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2010

## Suspicion and the Protection of Fourth Amendment Values

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### Recommended Citation

43 Tex. Tech. L. Rev. 237 (2010)

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# SUSPICION AND THE PROTECTION OF FOURTH AMENDMENT VALUES

*Fabio Arcila, Jr.*<sup>†</sup>

Suspicion is perhaps the core foundational principle through which we seek to protect and vindicate Fourth Amendment values. Fourth Amendment law could not be clearer, and repeats over and over again, that it proceeds from a presumptive suspicion requirement.<sup>1</sup> We are all so familiar with that proposition that we can easily incant it: a governmental search is presumptively unconstitutional unless supported by some threshold of prior suspicion.<sup>2</sup> Though suspicion is thus a hallmark of Fourth Amendment black letter law, I come to critique it. I critique it because the presumptive suspicion requirement's provenance is historically questionable, both as a matter of the common law and in light of federal statutory search law during the Framers' era. Even apart from the historical case, I critique it because it is demonstrably wrong in terms of contemporary constitutionalism. Fourth Amendment jurisprudence is not honest about suspicion's role in protecting Fourth Amendment values, and our failure to look critically at suspicion has prevented us from doing a better job of protecting those values. It can no longer do the heavy lifting we have asked it to do, and it is time to look elsewhere to develop alternative methods for protecting Fourth Amendment interests.

Suspicion worked well in the Framers' world, but that is a world very different from our own.<sup>3</sup> The Framers lived in a largely rural, agrarian world with a limited federal government and a limited administrative state.<sup>4</sup> Governmental search power existed under the common law for stolen goods,<sup>5</sup> and under statutory law to enforce revenue statutes, primarily customs duties<sup>6</sup> and, to a lesser extent excise taxes.<sup>7</sup> Requirements of

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† Associate Professor, Touro Law Center. Many thanks to Professor Arnold Loewy for the opportunity to present at the 4th Annual Texas Tech Criminal Law Symposium, which was dedicated to the Fourth Amendment.

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

2. *See Edmond*, 531 U.S. at 37; *Miller*, 520 U.S. at 313.

3. Fabio Arcila, Jr., *The Death of Suspicion*, 51 WM. & MARY L. REV. 1275, 1326-35 (2010) [hereinafter Arcila, *Death of Suspicion*].

4. *Id.* at 1327-28, 1331-32.

5. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 645 (1999) [hereinafter Davies, *Original Fourth Amendment*].

6. *E.g.*, 1799 Collection Act, Act of Mar. 2, 1799, ch. 22, § 68, 1 Stat. 627, 677-78; 1790 Collection Act, Act of Aug. 4, 1790, ch. 35, § 48, 1 Stat. 145, 170; 1789 Collection Act, Act of July 31, 1789, ch. 5, § 24, 1 Stat. 29, 43.

suspicion and probable cause were hallmarks of the common-law model and often requirements under revenue statutes.<sup>8</sup>

This background has led to our adoption of a presumptive suspicion requirement. But that requirement is of questionable validity under this historical record because it does not cover the totality of our experience. Even under the common law there are abundant reasons to question the protective role that suspicion really played. For example, there are many reasons to believe that prior suspicion often may not have been enforced *ex ante* through judicial sentryship prior to issuing search warrants.<sup>9</sup> And there are many reasons to question the efficacy of having enforced prior suspicion *ex post*,<sup>10</sup> either through a jury verdict in a common-law trespass action<sup>11</sup> or through judicial fiat in most civil search cases.<sup>12</sup> Changes in language also provide reason for questioning suspicion's effectiveness in protecting Fourth Amendment values. Probable cause was an important search concept to the Framers, but clearly it was also an immature concept that could be satisfied under terms that would never be accepted today, such as living an idle or vagrant life or merely being a nightwalker.<sup>13</sup>

Importantly, even if I am mistaken in my historical analysis, my critique of the presumptive suspicion requirement remains valid as a matter of contemporary constitutionalism. This is because suspicion has been under assault for decades, and we have now reached a point when it no longer works and is demonstrably wrong.<sup>14</sup>

Three developments have been putting pressure on the presumptive suspicion requirement: the move away from a rural, agrarian life to an urban life infused with rapidly evolving technology, especially in the surveillance sphere;<sup>15</sup> the rise of the regulatory state;<sup>16</sup> and post-9/11 security concerns.<sup>17</sup> Each of these developments has created both pressures and increased opportunities for preventative searches, many, if not most, of which cannot satisfy a prior suspicion requirement.<sup>18</sup>

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7. E.g., Hamilton's 1791 Excise Act, Act of Mar. 3, 1791, ch. 15, §§ 29, 32, 1 Stat. 199, 206, 207.

8. See Arcila, *Death of Suspicion*, *supra* note 3, at 1289 n.30, 1297, 1303 & n.92.

9. 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, 24-54 (2007) [hereinafter Arcila, *In the Trenches*].

10. See Arcila, *Death of Suspicion*, *supra* note 3, at 1313.

11. Fabio Arcila, Jr., *The Framers' Search Power: The Misunderstood Statutory History of Suspicion & Probable Cause*, 50 B.C. L. REV. 363, 371, 376-78 (2009) [hereinafter Arcila, *The Framers' Search Power*].

12. *Id.* at 392-413.

13. Arcila, *Death of Suspicion*, *supra* note 3, at 1314.

14. *Id.* at 1326-35.

15. *Id.* at 1327-31.

16. *Id.* at 1331-34.

17. *Id.* at 1334-35.

18. See *id.* at 1327-35.

Our lack of recognition of this changed paradigm goes a long way to explaining the widespread dissatisfaction with the state of Fourth Amendment law today. On the criminal side, the move toward an urban existence led to the establishment of a professionalized police force to protect the public, which, as Professor Davies has shown, resulted in a desire to expand their discretion.<sup>19</sup> This expanded discretion has not happily coexisted with a presumptive suspicion requirement, leading to a situation in which the reality is that the vast majority of criminal searches are suspicionless, yet are justified on other grounds, such as because they are plain view searches,<sup>20</sup> consent searches,<sup>21</sup> or simply (and outrageously) declared not to be searches at all though the dynamic is one in which the government was purposefully snooping for evidence of criminal conduct.<sup>22</sup> Even on the criminal side, where the presumptive suspicion requirement is most stringently applied, it is much more accurate to say that a small minority of criminal searches must be supported by some threshold of prior suspicion than to say that a search is presumptively unconstitutional unless supported by a threshold of prior suspicion.

On the civil side, though our Fourth Amendment jurisprudence continues to mouth the presumptive suspicion requirement,<sup>23</sup> it cannot do so with any credibility given the various doctrines that avoid it, from the special needs principle<sup>24</sup> to a generalized reasonableness approach,<sup>25</sup> all of which lead to the application of an unconstrained balancing test.<sup>26</sup> We arrived at a balancing test because of the need to allow flexibility in a

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19. *Id.* at 1326-27 & n.212.

20. *Texas v. Brown*, 460 U.S. 730, 738 n.4 (1983).

21. *See, e.g., United States v. Drayton*, 536 U.S. 194 (2002) (holding that police may rely upon consent to search on bus without advising about right to non-cooperation); *Illinois v. Rodriguez*, 497 U.S. 177, 186-89 (1990) (ruling that police may rely upon apparent authority to grant consent). The desire to allow police discretion was certainly a motivating factor in the Supreme Court's ruling that consent needs to be voluntary, but not knowing. *See Schneekloth v. Bustamonte*, 412 U.S. 218 (1973).

22. *See Illinois v. Caballes*, 543 U.S. 405, 408-09 (2005) (concluding that a police dog sniff during traffic stop is not a search); *United States v. Jacobsen*, 466 U.S. 109, 123-24 (1984) (ruling that a DEA field test of powder found in damaged Federal Express package was not a search); *United States v. Place*, 462 U.S. 696, 706-07 (1983) (declaring that a DEA dog sniff of seized luggage at airport is not a search).

23. *See, e.g., Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 624 (1989) (discussing special needs); *New Jersey v. T.L.O.*, 469 U.S. 320, 340 (1985).

24. *See, e.g., Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 829 (2002); *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665-66 (1989).

25. *See, e.g., Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2639 (2009); *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 449-50 (1990).

26. *See Sitz*, 496 U.S. at 449-50 (generalized reasonableness case); *Skinner*, 489 U.S. at 619-20 (special needs case); *see also* Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173, 1178-84, 1187-1207 (1988) (explaining that the Supreme Court is increasingly applying the balancing test, and critiquing that test); Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 44-50 (1988) (discussing Fourth Amendment balancing).

jurisprudence that has to grapple with constitutional challenges in contexts as varied as restaurant health inspections, student searches in public schools, and warrantless wiretapping—in other words, in myriad administrative contexts and on pressing national security concerns.<sup>27</sup> In light of this need for flexibility, demanding adherence to a presumptive suspicion requirement is unrealistic. Many, if not most, of these sorts of civil searches could not occur if a prior suspicion requirement applied, and thus the relevant administrative or security goals could not be achieved either, no matter how laudable or important.

The good news is that reducing our reliance on suspicion can actually help us do a better job in protecting Fourth Amendment values. This is because, though suspicion is very useful in protecting certain Fourth Amendment values, it does not adequately protect all of them. Take, for instance, the Fourth Amendment values of limiting governmental discretion, protecting privacy and dignitary interests, minimizing intrusiveness, and assuring a compelling and legitimate governmental need for a search. Suspicion works nicely to limit governmental discretion by forcing the government to articulate why it should be allowed to search. Suspicion is also useful in protecting privacy, though its usefulness here is more limited given the many aspects of privacy that the Fourth Amendment protects. A good example is dignitary interests. Part of what makes privacy important to us is that it can protect our dignitary interests. Suspicion can often protect privacy, and when it does so, it can protect dignitary interests as well. But, it does not protect all the privacy and dignitary interests that are important to us.

Consider, for example, the hypothetical of a strip search of an elementary school student for an aspirin, to enforce the school's zero-tolerance policy for drugs (which includes over-the-counter drugs, as is common and was recently exemplified in *Safford Unified School District No. 1 v. Redding*).<sup>28</sup> No matter how adequate the suspicion, the Fourth Amendment should condemn such a search because suspicion does not protect all of the Fourth Amendment values that are important. In this hypothetical, the presence of suspicion did not adequately protect the child's privacy and did nothing to protect her dignitary interests. Suspicion also did very little, if anything, to minimize the intrusiveness of the search or assure a compelling and legitimate governmental need. Rather, some concept other than suspicion would have to be applied to more directly and adequately protect those values.

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27. See Arcila, *Death of Suspicion*, *supra* note 3, at 1329-35.

28. See *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2639-40 (2009) ("In this case, the school's policies strictly prohibit the nonmedical use, possession, or sale of any drug on school grounds, including any prescription or over-the-counter drug, except those for which permission to use in school has been granted pursuant to Board policy.") (internal quotations and citation omitted).

Though I critique suspicion, I should be clear that I am not calling for its abandonment. To the contrary, I believe suspicion must continue to play an important role in Fourth Amendment jurisprudence.<sup>29</sup> My point is only that the role suspicion can effectively play in search and seizure law is not commensurate with its rhetorical role in that jurisprudence. Suspicion will continue to be an important means of protecting Fourth Amendment values in certain types of cases, primarily in certain types of criminal searches. But protected Fourth Amendment values are at stake in many other contexts, not just other types of criminal searches, but also in all civil searches, and in these other contexts suspicion will have a limited protective role.

Thus, decreasing our reliance on suspicion could have the salutary effect of broadening our thinking, both about the various Fourth Amendment values we seek to protect and about how to protect them.

One suggestion I have made elsewhere is to emphasize a structural approach to the Fourth Amendment, by which I mean revising our Fourth Amendment black letter law to accentuate a system of checks and balances through the separation of powers.<sup>30</sup> We could accomplish this by favoring governmental searches that are subject to oversight by another governmental branch, preferably through judicial—rather than merely legislative—oversight.<sup>31</sup>

Other ideas I have proposed are to more directly and explicitly embrace concepts that limit governmental discretion, such as adopting a proportionality principle throughout all Fourth Amendment jurisprudence.<sup>32</sup> Such a proportionality principle would be extremely useful in the public school strip search hypothetical. Another option is to limit consent to instances in which it is not only voluntary, but also knowing, which would require overruling *Schneekloth v. Bustamonte*.<sup>33</sup>

These reforms hold the potential for being a powerful means of limiting governmental search discretion, a key Fourth Amendment value, but one that Supreme Court case law is increasingly subverting. On the criminal side, cases like *Whren v. United States*, a traffic stop case, and *Illinois v. Caballes*, a dog sniff case, defer to executive discretion in implementing the search power.<sup>34</sup> On the civil side, deferential judicial review is rampant, such as in *Michigan v. Sitz*, the sobriety checkpoint case, or in the special needs school drug-testing cases such as *Vernonia School District 47J v. Acton* and *Board of Education of Independent School*

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29. See Arcila, *Death of Suspicion*, *supra* note 3, at 1339 (suggesting a suspicion guideline that more accurately reflects the concept's proper role in Fourth Amendment jurisprudence compared to the presumptive suspicion requirement).

30. See *id.* at 1336-37.

31. See *id.* at 1337-39.

32. See *id.* at 1339-40.

33. See *id.* at 1340 (critiquing *Schneck v. Bustamonte*, 412 U.S. 218 (1973)).

34. See *Illinois v. Caballes*, 543 U.S. 405 (2005); *Whren v. United States*, 517 U.S. 806 (1996).

*District No. 92 of Pottawatomie County v. Earls*.<sup>35</sup> This judicial tendency towards extending deference in search cases has been noted in prior scholarship, both my own<sup>36</sup> and of colleagues,<sup>37</sup> and represents perhaps the most pernicious threat to Fourth Amendment values. In these sorts of cases the Supreme Court majority is reluctant to engage in aggressive judicial review, preferring to extend the soft glove of deferential review, sometimes out of misguided respect for the search authority's expertise or ostensibly out of judicial restraint in favor of an essentially majoritarian Fourth Amendment.

But Fourth Amendment law is not administrative law, nor should it be. Neither the history supporting our adoption of the Fourth Amendment, nor the dynamics of each jurisprudence, supports extending into Fourth Amendment law the sort of deferential review that is the hallmark of administrative law.<sup>38</sup> The agency expertise that helps justify deferential review to agency action does not exist in any comparable way in the Fourth Amendment context.<sup>39</sup> On the civil side, the agencies or quasi-agencies, such as public schools, that conduct governmental searches may have expertise of some sort, such as enforcing sanitary standards or assuring workplace safety or educating students, but that does not translate into expertise about the appropriate scope and constraints on governmental search authority.<sup>40</sup> On the criminal side, the expertise justification fares better after the establishment of a professionalized police force, but does not, either by itself or in conjunction with a majoritarian rationale, justify deferential review in light of the Fourth Amendment's history and purposes.

Fourth Amendment history is marked by hostility to executive discretion amongst the populace, the courts, or both, such as was aimed at writs of assistance in the colonies<sup>41</sup> or against general warrants in the *Wilkes* cases from Great Britain.<sup>42</sup> And the Fourth Amendment itself is as anti-majoritarian as any other Bill of Rights provision,<sup>43</sup> if not more so, with its clear limitations on, and presupposition of an autonomous zone against,

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35. See *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822 (2002); *Vernonia Sch. Dist. 47J v. Action*, 515 U.S. 646 (1995); *Michigan v. Sitz*, 496 U.S. 444 (1990).

36. See Fabio Arcila, Jr., *Special Needs & Special Deference: Suspicionless Civil Searches in the Modern Regulatory State*, 56 ADMIN. L. REV. 1223, 1247-52 (2004) [hereinafter Arcila, *Special Needs*].

37. Christopher Slobogin, *Government Dragnets*, 73 LAW & CONTEMP. PROBS. (forthcoming 2010).

38. See Arcila, *Special Needs*, *supra* note 36, at 1253-59.

39. See *id.* at 1253-57.

40. See *id.* at 1247-49, 1253-57 (exploring separation of powers dimension of Fourth Amendment cases, in which the judiciary often extends deferential review consistent with a majoritarian approach, premised in part upon agency expertise).

41. See Arcila, *In the Trenches*, *supra* note 9, at 10-12.

42. See *id.*, at 14-15 n.41.

43. See Arcila, *Special Needs*, *supra* note 36, at 1260-61 (discussing *Chandler v. Miller*, 520 U.S. 305 (1997), as exemplifying a Supreme Court reluctance to interpret the Fourth Amendment along wholly majoritarian lines).

executive search authority.<sup>44</sup> This is not to deny that a deferential or majoritarian Fourth Amendment jurisprudence could be developed, or that a coherent theory could be articulated to justify it, but only to emphasize that to follow such a path would require a breathtaking departure from Fourth Amendment history and the Framers' intent in adopting it.<sup>45</sup>

Certainly, devoting resources to considering the values that the Fourth Amendment protects is a valuable endeavor, but I doubt that discussion can be meaningfully separated from the interpretative means by which the Fourth Amendment protects those values. To date, our Fourth Amendment jurisprudence has continued to insist that suspicion is a primary means of protecting those values. But the time has come to look for alternatives to suspicion in order to assure that Fourth Amendment values continue to be adequately protected.

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44. Arcila, *In the Trenches*, *supra* note 9, at 3 n.5 (noting that, during their confirmation hearings for a seat on the Supreme Court, both Chief Justice Roberts and Justice Alito, though "superheroes to the conservative movement," cited the Fourth Amendment "as one constitutional provision evincing an individual privacy right").

45. See Arcila, *Special Needs*, *supra* note 36, at 1255-56.



