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## What Is an Unreasonable Search?

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### INTRODUCTION

Perhaps the greatest puzzle of the Fourth Amendment—and indeed in all American law more broadly—is its definition of reasonableness. The Fourth Amendment guarantees our right to be secure “against unreasonable searches and seizures” without clearly elaborating on what such searches and seizures are.<sup>1</sup> The laconic

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<sup>1</sup> The full text of the Fourth Amendment is as follows: “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 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.” U.S. CONST. amend. IV. The first clause of the

construction of this clause could simultaneously suggest a lack of interest among the Framers in adding this particular right to the Constitution,<sup>2</sup> and their abiding belief that the right is so fundamental as to be already universally known.<sup>3</sup> We moderns, on the other hand, find the Fourth Amendment to be both intensely compelling and confounding.

Since its earliest decisions on the Fourth Amendment, the Supreme Court has used reasonableness as the overriding standard for assessing government searches and seizures. The Court's first case to consider the Amendment's substance was *Ex parte Jackson* (1877), involving a habeas petition that questioned the government's authority to open sealed letters and packages that had been deposited in the mail.<sup>4</sup> In a brief, unanimous opinion, the Court held:

The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household.<sup>5</sup>

As the foregoing passage shows, the Court used the entirety of the Fourth Amendment to outline the scope of the government's burdens in undertaking a search or seizure. It determined that the reasonableness clause of the Amendment required the government to obtain a warrant whereas the warrant clause set forth the conditions that needed to be satisfied for that warrant to be issued. In this way, the Court subsumed the warrant under reasonableness by treating both the absence of a warrant and the presence of a flawed warrant as grounds for finding a search or seizure unreasonable.

Nine years later, the Court clarified that the Fourth Amendment's reasonableness requirement demanded even more than a warrant

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Amendment, ending with "shall not be violated," is often referred to as the "reasonableness clause," while the remainder of the Amendment is called the "warrant clause."

<sup>2</sup> When the motion to include a Bill of Rights was raised at the 1787 Constitutional Convention, it was unanimously voted down. See JILL LEPORE, *THESE TRUTHS: A HISTORY OF THE UNITED STATES* 127 (2018). Some who opposed the Bill of Rights argued it was not only unnecessary but potentially harmful to robust individual rights. See NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 90 (1970).

<sup>3</sup> Most of the newly formed states had already included a search and seizure provision in their Declaration of Rights. See LEPORE, *supra* note 2.

<sup>4</sup> *Ex parte Jackson*, 96 U.S. 727 (1877).

<sup>5</sup> *Id.* at 733.

that satisfied the warrant clause. In *Boyd v. United States* (1886), the Court struck down the government's use of a court order to obtain the defendant's incriminating papers.<sup>6</sup> Widely recognized as the Supreme Court's first in-depth analysis of the Fourth Amendment, the *Boyd* case focused on the reasonableness of the paper search as the "principal question" to be resolved.<sup>7</sup> In doing so, the Court read the reasonableness clause to require not only a warrant but also conformity with either long usage or the understanding of reasonable searches and seizures at the time of the Amendment's adoption.<sup>8</sup> Observing that the laws and customs in England and America limited warrant-based searches and seizures to items such as stolen property and uncustomed goods—that is, cases where the government was already "entitled to the possession of the property"—the Court held that the search for the defendant's papers fell outside the bounds of reasonableness.<sup>9</sup>

Accordingly, *Boyd* established a broader and more thoroughgoing inquiry about reasonableness that extended beyond the warrant—the only criterion specified in the Fourth Amendment—by requiring the government to also demonstrate a property interest that would serve as a counterweight to the individual's stated right to be secure. While *Boyd*'s approach initially resulted in a more protective Fourth Amendment regime, subsequent Court cases largely tended to scale back the right by recognizing other government interests that may be used in this analysis. For example, in *Carroll v. United States* (1925), the Court dispensed with the warrant requirement for car searches based on Congress's conclusion that a warrant requirement would make it impossible for federal agents to enforce prohibition laws against "rum running automobiles" that could easily flee the jurisdiction.<sup>10</sup> The *Carroll* Court determined that, in light of law enforcement needs in this context, warrantless car searches were not unreasonable.<sup>11</sup> The case of *Terry v. Ohio* (1968) is another often-cited example of interest balancing that weakened individual rights.<sup>12</sup> By weighing the government's emergent need to prevent crime and

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<sup>6</sup> *Boyd v. United States*, 116 U.S. 616 (1886).

<sup>7</sup> *Id.* at 622.

<sup>8</sup> *Id.* at 623–24. The Court was guided by two maxims in the interpretation of the Amendment's indeterminate language: *consuetudo est optimus interpres legum* (custom is the best expounder of law) and *contemporanea expositio est optima et fortissima in lege* (a contemporaneous exposition is the best and strongest in the law). *See id.* at 622.

<sup>9</sup> *Id.* at 623.

<sup>10</sup> *Carroll v. United States*, 267 U.S. 132, 146 (1925).

<sup>11</sup> *Id.* at 146–47.

<sup>12</sup> *Terry v. Ohio*, 392 U.S. 1 (1968).

preserve officer safety against the lesser intrusions of a stop and frisk, the *Terry* Court determined that reasonableness demanded neither a warrant nor probable cause.<sup>13</sup>

These cases, among others,<sup>14</sup> have been viewed by many scholars as key examples of a jurisprudence of reasonableness that is “general,”<sup>15</sup> “open-ended,”<sup>16</sup> “inconsistent,”<sup>17</sup> and “danger[ous]”<sup>18</sup>—critiques aimed at highlighting both a lack of discipline in the Court’s reasonableness analysis as well as the contraction of Fourth Amendment protections resulting from this approach. Unfortunately, scholarly examinations have similarly failed to yield clear answers on how to faithfully evaluate the reasonableness of searches and seizures or how to determine the scope of the protection the Amendment actually promises.

The problem is not so much that Fourth Amendment reasonableness lacks meaning; on the contrary, it bears too much. The history of searches and seizures leading up to the adoption of the Fourth Amendment shows that there were plentiful grounds for objection by the English and colonial targets of such government intrusions. They complained about violence, fright, destruction of property, disturbance of tranquility, the rudeness and impudence of searchers, loss of class or status privileges, and exposure of personal and business secrets.<sup>19</sup> They sought protection for themselves, family members, homes, businesses, and ships.<sup>20</sup> There was also no uniformity when it came to warrants—not in terms of their content, form, source, or purpose.<sup>21</sup> Moreover,

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<sup>13</sup> *Id.* at 30–31.

<sup>14</sup> *See, e.g.,* *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931) (“There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances.”); *United States v. Rabinowitz*, 339 U.S. 56, 63 (1950) (“The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case.”).

<sup>15</sup> Silas J. Wasserstrom, *The Court’s Turn Toward a General Reasonableness Interpretation of the Fourth Amendment*, 27 AM. CRIM. L. REV. 119, 129 (1989).

<sup>16</sup> Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 732 (1999).

<sup>17</sup> Thomas K. Clancy, *The Fourth Amendment’s Concept of Reasonableness*, 2004 UTAH L. REV. 977, 1023.

<sup>18</sup> Wasserstrom, *supra* note 15, at 148.

<sup>19</sup> *See* Janine Young Kim, *On the Broadness of the Fourth Amendment*, 74 SMU L. REV. 3, 26–27 (2021).

<sup>20</sup> *See id.* at 16–19; *see also* WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING* 602–1791, at 741 (2009) (observing that the reference to “place” in the Fourth Amendment was intentionally broad and could cover any “enclosure”).

<sup>21</sup> Warrants could be general or specific, or confused with a “writ of assistance,” and may or may not include the name of the person suspected, the place to be searched, the

warrantless searches were not uncommon.<sup>22</sup> Given such an eclectic system, it is no wonder that trying to identify what a reasonable search was thought to be in the eighteenth century has been a challenge.

The text of the Amendment also provides little guidance. Nowhere does it define reasonableness, and the term is not used anywhere else in the Constitution or the Bill of Rights. The Amendment's curious syntax, with its two clauses separated by “, and”, has obscured more than elucidated its meaning. While some argue that the first clause establishes a legal standard of reasonableness that governs all searches and seizures, others claim that it is merely a nonoperative introductory statement.<sup>23</sup> There is also dissensus on the role the warrant plays in the Fourth Amendment scheme, with some believing there is a warrant requirement (or at least a warrant preference) and others finding the Framers actually disfavored warrants.<sup>24</sup> Although the Supreme Court incorporated the warrant into reasonableness from the start, the language of the Amendment does not necessitate that reading. And the Court eventually rejected the warrant requirement, though it has continued to express a warrant preference notwithstanding a plethora of decisions to the contrary.<sup>25</sup>

Despite these difficulties and contradictions, a handful of legal scholars have attempted to specify the original meaning of Fourth Amendment reasonableness. Of particular note is the analysis offered by Thomas Davies, who has argued that the phrase “unreasonable searches and seizures” derives from Coke's use of the phrase “against common right and reason” in *Bonham's Case* (1610).<sup>26</sup> Observing that, for Coke, anything “against reason” was contrary to the common law, Davies concludes that the Framers intended to proscribe all searches

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offense committed, items to be seized, etc. They were issued by multiple entities such as courts, justices of the peace, colonial governors, the Crown, and members of the royal cabinet, and covered a wide-ranging set of concerns such as religious conformity, political dissent, vagrancy, customs, stolen property, regulation of currency, and methods of punishment.

<sup>22</sup> See, e.g., CUDDIHY, *supra* note 20, at 194–226 (describing various types of warrantless searches in the colonies before 1760).

<sup>23</sup> Compare, e.g., LASSON, *supra* note 2, at 103, with Davies, *supra* note 16, at 679–83.

<sup>24</sup> Compare, e.g., Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925, 937–38 (1997), with Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 774–75 (1994).

<sup>25</sup> See *California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring) (observing that the warrant requirement had become “so riddled with exceptions that it was basically unrecognizable”).

<sup>26</sup> Davies, *supra* note 16, at 555 n.5 (citing *Bonham's Case* (1610) 77 Eng. Rep. 638 (CP)).

and seizures that were illegal under the common law, which he then narrows to a bar against general warrants only.<sup>27</sup> Others, like Laura Donohue, agree with Davies on this definition of reasonableness but not its implication; Donohue has determined instead that the prohibition against unreasonable searches encompassed not only general warrant-backed searches but warrantless ones as well.<sup>28</sup> In contrast, David Sklansky has argued that eighteenth-century lawyers no longer used “reasonable” and “unreasonable” in a Cokean sense. Based on dictionaries and other significant writings of the time, Sklansky asserts that the ordinary and modern meaning of moderation, sound judgment, and appropriateness had already become predominant by the time of the framing.<sup>29</sup> Thus, unlike Davies who gave reasonableness strict and specified content, Sklansky’s analysis appears to concede that the Court’s broad balancing approach passes muster even under originalist scrutiny.

The historical study in this Article tends toward Sklansky’s position—there is little evidence to support a single, substantive definition of Fourth Amendment reasonableness. By the late eighteenth century, reasonableness was used in multiple ways in multiple settings, and could therefore have led to diverse and divergent readings among those who drafted and approved the Fourth Amendment.<sup>30</sup> Varied negative experiences with certain English practices, as well as assorted beliefs and assumptions about the nature and scope of a person’s rights vis-à-vis government, would have almost certainly colored a colonist’s view on what constitutes a reasonable search and seizure. Such

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<sup>27</sup> See *id.* at 578.

<sup>28</sup> Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1192–93 (2016); cf. Davies, *supra* note 16, at 551–52 (explaining that the Framers were unconcerned with warrantless searches and seizures). There is less disagreement here than one supposes at first glance. Davies argues that the lack of attention to warrantless searches was because they were rare; thus, the Framers believed they could effectively control *all* searches if they controlled warrants. See *id.* at 552.

<sup>29</sup> David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1780–81 (2000). In fact, Coke himself appears to have linked the law’s reason to “what is useful and necessary.” See JAMES R. STONER, JR., *COMMON LAW AND LIBERAL THEORY: COKE, HOBBS, AND THE ORIGINS OF AMERICAN CONSTITUTIONALISM* 18 (1992) (citing to the maxim *lex est ratio summa, quae jubet quae sunt utilia et necessaria, et contra prohibet* (law is the perfection of reason, which commands what is useful and necessary, and forbids the contrary)).

<sup>30</sup> See James Q. Whitman, *Why Did the Revolutionary Lawyers Confuse Custom and Reason?*, 58 U. CHI. L. REV. 1321, 1366–68 (1991).

experiences, beliefs, and assumptions are impossible to capture precisely today—more than 200 years hence.<sup>31</sup>

That said, there are some sources that are generally accepted as having a major influence on the development of the Fourth Amendment, such as James Otis's case against the writs of assistance (1761) and Lord Camden's opinion in *Entick v. Carrington* (1765).<sup>32</sup> Certain founding fathers, like John Adams and James Madison, also clearly had an outsized role in crafting the language of, and informing the intent behind, the Amendment.<sup>33</sup> These, along with some lesser-known or lesser-studied sources will be (re)considered below in Part I—not with an eye toward discovering a single, unique definition of reasonableness but with the aim of discerning some relevant guideposts that can inform our reasonableness analysis. In other words, the goal is to see if history can at least point us to a happy medium, acknowledging that Fourth Amendment reasonableness is ultimately indeterminate but, at the same time, recognizing that it is not and cannot be a free-for-all if the right is to be taken seriously.

In Part II, I examine four concerns that emerge from the historical materials that can serve to further guide our understanding of Fourth Amendment reasonableness. The four I discuss—(1) abuse of power, (2) public good, (3) inequality/bias, and (4) absurdity—are not necessarily the most obvious criteria of reasonableness from this study. The few truly obvious ones—like the ban against general searches and what good warrants look like—are already operative and need not be rehashed. Instead, I have chosen to highlight those that I believe are the most interesting and relevant in light of where the law is today. Ultimately, this study reveals the overarching lesson that reasonableness was not narrowly conceived and that it had a powerful effect on the law. Accordingly, this Article is not directed toward condensing and thereby diminishing historical reasonableness, but

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<sup>31</sup> Indeed, according to Whitman, reasonableness was a confused concept even back then. *Id.*

<sup>32</sup> *Entick v. Carrington* (1765) 95 Eng. Rep. 807 (KB). Discussions on the Framing Era history of the Fourth Amendment often focus exclusively on these two cases. See, e.g., Timothy Casey, *Electronic Surveillance and the Right to be Secure*, 41 U.C. DAVIS L. REV. 977, 983 (2008); Jeffrey Bellin, *Fourth Amendment Textualism*, 118 MICH. L. REV. 233, 255–56 (2019).

<sup>33</sup> As will be described below, John Adams's extraordinary influence on the Fourth Amendment stems both from his writings about the *Writs of Assistance Case* and his authorship of the Massachusetts Declaration of Rights, which served as a model to the Fourth Amendment. See *infra* text accompanying notes 43, 46–50, 52. As for James Madison, he was the first author of the Bill of Rights and its champion at Congress. See *infra* text accompanying notes 34–36.

rather toward learning all that it embraced. The indeterminacy of reasonableness has always meant that choices needed to be made; I offer some unconventional but historically grounded options here.

## I

### THE HISTORICAL MATERIALS

#### *A. The Text and Its Adoption*

As I mentioned above, the Fourth Amendment's text on its own yields little insight into the meaning of "unreasonable searches and seizures." It is helpful, however, to examine how the wording of the Amendment came about as it provides some clues about the Framers' intent. The story of the Fourth Amendment's adoption has been told many times before, but it is important, fascinating, and fairly short—making it eminently worth retelling.

The Bill of Rights was sponsored by James Madison who, according to legal historian Nelson B. Lasson, recognized its importance in preserving individual rights but also had a relatively moderate view of the threat posed by the new federal government.<sup>34</sup> Accordingly, Madison's overarching approach toward the amendments appears to have been simultaneously urgent and anodyne. Once elected to Congress, Madison quickly and persistently brought up the Bill of Rights and repeatedly expressed his intention to make them as uncontroversial as possible to ensure swift passage.<sup>35</sup> Madison's proposed text for what would become the Fourth Amendment was as follows:

The rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.<sup>36</sup>

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<sup>34</sup> LASSON, *supra* note 2, at 98.

<sup>35</sup> *See id.* at 98–100, 100 n.75; PHILLIP A. HUBBART, MAKING SENSE OF SEARCH AND SEIZURE LAW: A FOURTH AMENDMENT HANDBOOK 68 (2005); *see also* From James Madison to George Nicholas, 5 July 1789, NAT'L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/01-12-02-0175> [<https://perma.cc/PLM7-9H4U>]; From James Madison to Thomas Jefferson, 13 June 1789, NAT'L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/01-12-02-0133> [<https://perma.cc/D2Y4-R8ZE>].

<sup>36</sup> *See* LASSON, *supra* note 2, at 100 n.77.



As Lasson and others have noted, this original draft was aimed chiefly at curbing general warrants.<sup>37</sup> During consideration by the House, Egbert Benson, a lawyer and representative from New York, objected to the Amendment's narrow scope, arguing that "it was not sufficient" and advancing instead the two-clause structure that we have today.<sup>38</sup> At the time, the House rejected Benson's suggestion, but when the Bill of Rights went to a Committee of Three to be arranged in a final form for a vote, that Committee (of which Benson was chair) made the alteration anyway.<sup>39</sup> The Senate proceeded to debate and modify the Bill of Rights, but no further changes were made to the search and seizure amendment. Nor did the House act to reinstitute the earlier language. It was in this presumably unorthodox way that the Fourth Amendment was eventually approved by both chambers and ratified by the states.

Unsurprisingly, Benson's complaint about sufficiency has lent support to the view that the Fourth Amendment extends beyond the ban against general warrants to establish a right against unreasonable searches and seizures more broadly.<sup>40</sup> This view is reinforced by the evolution of search and seizure provisions in state constitutions leading

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<sup>37</sup> See *id.* at 100; HUBBART, *supra* note 35, at 75–76. Although much has been made of this limitation, it is also clear that Madison understood the general warrant to be merely one means of conducting an unreasonable search and seizure (the right "shall not be violated by [such] warrants"), not its equivalent. Thus, while a fair reading of the draft language compels the conclusion that Madison only intended to prohibit general warrants, it does not necessarily follow that the meaning of "unreasonable searches and seizures" was understood to be confined to such warrants.

<sup>38</sup> See LASSON, *supra* note 2, at 101. Thomas Davies has disputed much of Lasson's account. Davies argues that it was likely Elbridge Gerry of Massachusetts, not Benson, who made the objection. Davies also asserts that the complaint about sufficiency had little to do with broadening the right, arguing instead that Gerry was only dissatisfied with the tone of the draft. See Davies, *supra* note 16, at 717–21. This latter point would, if correct, mark a significant change in the historical understanding of the Amendment, but the evidence that Davies marshals for this claim is equivocal at best. It is true that the proposed change prohibited general warrants more emphatically than before, but it also created two independent clauses—a result that should not have gone unnoticed during a debate about the Amendment's wording. Moreover, if Davies was correct that it was Gerry who made the suggestion, that may well strengthen Lasson's interpretation of the congressional debate. Gerry's revision rendered the text of the Fourth Amendment closer to the search and seizure provision of his home state's constitution, which also set off the reasonableness requirement from the warrant—not only as an independent clause but also as its own stand-alone sentence. See *infra* text accompanying note 44.

<sup>39</sup> See LASSON, *supra* note 2, at 101. Davies has provided an alternative account on this point as well, arguing the revised language was approved before going to the Committee of Three. See Davies, *supra* note 16, at 718–19.

<sup>40</sup> See LASSON, *supra* note 2, at 103; HUBBART, *supra* note 35, at 75–76; CUDDIHY, *supra* note 20, at 765–66.

up to Benson's objection. The first state constitutional provision to regulate searches and seizures was adopted in Virginia, whose Declaration of Rights of 1776 prohibited general warrants only.<sup>41</sup> About two months later, Pennsylvania approved its own Declaration of Rights on the model set by Virginia but with a noteworthy difference. Pennsylvania's search and seizure provision began with the affirmation "[t]hat the people have a right to hold themselves, their houses, papers and possessions free from search and seizure" before moving on to limit general warrants.<sup>42</sup> Other states that adopted similar provisions followed either the Virginia or Pennsylvania approach, the most significant of these being the Massachusetts Declaration of Rights (1780), which is widely acknowledged to be the primary model for the Fourth Amendment.<sup>43</sup> Longest among its counterparts, the first sentence of Article 14 of the Massachusetts Declaration of Rights reads: "Every subject has a right to be secure from all unreasonable searches, and seizures of his person, his houses, his papers and all his possessions."<sup>44</sup> Noted to be the first instance of the phrase "unreasonable searches and seizures" in a constitutional document, the phrase became a popular way to frame the right at issue. By 1788, when Virginia's Ratification Convention sent forth its proposed amendments to the Federal Constitution, the search and seizure clause that it proffered looked much more like Massachusetts's than its own.<sup>45</sup>

Thus, the text of the Fourth Amendment and the history of its adoption give strong support to the claim that the Fourth Amendment was intentionally written to encompass more than a ban on general warrants. To see what more the Amendment demanded, however, requires an examination into other possible sources of meaning.

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<sup>41</sup> See HUBBART, *supra* note 35, at 51–52. The Virginia provision stated:

That general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to [be] granted.

*Id.* at 52.

<sup>42</sup> *Id.* at 53.

<sup>43</sup> See *id.* at 56, 75.

<sup>44</sup> *Id.* at 56. Like other states' search and seizure provisions, this section goes on to limit the use of general warrants by enumerating the conditions upon which they should be granted.

<sup>45</sup> Virginia's recommended amendment began with the following: "That every freeman has a right to be secure from all unreasonable searches and seizures of his person, his papers and property." *Id.* at 65.

### B. *James Otis and the Writs of Assistance Case*

One widely accepted source for the Fourth Amendment right is James Otis's 1761 case against the writs of assistance in Massachusetts. The writ of assistance is often described as a general warrant, but the two instruments are in fact quite different. A warrant may be said to confer upon the government the power to search and seize, but when writs of assistance were used, the government claimed it already possessed that power. Many customs officials either had or purported to have *ex officio* authority (via statute and their commissions) to conduct searches and seizures without any warrants; the writs of assistance simply allowed such officials to empower (or compel) others to assist them.<sup>46</sup> The writs did operate like a general warrant to the extent that they did not contain or require any level of suspicion, oath or affirmation, particularity as to place, and so forth. In other ways, they were far worse; in particular, the writ, once issued, did not expire except upon six months after the death of the reigning king, so it could be used again and again, passed from one searcher to another.<sup>47</sup> It was upon the death of King George II in 1760 (and thus, the imminent expiry of the existing writs) that the *Writs of Assistance Case* came about in an effort to forestall the issuance of new writs of assistance for the lifetime of the next king.

Although Otis is said to have burned his notes for the arguments he made in the case, there are a handful of surviving documents that have shed light on this important event in Fourth Amendment history.<sup>48</sup> The most significant among these are the writings of John Adams who, as a young Massachusetts lawyer, attended the arguments and took down minutes of the case.<sup>49</sup> Shortly afterward, Adams—perhaps together

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<sup>46</sup> See John Adams, No. 44 Petition of Lechmere (Argument on Writs of Assistance) 1761: Editorial Note, in 2 LEGAL PAPERS OF JOHN ADAMS 106, 111, 111 n.16 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965); M.H. SMITH, THE WRITS OF ASSISTANCE CASE 334 (1978). But see LASSON, *supra* note 2, at 55 (noting that legal authority for warrantless searches was granted to colonial customs officers but not English officials). According to Maclin, the use of the writs in Massachusetts was not legally but politically driven, constituting an attempt to quell the objections and resistance of colonists who perceived the officials as having untrammelled power. Maclin, *supra* note 24, at 945.

<sup>47</sup> See Maclin, *supra* note 24, at 945. Writs were sometimes, but not always, issued by courts, so this may have also been cause for concern. However, the same was true of warrants as well at the time. See Amar, *supra* note 24, at 772–73.

<sup>48</sup> See SMITH, *supra* note 46, at 312 n.1.

<sup>49</sup> See John Adams, No. 44 Petition of Lechmere (Arguments on Writs of Assistance) 1761: Adams' Minutes of the Argument, in 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 46, at 123, 123–30. These minutes are, unfortunately, neither very detailed nor extensive.

with Otis—created an abstract of Otis’s arguments that enlarged upon the minutes.<sup>50</sup> A third document that provides some information about the case is an essay written by Otis that was published in a Boston newspaper a month after the verdict came down against his cause.<sup>51</sup>

Among these sources, Adams’s minutes probably have been the most closely scrutinized to glean the meaning of Fourth Amendment reasonableness—especially by Thomas Davies, whose interpretation was briefly alluded to above. Davies’s argument that “unreasonable” meant “illegal under the common law” comes from the portion of Adams’s minutes where Otis urged the court to void the provisions of a customs statute that authorized the writs of assistance. This section, in its entirety, reads as follows:

As to Acts of Parliament. An Act against the Constitution is void: an Act against natural Equity is void: and if an Act of Parliament should be made, in the very Words of this Petition, it would be void. The executive Courts must pass such Acts into disuse. 8 Rep. 118. from Viner. Reason of the Common Law to control an Act of Parliament. Iron Manufacture. Noble Lord’s Proposal, that we should send our Horses to England to be shod.<sup>52</sup>

Davies’s analysis focuses on the citation to Viner that refers to *Bonham’s Case* (1610), a much-analyzed English decision that is said to be the origin of judicial review.<sup>53</sup> In that case, Thomas Bonham, a doctor who had been fined and jailed by the London College of Physicians for failing to comply with a licensing statute, sued the College for damages in trespass and false imprisonment.<sup>54</sup> The Court of Common Pleas, of which Sir Edward Coke was Chief Justice, found in favor of Bonham upon various grounds, one of which was that the College may not be at once “judges, ministers, and parties; judges to give sentence or judgment; ministers to make summons; and parties to have the moiety of the forfeiture[.]”<sup>55</sup> Because the statutory scheme divided the assessed fine between the King and the College, it violated

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*See* Adams, *supra* note 46, at 122. It also appears that Adams was not present during the entirety of the arguments. *See* SMITH, *supra* note 46, at 264.

<sup>50</sup> *See* SMITH, *supra* note 46, at 317–19.

<sup>51</sup> JAMES OTIS, *Essay on the Writs of Assistance Case*, Boston Gazette, Jan. 4, 1762, in COLLECTED POLITICAL WRITINGS OF JAMES OTIS 15 (Richard Samuelson ed., 2015).

<sup>52</sup> Adams, *supra* note 46, at 127–28.

<sup>53</sup> Davies, *supra* note 16, at 555 n.5 (citing *Bonham’s Case* (1610) 77 Eng. Rep. 638 (CP)). There is dissensus on this point. Some analysts argue that Coke was expressing a constitutional framework for judicial review whereas others believe that Coke was merely endorsing a species of statutory interpretation. *See* STONER, *supra* note 29, at 51.

<sup>54</sup> *Bonham’s Case*, 77 Eng. Rep. at 638.

<sup>55</sup> *Id.* at 652.

the common law maxim that one cannot be a judge in one's own case ("*nemo debet esse Judex in propria causa*").<sup>56</sup> Addressing this apparent conflict between the statute and the maxim, *Bonham's Case* observed that "the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void[.]"<sup>57</sup> Relying on this citation, Davies connects Coke's decision in *Bonham's Case*, to Otis's arguments in the *Writs of Assistance Case*, on further to Adams's drafting of the Massachusetts Declaration of Rights where the phrase "unreasonable searches and seizures" first appeared.<sup>58</sup>

This elegant genealogy is, unfortunately, not as direct or clear as one would hope. When this section of Adams's minutes is read in its entirety, it appears that Otis invoked the "Constitution" and "natural Equity" as the main grounds for voiding legislation, with the third sentence on "the very Words of this Petition" suggesting that the violation against the Massachusetts Constitution and natural equity was inherent and patent.<sup>59</sup> The Viner citation actually comes after Otis urges the court to determine upon those grounds that such invalid parliamentary acts "must pass . . . into disuse." In other words, the *Bonham's Case* citation may well have been intended as support for precisely what it is most famous for: judicial review.

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<sup>56</sup> Although today maxims are often treated as mere proverbial sayings or at best a rule of thumb, they commanded much greater reverence in the sixteenth and seventeenth centuries. In one of the first English legal dictionaries, "Maximes" were defined as "foundations of the law, and the conclusions of reason, and are causes efficient, and certain universal propositions so sure and perfect, that they may not be at any time impeached or impugned, but ought always to be observed, and holden as strong principles and authorities of themselves." WILLIAM RASTELL, CERTAIN DIFFICULT AND OBSCURE WORDS AND TERMS OF THE COMMON LAWS AND STATUTES OF THIS REALM NOW IN USE, EXPUNDED AND EXPLAINED 494 (W. Rawlins et al. eds., 1685).

<sup>57</sup> *Bonham's Case*, 77 Eng. Rep. at 652.

<sup>58</sup> Although M.H. Smith notes that Adams appeared to have "lost interest" in the *Writs of Assistance Case* soon after writing up the abstract of the arguments, SMITH, *supra* note 46, at 246, there is evidence indicating that in 1780, the year that the Massachusetts Constitution was drafted, Adams wrote a letter to a Dutch lawyer about the significance of Otis's arguments to the revolutionary cause. *See id.* at 255–56.

<sup>59</sup> In his 1764 *Rights of the British Colonies*, Otis repeats the invocation to the British Constitution and natural equity as the limits on parliamentary power. *See* James Otis, *Rights of the British Colonies Asserted and Proved, 1764*, EVANS EARLY AM. IMPRINT COLLECTION, <https://quod.lib.umich.edu/e/evans/N07655.0001.001?rgn=main;view=fulltext> [<https://perma.cc/8NXX-9AVU>]. Neither reason nor the common law is raised in this regard, other than to observe generally that the parliament must be subject to "some equitable and reasonable bounds." *Id.*

The all-important phrase, “Reason of the Common Law to control an Act of Parliament,” appears only *after* the citation and could have two other meanings besides what Davies attributes to it. The first is that the phrase may not have been one of Otis’s substantive arguments against the writs at all but instead was included by Adams in the same way that we would today include an explanatory parenthetical after a citation. Indeed, in his minutes for other cases, Adams followed a similar format of citation-then-relevant-legal-proposition.<sup>60</sup> Thus, it seems quite possible that this phrase was not an independent argument about reason and the common law but merely an exposition of the Viner citation.

The second alternative meaning considers the possibility that whether citation or no, the phrase did form an additional argument from Otis. But if so, it may have launched Otis in a different direction as what immediately follows is the matter of the American horse and its shoeing in England. According to M.H. Smith, Adams explained, in 1818, that the reference was to a 1750 parliamentary statute that restricted iron and steel manufacture in the colonies, and about which an objecting member of Parliament (the “Noble Lord” in Adams’s notes) remarked that they might as well pass a law requiring Americans to send their horses to be shod in England.<sup>61</sup> This story suggests alternative meanings associated with unreasonableness—namely, absurdity and abusive self-dealing. Accordingly, while Davies appears justified in highlighting the use of the word “reason” by Otis as a possible source for Adams’s later innovation of the phrase “unreasonable searches and seizures,” the substantive meaning behind it is far from clear.

The narrative of Otis’s arguments contained in Adams’s abstract is not much more illuminating on the use of “reason,” although there, it does come up more directly as a basis for rejecting the writs of assistance. As a general matter, Otis’s overarching legal position was that only specific warrants are valid and that the writs of assistance do not qualify because they are general, lacking the particularity and oath that modern justice of the peace manuals have come to require.<sup>62</sup> Otis acknowledged, however, that the “old books” countenanced general

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<sup>60</sup> See, e.g., John Adams, No. 45 Folger v. Sloop *Cornelia* 1768: Adams’ Minutes of the Argument, in 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 46, at 159, 163 (citing to Viner).

<sup>61</sup> See SMITH, *supra* note 46, at 365.

<sup>62</sup> John Adams, No. 44 Petition of Lechmere (Argument on Writs of Assistance) 1761: Adams’ “Abstract of the Argument”, in 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 46, at 134, 141.

warrants.<sup>63</sup> Beyond this, there is little mentioned about the law.<sup>64</sup> The bulk of the abstract is devoted to describing a number of problematic features that make the writs of assistance objectionable—namely, that they (1) are “universal,” allowing anyone to wield it; (2) are “perpetual,” lacking any mechanism for accountability; (3) enable any holder to search and seize “at will”; and (4) empower even “menial servants” to exercise authority over the colonists.<sup>65</sup> Noting that “[e]very man prompted by revenge, ill humour or wantonness” can use the writs to their own purpose, Otis condemned the “absurdity in this writ” and anticipated that issuing them would plunge society “in tumult and in blood.”<sup>66</sup> It is just after describing such “absurdity” that the abstract states, “Thus, reason and the constitution are both against this writ.”<sup>67</sup> Later in the abstract, Viner is cited—presumably to *Bonham’s Case* again—but “reason” is not mentioned nearby.<sup>68</sup> Consequently, the overall effect is one that suggests that Otis used “reason” not in reference to any particular common law rule or principle but in relation to the offensive characteristics of the writs as a whole that would lead to irrational and potentially violent results.

The last document I examine here is an essay written by Otis himself that appeared in the *Boston Gazette* in 1762.<sup>69</sup> The essay is particularly interesting for two reasons. The first is that it was probably far more influential to colonial thinking about searches and seizures than Otis’s arguments in court, which were heard by only a small number of attendees.<sup>70</sup> The second reason is that, in this essay, Otis not only referred to “reason” but actually used the word “unreasonable” twice

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<sup>63</sup> See *id.*

<sup>64</sup> It should be noted here that the abstract also summarized the arguments of Jeremiah Gridley and Oxenbridge Thacher. Jeremiah Gridley argued on behalf of the Crown and relied on multiple legal sources in favor of the writs. Oxenbridge Thacher represented the merchants of Boston together with Otis. See *id.* at 136–39. But as the editors of Adams’s papers note, the abstract may be best described as “a minor work of political propaganda.” Adams, *supra* note 46, at 123.

<sup>65</sup> Adams, *supra* note 62, at 142–43.

<sup>66</sup> See *id.* at 143. Otis’s description may have been hyperbolic but also prescient; John Adams later claimed of the *Writs of Assistance Case* that “American Independence was then and there born.” See Adams, *supra* note 46, at 107.

<sup>67</sup> Adams, *supra* note 62, at 143.

<sup>68</sup> *Id.* at 144. The preceding sentence instead says, “An act against the constitution is void.” *Id.*

<sup>69</sup> OTIS, *supra* note 51. Smith explains that although the essay lacked a byline, Otis was almost certainly its author. SMITH, *supra* note 46, at 417–18.

<sup>70</sup> See Adams, *supra* note 46, at 116–17. According to Sklansky, the *Writs of Assistance Case* did receive “heavy coverage in the local press.” Sklansky, *supra* note 29, at 1777 n.230.

to describe searches and seizures conducted under the writs—a use that is much closer to the grammar of the Fourth Amendment. In the first instance, Otis complained that colonists were suffering from “unreasonable treatment” by England under the writs. Perhaps surprisingly, Otis appears to have been using “unreasonable” as a synonym for “unequal,” for he argued that Massachusetts merchants were being more “severely dealt with” than others, and the writ instituted “a further degree of severity.”<sup>71</sup> Otis is not more explicit about this comparison, but M.H. Smith indicates that this was likely a reference to Rhode Island, which followed a different procedure for the forfeiture of seized goods.<sup>72</sup> Indeed, Otis also insisted—erroneously—that Englishmen in England enjoyed greater rights against searches and seizures than in the colonies and often described colonists to be oppressed and “enslaved.”<sup>73</sup>

Otis used “unreasonable” a second time in his newspaper essay when he criticized customs officers for their “unreasonable and impudent demands.”<sup>74</sup> Like the abstract’s argument about “menial servants” possessed of complete discretion over the colonists, Otis reiterated his concern about status and dignity.<sup>75</sup> To be sure, it appears that Otis was expressing some class snobbery, but he also spoke to political identity and the rights attendant thereto. In the essay, Otis proceeded to warn that “every man in this province[] will be liable to be insulted by a petty officer, and threatened to have his house ransack’d . . . Will any one then under such circumstances, ever again boast of [B]ritish honor or [B]ritish privilege?”<sup>76</sup> These uses of “unreasonable” in the *Boston Gazette* essay align with the use of “reason” described above in the abstract of the *Writs of Assistance Case*—that is, as a way to describe the various intolerable characteristics of the writ of assistance that rendered the writ absurd, biased, and destructive of personal dignity and political identity.

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<sup>71</sup> See OTIS, *supra* note 51.

<sup>72</sup> See SMITH, *supra* note 46, at 418 (noting that Otis’s essay included “(inevitably) the Bostonians’ chronic complaint against the *de facto* free port status of Rhode Island”).

<sup>73</sup> See, e.g., Adams, *supra* note 62, at 140 (calling writs “an instrument of slavery”); Otis, *supra* note 59 (stating that boundless parliamentary authority would “make slaves” of the people).

<sup>74</sup> OTIS, *supra* note 51, at 16 (emphasis omitted).

<sup>75</sup> *Id.* at 15.

<sup>76</sup> *Id.* at 15–16 (emphasis omitted).



*C. Lord Camden and Entick v. Carrington*

Although Otis lost his fight against the writs, the colonists enjoyed a degree of vindication just two years later when the English courts declared general warrants to be illegal in a series of seditious libel cases. Several of the cases arose from a search for papers relating to the publication of the *North Briton No. 45*, reputed to be written by John Wilkes, a parliamentarian. When Wilkes successfully sued under trespass, John Entick—who had been searched earlier for the same offense but in a different publication—decided to file suit as well. In the history (or mythology) of the Fourth Amendment, Lord Camden’s opinion in *Entick v. Carrington* (1765) has been accorded a similar stature to Otis’s arguments in the *Writs of Assistance Case* as a foundational text for the right.<sup>77</sup>

Like Otis in his *Boston Gazette* essay, Entick’s lawyer, John Glynn, condemned the use of general search warrants as “unreasonable.”<sup>78</sup> Indeed, echoes of Otis abound in Glynn’s arguments; like Otis, Glynn decried the severe privacy violation of home searches and called on the court to end the practice, asserting that such searches—reminiscent of the Spanish Inquisition and Star Chamber methods—were inconsistent with English liberty. Despite these similarities, however, the legal footing of the two cases was significantly distinct. While Otis faced the formidable challenge of opposing a statute, Glynn argued against a custom.<sup>79</sup> It was in this context that Glynn invoked reasonableness, relying not on *Bonham’s Case* but instead on “Davis 32b,” a citation to Sir John Davies’s report of *The Case of Tanistry* (1608).<sup>80</sup>

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<sup>77</sup> *Entick v. Carrington* (1765) 95 Eng. Rep. 807 (KB). I rely mainly on this case report of the *Entick* case rather than the longer and more frequently cited version, *Entick v. Carrington* (1765) 19 St. Tr. 1029, as Thomas Davies argued that the latter was not available to the Framers until 1781. See Davies, *supra* note 16, at 727 n.512. Both versions, however, include the plaintiff’s argument regarding the unreasonableness of the general warrant used against Entick.

<sup>78</sup> See *Entick*, 95 Eng. Rep. at 812; see also *Entick*, 19 St. Tr. at 1039.

<sup>79</sup> The statute that authorized the general warrants at issue had expired by the time Entick’s home was searched. Thus, the government was forced to argue that the practice had become customary.

<sup>80</sup> JOHN DAVIES, *Hill. 5. Jac. in the King’s-Bench: The Case of Tanistry*, A REPORT OF CASES AND MATTERS IN LAW, RESOLVED AND ADJUDICATED IN THE KING’S COURT IN IRELAND 78, 88–89 (Sarah Cotter trans., Dublin, Dick’s Coffee House 1762), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015062964682&view=1up&seq=92&skin=2021> [https://perma.cc/9HXC-HLRM] (discussing the importance of the public good to the idea of reasonableness). This book was previously published in French. JOHN DAVIES, *Hillar’ 5. Jacobi, En Bank le Roy: Le Case de Tanistry*, in LES REPORTS DES CASES & MATTERS EN LEY, RESOLVES & ADJUDGES EN LES COURTS DEL ROY EN IRELAND 28, 32 (London, E.

At issue in that case was the Irish practice of tanistry, which determined inheritance of lands and titles according to election rather than the English rule of primogeniture. *Tanistry* used reasonableness not only as a standard to assess the overall merits of a particular custom but also to interrogate the process by which the custom began.<sup>81</sup> *Tanistry* recognized that even an ancient and continuous practice should be held void ab initio if it began through “oppression or extortion of lords and great men.”<sup>82</sup> Such customs were deemed to be “unreasonable, against common right, or purely against law,”<sup>83</sup> a description that closely resembles Coke’s “against common right and reason” in *Bonham’s Case*.<sup>84</sup> This was no accident; although *Tanistry* and *Bonham’s Case* had distinct legal postures, they both reflected the prevailing legal outlook that connected customs, the common law, and the English Constitution to reason.<sup>85</sup> Unlike much of the vague and confusing rhetoric on law and reason at that time, however, cases like *Tanistry* applied reasonableness as a legal test and more fully developed its definition in the process. The test’s “reasonable . . . commencement” requirement was one focus of Glynn’s argument as he characterized the English custom of general warrants as originating in “Star Chamber tyranny.”<sup>86</sup>

Reasonableness had a substantive dimension as well. Glynn maintained that courts found a custom void when the custom was “injurious to a multitude, and prejudicial to the common wealth.”<sup>87</sup> The relevance of the “publick good” to reasonableness can be understood by looking again to the work of Sir Davies, who considered reasonableness to be a key feature of the relationship between custom and common law.<sup>88</sup> According to Eugene Heath, Sir Davies theorized that the common law derived from custom; that is, the repetition over a prolonged period of time of what had once been merely one

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Flesher et al. 1674), <https://babel.hathitrust.org/cgi/pt?id=osu.32437121667600&view=1up&seq=103> [<https://perma.cc/7JTW-VNXP>].

<sup>81</sup> See Eugene Heath, *Sir John Davies on Custom and the Common Law*, 82 REV. OF POL. 438, 446 (2020).

<sup>82</sup> DAVIES, *supra* note 80, at 89. In the case, the tanistry system was rejected as originating in the “tyranny” of the powerful to gain land through violence. *Id.* at 94.

<sup>83</sup> *Id.* at 89.

<sup>84</sup> See *supra* text accompanying note 57.

<sup>85</sup> See, e.g., Whitman, *supra* note 30, at 1329 (describing this outlook as a “pan-Western phenomenon”).

<sup>86</sup> *Entick v. Carrington* (1765) 95 Eng. Rep. 807, 812–13 (KB).

<sup>87</sup> *Id.* at 812.

<sup>88</sup> DAVIES, *supra* note 80, at 89.

“reasonable act.”<sup>89</sup> In other words, an act is found reasonable because it is “good and beneficial,” and as such is emulated by others, thereby becoming custom.<sup>90</sup> That custom, if “continued without interruption time out of mind,” evolves to “obtaineth the force of a Law.”<sup>91</sup> Such long and arduous escalation from a single act, to custom, to common law renders the last practically synonymous with reasonableness, which for Sir Davies referred to the idea of benefit to the many. This unity of reason and the common law could not be achieved without consent or free will—that is, by ensuring that the multitudes over countless generations chose to follow the custom because it is good rather than because of coercion or oppression by others more powerful than they.<sup>92</sup> A similar interpretation of reasonableness is offered by David Bederman, who writes that English courts considered principles of fundamental fairness, the general good, as well as evenhandedness to determine the validity of local customs since at least the early seventeenth century.<sup>93</sup> Thus, for example, in the case of *Barker v. Cocker* (1621), an alleged custom of grouping together lambs belonging to several owners for purposes of tithing was held void for unreasonableness because it may turn out that under such custom an owner with only one lamb might lose their animal whereas an owner with many may lose none.<sup>94</sup> In this way, the doctrine of reasonableness in custom carried not only the wisdom of the ages but also moral force by protecting the vulnerable and disempowered.

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<sup>89</sup> See Heath, *supra* note 81, at 442.

<sup>90</sup> *Id.* It should be noted that what is good for the many is unlikely to be immediately known. The individuals who originate or repeat the initial act are not necessarily doing so because they already recognize that it is to the general or common good. Heath suggests that the act is likely done for selfish reasons, but the act over time, as repeated by many, reveals itself to be generally beneficial. See *id.* at 452–53.

<sup>91</sup> *Id.* at 442. Hans Pawlisch writes that seventeenth century English lawyers who practiced in Ireland treated Irish civil law as customary and thus the “common law of the land.” Hans S. Pawlisch, *Sir John Davies, the Ancient Constitution, and the Civil Law*, 23 HIST. J. 689, 697 (1980).

<sup>92</sup> See Heath, *supra* note 81, at 448. The condition of consent is even more explicit in Blackstone’s discussion of customary law. See David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375, 1388, 1391 (1996).

<sup>93</sup> See Bederman, *supra* note 92, at 1394.

<sup>94</sup> *Barker v. Cocker* (1621) 80 Eng. Rep. 471 (KB); see also Bederman, *supra* note 92, at 1394–95, 1395 n.95. Bederman also refers to *Haspurt v. Wills* (1670) 86 Eng. Rep. 50 (KB), where the court held a custom of collecting a maintenance fee from every vessel that passed a common key unreasonable as to the vessels that did not use the key for loading or unloading. See *id.* at 1395 n.95.

Lord Camden's opinion in *Entick* did not specifically reference the *Case of Tanistry*—perhaps because the original plea did not include the custom argument,<sup>95</sup> or, in the alternative, custom could not be established.<sup>96</sup> Nevertheless, the decision relied heavily on themes of public good and abuse of power found in the reasonableness test for customs.<sup>97</sup> For example, Camden noted that the case “is of the utmost consequence to the public”<sup>98</sup> and concluded that allowing the use of these general warrants “would destroy all the comforts of society.”<sup>99</sup> He also took pains to distinguish the general from the specific warrant, highlighting problems such as the lack of oath, probable cause, particularity, and adequate remedy or other means of accountability in case of a wrongful search and seizure.<sup>100</sup> For Camden, the absence of meaningful limits that would cabin a searcher's discretion militated against recognizing the legality of such vast powers.<sup>101</sup> Lastly, Camden speculated that the dearth of earlier challenges to the general warrant did not signal common consent but had more to do with the “guilt or poverty” of its victims that prevented them from “contending against the power of a Secretary of State and the Solicitor of the Treasury.”<sup>102</sup>

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<sup>95</sup> See *Entick v. Carrington* (1765) 95 Eng. Rep. 807, 817 (KB).

<sup>96</sup> See *id.* at 818 (noting that the secretary of state's practice of issuing general warrants was too new to qualify as custom).

<sup>97</sup> Indeed, in the longer version of the *Entick* opinion, Lord Camden called this part of the opinion “the most interesting question of the cause” because it determined whether “the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection of a messenger, whenever the secretary of state shall think fit.” *Entick v. Carrington* (1765) 19 St. Tr. 1029, 1063 (KB).

<sup>98</sup> 95 Eng. Rep. at 814.

<sup>99</sup> *Id.* at 817. The longer version of *Entick* is more emphatic, noting that any curtailment of a person's property rights must be grounded in “some public law for the good of the whole” and that existing laws of that variety—dealing with distresses, forfeitures, taxes, etc.—are created “by common consent . . . for the sake of justice and the general good.” See *Entick*, 19 St. Tr. at 1066. Lord Camden took a similar position in the earlier case of *Wilkes v. Wood*, stating that the general warrant “was a point of the greatest consequence he had ever met with in his whole practice,” and affecting “the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject.” *Wilkes v. Wood* (1763) 98 Eng. Rep. 489, 498 (CP).

<sup>100</sup> See *Entick*, 95 Eng. Rep. at 818. This did not mean that Lord Camden approved of specific warrants. In the longer *Entick* report, Camden describes specific warrants for stolen property to have “crept into the law by imperceptible practice” and seems to note approvingly that Coke believed even these to be illegal. See 19 St. Tr. At 1067; see also 95 Eng. Rep. at 818 (including the assessment of Coke only).

<sup>101</sup> 95 Eng. Rep. at 817–18 (also noting that this is “a power claimed by no other magistrate whatever”).

<sup>102</sup> *Id.* at 818.

One final aspect of Lord Camden's view on the general warrant may provide further insight into the meaning of reasonableness in eighteenth century law. In *Entick*, the plaintiff appeared to concede that the secretary of state did in fact possess the power to issue general warrants for the crime of high treason but not for the lesser offense of seditious libel.<sup>103</sup> Lord Camden likely agreed; in advance of his formal decision, he is said to have written a letter to William Pitt indicating that, despite his strong opposition to these warrants, he would not prohibit their use in cases of "high treason necessitating 'Constitutional Breaches of the Law.'"<sup>104</sup> This kind of approach to conflict resolution—that is, weighing the countervailing interests—was not uncommon at that time. Glynn, when he argued the *Wilkes* case, talked about a resultant "unequal ballance" should courts declare general warrants legal.<sup>105</sup> James Otis made a similar point in the *Writs of Assistance Case*, where he allowed that "flagrant Crimes" and "great public Necessity" may overcome the common law bar against home searches.<sup>106</sup>

Given the conflation of law and reason at the time, it may be that this technique of weighing varying interests in the law would have been considered distinctly reasonable. Indeed, Lord Camden appeared to describe reasonableness as a trade-off of competing interests when he observed in another part of *Entick* that the immunity that searchers gained through a warrant was premised upon their loss of discretion.<sup>107</sup> If so, it appears that this balancing approach toward reasonableness already coexisted with the long-standing legal test of reasonableness that incorporated basic principles such as the public good and common consent, as well as fundamental fairness and evenhandedness.

#### D. Legal Treatises: Coke, Blackstone, and Hale

So far, an analysis of the key sources of the Fourth Amendment has yielded some fairly specific definitions of eighteenth century

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<sup>103</sup> See *id.* at 814. Later, Glynn reiterated that more expansive government power in the case of treason was justified because it "require[d] immediate interposition for the benefit of the public." *Id.* at 815.

<sup>104</sup> CUDDIHY, *supra* note 20, at 482.

<sup>105</sup> See *Wilkes v. Wood* (1763) 98 Eng. Rep. 489, 490 (KB).

<sup>106</sup> See Adams, *supra* note 49, at 125–26.

<sup>107</sup> This is evident in the longer version of *Entick*, where Camden described the immunity-for-discretion exchange as "reasonable." *Entick v. Carrington* (1765) 19 St. Tr. 1029, 1062 (KB). Although the shorter version of the case does not contain this language, the point here is that judges were already using "reasonableness" in this way at that time. Moreover, the reasonable person standard was already recognized in bailments by the early 1700s. See *infra* text accompanying notes 148–51.

reasonableness. To review, these sources have revealed that Fourth Amendment reasonableness likely bars general searches (warrant-based or not), adopts then-existing common law rules, and embraces concepts like individual dignity, the common good, and fairness. That said, they also held open the door for a looser understanding of reasonableness. For example, Benson's objection to the original language of the Amendment remains murky. Otis's critique of Parliament's irrational and selfish economic regulations and the various absurdities and dangers of issuing a new writ of assistance is more descriptive than definitional. And Glynn, Camden, and Otis's concessions on necessity and interest balancing suggest that reasonableness may be as much a means as it is an end.

As noted above, David Sklansky has argued that eighteenth century lawyers tended to use the language of reasonableness in this looser, more ordinary sense that indicates rationality, moderation, and sound judgment.<sup>108</sup> This is evident in a variety of works, including the legal treatises that were widely read at the time. William Blackstone, probably the leading authority on English common law in the framing era, certainly took this flexible approach to reasonableness in his four-volume *Commentaries on the Laws of England* (1765).<sup>109</sup> Throughout the *Commentaries*, Blackstone referred to ideas like "unreasonable bail"<sup>110</sup> and the reasonableness of the proposition that only the person who is injured should have the power to forgive.<sup>111</sup> He also wrote of the "reasonable bounds" of a husband's power to correct his wife, explaining that granting such power is "reasonable" because the husband is answerable for her acts.<sup>112</sup> In the same paragraph,

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<sup>108</sup> See *supra* text accompanying note 29.

<sup>109</sup> See Mary Sarah Bilder, *James Madison, Law Student and Demi-Lawyer*, 28 L. & HIST. REV. 389, 398 (2010) (listing conventional texts of legal study in the eighteenth century). But according to Richard Samuelson, Blackstone's assertion of Parliament's supremacy helped precipitate the American Revolution because, under his constitutional framework, the colonists were left with "no sustainable rights." Richard Samuelson, *Blackstone and the Causes of the American Revolution*, THE PHILADELPHIA SOC'Y (Nov. 23, 1996), <https://phillysoc.org/samuels-on-blackstone-and-the-causes-of-the-american-revolution/> [https://perma.cc/MRS9-PRL8]. Consequently, the Framers would have embraced Coke's doctrine of judicial review over statutes found to be "against . . . reason." That position, however, does not ineluctably lead to the conclusion that the Framers had a singular legal definition of "reasonableness" in mind.

<sup>110</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 135 (Oxford, Clarendon Press 1768).

<sup>111</sup> *Id.* at 269.

<sup>112</sup> *Id.* at 444.

Blackstone described such power as one of “moderate correction.”<sup>113</sup> In the context of distresses, Blackstone noted that English law allows persons to break open the doors of homes so long as there is “reasonable ground to suspect that the goods are concealed therein.”<sup>114</sup> In other places, Blackstone described certain laws and practices as reasonable or unreasonable. For example, he called a mining statute an “extremely reasonable law” because it balanced well the interests of the mine owners and the king.<sup>115</sup> To summarize, Blackstone’s influential *Commentaries* made liberal use of reasonableness in its ordinary sense that touched on rationality and logic as well as equity and moderation.

For our purposes here, Blackstone’s most noteworthy use of reasonableness may be his gloss on Coke’s famous lines in *Bonham’s Case*. Blackstone wrote that parliamentary acts may be void if they are either impossible to perform or result in “absurd consequences, manifestly contradictory to common reason.”<sup>116</sup> Although Blackstone seemed to parrot Coke’s words, they are presented in a slightly different order, and it makes all the difference, for Blackstone appealed to “common reason” whereas Coke’s phrasing was “common right and reason.” For Coke, “reason” was far from “common”; he defined it instead as “the life of the law . . . ; which is to be understood of an artificial perfection of reason, gotten by long study, observation, and experience . . . by many successions of ages.”<sup>117</sup> Thus, this small change represented a major shift in the meaning of reasonableness from Coke to Blackstone.

Aside from the word order change, Blackstone also clearly linked absurdity of consequences to a breach of common reason in his analysis. In fact, Blackstone rejected judicial review. Within the same section, he concluded: “But if the parliament will positively enact a thing to be done which is unreasonable, I know of no power . . . [that

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<sup>113</sup> *Id.*

<sup>114</sup> 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 11 (Oxford, Clarendon Press 1768).

<sup>115</sup> 1 BLACKSTONE, *supra* note 110, at 295.

<sup>116</sup> *Id.* at 91. Blackstone located this power to void “unreasonable” consequences in equity. *See id.* Thomas Davies cited this passage to suggest that even before John Adams, Blackstone had already simplified Coke’s “against common right and reason” to “unreasonable.” *See Davies, supra* note 16, at 689–90. But as I explain here, Blackstone was not merely making a word substitution but effecting a wholesale change in meaning.

<sup>117</sup> 1 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND at 97.b. (London, J. & W.T. Clarke et al. 1823).

can] control it.”<sup>118</sup> For Blackstone, judges may reject unreasonable aspects of statutes that are “collateral” as a matter of “decency,” but they did not possess the authority to overrule the statute in its “main object” upon any grounds.<sup>119</sup> So while it is true that Blackstone did transform Coke’s “against . . . reason” into “unreasonable” in the *Commentaries*, this was not merely a change in form; Blackstone also significantly revised the meaning and import of reason in the relationship between the common law and statutory law.

Another popular treatise of the eighteenth century was Sir Matthew Hale’s *The History of the Pleas of the Crown* (1736). Indeed, according to M.H. Smith, James Otis relied heavily on Hale’s treatise.<sup>120</sup> Although Hale was clearly influenced by Coke, there are several places in his treatise where he plainly indicates disagreement—in particular, with Coke’s narrow view on search warrants. Unlike Coke, for example, Hale concluded that justices of the peace may issue specific warrants for the recovery of stolen goods upon information.<sup>121</sup> He argued that such warrants had become accepted and were of “great use and necessity” to the public and crime victims alike.<sup>122</sup> On the other hand, Hale described general warrants as “not good” and “not justifiable.”<sup>123</sup> Accordingly, much more than Coke or Blackstone, Hale offered a detailed analysis on the “moderation and temperaments” that would make a warrant valid.<sup>124</sup> The requirements included an oath that a crime had in fact been committed, as well as probable cause supported

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<sup>118</sup> 1 BLACKSTONE, *supra* note 110, at 91.

<sup>119</sup> *Id.*

<sup>120</sup> See SMITH, *supra* note 46, at 360 (calling Hale’s treatise “[h]is staple source material”).

<sup>121</sup> See 2 MATTHEW HALE, *HISTORIA PLACITORUM CORONAE. THE HISTORY OF THE PLEAS OF THE CROWN* 149–51 (London, E. & R. Nutt 1736).

<sup>122</sup> *Id.* at 149. As a point of interest, Hale expressed concern about rising crime rates when asserting the “great use and necessity” of specific warrants. See *id.*

<sup>123</sup> *Id.* at 150. Hale was referring to what he called “general warrants dormant”—warrants issued in advance of any crime having been committed. See *id.* Interestingly, Hale objects to such warrants on the basis of the common law maxim cited in *Bonham’s Case*; that is, that one cannot be a judge in one’s own case. See *id.* Elsewhere, Hale describes general arrest warrants as “void.” See 1 MATTHEW HALE, *HISTORIA PLACITORUM CORONAE. THE HISTORY OF THE PLEAS OF THE CROWN* 580 (London, E. & R. Nutt 1736).

<sup>124</sup> 2 HALE, *supra* note 121, at 149. In contrast, courts today would not recognize Blackstone’s “special warrant” as valid since it required such things as a seal from the justice of the peace and the place and time of its making rather than particularity and oath. It did, however, require that the “cause” of the warrant be included. See 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 290–91 (London, A. Strahan & W. Woodfall 1795).



by facts for suspicion directed to a particular place to be searched.<sup>125</sup> It is perhaps Hale's specificity that was especially useful for Otis: Smith argues that Otis's paraphrased citation to *Bonham's Case* was merely in service to his main argument in favor of Hale's specific warrant as described in his treatise.<sup>126</sup>

Although Hale did not use the language of reasonableness to discuss search warrants (but note that he did use the word "moderation," which is and was a common definition for reasonableness), he did use it very frequently throughout *The History of the Pleas of the Crown*. Here, too, Hale departed from Coke and used the ordinary definition of reasonableness like Blackstone. Hale's treatise refers to concepts like "reasonable alms,"<sup>127</sup> "immoderate or unreasonable correction,"<sup>128</sup> and "reasonable cause."<sup>129</sup> These uses clearly refer to a legal standard. For example, in his discussion of charitable alms given to traitors, Hale made it clear that charges of providing aid and comfort would be inappropriate but only "if the alms be reasonable."<sup>130</sup> Even more illuminating is Hale's analysis of homicide of a servant by a master. Hale wrote that while the death of a servant from moderate correction is *per infortunium*, "if the master design an immoderate or unreasonable correction, either in respect of the measure, or manner, or instrument thereof, and the servant die thereof, I see not how this can be excused from murder."<sup>131</sup> This last example not only indicates the use of reasonableness as a standard to assess the acts of the master, but further explains that it will be the specific facts and circumstances of the case that will be applied to the standard.

To be sure, reason and reasonableness were not always used in this active way. At one point, Hale described a rule as "unreasonable," but this appears to broadly indicate illogic or unjustness rather than a failure to satisfy any particular principle or standard to be met.<sup>132</sup> He

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<sup>125</sup> 2 HALE, *supra* note 121, at 150. Hale also urged, but did not require, that warrants (1) specify daytime execution, (2) be executed by a public officer rather than a private person, and (3) order the officer to return with the goods and/or the suspect for further examination so as to minimize avoidable errors. *See id.*

<sup>126</sup> *See* SMITH, *supra* note 46, at 359–60. Smith goes on to identify other sources of influence—e.g., the case of *Day v. Savage* and the Swiss jurist Emmerich de Vattel—that likely had a greater impact on Otis's thinking than Coke and *Bonham's Case*, which by the 1760s "had the look of times come and gone." *See id.* at 361–64.

<sup>127</sup> 1 HALE, *supra* note 123, at 331.

<sup>128</sup> *Id.* at 454.

<sup>129</sup> 2 HALE, *supra* note 121, at 56, 78.

<sup>130</sup> 1 HALE, *supra* note 123, at 332.

<sup>131</sup> *Id.* at 454.

<sup>132</sup> *See id.* at 416.

also used “reason of the law” to mean rationality and logic, as when he extended a statute on felonies to the offense of treason because “all treason is felony and more.”<sup>133</sup> Accordingly, Hale’s treatise—like Blackstone’s—supports the view that Coke’s specialized use of reasonableness was no longer favored among the major commentators of the common law. As Sklansky points out, the “linguistic continuity” around reasonableness did not necessarily reflect continuity in substance.<sup>134</sup>

### *E. Other Assorted Legal Materials*

It is not surprising, given the discussion above on Blackstone and Hale, that other legal writings of the time also adopted an ordinary definition of reasonableness. As I don’t wish to belabor this point, just a few examples will be provided in this Section to convey the ubiquity of ordinary reasonableness by the eighteenth century. Perhaps the most relevant among these legal materials are justice of the peace (JP) manuals that addressed searches and seizures and that also made frequent use of the words “reasonable” and “unreasonable.” For example, Richard Burn’s popular 1758 manual provided that people may be arrested as vagrants for failing to give a “reasonable account” of themselves,<sup>135</sup> and that a person who made an arrest may be required to justify it by showing “reasonable cause of suspicion.”<sup>136</sup> Burn also wrote that an arrestee may be detained by the officer for a “reasonable . . . time” before being brought to the justice under certain circumstances, such as a nighttime arrest, immediate threat of rescue, or illness.<sup>137</sup> Other JP manuals contained similar provisions, including those published by Joseph Starke and William Hening in Virginia.<sup>138</sup>

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<sup>133</sup> *Id.* at 366.

<sup>134</sup> Sklansky, *supra* note 29, at 1779–80.

<sup>135</sup> RICHARD BURN, *THE JUSTICE OF THE PEACE, AND PARISH OFFICER* 391 (5th ed., London, Henry Lintot 1758). Burn’s manual was edited and reprinted in the colonies. *See* JAMES PARKER, *THE CONDUCTOR GENERALIS* (New Jersey 1764); JOSEPH GREENLEAF, *AN ABRIDGEMENT OF BURN’S JUSTICE OF THE PEACE AND PARISH OFFICER* (Boston 1773).

<sup>136</sup> BURN, *supra* note 135, at 392; *see also* GREENLEAF, *supra* note 135, at 177 (providing that a person who wishes to call upon the constable to raise a hue and cry should give “reasonable assurance” of the crime).

<sup>137</sup> BURN, *supra* note 135, at 92–93; *see also* GREENLEAF, *supra* note 135, at 13 (omitting the specific reasons for prolonged detention).

<sup>138</sup> *See* RICHARD STARKE, *THE OFFICE AND AUTHORITY OF A JUSTICE OF PEACE* 18 (Williamsburg, Alexander Purdie & John Dixon 1774); WILLIAM WALLER HENING, *THE NEW VIRGINIA JUSTICE* 19, 41 (Richmond, T. Nicolson 1795) (describing the constable’s power to detain a person who engages or threatens to engage in an affray for a “reasonable time, till the heat shall be over” or surety is found). Hening’s manual was published after

Starke also referred to the authority of the justice to deny bail if it was “reasonable . . . to presume” a known thief to be guilty based on “Consideration of the Circumstances of the whole Matter, and the Probabilities on both Sides.”<sup>139</sup> Some manuals, along with statutes and legal treatises, also asserted the particular authority of judges to determine the requisite level of reasonableness of suspicion when issuing warrants.<sup>140</sup> These uses indicate that reasonableness constituted a flexible legal standard grounded in rationality, moderation, and judgment and governed by relevant facts and circumstances.

Legal dictionaries from the eighteenth century do not seem to have recognized a specialized definition for “reasonable” and “unreasonable,” although some included an entry for “reason,” defining it rather vaguely as “the very life of the law,” and noting also that “what is contrary to it, is unlawful.”<sup>141</sup> This would seem to align with the Cokean definition of “reason.” On the other hand, these dictionaries did include more specific uses of the adjective “reasonable,” such as the entry for “reasonable part,” referring to an unspecified amount of goods allotted to the wife and children of a deceased person.<sup>142</sup> This amount, according to historian Carole Shammas, “varied according to time and place,” though often divided into thirds for the wife, the children, and testamentary disposition each, unless the children were minors, in which case the Crown took

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the ratification of the Fourth Amendment in 1791, but it is included here to demonstrate continuity in the ways that reasonableness was utilized during this era.

<sup>139</sup> STARKE, *supra* note 138, at 33. There are uses of “reasonable” and “unreasonable” outside the context of criminal law in Starke’s manual, including a reference to an “unreasonable Seizure” that may occur when a sheriff attempts to collect unpaid property tax. *Id.* at 291.

<sup>140</sup> See, e.g., BURN, *supra* note 135, at 747 (citing Hale’s *History of the Pleas of the Crown*); HENING, *supra* note 138, at 450 (citing Hawkins’s *Pleas of the Crown* as well as Hale). Hening generally limits warrants to treason, felonies, and breaches of peace, noting that for other offenses, a summons rather than a warrant is appropriate. *Id.*; see also CUDDIHY, *supra* note 20, at 277, 314 (discussing excise laws of 1723 and 1731 that conditioned warrants upon a judge’s determination of reasonableness). In all these instances, reasonableness appears to relate only to the level of suspicion reached and not to limits on the places that may be searched. This substantive view of reasonableness is long-standing—Cuddihy reports that as early as 1447, officials of the Tailors’ Company of London complained that searches of homes were occurring “with outen matier or cause reasonable.” *Id.* at 413–14; cf. SMITH, *supra* note 46, at 11 (describing Edward I’s 1275 amercement act that prohibited fines “without reasonable Cause”).

<sup>141</sup> See, e.g., T. CUNNINGHAM, A NEW AND COMPLETE LAW DICTIONARY (London 1765); GILES JACOB, A NEW-LAW DICTIONARY (London, E. & R. Nutt and R. Gosling 1729).

<sup>142</sup> RICHARD BURN & JOHN BURN, A NEW LAW DICTIONARY 594 (London, A. Strahan & W. Woodfall 1792).

wardship and “great monetary benefit.”<sup>143</sup> In addition, some dictionaries contained the term “reasonable aid,” which was “a duty that the lord of the fee claimed of his tenants” to help pay for the expenses of knighting his son, arranging the marriage of his daughter, or paying ransom in case of capture.<sup>144</sup> The adjective “reasonable” operated as an indeterminate cap on the amount of tax that the lord could extract from the tenant until a fixed rate of twenty shillings was established by statute in 1275 for the first two types of aid.<sup>145</sup> In both entries, “reasonable” was used in the ordinary sense of moderate or equitable—a use that dates back to Magna Carta (1215), which first articulated these doctrines.<sup>146</sup>

Other types of law-related writings from the eighteenth century and before also contain references to “reasonable” and “unreasonable” that suggest a similar use as a fact-dependent standard. For example, Henry VIII’s letter patent (1518) that first granted the London College of Physicians its regulatory power—challenged in the aforementioned *Bonham’s Case*—authorized that body to discipline doctors in various ways “reasonable and fitting.”<sup>147</sup> In a truly dizzying example of the plasticity of reasonableness, the *Coggs v. Bernard* (1703) case, which established the negligence standard in bailments,<sup>148</sup> employed reasonableness multiple times and with a seemingly different meaning each time—from condemning the theretofore strict liability regime as “unreasonable”;<sup>149</sup> to allowing that bailees of farm animals may use them in a “reasonable manner”;<sup>150</sup> to, of course, requiring that certain parties must use “reasonable care” and observing that to expect more

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<sup>143</sup> Carole Shammas, *English Inheritance Law and Its Transfer to the Colonies*, 31 AM. J. LEGAL HIST. 145, 146 (1987).

<sup>144</sup> CUNNINGHAM, *supra* note 141; JACOB, *supra* note 141; *see also* Shibley Rahman, *What Is Reasonable? by Prof Gary Slapper*, SHIBLEY RAHMAN (Dec. 18, 2011), <http://shibleyrahman.com/law/what-is-reasonable-by-prof-gary-slapper/> [<https://perma.cc/7P4N-68JX>].

<sup>145</sup> *See* James Ross, *The English Aristocracy and Mesne Feudalism in the Late Middle Ages*, 133 ENG. HIST. REV. 1, 5 (2018), [https://cris.winchester.ac.uk/ws/portalfiles/portal/1859490/1849592\\_Ross\\_EnglishAristocracyMesneFeudalism\\_original.pdf](https://cris.winchester.ac.uk/ws/portalfiles/portal/1859490/1849592_Ross_EnglishAristocracyMesneFeudalism_original.pdf) (accepted manuscript) (noting also that the new fixed rate did not apply to ransom for capture).

<sup>146</sup> *See* Rahman, *supra* note 144 (discussing reasonable aid); Shammas, *supra* note 143, at 146 (discussing reasonable part).

<sup>147</sup> *Bonham’s Case* (1610) 77 Eng. Rep. 638, 640 (CP).

<sup>148</sup> *Coggs v. Bernard* (1703) 2 Ld. Raym. 909, 909 (KB).

<sup>149</sup> *Id.* at 914. Judge Holt similarly describes strict liability as “hard,” stressing the need to “consider the reason of the case. For nothing is law that is not reason.” *Id.* at 911.

<sup>150</sup> *Id.*

would be “unreasonable.”<sup>151</sup> One final excerpt from the apropos setting of colonial government: the 1691 Charter of Massachusetts Bay empowered the governor and the general court to pass “proportionable and reasonable Assessments[,] Rates[,] and Taxes” and other “wholsome and reasonable Orders[,] Laws[,] Statutes” for the welfare and protection of the colonists.<sup>152</sup> These examples provide a sense of how ordinary reasonableness was already widely used as a legal standard in reference books, cases, statutes, and constitutional documents by the late eighteenth century when the Fourth Amendment was adopted. This examination of reasonableness in English and American law writings show that the term was as capacious in the eighteenth century as it is today. Not only was reasonableness frequently and variably used in many legal texts, but it appeared that way in works that specifically discussed government searches and seizures. By the time John Adams wrote the Massachusetts Constitution in 1780, and coined the phrase “unreasonable searches and seizures,” he would have been well aware of these uses of reasonableness generally, and perhaps recalled Otis’s uses of “unreasonable” to describe searches under writs of assistance in particular. Accordingly, it is hard to believe, as Thomas Davies has suggested, that Adams decided to transform Coke’s “against common right and reason” to “unreasonable” and yet hoped to somehow maintain and convey the former’s esoteric, early seventeenth century meaning.

The connection between Cokean reasonableness and the Fourth Amendment becomes even more tenuous when extended to James Madison’s draft. Although not a lawyer by profession as Adams was, Madison studied law and was familiar with Coke.<sup>153</sup> But he may have misread him. Madison’s notes on Coke indicate that he understood Coke to have been expounding on the process of legal reasoning rather than its substance. In his notes from his law studies, Madison paraphrased Coke to have distinguished between “Artificial Logick” and “Natural Logic,” not artificial reason and natural reason.<sup>154</sup>

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<sup>151</sup> *Id.* at 918.

<sup>152</sup> *The Charter of Massachusetts Bay – 1691*, YALE L. SCH.: THE AVALON PROJECT, [https://avalon.law.yale.edu/17th\\_century/mass07.asp](https://avalon.law.yale.edu/17th_century/mass07.asp) [<https://perma.cc/WA3S-ZLLG>].

<sup>153</sup> See David Thomas Konig, *James Madison and Common-Law Constitutionalism*, 28 L. & HIST. REV. 507, 511 (2010) (discussing Madison’s studies in law); see also Bilder, *supra* note 109, at 395 (noting that Madison intermittently studied some law but chiefly for the purpose of understanding government).

<sup>154</sup> Konig, *supra* note 153. But perhaps this was not a misreading at all. Madison’s shift from “reason” to “logic” may be warranted by Coke’s approving commentary on Thomas

Moreover, like most other students of the law at the time, Madison also read Blackstone (though perhaps not Hale) who, as discussed above, used the language of reasonableness quite differently from Coke.<sup>155</sup> To one as sensitive to the vagaries of language as Madison was, relying on the widely and variably used “unreasonable” as a signifier for Coke’s “against common right and reason”—even had he read it correctly—would have been quite out of character.<sup>156</sup> At the same time, Madison’s legal study would have enabled him to amply appreciate the enduring and fundamental significance of reasonableness in the law dating back to at least Magna Carta. Considering Madison’s desire for a swift and uncontroversial approval of the Bill of Rights, it may be that “unreasonable” served as a generally agreeable yet legally powerful adjective to denote only that the new government’s search and seizure power is a limited one.

## II

### SOME GUIDEPOSTS OF REASONABLENESS

The historical study in Part I suggests that reasonableness could, and probably did, have multiple meanings for the Framers, only some of whom were lawyers in any case.<sup>157</sup> Among these meanings, moreover, there is evidence that the kind of fact-based, interest-balancing approach that today’s Supreme Court is criticized for was not unheard of in the eighteenth century. Indeed, even James Otis and Lord Camden appear to have accepted that individual rights will give way when the public’s interests are compelling enough and when circumstances of necessity obtain. Consequently, one important conclusion that could be drawn from this discussion is that the Court’s modern Fourth Amendment jurisprudence is not only “practically perfect,” as one

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Littleton’s epilogue, where the latter advised that knowledge of law comes by the “arguments and reasons in the law.” See 2 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 394.b–95.a (Philadelphia, Robert H. Small 1853); see also Ian Williams, *Dr. Bonham’s Case and “Void” Statutes*, 27 J. OF LEGAL HIST. 111, 121 (2006) (arguing that by “common right and reason” Coke was referring to a “method” of statutory interpretation based on existing rules); Allen Dillard Boyer, “*Understanding, Authority, and Will*”: *Sir Edward Coke and the Elizabethan Origins of Judicial Review*, 39 B.C. L. REV. 43, 49–50 (1997) (describing the relationship between Coke’s “artificial reason” and the rhetorician’s “artificial logic”).

<sup>155</sup> See Bilder, *supra* note 109, at 399.

<sup>156</sup> See *id.* at 437–41.

<sup>157</sup> See Sklansky, *supra* note 29, at 1780.

commentator has put it, but also historically well-founded.<sup>158</sup> On the other hand, many of the critiques leveled against the Court's reasonableness analysis are not *that* it uses interest balancing but *how* the Court has balanced the competing interests and accounted for the circumstances involved.<sup>159</sup> As to this latter problem, the history described in Part I can provide some useful "guideposts" that may not only inject better discipline into the process but also lend it greater legitimacy as the Court's search and seizure jurisprudence continues to evolve.<sup>160</sup> Below I discuss four such guideposts that are especially relevant to Fourth Amendment issues today.

### A. Abuse of Power

The clearest among the four historical guideposts I discuss here is the concern over government abuse of power, which appears in many of the materials examined above—most notably in the *Writs of Assistance Case* and in *Entick*. General warrants represented a severe abuse of power that not only authorized unchecked discretion to search and seize but also prevented resistance by their targets and immunized the searchers from liability. Reasonableness in *Tanistry* also constrained abuse of power by requiring that customs cannot originate or be maintained through coercion by "lords and great men."<sup>161</sup> It was also a key concern for colonists who demanded a Bill of Rights that would protect them against arbitrary encroachments by the new federal government.

To students of modern criminal procedure, worry about abuse of power is a familiar problem in light of the proliferation of warrantless searches and seizures that enable police officers to make the call themselves on whether there is probable cause, reasonable suspicion, exigent circumstances, consent, and so on. The solicitude shown by the Court toward a police officer's judgment in these regards is certainly a dramatic shift from the constraints that the historical materials above sought to impose on government officials. In fact, not only did Otis and Camden express concerns about the low-ranking "menial servants" that might conduct searches and seizures but they also questioned the search

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<sup>158</sup> See generally Stephen A. Saltzburg, *Terry v. Ohio: A Practically Perfect Doctrine*, 72 ST. JOHN'S L. REV. 911 (1998) (analyzing the *Terry* case, considered by many to be start of the Court's current reasonableness approach).

<sup>159</sup> See, e.g., Wasserstrom, *supra* note 15, at 148 (warning against erosion of protections).

<sup>160</sup> Chief Justice Roberts discussed history-based guideposts to Fourth Amendment analysis in his opinion in *Carpenter v. United States*, 138 S. Ct. 2206, 2214 (2018).

<sup>161</sup> DAVIES, *supra* note 80, at 89.

authority of higher-ranked officials—such as those that worked in the Court of Exchequer and the secretary of state himself.<sup>162</sup> Thus it is puzzling that notwithstanding this perennial concern, the Supreme Court has determined that reasonableness does not require a warrant in most search cases.

Trying to return to a more warrant-based system of searches and seizures is likely to be futile at this point. That said, viewing abuse of power from a more historical perspective could perhaps support a warrant requirement in novel settings going forward. In the 2018 case of *Carpenter v. United States*, Chief Justice Roberts required the government to obtain a warrant to access cell site location information by noting that Fourth Amendment history suggested “some basic guideposts”: that is, that the individual interest in privacy must be protected from “arbitrary power” and “relatedly, that a central aim of the Framers was ‘to place obstacles in the way of a too permeating police surveillance.’”<sup>163</sup> The Court does not often refer to the role of the Fourth Amendment or the courts as essentially obstructive, yet that is clearly what the language of the Amendment (“shall not be violated”) and the historical materials on searches and seizures contemplate. In other words, the entire history of the Fourth Amendment indicates that the Framers were not merely interested in defining what *is* an unreasonable search but in proscribing some government conduct *as* an unreasonable search.

The early Supreme Court appeared to recognize this aim by incorporating a warrant requirement into reasonableness in *Ex parte Jackson*.<sup>164</sup> Soon after in *Boyd v. United States*, the Court more explicitly articulated the judiciary’s obstructionist role in the constitutional scheme, declaring that its “motto should be *obsta principiis*” in order to guard against even slight and “stealthy encroachments” on Fourth Amendment rights.<sup>165</sup> The Court affirmed this principle again in *United States v. Di Re*, invoking history and the Framers’ intent to place “obstacles” against government surveillance.<sup>166</sup> But for the next seventy years, the Court seemed to

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<sup>162</sup> See Adams, *supra* note 46, at 126–27 (discussing Otis’s dismissive view of Exchequer precedents); *Entick v. Carrington* (1765) 95 Eng. Rep. 807, 816–17 (KB) (discussing the nature of the secretary of state’s authority); *id.* at 818 (referring to the secretary of state as a “private office”).

<sup>163</sup> 138 S. Ct. at 2214 (first quoting *Boyd v. United States*, 116 U.S. 616 (1886); and then quoting *United States v. Di Re*, 332 U.S. 581 (1948)).

<sup>164</sup> See *supra* text accompanying note 5.

<sup>165</sup> 116 U.S. at 635.

<sup>166</sup> 332 U.S. at 595.



abandon this historical purpose in favor of allowing an unprecedented level of discretion to rest in police officers. Moreover, like the general warrant, it has insulated the government from accountability by its acceptance of multiple doctrines, such as qualified immunity, good faith, and the weakening of the probable cause and reasonable suspicion standards.

Time will tell whether the revival of an obstructionist stance in *Carpenter* will fade into obscurity once again. But there is no question that the goal of curbing abuse of power is a key historical guidepost of reasonableness—one that justifies a very different outlook on police practices and the role of the courts than what dominates today.

### B. Public Good

One of the most interesting, and sadly overlooked, meanings of legal reasonableness is the idea of the public good. As discussed above, reasonableness was invoked in *Entick v. Carrington* and traced to *The Case of Tanistry*, although the doctrine goes back further.<sup>167</sup> The requirement that a custom reflects a consensus about the public good, or benefit to the many, was a key element for finding local practices reasonable and legal in the common law. James Otis also acknowledged the importance of the public good in the search and seizure context and agreed that common law restrictions on searches and seizures did allow for some home intrusions, that is, in cases where “flagrant Crimes” and “great public Necessity” were involved.<sup>168</sup> And, of course, the Fourth Amendment itself recognizes the “right of the people,” held both in the singular and plural.<sup>169</sup>

Modern Fourth Amendment balancing takes a somewhat inconsistent stance on reasonableness and the public good. At times, the Court’s analysis treats the state and the defendant like private parties in a dispute whose conflicting interests may be straightforwardly identified and weighed to determine who shall prevail. A key example of this is *Terry v. Ohio*, where the Court described the government’s desire for “an escalating set of flexible responses” that, if granted, will undoubtedly diminish an individual’s freedom in public settings.<sup>170</sup> The *Terry* Court ultimately found that a stop and frisk, being a lesser

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<sup>167</sup> See Andrea C. Loux, *The Persistence of the Ancient Regime: Custom, Utility, and the Common Law in the Nineteenth Century*, 79 CORNELL L. REV. 183, 189 (1993).

<sup>168</sup> See *supra* text accompanying note 105.

<sup>169</sup> U.S. CONST. amend. IV.

<sup>170</sup> *Terry v. Ohio*, 392 U.S. 1, 10 (1968).

intrusion than some other searches and seizures, was reasonable with less than probable cause where the officer was attempting to disrupt the commission of an impending armed robbery while at the same time protecting himself.<sup>171</sup> Or consider *Winston v. Lee*, where the Court determined that the defendant's objection to forced surgery was weightier than the state's desire to obtain the bullet evidence that was lodged in his chest.<sup>172</sup> Although *Winston* also involved the serious crime of attempted armed robbery, the individual interest there was deemed to be significantly greater (an intrusion into the defendant's body) whereas the government's interest was diminished because it had ample evidence to prosecute even without the bullet.<sup>173</sup>

But Fourth Amendment balancing also often speaks of the public good, both implicitly and explicitly. It assumes reasonableness as a trade-off between security and privacy—that is, between the public's protection from crime (or some other harm) and the individual's right to be let alone. In this paradigm of the Fourth Amendment balance, societal safety is merged into or even conflated with the government's interest, which tends to make this method appear salutary regardless of the outcome. After all, one can readily agree that the officer in *Terry* was acting for the public good when he stopped a serious and potentially violent crime from taking place.<sup>174</sup> This general protection significantly blunts the force of the complaint that the individual defendant may make as they, too, enjoy this benefit offered by the state. This effect is even more pronounced in special needs cases, where the government disclaims its interest in “ferreting out crime”<sup>175</sup> and asserts a primarily protective role, such as stopping drunk driving or preserving the health of unborn babies.<sup>176</sup> Occasionally, aspects of the

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<sup>171</sup> *Id.* at 30.

<sup>172</sup> *Winston v. Lee*, 470 U.S. 753, 766 (1985).

<sup>173</sup> *Id.*

<sup>174</sup> Though one should not be too naïve about this point. Numerous commentators have shown that the criminal justice system has been used by the powerful to oppress others and to maintain their position. See, e.g., DAN CANON, PLEADING OUT: HOW PLEA BARGAINING CREATES A PERMANENT CRIMINAL CLASS 10 (2022) (“[T]he American legal system was designed by people in power as a tool to keep them in power at whatever cost.”); cf. Jill Lepore, *The Invention of the Police*, THE NEW YORKER (July 13, 2020), <https://www.newyorker.com/magazine/2020/07/20/the-invention-of-the-police> [<https://perma.cc/693W-3P5N>] (explaining the origins of the American police in slave patrols and how it later grew within anti-immigrant and anti-labor efforts).

<sup>175</sup> *Terry*, 392 U.S. at 12 (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)).

<sup>176</sup> See *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (approving suspicionless sobriety checkpoints); *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (striking down state hospital program that referred drug-addicted pregnant women to prosecutors).

public good are expressly acknowledged but seem to have no active role. In *Terry*, for example, Chief Justice Warren expressed concern that frequent stops and frisks created acute social friction, especially between the police and Black communities. Even though this problem for the public good was found to be “relevant,” it did not figure into the balancing analysis that the Court ultimately conducted.<sup>177</sup>

The fusion between the public good and state interest was not a given in the eighteenth century. For jurists like Sir John Davies, what was good for the many could not have been the same as what was good for the state. Davies’s theory of the common law is best described as bottom-up, whereby the public good was determined according to aggregate individual acts freely chosen rather than imposed by an authority figure like the king, judges, or even Parliament.<sup>178</sup> This is not to say that the state and public interests could not coincide but only that they are not inherently one and the same. John Glynn also raised the problem of interest divergence in his arguments before the court in *Entick*. He noted, for example, that the English government’s power to press (which also motivated many searches and seizures) was approved “in times when the lower part of the subjects were little better than slaves to their lords and great men.”<sup>179</sup> Glynn asserted that the law of general warrants, like impressment laws, was thus contrary to the public good, notwithstanding any long usage or even the occasional imprimatur of the Crown and legislature.<sup>180</sup> Lord Camden agreed to a sufficient extent as to conclude that general warrants for seditious libel—an offense that was a long-standing preoccupation of the English government—threatened “all the comforts of society” and could not be found consistent with the common law.<sup>181</sup>

When state interest and public good are disentangled, a new perspective on Fourth Amendment balancing emerges. If reasonableness should account for the public good, then perhaps some of the factors that the Court has included in its analysis—such as police efficiency and ease of enforcement—ought to be reconsidered, particularly if they have a significant negative impact on the Fourth Amendment rights of the people. And other factors—like the aforementioned community impact in *Terry*—should be more clearly placed in the balance as well so that they are given due consideration

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<sup>177</sup> *Terry*, 392 U.S. at 17 n.14.

<sup>178</sup> See, e.g., Loux, *supra* note 167, at 183 (describing customs as “law ‘from below’”).

<sup>179</sup> *Entick v. Carrington* (1765) 95 Eng. Rep. 807, 814 (KB).

<sup>180</sup> *Id.* at 812.

<sup>181</sup> *Id.* at 817–18.

in the reasonableness analysis. Perhaps if the Court had more closely scrutinized and explained what falls within the umbrella state interest of “effective law enforcement,” and mobilized the community impact within the balancing analysis, its jurisprudence would be less “danger[ous].”<sup>182</sup> Such an approach would also take more fully into account “the context” that the *Terry* Court found so important in identifying the scope of the Fourth Amendment right, while at the same time respecting the significance of the public good to the historical meaning of reasonableness.<sup>183</sup>

### C. Inequality/Bias

Perhaps the most surprising aspect of Fourth Amendment reasonableness that comes out of its history is its attention to equality and evenhandedness. James Otis, for example, railed against what he saw as unequal treatment between the English in England and the English in the colonies, as well as between the colonists in Rhode Island and the colonists in Massachusetts. He called the former “slavery,” while the latter was condemned as “unreasonable treatment.”<sup>184</sup> But even before Otis connected inequality to unreasonableness, the legal test of reasonableness as to customs appears to have incorporated this concept as well. Despite the doctrine’s seemingly majoritarian focus on “benefit to the many,” concerns about fairness and equality were deemed significant enough to negate the legality of customs.<sup>185</sup>

Bias was also denounced in *Bonham’s Case* and the old common law maxim of *nemo debet esse Judex in propria causa*. Indeed, the maxim was used to criticize general searches in the eighteenth century that allowed the searchers themselves to exercise discretion.<sup>186</sup> Beyond the intentional bias of interested judging, cases like *Barker v. Coker* demonstrated that a seemingly neutral rule can run afoul of reasonableness if it has a disparate impact, or places a heavier burden,

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<sup>182</sup> See Wasserstrom, *supra* note 15, at 148.

<sup>183</sup> *Terry v. Ohio*, 392 U.S. 1, 9 (1968).

<sup>184</sup> See *supra* text accompanying notes 71–73; see also Otis, *supra* note 59, at 30 (insisting on equal rights among the various colonies without “partial views” in favor of one over another); ANDREW E. TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789–1868, at 5 (2006) (observing that political inequality was a widespread complaint within the revolutionary generation).

<sup>185</sup> See *supra* text accompanying notes 93–94.

<sup>186</sup> See Davies, *supra* note 16, at 691–92 (citing 2 SIR MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN 150 (Solemn Emlyn ed., 1736)).

on some individuals or groups.<sup>187</sup> Thus, reason and reasonableness appear to have accounted for both intentional bias and inequality of outcomes.

Accordingly, there is a historically grounded rationale for reconsidering the Court's decision in *Whren v. United States*, which denied racial bias as a basis for finding unreasonableness.<sup>188</sup> In *Whren*, the Court rejected the defendant's contention that his car was stopped by the police because he was Black, thereby rendering the seizure unreasonable.<sup>189</sup> Justice Scalia, in his majority opinion, excluded officer bias and the phenomenon of "driving while Black" from the reasonableness analysis, and held that the Fourth Amendment standard required only probable cause.<sup>190</sup> *Whren* redirected equality claims to be resolved under the Equal Protection Clause instead.<sup>191</sup>

This "objective" rule is surely an easier one for the Court to enforce, but it is not necessarily the best nor the most historically accurate. It should be noted first that many commentators have argued persuasively that with the passage of the Equal Protection Clause, Fourth Amendment reasonableness was essentially rewritten to incorporate equality concerns.<sup>192</sup> But even if that were not the case, as this Article has shown, the pre-adoption history of Fourth Amendment reasonableness contains many possible meanings and many significant guideposts, including this one. To be sure, equality—especially toward the weak in society—was not the most pressing concern among the colonists or in the law of the eighteenth century. The privileges of race, class, gender, religion, etc. were far more accepted (indeed, actively sustained) than they are now, and so it would be logical to assume that this history would be silent on these issues. Remarkably, it is not. English law and American colonists recognized and understood (in their own, limited way) the unjustness of inequality and bias, and the tangible, destructive harms that result therefrom—and they called it "unreasonable." Even more striking is the colonists' (again, limited) understanding of how inequality can be based on identity—in their case, as American-born colonists seeking the full rights of all

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<sup>187</sup> See *supra* text accompanying note 94.

<sup>188</sup> *Whren v. United States*, 517 U.S. 806 (1996).

<sup>189</sup> *Id.* at 813.

<sup>190</sup> *Id.* at 819. One could argue, however, that probable cause was not a sufficient substantive ground for Fourth Amendment reasonableness until as late as 1967 when the Court finally struck down the mere evidence rule in *Warden v. Hayden*, 387 U.S. 294 (1967).

<sup>191</sup> *Whren*, 517 U.S. at 813.

<sup>192</sup> See, e.g., TASLITZ, *supra* note 184, at 12.

Englishmen. In light of the problems of race and policing that we face today, it may be especially worthwhile to recall and recover this facet of reasonableness.

#### *D. Absurdity*

The final guidepost explored here is the relationship between reasonableness and absurdity or other negative consequences, such as violence. The link between absurdity and unreasonableness can be found in Otis and Blackstone as discussed above, although it is likely they were using it in slightly different senses. Blackstone used absurdity as a way to describe an undesirable and unintended consequence of a statute that may be set aside for that reason.<sup>193</sup> For Otis, on the other hand, the unreasonableness of the writ of assistance was due to its absurd features—that is, features that allowed it to be used with almost no limitations. As such, the continued use of the writ, he argued, would eventually lead to social violence.

Although absurdity may seem at first glance to be too extreme to be useful for Fourth Amendment analysis, there are certain aspects of especially Otis's approach that might be relevant today. Notably, Otis's presentation of the writ's absurdity was not piecemeal but as a whole. In fact, every single feature of the writ of assistance that Otis complained of had a precedent that could support the granting of a new writ. It was the amalgamation of all these features—that these “universal” writs would allow “menial servants”<sup>194</sup> to have

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<sup>193</sup> 1 BLACKSTONE, *supra* note 110, at 91 (noting that when “general words” of a statute lead to an unreasonable consequence, “the judges are in decency to conclude that this consequence was not foreseen”). Stoner writes that “absurd” was a word with similar meaning to “against common right and reason,” as were other often-used adjectives for bad laws like “inconvenient” and “repugnant.” See STONER, *supra* note 29, at 54.

<sup>194</sup> Legal treatises indicate that ordinary people could be conscripted at any time by an officer to assist with a search or seizure, with or without an official writ. See, e.g., 1 HALE, *supra* note 123, at 577, 581 (authorizing an officer to require assistance from anyone present to make an arrest); SMITH, *supra* note 46, at 27 (noting that at common law the right to seize was available to anyone); see also 1 HALE, *supra* note 123, at 588–89 (describing the legal obligation of private persons to raise a “hue and cry” and to detain “reasonably”); *id.* at 465 (calling “hue and cry” a “good warrant”).

“perpetual”<sup>195</sup> power to search and seize “at will”<sup>196</sup>—that made the writ ultimately absurd.

Such a holistic review of the government’s search and seizure practices can operate as an effective backstop against practices that, when taken in their component parts, seem reasonable at every step. Take, for example, the Supreme Court’s approval of manufactured exigencies, considered in *Kentucky v. King*.<sup>197</sup> There, uniformed officers ran through the common area of an apartment building to locate a suspect who was reported to have just engaged in a controlled crack cocaine transaction.<sup>198</sup> The officers did not see the suspect but heard a door shut and smelled burning marijuana coming from one of the apartments.<sup>199</sup> They then proceeded to bang on the door “as loud as they could” and announced their presence (yelling either “[t]his is the police” or “[p]olice, police, police”).<sup>200</sup> Upon hearing “‘people inside moving’ and . . . ‘things . . . being moved inside,’” the officers announced they were about to enter and kicked open the door.<sup>201</sup>

In his opinion for the majority, Justice Alito explained that the officers acted reasonably at each step. Beginning with the loud knocking and yelling outside the apartment, he noted that police officers may have very good reason to forcefully knock on the door and loudly announce their presence in order to effectively alert those inside. Justice Alito went on to suggest that this was a cause for reassurance, since the residents may be “startled by an unexpected knock” if they didn’t know that it was the police and not some “unknown persons in plain clothes” at the door.<sup>202</sup> In this, Justice Alito seemed to merely

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<sup>195</sup> English legal practice did recognize ex officio powers to search and seize—e.g., customs officials by statute—that could be characterized as perpetual. *See* CUDDIHY, *supra* note 20, at 321; *see also* 1 HALE, *supra* note 123, at 575 (recognizing officials’ power to arrest “*virtute officii*”); 4 BLACKSTONE, *supra* note 124, at 289 (discussing the power of the watchmen *virtute officii* to arrest nightwalkers until morning); CUDDIHY, *supra* note 20, at 45 (describing legislation that authorized routine, monthly vagrancy searches).

<sup>196</sup> General warrants and warrantless searches remained common in English and colonial search and seizure practice when Otis made his arguments. As Otis conceded, general warrants remained in many legal manuals of that time. *See, e.g.*, CUDDIHY, *supra* note 20, at 318–19 (describing the prevailing acceptance of general warrants in JP manuals). Thus, many searches and seizures were made “at will.”

<sup>197</sup> *Kentucky v. King*, 563 U.S. 452 (2011).

<sup>198</sup> *Id.* at 455–56.

<sup>199</sup> *Id.* at 456.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 468.

apply the established principle that the police may do what a layperson could do without triggering the Fourth Amendment.

As for the forcible entry itself, it would turn on the presence of an exigent circumstance that would excuse the absence of a warrant in the case. Although the Court did not determine this factual issue and merely assumed for purposes of analysis that an exigency existed, it did explain that unless there was already an actual or threatened violation of the defendant's Fourth Amendment right, sounds that could be attributed to the imminent destruction of evidence—a common basis for finding exigency—would suffice to validate the warrantless entry.<sup>203</sup>

Yet surely this is, taken in its totality and context, quite absurd under both senses used by Otis and Blackstone. Notwithstanding Justice Alito's careful parsing of the sequence of events, the actions of the officers—losing track of a suspect after a crack cocaine buy, deciding that he must have entered an apartment smelling of burning marijuana, forcefully banging on the door and yelling out their presence, thereby causing a reaction of people or things “moving” inside, and then finally justifying their act of kicking in the door and bursting inside upon the noises they caused themselves—are reminiscent of a Keystone Kops film rather than sound detective work. Unsurprisingly, the police were also wrong: the original suspect had entered a different apartment. Moreover, as Justice Ginsburg pointed out in her dissent, the use of the exigent circumstances doctrine here was far afield from what was originally intended. Under the Court's decision, she warned, “[i]n lieu of presenting their evidence to a neutral magistrate, police officers may now knock, listen, then break the door down, never mind that they had ample time to obtain a warrant.”<sup>204</sup>

For cases like *Kentucky v. King*, a catchall guidepost of absurdity may operate to block searches and seizures that may appear reasonable in their component parts. Like other catchall conditions, such as tort law's proximate cause element, absurdity ultimately relies on judgment. As a result, it is unlikely to be routinely used to alter the outcome. Nonetheless, this historical guidepost of reasonableness may provide a better perspective in egregious cases where a seemingly thoughtful, granular analysis yields an unintended, undesirable, and generally absurd outcome.

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<sup>203</sup> *Id.* at 462, 471. The example Justice Alito gave for such a prior violation or threat was a declaration by the police “that they would break down the door if the occupants did not open the door voluntarily.” *Id.* at 471.

<sup>204</sup> *Id.* at 473.



## CONCLUSION

Fourth Amendment reasonableness remains a legal mystery. This is not because we know too little about how it came to be but because, in some ways, we know too much. The myriad concerns that animated the Fourth Amendment create the problem of an almost boundless individual right that, ironically, may drive the courts to try to limit the right instead of the government. Indeed, over the past fifty or so years, we have seen the Supreme Court take a much more pro-government approach than ever before as new policing methods, and especially new technologies, arise. In this relatively recent turn in Fourth Amendment jurisprudence, the Court has not only pared down the individual right but also veered away from many of the historical underpinnings of reasonableness (even as it occasionally asserted an intention to reclaim them).

I suggest in this brief historical study that there may be some useful concepts that ought to be resurrected and reconsidered for a more faithful and relevant analysis of Fourth Amendment reasonableness. Given the radical capaciousness of reasonableness, they can only be suggestions—guideposts at best. This is especially true because with a standard like reasonableness, it is hard to say that the Court is definitely wrong in its approach. Nonetheless, there is still room for improvement, and the guideposts I highlight here are found in multiple historical sources and reflect, in some cases, long-standing common law rules and principles. As such, I believe they are well worthy of discussion as part of what Thomas Littleton, via Coke, called the “arguments and reasons in the law” that add to our growing knowledge of this constitutional right.

