NEW AND NEWER WAYS OF THINKING ABOUT THE FOURTH AMENDMENT

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INTRODUCTION

Sherry Colb was one of the most innovative Fourth Amendment thinkers of her generation. Every criminal procedure buff has something to say about search and seizure law, but Sherry was one of the few scholars who added to the canon. In particular, her two articles in *Columbia Law Review, Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*,[1] published in 1996, and *The Qualitative Dimensions of Fourth Amendment "Reasonableness,"*[2] published in 1998, opened up new ways of thinking about how the Fourth Amendment should be construed. Here I want to say a few words about what she taught me and others about the Fourth Amendment, and then a few more words about how her work might be extended in new directions.

I
DISTINGUISHING THE GUILTY FROM THE INNOCENT

In *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, Professor Colb took on a puzzle that had long vexed—or been ignored by—Fourth Amendment scholars. The Supreme Court has always held that even guilty people have a Fourth Amendment right to contest an "unreasonable" search (that is, a search not founded on a warrant, probable cause, or some other justification).[3] At the same time, the Court has said that criminals cannot reasonably expect privacy in premises

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1 Sherry F. Colb. *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456 (1996) [hereinafter Colb, *Innocence*].

2 Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment "Reasonableness"*, 98 COLUM. L. REV. 1642 (1998) [hereinafter Colb, *Reasonableness*].

3 *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 658 (1961) ("However much in a particular case insistence upon [Fourth Amendment] rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness.") (quoting Miller v. United States, 357 U.S. 301, 313 (1958)).

they use for illicit purposes,[4] thus suggesting that, under the current definition of the Fourth Amendment's threshold,[5] criminals should have *no* Fourth Amendment protection against successful police intrusions. So which is it? Do criminals have a reasonable expectation of privacy in spaces they use to hide incriminating evidence? Or do they forfeit that privacy once they rely on it to conceal their wrongdoing?

The average layperson would probably pick option two. But the law has gone with option one. The standard explanation of this stance is that guilty people should be accorded privacy rights to protect innocent people.[6] Guilty people must have standing to contest unreasonable searches so that police will be deterred from barging into the houses, persons, papers, and effects of people who are doing nothing wrong. Otherwise, police obsessed with ferreting out crime will feel no compunction about invading privacy based on mere speculation or perhaps based on nothing at all.

The problem with this explanation is twofold. First, contrary to the courts' and scholars' assumption, limiting the ability to contest unreasonable searches and seizures to innocent people might provide more than enough disincentive to police tempted to run wild, *if* there were an effective way of doing so through damages or something similar (about which more in a moment).[7] Second, the exclusionary rule—to date, the only realistic remedy for Fourth Amendment violations[8]—directly benefits *only* guilty people, who as a result of the rule's operation often escape conviction and are left free to prey on the public.

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4 *See, e.g.*, Lewis v. United States, 385 U.S. 206, 211 (1966) ("[W]hen, as here, the home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street."); Rakas v. Illinois, 439 U.S. 128, 143–44 n.12 (1978) ("A burglar plying his trade in a summer cabin during the off season may have a thoroughly justified subjective expectation of privacy, but it is not one which the law recognizes as 'legitimate.'").

5 United States v. Jacobsen, 466 U.S. 109, 113 (1984) ("A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed.").

6 United States v. Leon, 468 U.S. 897, 973 (1984) (Stevens, J., dissenting) ("Courts can protect the innocent against such invasions only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty.") (quoting Brinegar v. United States, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting)).

7 *See infra* text accompanying notes 32–40.

8 Davis v. United States, 564 U.S. 229, 259 (2011) (Breyer, J., dissenting) ("[T]he exclusionary rule is often the only sanction available for a Fourth Amendment violation . . . .").

Many see that outcome as undeserved, dangerous, and too high a price to pay for whatever extra deterrence vesting privacy rights in the guilty might bring.[9]

Enter Sherry's solution to this puzzle. She agreed with the intuition that people should not be accorded privacy protection in spaces used to facilitate crime.[10] Thus, if the only Fourth Amendment argument guilty people can advance is that the police were infringing their expectation of privacy, they should not prevail, even if the police lacked probable cause or whatever other justification might generally be required under the Fourth Amendment.[11] At the same time, Sherry believed that the innocent have a privacy interest that is protected not only against unreasonable searches but also against *reasonable* searches.[12]

As she did in all of her scholarship, Sherry drew telling analogies from entirely different areas of the law to make both these points. For instance, with respect to the first point she noted that the criminal law does not sanction *anyone*—regardless of intent—if their wrongdoing turns out to be justifiable;[13] by analogy, she contended, the Fourth Amendment should never punish police conduct—reasonable or not—that nabs a criminal. With respect to the second point, she reminded us that strict liability in tort requires compensation for *anyone* harmed by the defendant, because defendants, even when they act in a reasonable manner, are better equipped to rectify the undeserved loss suffered by the victim;[14] similarly, she argued, the Fourth Amendment should always sanction police conduct—reasonable or unreasonable—that harms the innocent. To Sherry, any other interpretation of the Fourth Amendment lacks "moral coherence."[15]

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9 *See, e.g.*, Malcom Richard Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 214 (1978) (examining the exclusionary rule from the perspective of a judge of a U.S. Court of Appeals who proposed its abolition).

10 Colb, *Innocence*, *supra* note 1, at 1459 (endorsing "the intuition that guilty people really do not deserve the right when its exercise consists of the concealment of incriminating evidence").

11 *Id.* at 1464 ("[W]hen an unreasonable search occurs, only the *innocent* victim experiences . . . the privacy harm.").

12 *Id.* at 1520 ("[W]hen the type of harm that a reasonableness standard is generally meant to avoid comes to pass, the [innocent] victim of the harm should be compensated, notwithstanding the reasonableness of the defendant's actions.").

13 *Id.* at 1473–74.

14 *Id.* at 1520.

15 *Id.* at 1473.

That is the gist of Sherry's Innocence Model of the Fourth Amendment. It was a brand-new way of thinking about search and seizure law. At the time Sherry wrote, some scholars had already promoted an "innocence model" of the amendment that posited that its sole goal was to protect the innocent.[16] But, in contrast to Sherry, those scholars still believed both that vindicating the privacy of the guilty was the way to achieve that goal, and that the innocent should have no cause of action when the police search was reasonable.[17] Sherry's take on the amendment was unique.

Had she stopped there, her model of the Fourth Amendment might not have found much purchase, if only because, viewed through the prism of the exclusionary rule, it appeared to reduce the Fourth Amendment "to a form of words," to use Justice Holmes phrase.[18] Guilty people would not be able to use the rule to enforce the amendment because of their dirty hands. And innocent people, by definition, could not resort to it, meaning that their only remedy for the privacy invasion would be damages, a remedy the Supreme Court itself had labeled "worthless and futile."[19]

To Sherry, however, the Innocence Model did not exhaust the Fourth Amendment's potential. Sherry reminded us that the Amendment was drafted not just to protect the privacy associated with houses, persons, papers and effects, but also to register the Drafters' outrage at Britain's reliance on writs of assistance and other general warrants.[20] Those writs authorized search of anyone or anyplace at any time for evidence of uncustomed goods, sedition, and the like.[21] The Fourth Amendment was meant to safeguard not only the privacy of innocent people, but also to protect all individuals, even those who turn out to be guilty, from being singled out arbitrarily or randomly, a harm that Sherry labeled "targeting."[22] She posited

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16 *See, e.g.*, Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1230 (1983) (stating that, under the author's theory, "a guilty person, lacking the right to secrete evidence, is essentially an incidental beneficiary of a rule designed to benefit somebody else—an innocent person who is not before the court").

17 *See id.* at 1269, 1269 n.180 (stating that deterrence, not "[v]indication of personal rights," should be the main goal of the exclusionary rule).

18 Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

19 Mapp v. Ohio, 367 U.S. 643, 652 (1961).

20 Colb, *Innocence*, *supra* note 1, at 1482–85.

21 *See* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 551 (1999).

22 Colb, *Innocence*, *supra* note 1, at 1464.

that even the guilty person is harmed by a suspicionless stop, arrest, or search, either because they intuit that the officer has nothing on them and thus has stopped them for specious reasons, or because they find out about that fact later.[23] Sherry drew an analogy here with overbreadth doctrine, which allows even wrongdoers to benefit from a finding that a vague statute allows arbitrary chilling of First Amendment rights.[24] This Targeting Model of the Fourth Amendment was also new with Sherry. It explains how guilty people can forfeit their Fourth Amendment privacy rights when using their private spaces for crime at the same time they retain a Fourth Amendment right to avoid arbitrary police actions. Under the Targeting Model, as in the current regime, the guilty can be enforcers of the Fourth Amendment, but only through claims about targeting harms as opposed to privacy harms.

Combining her two insights, Sherry proposed that henceforth the Fourth Amendment should be interpreted in light of an "Innocence plus Targeting Model," again, a brand-new concept. She was coyer about how enforcement of this model would occur. Throughout her article, she evinced considerable ambivalence about the exclusionary rule.[25] On the one hand, Sherry clearly believed that the rule overcompensates guilty people; any targeting harm they experience does not come close to justifying avoidance of their just punishment, which is often the effect of the rule.[26] But Sherry also recognized the difficulties that would arise if the rule were replaced with a damages regime that operated in line with her approach to the Fourth Amendment. For guilty people, such a regime would only compensate the targeting harm, which she rightly viewed as much less serious than the privacy harm to innocent

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23 Sherry noted that a guilty person might attribute a search to their guilt and thus not experience a targeting harm. But she pointed out that often the suspicionless nature of a search will be evident from police conduct, that many such people will have had experience with targeting before, and that, in any event, ignorance of the harm at the time it occurs is usually not required for other types of targeting claims (as is true, she noted, with anti-discrimination law). *Id.* at 1500–01.

24 *Id.* at 1495–98.

25 *Id.* at 1465 ("The Innocence plus Targeting model does not resolve definitively the controversial question whether the Fourth Amendment exclusionary rule ought to be retained.").

26 *Id.* at 1498 ("Under the Innocence plus Targeting model, then, the exclusionary rule is flawed *as a remedy* for the [guilty] person searched, both because it retur[n]s to him a benefit that he did not deserve to have and because it fails to rectify the loss that he did not deserve to suffer.").

people, thus warranting only minimal damages.[27] That fact, she recognized, might lead to underdeterrence of arbitrary policing.[28] At the same time, her proposal would mean that innocent people whose privacy rights are violated would be entitled to full compensation, even when the invasion was reasonable.[29] Thus, there is also the possibility of overdeterrence in an Innocence plus Targeting regime.[30] In light of all of this, Sherry ended up tentatively concluding that the exclusionary rule might be the optimal way of minimizing under- and over-deterrence, protecting the privacy rights of innocents, and preventing targeting harms.[31]

I think Sherry's initial hesitance about the exclusionary rule was correct. The rule not only provides far too much benefit to guilty people; it is also useless to the injured innocent, the only people whose privacy Sherry believed the Fourth Amendment protects.[32] In short, the rule undermines the "moral coherence" that Sherry wanted to promote. Perhaps the rule's disproportionate treatment of both the guilty and the innocent might be tolerable if it did a good job deterring privacy invasions. But it does not, because its effect is felt mostly by prosecutors, not the police; even in its heyday—before the Court mangled it—the rule had very little impact on ordinary policing or even on police (lack of) knowledge about search and seizure law.[33] Further, because the rule only benefits people who judges and justices know are guilty and thus not entitled to windfall dismissals, it has led to a Fourth Amendment that is a mere skeleton of what it could be.[34]

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27 *Id.* at 1491 (calling the right not to be targeted "secondary" to the privacy right); *id.* at 1517 (noting that the person who could claim only a targeting harm should not "be permitted to recover as much as a plaintiff with 'clean hands'").

28 *Id.* at 1520–21.

29 *Id.* at 1508 ("[T]he search of an innocent person is a harm not only because it is unnecessary, but also because the innocent person deserves better.").

30 *Id.* at 1521.

31 *Id.* at 1498, 1522 (concluding that "[t]he Innocence plus Targeting model . . . is . . . agnostic as to whether there ought to be a Fourth Amendment exclusionary rule" and noting that the exclusionary rule may, "in spite of its apparent unfairness" perform the prevention function "more or less effectively.")

32 *Id.* at 1476 (noting that the exclusionary remedy "is unavailable in the worst case scenario in which an innocent person harboring no evidence of criminal conduct is searched").

33 For a summary of the relevant research, see Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 368–400.

34 *Id.* 400–05.

For these and other reasons too numerous to go into here,[35] I think Sherry should have stuck to her guns. In place of the rule, I have proposed an administrative damages penalty that would provide liquidated damages (say, 1.5% of the average officer's salary) for inchoate Fourth Amendment violations, paid directly by individual officers who act in bad faith and by police departments when the police act in good faith.[36] That regime avoids the negative aspects of the exclusionary rule because it allows conviction of the guilty, provides a remedy for the innocent, imposes a direct sanction on miscreant officers who recklessly violate the Constitution, creates an incentive for departments to provide training, and exposes judges interpreting the Fourth Amendment to the many innocent people harmed when it is violated.[37] It can also be constructed to avoid under- and over-deterrence.[38]

Sherry's work suggests two tweaks to this scheme (which I have incorporated into a more recent defense of my administrative penalty proposal).[39] Consistent with Sherry's insights, liquidated damages should be lower for the guilty, who only experience a targeting harm, than for the innocent, who can experience both a targeting harm and a privacy invasion. And *all* privacy invasions perpetrated on the innocent, not just those that occurred in the absence of cause, would be compensated.[40] That regime would more precisely titrate what the guilty deserve and maximize protection of the innocent.

One very important consequence of this approach is the effect it is likely to have on stop and frisk practices. Sherry's article focused almost entirely on searches, and in particular searches of the home. But of course the Fourth Amendment applies to street policing as well, with the Supreme Court holding in *Terry v. Ohio* that investigative detentions and frisks, while not requiring probable cause, must at least be based on reasonable suspicion that criminal activity is afoot and that the stopped person is armed.[41] Under a damages

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35 *See generally id.*.

36 *Id.* at 405.

37 *Id.* at 384–405.

38 *Id.* at 405–23.

39 *See* CHRISTOPHER SLOBOGIN, REHABILITATING CRIMINAL JUSTICE: INNOVATIONS IN POLICING, ADJUDICATION AND SENTENCING ch. 4 (forthcoming March 2025).

40 Apparently, this was the way damages functioned in colonial times. *See* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 767 (1994).

41 Terry v. Ohio, 392 U.S. 1, 30 (1968).

regime consistent with Sherry's approach, not only would every person subjected to a suspicionless stop and frisk be entitled to relief, but so would every person subject to a stop that *is* based on reasonable suspicion, if that suspicion turned out to be wrong. In New York City a decade ago, one study found that less than 2% of the hundreds of thousands of those stopped by police were found to have weapons or drugs on their person.[42] Under Sherry's Innocence plus Targeting Model, as modified by me, 98% of those stopped would have a damages remedy for privacy invasion because of their innocence;[43] further, the portion of the 2% found in possession of weapons or contraband who were stopped on less than reasonable suspicion would also be entitled to compensation for the targeting harm. It is possible that, even if only a fraction of these claims were brought, stop and frisk practices would grind to a halt or be seriously constrained. But for those concerned about the seemingly random and often racially disparate tenor of modern urban street policing (of which there are many),[44] that would be a good outcome.

Although I found *Innocence, Privacy and Targeting* persuasive both when I read it twenty-five years ago and when I read it again in 2023, one aspect of it initially bothered me. Sherry stated that there is no targeting harm when the search or seizure is "objectively justifiable."[45] As she put it, "the ready availability of a justification for a search provides good evidence for both the person searched and a court of law that the search was legitimately motivated."[46] Thus, she concludes, "[p]retextual searches should . . . not be actionable under the Fourth Amendment in most cases" (because, in fact, a law has been violated).[47] The problem with that statement, as many scholars

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42 Floyd v. City of New York, 959 F. Supp. 2d 540, 573 (S.D.N.Y. 2013) (finding that, of 4 million people stopped between 2004 and 2012, 1.8% possessed contraband or weapons).

43 Sherry distinguished *Terry* stops from regularized checkpoints. Colb, *Innocence*, *supra* note 1, at 1487–88. In the latter situation, there is neither a targeting harm (because of the checkpoint's regularized nature) nor a privacy harm (because even though virtually everyone stopped is "innocent," the even-handed nature of the seizure substantially reduces its intrusiveness).

44 *See, e.g.*, Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 131 (2017); Ekow Yankah, *Pretext and Justification: Republicanism, Policing, and Race*, *in* THE CAMBRIDGE HANDBOOK OF POLICING IN THE UNITED STATES 122, 133 (Tamara Rice Lave & Eric J. Miller eds., 2019).

45 Colb, *Innocence*, *supra* note 1, at 1490.

46 *Id.*

47 *Id.* at 1490–91.

have pointed out,[48] is that when the officer's action is clearly pretextual, an objective reason, no matter how justifiable, fails to answer satisfactorily the "Why me?" question Sherry says the targeting prohibition is meant to address; further, allowing such actions would actively encourage targeting harms. Many illegitimate agendas—racial and otherwise—can hide behind "objectively justifiable" reasons.

Sherry knew that, and she did insist that proof of invidious discrimination amounting to an equal protection violation should be grounds for invalidating a search or seizure.[49] But she was also concerned about the administrability of a robust pretext doctrine.[50] Fortunately, in *The Qualitative Dimensions of Fourth Amendment "Reasonableness"* she brilliantly provided a second—and preferable—pathway for challenging police conduct based on hidden agendas, one that avoids having to read the minds of officers.[51] My discussion of this second Columbia Law Review article will start with its implications for pretextual police actions, and then explore its larger goal, which is to make the Fourth Amendment a shield not only for privacy but also for substantive interests more generally.

II
Distinguishing Substance from Procedure

In bolstering her stance against allowing pretext arguments in *Innocence, Privacy and Targeting*, Sherry cited *Whren v. United States*,[52] the famous Supreme Court decision that unanimously adopted that position. In *Whren*, plain-clothed vice-squad officers, driving an unmarked car in a high drug

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48 *See, e.g.*, Richard S. Frase, *What Were They Thinking? Fourth Amendment Unreasonableness in* Atwater v. City of Lago Vista, 71 Fordham L. Rev. 329, 329–33 (2002).

49 *See* Colb, *Innocence*, *supra* note 1, at 1490 n.85 (recognizing "[o]ne important exception to such a rule would apply in the case of invidiously motivated harassment").

50 *Id.* at 1490 n.86 ("[A]n individual subjective inquiry would be too costly to administer.").

51 *See generally* Colb, *Reasonableness*, *supra* note 2. Sherry most fully developed the argument described below in Sherry F. Colb, *Stopping a Moving Target,* 3 Rutgers Race & L. Rev. 191, 205 (2001). She later fine-tuned the argument in Sherry F. Colb, *A New and Improved Doctrine of Double Effect: Not Just for Trolleys*, 55 Conn. L. Rev. 533, 570 (2023) (arguing that pretext arguments are permissible in situations where the action can lawfully be justified on "virtually [an] infinite number" of grounds, such as enforcement of traffic laws). But the core of the argument is found in *The Qualitative Dimensions of Fourth Amendment "Reasonableness"*.

52 Whren v. United States, 517 U.S. 806 (1996).

area, saw the driver of a truck look down into the lap of his passenger and remain stopped at an intersection for more than 20 seconds afterward. When the officers made a U-turn to head back toward the truck, it suddenly turned right, without signaling, and sped off at an "unreasonable" speed. The officers stopped the vehicle and subsequently observed crack cocaine in Whren's hands.[53] Whren argued that the officers used the traffic stop as a pretext for accomplishing their real, illegitimate, agenda, which Whren conjectured was either to see if they could discover drugs in the truck despite lacking articulable suspicion or to harass Whren and his colleague because they were Black.[54]

As proof of these likely motivations, Whren pointed to the fact that the officers were not uniformed cops but rather vice-squad officers who, under D.C. police regulations, were only supposed to enforce traffic laws in life-threatening situations.[55] But the Court held that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis" and that determining what "a reasonable officer" would have done under the circumstances in *Whren* would ultimately require that type of inquiry.[56] To Whren's argument that allowing plain-clothes officers to stop cars for traffic violations would cause confusion and alarm that outweighed any interest in traffic safety,[57] the Court responded:

> we are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement. And even if we could identify such exorbitant codes, we do not know by what standard (or what right) we would decide, as petitioners would have us do, which particular provisions are sufficiently important to merit enforcement.[58]

In *The Qualitative Dimensions of Fourth Amendment "Reasonableness"* Sherry calls the Court's bluff. She provides both the "standard" that should govern judgments about whether otherwise-justified searches and seizures are illegitimate and an explanation for why that standard is grounded in the Constitution. In its shortest form, the standard Sherry proposed is that a search or seizure is unreasonable "whenever the

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53 *Id.* at 808–09.

54 *Id.* at 810.

55 *Id.* at 815.

56 *Id.* at 813–14.

57 *Id.* at 817.

58 *Id.* at 818–19.

intrusiveness of a search outweighs the gravity of the offense being investigated."[59] Under this rule, probable cause—the usual "quantitative" requirement of the Fourth Amendment—is not enough, by itself, to authorize a search. Rather, the Fourth Amendment's reasonableness clause also requires an assessment of what Sherry called the "qualitative" impact of a search or seizure, as measured by the substantive importance of the interest the state seeks to achieve.[60] Sherry pointed out that in virtually all other areas of constitutional law the Supreme Court has balanced the state's substantive interest against the individual's substantive interest.[61] She also noted that there are even a few Fourth Amendment cases where the Court has done so—specifically, its decision requiring that, before the state may use surgery to recover evidence, it must not only make a probable cause showing but also a showing that the evidence is crucial to solving a serious crime,[62] and its decision governing the use of deadly force to arrest that requires not only probable cause but a reasonable belief that the force is necessary to apprehend a dangerous criminal.[63]

Failing to incorporate the qualitative/substantive dimension into Fourth Amendment reasonableness analysis, Sherry argued, would often allow the government to render the quantitative/procedural component of the Amendment meaningless.[64] If probable cause proves to be too much of a barrier to finding evidence of criminal activity, for instance, the state can create easily violated loitering, trespass, or inspection laws that provide huge discretion to police to accost almost anyone on the street or enter almost any premises. As she noted, "substantive and procedural privacy are not two closed systems. The authority to regulate the one can be made to

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59 Colb, *Reasonableness*, *supra* note 2, at 1645.

60 *Id.* at 1645–46 ("This approach construes Fourth Amendment 'reasonableness' as having qualitative as well as quantitative content. Any governmental intrusion that rises to the level of a 'search' or 'seizure' might, on this theory, be disproportionate and therefore unreasonable, in spite of the sufficiency of the evidence suggesting that the search or seizure would uncover illegality.") (footnote omitted).

61 *Id.* at 1661 ("As in the context of other substantive rights, such as First Amendment free speech and Fourteenth Amendment equal protection, the Court in adopting substantive Fourth Amendment balancing would have to decide whether to perform such balancing on an ad hoc basis, deciding each case on its facts, or whether instead to make categorical judgments.") (footnotes omitted).

62 *Id.* at 1673–75 (describing Tennessee v. Garner, 471 U.S. 1 (1985)).

63 *Id.* at 1675–76 (describing Winston v. Lee, 470 U.S. 753 (1985)).

64 *Id.* at 1660.

compensate for judicial restraints upon the authority to regulate the other, in a sort of 'conservation of police power.'"[65]

Apply all of this to *Whren*. The police clearly had probable cause to believe a traffic law had been violated in that case. But given the ubiquity of traffic laws, police will almost always have probable cause against anyone—including any driver reading this article—every time they travel more than a few blocks.[66] In *Qualitative Dimensions*, Sherry maintained her earlier stance that subjective pretext arguments in cases like *Whren* should usually be unavailing. But she also thought that defendants should be able to argue that enforcement of a given traffic law in their case violated the qualitative aspect of the Fourth Amendment when the law being violated—for instance, the "unreasonable speed" rule at issue in *Whren* or rules governing failing to signal, abrupt turns, and veering over the median or the shoulder—either did not need to be enforced to prevent high-risk driving in the case at hand or could be enforced in some other way (e.g., a citation mailed to the owner).[67] As she put it, "[t]hough limiting stops to situations presenting actual hazards requires factually sensitive determinations, such determinations are entirely appropriate if, as I have suggested, it is dangerous driving, rather than formal violation of traffic rules, that justifies stops and their associated costs."[68] The inquiry she required, whether carried out on a case-by-case basis or in a more rule-based way, would be difficult. But it is much easier than divining officers' "real" motivations. And, most important, it is a coherent marriage of procedure and substance.

Unfortunately, Sherry noted, the Court has failed to carry out this analysis in several cases where it should have. Take first *Terry* stops. *Terry*, as originally conceived, was attentive to both quantitative and qualitative issues. The decision adopted the lower reasonable suspicion standard because a stop is less intrusive than an arrest and because a frisk is less intrusive than a full search.[69] But it also limited this relaxed

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65 *Id.* at 1661.

66 *Id.* at 1651. Sherry quoted David Harris' observation that "[p]olice officers in some jurisdictions have a rule of thumb: The average driver cannot go three blocks without violating some traffic regulation." *Id.* (alteration in original) (quoting David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 558 (1997)).

67 *Id.* at 1654–55.

68 *Id.* at 1655–56.

69 Terry v. Ohio, 392 U.S. 1, 26 (1968) ("An arrest is a wholly different kind of intrusion upon individual freedom from a limited search for weapons . . . .").

quantitative requirement to situations in which the criminal activity sought to be prevented was serious and imminent, two qualitative criteria.[70] Since *Terry*, however, the Court has upheld stops of individuals based solely on suspicion they committed crime in the past—when imminent danger is non-existent[71]—as well as frisks of people suspected of narcotics possession—in which there is no necessary safety risk to the police.[72] While reasonable suspicion existed in these cases, the substantive requirements imposed by *Terry* did not.

Sherry provided numerous other examples of similar failures. In *Zurcher v. Stanford Daily*,[73] the Court permitted search of a newspaper's offices pursuant to a warrant without any inquiry into whether the newspaper, an innocent third party that happened to have photographic evidence of wrongdoing, would have handed over the evidence voluntarily. In *Payton v. New York*[74] and *Welsh v. Wisconsin*,[75] the Court held that a warrant is *always* sufficient to make a home arrest without any further showing either that the crime was serious or that the target was in the home. In all three of these cases, the government met the requisite qualitative requirement (probable cause) but was not required to show that its substantive goals could be met in other, less intrusive ways.[76] In a fourth case, *Wyman v. James*,[77] Sherry pointed out, the Court improperly relaxed *both* the qualitative and the quantitative components of the analysis. While the Court justifiably found there to be a compelling goal in protecting children from abuse (relevant to the qualitative inquiry),[78] it did not explain why that goal justified suspicionless entries only of mothers on welfare, as

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70 *Id.* at 24 (stating that a frisk is permissible "[w]hen an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others").

71 Colb, *Reasonableness*, *supra* note 2, at 1693 (citing United States v. Hensley, 469 U.S. 221, 229 (1985)).

72 *Id.* (citing United States v. Sokolow, 490 U.S. 1, 7 (1989)).

73 Zurcher v. Stanford Daily, 436 U.S. 547 (1978) (discussed in Colb, *Reasonableness*, *supra* note 2, at 1685–86).

74 Payton v. New York, 445 U.S. 573 (1980) (discussed in Colb, *Reasonableness*, *supra* note 2, at 1677–80).

75 Welsh v. Wisconsin, 466 U.S. 740 (1984) (discussed in Colb, *Reasonableness*, *supra* note 2, at 1681–84).

76 Although the defendant in *Welsh* prevailed, the Court strongly suggested that Welsh would have lost had the police obtained a warrant. *See id.* at 754 (emphasizing that the arrest in the case was warrantless).

77 Wyman v. James, 400 U.S. 309 (1971).

78 *Id.* at 318 ("The focus is on the *child* and, further, it is on the child who is *dependent*. There is no more worthy object of the public's concern.").

opposed to all mothers.[79] And the Court also failed to make the government meet any quantitative test (not even reasonable suspicion) before it could enter a home to implement that goal.[80]

Indeed, in cases like *Wyman* Sherry suggested that the quantitative and qualitative requirements should be particularly demanding, because the interest being protected is not just physical privacy but also what Sherry called protection from governmental "personal knowledge" of a person's private life.[81] Here she referenced cases like *Griswold v. Connecticut*,[82] in which Justice Douglas called "repulsive" the idea of searching the "marital bedroom for telltale signs of the use of contraceptives,"[83] and *Stanley v. Georgia*,[84] where the majority upheld the right to possess pornography "in the privacy of a person's home" even though the possession of obscene materials can be criminalized without violating the First Amendment.[85] Just as the state should not be able to enforce traffic laws any time it has probable cause to believe they have been violated without considering the underlying purpose behind the laws, laws that permit intrusions into the home to investigate intimate practices such as marital relationships, sexual practices, and child-rearing should be carefully cabined. As Sherry stated,

> a person might need a broad freedom to decide what to do in her private spaces, even when some of the chosen activities are themselves deemed less than fundamental (or perhaps even patently offensive) by the Court. Absent such freedom, any physical privacy might be illusory, because it would be subject to termination on the basis of suspicion regarding such a large category of activities that the requisite suspicion would become fairly easy for the government to acquire at will, rendering the zone of privacy accordingly precarious.[86]

Thus, Sherry viewed substantive privacy rights and Fourth Amendment privacy rights "as parts of one integrated whole,

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79 *See id.* at 342 (Marshall, J., dissenting) ("These are heinous crimes, but they are not confined to indigent households. Would the majority sanction, in the absence of probable cause, compulsory visits to all American homes for the purpose of discovering child abuse?").

80 Colb, *Reasonableness*, *supra* note 2, at 1718–19.

81 *Id.* at 1666 (defining "personal knowledge" and distinguishing it from "informational knowledge").

82 Griswold v. Connecticut, 381 U.S. 479 (1965).

83 *Id.* at 485–86.

84 Stanley v. Georgia, 394 U.S. 557 (1969).

85 *Id.* at 564.

86 Colb, *Reasonableness*, *supra* note 2, at 1705.

legitimately protected by the Constitution."[87] Whether that view can withstand the impact of *Dobbs v. Jackson Women's Health Organization*[88] remains to be seen.

Sherry's more general argument that the Fourth Amendment should ensure that qualitative as well as quantitative standards are met still stands, however. As with the Innocence plus Targeting Model, this was a new way of looking at the Fourth Amendment. At the time Sherry wrote, virtually no scholars had observed the hydraulic relationship between substance and procedure in Fourth Amendment cases, and none as clearly or with such persuasiveness as Sherry. For instance, Bill Stuntz famously complained about constitutional law's inattention to substantive criminal law.[89] But both his diagnosis of and his prescription for the problem are less satisfying than Sherry's. He blamed the breadth of criminal law, not law enforcement's abuse of it, for the oppressive nature of modern-day policing.[90] And his solution—the development of a more robust substantive due process analysis allowing courts to strike down widely supported traffic, trespass and pornography statutes[91]—would be much less likely to bear fruit than granting judges the lesser power, for which Sherry advocated, of deciding on a case-by-case basis whether a particular police action rationally advances the underlying goals of those statutes.[92]

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87 *Id.*

88 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 239 (2022) (in holding that abortion is not protected by a constitutional right to privacy, stating that "[i]n interpreting what is meant by the Fourteenth Amendment's reference to 'liberty,' we must guard against the natural human tendency to confuse what that Amendment protects with our own ardent views about the liberty that Americans should enjoy").

89 *See* William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 1 (1996) ("[W]ithout substantive limits, important parts of the law of criminal procedure seem likely to fall apart.").

90 *Id.* ("In a world in which prosecutors can choose whom to prosecute, special rules for criminal procedure logically require substantive limits on the law of crimes.").

91 William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 66 (1997) ("Serious constitutional regulation of substantive criminal law, if it existed, would have to take some combination of two forms. The first is a proportionality rule, requiring that the conduct criminalized be serious enough to justify the punishment attached to it. The second is an application of the first: a kind of criminal substantive due process, ensuring that the conduct criminalized was serious enough to justify some criminal punishment.") (emphasis omitted).

92 Lauren Sudeall Lucas, *Public Defense Litigation: An Overview*, 51 IND. L. REV. 89, 109 (2018) ("[T]he decision to decriminalize certain offenses is ultimately a legislative decision . . . .").

One important issue that Sherry did not address in her article is whether substantive concerns should support only an upward ratchet of Fourth Amendment protection. Most of Sherry's examples of the substantive-procedure dynamic led her to call for strengthening limitations on searches and seizures. But perhaps the government's qualitative interest can be so compelling that the quantitative requirement is nullified. For instance, a few scholars have argued that if the crime being investigated is particularly serious, the government need demonstrate little or no suspicion.[93] Along the same lines, Justice Robert Jackson famously declared that he would "candidly strive hard" to uphold a roadblock to save a kidnap victim even though the police had to "search every outgoing car," because "it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life."[94] In contrast, in *Mincey v. Arizona*[95] the Court refused to adopt a "homicide exception" to the warrant and probable cause requirements, not only for administrability reasons but because "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment."[96]

Sherry's analysis of *Terry* points the way out of this conundrum. As she implied, the government's interest in *preventing* serious imminent crime can justify relaxation of the quantitative standard down to at least reasonable suspicion (as it did in *Terry*), and perhaps even further in more serious cases, such as those involving child kidnapping and terrorism. I have explicitly made this kind of argument.[97] But I've also cautioned, and I think Sherry would have too, that an intrusive search designed to find evidence of an *already completed* crime should always, as *Mincey* suggests, require at least probable cause on the quantitative side.[98]

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93 Orin S. Kerr, *Do We Need a New Fourth Amendment?*, 107 MICH. L. REV. 951, 963 (2009) (suggesting that "a 10 percent chance of cracking a major terrorism case serves the public interest in security vastly more than a near certainty of gaining marginally relevant evidence of speeding" and thus that the first type of search should be permitted on less than probable cause).

94 Brinegar v. United States, 338 U.S. 160, 183 (1949) (Jackson, J., dissenting).

95 Mincey v. Arizona, 437 U.S. 385 (1978).

96 *Id.* at 393.

97 CHRISTOPHER SLOBOGIN, VIRTUAL SEARCHES: REGULATING THE COVERT WORLD OF TECHNOLOGICAL POLICING 68-71 (2022).

98 *Id.*

A more prosaic example of the role necessity plays in the Fourth Amendment setting frequently arises in connection with "programmatic" searches and seizures, such as health and safety inspections of houses, sobriety checkpoints, drug testing programs, and the like.[99] In these cases, development of quantitative suspicion is usually not possible, because the group focus of the program means that cause to search or seize any particular person does not exist.[100] Sherry's analysis suggests that this fact should put particular pressure on the qualitative side of the analysis.[101] Some scholars have argued, for instance, that the government should have to demonstrate both that the program meets a compelling state interest and that other options for achieving that goal do not exist.[102] These examples illustrate, once again, that Sherry's work continues to provide a conceptual basis for much that is new and brewing in Fourth Amendment jurisprudence.

Conclusion

Innocence, Privacy and Targeting and *The Qualitative Dimensions of Fourth Amendment "Reasonableness"* are only two of Sherry's articles on the Fourth Amendment. She also provided insights about the definition of "search" under the Fourth Amendment,[103] the related issue of Fourth Amendment standing,[104] why property should not replace privacy as the focus of Fourth Amendment protection[105] (particularly important these days given the Supreme Court's renewed interest in a property orientation),[106] and the relationship of

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99 *See generally* Christopher Slobogin, *Policing as Administration*, 165 U. Pa. L. Rev. 91, 98-108 (2017) (describing cases).

100 *Id.* at 93.

101 *But see supra* note 43 (noting that, in *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, Sherry approved of suspicionless checkpoints carried out in a neutral fashion without mentioning qualitative considerations).

102 *See* Stephen J. Schulhofer, More Essential Than Ever: The Fourth Amendment in the Twenty-First Century 53 (2012). I have argued for a somewhat different approach, relying on administrative law principles. Slobogin, *supra* note 99, at 157-81 (arguing that administrative law principles should apply in such situations).

103 Sherry F. Colb, *What is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints at a Remedy*, 55 Stan. L. Rev. 119 (2002).

104 Sherry F. Colb, *Standing Room Only: Why Fourth Amendment Exclusion and Standing Can No Longer Logically Coexist*, 28 Cardozo L. Rev. 1663 (2007).

105 Sherry F. Colb, *A World Without Privacy: Why Property Does Not Define the Limits of the Right Against Unreasonable Searches and Seizures*, 102 Mich. L. Rev. 889 (2004).

106 *See, e.g.*, United States v. Jones, 565 U.S. 400, 406 (2012) ("Fourth Amendment rights do not rise or fall with the *Katz* formulation. . . . [F]or most

probable cause to statistical analysis.[107] But to my mind the two articles discussed here are Sherry's most innovative and unique works on the subject. They unequivocally deserve a place in the pantheon of Fourth Amendment scholarship.

of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ('persons, houses, papers, and effects') it enumerates.").

[107] Sherry F. Colb, *Probabilities in Probable Cause and Beyond: Statistical Versus Concrete Harms*, 73 L. & CONTEMP. PROBS. 69 (2010).