REHNQUIST AND PANVASIVE SEARCHES

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INTRODUCTION

We are living in a mass-surveillance society. Digital cameras with zoom and night-vision capacity proliferate in our nation's cities.[1] Fusion centers, at last count numbering over seventy around the country, are sucking up gigabytes of information about our transactions.[2] Transponders in our cars and Global Positioning System (GPS) devices in our phones allow our travels to be tracked twenty-four hours a day.[3] Drones developed for wartime, equipped with high-powered magnification devices, are

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[1] *See, e.g.*, Paul Joseph Watson, *New Street Lights to Have "Homeland Security" Applications*, INFOWARS.COM (Oct. 26, 2011), http://www.infowars.com/new-street-lights-to-have-homeland-security-applications; *Local Surveillance to Plug into Homeland Security Camera System*, INFOWARS.COM (Sept. 24, 2008), http://www.infowars.com/local-surveillance-to-plug-into-homeland-security-camera-system; Fran Spielman, *Feds Give City $48 Million in Anti-terrorism Funds*, CHI. SUN-TIMES, Dec. 4, 2004, at 10.

[2] *See* U.S. DEP'T OF HOMELAND SEC., *Fusion Center Locations and Contact Information*, http://www.dhs.gov/fusion-center-locations-and-contact-information (last visited Jan. 6, 2013) (listing 77 fusion center locations).

[3] *See* FED. TRADE COMM'N, RADIO FREQUENCY IDENTIFICATION: APPLICATIONS AND IMPLICATIONS FOR CONSUMERS (2005); Justin Elliot, *How Easy Is It for the Police to Get GPS Data from Your Phone?*, TPM MUCKRAKER (Dec. 9, 2009, 2:13 PM), http://tpmmuckraker.talkingpointsmemo.com/2009/12/cell_phone_surveillance_unpacking_the_legal_issues.php.

flying over our urban areas every hour of the day.[4] Although these techniques are now pervasive, and are often invasive, their defining characteristic is their *pan*vasiveness—the fact that they affect so many people, most of them innocent of any wrongdoing.

Panvasive surveillance could be deemed a type of search. But the Supreme Court's interpretation of the Fourth Amendment's prohibition on unreasonable "searches" has pretty much neutered the Constitution's ability to regulate the ways modern government keeps tabs on its citizens. According to the Court, one generally cannot have a reasonable expectation of privacy—and thus can have no constitutionally protected interest—in activities that take place in public spaces or in transactions that involve third parties.[5] We assume the risk that these everyday activities will be viewed by or disclosed to the government, and thus the government needs no justification when it decides to monitor them. The Court's recent decision in *United States v. Jones*[6]—which held that placing a tracking device on a car infringes a property interest protected by the Fourth Amendment[7]—and the concurring opinions in that case—which evidenced a willingness to recognize a Fourth Amendment privacy interest in travels over a long period of time[8]—signal that the Court may be rethinking its views on this score. But as the law stands right now, panvasive investigative techniques are immune from Fourth Amendment regulation.

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[4] *Is the NYPD Experimenting with Drones over the City? Evidence Points to Yes*, CBS NEW YORK (Jan. 23, 2012, 11:59 PM), http://newyork.cbslocal.com/2012/01/23/is-the-nypd-experimenting-with-drones-over-the-city-evidence-points-to-yes; Katie Baker, *CNN: 'Houston Police Use Drone Planes,'* THE RAW STORY (Nov. 25, 2007), http://rawstory.com/news/2007/CNN_Houston_police_use_drone_planes_1124.html.

[5] *See* Christopher Slobogin, *Is the Fourth Amendment Relevant in a Technological Age?*, *in* CONSTITUTION 3.0: FREEDOM AND TECHNOLOGICAL CHANGE 11, 12-19 (Jeffrey Rosen & Benjamin Wittes eds., 2011). Some scholars have argued that the First Amendment can fill the gaps left by the Court's Fourth Amendment jurisprudence, but no court has been willing to take this approach. *See* Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112 (2007); *see also* Marc Jonathan Blitz, Stanley *in Cyberspace: Why the Privacy Protection of the First Amendment Should Be More Like that of the Fourth*, 62 HASTINGS L.J. 357 (2010).

[6] 132 S. Ct. 945 (2012).

[7] *Id.* at 949.

[8] *See id.* at 955-56 (Sotomayor, J., concurring); *id.* at 963 (Alito, J., concurring in the judgment).

William Rehnquist had a lot to do with that. In the opinions addressing search and seizure issues that he wrote or joined, he endorsed a view of the Fourth Amendment that favored the concrete over the invisible. To him, a confrontation with a police officer, no matter how intimidating, was not a seizure unless it involved some type of physical force.[9] More relevant to the current discussion, the Fourth Amendment opinions he wrote or joined stand for the proposition that a police action that avoids physical invasion of "persons, houses, papers, and effects"[10] is not a search, no matter how aggressive police were in looking for evidence of crime.[11]

Yet Rehnquist was not inattentive to the less tangible interests that the Fourth Amendment might be said to protect. In particular, panvasive police surveillance, even if aimed solely at activities openly carried out in public, was something that concerned him. Support for that perhaps surprising conclusion comes not from his Fourth Amendment opinions, which did not give him an occasion to address the issue directly, but from a law review article he wrote shortly after he joined the Court, entitled *Is an Expanded Right of Privacy Consistent with Fair and*

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[9] *See, e.g.*, United States v. Drayton, 536 U.S. 194, 200 (2002) (holding, in an opinion joined by Rehnquist, that police confrontation of a passenger on a bus was not a seizure); Florida v. Rodriguez, 460 U.S. 1, 6-7 (1984) (per curiam) (holding, in an opinion joined by Rehnquist, that a police request to follow officer to another location was consensual); Florida v. Royer, 460 U.S. 491, 508, 518 (1983) (holding, with Rehnquist dissenting, that Royer was seized when agents held his ticket and identification); United States v. Mendenhall, 446 U.S. 544, 555 (1980) (in which Rehnquist was one of only two Justices concluding that Mendenhall was not seized); Dunaway v. New York, 442 U.S. 200, 218-19, 223-25 (1979) (holding, with Rehnquist as one of two dissenters, that Dunaway was not seized when he was taken from his home to the stationhouse for questioning).

[10] U.S. CONST. amend. IV.

[11] *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 41-46 (2001) (Stevens, J., dissenting) (arguing, with Rehnquist in dissent, that use of a thermal imager to detect heat differentials inside a home is a search); Florida v. Riley, 488 U.S. 445, 451-52 (1989) (holding, in an opinion joined by Rehnquist, that flying 400 yards over a backyard is not a search); California v. Greenwood, 486 U.S. 35, 40 (1988) (holding, in an opinion joined by Rehnquist, that searching through garbage is not a search); Oliver v. United States, 466 U.S. 170, 176-77 (1984) (holding, in an opinion joined by Rehnquist, that search of open fields is not a search); United States v. Place, 462 U.S. 696, 707 (1983) (stating, in dictum joined by Rehnquist, that a dog sniff of luggage is not a search). *Cf.* Bond v. United States, 529 U.S. 334, 338-39 (2000) (holding, in an opinion written by Rehnquist, that physically manipulating luggage to feel the contents is a search).

Effective Law Enforcement? Or: Privacy, You've Come a Long Way, Baby.[12] Despite the subtitle's insinuation that the privacy envelope might have been pushed too far, this article, appearing in 1974 in the *University of Kansas Law Review*, expounds on principles that might be particularly pertinent in thinking about whether and how modern police investigative techniques ought to be regulated.

Stated succinctly, the principles that one can glean from Rehnquist's article are three in number: (1) the Fourth Amendment protects "freedom from unauthorized oversight or observation;" (2) government infringement of this freedom requires a "particularized law enforcement interest;" and (3) the latter requirement is strongest when the government seeks items a person "has chosen to keep private and away from prying eyes," but does not disappear simply because the activities or items observed are in public.[13] After describing some of the more provocative general points Rehnquist makes in his *University of Kansas Law Review* article, this Essay explains how these three specific principles emerge from its pages. The Essay then speculates how Rehnquist might have applied the principles to panvasive investigative methods. It concludes that the Fourth Amendment analysis Rehnquist appears to endorse in his article, contrary to the Court's current approach, might place some non-trivial limitations on many of the global investigative methods modern police forces use today.

I. *PRIVACY, YOU'VE COME A LONG WAY, BABY*: SOME GENERAL THEMES

Rehnquist's article, a written version of two lectures delivered at the University of Kansas School of Law on September 26th and 27th, 1974, is fascinating for a number of reasons. First, of course, it is authored by a man who would be instrumental in defining the scope of constitutional privacy for the next quarter

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[12] William H. Rehnquist, *Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement? Or: Privacy, You've Come a Long Way, Baby*, 23 U. KAN. L. REV. 1 (1974).

[13] *See infra* notes 37-69 and accompanying text (discussing Rehnquist's three principles).

century.[14] Second, somewhat surprisingly in light of Rehnquist's antipathy toward expansive Fourth Amendment protections, the article is very respectful of privacy. Rehnquist states that privacy is a "concept going to the roots of our citizens' independence, dignity, and integrity."[15] While the overall tone of the article is that privacy interests should generally not trump legitimate law enforcement goals, he emphasizes that "no thinking person" would consider privacy "a negative value."[16]

Third, while the article is on the whole cautious in its conclusions, some of its ruminations about the interaction of privacy and law enforcement verge on the controversial, or at least are unexpectedly provocative for a new Justice on the Court. A central theme of the article is the parallel it draws between Justice Louis Brandeis's right to be let alone,[17] often seen as the progenitor of the Supreme Court's privacy-oriented approach to the Fourth Amendment,[18] and the Court's anti-regulatory line of cases originating with *Lochner v. New York* in 1905.[19] Rehnquist recognized that *Lochner*'s aggressive interpretation of the freedom of contract—an approach that allowed the Court to strike down democratically enacted wage and hour statutes—was no longer the law.[20] But, he asserted that the now-defunct, *Lochner*-type cases were "sisters under the skin"[21] with decisions like *Griswold v. Connecticut*,[22] which nullified, on privacy grounds, a law

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[14] Craig M. Bradley, *The Fourth Amendment: Be Reasonable*, *in* THE REHNQUIST LEGACY 104, 104 (Craig Bradley ed., 2006) (stating that, in the Fourth Amendment context, "[m]ore often than not, [Rehnquist] has convinced a majority of his colleagues to go along with his conservative views and, even in dissent, invariably advances cogent and well-reasoned arguments").

[15] Rehnquist, *supra* note 12, at 1.

[16] *Id.* at 2.

[17] Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (stating that the Fourth Amendment "conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men").

[18] *See* Thomas K. Clancy, *What Is a "Search" Within the Meaning of the Fourth Amendment?*, 70 ALB. L. REV. 1, 51 (2006) ("Following Brandeis' lead, many others through the decades have voiced similar arguments that the Fourth Amendment must be construed to afford protections against the dramatic increase in the ability of the government to intrude based on advances in technology.").

[19] *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905).

[20] Rehnquist, *supra* note 12, at 6.

[21] *Id.* (internal quotation marks omitted).

[22] 381 U.S. 479 (1965).

restricting the use of birth control, and *Roe v. Wade*,[23] which limited legislatures' ability to restrict abortion. Thus, Rehnquist apparently did not entirely subscribe to the economic-freedom-may-be-restricted-but-personal-freedom-may-not-be dichotomy on which the Court itself has relied in distinguishing the two lines of cases.[24] Rather, he thought they were closely related because both grapple with the extend to which the government can control individuals' decisions about their lives.

That reluctance to confine *Griswold* and its progeny to the most intimate liberty interests led him to an astonishing proposal for a conservative Justice: Decriminalization. Privacy might best be protected not by placing limitations on police ability to enforce the law, Rehnquist suggested, but by eliminating, as both *Griswold* and *Lochner* did, certain types of laws. Rehnquist started this train of thought by noting that, consistent with procedural-justice research that would not see the light of day until a decade later,[25] restrictions on law enforcement in the name of privacy not only handcuff police but might also "lessen[] the pressure to obey the law" by people who are normally law-abiding—whether they obey the law because of a sense of moral duty or because they fear being caught for their transgressions.[26] What is the point of following the law, Rehnquist thought people might complain, if the government does not enforce it?

He then tied this observation to his affinity for the civil libertarian aspects of *Lochner*. Rather than making law enforcement difficult in order to protect privacy, he reasoned, a better way of avoiding "the corroding effect of undermining both respect for the law and willingness to obey the law" might be to eliminate some of the more intrusive criminal statutes.[27] Although his level of enthusiasm for this radical move is difficult to assess, he stated that "it is not at all impossible" that prostitution,

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[23] 410 U.S. 113 (1973).

[24] The distinction was made most explicitly in *Griswold*, 381 U.S. at 482 ("We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation.").

[25] *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990).

[26] Rehnquist, *supra* note 12, at 19.

[27] *Id.* at 20.

pimping, and even marijuana-possession laws could join in purgatory the provisions struck down in *Griswold* and *Roe*![28] To be clear, he believed that decriminalization is the province of legislatures, not courts. But, presaging a debate that is heating up today,[29] he labeled as "compelling" the argument that "it is preferable to repeal a law that makes a particular act criminally punishable rather than to keep the law on the books but make it very difficult to enforce against those who transgress it."[30]

Another surprising set of claims Rehnquist made in *Privacy, You've Come a Long Way, Baby*—at least for those who think of him as a dyed-in-the-wool Crime Control Crusader—presage modern-day debates about the inevitable tension between privacy on the one hand and the state's increasing demand for personal information necessary to carry out its taxation and regulatory objectives on the other.[31] As Rehnquist put it, "[T]he stark fact of the matter is that one need in no way be under suspicion of having violated a law or breached a regulation in order for the government to begin to acquire information about him."[32] He then stated that while a person could, in theory, avoid revelation of private details by declining government largesse and thus avoid

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[28] *Id.*

[29] *Compare* Jeffrey Bellin, *Crime-Severity Distinctions and the Fourth Amendment: Reassessing Reasonableness in a Changing World*, 97 IOWA L. REV. 1, 36 (2011) (arguing that police misuse of arrests for minor crimes should be fought by increasing Fourth Amendment protection in such situations), *with* Christopher Slobogin, *Why Crime Severity Analysis is Not Reasonable*, 97 IOWA L. REV. BULL. 1, 5-7 (2012), http://www.uiowa.edu/~ilr/bulletin/ILRB_97_Slobogin.pdf (arguing that abuses of discretion in minor cases should be addressed through eliminating vagueness-tainted minor crimes, not changing Fourth Amendment justification standards). In *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510 (2012), the Court refused to differentiate between serious and minor offenses in the context of strip searches prior to detention in jail, on the ground that even people arrested for disorderly conduct, trespass, and shoplifting could smuggle in contraband and weapons, *see id.* at 1523. The four-member dissent found this danger to be minimal when weighed against the invasion and argued that strip searches should require reasonable suspicion. *Id.* at 1525 (Breyer, J., dissenting). Another solution, per Rehnquist, would be to decriminalize disorderly conduct and other minor offenses, or at least foreclose custodial arrests of those who commit such offenses. *See supra* text accompanying notes 28-30.

[30] Rehnquist, *supra* note 12, at 21.

[31] *See, e.g.*, William Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1019 (1995) (arguing that a Fourth Amendment based on privacy is in significant tension with the state's need to gather information relevant to the regulatory state).

[32] *Id.* at 15.

government regulatory inquiries, "in the real world this may not be a very meaningful option."[33]

The latter observation is particularly interesting in light of the Court's statement two years later in *United States v. Miller*[34] (a decision Rehnquist joined) that people "voluntarily" convey their financial information to banks.[35] His 1974 lecture, read in context, is not necessarily inconsistent with that decision.[36] But his language at least indicates a Justice aware of the tradeoffs.

II. *IS AN EXPANDED RIGHT OF PRIVACY CONSISTENT WITH FAIR AND EFFECTIVE LAW ENFORCEMENT?*: THREE PRINCIPLES

Much of the rest of Rehnquist's 1974 article wrestles with the privacy implications of variations on one particular scenario: Government recording and dissemination of convictions, arrests, and sub-arrest "detentions." It was in the course of discussing this topic that Rehnquist developed the three principles described earlier.

Rehnquist began by stating what he regarded as a truism: Convictions and arrests are public events and thus cannot be "private."[37] Borrowing from *Webster's Dictionary*, he defined the latter term—which he believed to be "largely" coextensive with the protection afforded by the Fourth Amendment—as "'the quality or state of being apart from the company or observation of others'" or "'freedom from unauthorized oversight or observation,'" thus establishing what I am calling his first principle of the Fourth Amendment.[38] Using this definition of privacy, Rehnquist quickly

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[33] *Id.* at 16.

[34] 425 U.S. 435 (1976).

[35] *Id.* at 442.

[36] Immediately after the quoted statement Rehnquist seemed to express a reluctance to carry the idea to its logical conclusion by stating:

> [I]f we find significant policy obstacles to dispensing with the requirement that individuals who seek benefits from the government furnish information to show that they are entitled to the benefits, it may well be that some of the same policy arguments militate against the incautious imposition of additional restrictions on governmental information gathering in the area of criminal law enforcement.

Rehnquist, *supra* note 12, at 18-19.

[37] *Id.* at 8 (internal quotation marks omitted).

[38] *Id.* at 4 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1804 (1961)).

concluded that legitimate convictions and arrests (as distinguished from sub-arrest detentions) are "public" facts, and that any individual interest in expunging them is generally overridden by government informational needs.[39]

Furthermore, Rehnquist was loath to put significant limitations on dissemination of conviction and arrest data. He saw no reason to prevent such records from being revealed to other law enforcement agencies.[40] Nor did he appear to have a problem with providing conviction or arrest records to potential employers. While he could see "respectable arguments" for withholding arrest data from the latter group given the possibility of inaccuracy and unfair prejudice, he suggested that "an educational campaign" would be a preferable way of handling any bias problem.[41] With respect to presumably more reliable conviction records, not even disclosure to the public at large appeared to give him pause. Noting that recent trends had been "to open up governmental activities to public inspection and to permit public access to many kinds of government records that were formerly thought to be confidential," he stated that "it would take a far stronger claim of privacy than any I have heard made to require the opposite result in the case of criminal conviction."[42]

Fifteen years later Rehnquist would join an opinion upholding denial of a Freedom of Information Act ("FOIA") request for a government rap sheet.[43] But that decision was based on the rationale that the FOIA is meant to facilitate press and citizen access to "what the Government is up to," not to records documenting individuals' personal information.[44] More representative of Rehnquist's approach to privacy claims with respect to dissemination of criminal records are the holdings in *Paul v. Davis*[45] and *Smith v. Doe*.[46] In *Davis*, written by Rehnquist two years after the Kansas speech, the Court held that public

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[39] *Id.* at 8-9 (records of conviction); *id.* at10 (arrest records).

[40] *Id.* at 10.

[41] *Id.* at 12.

[42] *Id.*

[43] U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 762-63 (1989).

[44] *Id.* at 780 (internal quotation marks omitted).

[45] 424 U.S. 693 (1976).

[46] 538 U.S. 84 (2003).

distribution of flyers containing a picture of Davis and erroneously depicting him as an "active shoplifter" did not deprive him of "liberty" or "property," regardless of any harm they may have done to his reputation.[47] Rehnquist also characterized as "far afield" Davis's argument that the distribution of the flyers impinged "his freedom of action in a sphere contended to be 'private;'" Rehnquist simply pointed to the fact that the arrest upon which the flyer was based was an "official act."[48] In *Smith*, Rehnquist joined an opinion that rejected an ex post facto claim against a sex-offender notification, in the course of which the Court stated that "[a]lthough the public availability of the information may have a lasting and painful impact on the convicted sex offender, these consequences flow not from the Act's registration and dissemination provisions, but from the fact of conviction, already a matter of public record."[49]

Thus, Rehnquist was not sympathetic to privacy challenges involving the disclosure, much less the recording, of convictions and arrests. But he was more reluctant to sanction lesser information-gathering endeavors, including government documentation of sub-arrest detentions. In the course of explaining why, he recognized that even activities that take place in public should often be immune from government observation, particularly when, to use the term coined earlier, they are panvasive.

Rehnquist began his analysis by asking the reader to imagine that police officials station a car at the entrance of a popular bar's parking lot every evening for two hours, solely for the purpose of taking down license numbers that are subsequently matched with names through motor vehicle records.[50] He then stated:

> If we assume that the bar has the necessary liquor license to sell drinks, that nothing more is known about the individuals patronizing the bar than that they happen to drive into its

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[47] *Davis*, 424 U.S. at 695, 712 (internal quotation marks omitted).

[48] *Id.* at 713.

[49] *Smith*, 538 U.S. at 101. Rehnquist also joined the majority opinion in *Whalen v. Roe*, 429 U.S. 589 (1977), which held that "neither the immediate nor the threatened impact" of revealing patients' identities to treatment personnel constituted "an invasion of any right or liberty protected by the Fourteenth Amendment," *id.* at 603-04.

[50] Rehnquist, *supra* note 12, at 9.

> parking lot at this hour, and that there are no other special circumstances present, I would guess that the great majority of people who might have the question posed to them would say that this is not a proper police function.[51]

Rehnquist apparently placed himself within this hypothesized majority. While he noted that, given the fact that other citizens could easily observe the activity, driving into a bar parking lot could not be considered private "in any normal sense of the word, there would be an uneasiness, and I think a justified uneasiness, if those who patronized the bar felt that their names were being taken down and filed for future reference" by the government.[52] He went on to say that "most of us would feel that . . . a dossier on every citizen ought not to be compiled even if manpower were available to do it."[53]

Coming from Rehnquist, these comments are remarkable, because they are contrary to the dogma, alluded to earlier, that the Court began developing even before he joined the Court: Outside the home, one cannot have a reasonable expectation of privacy in activity that occurs in full view of third parties. This idea was espoused even in the landmark and supposedly liberal case of *Katz v. United States*,[54] which stated in 1967, several years before Rehnquist joined that Court, that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."[55] It was repeated in several later cases involving tracking on public thoroughfares,[56] flyovers of curtilage,[57] and (in cases like *Miller*) accessing financial

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[51] *Id.*

[52] *Id.*

[53] *Id.* at 10.

[54] 389 U.S. 347 (1967).

[55] *Id.* at 351.

[56] United States v. Knotts, 460 U.S. 276, 281-82 (1983) ("When [the defendant] traveled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was travelling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination when he exited from public roads onto private property.").

[57] California v. Ciraolo, 476 U.S. 207, 213-14 (1986) ("Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed. . . . [Therefore] we readily conclude that respondent's expectation that his garden was protected from such observation is unreasonable and is not an expectation that society is prepared to honor.").

and phone information from the companies that maintained it[58]—all of which Rehnquist joined.

To be sure, in his *University of Kansas Law Review* article Rehnquist was careful to avoid saying that his bar hypothetical implicated the Fourth Amendment. Rather he distinguished "our general aversion to governmental surveillance of even our most public acts" from "the 'core' concerns of the [F]ourth [A]mendment privacy."[59] The important point, however, is that whatever one calls the claim attributable to the bar patrons, Rehnquist thought it a viable one. This type of public surveillance was not, to Rehnquist, a proper government function. Furthermore, even though he stated that activities in a public place cannot be called private in a "'dictionary'" sense, he also recognized that people who engage in them can have a "claim to privacy" in a more general sense.[60] Indeed, as a technical matter, the dictionary definition he quoted speaks of "*unauthorized* oversight or observation."[61] One can thus make the case that, even in Rehnquist's own terms, privacy is infringed when government acquires information it is not authorized to acquire.

The inevitable next question concerns when government information gathering is authorized. In developing what might be termed his second principle, Rehnquist suggested that there must be a "particularized law enforcement interest" to justify an infringement of "privacy."[62] But by this he did not necessarily mean "individualized suspicion," as that term has been used in many Supreme Court cases, to refer to suspicion about a particular individual.[63] Rather, he was quite willing to countenance a more general, programmatic government rationale.

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[58] Smith v. Maryland, 442 U.S. 735, 744 (1979) ("When he used his phone, petitioner voluntarily conveyed numerical information to the telephone company and 'exposed' that information to its equipment in the ordinary course of business. In so doing, petitioner assumed the risk that the company would reveal to police the numbers he dialed."); United States v. Miller, 425 U.S. 435, 443 (1976) ("The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government.").

[59] Rehnquist, *supra* note 12, at 14.

[60] *Id.* at 13.

[61] *Id.* at 4 (emphasis added) (internal quotation marks omitted).

[62] *Id.* at 11.

[63] *Cf.* United States v. Martinez-Fuerte, 428 U.S. 543, 560-61 (1976) (contrasting stops at a checkpoint with stops of individuals and stating that, although "some

For instance, building on the bar scenario he asserted that if, on two successive evenings, a patron of the bar had been killed during the evening hours in question "a significantly different picture would be presented."[64] Surveillance of the many innocent people observed during the stakeout would now be permissible, he stated, since the government has a legitimate interest "in developing whatever information might be available about each patron of the bar during the time in question on subsequent nights."[65] Similarly, Rehnquist wrote, photographing spectators at a series of rallies held by a presidential candidate, after police come to suspect that someone might be stalking the candidate, could be justified "given the extraordinary gravity and seriousness" of the situation.[66] Both scenarios require invading the public anonymity of dozens or hundreds of people. But because they involve attempting to detect, apprehend, or preempt a killer, neither gave Rehnquist pause.

This willingness to permit "pan-investigations" of public activities in the absence of individualized suspicion, but only if some type of legitimate justification exists, suggests a third principle behind Rehnquist's comments. In other work, I have called it the "proportionality principle," the idea that the justification for a government-investigative action ought to be proportionate to its intrusiveness.[67] As Rehnquist put it, "The very strong core-area interest of the individual in not having private papers in his home searched and seized by the government may be overridden because of what is considered the even stronger societal interest in permitting police, upon a proper showing, to conduct a search in order to apprehend and convict a criminal.[68] At the same time, he stated, "[T]he much lesser individual interest in not having public activities observed and recorded may prevail

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quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure[,] . . . the Fourth Amendment imposes no irreducible requirement of such suspicion.").

[64] Rehnquist, *supra* note 12, at 11.

[65] *Id.*

[66] *Id.* at 13.

[67] *See* CHRISTOPHER SLOBOGIN, PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT 21 (2007); *see also* Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 68-75 (1991).

[68] Rehnquist, *supra* note 12, at 14.

in the absence of any governmental justification for the surveillance."[69] Thus, Rehnquist seemed to think that even minimal governmental intrusions required some, albeit minimal, justification.

III. IMPLICATIONS

To those familiar with the Court's Fourth Amendment jurisprudence, the previous sentence rings hollow. In the public-surveillance and institutional-third-party cases noted above, Rehnquist joined or wrote decisions that permitted, in the absence of any justification whatsoever, government observation of or access to all sorts of activities and transactions, not only "public" ones but also many that most people would dub "private."[70] Rehnquist's *University of Kansas Law Review* article might be written off as merely the product of a new Justice waxing philosophical about sub-constitutional matters that he knows will have no impact on the Court's docket.

In none of the Supreme Court cases noted to this point, however, was the police action panvasive in nature. Rather, all of them involved an investigation of one individual for whom the government had developed at least some degree of suspicion. For instance, in *Miller* government agents had zeroed in on Miller as the operator of an illegal distillery at the time they requisitioned his bank records.[71] In *Smith v. Maryland*,[72] which held that phone records maintained by the phone company are not protected by the Fourth Amendment, the police already had reason to suspect that Smith was the perpetrator of a robbery before they obtained phone-company logs describing his phone calls.[73] In each of the flyover cases, government agents or informants had fingered the

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[69] *Id.*

[70] For instance, while the Court has held that information given to a bank is not private for Fourth Amendment purposes, *United States v. Miller*, 425 U.S. 435, 441-42 (1976), most citizens would probably conclude otherwise. *See* Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society,"* 42 DUKE L.J. 727, 738-39 (1993) (reporting results of a survey indicating that participants believed "[p]erusing bank records" to be highly intrusive).

[71] United States v. Miller, 425 U.S. 435, 437 (1976).

[72] 442 U.S. 735 (1979).

[73] *Id.* at 737.

defendants before aerial surveillance took place.[74] In short, none of these cases can be analogized to Rehnquist's bar example.

Of course, a number of other cases decided during the Rehnquist era—specifically, those involving regulatory inspections, roadblocks, and drug testing programs—did uphold dragnet-type police operations. Rehnquist could be counted upon to find for the government in these cases as well, and indeed was the only Justice to do so in all of them. With respect to regulatory searches, Rehnquist joined opinions upholding warrantless, non-particularized inspections of coal mines[75] and junkyards,[76] and joined the dissent in a case holding that warrants are required to conduct non-consensual Occupational Safety and Health Administration inspections.[77] He wrote or joined opinions upholding checkpoints designed to nab illegal immigrants,[78] unlicensed drivers,[79] drunk drivers,[80] and (as in his modified bar example) witnesses to a crime.[81] He also joined majority opinions upholding suspicionless drug testing of railway workers,[82] customs agents,[83] and school children.[84] Furthermore, in the only three

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[74] *See* Florida v. Riley, 448 U.S. 445, 448-49 (1989) (flyover initiated by an anonymous tip that Riley was growing marijuana in his backyard); California v. Ciraolo, 476 U.S. 207, 209 (1986) (flyover initiated by an anonymous tip); Dow Chemical Co. v. United States, 476 U.S. 227, 229 (1986) (flyover occurred after Dow Chemical refused a second inspection).

[75] Donovan v. Dewey, 452 U.S. 594, 608-09 (1981) (Rehnquist, J., concurring in the judgment). Rehnquist was careful to note in his concurrence that the inspection of the coal mine only involved observation of space "largely visible to the naked eye without entrance onto the company's property." *Id.* at 609. He abandoned this fastidiousness in subsequent business-inspection cases. *See infra* notes 76-77 and accompanying text.

[76] New York v. Burger, 482 U.S. 691, 712 (1987).

[77] Marshall v. Barlow's, Inc., 436 U.S. 307, 325 (1978) (Stevens, J., dissenting).

[78] United States v. Martinez-Fuerte, 428 U.S. 543, 561-62 (1976).

[79] In *Delaware v. Prouse*, 440 U.S. 648 (1979), Rehnquist dissented to an opinion holding that random stops to check licenses violate the Fourth Amendment. *See id.* at 664 (Rehnquist, J., dissenting). However, he agreed with the Court's dictum that checkpoints set up for the same purpose are constitutional, albeit with the observation that the majority's dictum "elevates the adage 'misery loves company' to a novel role in Fourth Amendment jurisprudence." *Id.*

[80] Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990). Rehnquist wrote the majority opinion in this case. *See id.*

[81] Illinois v. Lidster, 540 U.S. 419, 420 (2004).

[82] Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 634 (1989).

[83] Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 677 (1989).

[84] Bd. of Educ. v. Earls, 536 U.S. 822, 830 (2002); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995).

roadblock and drug-testing cases in which the Court found against the government, he wrote or joined dissents.[85] For instance, in *Chandler v. Miller*, where the other eight members of the Court voted to nullify a Georgia statute that required candidates for political office to undergo drug testing,[86] Rehnquist wrote a scathing dissenting opinion arguing that the Court's reasoning would also prohibit a state from requiring candidates to undergo a general health examination.[87]

So Rehnquist was a constant, and occasionally the lone, voice in favor of panvasive searches and seizures. But in each case he was able to find a "particularized" government rationale. Whether it was the dangers of coal mining, the use of junkyards to hide car theft, illegal immigration, drunk driving, or the ravages of drug usage, Rehnquist could point to a "significant" problem that the search and seizure program was meant to address.[88]

In a few of these cases, the government interest Rehnquist identified was admittedly amorphous. In *Chandler*, for instance, he stressed that "the use of illegal drugs and abuse of legal drugs is one of the major problems of our society" without providing any concrete evidence that Georgia candidates were afflicted by this problem,[89] a point he implicitly recognized by stating at the end of his opinion that "[n]othing in the Fourth Amendment or in any other part of the Constitution prevents a State from enacting a statute whose principal vice is that it may seem misguided or even silly to the Members of this Court."[90] And in *City of Indianapolis v. Edmond*,[91] he authored a dissent that appeared to permit roadblocks at the government's whim, as long as they are administered in a non-discriminatory fashion.[92] He specifically

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[85] *See* City of Indianapolis v. Edmond, 531 U.S. 32, 48 (2000) (Rehnquist, J., dissenting); Ferguson v. City of Charleston, 532 U.S. 67, 91 (2001) (Scalia, J., dissenting); Chandler v. Miller, 520 U.S. 305, 323 (1997) (Rehnquist, C.J., dissenting).

[86] *See Chandler*, 520 U.S. at 322-23.

[87] *See id.* at 327-28 (Rehnquist, C.J., dissenting).

[88] *See, e.g.*, Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 451 (1990) ("No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it.").

[89] *Chandler*, 520 U.S. at 324 (Rehnquist, C.J., dissenting).

[90] *Id.* at 328.

[91] 531 U.S. 32 (2000).

[92] *Id.* at 53 (Rehnquist, C.J., dissenting) ("These stops effectively serve the State's legitimate interests; they are executed in a regularized and neutral manner; and they

objected to the majority's holding that roadblocks set up to achieve "ordinary law enforcement interests" were unconstitutional in the absence of individualized suspicion.[93]

Yet even in *Chandler* and *Edmond*, Rehnquist tried to identify a concrete law-enforcement problem the panvasive technique could address. In *Chandler*, he mentioned the possibility that drug use by politicians could increase the risk of corruption and the handling of sensitive information.[94] In *Edmond*, he emphasized that while the roadblock was designed in part to interdict drugs, it was also set up to check licenses (as indicated by the fact that forty-nine drivers who went through the roadblock were arrested for non-drug offenses).[95] Furthermore, as solicitous as he was of roadblocks in *Edmond*, he never explicitly sanctioned them as a method of checking cars for evidence of any and all crime. Rather, he simply stated that "[e]fforts to enforce the law on public highways used by millions of motorists are obviously necessary to our society"[96] after referencing *United States v. Martinez-Fuerte*[97] and *Michigan Department of State Police v. Sitz*,[98] the Court cases that upheld checkpoints near the border for illegal immigrants and sobriety checkpoints. Using what he called "balancing" analysis, Rehnquist concluded that these specified government interests were sufficient to justify the intrusion involved, which he viewed as minimal.[99]

At bottom, none of these cases involved the type of random information gathering involved in Rehnquist's bar example, which in 1974 he stated was "not a proper police function."[100] What would he say today if confronted with the panvasive investigative

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only minimally intrude upon the privacy of the motorists. They should therefore be constitutional.").

[93] *Id.* at 55 (criticizing the majority's holding that at least some individualized suspicion is required for general law enforcement at checkpoints by stating that "the Court's newfound non-law-enforcement primary purpose test is both unnecessary to secure Fourth Amendment rights and bound to produce wide-ranging litigation over the 'purpose' of any given seizure").

[94] *Chandler*, 520 U.S. at 326-27 (Rehnquist, C.J., dissenting).

[95] *Edmond*, 531 U.S. at 51 (Rehnquist, C.J., dissenting).

[96] *Id.* at 55.

[97] 428 U.S. 543, 561-62 (1976).

[98] 496 U.S. 444, 455 (1990).

[99] *Id.* at 455.

[100] Rehnquist, *supra* note 12, at 9.

methods described at the beginning of this Essay? How would he react to the specter of cameras recording everyone's public travels, gargantuan data-mining programs, dragnet tracking, and city-wide aerial surveillance? At this point, answers to these questions can only be pure speculation. But it is speculation worth pursuing, since it exposes how even a very conservative Justice might react negatively to dragnet surveillance.

First, consider two solutions proffered by others. The first is to limit such panvasive techniques to investigation of serious crimes.[101] The second is to place no limitations on the use of these techniques but rather to restrict the information so gathered to prosecution of serious offenses.[102]

If he were to remain consistent with his 1974 article, Rehnquist would be unlikely to choose either route. As noted earlier, for procedural-justice reasons he would prefer repealing laws prohibiting lesser transgressions to making them difficult to enforce.[103] Moreover, given his avid support for the Supreme Court's decision in *Whren v. United States*,[104] which permits valid

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[101] *See* Bellin, *supra* note 29, at 6 ("[A]s judges develop new rules to apply the Fourth Amendment in the modern era, they incorporate the severity of the crime being investigated into determinations of constitutional reasonableness."); William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 875 (2001) ("[T]he worst crimes are the most important ones to solve, the ones worth paying the largest price in intrusions on citizens' liberty and privacy."); Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment "Reasonableness,"* 98 COLUM. L. REV. 1642, 1662 (1998) ("The main problem with current Supreme Court doctrine in the Fourth Amendment area is its almost complete failure to engage in any substantive scrutiny at all . . . .").

[102] *See* SIMON CHESTERMAN, ONE NATION UNDER SURVEILLANCE: A NEW SOCIAL CONTRACT TO DEFEND FREEDOM WITHOUT SACRIFICING LIBERTY 5 (2011) ("[T]he point of this book is to shift the focus away from questions of whether and how governments should *collect* information and onto more problematic and relevant questions concerning its *use*."); Orin S. Kerr, *Use Restrictions and the Future of Surveillance Law*, *in* CONSTITUTION 3.0: FREEDOM AND TECHNOLOGICAL CHANGE 37, 39-45 (Jeffrey Rosen & Benjamin Wittes eds., 2011) ("Computer surveillance uses widespread collection and analysis of less intrusive information to yield clues normally observable only through the collection of more intrusive information. To achieve those benefits, the law will need to allow relatively widespread collection of data but then give greater emphasis and attention to their use and disclosure."); William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2183 (2002) ("Instead of limiting what search tactics the government can use or requiring permission when it uses them, we could limit what the government does with the information once it has it.").

[103] *See supra* notes 25-30 and accompanying text.

[104] 517 U.S. 806 (1996).

seizures for minor violations even when the police's real agenda is to gather evidence of more serous criminality, he appeared to view arrests for infractions that remain on the books as an excellent crime-control mechanism.[105] Presumably, then, he would have been reluctant to adopt a rule cabining government's ability to use technology as a means of sniffing these infractions out.

Rehnquist might have been more attracted to an approach imposing restrictions on use rather than restrictions on acquisition. However, two aspects of his 1974 article suggest he would have been reluctant to adopt this scheme as well. First, the article, as well as his opinions in *Davis* and *Smith*, make clear that he was reluctant to limit law enforcement use of legitimately acquired information, whatever its nature.[106] Second, and most importantly, his article registered real concern about panvasive searches—as he put it, actions that smacked of government "dossier" creation[107]—if they are conducted in the absence of any justification.

Instead of adopting one of these approaches, Rehnquist more likely would have engaged in the balancing analysis apparent in *Chandler*, *Edmond*, and his other Fourth Amendment opinions and consistent with the third principle—proportionality—implicit in his article.[108] On the individual interest side of the balance, one familiar with his body of work on the Court would not be unreasonable in concluding that he would have considered the degree of intrusion connected with public surveillance and data mining minimal. Indeed, had he been on the Court in the 2011-2012 term when it decided *United States v. Jones*,[109] the most important, recent Fourth Amendment privacy case, he might well have been a lone dissenter, disagreeing with both the legal fiction endorsed by the majority—that placement of a GPS device on a

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[105] City of Indianapolis v. Edmond, 531 U.S. 32, 52 (2000) (Rehnquist, J., dissenting) ("Once the constitutional requirements for a particular seizure are satisfied, the subjective expectations of those responsible for it, be it police officers or members of a city council, are irrelevant."); *see also* Scott v. United States, 436 U.S. 128, 136 (1978) ("Subjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional").

[106] *See supra* notes 40-49 and accompanying text.

[107] Rehnquist, *supra* note 12, at 10.

[108] *See* Bradley, *supra* note 14, at 104 (noting Rehnquist would reason that "[e]ach search must be assessed according to its reasonableness.").

[109] 132 S. Ct. 945 (2012).

car violates a property interest—and the expansive notion of privacy championed by the concurring opinions—that prolonged tracking is a search.[110]

Yet *Jones*, like *Miller* and most other Court cases dealing with the definition of "search," involved investigation of a single person.[111] If his 1974 article is any guide, when considering the individual interests associated with *panvasive* surveillance, Rehnquist was more willing to ascribe weight to what he called the "sense of unease" that comes from government information gathering.[112] While he might have drawn a distinction between the visible police vehicle in his bar scenario and the usually covert nature of technological surveillance, his distaste for government-compiled dossiers suggests he would recognize that such a distinction quickly dissipates once people find out about government programs capable of monitoring the public activities of the entire population and of trawling through billions of data points.[113]

Given the views expressed in his *University of Kansas Law Review* article, then, it seems likely that Rehnquist would have been bothered by the panvasiveness of modern technological surveillance and that instead his focus would have been on the nature of the government interest. The problem for him in the bar scenario was the complete lack of justification for the police activity. The usual justification given for modern camera

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[110] Rehnquist would have had problems with the majority opinion in *Jones* because he consistently distinguished cars from homes in Fourth Amendment cases. *See, e.g.*, Rakas v. Illinois, 439 U.S. 128, 148 (1978) (Rehnquist majority opinion emphasizing that "[w]e have on numerous occasions pointed out that cars are not to be treated identically with houses or Apartments for Fourth Amendment purposes"); *see also Edmond*, 531 U.S. at 55. He would have trouble with the concurring opinions because he would have been reluctant to reverse the Court's cases holding that one does not have privacy in public. *See, e.g.*, Bond v. United States, 529 U.S. 334, 337 (2000) (Rehnquist majority opinion distinguishing manipulation of luggage from flyover cases by noting that the latter "involved only visual, as opposed to tactile, observation").

[111] After developing reason to believe Jones was a drug trafficker, police tracked Jones via a GPS device planted on his car for almost a month. *Jones*, 132 S. Ct. at 948.

[112] *See supra* text accompanying notes 52-53.

[113] *See, e.g.*, Christopher Slobogin, *Government Data Mining and the Fourth Amendment*, 75 U. CHI. L. REV. 317, 334-36 (2008) (reporting results of a survey indicating that people view many types of camera surveillance and record gathering to be more intrusive than a roadblock and, in some circumstances, more intrusive than a frisk).

surveillance or data mining is that it allows government to detect otherwise hard-to-detect crime or maintain order through deterrence.[114] Admittedly, these justifications are not completely irrational. But unless confined to prevent something of "extraordinary gravity and seriousness,"[115] as in the presidential-rally example he proffered in his *University of Kansas Law Review* article, they are even weaker and less specific than the rationales Rehnquist was willing to accept in *Chandler* and *Edmond*. Perhaps they nonetheless would have struck him as adequate, at least as a matter of Fourth Amendment law. Perhaps, however, he would finally have drawn a line, remembering the qualms he expressed back in 1974.[116]

CONCLUSION

My own preference with respect to regulation of panvasive investigative techniques combines political-process theory with a more robust version of Rehnquist's proportionality reasoning.[117] If the panvasive technique is authorized, directly or through appropriate delegation, by a legislative body that is truly representative of the targeted polity, and if it applies evenly to all (including the officials who authorize the technique), it should be upheld unless it fails to meet the traditional rational basis test. If no such legislative authorization exists (which describes almost every dragnet case considered by the Court during the Rehnquist era),[118] then seizures or searches conducted during such programs should be based on suspicion proportionate to the degree of intrusion.

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[114] *See* SLOBOGIN, *supra* note 67, at 84-88 (cameras); *id.* at 169-70 (records access).

[115] Rehnquist, *supra* note 12, at 13.

[116] Possibly relevant here is the statement Rehnquist made in *Donovan v. Dewey*, 452 U.S. 594, 608 (1981) (Rehnquist, J., concurring in the judgment), that: "I have no doubt that had Congress enacted a criminal statute similar to that involved here—authorizing, for example, unannounced warrantless searches of property reasonably thought to house unlawful drug activity—the warrantless search would be struck down under our existing Fourth Amendment line of decisions." Would proportionality reasoning have led him also to strike down *suspicionless* surveillance of people and records found *outside* one's property?

[117] *See* Christopher Slobogin, *Government Dragnets*, 73 LAW & CONTEMP. PROBS. 107 (2010).

[118] *Id.* at 136.

Rehnquist clearly would not have required a legislative enactment in these situations. But he did appear to prefer that authorization for dragnets come from a supervisory executive official and be applied in a non-discriminatory fashion.[119] And while he likely would have found most such legislative or executive authorizations of panvasive actions rational, the burden of this Essay has been to show that even he would have required some specifiable reason for such actions, roughly proportionate to their intrusiveness. If the Justice often considered the least friendly to the Fourth Amendment had reservations about unregulated panvasive methods, the current Court should as well.[120]

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[119] *See* City of Indianapolis v. Edmond, 531 U.S. 32, 53 (2000) (Rehnquist, J., dissenting); Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 452-53 (1990) (Rehnquist majority opinion noting that the sobriety checkpoint location was selected by the director of the state police "pursuant to . . . guidelines" and that the guidelines governing the police minimize police discretion).

[120] *Cf. Edmond*, 531 U.S. at 56 (Thomas, J., dissenting) ("I rather doubt that the Framers of the Fourth Amendment would have considered 'reasonable' a program of indiscriminate stops of individuals not suspected of wrongdoing.").