



2009

Diminishing Probable Cause and Minimalist Searches

Kit Kinports
Penn State Law

Follow this and additional works at: http://elibrary.law.psu.edu/fac_works

 Part of the [Criminal Law Commons](#), [Criminal Procedure Commons](#), and the [Fourth Amendment Commons](#)

Recommended Citation

Kit Kinports, *Diminishing Probable Cause and Minimalist Searches*, 6 *Ohio St. J. Crim. L.* 649 (2009).

This Article is brought to you for free and open access by the Faculty Works at Penn State Law eLibrary. It has been accepted for inclusion in Journal Articles by an authorized administrator of Penn State Law eLibrary. For more information, please contact ram6023@psu.edu.

Diminishing Probable Cause and Minimalist Searches

Kit Kinports*

A quarter of a century has now passed since the Supreme Court redefined probable cause in *Illinois v. Gates*, adopting a “fluid,” “practical, common-sense,” totality-of-the-circumstances test that asks whether “there is a fair probability that contraband or evidence of a crime will be found in a particular place.”¹ The Court’s definition of the reasonable suspicion necessary to conduct a stop and frisk is likewise a “commonsense” totality-of-the-circumstances test.² Over the years, the Court has extended the reasonable suspicion standard beyond the stop-and-frisk context,³ but it has nevertheless maintained a distinction between the concept of probable cause and the “obviously less demanding” requirement of reasonable suspicion.⁴

Recently, however, phrases like “reasonable belief” and “reason to believe” have crept into Supreme Court opinions analyzing intrusions that generally require proof of probable cause. The Court has not specifically rejected the probable cause requirement or adopted a reasonable suspicion standard in these cases; in fact, it has given no indication that it is altering the required quantum of proof. But by using such language, without further definition or discussion of its relationship to probable cause and reasonable suspicion, the Court risks melding the two standards. At the same time, it sets the stage for lines to be drawn between ordinary criminal law-enforcement searches depending on whether they can be characterized as minimally or highly intrusive. Any such fundamental alterations of Fourth Amendment jurisprudence should be made transparently and not accomplished by means of indirection.

I. “REASONABLE BELIEFS” AND THE FOURTH AMENDMENT

In two opinions issued in 2006, the Supreme Court used the phrase “reason to believe” in discussing the doctrine of exigent circumstances. Exigency has historically been considered a justification for dispensing with a warrant, but not

* Professor & Polisher Family Distinguished Faculty Scholar, Pennsylvania State University Dickinson School of Law. A.B. 1976, Brown University; J.D. 1980, University of Pennsylvania.

¹ 462 U.S. 213, 232, 238 (1983).

² See, e.g., *United States v. Cortez*, 449 U.S. 411, 417–18 (1981).

³ See *United States v. Knights*, 534 U.S. 112, 121 (2001) (search of probationer’s home); *Richards v. Wisconsin*, 520 U.S. 385, 394–95 (1997) (no-knock entry); *Maryland v. Buie*, 494 U.S. 325, 334 & n.2 (1990) (protective sweep).

⁴ *United States v. Sokolow*, 490 U.S. 1, 7 (1989).

an exception to probable cause.⁵ In neither opinion did the Court cite any support for the phrase, or describe its relationship to probable cause and reasonable suspicion. The language appearing in these decisions thus creates an ambiguity as to whether the Court is adhering to the traditional definition of probable cause, replacing it with a reasonable suspicion requirement, or creating yet a third standard, possibly an amalgam of the other two or something in between.

In the first of the two cases, *Georgia v. Randolph*, the majority thought there was “no question” that police may enter a home to protect a victim of domestic violence “so long as they have *good reason to believe* such a threat exists.”⁶ This observation prompted Chief Justice Roberts and Justice Scalia to complain in dissent that the majority was “alter[ing] established Fourth Amendment rules” and “spin[ning] out an entirely new framework for analyzing exigent circumstances,” creating a new warrant exception allowing “warrantless entry *short of exigency* in potential domestic abuse situations.”⁷

Just two months later, in *Brigham City v. Stuart*, it was somewhat surprisingly the Chief Justice himself, writing for a unanimous Supreme Court, who commented that the police may make a warrantless entry into a home if they have “an objectively *reasonable basis for believing* that an occupant is seriously injured or imminently threatened with such injury.”⁸ Although the Court’s focus in what Justice Stevens called “an odd flyspeck of a case”⁹ was on rejecting the lower court’s view that a police officer’s subjective motivations are relevant in applying the exigent circumstances exception, the Court did not indicate whether it was requiring the probable cause typically needed to justify a warrantless search based on exigency or some lesser standard of proof. Thus, notwithstanding Justice Stevens’ assertion, it is not so clear that the Court’s opinion in *Stuart* merely “restat[ed] well-settled rules of federal law.”¹⁰

These two decisions did not come completely out of the blue; terms like “reasonable belief” and “reason to believe” can be found in earlier Supreme Court opinions as well. Several years before the *Gates* decision, in the course of holding that the police must obtain a warrant in order to make an in-home arrest, the Court observed in *Payton v. New York* that an arrest warrant allows entry into the home “when there is *reason to believe* the suspect is within.”¹¹ Although some Justices

⁵ See, e.g., *Vale v. Louisiana*, 399 U.S. 30, 34 (1970).

⁶ 547 U.S. 103, 118 (2006) (emphasis added) (responding to the dissent’s concerns about the impact of the Court’s holding—that the consent search exception does not apply where one co-occupant is present and objects to the search—on domestic violence victims).

⁷ *Id.* at 140, 141 (Roberts, C.J., dissenting) (emphasis added).

⁸ 547 U.S. 398, 400 (2006) (emphasis added).

⁹ *Id.* at 407 (Stevens, J., concurring).

¹⁰ *Id.*

¹¹ 445 U.S. 573, 602 (1980) (emphasis added).

interpreted this language as equivalent to a probable cause requirement,¹² the *Payton* majority likely intended to endorse some lesser standard given that it expressly rejected the need for “a search warrant based on probable cause to believe the suspect is at home.”¹³

More recently, in *Thornton v. United States*, Justice Scalia, joined by Justice Ginsburg, took the position that the warrant exception for searches incident to the arrest of a vehicle’s occupants should be restricted to situations where “it is *reasonable to believe*” the police might discover “evidence relevant to the crime of arrest.”¹⁴ The two Justices did not further clarify this standard, or discuss its relationship to probable cause and reasonable suspicion. Presumably, however, they did not intend to require probable cause, which would independently entitle the police to search the vehicle under the automobile exception.

Adding to the confusion created by the appearance of phrases like “reasonable belief” and “reason to believe” untethered to either probable cause or reasonable suspicion, the Court has on other occasions specifically equated these terms both with reasonable suspicion and with probable cause. Linguistically, the phrases seem more closely aligned with reasonable suspicion, and in fact in *Terry* itself, the Court noted that an officer who has “reason to believe” a suspect is armed and dangerous may conduct a frisk, “regardless of whether he has probable cause to arrest.”¹⁵ Likewise, *Maryland v. Buie* authorized protective sweeps based on reasonable suspicion, specifically requiring the police to have “‘a reasonable belief’ . . . that the area swept harbored an individual posing a danger to the officer or others.”¹⁶

By contrast, other Supreme Court opinions have associated terms like “reasonable belief” with probable cause. In *Maryland v. Pringle*, for example, the Court observed that “[t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt.”¹⁷ Similarly, *Illinois v. Gates*, in describing the probable cause determination made in *Ker v. California*, noted that the police had “‘a reasonable belief . . . that Ker was illegally in possession of marijuana.’”¹⁸

¹² See *id.* at 616 n.13 (White, J., dissenting); see also *Maryland v. Buie*, 494 U.S. 325, 341 n.3 (1990) (Brennan, J., dissenting).

¹³ *Payton*, 445 U.S. at 602. In fact, the lower courts have most often read the *Payton* standard as a “unique formulation” somewhat lower than probable cause. Matthew A. Edwards, *Posner’s Pragmatism and Payton Home Arrests*, 77 WASH. L. REV. 299, 363 (2002).

¹⁴ 541 U.S. 615, 632 (2004) (Scalia, J., concurring in the judgment) (emphasis added). The majority declined to express an opinion on this issue because it had not been addressed by the parties. See 541 U.S. at 624 n.4.

¹⁵ *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

¹⁶ 494 U.S. 325, 327 (1990) (quoting *Michigan v. Long*, 463 U.S. 1032, 1049 (1983)). See also *United States v. Brignoni-Ponce*, 422 U.S. 873, 880–81 (1975).

¹⁷ 540 U.S. 366, 371 (2003) (quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949)).

¹⁸ 462 U.S. 213, 233 n.7 (1983) (quoting *Ker v. California*, 374 U.S. 23, 36 (1963)). See also *Wyoming v. Houghton*, 526 U.S. 295, 305, 302 (1999) (refusing to require that police have “positive reason to believe” evidence may be in the possession of a passenger, in rejecting the contention that

Finally, the term “reasonable belief” has appeared in several Supreme Court opinions that are sometimes viewed as falling within an “emergency” or “community-caretaking” exception to the warrant requirement.¹⁹ Some courts and commentators would draw a line between, on the one hand, searches conducted pursuant to a police officer’s community-caretaking function (preventing physical injury and property damage) and, on the other, exigent circumstances, where police act without a warrant in order to serve law-enforcement interests (preserving evidence and preventing the flight of a suspect).²⁰ But the Supreme Court has never endorsed an “emergency” community-caretaking exception separate from “exigent” circumstances²¹ or administrative inspections.²²

Nevertheless, one possible reading of *Georgia v. Randolph* and *Brigham City v. Stuart* is that the Court was using the phrase “reason to believe” to refer to a community-caretaking exception distinct from exigent circumstances. After all, in both opinions the language at issue appeared as the Court was describing situations where the police enter a home to protect domestic violence victims and others from physical injury. But the problem with this reading of the cases is that the Court seemed to be discussing the doctrine of exigency pure and simple. Thus, while the Court expressly recognized that the lower court opinion in *Stuart* had separately addressed the emergency aid doctrine and the exigent circumstances exception, the Supreme Court’s analysis both there and in *Randolph* collapsed law-enforcement goals and community-caretaking functions within the general rubric of “exigent

automobile exception searches require “a showing of individualized probable cause” for each container inspected); *United States v. Watson*, 423 U.S. 411, 418 (1976) (noting that “[t]he cases construing the Fourth Amendment . . . reflect the ancient common-law rule” permitting the police to make a warrantless arrest based on “reasonable ground for making the arrest”); MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 120.1 (Proposed Official Draft 1975) (allowing arrest if the police have “reasonable cause to believe” suspect committed a crime).

¹⁹ See *Mincey v. Arizona*, 437 U.S. 385, 392 (1978) (“Numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid.”); *Cady v. Dombrowski*, 413 U.S. 433, 448 (1973) (“Where, as here, the trunk of an automobile, which the officer reasonably believed to contain a gun, was vulnerable to intrusion by vandals, we hold that the search was not ‘unreasonable’ . . .”).

²⁰ See, e.g., John F. Decker, *Emergency Circumstances, Police Responses, and Fourth Amendment Restrictions*, 89 J. CRIM. L. & CRIMINOLOGY 433, 446, 440 (1999) (taking the position that probable cause and reasonable suspicion “have no operable effect” in community-caretaking cases, which instead should require an “objectively reasonable basis for a belief in the immediate need for police assistance”).

²¹ See *Schmerber v. California*, 384 U.S. 757, 770 (1966) (using the term “emergency” in referring to warrantless searches aimed at preventing the destruction of evidence).

²² See *Cady*, 413 U.S. at 441 (referring to “community caretaking functions” in connection with an inventory search); see also *Michigan v. Clifford*, 464 U.S. 287, 293 (1984) (plurality opinion) (“A burning building of course creates an exigency that justifies a warrantless entry by fire officials to fight the blaze.”); *Mincey*, 437 U.S. at 392 (noting that “one exigency obviating the requirement of a warrant is the need to assist persons who are seriously injured”), quoted in *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

circumstances.”²³ Moreover, the Court in *Stuart* expressly refused to recognize a distinction—“even if . . . subjective motives could be so neatly unraveled”—depending on whether the police were intending to serve law-enforcement or community-caretaking objectives.²⁴ And, in the end, analyzing *Randolph* and *Stuart* as illustrations of a separate community-caretaking doctrine does nothing to help situate the concept of “reasonable belief” in the probable cause/reasonable suspicion dichotomy.

II. THE LINE BETWEEN PROBABLE CAUSE AND REASONABLE SUSPICION

The confusion evident in the Supreme Court’s opinions concerning the relationship between probable cause, reasonable suspicion, and reasonable belief can perhaps be traced to the history underlying the Fourth Amendment. Prior to the Court’s decision in *Terry v. Ohio*, probable cause, reasonable suspicion, reasonable cause, and reasonable belief had roughly the same connotation and were used interchangeably.²⁵ Moreover, the term that found its way into the Fourth Amendment—“probable cause”—did not have any fixed meaning at the time of ratification,²⁶ and there is no evidence that the language chosen by the Framers was meant to “codify for all time a particular conception of probable cause.”²⁷

Although this history may pinpoint the source of the initial confusion, once the Court drew a line between probable cause and reasonable suspicion in *Terry*, it had an obligation to use more precise language in order to keep the two concepts distinct. In fact, however, on some occasions the Court has engaged in the unfortunate practice of relying on its reasonable suspicion precedents in analyzing probable cause and vice versa.²⁸

Several distinctions between probable cause and reasonable suspicion have been suggested over the years. One possibility is that probable cause involves the

²³ See *Stuart*, 547 U.S. at 403 (using the term “exigency” to refer to the destruction of evidence and the escape of fleeing suspects, as well as injury to person and property); see also *Georgia v. Randolph*, 547 U.S. 103, 116 n.6 (2006).

²⁴ *Stuart*, 547 U.S. at 405. For discussion of the Supreme Court’s inconsistent use of perspective in these and other criminal procedure cases, see Kit Kinports, *Criminal Procedure in Perspective*, 98 J. CRIM. L. & CRIMINOLOGY 71 (2007).

²⁵ See Joseph D. Grano, *Probable Cause and Common Sense: A Reply to the Critics of Illinois v. Gates*, 17 U. MICH. J.L. REFORM 465, 479–95 (1984); Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951, 979–80 (2003).

²⁶ See Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 253–54 (1984); Lerner, *supra* note 25, at 977–78.

²⁷ Grano, *supra* note 25, at 478.

²⁸ See, e.g., *Illinois v. Gates*, 462 U.S. 213, 231–33 (1983) (quoting several reasonable suspicion precedents in redefining probable cause); *Terry v. Ohio*, 392 U.S. 1, 22, 27 (1968) (citing several probable cause precedents in explaining reasonable suspicion standard).

reasonable belief that a defendant actually is guilty of a crime, whereas reasonable suspicion arises when the police reasonably suspect the defendant may be committing a crime.²⁹ More specifically, this distinction could break down into the difference between reasonable “belief” and reasonable “suspicion,”³⁰ or between the reasonable belief that a defendant *actually did* commit a crime and the reasonable belief that she *may have been* involved in a crime.³¹ Although these are, in theory, distinctions that could be drawn between probable cause and reasonable suspicion, ultimately they find no support in the Supreme Court’s precedents.

Thus, while “suspicion” is ordinarily used in connection with the *Terry* stop-and-frisk standard,³² the term occasionally appears in reference to probable cause.³³ Moreover, as discussed in the previous section, the Court has repeatedly used the word “belief” in describing both probable cause and reasonable suspicion.

Likewise, the Court’s opinions do not reflect any consistent “did” v. “may have” distinction, with each verb form appearing in the context of both probable cause and reasonable suspicion. In *Ornelas v. United States*, for example, the Court described probable cause as requiring “facts . . . sufficient to warrant a man of reasonable prudence in the belief that . . . evidence of a crime *will* be found” in the place to be searched.³⁴ The plurality in *Texas v. Brown*, on the other hand, started out similarly but concluded with the phrase “certain items *may be* contraband or stolen property or useful as evidence of a crime.”³⁵ A similar lack of consistency can be found in the reasonable suspicion cases. In *Terry*, the Court authorized the police to stop and frisk when they “reasonably . . . conclude . . . that criminal activity *may be* afoot and that the persons with whom [they are] dealing *may be* armed and presently dangerous,”³⁶ whereas *United States v. Cortez* described the reasonable suspicion standard in more definitive terms—requiring

²⁹ See 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 9.5(a), at 472 (4th ed. 2004).

³⁰ See Ronald J. Bacigal, *Making the Right Gamble: The Odds on Probable Cause*, 74 MISS. L.J. 279, 290–91 (2004).

³¹ See Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 327–29 (1984).

³² See, e.g., *Dunaway v. New York*, 442 U.S. 200, 213 (1979) (observing that “suspicion, or even ‘strong reason to suspect,’” is an insufficient basis for an arrest warrant) (quoting *Henry v. United States*, 361 U.S. 98, 101 (1959)).

³³ See *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (noting that probable cause “‘imports a seizure made under circumstances which warrant suspicion’”) (quoting *Illinois v. Gates*, 462 U.S. 213, 235 (1983) (quoting *Locke v. United States*, 11 U.S. 339, 348 (1813))); *Illinois v. Andreas*, 463 U.S. 765, 771 (1983) (using the phrase “probable cause to suspect”).

³⁴ 517 U.S. 690, 696 (1996) (emphasis added); see also *Gates*, 462 U.S. at 238, quoted *supra* text accompanying note 1.

³⁵ 460 U.S. 730, 742 (1983) (plurality opinion) (emphasis added).

³⁶ 392 U.S. 1, 30 (1968) (emphasis added). *But cf. id.* at 27 (suggesting that a frisk requires a reasonable belief that the officer’s safety “was in danger”) (emphasis added).

“some objective manifestation that the person stopped *is*, or *is about to be*, engaged in criminal activity.”³⁷

In a recent article, Craig Lerner posits that while the definition of probable cause is “inexorably fixed,” application of the reasonable suspicion standard involves a balancing process.³⁸ The Court’s precedents, however, provide no greater support for this purported distinction between the two concepts. In *Terry*, the Court obviously did balance the relevant competing interests in deciding “as a general proposition” that the Fourth Amendment allows police practices less intrusive than a full search and arrest (i.e., a stop and frisk) on less than probable cause (i.e., reasonable suspicion).³⁹ But the Court did not envision that in evaluating whether or not reasonable suspicion exists on a given set of facts, the police or the courts would use a balancing test—any more than they do in ascertaining the existence of probable cause.⁴⁰

In support of his theory, Lerner points specifically to language in the Court’s opinion in *United States v. Knights*, which held that only reasonable suspicion was necessary to justify the warrantless search of the home of a probationer whose sentence had been conditioned on his submission to a broad range of searches. As Lerner notes, *Knights* observed that a “lesser” standard than probable cause satisfies the Fourth Amendment “when the balance of governmental and private interests makes such a standard reasonable.”⁴¹ Although some ambiguity may surround the Court’s indefinite reference to “lesser” standards, in lieu of the more precise term “reasonable suspicion,” the cases relied on by the Court here are *Terry* and others applying the reasonable suspicion standard. Moreover, reasonable suspicion was conceded on the facts of *Knights*, and the Court therefore did not analyze the facts of the case. Thus, the most plausible reading of the Court’s opinion in *Knights* is that it, like *Terry*, relied on a balancing process to justify holding “as a general proposition” that reasonable suspicion, rather than probable cause, was the applicable standard, but did not anticipate that any further balancing need be done in evaluating whether reasonable suspicion existed on the facts of the particular case.⁴²

³⁷ 449 U.S. 411, 417 (1981); see also *Maryland v. Buie*, 494 U.S. 325, 327 (1990), quoted *supra* text accompanying note 16.

³⁸ Lerner, *supra* note 25, at 1003.

³⁹ *Terry*, 392 U.S. at 20.

⁴⁰ See, e.g., *Dunaway v. New York*, 442 U.S. 200, 208 (1979) (noting that “[t]he ‘long-prevailing standards’ of probable cause embodied ‘the best compromise’” of competing interests, and therefore “[t]he standard [of probable cause] applied to all arrests, without the need to ‘balance’ the interests and circumstances involved in particular situations”) (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)).

⁴¹ 534 U.S. 112, 121 (2001).

⁴² The Court expanded *Knights* in *Samson v. California*, 547 U.S. 843, 855 n.4 (2006), observing that “[t]he touchstone of the Fourth Amendment is reasonableness, not individualized suspicion,” and upholding the search of a parolee whose release had been subject to a search condition similar to that in effect in *Knights*—not only without a warrant but without even the

A final proposed difference between probable cause and reasonable suspicion turns on an empirical assessment of the precise degree of certainty underlying the police officer's suspicions.⁴³ But not only has the Court resisted quantifying the concepts of probable cause and reasonable suspicion,⁴⁴ it has also despaired of "[a]rticulating precisely" concepts that are "not readily, or even usefully, reduced to a neat set of legal rules."⁴⁵ The Court has indicated generally that reasonable suspicion is "a less demanding standard" than probable cause in terms of both the "quantity or content" of information necessary and the "quality" or "reliability" of that information.⁴⁶ The Court has also noted that reasonable suspicion requires "considerably less" than a preponderance of the evidence,⁴⁷ but it has refused to endorse any more specific description of the difference between the two standards.

Rather than adopting any of these suggestions or otherwise specifically delineating the difference between the two concepts, the Court seems to have adopted a "we know it when we see it" attitude, taking the position that probable cause is a more demanding standard than reasonable suspicion in some amorphous, ineffable way. Maybe that approach is unobjectionable. After all, such flexibility/imprecision is arguably both the virtue and vice of totality-of-the-circumstances tests. But even if the Court is understandably reluctant to give further content to each of the two standards themselves, it can nevertheless be faulted for failing to maintain a distinction between them.

Over the years, some commentators have called for a complete blurring of the line between the two standards, endorsing a flexible, sliding-scale definition of probable cause in place of the Court's "two-tiered" approach to probable cause and reasonable suspicion.⁴⁸ As described in greater detail below, the sliding-scale model would take into account, for example, the intrusiveness of the police action, the gravity of the crime, and the immediacy of the need for police intervention.

reasonable suspicion involved in *Knights*. If *Samson* prevails, and all of Fourth Amendment scrutiny is reduced to an ad hoc, free-wheeling balancing process, without any sort of structure or standards, this commentary is, of course, beside the point. But so too is a good deal more of Fourth Amendment jurisprudence.

⁴³ Bacigal, *supra* note 30, at 338 (suggesting that reasonable suspicion could be associated with a 20–40% likelihood and probable cause (a fair probability) with a 40–49% likelihood); Wayne R. LaFare, "Street Encounters" and the Constitution: Terry, Sibron, Peters, and Beyond, 67 MICH. L. REV. 40, 73–75 (1968) (taking the position that probable cause is a "more probable than not" standard whereas reasonable suspicion involves "a substantial possibility").

⁴⁴ See, e.g., *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (observing that probable cause is "incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances").

⁴⁵ *Ornelas v. United States*, 517 U.S. 690, 695–96 (1996) (quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983)).

⁴⁶ *Alabama v. White*, 496 U.S. 325, 330 (1990).

⁴⁷ *United States v. Sokolow*, 490 U.S. 1, 7 (1989).

⁴⁸ See, e.g., Alschuler, *supra* note 26, at 243–56; Bacigal, *supra* note 30, at 323–33; Grano, *supra* note 25, at 501–06; Lerner, *supra* note 25, at 1014–22; Christopher Slobogin, *The Liberal Assault on the Fourth Amendment*, 4 OHIO ST. J. CRIM. L. 603, 605–11 (2007).

Others are critical of this suggestion, pointing out the quintessentially ad hoc nature of the sliding scale and objecting that it “could only produce more slide than scale.”⁴⁹ If the Court opts to move away from the two-tiered approach, it should do so openly and honestly—rather than hiding the ball by introducing a term like “reasonable belief” without explaining its relationship to probable cause and reasonable suspicion. The confusion that results from this lack of transparency not only generates uncertainty concerning the meaning of probable cause but threatens as well to undermine the search warrant requirement.

III. “MINIMALLY INTRUSIVE” SEARCH WARRANTS

Although the term “reason to believe” was used in *Georgia v. Randolph* and *Brigham City v. Stuart* in the context of warrantless exigent circumstances searches, the Supreme Court’s tendency to conflate probable cause and reasonable suspicion threatens to bleed over to warranted searches as well. To date, the Court has not purported to adopt differing standards of probable cause depending on whether a warrant is involved, and any diminution of the showing required for an exigent circumstances search therefore threatens to work a corresponding reduction in the showing necessary to obtain a search warrant.

As noted above, proponents of the sliding-scale approach to probable cause have suggested that one relevant factor in assessing the amount of evidence necessary to justify a search is the level of intrusiveness associated with the search.⁵⁰ Thus, for example, in commenting on the Supreme Court’s conclusion in *Kyllo v. United States* that the use of a thermal imaging device on a home constitutes a Fourth Amendment “search” and therefore requires a warrant,⁵¹ Professor Lerner described the thermal imager as “minimally intrusive.”⁵² If probable cause is required to search a home, “however the search is framed and regardless of how unobtrusive it is,” he argued, the police will “simply obtain a

⁴⁹ Anthony C. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 394 (1974); see also Wasserstrom, *supra* note 31, at 327–29, 391. But cf. JOSHUA DRESSLER & ALAN C. MICHAELS, 1 UNDERSTANDING CRIMINAL PROCEDURE: INVESTIGATION § 8.07[C][1], at 145 (4th ed. 2006) (observing that “[l]ogic would suggest” that a sliding scale would also “slide in the other direction”).

⁵⁰ See Grano, *supra* note 25, at 504 (reasoning that “[c]ommon sense and experience teach that some intrusions are more burdensome than others”); Lerner, *supra* note 25, at 1020–21 (arguing that “not all searches or seizures are equal in the resultant privacy intrusions,” and suggesting by way of example that “[t]he probable cause required to search a car or warehouse might be insufficient to justify a house search or an arrest”).

⁵¹ 533 U.S. 27, 40 (2001).

⁵² Lerner, *supra* note 25, at 1009. Cf. William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2166–68 (2002) (endorsing the use of suspicionless “group stops,” so long as they are done respectfully, on the ground that they are “likely to cause a small fraction of the injury inflicted by stopping the same fifty people one by one,” though cautioning that arrests and searches “require probable cause now, and this state of affairs should continue”).

warrant to physically enter the premises” instead of “bother[ing]” to use a thermal imager.⁵³

Lerner’s suggestion that the showing required to obtain a search warrant should vary depending on whether the police contemplate a “minimally” or a highly intrusive search contravenes the Supreme Court’s Fourth Amendment jurisprudence. In *Arizona v. Hicks*, for example, the majority rejected Justice O’Connor’s suggestion in dissent that a distinction be drawn between a “‘cursory inspection,’” requiring only reasonable suspicion, and a “‘full-blown search,’” which needed probable cause.⁵⁴ The Court refused to create “a new thicket of Fourth Amendment law” by drawing a line based on the intrusiveness of police searches in situations that involved “[n]o special operational necessities.”⁵⁵

The Supreme Court’s conclusion in *Hicks* makes perfect sense. Ordinary criminal law-enforcement searches inevitably vary in their intrusiveness, depending, for example, on where the police are searching and what they are looking for. A search warrant for a home, for example, will generally lead to a longer and more detailed inspection when the police are conducting a drug investigation than when they are searching for a stolen car. In fact, the police may not know how intrusive a search will be required until they actually start executing the search warrant. Once courts begin to draw lines between search warrants based on their relative intrusiveness, it is difficult to find a stopping point.

Consider, for example, another arguably minimalist search: police entries to secure the premises and preserve the status quo while they apply for a search

⁵³ Lerner, *supra* note 25, at 1009. Relying on similar reasoning, an Eighth Circuit panel concluded in *United States v. Kattaria*, 503 F.3d 703, 706-07 (8th Cir. 2007), that a warrant authorizing “a limited thermal imaging search,” as opposed to “a full physical search,” may be issued based only on reasonable suspicion. On rehearing en banc, the Eighth Circuit affirmed without reaching that issue, finding that the searches in question were “supported by traditional probable cause” or, in the alternative, by the good-faith exception. *United States v. Kattaria*, 553 F.3d 1171, 1174 (8th Cir. 2009) (en banc) (per curiam). Nevertheless, two judges wrote separately, relying on “the conflicting signals” in the Supreme Court’s Fourth Amendment rulings and the history underlying the Amendment to endorse “a more focused probable cause standard” that would vary depending on the intrusiveness of the search. *Id.* at 1181, 1183 (Loken, C.J., concurring).

⁵⁴ 480 U.S. 321, 328 (1987) (quoting *id.* at 333 (O’Connor, J., dissenting)); see also *Griffin v. Wisconsin*, 483 U.S. 868, 877 (1987) (pointing out that “where the matter is of such a nature as to require a judicial warrant, it is also of such a nature as to require probable cause”).

⁵⁵ 480 U.S. at 328, 327 (observing that a “minimally intrusive” seizure does not require probable cause if “operational necessities render it the only practicable means of detecting certain types of crime,” citing the special needs and police-safety concerns underlying the administrative inspection and stop-and-frisk cases). See also *Maryland v. Buie*, 494 U.S. 325, 335 n.3 (1990) (allowing “cursory” protective sweep based only on reasonable suspicion, and distinguishing *Hicks* on the grounds that the officer there was “searching for evidence plain and simple,” whereas a protective sweep, like a *Terry* frisk, may be conducted without probable cause “only because [it is] limited to that which is necessary to protect the safety of officers and others”); *Camara v. Municipal Court*, 387 U.S. 523 (1967) (upholding the use of area warrants without traditional probable cause in the context of special needs administrative inspections).

warrant. The Supreme Court suggested in *Segura v. United States* that securing the premises from the inside of a home constitutes a Fourth Amendment search that requires both probable cause and exigent circumstances.⁵⁶ Nonetheless, the process of securing the premises obviously entails less intrusion than an intensive search for evidence. And if the police have the probable cause and exigent circumstances needed to conduct a full search under the exigent circumstances exception, they arguably have no incentive to “bother” choosing the “minimally intrusive” option of securing the premises first.

The “squeeze[ing]” of luggage at issue in *Bond v. United States* provides another illustration.⁵⁷ The Court evaluated the intrusiveness of the border patrol agent’s action in determining that the “physical manipulation” of Bond’s bag violated his reasonable expectation of privacy and thus rose to the level of a Fourth Amendment search.⁵⁸ But the Court then went on to find a Fourth Amendment violation without stopping to consider that the agent’s action was far less intrusive than opening and searching the contents of the bag. Once the Fourth Amendment was implicated, the Court did not entertain the possibility that anything less than traditional probable cause and a warrant (or some exception to the warrant requirement) were necessary to justify even such a minimalist search.

Advocates of the sliding scale apparently are not troubled by the line-drawing difficulties that would flow from creating a continuum of search warrants depending on their intrusiveness. Rather, they assert, the sliding-scale approach would “revitalize[]” the warrant requirement⁵⁹ because requiring probable cause before the police engage in “exploratory” investigative techniques tends to foreclose the use of those law-enforcement tools.⁶⁰ But diminishing the quantum of proof necessary to obtain a search warrant does not serve to “revitalize” the warrant requirement. Instead, it has precisely the opposite effect, further fueling the concerns of those who charge that the warrant process is already weighted too heavily in favor of the police.⁶¹

⁵⁶ 468 U.S. 796, 798 (1984). Cf. *Illinois v. McArthur*, 531 U.S. 326, 337 (2001) (listing among the relevant factors supporting the constitutionality of police officers’ decision to secure the premises from the outside that they “reasonably believed” the defendant would destroy the evidence).

⁵⁷ 529 U.S. 334, 335 (2000).

⁵⁸ *Id.* at 337–38 (reasoning that “[p]hysically invasive inspection is simply more intrusive than purely visual inspection”).

⁵⁹ Lerner, *supra* note 25, at 1026.

⁶⁰ Slobogin, *supra* note 48, at 607.

⁶¹ See, e.g., William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 888–89 (1991) (describing the warrant process as “slapdash” and “casual”); Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 34 (1988) (calling “the ‘rubber stamp’ quality of magistrate review of warrant applications . . . an open scandal”).

IV. CONCLUSION

Historically, the Supreme Court used phrases such as “reasonable belief” and “reason to believe” as shorthand references for both probable cause and reasonable suspicion. While this lack of precision was unobjectionable when the concepts were interchangeable, that has not been true since *Terry v. Ohio* created a distinction between the two standards. When the Justices then resurrected these terms in 2006 without situating them in the dichotomy between probable cause and reasonable suspicion, it was not clear whether they were adopting the reasonable suspicion standard (which the phrases more closely resemble), using the “reasonable belief” definition of probable cause, or creating a smokescreen, surreptitiously setting the stage for abandoning the two-tiered approach in favor of a sliding-scale model of probable cause.

In addition to confusing the concepts of probable cause and reasonable suspicion, the Court’s use of the term “reasonable belief”—whether careless or deliberate—leaves the door open for those who would draw a line between minimally and highly intrusive searches, whether based on a search warrant or some exception to the warrant requirement. By conflating probable cause and reasonable suspicion in *Georgia v. Randolph* and *Brigham City v. Stuart*, the Court thus risks watering down the showing needed to obtain a warrant and thereby diluting the protections of the Fourth Amendment. Any such decision to abandon the two-tiered approach to probable cause and reasonable suspicion, or to allow the issuance of a warrant without traditional probable cause in a purely investigative, non-special needs case, is one the Court should make openly and intentionally, using a transparent decision-making process.