacy of students.

Id.; see also Dworkin, supra note 65, at 365-66 (exclusionary rule can effectively deter only those unlawful searches and seizures which are defined by clear, inflexible rules; to achieve control of police conduct, flexibility must be subordinated to clarity and consistency). But see Alschuler, Bright Line Fever and the Fourth Amendment, 45 U. Pitt. L. Rev. 227, 231, 233, 287 (1984) (criticizing categorical fourth amendment rules).

[97] Oliver v. United States, 466 U.S. 170, 181-82 (1984) (citation omitted). The Court accordingly declined to endorse a case-by-case approach for this type of search. Instead, it created a per se rule exempting any such searches from fourth amendment constraints. Id. at 181. In eschewing a balancing analysis in favor of a per se rule which increased the government's search and seizure powers, *Oliver* followed a pattern set by other Supreme Court decisions. See Alschuler, supra note 96, at 242 (Court's "current bright line rules tell police officers, 'Yes, you may search,' rather than 'No, you may not' ").

[98] Although constitutional rights are inevitably devalued in principle by being robbed of the automatic or presumptive protection they would receive under a nonbalancing approach, they should not necessarily receive less actual protection in terms of specific holdings in balancing cases. In theory, a balancing approach could be employed in such a way that individual rights are upheld as often as they would be under an approach using categorical rules. For example, in the first amendment context, the Court initially used balancing to invalidate regulations that burdened free speech even though they were not intended to do so, and consequently would not have been invalidated under the applicable categorical rule, which looked to legislative intent. See Cantwell v. Connecticut, 310 U.S. 296, 303-07 (1940); Thornhill v. Alabama, 310 U.S. 88, 95-96 (1940); Schneider v. New Jersey, 308 U.S. 147, 161 (1939).

However, in the fourth amendment context, the Court's balancing holdings have restricted rather than expanded individual rights, thus following a trend of balancing methodology generally "to mak[e] support for liberty over security the exception rather than the rule."

should be conducted, if at all, with a "thumb on the scales" on the side of individual rights.[99] In contrast, the Supreme Court too often has conducted its fourth amendment balancing tests with "the judicial thumb . . . planted firmly on the law-enforcement side of the scales."[100] This distortion in the Court's fourth amendment balancing results from inaccuracies both in identifying and in comparing the countervailing interests purportedly at stake.

A. Inaccurate Identification of Competing Interests

1. Costs

The cost component of the Court's fourth amendment cost-benefit balancing test generally consists of conclusory assertions about the importance of avoiding the objective and subjective intrusiveness entailed in the search or seizure at issue.[101] The Court's evaluation consistently focuses upon the particular individual who is involved in the case before it. This narrow focus leads to undervaluation of the costs of any search or seizure, in terms of limiting individual freedoms, for two reasons. First, because the individuals who assert fourth amendment rights in many cases are guilty of criminal conduct,[102] the Court often concludes that the interest in sheltering evidence of their misconduct is slight.[103] It thus loses sight of the fact that the search and seizure standards approved for the guilty will also apply to the innocent.[104]

This problem with fourth amendment balancing is illustrated by *United States v. Montoya de Hernandez*.[105] The Court upheld a 27-hour warrantless detention of a suspected alimentary canal drug smuggler while customs officials were waiting for her to move her bowels in their presence.[106] Throughout the detention, the suspect did not eat, drink, or

C. Ducat, Modes of Constitutional Interpretation 180 (1978); see Henkin, supra note 7, at 1048; note 49 supra.

99 Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 1, 16, 28; Redish, The Content Distinction in First Amendment Analysis, 34 Stan. L. Rev. 113, 145 (1981).

100 United States v. Sharpe, 470 U.S. 675, 720 (1985) (Brennan, J., dissenting).

101 See, e.g., United States v. Villamonte-Marquez, 462 U.S. 579, 592 (1983) (upholding Coast Guard's boarding of ship and inspection of documents without warrant or individualized suspicion, saying "the resultant intrusion on fourth amendment interests is quite limited").

102 See note 77 supra.

103 See, e.g., New York v. Class, 475 U.S. 106, 116 (1986) (in upholding warrantless, suspicionless search of car's interior for purpose of obtaining Vehicle Identification Number, Court relied upon fact that gun was found protruding from under driver's seat).

104 See text accompanying note 77 supra.

105 473 U.S. 531 (1985).

106 Id. at 544.

use toilet facilities.[107] The Court stated that the defendant "alone was responsible for much of the duration and discomfort of the seizure."[108] That the defendant's guilt could not justify her prolonged, degrading detention was explained by Justice Brennan in dissent: "Although we now know that De Hernandez was indeed guilty of smuggling drugs internally, such *post hoc* rationalizations have no place in our Fourth Amendment jurisprudence, which demands that we 'prevent hindsight from coloring the evaluation of the reasonableness of a search or seizure.' "[109]

The Court's tendency to focus on individual fourth amendment litigants also causes it to neglect systematic evaluation of the collective harm to individual rights resulting from searches or seizures that are similar or identical to the one that gave rise to the case. This failure leads to significant undervaluation of the cost to individual rights of mass or random searches or seizures. One case which illustrates this troublesome aspect of fourth amendment balancing is *United States v. Martinez-Fuerte*.[110] In upholding warrantless, suspicionless stops and inspections of all vehicles and passengers at border patrol checkpoints, the Court stressed that each detention constituted a "quite limited" intrusion on the fourth amendment interests of each motorist stopped,[111] but it did not take into account the intrusiveness experienced collectively by the thousands of motorists detained at the checkpoint each day, or the hundreds of thousands detained each week.[112] In contrast, the view of the Ninth Circuit Court of Appeals that these checkpoint stops constituted an "intolerable" interference with the rights of innocent persons[113] was a major reason for that court's conclusion that the stops were unconstitutional.[114]

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107 Id. at 535.

108 Id. at 543.

109 Id. at 559 (Brennan, J., dissenting) (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 565 (1976)). For similar discussions by Justice Brennan, see United States v. Jacobsen, 466 U.S. 109, 139 (1984) (Brennan, J., dissenting); United States v. Villamonte-Marquez, 462 U.S. 574, 606 n.9 (1983) (Brennan, J., dissenting).

110 428 U.S. 543 (1976).

111 Id. at 546-47, 557-58. The majority asserted that, in contrast with roving patrol stops, "[r]outine checkpoint stops do not intrude similarly on the motoring public." Id. at 559.

112 The majority recited, but did not take into account in assessing the cost side of the balancing test, statistics showing that, during one eight-day period, 146,000 vehicles and their occupants were stopped and briefly inspected at one checkpoint, and 820 vehicles and their occupants were subjected to more extensive inspections. Id. at 554.

113 United States v. Martinez-Fuerte, 514 F.2d 308, 322 (9th Cir. 1975), rev'd, 428 U.S. 543 (1976).

114 Id. The court noted that only one car out of every 1000 passing through the checkpoint carried persons illegally within the country, and held that this percentage did not justify stopping ten million cars per year. Id.

The Supreme Court's overly narrow focus on individual litigants is further illustrated by comparing majority opinions with those filed in dissent or concurrence. For example, in *Mon-*

Another source of the Court's tendency to understate the rights invaded by a search or seizure is its reliance on the concept of subjective intrusiveness, which often undervalues the deprivations of privacy and freedom at issue. Certain factors that the Court views as reducing the subjective intrusiveness of a search or seizure seem likely instead to have the opposite effect. For example, the Court has stressed that the subjective intrusiveness attributable to a search or seizure will be lessened if it is conducted uniformly, with respect to broad groups of similarly situated individuals.[115] However, some individuals might well be more upset by massive intrusions than by individualized ones.[116] The Court has also said that the subjective intrusiveness of a search or seizure will be decreased if it is preceded by advance notice, thus minimizing the surprise element.[117] However, it seems likely that some individuals will experience more anxiety the longer they must anticipate undergoing a search or seizure. Further, the Court has asserted that a search or seizure conducted in public is less subjectively intrusive than one conducted in private.[118] Probably, though, some individuals would suffer greater

toya de Hernandez, the majority focused on circumstances unique to the defendant, including the fact that she turned out to be guilty of alimentary canal drug smuggling, 473 U.S. at 544, while the dissent cited evidence indicating that there are many highly intrusive border searches of suspicious-looking but ultimately innocent travelers. Id. at 557 (Brennan, J., dissenting). Moreover, in United States v. Villamonte-Marquez, 462 U.S. 579 (1983), the majority described the invasion of fourth amendment rights resulting from customs officers's warrantless, suspicionless boardings and searches of boats as "only a modest intrusion," focusing on the particular incidents involved in the case, id. at 592, while the dissent noted that, as a result of the holding, all maritime traffic may be stopped and boarded at random. Id. at 605 (Brennan, J., dissenting).

115 See United States v. Ortiz, 422 U.S. 891, 894-95 (1975). In *Ortiz*, the majority argued that the circumstances of a checkpoint stop, at which motorists can see other vehicles being stopped, are "far less intrusive" than those attending a roving patrol stop. Id. Similarly, in Delaware v. Prouse, 440 U.S. 648 (1979), the Court said that roadblocks at which police officers stopped every driver, or every *n*th driver, to check for licenses and registrations, would be less subjectively intrusive than random stops for the same purpose. Id. at 663. Justice Rehnquist trenchantly questioned the soundness of this unsubstantiated assumption: "[The majority assumes that] motorists, apparently like sheep, are much less likely to be 'frightened' or 'annoyed' when stopped en masse. . . . The Court thus elevates the adage 'misery loves company' to a novel role in Fourth Amendment jurisprudence." Id. at 664 (Rehnquist, J., dissenting).

116 See Jacobs & Strossen, supra note 6, at 630 n.154. Jacobs and Strossen argue that some travelers would be particularly frightened by the "law enforcement extravaganzas" of many roadblocks, which often involve numerous officers, vehicles with blinking lights, and spectators. Id. They note that such displays of police power "are the hallmark of authoritarian regimes" in other countries, and point to one state case in which roadblocks were found unconstitutional *because* of their mass nature, which the court found increased their subjective intrusiveness. Id. (citing State v. Smith, 674 P.2d 562, 564 (Okla. Crim. App. 1984)).

117 United States v. Martinez-Fuerte, 428 U.S. 543, 559 (1976); see Delaware v. Prouse, 440 U.S. 648, 657 (1979) ("anxiety" is aspect of subjective intrusiveness). The Court apparently associates anxiety with surprise.

118 United States v. Martinez-Fuerte, 428 U.S. 543, 560 (1976).

embarrassment[119] if they were subjected to a search or seizure in public view.[120] Thus, the subjective intrusiveness component of the fourth amendment balancing test, a key factor that the Court weighs against governmental abrogation of fourth amendment rights, has proven particularly vulnerable to judicial value judgments.

The Court also understates the costs attributable to searches or seizures by failing to recognize that "[t]he privacy secured by the fourth amendment fosters large social interests."[121] Professor Weinreb has written that, "Political and moral discussion, affirmation and dissent, need places to be born and nurtured, and shelter from unwanted publicity. So do economic and aesthetic creation and enterprise. . . . What the fourth amendment protects above all is the conduct of ordinary lives."[122] Much like the Court's failure to account for the aggregated effect of multiple individual searches, this aspect of its fourth amendment balancing analysis results in undervaluation of costs because of an overly narrow focus upon the individual.[123]

The Court also has failed to take account of the fact that a search or seizure may have adverse consequences upon the very societal law enforcement interests which are routinely cited as justification for any challenged search or seizure. For example, massive or intrusive searches or seizures may undermine individuals' respect for the legal system.[124] The Court has noted that "[i]ndiscriminate application" of the exclusionary rule "may well 'generat[e] disrespect for the law and administration of

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[119] See United States v. Ortiz, 422 U.S. 891, 895 (1975) ("embarrassment" is aspect of subjective intrusiveness).

[120] See Hayes v. Florida, 470 U.S. 811, 819 (1985) (Brennan, J., concurring in the judgment) ("It would seem that on-site fingerprinting (apparently undertaken in full view of any passerby) would involve a singular intrusion on the suspect's privacy . . . ."); People v. Carlson, 677 P.2d 310, 317 (Colo. 1984) (en banc) (roadside sobriety tests could be considered more subjectively intrusive than chemical testing for blood alcohol content because latter usually takes place "in the relatively obscure setting of a station house or hospital," whereas former "often take[s] place on or near a public street with the suspect exposed to the full view of . . . anyone else who happens to be in the area.").

[121] Weinreb, Generalities of the Fourth Amendment, 42 U. Chi. L. Rev. 47, 85 (1974).

[122] Id.

[123] Id. In contrast, the "benefits" side of the Court's analysis is calculated strictly at the level of societal interests. See text accompanying notes 132-37 infra.

[124] See Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting), overruled by Katz v. United States, 389 U.S. 347 (1967). In this famous dissent, Justice Brandeis wrote:

> In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

Id.

justice.' "[125] The Court thus has taken judicial notice of the potential law enforcement cost of *enforcing* fourth amendment standards—allowing some private lawbreakers to go unpunished. Likewise, it should acknowledge the potential law enforcement cost of *not* enforcing fourth amendment standards—allowing some governmental lawbreakers to go unpunished.[126]

A related societal cost associated with many searches and seizures, which is not assigned any weight in the Supreme Court's fourth amendment balancing analyses, is damage to the community's collective security—the very security which it is the ultimate goal of law enforcement efforts to promote. This collective security is threatened as much by police invasions of privacy or freedom as it is by criminal invasions.[127] Unreasonable searches and seizures are just as illegal as the crimes which the police seek to control.

The societal interest in checking or deterring illegal searches and seizures is at least as important as the societal interest in checking or deterring other illegal activities.[128] The fourth amendment specifically prohibits certain intrusive law enforcement measures, even though this entails some cost to other law enforcement goals.[129] Presumably, the Framers chose to impose these costs in light of the offsetting societal benefits of promoting privacy and liberty.[130] The Court's failure to rec-

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[125] United States v. Leon, 468 U.S. 897, 908 (1984) (quoting Stone v. Powell, 428 U.S. 465, 491 (1976)).

[126] See Barnett, Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice, 32 Emory L.J. 937, 985 (1983) (referring to goal of achieving "a society free of crimes committed by any person, whether that person is in uniform or not"); see also note 137 infra; text accompanying notes 146-48 (further respects in which Court's implementation of balancing analysis differs in exclusionary rule cases from other fourth amendment cases).

[127] See Aleinikoff, supra note 7, at 981 ("[S]ociety has a general interest in preventing unwarranted governmental intrusions.").

[128] See Johnson v. United States, 333 U.S. 10, 14 (1948) ("The right of officers to thrust themselves into a home is . . . a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance."); Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting), overruled by Katz v. United States, 389 U.S. 347 (1967); Loewy, Protecting Citizens From Cops and Crooks: An Assessment of the Supreme Court's Interpretation of the Fourth Amendment During the 1982 Term, 62 N.C.L. Rev. 329, 339 (1984) ("Both society at large and the immediately affected individual are victimized when one's property or security is unjustifiably invaded by either a cop or a crook."); see also Tribe, supra note 7, at 610 (in redefining Americans as a people more interested in punishment of private wrongdoers than in security against unlawful intrusions by public officials, Court's fourth amendment balancing analysis "*defines as benefits what we once deemed costs*" (emphasis in original)).

[129] See Stewart, The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases, 83 Colum. L. Rev. 1365, 1392-93 (1983) (Framers took into account and accepted inevitable result of fourth amendment—that police officers obeying its strictures would catch fewer criminals).

[130] See Harris v. United States, 331 U.S. 145, 198 (1947) (Jackson, J., dissenting) ("[T]he

ognize the long-range societal cost of damage to these fundamental freedoms, and its focus upon the short-range societal gain of advancing certain law enforcement goals, thus seems inconsistent with the fourth amendment's purpose.[131]

2. *Benefits*

The benefit component of the Court's fourth amendment balancing test generally consists of conclusory statements about the gravity of the law enforcement problem at issue and the contribution of the challenged law enforcement technique to resolving it. This approach exaggerates the societal contributions of a search or seizure by overstating its role in advancing law enforcement goals.

One way in which the Court's fourth amendment balancing test overstates the contributions to law enforcement of searches or seizures is that the Court generally does not confine its consideration to the particular individual or incident involved in the case before it. Instead, the Court typically regards the particular case as representative of broader societal problems.[132] For example, if the individual who was subject to the challenged search or seizure is suspected of being an illegal immigrant, the Court does not characterize society's stake in the challenged search or seizure simply as detecting the particular illegal entry of which he is suspected, nor as the somewhat larger goal of deterring that individual from attempting a future illegal entry.[133] Rather, the material societal interest is placed on a significantly higher plane of abstraction: controlling and deterring illegal immigration in general.[134] One case that

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forefathers thought this [fewer arrests or convictions] was not too great a price to pay for that decent privacy of home, papers and effects which is indispensable to individual dignity and self-respect.").

131 See United States v. Leon, 468 U.S. 897, 959 (1984) (Brennan, J., dissenting). One additional tangible societal cost imposed by every search and seizure resulting in a Supreme Court decision, but which has not entered into the Court's cost calculus, is the expense of litigation. See Nix v. Williams, 467 U.S. 431, 456-58 (1984) (Stevens, J., concurring in the judgment) (emphasizing need for Court to recognize costs borne by states when forced to defend actions of police officers who have taken "procedural shortcuts").

132 See New York v. Class, 475 U.S. 106, 111-12, 114 (1986) (in upholding warrantless, suspicionless search of car to locate its Vehicle Identification Number (VIN), Court cited role of VIN in automobile regulation and highway safety nationwide); United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985) (in upholding prolonged border detention of woman suspected of carrying drugs internally, Court invoked "the veritable national crisis in law enforcement caused by smuggling illicit narcotics"); New Jersey v. T.L.O., 469 U.S. 325, 339 (1985) (in upholding warrantless search, without probable cause, of student's purse, Court relied upon nationwide school discipline problems); see also United States v. Leon, 468 U.S. 897, 951 (1984) (Brennan, J., dissenting) (noting that majority, in rejecting exclusionary rule for cases where police made objectively reasonable mistakes, weighed aggregated societal costs of exclusion in *all* cases).

133 See United States v. Martinez-Fuerte, 428 U.S. 543, 560-62 (1976).

134 See United States v. Brignoni-Ponce, 422 U.S. 873, 878-79 (1975) (noting "significant

typifies this expansive view of the societal benefits accruing from the detention of an illegal immigrant is *United States v. Martinez-Fuerte*,[135] which upheld detentions of all cars at a border patrol checkpoint stop.[136] The Court noted that approximately nine million Mexicans are illegally living in the United States, and framed the relevant law enforcement goal as interdicting this substantial flow of illegal entrants.[137]

The Court's tendency to inflate the governmental stake in any search or seizure is augmented by its corresponding tendency to assume that the search or seizure will be uniquely successful in promoting law enforcement goals. This entails two separate assumptions, neither of which is supported by judicial analysis or evidence. The first is that the challenged law enforcement method will in fact effectively promote the law enforcement goal at issue.[138] The second is that it will do so to a substantially greater degree than alternative law enforcement methods.[139] Rather than insisting on evidence of the comparative effectiveness of the challenged search or seizure, the Court has upheld searches and seizures in the face of persuasive arguments or evidence indicating that they might not effectively promote the law enforcement goals at is-

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economic and social problems" created by nationwide undocumented alien population).

135 428 U.S. 543 (1976).

136 Id. at 567.

137 Id. at 551-52. In contrast, as part of its general tendency to understate the value of the exclusionary rule in deterring illegal police searches, see note 147 and accompanying text infra, the Court consistently weighs only the likelihood that the rule would deter future fourth amendment violations by the particular law enforcement officer whose evidence is suppressed. See *Leon*, 468 U.S. at 928, 953 (Brennan, J., dissenting). For discussion of further respects in which the Court's balancing analysis in exclusionary rule cases differs from its analysis in other fourth amendment cases, see text accompanying notes 125-26 supra; text accompanying notes 146-48 infra.

138 See Colorado v. Bertine, 479 U.S. 367, 382-84 (1987) (Marshall, J., dissenting) (governmental interests asserted to justify warrantless, suspicionless search of contents of backpack contained in arrestee's impounded van were not actually promoted; to the contrary, asserted interest in protecting police from potential danger was undermined by opening containers to inventory contents).

139 See *Bertine*, 479 U.S. at 748 (Marshall, J., dissenting) (government's asserted interests in protecting arrestee's property and protecting police from claims concerning, or danger from, such property, could have been promoted either by parking and locking van in secure police impoundment lot or by letting arrestee make alternative arrangements for safekeeping); United States v. Jacobsen, 466 U.S. 109, 125 (1984) (in upholding warrantless seizure of material under government control which was suspected to be cocaine, Court does not say how law enforcement interests were promoted beyond what would have been achieved by conducting seizure pursuant to warrant); United States v. Villamonte-Marquez, 462 U.S. 579, 592-93 (1983) (in upholding Coast Guard's warrantless, suspicionless boardings and inspections of vessels to check compliance with documentation requirements, Court does not address how requirements would be less effectively promoted if inspections were carried out based upon individualized suspicion); *Martinez-Fuerte*, 428 U.S. at 552-54 (in upholding border patrol stops and inspections of vehicles and passengers at permanent checkpoints without any individualized suspicion, Court does not compare number of deportable aliens thus identified to number that would have been identified pursuant to reasonable suspicion standard).

sue, or that alternative methods might be at least as effective.[140]

For example, the Court's balancing analysis in *Martinez-Fuerte* took no account of the fact that the checkpoint stops were strikingly unsuccessful in actually promoting the stated goal of interdicting illegal entrants into the United States. The border patrol's own statistics revealed that out of 145,960 vehicles which passed through the checkpoint during one eight-day period, only 171, or 0.12 percent, were found to contain deportable aliens.[141] Moreover, the Court did not examine alternative law enforcement methods which might well have been more effective, in addition to being less intrusive. As another example, in *Bell v. Wolfish*,[142] the Court upheld a prison rule subjecting all pretrial detainees to visual anal and genital inspections after every contact visit, on the rationale that these searches would prevent the smuggling of contraband.[143] In so ruling, the Court overlooked evidence that these extremely intrusive and humiliating searches would probably not detect hidden narcotics, as well as evidence that the less intrusive search technique of using metal detectors and similar devices would probably locate many weapons and other particularly dangerous contraband.[144]

The Court also tends to overstate the societal benefits allegedly resulting from searches and seizures by attributing a significant positive weight to the alleged deterrent effect of crime control measures. As discussed above, deterrence is essentially not susceptible to objective proof.[145] The Court regularly asserts that the power to conduct searches and seizures substantially deters unlawful conduct by private citizens, without evidence of such an effect.[146] In contrast, the Court routinely asserts that the exclusionary rule does *not* substantially deter unlawful police conduct, again without evidence.[147] The Court's conclusions that

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[140] See notes 138-39 supra. The Court's pattern of assuming that broader search and seizure powers will promote law enforcement goals, regardless of the actual evidence, is also illustrated by its decisions limiting the fourth amendment exclusionary rule. For example, in *Leon*, 468 U.S. at 922, the Court asserted that a "substantial" law enforcement benefit would result from curbing the rule, although the studies that the Court cited supported the opposite conclusion. See id. at 907 n.6 (in summarizing results of research on exclusionary rule's effect upon disposition of felony arrests, Court noted that "[m]any of these researchers have concluded that the impact of the exclusionary rule is insubstantial").

[141] United States v. Martinez-Fuerte, 514 F. 2d 308, 313-14 (9th Cir. 1975), rev'd, 428 U.S. 543 (1976).

[142] 441 U.S. 520 (1979).

[143] Id.

[144] Id. at 578 (Marshall, J., dissenting); id. at 594-95 (Stevens, J., dissenting).

[145] See text accompanying notes 65-67 supra.

[146] See text accompanying notes 149-50 infra.

[147] See United States v. Leon, 468 U.S. 897, 952-55 (1984) (Brennan, J., dissenting) (majority's argument that exclusionary rule has no deterrent effect considers only extent to which rule might deter future misconduct by individual officers who have had evidence suppressed in their own cases, but Court overlooks rule's chief deterrent value, substantiated by testimony of

the deterrent effect of certain law enforcement measures represents a substantial societal benefit are thus tantamount to its assigning a high value to any efforts to control the crime in question, regardless of the objective success of these efforts.[148]

The Court's proclivity toward invoking the purported deterrent effect of a challenged investigative technique in a conclusory manner, to justify that technique, is illustrated by comparing two fourth amendment balancing cases in which the Court reached diametrically opposite conclusions concerning the deterrent effect of the same law enforcement measure—stopping cars near the Mexican border based on reasonable suspicion. In *United States v. Brignoni-Ponce*,[149] the Court rejected the contention that border patrol agents on roving patrol near the Mexican border could stop and inspect vehicles and passengers only if they had probable cause. Instead, the Court ruled that these roving patrol stops could be based on the lower "reasonable suspicion" standard, relying on the assumption that detentions based on this standard would "deter the movement of" illegal entrants and smugglers "by threatening apprehension and increasing the cost of illegal transportation."[150] One year later, in *United States v. Martinez-Fuerte*,[151] the Court held that border patrol agents could lawfully detain all vehicles at checkpoints, without any particularized suspicion, on the rationale that a rule requiring such stops to be based on reasonable suspicion "would largely eliminate any deterrent to the conduct of well-disguised smuggling operations."[152]

A final way in which the Court overstates the societal benefit from any search or seizure is by failing to offset the measure's negative effects

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law enforcement personnel, which is its tendency to promote institutional compliance with fourth amendment); Canon, Ideology and Reality in the Debate over the Exclusionary Rule: A Conservative Argument for its Retention, 23 S. Tex. L.J. 559, 561-64 (1982).

For a discussion of further respects in which the Court's balancing analysis in exclusionary rule cases differs from its analysis in other fourth amendment cases, see text accompanying notes 125-26 supra.

148 In applying the Supreme Court's fourth amendment balancing tests, some lower courts have upheld challenged law enforcement measures notwithstanding objective evidence that they achieve no substantial societal benefits in terms of apprehending criminals, largely or solely because of the measures' purported deterrence value. See State v. Deskins, 234 Kan. 529, 545, 673 P.2d 1174, 1187 (1983) (Prager, J., dissenting) (court upheld police roadblocks at which all motorists were inspected for intoxication, although record indicated that roadblocks led to detection of no more intoxicated drivers than if police assigned to roadblocks had used traditional investigative technique of stopping selected motorists based on actual evidence of intoxication); Little v. State, 300 Md. 485, 514-15, 479 A.2d 918-19 (1984) (Davidson, J., dissenting) (same).

149 422 U.S. 873 (1975).

150 Id. at 879.

151 428 U.S. 543 (1976).

152 Id. at 557.

upon societal interests[153] against its positive ones.[154] Society's interest in maintaining the rights protected by the fourth amendment clearly should be given some weight.[155] The Court's general failure to do so inflates the value it ascribes to the net societal benefits of searches and seizures.

B. Inaccurate Comparison of Competing Interests

The problems resulting from the Court's inaccurate identification of the competing interests implicated by searches and seizures are compounded by its inaccurate comparisons of those competing interests. The Court obscures the comparison process, first, by attempting to compare individual and societal interests that have been described at disparate levels of abstraction.[156]

The Court's characteristically constricted view of the freedoms jeopardized by a search or seizure—those of the particular litigant before it—would not necessarily tilt the balance against such freedoms if they were weighed against law enforcement interests of equivalent narrowness—those tied directly to the same single litigant. Conversely, the Court's typically expansive view of the law enforcement interests at stake in any search or seizure—broad national law enforcement goals—would not necessarily tip the scales in favor of such interests if they were weighed against freedoms of equivalent breadth—broad goals of preserving individual privacy and liberty throughout our nation. However, the Court's regular weighing of the privacy and liberty rights of a single individual against the law enforcement interests of the collective national community inevitably predetermines the outcome.[157]

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153 For a discussion of these negative societal effects, see text accompanying notes 124-31 supra.

154 Cf. Radin, The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause, 126 U. Pa. L. Rev. 989, 1055-56 (1978) (arguing with regard to death penalty that "[t]he proper way to calculate social utility is to subtract from the social gain produced by a punishment any harm attributable to it").

155 In procedural due process cases, the Court occasionally has recognized the societal interest in protecting the individual rights at stake. See Morrissey v. Brewer, 408 U.S. 471, 484 (1972) (society has interest in granting conditional liberty to parolee in hopes of "restoring him to normal and useful life within the law"); Goldberg v. Kelly, 397 U.S. 254, 265 (1970) (there is public interest in averting "societal malaise that may flow from a widespread sense of frustration and insecurity" if individuals are unfairly denied welfare benefits).

156 See Pound, A Survey of Social Interests, 57 Harv. L. Rev. 1, 2 (1943) (by balancing interests expressed on individual level against those expressed on societal level, "we may decide the question in advance in our very way of putting it").

157 See State v. Tourtillott, 289 Or. 845, 879-82, 618 P.2d 423, 440-42 (1980) (Linde, J., dissenting) (upholding routine roadblock stops of motorists, without individualized suspicion, to enforce hunting and fishing regulations), cert. denied, 451 U.S. 972 (1981).

> The . . . most common fallacy in "balancing" is to place on one side the entire, cumulated interest represented by the state's policy and compare it with one individual's "interest" in freedom from the specific intrusion on the other side . . . . The semantic "balance" looks different when it matches the freedom of thousands of citizens from

One case which exemplifies the Court's comparison of narrowly viewed liberty interests with broadly viewed law enforcement concerns has already been noted: *United States v. Martinez-Fuerte*.[158] In approving border patrol checkpoints at which all vehicles and passengers were detained and inspected, the Court weighed the individual interest of a single motorist in avoiding detention against the societal interest in combating the nationwide illegal immigration problem. The balance would not necessarily have tipped in favor of the societal interest if the countervailing individual concerns had been seen as those of the thousands of motorists who suffered groundless detention and inspection each day, few of whom were illegal immigrants or smugglers.[159]

Another major methodological problem with the Court's comparison of competing interests implicated by a search or seizure is its focus on law enforcement ends, and its failure to take account of the various means for achieving those ends. This problem is manifested in the Court's failure to evaluate the marginal costs and benefits associated with any particular search or seizure technique, or to compare them to the marginal costs and benefits associated with alternative techniques.[160] An accurate balancing test would not confine itself to comparing the total costs and benefits ascribable to a certain investigative measure, viewed in

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being stopped and questioned by police officers against the chance that one or a few will admit to a . . . violation.

Id. at 881, 618 P.2d at 441-42. Similar criticisms have been leveled at the Court's execution of first amendment balancing. See Barenblatt v. United States, 360 U.S. 109, 144 (1959) (Black, J., dissenting).

158 428 U.S. 543 (1976).

159 During one eight-day period, roughly 146,000 vehicles were stopped and briefly inspected at the checkpoint, 820 were subjected to more extensive inspections, and only 171 of these contained deportable aliens. Id. at 554.

For another example of the Court's purported comparison of mismatched costs and benefits in a fourth amendment balancing analysis, with a resulting overstatement of the law enforcement costs of enforcing fourth amendment rights, see United States v. Leon, 468 U.S. 897, 907-08 (1984) (weighing aggregate law enforcement cost of excluding evidence in all cases where search or seizure is held to violate fourth amendment against individual rights cost of admitting illegally obtained evidence in only relatively small subset of those cases: those in which police had good faith belief that search or seizure complied with fourth amendment).

160 See Colorado v. Bertine, 479 U.S. 367, 377 (1987); United States v. Jacobsen, 466 U.S. 109, 125 (1984); United States v. Villamonte-Marquez, 462 U.S. 579, 589-90 (1983). In the one fourth amendment case in which the Court did expressly engage in marginal cost-benefit balancing, Delaware v. Prouse, 440 U.S. 648 (1979), the law enforcement measure in question was struck down. Id. at 659-61; see text accompanying notes 237-43 infra.

It may be difficult or even impossible to assign objective comparative values to any competing interests. See notes 50-51 and accompanying text supra. Nonetheless, the balancing methodology is increasingly predominant in fourth amendment jurisprudence. Surely the fairness of this methodology would be enhanced if the relevant competing interests were at least accurately identified and evenhandedly compared. For a more detailed discussion of the concern about judicial capabilities of evaluating the comparative intrusiveness and effectiveness of alternative search and seizure measures, see text accompanying notes 405-27 infra.

isolation. Rather, it would assess the marginal costs and benefits associated with the challenged technique—the incremental costs and benefits specifically attributable to it, beyond those also attributable to another, less intrusive, measure—and compare those to the marginal costs and benefits of alternative techniques.[161] The central issue is whether the additional law enforcement benefits resulting from a more intrusive search or seizure justify its additional individual rights costs. An important corollary issue is whether an alternative measure would yield equivalent incremental benefits at a smaller incremental cost. The logic of including these inquiries in any cost-benefit analysis of "reasonableness" is illustrated by their inclusion both in Jeremy Bentham's original utilitarian balancing scheme,[162] and in other constitutional balancing tests.[163]

The logical necessity of comparing the marginal costs and benefits of alternative means, in executing any balancing test, applies to the fourth amendment balancing test in particular. If only absolute costs and benefits were considered, then somewhat draconian law enforcement measures would be tolerated despite their relatively de minimis contributions to law enforcement.[164] However, our legal system does recognize the

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[161] Weighing the total benefits associated with any measure, as opposed to the marginal benefits attributable specifically to that measure, necessarily inflates the benefit side of the balance. While this distorts the cost-benefit comparison in any balancing case, the distortion is most problematic in cases where the countervailing cost is an invasion of individual rights. See Note, The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, a Justification and Some Criteria, 27 Vand. L. Rev. 971, 1023 (1974) ("If . . . the individual interest . . . is ranked as fundamental . . . [t]he only state interest that *should* be balanced against the individual's is that marginal difference between the existing statute and the alternative."); Yale First Amendment Note, supra note 7, at 467 ("A scale which puts in one pan the public interest in some legitimate end of government . . . rather than the interest in a particular means to that end will rarely tip in favor of competing values.").

[162] See Wormuth & Mirkin, The Doctrine of the Reasonable Alternative, 9 Utah L. Rev. 254, 306 (1964). Wormuth and Mirkin noted that Bentham listed four cases in which "punishment ought not to be inflicted," including two which constitute the doctrine of the reasonable alternative: "[w]here it is *unprofitable*, or too *expensive*: where the mischief it would produce would be greater than what it prevented;" and "where it is *needless*: where the mischief may be prevented, or cease of itself, without it: that is, at a cheaper rate." Id. (citing J. Bentham, An Introduction to the Principles of Morals and Legislation 282 (Harrison ed. 1948)).

[163] See Yale First Amendment Note, supra note 7, at 467-68 (noting that the Court has done its balancing in first amendment context "at the margin"). In at least some due process cases, the Court appears to have examined the marginal costs and benefits associated with both the government's chosen means and alternative means which intrude less upon individual due process interests. See, e.g., Goss v. Lopez, 419 U.S. 565, 583 (1975) (evaluating costs and benefits of imposing trial-like procedures in high school temporary suspension cases).

Indeed, the comparison of the marginal costs and benefits attributable to alternative means has been described as at least implicitly controlling in every constitutional balancing issue. See Karst, supra note 53, at 84 (arguing that, whether explicitly or implicitly, all constitutional balancing issues should include judicial inquiry into marginal costs and benefits of alternative means as questions of legislative fact).

[164] As an example, assume that the benefits of law enforcement measure A are fairly assigned a value of 100, and that its costs are fairly assigned a value of 50. Assume further that

need for proportionality between the intrusiveness or severity of law enforcement measures and the benefits they produce.[165]

Notwithstanding the logic of integrating the least intrusive alternative requirement into any balancing test, the Supreme Court has not systematically incorporated it into fourth amendment balancing. The remainder of this Article examines in greater detail the rationale and means for doing so, as a significant step toward correcting the fourth amendment balancing test's present tilt against privacy and liberty rights.[166]

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additional law enforcement measure B would enhance the benefits resulting from measure A by a value of 1, but would exact an increased cost of 50. Finally, assume that additional measure C would likewise enhance the benefits resulting from measure A by a value of 1, but at an increased cost of 1. Applying the Supreme Court's version of the fourth amendment balancing test to the foregoing hypothetical example, additional measure B would be upheld, merely because its aggregate benefits (101) would outweigh its aggregate costs (100). The Court would not take into account the fact that measure B's marginal costs (50) outweigh its marginal benefits (1). Nor would the Court take account of the fact that the same marginal benefits attributable to measure B (1) could also be achieved through measure C at a lower marginal cost (1).

[165] See, e.g., Stone v. Powell, 428 U.S. 465, 490 (1976) (idea of proportionality is "essential to the concept of justice."). For other reasons why the balancing test's cost-benefit comparison tends unfairly to disfavor fourth amendment rights, aside from the methodological flaws in the Court's comparison process, see Note, supra note 6, at 1142-44 (courts tend "to hear the needs of law enforcement more clearly than the claims of privacy," because effectiveness of law enforcement is more susceptible to empirical proof than extent of privacy concerns, and these cases often pit experienced institutional litigants against less experienced individual defendants).

[166] This Article also endorses measures to counter other defects in the Court's fourth amendment balancing test, aside from the test's omission of the least intrusive alternative requirement. These other countermeasures, which follow from the above discussion, are relatively straightforward, and can be listed as simple "dos" and "don'ts" for courts executing fourth amendment balancing tests:

1. Don't consider whether the individual asserting a fourth amendment claim was found guilty of criminal conduct. See text accompanying notes 102-09 supra.

2. Do consider the collective impact of the type of search or seizure at issue upon all individuals who have been, or are likely to be, subjected to such searches or seizures, if the countervailing law enforcement interests are considered on a comparably collective scale. See text accompanying notes 110-14 supra.

3. Don't rely upon the subjective intrusiveness concept in evaluating the individual rights costs of a search or seizure. See text accompanying notes 115-20 supra.

4. Do consider the societal cost of any search or seizure in terms of reduced privacy, potentially reduced respect for the law, and damage to the community's collective security. See text accompanying notes 121-31, 153-55 supra.

5. Do confine consideration of the benefits allegedly resulting from a search or seizure to those following from only the particular incident involved, if the countervailing costs are considered on a comparably limited scale. See text accompanying notes 132-37 supra.

6. Don't assume, without analysis or evidence, that the challenged search or seizure technique will in fact effectively promote the law enforcement goal at issue, or that it will do so to a substantially greater degree than alternative law enforcement methods. See text accompanying notes 138-44 supra.

7. Don't attribute a significant positive weight to the alleged deterrent effect of searches

IV

REFORM OF THE FOURTH AMENDMENT BALANCING TEST BY INCLUDING THE LEAST INTRUSIVE ALTERNATIVE ANALYSIS

The least intrusive alternative principle has a long history of acceptance in a number of legal contexts. It has been invoked by both state and federal courts,[167] and it also is embodied in statutes[168] and regulations.[169] Since the concept's inception, it has been applied in a growing number of constitutional and nonconstitutional contexts. For example, within the past fifteen years, it has been extensively incorporated into various legal doctrines concerning civil commitment of the mentally ill.[170] This historical pattern suggests that the analysis could be incorporated relatively easily into yet another area of law: that pertaining to search and seizure.

The Supreme Court has never systematically applied the least intrusive alternative analysis to the fourth amendment. In fact, a number of

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and seizures absent evidence of such an effect. See text accompanying notes 145-52 supra.

8. Don't compare costs and benefits that have been described at disparate levels of abstraction. See text accompanying notes 156-59 supra.

167 For examples of federal court decisions applying this standard to constitutional provisions other than the fourth amendment, see notes 180-96 and accompanying text infra. For examples of such state court decisions, see City of Carmel-by-the-Sea v. Young, 2 Cal. 3d 259, 272, 466 P.2d 225, 232, 85 Cal. Rptr. 1, 10 (1970) (invalidating election disclosure law as unnecessary intrusion on privacy); One Eleven Wines & Liquors, Inc. v. Division of Alcoholic Beverages Control, 50 N.J. 329, 341, 235 A.2d 12, 19 (1967) (invalidating suspension of liquor license of bar which permitted homosexuals to congregate); Good Humor Corp. v. City of New York, 290 N.Y. 312, 319, 49 N.E.2d 153, 156 (1943) (invalidating prohibition on street peddlers); State ex rel. Superior Court v. Sperry, 79 Wash. 2d 69, 78, 483 P.2d 608, 613, cert. denied, 404 U.S. 939 (1971) (invalidating court order prohibiting newspaper publication of trial testimony that judge had ruled inadmissible).

168 See, e.g., 18 U.S.C. §§ 2518(1)(c), 2518(3)(c), 2518(5) (1982 & Supp. III 1985) ("minimization" requirement for wiretapping); 18 U.S.C. § 3142(a) (Supp. III 1985) (pretrial release in noncapital criminal cases); N.Y. Jud. Law § 352.2(2) (McKinney 1983 & Supp. 1988) (disposition of juvenile offenders).

Some statutory least intrusive alternative requirements reflect concerns of a constitutional dimension. For example, the wiretapping statute, originally enacted in 1968, Pub. L. No. 90-351, 82 Stat. 218, codified an earlier Supreme Court holding that the fourth amendment imposes a least intrusive alternative requirement upon searches and seizures conducted by wiretapping. See Berger v. New York, 388 U.S. 41, 57, 60, 63 (1967) (state wiretapping statute violates fourth amendment because it lacks adequate procedures to protect privacy; Court distinguished permissible instances of wiretapping in which "no greater invasion of privacy was permitted than was necessary under the circumstances").

169 See, e.g., Federal Correctional Institution Regulations, 28 C.F.R. § 552.10 (1987) (officials "shall employ the least intrusive method of search practicable, as indicated by the contraband and the method of suspected introduction").

170 See Chambers, Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives, 70 Mich. L. Rev. 1108, 1137-45, 1151-54 (1972); Hoffman & Foust, Least Restrictive Treatment of the Mentally Ill: A Doctrine in Search of Its Senses, 14 San Diego L. Rev. 1101, 1105-22 (1977).

the Court's fourth amendment decisions have expressly rejected this concept.[171] Nonetheless, in a few fourth amendment cases, the Court has indicated support for the least intrusive alternative analysis.[172] Numerous search and seizure decisions of lower federal courts and state supreme courts also have endorsed the idea.[173]

The ultimate justification for incorporating the least intrusive alternative test into the fourth amendment balancing analysis does not reside in the aggregation of precedents. Rather, it inheres in the logical force of the principles which underlie the test. However, as one survey of the least intrusive alternative requirement commented, its "pervasiveness" and "long-recognized utility" are significant, "for tradition and precedent are keystones of our constitutional law, in much the same way as they are to our common law."[174]

A. The Least Intrusive Alternative Requirement in Other Contexts

1. Constitutional Analogues

This Article does not essay a comprehensive survey of the least intrusive alternative doctrine in non-fourth amendment contexts because such surveys have been provided in other works.[175] Rather, the present

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171 See, e.g., Illinois v. Lafayette, 462 U.S. 640, 647 (1983) ("The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means."); Cady v. Dombrowski, 413 U.S. 433, 447 (1973) ("The fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not by itself render the search unreasonable.").

172 See, e.g., Florida v. Royer, 460 U.S. 491, 500 (1983) (warrantless investigative detentions must last no longer than is necessary and should employ "the least intrusive means reasonably available to verify or dispel the officer's suspicion"); Terry v. Ohio, 392 U.S. 1, 25-26 (1968) (brief warrantless detention or pat-down search based upon reasonable suspicion must be "strictly circumscribed by the exigencies which justify its initiation"); see notes 216-58 and accompanying text infra.

173 See, e.g., United States v. Hill, 458 F. Supp. 31, 36 n.17 (D.D.C. 1978) ("less drastic means" test from first amendment jurisprudence is applicable in fourth amendment context); State v. Kaluna, 555 Haw. 361, 369, 520 P.2d 51, 58-59 (1974) (Hawaiian constitution's prohibition against "unreasonable" searches and seizures mandates that "governmental intrusions . . . be no greater in intensity than absolutely necessary under the circumstances").

174 Note, supra note 161, at 1016.

175 See Chambers, supra note 170, at 1145-51; Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482, 1484-86 (1975); Hoffman & Foust, supra note 170, at 1105-22; Menninger, The Right to the Least Restrictive Sentence, 28 Kan. L. Rev. 553, 554-61 (1980); Morris, The Future of Imprisonment: Toward a Punitive Philosophy, 72 Mich. L. Rev. 1161, 1163-64 (1974); Radin, supra note 154, at 1005-06, 1045-56; Ratner, The Function of the Due Process Clause, 116 U. Pa. L. Rev. 1048, 1082-89 (1968); Robinson, Recent Antitrust Developments: 1975, 76 Colum. L. Rev. 191, 231-33 (1976); Rubin, Probation or Prison: Applying the Principle of the Least Restrictive Alternative, 21 Crime & Delinq. 331, 333-36 (1975); Singer, Sending Men to Prison: Constitutional Aspects of the Burden of Proof and the Doctrine of the Least Drastic Alternative as Applied to Sentencing Determinations, 58 Cornell L. Rev. 51, 56-64 (1972); Spece, supra note 13; Spece, supra note 75, at 1052-65; Spece, Preserving the Right to Treat-

discussion is confined to a brief overview for purposes of illuminating the concept's longstanding, widespread, and growing use, as well as the principles underlying it.

The tradition of the Supreme Court's seeking less drastic alternatives traces back "to at least 1821, when the Congressional contempt power was limited to 'the least possible power adequate to the end proposed.' "[176] Although the Supreme Court regularly has invoked the least intrusive alternative principle in certain types of constitutional cases, at least since the 1920s,[177] the doctrine began to have its most serious impact in the early 1960s, when it was applied to free speech and association cases.[178] Professor Spece has noted that by 1975, this concept had been used as a "part of the Court's analysis in virtually every field of constitutional adjudication."[179]

Least intrusive alternative analysis is currently an integral element of the Court's review of claims concerning the following constitutional rights or provisions: freedom of speech;[180] freedom of association;[181] freedom of the press;[182] free exercise of religion;[183] the substantive due process rights of privacy and personhood;[184] procedural due process rights;[185] the equal protection clause;[186] rights of political participa-

ment: A Critical Assessment and Constructive Development of Constitutional Right to Treatment Theories, 20 Ariz. L. Rev. 1, 33-46 (1978) [hereinafter Spece, Preserving the Right]; Spece, A Purposive Analysis of Constitutional Standards of Judicial Review and a Practical Assessment of the Constitutionality of Regulating Recombinant DNA Research, 51 S. Cal. L. Rev. 1281, 1340-45 (1978) [hereinafter Spece, Purposive Analysis]; Struve, The Less-Restrictive-Alternative Principle and Economic Due Process, 80 Harv. L. Rev. 1463, 1463-64 (1967); Wormuth & Mirkin, supra note 162; Zlotnick, First Do No Harm: Least Restrictive Alternative Analysis and the Right of Mental Patients to Refuse Treatment, 83 W. Va. L. Rev. 375, 384-405 (1981); Note, supra note 161, at 973-1016; Yale First Amendment Note, supra note 7, at 464.

176 See Note, supra note 161, at 1017 (quoting Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 231 (1821)).

177 See Brown, Due Process of Law, Police Power, and the Supreme Court, 40 Harv. L. Rev. 943, 954-55 (1927) (describing least intrusive alternative as common element in due process cases).

178 Note, supra note 161, at 972 & n.2; see Aptheker v. Secretary of State, 378 U.S. 500, 507, 512-14 (1964); NAACP v. Button, 371 U.S. 415, 431-38 (1963); Shelton v. Tucker, 364 U.S. 479, 488 (1960).

179 Spece, supra note 75, at 1053.

180 See Martin v. City of Struthers, 319 U.S. 141, 147 (1943).

181 See Shelton v. Tucker, 364 U.S. 479, 488 (1960).

182 See Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-07 (1982).

183 See Cantwell v. Connecticut, 310 U.S. 296, 306-07 (1940).

184 See Roe v. Wade, 410 U.S. 113, 155 (1973).

185 See Goldberg v. Kelly, 397 U.S. 254, 266 (1970).

186 See Fullilove v. Klutznick, 448 U.S. 448, 517-18 (1980) (Marshall, J., concurring).

tion;[187] the right to travel;[188] the privileges and immunities clause;[189] and the commerce clause.[190] Other areas of constitutional jurisprudence with respect to which the least intrusive alternative requirement has received some judicial or scholarly endorsement include: the rights of criminal defendants who are incarcerated pending trial;[191] the sentencing of defendants convicted of crimes,[192] including juvenile offenders;[193] the assessment of whether certain punishments, including the death penalty,[194] violate the eighth amendment's ban upon "cruel and unusual punishments";[195] and the selection of commitment and treatment alternatives for mentally ill or retarded people.[196]

The sheer number and variety of constitutional contexts in which the least intrusive alternative concept has been utilized or endorsed is a

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187 See Bullock v. Carter, 405 U.S. 134, 148-49 (1972).

188 See Aptheker v. Secretary of State, 378 U.S. 500, 507, 512-14 (1964) (grounded on first amendment concerns); Kent v. Dulles, 357 U.S. 116, 125 (1958) (based on due process considerations).

189 See Toomer v. Witsell, 334 U.S. 385, 398-99 (1948).

190 See Dean Milk Co. v. Madison, 340 U.S. 349, 354 (1951).

191 See Brenneman v. Madigan, 343 F. Supp. 128, 138-39 (N.D. Cal. 1972); Note, Constitutional Limitations on the Conditions of Pretrial Detention, 79 Yale L.J. 941 (1970).

192 See ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Sentencing Alternatives and Procedures, Standard 18-2.2 (1968) (endorsing general least restrictive alternative principle for sentencing); id., Commentary at 18-58 (principle that "individual's liberty should be restrained only to the minimum degree necessary to achieve the essential needs of society" has been codified "in virtually every recent model code," and "has received the support of most commentators, including the proponents of retributive models"); see also Morris, supra note 175, at 1163-64 (1974) ("Justification for this utilitarian and humanitarian principle follows from the belief that any punitive suffering beyond societal need is, presumably, what defines cruelty.").

193 See J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child 53 (1973) (arguing that even where juvenile has engaged in violence and law's primary goal is society's safety, least restrictive sanction should be imposed).

194 See Commonwealth v. O'Neal, 367 Mass. 440, 450, 327 N.E.2d 662, 668 (1975) (under state constitution, state must demonstrate that death penalty "is the least restrictive means toward furtherance of a compelling governmental end"). But see Gregg v. Georgia, 428 U.S. 153, 175 (1976) (in rejecting federal constitutional challenge to state death penalty statute, Court said it "could not require the legislature to select the least severe penalty possible").

195 See Radin, supra note 154.

196 See Covington v. Harris, 419 F.2d 617, 623 (D.C. Cir. 1969); Chambers, supra note 170; Hoffman & Foust, supra note 170.

The least intrusive alternative requirement has also been enshrined in the International Covenant on Civil and Political Rights, arts. 18(3), 19(3), 21-22 (opened for signature Dec. 16, 1966, 999 U.N.T.S. 171). These articles of the International Covenant state that freedom of religion, opinion, expression, peaceful assembly, and association may be subject only to such restrictions as are "necessary" to promote specified important goals. Id. International tribunals have interpreted this standard as embodying the "notion that the restriction, even if justified by compelling governmental interests, must be so framed as not to limit the right protected . . . more than is necessary." Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism 135 (Advisory Opinion OC-5/85 of Nov. 13, 1985, Inter-American Court of Human Rights).

clear indication that it could appropriately be employed in evaluating fourth amendment searches and seizures. Such a conclusion receives substantial support from the fact that, as discussed in the next section, the concept also has been used to protect nonconstitutional interests, which are less deserving of judicial protection than are fundamental rights.

2. *Common Law Analogues*

Because fourth amendment rights are fundamental to the American constitutional system, they are entitled to the heightened protection afforded by invigorated judicial scrutiny.[197] Ascertaining "reasonableness" in the context of fourth amendment rights should thus demand judicial scrutiny at least as intensive as that directed at ascertaining reasonableness in the context of nonconstitutionally based rights.[198] Accordingly, it is noteworthy that least intrusive alternative analysis has been utilized to evaluate the reasonableness of measures encroaching upon rights or interests that are not derived from the Constitution.

A significant example of a nonconstitutional reasonableness test that, in some cases, has been viewed as embodying a least intrusive alternative requirement is the "rule of reason" in antitrust law.[199] Indeed, it has been said that "[t]he term 'less restrictive alternative' is derived from antitrust law, where the availability of an alternative less restrictive of competition militates against acceptance of economic justifications for an anticompetitive practice."[200] The least intrusive alternative concept in

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[197] See notes 70-75 and accompanying text supra; text accompanying notes 378-80 infra. In addition to the fundamental nature of fourth amendment rights, several other factors favor judicial enforcement of these rights that is at least as strict as judicial enforcement of other constitutional rights. See text accompanying notes 76-95 supra.

[198] Some commentators have expressly cautioned that the concept of "reasonableness" for fourth amendment purposes cannot be equated with the concept of "reasonableness" for other legal purposes, such as evaluating negligence claims or subjecting a governmental measure to minimal scrutiny under the equal protection clause. Rather, they claim that the concept of "reasonableness" implies a stricter standard in the fourth amendment context. See Bacigal, supra note 6, at 772 (concept of "reasonable" degree of certainty necessary for fourth amendment's probable cause requirement "has little or nothing to do with the judgment of a reasonably prudent man"; fourth amendment requirements should not "vary according to the definition of a reasonable search embraced by a majority of the population" because "Bill of Rights is not subject to change based on the whims of society's current majority"); Dworkin, supra note 65, at 366 (for negligence purposes, reasonableness should be determined by jury according to circumstances of each case, but similar approach in fourth amendment context would eviscerate constitutional protection); Note, supra note 15, at 463 n.168 (fourth amendment "reasonableness" is distinguishable from "reasonableness" that "pervades the so-called lower tier standard of judicial review" under equal protection clause).

[199] See generally Standard Oil Co. v. United States, 221 U.S. 1 (1911) (broad language of § 1 of Sherman Act construed as prohibiting only those arrangements which are significantly and unreasonably anticompetitive in character or effect).

[200] Struve, supra note 175, at 1463 n.1 (citing White Motor Co. v. United States, 372 U.S.

antitrust law had its genesis in 1936, in *International Business Machines Corp. v. United States*.[201] The Supreme Court held that IBM's anticompetitive "tie-in" arrangement, which required lessees of its tabulating machines to use them only with IBM cards, violated the Clayton Act.[202] IBM asserted that this requirement was designed to protect customer goodwill by preventing the use of inferior quality cards, which could cause the machines to malfunction.[203] In rejecting this rationale, the Court said that IBM could have achieved its objective through alternative means which would not have had an anticompetitive effect, such as providing information about the advantages of using IBM cards.[204]

Another nonconstitutional reasonableness test which has been interpreted to include a least intrusive alternative requirement is the tort law negligence standard. Under Judge Learned Hand's classic formula, set forth in *United States v. Carroll Towing Co.*,[205] a defendant will be found to have acted negligently—i.e., unreasonably[206]—when the burden of preventing the occurrence of the injury is less than the loss suffered multiplied by the probability of occurrence.[207] The Restatement of Torts

253, 271-72 (1963) (Brennan, J., concurring)); Turner, The Validity of Tying Arrangements Under the Antitrust Laws, 72 Harv. L. Rev. 50, 59 (1958); see also Robinson, supra note 175, at 232 ("[T]he 'less restrictive alternative' formulation . . . is simply a verbal variant of the traditional rule of reason inquiry into whether a restraint of trade is reasonably necessary to accomplish a legitimate objective and therefore lawful despite its anticompetitive effect.").

201 298 U.S. 131 (1936).

202 Id. at 140.

203 Id. at 133-34.

204 See id. at 140 ("[W]e can perceive no tenable basis for an exception [to the Clayton Act's prohibition of monopolistic tying clauses] in favor of a condition . . . where it does not appear that the [protection of good will] can not be achieved by methods which do not tend to monopoly . . . ."). Significantly, the Court apparently imposed upon IBM the burden of disproving the effectiveness of the hypothesized alternative measures.

For other examples of decisions in which the Court considered the least intrusive alternative concept in the context of antitrust law reasonableness, see Northern Pac. R.R. v. United States, 356 U.S. 1, 6 n.5 (1958); International Salt Co. v. United States, 332 U.S. 392, 395-99 (1947); accord Mozart Co. v. Mercedes-Benz of N. Am., Inc., 833 F.2d 1342, 1349 (9th Cir. 1987) ("A tie-in does not violate the antitrust laws 'if implemented for a legitimate purpose and if no less restrictive alternative is available.' " (quoting Phonetele, Inc. v. American Tel. & Tel. Co., 664 F.2d 716, 739 (9th Cir. 1981), cert. denied, 459 U.S. 1145 (1983))); see also Broadcast Music, Inc. v. CBS, 441 U.S. 1, 33 (1979) (Stevens, J., dissenting) (concluding that blanket licensing scheme for use of copyrighted musical compositions violates rule of reason and noting that purposes allegedly served by blanket licenses could have been served by less restrictive licenses).

205 159 F.2d 169, 173 (2d Cir. 1947).

206 See W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on the Law of Torts § 30, at 164-65 (5th ed. 1984) (cause of action for negligence arises when duty owed to protect others from "unreasonable risks" is breached, thus causing actual harm).

207 *Carroll Towing*, 159 F.2d at 173. Judge Hand enunciated a variation of his *Carroll Towing* formula, which expressly included the least intrusive alternative requirement, for reviewing alleged free speech violations; this formula was subsequently adopted by the Supreme Court. United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950) (interpreting "clear and

adopts essentially the same calculus, stating that an "act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act . . . ."[208] The concept of utility, which is an essential element of the *Carroll Towing*-Restatement formula, comprises three factors:

> (a) [T]he social value which the law attaches to the interest which is to be advanced or protected by the conduct;
> (b) the extent of the chance that this interest will be advanced or protected by the particular course of conduct;
> (c) *the extent of the chance that such interest can be adequately advanced or protected by another and less dangerous course of conduct.*[209]

The third factor essentially embodies the least intrusive alternative concept. Moreover, the drafters' comments indicate that this provision constitutes a relatively strict version of the concept. According to the comments, the defendant is absolutely required to pursue alternative conduct unless it would be "*clearly*" likely to advance his interest less adequately.[210] Even then, the defendant will still be required to pursue the alternative conduct if the additional risk involved in the challenged conduct outweighs the additional advancement of his interests.[211]

Under the Restatement's proposed least intrusive alternative criterion, the property and other nonconstitutional interests that negligence law shields from intrusions by private parties would receive more judicial protection than the privacy and liberty rights that the fourth amendment shields from intrusions by governmental agents. This standard dictates that private parties be held liable for invading someone else's privacy or liberty if the ends they pursued could have been advanced in a less invasive manner. In contrast, under current Supreme Court doctrine, a police officer's invasion of privacy or liberty would not be deemed to violate the fourth amendment on this ground. These outcomes invert the relative degrees of protection that should be afforded to fourth amendment rights and to the interests protected by common law negligence principles, respectively.[212]

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present danger" test as posing issue "whether the gravity of the 'evil,' discounted by its improbability, justifies such an invasion of free speech as is necessary to avoid the danger"), aff'd, 341 U.S. 494 (1951).

208 Restatement (Second) of Torts § 291 (1965).

209 Id. § 292 (emphasis added).

210 See id. § 292, comment on clause (c) (1965) (emphasis added). The comment further states that the duty to pursue a less dangerous alternative may be excused if the defendant was "acting in an emergency which *required* him to make an immediate decision." Id. (emphasis added).

211 Id.

212 It could perhaps be argued that a heavier burden of proof should be borne by private defendants in negligence cases than by police officers in fourth amendment cases, because the latter act to advance the public good, whereas the former act to advance their own private

B. The Least Intrusive Alternative Requirement in the Search and Seizure Context

1. Supreme Court Opinions

Neither a majority nor a plurality opinion of the Supreme Court has ever addressed the general applicability of least intrusive alternative analysis to fourth amendment issues.[213] Furthermore, no opinion of the Court has discussed in any detail the applicability or non-applicability of this analysis to specific fourth amendment issues. However, in some two dozen fourth amendment cases decided over the past two decades, at least one of the opinions contains language alluding, either approvingly or disapprovingly, to the least intrusive alternative concept.[214]

a. Cases supporting the least intrusive alternative analysis. The Court seems most willing to engraft a least intrusive alternative requirement upon its fourth amendment reasonableness test in circumstances in which reasonableness may well be lacking. This lack of reasonableness occurs either because the traditional safeguard of probable cause is absent, or because the search or seizure constitutes an especially severe invasion of fourth amendment rights. However, the Court has not consistently enforced a least intrusive alternative requirement, even in these two categories of search and seizure cases.[215]

The two areas in which the Court has sanctioned searches or seizures based upon less than probable cause are investigative detentions and administrative searches. *Terry v. Ohio*,[216] the Court's first case to authorize an "investigative detention," was also the first fourth amendment case which can be read to imply support for a least intrusive alternative analysis. In upholding a brief detention and pat-down search, the

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interests. This argument should fail, however, for two reasons. First, it cannot be presumed that every police officer, in carrying out every action, has only the public interest in mind, let alone the same conception of the public interest as that reflected in the fourth amendment. See text accompanying notes 83-86 supra. Second, the rights invaded in the fourth amendment situation are of greater stature than the interests invaded in the negligence situation. This distinction entitles the former to more judicial protection. See notes 70-75 and accompanying text supra; text accompanying notes 378-91 infra.

213 But see Florida v. Royer, 460 U.S. 491, 528 (1983) (Rehnquist, J., dissenting) (arguing that plurality incorrectly imported first amendment "least intrusive means" analysis into fourth amendment context).

214 It is difficult to pinpoint precisely the number of cases which refer to the doctrine because the pertinent opinions often allude to the least intrusive alternative concept indirectly rather than discussing it expressly.

215 See text accompanying notes 264-92 infra (cases involving searches or seizures not based on probable cause, where Court did not enforce least intrusive alternative requirement); see also United States v. Montoya de Hernandez, 473 U.S. 531 (1985) (case involving especially intrusive search in which Court did not enforce least intrusive alternative requirement).

216 392 U.S. 1, 27 (1968).

Terry Court stressed that the officer had "confined his search strictly to what was minimally necessary to learn whether the [defendants] were armed and to disarm them once he discovered the weapons."[217] Furthermore, the Court emphasized that any seizure based only on reasonable suspicion must be "strictly circumscribed by the exigencies which justify its initiation."[218]

Some Supreme Court Justices,[219] lower federal courts,[220] and fourth amendment scholars[221] have read *Terry* as imposing a least intrusive alternative requirement upon all investigative detentions not justified under the traditional probable cause standard.[222] In addition, the Supreme Court explicitly enunciated a least intrusive alternative requirement in one subsequent investigative detention case.

The Court held in *Florida v. Royer*[223] that the fourth amendment was violated by the detention of a suspected drug courier and the search of his luggage at an airport, because the government had not proven its compliance with the least intrusive alternative requirement.[224] The defendant, who fit the "drug courier profile," had been approached by two detectives.[225] At the detectives' request, but without orally consenting, the defendant produced his airline ticket and driver's license.[226] Without returning these documents to the defendant, the detectives asked him to accompany them to a small room in the airport, which he did.[227] Without the defendant's consent, one of the detectives retrieved his luggage from the airline and brought it to the room.[228] When the detectives asked the defendant if he would consent to a search of his luggage, he

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217 Id. at 30.

218 Id. at 25-26.

219 See Florida v. Royer, 460 U.S. 491, 511 n.* (Brennan, J., concurring in the judgment) ("[A] lawful [*Terry* investigative] stop must be so strictly limited that it is difficult to conceive of a less intrusive means that would be effective to accomplish the purpose of the stop.").

220 See United States v. Vasquez, 638 F.2d 507, 520 (2d Cir. 1980) ("In general, if probable cause is lacking, [a fourth amendment] intrusion must be no greater than the circumstances require.").

221 See LaFave, supra note 3, at 1744 (describing "the tendency of the Court to ignore the *Terry* teaching that searches and seizures allowed without probable cause under this [balancing] test must be 'limited to that which is necessary' " as "distressing" (quoting Terry v. Ohio, 392 U.S. 1, 26 (1968))).

222 Such a rule promotes fourth amendment values by ensuring that searches or seizures which fall short of the traditional probable cause standard for reasonableness in their inception would at least comply with a relatively strict standard for reasonableness in their execution. See note 20 supra.

223 460 U.S. 491 (1983).

224 Id. at 507-08.

225 Id. at 493-94.

226 Id. at 494.

227 Id.

228 Id.

produced a key and unlocked a suitcase in which drugs were found.[229] The Supreme Court concluded that the foregoing facts failed to comply with the least intrusive alternative standard in three respects: (1) the detectives should have returned the defendant's ticket and driver's license and informed him that he was free to go, thus making the encounter a consensual one; (2) there was no need to remove the defendant from the airport concourse to the "interrogation room"; and (3) the detectives could have examined the contents of the defendant's luggage more expeditiously through the use of trained dogs.[230] Throughout its discussion, the Court stressed that the government bore the burden of disproving the feasibility of these hypothesized less intrusive means.[231] The Court has not overruled *Royer*, and Justices Brennan and Marshall continue to cite it for the proposition that all detentions not based upon probable cause must be carried out in the least intrusive manner reasonably available.[232]

Aside from *Royer*, the Supreme Court has issued only two other majority or plurality opinions in fourth amendment cases which expressly incorporated least intrusive alternative analysis in evaluating a search or seizure:[233] *Delaware v. Prouse*[234] and *United States v. Brignoni-*

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229 Id.

230 Id. at 500-06.

231 The Court stated that:

> [A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time. It is the State's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure.

Id. at 500 (citation omitted).

232 See United States v. Sharpe, 470 U.S. 675, 704 (1985) (Brennan, J., dissenting); United States v. Villamonte-Marquez, 462 U.S. 579, 609 (1983) (Brennan & Marshall, JJ., dissenting).

Although it did not expressly cite *Royer*'s least intrusive alternative holding, one subsequent, factually analogous case did reflect a similar rationale. United States v. Place, 462 U.S. 696, 709 (1983). In *Place*, the Court held that drug enforcement agents detaining defendant's luggage at an airport for 90 minutes in order to subject it to a "sniff test" by a narcotics detection dog, based upon reasonable suspicion, exceeded the bounds of a permissible investigative detention. Id. One factor supporting the holding was that the agents could have made the dog available immediately upon defendant's arrival at the airport "and thereby could have minimized the intrusion on [defendant's] Fourth Amendment interests." Id.

233 A number of concurring and dissenting opinions in fourth amendment cases have supported a "reasonableness" inquiry into less intrusive alternatives. See, e.g., Colorado v. Bertine, 479 U.S. 367, 378-80 (1987) (Marshall, J., dissenting) (although majority upheld warrantless, suspicionless search of contents of backpack in defendant's van as part of inventory following defendant's arrest for driving under influence of alcohol, dissent said police could have promoted their objectives through less intrusive means of parking and locking van near place where defendant was stopped); United States v. Montoya de Hernandez, 473 U.S. 531, 565 (1985) (Brennan, J., dissenting) (although Court upheld 27-hour warrantless detention at international border of woman suspected of being "balloon swallower" of drugs, dissent said government's interest in preventing drugs from crossing United States borders would have been vindicated by less intrusive alternative of giving suspect option of leaving country or

Ponce.[235] Like *Royer*, these cases invalidated investigative detentions. Also parallel to *Royer*, these cases have not been expressly repudiated, but appear to have been undermined by subsequent Supreme Court decisions.[236]

In *Prouse*, the Court held that the fourth amendment was violated by a police officer's random detention of a car and driver, without any individualized suspicion, to check the driver's license and the vehicle's registration.[237] The Court framed the central issue as "whether in the service of [the State's] important ends [(enforcing vehicle safety regulations)] the discretionary spot check is a sufficiently productive mechanism to justify the intrusion upon Fourth Amendment interests which such stops entail."[238] The Court's negative response to this question was premised upon "the alternative mechanisms available, both those in use and those that might be adopted," which left the Court "unconvinced that the incremental contribution to highway safety of the random spot check justifies the practice under the Fourth Amendment."[239]

Without citing evidence, the Court asserted that their small marginal contribution to the state's interest in enforcing vehicle safety regulations could not justify using random spot checks rather than the less intrusive alternative of detaining motorists based upon probable cause.[240] It imposed upon the government the relatively stringent burden of disproving these assumptions through "some empirical data."[241] Similarly, the Court expressed the view that the traditional law enforcement method of detaining motorists based upon probable cause would deter

submitting to rectal exam or X-ray); Bell v. Wolfish, 441 U.S. 520, 594-95 (1979) (Stevens, J., dissenting) (rule that all pretrial detainees must undergo visual body cavity inspection after all contact visits should be found unconstitutional in light of less intrusive alternatives for detecting contraband, including use of metal detectors and non-cavity strip searches).

In addition, a number of majority and plurality opinions have implicitly or indirectly supported the incorporation of the least intrusive alternative standard into fourth amendment analysis. See, e.g., Arizona v. Hicks, 480 U.S. 321, 327 (1987) (noting previous cases upholding property seizures on less than probable cause where search "is minimally intrusive and operational necessities render it the only practicable means of detecting certain types of crime"); Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 456-57 (1977) (in upholding statute requiring Administrator of General Services to take possession of former President Nixon's papers and tape recordings, Court noted, "The processing contemplated . . . represents the least intrusive manner in which to provide an adequate level of promotion of government interests of overriding importance.").

234 440 U.S. 648 (1979).

235 422 U.S. 873 (1975).

236 See text accompanying notes 273-92 infra.

237 *Prouse*, 440 U.S. at 663.

238 Id. at 659.

239 Id.

240 Id. at 659-61.

241 Id. at 659.

vehicle safety violations at least as effectively as random spot checks.[242] It again imposed upon the state the burden of disproving this assumption by "something more than mere assertion to the contrary."[243]

In *Brignoni-Ponce*, the Court held that border patrol officers on roving patrol could not stop vehicles unless they had reasonable suspicion that the vehicles contained undocumented aliens.[244] The Court invoked the least intrusive alternative concept in rejecting the government's argument that roving border patrol searches and seizures should be permitted without any individualized suspicion.[245] Just as it had done in *Prouse*, the Court asserted that the relevant law enforcement goals could be pursued through the more traditional technique of searches and seizures based upon individualized suspicion at least as effectively as through the more intrusive[246] technique of random stops.[247] Also as in *Prouse*, the Court in *Brignoni-Ponce* required the government to disprove the effectiveness of searches and seizures based on particularized suspicion.[248]

The second type of search or seizure that the Court has authorized on less than probable cause, pursuant to a balancing analysis, is an "administrative inspection."[249] The Court's decisions upholding administrative inspections, like its decisions upholding investigative detentions, endorse the least intrusive alternative analysis.[250] In *Camara v. Municipal Court*,[251] its first administrative inspection case, the Court approved routine building inspections to enforce health and safety codes, even

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242 Id. at 660.

243 Id.

244 United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975).

245 Id. at 883 & n.8.

246 Any particular individuals who are stopped by a border patrol agent would probably experience the same degree of "objective" or physical intrusiveness, and might experience the same degree of "subjective" or psychological intrusiveness, regardless of whether they were stopped on a selective or indiscriminate basis, see notes 115-16 and accompanying text supra. However, viewed collectively, the total governmental intrusion into individual privacy and freedom under a random inspection system, where there is no individualized suspicion for stopping anyone, necessarily exceeds the total governmental intrusion into individual privacy and freedom under a system where all search victims have been specifically targeted based on some objective indicia that they have committed crimes.

247 *Brignoni-Ponce*, 422 U.S. at 884-85.

248 Id. at 883. The force of the *Brignoni-Ponce* holding and rationale concerning least intrusive alternatives was weakened by the Court's decision one year later in United States v. Martinez-Fuerte, 428 U.S. 543 (1976). See text accompanying notes 264-72 infra.

249 See note 22 supra.

250 Significantly, the two Supreme Court decisions that reintroduced balancing into fourth amendment jurisprudence regarding searches and seizures, respectively, Camara v. Municipal Court, 387 U.S. 523 (1967), and Terry v. Ohio, 392 U.S. 1 (1968), each endorsed the least intrusive alternative test as an element of fourth amendment balancing. Thus, at a time when the Court still viewed balancing as a novel departure from the traditional probable cause requirement, it employed a form of balancing that more vigorously protected fourth amendment rights than does the present version.

251 387 U.S. 523 (1967).

without probable cause to suspect that any particular building contained violations.[252] The Court said that the absence of alternative code enforcement methods constituted a principal justification for this exception to the probable cause requirement.[253]

The theme of "necessity" continues to echo through the Court's post-*Camara* decisions which have upheld other administrative inspections lacking in probable cause.[254] In these cases, the Court regularly cites the absence of less intrusive alternatives as a factor leading it to uphold challenged inspection schemes.[255] However, the least intrusive alternative concept has not produced any holdings that administrative searches violated the fourth amendment.

The Court also has incorporated a least intrusive alternative analysis in cases involving especially intrusive invasions of fourth amendment rights. There are two cases in this category: *Winston v. Lee*, which enjoined a state's proposed surgical extraction of a bullet from the defendant's chest;[256] and *Tennessee v. Garner*, which prohibited the police from shooting at a fleeing felony suspect in order to arrest him.[257]

The Supreme Court did not articulate its rationale for employing a least intrusive alternative analysis in the foregoing search and seizure

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252 Id. at 538-39.

253 Id. at 537 (Court determined that these inspections constituted "the only effective way" to enforce health and safety codes at issue).

254 See Michigan v. Clifford, 464 U.S. 287, 294 (1984) (issuance of warrant to conduct administrative search to determine cause of fire requires showing that scope of proposed search "will not intrude unnecessarily on the fire victims' privacy"); see also id. at 295 ("If . . . the administrative search is justified by the immediate need to ensure against rekindling, the scope of the search may be no broader than reasonably necessary to achieve its end.").

Similarly, in New Jersey v. T.L.O., 469 U.S. 325 (1985), which was the first decision to uphold a full-fledged search without probable cause, the Court also suggested that the search should be carried out in accordance with the least intrusive alternative standard. See id. at 342 (students' interests should "be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools").

255 See *Clifford*, 464 U.S. at 293 (noting that warrantless administrative searches of fire sites may be justified because "[t]he aftermath of a fire often presents exigencies that will not tolerate the delay necessary to obtain a warrant or secure the owner's consent"); Donovan v. Dewey, 452 U.S. 594, 603 (1981) (in upholding warrantless inspection provision of Federal Mine Safety and Health Act of 1977, Court noted "notorious ease with which many safety or health hazards may be concealed if advance warning of inspection is obtained," and hence concluded that "unannounced, even frequent, inspections are essential"); United States v. Biswell, 406 U.S. 311, 316 (1972) (in upholding federal agents' warrantless inspection of licensed gun dealer's storeroom, Court explained, "if inspection is to be effective and serve as a credible deterrent, unannounced, even frequent inspections are essential.").

256 470 U.S. 753, 765-66 (1985).

257 471 U.S. 1, 11-12 (1985). The least intrusive alternative concept was implicit not only in the narrow standard which the Court crafted for the permissible use of deadly force, but also in the rationale which supported that rule. See id. at 10 ("We are not convinced that the use of deadly force is a sufficiently productive means of accomplishing [governmental goals] to justify the killing of nonviolent suspects.").

cases. However, the least intrusive alternative requirement is justified by a coherent rationale that warrants its enforcement in fourth amendment cases besides those in which the Court has approved it, that is, cases involving investigative detentions, administrative inspections, and particularly severe intrusions.[258] Conversely, the rationales asserted in the Court's fourth amendment decisions that have rejected the least intrusive alternative requirement are not persuasive.

b. Cases disfavoring the least intrusive alternative analysis. Ten Supreme Court decisions have declined to employ a least intrusive alternative analysis in a fourth amendment setting. In addition to four investigative detention decisions which did not adopt *Royer*'s least intrusive alternative standard,[259] six majority opinions have expressly disavowed[260] the least intrusive alternative analysis,[261] albeit with little discussion. These six cases can be grouped into two categories: two involved jailhouse searches of pretrial detainees[262] and four involved warrantless searches of the contents of a car or container.[263]

The Court's first investigative detention case to reject the least intrusive alternative concept was *United States v. Martinez-Fuerte*, which upheld the United States Border Patrol's routine detention and inspection of vehicles and passengers at permanent checkpoints without warrants or individualized suspicion. The Supreme Court rejected the holding by the Court of Appeals for the Ninth Circuit that less intrusive alternative measures could promote the checkpoints' purpose of curbing illegal entry into the United States.[264] Of the various alternative measures which the court of appeals proposed, the Supreme Court specifically addressed only

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[258] See text accompanying notes 368-93 infra.

[259] United States v. Montoya de Hernandez, 473 U.S. 531 (1985); United States v. Sharpe, 470 U.S. 675 (1985); United States v. Villamonte-Marquez, 462 U.S. 579 (1983); United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

[260] In other search and seizure cases, the Court could be said to have rejected the least intrusive alternative principle implicitly or indirectly. See, e.g., South Dakota v. Opperman, 428 U.S. 364 (1976) (upholding search of glove compartment of abandoned car impounded by police, Court did not consider less intrusive means for accomplishing search's purpose).

[261] Colorado v. Bertine, 479 U.S. 367, 374 (1987); Block v. Rutherford, 468 U.S. 579, 587 (1984); Michigan v. Long, 463 U.S. 1032, 1052 n.16 (1983); Illinois v. Lafayette, 264 U.S. 640, 647 (1983); Bell v. Wolfish, 441 U.S. 520, 559 n.40 (1979); Cady v. Dombrowski, 413 U.S. 433, 447 (1973). These cases all involved searches and seizures directed at individuals suspected of committing crimes. Cf. Zurcher v. Stanford Daily, 436 U.S. 547 (1978) (with respect to search and seizure of party not suspected of having committed crime, where probable cause and warrant requirements had been satisfied, Court rejected contention that least intrusive alternative requirement should be *additional* prerequisite for constitutionality).

[262] Block v. Rutherford, 468 U.S. 576 (1984); Bell v. Wolfish, 441 U.S. 520 (1979).

[263] Colorado v. Bertine, 479 U.S. 367 (1987); Michigan v. Long, 463 U.S. 1032 (1983); Illinois v. Lafayette, 462 U.S. 640 (1983); Cady v. Dombrowski, 413 U.S. 433 (1973).

[264] *Martinez-Fuerte*, 428 U.S. at 556 n.12, rev'g 514 F.2d 308, 318-19 (9th Cir. 1975).

one: legislation prohibiting the knowing employment of undocumented aliens. The Court dismissed this proposal, observing that "[t]he logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers."[265] It continued, "[T]he defendants do not suggest persuasively that the particular law enforcement needs served by the checkpoints could be met without reliance on routine checkpoint stops."[266]

The Court's rationale for rejecting the least intrusive alternative requirement in *Martinez-Fuerte* presents several problems. First, the Court ignored all less intrusive alternative measures other than the one which it deemed "elaborate."[267] In contrast, the most obvious alternative measure—making stops based on individualized suspicion—is simple. It is also one of the "traditional law enforcement methods" which the Court consistently has deemed to be particularly appropriate alternatives in the context of the first amendment least intrusive alternative doctrine.[268] In fact, the year before it decided *Martinez-Fuerte*, the Court had expressly endorsed the efficacy of border patrol stops based on individualized suspicion in *United States v. Brignoni-Ponce*.[269]

The *Martinez-Fuerte* analysis is also troubling because of the heavy burden of proof it imposes upon parties challenging searches and seizures. The Court required the defendants to demonstrate "persuasively" that the "particular" law enforcement goals served by the border patrol checkpoint could be met through alternative measures.[270] By defining the relevant law enforcement goals as narrowly as those promoted by the specific challenged measure, the Court makes it difficult for another measure to qualify. For example, it could plausibly be argued that

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265 Id.

266 Id.

267 Id. In any event, it is not clear that the alternative measure which the Court discussed was in fact so "elaborate" that the government should not have been required at least to make some showing that it had considered this measure. See United States v. Barbera, 514 F.2d 294, 302-03 & 302 n.21 (2d Cir. 1975) (a pre-*Martinez-Fuerte* decision invalidating border patrol's interrogation, without individualized suspicion, of bus passengers near international border, in light of potential alternatives including legislation criminalizing employment of illegal aliens).

268 See text accompanying notes 423-27 infra. Consistent with the implementation of the least intrusive alternative doctrine in other constitutional contexts, this Article does not propose that the government be forced to consider every possible alternative measure, no matter how "elaborate" or otherwise burdensome. Rather, it recommends only that the government be required to utilize reasonably available and effective alternatives. See note 450 and accompanying text infra.

269 422 U.S. 873, 883 (1975). Statistics recited in *Martinez-Fuerte* revealed that only a small fraction of all vehicles detained at the checkpoints proved to be carrying illegal immigrants. United States v. Martinez-Fuerte, 514 F.2d 308, 313-14 (9th Cir. 1975), rev'd, 428 U.S. 543 (1976); see text accompanying note 141 supra. These statistics demonstrated not only the checkpoint's high degree of intrusiveness, but also its low degree of effectiveness.

270 *Martinez-Fuerte*, 428 U.S. at 556 n.12.

the "particular" purpose served by border patrol checkpoint stops is to detain every car passing through the checkpoint's vicinity; obviously, no other measure could serve this "particular" purpose. By imposing such a heavy burden of proof upon those challenging searches and seizures, *Martinez-Fuerte* is inconsistent with *Delaware v. Prouse*[271] and *Brignoni-Ponce*, which appropriately had imposed upon the government the burden of showing that no less intrusive alternatives were available.[272]

The Court's second investigative detention decision disfavoring the least intrusive alternative requirement was *United States v. Villamonte-Marquez*, which upheld the Coast Guard's warrantless, suspicionless boarding of a ship to inspect documents, as authorized by a congressional statute.[273] The majority opinion rejected the dissenters' position that the governmental interest in enforcing documentation requirements could be pursued through less intrusive alternative measures, such as providing boats with visible proof of registration similar to automobile licenses.[274] In distinguishing the random vessel inspections in *Villamonte-Marquez* from the random automobile inspection which it had struck down in *Prouse*, the Court noted that boats do not have any counterpart to license plates.[275] Yet, as Justice Brennan commented: "It is unseemly at best for the Government to refrain from implementing a simple, effective, and unintrusive law enforcement device, and then to argue to this Court that the absence of such a device justifies an unprecedented invasion of constitutionally guaranteed liberties."[276] The Court's only explanation for its rejection of the least intrusive alternative approach in *Villamonte-Marquez* was its observation that "[s]o long as the method chosen by Congress is constitutional, then it matters not that alternative methods exist."[277] This observation, however, begs the critical question whether Congress's chosen method can indeed be constitutional in the face of reasonably effective, less intrusive alternative measures for promoting congressional goals.

The Court's two remaining investigative detention cases repudiating the least intrusive alternative analysis, *United States v. Sharpe*[278] and *United States v. Montoya de Hernandez*,[279] involved unusually prolonged investigative detentions not based on probable cause. In *Sharpe*, Drug Enforcement Administration agents detained the defendant on a high-

271 440 U.S. 648 (1979).
272 See text accompanying notes 237-48 supra.
273 462 U.S. 579, 593 (1983).
274 Id. at 591 n.5.
275 Id. at 589-90.
276 Id. at 609 (Brennan, J., dissenting).
277 Id. at 591 n.5.
278 470 U.S. 675 (1985).
279 473 U.S. 531 (1985).

way for twenty minutes.[280] In *Montoya de Hernandez*, customs officials detained a woman who had arrived at the Los Angeles airport from Colombia and was suspected of being an alimentary canal drug smuggler.[281] The subject was detained for approximately twenty-seven hours, during sixteen of which she was held incommunicado.[282] She was confined to a room and told that she would not be allowed to leave until she agreed to an X-ray or her bowels moved.[283] Throughout her detention, she did not eat, drink, urinate, or defecate.[284]

The lower courts had held both of these protracted investigative detentions unconstitutional,[285] and dissenting Supreme Court Justices urged affirmance, relying on the least intrusive alternative concept.[286] Yet, the Supreme Court reversed the lower court rulings in both cases, summarily dismissing the least intrusive alternative argument and basing its decisions upon the rationale that "[a] court should not indulge in unrealistic second-guessing. A creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished."[287] While this statement may well be correct, it is not germane to the issue posed by the least intrusive alternative test. The issue is not whether some judge can devise an imaginative alternative means which is less intrusive than the challenged measure, but rather, whether the state can show that the challenged measure was the least intrusive that was reasonably available and substantially effective for promoting its goals.[288] Moreover, as Justice Brennan explained, "There is nothing 'unrealistic' about requiring police officers to pursue the 'least intrusive means reasonably available' when detaining citizens on less than probable cause . . . ."[289]

The intrusive searches and seizures that occurred in *Sharpe* and

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280 *Sharpe*, 470 U.S. at 677, 679.

281 *Montoya de Hernandez*, 473 U.S. at 532-33.

282 Id. at 534-35.

283 Id.

284 Id.

285 United States v. Montoya de Hernandez, 731 F.2d 1369, 1373 (9th Cir. 1984), rev'd, 473 U.S. 531 (1985); Sharpe v. United States, 712 F.2d 65, 65 (4th Cir. 1983), rev'd, 470 U.S. 675 (1985).

286 *Montoya de Hernandez*, 473 U.S. at 564-65 (Brennan & Marshall, JJ., dissenting); *Sharpe*, 470 U.S. at 716-21 (Brennan, J., dissenting).

287 *Sharpe*, 470 U.S. at 686-87 (citation omitted); accord *Montoya de Hernandez*, 473 U.S. at 542.

288 See note 450 and accompanying text infra. Additionally, the proposed procedures for implementing this standard entail some judicial deference to the government's evaluation of alternatives, particularly if the search or seizure is conducted pursuant to a fixed rule. See text accompanying notes 452, 468 infra.

289 *Sharpe*, 470 U.S. at 717 n.20 (Brennan, J., dissenting) (quoting Florida v. Royer, 460 U.S. 491, 500 (1983)).

Montoya de Hernandez could have been avoided, and the state's goals substantially advanced, pursuant to straightforward rules embodying the least intrusive alternative principle. In *Montoya de Hernandez*, the government could fully have served its goal of preventing the suspected drug smuggler from entering the country, without forcing her to undergo the prolonged, humiliating, warrantless detention she endured, through the alternative means, suggested by Justice Brennan, of giving her a choice between returning directly to her home country or entering the United States on the condition of submitting to the intrusive search.[290] In *Sharpe*, the police could have followed Justice Marshall's suggestion of adopting a maximum time limit for detentions without probable cause.[291] By definition, such a rule would not permit the police to pursue their law enforcement goals as freely as they could if allowed to detain suspects without probable cause for unlimited time periods. However, such unlimited detentions are foreclosed by the fourth amendment.[292]

The two pretrial detention cases which rejected the least intrusive alternative requirement are *Bell v. Wolfish*[293] and *Block v. Rutherford*.[294] The opinions in both cases emphasized the special security concerns implicated by searches or seizures in correctional institutions.[295] Consequently, their rationales may apply with only limited force to other searches or seizures.

Bell held that the fourth amendment was not violated by the government's policy of conducting strip searches and visual body cavity inspections of inmates after every contact visit with a person from outside the institution.[296] In support of its contrary ruling, the district court had noted that metal detectors and similar devices employed for airline security constituted a less intrusive and equally effective alternative way to search for weapons and other dangerous instruments.[297] The Supreme

290 See *Montoya de Hernandez*, 473 U.S. at 564 (Brennan, J., dissenting).

291 See *Sharpe*, 470 U.S. at 692-93 (Marshall, J., concurring in the judgment).

292 See id. at 686 ("[O]bviously, if an investigative stop continues indefinitely, at some point it can no longer be justified as an investigative stop."); see also United States v. Martinez-Fuerte, 428 U.S. 543, 575 (1976) (Brennan, J., dissenting)("There is no principle in the jurisprudence of fundamental rights which permits constitutional limitations to be dispensed with merely because they cannot be conveniently satisfied.").

293 441 U.S. 520 (1979).

294 468 U.S. 576 (1984).

295 See *Block*, 468 U.S. at 591; *Bell*, 441 U.S. at 559.

296 *Bell*, 441 U.S. at 558.

297 United States ex rel. Wolfish v. Levi, 439 F. Supp. 114, 147-48 (S.D.N.Y. 1977), aff'd in part and rev'd in part, 573 F.2d 118 (2d Cir. 1978), rev'd sub. nom. Bell v. Wolfish, 441 U.S. 520 (1979). While the lower court acknowledged that narcotics secreted in body cavities could not be detected through these devices, it noted that narcotics thus hidden could also evade detection through the challenged visual cavity searches. Id. at 147. Therefore, with respect to narcotics, as well as weapons, the court concluded that the more intrusive search technique was no more effective than the less intrusive one. Id.

Court questioned whether the least intrusive alternative requirement was "relevant to the determination of the reasonableness of the particular search method at issue . . . ."[298] Nevertheless, assuming arguendo that the least intrusive alternative requirement was applicable, the Court in any event concluded that the proposed metal detector alternative was insufficiently effective.[299] As the dissenting Justices pointed out, however, substantial evidence indicated that metal detectors could be even more effective than the challenged body cavity inspections for locating the most dangerous contraband.[300] The majority in effect imposed an inappropriately heavy burden of proof upon the detainees who challenged the intrusive searches, one which is inconsistent both with constitutional theory in general,[301] and with the Court's fourth amendment decisions in *Prouse* and *Brignoni-Ponce* in particular.[302] In *Block*, the Court simply extended *Bell*'s ruling to searches of pretrial detainees' cells, announcing its "reaffirm[ation] that administrative officials are not obliged to adopt the least intrusive means to meet their legitimate objectives."[303]

The four remaining search and seizure cases in which the Supreme Court declined to adopt the least intrusive alternative requirement all involved warrantless searches of the contents of a car or container. In *Cady v. Dombrowski*[304] the Court upheld a post-accident, warrantless search of an impounded car's interior and locked trunk, where the police had reason to believe the car contained a revolver.[305] The Court rejected the argument that this search and seizure should be held unconstitutional because the asserted public safety concern, preventing someone from gaining access to the revolver, could have been promoted through less intrusive means, such as posting a police guard.[306] The Court rejected this proposed alternative measure on the ground that "what might be normal police procedure in [a metropolitan] area may be neither normal

298 *Bell*, 441 U.S. at 559 n.40. The Court quoted its assertion in *Martinez-Fuerte* that "[t]he logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers." Id. (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 556-57 n.12 (1976)). For an examination of some problems with this asserted basis for rejecting the least intrusive alternative principle, see text accompanying notes 267-69 supra.

299 *Bell*, 441 U.S. at 559 n.40.

300 Id. at 594-95 (Stevens, J., dissenting).

301 See note 75 supra; text accompanying notes 378-80 infra.

302 See text accompanying notes 237-48 supra.

303 *Block*, 468 U.S. 576, 591 n.11 (citing *Bell*, 441 U.S. at 542 n.25). The district court had sustained the challenge, relying upon the least intrusive alternative principle. Rutherford v. Pitchess, 457 F. Supp. 104, 108 (C.D. Cal. 1978), aff'd, 710 F.2d 572 (9th Cir. 1983), rev'd sub. nom. Block v. Rutherford, 468 U.S. 576 (1984).

304 413 U.S. 433 (1973).

305 Id. at 448.

306 Id. at 447.

nor possible in" a rural area, such as the one where the challenged search occurred.[307] The Court then concluded, "The fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, by itself, render the search unreasonable."[308]

Cady's repudiation of the least intrusive alternative requirement cannot be justified by its stated rationale that certain communities might have practical problems in complying with such a requirement. This rationale is troublesome, first, because the Court did not even make a definitive finding that the proposed alternative measure was in fact infeasible. In effect, it employed a presumption that this was the case, imposing upon the defendant the burden of rebuttal. This allocation of evidentiary burdens defies essential principles concerning the special protection due the fundamental rights protected by the fourth amendment.[309] Moreover, even assuming that the proposed alternative was in fact more costly to the state than the challenged measure, settled precedents dictate that this consideration cannot justify invasions upon constitutional rights.[310]

In *Illinois v. Lafayette*,[311] the Court upheld the warrantless search of defendant's shoulder bag pursuant to a standard police procedure of inventorying the possessions of all arrested individuals prior to their incarceration.[312] The government asserted the following interests to justify this inventory process: inhibiting theft or mishandling of articles taken from defendants by persons engaged in police activities; deterring defendants' false claims of theft or mishandling; and preventing defendants from injuring themselves with items in their possession.[313] The Illinois Appellate Court had ruled that the search was unconstitutional because the governmental interests could have been met through the less intrusive means of sealing the shoulder bag within a plastic bag or box and placing it in a secured locker.[314] The Supreme Court reversed, rejecting the least

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307 Id. (search occurred in Kawaskum, Wisconsin).

308 Id. The sole authority cited in support of this otherwise unexplained assertion was a "compare" cite to Chambers v. Maroney, 399 U.S. 42 (1970). *Cady*, 413 U.S. at 447. The Court's reliance upon *Chambers* is unpersuasive. That case involved a warrantless search of a car which had been brought to the stationhouse after its occupants had been arrested and taken into custody. The *Chambers* Court's only reference to the less intrusive alternative concept was its suggestion, in dicta, that "arguably, only the 'lesser' intrusion [warrantless seizure and detention of the car] is permissible until the magistrate authorizes the 'greater' [warrantless search of the car]." *Chambers*, 399 U.S. at 51. The Court did not rule on this question of principle, however, because it concluded as a matter of fact that the warrantless search was not more intrusive than a warrantless seizure and detention would have been. Id. at 52.

309 See notes 70-75 and accompanying text supra; text accompanying notes 378-91 infra.

310 See Spece, supra note 75, at 1055 n.31.

311 462 U.S. 640 (1983).

312 Id. at 646.

313 Id.

314 People v. Lafayette, 99 Ill. App. 3d 830, 834-35, 425 N.E.2d 1383, 1386 (1981), 462 U.S. 640 (1983).

intrusive alternative requirement, stating that "[w]e are hardly in a position to second-guess police departments as to what practical administrative method will best deter theft by and false claims against its employees and preserve the security of the stationhouse . . . ."[315] The Court continued, noting that even if less intrusive means existed to meet the government's ends it would be unreasonable to require officers to make "fine and subtle distinctions in deciding which containers or items may be searched and which must be sealed as a unit."[316]

Both proffered rationales for rejecting the least intrusive alternative requirement are unpersuasive. In asserting its inability to "second-guess" police departments as to what measure will "best" promote the purposes underlying the inventory search, the Court misstates the relevant question. The issue is not how best to effectuate the state's purposes, but how to advance the state interests consistent with an individual's fourth amendment rights. Clearly, the Court not only is "in a position to second-guess police departments" on this issue, but indeed has a constitutional duty to do so.[317] Even with respect to the comparative effectiveness of alternative law enforcement measures, courts are in a strong position to review police decisions.[318] Indeed, under the fourth amendment balancing test, courts routinely assess the effectiveness of various law enforcement measures.[319]

The Court's rationale that police officers should be permitted to rely on a simple rule, rather than having to make subtle distinctions, is equally problematic. The proposed alternative of uniformly sealing and securing all arrestees' property, without the burden of searching and cataloguing the contents of such property, is far simpler than the challenged inventory system. Furthermore, even assuming arguendo that an alternative to inventory searches did require police officers to make fine distinctions, this situation would be fully consistent with their experience

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315 *Lafayette*, 462 U.S. at 647.

316 Id.

317 See United States v. Villamonte-Marquez, 462 U.S. 579, 601 (1983) (Brennan, J., dissenting) ("[I]t is a non sequitur to reason that because the police in a given situation claim to need more intrusive and arbitrary enforcement tools than the Fourth Amendment has been held to permit, we may therefore dispense with the Fourth Amendment's protections."); Bell v. Wolfish, 441 U.S. 520, 595 (1979) (Stevens, J., dissenting) ("[T]he easiest course for jail officials is not always one that our Constitution allows them to take.").

318 See United States v. Sharpe, 470 U.S. 675, 716 n.20 (1985) (Brennan, J., dissenting) ("There is nothing 'unrealistic' about requiring police officers to pursue the 'least intrusive means reasonably available' when detaining citizens on less than probable cause. . . . [It] is the *duty* of courts in every Fourth Amendment case to determine whether police conduct satisfied constitutional standards." (citation omitted)).

319 See *Villamonte-Marquez*, 462 U.S. at 588; text accompanying notes 132-55 supra. While this Article has criticized the manner in which the Supreme Court has made such assessments, it also has proposed guidelines for implementing balancing tests that should lead to more accurate evaluations of effectiveness. See note 166 supra.

and responsibilities in other fourth amendment contexts.[320]

In *Michigan v. Long*,[321] the Court upheld a police officer's search of a car's passenger compartment while the driver was standing behind the car and being watched by another police officer.[322] The police lacked probable cause to arrest the driver, but the Court found that the police did have the requisite "reasonable suspicion" to frisk him for weapons, which they had done before searching the car.[323] The state attempted to justify the car search by arguing that it was necessary in order to safely inspect the car's registration and insurance papers.[324] The police did not want to give the defendant access to the car for purposes of retrieving those papers before they ascertained that the car contained no weapons.[325] However, as the dissent noted, the officers' safety concerns could have been satisfied through the less intrusive alternative measure of holding the defendant outside the car while the officers themselves retrieved the necessary papers, confining their search to the place where the defendant told them the papers were located.[326]

In rejecting this reasoning, the majority twice said that, where police officers are attempting to protect themselves or others from possible danger, they are not required to adopt alternative measures "to avoid a legitimate *Terry*-type intrusion."[327] However, these statements beg the essential question of what is a "legitimate" intrusion under *Terry*. In *Terry v. Ohio*, the Court repeatedly stressed that a permissible investigative detention must be confined "strictly to what [is] minimally necessary to learn whether the [suspects are] armed."[328] Moreover, *Florida v. Royer* had re-emphasized the narrow scope of a permissible *Terry* stop by expressly imposing a least intrusive alternative requirement upon its execution.[329] In *Long*, the police had already frisked the defendant and discovered that he possessed no weapons before they began to search his car.[330] Thus, they had already exhausted the authority conferred by

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320 In Tennessee v. Garner, 471 U.S. 1 (1985), the Court held that police may use deadly force to stop a fleeing felony suspect only when necessary to prevent escape and where there is probable cause that the suspect poses a significant threat of death or serious physical injury to others. The Court stated, "We do not deny the practical difficulties of attempting to assess the suspect's dangerousness. However, similarly difficult judgments must be made by the police in equally uncertain circumstances." Id. at 20 (citing Terry v. Ohio, 392 U.S. 1, 20, 27 (1968)).

321 463 U.S. 1032 (1983).

322 Id. at 1035.

323 Id. at 1051.

324 Id. at 1035-37.

325 Id.

326 Id. at 1065 & n.7 (Brennan, J., dissenting).

327 Id. at 1052 n.16.

328 392 U.S. 1, 30 (1968).

329 460 U.S. 491, 500-06 (1983); see notes 223-32 and accompanying text supra.

330 *Long*, 463 U.S. at 1036.

Terry.[331]

In addition to its questionable reliance on *Terry*, the Court in *Long* further attempted to justify its rejection of the least intrusive alternative principle by repeating its assertion in *Lafayette* that it would be unrealistic to expect police officers to make fine on-the-spot determinations.[332] As in *Lafayette*, however, the police conduct challenged in *Long* could be governed by a straightforward rule incorporating the least intrusive alternative principle. That rule would prohibit any search of a vehicle for weapons, without probable cause, during an investigative detention. To prevent the detainee from gaining access to any weapons the car might contain, the police should instead follow the procedure suggested by the dissenting Justices—hold the defendant outside the car while confining their search for documents to the area where the defendant tells them such documents are stored.[333]

In *Colorado v. Bertine*,[334] the Court upheld the "inventory" search of the contents of a backpack in an impounded van whose driver had been arrested for driving under the influence of alcohol, notwithstanding that the search's purported purposes could have been accomplished through the less intrusive alternative means of securing the van and its contents.[335] The Colorado Supreme Court had invalidated the search based upon the least intrusive alternative requirement, distinguishing *La-*

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331 For the foregoing reasons, *Long* appears to be inconsistent not only with *Royer*, but also with *Terry*. One commentator has attempted to reconcile the apparent inconsistency between *Long* and *Royer* by noting that in *Long* the police sought weapons and therefore had greater safety concerns. See Harris, supra note 6, at 56-57. This distinction is not persuasive. The police had no more reason to believe that the detained individual had a weapon in *Long* than in *Royer*. If anything, the individual who was detained in *Royer* would have been a more likely candidate for weapons possession, since he was suspected of being a drug smuggler, whereas the individual detained in *Long* had simply been involved in an automobile mishap. Moreover, prior to the challenged search of the car's interior in *Long*, the officers had frisked the detainee and discovered that he carried no weapons. *Long*, 463 U.S. at 1036. In contrast, the detainee in *Royer* was never subjected to a frisk for weapons.

In any event, even if the police had reasonably suspected that the individual detained in *Long* had access to a weapon, that still would not warrant an exception to the least intrusive alternative requirement. The requirement simply mandates that the police pursue their law enforcement goals, including that of preventing a suspect from gaining access to a weapon, in the least intrusive, reasonably effective manner available. See text accompanying note 450 infra. As the dissent noted, the police in *Long* did have recourse to such a less intrusive means, which would have been equally effective as the challenged search in promoting their safety. *Long*, 463 U.S. at 1066 n.7 (Brennan, J., dissenting).

332 See Illinois v. Lafayette, 462 U.S. 640, 648 (1983).

333 See LaFave, supra note 3, at 1742. Criticizing the Court's rejection of this alternative in *Long*, Professor LaFave wrote, "In other words, an officer who could avoid any risk of the suspect getting at a possible weapon in the car by having him exit and move away from the vehicle . . . , may instead ignore that alternative and thereby generate a continuing danger justifying a search of the vehicle." Id.

334 479 U.S. 367 (1987).

335 Id. at 378-80.

fayette on two grounds. First, because the defendant in *Bertine* was not being incarcerated, the case did not entail the unique state interest in preventing the introduction of contraband or weapons into a jail, which had justified the pre-incarceration inventory in *Lafayette*.[336] Second, in *Bertine*, the van was held in a secure, well-lighted facility, and the defendant himself was available to make alternative arrangements for protecting his property, thus rendering the state's asserted security justifications de minimis.[337] However, the United States Supreme Court disagreed.[338]

The only additional gloss which the *Bertine* opinion provided upon language from *Lafayette* and other Supreme Court decisions rejecting the least intrusive alternative requirement was the majority's assertion that "reasonable police regulations satisfy . . . the Fourth Amendment, even though courts might as a matter of hindsight be able to devise equally reasonable rules requiring a different procedure."[339] The problem with this language is its assumption, without explanation, that the alternative procedures endorsed by the Colorado Supreme Court, as well as by the dissenting United States Supreme Court Justices, were merely "equally" reasonable, and not more so. If two procedures are equally effective in promoting the government's goal, but one intrudes less on individual rights, it is plainly more reasonable than the other.[340]

2. *Lower Court Opinions*

Surveys of the pertinent lower federal and state supreme court decisions[341] demonstrate that, despite the Supreme Court's unfavorable rulings on point, ample room remains for imposing a least intrusive alternative requirement in fourth amendment cases. The unfavorable Supreme Court decisions concern only a few types of searches and seizures, and they can be construed fairly narrowly. Conversely, the Supreme Court decisions that have endorsed the least intrusive alternative principle can be construed quite broadly. Moreover, state courts may disregard the relevant Supreme Court rulings construing the fourth amendment, and impose a least intrusive alternative requirement in any

336 People v. Bertine, 706 P.2d. 411, 416-17 (Colo. 1985), rev'd, 479 U.S. 367 (1987).

337 Id. at 417.

338 *Bertine*, 479 U.S. at 376.

339 Id.

340 See note 1 and accompanying text supra. Indeed, Justice Marshall's dissent in *Bertine* explained that, in some significant respects, the alternative procedure was more effective than the challenged inventory search, as well as less intrusive. *Bertine*, 479 U.S. at 384-86 (Marshall, J., dissenting). The majority's characterization of the two procedures as "equally reasonable" is thus doubly unwarranted.

341 These surveys included all cases available on the LEXIS Genfed and States libraries as of Febuary 20, 1987.

search or seizure case based upon a state constitutional counterpart to the fourth amendment.[342]

Many lower courts have taken advantage of the opportunities left open by the pertinent Supreme Court rulings and have implemented the least intrusive alternative requirement in cases involving a wide range of investigative techniques. The opinions in these cases tend to focus on the particular situation presented, with little analysis and few citations to other authorities. Nevertheless, when these isolated rulings are considered together, there emerges a coherent, comprehensive doctrine requiring that searches and seizures comply with the least intrusive alternative standard.[343]

a. Federal courts. Seven United States Courts of Appeals have decided seventeen cases, involving a broad range of search and seizure techniques, that addressed the least intrusive alternative standard in the fourth amendment context. All seventeen of these decisions accepted it.[344] These cases were decided by eight different circuit courts and in-

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342 See note 16 supra.

343 These decisions do not include those whose holdings on this point were subsequently reviewed by the Supreme Court, or those that simply followed controlling Supreme Court precedents on analogous facts. Accordingly, for example, this Article does not list the decisions which follow the Supreme Court's holding in Florida v. Royer, 460 U.S. 491 (1983), that investigative detentions should be reviewed pursuant to the least intrusive alternative standard. Likewise, it does not list the decisions which follow the Supreme Court's holding in Illinois v. Lafayette, 462 U.S. 640 (1983), rejecting the least intrusive alternative test for post-arrest inventory searches.

In some cases, it is unclear whether the court viewed compliance with the least intrusive alternative principle as an absolute prerequisite for a search or seizure to be constitutional. However, in each case listed as endorsing the least intrusive alternative principle, the court viewed compliance with that principle as at least an important factor in determining constitutionality.

344 See United States v. Oyekan, 786 F.2d 832, 838 (8th Cir. 1986) (upholding border detentions, strip searches, and X-rays of two women suspected of carrying drugs internally because court found "these procedures were performed . . . by the least intrusive means possible," and that they were "arguably far less intrusive than the procedure approved [by the Supreme Court] in *Montoya de Hernandez* [473 U.S. 531 (1985)]"); United States v. Biasucci, 786 F.2d 504, 510 (2d Cir.) (before court may issue warrant authorizing visual electronic surveillance, it should certify that there is no less intrusive means for obtaining needed evidence), cert. denied, 479 U.S. 827 (1986); United States v. Gonzalez, 763 F.2d 1127, 1133 (10th Cir. 1985) (in suppressing evidence after police officer's coercion of suspect to go to police station for investigation without arrest, court noted "reasonable alternatives," such as calling for backup officer, obtaining suspect's consent to search, and obtaining suspect's consent to drive his car to safer location); United States v. Parr, 716 F.2d 796, 816 & n.21 (11th Cir. 1983) (in determining whether to issue warrant for search of home to secure valuables after fire, court held that magistrate should consider whether there are reasonable alternatives to searching, taking into account whether owner or occupant is likely to return soon, and whether reasonable efforts have been made to locate him/her and to obtain consent); United States v. Munoz, 701 F.2d 1293, 1300-01 (9th Cir. 1983) (invalidating patrol stops of motorists in national parks without individualized suspicion to check for woodcutting permits and game violations, because gov-

volved a broad range of search and seizure techniques. Of the thirteen relevant district court decisions revealed by the survey, issued by courts in ten different states and the District of Columbia, twelve endorsed the least intrusive alternative requirement in the context of various types of searches and seizures,[345] while only one ruled to the

ernment's interest in preserving park's resources could be promoted through less intrusive means); United States v. Eagon, 707 F.2d 362, 365 (9th Cir. 1982) (Coast Guard boardings of ships without individualized suspicion to inspect compliance with registration and documentation requirements must comply with least intrusive alternative standard), cert. denied, 469 U.S. 992 (1983); United States v. Waltzer, 682 F.2d 370, 372-73 (2d Cir. 1982) (officers may not rely upon drug courier profile to justify luggage search where they could have established probable cause through more reliable, less intrusive method of using drug-sniffing dog), cert. denied, 463 U.S. 1210 (1983); United States v. Watson, 678 F.2d 765, 768 (9th Cir.) (same), cert. denied, 459 U.S. 1038 (1982); Hunter v. Auger, 672 F.2d 668, 676 (8th Cir. 1982) (strip searches of prison visitors could be conducted only if there was reasonable suspicion that individual in question was involved in drug smuggling activity); United States v. Vasquez, 638 F.2d 507, 520 (2d Cir. 1980) (enunciating general less intrusive alternative requirement for all searches and seizures not based upon probable cause), cert. denied, 450 U.S. 970 (1981); United States v. Hilton, 619 F.2d 127, 133 (1st Cir.) (upholding Coast Guard boardings of ships without individualized suspicion to conduct safety and document inspections, noting that "[t]here can be no possibility of setting up roadblocks in the North Atlantic as a less intrusive alternative"), cert. denied, 449 U.S. 887 (1980); United States v. Piner, 608 F.2d 358, 361 (9th Cir. 1979) (same); McMorris v. Alioto, 567 F.2d 897, 899-900 (9th Cir. 1978) (magnetometer searches of individuals entering courthouse must comply with least intrusive alternative standard); United States v. Ford, 553 F.2d 146, 158 (D.C. Cir. 1977) ("[T]he least intrusive means rationale . . . requires that, where possible, . . . [oral evidence obtained by electronic surveillance] should be gathered without entering private premises and that where entry is required the judicial authorization therefor should circumscribe that entry to the need shown."), aff'd, 441 U.S. 238 (1979); United States v. Cameron, 538 F.2d 254, 257-58 (9th Cir. 1976) (suppressing narcotics found after two forced digital rectal probes, two enemas, and forced administering of liquid laxative, court stated that "less instrusive means of obtaining the evidence" such as natural elimination should have been considered); United States v. Barbera, 514 F.2d 294, 302-03 & 302 n.21 (2d Cir. 1975) (invalidating border patrol's interrogation, without individualized suspicion, of bus passengers near international border, citing potential alternatives, such as legislation criminalizing employment of illegal aliens and administrative rulemaking); United States v. Albarado, 495 F.2d 799, 808-09 (2d Cir. 1974) (invalidating frisk of prospective airplane passenger because less intrusive alternatives existed).

Six additional cases, while not expressly invoking "least intrusive alternative" or equivalent rubric, implicitly endorsed the concept to which that term refers. See Weber v. Dell, 804 F.2d 796, 804 (2d Cir. 1986), cert. denied, 107 S. Ct. 3263 (1987); United States v. Pino, 729 F.2d 1357, 1359-60 (11th Cir. 1984); Balelo v. Baldridge, 724 F.2d 753, 766-67 (9th Cir.) (en banc), cert. denied, 467 U.S. 1252 (1984); United States v. Cardwell, 680 F.2d 75, 78 (9th Cir. 1982); United States v. Robinson, 533 F.2d 578, 581 & n.5, 584 n.13 (D.C. Cir.), cert. denied, 424 U.S. 956 (1976); Zweibon v. Mitchell, 516 F.2d 594, 668 (D.C. Cir. 1975), cert. denied, 425 U.S. 944 (1976).

[345] Lovvorn v. City of Chattanooga, 647 F. Supp. 875, 880 n.5 (E.D. Tenn. 1986) (observation of drug testing subjects during donation of urine sample was intrusive, but not constitutionally infirm because no sufficiently effective less intrusive alternative existed), aff'd, 846 F.2d 1539 (6th Cir. 1988); Wilkinson v. Forst, 639 F. Supp. 518, 525 & n.58, 531 (D. Conn. 1986) (holding fourth amendment violated by indiscriminate searches of people and cars at Ku Klux Klan rallies, when government goal of crowd control could have been pursued through less intrusive alternative means of searching those individuals reasonably suspected of posing safety threat), aff'd in relevant part, 832 F.2d 1330 (2d Cir. 1987); Kathriner v. City of Over-

contrary.[346] Although most of these cases assert their holdings in conclusory terms, without substantial explanation, several contain more detailed analyses concerning the overall role of least intrusive alternative

land, 602 F. Supp. 124, 125 (E.D. Mo. 1984) (strip searches of pre-trial detainees permissible only when there is reasonable suspicion that particular detainee possesses contraband or weapons which cannot be discovered through less intrusive means); Hunt v. Polk County, 551 F. Supp. 339, 341, 344-45 (S.D. Iowa 1982) (county jail's policy of strip searching temporary detainees justified only where "reasonable suspicion" existed that detainee was concealing weapon or contraband; absent such suspicion, availability of less intrusive methods of preventing transmission of such items to long-term inmates mandated invalidation of jail's policy); Arruda v. Fair, 547 F. Supp. 1324, 1332, 1333-34 (D. Mass. 1982) (upholding prison policy of conducting visual strip searches, including visual rectal searches, of inmates in segregation unit following interviews with any visitors, noting that these searches constitute "the least intrusive and most effective procedure" for discovering contraband secreted on inmates' bodies), aff'd, 710 F.2d 886 (1st Cir.), cert. denied, 464 U.S. 999 (1983); Hawaii Psychiatric Soc'y v. Ariyoshi, 481 F. Supp. 1028, 1046-47, 1049 (D. Haw. 1979) (enjoining enforcement of state statute authorizing searches of offices and records of Medicaid providers pursuant to administrative inspection warrants, because state did not show unavailability of other, less intrusive techniques to pursue its interest in preventing fraud); Tinetti v. Wittke, 479 F. Supp. 486, 490-91 (E.D. Wis. 1979) (invalidating county policy of strip searching all persons arrested for nonmisdemeanor traffic violations because not least intrusive means for discovering concealed weapons), aff'd, 620 F.2d 160 (7th Cir. 1980); United States v. Hill, 458 F. Supp. 31, 36-37 & 36 n.17 (D.D.C. 1978) (invalidating warrantless inventory search of flight bag contained in impounded car because government's purpose of protecting property and preventing false claims against police could have been served at least as effectively, if not more so, through less intrusive means of sealing and removing bag); Lively v. Cullinane, 451 F. Supp. 1000, 1002, 1005 (D.D.C. 1978) (pursuant to least intrusive alternative analysis, sustains fourth amendment claim that police department detains arrested persons for unreasonably long period before presenting them to magistrate and forbids any delay in arraignment which is not "necessitated" by administrative or safety concern); Burkhart v. Saxbe, 448 F. Supp. 588, 598 (E.D. Pa. 1978) (full evidentiary hearing required to determine whether warrantless electronic surveillance constituted least intrusive means of acquiring information at issue), aff'd on other grounds sub nom. Forsythe v. Kleindienst, 599 F.2d 1203 (3d Cir. 1979), cert. denied, 453 U.S. 913 (1981); United States v. Sandoval-Ruano, 436 F. Supp. 734, 737-39 (S.D. Cal. 1977) (invalidating border patrol checkpoint stop because roving patrol stops based on reasonable suspicion constitute less intrusive means of combating alien smuggling problem in area); Giampetruzzi v. Malcolm, 406 F. Supp. 836, 844-45 (S.D.N.Y. 1975) (shakedown practice requiring inmate to stand with back to cell during daily searches constituted an "unnecessary aggravation of the terms of confinement" and therefore rendered search "unreasonable").

Two other district court cases provide indirect support for the least intrusive alternative analysis. United States v. Feola, 651 F. Supp. 1068, 1104-05 (S.D.N.Y. 1987) (in upholding orders permitting electronic surveillance, court noted that police showed futility of less intrusive investigative techniques); Hurley v. Ward, 549 F. Supp. 174, 184, 186 (S.D.N.Y. 1982) (construing Bell v. Wolfish, 441 U.S. 520 (1979), narrowly to permit routine prison strip searches only after contact visits, court found them "clearly unreasonable and unjustified under all other circumstances").

[346] Thom v. New York Stock Exchange, 306 F. Supp. 1002, 1010 (S.D.N.Y. 1969) (rejecting various challenges, including one based on fourth amendment, to state law requiring fingerprinting of all national securities exchange employees, noting that "as plaintiffs have failed to establish any significant invasion of a protected privacy interest, there is no justification for applying a 'less restrictive alternatives' or other such stringent test ordinarily reserved for the 'preferred' First Amendment rights"), aff'd sub nom. Miller v. New York Stock Exchange, 425 F.2d 1074 (2d Cir.), cert. denied, 398 U.S. 905 (1970).

analysis in the fourth amendment reasonableness test.

In the earliest of these more expansive cases, *United States v. Hill*,[347] the United States District Court for the District of Columbia relied upon the Supreme Court's decision in *Shelton v. Tucker*[348] in extending the least intrusive alternative requirement to the fourth amendment context.[349] In *Shelton*, the Court had held that governmental measures abridging first amendment rights had to satisfy the least intrusive alternative requirement.[350] The *Hill* court proposed that the same standard should apply in fourth amendment jurisprudence.[351]

Hill was decided before the Supreme Court rejected the application of least intrusive alternative analysis to various fourth amendment issues.[352] Following some of those Supreme Court decisions, another district court noted the anomaly "that the Supreme Court has instructed lower courts to consider less restrictive alternatives in the context of the first, but not the fourth amendment."[353]

A recent opinion by the United States District Court for the District of Connecticut, *Wilkinson v. Forst*,[354] devised a standard that reconciled the Supreme Court's fourth amendment decisions rejecting the least intrusive alternative concept with other fourth amendment decisions supporting this concept. Notwithstanding the Supreme Court's holdings that the existence of a less intrusive alternative should not be a *dispositive* factor requiring judicial invalidation of a search or seizure, the court in *Wilkinson* noted that lower courts should still consider it to be a *significant* factor, weighing in favor of invalidation.[355] Following this approach, *Wilkinson* struck down a state police practice of indiscriminately searching people and cars at Ku Klux Klan rallies, in large part because the court found that the police could have pursued their asserted purpose of maintaining crowd control through the less intrusive means of conducting stops and frisks based upon a reasonable suspicion that a particular individual posed a threat to public safety.[356]

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347 458 F. Supp. 31 (D.D.C. 1978).

348 364 U.S. 479 (1960).

349 *Hill*, 458 F. Supp. at 36 n.17 (citing *Shelton*, 364 U.S. at 488).

350 *Shelton*, 364 U.S at 488.

351 See *Hill*, 458 F. Supp. at 36 & n.17 ("Though admittedly this 'less drastic means' test has traditionally been applied to legislative enactments touching on first amendment rights, we think it no less applicable to administrative regulations touching on other personal liberties such as those encompassed within the Fourth Amendment.").

352 See notes 259-340 and accompanying text supra.

353 Cole v. Snow, 586 F. Supp. 655, 661 n.13 (D. Mass. 1984) (prison policy requiring pre-visit strip searches of all visitors was overbroad, in violation of first amendment rights to communicate and associate), modified sub nom. Blackburn v. Snow, 771 F.2d 556 (1st Cir. 1985).

354 639 F. Supp. 518 (D. Conn. 1986).

355 Id. at 525 n.58.

356 Id.

b. State supreme courts. The state supreme court survey revealed that the least intrusive alternative concept has been embraced by all nineteen courts that have considered the issue,[357] in a variety of search and seizure contexts,[358] and in interpreting both the fourth amendment and its state constitutional counterparts.[359] The survey disclosed a total of forty-six cases on point, of which thirty-nine enforced the least intrusive alternative principle,[360] and five rejected it.[361]

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357 The survey disclosed many lower or intermediate state court decisions which discuss the least intrusive alternative concept under both the fourth amendment and its state constitutional counterparts. However, for the sake of brevity this Article does not summarize these decisions, as they generally follow the pattern of the state high court decisions. Moreover, as was the case regarding federal court decisions, this Article does not summarize state court decisions which either were reviewed by the United States Supreme Court or simply follow Supreme Court precedents in analogous factual situations.

358 The 46 decisions addressing the least intrusive alternative analysis which the survey disclosed were issued by 19 different state high courts. All of these courts enforced the least intrusive alternative requirement in at least one search or seizure case. Five of them also issued at least one decision which rejected the least intrusive alternative requirement in a search or seizure case. However, the survey disclosed no state high court which rejected the least intrusive alternative test in a search or seizure case without also enforcing it in another such case.

359 Of the 39 decisions which upheld the least intrusive alternative requirement for various searches and seizures, 18 were grounded on the fourth amendment, 8 on a state constitutional analogue, and 13 on both. Of the five decisions which rejected the least intrusive alternative requirement for various searches and seizures, three were based on the fourth amendment and two on state constitutional counterparts.

360 Reeves v. State, 599 P.2d 727, 736-37 (Alaska 1979); State v. Superior Court ex rel. County of Pima, 143 Ariz. 45, 49, 691 P.2d 1073, 1076 (1984); State ex rel. Ekstrom v. Justice Court, 136 Ariz. 1, 4-5, 663 P.2d 992, 995-96 (1983); People v. Scott, 21 Cal. 3d 284, 292-94, 578 P.2d 123, 127-28, 145 Cal. Rptr. 876, 880-81 (1978); People v. Brisendine, 13 Cal. 3d 528, 545, 552, 531 P.2d 1099, 1106, 1109, 119 Cal. Rptr. 315, 325-26, 330 (1975); Mozzetti v. Superior Court, 4 Cal. 3d 699, 707, 484 P.2d 84, 89, 94 Cal. Rptr. 412, 417 (1971); City of Carmel-by-the-Sea v. Young, 2 Cal. 3d 259, 272, 466 P.2d 225, 232, 85 Cal. Rptr. 1, 10-11 (1970); People v. Clements, 661 P.2d 267, 270-71 (Colo. 1983); People v. Hicks, 197 Colo. 168, 172, 590 P.2d 967, 969 (1979); People v. Counterman, 192 Colo. 152, 157, 556 P.2d 481, 485 (1976); State v. Gwinn, 301 A.2d 291, 293-94 (Del. 1972); State v. Jones, 483 So. 2d 433, 439 (Fla. 1986); Winfield v. Division of Pari-Mutuel Wagering, 477 So. 2d 544, 548 (Fla. 1985); State v. Casal, 410 So. 2d 152, 155 (Fla. 1982), cert. denied, 462 U.S. 637 (1983); State v. Ching, 67 Haw. 107, 112, 678 P.2d 1088, 1092 (1984); State v. Paahana, 66 Haw. 499, 508, 666 P.2d 592, 597 (1983); State v. Merjil, 65 Haw. 601, 607, 655 P.2d 864, 867 (1982); State v. Barnes, 58 Haw. 333, 338, 568 P.2d 1207, 1211-12 (1977); State v. Kaluna, 55 Haw. 361, 369, 373-74, 520 P.2d 51, 58-59, 61 (1974); People v. Helm, 89 Ill. 2d 34, 39, 431 N.E.2d 1033, 1035 (1981); People v. Bayles, 82 Ill. 2d 128, 143, 411 N.E.2d 1346, 1353 (1980), cert. denied, 453 U.S. 923 (1981); State v. Killcrease, 379 So. 2d 737, 739 (La. 1980); Commonwealth v. Borges, 395 Mass. 788, 791-94, 482 N.E.2d 314, 316-18 (1985); Commonwealth v. Sumerlin, 393 Mass. 127, 130, 469 N.E.2d 826, 828 (1984), cert. denied, 461 U.S. 1193 (1985); Commonwealth v. Leone, 386 Mass. 329, 338, 435 N.E.2d 1036, 1042 (1982); People v. Holloway, 416 Mich. 288, 302-03, 330 N.W.2d 405, 410-11 (1982), cert. denied, 461 U.S. 917 (1983); City of Helena v. Lamping, 719 P.2d 1245, 1248 (Mont. 1986); State v. Sierra, 692 P.2d 1273, 1276 (Mont. 1985); State v. Sawyer, 174 Mont. 512, 517, 571 P.2d 1131, 1134 (1977); State v. Koppel, 127 N.H. 286, 292, 499 A.2d 977, 981 (1985); State v. Davis, 104 N.J. 490, 504, 517 A.2d 859, 867 (1986); State v. Mangold, 82 N.J. 575, 577, 414 A.2d 1312, 1313 (1980); In re Abe A.,

Several of the state high court decisions are particularly noteworthy because they interpreted their state constitutions as imposing the least intrusive alternative requirement with respect to relatively broad categories of searches and seizures. The Supreme Court of Hawaii has given the broadest scope to this requirement, holding that no search or seizure will be approved under the state constitution unless there are no less intrusive means available for carrying it out. In *State v. Kaluna*,[362] the court held that Hawaii's constitutional guarantee against "unreasonable" searches and seizures incorporates a relatively stringent version of the least intrusive alternative principle: "[g]overnmental intrusions . . . [must] be no greater in intensity than absolutely necessary under the circumstances."[363] The court explained that this "test of necessity [is] inherent in the concept of reasonableness."[364]

Similarly, the Vermont Supreme Court has held that, to pass muster under the state constitution, any warrantless search or seizure must employ the "least restrictive method."[365] And the New Hampshire Supreme Court has ruled that, to justify the search or seizure of a motor vehicle without individualized suspicion under the New Hampshire constitution, the state must prove, among other things, "that no less intrusive means are available to accomplish the state's goal."[366]

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56 N.Y.2d 288, 298, 437 N.E.2d 265, 270, 452 N.Y.S.2d 6, 11 (1982); People v. Teicher, 52 N.Y.2d 638, 655, 422 N.E.2d 506, 515, 439 N.Y.S.2d 846, 855 (1981); State v. Keller, 265 Or. 622, 627-28, 510 P.2d 568, 570 (1973); State v. Badger, 141 Vt. 430, 455, 450 A.2d 336, 350 (1982); State v. Hartzog, 96 Wash. 2d 383, 400-01, 635 P.2d 694, 703-04 (1981); State v. Klinker, 85 Wash. 2d 509, 522, 537 P.2d 268, 278 (1975); State v. McDougal, 68 Wis. 2d 399, 412-13, 228 N.W.2d 671, 677-78 (1975), cert. denied, 459 U.S. 987 (1982).

361 State v. Myers, 601 P.2d 239 (Alaska 1979); People v. Gale, 9 Cal. 3d 788, 511 P.2d 1204, 108 Cal. Rptr. 852 (1973); People v. Trusty, 183 Colo. 291, 516 P.2d 423 (1973); People v. Bartley, 109 Ill. 2d 273, 486 N.E. 2d 880 (1985); People v. Scott, 63 N.Y.2d 518, 473 N.E.2d 1, 483 N.Y.S.2d 649 (1984).

Two other cases expressly reserved judgment on the issue. Commonwealth v. Amaral, 398 Mass. 98, 101, 495 N.E. 2d 276, 279 (1986) (drunk driving roadblock); Commonwealth v. Trumble, 396 Mass. 81, 89-90, 483 N.E.2d 1102, 1107 (1985) (same).

362 555 Haw. 361, 520 P.2d 51 (1974).

363 Id. at 369, 520 P.2d at 58-59.

364 Id. at 372, 520 P.2d at 60.

365 State v. Badger, 141 Vt. 430, 455, 450 A.2d 336, 350 (1982). Applying this standard, the *Badger* court upheld the warrantless seizure of defendant's bloodstained shoes, on the grounds that the shoes were "manifestly vulnerable to easy destruction," that the seizure "did not pry into defendant's privacy" because the shoes had been "openly displayed to the public," and that "had the police chosen instead to obtain a warrant, far more restrictive actions would have been required to preserve the evidence" because "[t]he police would have had to restrain the defendant, perhaps for hours, until a warrant could have been obtained." Id. at 454-55, 450 A.2d at 350.

366 State v. Koppel, 127 N.H. 286, 292, 499 A.2d 977, 982 (1985). Applying the least intrusive alternative requirement to the facts at issue, the *Koppel* court held that a drunk driving roadblock violated the New Hampshire state constitution. Id. at 294, 499 A.2d 978. Imposing a relatively heavy burden of proof on the state, the court wrote that, "[t]o justify the greater

The foregoing survey reveals that state and lower federal courts have widely accepted the least intrusive alternative standard as a significant factor for evaluating various types of searches and seizures. While only one of these decisions discusses or endorses the general principle that the least intrusive alternative standard should be a required element in every fourth amendment balancing test,[367] taken together the decisions indicate that such a requirement could be implemented without radically altering the judicial analysis that courts currently apply. The following section presents the rationales which support the systematic integration of the least intrusive alternative principle into fourth amendment balancing.

C. Arguments For and Against Including the Least Intrusive Alternative Analysis in Fourth Amendment Balancing Tests

1. Theoretical Arguments

As a matter of abstract logic, the case for incorporating the least intrusive alternative principle into any reasonableness inquiry, including the Supreme Court's fourth amendment balancing test, appears unassailable. If the benefits which flow from one measure could be substantially achieved through a second measure entailing lesser costs, the latter should surely be deemed more reasonable, on balance, than the former.[368] That the least intrusive alternative requirement is a logically necessary element of any reasonableness standard[369] is manifested by its widespread incorporation into numerous constitutional and other balancing tests.[370] Indeed, Professor Karst has suggested that the least intrusive alternative concept is at least implicitly considered in all instances of constitutional balancing.[371] Further support for the incorporation of a least intrusive alternative requirement into fourth amendment balancing

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intrusiveness of roadblocks," vis-a-vis a suggested roving patrol program or other, less intrusive means, "the State would have to prove that they had a *substantially* greater deterrent value than such a program." Id. (emphasis added).

367 State v. Kaluna, 555 Haw. 361, 520 P.2d 51 (1974); see notes 362-64 and accompanying text supra.

368 See notes 160-65 and accompanying text supra. The abstract logic of the least intrusive alternative principle is so compelling that it should be followed by rational legislators and executive branch officials. Indeed, a major criticism of incorporating the least intrusive alternative concept into the standard for judicial review is precisely that it would usurp the functions of other governmental branches, which are presumed to have undertaken the analysis themselves. See text accompanying notes 428-31 infra.

369 See Spece, supra note 13, at 167 (least intrusive alternative principle "is, in actuality, a simple requirement that the state act logically or rationally").

370 See text accompanying notes 176-212 supra.

371 Karst, supra note 53, at 84; see also text accompanying notes 180-90 supra (Supreme Court already incorporates least intrusive alternative principle in many areas of constitutional analysis).

is provided by numerous judicial opinions, including several Supreme Court majority or plurality opinions.[372] Moreover, some scholars appear to assume that the least intrusive alternative standard should be an inherent element of fourth amendment reasonableness.[373]

Even when a less intrusive alternative search or seizure measure would be less effective in accomplishing the state's law enforcement goals than the challenged measure, logic still dictates that the decreased effectiveness be weighed against the increased protection of individual privacy and freedom. Failure to engage in this assessment automatically elevates any increased efficiency in promoting governmental goals above countervailing interests. Such a per se rule is antithetical to any balancing analysis, the central feature of which is a case-by-case assessment of competing costs and benefits. Accordingly, even nonconstitutional balancing tests reject such an automatic deferral to efficiency interests.[374]

It would be particularly inappropriate to give automatic precedence to efficiency considerations when the countervailing interests constitute individual rights guaranteed under the Constitution. To elevate the promotion of governmental efficiency over the promotion of individual rights would be to invert the proper relationship between governmental and individual interests embodied in the Bill of Rights.[375] The special status that the Bill of Rights accords to the enumerated individual freedoms demands that they should not readily be subordinated to countervailing interests.[376] To the contrary, the Bill of Rights embodies the philosophy that the government must make some compromises in pursuing even its most important goals, such as preserving domestic tranquillity and national security, in order to promote our society's paramount goal of fostering individual freedom.[377]

Given the special status of the liberties protected by the Bill of Rights, the Supreme Court generally has reviewed governmental inva-

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372 See Tennessee v. Garner, 471 U.S. 1 (1985); Winston v. Lee, 470 U.S. 753 (1985); Florida v. Royer, 460 U.S. 491 (1983); Delaware v. Prouse, 440 U.S. 648 (1979); United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Terry v. Ohio, 392 U.S. 1 (1968).

373 See, e.g., Aleinikoff, supra note 7, at 990 n.269 (asserting that governmental "power to seize" under fourth amendment "need not include actions beyond what is necessary to effectuate the purpose of the seizure"); Herman, Warrants for Arrest or Search: Impeaching the Allegations of a Facially Sufficient Affidavit, 36 Ohio St. L.J. 721, 759 (1975) ("fundamental judgment[]" underlying fourth amendment is "that free people have a right to be free from unnecessary, or unnecessarily broad, intrusion by the functionaries of government").

374 See Restatement (Second) of Torts § 292 comment on clause (c) (1965).

375 See R. Dworkin, Taking Rights Seriously 194, 269 (1977) (to treat constitutionally guaranteed rights merely as "interests" which may be overcome by other interests is inconsistent with meaning of "right").

376 See id.; Aleinikoff, supra note 7, at 992 (constitutional balancing analysis jeopardizes constitutional supremacy, because constitutional value does not automatically trump competing nonconstitutional value).

377 See text accompanying notes 56-61 supra.

sions of these liberties under standards which impose a heavy burden of justification upon the government.[378] The "strict scrutiny" to which the Court has subjected any governmental measure infringing on rights deemed "fundamental" entails judicial review of the government's ends, as well as its means. For example, under its equal protection clause jurisprudence, the Court will sanction a measure which intrudes upon a "fundamental" right only if the measure is a necessary means to promote the government's asserted end, and if the end itself is of "compelling" importance.[379] Similarly, a measure which restricts free speech will be held constitutional only if the restriction "furthers an important or substantial governmental interest . . . and if the incidental restriction . . . is no greater than is essential to the furtherance of that interest."[380]

Moreover, when a governmental measure invades first amendment rights, the Court has made clear that it will not be sustained merely because there is no less intrusive, but equally effective, alternative; in order to protect these individual rights, the Court has in the past ordered the government to use less effective means for pursuing its countervailing goals. For example, in the leading case of *Schneider v. State*,[381] the Court overturned an ordinance which prohibited the distribution of handbills, stating that the city's goal of controlling litter should instead be pursued through anti-littering measures, since such measures would intrude less on free speech rights.[382]

The rights guaranteed by the first amendment, which probably have the most extensive history of protection under the least intrusive alternative doctrine,[383] are sometimes referred to as "preferred" freedoms.[384]

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[378] See note 75 supra.

[379] See Dunn v. Blumstein, 405 U.S. 330, 342 (1972); Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

[380] United States v. O'Brien, 391 U.S. 367, 377 (1968).

[381] 308 U.S. 147 (1939).

[382] Id. at 162; see also Ely, supra note 175, at 1486-87 (noting that "absence of gratuitous inhibition is not enough" to uphold a measure which invades first amendment rights). In contrast, the Court has refused to impose a less intrusive alternative requirement in fourth amendment cases, even when the less intrusive search and seizure techniques are equally effective and no more costly than the more intrusive measure. See, e.g., Colorado v. Bertine, 479 U.S. 367, 377-87 (1985) (Marshall, J., dissenting) ("park and lock" alternative to post-arrest inventory search of vehicle's contents would have been less intrusive, more effective in promoting state's asserted goal of protecting officers' safety, and less costly than inventory search which Court sustained); Illinois v. Lafayette, 462 U.S. 640 (1983) (upholding pre-incarceration inventory searches of arrestees' property although state purposes could have been achieved through equally effective, less costly and less intrusive means).

[383] See Note, supra note 161, at 1011-16; Yale First Amendment Note, supra note 7, at 466-67.

[384] See, e.g., McKay, The Preference for Freedom, 34 N.Y.U. L. Rev. 1182, 1184 (1959) ("[F]reedom of expression is so vital in its relationship to the objectives of the Constitution that inevitably it must stand in a preferred position.").

On this basis, one could perhaps argue that fourth amendment liberties should receive less judicial protection than that granted to first amendment rights, and that they should not be insulated by the least intrusive alternative doctrine.[385] However, the rationale which is commonly offered for according a special status to first amendment liberties—that they create the environment necessary for other freedoms to flourish—[386] is equally applicable to the fourth amendment. As Professor Paulsen has said, "All the other freedoms, freedom of speech, of assembly, of religion, of political action, presuppose that arbitrary and capricious police action has been restrained. Security in one's home and person is the fundamental without which there can be no liberty."[387] Indeed, fourth amendment rights constitute preconditions for the "preferred" first amendment freedoms themselves. Since colonial days, governmental search and seizure powers have been used to curb freedom of speech, freedom of the press, and freedom of association.[388] In the Supreme Court's words, "The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression."[389]

A sound argument can thus be made that fourth amendment rights should be entitled to the same degree of judicial protection as first amendment rights. Moreover, as discussed above, in addition to the fundamental nature of fourth amendment rights, several other considerations weigh in favor of judicial enforcement of these rights that is at least as strict as judicial enforcement of other constitutional rights.[390]

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385 See Thom v. New York Stock Exchange, 306 F. Supp. 1002, 1010 (S.D.N.Y. 1969) (discussing least intrusive alternative test in fourth amendment context and stating that "such [a] stringent test [is] ordinarily reserved for the 'preferred' First Amendment rights"), aff'd sub nom. Miller v. New York Stock Exchange, 425 F.2d 1074 (2d. Cir.), cert. denied, 398 U.S. 905 (1970). This case was the only one revealed in the survey of lower federal courts, see notes 344-46 supra, that rejected the least intrusive alternative analysis in the fourth amendment context.

386 See Palko v. Connecticut, 302 U.S. 319, 327 (1937) (Cardozo, J.) (first amendment "is the matrix, the indispensable condition, of nearly every other form of freedom"). But cf. Ducat, Modes of Constitutional Interpretation 243-44 (1978) (criticizing notion that preferred freedoms should be limited to those which are instrumental to advancing other rights and urging that preferred status should be granted to all liberties which "sustain the identity of the individual").

387 M. Paulsen, The Exclusionary Rule and Misconduct by the Police, in Police Power and Individual Freedom 87, 97 (C. Sowle ed. 1962); see Harris v. United States, 331 U.S. 145, 157 (1947) (Jackson, J., dissenting) (fourth amendment freedoms are "indispensable to individual dignity and self-respect").

388 See Marcus v. Search Warrant, 367 U.S. 717, 724-29 (summarizing history of governmental use of search and seizure to limit first amendment rights).

389 Id. at 729; see also United States v. White, 401 U.S. 745, 762 (1971) (Douglas, J., dissenting) (electronic surveillance, "if prevalent," violates fourth amendment since it "kills free discourse and spontaneous utterances" which first amendment protects).

390 See notes 76-89 and accompanying text supra.

Accordingly, a strong claim can be maintained that alleged infringements of fourth amendment rights should be subject to both the means and the ends scrutiny which the Supreme Court applies to claimed infringements of other fundamental rights.[391]

However, this Article proposes only that all searches or seizures be subjected to the means portion of the strict scrutiny test.[392] The least intrusive alternative principle does not entail any review of the importance of the government's end. Viewed in this light, the proposal that searches and seizures comply with the least intrusive alternative requirement seems modest; even if this proposal were adopted, fourth amendment rights would receive less judicial protection than other basic rights. Because fourth amendment rights are "second to none"[393] in importance, governmental actions which intrude upon them should be subject to at least one aspect of the scrutiny applied to infringements of other Bill of Rights freedoms. The Court's refusal to insist that the government conduct searches and seizures pursuant to the least intrusive alternative measure that would still substantially promote state goals relegates fourth amendment freedoms to a second class status in comparison to other constitutional rights.

2. *Pragmatic Arguments*

The theoretical argument that the least intrusive alternative principle should be an element of any reasonableness inquiry, particularly one which purports to protect such important rights as those guaranteed by the fourth amendment, is compelling. It is thus not surprising that the arguments against incorporating this requirement into fourth amendment balancing do not purport to detract from its logical force. Rather, these arguments are grounded in the asserted pragmatic problems of enforcing the requirement.

As previously noted, the judicial opinions and the scholarly litera-

391 In the latest of his several articles concerning the least intrusive alternative requirement, Professor Spece urges adoption of this requirement as the appropriate intermediate standard of review in equal protection and due process cases—i.e., the standard to be applied to violations of rights which are less than fundamental in nature. See Spece, supra note 13, at 146.

In correspondence with the author of this Article, Professor Spece has suggested that all the requirements under the compelling state interest test used to protect fundamental rights in the equal protection and substantive due process context should also be enforced in the fourth amendment context. In addition to showing that a challenged search or seizure satisfies the least intrusive alternative standard, he posits, the state should also be required to show that it is attempting to advance a compelling state interest, that this interest is substantially advanced, and that the state's asserted interest is its actual one. Letter from Roy G. Spece, Jr., to Nadine Strossen (Apr. 19, 1988) (on file at New York University Law Review).

392 For further discussion of how the proposed test would actually operate, see text accompanying notes 449-92 infra.

393 Harris v. United States, 331 U.S. 145, 157, 163 (1947) (Frankfurter, J., dissenting).

ture contain almost no discussion of either the pros or cons of incorporating the least intrusive alternative requirement into the fourth amendment balancing test.[394] The few search and seizure decisions by lower federal courts and state supreme courts which rejected the least intrusive alternative test simply asserted their rulings in conclusory terms.[395] Nor is there much more analysis in the Supreme Court's fourth amendment decisions disfavoring the least intrusive alternative criterion.[396]

In light of the paucity of judicial or scholarly discussion suggesting potential problems with the least intrusive alternative concept in the fourth amendment context, the primary source for such arguments is the case law and scholarly literature concerning the least intrusive alternative concept in other contexts. Three major pragmatic objections have been raised to the inclusion of least intrusive alternative analysis in other balancing tests that could also be asserted against its inclusion in fourth amendment balancing: (1) that courts are incapable of evaluating the comparative intrusiveness and effectiveness of search and seizure measures;[397] (2) that any such analysis would entail an inappropriately extensive judicial intervention into legislative or executive branch decision making;[398] and (3) that such an analysis would undermine the provision of fixed, clear rules to guide police in conducting searches and seizures.[399]

Two general criticisms that apply to all three of these objections are worthy of note prior to an individual evaluation of each objection. First, these objections have all been asserted against the least intrusive alterna-

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394 See note 15 supra; text accompanying note 213 supra. Of the relevant scholarly references, only two suggested any reservations about integrating the least intrusive alternative principle into fourth amendment balancing. See Bacigal, supra note 6, at 800 ("[N]o existing methodology evaluates the relative restrictiveness and efficiency of various alternatives."); LaFave, supra note 15, at 163 (as applied to searches incident to arrests, least intrusive alternative doctrine would "mak[e] it impossible for the police to follow the better course of utilizing 'standard procedures' for such searches"). Neither objection affords a sound basis for rejecting the fourth amendment least intrusive alternative requirement. See text accompanying notes 405-27, 448-49, 468 infra. Moreover, Professor LaFave subsequently expressed support for the notion that investigative detentions should comply with the least intrusive alternative requirement. See LaFave, supra note 3, at 1742-43.

395 See Thom v. New York Stock Exchange, 306 F. Supp. 1002 (S.D.N.Y. 1969), aff'd sub nom. Miller v. New York Stock Exchange, 425 F.2d 1074 (2d Cir.), cert. denied, 398 U.S. 905 (1970); State v. Myers, 601 P.2d 239 (Alaska 1979); People v. Gale, 9 Cal. 3d 788, 511 P.2d 1204, 108 Cal. Rptr. 852 (1973); People v. Trusty, 183 Colo. 291, 516 P.2d 423 (1973); People v. Bartley, 109 Ill. 2d 273, 486 N.E.2d 880 (1985); People v. Scott, 63 N.Y.2d 518, 473 N.E.2d 1, 483 N.Y.S.2d 649 (1984).

396 For critiques of the specific rationales and holdings in each of these cases, see text accompanying notes 259-340 supra.

397 See Yale First Amendment Note, supra note 7, at 472-74.

398 See Spece, supra note 13, at 158 n.150.

399 See LaFave, supra note 15, at 163.

tive requirement in other legal contexts,[400] and the reasons that they have been deemed inadequate to overcome the doctrine's application in other contexts also render them inadequate to overcome its application to fourth amendment balancing.[401]

The second general reason for rejecting all three potential objections to a least intrusive alternative requirement in the fourth amendment balancing analysis is that each objection has been leveled against the fourth amendment balancing test itself.[402] Therefore, if any such objection would justify rejecting the least intrusive alternative concept as an element of fourth amendment balancing, it would also warrant rejecting fourth amendment balancing per se. None of these objections to the fourth amendment balancing test would be exacerbated by including the least intrusive alternative requirement in that test. To the contrary, this proposed modification of the fourth amendment balancing analysis would diminish the force of each objection. A court's difficulty in evaluating the intrusiveness and effectiveness of a challenged search or seizure might be reduced because the parties would be likely to provide the court with information regarding more than one alternative search or seizure technique, thus enhancing the court's ability to evaluate the challenged technique.[403] The objection that courts would be undertaking legislative

400 Regarding the first two objections, see Yale First Amendment Note, supra note 7, at 474 (problems with least intrusive alternative element of first amendment balancing test are court's lack of "competency to measure relative efficiency, cost, and repressive effect of alternative measures," and "deference that should be paid the legislature's choice"). Regarding the third objection, see T. Emerson, supra note 62, at 16 ("The ad hoc balancing test is so unstructured that it can hardly be described as a rule of law at all.").

401 There is no theoretical distinction between the fourth amendment and other constitutional provisions which would make the least intrusive alternative requirement less essential to fourth amendment balancing than to other constitutional balancing tests. See notes 70-75 and accompanying text supra; text accompanying notes 378-91 supra.

402 With respect to the first objection, see B. Cardozo, supra note 52, at 85-86 ("[T]he estimate of the comparative value of one social interest and another . . . will be shaped for the judge . . . in the end, by his intuitions, his guesses, even his ignorance or prejudice."); Kahn, supra note 7, at 29 ("Balancing suggests a process of reasoning, when in fact there is nothing in [the] argument but a choice among conflicting claims."); Tribe, supra note 7, at 620 ("Part of the allure of . . . cost-benefit calculations is the illusion that . . . hard constitutional choices can be avoided . . . ."); text accompanying notes 50-52 supra (courts are ill-equipped to evaluate competing costs and benefits pursuant to constitutional balancing). Concerning the second objection, see Henkin, supra note 7, at 1048 ("Ad hoc balancing . . . sets the court to doing, and doing finally, . . . what would seem emphatically to be the province or competence of the political branches—the weighing of competing social interests and values."). Respecting the third objection, see T. Emerson, supra note 62, at 16 ("The ad hoc balancing test is so unstructured that it can hardly be described as a rule of law at all."); Reich, supra note 62, at 737-38 (balancing opinions "tak[e] little from the past and offer[ ] less for the future; each is a law unto itself"); text accompanying notes 62-63 supra (constitutional balancing test undermines development of fixed rules to guide future conduct).

403 See Yale First Amendment Note, supra note 7, at 466-68, 473-74. Although this Note criticizes the least intrusive alternative element of the Supreme Court's first amendment analy-

functions would also lose some force with the incorporation of a least intrusive alternative requirement, because that requirement would compel courts to perform a quintessentially judicial function: to protect individual rights. Finally, incorporating a least intrusive alternative requirement in fourth amendment balancing would also mitigate the third general problem with balancing: undermining the development of rules to guide police conduct. As explained below, courts could use the imposition of a least intrusive alternative requirement to create an incentive for legislatures and law enforcement agencies to promulgate rules governing searches and seizures.[404]

a. Judicial ability to evaluate comparative intrusiveness and effectiveness of alternative measures. The first potential objection to including a least intrusive alternative requirement in the fourth amendment balancing test is that the courts do not possess the expertise needed to evaluate the comparative effectiveness or intrusiveness of various alternative measures. According to this argument, the courts are handicapped in evaluating the efficacy and intrusiveness of various alternative measures, in comparison with legislative bodies, because courts lack the resources of committees, staff, and public hearings to assemble data.[405]

This theoretical handicap is less relevant in the context of fourth amendment claims than in the context of other constitutional claims since most search and seizure decisions are made not by legislatures, but by police officers or agencies.[406] However, even with respect to the few search and seizure decisions that are made by legislatures, the courts' alleged comparative disadvantage in evaluating alternative measures is not a persuasive reason for rejecting the least intrusive alternative requirement. This argument oversimplifies the roles of courts and other

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sis on grounds of judicial inability to implement it, id. at 474, the Note nevertheless recognizes that the Court "cannot use a balancing test and ignore less repressive ways to achieve the governmental goal unless it is willing to give the state interest overwhelming weight in the balance." Id. at 473-74. The Note recognizes a dilemma between the theoretical necessity of incorporating the least intrusive alternative test in first amendment balancing and the lack of judicial competence to implement this test. To resolve this dilemma, the Note proposes the procedural device of "requiring the government to prove the absence of reasonable alternatives." Id. at 474. Likewise, the present Article recommends that the same procedural device be utilized in implementing the least intrusive alternative test in fourth amendment balancing. See text accompanying notes 452-57 infra.

404 See text accompanying note 468 infra. In addition to rectifying the problems with the fourth amendment balancing analysis which also have been attributed to the least intrusive alternative test, incorporating the least intrusive alternative standard into fourth amendment balancing would have the further advantage of mitigating the greatest substantive problem with such balancing: its erosion of the individual privacy and liberty rights which the fourth amendment is designed to protect.

405 See Yale First Amendment Note, supra note 7, at 472-74.

406 See text accompanying notes 79-89 supra.

governmental branches, as well as their interrelationships. Courts have some fact-finding resources that the legislatures lack, including the authority to appoint expert witnesses at the parties' expense.[407] Even if legislatures have some fact-finding resources which courts lack, they may not actually avail themselves of such resources to evaluate alternative measures in a particular situation.[408] It should also be stressed that courts would not necessarily undertake the least intrusive alternative analysis ab initio or instead of legislatures. Rather, the government officials or agencies defending any challenged measure should bear the burden of demonstrating, to the court's satisfaction, that they gave adequate consideration to the relative intrusiveness and effectiveness of alternative measures.[409]

Moreover, the courts are widely recognized to have particular expertise, in comparison with the other branches of government, in matters of criminal procedure, including search and seizure methods.[410] Therefore, if the courts are deemed to have sufficient expertise in free speech and numerous other areas in which they regularly engage in least intrusive alternative analysis, a fortiori, they have sufficient expertise to apply this analysis to the search and seizure domain, with which they are at least as familiar.

Finally, compared to police officers and agencies—probably the most frequent fourth amendment decisionmakers—courts appear well-equipped to evaluate alternative investigative techniques. Courts clearly have more fact-finding resources than individual officers, and they may well have more than some law enforcement agencies.[411] While police officers and agencies have expertise regarding search and seizure issues, courts possess this expertise as well.[412] Furthermore, courts have more expertise than police officers or agencies concerning the constitutional rights implicated by any search or seizure decision. Likewise, the courts

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407 See Fed. R. Evid. 706(a)-(b). Obviously, courts make factual investigations and determinations every day. In doing so, courts may direct the parties to produce additional witnesses or materials, summon their own witnesses, and conduct independent investigations, in addition to relying on the witnesses, documents, exhibits, and other materials that the parties bring to their attention. Fed. R. Evid. 614. Both the parties and the courts can call witnesses who will provide expert opinions and background information. See Fed. R. Evid. 702-06. Professor Brest has pointed out another fact-finding advantage that a court has over a legislature: the legislature must generally engage in prediction as to how a measure will operate, whereas a court generally may evaluate the measure's record of actual operation. P. Brest, supra note 79, at 1009.

408 See text accompanying notes 441-43 infra.

409 See text accompanying notes 452-55 infra.

410 See note 82 supra.

411 See text accompanying notes 307, 407-08 supra.

412 See Harvard Developments Note, supra note 82, at 1128 (noting expertise of courts concerning rights of criminally accused).

could be expected to display more objectivity than police officers or agencies in evaluating alternative search and seizure techniques, because the judicial commitment to advancing law enforcement goals is tempered by a commitment to protecting individual rights.[413]

To protest that courts are institutionally incapable of making the factual determinations necessary to evaluate searches and seizures under the least intrusive alternative principle would discredit the whole notion of fourth amendment balancing.[414] The present balancing test requires courts to evaluate the effectiveness and intrusiveness of the search and seizure technique at issue. It is difficult to understand why a court that could assign weight to the effectiveness and intrusiveness of two techniques, considered independently, could not also rank these weights.

Value judgments are inevitably involved in determining the relative intrusiveness of alternative search and seizure techniques. This phenomenon is most vividly illustrated by decisions which have reached conflicting conclusions about which of two techniques is more intrusive.[415] However, if the difficulty of evaluating the intrusiveness of a search or seizure is not sufficiently problematic to preclude fourth amendment balancing altogether, it should not preclude the refinement of balancing through the least intrusive alternative test. Some conflicting views as to which of two alternative means is less intrusive could be resolved based upon the fourth amendment's language.[416] Other such conflicts might be resolved in accordance with the preference of the individual subjected to the challenged search or seizure.[417]

The concern that courts may be institutionally handicapped in re-

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413 See notes 83-89 and accompanying text supra.

414 As noted above, courts do have certain handicaps in undertaking these analyses, and that is one legitimate criticism of fourth amendment balancing. See text accompanying note 405 supra. However, the force of that criticism is lessened, not augmented, by incorporating the least intrusive alternative requirement into the balancing test. See text accompanying note 403 supra.

415 Compare United States v. Place, 462 U.S. 696, 707 (1983) (sniff of luggage by narcotics detection dog is relatively unintrusive because it does not require opening luggage and discloses only presence or absence of narcotics) with id. at 719-20 (Brennan, J., concurring) (use of dog represents greater intrusion into privacy than search by officers alone, because dog adds new dimension to human perception); compare United States v. Cardwell, 750 F.2d 341, 345 (5th Cir. 1984) (digital search of rectum, seeking narcotics, held to be less intrusive than X-ray examination, although defendant contended opposite), cert. denied, 471 U.S. 1007 (1985) with United States v. Pino, 729 F.2d 1357, 1359 (11th Cir. 1984) (rectal probe for drugs is more intrusive than X-rays).

416 See, e.g., Chambers v. Maroney, 399 U.S. 42, 63-64 (1970) (Harlan, J., concurring in part and dissenting in part) (fourth amendment's mandate of adherence to judicial processes means it will almost always be less intrusive to seize car for period necessary to obtain search warrant than to conduct warrantless search of car immediately after its seizure).

417 This suggested approach would be consistent with this Article's general recommendation that the government should bear the burden of proof on the least intrusive alternative issue. See text accompanying notes 454-57 infra.

viewing alternative search and seizure measures probably prompted the Supreme Court's reluctance, in *United States v. Martinez-Fuerte*,[418] to evaluate an "elaborate" proposed alternative—namely, legislation prohibiting the employment of undocumented aliens as a substitute for border patrol checkpoint stops to identify such individuals.[419] Even assuming that the Court correctly declined to evaluate such an unusual proposed alternative measure because of insufficient expertise, this fact would not justify a more generalized judicial reluctance to consider alternative search and seizure techniques. That courts should not be required to speculate on the potential effectiveness and intrusiveness of hypothetical alternative measures that are relatively far afield from a challenged measure does not mean that they should not evaluate other, more familiar, types of alternative measures.

In contrast to the extreme hypothetical the Court used to avoid least intrusive alternative analysis in *Martinez-Fuerte*,[420] many alternative means can be readily evaluated by courts because they actually have been employed.[421] For example, with respect to the border patrol checkpoints in *Martinez-Fuerte*, the Court could have analyzed a "simple" alternative bearing a closer relationship to the challenged checkpoints than the hypothesized "elaborate" alternative. The detention of particular motorists based upon individualized suspicion that they are violating immigration laws would have been such an alternative, as its efficacy had been en-

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418 428 U.S. 543 (1976).

419 Id. at 557 n.12; see text accompanying notes 264-69 supra.

420 See text accompanying notes 418-19 supra.

421 A common method of demonstrating the existence of less intrusive alternatives is to show that the state also uses other means to achieve the goal promoted by the challenged means. See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 768-69 (1976) (advertising ban on drugs not justified by state's interest in maintaining pharmacists' professional standards, because other state regulations serve this interest without limiting speech); Buckley v. Valeo, 424 U.S. 1, 55-56 (1976) (statutory campaign expenditure limitation not justified by interests in alleviating corruption and equalizing financial resources, because these interests are promoted by other statutory provisions, which are less restrictive of political expression); Shapiro v. Thompson, 394 U.S. 618, 635-37 (1969) (in holding state one-year residency requirement for welfare payments unconstitutional, Court noted "less drastic means" that other states have used to promote asserted goals of budgetary planning and avoiding fraud).

In the fourth amendment context, courts could draw upon their extensive experience in evaluating the extent to which various law enforcement methods infringe upon fourth amendment rights. For example, in reviewing post-arrest inventory searches, the Supreme Court could have considered the experience of states that require the use of less intrusive alternative measures for securing property and insulating the police from false claims. See People v. Hicks, 197 Colo. 168, 172, 590 P.2d 967, 969 (1979) (property owner could have waived potential claims against police); State v. Gwinn, 301 A.2d 291, 293-94 (Del. 1972) (police could have sealed and secured defendant's luggage found in car); People v. Helm, 89 Ill. 2d 34, 39, 431 N.E.2d 1033, 1035 (1981) (police could have secured defendant's purse in locked strongbox at stationhouse).

dorsed by the Court itself the year before.[422]

In support of its holdings that more intrusive measures are unconstitutional in the first amendment context, the Supreme Court consistently has designated "traditional legal methods"[423] as less intrusive alternatives which must be employed instead. For example, in *Talley v. California*,[424] the Court held that the government should seek to curb defamatory or fraudulent publications through libel suits and criminal prosecutions, rather than by prohibiting such publications.[425] In the fourth amendment sphere, courts are particularly capable of evaluating the intrusiveness and efficacy of potential alternative search and seizure measures, as these alternatives are likely to be traditional legal methods. The Supreme Court frequently has utilized the fourth amendment balancing test to evaluate novel law enforcement techniques that depart from the traditional model of searches and seizures based upon probable cause.[426] Thus, these balancing analyses are particularly well-suited for the consideration of less intrusive alternative techniques, which generally consist of more traditional legal methods.[427]

b. Appropriateness of judicial intervention into legislative and executive branch decision making. The second major potential objection to imposing a least intrusive alternative requirement in search and seizure cases is that it would entail inappropriate judicial intervention into legislative and executive branch decision making. In the context of a first amendment challenge to state legislation concerning members of the communist party, the Indiana Supreme Court asserted that the imposition of this requirement would be "a blatant assumption of a legislative function."[428] The Indiana court correctly asserted that both legislative and executive officials should assess the relative intrusiveness and effec-

422 United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975).

423 Martin v. City of Struthers, 319 U.S. 141, 147 (1943).

424 362 U.S. 60 (1960).

425 Id. at 65; see also Thomas v. Collins, 323 U.S. 516 (1944) (government should punish fraudulent misrepresentation rather than require union organizers to register with state officials).

426 See Brown v. Texas, 433 U.S. 47, 50 (1979); Terry v. Ohio, 392 U.S. 1, 23-31 (1968).

427 In the fourth amendment balancing cases in which the Court has endorsed least intrusive alternative analysis, the specific alternative measures that it invoked constituted traditional law enforcement techniques. For example, in Delaware v. Prouse, 440 U.S. 648 (1979), the alternative measure upon which the Court relied in invalidating random vehicle stops to inspect licenses and registrations was the traditional legal method of stopping motorists based upon probable cause. See id. at 660. Similarly, in United States v. Brignoni-Ponce, 422 U.S. 873 (1975), the alternative measure upon which the Court relied in invalidating random vehicle stops to search for undocumented aliens was the more traditional law enforcement measure of stopping only those vehicles which give rise to a reasonable suspicion. See id. at 883 & n.8.

428 State v. Levitt, 203 N.E.2d 821, 826 (Ind. 1965).

tiveness of various alternative measures.[429] However, this does not mean that, in reviewing the comparative intrusiveness and effectiveness of alternative measures, a court usurps the legislative or executive function, any more than it does when reviewing the comparative intrusiveness and effectiveness of a single measure. Even assuming that government officials have acted rationally and conscientiously, and accordingly have compared the chosen measure with alternatives before enacting it,[430] courts reconsider that comparison in every cost-benefit balancing analysis. While one might plausibly contend that this judicial repetition of the legislative or executive balancing constitutes an inappropriate usurpation of the other branch's function,[431] it is not plausible to say that the courts should repeat every facet of the legislative or executive balancing analysis except one—especially one as important as the least intrusive alternative test.

In contrast with the more stringent compelling state interest standard of review the Supreme Court has applied to governmental measures that trench upon other individual rights,[432] the review of searches and seizures under the least intrusive alternative test would entail a relatively low level of judicial intervention into the decisionmaking processes of the other branches of government.[433] The value judgments made in analyzing the intrusiveness or effectiveness of a legislative or executive body's chosen means are significantly more limited than those involved in evaluating the importance of its chosen ends.[434] Furthermore, least intrusive

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[429] See id.; note 54 supra.

[430] Much public choice literature contends that legislative and executive branch officials do not engage in such a rational, conscientious decisionmaking process in any event. See, e.g., D. Mayhew, Congress: The Electoral Connection 5 (1974) (federal legislators are "single minded seekers of reelection"); K. Scholzman & J. Tierrey, Organized Interests and American Democracy (1988) (organized interest groups frequently play central role in legislative process); Shepsle, Prospects for Formal Models of Legislatures, 10 Legis. Studies Q. 5, 12-13 (1985) (legislators are motivated solely by self-interest and not by their views of public interest).

[431] Judicial balancing in fourth amendment cases is subject to criticism on the ground that it involves some judicial performance of a legislative function. See Henkin, supra note 7, at 1048. In response, one could argue that, as is the case for all judicial review of legislative judgments, review through the balancing approach has two beneficial effects: (1) stimulating sounder legislative judgments in the first place, and (2) overturning any unsound legislative judgments which might nevertheless be made. Whatever the merits of this criticism of fourth amendment balancing, they are decreased by incorporating the least intrusive alternative requirement into the balancing test. See text following note 403 supra.

[432] See Dunn v. Blumstein, 405 U.S. 330, 342 (1972); Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

[433] See Note, supra note 161, at 1018 (through application of least intrusive means doctrine, "[t]he Court is not making a final determination that the legislature's purpose is unconstitutional; it is merely circumscribing the means by which that goal can be reached").

[434] See Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 48 (1972).

alternative analysis does not permit courts to prescribe the alternative means which another branch should adopt; at most, courts may make suggestions. Therefore, following the judicial invalidation of a particular means, legislative or executive branch officials remain free to adopt alternative measures which have not been recommended by the court, or even—upon appropriate consideration and determination—to re-enact the same measure which the court previously struck down.[435]

Professor Spece maintains that, far from usurping the roles of the legislative or executive branch, the least intrusive alternative analysis actually facilitates decision making by prompting those officials to evaluate alternative measures.[436] The result, as Professor Ratner has observed, is not that the judicial branch arrogates the functions of other governmental branches, but rather, that all three branches of government work in harmony.[437] In enforcing the least intrusive alternative standard, courts may provide the relevant legislative or executive branch officials with some suggestions concerning appropriate alternatives. In effect, the courts remand the challenged measure to the other governmental officials for reconsideration in light of the judicial guidance.[438]

Moreover, rather than constituting an expansion of the courts' proper role, this form of judicial review is consistent with the courts' appropriate role in our tripartite governmental system: to protect constitutionally guaranteed rights from abuse by the other branches of government. The review of governmental actions in accordance with the least

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435 See Ratner, supra note 175, at 1089. A search and seizure measure that was initially struck down under the least intrusive alternative requirement could potentially be approved, upon reconsideration, in light of the burdens of production and persuasion proposed at text accompanying notes 459-62 infra. For example, a challenged measure could be invalidated because of the state's inability to make a prima facie showing that it had in fact evaluated the comparative intrusiveness and effectiveness of alternative measures. Following remand, however, the state might be able to make the required prima facie showings. Conversely, the challenging party might be unable to demonstrate that any alternative measure was both substantially less intrusive and substantially as effective.

For a recent example of this scenario in the context of first amendment least intrusive alternative analysis, see Carlin Communications, Inc. v. FCC, 749 F.2d 113 (2d Cir. 1984) [hereinafter Carlin I]; Carlin Communications, Inc. v. FCC, 787 F.2d 846 (2d Cir. 1986) [hereinafter Carlin II]; Carlin Communications, Inc. v. FCC, 837 F.2d 546 (2d Cir. 1988) [hereinafter Carlin III]. In both Carlin I and Carlin II, the court remanded the FCC's proposed regulations governing the telephone transmission of sexually explicit messages, so that the FCC could develop a record showing its thorough evaluation of alternative possible regulations that would be less intrusive upon free speech rights. See Carlin I, 749 F.2d at 123; Carlin II, 787 F.2d at 856. However, following the second remand, the court ultimately upheld proposed regulations it had previously questioned, see Carlin I, 749 F.2d at 123; Carlin II, 787 F.2d at 856, on the ground that the record developed in the interim showed that the regulations did satisfy the least intrusive alternative standard. See Carlin III, 837 F.2d at 556.

436 See Spece, supra note 75, at 1059.

437 See Ratner, supra note 175, at 1050, 1089.

438 See Note, supra note 161, at 998.

intrusive alternative criterion has been described as "a necessary adjunct" to the courts' assigned constitutional function, without which individual rights could not survive claims of strong countervailing interests.[439]

For the foregoing reasons, little weight should be attributed to the contention that judicial enforcement of the least intrusive alternative requirement usurps the legislative or executive role in evaluating searches and seizures, even when the legislative or executive officials have in fact evaluated the search or seizure at issue in a particular case. This contention should carry even less weight with respect to the numerous searches and seizures that are subject to judicial review without having received much, if any, prior legislative or executive scrutiny. The typical search or seizure decision is made by an individual police officer in response to the exigencies of a particular situation, with little time for analysis. Furthermore, the law enforcement agents and agencies making most search and seizure policy decisions have relatively few resources for evaluating alternative measures.[440]

Moreover, even the few search and seizure decisions made by legislative bodies may not have received much advance evaluation. Notwithstanding a legislature's potential access to resources which could facilitate its fact-finding, in many cases the legislature will not actually have taken advantage of these resources to evaluate the intrusiveness or efficacy of law enforcement measures.[441] As Professor Spece has noted, "the potential for being a superior fact-finder should be irrelevant if little or no fact-finding has actually been done."[442] Additionally, legislative history sometimes reveals that the legislature itself deliberately referred the consideration of less intrusive alternative measures to the courts.[443]

c. Effect of analysis on fixed rules for police conduct. The third major consideration that potentially weighs against incorporating a least intrusive alternative requirement into fourth amendment balancing tests is the prospect that such a requirement could undermine the provision of clear rules governing police conduct. Although he subsequently expressed some support for the fourth amendment least intrusive alternative requirement,[444] Professor LaFave noted this potential problem with

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439 Id. at 1025-26.

440 See text accompanying notes 307 407-08 supra.

441 See, e.g., P. Brest, supra note 79, at 1009; Gunther, supra note 434, at 21; Spece, supra note 75, at 1061; see also United States v. Barbera, 514 F.2d 294 (2d Cir. 1975) (in refusing to sustain search and seizure in light of less intrusive alternative measures, Second Circuit stressed that other government branches had not sufficiently explored such alternatives).

442 Spece, supra note 75, at 1078.

443 See Ratner, supra note 175, at 1089 n.230.

444 See LaFave, supra note 3, at 1744-46.

respect to searches incident to arrests.[445]

Professor LaFave and other leading fourth amendment scholars have forcefully explained the advantages of fixed, precise rules governing searches and seizures, as opposed to vague, open-ended standards that turn upon the facts of each police-citizen encounter.[446] Indeed, a major problem of current fourth amendment balancing is that it works counter to the development of such rules. Insofar as Professor LaFave asserts that fourth amendment jurisprudence should foster the development of fixed rules of police conduct, this Article is in accord with him.

The Article parts company with Professor LaFave, however, insofar as he believes that the application of the least intrusive alternative analysis is inherently inconsistent with "standard procedures" for searches incident to arrests.[447] To be sure, this analysis can be used to formulate and review ad hoc procedures that are applied to particular cases in response to rapidly developing factual situations, including some searches incident to arrests. However, as the final sections of this Article recommend, the least intrusive alternative principle should also be employed in devising and evaluating standard procedures or fixed rules governing searches incident to arrests, as well as other types of searches and seizures. Judicial adoption of a least intrusive alternative requirement for searches and seizures should prompt police departments to adopt specific rules incorporating this standard.

The theoretical justifications for requiring fourth amendment balancing tests to incorporate a least intrusive alternative requirement are so compelling that the only arguments against such a requirement are of a pragmatic nature. As the preceding discussion has demonstrated, these arguments do not provide a persuasive basis for rejecting the least intrusive alternative standard in search and seizure cases. That such a standard can be enforced by the courts as a practical matter is indicated by the following section, which outlines procedures for implementing it.

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445 LaFave, supra note 15, at 163. He characterized a requirement that "all such searches be justified by a showing . . . of intrusiveness limited to that essential to find" the items sought, as "a finespun new doctrine," which would "make[ ] it impossible for the police to follow the better course of utilizing 'standard procedures' for such searches." Id.

446 See K. Davis, Discretionary Justice: A Preliminary Inquiry 215-33 (1969); Amsterdam, supra note 24, at 414-29; Kaplan, The Limits of the Exclusionary Rule, 26 Stan. L. Rev. 1027, 1050-55 (1974); LaFave, supra note 15, at 131-61; McGowan, Rulemaking and the Police, 70 Mich. L. Rev. 659, 663-94 (1972); Vorenberg, Narrowing the Discretion of Criminal Justice Officials, 1976 Duke L.J. 651, 662-66. But see Alschuler, supra note 96, at 231, 233, 287 (criticizing categorical fourth amendment rules).

447 See LaFave, supra note 15, at 163.

V

PROPOSED PROCEDURES AND RULES FOR IMPLEMENTING THE LEAST INTRUSIVE ALTERNATIVE ANALYSIS IN FOURTH AMENDMENT BALANCING

A. Proposed Procedures

There has been little explicit judicial discussion of the actual operation of the least intrusive alternative requirement, even in the constitutional contexts in which that requirement has been imposed. As identified by Professor Spece, the most important questions concerning the specific implementation of this requirement, to which the precedents in other constitutional law areas give no clear answers, include: (1) whether the state must use alternatives only if they are equally effective and available, or also if they are somewhat less effective than the challenged measures; (2) whether the state must use the least intrusive alternative, or simply a less intrusive one; (3) which party bears the burden of proof, and by what standard; and (4) what consideration should be given to pecuniary costs.[448]

Because of the relatively limited judicial experience with a fourth amendment least intrusive alternative requirement, the answers which this Article proposes to the foregoing questions are necessarily tentative. These recommendations, as well as other substantive and procedural details of implementing the least intrusive alternative requirement, should be carefully reevaluated in light of actual judicial experience.

First, the state should be required to use an alternative measure which is *substantially* less intrusive than the challenged measure, even if the less intrusive measure is *somewhat* less effective or available than the challenged one in promoting the state's goals. As discussed above, this standard is integral not only to the concept of a least intrusive alternative requirement, but also to that of a cost-benefit balancing analysis.[449] However, the state should not be required to use an alternative measure unless it is reasonably available and *sufficiently* effective to enable the state *substantially* to achieve its goals.[450] Moreover, the state should not

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448 Spece, supra note 75, at 1054-55.

449 See text accompanying notes 160-65, 368-74 supra.

450 This standard has been endorsed in other constitutional contexts. See Ratner, supra note 175, at 1089 ("[D]eference is due the legislative choice unless the alternative . . . is . . . within the same range of effectiveness and cost."); Spece, supra note 75, at 1055 ("The better interpretation of the principle . . . is that only equally or substantially as effective (i.e., almost of the same degree of effectiveness) alternatives must be used."). But see Ely, supra note 175, at 1486-87 (if least intrusive alternative principle in first amendment context required state to use less intrusive alternative only if it is equally effective, then it proscribes only "gratuitous inhibition," which "would go a long way toward eviscerating the first amendment").

Professor Spece has articulated two persuasive rationales for the substantially-as-effective

ordinarily be required to adopt an alternative measure that is less effective than the challenged measure simply to achieve an insubstantial decrease in intrusiveness. Rather, the state should be forced to make a compromise in effectiveness only if it will achieve a significant reduction in intrusiveness.

The foregoing suggested guidelines concerning the first operational issue also indicate the recommended response to the second. The state's obligation should transcend that of employing measures which are just *somewhat* less intrusive than the challenged ones. Rather, the state should be required to utilize those alternative measures which are the *least* intrusive reasonably available, consistent with the state's substantial achievement of its law enforcement goals.[451]

The third implementation issue concerns burdens of proof. The state should bear at least the burden of showing that it actually evaluated the comparative intrusiveness and effectiveness of alternative measures.[452] The state should also be required to make a prima facie showing that, under this analysis, the chosen measure was the least intrusive reasonably available for substantially achieving its goals.[453] If the state can-

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rule. First, this version of the least intrusive alternative principle "would prevent the sub rosa ends scrutiny that inevitably occurs if the principle is interpreted to force the state to use less effective alternatives . . . ." Spece, supra note 75, at 1055. Second, he points out that under this version of the principle, courts "need not confront the difficult task of determining precise equality in effectiveness, and the goals of accuracy and efficiency would be furthered." Spece, Purposive Analysis, supra note 175, at 1342-43. In contrast, measuring comparative effectiveness more precisely, to identify equally effective measures, would constitute a technical determination which courts might not be well equipped to make. See id. at 1342.

451 This appears to be the prevailing standard that the Court has applied in cases involving other fundamental rights, notably free speech rights. See Note, supra note 161, at 1030 (where "important" first amendment rights are threatened, "the Court will be looking for the least drastic means irrespective of the degree to which it is less restrictive").

It should be stressed that the overall goal under the proposed test would be to implement the least intrusive search and seizure measure compatible with substantially advancing the relevant law enforcement aim. This goal is different from the one which would be sought under a conventional cost-benefit balance: achieving the highest net benefit. For example, a classic utilitarian balancing analysis would clearly prefer Measure 1 in the following hypothetical: Measure 1 advances law enforcement goals by 200 units, at an intrusiveness cost of 100, for a net benefit of 100; Measure 2 advances law enforcement goals by 100 units, at an intrusiveness cost of 50, for a net benefit of 50. Under its fourth amendment cost-benefit analysis, the Supreme Court would probably approve either measure, focusing only on the fact that their benefits outweigh their costs without distinguishing them. In contrast, the least intrusive alternative analysis would prefer Measure 2, with its significantly reduced intrusiveness, so long as the 100 law enforcement units attributable to Measure 2 substantially advance society's law enforcement goals.

452 Cf. United States v. Barbera, 514 F.2d 294, 302-03 & n.21 (2d Cir. 1975) (in refusing to sustain search and seizure in light of less intrusive alternative measures, Second Circuit stressed that other governmental branches had not sufficiently explored such alternatives).

453 In the federal system, as well as in most states, the prosecutor bears the burden of proof regarding the propriety of a challenged search or seizure only if there was no warrant; with respect to warranted searches or seizures, the defendant bears the burden of proof. See W.

not make these showings, by a preponderance of the evidence, its challenged search or seizure should be held unconstitutional.[454] If the state does make such a showing, the burden of proof should shift to the party challenging the search or seizure measure at issue to demonstrate that an alternative measure (either one that the state considered and rejected, or one that the state failed to consider) did indeed satisfy the criteria of being substantially less intrusive, while substantially as effective.[455] A preponderance of the evidence would also be an appropriate standard for this burden of proof.

The final issue involved in integrating the least intrusive alternative requirement into the fourth amendment balancing test is the role that fiscal costs or administrative convenience should play in the analysis. Based on the Supreme Court's treatment of these considerations in other constitutional contexts,[456] they should be irrelevant unless they are so substantial as to foreclose a particular alternative measure. Even under

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LaFave & J. Israel, Criminal Procedure § 10.3(b) (1984). This Article recommends that the least intrusive alternative requirement be enforced in the context of a magistrate's determination whether to issue a warrant. See text accompanying notes 482-83 infra. Under such a procedure, it would be appropriate to shift to defendants who challenge warranted searches the burden of proof on the least intrusive alternative issue. If, however, no least intrusive alternative assessment was made prior to a warrant's issuance, the mere fact that the search was pursuant to a warrant should not justify imposing the evidentiary burden on defendant.

454 Cf. Yale First Amendment Note, supra note 7, at 474:

> Procedural devices, such as requiring the government to prove the absence of reasonable alternatives when it threatens a serious infringement of first amendment freedoms, might offer an escape in some cases [from the problem posed by the Court's difficulty in choosing between various means and the deference that should be paid to the legislature's choice] . . . .

In first amendment cases enforcing the least intrusive alternative requirement, the Supreme Court has indicated that the government bears the burden of demonstrating the lack of less intrusive alternatives. See Sherbert v. Verner, 374 U.S. 398, 407 (1963); Talley v. California, 362 U.S. 60, 66-67 (1960) (Harlan, J., concurring); Thornhill v. Alabama, 310 U.S. 88, 98 (1940).

455 Cf. Struve, supra note 175, at 1473 (construing state cases applying less intrusive alternative doctrine in economic due process cases as imposing burden of production on party challenging regulation, where possible justification for choosing more restrictive alternative is apparent, but imposing burden of production on state if common knowledge and common sense strongly suggest that less restrictive alternative would be adequate and that no possible justification exists for selecting restrictive regulation).

456 The Supreme Court has indicated that cost savings or administrative convenience cannot justify burdens upon fundamental individual rights in the context of strict scrutiny under the equal protection clause. See Bullock v. Carter, 405 U.S. 134, 149 (1972); Shapiro v. Thompson, 394 U.S. 618, 633-34 (1969). Moreover, the Court has indicated that cost savings cannot justify burdens upon individual rights which it has not deemed fundamental, in the context of intermediate scrutiny under the equal protection clause. See Craig v. Boren, 429 U.S. 190, 198 (1976). Aside from the principled rationale for this result—that individual rights should not be subordinated to fiscal concerns—it also has a pragmatic rationale: avoiding the courts' involvement in the time-consuming and difficult process of closely assessing the costs of alternative measures. See Spece, Purposive Analysis, supra note 175, at 1343.

such circumstances, the challenged search or seizure technique should not necessarily be sustained. The absence of effective, affordable alternative measures has never been a sufficient basis for upholding a challenged measure.[457]

A fuller understanding of how the proposed least intrusive alternative requirement would function in the fourth amendment balancing test necessitates a consideration not only of the foregoing particulars of its operation, but also of its interrelationship with other fourth amendment standards. Although a search or seizure's compliance with the least intrusive alternative test should be a *necessary* condition for satisfying the fourth amendment, it is not a *sufficient* condition.

To be held reasonable in its inception, a search or seizure must comply with, or satisfy a specific exception to, the warrant and probable cause requirements. If the type of search or seizure at issue is among those regarding which the Supreme Court has held that the necessity for probable cause should be determined according to the balancing test, then it should be upheld only if it satisfies both of the following criteria: (1) its benefits exceed its costs, and (2) there is no significantly less intrusive alternative measure through which the state could substantially achieve its goals. To be held reasonable in its execution, a search or seizure must be carried out by means which comport with basic notions of fairness and dignity.[458] Where the execution is analyzed under a bal-

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[457] See notes 467-68 and accompanying text infra. In its first search and seizure case to reject the least intrusive alternative requirement, Cady v. Dombrowski, 413 U.S. 433 (1973), the Supreme Court apparently did rely upon the greater costs of the proposed alternative measure—the posting of a police guard to prevent the removal of a gun from a car, as opposed to searching car for purposes of removing the gun. Id. at 447. In *Cady*, the Court expressly recognized that the proposed alternative measure might have been feasible in a metropolitan area, even if not in the rural area in question. Id. Yet, as Justice Marshall noted in a more recent fourth amendment case, "Constitutional rights should not vary in this [geographical] manner." United States v. Sharpe, 470 U.S. 675, 694 (1985) (Marshall, J., concurring in the judgment) (Court's approval of 20-minute warrantless, suspicionless detention on ground that police acted with "due diligence" means that if amount of resources which any community devotes to law enforcement is fixed, then conduct which fails test in one community could satisfy it in another).

In his dissenting opinion in *Sharpe*, Justice Brennan articulated additional reasons why relatively intrusive searches and seizures should not be justified by fiscal and administrative concerns:

> *Terry*'s [392 U.S. 1 (1968)] exception to the probable-cause safeguard must not be expanded to the point where the constitutionality of a citizen's detention turns only on whether the individual officers were coping as best they could given inadequate training, marginal resources, negligent supervision, or botched communications. Our precedents require more—the demonstration by the Government that it was infeasible to conduct the training, ensure the smooth communications, and commit the sort of resources that would have minimized the intrusions.

Sharpe, 470 U.S. at 718-20 (Brennan, J., dissenting) (citation omitted).

[458] Cf. Schmerber v. California, 384 U.S. 757, 767, 771-72 (1966) (blood samples taken by hospital held to be so commonplace and free from risk of trauma or pain as to pose no threat

ancing approach,[459] it would have to meet each of the following two tests: (1) the benefits associated with the means of execution should outweigh the associated costs; and (2) these means should also be the least intrusive reasonably available for substantially promoting the state's goals.

The Supreme Court decisions which have enforced the least intrusive alternative test generally comport with the outlined analytical framework. This approach is most apparent in the Court's two recent decisions overruling unusually intrusive searches and seizures: *Winston v. Lee*[460] and *Tennessee v. Garner*.[461]

In *Winston*, the Court reviewed whether a surgical search and seizure could reasonably be initiated under the traditional warrant and probable cause standards.[462] Although these standards were both satisfied, the Court invoked a balancing test to evaluate whether the proposed search and seizure would be reasonably executed. The Court's holding that the surgical intrusion would violate the fourth amendment was based on its conclusion that the benefits associated with the surgical extraction, in terms of the state's ability to mount an effective prosecution, were outweighed by the attendant costs in terms of the defendant's physical integrity.[463] The fact that there plainly was no other, less intrusive means of pursuing the more immediate goal of adding the embedded bullet to the state's arsenal of evidence did not persuade the Court to authorize the search.[464]

The notion that a search or seizure cannot survive fourth amendment scrutiny simply because it is the least intrusive means reasonably available for substantially promoting the state's law enforcement goals is consistent with other Supreme Court rulings as well. The Court repeatedly has stressed that it "has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means

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to personal privacy and dignity).

459 The Supreme Court has not expressly articulated the standards for determining whether a search or seizure was executed reasonably. However, the Court's decisions discussing whether searches and seizures were reasonably executed have in fact employed a balancing analysis. See Tennessee v. Garner, 471 U.S. 1, 7-8 (1985); Winston v. Lee, 470 U.S. 753, 760-66 (1985). For a criticism of the use of the balancing methodology in *Garner*, and a proposed non-balancing approach for resolving that case, see Aleinikoff, supra note 7, at 989-91, 1002-04.

460 470 U.S. 753 (1985) (enjoining state's proposed surgical extraction of bullet from defendant's chest).

461 471 U.S. 1 (1985) (prohibiting police from shooting at fleeing felony suspect in order to apprehend him).

462 *Winston*, 470 U.S. at 760-61.

463 Id. at 766.

464 Id.

consistent with that end."[465]

Additionally, the proposed least intrusive alternative test should be integrated within the overall fourth amendment context in such a way as to foster the development of standardized procedures governing searches and seizures. If reviewing courts accorded a presumption of constitutionality to searches or seizures that comport with the least intrusive alternative principle, law enforcement agencies would be encouraged to develop search and seizure rules incorporating the principle. This would relieve the courts from evaluating in an ad hoc fashion the individual facts and circumstances of each particular case, and would shift the judicial focus toward evaluation of the underlying rules pursuant to which searches or seizures are conducted.

In accordance with the burden of proof allocation recommended above,[466] the state would have to show that, in formulating a rule governing a challenged search or seizure, it had evaluated the comparative effectiveness and intrusiveness of alternative rules. The state would then have to show that it reasonably determined that the selected rule was the least intrusive one reasonably available for substantially achieving the state's goals. If the state could meet this burden, then the search or seizure would be upheld unless the party challenging it could demonstrate that an alternative rule would have enabled the state to achieve its goals while intruding substantially less upon individual freedom and privacy. Thus, if a challenged search or seizure were governed by a specific rule, and complied with that rule, it would be presumptively constitu-

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465 Katz v. United States, 389 U.S. 347, 356-57 (1967); accord United States v. Leon, 468 U.S. 897, 914-15 (1984); United States v. United States District Court, 407 U.S. 297, 316-17 (1972); see also Florida v. Royer, 460 U.S. 491, 511 n.* (1983) (Brennan, J., concurring in the judgment. In *Royer*, Justice Brennan commented that:

> I interpret the plurality's requirement that the investigative methods employed pursuant to a Terry stop be "the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time," . . . to mean that the availability of a less intrusive means may make an otherwise reasonable stop unreasonable. I do not interpret it to mean that the absence of a less intrusive means can make an otherwise unreasonable stop reasonable.

Id.; see Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) ("To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.").

In its first decision authorizing certain administrative inspections without probable cause, the Court relied in part on the absence of alternative effective measures to enforce the health and safety codes at issue. However, the Court stressed that this decision was also based on several other factors. Camara v. Municipal Court, 387 U.S. 523, 537 (1967) (other significant factors included long history of judicial and public acceptance of types of inspections at issue, nonpersonal nature of inspections, which focused solely on buildings, and fact that inspections were not aimed at discovery of evidence of crime).

466 See text accompanying notes 454-57 supra.

tional. A defendant could overcome this presumption only by showing that the underlying rule did not satisfy the least intrusive alternative standard. A defendant could not prevail, however, by showing that the rule, while generally conforming to the least intrusive alternative principle, was not the least intrusive alternative measure in light of the particular facts involved in his case.

If a challenged search or seizure is governed by a rule but does not comply with that rule, it should be found to be presumptively unconstitutional. A sound argument could be made that such a search or seizure should even be found per se unconstitutional, in order to maximize the incentives for a rulemaking process. Perhaps there could be a limited exception for "emergency" or other "extraordinary" situations. However, a heavy burden of proof should be borne by any governmental party seeking to overcome the presumption of unconstitutionality that would attach to any search or seizure not conforming to an applicable least intrusive alternative rule.

Where a challenged search or seizure is not governed by any rule, it should first be analyzed from the perspective of the law enforcement officer who carried it out at the time and under the circumstances in question. If, viewed from that perspective, the officer's legitimate objectives could have been substantially promoted through less intrusive means than those actually employed, the challenge should succeed. A more difficult issue is whether courts should go further and presume that a search or seizure conducted without the authorization of a specific rule is unconstitutional. Such an approach would constitute an additional incentive for law enforcement agencies to promulgate rules governing searches and seizures. However, to demand the issuance of rules to govern every search and seizure might well be unrealistic, and hence unfair, in light of the myriad, unforeseeable specific situations in which law enforcement officers should be permitted to exercise their search and seizure powers. One possible accommodation between these competing concerns might be to apply a presumption of unconstitutionality in the absence of a specifically applicable rule only to searches or seizures conducted in recurring or otherwise foreseeable situations with respect to which rules reasonably should have been formulated.

B. Proposed Rules

The judicial decisions which have applied least intrusive alternative analysis to various types of searches and seizures suggest potential models for the type of fixed rules proposed here. The searches and seizures sanctioned by the recommended rules would all be significantly less intrusive than the alternative techniques which the government utilized in

the cases prompting the proposals. Therefore, consistent with the burden of proof allocation recommended above,[467] courts could deem searches or seizures not conforming to the recommended rules to be presumptively unconstitutional unless the state could demonstrate that the rules were not substantially as effective as the measures it had employed.[468]

1. Rules Governing the Inception of Searches or Seizures

With respect to the inception of a search or seizure, Supreme Court decisions afford some support for three potential fixed rules incorporating the least intrusive alternative concept. Specifically, unless the state could demonstrate, inter alia, the absence of less intrusive alternative measures, it should not be permitted to initiate the following types of searches and seizures: (1) mass or random detentions or investigations based only on reasonable suspicion, but not probable cause; (2) mass or random detentions or investigations not based on any individualized suspicion; and (3) any particularly intrusive search.

The first two suggested rules are consistent with three Supreme Court decisions which adopted the least intrusive alternative principle: *United States v. Brignoni-Ponce*,[469] *Delaware v. Prouse*,[470] and *Florida v. Royer*.[471] These cases emphasize that important historical and logical considerations counsel against permitting exceptions to the usual probable cause standard for conducting searches or seizures. Courts should be loathe to sanction any deviations from the individualized suspicion requirement.[472] If, however, these traditional requirements may be waived in light of important governmental interests, then the government should have to demonstrate that such a waiver is actually *necessary* to promote the asserted interests.[473]

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467 See text accompanying notes 454-57 supra.

468 As with the suggested procedural guidelines, these proposed substantive rules are preliminary in nature. A thorough analysis of the implications of these potential rules is beyond the scope of this Article, which therefore does not necessarily endorse any of them, but instead advances them for purposes of stimulating scholarly consideration and judicial experimentation.

469 422 U.S. 873, 881-82 (1975); see text accompanying notes 244-48 supra.

470 440 U.S. 648, 654-55 (1979); see text accompanying notes 237-43 supra.

471 460 U.S. 491, 498-99 (1983); see text accompanying notes 223-32 supra.

472 See Weinreb, supra note 121, at 51. Professor Weinreb writes that

> the government may intrude on privacy . . . only if there is special need that can be stated with particularity. What the fourth amendment most clearly prohibits are practices like . . . random searches of people on the street for general governmental purposes: to acquire information, or to prevent danger to the public, or to look for evidence of wrongdoing . . . .

Id.; see also Loewy, supra note 128, at 341-42 (because individual's privacy, once breached, is not repaired easily, search or seizure of presumptively innocent person should not be allowed without strong justification).

473 See note 1 and accompanying text supra. Accordingly, one state supreme court has

Some Supreme Court decisions are also consistent with the proposed prohibition on searches that are particularly intrusive.[474] These decisions recognize that when searches or seizures involve particularly severe infringements of privacy and liberty, they will not necessarily be deemed reasonable in their inception even if they satisfy the probable cause and warrant requirements or the standard balancing test. Unusually intrusive search and seizure techniques may be utilized only if the state can demonstrate that no less intrusive, more traditional technique can reasonably promote its interests. Examples of searches and seizures that should not be upheld unless they satisfy this least intrusive alternative requirement include body cavity searches and strip searches.[475]

2. *Rules Governing the Execution of Searches or Seizures*

The judicial decisions also suggest a number of potential rules incorporating the least intrusive alternative standard for determining whether a search or seizure was constitutionally executed. The cases from which these rules are derived either expressly employed least intrusive alternative analysis, or reached results consistent with that analysis. These rules are:

1. The scope of searches and seizures incident to valid arrests should be limited to the arrestee's person and the area within his immediate control from which he could obtain weapons or destroy evidence.[476]

2. An "investigative detention" (i.e., any detention not based upon probable cause) should last no longer than necessary and employ investigative methods no more intrusive than necessary to verify or dispel the suspicion that led to it.[477]

3. A search and seizure may be conducted incident to an investigative detention only based upon reasonable suspicion that the suspect is

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expressly ruled that certain searches or seizures not based on probable cause would be held unconstitutional unless they complied with, among other criteria, the least intrusive alternative requirement. See State v. Koppel, 127 N.H. 286, 292, 499 A.2d 977, 982 (1985).

474 See Tennessee v. Garner, 471 U.S. 1, 11-12 (1985); Winston v. Lee, 470 U.S. 753, 765-66 (1985).

475 For example, courts that have applied this principle to body cavity searches have found such searches to violate the least intrusive alternative requirement because of the availability of alternative, less intrusive search techniques, including X-rays, metal detectors, and natural elimination. See United States v. Cameron, 538 F.2d 254, 258 (9th Cir. 1976) (natural elimination); State v. Merjil, 65 Haw. 601, 607, 655 P.2d 864, 867 (1982) (X-ray).

In addition to the three proposed rules supported by Supreme Court opinions, a fourth potential rule is suggested by an Eleventh Circuit decision, United States v. Parr, 716 F.2d 796 (11th Cir. 1983). In evaluating whether to issue a search warrant, a magistrate should consider reasonably effective, less intrusive alternative means for pursuing the governmental objective. Id. at 816 n.21.

476 Chimel v. California, 395 U.S. 752, 763 (1969).

477 See Florida v. Royer, 460 U.S. 491, 507-08 (1983); Terry v. Ohio, 392 U.S. 1, 23-30 (1968).

armed and presently dangerous. The scope of such a search and seizure should be limited to what is necessary for the discovery of weapons that might be used against the detaining officer or others nearby.[478] Moreover, the initial search for weapons should be limited to a patdown of the detainee's outer clothing. If, following the patdown, the officer cannot point to specific and articulable facts that reasonably support the belief that the accused is armed and dangerous, a more extensive intrusion should be prohibited.[479]

4. If an initial metal detector screening at an airport, courthouse, or other public building indicates the presence of metal on an individual's person, the government should use the least intrusive, reasonably available method for conducting its follow-up investigation, including asking the person to remove any metal objects from his or her possession and to walk through the magnetometer again, or using a hand-held magnetometer to locate the metal. A frisk of the person's body should be used only as a last resort.[480]

5. When there is probable cause to believe that an individual has committed a crime, based on a police officer's on-the-scene observations, the officer should not subject the suspect to a full custodial arrest where the state's goals can be substantially advanced through a less intrusive form of seizure, such as a citation or notice to appear.[481]

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[478] See State v. Paahana, 66 Haw. 499, 505-06, 666 P.2d 592, 597 (1983).

[479] This specific proposed rule was implicitly endorsed in the Supreme Court's decision in Terry v. Ohio, 392 U.S. 1 (1968). Moreover, in Florida v. Royer, 460 U.S. 491 (1983), the Court stated that investigative detentions generally must comply with the least intrusive alternative standard. See id. at 507-08. However, this general principle has not been consistently implemented in subsequent Supreme Court decisions. See United States v. Montoya de Hernandez, 473 U.S. 531, 542 (1985); United States v. Sharpe, 470 U.S. 675, 686-87 (1985); United States v. Villamonte-Marquez, 462 U.S. 579, 591 n.5 (1983); text accompanying notes 264-92 supra. It has, though, been followed by lower courts. See United States v. Manbeck, 744 F.2d 360, 377-78 (4th Cir. 1984), cert. denied, 469 U.S. 1217 (1985); State v. Chaffee, 328 S.E.2d 464 (S.C. 1984). Justices Brennan and Marshall each have advocated more stringent versions of *Royer*'s least intrusive alternative requirement for investigative detentions. See United States v. Sharpe, 470 U.S. 675, 693-96 (1985) (Marshall, J., concurring) (Court should issue specific maximum time limit for any investigative detention); id. at 704 & n.1 (Brennan, J., dissenting) ("[A] lawful stop must be so strictly limited that it is difficult to conceive of a less intrusive means that would be effective to accomplish the purpose of the stop.").

[480] See United States v. Albarado, 495 F.2d 799, 808-09 (2d Cir. 1974).

[481] This suggested rule is recommended in LaFave, supra note 15, at 160-61. In Professor LaFave's view, use of this rule is supported by the Supreme Court's decision in Davis v. Mississippi, 394 U.S. 721, 727-28 (1969) (suspect could be required to appear at police station for fingerprinting even absent probable cause, but emphasizing that this "limited detention" should be pursuant to court order and should not "come unexpectedly or at an inconvenient time"). Professor LaFave said *Davis* "strongly suggests that a physical taking of custody for this purpose would be unjustified absent some indication the suspect would not appear in response to the court order." LaFave, supra note 15, at 160 n.161; see also Gustafson v. Florida, 414 U.S. 260, 266-67 (1973) (Stewart, J., concurring) ("[A] persuasive claim might have been made . . . that the custodial arrest of the petitioner for a minor traffic offense violated his rights

6. When there is probable cause to believe that an individual has committed a crime, based on information other than a police officer's on-the-scene observations, an arrest warrant should not be used to secure the individual's presence in court where less intrusive pleading devices, including a civil summons, are reasonably likely to achieve the same result.[482]

7. Search warrants should not be used to obtain documents or other materials from persons who are not defendants or suspects in criminal proceedings. Instead, the government should seek such materials through less intrusive procedural devices, such as a subpoena duces tecum.[483]

8. When motor vehicles or other types of property have been properly seized, their contents should not be searched without a search warrant, unless the search falls within a specific exception to the warrant requirement. Instead, the police should follow the less intrusive practice of retaining custody of the seized property pending procurement of a search warrant, unless the property owner chooses to avoid the resulting delay by consenting to a warrantless search.[484]

9. The government should not conduct an inventory search of the contents of a motor vehicle which is to be stored in its custody without first making a reasonable effort to contact the vehicle's owner, who then may either consent to the inventory or make his own arrangements to safeguard the vehicle's contents.[485]

10. There should be no post-arrest, pre-incarceration inventory searches of property in an arrestee's possession, except in accordance with the least intrusive alternative principle.[486]

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under the Fourth and Fourteenth Amendments.").

[482] See State v. Klinker, 85 Wash. 2d 509, 522-23, 537 P.2d 268, 278-79 (1975) (where defendant in filiation proceeding was long-time resident and hence unlikely to flee jurisdiction, he should have been served with ordinary civil process, rather than arrest warrant).

[483] See Stanford Daily v. Zurcher, 353 F. Supp. 124, 130-32 (N.D. Cal. 1972), aff'd per curiam, 550 F.2d 464 (9th Cir. 1977), rev'd, 436 U.S. 547 (1978).

[484] This recommended rule is based upon the Supreme Court's decisions in three cases: Arkansas v. Sanders, 442 U.S. 753 (1979); United States v. Chadwick, 433 U.S. 1 (1977); Chambers v. Maroney, 399 U.S. 42 (1970). The *Chambers* case is discussed at note 308, supra. Although in none of these cases did the Court expressly espouse the proposed less intrusive alternative principle, the reasoning in these cases is consistent with that principle. See Note, supra note 15, at 464.

[485] See State v. Mangold, 82 N.J. 575, 587, 414 A.2d 1312, 1318 (1980).

[486] This proposed general rule incorporates the following subsidiary guidelines:

(a) The search of an arrestee's person should be no more intrusive than reasonably necessary to prevent weapons, other potentially dangerous items, or contraband from entering the institution.

(b) Any items taken from the arrestee should not be further searched or opened except pursuant to a search warrant or applicable exception to the warrant requirement.

(c) The inventory should consist of a cataloguing of the arrestee's property and should

11. Police should not search a motor vehicle for weapons, without probable cause to believe that the vehicle does contain weapons, when the driver or other occupants could not in any event gain access to any such weapons. The police should instead use the less intrusive alternative means of detaining the occupants outside the vehicle for the duration of their investigation.[487]

12. "Protective" inventory searches of property after a fire, intended to assist an absent owner by identifying valuables, should be conducted only if the less intrusive alternative measure of contacting the owner is unsuccessful.[488]

13. The police should not conduct inventory searches of the contents of found containers absent probable cause to believe the property contains valuables or weapons. The governmental purposes of protecting the property and preventing false theft claims against the police should instead be served by the less intrusive means of sealing and storing the property in a secure place.[489]

14. The police should not search the contents of luggage or other closed containers for drugs when they could rely instead upon the arguably less intrusive alternative means of using drug-sniffing dogs.[490] In such circumstances, suspects should be allowed to designate which search method they prefer.

15. Officers should conduct routine searches of the cells of pretrial

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not, without a specific request from the arrestee, extend to a search and inventory of the contents of any luggage, packages, or other containers.

(d) The police should advance the purposes that could be promoted by an inventory search of the contents of containers by the less intrusive means of sealing them and putting them in a secure place. The police could also allow the arrestee to choose between waiving any claim concerning the contents or consenting to a search.

The foregoing specific rules were enunciated in Reeves v. State, 599 P.2d 727, 737-38 (Alaska 1979). Other state supreme courts also have endorsed the general principle that the purposes of pre-incarceration inventory searches of containers' contents could be accomplished by the less intrusive means of sealing the containers. See State v. Kaluna, 55 Haw. 361, 520 P.2d 51 (1974); State v. Sierra, 692 P.2d 1273 (Mont. 1985).

[487] This suggested rule is based upon the factual situation in Michigan v. Long, 463 U.S. 1032, 1034-36 (1983). See text accompanying notes 321-33 supra. The rationale for this type of search is that it protects the police in the event that the car's occupant might gain access to any weapons that might be in the car. However, this rationale dissipates when the car's occupant cannot gain access to its contents because, as in *Long*, the occupant is outside the car in police custody.

[488] This proposed principle is derived from United States v. Parr, 716 F.2d 796, 816 (11th Cir. 1983).

[489] This recommended principle was set forth in State v. Ching, 67 Haw. 107, 112, 678 P.2d 1088, 1093 (1984).

[490] This suggested rule is derived from Florida v. Royer, 460 U.S. 491, 505-06 & n.10 (1983). See text accompanying notes 223-32 supra. But see id. at 511 n.* (Brennan, J., concurring in result) ("I am not at all certain that the use of trained narcotics dogs constitutes a less intrusive means of conducting a lawful *Terry* investigative stop.").

detainees only while the inmates are near enough to observe the process and to raise or answer any relevant inquiries.[491]

16. The government should not compel a person who is in custody for a civil offense to participate in a lineup, but instead should use less intrusive identification devices, such as photographs and fingerprints.[492]

CONCLUSION

The "general reasonableness" or balancing test, which the Supreme Court recently has invoked to evaluate fourth amendment challenges to a growing range of searches and seizures, has the effect of eroding the fundamental privacy and liberty rights protected by the fourth amendment. This erosion occurs due to conceptual problems common to all constitutional balancing tests, as well as problems specific to the Court's implementation of fourth amendment balancing.

Without endorsing the notion that the propriety of instituting any search or seizure should be evaluated under a balancing test rather than in accordance with categorical rules, this Article recognizes that the Supreme Court is unlikely to eschew fourth amendment balancing in the reasonably near future. It therefore makes specific proposals for adjusting the scales on which the Court has conducted fourth amendment balancing, so that the Court does not continue to undervalue privacy and liberty rights, or to inflate the countervailing law enforcement interests.

To give proper weight to fourth amendment values, the balancing analysis must compare the marginal costs and benefits of alternative search and seizure techniques, and uphold a particular technique only if it is the least intrusive measure that substantially promotes the state's goals. This least intrusive alternative requirement is an integral component of other balancing or reasonableness tests in diverse constitutional and nonconstitutional areas of law. The inherent logic of incorporating the least intrusive alternative analysis into any reasonableness inquiry applies with particular force in the fourth amendment context, as demonstrated by the numerous lower federal and state court decisions that have imposed the requirement upon a range of searches and seizures. This Article has suggested possible procedural guidelines and substantive rules for implementing the least intrusive alternative requirement in the search and seizure context.

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[491] This proposed rule is modeled on the district court's order in Rutherford v. Pitchess, which was subsequently reversed by the Supreme Court. Rutherford v. Pitchess, 457 F. Supp. 104, 108 (C.D. Cal. 1978), aff'd, 710 F.2d 572 (9th Cir. 1983), rev'd sub nom. Block v. Rutherford, 468 U.S. 576 (1984); see note 303 and accompanying text supra.

[492] See State v. Wilks, 121 Wis. 2d 93, 111, 358 N.W.2d 273, 282 (1984) (suggested principle was rejected by majority, but endorsed by dissenting justices), cert. denied, 471 U.S. 1067 (1985).

The powerful logical and constitutional rationales for integrating the least intrusive alternative test into fourth amendment balancing were aptly capsulized by the Second Circuit Court of Appeals:

> [I]t is, and indeed for preservation of a free society must be, *a constitutional requirement that to be reasonable the search must be as limited as possible commensurate with the performance of its functions.*
>
> . . . [T]he public does have the expectation, or at least under our Constitution the right to expect, that no matter what the threat, the search to counter it will be as limited as possible, consistent with meeting the threat.[493]

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[493] United States v. Albarado, 495 F.2d 799, 806 (2d Cir. 1974) (emphasis in original).