2003

The Poverty Exception to the Fourth Amendment

Christopher Slobogin

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I. INTRODUCTION

This Essay explores the subterranean Fourth Amendment—the below-the-surface motifs of current rules regulating searches and seizures by the police. The three themes it identifies—having to do with alienage, race, and poverty—vary in their proximity to the surface and their pervasiveness. But they all taint the ground rules that purportedly govern police investigations.

The idea for this Essay was triggered by Professor Alfredo Mirandé's work "Is There a Mexican Exception to the Fourth Amendment?" published in this special issue of *Florida Law Review*.[1] The thesis of Professor Mirandé's essay is that the effect, if not the intent, of Fourth Amendment caselaw has been to accord Mexicans less protection than non-Mexicans. This "exception," Professor Mirandé asserts, exists independently of the courts' more explicit exceptions to the warrant and probable cause stipulations of the Fourth Amendment.[2]

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1. Alfredo Mirandé, *Is There a Mexican Exception to the Fourth Amendment?*, 55 FLA. L. REV. 365 (2003).

2. *See id.*

My original reason for agreeing to write this Essay was that I have difficulty accepting this assessment of Fourth Amendment jurisprudence. After looking closely at the cases Professor Mirandé cites, I am willing to accept that *illegal aliens* are unfairly treated under the Fourth Amendment. But I see little evidence of a Mexican exception to the Fourth Amendment. With one anomaly, the cases Professor Mirandé relies upon to support the latter proposition all seem consistent with other caselaw that has nothing to do with people from countries south of our border.

That was to have been the gist of my response. But Professor Mirandé's essay eventually led me to consider the possibility of other "unofficial" exceptions to the Fourth Amendment based on suspect or quasi-suspect classifications. I ended up concluding that, in addition to the illegal alien rule, there is at least one other unrecognized and illegitimate exception to the Fourth Amendment—a "poverty exception." More specifically, this Essay argues that there are a number of cases, even if one looks solely at U.S. Supreme Court jurisprudence, that sound neutral with respect to class and economic circumstance, but in fact seriously undermine the Fourth Amendment as applied to poorer people.

As a way of introducing that thesis, I first briefly examine the evidence in Supreme Court caselaw for an illegal alien exception,[3] which I think does exist, and for Professor Mirandé's Mexican exception,[4] which is much harder to find in the Court's cases. I then make the case for the poverty exception,[5] which is not as conspicuous as the first exception, but much more concrete than the second. The Essay ends with a brief critique of Professor William Stuntz' thought-provoking but ultimately troublesome thesis about the relationship between poverty and the Fourth Amendment.[6]

II. THE ILLEGAL ALIEN EXCEPTION: EXPLICIT AND DUBIOUS

The case for an illegal alien "exception" to the Fourth Amendment comes from two Supreme Court decisions, the first dealing with the scope of the exclusionary rule,[7] the second with the definition of the word "people" in the Fourth Amendment.[8] On the surface, the first case seems to be primarily another manifestation of the Supreme Court's hostility toward exclusion as a Fourth Amendment remedy, and only secondarily about illegal aliens, and the second decision does not appear to be about illegal aliens at all. But a closer inspection of these two cases reveals that the

3. *See infra* Part II.
4. *See infra* Part III.
5. *See infra* Part IV.
6. *See infra* Part V.
7. *See infra* notes 18-24 and accompanying text.
8. *See infra* notes 25-30 and accompanying text.

Court is willing to distort basic Fourth Amendment principles to ensure the latter group is excluded from the amendment's protections.

Suppression of illegally seized evidence has been the principal method of sanctioning Fourth Amendment violations since *Mapp v. Ohio*.[9] In the past three decades, however, the Supreme Court has created a host of exceptions to the exclusionary rule's application. Virtually all of these exceptions are grounded on one of two theories of deterrence, the good faith theory or the secondary process theory.

The good faith theory justifies foregoing exclusion when officers conduct an illegal search or seizure relying on a facially valid warrant,[10] a statute,[11] or a computerized arrest report.[12] In all of these situations, one can make a plausible claim that the threat of exclusion does not act as a deterrent. Police officers who believe they are operating with a valid warrant or under a duly enacted statute, the theory goes, are not likely to believe their actions violate the Fourth Amendment.

The secondary process theory rejects application of the exclusionary remedy in connection with proceedings—such as grand jury[13] and sentencing hearings[14]—or procedures—such as impeachment of the defendant[15]—that are ancillary to making the prosecution's prima facie case. The reasoning here is that exclusion is not necessary in such situations because sufficient deterrence is achieved through preventing use of illegal evidence in the government's case-in-chief, the supposed focus of all law enforcement efforts.[16] The secondary process theory also can be used to justify the introduction of illegally obtained evidence in *non*criminal adjudications, such as tax deficiency proceedings, at least when the

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9. 367 U.S. 643 (1961).

10. United States v. Leon, 468 U.S. 897, 922 (1984) (holding that exclusion is not required when police rely in objective good faith on a warrant issued by a neutral and detached magistrate that is later determined to be invalid); Massachusetts v. Sheppard, 468 U.S. 981, 991 (1984) (holding same).

11. Illinois v. Krull, 480 U.S. 340, 349-50 (1987) (holding that exclusion is not required when police conduct a search authorized by a statute subsequently found unconstitutional); Michigan v. DeFillippo, 443 U.S. 31, 41 (1979) (holding same).

12. Arizona v. Evans, 514 U.S. 1, 15-16 (1995) (holding that exclusion is not required when police reasonably rely on a computerized arrest record that turns out to be inaccurate).

13. United States v. Calandra, 414 U.S. 338, 354-55 (1974) (holding that illegally seized evidence may be considered by the grand jury).

14. Although the Supreme Court has yet to so hold, lower courts routinely conclude that the rule is inapplicable at sentencing. *See, e.g.*, United States v. McCrory, 930 F.2d 63 (D.C. Cir. 1991).

15. United States v. Havens, 446 U.S. 620, 627-28 (1980) (holding that illegally seized evidence may be used to impeach a defendant if cross-examination questions stay within the scope of direct examination).

16. *Cf. Calandra*, 414 U.S. at 351 ("Any incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best.").

evidence is obtained by *police* who are looking for evidence of *crime*,[17] because again the specter of exclusion at the criminal trial is seen as sufficient deterrence.

An exception to this theoretical framework for deciding when exclusion is warranted occurs when illegal aliens are involved, however. In *INS v. Lopez-Mendoza*,[18] the Supreme Court held that the exclusionary rule does not apply in civil deportation proceedings, even when the officials who conduct the illegal action are not police officers bent on obtaining evidence for a criminal trial, but rather INS officials looking for evidence suitable to support deportation.[19] The Court's justifications for this holding were several: (1) the INS' own administrative sanctions already provide some deterrence[20] (even though those sanctions had never been imposed on an INS official![21]); (2) applying the rule in this setting would be administratively inconvenient, given the high number of civil deportation proceedings;[22] and (3) somewhat inconsistently with the second justification, INS officers know Fourth Amendment challenges to deportation actions are rare and so are unlikely to be deterred by exclusion.[23]

None of these reasons even remotely suggest that violations of the Fourth Amendment by INS officials are likely to be the result of honest mistake. Nor do they indicate that INS officials who are thinking about violating the Fourth Amendment will be concerned about exclusion in a parallel criminal proceeding (indeed, criminal deportation proceedings are exceedingly rare[24]). In other words, *Lopez-Mendoza* allowed the introduction of illegally seized evidence even though neither the good faith nor secondary proceeding rationales apply. As a result of that case, INS

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17. United States v. Janis, 428 U.S. 433, 454 (1976) (holding that illegally seized evidence may be used at a tax deficiency proceeding when seizure is by a police officer).

18. 468 U.S. 1032 (1984).

19. *Id.* at 1051.

20. *Id.* at 1045 ("[T]he deterrent value of the exclusionary rule in deportation proceedings is undermined by the availability of alternative remedies for institutional practices by the INS that might violate Fourth Amendment rights.").

21. *Id.* at 1054-55 & n.2 (White, J., dissenting) (noting that the INS could point to no instances where disciplinary proceedings were brought against officers for violation of search and seizure rules).

22. *Id.* at 1048-49 ("The ensuing delays and inordinate amount of time spent on [exclusionary rule] cases at all levels has an adverse impact on the effective administration of the immigration laws.").

23. *Id.* at 1044 (reasoning that because so few exclusions occur in criminal deportation proceedings, "[e]very INS agent knows . . . that it is highly unlikely that any particular arrestee will end up challenging the lawfulness of his arrest in a formal deportation proceeding").

24. *Id.* at 1042-43 ("[I]t must be acknowledged that only a very small percentage of arrests of aliens are intended or expected to lead to criminal prosecutions.").

officials whose sole goal is acquiring evidence to deport may knowingly violate the Fourth Amendment without fear of exclusion in any proceeding.

Because it departs from the Supreme Court's normal explanations for rejecting the exclusionary remedy, *Lopez-Mendoza* evidences particular hostility toward search and seizure claims that are raised by illegal aliens. But at least the case assumes that illegal aliens *have* Fourth Amendment rights (albeit rights that will not be vindicated through exclusion in the deportation context). That assumption may no longer be accurate. Six years after *Lopez-Mendoza*, the Supreme Court decided *United States v. Verdugo-Urquidez*,[25] which may have rendered the former case irrelevant.

Normally, the Fourth Amendment requires that police obtain a warrant, issued by a neutral and detached magistrate, before making a non-exigent search of a home. In *Verdugo-Urquidez*, however, the Court upheld warrantless non-exigent searches of two residences because they were on foreign soil and owned by someone with an insufficient connection to the United States.[26] According to the Court, a person who is not a U.S. citizen and has no "voluntary attachment" to the United States, but rather, like Verdugo-Urquidez, is connected to this country only because he was brought here under arrest, is not one of the "people" protected by the amendment.[27] In such a situation, neither the person nor his or her property is entitled to Fourth Amendment protection, even against actions conducted, as they were here, by American police.

Although Verdugo-Urquidez was not himself an illegal alien (because his presence in the country was the result of conduct by U.S. authorities),[28] the language used to describe why the Fourth Amendment did not apply to protect him could very easily refer to someone from that group as well; [t]he Fourth Amendment, the Court stated, only enures to the benefit of "persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[29] Certainly many illegal aliens, especially those who have just crossed the border, would have a hard time showing they have developed a "sufficient connection" to the United States. Indeed, the Court admitted in *Verdugo-Urquidez* that "[o]ur statements in *Lopez-Mendoza* are . . . not dispositive of how the Court would rule on a Fourth Amendment claim by illegal aliens in the United States if such a claim were

25. 494 U.S. 259 (1990).

26. *Id.* at 265 (stating that the "people" in the Fourth Amendment "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community").

27. *Id.* at 274-75.

28. *Id.* at 262.

29. *Id.* at 265.

squarely before us,"[30] and lower courts have not been hesitant to apply *Verdugo-Urquidez* to the latter group.[31]

If that means that illegal aliens have no Fourth Amendment rights, consider the implications. Of all the people in the United States, including violent criminals, *only* those who lack proper documentation can be searched and seized without justification. The message this treatment sends is that illegal aliens are not "people"—literally, not just as a constitutional matter. Rather than human beings with autonomy and privacy interests, illegal aliens, like illegal drugs and illegal weapons, are contraband that can be seized and inspected as the government sees fit.

The practical consequence, if not the intent, of *Lopez-Mendoza* and *Verdugo-Urquidez* is the creation of an illegal alien exception to the Fourth Amendment. Because that exception unfairly singles out illegal aliens,[32] it should be eliminated.[33]

III. THE MEXICAN EXCEPTION: IMPLICIT AND BARELY DISCERNIBLE

To be distinguished from the illegal alien exception is Professor Mirandé's Mexican exception to the Fourth Amendment.[34] In addition to *Lopez-Mendoza* and *Verdugo-Urquidez*, which I think better illustrate the first exception (since they apply to *any* illegal alien, not just Mexicans or Latinos/as), Professor Mirandé's essay mentions several other Supreme Court cases in support of his argument that a Mexican exception exists. All

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30. *Id.* at 272.

31. James G. Connell, III & Rene L. Valladares, *Search and Seizure Protections for Undocumented Aliens: The Territoriality and Voluntary Presence Principles in Fourth Amendment Law*, 34 AM. CRIM. L. REV. 1293, 1295 (1997) ("[C]ourts have cited *Verdugo-Urquidez* for the proposition that the Fourth Amendment does not automatically protect undocumented aliens even if the challenged search and seizure took place in this country.").

32. The claim of unfairness is subject to a caveat. *Lopez-Mendoza* may not be the *only* case in which the Court has departed from the good faith and secondary process rationales for avoiding exclusion. *See* Pennsylvania Bd. of Probation & Parole v. Scott, 524 U.S. 357 (1998) (refusing to apply the exclusionary rule to parole revocation proceedings even when the illegal searches were conducted by parole officers interested primarily in garnering evidence for revocation proceedings). And *Verdugo-Urquidez* might eventually be limited to its facts (which involved searches on foreign soil and a person with *no* voluntary attachment to the United States), or by the suggestion of two of the six Justices in the majority that had there been a way to comply with U.S. law in Mexico a different outcome might have resulted. *Verdugo-Urquidez*,494 U.S. at 278 (Kennedy, J., concurring); *id.* at 279 (Stevens, J., concurring). But criminal proceedings using evidence found by parole officers are much more likely than criminal deportation proceedings using evidence found by INS officials. *See supra* note 23. And *Verdugo-Urquidez* is as likely to be given an expansive reading as a narrow one. *See supra* note 31.

33. For a similar conclusion, see Victor C. Romero, *Whatever Happened to the Fourth Amendment? Undocumented Immigrants' Rights After* INS v. Lopez-Mendoza *and* United States v. Verdugo-Urquidez, 65 S. CAL. L. REV. 999 (1992).

34. *See generally* Mirandé, *supra* note 1.

but one, however, are consistent with caselaw that applies to people of all nationalities.

Most of the cases cited by Professor Mirandé are part of the Court's so-called "border" jurisprudence. It is true that the Fourth Amendment's protections are significantly relaxed for searches and seizures conducted at the border or its functional equivalent.[35] But again, this law, or lack thereof, governs at all borders, north and south. In its other cases involving searches and seizures near the border, the Court has closely adhered to its universally-applied Fourth Amendment caselaw. Although decisions like *Almeida-Sanchez v. United States*[36] and *United States v. Ortiz*,[37] which Professor Mirandé considers strong proof of a Mexican exception, permitted warrantless searches of cars stopped near the border, they were merely routine applications of the Court's long-standing vehicle search exception jurisprudence allowing such searches when there is probable cause.[38] Indeed, they both rejected the government's argument that this exception should be broadened even further in the immigration context.[39] In the same vein is *United States v. Brignoni-Ponce*,[40] which made clear that the fact that a car is stopped near the border does not eliminate the reasonable suspicion requirement for brief investigative detentions.[41]

I have more trouble with two other "border" cases mentioned by Professor Mirandé, but primarily because I have problems with the generally applicable Fourth Amendment law on which they are based rather than because I share Professor Mirandé's concerns about anti-Mexican bias. *INS v. Delgado*[42] held that the Fourth Amendment was not implicated when armed INS officials briefly questioned factory workers to determine their citizenship status,[43] but that dubious decision is entirely consistent with the Court's similarly dubious line of cases holding that brief questioning of

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35. *See, e.g.*, United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985) ("Routine searches of the persons and effects of entrants [at the border] are not subject to any requirement of reasonable suspicion, probable cause, or warrant.").

36. 413 U.S. 266 (1973).

37. 422 U.S. 891 (1975).

38. *See* Carroll v. United States, 267 U.S. 132, 153-56 (1925) (holding that police may conduct a warrantless search of a readily mobile automobile when they have probable cause). This rule has been dubbed the "automobile exception." *See* CHARLES WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS ch. 7 (4th ed. 2000).

39. *Almeida-Sanchez*, 413 U.S. at 270 ("[T]he Government . . . understandably sidesteps the automobile search cases [and] relies heavily on cases dealing with administrative inspections. But these cases fail to support the constitutionality of this search."); *Ortiz*, 422 U.S. at 896 ("We are not persuaded that the differences between roving patrols and traffic checkpoints justify dispensing in this case with the safeguards we required in *Almeida-Sanchez*.").

40. 422 U.S. 873 (1975).

41. *Id.* at 882.

42. 466 U.S. 210 (1984).

43. *Id.* at 218.

anyone is generally not a seizure.[44] And although *United States v. Martinez-Fuerte*,[45] dealing with illegal immigrant checkpoints in Southern California, was the first decision in which the Court permitted seizures at roadblocks despite the absence of any individualized suspicion,[46] it certainly was not the last.[47] Like the first three border decisions mentioned,[48] these two opinions are merely applications of established Fourth Amendment law, however questionable, to cases that happened to involve Mexicans.

The one caveat I would make to that conclusion is that in two of these five cases, *Brignoni-Ponce* and *Martinez-Fuerte*, the Court specifically stated that Mexican ancestry could be used to justify the seizures that took place.[49] In no other case has the Court explicitly stated that race or ethnicity may be a factor justifying a search or seizure, and in fact it has suggested that reliance on race is generally *not* permissible for such a purpose.[50] While I think there is a plausible justification for such reliance, that justification can only be carried so far.

The plausible justification is the border setting at issue in these cases. Just as police may focus on people of a certain race when investigating a crime known or suspected to have been committed by a person of that race, it is not unreasonable to permit officials looking for illegal aliens near Mexico to consider Mexican heritage as one of the relevant factors. It is true that not every illegal alien in that area will be Mexican. But because of the reality of our southern border, undocumented entrants are very likely to be Mexican nationals, and the Fourth Amendment has never required certainty, but rather only an "articulable" probability that evidence of criminal activity will be discovered through their investigative actions.[51]

That reasoning at most justifies the holding in *Brignoni-Ponce*, however. There the Court stated that "Mexican appearance" is "a relevant factor, but standing alone it does not justify stopping all Mexican-

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44. *See, e.g.*, Florida v. Bostick, 501 U.S. 429, 437 (1991) (holding that police questioning of a passenger on a bus is not a seizure).

45. 428 U.S. 543, 563 (1976).

46. *Id.*

47. *See, e.g.*, Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 455 (1999) (upholding suspicionless stops at sobriety checkpoints); Delaware v. Prouse, 440 U.S. 648, 663 (1979) (suggesting that suspicionless stops at license checkpoints are permissible).

48. *See supra* notes 36-40.

49. United States v. Brignoni-Ponce, 422 U.S. 873, 886-87 (1975) ("[T]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor . . . ."); *Martinez-Fuerte*, 428 U.S. at 563 ("[E]ven if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry, we perceive no constitutional violation.").

50. In *Whren v. United States*, 517 U.S. 806 (1996), the Court indicated that proof that a search or seizure was the product of intentional racial discrimination would provide a basis for relief under the Fourteenth Amendment. *Id.* at 813.

51. *Cf.* Terry v. Ohio, 392 U.S. 1, 21 (1968).

Americans to ask if they are aliens."[52] In *Martinez-Fuerte*, in contrast, the Court held that a referral from the initial checkpoint to a "secondary referral" point, where prolonged questioning and document checks occurred, could be based "largely" and perhaps *solely* on Mexican ancestry.[53] As I have written elsewhere,[54] even if race is relevant to the suspicion inquiry (and I think it is in this context), we should not countenance its use if doing so sends a message that government actions may be based largely or solely on the color of a person's skin or his or her ethnicity.[55] Otherwise, those who are seized are being told that they become criminal suspects merely by looking the way they do, and the rest of society is sent the abhorrent message that discriminatory actions based on race and ethnicity are permissible.[56]

Martinez-Fuerte, then, does seem to advance a "Mexican exception" to the Fourth Amendment, and it is one that should not exist. But it appears to be the only plain example of such an exception in the Supreme Court's cases.

IV. THE POVERTY EXCEPTION: IMPLICIT BUT REAL

Even if a "Mexican exception" to the Fourth Amendment is hard to parse from the cases, that phrase, and the illegal alien cases, raise an

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52. *Brignoni-Ponce*, 422 U.S. at 886-87. The Court noted that, in addition to appearance, police searching for illegal immigrants in vehicles might look at the characteristics of the area where the vehicle is found and its proximity to the border, information about recent illegal border crossings in the area, the driver's behavior, and aspects of the vehicle itself. *Id.* at 884-85.

53. *Martinez-Fuerte*, 428 U.S. at 563.

54. Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1 (1991).

55. *See id.* at 84-86.

56. It is possible that this argument might also require reversal of *Brignoni-Ponce* "as applied." While that decision is justifiable on its face, Professor Johnson has noted that its application has lead to very disturbing police actions. *See* Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675, 697-716 (2000) (detailing cases where police stopped Mexican-Americans apparently solely or largely because of their appearance, and describing the resulting dignitary harms). Professor Mirandé makes the same point. *See generally* Mirandé, *supra* note 1. If courts are relying on *Brignoni-Ponce* as authority for using Latino/a heritage as the *main* criterion for immigration-related stops in the Southwest then, as I argue in the text, it is bad law, however justifiable in theory.

However, it is worth noting that, in three of the four cases Professor Mirandé cites as evidence of racial profiling, the Ninth Circuit found the Fourth Amendment *was* violated. *Id.* at 367-76. *See* Gonzalez-Rivera v. INS, 22 F.3d 1441 (9th Cir. 1994) (holding that it was unreasonable to stop two men of Mexican-American ancestry who looked at police and then looked away and one of whom was wearing a cap); United States v. Salinas, 940 F.2d 392 (9th Cir. 1991) (holding that it was unreasonable to stop person of Mexican ancestry driving an old car that appeared loaded down); United States v. Mallides, 473 F.2d 859, 861 (9th Cir. 1973) (holding that it was unreasonable to stop six "Mexican-American appearing males" riding in a sedan at dusk who were sitting erectly and not looking at a passing patrol car).

interesting query. Are there other examples in Supreme Court caselaw that demonstrate inequitable application, conscious or not, of the Fourth Amendment to a particular group? For instance, is there an "African-American exception" to the Fourth Amendment,[57] or a "drug user exception"?[58] Below I make the case for what I think may be the best "hidden" example of anti-egalitarianism in Fourth Amendment law—an exception based on poverty (which may, given the overlap between class and race, come close to being a "minority exception" as well, but is not the same thing). The discussion focuses on the Supreme Court's caselaw, first in connection with searches, and then in connection with seizures.

A. *Search Jurisprudence*

Much of the evidence for the "poverty exception" to the Fourth Amendment comes from the Supreme Court cases that define the threshold of that amendment. These cases tell us when we have a "reasonable expectation of privacy," police infringement of which is a "search" that triggers the Fourth Amendment's protection.[59] If the police engage in a search, so defined, then they usually need probable cause and often need a warrant. If their action is not a search, they need neither a warrant, or *any* justification for their action.

Several Court decisions define expectations of privacy in a way that makes people who are less well-off more likely to experience warrantless, suspicionless government intrusions. For instance, the Court has stressed that the Fourth Amendment is less likely to be implicated when a reasonable person would have taken more steps to ensure the privacy of the area searched.[60] Similarly, it has indicated that the amendment is not applicable when the vantage point used by the police to spy or eavesdrop on people in their homes and other locations is "lawful," that is, public or quasi-public.[61] Instead of declaring that one's living space and belongings are

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57. *See infra* note 93.

58. As several commentators have pointed out, many of the exceptions to the traditional warrant and probable cause requirements have come from cases involving drug dealers and users and possessors of drugs. *See, e.g.*, Stephen A. Saltzburg, *Another Victim of Illegal Narcotics: The Fourth Amendment (as Demonstrated by the Open Fields Doctrine)*, 48 U. PITT. L. REV. 1 (1986).

59. *See generally* WHITEBREAD & SLOBOGIN, *supra* note 38, § 4.03.

60. *See, e.g.*, United States v. Dunn, 480 U.S. 294, 305 (1987) (holding that search of barn did not implicate the Fourth Amendment in part because target had only covered opening into the barn with see-through netting); California v. Ciraolo, 476 U.S. 207, 211, 213-14 (1986) (holding that a police flyover of a backyard does not implicate the Fourth Amendment in part because anyone flying over the property or on a large vehicle could have seen over target's fence); Rawlings v. Kentucky, 448 U.S. 98, 106 (1980) (holding that "legitimate expectations of privacy" may exist only when the search target has taken precautions that are customarily taken by those seeking privacy).

61. *Dunn*, 480 U.S. at 304-05 (holding that viewing a barn from private "open fields" is not

automatically entitled to constitutional protection—a conclusion that would seem to follow from the Fourth Amendment's explicit mention of "houses" and "effects"[62]—the Court has signaled that the reasonableness of privacy expectations in such areas is contingent upon the existence of "effective" barriers to intrusion. In other words, one's constitutional privacy is limited by one's actual privacy.[63]

That stance ineluctably leads to the conclusion that Fourth Amendment protection varies depending on the extent to which one can afford accoutrements of wealth such as a freestanding home, fences, lawns, heavy curtains, and vision- and sound-proof doors and walls.[64] Although the Supreme Court itself has yet to hear a case directly on point, lower courts have not been reticent about following up on this implication of the Court's decisions. As a result, people who live in public spaces (for instance, the homeless who reside in boxes) and people who have difficulty hiding or distancing their living space from casual observers (for instance, those who live in tenements and other crowded areas) are much more likely to experience unregulated government intrusions.[65]

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a search). Lower courts have held that viewing the interior of a home from that part of the curtilage that invites the public (e.g., a sidewalk) is not a search. *See* WAYNE LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.3(c) (3d ed. 1996).

62. *See* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, paper, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

63. *See, e.g.*, Florida v. Riley, 488 U.S. 445, 451 (1989) (holding that officer who saw marijuana in backyard from helicopter did not engage in search because "[a]ny member of the public could legally have been flying over Riley's property in a helicopter at the altitude of 400 feet and could have observed Riley's greenhouse. The police officer did no more."); California v. Ciraolo, 476 U.S. 207, 213-14 (1986) (finding no search when officers saw marijuana in backyard from airplane because "[a]ny member of the public flying in this airspace who glanced down could have seen everything that these officers observed"). The Court's recent decision in *Kyllo v. United States*, 533 U.S. 27 (2001), although emphasizing the sanctity of the home in holding that use of a thermal imager to detect heat sources within a house is a search, unfortunately restates the proposition that home surveillance that does not involve "intrusion into a constitutionally protected area" is not a search. *Id.* at 34. *See generally* Christopher Slobogin, *Peeping Techno-Toms and the Fourth Amendment: Seeing Through* Kyllo's *Rules Governing Technological Surveillance*, 86 MINN. L. REV. 1393, 1406-11 (2002) (arguing that *Kyllo* leaves intact the inquiry into whether sufficient steps to protect privacy have been taken).

64. *See* Ronald J. Bacigal, *Some Observations and Proposals on the Nature of the Fourth Amendment*, 46 GEO. WASH. L. REV. 529, 541-42, 542 nn. 94-95 (1978) (arguing that Fourth Amendment privacy exists only for "those wealthy enough to live exclusively in private places").

65. With respect to homes in public areas, see, e.g., People v. Thomas, 45 Cal. Rptr. 2d 610, 613 n.2 (Cal. Ct. App. 1995) (no privacy expectation in cardboard box located on city sidewalk in which homeless defendant was residing); State v. Mooney, 588 A.2d 145, 154 (Conn. 1991) (no privacy interest in home under a bridge); State v. Cleator, 857 P.2d 306, 308 (Wash. Ct. App. 1993) (no privacy expectation in tent pitched on public land without permission). *But see* State v. Dias, 609 P.2d 637, 640 (Haw. 1980) (holding that people who had lived in makeshift homes on public land for a long period without government interference have expectation of privacy).

Even in those situations where the interior of the home is not viewable from a public space, the homes of poor people are more likely to receive little or no Fourth Amendment protection. The most blatant example of this tendency is *Wyman v. James*,[66] in which the Supreme Court held that welfare workers may conduct warrantless, suspicionless inspections of benefit recipients' homes for the purpose of detecting welfare fraud.[67] Five members of the six-member majority in *Wyman* went so far as to say that such inspections are not searches at all,[68] while the sixth concluded that, even if such inspections are searches, they are reasonable because the evidence so obtained could not result in criminal sanction.[69]

Yet a mere four years earlier, in a case involving inspection of a home *outside* the welfare context, the Court had expressly rejected the latter line of reasoning (and thereby implicitly rejected the non-search rationale as well). In *Camara v. Muncipal Court*,[70] the Court considered whether the Fourth Amendment applies to residential health and safety inspections for faulty wiring, leaky pipes, and the like.[71] These inspections, like welfare inquiries, normally result only in a civil penalty if violations are found.[72] Yet the Court held that health and safety inspections, if conducted nonconsensually, *do* require a warrant, albeit one that can be based on generalized rather than individualized suspicion.[73] Furthermore, the Court was only willing to relax the warrant requirement to this extent because of the public's general "acceptance" of such inspections, their lesser invasiveness, and the difficulty of detecting health and safety violations in other ways.[74] None of these assumptions are as easily made in the welfare inspection context, where relevant information can be gleaned in a number of ways other than traipsing through the home without a warrant.[75]

With respect to viewing of tenements and the like, see, e.g., *United States v. Garcia*, 997 F.2d 1273, 1280 (9th Cir. 1993) (finding no search where police look into back door that is "readily accessible from a public place, like the driveway and parking area here"); *State v. Cloutier*, 544 A.2d 1277 (Me. 1988) (no search where officer on path from side door looked into basement window); LAFAVE, *supra* note 61, at 486 ("[C]ourts are inclined to view those occupying [multiple-occupancy] dwellings as having a reduced privacy expectation.").

66. 400 U.S. 309 (1971).

67. *Id.* at 326.

68. *Id.* at 318.

69. *Id.* at 326 (White, J., concurring).

70. 387 U.S. 523 (1967).

71. *Id.* at 525.

72. *Id.* at 531.

73. *Id.* at 538-40. The term "generalized suspicion" is mine. Slobogin, *supra* note 54, at 82-83.

74. *Camara*, 387 U.S. at 537.

75. For instance, in *Wyman* itself the record showed that federal regulations regarding investigation of welfare fraud required neither a home visit nor an interview with the recipient's children, *Wyman*, 400 U.S. at 319, that James offered to provide the state any information it

Wyman and *Camara* are hard to reconcile, except on the ground that the homes of people on welfare get less Fourth Amendment protection. Admittedly, there is a line of cases, decided subsequent to *Wyman* and *Camara*, which stands for the proposition that licenses to engage in certain businesses may be conditioned on relaxed Fourth Amendment protection.[76] From these cases one might argue that welfare benefits can likewise be conditioned on relinquishment of Fourth Amendment rights in one's home. But homes are not businesses; they are clearly entitled to greater privacy.[77] More importantly, the Court has specifically refused to permit warrantless entries even of businesses when the government is after assets for tax purposes.[78] Presumably, therefore, the Court would require a warrant when the IRS seeks evidence of tax-related illegalities (whether in a business *or* residence) even though tax breaks, like welfare benefits, are a form of government largesse that could be conditioned on relinquishment of Fourth Amendment rights. Those suspected of tax fraud get full Fourth Amendment protection; those suspected of welfare fraud get none. Once again, the poor person's Fourth Amendment rights pale against the wealthier person's.

There are other, more subtle, indications in the Court's caselaw that the homes and belongings of poorer folk receive lesser constitutional protection from government searches. For example, adjoining apartments may be searched even when only one of them is listed in the warrant, so long as the "objective" facts make distinguishing between the two difficult,[79] something that would never happen with two freestanding houses or even most well-designed (i.e., more expensive) apartments.[80] Along the same lines,

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desired in an interview, *id.* at 314, and that the state already knew her child had a skull fracture, a dent in the head, and a possible rat bite. *Id.* at 322 n.9.

76. *See, e.g.*, Donovan v. Dewey, 452 U.S. 594, 600 (1981) (upholding a warrantless, suspicionless inspection of a coal mine because coal mining is a "pervasively regulated" industry); United States v. Biswell, 406 U.S. 311, 316 (1972) (upholding a warrantless, suspicionless inspection of a gun store on the ground that "[w]hen a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms and ammunition will be subject to effective inspection").

77. LAFAVE, *supra* note 61, at 531 ("It is a fair generalization . . . that business and commercial premises are not as private as residential premises, and that consequently there are various police investigative procedures which may be directed at such premises without the police conduct constituting a Fourth Amendment search.").

78. G.M. Leasing Corp. v. United States, 429 U.S. 338, 359 (1977) (holding that a warrant, based on probable cause, is required before agents from the IRS may enter business premises to seize assets to satisfy tax assessments).

79. Maryland v. Garrison, 480 U.S. 79, 88 (1987).

80. Indeed, it is hard to believe that objective facts could justify search of two different apartments. As Justice Blackmun stated in his dissent in *Garrison*, it is "difficult to imagine that, in the initial security sweep, a reasonable officer would not have discerned that two apartments were on the third floor. . . ." *Id.* at 101 (Blackmun, J., dissenting).

vehicles, in which less well-off people are much more likely to live, may be searched without a warrant.[81] When that holding was based on the idea that cars might disappear before a warrant could be obtained,[82] it at least had a presumptively neutral justification. Now, however, the rule is bottomed solely on the Court's assumption that a mobile vehicle—regardless of whether it is *likely* to move before a warrant can be obtained and regardless of whether it *is* a home—is associated with a lesser expectation of privacy than a house.[83]

Consider two other possible examples of a poverty exception in the search context. Justice Scalia has asserted, probably accurately, that under the Court's "container jurisprudence" any container outside a building can be subject to warrantless search,[84] again a scenario more likely to affect those who have no building in which to place their belongings. Finally, the Court has held that, while consent to search a car clearly permits police to search a brown paper bag on the car floor,[85] "[i]t is very likely unreasonable" to believe that the same consent would authorize search of a locked briefcase in the trunk,[86] dictum that speaks for itself.

B. *Seizure Jurisprudence*

Examples of a Fourth Amendment poverty exception also abound in connection with seizures. For instance, a public arrest need not be authorized by a warrant.[87] As is true of the vehicle exception described above, this rule would not be inequitable if limited to those situations in which police have no time to obtain a warrant. But the Court does not require exigency for an arrest made in public.[88] As a result, the police virtually never need a warrant to arrest either a homeless person or a person

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81. California v. Carney, 471 U.S. 386, 394 (1985) (holding that police may search a "vehicle" in any setting that "objectively indicates that the vehicle is being used for transportation," and concluding that the search of the mobile home in this case did not require a warrant).

82. Carroll v. United States, 267 U.S. 132, 151 (1925), was the case that established the "automobile exception" but, unlike *Carney*, 471 U.S. at 386, it focused on the mobility of the car rather than the privacy interest associated with it.

83. *See supra* note 38; *see also* Pennsylvania v. Labron, 518 U.S. 938, 940 (1996) (rejecting a lower court holding requiring "exigency" in order to justify a warrantless automobile search). The Court's migration from an exigency to a privacy rationale for the automobile exception is recounted in WHITEBREAD & SLOBOGIN, *supra* note 38, § 7.02.

84. California v. Acevedo, 500 U.S. 565, 585 (1991) (Scalia, J., concurring).

85. Florida v. Jimeno, 500 U.S. 248, 251 (1991).

86. *Id.* at 251-52.

87. United States v. Watson, 423 U.S. 411, 423 (1976).

88. *Id.* ("[W]e decline to transform [a] judicial preference [for arrest warrants] into a constitutional rule when the judgment of the Nation and Congress has for so long been to authorize warrantless public arrests on probable cause.").

who spends most of his time outdoors because his home is crowded, in a state of disrepair, or simply unpleasant. In contrast, the person with a good home is generally protected from warrantless arrest in non-exigent circumstances.

Consider also the Court's suspect holding that brief police-citizen encounters on the street and on public transportation are "consensual,"[89] despite the fact that such encounters are often tense even when the citizen is innocent.[90] That holding is much more likely to affect the poor, who spend relatively more of their time on the street. Similarly, living in a high crime (poor) neighborhood, while not sufficient in itself to give police reasonable suspicion to stop individuals,[91] can authorize detention on relatively little else, such as when the person runs from the police,[92] despite the fact that many poor people, especially African-American ones in certain urban areas, do not want to deal with the police even when innocent of any crime.[93]

Finally, there is *Lago Vista v. Atwater*,[94] perhaps not an obvious example of the poverty exception, but worth at least considering from that perspective. There, over a vigorous dissent by four justices,[95] the Court held that the Fourth Amendment does not prevent custodial arrest even for "very minor crimes."[96] Police will use this authority primarily to arrest three types of people for minor offenses: (1) traffic violators who are from out-

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89. *See, e.g.*, Florida v. Bostick, 501 U.S. 429, 439-40 (1991) (holding that brief questioning on a bus is not a seizure); California v. Hodari D., 499 U.S. 621, 629 (1991) (holding that chasing a fleeing individual is not a "seizure"); INS v. Delgado, 466 U.S. 210, 216 (1984) (holding that "brief questioning" not involving physical restraint is not a seizure).

90. Daniel J. Steinbock, *The Wrong Line Between Freedom and Restraint: The Unreality, Obscurity, and Incivility of the Fourth Amendment Consensual Encounter Doctrine*, 38 SAN DIEGO L. REV. 507, 521 (2001) ("The doctrine of consensual encounters, as established by the Supreme Court and administered by the lower courts, is by and large a fictional construct, exempting from the coverage of the Fourth Amendment significant interferences with personal liberty.").

91. Illinois v. Wardlow, 528 U.S. 119, 124 (2000) (individual's presence in a high crime area, "standing alone," is insufficient for reasonable suspicion).

92. *Id.* at 124-25.

93. *See* United States v. Bayless, 913 F. Supp. 323 (S.D.N.Y. 1996) ("[R]esidents in this [African-American] neighborhood tended to regard police officers as corrupt, abusive and violent."). The *Bayless* scenario is a possible example of an "African-American exception" to the Fourth Amendment. But as with the cases purporting to endorse a Mexican exception, it is weak evidence of such an exception, even if one accepts that many innocent African-Americans run from the police. Reasonable suspicion only requires a modicum of suspicion, and running from police, independent of the runner's race, *more often than not* is evidence of guilt. On the other hand, the same cannot be said of living in a poor, high-crime neighborhood. *See generally* Slobogin, *supra* note 54, at 80 n.262.

94. 532 U.S. 318 (2001).

95. *Id.* at 361 (O'Connor, J., dissenting).

96. *Id.* at 354.

of-state and may need to be taken into custody to ensure their fines are paid; (2) those who "misbehave" when confronted by the police (apparently the category into which Ms. Atwater, a middle-class "soccer mom," fits[97]); and (3) those whom the police simply want to harass or check out, despite the absence of any concrete suspicion. The last (and by far the largest) category of arrests will occur because, given the Court's search incident to arrest jurisprudence,[98] police may conduct a search of a person and the interior of the person's car if they can come up with a valid ground for custodial arrest. What type of people are police most likely to stop for trivial criminal violations in the hopes of carrying out such warrantless and suspicionless searches? I leave it for the reader to decide.

V. CONCLUSION

Relative wealth makes a difference in search and seizure. *Atwater* and a few of my other illustrations may be contestable as solid evidence of a poverty exception to the Fourth Amendment. But compared, for instance, to the evidence for an exception aimed at Mexicans, there are fairly robust indications that the Court's caselaw affords the poorer people in our country much less protection of their privacy and autonomy than those who are better off.

If there is a "poverty exception," why does it exist? One might try for a deep critique, and suggest that the Founding Fathers were primarily interested in protecting middle class property values over all else.[99] More prosaically, perhaps the members of the Supreme Court presided over by Chief Justices Burger and Rehnquist, from which virtually all of these cases come, cannot imagine their own privacy being invaded by street cops, welfare workers, or traffic police using minor violations pretextually; consciously or unconsciously, their decisions may reflect that fact. Most directly, a Court interested in crime control might want Fourth Amendment rules that make it relatively easy to search and seize the class of people most likely to commit crime—the poor.

I am willing to believe that the poverty exception is not an intentional creation of the Court. Certainly, seemingly "neutral" reasons can be given for all the decisions described in this Essay. But neutral reasons also can be given for the *contrary* result in each instance. Perhaps had the Court

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97. Although neither Ms. Atwater nor her child were wearing a seatbelt, there was evidence that the officer who stopped her had a previous unpleasant encounter with her that might have influenced his actions. *Id.* at 324 n.1.

98. *See* New York v. Belton, 453 U.S. 454, 460 (1981) (holding that a custodial arrest of a car occupant permits search of the interior of the car); United States v. Robinson, 414 U.S. 218, 236 (1973) (holding that a custodial arrest authorizes search of the arrestee's person).

99. *See generally* CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 100-01 (1962 ed.).

thought more carefully about the interests of the poorer segments of society when deciding its cases, it would have structured a Fourth Amendment that is more protective of us all.

POSTSCRIPT: POVERTY AND THE FOURTH AMENDMENT ACCORDING TO PROFESSOR STUNTZ

After completing this Essay, I was reminded of Professor William Stuntz' thought-provoking 1999 article "The Distribution of Fourth Amendment Privacy."[100] On the surface, that article and this Essay are similar in perspective, for Stuntz too argues that the Fourth Amendment needs revision given its differential impact on those who are poor. However, both his description of the Fourth Amendment's discriminatory effects and his prescription for how to deal with them are quite different than mine. Fleshing out these points helps finetune the theme of this Essay.

Stuntz makes three basic assertions. His first claim—and the one most closely related to the argument in this Essay—is that Fourth Amendment law, in particular its emphasis on privacy, raises the cost of investigating middle- and upper-class crime relative to crime committed by the urban poor.[101] Because the latter group is more likely to engage in crime in less "private" places, such as the streets and cars, it is less likely to receive Fourth Amendment protection.[102] Building on that premise, his second assertion is that, contrary to my position, we ought to *relax* Fourth Amendment standards to the extent they are based on privacy, as a means of lowering the cost of investigating the more well-to-do.[103] His third assertion is that this step might, in turn, increase the presence of wealthier people in prisons, thereby exerting pressure to change our currently harsh approach to punishment, which may exist, in part, because those with political clout do not experience it.[104]

Crucial to all three assertions is the assumption that Fourth Amendment law itself is a primary cause of differential law enforcement. I agree with that conclusion to a point. As I have already demonstrated, *current* Fourth

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100. William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265 (1999).

101. *Id.* at 1267.

102. *Id.* (concluding that "[p]rivacy, as Fourth Amendment law defines it, is something people tend to have a lot of only when they also have a lot of other things").

103. *Id.* at 1289 ("[L]ess constitutional regulation might not be a bad thing, given that constitutional regulation does not seem to be advancing the cause of fairer, and more fairly distributed, policing.").

104. *Id.* at 1287 ("[I]f the pool of criminal defendants had been wealthier and white . . . it seems plausible to suppose that the politics of crime and punishment would look different today."). Professor Stuntz develops this point further in William J. Stuntz, *Race, Class and Drugs*, 98 COLUM. L. REV. 1795, 1840-41 (1998).

Amendment law defines expectations of privacy and consensual encounters so narrowly that only those people who can afford opaque living quarters and crime-free neighborhoods are likely to avoid random or near-random government confrontation.

But Stuntz is after bigger and different game than the specific rules I have criticized. He is dissatisfied with *any* Fourth Amendment jurisprudence to the extent it relies on varying the degree to which the government must justify its actions on the degree to which privacy is invaded. Even reforming the law in the way that I advocate would make house searches more difficult to justify than car searches, car searches harder to uphold than frisk "searches," and home arrests more burdensome than stops of both cars and pedestrians.[105] Stuntz argues against this proportionality approach because of its disproportionate impact on the poor.

The descriptive problem with this argument is that a proportionality-driven Fourth Amendment approach does not have the impact Stuntz says it has. The police undoubtedly are fixated on the urban poor. But the greater willingness of the police to investigate this group is the product of a number of factors having nothing to do with the Fourth Amendment. Police investigative behavior is most strongly influenced by the simple fact that the urban poor commit more violent crime and at least as much drug crime as other groups in society.[106] Furthermore, classism and racism, citywide and community-based political pressure, and the relative ease of policing known "crime areas" all conspire to make the disadvantaged city-dweller a relatively attractive police target.[107]

If Stuntz is correct that the Fourth Amendment is one of the real culprits in explaining differential police treatment, one would expect to see very few searches of houses belonging to the urban poor, because such searches, requiring a warrant and probable cause, are inefficient in a poor

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105. For further elaboration of my views on Fourth Amendment doctrine (which explicitly call for a hierarchy of Fourth Amendment protections), see Slobogin, *supra* note 54, and Christopher Slobogin, *Let's Not Bury* Terry: *A Call for Rejuvenation of the Proportionality Principle*, 72 ST. JOHN'S L. REV. 1053 (1998).

106. Following Stuntz, *supra* note 100, at 1272-73, I equate the urban poor in this context with young Black males. As David Cole notes, "[a]ll relevant data–from arrest rates to conviction rates to victim reporting–suggest that young people are more likely to commit crime than old people, men more likely than women, and black people more likely than white people." DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 21-22 (1999). Stuntz himself quotes data indicating that Blacks and Hispanics use drugs at least as often as Whites in proportion to their representation in the population. *See* Stuntz, *supra* note 100, at 1286 n.77.

107. *See* Carol S. Steiker, *"How Much Justice Can You Afford"–A Response to Stuntz*, 67 GEO. WASH. L. REV. 1290, 1291-92 (1999) (detailing reasons why it would be "difficult . . . to imagine that law enforcement policy would change even if Fourth Amendment law were altered so as to decrease the relative cost of policing the rich").

neighborhood where police can easily resort to street stops and frisks. Yet the evidence we have suggests that relatively *more* house searches occur in inner city neighborhoods than anywhere else.[108] The police are not picking on the urban poor because the rest of society is too hard to search; they are simply going after the group they think, rightly or wrongly, is most crimogenic, in whatever fashion available to them, including searches of houses. The same attitudes that explain the driving-while-Black phenomenon, which involves disproportionate stops of Black and Hispanic-driven cars on highways driven by people of all classes and races,[109] also explain police treatment of inner city poor. The Fourth Amendment's hierarchical focus on privacy plays little or no role in facilitating this differential treatment.

But let us assume I am wrong about this. That gets us to the prescriptive part of the analysis. One would think that, if Stuntz is right that Fourth Amendment rules provide a significant incentive for police to focus on the poor, the solution would be to provide more Fourth Amendment protection to that group, rather than reducing it for the rest of society. Stuntz argues, however, that the latter move is not possible. He rightly points out that, at least as the Court defines it, expectations of privacy and autonomy vis-á-vis the government are governed largely by expectations of privacy and autonomy vis-á-vis others,[110] and that, under this standard,

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108. The only evidence I could find on this point comes from the famous National Center for State Courts study. RICHARD VAN DUIZEND ET AL., THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, PRACTICES (1985). That study involved seven cities, three of which (Harbor, Hill and River) had populations which were approximately 60% Black and Hispanic, and the other four of which (Border, Forest, Mountain and Plains) were approximately thirty percent or less Black and Hispanic. *Id.* at 5 (Table 1). A later study of the same cities reported crimes rates, populations, and number of warrants issued in these same seven cities for the year 1984. Craig Uchida et al., *Acting in Good Faith: The Effects of* United States v. Leon *on the Police and Courts*, 30 ARIZ. L. REV. 467, 473 (1988) (Table 1, on characteristics of cities) & 487 (Table 3, on warrant-based caseflow). Based on this information (and simplifying it), Harbor City and Border City had similar populations (around 1 million) and crime rates (Harbor City averaged 80 crimes/1000 to Border City's 70 crimes/1000), yet Harbor City, with a minority population three times greater than Border City's (20%), issued well over twice as many warrants (368 to 135). Hill City and Forest City also had similar populations (around 500,000) and crime rates (Hill City averaged 115 crimes/1000 to Forest City's 110 crimes/1000), yet Hill City, with a minority population three times greater than Forest City's (20%), issued more warrants (125 to 109). River City and Plains City had similar populations (around 750,000) and similar warrant issuance numbers (119 to 113). Although River City had twice the minority population that Plains City did (60% to 30%), Plains City's crime rate was somewhat higher (100/1000 compared to 80/1000), a fact that should lead to *more* warrants, not fewer, *if* all else is held equal.

109. *See generally* David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 561-66 (1997) (describing statistics in several jurisdictions indicating that Black and Hispanic drivers are stopped much more often than whites relative to their presence on the highways).

110. *See supra* note 63; *see also* Stuntz, *supra* note 100, at 1268-69 (describing cases that

activities in public, and brief encounters with others, will always be seen as less intrusive than house searches and arrests.

If we are willing to reject the Court's current mode of analysis, however, we can still provide the poor more meaningful Fourth Amendment protection without abandoning a proportionality-driven Fourth Amendment. As many have argued,[111] the Court is wrong in linking the scope of Fourth Amendment privacy to our everyday privacy. Especially in this age of easy technological surveillance, the latter barely exists. Instead, based either on a privacy notion or a mutual government-citizen trust rationale,[112] the poor's homes should be accorded the same constitutional protection as the mansions of the wealthy; the poor's belongings, even those in paper bags, should be treated in the same fashion as the contents of a briefcase; and street stops should be recognized as the nonconsensual encounters they are (as the few well-to-do people who have experienced them recognize[113]).

Stuntz' dislike for the privacy basis of the Fourth Amendment does not lead him to abandon all regulation of police search and seizure, of course. Rather, he suggests that because of our obsession with privacy we have not paid enough attention to the *coercive* aspects of police investigative techniques.[114] For example, he notes, a coercion-based approach to the Fourth Amendment might be more successful than current rules at

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"take the privacy people have, and use it to define the privacy that the police cannot invade without some good cause."); *id.* at 1284 (describing caselaw as holding that police-citizen "encounters are generally deemed consensual if the officer refrains from physical force and puts his commands in the form of questions").

111. *See, e.g.*, Mary I. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 CAL. L. REV. 1593, 1597 (1987) (arguing, in the Fourth Amendment standing context, that "the threat to our interests comes not from other individuals, but from the government").

112. *See* Scott E. Sundby, *"Everyman's" Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751, 1763, 1777 (1994) (arguing that the privacy focus of the Fourth Amendment should be supplanted with a focus on mutual "government-citizen trust" so as to avoid a Fourth Amendment based on a "factor that, over the long term, resulted in an overall decline in the Amendment's protections"). I have argued that Sundby's trust model is problematic as a framework for devising specific rules governing search and seizure, but that it makes good sense as a metaphor for describing why government power should be limited even when we lack privacy vis-á-vis others. Slobogin, *supra* note 105, at 1060.

113. See account of ex-professional baseball player Joe Morgan's encounter with the police, in Victor Merina, *Joe Morgan's Suit Protests Drug 'Profile,'* L.A. TIMES, Aug. 7, 1990, at B1 (discussing Morgan's federal civil rights lawsuit against the City of Los Angeles for illegal racial profiling at Los Angeles International Airport).

114. Stuntz, *supra* note 100, at 1289 ("Perhaps it is time to think about search and seizure cases not in terms of the strength of different defendants' privacy interests, but in terms of the kinds of interests that matter most to the kinds of suspects police target most . . . police coercion and harassment. . . .").

inhibiting random stops and searches at "street markets," in which many of the poor conduct their drug business.[115]

He is probably right. But a properly constructed privacy-based approach that recognizes the nonconsensual nature of such stops would have the same inhibitory effect on police behavior.[116] In any event, recasting the issue in terms of coercion will not avoid the hierarchical effects Stuntz seeks to prevent: because home arrests and searches are more coercive than street stops and frisks, his regime will still disproportionately affect poor people. Moreover, reliance on coercion as the touchstone of Fourth Amendment analysis leaves huge loopholes in the regulatory regime. For instance, because surveillance using technology such as wiretaps, video cameras, beepers, magnification devices, and x-rays can often be conducted coercion-free,[117] it would be subject to little or no regulation under Stuntz' approach, with a consequent vast potential for "expensive" mistakes against rich and poor alike.

Where Stuntz is closest to the target is in his third assertion that sentencing policy would change if we put more well-to-do people in prison. American sentencing rules, which are among the world's harshest,[118] probably *would* become fairer if we put a greater number of such people behind bars. Stuntz is willing to restructure Fourth Amendment law radically to achieve that goal.

There is no doubt that if we relaxed restrictions on search and seizure, more people, including more upper class people, would end up in prison. Consider a number of other moves we could make in the same vein. Suspects could be denied counsel during interrogation, regardless of whether they have one waiting in the wings.[119] All defendants, rich and poor, could be required to accept representation by overworked public

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115. Although he alludes to this point in his George Washington Law Review article, see *id.* at 1284, it is best developed in Stuntz, *supra* note 104, at 1823-24.

116. *See* Slobogin, *supra* note 105, at 1057-58, 1083 (arguing that a "security" model of the Fourth Amendment that recognizes privacy, autonomy, and property interests should require reasonable suspicion for short stops and patdowns and probable cause for prolonged stops).

117. For a description of the extent to which technology poses threats to privacy, see Christopher Slobogin, *Technologically-Assisted Physical Surveillance: The American Bar Association's Tentative Draft Standards*, 10 HARV. J. L. & TECH. 383, 404-08 (1997) (describing video surveillance and tracking, magnification, illumination and detection devices).

118. *See* THE SENTENCING PROJECT, AMERICANS BEHIND BARS: U.S. AND INTERNATIONAL USE OF INCARCERATION 1995 (1997) (The United States incarcerates approximately 600 out of every 100,000 citizens; the closest Western European country is Spain, which incarcerates 105 out of every 100,000 citizens.).

119. *Cf.* Philip E. Johnson, *A Statutory Replacement for* Miranda, 24 AM. CRIM. L. REV. 303, 308-09 (1986) (recommending elimination of the right to counsel at interrogation); Thomas Weigend, *Germany*, *in* CRIMINAL PROCEDURE: A WORLDWIDE STUDY 187, 201 (Craig Bradley ed., 1999) (noting that Germany provides a right to silence but no right to counsel during police interrogation).

defenders.[120] Defendants could be limited in their spending on experts and other types of evidence preparation.[121] In short, at every point where wealth provides an advantage, we could refashion the constitutional rule (downward) to neutralize that advantage. We could force the O.J. Simpsons of the world to play by the rules governing most criminal defendants.

Perhaps, in a very indirect way, that approach would improve the overall quality of the criminal justice system. The elite might not put up with a system that treats everyone the way we now treat the poor. If so, by reducing the constitutional protection all defendants enjoy, in theory we would actually increase the protection the poor enjoy in fact.

Of course, the other possibility is that, if there was such a downward ratchet, everyone would lose, rich and poor alike. At least in the Fourth Amendment context, I am not willing to take that risk. There are other less constitutionally threatening means of bringing home the costs of our crime and sentencing policies.[122] In the meantime, rather than minimizing Fourth Amendment protection for the better-off, we should eliminate the poverty exceptions that permeate Fourth Amendment law.

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120. *Cf.* Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 334-35 (1985) (holding that a congressional statute limiting attorneys' fees in administrative cases involving veterans to $10 per case did not violate either the due process clause or the First Amendment).

121. *Cf.* Ake v. Oklahoma, 470 U.S. 68, 83 (1985) (holding that indigent defendants are entitled to state-paid expert assistance only when the expertise is relevant to a "significant factor" in the defense, and that even in such cases the defendant is entitled to only one such expert, who need not be the one the defendant prefers).

122. One method, of course, is equal enforcement of the law, which would not only put more upper and middle class people in prison but might also, as Stuntz himself has pointed out, improve social norms toward drug usage. Stuntz, *supra* note 104, at 1841 ("[M]ore equal enforcement might strengthen the norm itself, which would do more than prison cells can to combat the social breakdown that drugs can cause.").