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## The Death of Suspicion

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## THE DEATH OF SUSPICION

FABIO ARCILA, JR.\*

### ABSTRACT

*At the nation's founding, search warrants and the concept of suspicion were well entrenched as a means of limiting governmental search power. This tradition largely explains why today's Fourth Amendment law includes two foundational black letter rules: the presumptive warrant requirement and the presumptive suspicion requirement.*

*Unfortunately, neither of these rules is correct. Certainly they have historical support, especially in the common law. But whether they reflect the totality of our historic experience is questionable, especially when civil search practices are considered. More importantly, modern developments—such as urban life and technological advancements, the rise of the regulatory state, and post-9/11 security*

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*concerns—have sufficiently changed circumstances so that these rules are now unworkable. Indeed, in today's world these rules are now demonstrably wrong. Worst of all, adhering to them has prevented us from formulating a more coherent Fourth Amendment jurisprudence.*

*This Article is a call to arms. It challenges us to recognize that a new paradigm now confronts us, in which reasonableness serves as the constitutional touchstone for all governmental searches, and where neither warrants nor suspicion can be expected to serve as primary mechanisms for protecting Fourth Amendment values. Therefore, we must confront the need to identify new ways of assuring adequate Fourth Amendment protections. To that end, the Article concludes by offering some broad guidelines to start us on the way.*

TABLE OF CONTENTS

INTRODUCTION . . . . . 1278

I. FALLACY OF THE PRESUMPTIVE WARRANT

    REQUIREMENT . . . . . 1280

*A. Criminal Context* . . . . . 1281

*B. Civil Context* . . . . . 1288

II. FALLACY OF THE PRESUMPTIVE SUSPICION

    REQUIREMENT . . . . . 1293

*A. The Fourth Amendment’s Text* . . . . . 1293

*B. Originalism* . . . . . 1297

            1. *Suspicionless Maritime Customs Searches* . . . . . 1298

            2. *Suspicionless Building and Home Searches* . . . . . 1304

            3. *Suspicion as an Illusory Protection* . . . . . 1310

*a. Suspicion’s Limited Protective Role* . . . . . 1311

*b. Changes in Language* . . . . . 1314

*c. Limits on Search Remedies* . . . . . 1315

*d. Successful-Search Immunity Defense* . . . . . 1316

*C. Suspicion as Proxy* . . . . . 1324

III. JUDGING REASONABLENESS WITHOUT SUSPICION:

    THE NEW PARADIGM . . . . . 1326

*A. Modern Urban Life and Technological*

*Advancements* . . . . . 1327

*B. The Rise of the Regulatory State* . . . . . 1331

*C. The Post-9/11 World* . . . . . 1334

CONCLUSION . . . . . 1335

## INTRODUCTION

Suspicion is a siren. It has lured us into misguided Fourth Amendment waters, obscuring a more rational search jurisprudence, not only in the criminal context, but particularly in the civil context.<sup>1</sup> We cling to the rule that suspicion generally is required under the Reasonableness Clause, while ignoring that suspicion is a core requirement only under the Warrant Clause, through its reference to probable cause.<sup>2</sup> Yet the Supreme Court, which has correctly held that the Reasonableness Clause controls a civil search's constitutionality, continues to assure us that civil searches generally should be based on some level of individualized suspicion to be constitutional. Commentators, who commonly advocate for stricter enforcement of the rule, do not help matters. In perpetuating this rule, we remain trapped by our jurisprudence's inertia and fail to correct toward a sound course.

Simply put, suspicion is not the primary determinant of a governmental search's constitutionality, whether the search is criminal or civil in nature. Avoiding governmental overreaching is. Not all suspicion-based searches are reasonable. Reasonableness depends on many factors, such as the search's scope and intrusiveness, all of which help us determine whether the government exceeded its constitutional bounds. Conversely, the vast majority of today's suspicionless searches—be they criminal or civil in nature—are reasonable. These searches are perfectly constitutional so long as they do not involve governmental overreaching. Nonetheless, as if in a trance, we continue to assert loyalty to a suspicion-centered search regime that leaves us marooned on an unstable jurisprudential foundation. The rule has no grounding in the Fourth Amendment's text, a strong originalist case can be made against it, and though it once served us well it has now become unworkable due to modern developments.

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1. I will use the term "criminal searches" to refer to those searches whose primary purpose is to uncover evidence of criminal wrongdoing, and the term "civil searches" to refer to those having civil ends.

2. See U.S. CONST. amend. IV. The Fourth Amendment's language is provided *infra* in the text accompanying note 50.

Our myopic focus upon suspicion has had two important consequences—our adoption of a presumptive warrant requirement and a presumptive suspicion requirement—each of which has contributed to leading us astray. I will debunk the presumptive warrant requirement in Part I and explain why it is an inaccurate statement of black letter law in the criminal and civil contexts.

Part II is devoted to the presumptive suspicion requirement. It notes that suspicion is not a textual requirement under the Fourth Amendment, and further emphasizes that, during the Framers' time, suspicion was not a universal requirement for valid searches. The Framers, for example, statutorily authorized suspicionless searches in the maritime customs context, and even extended such search authority to homes and other buildings to enforce revenue laws. Further, to the extent that suspicion was required, numerous reasons exist for believing that it was often an illusory protection. Among those reasons are that, though an articulated concept, probable cause sentryship on the judiciary's part was almost certainly not fully developed at any point during the Framers' era; changes in language have likely resulted in probable cause having a more demanding definition now than at the nation's founding; during the Framers' era, numerous statutory obstacles existed to accessing a search remedy; and evidence indicates that suspicionless searches were allowed so long as they were successful. I close Part II by explaining that we would do better to conceive of suspicion as merely one proxy for protecting Fourth Amendment values, which can also be protected using other mechanisms, sometimes more effectively.

Finally, Part III argues that we are now confronted with a new paradigm of judging Fourth Amendment reasonableness in the absence of suspicion. This paradigm has been brought about by numerous developments, including the reality of modern urban life and technological advancements, the rise of the regulatory state, and security concerns in the post-9/11 world. All of these developments have resulted in an increased interest—and sometimes a need—to engage in preventative searches, such as for national security purposes.

I conclude by suggesting some broad Fourth Amendment guidelines that have distinct advantages over our current juris-

prudence. These guidelines replace the presumptive warrant and suspicion requirements. They also go much further in fleshing out—more accurately than in the current jurisprudence—a few important Fourth Amendment principles. These guidelines have the key advantage of charting a middle course, which avoids one pervasive criticism of our present Fourth Amendment law, namely that it manically swings between a formalistic, strict application of the presumptive warrant and suspicion rules and an unbounded balancing approach. The guidelines enjoy this advantage because they provide explicit, discretion-limiting beacons that reflect core Fourth Amendment values. They thus provide a starting point for reformulating our Fourth Amendment jurisprudence so that it is more honest, coherent, and accurate.

### I. FALLACY OF THE PRESUMPTIVE WARRANT REQUIREMENT

The so-called black letter rule that the Constitution, through the Fourth Amendment, imposes a presumptive warrant requirement for governmental searches is commonly invoked by both courts<sup>3</sup> and commentators.<sup>4</sup> A common formulation of this rule is that, except for certain carefully limited exceptions, searches must be conducted under a valid warrant to be constitutional.<sup>5</sup> The problem with this rule is that it is untrue. In terms of the historical record, the Framers did not include the Warrant Clause in the Fourth Amendment to create a presumptive warrant requirement. Rather, they included it to strictly limit the grounds upon which warrants could issue. Further, this rule is a highly inaccurate description of

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3. See, e.g., *Ornelas v. United States*, 517 U.S. 690, 699 (1996); *Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971); *Katz v. United States*, 389 U.S. 347, 357 (1967); *Camara v. Mun. Ct.*, 387 U.S. 523, 528-29 (1967); *Chapman v. United States*, 365 U.S. 610, 615 (1961); *Johnson v. United States*, 333 U.S. 10, 14-15 (1948).

4. See, e.g., Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473, 530 (1991); Doriane Lambelet Coleman, *Storming the Castle To Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 WM. & MARY L. REV. 413, 459, 522-26, 532 (2005); Joseph D. Grano, *Rethinking the Fourth Amendment Warrant Requirement*, 19 AM. CRIM. L. REV. 603, 605 & n.10 (1982); Wayne D. Holly, *The Fourth Amendment Hangs in the Balance: Resurrecting the Warrant Requirement Through Strict Scrutiny*, 13 N.Y.L. SCH. J. HUM. RTS. 531, 540-41, 548-54, 587 (1997).

5. See, e.g., *Arizona v. Gant*, 129 S. Ct. 1710, 1716 (2009); *O'Connor v. Ortega*, 480 U.S. 709, 720 (1987); *Coolidge*, 403 U.S. at 454-55.

modern Fourth Amendment jurisprudence. Thus, the Fourth Amendment does not impose a presumptive warrant requirement for either criminal or civil searches.

### A. Criminal Context

The black letter presumptive warrant rule is not even true in the criminal context, where it purportedly applies the most stringently.<sup>6</sup> The reasons why this so-called rule is invalid in the criminal context, while multifaceted, can be boiled down to two straightforward arguments: history and coherence.

Though still a prevailing view in current Supreme Court jurisprudence,<sup>7</sup> any assertion that the Warrant Clause somehow generally governs the constitutionality of criminal searches is contrary to a proper historical understanding of why the Framers included it in the Fourth Amendment. The Framers included the Warrant Clause *only* to specify the limited grounds—probable cause, particularity, and oath or affirmation<sup>8</sup>—upon which warrants can be granted,<sup>9</sup> allowing future generations to weaken these restrictions only through the difficult constitutional amendment process. The Framers had multiple objectives in doing so. First, they constitutionalized the common law ban on general warrants<sup>10</sup> to ensure

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6. See Grano, *supra* note 4, at 605 & n.10.

7. See *Gant*, 129 S. Ct. at 1716.

8. See *infra* text accompanying note 50 for the Fourth Amendment's language.

9. See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 774 (1994) [hereinafter Amar, *Fourth Amendment*] ("The Warrant Clause says only when warrants may not issue, not when they may, or must.").

10. English legal doctrine had evolved to abhor general search warrants by no later than the mid-1700s. See 2 SIR MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 150 (Sollom Emlyn ed., 1800) [hereinafter HALE 1800]; 2 SIR MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 150 (Sollom Emlyn ed., photo. reprint 1971) (1736) [hereinafter HALE 1736]; 2 WILLIAM HAWKINS, *A TREATISE OF THE PLEAS OF THE CROWN* 82, 84 (4th ed. 1762) [hereinafter HAWKINS 1762]; 2 WILLIAM HAWKINS, *A TREATISE OF THE PLEAS OF THE CROWN* 82, 84 (3d ed. 1739) [hereinafter HAWKINS 1739]. During the same period, English common law (in the famous *Wilkes* cases) had also begun to attack general search warrants. See *infra* note 11. By independence, and certainly after the Fourth Amendment's adoption, American case law and legal doctrine had incorporated this disdain for general warrants. See *Frisbie v. Butler*, 1 Kirby 213 (Conn. 1787); RICHARD BURN, *ABRIDGMENT, OR THE AMERICAN JUSTICE* 357 (1792) [hereinafter BURN 1792]; DANIEL DAVIS, *A PRACTICAL TREATISE UPON THE AUTHORITY AND DUTY OF JUSTICES OF THE PEACE IN CRIMINAL PROSECUTIONS* 47 (photo. reprint 1994) (1824); RODOLPHUS DICKINSON, *THE POWERS AND DUTIES OF JUSTICES OF THE*



that only *specific* warrants could issue, thereby ensuring that the general warrants that had been used to oppressive ends in Great Britain—most infamously in the *Wilkes* cases<sup>11</sup>—could not be

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PEACE 253 (1818); JOHN A. DUNLAP, *THE NEW-YORK JUSTICE* 368 (1815); JAMES EWING, *A TREATISE ON THE OFFICE AND DUTY OF A JUSTICE OF THE PEACE* 505 (1805); JOHN FAUCHERAUD GRIMKÉ, *THE SOUTH-CAROLINA JUSTICE OF PEACE* 398 (3d ed. 1810); WILLIAM WALLER HENING, *THE NEW VIRGINIA JUSTICE* 621 (3d ed. 1820) [hereinafter HENING, *NEW VIRGINIA JUSTICE* 1820]; WILLIAM WALLER HENING, *THE NEW VIRGINIA JUSTICE* 413, 462, 464 (1799) [hereinafter HENING, *NEW VIRGINIA JUSTICE* 1799]; WILLIAM WALLER HENING, *THE NEW VIRGINIA JUSTICE* 450 (1795) [hereinafter HENING, *NEW VIRGINIA JUSTICE* 1795]; HENRY HITCHCOCK, *THE ALABAMA JUSTICE OF THE PEACE* 407 (1822) [hereinafter HITCHCOCK, *THE ALABAMA JUSTICE*]; FRANÇOIS-XAVIER MARTIN, *THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE* 278, 280 (1791) [hereinafter MARTIN, *OFFICE AND AUTHORITY*]; *A NEW CONDUCTOR GENERALIS* 404 (Albany, D. & S. Whiting 1803) [hereinafter *NEW CONDUCTOR GENERALIS*]; JAMES PARKER, *THE CONDUCTOR GENERALIS* 314-15, 360 (1801) [hereinafter PARKER, *CONDUCTOR GENERALIS*]; HENRY POTTER, *THE OFFICE AND DUTY OF A JUSTICE OF THE PEACE* 273 (1816); RICHARD STARKE, *THE OFFICE AND AUTHORITY OF A JUSTICE OF PEACE* 351 (1774); see also 2 RICHARD BACHE, *THE MANUAL OF A PENNSYLVANIA JUSTICE OF THE PEACE* 138-39 (1814); 7 NATHAN DANE, *A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW* 248-49, at § 2 (1824). See generally Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 655-57 & n.299 (1999) [hereinafter Davies, *Original Fourth Amendment*]. Through the Warrant Clause and its particularity requirement, the Framers constitutionalized the unlawfulness of general warrants, thus doing everything they could to prevent a return of general warrants. Cf. Davies, *Original Fourth Amendment*, *supra*, at 590 (“[T]he Framers adopted constitutional search and seizure provisions with the precise aim of ensuring the protection of person and house by prohibiting legislative approval of general warrants.”); *id.* at 657-60 (arguing that the Framers feared legislative approval of general warrants for customs—but not criminal—searches); George C. Thomas, III, *Time Travel, Hovercrafts, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment*, 80 NOTRE DAME L. REV. 1451, 1456 (2005) (contending that the Warrant Clause was “[w]ritten to ensure that Congress could not authorize general searches”).

11. The *Wilkes* cases were famous litigations that occurred in Great Britain in the 1760s and resulted in court rulings that for the first time cast doubt upon the legality of general warrants. See Fabio Arcila, Jr., *In the Trenches: Searches and the Misunderstood Common-Law History of Suspicion and Probable Cause*, 10 U. PA. J. CONST. L. 1, 14 n.41 (2007) [hereinafter Arcila, *In the Trenches*]. In the *Wilkes* cases, officials who had operated under general warrants were held liable for damages in trespass. *Money v. Leach*, (1765) 97 Eng. Rep. 1075, 1075, 1077, 3 Burr. 1742, 1742, 1745, 19 How. St. Tri. 1001, 1003, 1006 (K.B.) (£2,000 in damages claimed; jury awarded £400); *Entick v. Carrington*, (1765) 95 Eng. Rep. 807, 808, 811, 19 How. St. Tri. 1029, 1030, 1036, 2 Wils. K.B. 275, 275, 280 (C.P.) (£2,000 in damages claimed; jury awarded £300); *Beardmore v. Carrington*, (1764) 95 Eng. Rep. 790, 790-91, 793-94 (C.P.) (£10,000 in damages claimed; jury awarded £1,000); *Huckle v. Money*, (1763) 95 Eng. Rep. 768, 768-69 (C.P.) (plaintiff “suffered very little or no damages ... perhaps [£20] would have been thought damages sufficient,” yet jury awarded £300); *Wilkes v. Wood*, (1763) 98 Eng. Rep. 489, 489, 499, 19 How. St. Tri. 1153, 1153, 1168 (C.P.) (£5,000 in damages claimed; jury awarded £1,000); see also *Wilkes v. Wood*, 19 How. St. Tri. 1381, 1407-08 (reporting that, in litigation *Wilkes* brought against Secretary of State Lord Halifax, who had issued the general warrants, *Wilkes* had claimed £20,000 in damages, with the jury awarding

used in the new nation. As Professor Taylor has explained, the Framers “did not prohibit as unreasonable all searches not covered by warrants issued in compliance with the second clause” because “their prime purpose was to prohibit the oppressive use of warrants.”<sup>12</sup> Second, they sought to avoid any repeat of the colonial practice in which crown authorities had resorted to laxly issued writs of assistance to help justify their customs searches.<sup>13</sup> Being familiar with the abuses that accompanied writs of assistance, the

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him £4,000). See generally NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 43-48 (Leonard W. Levy ed., Da Capo Press 1970) (1937). A concurring justice in *Huckle v. Money* noted that the court was essentially reviewing a “motion to set aside 15 verdicts ... ; for all the other persons who have brought actions against these [searchers] have had verdicts for [£200] in each cause by consent.” (1763) 95 Eng. Rep. 768, 769 (C.P.) (Bathurst, J., concurring). The actions were costly to the government, and not just because of the damages granted. “The government undertook the responsibility of defending all actions arising from the warrant and the payment of all judgments. The expenses incurred were said to total £100,000.” LASSON, *supra*, at 45 (citation omitted).

The *Wilkes* cases were widely publicized in the colonies and ubiquitously discussed in Framing-era American cases and justice manuals. *E.g.*, *Grumon v. Raymond*, 1 Conn. 40, 42-44 (1814) (citing and discussing *Entick v. Carrington* and Lord Halifax’s warrants); *Bell v. Clapp*, 10 Johns. 263, 265-66 (N.Y. Sup. Ct. 1813) (citing and discussing *Entick*); DUNLAP, *supra* note 10, at 370 (discussing and citing *Entick*); HENING, NEW VIRGINIA JUSTICE 1795, *supra* note 10, at 404 (discussing both *Wilkes* and *Entick*); HITCHCOCK, THE ALABAMA JUSTICE, *supra* note 10, at 408-09 (discussing and citing *Wilkes* and *Entick*). See generally Amar, *Fourth Amendment*, *supra* note 9, at 772 & n.54; Arcila, *In the Trenches*, *supra*, at 28 & n.96 (recounting citations and discussions of *Money v. Leach*); Davies, *Original Fourth Amendment*, *supra* note 10, at 562-65 & nn.21-25. They were also widely discussed in English treatises that Americans likely consulted. *E.g.*, 2 SERJEANT WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 131 n.2, 135 n.6, 138 n.7, 181 nn.3-4 (Thomas Leach ed., 6th ed. 1787) [hereinafter HAWKINS 1787]. The Supreme Court has described *Entick* as “a ‘monument of English freedom’ ‘undoubtedly familiar’ to ‘every American statesman’ at the time the Constitution was adopted, and considered to be ‘the true and ultimate expression of constitutional law.’” *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989) (quoting *Boyd v. United States*, 116 U.S. 616, 626 (1886)); accord *Berger v. New York*, 388 U.S. 41, 49 (1967).

12. See TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 43 (1969).

13. Colonial hostility to these searches was particularly acute in Massachusetts, where colonial merchants litigated against the writs of assistance. Fabio Arcila, Jr., *A Response to Professor Steinberg’s Fourth Amendment Chutzpah*, 10 U. PA. J. CONST. L. 1229, 1244 (2008) [hereinafter Arcila, *Fourth Amendment Chutzpah*]. It is generally thought that this litigation had an impact upon colonial thinking about search and seizure protections, though this position has been disputed. *Id.* at 1243-44 & nn.46-47. For an overview of writs of assistance, see Arcila, *In the Trenches*, *supra* note 11, at 10-12 (explaining that the writs did not provide any search authority in themselves, but colonial customs officers claimed to be statutorily authorized to search as part of their commissions).

Framers believed that both probable cause<sup>14</sup> and particularity should support any search authorized under legal process. The Framers' key concern behind their desire to ban general warrants and writs of assistance was to limit search discretion,<sup>15</sup> and requiring both probable cause and particularity served that end. Third, the Framers sought to limit access to warrants because they immunized officers from suits challenging the propriety of their searches.<sup>16</sup> The Framers accomplished this goal through the

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14. Amar, *Fourth Amendment*, *supra* note 9, at 782 ("[T]he Framers did not mind 'discourag[ing] resort to ... a warrant.' They wanted to *limit* this imperial and ex parte device, so they insisted on a substantial standard of proof...." (quoting *Whiteley v. Warden*, 401 U.S. 560, 566 (1971))).

15. Major British treatises expressed concern regarding the discretion that general warrants conferred. *E.g.*, 2 HAWKINS 1787, *supra* note 11, at 132; 2 HAWKINS 1762, *supra* note 10, at 82; 2 HAWKINS 1739, *supra* note 10, at 82; 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 82 (1721) [hereinafter HAWKINS 1721]. American justice of the peace manuals did likewise. *E.g.*, RICHARD BURN, AN ABRIDGMENT OF BURN'S JUSTICE OF THE PEACE AND PARISH OFFICER 322-23 (Boston, Joseph Greenleaf 1773) [hereinafter BURN'S JUSTICE OF THE PEACE ABRIDGMENT 1773]; DAVIS, *supra* note 10, at 47; GRIMKÉ, *supra* note 10, at 398; PARKER, CONDUCTOR GENERALIS, *supra* note 10, at 315; POTTER, *supra* note 10, at 273. Davies has noted a "consistent" concern with the discretionary authority that general warrants offered. *See generally* Davies, *Original Fourth Amendment*, *supra* note 10, at 578-82. He agrees that "general warrants were 'unreasonable' precisely because they bestowed discretionary arrest and search authority on ordinary peace officers." Thomas Y. Davies, *Correcting Search-and-Seizure History: Now-Forgotten Common-Law Warrantless Arrest Standards and the Original Understanding of "Due Process of Law,"* 77 MISS. L.J. 1, 5 (2007) [hereinafter Davies, *Correcting History*].

16. Professor Amar is the strongest proponent of the view that the Framers were hostile to warrants because of their immunizing effect. *See* Amar, *Fourth Amendment*, *supra* note 9, at 771-72, 774, 779; Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 SUFFOLK U. L. REV. 53, 60 (1996) [hereinafter Amar, *Writs of Assistance*]; *see also* Gerard V. Bradley, *The Constitutional Theory of the Fourth Amendment*, 38 DEPAUL L. REV. 817, 844 (1989). In opposition, Professor Davies believes that the Framers were hostile only to general warrants but favored specific warrants. Davies, *Original Fourth Amendment*, *supra* note 10, at 584-85. Davies agrees that specific warrants immunized the searcher but he greatly discounts the importance Amar places on this feature. *See id.* at 588-89.

Both Amar and Davies make valid points. However, in general, Davies improperly discounts the Framers' concern about the state's warrant power. Davies is right that, if anything, the Framers favored the use of specific warrants, having often provided for their use when granting search power. *See* Fabio Arcila, Jr., *Special Needs and Special Deference: Suspicionless Civil Searches in the Modern Regulatory State*, 56 ADMIN. L. REV. 1223, 1238 & nn.71-72 (2004) [hereinafter Arcila, *Special Needs*]. But if Davies means to assert that the Framers therefore were unconcerned about specific warrants, he is mistaken. The following passage is instructive in this regard:

All the checks which the *English* law, and which even the constitution of the *United States*, have imposed upon the operation of these search warrants, and with the manifestation of a strong jealousy of the abuses incident to them, would

scarcely have been thought of, or have been deemed necessary, if the warrant did not communicate the power of opening the outer door of a house.

*Bell v. Clapp*, 10 Johns. 263, 266 (N.Y. Sup. Ct. 1813) (emphasis added). The court was discussing *specific* search warrants, so its reference to “the operation of these search warrants” was a reference to the operation of *specific* search warrants. *See id.* at 265. In this passage the court is discussing the immunizing effect of specific search warrants even when doors have been broken, which shows that there *was* a contemporary concern even with specific search warrants. This explains the court’s implicit reference to the Fourth Amendment and its explicit mention of the Framers’ “manifestation of a strong jealousy of the abuses incident to them [i.e., specific search warrants].” *See id.* at 265.

Because general search warrants were illegal as a matter of legal doctrine, *see supra* note 10, they should have had no immunizing power. (Davies has reached the same conclusion. *See Davies, Original Fourth Amendment, supra* note 10, at 588 & n.99.) This was indeed the case, though unfortunately the majority of Framing-era treatises were not as clear on the matter as they could have been.

These treatises usually indicated that “warrants” immunized an officer who had searched, but failed to mention whether the warrant had to be specific or could be general. *See BURN* 1792, *supra* note 10, at 358-59 (indicating that warrant immunized officer for breaking door, with no mention of whether the warrant had to be specific or could be general, but clarifying that the warrant immunized informer regarding broken door only if search successful); *accord* 7 DANE, *supra* note 10, at 245 & n.\*; DUNLAP, *supra* note 10, at 370-71; EWING, *supra* note 10, at 128, 506; GRIMKÉ, *supra* note 10, at 399; HENING, NEW VIRGINIA JUSTICE 1799, *supra* note 10, at 40, 414; NEW CONDUCTOR GENERALIS, *supra* note 10, at 405; *see also* MARTIN, OFFICE AND AUTHORITY, *supra* note 10, at 279 (indicating, in passage apparently applying to arrests, that warrant will justify officer though justice of peace “commit[ted] a mistake,” so long as warrant within justice of peace’s jurisdiction and “legally cognizable before him”). However, because (as indicated *supra* note 10) these treatises had elsewhere explained that general warrants were illegal, one would expect any sound lawyer or judge to understand that such warrants lacked any immunizing power.

I have found only one Framing-era justice manual that explicitly limited the immunity principle to specific search warrants. It indicated that immunity was limited to warrants “regularly granted, and specifically directed.” DAVIS, *supra* note 10, at 75. Elsewhere, however, even this justice manual was not so careful in distinguishing between the immunizing effects of general versus specific search warrants. *See id.* at 47-48 (indicating that warrant immunized officer for breaking door, with no mention of whether warrant had to be specific or could be general).

Regardless of the opacity in most Framing-era legal publications regarding the issue, American cases from the period show that the common law had recognized that general warrants lacked an immunizing effect. For example, in an 1814 case a Connecticut court declared that an official who had searched under a general warrant was liable, explaining that:

an officer is not always liable when he executes an improper warrant ... where it does not appear on the face of the warrant that it is illegal.... But an officer is bound to know the law; and when the warrant, on the face of it, appears to be illegal, and he executes it, he is liable to the person arrested. Such was the present case.

*Grumon v. Raymond*, 1 Conn. 40, 47-48 (1814).

It is not surprising that early American case law absorbed this doctrine given that it was a primary lesson from the series of *Wilkes* cases in England. *See Davies, Original Fourth*

Warrant Clause's three requirements,<sup>17</sup> all of which constitute obstacles that must be overcome before a warrant may issue.

Furthermore, though it is often said that warrants have special applicability to homes,<sup>18</sup> during the Framing era warrants were not always necessary for home searches. A famous treatise indicated that, in what today would be considered an exigent circumstance exception to a warrant requirement, the common law authorized private homes to be searched for felons on hue and cry, merely upon suspicion.<sup>19</sup> Even forcible entry was allowed on such hue and cry, though it was justified only if the felon was present.<sup>20</sup> Another leading treatise authorized warrantless entry into private homes to pursue known felons or to "suppress" an "affray" occurring "in the view or hearing of a constable."<sup>21</sup>

Even putting history aside, Professor Amar has shown that any assertion that criminal search constitutionality is usually governed by reference to the Warrant Clause makes no sense in the real world. Adhering to this incorrect proposition has left us with an emasculated and meaningless governing principle as more and more exceptions are added in a futile effort to save the rule. The catalogues of these exceptions are readily found. Professor Amar's *partial* list includes searches incident to arrest, searches under various exigent circumstances, consent searches, and plain view searches.<sup>22</sup> Other additions to this list include stop and frisk searches and automobile searches, among others that the leading

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*Amendment*, *supra* note 10, at 655. Indeed, *Grumon* relies heavily on several of the *Wilkes* decisions. See 1 Conn. at 43, 45.

Because the illegality of general warrants was well established, it seems improbable that the Framers would have been concerned about general warrants having an immunizing effect. The more likely objection, evidenced in American justice manuals, would have been to the discretion that general warrants provided a searcher. See *supra* note 15.

17. See *supra* text accompanying note 8.

18. See, e.g., *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006); *Kyllo v. United States*, 533 U.S. 27, 40 (2001); *Payton v. New York*, 445 U.S. 573, 586 (1980); *Agnello v. United States*, 269 U.S. 20, 33 (1925).

19. 2 HALE 1800, *supra* note 10, at 102-03; 2 HALE 1736, *supra* note 10, at 102-03.

20. 2 HALE 1800, *supra* note 10, at 102-03; 2 HALE 1736, *supra* note 10, at 102-03.

21. 2 HAWKINS 1787, *supra* note 11, at 139; accord 2 HAWKINS 1762, *supra* note 10, at 86-87; 2 HAWKINS 1739, *supra* note 10, at 86-87.

22. See Amar, *Fourth Amendment*, *supra* note 9, at 764-69.

treatise identifies in an even more exhaustive list of exceptions to a purported warrant “requirement.”<sup>23</sup>

At some point, the list of “carefully defined exceptions” to a presumptive warrant rule can grow so large that the rule itself is no longer valid. It is easy to conclude that we have reached that point.<sup>24</sup> In criminal investigations today, warrants are required principally only for searches of premises or communications.<sup>25</sup> Police and other state and federal law enforcement officers know they can conduct most other criminal searches without a warrant. All these exceptions to a presumptive warrant requirement in the criminal search context reveal the invalidity of the purported rule.

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23. See 6 WAYNE R. LAFAVE, *SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* 965-66 (4th ed. 2004) (Index, “Warrantless Searches” entry).

24. I am certainly not the only person to have made this observation. *E.g.*, *California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring) (complaining that “the ‘warrant requirement’ ha[s] become so riddled with exceptions that it [is] basically unrecognizable”); Bookspan, *supra* note 4, at 501; Stephen A. Saltzburg, *The Fourth Amendment: Internal Revenue Code or Body of Principles?*, 74 GEO. WASH. L. REV. 956, 957-58 (2006); William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 882 (1991).

25. See 18 U.S.C. § 2511 (2006) (prohibiting warrantless interception and disclosure of wire, oral, or electronic communications); 18 U.S.C. § 2703 (2006) (requiring warrant for government to obtain disclosure from electronic communications service provider); *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990) (“The Fourth Amendment generally prohibits the warrantless entry of a person’s home, whether to make an arrest or to search for specific objects.”); *Payton v. New York*, 445 U.S. 573, 586 (1980) (“It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable.” (internal quotations and citation omitted)); *Katz v. United States*, 389 U.S. 347, 356-57 (1967) (requiring search warrant for electronic aural surveillance); Stuntz, *supra* note 24, at 922. Indeed, the Supreme Court’s disinclination to require the use of search warrants has been recognized for decades. See Robert M. Bloom, *The Supreme Court and Its Purported Preference for Search Warrants*, 50 TENN. L. REV. 231, 235-36, 259-61 & n.205 (1983). The Court’s seemingly inexorable trend towards limiting a warrant requirement has continued. For example, it has rejected a warrant requirement for a search of containers on a bus after obtaining consent, but under circumstances in which (despite the Court’s holding to the contrary) individuals likely would not have felt free to deny consent or to leave the bus, *United States v. Drayton*, 536 U.S. 194 (2002); for a search of a bag located in a car’s trunk, *California v. Acevedo*, 500 U.S. 565 (1991); for the seizure of evidence in plain view, even when its discovery was not inadvertent because the officer had intended to look for evidence other than what was specified in a search warrant, *Horton v. California*, 496 U.S. 128 (1990); and also for the search of an occupied motor home, *California v. Carney*, 471 U.S. 386 (1985). Recently, the Supreme Court may have expressed recognition that this trend has extended too far, and attempted to swing the pendulum back toward a more meaningful warrant requirement for at least some car searches. See *Arizona v. Gant*, 129 S. Ct. 1710 (2009) (search of vehicle incident to arrest is allowed only if arrestee is unsecured and within reaching distance of passenger compartment, or if it is “reasonable to believe” that evidence of arresting offense might be in vehicle).

To read in a warrant requirement that is not in the text—and then to read in various nontextual exceptions to that so-called requirement—is not to read the Fourth Amendment at all. It is to rewrite it....

... [T]he Framers did say what they meant, and what they said makes eminent good sense: all searches and seizures must be reasonable. Precisely because these searches and seizures can occur in all shapes and sizes under a wide variety of circumstances, the Framers chose a suitably general command.<sup>26</sup>

### *B. Civil Context*

The argument against any presumptive warrant requirement for criminal searches, which is set forth in the immediately preceding section, seals the case against any such requirement for civil searches. Fourth Amendment protections are at their highest in criminal cases as a proportional safeguard against the government's penal power.<sup>27</sup> Therefore, if the Warrant Clause does not govern the

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26. See Amar, *Fourth Amendment*, *supra* note 9, at 771.

27. A prime example of this principle can be seen in the differing levels of protection afforded to the home depending upon whether a search is criminal or civil in nature. Entry into the home to conduct a criminal search generally requires a warrant. See *Agnello v. United States*, 269 U.S. 20, 33 (1925). Entry into the home to conduct a civil search need not be authorized by a warrant, or even justified by suspicion. See *Griffin v. Wisconsin*, 483 U.S. 868, 880 (1987); *Wyman v. James*, 400 U.S. 309, 318-24 (1971).

I recognize that this principle is debatable, as there have been instances when Fourth Amendment jurisprudence has been criticized for extending more protections to criminals than law-abiding persons. See *Camara v. Municipal Court*, 387 U.S. 523, 530 (1967) ("It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior."); Wayne R. LaFare, *Administrative Searches and the Fourth Amendment: The Camara and See Cases*, 1967 SUP. CT. REV. 1, 18. For example, during an earlier period the Supreme Court indicated that the Fourth Amendment extended more protection against criminal than civil searches. See *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) (explaining that, prior to *Camara*, 387 U.S. 523, "[e]ntries upon property for civil purposes, where the occupant was suspected of no criminal conduct whatsoever, involved a more peripheral concern and the less intense 'right to be secure from intrusion into personal privacy'" (quoting *Frank v. Maryland*, 359 U.S. 360, 365 (1959))). The principle I assert in the text accompanying this note is vulnerable to the same critique.

The critique, however, is facile. It compares apples (criminals) to oranges (law-abiding persons), rather than considering the proper comparison between a presumptively law-abiding person seeking protection from either a criminal or civil search. This apples-to-oranges comparison is thus invalid because it draws a distinction on a basis as to which the Fourth Amendment is agnostic: the blameworthiness of the search target. The Fourth Amendment extends the same protections regardless of whether the search target engaged in wrongdoing.

constitutionality of criminal searches, certainly it cannot govern the constitutionality of civil searches. Professor Amar makes this implication clear with his simple declaration that “*all* searches and seizures must be reasonable.”<sup>28</sup> Indeed, though he concentrates heavily on criminal searches in his argument, he certainly believes that the same argument extends to civil searches.<sup>29</sup>

The rule’s invalidity in the civil context also can be shown both in terms of an originalist analysis and in terms of our modern Fourth Amendment jurisprudence. From an originalist perspective, numerous federal statutes from the Framers’ era authorized warrantless civil searches.<sup>30</sup> These statutes evidence that neither the Framers nor other political leaders from their generation believed that a

See *Minnesota v. Carter*, 525 U.S. 83, 109-10 (1998) (Ginsburg, J., dissenting); *Florida v. Royer*, 460 U.S. 491, 519 n.4 (1983) (Blackmun, J., dissenting); *Ker v. California*, 374 U.S. 23, 33 (1963); *McDonald v. United States*, 335 U.S. 451, 453 (1948). Thus, a more valid measure considers the punitive scope of the power that the government is bringing to bear in a particular case. My assertion rests on what should be a largely uncontroversial principle: as a general matter, government’s power through criminal law enforcement to completely deprive a person of freedom should be subject to greater checks than its lesser power in the civil context to partially infringe upon that freedom.

28. Amar, *Fourth Amendment*, *supra* note 9, at 771 (emphasis added).

29. For example, Professor Amar uses several civil search examples in his argument against measuring the constitutionality of searches by reference to the Warrant Clause. He discusses the Framers’ passage of statutes authorizing civil searches of maritime vessels for regulatory purposes at the border. See *id.* at 766. Other examples he points to are the extensive “real-life, unintrusive, nondiscriminatory searches” that routinely occur, such as “metal detectors at airports, annual auto emissions tests, inspections of closely regulated industries, public school regimens, border searches, and on and on,” all of which would become unconstitutional if the Warrant Clause were applied. *Id.* at 769-70. To erase any doubt as to his opinion, he emphasizes that “[t]he text of the [Fourth] Amendment applies equally to both civil and criminal law.” *Id.* at 770 & n.45.

30. *E.g.*, Act of May 6, 1822, ch. 58, § 2, 3 Stat. 682, 682 (granting “Indian agents” authority to conduct warrantless searches of traders “upon suspicion or information that ardent spirits are carried into the Indian countries”); Act of Mar. 3, 1815, ch. 94, § 2, 3 Stat. 231, 232 (granting authority to customs officials to stop and search “any carriage or vehicle ... and ... any person travelling on foot, or beast of burden” for illegal goods upon suspicion); Act of Feb. 4, 1815, ch. 31, §§ 2, 4, 3 Stat. 195, 195-96 (same); Act of Apr. 25, 1808, ch. 66, § 7, 2 Stat. 499, 501 (authorizing warrantless but suspicion-based search of maritime vessels to enforce embargo laws); Act of Mar. 2, 1799, ch. 22, §§ 67-68, 1 Stat. 627, 677-78 (“That it shall be lawful for the collector, naval officer, or other officer of the customs, after entry made of any goods, wares or merchandise, on suspicion of fraud, to open and examine....”); Act of Aug. 4, 1790, ch. 35, §§ 46-48, 1 Stat. 145, 169-70 (providing for the search and seizure, upon suspicion, of goods subject to duty); Act of July 31, 1789, ch. 5, §§ 22-24, 1 Stat. 29, 42-43 (giving customs officials search and seizure powers upon suspicion of fraud in the collection of duties); see also *infra* notes 105-10 and accompanying text (discussing warrantless search provisions of Hamilton’s 1791 Excise Act); *infra* note 125.



warrant was usually required for a valid search. To the contrary, in numerous instances they believed that searches could be perfectly legal even absent a warrant. Despite being repeatedly pummeled with the black letter presumptive warrant rule, we continue to believe the same thing today. In context after context, we are content to submit each other, and even ourselves, to warrantless civil searches.<sup>31</sup>

For those unconvinced by the preceding argument, consider the incoherence that results from a generalized warrant requirement for civil searches. A primary example is the administrative warrant. In 1967 the Supreme Court, in *Camara v. Municipal Court*, constitutionally mandated such warrants for municipal housing inspections, at a time when it was still professing that the Warrant Clause usually governed the constitutionality of civil searches.<sup>32</sup> The Court extended this administrative warrant regime to commercial premises in *See v. City of Seattle*, a companion case decided the same day.<sup>33</sup>

Though the Supreme Court in *Camara* and *See* mandated the use of warrants, it did not really mean it, at least not in a valid constitutional sense. This is clear from the nature of the warrants that it mandated. According to the *Camara* Court, housing inspectors are constitutionally required to obtain warrants, but those warrants can be issued on a make-believe version of probable cause based upon factors such as condition of the area, the amount of time passed since the last inspection, or the condition of the building.<sup>34</sup>

Such administrative warrants have rightly been called “freakish,”<sup>35</sup> and should be offensive to both Reasonableness Clause and Warrant Clause adherents. Reasonableness Clause adherents should object to the conflation of Fourth Amendment reasonableness with the Warrant Clause’s requirements. Probable cause and

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31. See *infra* notes 238-43 and accompanying text.

32. See 387 U.S. 523, 528-29, 534 (1967).

33. 387 U.S. 541, 542 (1967).

34. *Camara*, 387 U.S. at 538; see also Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 UTAH L. REV. 977, 1007-08 [hereinafter Clancy, *Fourth Amendment Reasonableness*] (describing the *Camara* Court, using a poetic oxymoron, as having “created a nonindividualized concept of probable cause,” which “was certainly not the traditionally accepted meaning of the probable cause standard”).

35. David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1813 (2000).

particularity, for example, are distinct aspects of reasonableness, and are textually required only when the Warrant Clause is implicated. But the Court's approach in *Camara* and *See* short-circuits this analysis, suggesting that reasonableness is present if the Warrant Clause is purportedly satisfied.

*Camara's* administrative warrants also should upset Warrant Clause adherents. One objectionable feature is that the *Camara* Court's approach "altered probable cause's meaning."<sup>36</sup> Under *Camara*, "probable cause was recast as standing for a broader concept of reasonableness based on a weighing of the governmental and individual interests."<sup>37</sup> "Instead of probable cause defining a reasonable search," as would be the case if the Warrant Clause really served as the constitutional touchstone, "after *Camara*, reasonableness, in the form of a balancing test, defined probable cause."<sup>38</sup> The result is that *Camara* has been long criticized for "degrad[ing]"<sup>39</sup> the Warrant Clause because it "allow[s] warrants to issue without particularized suspicion, therefore ... sanctioning the same type of general warrant that led to the Amendment's adoption."<sup>40</sup> *Camara* also is objectionable because it authorizes the use of administrative warrants to justify area searches.<sup>41</sup> As such, it does violence to the Warrant Clause's particularity requirement.<sup>42</sup> No one devoted to a coherent Fourth Amendment jurisprudence can be satisfied with *Camara's* and *See's* administrative warrant requirement.

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36. Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383, 426 (1988).

37. *Id.* at 393.

38. *Id.* at 394.

39. TAYLOR, *supra* note 12, at 98.

40. Barry J. Stern, *Warrants Without Probable Cause*, 59 BROOK. L. REV. 1385, 1399 (1994); see also Bookspan, *supra* note 4, at 506-07 & n.178; Silas Wasserstrom & Louis M. Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 25-26 (1988).

*Camara's* validation of a lower probable cause standard applicable to the issuance of administrative warrants as opposed to warrants issued in the criminal context also led to criticisms that the Court's Fourth Amendment civil search jurisprudence was extending greater rights to criminals than the law-abiding public. See, e.g., Kevin I. MacKenzie, Note, *Administrative Searches and the Fourth Amendment: An Alternative to the Warrant Requirement*, 64 CORNELL L. REV. 856, 863 (1979); Note, *Rationalizing Administrative Searches*, 77 MICH. L. REV. 1291, 1325 (1979).

41. *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967).

42. Bookspan, *supra* note 4, at 506; Wasserstrom & Seidman, *supra* note 40, at 25-26.

To be more charitable, the majorities in *Camara* and *See* were seeking to uphold important Fourth Amendment values. Unfortunately, their analytic failures led them into flawed reasoning. The value of the regulatory warrants that *Camara* and *See* demanded, which essentially allow suspicionless searches, is obviously not to assure the satisfaction of some threshold level of individualized suspicion. Rather, the Court adopted them to promote another Fourth Amendment interest: limiting the government's discretion in executing searches.<sup>43</sup> This is undoubtedly a benefit of the *Camara* ruling.

Accordingly, the decision has been defended, but on a misguided basis that only perpetuates Fourth Amendment incoherence. One commentator has praised *Camara* because "[a]n absolute prohibition on the use of warrants in this instance would have been intolerable to the framers whose purpose in adopting the Fourth Amendment was to protect against the invasion of privacy by executive officers acting with unbridled discretion."<sup>44</sup> But this view mistakenly defends *Camara*'s fractured Fourth Amendment benefit based on at least two fundamental misunderstandings of the Framers' intent. First, prohibiting the use of warrants in this situation would *not* have been intolerable to the Framers. To the contrary, prohibiting these sorts of warrants was *precisely* what the Framers sought to accomplish through the Fourth Amendment, out of a concern about warrants' immunizing effects.<sup>45</sup> Second, the Framers understood that core Fourth Amendment values, such as limiting governmental discretion, could be protected through means

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43. The Supreme Court was implicitly addressing this point when it wrote in another administrative warrant case that:

[a] warrant ... provide[s] assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria. Also, a warrant would then and there advise the owner of the scope and objects of the search, beyond which limits the inspector is not expected to proceed.

*Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323 (1978) (citation omitted); see also Stephen J. Schulhofer, *On the Fourth Amendment Rights of the Law-Abiding Public*, 1989 SUP. CT. REV. 87; Stern, *supra* note 40, at 1400. The Supreme Court has noted that limiting discretion is a core Fourth Amendment concern. See *Delaware v. Prouse*, 440 U.S. 648, 653-55 (1979).

44. Stern, *supra* note 40, at 1402. In defending *Camara*, Stern advocates for the issuance of warrants on less than probable cause (in his words, "variable probable cause," which might amount to nothing more than "reasonable suspicion"). See *id.* at 1402-03.

45. See *supra* note 16 and accompanying text.

other than warrants, such as through a properly designed regulatory framework.<sup>46</sup> Thus, though *Camara*'s outcome in upholding the searches can rightly be justified on a necessity theory,<sup>47</sup> its reasoning cannot.

## II. FALLACY OF THE PRESUMPTIVE SUSPICION REQUIREMENT

It is a familiar proposition that the Fourth Amendment generally requires searches to be premised upon suspicion, and indeed the Supreme Court repeatedly has assured us that this is so.<sup>48</sup> Originalism explains part of our attraction to this rule, as the temptation to claim an originalist presumptive suspicion requirement is great. Such a claim can be based, for instance, upon the preponderance of civil search statutes from our nation's early history that facially required prior suspicion.<sup>49</sup> There are, however, at least two fundamental problems with this presumptive suspicion requirement. First, it has no grounding in the Fourth Amendment's text. Second, it is demonstrably overbroad, as shown by colonial and early federal exceptions to prior suspicion requirements. Thus, even originalism may undermine any presumptive suspicion requirement.

### A. *The Fourth Amendment's Text*

To correctly understand suspicion's role in Fourth Amendment jurisprudence requires us to recognize that (1) it is only in the Warrant Clause that the Fourth Amendment explicitly addresses the concept of suspicion, through its probable cause requirement; and (2) because there is no presumptive warrant requirement, it is the Reasonableness Clause that governs the constitutionality of

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46. See Fabio Arcila, Jr., *The Framers' Search Power: The Misunderstood Statutory History of Suspicion & Probable Cause*, 50 B.C. L. REV. 363, 403-05 & n.200 (2009) [hereinafter Arcila, *The Framers' Search Power*] (noting that Hamilton's 1791 Excise Act returned a probable cause/immunity issue to the jury to address anti-Federalist rhetoric).

47. See Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 603 (1994).

48. E.g., *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000); *Chandler v. Miller*, 520 U.S. 305, 308, 313 (1997).

49. See *supra* note 30; *infra* note 92.

both criminal and civil searches. When combined, these propositions inescapably belie any presumptive suspicion requirement.

As is well known, the Fourth Amendment is comprised of two clauses, the Reasonableness Clause—

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ...

and the Warrant Clause—

... and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>50</sup>

*The Reasonableness Clause contains no reference to suspicion of any kind.* Rather, it simply declares that people and their property are protected against unreasonable searches. *Only the Warrant Clause contains any textual support for a suspicion requirement*, and that only implicitly, through its probable cause requirement. Thus, from a purely textual standpoint, the instances in which suspicion is an *absolute* requirement for the constitutionality of a search exist *only* when the Warrant Clause and its probable cause requirement are implicated. Consequently—and, again, from a purely textual standpoint—suspicion is a constitutional requirement only to the extent a warrant is required to validate a given search. It is only when a warrant-based search is at issue that suspicion is *always* required to assure that the search meets constitutional standards.

The Framers never intended for the Fourth Amendment to impose any generalized suspicion requirement. Anyone with an impulse to the contrary has simply been brainwashed by the repeated mantra that the Fourth Amendment generally does require suspicion. To the contrary, the Fourth Amendment's history demonstrates that the Framers did not intend for the Warrant Clause to impose a generalized Fourth Amendment probable cause or suspicion requirement. Rather, they included the Warrant Clause in the Fourth Amendment for more limited reasons, among them to assure that warrants could issue *only* under probable cause.<sup>51</sup> But, of course, to declare that probable cause must support all *warrants*

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50. U.S. CONST. amend. IV.

51. See *supra* text accompanying notes 8-17.

is not to say that probable cause or some other level of suspicion generally must support all *searches*. The vast majority of searches, after all, do not require a validating warrant.<sup>52</sup> Professor Amar has, again, beautifully made this argument in more detail,<sup>53</sup> and thus I will not give it further attention here.

Having eliminated the Warrant Clause as the source for the purported Fourth Amendment presumptive suspicion requirement, the only other available source is the Reasonableness Clause. The Framers, after all, adopted the Warrant Clause to accomplish a specific number of limited objectives.<sup>54</sup> Imposing a presumptive suspicion rule was not one of them. With the Warrant Clause eliminated, the only other textual source for constitutional search and seizure protections is the Reasonableness Clause. *Thus, it must be the Reasonableness Clause that governs the constitutionality of all searches, both criminal and civil.* But the Reasonableness Clause must cover too many situations to impose a presumptive suspicion rule.<sup>55</sup> Even more fundamentally, the Reasonableness Clause says nothing about suspicion—when it is required, when it is not—and thus as a textual matter provides no support for a presumptive suspicion rule.<sup>56</sup>

Though this textual analysis is quite straightforward, it has not saved our Fourth Amendment jurisprudence from a torturous developmental history, one that has impacted our view of suspicion. For a good part of the last century, the question of how the Fourth Amendment's two clauses interact to govern a search's constitutionality divided the Supreme Court. This question was once the subject of a raging debate concerning the extent to which searches can be constitutional solely under the Reasonableness Clause, or whether the Warrant Clause provides the measure of a search's constitutionality. The Supreme Court's warring opinions in *Almeida-Sanchez v. United States* exemplified this debate.<sup>57</sup> Though it is not yet clear that this debate has been completely resolved, it has now waned, at

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52. See *infra* notes 238-43 and accompanying text.

53. Amar, *Fourth Amendment*, *supra* note 9, at 782-85.

54. See *supra* text accompanying notes 8-17.

55. See *infra* text accompanying notes 211-43.

56. See *supra* note 50 and accompanying text.

57. 3 U.S. 266 (1973).

least in terms of Supreme Court jurisprudence.<sup>58</sup> Though there remains a considerable amount of conflicting Supreme Court guidance,<sup>59</sup> the Court seems to have resolved that the constitutionality of criminal searches generally is judged under the Warrant Clause.<sup>60</sup> Though the Court does not appear to have said so explicitly, it effectively has resolved that civil searches are judged solely by reference to the Reasonableness Clause.<sup>61</sup>

In reaching this resolution, the Court is only half right. It is correct that the Reasonableness Clause governs the constitutionality of all civil searches. But it is wrong in continuing to assert that the Warrant Clause generally provides the measure of a criminal search's constitutionality. Rather, as stated above, the Reasonableness Clause governs the constitutionality of both criminal and civil searches. It is surprising how easily this proposi-

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58. The debate among scholars remains spirited. Compare TAYLOR, *supra* note 12, at 43-44, 46-47 (arguing that reasonableness is the ultimate constitutional touchstone for governmental searches, which need not always comply with the Warrant Clause), and Amar, *Fourth Amendment*, *supra* note 9, at 761-71 (same), with Davies, *Original Fourth Amendment*, *supra* note 10, at 591-600, 736-40 (arguing that originalism supports a variant of presumptive warrant requirement, and discredits generalized reasonableness approach), and Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 199-202, 247-48 (1993) (critiquing the limited sphere of influence the Supreme Court has given the Warrant Clause).

Professor Maclin has asserted that advocates for the warrant preference rule have never claimed that originalism supports their position. Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse Than the Disease*, 68 S. CAL. L. REV. 1, 8 (1994) ("Proponents of the warrant preference rule have never claimed that eighteenth- and nineteenth-century authorities share their view about the phraseology of the Fourth Amendment."); see also *id.* at 25 ("The warrant preference rule is a twentieth-century construction of the Fourth Amendment ...."). To the contrary, however, some scholars have at a minimum strongly implied that a warrant preference rule is consistent with original intent. See, e.g., Davies, *Original Fourth Amendment*, *supra* note 10, at 649-50; Schulhofer, *supra* note 43, at 115; Geoffrey G. Hemphill, Note, *The Administrative Search Doctrine: Isn't This Exactly What the Framers Were Trying To Avoid?*, 5 REGENT U. L. REV. 215, 233 (1995).

59. For a brief overview of the conflicting Supreme Court guidance concerning whether a reasonableness or warrant clause preference rule applies in Fourth Amendment jurisprudence, see Arcila, *In the Trenches*, *supra* note 11, at 6-7 & n.16.

60. See *id.* at 7 & n.19.

61. See *id.* at 7 & n.18 (explaining that "[s]ince the mid-1980s the Supreme Court has judged the constitutionality of all civil searches under the 'special needs' principle"). Recently, the Supreme Court adjudged the constitutionality of a civil search under a general reasonableness test, rather than the special needs principle. *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2641-42 (2009) (holding unconstitutional a juvenile strip search in a high school setting). The difference is of little import because both approaches result in a balancing test. See Arcila, *Special Needs*, *supra* note 16, at 1228.

tion can be substantiated despite the prominence our Fourth Amendment jurisprudence has given to the Warrant Clause.

It is certainly possible for the Fourth Amendment to have imposed a presumptive suspicion requirement through some mechanism other than its text, such as incorporation of historical practice, and indeed this argument has been made.<sup>62</sup> The next section addresses why such arguments are incorrect.

### *B. Originalism*

A plausible case for a presumptive suspicion rule can be premised upon constitutional common law<sup>63</sup> and the history of searches that preceded, and served as an impetus for, the Fourth Amendment. This argument points to suspicion's long and undeniable role under the common law as a validating mechanism for searches.<sup>64</sup> Moreover, in adopting the Fourth Amendment, the Framers were responding to loyalist authorities' attempts to exercise essentially unconstrained search power.<sup>65</sup> In response, after independence the Framers generally conditioned statutory searches upon suspicion.<sup>66</sup>

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62. Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925, 961-65 (1997) [hereinafter Maclin, *Fourth Amendment Complexity*] (contending that Fourth Amendment history demonstrates that Framers intended to create presumptive suspicion requirement).

63. By "constitutional common law," I mean those aspects of common law that addressed search or seizure and that the Framers meant to incorporate into the Fourth Amendment. Identifying those precise aspects is not only difficult, but likely impossible. Yet it seems certain that the Framers, who drafted and enacted the Bill of Rights in the common law's looming shadow, did intend such incorporations. See Arcila, *Fourth Amendment Chutzpah*, *supra* note 13, at 1251-53 (discussing incorporation concept, and difficulty in identifying common law aspects that were incorporated); see also Amar, *Fourth Amendment*, *supra* note 9, at 758 (asserting that Fourth Amendment sounds in "constitutional tort law"); Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 58 & n.304 (2009) ("The Court has read the Fourth Amendment's prohibition on unreasonable searches and seizures ... to incorporate common law rights it meant to protect.").

The phrase also has been used famously in a different sense. See Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 3 (1975) (providing examples of "constitutional common law" that, though having their origins in the Constitution, are "subject to amendment, modification, or even reversal by Congress").

64. See BARBARA J. SHAPIRO, "BEYOND REASONABLE DOUBT" AND "PROBABLE CAUSE": HISTORICAL PERSPECTIVES ON THE ANGLO-AMERICAN LAW OF EVIDENCE 145-47 (1991); Jack K. Weber, *The Birth of Probable Cause*, 11 ANGLO-AM. L. REV. 155, 159-66 (1982).

65. See Arcila, *Special Needs*, *supra* note 16, at 1236-37.

66. See *supra* note 30; *infra* note 92.



This history has contributed towards suspicion's dominant role in Fourth Amendment jurisprudence. Yet, it is crucial to recognize that suspicion has come to play this role for *instrumental* reasons. It worked well in the Framers' simpler world, which explains why they often required it, even for regulatory searches. Thus, it was at the core of their conception of the Fourth Amendment, and consequently it has formed the core of our Fourth Amendment jurisprudence.

But we have overstated suspicion's role in constitutional search and seizure jurisprudence because we have not recognized that the Framers merely viewed suspicion instrumentally. The Framers did not intend suspicion to be either an absolute or presumptive prerequisite to all valid searches.

The evidence against any originalist presumptive suspicion requirement is abundant. It turns in part upon the statutory choices that the Framers made when they authorized suspicionless searches in the maritime customs context, as well as suspicionless searches of buildings and even homes for regulatory purposes. Additional evidence also can be found in the numerous ways in which suspicion served as perhaps an illusory protection during the Framers' era, sometimes due to the immaturity of the concept during that period, at other times due to the Framers' active statutory intervention in limiting access to search remedies, and also because evidence indicates that the common law validated even suspicionless searches so long as the search turned out to be successful.

### *1. Suspicionless Maritime Customs Searches*

Immediately upon the nation's founding, the Framers statutorily authorized suspicionless customs searches of maritime vessels.<sup>67</sup> The Framers' omission of a suspicion requirement for these maritime searches contrasts starkly with the suspicion-based statutory searches the Framers generally authorized on land.<sup>68</sup> The implication is unavoidable: the Framers knew how to statutorily require

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67. *E.g.*, Act of Mar. 3, 1815, ch. 94, § 1, 3 Stat. 231, 231-32; Act of Feb. 18, 1793, ch. 8, § 27, 1 Stat. 305, 315; Act of Aug. 4, 1790, ch. 35, § 31, 1 Stat. 145, 164; *see* *United States v. Villamonte-Marquez*, 462 U.S. 579, 584-85, 592 (1983) (discussing § 31 of the Act of August 4, 1790, the Court wrote "the First Congress clearly authorized the suspicionless boarding of vessels, reflecting its view that such boardings are not contrary to the Fourth Amendment").

68. *See infra* note 92.

prior suspicion, but consciously chose not to impose such a requirement for maritime customs searches. This is powerful evidence against a Fourth Amendment presumptive suspicion requirement.

The Framers' choice is important because, in their time, claims had been made for extending the mythic "house as castle" principle<sup>69</sup>

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69. I refer to the "house as castle" principle as "mythic" because, though the sentiment undoubtedly did come to dominate both English and colonial thought about governmental search powers, its origins were overstated.

The principle has ancient roots. See LASSON, *supra* note 11, at 18, 34 n.78. However, for purposes of the development of search and seizure law in England and the colonies, its origins are attributed to *Semayne's Case*, (1603) 77 Eng. Rep. 194, 195 (K.B.). William Cuddihy, *From General to Specific Warrants: The Origins of the Fourth Amendment*, in *THE BILL OF RIGHTS: A LIVELY HERITAGE* 85, 89 (Jon Kukla ed., 1987). *Semayne's Case* provided that "the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose." 77 Eng. Rep. at 195 (citation omitted).

During Parliamentary debate on the legality of general warrants, William Pitt exemplified the popular view that *Semayne's Case* recognized a broad protection against searches of private homes when he argued that:

It is ... a maxim of our law, that every Englishman's house is his castle. Not that it is surrounded with walls and battlements. It may be a strawbuilt shed. Every wind of heaven may whistle round it. All the elements of nature may enter in. But the king cannot; the king dare not.

WILLIAM GODWIN, *THE HISTORY OF THE LIFE OF WILLIAM PITT, EARL OF CHATHAM* 153 (2d ed. London, C. Kearsley, 1783). Some discrepancy exists regarding the date of Pitt's speech, what prompted it (common possibilities include cider taxes, excise taxes, or general warrants), whether it is properly attributed to him, as well as to the speech's actual content, with another commonly reported version being:

The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter—the rain may enter—but the King of England cannot enter!—all his force dares not cross the threshold of the ruined tenement!

THE OXFORD DICTIONARY OF QUOTATIONS 373-74 (3d ed. 1979) (attributing quote to Lord Brougham). See generally WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING* 602-1791, at 465-66 & n.145 (2009).

In any case, the popular reading was prevalent in the colonies, as exemplified by James Otis's repeated use of it in his famous legal argument against writs of assistance in *The Writs Of Assistance Case*. See James Otis, *Argument on Writs of Assistance* (1761), in 2 *LEGAL PAPERS OF JOHN ADAMS* 125 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965) [hereinafter LPJA] ("This Writ is against the fundamental Principles of Law. The Privilege of House. A Man, who is quiet, is as secure in his House, as a Prince in his Castle, not with standing all his Debts, and civil Possesses of any kind."); *id.* at 142 ("Now one of the most essential branches of English liberty, is the freedom of one's house. A man's house is his castle; and while he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege." (from John Adams's abstract of Otis's argument)); see also JOSIAH QUINCY, JR., *REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY BETWEEN 1761-1772*, at 471 (1865); M.H. SMITH, *THE WRITS OF ASSISTANCE CASE* 553-54 (1978). Though there is some dispute on the matter, solid reasons exist to believe that Otis's argument had a significant influence on

to ships. Throughout the eighteenth century, a popular consciousness was growing both in England and the colonies that some meaningful scope of protection should exist against governmental searches. Part of this movement argued for extending search protections even to ships. In 1734, a South Carolinian contended that “my house is my castle, and so is my ship.”<sup>70</sup> This claim was reiterated in the new nation, when in 1807 a Virginia committee advocated for adoption of the principle: “*let every man’s ship be his castle, and as free from search as his house.*”<sup>71</sup> A few years later, an apparently popular essay (given that it was published on at least two different occasions) declared, in the context of protesting impressment, that:

Were a press-gang to steal the son of a *leader of opposition* from his house, the nation would be in a ferment—Why? Because his house is his castle, and its sanctity has been violated. Wherever a man has his lawful home, there is his castle. *Is not a ship, in which a seaman dwells, as much his castle as Quincy’s, or Randolph’s, or Pickering’s, dwelling?*<sup>72</sup>

Increased attention to ship searches occurred in part because of growing colonial hostility to Royal Navy involvement in customs searches.<sup>73</sup> Cuddihy reports that even such lower ranks as “midship

colonial thought. Arcila, *Fourth Amendment Chutzpah*, *supra* note 13, at 1243-44 & nn.46-47.

The popular reading of *Semayne’s Case* is too broad because the opinion repeatedly took pains to preserve governmental authority to search private homes in cases in which the king was involved. 77 Eng. Rep. at 195-98. Thus, a more accurate recitation of the case is that “a man’s house was his castle only against intrusions by his fellow subjects, not by the Crown. When the public welfare was at stake, the king’s key legally opened all doors.” Cuddihy, *supra*, at 89; accord *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995); *Payton v. New York*, 445 U.S. 573, 604-05 (1980); William J. Cuddihy, *Fourth Amendment (Historical Origins)*, in *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 761, 762 (Leonard W. Levy et al. eds., 1986); Horace L. Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 798, 800-01 (1924).

70. S.C. GAZETTE, Nov. 2-9, 1734, at 2.

71. ALEXANDRIA DAILY ADVERTISER, July 15, 1807, at 3.

72. DAILY NAT’L INTELLIGENCER, Apr. 8, 1818, at 2 (second emphasis added); accord *NATIVE AM.* Apr. 28, 1813, at 1 (same essay).

73. See WILLIAM S. MCCLELLAN, *SMUGGLING IN THE AMERICAN COLONIES AT THE OUTBREAK OF THE REVOLUTION* 58-59, 82-83 (1912); *OBSERVATIONS ON SEVERAL ACTS OF PARLIAMENT* 15-18 (Boston, Edes & Gill 1769); NEIL R. STOUT, *THE ROYAL NAVY IN AMERICA, 1760-1775*, at 25-38, 130 (1973); *Resolves by the Massachusetts House of Representatives of July 1, 1769*, BOSTON EVENING POST, July 3, 1769, at 1 (Supplement); Governor Francis Bernard, *Massachusetts Proclamation of Nov. 16, 1763*, BOSTON GAZETTE, Nov. 21, 1763, at

men[] and ordinary gunners eventually received commissions with general powers of search and seizure.”<sup>74</sup> Colonists condemned them as “the most ignorant hair-brain’d ... persons”<sup>75</sup> and as “pimping tide waiters.”<sup>76</sup> A call for greater protections was made on the ground that an English customs law applicable in the colonies, the 1764 Sugar Act,<sup>77</sup> “impower[ed] commanders of the king’s ships, to seize”;<sup>78</sup> allowed invasive searches; was too complicated; and left colonists without any effective means of redress from its oppressive application.<sup>79</sup> In 1768, John Hancock prevented tide waiters from searching his ship the *Lydia* below deck during a daytime search.<sup>80</sup> Hancock’s actions arguably endorsed the assertion that a ship enjoying protections similar to a castle.<sup>81</sup>

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74. CUDDIHY, *supra* note 69, at 586.

75. *Journal of the Times*, BOSTON EVENING POST, June 26, 1769, at 1.

76. *Rules by Which a Great Empire May Be Reduced to a Small One*, DUNLAP’S PA. PACKET OR, THE GENERAL ADVERTISER, Aug. 8, 1774, at 1 (Postscript).

The Royal Navy’s involvement was controversial not only because its officers would act as customs agents, but also because it would sometimes engage in impressment. See W.T. BAXTER, *THE HOUSE OF HANCOCK: BUSINESS IN BOSTON 1724-1775*, at 263-64 (1945); THOMAS HUTCHINSON, *THE HISTORY OF THE PROVINCE OF MASSACHUSETTS BAY* 231 (1828); *OBSERVATIONS ON SEVERAL ACTS OF PARLIAMENT*, *supra* note 73, at 16.

77. 4 Geo. 3, ch. 15 (1764) (Eng.).

78. OXENBRIDGE THACHER, *THE SENTIMENTS OF A BRITISH AMERICAN* 10 (Boston, Edes & Gill 1764).

79. See *id.* at 10-11.

80. HERBERT S. ALLAN, *JOHN HANCOCK: PATRIOT IN PURPLE* 102-03 (1948); BAXTER, *supra* note 76, at 260-61; OLIVER M. DICKERSON, *THE NAVIGATION ACTS & THE AMERICAN REVOLUTION* 234 (1951).

81. I recognize that this point is debatable given another incident that also involved Hancock and the *Lydia*. A day after the original incident, Hancock found either one or both of the tide waiters engaged in a nighttime search of the ship. Hancock demanded his or their documentary search authority. The tide waiter(s) had no writ of assistance, and their credentials (commission and orders) were undated and thus deficient. Hancock then caused the tide waiter(s) to be forcibly expelled from below decks. ALLAN, *supra* note 80, at 102-03; BAXTER, *supra* note 76, at 261; DICKERSON, *supra* note 80, at 234. However, at that point, Hancock remained willing to allow the tide waiter(s) to search “every part of the vessel except the hold.” ALLAN, *supra* note 80, at 103; accord BAXTER, *supra* note 76, at 261; DICKERSON, *supra* note 80, at 234-35. Hancock’s willingness to continue to allow the tide waiter(s) to search above decks undercuts my claim that some viewed ships as enjoying protections comparable to a castle. This is particularly so because a nighttime search was at issue. At the time, writs purported to authorize nighttime vessel searches, LASSON, *supra* note 11, at 54 n.17, though nighttime searches of houses (that is, castles) clearly were disfavored, see *id.* at 54 (writs permitted only daytime searches on land); BURN’S *JUSTICE OF THE PEACE ABRIDGMENT* 1773, *supra* note 15, at 323; 2 HALE 1736, *supra* note 10, at 150. Moreover, Hancock later was declared within his rights in expelling the tide waiter(s) because they

Other merchants publicly boasted that they would disallow their ships from being searched.<sup>82</sup> Cuddihy has concluded that during the 1771-1776 period, "Americans increasingly regarded not only houses but ships as castles."<sup>83</sup> The evidence discussed above supports this view, and even provides justification for extending it into the 1800s. Though some contrary evidence exists,<sup>84</sup> this implies that, around the time of the nation's founding, ships were widely considered deserving of search and seizure protection, possibly even in a constitutional sense.

The Framers' omission of a suspicion requirement for maritime customs searches is conspicuous because they were well aware of the ardent public hostility to those searches. Colonial history is overrun with incidents involving resistance to shipboard customs searches and seizures. In 1765, a mob rushed aboard the sloop *Polly*, which customs officers had seized for undeclared molasses, and stripped her.<sup>85</sup> A famous colonial challenge to customs enforcement involved the 1768 seizure of John Hancock's ship *Liberty*, which resulted in a riot.<sup>86</sup> Later, Hancock participated in a Boston town

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lacked authority to search. *Opinion of Attorney General Jonathan Sewall in the Case of the Lydia, Given to the Commissioners of Customs at Boston, April 23, 1768*, in Oliver M. Dickerson, *Opinion of Attorney General Jonathan Sewall of Massachusetts in the Case of the Lydia*, 4 WM. & MARY Q. 499, 501-04 (Oct. 1947). This further supports that he merely was exercising existing rights, rather than manifesting a revolutionary intent with Fourth Amendment implications.

82. *E.g.*, Letter from Sir Francis Bernard, Governor of Massachusetts, to Lord Barrington (Mar. 4, 1768), in THE BARRINGTON-BERNARD CORRESPONDENCE & ILLUSTRATIVE MATTER 1760-1770, at 147, 148 (Edward Channing & Archibald Cary Coolidge eds., 1912) (indicating that protest was against trading laws and impost duties).

83. CUDDIHY, *supra* note 69, at 591.

84. See WILLIAM PULTENEY, THE BUDGET OPENED 26 (1733) (describing ships as "floating Castles," but distinguishing them from houses and admitting that ships are readily subject to inspection while houses should not be); accord 10 CRAFTSMAN 301 (1732-33) (same passage). Note that Cuddihy cites these sources in support of the proposition that "by the eighteenth century, many believed that the reasonable expectation of privacy extended beyond houses to ships," CUDDIHY, *supra* note 69, at 413 & n.28, but the sources actually support the opposite proposition.

85. EDMUND S. MORGAN & HELEN M. MORGAN, THE STAMP ACT CRISIS: PROLOGUE TO REVOLUTION 65 (rev. ed. 1962); CARL UBBELOHDE, THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION 67-69 (1960); see also 10 LAWRENCE H. GIPSON, THE BRITISH EMPIRE BEFORE THE AMERICAN REVOLUTION: THE TRIUMPHANT EMPIRE: THUNDER-CLOUDS GATHER IN THE WEST, 1763-1766, at 243-44 (1961).

86. See Arcila, *In the Trenches*, *supra* note 11, at 12 n.36. After its seizure, Hancock's *Liberty* was condemned and "pressed into the revenue service." STOUT, *supra* note 73, at 129; see also ALLAN, *supra* note 80, at 109; BAXTER, *supra* note 76, at 268.

meeting that issued a declaration that the seizure had been improper.<sup>87</sup> Lasson reports that “[a]t Newbury, a seizure of molasses was rescued by a half dozen well-manned boats which went after the officer, took the goods from him and the boat he was in, and left him to stay all night on the beach,” as well as that “[a]fter a seizure under a writ of assistance at Falmouth (now Portland) the assistance rendered by the people of the town consisted in the forcible recapture of the goods.”<sup>88</sup> Cuddihy recounts numerous other instances of resistance to ship-related searches and seizures,<sup>89</sup> and many others exist in the historical record as well.<sup>90</sup> The public resistance to these customs searches was so profound that even “energetic” customs officers “rarely attempted a seizure, afloat or ashore, for the mob speedily ‘liberated’ whatever had been confiscated.”<sup>91</sup> Despite the public hostility to these governmental searches, the Framers failed to require suspicion for ship-related customs searches. This choice certainly appears purposeful, given the Framers’ ubiquitous inclusion of a prior suspicion requirement in statutes authorizing customs searches on land.<sup>92</sup>

The Fourth Amendment implications of this choice are subject to debate. So long as one believes that the Framers’ views about civil searches in general, and maritime searches in particular, inform the Fourth Amendment and its scope,<sup>93</sup> the implication is that the Fourth Amendment was not meant to impose a universal presumptive suspicion requirement. This is likely the correct view. The Framers’ choices in their customs legislation are usually viewed as representative of their intent regarding the scope of

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87. See Arcila, *In the Trenches*, *supra* note 11, at 12 n.36.

88. LASSON, *supra* note 11, at 68.

89. CUDDIHY, *supra* note 69, at 510-11, 514, 520.

90. See, e.g., 3 THOMAS HUTCHINSON, *THE HISTORY OF THE COLONY AND PROVINCE OF MASSACHUSETTS-BAY* 136 (Lawrence S. Mayo ed., 1936); MCCLELLAN, *supra* note 73, at 87-88; STOUT, *supra* note 73, at 130, 140-41.

91. CUDDIHY, *supra* note 69, at 501.

92. Numerous early civil search statutes imposed a suspicion requirement for land searches. *E.g.*, Act of Mar. 3, 1815, ch. 100, § 10, 3 Stat. 239, 241; Act of Mar. 3, 1815, ch. 94, § 2, 3 Stat. 231, 232; Act of Feb. 4, 1815, ch. 31, §§ 2, 4, 3 Stat. 195, 195-97; Act of Mar. 2, 1799, ch. 22, § 68, 1 Stat. 627, 677-78; Act of Aug. 4, 1790, ch. 35, § 48, 1 Stat. 145, 170; Act of July 31, 1789, ch. 5, § 24, 1 Stat. 29, 43. In a few instances the Framers authorized suspicionless searches on land. See *infra* Part II.B.2.

93. Some scholars argue that these matters are not relevant to the Fourth Amendment. See *infra* note 97.

Fourth Amendment protections.<sup>94</sup> There is good reason for this. The Fourth Amendment was a limit on *federal* power,<sup>95</sup> and during the Framers' era the federal search power was primarily exercised to enforce revenue laws in the customs and maritime contexts.<sup>96</sup> Thus, the Framers' views about customs and maritime searches most likely are instructive with regard to the Fourth Amendment.<sup>97</sup>

## 2. *Suspicionless Building and Home Searches*

The presumptive warrant requirement is frequently invoked as a protection that is particularly applicable to the home,<sup>98</sup> as well as other types of buildings.<sup>99</sup> Because the Fourth Amendment demands that warrants be supported by probable cause, implicit in this conception about homes and buildings is that the presumptive suspicion requirement applies as well. From an originalist perspective, this approach seems justified given that the common law tradition manifested a special concern for the home. But it is easy to overstate this common law tradition. Moreover, insufficient attention has been paid to a striking statutory choice the Framers made in 1791, just months before the Fourth Amendment became

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94. See, e.g., Amar, *Fourth Amendment*, *supra* note 9, at 766-67; Akhil Reed Amar, Terry and Fourth Amendment First Principles, 72 ST. JOHN'S L. REV. 1097, 1104-05 (1998); Amar, *Writs of Assistance*, *supra* note 16, at 59; Maclin, *Fourth Amendment Complexity*, *supra* note 62, at 951-54; Sklansky, *supra* note 35, at 1806-07.

95. The Fourth Amendment was not deemed applicable to the states until the mid-1900s. Arcila, *In the Trenches*, *supra* note 11, at 51 & n.189.

96. See Bookspan, *supra* note 4, at 507 n.178; Thomas, *supra* note 10, at 1459 n.36 ("When the Framers thought 'search and seizure,' they almost certainly thought 'customs.'").

97. This is not the only plausible interpretation, of course. Professor Davies, for one, disagrees with my conclusion. He argues that the Framers' choice represents their understanding that ship and other regulatory searches fell completely outside the Fourth Amendment's purview. Davies, *Original Fourth Amendment*, *supra* note 10, at 605-08. Other scholars have made similar arguments. See Arcila, *The Framers' Search Power*, *supra* note 46, at 421 n.273; Thomas, *supra* note 10, at 1477-78 (arguing that customs and maritime inspections were "sui generis"). Based upon his view, Davies argues that the Framers' choices with regard to customs and maritime searches say nothing about Fourth Amendment protections. According to Davies, under an originalist perspective, no presumptive suspicion requirement flows from the Fourth Amendment in the civil search context because the amendment was simply inapplicable. Even if Davies is correct, an important point is confirmed: the Framers did not intend to impose a universal presumptive suspicion requirement upon all governmental searches.

98. See *supra* note 18 and accompanying text.

99. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311 (1978).

effective, in which they approved not only warrantless but also suspicionless searches of private homes and other buildings.

The common law tradition of protecting the home is often traced to the famous British maxim that “a man’s home is his castle.”<sup>100</sup> But, as I explained above, the popular reading of *Semayne’s Case*, the British case from which the maxim derives, is much too broad and fails to acknowledge the very expansive power the ruling recognized for public intrusions into private homes.<sup>101</sup> Additionally, other factors may have undermined a universal suspicion requirement for home searches. The common law presumptively required a search warrant before a home could be searched for stolen goods,<sup>102</sup> and the Fourth Amendment mandated that probable cause had to support such warrants. But evidence indicates that the common law might sometimes have tolerated suspicionless searches of homes, such as during a search incident to arrest.<sup>103</sup> Moreover, as I explain in greater detail below, a realistic assessment of search and seizure law in the Framers’ era provides reasons to doubt the effectiveness of any presumptive suspicion requirement, if one did exist.<sup>104</sup>

Neglected in originalist Fourth Amendment analyses is the dramatic choice the Framers made to allow suspicionless and warrantless searches of private homes—along with other buildings—in Hamilton’s 1791 Excise Act.<sup>105</sup> This statutory enactment sought to raise internal revenue by imposing excise taxes upon distillers.<sup>106</sup> What is important about it, for present purposes, is that

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100. See *supra* note 69.

101. See *supra* note 69.

102. See Davies, *Original Fourth Amendment*, *supra* note 10, at 645.

103. This assertion is not without controversy. Evidence exists to support the notion that the common law recognized a right to search homes incident to arrest. See TAYLOR, *supra* note 12, at 28-29, 45. Professor Davies, however, takes issue with this assertion, and has contested the historical evidence upon which Professor Taylor relied. Davies, *Original Fourth Amendment*, *supra* note 10, at 646-47 & nn.276-77; see also *United States v. Rabinowitz*, 339 U.S. 56, 75-79 (1950) (Frankfurter, J., dissenting) (arguing that historical evidence supporting search incident to arrest indicates that only search of person was allowed, but not search of surroundings). Cuddihy takes the middle road, asserting that legal doctrine from the era did not recognize authority for such searches, but that evidence of actual practice shows it occurred. CUDDIHY, *supra* note 69, at 578-79.

104. See *infra* Part II.B.3.

105. Act of Mar. 3, 1791, ch. 15, 1 Stat. 199.

106. See *id.*



distillers could operate at least partially, if not wholly, out of their homes, a reality that some prior scholarship has not sufficiently recognized. The Excise Act's text acknowledges that private homes could be used for distillery operations, as it repeatedly refers to the possibility that they might be in a "house" as opposed to some other kind of commercial premise.<sup>107</sup> The Act had to include search provisions to assure it could be adequately enforced, and to that end distinguished between registered and unregistered distillers.<sup>108</sup> The Act required distillers to register with local authorities.<sup>109</sup> Remarkably, *registered distillers were subject to suspicionless (and warrantless) searches*<sup>110</sup>—even though the Act's very text recognized that distillery operations could be located in private homes. Nothing in the Act, or any other source of law, exempted registered distillery operations located in private homes from such suspicionless searches.

Admittedly, what power this Excise Act has to undermine the presumptive suspicion rule is debatable. One could argue that the Act's provision for suspicionless searches of private homes is of secondary importance, perhaps on the basis that distillery operations were rarely located in private homes. One defender of the Act, for instance, asserted that "distilleries in most cases form no part of the dwellings of their owners, any more than a saw mill or a smith shop."<sup>111</sup> This defender, however, was hardly a disinterested observer, as he was an Excise Act enforcement officer.<sup>112</sup> Further

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107. *Id.* §§ 25-26, 29, 1 Stat. at 205-06.

108. It also distinguished between distillation for personal versus commercial use, exempting the former from all requirements under the Act. *Id.* § 36, 1 Stat. at 208 (exemption for operation of one still having a capacity of fifty gallons or less).

109. *Id.* § 25, 1 Stat. at 205.

110. *Id.* §§ 25-26, 29, 1 Stat. at 205-06. Distillery operations that had failed to register were subject to warrant-based searches. *Id.* § 32, 1 Stat. at 207. The standard for obtaining a warrant was "reasonable cause of suspicion." *Id.* Though this differs in syntax from the Fourth Amendment "probable cause" standard for obtaining a warrant, it appears that these two phrasings were considered to have the same substantive meaning. Arcila, *The Framers' Search Power*, *supra* note 46, at 396 n.162.

111. John Neville, *An Address to the Citizens of Westmoreland, Fayette, and Alleghany Counties on the Revenue Law*, 3 GAZETTE OF THE UNITED STATES 284 (Dec. 31, 1791).

112. The defender was John Neville. See *supra* note 111. Neville was an Excise Act enforcement officer during the infamous Whiskey Rebellion several years later, in which he killed a man who was among a mob that had surrounded his house. The next day, rioters burned down his house, barn, and other buildings on his property. Neville escaped uninjured. H.M. BRACKENRIDGE, HISTORY OF THE WESTERN INSURRECTION IN WESTERN PENNSYLVANIA,

evidence regarding the extent to which distillery operations, even if just a storage area, were located in private homes would be helpful in analyzing this issue.<sup>113</sup>

Cuddihy, for one, perceives the Act's provision for suspicionless home searches to be of minor importance, though his position is disputable. He argues that:

Congress and Hamilton designed [the] searches [under the 1791 Excise Act] as a minor exception to the general rule that only specific search warrants afforded entrance to structures on land under normal circumstances. The goal of Hamilton's excise searches was not to legitimate warrantless searches of houses but to indicate that distilleries did not constitute dwelling houses or afford the same degree of privacy.<sup>114</sup>

In support of this assertion, he correctly points out that:

only apartments where spirits were manufactured or stored were subject to inspection, not the entire building containing them .... Moreover, those who registered could specify the area to be searched as narrowly or spaciouly as they wished: ... a

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COMMONLY CALLED THE WHISKEY INSURRECTION 40-49 (photo. reprint 1969) (1859); THOMAS P. SLAUGHTER, *THE WHISKEY REBELLION: FRONTIER EPILOGUE TO THE AMERICAN REVOLUTION* 177-80 (1986).

113. I have not had the opportunity to meaningfully research this issue, but what information I have uncovered indicates that distillery operations were conducted in homes, though whether in an amount subject to regulation by Hamilton's 1791 Excise Act is unclear. See WILLIAM HOGELAND, *THE WHISKEY REBELLION: GEORGE WASHINGTON, ALEXANDER HAMILTON, AND THE FRONTIER REBELS WHO CHALLENGED AMERICA'S NEWFOUND SOVEREIGNTY* 66 (2006) ("Americans drank alcoholic beverages in huge quantities. Distilling went on in home stillhouses, at community stills, and in large-scale commercial operations."); *id.* at 67 (observing that "small distillers ... made up the majority that would pay" Hamilton's excise tax); SLAUGHTER, *supra* note 112, at 168 (concluding that "[i]t was the small farmers, sometimes tenants who owned little more than a dilapidated still, and artisans and laborers who owned nothing at all, who violently resisted the excise," which suggests that small home distilleries existed that were subject to the excise); *supra* note 108. I have also lacked the opportunity to adequately research the extent to which the Act was enforced, which might shed some light on the home search issue. What evidence I have uncovered suggests that the Act was not effectively enforced. SLAUGHTER, *supra* note 112, at 166-69 & nn.25 & 29. This suggests that home searches under the Act likely did not occur. This, however, does not detract from my argument, which is a textual one, emphasizing that the Framers were willing to subject homes to suspicionless searches, according to the Excise Act's text.

114. CUDDIHY, *supra* note 69, at 745.

lone apartment in a house, or even a single vault in an individual room.<sup>115</sup>

One problem with Cuddihy's interpretation is that it is not clear how meaningfully protective of privacy the Excise Act's provisions were in narrowing the scope of searches. I am unaware of any evidence indicating how often a home—in whole or in part—was registered under the Act. But the Act's text acknowledges this possibility, and in such instances, and even if only a portion were registered, it seems plausible that many times an excise officer would have to pass through private parts of a house to reach the registered portion. In these instances, an entire family, including wife and children, would have been forced to tolerate the indignity of the excise officer's examination, however cursory, of themselves and the home's interior on the way to the registered portion of the premise.

Another problem is that Hamilton's 1791 Excise Act was widely *perceived* as overly intrusive of privacy. Cuddihy correctly reports that it "triggered apocalyptic protests."<sup>116</sup> Many of these protests raised the specter of abusive home searches. During debate, Representative Josiah Parker warned that the Act "will let loose a swarm of harpies, who ... will range thro the country, prying into every man's house and affairs."<sup>117</sup> An anonymous essay protested that "[i]t is undeniable, that every citizen's house in the United States, is liable to undergo the insult of a search," and complained that "a constable ... may easily be had to accompany [the excise officer] in his search; who will perhaps have" stipulated "to come in for snacks with him."<sup>118</sup> Several southwestern Pennsylvania counties issued a resolution declaring that "[i]t is insulting to the feelings of the people to have their ... houses painted and ran-

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115. *Id.* at 744-45 & nn.281 & 283 (citing to sections 25, 26, and 29 of Hamilton's 1791 Excise Act).

116. *Id.* at 743; *see also id.* at 743-44 & nn.276-77.

117. *Report of Rep. Josiah Parker's Comments on Jan. 5, 1791 Regarding Hamilton's 1791 Excise Act*, GAZETTE OF THE U.S., Jan. 8, 1791, at 697, 698. At another point of the debate, Representative Steel objected that, under the bill, "citizens are subjected to the most unreasonable, unusual and disgusting situation of having their houses searched at any hour of the day or night." *Congress. House of Representatives, Friday June 18, THE DAILY ADVERTISER*, June 22, 1790, at 1.

118. *On the Excise Law*, NAT'L GAZETTE, Feb. 2, 1793, at 109.

sacked.”<sup>119</sup> Perhaps these protests were misguided because they misapprehended the threat to privacy that the Excise Act posed. Perhaps the frequent invocations of home invasions were largely rhetorical and divorced from reality. But they are sufficiently striking that they should give us pause before concluding that the Excise Act’s suspicionless home search provisions<sup>120</sup> were of little importance. There certainly is reason to believe that these protests were more than rhetorical. Those southwestern Pennsylvania counties that protested the Act were the same ones that exploded in the Whiskey Rebellion a few years later, which was quelled only when President George Washington declared martial law and entered the area with over ten thousand troops.<sup>121</sup> Thus, reasons exist for doubting whether Cuddihy’s interpretation is correct.

In any case, the provisions for suspicionless and warrantless house searches demonstrate the inaccuracy of assertions such as: “[w]hen manufacturing was carried on almost exclusively within the home, ... the right to enter without [a] warrant would certainly have never been conceded.”<sup>122</sup> Professors Schulhofer and Thomas have made similar mistakes. Schulhofer has asserted that “[i]t was precisely in the area of the Crown’s ‘special needs’ for import regulation and revenue forfeitures ... that the Framers were most insistent upon a warrant issued on particularized probable cause.”<sup>123</sup> Though not an “import regulation,” Hamilton’s Excise Act was a revenue statute that dispensed with both suspicion and warrant requirements for home searches. For his part, Thomas has written that “[t]he Excise Act of 1791 ... dispensed with warrants for searches of registered premises that stored liquor, *but required warrants based on ‘reasonable cause of suspicion’ for searches of*

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119. *Resolves of Southwestern Pennsylvania Delegates of Sept. 7, 1791 Regarding Hamilton’s 1791 Excise Act*, INDEP. GAZETTEER, Sept. 24, 1791, at 3. The complaint about painting likely refers to the Hamilton 1791 Excise Act requirement that registered distillers mark the words “Distiller of Spirits” on the front of buildings. Act of Mar. 3, 1791, ch. 15, § 25, 1 Stat. 199, 205.

120. See *supra* notes 107-10 and accompanying text.

121. See ROBERT W. COAKLEY, *THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1789-1878*, at 43 (1988); HOGELAND, *supra* note 113, at 7, 190; SLAUGHTER, *supra* note 112, at 3, 212; Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 160-61 (2004).

122. Andrew A. Bruce, *Arbitrary Searches and Seizures as Applied to Modern Industry*, 18 GREEN BAG 273, 280 (1906).

123. Schulhofer, *supra* note 43, at 115.

*private residences.*"<sup>124</sup> To the contrary, the Excise Act allowed *warrantless* and even *suspicionless* searches of private homes that had registered with local authorities. Under the Act, whether an edifice was subject to a warrantless, or only warrant-based, search depended *solely* upon whether it was a registered premise. It did not hinge upon whether the edifice was a private home or commercial premise, in recognition that distillery-related businesses could operate out of private homes. Cuddihy makes a related error, and is wrong for the same reason.<sup>125</sup>

### 3. Suspicion as an Illusory Protection

A realistic assessment of life under the Fourth Amendment during the nation's early history, in relation to factors such as search warrant procedures and the accessibility of remedies for

124. George C. Thomas, III, *Remapping The Criminal Procedure Universe*, 83 VA. L. REV. 1819, 1829 (1997) (reviewing AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* (1997)) (emphasis added).

125. Cf. CUDDIHY, *supra* note 69, at 743 (contending that Hamilton's 1791 Excise Act "assumed the constitutionality of some kinds of warrantless searches, albeit not of the house-to-house kind.... [S]pecific warrants remained the only method of entrance into private homes."). In support of this assertion, Cuddihy relies upon the 1791 Excise Act's sections 29 and 32. *Id.* at 743 n.274. Section 29 provides "[t]hat it shall be lawful for the officers of inspection ... upon request, to enter into all and every the *houses*, store-houses, ware-houses, buildings and places which shall have been" registered as distillery operations. Act of Mar. 3, 1791, ch. 15, § 29, 1 Stat. 199, 206 (emphasis added). Section 32 authorizes inspection of suspected distillery operations by warrant. *Id.* § 32, 1 Stat. at 207.

Cuddihy's interpretation is possible, but likely wrong. The best reading of section 29's language, with its explicit reference to "houses," is that it authorized warrantless and suspicionless searches of registered distillery operations, even if they were located in private homes. See *supra* notes 105-10 and accompanying text. Nothing in section 32 undermines this interpretation. Rather, section 32 provided a mechanism to search *nonregistered* premises suspected of running a distillery operation in violation of the Act. See *supra* note 110.

Cuddihy's interpretation is correct only if section 29's reference to entry "upon request" was meant to provide a bar to entry. If so, then I have misinterpreted section 29 as authorizing warrantless and suspicionless entry. Rather, it would have allowed entry only upon *consent*, forcing officials to seek recourse to a search warrant under section 32 if entry was refused.

I cannot totally discount Cuddihy's interpretation, but I doubt it is correct. It places too much reliance on the phrase "upon request" while ignoring the vitriolic scorn directed toward excise taxes, which included repeated and vociferous protests that enforcement allowed invasive home searches, a concern that even contributed to insurrection during the Whiskey Rebellion, which protested this very Excise Act. See *supra* notes 112, 116-19 and accompanying text; see also Arcila, *The Framers' Search Power*, *supra* note 46, at 404 n.200. Given this history and the Excise Act's structure, section 29's reference to "upon request" is better read as akin to "upon notice," rather than to "upon [a] request [that is granted]."

wrongful searches, provides another important reason for doubting the validity of an originalist presumptive suspicion requirement. It certainly appears true that suspicion played an important role in the Framers' conception of Fourth Amendment protections. Nonetheless, it also appears true that we have overemphasized the protections that suspicion afforded. We have failed to acknowledge the many limitations on suspicion's role during that same era, which the Framers either accepted or actually implemented. I will discuss those limitations in this section. To the extent that I have set out my position on these matters in detail elsewhere, I will only summarize them here.

*a. Suspicion's Limited Protective Role*

Under both common and statutory law during the Framers' era, suspicion played a role in search and seizure law, but in a more nuanced manner than we have acknowledged. Examples can be found in the common law procedure for issuing search warrants and challenging wrongful searches, and in the choices the Framers made when implementing civil search statutes.

Many judges in the Framers' era may have believed that judicial sentryship of probable cause prior to issuing search warrants was optional, and would have felt justified in not monitoring suspicion at all prior to issuing such warrants.<sup>126</sup> Perhaps the best evidence of this can be found in leading English treatises, which stated that judicial sentryship of suspicion was "convenient" but "not always necessary"—in other words, that it was merely optional.<sup>127</sup> American manuals for justices of the peace—which justices of the peace, who actually issued search warrants, most likely consulted—often included this guidance from English treatises.<sup>128</sup> Additionally, legal forms regularly implied that judicial sentryship of suspicion was optional. Often, they did not require the applicant for a search warrant to specify the detailed factual grounds supporting suspi-

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126. Arcila, *In the Trenches*, *supra* note 11, at 24-48 (making this argument with regard to actual search warrant practice). *But cf.* Davies, *Original Fourth Amendment*, *supra* note 10, at 589 & n.103, 654 n.297 (arguing that judicial sentryship of probable cause prior to issuing search warrants was well established as a matter of legal doctrine).

127. Arcila, *In the Trenches*, *supra* note 11, at 24-26 & nn.84-87.

128. *Id.* at 24-27.

cion.<sup>129</sup> Moreover, like today, search warrants themselves did not specify the grounds supporting suspicion.<sup>130</sup> But, unlike today, there was no reliable procedure for preserving a record of the asserted grounds supporting probable cause.<sup>131</sup>

Given that the application forms for search warrants often did not require the specification of underlying facts, there are abundant reasons for doubting that judges would have had the information they needed to act as probable cause sentries prior to issuing search warrants. Admittedly, judges who wished to act as probable cause gatekeepers could have orally inquired in an effort to obtain the information they needed. But we can expect that they would have done so only if they believed this was the proper procedure to follow. Not only could legal treatises and American justice manuals have easily negated such a belief, for the reasons already discussed above, but solid reasons exist to believe that important civil search statutes from the era either were meant, or were perceived, to deprive an issuing magistrate of the power to review claims of prior suspicion.<sup>132</sup> Thus, it is far from clear that issuing judges would have inquired into the grounds of probable cause if, as was often the case, such information was not initially provided.

Even if *ex ante* judicial sentryship of probable cause was limited, this does not fatally undermine suspicion's protective role during the Framers' era, though it should cause us some doubts about suspicion's efficacy. Under the common law, an *ex post* examination of suspicion was available to an aggrieved claimant through a trespass action, with a jury assessing whether the requisite level of suspicion had existed for the search.<sup>133</sup> The dynamics of such an *ex post* review might be considered superior in that it allowed for an adversarial presentation about the adequacy of suspicion—as opposed to the *ex ante*, *ex parte* warrant application process—and made claimant-friendly juries the decision maker, rather than a single, government-employed judge.<sup>134</sup>

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129. *Id.* at 32-36; Wesley M. Oliver, *Portland, Prohibition and Probable Cause: Maine's Role in Shaping Modern Criminal Procedure*, 2008 ME. B. J. 210, 212 & nn.14 & 22-24.

130. Arcila, *In the Trenches*, *supra* note 11, at 36-40.

131. *Id.*

132. *Id.* at 45-48.

133. Arcila, *The Framers' Search Power*, *supra* note 46, at 376-79.

134. See Amar, *Fourth Amendment*, *supra* note 9, at 773 ("Far more trustworthy were twelve men, good and true, on a local jury, independent of the government, sympathetic to the

Yet *ex post* review under the common law also suffered from various deficiencies. The most important was that suspicion would be assessed only if a claimant took the initiative to litigate the issue. This required not only a motivated claimant, but also that the litigation be economically feasible, both in terms of the claimant's ability to finance the litigation and potential damages. Thus, there is reason to believe that litigation would ensue only in a minority of the instances in which a searched party was aggrieved. When such litigation happened, the adequacy of suspicion would have been assessed only once, not twice, if *ex ante* judicial sentryship had not occurred. And if no such litigation happened, the adequacy of suspicion justifying a search may never have been independently assessed.

Suspicion likely played a more effective protective role in civil search cases. In the new nation's civil search statutes, the Framers departed from the common law model in numerous ways, but for present purposes one change was particularly significant. In these statutes, the Framers often chose to make probable cause an immunity standard.<sup>135</sup> By linking immunity to probable cause, the Framers gave civil searchers a strong incentive to operate from a threshold level of suspicion before searching. By the same token, in these same statutes the Framers often authorized suspicionless searches.<sup>136</sup> Thus, while those provisions linking immunity to probable cause did help engender a focus upon threshold levels of suspicion, one can question what impact those provisions had in light of other instances in which suspicion was statutorily shunted aside.

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legitimate concerns of fellow citizens, too numerous to be corrupted, and whose vigilance could not easily be evaded by governmental judge-shopping.”); *id.* at 817 (“Civil litigation after the fact, with both citizen and government represented in the court-room, would be far more deliberative and reviewable than the current system of practically unreviewable rubberstamp magistrates acting *ex parte*.”). For more about the colonial history of juries being particularly claimant friendly, see Arcila, *The Framers' Search Power*, *supra* note 46, at 380 & nn.66-67, 398 & n.170, 408 & n.219.

135. Arcila, *The Framers' Search Power*, *supra* note 46, at 392-410.

136. See *supra* Part II.B.1-2.



*b. Changes in Language*

Even if one believes, contrary to the preceding section, that judges acted as probable cause sentries prior to issuing search warrants, that procedural protection may often have been illusory given the meaning attributed to probable cause at the time. In the new nation, “probable cause” and its variants, such as “reasonable cause,” did not mean the same thing as they do now. For example, during the nation’s early history “probable cause” and “reasonable cause” were given the same meaning.<sup>137</sup> In contrast, modern Fourth Amendment jurisprudence has distinguished between “probable cause” and “reasonable suspicion” since at least 1968.<sup>138</sup> Further, historical evidence about the meaning attributed to “probable” at the nation’s founding indicates that, contrary to today, it could have meant “possible” or even been equated with a mere hunch.<sup>139</sup>

Moreover, search and seizure law was developing during an era when influential British treatises instructed that probable cause could be satisfied through allegations that would never be accepted today. They indicated that “probable cause” or “sufficient causes of suspicion” could exist based upon “common fame”,<sup>140</sup> merely being found in “party with him that committed the robbery”<sup>141</sup> or even “keeping company with persons of scandalous reputations”,<sup>142</sup> “living a vagrant, idle and disorderly life, without having any visible means to support it”,<sup>143</sup> or “being charged with a treason or felony” while “say[ing] nothing to it, but seem[ing] tacitly by his silence to own himself guilty.”<sup>144</sup> Another nugget of legal wisdom was that “just suspicion” could exist because a person was a “night-walker.”<sup>145</sup> In light of this evidence, abundant linguistic reasons exist for doubting that probable cause offered a meaningful level of search or seizure protection.

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137. See Arcila, *The Framers’ Search Power*, *supra* note 46, at 396 n.162.

138. See *Terry v. Ohio*, 392 U.S. 1, 27, 30 (1968).

139. See Arcila, *In the Trenches*, *supra* note 11, at 43-44.

140. 2 HALE 1800, *supra* note 10, at 81; 2 HALE 1736, *supra* note 10, at 81; 2 HAWKINS 1787, *supra* note 11, at 119; accord 2 HAWKINS 1739, *supra* note 10, at 76.

141. 2 HALE 1800, *supra* note 10, at 81; 2 HALE 1736, *supra* note 10, at 81.

142. 2 HAWKINS 1787, *supra* note 11, at 119; accord 2 HAWKINS 1739, *supra* note 10, at 76.

143. 2 HAWKINS 1787, *supra* note 11, at 119; accord 2 HAWKINS 1739, *supra* note 10, at 76.

144. 2 HAWKINS 1787, *supra* note 11, at 119; accord 2 HAWKINS 1739, *supra* note 10, at 76.

145. 2 HALE 1800, *supra* note 10, at 85; 2 HALE 1736, *supra* note 10, at 85.

*c. Limits on Search Remedies*

In the civil search context during this early part of our history, the Framers strongly and persistently discouraged suits against governmental officers through the statutory implementation of numerous procedural obstacles that claimants had to overcome.<sup>146</sup> Not all of these procedural obstacles undermined suspicion as a Fourth Amendment protective mechanism. For example, the Framers' statutes sometimes deprived even successful claimants of costs if the judge made a probable cause certification,<sup>147</sup> and in other instances placed the burden of proof upon the claimant if a judge determined that probable cause had been present.<sup>148</sup> Because these obstacles were triggered only if probable cause had supported the search, they were consistent with the notion of using suspicion as a Fourth Amendment protective concept.

However, in numerous other instances the Framers imposed procedural obstacles that made it harder to access search remedies, and when they did so the result was to undermine suspicion's protective function. This is because, in these instances, the procedural obstacles applied regardless of suspicion. These procedural obstacles applied even if the search had been wrongful either due to a suspicion deficit, that is, some level of suspicion had been present but not enough to meet the required threshold, or even due to a complete lack of suspicion. The laundry list of these procedural obstacles that the Framers favored included: (1) authorizing officers to plead the general issue;<sup>149</sup> (2) authorizing them to plead the President's rules in defense, or to submit into evidence the statutory act and its authorization for civil searches, as well as "any special matter";<sup>150</sup> (3) granting successful defendants double or even treble costs;<sup>151</sup> (4) authorizing the court to summarily adjudge the case;<sup>152</sup> and (5) allowing removal of a case from state court even after judgment, with the federal court then proceeding de novo.<sup>153</sup> It is

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146. Arcila, *The Framers' Search Power*, *supra* note 46, at 414-20.

147. *Id.* at 417-18.

148. *Id.* at 418-19.

149. *Id.* at 414-16.

150. *Id.* at 416.

151. *Id.* at 417.

152. *Id.* at 420.

153. *Id.*

perhaps telling that the Framers chose to implement these procedural obstacles without reference to suspicion given that they clearly knew how to safeguard suspicion's protective role when implementing such obstacles.<sup>154</sup>

*d. Successful-Search Immunity Defense*

Professor Amar has asserted that the common law recognized a successful-search immunity defense,<sup>155</sup> and though this assertion has been challenged, he appears to be correct. The historical evidence indicates that under the common law, success immunized the initial deficiencies in a search, including a lack of a warrant or even suspicion. The common law did so by providing an immunity defense to a trespass action when stolen goods or contraband were found. During the Framers' era, guidance to this effect was found in a leading British treatise<sup>156</sup> and was ubiquitously reiterated in both British and American manuals for justices of the peace.<sup>157</sup> A leading British case from 1728 arguably agreed with this guidance.<sup>158</sup> The language that was used in these authorities made it crystal clear that the successful-search immunity defense applied in common law contexts (stolen goods) as well as statutory contexts (contraband

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154. See *supra* text accompanying notes 147-48.

155. Amar, *Fourth Amendment*, *supra* note 9, at 767 ("At common law, it seems that nothing succeeded like success. Even if a constable had no warrant, and only weak or subjective grounds for believing someone to be a felon or some item to be contraband or stolen goods, the constable could seize the suspected person or thing. The constable acted at his peril. If wrong, he could be held liable in a damage action. But if he merely played a hunch and proved right—if the suspect was a felon, or the goods were stolen or contraband—this ex post success apparently was a complete defense.").

156. 2 HALE 1800, *supra* note 10, at 151 (stating that, "[i]f the door be shut" and not opened upon request, "the officer may break open the door" without punishment "if the stolen goods be in the house"); accord 2 HALE 1736, *supra* note 10, at 151. Hale also made a similar point in the context of a hue-and-cry search. See *infra* note 195.

157. Arcila, *The Framers' Search Power*, *supra* note 46, at 373 & n.34.

158. In *Leglise v. Champante*, which involved a claimant's challenge to a customs officer's seizure of wine, the court stated that "the officer seizes at his peril, and ... a probable cause is no defense." (1728) 93 Eng. Rep. 871, 871, 2 Strange 820, 820 (K.B.) (emphasis added). The court clearly rejected probable cause as an immunity standard. Though debatable, its reference to "at his peril" suggests that the court agreed that immunity was dependent upon successfully seizing contraband. See *infra* note 195 and accompanying text.

I have previously noted that the *Leglise* probable cause ruling might be incorrect because the reporter includes a notation identifying an applicable statute that contained a probable cause safe harbor. Arcila, *The Framers' Search Power*, *supra* note 46, at 374 & n.36.

evading regulatory statutes), and also to houses.<sup>159</sup> This would have seemed a familiar doctrine in the Framers' era. During colonial times, colonists had bitter experience with writs of assistance.<sup>160</sup> There is reason to believe that this experience would have familiarized them with a successful-search immunity defense because, as Professor Amar has explained, it appears that writs offered immunity only if a search had been successful.<sup>161</sup>

Professor Davies does not believe that the common law recognized this immunity defense, at least in connection with house searches.<sup>162</sup> His conclusion is based upon two factors. First, Davies asserts that Professor Amar provides no evidence in support of the claim that a successful-search immunity defense existed. Second, Davies relies upon five cases to disprove the defense. The best reading of all the evidence, however, indicates that Davies is mistaken.

Davies writes that "Professor Amar has asserted the existence of a broad 'ex post success justification' for searching for and discovering stolen goods or contraband—but has not identified any supporting authority."<sup>163</sup> This is a grudging view, and it depends heavily upon how Davies limits it to the *search* context. Specifically, Amar does provide supporting authority for his ex post success justification, but it concerns principally the *seizure* or *arrest* contexts.<sup>164</sup> He does cite other authorities in an attempt to support a successful-*search* immunity defense, but (as he himself acknowledges) they do not provide *direct* support for that proposition. As to searches, he cites three British decisions,<sup>165</sup> all of which were part of the famous

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159. See Arcila, *The Framers' Search Power*, *supra* note 46, at 373 n.34 (citing sources that refer variously to breaking down the doors of a house to search for stolen goods, as well as to authorizations to enter houses to search for and seize "run goods [i.e., contraband] ... at the [] peril of finding some there").

160. Arcila, *In the Trenches*, *supra* note 11, at 10-12.

161. *Id.* at 11 n.31 (noting this possibility, and admitting that earlier I had failed to recognize it).

162. Davies, *Original Fourth Amendment*, *supra* note 10, at 647-48 & nn.278-79.

163. *Id.* at 647.

164. For example, Amar cites several authorities in support of an ex post success defense in the arrest context, such as Hawkins's leading English treatise as well as three state court decisions from the 1800s. Amar, *Fourth Amendment*, *supra* note 9, at 767 nn.30 & 33. Davies agrees with Amar that the common law recognized "an 'ex post success defense' to trespass for felony arrests." Davies, *Original Fourth Amendment*, *supra* note 10, at 647 n.278.

165. Amar, *Fourth Amendment*, *supra* note 9, at 767 & n.31.

*Wilkes* controversy “that inspired the Fourth Amendment.”<sup>166</sup> Amar claims that “[v]ariants of the ex post success defense appeared prominently in” these three decisions.<sup>167</sup> Davies is surprisingly silent about them. This may be because Amar provides only *indirect* support for the successful-search immunity defense. (Amar, after all, explained that the cases referred to “variants” of the defense.) So, when Amar cites to one of the published versions of *Entick v. Carrington*,<sup>168</sup> he is referring to the passage indicating that an owner of stolen goods would be liable for a search *unless* the goods were found<sup>169</sup>—the flip side of the successful-search immunity defense.

Regardless, the case in favor of a successful-search immunity defense does not depend solely upon Amar’s authorities. As indicated above, voluminous authorities provide abundant support for it.<sup>170</sup>

Davies, in asserting “that the success of a search was not sufficient justification for a violation of a house,”<sup>171</sup> relies upon five cases, but to no avail. Davies relies upon *Bruce v. Rawlins*,<sup>172</sup> which upheld a trespass verdict against customs officers who had searched a home under a writ of assistance but without a constable, as the writ had required.<sup>173</sup> According to Davies, “the successful seizure of uncustomed goods was not enough to justify the house search; the justification for the house search depended on compliance with the writ of assistance.”<sup>174</sup> The first problem with Davies’s conclusion is

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166. *Id.* at 767. See generally Arcila, *In the Trenches*, *supra* note 11, at 14-15 & nn.41-50.

167. Amar, *Fourth Amendment*, *supra* note 9, at 767.

168. *Id.* at 767 & n.31 (citing *Entick v. Carrington*, 19 How. St. Tri. 1029, 1067 (C.P. 1765))

169. *Entick*, 19 How. St. Tri. at 1067 (“[T]he owner must abide the event at his peril: for if the goods are not found, he is a trespasser....”). Notice that this “variant” uses the same term—“peril”—that is contained in some of the authorities I rely upon as providing direct support for the successful-search immunity defense. See *supra* notes 155-59.

Amar also cites to a portion of *Money v. Leach*, but I see no reference to the successful-search immunity defense, either directly or indirectly, at the pages he cites. Cf. Amar, *Fourth Amendment*, *supra* note 9, at 767 & n.31 (citing *Money v. Leach*, 97 Eng. Rep. 1075, 1082-83 (K.B. 1765)). He also cites *Wilkes v. Wood*, but again any reference to the defense seems to be absent. Cf. Amar, *Fourth Amendment*, *supra* note 9, at 767 & n.31 (citing *Wilkes v. Wood*, 19 How. St. Tri. 1153, 1166 (C.P. 1763), 98 Eng. Rep. 489, 498).

170. See *supra* notes 155-59 and accompanying text.

171. Davies, *Original Fourth Amendment*, *supra* note 10, at 647-48.

172. (1770) 95 Eng. Rep. 934, 3 Wilson 61 (K.B.).

173. Davies, *Original Fourth Amendment*, *supra* note 10, at 647-48 & n.279.

174. *Id.* at 648 n.279.

that the successful-search immunity defense was never at issue because the search had been *unsuccessful*. The case report expressly states that “defendants searched, but found no uncustomed goods,” and even notes that the officers “departed, cursing and saying, *Damn it, there are no goods!*”<sup>175</sup> The second problem is that, as Davies notes, the search had occurred under authority of a writ of assistance.<sup>176</sup> Amar has identified reasons for believing that such writs provided immunity only if the search was successful.<sup>177</sup> The search in *Bruce* was unsuccessful. Thus, it is not directly on point, and moreover I see nothing in it that provides even implicit evidence against a successful-search immunity defense.

Davies also is off the mark in relying upon *Bell v. Clapp*, an 1813 New York case, though he does slightly better with *Sandford v. Nichols*, an 1816 Massachusetts case.<sup>178</sup> Davies claims support from these decisions because each involved successful searches yet neither mentions the successful-search immunity defense.<sup>179</sup>

With respect to *Bell*, Davies’s reasoning goes too far because he is relying upon a nonexistent negative implication. *Bell*, in which the court upheld a search because it occurred under a valid warrant,<sup>180</sup> merely validates the common law doctrine that warrants immunized searchers.<sup>181</sup> It is an error in logic to conclude that this invalidates, by negative implication, the successful-search immunity defense. When alternate explanations are available, embracing one does not necessarily invalidate the other. For example, *Bell* could have resulted from a tactical lawyering decision to rely upon one defense but not the other. It is even possible the successful-search defense was raised but that no reference was made to it in the reported decision because the case could be resolved on the warrant ground.

*Sandford* is admittedly a stronger case for Davies, but it cannot bear the weight he places upon it because he commits the similar error of relying too heavily upon a debatable negative implication.

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175. *Bruce*, 95 Eng. Rep. at 934, 3 Wilson at 61 (italics original to Wilson reporter).

176. *Id.* at 934-35, 3 Wilson at 61, 63.

177. See *supra* note 161 and accompanying text.

178. See Davies, *Original Fourth Amendment*, *supra* note 10, at 648.

179. See *id.* at 648 & nn.280 & 282.

180. *Bell v. Clapp*, 10 Johns. 263, 265-66 (N.Y. Sup. Ct. 1813).

181. See Arcila, *The Framers’ Search Power*, *supra* note 46, at 372 & nn.31-33.

The *Sandford* court held in a trespass case that the warrant should not have been allowed into evidence to justify the search because it was defective for a lack of particularity.<sup>182</sup> It is certainly unusual that the trespass verdict's validity rested upon the admissibility of a warrant when the successful-search defense could have mooted that issue. But *Sandford*'s failure to explicitly address the defense raises the prospect of confounding factors, so that we should pause before agreeing with Davies's conclusion. The decision could, for instance, have resulted from less-than-stellar lawyering or judging, which could explain why the defense was not discussed. In other words, though Davies finds in *Sandford*'s omission conclusive proof against the successful-search immunity defense, a sounder approach is to interpret the omission as, at best, inconclusive. Thus, it is this very omission that makes *Sandford* too thin a reed upon which to reject, as Davies does, the extensive evidence supporting the successful-search immunity defense.<sup>183</sup>

Davies also relies upon *Sailly v. Smith*, an 1814 New York case, but it, too, fails to support him. *Sailly* upheld a warrantless but statutorily-authorized search and seizure of unlawfully imported goods that were found in an open public horse-shed.<sup>184</sup> Davies emphasizes that:

[t]he court's opinion noted that the statute also purported to authorize warrantless searches of dwelling-houses, and commented that authority for a warrantless search of a house would be "an extensive and highly important authority ... if it does exist," and that the "more correct course" for searching a house would be for the officer to obtain a search warrant.<sup>185</sup>

Based upon these passages and the discussion of warrants, in conjunction with the opinion's failure to invoke the successful-search immunity defense, Davies concludes that no such defense existed. Again, Davies reads too much into the decision.

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182. *Sandford v. Nichols*, 13 Mass. (1 Tyng) 286, 289 (1816).

183. See *supra* notes 155-61 and accompanying text for a review of the evidence supporting this defense.

184. *Sailly v. Smith*, 11 Johns. 500, 502-03 (N.Y. Sup. Ct. 1814).

185. Davies, *Original Fourth Amendment*, *supra* note 10, at 649 n.283 (quoting *Sailly*, 11 Johns. at 502-03).

Though the court did not provide an explicit citation to the relevant statute, it was referring to the March 1809 Non-Intercourse Act.<sup>186</sup> There lies the first problem because it appears that the *Sailly* court was *incorrect* in claiming that the March 1809 Non-Intercourse Act authorized warrantless home searches. This issue is challenging to pin down because the Act *indirectly* granted search authority by reference to other unspecified statutes, stating that customs officers “shall have the like power and authority ... to enter any ship or vessel, *dwelling-house*, store, building or other place, for the purpose of searching for and seizing any such goods ... *which ... they now have by law in relation to goods ... subject to duty.*”<sup>187</sup> The problem with the *Sailly* court’s interpretation is that customs law, which imposed duties and established enforcement regimes, had long required *warrants* for land-based searches in general and house searches in particular. This had been the case in the nation’s first customs law, the 1789 Collection Act,<sup>188</sup> and as far as I am aware the pattern had been followed in all customs laws up to the March 1809 Non-Intercourse Act.<sup>189</sup>

In any case, let us return to what lessons, if any, *Sailly* provides with regard to the existence of a successful-search immunity defense. After apparently misinterpreting the March 1809 Non-Intercourse Act as authorizing warrantless home searches, the *Sailly* court refused to resolve whether the Act lawfully did so, stating that “it is not necessary to decide whether the collector, by *law*, is, at all times, authorized to enter and search a dwelling

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186. See *Sailly*, 11 Johns. at 502 (providing title of act, referring to its section eight, and noting that it was “continued in force, by a supplementary act, passed the second day of March, 1811”); cf. Act of Mar. 2, 1811, ch. 29, § 3, 2 Stat. 651, 651 (providing that section eight of March 1809 Non-Intercourse Act “shall have full force and be immediately carried into effect against Great Britain”); March 1809 Non-Intercourse Act, Act of Mar. 1, 1809, ch. 24, 2 Stat. 528 (showing same title of act as given in *Sailly*).

187. March 1809 Non-Intercourse Act, § 8, 2 Stat. at 530 (emphasis added); see also *Sailly*, 11 Johns. at 502 (quoting this language).

188. Act of July 31, 1789, ch. 5, § 24, 1 Stat. 29, 43.

189. *E.g.*, Act of Mar. 2, 1799, ch. 22, § 68, 1 Stat. 627, 677-78; Act of Aug. 4, 1790, ch. 35, § 48, 1 Stat. 145, 170. The only intervening revenue law of which I am aware that did not follow this pattern was Hamilton’s 1791 Excise Act, which had allowed warrantless searches of homes if they had been registered under the Act. See *supra* notes 105-25 and accompanying text. But it imposed *excise* taxes, not customs *duties*, and thus appears to have been inapplicable under the terms of the March 1809 Non-Intercourse Act, which referred to “goods ... subject to *duty*.” See *supra* text accompanying note 187 (emphasis added).



house, without first obtaining a *warrant* from a magistrate.”<sup>190</sup> In conformity with the common law tradition, the court concededly iterated a preference for warrant-based home searches. But the court certainly was not insisting upon a validating warrant. It noted, “yet, public convenience, in many instances, may require that it [i.e., the power to conduct warrantless home searches] should be exercised.”<sup>191</sup> Emphasizing that the search at issue had been of a “sleigh standing under an open [horse] shed”—leaving unspoken how unfavorably it compared to a house in terms of Fourth Amendment protections—the court *upheld* the search and seizure on the basis that “the law of the *United States* [that is, the March 1809 Non-Intercourse Act] authorized it, and is a sufficient protection to the defendant in this cause.”<sup>192</sup> Of course, since the March 1809 Non-Intercourse Act simply propagated prior existing statutory search authority, which had required warrants for land-based searches, this *Sailly* court ruling also appears to have been incorrect.

Regardless, it goes too far to argue that the *Sailly* court’s expressed *preference* for warrants equates with a *rejection* of the successful-search immunity defense. Any argument that the court cast doubt upon the defense by failing to rely upon it is unavailing for the same reason that such a negative implication from *Bell* is a logical error: adoption of one available alternative rationale (the statutory authorization for the warrantless search) does not invalidate the other available alternative that was not invoked (the successful-search immunity defense).

The last case Davies relies upon, *Banks v. Farwell*,<sup>193</sup> likewise does not offer Davies sufficient support. Davies claims that *Banks* is consistent with his position that there was no successful-search immunity defense because “the judges recited that ‘[h]ad [the constable and the complainant] attempted to break into the plaintiff’s house or shop for the purpose of searching for stolen property, they would have gone aside from their authority and would have acted *at their peril*.’”<sup>194</sup> There are two problems with Davies’s

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190. *Sailly*, 11 Johns. at 502-03.

191. *Id.* at 503.

192. *Id.*

193. 38 Mass. (21 Pick.) 156 (1838).

194. Davies, *Original Fourth Amendment*, *supra* note 10, at 649 n.284 (emphasis added)

interpretation. The first problem is that Davies either overinterprets or misinterprets the passage. True, the court's reference to going "aside from their authority" might support his argument. But the phrase is too ambiguous to offer Davies sufficient support because it begs the question of what exactly was the scope of the officials' authority. Rather, the key to understanding the passage is its closing phrase. The court's choice of the phrase "at their peril" was quite purposeful because it refers to the risk of *not* finding contraband.<sup>195</sup> The court meant that, even if the officers had acted "aside from their authority," the successful-search immunity defense would have protected them had they *found* contraband—they would have avoided the "peril" of liability to which they would have been exposed had they found nothing. Thus, *Banks* and its reference to "peril" is perfectly consistent with the successful-search immunity defense. The second problem with Davies's interpretation is that the court *upheld* the successful search and seizure against the trespass challenge.<sup>196</sup> It appears to have done so on the theory that the search and seizure was a lawful corollary to the duty that the arrest warrant imposed upon the constable.<sup>197</sup> Again, the court's willingness to rule based on one available ground (the search was a lawful corollary to the constable's duty under the arrest warrant) does not invalidate another available rationale (the successful-search immunity defense). Consequently, *Banks* is not solid evidence against the successful-search immunity defense.

In sum, of the five cases Davies relies upon, only *Sandford* provides some slight support for his position. But it is too slender a reed upon which to perch, particularly in light of the extensive

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(alteration in original) (quoting *Banks*, 38 Mass. (21 Pick.) at 159).

195. See 3 NATHAN DANE, A GENERAL ABRIDGEMENT AND DIGEST OF AMERICAN LAW 521, at § 8 (1824) (stating that "[o]fficers enter houses to seize run goods &c., at their peril of finding some there" (emphasis added)); 2 HALE 1800, *supra* note 10, at 103 (indicating that a constable engaged in a hue-and-cry pursuit breaks open doors "at his peril" of finding the suspect inside; thus, a search is "justifiable, if he be there; not justifiable, if he be not there"); 2 HALE 1736, *supra* note 10, at 103 (same); *supra* note 158 (citing the 1728 British case *Leglise v. Champante* and quoting its use of the "peril" formulation); see also HENING, NEW VIRGINIA JUSTICE 1799, *supra* note 10, at 40 (explaining that a lay person, who arrests upon mere suspicion, breaks open doors "at his peril" because breaking is justifiable only if the arrestee is a felon).

196. *Banks*, 38 Mass. (21 Pick.) at 159-60.

197. See *id.*

authorities that support the successful-search immunity defense.<sup>198</sup> In the absence of more reliable reasons to question the latter authorities, they carry the day.

### *C. Suspicion as Proxy*

Due to the analytical incoherence of our Fourth Amendment jurisprudence, suspicion is useful mostly as a proxy, rather than as a determinant of constitutional reasonableness in and of itself. Often its value is that it serves as a proxy to other protected Fourth Amendment values, and as such helps to protect against governmental overreaching.<sup>199</sup> Characterizing suspicion as merely a proxy should be uncontroversial. It is because suspicion is merely a proxy that it is not necessarily requisite to the Fourth Amendment constitutionality of a governmental search. Many suspicionless searches are constitutional under the Fourth Amendment, in both the criminal<sup>200</sup> and civil<sup>201</sup> contexts.

*The reason why suspicion's main value is as a proxy is that, as I explained above, the Reasonableness Clause governs the constitutionality of all searches, both criminal and civil.*<sup>202</sup> It is the relationship between suspicion and the Reasonableness Clause, and how each relates to a search's constitutionality, that is the key to this proper understanding of the Fourth Amendment. Return to the Fourth Amendment's text. Recall that when the Warrant Clause's text is considered in light of history, it clearly does not impose a presumptive suspicion requirement, and that from both a textual and functional standpoint the Reasonableness Clause does not either.<sup>203</sup>

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198. See *supra* notes 156-61 and accompanying text.

199. See Clancy, *Fourth Amendment Reasonableness*, *supra* note 34, at 996, 1031 (discussing purposes that suspicion serves).

200. See, e.g., *Illinois v. Caballes*, 543 U.S. 405, 408-09 (2005) (police use of dog sniffs); *Oliver v. United States*, 466 U.S. 170, 176-81 (1984) (police searches of open fields); *Texas v. Brown*, 460 U.S. 730, 738 n.4 (1983) (plain view search by police); *Weeks v. United States*, 232 U.S. 383, 392 (1914) (search incident to arrest).

201. See, e.g., *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 829-30 (2002) (student drug testing); *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 447, 450-51, 455 (1990) (highway sobriety checkpoints manned by police); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668, 677 (1989) (employee drug testing); *New York v. Burger*, 482 U.S. 691, 702-12, 717-18 (1987) (junk yard inspection by police).

202. See *supra* text accompanying notes 54-57.

203. See *supra* notes 50-56 and accompanying text.

The Reasonableness Clause's primacy becomes clearer when one closely considers suspicion's role in Fourth Amendment jurisprudence. Even in those instances when a search warrant is required—and certainly in all instances of warrantless searches—suspicion is not sufficient, by itself, to assure a search's constitutionality. The Fourth Amendment protects a host of values, and suspicion protects only some of them. Irrespective of suspicion—and even in instances when a required suspicion threshold has been satisfied—a search could be unconstitutional under the Fourth Amendment for many reasons. It could be that the search was overly invasive or intrusive.<sup>204</sup> It could be that the governmental interest supporting the search was not sufficiently compelling.<sup>205</sup> Or, it could be that the search target's privacy interests were so substantial as to render the search illegitimate.

Consider, for example, the two cases in which the Supreme Court has validated suspicionless drug testing of public high school students, first of student athletes,<sup>206</sup> and then of any student involved in school-related extracurricular activities.<sup>207</sup> The Court's reasoning in these cases turned crucially upon the *in loco parentis* doctrine,<sup>208</sup> which leads to a question: Would the outcomes have been the same if undergraduate college students had been at issue? How about graduate students? Though all other factors would remain the same—the governmental interest in combating drug use, the school interest in assuring student safety, for example—the best outcome would be to invalidate these searches because the students' privacy interests would now trump other factors since the *in loco parentis* doctrine would no longer subjugate those privacy interests. These values—invasiveness or intrusiveness, assuring a compelling governmental need, privacy interests—are only some of the ones that the Fourth Amendment protects but suspicion does not. Other Fourth Amendment values that the Court has properly considered when judging a search's constitutionality include the immediacy of

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204. See *Safford Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2642 (2009) ("Here, the content of the suspicion failed to match the degree of intrusion.").

205. See *Chandler v. Miller*, 520 U.S. 305, 318 (1997) (invalidating suspicionless drug testing of certain candidates for public office in Georgia because the governmental interest supporting the search was merely symbolic, which was not sufficiently "substantial").

206. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

207. *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822 (2002).

208. *Acton*, 515 U.S. at 654-55; see *Earls*, 536 U.S. at 830-31.

the governmental interest, as well as the search's efficacy and its deterrence value.<sup>209</sup> Only through Reasonableness Clause primacy does Fourth Amendment jurisprudence protect all such values.

The Fourth Amendment value that suspicion most directly protects is limited governmental discretion, which is another value that the Supreme Court has repeatedly considered.<sup>210</sup> No doubt, suspicion can serve as an extremely useful tool for limiting governmental discretion. But it is no panacea. Suspicion's effectiveness in this regard depends upon a host of factors, such as the rigorousness of the suspicion threshold (for example, probable cause versus reasonable suspicion), or the deliberateness with which judges carry out their probable cause sentryship role prior to issuing search warrants. Moreover, suspicion is far from the only tool available for limiting governmental discretion, and others may be more useful in particular circumstances.

Limiting governmental discretion is probably the core Fourth Amendment value. The next section is devoted to considering means that are available for protecting this and other Fourth Amendment values in the absence of suspicion.

### III. JUDGING REASONABLENESS WITHOUT SUSPICION: THE NEW PARADIGM

It might be argued that, regardless of the lack of textual support, the presumptive suspicion requirement is well founded in practice and tradition. Extensive support exists for this argument.<sup>211</sup> However, this proposition, no matter how well founded in the past, no longer represents a workable Fourth Amendment jurisprudence in today's world.

In the simpler world that existed at the nation's founding, suspicion was a useful mechanism for constraining governmental power and discretion. As the decades marched on, however, our world became increasingly complex and interconnected. Rural

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209. Arcila, *Special Needs*, *supra* note 16, at 1230.

210. *Id.*

211. See *supra* notes 63-66 and accompanying text. Such evidence has persuaded Professor Clancy, for example, to argue for continuing to give suspicion a primary role in Fourth Amendment jurisprudence. See Clancy, *Fourth Amendment Reasonableness*, *supra* note 34, at 1031.

agricultural life gave way to an urban industrial existence as the Industrial Revolution, and then the Second Industrial Revolution, unfolded in the 1800s. Scholarship already has suggested how some of these changes dramatically transformed both Fourth Amendment jurisprudence and our views about legitimate governmental search and seizure power.<sup>212</sup> What has not been adequately discussed, however, is that in this new world suspicion is incapable of performing as extensive a protective function as it did at the nation's founding.

Judging Fourth Amendment reasonableness, usually in the absence of suspicion, is the future. And the future is now. Using the Fourth Amendment's Reasonableness Clause as the constitutional touchstone, and recognizing that suspicion is not necessarily at the core of Fourth Amendment constitutionality, is demanded by numerous developments, most prominently the reality of modern, urban life as well as the consequences of technological advances; the rise of the regulatory state; and the increased interest in preventative searches arising from the post-9/11 world. As I will discuss below, our existing Fourth Amendment jurisprudence, with its myopic focus upon suspicion and its failure to develop alternative protective mechanisms, is ill-suited to our new world.

### *A. Modern Urban Life and Technological Advancements*

When assessing suspicion's utility today as a primary mechanism for protecting Fourth Amendment values, contrast the Framers' world with our own. Initially, our country was primarily rural, and our economy based largely upon small-scale agriculture, with waterways providing the primary means of transportation.<sup>213</sup> In 1760, what are now major cities—Philadelphia, New York, and Boston—were little more than “large towns” with populations of

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212. See Davies, *Correcting History*, *supra* note 15, at 181-94 (explaining that in the 1800s a greater concern about crime arose, which led to the rise of professionalized police and the relaxing of arrest and search standards so those police would have greater discretion); Davies, *Original Fourth Amendment*, *supra* note 10, at 634 (explaining that warrantless arrest standards were relaxed in the nineteenth century “when crime and urban disorder emerged as concerns”). Though not explicitly noted by Davies, these events corresponded with an exponential increase in urbanization. See *infra* notes 213-25 and accompanying text.

213. WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830*, at 1-2 (Univ. of Ga. Press 1994) (1975).

merely 23,000, 18,000, and 16,000, respectively.<sup>214</sup> In 1800, “80 percent of the American people” worked in agriculture.<sup>215</sup> In the period between 1820 and 1840, rural living continued to dominate,<sup>216</sup> though the balance started to shift in the mid-1800s.<sup>217</sup>

The Industrial Revolution’s advent in the 1800s was the primary catalyst for these changes, leading to an astounding transformation as industry blossomed, people switched from a rural agricultural life to an urban industrial one, modern cities and industrial regions developed, and transportation and communication dramatically improved. The Framers’ agricultural world of the 1700s quickly gave way to changes the Industrial Revolution wrought in the 1800s. And peculiarly American advantages led to a second blossoming from the Industrial Revolution by the end of the 1800s.<sup>218</sup> “[I]t was during the early 1880s that the United States became preponderantly an industrial rather than an agricultural country. Also by 1880 or so, it surpassed England as the world’s leading industrial power.”<sup>219</sup>

These developments led to an explosion in urban populations, which increased from 201,655 in 1790, to 6.2 million in 1860, to 30.2 million in 1900, and 54.3 million in 1920.<sup>220</sup> The move towards an urban life is now entrenched, with the urban-rural divide being the

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214. *Id.* at 1.

215. CARROLL PURSELL, *THE MACHINE IN AMERICA: A SOCIAL HISTORY OF TECHNOLOGY* 109 (2d ed. 2007).

216. See ROBERT MCC. ADAMS, *PATHS OF FIRE: AN ANTHROPOLOGIST’S INQUIRY INTO WESTERN TECHNOLOGY* 158 (1996) (noting that, in 1820, 90 percent of the population “living in the northern states” still lived in rural areas); PURSELL, *supra* note 215, at 146 (“In 1840 there were only 1.8 million Americans living in towns of more than 2,500 people, compared with 15.2 million rural dwellers.”).

217. See *infra* note 220.

218. See ADAMS, *supra* note 216, at 177 (“Real national product increased nearly seventyfold in the United States between 1840 and 1960.”).

219. *Id.* at 178.

220. U.S. CENSUS BUREAU, *CENSUS 1990: SELECTED HISTORICAL DECENNIAL CENSUS POPULATION AND HOUSING COUNTS, URBAN AND RURAL POPULATIONS*, tbl.4, <http://www.census.gov/population/www/censusdata/files/table-4.pdf> [hereinafter *URBAN AND RURAL POPULATIONS*]; see also PETER N. STEARNS, *THE INDUSTRIAL REVOLUTION IN WORLD HISTORY* 9 (3d ed. 2007) (“By 1850 there were still as many craft workers as factory workers and as many rural people as urban.”). Exactly what Stearns meant when claiming that in 1850 there were “as many rural people as urban” is unclear, as 1850 census data show a rural population of 19.6 million and an urban population of only 3.57 million. *URBAN AND RURAL POPULATIONS*, *supra*. In any case, in 1830 the rural population began a proportional decline that was initially gradual but then (around 1890) rapidly accelerated, while the urban population began to rapidly increase. *Id.*

opposite of what it was in the Framers' time. In 1790, 5.1 percent of the population lived in urban areas, while 94.9 percent lived in rural locations.<sup>221</sup> In 1810, this ratio remained nearly unchanged, with 7.3 percent living in urban areas, while 92.7 percent lived in rural locations.<sup>222</sup> By contrast, in 2000, 79 percent of the nation's population lived in urban centers.<sup>223</sup> Only 21 percent lived in rural areas.<sup>224</sup> These changes led to a tremendous transformation in our search and seizure law.<sup>225</sup>

It is doubtful the Framers could have imagined the density or other realities of our urban centers, but certainly they never could have conceived of the technology that permeates such urban life. For example, breathtaking technological advances, particularly since the mid-1900s, and which accelerated in the late 1900s and into the new twenty-first century, have continued to ease communications across long distances and increased globalization. I am no longer astounded when my taxi driver in New York City spends the entire ride speaking to his brother through a mobile telephone when his brother is in Bengal, halfway across the globe. Although this isolated anecdote says nothing about Fourth Amendment jurisprudence, the communication advances that made the call possible have enormous implications for the appropriate scope of the government's search power, as exemplified by post-9/11, high-tech controversies such as the Department of Defense's "Total Information Awareness" program<sup>226</sup> and the NSA's domestic wiretapping program.<sup>227</sup>

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221. URBAN AND RURAL POPULATIONS, *supra* note 220, at tbl.4.

222. *Id.*

223. U.S. CENSUS BUREAU, URBAN/RURAL AND INSIDE/OUTSIDE METROPOLITAN AREA CENSUS 2000 SUMMARY FILE 1, [http://factfinder.census.gov/servlet/GCTTable?\\_bm=y&-geo\\_id=&-ds\\_name=DEC\\_2000\\_SF1\\_U&-\\_lang=en&-\\_caller=geoselect&-redoLog=false&-format=US-1&-mt\\_name=DEC\\_2000\\_SF1\\_U\\_GCTP1\\_US1](http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=&-ds_name=DEC_2000_SF1_U&-_lang=en&-_caller=geoselect&-redoLog=false&-format=US-1&-mt_name=DEC_2000_SF1_U_GCTP1_US1) (last visited Feb. 11, 2010).

224. *Id.*

225. See *supra* note 212 and accompanying text.

226. After 9/11, the Defense Department began planning to create what might be called a super-duper metadatabase known as the Total Information Awareness program, "a computer system that could create a vast electronic dragnet, searching for personal information as part of the hunt for terrorists around the globe—including the United States." John Markoff, *Pentagon Plans a Computer System That Would Peek at Personal Data of Americans*, N.Y. TIMES, Nov. 9, 2002, at A12; see also Jeffrey Rosen, *Total Information Awareness*, N.Y. TIMES, Dec. 15, 2002 (Magazine), at 128. I use the term "metadatabase" because the system was conceived to "provide intelligence analysts and law enforcement officials with instant access to information from Internet mail and calling records to credit card and banking transactions and travel documents, without a search warrant," Markoff, *supra*, and also "financial,



educational, travel and medical records, as well as criminal and other governmental records," Rosen, *supra*. I use the term "super-duper" because the system was to have the capability of performing "data-mining" and was to include "profiling technologies." *Id.* Both houses of Congress sought to curb the program, though they gave the Pentagon the option of supplying a report as a condition for continuing it. Adam Clymer, *Congress Agrees To Bar Pentagon from Terror Watch of Americans*, N.Y. TIMES, Feb. 12, 2003, at A1; Adam Clymer, *Senate Rejects Pentagon Plan To Mine Citizens' Personal Data for Clues to Terrorism*, N.Y. TIMES, Jan. 24, 2003, at A12. The Pentagon supplied the report, in which it announced the public-relations gambit that it had changed the program's name to "Terrorist Information Awareness." Adam Clymer, *New Name of Pentagon Data Sweep Focuses on Terror*, N.Y. TIMES, May 21, 2003, at A20.

Governmental efforts to pursue the program in some form apparently continue. The *New York Times* reported that a federal advisory committee found that "the Defense Department and many other agencies were collecting and using 'personally identifiable information on U.S. persons for national security and law enforcement purposes,'" and that "[s]ome of these activities ... resemble[d] the Pentagon program initially known as Total Information Awareness." Robert Pear, *Panel Urges New Protection on Federal 'Data Mining'*, N.Y. TIMES, May 17, 2004, at A12; see also John Markoff, *Taking Snooping Further: Government Looks at Ways To Mine Databases*, N.Y. TIMES, Feb. 25, 2006, at C1.

For academic commentary about the Total Information Awareness program and similar efforts, see Christopher Slobogin, *Government Data Mining and the Fourth Amendment*, 75 U. CHI. L. REV. 317, 317-20 (2008); Daniel J. Solove, *Data Mining and the Security-Liberty Debate*, 75 U. CHI. L. REV. 343, 343-44 (2008). Slobogin reports that a "fusion center initiative ... appears to be the new TIA," and "is operated by the Department of Homeland Security." Slobogin, *supra*, at 319. Fusion centers are "an amalgamation of commercial and public sector resources for the purpose of optimizing the collection, analysis, and sharing of information on individuals," designed to gather data about banking and finance, real estate, education, retail sales, social services, transportation, postal and shipping, and hospitality and lodging transactions." *Id.* at 318 (quoting Lillie Coney, Elec. Privacy Info. Ctr., Statement to the Department of Homeland Security Data Privacy and Integrity Advisory Committee 1, 4 (2007), available at <http://www.epic.org/privacy/fusion/fusion-dhs.pdf>).

227. News coverage of the NSA's controversial post-9/11 domestic wiretapping program, formally known as the "Terrorist Surveillance Program," has been extensive. See, e.g., *Bush Ends Warrantless Surveillance Program, FISA Court To Oversee Wiretaps on Terrorists*, 75 U.S.L.W. 2423, 2424 (Jan. 23, 2007); Dan Eggen & Paul Kane, *Gonzales Hospital Episode Detailed: Ailing Ashcroft Pressured on Spy Program, Former Deputy Says*, WASH. POST, May 16, 2007, at A1; Siobhan Gorman, *NSA's Domestic Spying Grows as Agency Sweeps up Data*, WALL ST. J., Mar. 10, 2008, at A1; Michael Isikoff, *The Fed Who Blew the Whistle*, NEWSWEEK, Dec. 22, 2008, at 40, 42, 44-46; Eric Lichtblau & David Johnston, *Court To Oversee U.S. Wiretapping in Terror Cases*, N.Y. TIMES, Jan. 18, 2007, at A1; Eric Lichtblau, *Debate and Protest at Spy Program's Inception*, N.Y. TIMES, Mar. 30, 2008, at A19; Eric Lichtblau, *Gonzales Invokes Actions of Other Presidents in Defense of U.S. Spying*, N.Y. TIMES, Jan. 25, 2006, at A19; Walter Pincus, *Judge Discusses Details of Work on Secret Court: He Takes Issue with NSA's Wiretaps*, WASH. POST, June 26, 2007, at A4; James Risen & Eric Lichtblau, *Extent of E-Mail Surveillance Renewed Concerns in Congress*, N.Y. TIMES, June 17, 2009, at A1 (reporting that "critics in Congress [are] saying [that the NSA's] recent intercepts of the private telephone calls and e-mail messages of Americans are broader than previously acknowledged"); Brian Ross et al., *Exclusive: Inside Account of U.S. Eavesdropping on Americans*, ABC NEWS, Oct. 9, 2008, <http://abcnews.go.com/blotter/story?id=5987804&page=1>.

In light of all these changes, we perpetuate doctrinal incoherence by continuing to overemphasize suspicion in our Fourth Amendment doctrinal formulations. Simply put, continuing to give suspicion pride of place in our Fourth Amendment jurisprudence fails to account for the massive societal and technological changes that have occurred since the Framers' era.

### *B. The Rise of the Regulatory State*

Not only has modern urban life enveloped in technology affected search and seizure law, but its impact has been magnified by the rise of the regulatory state. The federal government had a highly limited regulatory state during the first 100 years or so of the nation's history. The most prominent part of the regulatory state was the customs service, which was charged with enforcing customs duties, the primary source of governmental revenue at the nation's founding. Though this regulatory state had a small footprint, it nonetheless holds important lessons about the Framers' views on search and seizure.<sup>228</sup>

The regulatory state's development accelerated during the Industrial Revolution, which "was viewed as causing or contributing to important social problems in a manner that required its management," leading, for example, to the Interstate Commerce Commission's creation near the end of the 1880s.<sup>229</sup> Significant regulatory efforts followed in the antitrust and bankruptcy contexts.<sup>230</sup> All these developments likewise had important implications for the Fourth Amendment. An 1886 decision, *Boyd v. United States*, held that Fourth and Fifth Amendment protections pre-

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For academic commentary, see Paul M. Schwartz, *Reviving Telecommunications Surveillance Law*, 75 U. CHI. L. REV. 287, 305-09 (2008). These post-9/11 events were not the first time the NSA had found itself embroiled in controversy over domestic spying. See Nicholas M. Horrock, *N.S.A. Chief Tells of Broad Scope of Surveillance: Describes Scanning of Calls and Cables of Foreign and U.S. Citizens and Groups*, N.Y. TIMES, Oct. 30, 1975, at A1.

228. See Arcila, *The Framers' Search Power*, *supra* note 46 (reviewing civil search statutes from the Framers' era, and arguing that the Framers were more interested in protecting the government's search power than in protecting the people from it, which the Framers accomplished by making probable cause an immunity standard and displacing the jury's traditional common law role in assessing whether probable cause had supported the search).

229. Arcila, *Special Needs*, *supra* note 16, at 1241.

230. *Id.*

vented the government from compelling the production of documents during an in rem forfeiture proceeding,<sup>231</sup> and thus provided a significant shield against these regulatory regimes.<sup>232</sup> The Court's eventual rejection of *Boyd* represented the "end of substantive Fourth Amendment limits on the government's regulatory power," which "helped make the modern regulatory state possible."<sup>233</sup>

Since these developments, the modern regulatory state has exploded. Before we consider its magnitude, let us first focus upon criminal law enforcement, as the comparison between the two will be instructive. For present purposes, I will include within criminal law enforcement both the federal and state governments. The federal government reports that 43.5 million persons had contact with police in 2005.<sup>234</sup> Because nearly 30 percent of these individuals had more than one contact with police, the total number of police contacts in 2005 is estimated at 71.1 million.<sup>235</sup> This is only an extremely rough barometer of the extent to which the federal and state governments conducted searches during 2005 for traditional law enforcement purposes, but it is a meaningful one given that each of these contacts resulted in at least a plain view search of the person.<sup>236</sup> Moreover, other indicia do not appear to significantly increase the rate of traditional criminal searches. For example, United States magistrates issued 34,246 search warrants in 2005,

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231. 116 U.S. 616, 618-33 (1886).

232. Arcila, *Special Needs*, *supra* note 16, at 1241.

233. *Id.* at 1242.

234. MATTHEW DUROSE ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2005, at 2 (2007), <http://bjs.ojp.usdoj.gov/content/pub/pdf/cpp05.pdf>.

235. *Id.* "The most common reason for contact was as a driver during a traffic stop, accounting for about 4 out of 10 contacts.... The second most frequent reason for contact with police was to report a crime or problem, accounting for about 1 in every 4 contacts." *Id.* at 3.

236. One commentator on this Article wondered whether these contact numbers included telephone contacts, such as 911 calls, which would not have resulted in plain view searches. That is not the case. The contacts had to result in plain view searches because only face-to-face contacts are included. *Id.* at 10 (explaining that the number of contacts derives from a survey in which "[r]espondents ... were directly interviewed to determine how many had a face-to-face contact with police during the previous 12 months"); *see also id.* at 1 (referring to "the 43.5 million persons who had face-to-face contact with police"); *id.* at 2 ("The total number of contacts was 71.1 million, with an average of 1.6 face-to-face contacts per resident."); *id.* at 3 ("Survey respondents who had face-to-face contact with police were asked to describe the nature of the contact.").

32,467 in 2006, and 33,632 in 2007.<sup>237</sup> These numbers do not appreciably increase the rate of criminal searches if we presume that at least 71.1 million criminal searches occurred in 2005.

Now return to the regulatory state. Even when limiting our inquiry to the federal government, the degree of interaction between the person and the civil regulatory apparatus is monumental, and the vast majority of such civil searches are both warrantless and suspicionless. Perhaps the best example is that during 2005 “airlines carried 660 million domestic passengers,”<sup>238</sup> all of whom had to subject themselves and their baggage to warrantless and suspicionless civil searches as they passed through airport security.<sup>239</sup> Add to this the myriad other ways in which individuals and businesses are subject to civil searches, which also are usually both warrantless and suspicionless—from inspections by the United States Department of Agriculture<sup>240</sup> to the United States Occupational Safety and Health Administration<sup>241</sup> to the Food and

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237. U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, DUTIES PERFORMED BY MAGISTRATE JUDGES IN U.S. DISTRICT COURTS (2007), <http://www.albany.edu/sourcebook/pdf/t1842007.pdf> (last visited Feb. 11, 2010).

238. Press Release, U.S. Dep’t of Transp., Bureau of Transp. Statistics, 2005 Domestic Airline Passenger Traffic up 4.1 Percent from 2004, at 1 (Mar. 16, 2006), *available at* [http://www.bts.gov/press\\_releases/2006/bts013\\_06/pdf/bts013\\_06.pdf](http://www.bts.gov/press_releases/2006/bts013_06/pdf/bts013_06.pdf). The 660 million passenger number is roughly commensurate with subsequent years for which data is available. Press Release, U.S. Dep’t of Transp., Bureau of Transp. Statistics, December 2008 Airline Traffic Data: System Traffic down 5.7 Percent in December from 2007 and down 3.7 Percent in 2008, at 3 (Mar. 12, 2009), *available at* [http://www.bts.gov/press\\_releases/2009/bts012\\_09/pdf/bts012\\_09.pdf](http://www.bts.gov/press_releases/2009/bts012_09/pdf/bts012_09.pdf) (“U.S. airlines carried 649.9 million scheduled domestic passengers in 2008, down 4.3 percent from the 679.2 million carried in 2007 and the fewest annual domestic passengers since 2004 ....”).

239. See 49 U.S.C. § 44901(a) (2006). Federal regulations have implemented these screening procedures. See 49 C.F.R. §§ 1544.201(b), 1540.107, 1544.203(c), 1544.205(b), 1544.207 (2008). Aviation screening procedures have repeatedly been upheld against Fourth Amendment challenges. See, e.g., *United States v. Hartwell*, 436 F.3d 174 (3d Cir. 2006); *United States v. Marquez*, 410 F.3d 612 (9th Cir. 2005); *Singleton v. Comm’r*, 606 F.2d 50 (3d Cir. 1979).

240. A USDA subunit, the Food Safety and Inspection Service, is granted search authority to oversee meat, poultry, and egg products. See 21 U.S.C. §§ 603(a), 608 (2006); 9 C.F.R. §§ 201.95, 302.1, 300.6 (2008). Another subunit, the Grain Inspection, Packers and Stockyards Administration, is authorized to inspect stockyards, market agencies, dealers, and packers. See 7 U.S.C. § 228 (2006); 9 C.F.R. § 201.95 (2008). Additionally, the Animal and Plant Health Inspection Service is granted search authority to enforce the Animal Welfare Act. See 7 U.S.C. §§ 2146, 2147 (2006); 9 C.F.R. § 2.126 (2008).

241. See 29 U.S.C. § 657 (2006); 29 C.F.R. §§ 1903.3, 1926.3 (2008); *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 313-24 (1978) (holding that, as applied, § 657’s warrantless search

Drug Administration,<sup>242</sup> or to welfare home inspections<sup>243</sup>—and two truths become clear. First, the modern regulatory state is a constant presence in our daily lives. By comparison, we are only rarely subjected to searches for criminal law enforcement purposes. Second, unlike in the criminal law enforcement context, neither warrants nor prior suspicion can provide workable protections against governmental civil searches because in many—probably most—instances they would fatally undermine the regulatory regime.

### *C. The Post-9/11 World*

In addition to the modern regulatory state's rise, the 9/11 terrorist attacks have placed tremendous stress upon our Fourth Amendment jurisprudence. For some time prior to 9/11, we were confronting the challenge of guarding against attack by nongovernmental actors who would probe our every vulnerability. The 9/11 attacks were a terrible demonstration of the tremendous injury that such actors can inflict. Added to this concern are the myriad ways in which we have created a world in which the potential for wrecking havoc exists. Consider biological or chemical attacks against targets as varied as ports or the food supply, or technological attacks against computer systems that could be aimed at basic infrastructure like the electrical grid.

These threats caused the George W. Bush presidential administration to engage in wide-ranging reforms and initiatives, many of which were highly controversial and of dubious constitutionality, including on Fourth Amendment grounds. These included: (1) the Defense Department's Total Information Awareness Program, which

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authorization violated the Fourth Amendment; allowing use of administrative warrants that comply with *Camara* and *See, see supra* notes 32-47 and accompanying text; and preserving warrantless search authority for closely regulated industries).

242. *See* 21 U.S.C. §§ 374(a)(1), (f), (g); 21 C.F.R. §§ 600.21, 806.30; *Wedgewood Village Pharmacy, Inc. v. United States*, 421 F.3d 263, 273 (3d Cir. 2005) (holding that no warrant is required under § 374(a), and that "refusing a legitimate inspection request is a criminal violation of the [Food, Drug, and Cosmetic Act]"); *United States v. New England Grocers Supply Co.*, 488 F. Supp. 230, 237-39 (D. Mass. 1980) (finding warrantless searches constitutional if FDA agents have "reason to suspect violations of the [Food, Drug, and Cosmetic Act] so long as the searches were otherwise reasonable" under the Act).

243. *See Wyman v. James*, 400 U.S. 309 (1971); *Sanchez v. County of San Diego*, 464 F.3d 916 (9th Cir. 2006), *reh'g en banc denied*, 483 F.3d 965 (9th Cir. 2007).

appears to continue to exist in a balkanized form;<sup>244</sup> (2) investigatory initiatives using the USA PATRIOT Act;<sup>245</sup> and (3) the NSA domestic wiretapping program.<sup>246</sup>

Each of these efforts resulted from pressure to engage in preventative searches, and from the reality that technological advances could be helpful in doing so. Such pressure could not meaningfully be resisted, certainly from a political perspective. And these efforts also had something else in common: an abandonment of the prior suspicion requirement, or at least the type of suspicion that would serve to safeguard either the search target in a manner consistent with traditional Fourth Amendment jurisprudence, or others who might be caught up in a dragnet. And in each of these instances, the abandonment of such prior suspicion was necessary to serving the goals of each program. While the merits of these programs are debatable, the dynamic that they represent—preventative searches in which prior suspicion is abandoned or limited—will continue. How Fourth Amendment jurisprudence will respond is a crucial issue of our time.

### CONCLUSION

Fourth Amendment law is at a crossroads. We have been heading in this direction for quite some time, and if we had not yet arrived, the pressure that post-9/11 controversies have placed upon our constitutional search and seizure law would have brought us hurtling to that juncture. Regardless of one's Fourth Amendment views about the various federal responses to 9/11, it should be clear to all that a suspicion-based regime is unworkable. Even if one is of the view that suspicion has been more of an absolute Fourth Amendment requirement, rather than merely a proxy (as I contend),<sup>247</sup> that view does not support applying such a requirement now. A suspicion requirement made sense in the Framers' time, when life was mostly rural and agricultural, and there was a small regulatory state. But now that governmental power includes large,

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244. See *supra* note 226.

245. See Arcila, *Fourth Amendment Chutzpah*, *supra* note 13, at 1239 & nn.33-36.

246. See *supra* note 227; see also Arcila, *Fourth Amendment Chutzpah*, *supra* note 13, at 1237-38 & n.30.

247. See *supra* Part II.C.

professionalized police forces, when urban life has created a greater interest in expanded policing and hence search powers, and with the rise of the regulatory state and the increasing interest in preventative searches in a post-9/11 world, a presumptive suspicion requirement must be abandoned because it is simply unworkable.

Another reason for putting the so-called presumptive suspicion requirement behind us is that this ill-advised focus upon suspicion has had unfavorable consequences for our Fourth Amendment civil search jurisprudence. The focus on suspicion, for example, has caused us to concentrate upon the Warrant Clause.<sup>248</sup> But this focus has run us off the tracks, causing us to iterate an improperly formulated rule that is both historically questionable,<sup>249</sup> as well as presently unworkable. Worse, our Fourth Amendment jurisprudence continues to mouth adherence to a presumptive suspicion requirement though the rule is demonstrably wrong and, worse yet, leads to results patently at odds with Fourth Amendment protected interests. Moreover, our focus upon suspicion has not only led us astray in terms of the black letter rules we have developed, it has obscured the urgency with which we need to reform our civil search jurisprudence to adequately protect all Fourth Amendment interests.

We would be better served by a new Fourth Amendment jurisprudence. Because the Fourth Amendment today covers all governmental search activity, it may be an unmanageable task to seek complete coherence.<sup>250</sup> Another such obstacle is that privacy is central to the Fourth Amendment, but research increasingly suggests that it is too unstable a concept on which to found a search and seizure jurisprudence upon which consensus will exist.<sup>251</sup>

The law in other contexts that are similarly, if not more, complex has sought to provide guidance about constitutionality in a man-

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248. This is because, in the Fourth Amendment, only the Warrant Clause contains any reference to suspicion, indirectly through its invocation of probable cause. *See supra* note 50 and accompanying text.

249. *See supra* Part II.B.

250. *See* Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503 (2007) (arguing that no unifying Fourth Amendment theory is possible given the different objectives Fourth Amendment jurisprudence is meant to serve).

251. Alessandro Acquisti et al., *The Impact of Relative Judgements on Concern About Privacy* (working paper to be submitted for publication) (demonstrating that conceptions of privacy are mutable and context-dependent).

ner that perhaps has been more helpful. One example that comes to mind is the jurisprudence regarding presidential power that derives from Justice Jackson's famous concurring opinion in the *Youngstown Steel* case.<sup>252</sup> Perhaps a new search jurisprudence that formulates such broad principles would be helpful in the Fourth Amendment context. Indeed, it might be the best we can do in light of all the varying and competing interests that the Fourth Amendment is asked to serve.

In that spirit, I offer the following guidelines, which would more accurately reflect a proper formulation of Fourth Amendment law than many of our current black letter formulations, such as the presumptive warrant or suspicion requirements.

*Reasonableness:* All governmental searches must be reasonable, in conformance with the Fourth Amendment's Reasonableness Clause. This foundational guideline emphasizes that the Reasonableness Clause, not the Warrant Clause, is the constitutional touchstone. Thus, it overrules all the various iterations of the warrant preference requirement.

*Oversight:* An unconstrained governmental search power is more likely unconstitutional, while a government search power that is constrained through oversight by another governmental branch is more likely constitutional. Oversight possibilities include legislative oversight through statutory or regulatory guidelines, as well as judicial oversight through preclearance, such as through the use of warrants, judicial orders, subpoenas, and, of course, ex post judicial review of challenged searches. This guideline is important because it emphasizes the importance of checks and balances in search and seizure law. Current Fourth Amendment law advances this interest through the presumptive warrant requirement, which is justified

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252. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Justice Jackson's concurring opinion set forth a tripartite framework for judging the constitutionality of presidential actions. He proposed that the legality of the President's action depends upon the specific situation: (1) an action likely would be upheld if the Constitution expressly granted power to the President, or to Congress to authorize it, and the action fell within explicit or implied statutory power; (2) if an action contradicted Congress's express or implied policy, it likely would be invalid, unless based upon a constitutional grant of exclusive power to the President that was beyond Congress's power to limit or regulate; and (3) an action could be upheld in the absence of a congressional grant or denial of authority, based upon independent executive power when concurrent or uncertain power exists; in this category, congressional indifference or acquiescence may be determinative. *Id.* at 635-38 (Jackson, J., concurring).



in part by its consequence of placing a “neutral and detached” magistrate between the government and the search target.<sup>253</sup> This guideline is preferable because, while emphasizing the crucial need of oversight, it allows greater flexibility by recognizing that oversight can exist through mechanisms other than warrants, and because it is grounded in the Reasonableness Clause, while the presumptive warrant requirement is grounded in the Warrant Clause.

*Judicial Preclearance:* *Where practicable, governmental searches should be subject to preclearance by the judiciary, preferably in the form of a warrant, which must always be supported by probable cause in conformance with the Fourth Amendment’s Warrant Clause, or alternatively through a judicial order or judicial subpoena.* This guideline is a corollary to the preceding one. It is included to emphasize that ex ante oversight is preferable to ex post oversight,<sup>254</sup> and that judicial oversight is preferable to legislative oversight. It is justified because preclearance becomes more important as the exclusionary rule is increasingly limited,<sup>255</sup> as has been occurring.<sup>256</sup> Also, this guideline would overrule cases allowing warrants based on less than probable cause, such as *Camara* and others.<sup>257</sup> The guideline is preferable to the current presumptive warrant rule for at least two reasons. First, it is a more honest description of search warrants’ role in Fourth Amendment law than the presumptive warrant requirement.<sup>258</sup> The guideline states that

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253. See *Shadwick v. City of Tampa*, 407 U.S. 345, 354 (1972); *Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

254. Whether ex ante or ex post oversight is preferable, as an abstract matter, has been explored. See Stuntz, *supra* note 24, at 881-98.

255. See *id.* at 910-18, 941-42.

256. See, e.g., *Herring v. United States*, 129 S. Ct. 695, 702-04 (2009) (holding that the exclusionary rule is not available to remedy police recordkeeping error that is merely negligent); *Hudson v. Michigan*, 547 U.S. 586, 590-99 (2006) (ruling that exclusion is not an available remedy for violation of the knock-and-announce rule).

257. Numerous cases allow warrants to issue on less than probable cause. See *supra* notes 34-43 and accompanying text (discussing *Camara*); see also *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 320-21 (1978).

258. The Supreme Court has in the past properly identified this principle, though ironically it did so in a case that famously limited the use of search warrants. See *Terry v. Ohio*, 392 U.S. 1, 20 (1968) (“[T]he police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure....”). Professor Bradley also has correctly identified this principle. Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1471 (1985) (describing one model as “a warrant is always required

warrants are to be used “when practicable.” This is considerably more accurate than claiming they are presumptively required, which leads to the inaccurate inference that warrantless searches are unconstitutional. Second, the guideline emphasizes—again more accurately—that preclearance is not limited to the warrant procedure, but may also occur through alternatives such as judicial orders or subpoenas.

*Suspicion:* A governmental search power that is not subject to ex ante oversight by another governmental branch is more likely unconstitutional if unsupported by some level of suspicion, and more likely constitutional if supported by some level of suspicion. This is a more honest formulation of suspicion’s role in Fourth Amendment jurisprudence than our current presumptive suspicion rule. Under this guideline, suspicion will still play an important role, but the guideline’s flexibility acknowledges that we cannot depend upon suspicion or probable cause to do the brunt of the work in protecting Fourth Amendment interests. Needless to say, difficulty will still exist in identifying the appropriate level of suspicion that should apply in particular contexts.

*Proportionality:* A governmental search power that is more intrusive than necessary is more likely unconstitutional; a governmental search power that is closely proportional to the degree of harm to be avoided or investigated is more likely constitutional. This is not a least restrictive means test, in acknowledgment of the Supreme Court’s hostility to such a test,<sup>259</sup> but the guideline does crucially emphasize that Fourth Amendment jurisprudence *must* prefer some level of proportionality between a search’s intrusiveness and the governmental interest at stake. This principle is implicit in some Fourth Amendment cases, such as *New Jersey v. T.L.O.*<sup>260</sup> and *Terry*

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for every search and seizure when it is practicable to obtain one”).

259. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 663 (1995); *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 629 n.9 (1989); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556 n.12 (1976).

260. 469 U.S. 325, 342 (1985) (holding that a student search “will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction”).

*v. Ohio*,<sup>261</sup> but it is sufficiently fundamental that it needs to be made explicit throughout the entirety of Fourth Amendment law.<sup>262</sup>

*Consent.* *Consent will justify a governmental search only if it was both knowing and voluntary; knowingness can be satisfied by providing advance notice that consent may be refused.* This is a very important guideline in terms of the reality of day-to-day life, as governmental authorities often search pursuant to consent,<sup>263</sup> and considerable evidence suggests that they often engage in pernicious racial targeting while doing so.<sup>264</sup> The guideline would overrule *Schneckloth v. Bustamonte*,<sup>265</sup> in which the Supreme Court held that consent to search need be only voluntary, not knowing.<sup>266</sup> Additionally, it would make *Ohio v. Robinette*,<sup>267</sup> which held that there is no requirement that police inform a subject that he or she is free to leave before a consent search may be deemed voluntary,<sup>268</sup> much less important. Numerous commentators have called for a prophylactic standard under which consent searches would be unconstitutional.<sup>269</sup> This guideline does not go so far. It still allows consent to justify a search, but, crucially, only if the search target is aware of the right to refuse.

261. 392 U.S. 1 (1968) (ruling that a level of suspicion lower than probable cause—namely, reasonable suspicion—justifies an investigatory stop and frisk since it is a limited warrantless intrusion); see also Christopher Slobogin, *Let's Not Bury Terry: A Call for Rejuvenation of the Proportionality Principle*, 72 ST. JOHN'S L. REV. 1053 (1998).

262. See Slobogin, *supra* note 261, at 1054 (advocating for adoption of “the proportionality principle,” under which “[a] search or seizure is reasonable if the strength of its justification is roughly proportionate to the level of intrusion associated with police action,” and clarifying that it should be “extended ... to the entire Fourth Amendment universe”).

263. See Ricardo J. Bascuas, *Fourth Amendment Lessons from the Highway and the Subway: A Principled Approach to Suspicionless Searches*, 38 RUTGERS L.J. 719, 761-69 (2007) (describing the DEA’s “Operation Pipeline,” a program to train state and local police to leverage traffic stops by seeking consent to search); Robert H. Whorf, “Coercive Ambiguity” in the Routine Traffic Stop Turned Consent Search, 30 SUFFOLK U. L. REV. 379, 389-90 (1997); Thomas, *supra* note 10, at 1505-06; see also *supra* note 235 (noting that the most common reason for contact with police is a traffic stop).

264. See Timothy P. O’Neill, *Vagrants in Volvos: Ending Pretextual Traffic Stops and Consent Searches of Vehicles in Illinois*, 40 LOY. U. CHI. L.J. 745, 747, 773 (2009).

265. 412 U.S. 218 (1973).

266. *Id.* at 227.

267. 519 U.S. 33 (1996).

268. *Id.* at 35, 39-40.

269. *E.g.*, Christo Lassiter, *Eliminating Consent from the Lexicon of Traffic Stop Interrogations*, 27 CAP. U. L. REV. 79, 82-83 (1998); Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 258-71 (2001); Thomas, *supra* note 10, at 1505-13.

As I hope is clear from these guidelines, my advocacy for a Reasonableness Clause approach to the Fourth Amendment, and my criticisms of the presumptive warrant and suspicion requirements, are not meant to argue for the replacement of current Fourth Amendment jurisprudence with one that gives priority to governmental or law enforcement priorities. To the contrary, my guidelines are meant to suggest that, in reevaluating our approach to the Fourth Amendment, its core concepts—limitation of governmental discretion, restrictions on governmental power for the protection of individuals—should continue to guide us.

In the new Fourth Amendment jurisprudence I envision, warrants will continue to play a role, as will suspicion. But other important and useful concepts will also explicitly take their place in the jurisprudence, with the benefit of forcing courts to consider the full panoply of protected Fourth Amendment interests. A large problem with current Fourth Amendment law is that it veers wildly between two opposing poles—the strict application of the presumptive warrant or suspicion requirements on one hand, and effectively unconstrained balancing through a totality-of-the-circumstances approach in the other. The guidelines suggested above serve as one possible antidote to this bipolar jurisprudence by offering a middle road of guided discretion.

Reformulating our Fourth Amendment jurisprudence will be a daunting task. No doubt, even my broad proposals above will be subject to vociferous criticisms from many quarters. One can certainly question whether the effort is worthwhile. Though I have identified above some areas of Fourth Amendment law that would change, it may well be that courts applying such guidelines would keep muddling about in their Fourth Amendment decisions. There can be no guarantee of greater Fourth Amendment coherence if such guidelines are followed, at least in terms of case results. But hopefully a revamped Fourth Amendment would at least result in greater coherence in the doctrine by which we order our affairs and formulate our expectations about the legitimate scope of the governmental search authority to which we are subjected.

