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The Reasonableness of Probable Cause

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Craig S. Lerner

Abstract

Probable cause is generally cast in judicial opinions and the scholarly literature as a fixed probability of criminal activity. In the weeks before the September 11 attacks, FBI headquarters, applying such an unbending standard, rejected a warrant application to search Zacarias Moussaoui's laptop computer. This article, which begins with an analysis of the Moussaoui episode, argues that the probable cause standard should be calibrated to the gravity of the investigated offense and the intrusiveness of a proposed search. Tracing the evolution of probable cause from the common law through its American development, the article argues that the Supreme Court's current insistence on a "single standard" lacks historical support. Probable cause should be recast within a reasonableness framework, embracing the common sense view that not all searches equally trench on privacy concerns and not all crimes equally threaten the social order.

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[A]lthough I thought that probable cause existed (“probable cause” meaning that the proposition has to be more likely than not, or if quantified, a 51% likelihood), I thought our United States Attorney’s Office . . . [is] regularly requiring much more than probable cause before approving affidavits, (maybe, if quantified, 75%–80% probability and sometimes even higher)¹

I. Introduction

Nearly a month before the September 11 attacks, FBI agents in Minneapolis arrested Zacarias Moussaoui on an immigration overstay violation. His perplexing determination to fly, or simply steer, a jumbo jet, combined with his links to radical Muslim fundamentalists, sparked concern in the FBI’s Minneapolis field office. Moussaoui’s claims, when questioned, to being “just a businessman,” proved specious, and agents were eager to confirm, or allay, their relatively inchoate concerns by searching Moussaoui’s laptop computer. Yet Moussaoui refused to consent. Was there probable cause to obtain a warrant?²

Coleen M. Rowley, the Chief Division Counsel of the FBI’s Minneapolis office, thought so.³ As reflected in the quotation that introduces this Article, she placed the likelihood of criminal activity at greater than fifty percent. The established practice in the federal system, however, requires law enforcement officers to secure approval for warrant applications from a prosecutor, and in Rowley’s estimation, the U.S. Attorney’s Office in Minneapolis required showings akin to a “clear and convincing” evidentiary

1. Memorandum from Coleen M. Rowley, FBI Special Agent and Minneapolis Chief Division Counsel, to Robert Mueller, FBI Director, para. 7 (May 21, 2002), at <http://www.time.com/time/covers/1101020603/memo.html> (last visited Oct. 17, 2002) [hereinafter, Rowley Memorandum].

2. For a complete account of the FBI’s dealings with Moussaoui, see discussion *infra* Part II.

3. Rowley Memorandum, *supra* note 1, paras. 6–7.

standard. In late August, Rowley instead tried to convince FBI headquarters to approve a warrant under the Foreign Intelligence Surveillance Act. But headquarters balked, despite the persistent, and increasingly frantic, efforts on the part of Rowley and others in the Minneapolis office. Months after the September 11 attacks, Rowley sent FBI Director Robert Mueller a memo excoriating headquarters for its refusal to approve the warrant application.⁴

Among the important issues raised in the Rowley Memorandum⁵ is the meaning of probable cause, that elusive and perhaps hopelessly indeterminate constitutional standard for the issuance of law enforcement warrants.⁶ For her arguments on this point and several others, Rowley was hailed, after the memo's publication, as "[t]he blunt Midwesterner" ultimately vindicated in her struggle with Washington bureaucrats.⁷ And yet, *was* she vindicated? The fact that a crime eventually occurs does not mean that probable cause existed at every antecedent point in time. If a police officer sees four former felons gathering in the back room of a bar, probable cause does not then exist to arrest them and search their homes. Even if it emerges that a bank robbery could have been prevented had warrants been issued, hindsight bias should not cloud an assessment of probable cause. Perhaps sensing the direction and violence of the political winds, Director Mueller declined to make this point forcefully in response to the Rowley Memorandum. In fact, he joined the chorus of fulsome praise. But in the midst of his commendation of the "aggressive[]" efforts of the Minneapolis field office, Mueller struck this discordant note: "The attorneys back at the FBI determined that there was insufficient probable cause for a [warrant], *which appears to be an accurate decision.*"⁸ In effect, then, Mueller seemed to suggest, if ever so tactfully, that with respect to one of the central points of her memo, Rowley was wrong.⁹

4. *Id.* paras. 6–8.

5. Rowley also questioned the failure of FBI headquarters to share pertinent information with field offices and to coordinate investigations conducted simultaneously in Phoenix and Minnesota. *Id.* paras. 6–8. More generally, Rowley criticized the incentive structures within the FBI that have led, she argues, to an overcautious headquarters staffed with careerist mediocrities. *Id.* para. 8 n.5.

6. See U.S. CONST. amend. IV ("[N]o Warrants shall issue, but upon probable cause . . .").

7. Maureen Dowd, *Department of Political Security*, N.Y. TIMES, June 9, 2002, § 4, at 15.

8. Sarah Downey, *Who Is Zacarias Moussaoui?*, NEWSWEEK WEB EXCLUSIVE, Dec. 14, 2001, at <http://www.msnbc.com/news/673068.asp?cp1=1> (emphasis added). Mueller was questioned about this statement by Tim Russert in a television interview and stood by it. *NBC News: Meet the Press* (NBC television broadcast, June 2, 2002), available at 2002 WL 7833837.

9. Mueller was not Rowley's only critic. From a civil libertarian perspective, Professor Jonathan Turley assailed Rowley's memo for betraying a skewed understanding of constitutional rights and probable cause. Jonathan Turley, Commentary, *Wrong, As a Matter of Law: FBI Agent Coleen Rowley Ignores Our Constitutional Rights In Her Memo*, L.A. TIMES, May 30, 2002, at B15. Curiously, Rowley's claim that probable cause existed prior to September 11 has aroused skepticism on the political right as well. See Richard Lowry, *A Better Bureau*, NAT'L REV., July 1, 2002, at 28, 28 ("There was certainly evidence prior to September 11 that Moussaoui was a Muslim extremist, but 'probable cause' that he was an agent of a foreign power or terrorist group? It was by no means a slam dunk."); Ann Coulter, *The Whistle-Blower They Like*, FRONT PAGE MAGAZINE,



The layperson may be excused for finding all of this bewildering. We are to understand that the FBI acted commendably in investigating Moussaoui, that there was a nontrivial likelihood that he was engaged in criminal activity of the gravest sort, and that the search the FBI proposed to conduct of Moussaoui's laptop was narrowly tailored to address its concerns. If one weighed the expected social benefit of such a search against the cost of such a privacy intrusion, many would view the search as a reasonable one. With respect to many searches and seizures governed by the Fourth Amendment, courts conduct precisely this sort of balancing. Magnetometer searches in airports, to take an easy example, are justified because the possible harm (extremely high) is balanced against the privacy intrusion (relatively minimal).¹⁰ Why was such a balancing not appropriate here?

The curious answer is that probable cause is widely viewed in the legal community as a fixed standard.¹¹ On this point, in fact, Rowley and her critics seem to find common ground. The U.S. Attorney in Minneapolis, when asked about the Rowley Memorandum, stated: "We apply the *same* standard of probable cause in every case."¹² There may be a disagreement (among Rowley, FBI headquarters, and the U.S. Attorney's Office) as to just how probable probable cause is, but there is a consensus that probable cause is, in the words of the Supreme Court, "a *single*, familiar standard."¹³ Serial murder or agricultural subsidy fraud, aircraft piracy or taking the name of Smokey the Bear in vain,¹⁴ probable cause is treated as fixed and unvarying—the North Star of Fourth Amendment jurisprudence. Of course, the North Star is fabulously helpful for those embarking on long journeys in the Pacific;¹⁵ yet it is of virtually no assistance to those traveling around the block. Likewise, the prevailing conception of probable cause has rendered this single standard, and the Warrant Clause, irrelevant for vast reaches of police activity.

The Supreme Court's Fourth Amendment jurisprudence is marked by two presumptions which, on fuller inspection, turn out to be fictitious. The first is that warrantless searches are presumptively unconstitutional.¹⁶

June 20, 2002, para. 12, at <http://www.frontpagemag.com/articles> ("Being in league with known terrorists may be suspicious, but it is not probable cause to believe that a particular crime is being or has been committed by a specific individual.").

10. *United States v. Edwards*, 498 F.2d 496, 500 (2d Cir. 1974).

11. *See infra* subpart III(B)(1).

12. Frederic J. Frommer, *Minn. U.S. Attorney Challenges Rowley*, AP ONLINE, June 6, 2002, para. 3, at 2002 WL 21844350 (emphasis added).

13. *Dunaway v. New York*, 442 U.S. 200, 208 (1979) (emphasis added).

14. *See* 18 U.S.C. § 711 (2000) (making the unauthorized use of the "Smokey the Bear" name punishable by up to six months in jail).

15. For a riveting account of the uses early Pacific Islanders made of the North Star, at least when traveling in the Northern hemisphere, see JAMES A. MICHENER, *HAWAII* 86–90 (1959).

16. *See Katz v. United States*, 389 U.S. 347, 357 (1967) (proclaiming that "searches conducted outside the judicial process, without prior judicial approval by a judge or magistrate, are *per se*



Although the Supreme Court has not tired of repeating this proposition, the “warrant requirement,” as it is typically called, is so riddled with exceptions—at least two dozen at a recent count¹⁷—that the presumption in practice works in exactly the opposite direction.¹⁸ Indeed, with some, although only some, exaggeration, the current state of the law seems to be that warrants are required only for residential searches. The decline of the warrant requirement is already the subject of overheated protest and repetitive comment, and there is little need to add to the vast, yet still burgeoning, scholarship.¹⁹

A second fiction, however, has received little attention. It is what I will call the probable cause presumption: except in limited circumstances, searches for which the antecedent predicate is less than probable cause are unconstitutional. The U.S. Supreme Court,²⁰ the federal courts of appeal,²¹

unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions”).

17. See *California v. Acevedo*, 500 U.S. 582, 585 (1991) (Scalia, J., concurring) (noting that as of 1991 there were 22 exceptions to the warrant requirement (citing Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473–74 (1985))); George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers’ Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145, 169 (2001) (“Today, roughly twenty-four exceptions to this ‘warrant requirement’ exist, discovered by the Court largely in cases coming from state courts.”).

18. See, e.g., James B. Haddad, *Well-Delineated Exceptions, Claims of Sham, and Fourfold Probable Cause*, 68 J. CRIM. L. & CRIMINOLOGY 198, 198 (1977) (“[T]he [per se rule] fails to reflect judicial practice . . .”).

19. See, e.g., Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473, 478 (1991) (lamenting “[t]he evisceration of the warrant requirement and its accompanying erosion of fourth amendment protections”); Wayne D. Holly, *The Fourth Amendment Hangs in the Balance: Resurrecting the Warrant Requirement Through Strict Scrutiny*, 13 N.Y.L. SCH. J. HUM. RTS. 531, 543 (1997) (bemoaning the Supreme Court’s “hypocrisy” in exulting a warrant requirement and then riddling it with exceptions); Tracey Maclin, *Justice Thurgood Marshall: Taking the Fourth Amendment Seriously*, 77 CORNELL L. REV. 723, 756 (1992) (applauding Justice Marshall for opposing “the Court’s current systematic evisceration of the Fourth Amendment’s traditional safeguards” including the warrant requirement).

20. See, e.g., *United States v. Knights*, 534 U.S. 112, 121 (2001) (stating that “the Fourth Amendment ordinarily requires the degree of probability embodied in the term ‘probable cause’”); *Ferguson v. City of Charleston*, 532 U.S. 67, 74 n.7 (2001) (“[I]n limited circumstances, a search unsupported by either warrant or probable cause can be constitutional . . .”); *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) (approving of searches conducted without probable cause “in certain limited circumstances” (quoting *Almeida-Sanchez v. United States*, 413 U.S. 266, 277 (1973) (Powell, J., concurring))). The Supreme Court has also occasionally stated, on a seemingly inconsistent and even schizophrenic note, that “the ultimate measure of the constitutionality of a governmental search is ‘reasonableness,’” that is, *not* probable cause. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995). The very same paragraph in *Acton* that begins by touting reasonableness, not probable cause, as the “ultimate measure,” concludes as follows: “A search unsupported by probable cause can be constitutional . . . ‘when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.’” *Id.* at 653 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)). The apparent import of the latter sentence is that probable cause, and not reasonableness, is the ordinary (and ultimate?) measure under the Fourth Amendment, except in the event of “special needs.” See *infra* subpart V(C).

21. See, e.g., *Aubrey v. Sch. Bd.*, 148 F.3d 559, 562 (5th Cir. 1998) (recognizing departures from the probable cause requirement in “limited circumstances”); *United States v. Ward*, 131 F.3d



the federal district courts,²² and miscellaneous state courts,²³ all recite this proposition with unflinching energy. It makes a nice story, suggesting a contrast between a probable cause standard (fixed, easily knowable, relatively high), which governs the vast majority of police searches, and a reasonableness balancing that applies to a discrete set of circumstances. There's only one problem: It is plainly not true. The reality experienced by American citizens today is that they are searched and seized on a regular basis, and for the vast majority of these searches (e.g., airport searches, street stops, DUI checkpoints, urine testing of government employees), the constitutionality seems to turn not on probable cause, but on the reasonableness of the search, factoring in the degree of the intrusion and the gravity of the investigated offense.²⁴

This Article argues for a reappraisal of the concept of probable cause. Part II explores, through an analysis of the proposed search of Moussaoui's laptop computer, some of the multitude of problems that arise in the probable cause assessment. It is useful to walk through the Moussaoui episode twice—first through the eyes of the agents on the scene, who surmised that Moussaoui was up to no good, and then through the eyes of a lawyer, analyzing whether probable cause existed. Viewing the episode from a legal perspective, it is remarkable how little evidence there was, at least of a sort recognized as probative under current law, that Moussaoui was a terrorist. And yet there is the lurking question: Should it matter that the crime investigated here was of the gravest seriousness? Should probable cause fluctuate, even the tiniest bit, when the crime under investigation is aircraft piracy and not taking the name of Smokey the Bear in vain?

In answering these questions, Part III seeks guidance from English and colonial practice. Although the past cannot supply neatly packaged answers

335, 342 (3rd Cir. 1997) (noting that a warrant or “individualized suspicion” is not required for a search under limited circumstances); *Ahern v. O'Donnell*, 109 F.3d 809, 816–17 (1st Cir. 1997) (recognizing that the United States Supreme Court has permitted limited exceptions to the probable cause requirement); *United States v. Drinkard*, 900 F.2d 140, 144 n.6 (8th Cir. 1990) (finding that the “Supreme Court has moved away from the bright-line warrant requirement based on probable cause in certain limited circumstances”).

22. *See, e.g.*, *United States v. Brown*, 69 F. Supp. 2d 925, 929 (E.D. Mich. 1999) (recognizing departures from the probable cause requirement “in limited circumstances”); *Andrews v. Crump*, 984 F. Supp. 393, 409 n.11 (W.D.N.C. 1996) (recognizing that while “both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search, . . . in certain limited circumstances neither is required” (quoting *T.L.O.*, 469 U.S. at 340)).

23. *See, e.g.*, *State v. Russo*, 790 A.2d 1132, 1160 (Conn. 2002) (recognizing departures from the probable cause requirement in “limited circumstances” (quoting *Ferguson v. City of Charleston*, 532 U.S. 67, 74 n.7 (2001))); *Anchorage Police Dep't Employees Ass'n v. Municipality of Anchorage*, 24 P.3d 547, 553 n.41 (Alaska 2001) (quoting *Ferguson v. City of Charleston* for the origins of the “special needs” test used to determine if a search unsupported by probable cause can be constitutional); *N.J. Transit PBA Local 304 v. N.J. Transit Corp.*, 701 A.2d 1243, 1249 (N.J. 1997) (asserting that “[g]enerally, under the Fourth Amendment . . . searches or seizures conducted without a warrant based on probable cause are considered *per se* unreasonable”).

24. *See infra* subparts V(C–D).



to contemporary problems, historical study is often helpful in exposing the assumptions that clutter contemporary thinking. Specifically, the contemporary insistence on probable cause as a “single standard,” as well as the now commonplace contrast of “probable cause” and “reasonable suspicion,” have little or no support in historical practice.

Part IV sketches the development of probable cause in American courts. Painted with broadest strokes, probable cause in America started as a low evidentiary standard, ramped up in the mid-twentieth century, receded in the early 1980s, and has possibly risen again in recent years. Yet this sweeping view fails to do justice to the nuances, and often the inconsistencies, within the doctrinal development. Until the 1960s, however, the roughly interchangeable use of terms like “probable cause,” “reasonable cause,” and “reasonable grounds” was a consistent theme in the case law.

As explored in Part V, the birth of “probable cause” as a doctrine distinct from “reasonable cause” dates to the Supreme Court’s decision in *Terry v. Ohio*.²⁵ Since *Terry*, courts have cast probable cause as a fixed standard, and therefore distinct from a freewheeling reasonableness inquiry. Even where a search is minimally intrusive, or especially imperative, probable cause is often viewed as unwavering. Preserved in all its pristine glory, probable cause has declined in significance and is no longer applied to a vast range of police activity. The doctrines of “reasonable suspicion,” “special needs,” and exigent circumstances have eroded the domain governed by probable cause.

Finally, Part VI proposes an alternative approach to probable cause. Factoring in the gravity of the investigated offense and the intrusiveness of the proposed search results in a more reasonable framework for thinking about probable cause. Employing such a framework, Part VI returns to the Moussaoui episode and other scenarios that highlight the need for a reassessment of the probable cause standard. Probable cause reasonably understood can encourage police to more narrowly tailor proposed searches to minimize their intrusiveness. Furthermore, recognizing the reasonableness of probable cause is a necessary precondition to a revitalized warrant requirement.

II. Moussaoui’s Laptop: The Search That Wasn’t

The debate within the FBI as to whether to search Zacarias Moussaoui’s laptop computer illuminates many of the problems that confront us. It is by no means clear that the evidence supported Rowley’s claim that probable cause existed. As we shall see, how much to weigh, if at all, each piece of evidence adduced by Rowley is in many instances uncertain under current law, and where probable cause exists along a spectrum of certainty appears hopelessly shrouded in mystery.

25. 392 U.S. 1 (1968).



A. Facts

On August 15, 2001, a flight instructor at the Pan Am International Flight Academy in Minneapolis called a local FBI agent and expressed concerns about a student who had recently enrolled in classes in flying a Boeing 747.²⁶ The instructor told the FBI agent that the student, whom the instructor appears to have identified as a Middle Eastern man, was at first evasive and then belligerent when asked to specify his country of origin.²⁷ Apparently reliable sources²⁸ report that the instructor also told the FBI agent that Moussaoui had demonstrated little or no aptitude in the basics of flying, making even more perplexing his determination to navigate the cumbersome 747.²⁹ Although the instructor may not have attributed to Moussaoui the widely circulated remark that his interest was not in taking off or landing, but simply in flying the plane, Moussaoui's insistence on flying a 747, despite his patent ineptitude, provoked the most dire of suspicions on the part of the flight instructor. The instructor reportedly told the FBI agent, "Do you realize how serious this is? This man wants training on a 747. A 747 loaded with fuel could be used as a weapon!"³⁰

The following day, August 16,³¹ FBI agents confronted Moussaoui in his hotel room and asked for his immigration papers. After finding evidence of an immigration violation, the FBI called in agents from the Immigration and Naturalization Service (INS), who arrested Moussaoui for overstaying his visa.³² It is unclear what the FBI and INS agents found in Moussaoui's hotel room at that time.³³ What is clear is that the agents requested

26. Moussaoui had attended classes on August 13 and 15. Indictment ¶¶ 71–72, U.S. v. Moussaoui, No. 01-455-A (E.D. Va. Dec. 11, 2001), at <http://notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/64329/0.pdf> (last visited Nov. 8, 2002).

27. Greg Gordon, *At Flight School, Suspect Raised Eyebrows Quickly*, MILWAUKEE J. SENTINEL, Dec. 26, 2001, at 1A.

28. Precisely what else the flight instructor relayed to the FBI agent is, for the time being, cloaked in something akin to secrecy as the FBI conducts an internal investigation. Whatever else the investigation ultimately accomplishes, it has, for several months, provided a pretext for filtering the information reaching the general public. At a Senate Judiciary Committee hearing on June 6, 2002, Director Mueller repeatedly deflected questions about the sequence of events prior to September 11 with references to the conveniently ongoing internal probe. *Oversight Hearing on Counterterrorism, Before the Senate Comm. on the Judiciary*, 107 Cong. (2002) (testimony of Robert S. Mueller, III, Director, Federal Bureau of Investigation), available at 2002 WL 1232579, at *13, *79 [hereinafter *FBI Counterterrorism Hearings*].

29. Prior to enrolling in aviation classes in Minneapolis, Moussaoui had studied briefly at a flight school in Norman, Oklahoma. Indictment ¶ 46, *Moussaoui* (No. 01-455-A).

30. Gordon, *supra* note 27.

31. The Rowley Memorandum (and some subsequent press accounts) have reported that the initial confrontation and arrest occurred on August 15. Rowley Memorandum, *supra* note 1, para. 4. In her Senate testimony, however, Rowley clarified that she had misdated the event, which in fact occurred on August 16. *FBI Counterterrorism Hearings, supra* note 28, at *94.

32. Romesh Ratnesar & Michael Weisskopf, *The Whistleblower*, TIME, June 3, 2002, at 24.

33. The Rowley Memorandum indicates that the agents searched some of Moussaoui's personal effects, but not as thoroughly as they would have liked, presumably because they lacked a warrant.



Moussaoui's consent to search his laptop computer, which he denied. In her memo to Mueller, Rowley wrote that "[t]he agents in particular believed that Moussaoui signaled he had something to hide in the way he refused to allow them to search his computer."³⁴

With Moussaoui in custody, on the evening of August 16, the FBI and INS agents called Rowley to discuss their options. Apparently, one of their first steps (after it emerged that Moussaoui was a French citizen of Moroccan descent) was to coordinate with the Central Intelligence Agency (CIA) and FBI legal attaché in Paris, who in turn requested the assistance of the French Intelligence Service (FIS).³⁵ The precise nature of the information relayed by the FIS has been debated. Rowley writes that "reasonable suspicions quickly ripened into probable cause" when the FIS reported Moussaoui's "affiliations with radical fundamentalist Islamic groups and activities connected to Osama bin Laden."³⁶ Unnamed "intelligence" sources have, however, leaked to the press (doubtless to undermine Rowley's memo) that the precise information provided by the FIS was that Moussaoui had "a 'radical fundamentalist background' and that he had convinced a friend to fight with anti-Russian rebels in Chechnya."³⁷ The FIS made no mention of ties to bin Laden or Al Qaeda.³⁸

Soon after receiving information from the FIS, the Minneapolis agents decided to seek not a criminal warrant to search Moussaoui's laptop, but a

See Rowley Memorandum, *supra* note 1, paras. 5–6 (recounting the agents' efforts to get a warrant because they wanted to "conduct a more thorough search of his personal effects"). According to his December 2001 indictment, Moussaoui possessed, among other items, a pair of knives, fighting gloves, shin guards, a piece of paper referring to a handheld Global Positioning System receiver, a notebook (listing German Telephone #1, German Telephone #2, and the name "Ahab Sabet"), letters indicating that Moussaoui was a marketing consultant in the United States for Infocus Tech, and a flight manual for the Boeing 747. Indictment ¶ 73, *Moussaoui* (No. 01-455-A). The publicly available documents do not clarify which of these items were found on August 16 and which were found when a full search was conducted (with a warrant) after the September 11 attacks.

34. Rowley Memorandum, *supra* note 1, para. 5.

35. *Id.* paras. 4–5 (describing the phone call to Rowley and receipt of information from FIS a few days later); Gary Fields & David S. Cloud, *U.S. Got Two Cables in August About Moussaoui from France*, WALL ST. J. EUR., May 29, 1992, at A3 (describing the FBI's contacting of French intelligence officials through the CIA).

36. Rowley Memorandum, *supra* note 1, para. 5.

37. Fields & Cloud, *supra* note 35. It seems that the French initially reported that they had no knowledge of Moussaoui, but quickly followed up with the connection to the Chechen rebels. That information may have been based on little more than the report of a French family that Moussaoui had lobbied their son to go fight in Chechnya, where he had died. *See Hill Probers Upgrade Evidence Gathered From Moussaoui*, WASH. POST, June 6, 2002, at A18; *see also* Turley, *supra* note 9 ("Rowley also places importance on a French report that 'confirmed [Moussaoui's] radical fundamentalist Islamic' affiliations. This report was extremely vague and was discounted by the FBI and other intelligence and foreign agencies." (quoting Rowley Memorandum, *supra* note 1, para. 5)).

38. Fields & Cloud, *supra* note 35.



warrant under the Foreign Intelligence Surveillance Act (FISA).³⁹ The FISA creates a different track for conducting surveillance and physical searches when a “significant purpose” is to gather foreign intelligence and not enforce the criminal law.⁴⁰ Whereas in the law enforcement context the government must show probable cause of criminal activity,⁴¹ in the FISA context, the government must simply show probable cause to believe that the target of the surveillance or search is “an agent of a foreign power.”⁴² However, in part to ensure that FISA warrants are reserved for special cases and not used to conduct domestic surveillance of U.S. citizens, field officers seeking FISA warrants are required to obtain the approval of the Attorney General.⁴³

Over the course of a week, the Minneapolis office and FBI headquarters sparred over the FISA application, which headquarters ultimately rejected on August 28.⁴⁴ An incredulous Rowley notes that at one point, her contact at FBI headquarters speculated that the FIS information “could be worthless because it only identified Zacarias Moussaoui by name and he . . . didn’t know how many people by that name existed in France.”⁴⁵ The remarkable caution at FBI headquarters may have resulted from a fear of offending the

39. Rowley Memorandum, *supra* note 1, para. 6. The FISA is found in 50 U.S.C. §§ 1800–1829 (2002). Since the inception of the American republic, Presidents have authorized surveillance of citizens and aliens, domestically and abroad, in national security operations. See William C. Banks & M.E. Bowman, *Executive Authority for National Security Surveillance*, 50 AM. U. L. REV. 1, 10–18 (2000). In *United States v. United States District Court*, 407 U.S. 297 (1972) (commonly known as the “Keith decision”), however, the Supreme Court held unconstitutional the domestic surveillance of U.S. citizens with no proven connection to a foreign government. *Id.* at 321. The Court reserved judgment as to “the issues which may be involved with respect to activities of foreign powers or their agents.” *Id.* at 322. The FISA “sought to put to rest [this] troubling constitutional issue.” *ACLU Found. of S. Cal. v. Barr*, 952 F.2d 457, 460 (D.C. Cir. 1991). The FISA created a special court, consisting of seven (recently expanded to eleven) federal judges, authorized to hear applications for surveillance orders. 50 U.S.C. § 1803(a) (2002).

40. 50 U.S.C. § 1804(a)(7)(B) (2002). As originally drafted, the FISA provided that “the purpose” of the surveillance must be to gather foreign intelligence. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, § 1556, 92 Stat. 1783 (authorizing electronic surveillance to obtain foreign intelligence information). The U.S.A. Patriot Act of 2001, Pub. L. 107-56, § 218, 115 Stat. 272 (to be codified at 50 U.S.C. § 1823), amended the FISA to authorize surveillance when “a significant purpose” is the gathering of foreign intelligence. The import of this change was the subject of protracted litigation. See *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611 (Foreign Intel. Surv. Ct. 2002) (dismissing the relevance of the Patriot Act in construing the FISA), *rev’d*, *In re Sealed Case*, 310 F.3d 717 (Foreign Intel. Surv. Ct. Rev. 2002) (holding that it was “error” on the part of the FISA not to consider the change effected by the Patriot Act). The litigation is discussed in Craig S. Lerner, *The USA Patriot Act: Promoting the Cooperation of Foreign Intelligence and Law Enforcement*, 11 GEO. MASON L. REV. (forthcoming 2003).

41. See *Illinois v. Gates*, 462 U.S. 213, 214 (1983) (defining “probable cause” in the law enforcement context as a likelihood that “contraband or evidence of a crime will be found in a particular place”).

42. 50 U.S.C. § 1805(a)(3)(A).

43. *Id.* § 1804(a).

44. Rowley Memorandum, *supra* note 1, para. 10.

45. *Id.* para. 8 n.6.



then-Chief Judge of the FISA Court, Royce Lamberth, who had reprimanded the head of the FBI's Counterterrorism Unit for what he had deemed faulty warrant applications in the past.⁴⁶

Unbeknownst to Rowley, the section at FBI headquarters that was reviewing her application had recently received a memo from an FBI agent in Phoenix, who reported "aeronautical students with a large picture of Osama bin Laden in their room."⁴⁷ A 1998 memo from an Oklahoma City agent, also withheld from the Minneapolis office, likewise warned of "large numbers of Middle Eastern men receiving flight training at [Oklahoma's] airports,"⁴⁸ and added that "this is a recent phenomenon and may be related to planned terrorist activity."⁴⁹ Even without access to these memos, the Minneapolis office became increasingly desperate in its efforts to find some means to search the laptop.⁵⁰ FBI headquarters eventually acquiesced in a last-ditch plan: Moussaoui (and his laptop) would be flown to Paris and turned over to French authorities, who would seek authority to search under the more permissive French law.⁵¹ After the attacks on the morning of September 11, the FBI abandoned this plan and quickly obtained a criminal warrant to search Moussaoui's laptop and other personal belongings.⁵²

It is interesting to note that, in Rowley's opinion, the events of September 11 did nothing to add to the probable cause that had existed prior to the attacks:

To say . . . that probable cause did not exist until after the disastrous event occurred, is really to acknowledge that the missing piece of probable cause was only the FBI's (FBIHQ's) failure to appreciate

46. James Risen, *A Nation Challenged: Intelligence; In Hindsight, C.I.A. Sees Flaws That Hindered Efforts on Terror*, N.Y. TIMES, Oct. 7, 2001, at 1A. The alleged misstatements and inaccuracies in the FISA applications are laid out in *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d at 620–21.

47. 148 CONG. REC. S5795 (daily ed. June 20, 2002) (quoting Senator Specter, who had been briefed by "intelligence sources"). The agent's suspicions were subsequently corroborated. At least one of the September 11 hijackers, Hani Hanjour, studied at the Phoenix Pan Am International Flight Academy. Indictment, *U.S. v. Moussaoui*, No. 01-455-A (E.D. Va. Dec. 11, 2001), at ¶ 40.

48. Michael Duffy & Nancy Gibbs, *How Far Do We Want the FBI to Go*, TIME, June 10, 2002 at 24. The FBI agent's memo was entitled "Weapons of Mass Destruction." Dan Egan & Sue Schmidt, *Mueller: Clues Might Have Lead to September 11 Plot*, WASH. POST, May 30, 2002, at A1.

49. Egan & Schmidt, *supra* note 48.

50. Apparently, efforts were undertaken to convince the CIA to pursue a FISA warrant, but when FBI headquarters learned of this breach of protocol, it reprimanded the field office and ordered it to abort this effort. Ratnesar & Weisskopf, *supra* note 32, at 34.

51. Dan Eggen, *Agent Claims Supervisor Thwarted Probe; Stopping Some Hijackers Said Possible*, WASH. POST, May 27, 2002, at A1.

52. Thomas Frank, *Mistakes Were Made; Memos, E-mails Detail CIA, FBI Errors Before 9/11*, NEWSDAY, Oct. 20, 2002, at A7.

that such an event could occur. The probable cause did not otherwise improve or change.⁵³

Actually, Rowley's contact at headquarters agreed that the September 11 events did not add to the probable cause assessment. In the initial hours after the attack, according to Rowley, the contact instructed the Minneapolis office to do nothing because the events of the morning were likely only a "coincidence."⁵⁴ When the search was eventually conducted, it in fact revealed links to Al Qaeda terrorists.⁵⁵

B. Analysis

With respect to Moussaoui's laptop, the question of probable cause is twofold: first, was there probable cause to believe that evidence of a crime would be discovered, which would justify a criminal warrant; and second, was there probable cause to believe Moussaoui was an agent of a foreign power, which would justify a FISA warrant?

But before addressing these questions, it is worth noting one salient fact about the behind-the-scenes account of the warrant application process described in the Rowley Memorandum: Within the law enforcement community itself there was an intense disagreement as to whether probable cause existed. Academic discussions of the warrant application process (and law enforcement generally) often have an air of unreality about them in that prosecutors and police officers are depicted as a vast monolith. As anyone who has worked in a prosecutorial office can attest, the relationship between prosecutors and law enforcement agents is often one of, to put the matter delicately, creative dissonance.⁵⁶ A frequent complaint among agents is that some prosecutors refuse to bring the close case or approve a certain course of investigative action. In the federal system, agents generally cannot even approach a magistrate to obtain a warrant until an Assistant United States Attorney (AUSA) has given approval, and this preclearance mechanism is also observed in many state systems.⁵⁷ Thus, the high success rate of warrant applications, sometimes trotted out to disparage the vitality of the warrant

53. Rowley Memorandum, *supra* note 1, para. 6.

54. *Id.* para. 6 n.2.

55. *Id.* para. 8. Moussaoui has apparently turned out not to be, as he was originally crowned, the "20th hijacker." That title has since been assigned to Ramzi Binalshibh, recently arrested in Pakistan. See Kamran Khan & Susan Schmidt, *Key 9/11 Suspect Leaves Pakistan in U.S. Custody*, WASH. POST., Sept. 17, 2002, at A1 (reporting on the arrest of Ramzi Binalshibh, who claimed he would have been with the 19 hijackers if he had not been refused a U.S. visa).

56. This is an ongoing theme in the television show *Law and Order* (NBC).

57. See Laurence A. Benner & Charles T. Samarkos, *Searching for Narcotics in San Diego: Preliminary Findings from the San Diego Search Warrant Project*, 36 CAL. W. REV. 221, 225 (2000) (citing a recent survey of search warrant applications in San Diego County revealing that 98.4% were reviewed by a lawyer).



requirement,⁵⁸ proves no such thing. Warrant applications—such as Rowley’s—can be vetoed before a magistrate is ever consulted.

The Rowley Memorandum reflects a perception among many law enforcement agents that AUSAs sometimes prefer to “play it safe.” Indeed, the reason Rowley gave for seeking a FISA warrant, and not a law enforcement warrant, was her perception that the U.S. Attorney’s office in Minneapolis was excessively stringent in its warrant approvals.⁵⁹ She explained in her memo:

[A]lthough I thought probable cause existed (“probable cause” meaning that the proposition has to be more likely than not, or if quantified, a 51% likelihood), I thought our United States Attorney’s Office, (for a lot of reasons including just to play it safe) [is] regularly requiring much more than probable cause before approving affidavits, (maybe, if quantified, 75%-80% probability and sometimes even higher), and depending on the actual AUSA who would be assigned, might turn us down.⁶⁰

Rowley’s assessment that there was a greater than fifty-fifty likelihood of criminal activity may be hard to defend when the evidence is subject to legal analysis.

1. *French Citizen/Ethnic and Religious Origins.*—It is worth emphasizing at the outset that Moussaoui was born in France and carried a French passport, unlike the nineteen September 11 hijackers, who were all citizens of Middle Eastern countries.⁶¹ However strained U.S.-French relations may have become in recent months,⁶² there has been no suggestion that French citizens visiting this country are any more inclined to commit crimes than citizens of other countries (or U.S. citizens, for that matter). To be sure, Moussaoui’s parents were Moroccan, but he was nonetheless for all

58. See Stephen Labaton, *Before the Explosion, Officials Saw Little Risk for Building in Oklahoma City*, N.Y. TIMES, May 2, 1995, at A19 (noting that only 7 out of 8,950 wiretap applications were rejected over a 10-year period and concluding that these “figures show that Federal and state judges are largely rubber stamps for law enforcement”).

59. Rowley Memorandum, *supra* note 1, para. 7 (“Although I think there’s a decent chance of being able to get a judge to sign a criminal search warrant, our USAO seems to have an even higher standard much of the time, so rather than risk it, I advised that they should try the other route.”).

60. *Id.* Rowley thus made, in her words, the “tactical choice” to pursue a FISA warrant, and not a criminal warrant, because she was concerned that if the U.S. Attorney’s Office rejected the latter, FBI headquarters might be even more skittish about approving the FISA application. *Id.*

61. See Mary Beth Sheridan, *15 Hijackers Obtained Visas in Saudi Arabia; Most Citizens of That Country Seeking to Visit U.S. Are Approved Without Interviews*, WASH. POST, Oct. 31, 2001, at A10 (noting that fifteen of the hijackers were from Saudi Arabia, two were from the United Arab Emirates, and the remaining two were from Lebanon and Egypt).

62. See Peter Ford, *‘Evil Axis’ and Others Talk Back; State of Union Raises Hackles Worldwide, Even Among Allies*, CHRISTIAN SCI. MONITOR, Jan. 31, 2002, at A1 (reporting that European leaders have cautioned U.S. President Bush against taking action against Iraq).



legal purposes treated by American authorities as a French citizen.⁶³ Interestingly, in her memo to Mueller, Rowley never draws attention to Moussaoui's Moroccan heritage.

Moussaoui was, like the nineteen September 11 hijackers, Muslim, but the significance of his religion is opaque. Over the course of the 1990s, some Muslim and Middle Eastern men have committed acts of terrorism, several of which were directed at U.S. citizens;⁶⁴ nonetheless, it is unclear whether membership in a race, religion, or ethnic group that has been disproportionately linked to terrorism against the United States is a constitutionally permissible factor in the probable cause calculus.⁶⁵ Even after September 11, the Bush administration has often suggested that such factors should not be considered in formulating a terrorist profile.⁶⁶ And even if they can be considered, it is of course the case that only an infinitesimal percentage of Muslim and Middle Eastern men, either in the United States or abroad, have committed terrorist acts against American citizens.

2. *Immigration Violation.*—Although Moussaoui lawfully entered the United States with a student visa, his visa expired on May 23, 2002, nearly three months before FBI and INS agents confronted him on August 16.⁶⁷ Moussaoui had applied for a visa extension, but had not yet received it.⁶⁸ It is perhaps fair to conclude that persons illegally in the United States are more likely to commit crimes than persons lawfully present here. But Moussaoui

63. Not surprisingly, France, not Morocco, has interceded on Moussaoui's behalf during his trial. See Tom Jackman, *Judge Rejects Lawyers' Bids To Visit Moussaoui*, WASH. POST, July 23, 2002, at A4.

64. See PAUL R. PILLAR, TERRORISM AND U.S. FOREIGN POLICY 52 (2001) ("Islamists were responsible for all of the major anti-U.S. terrorist attacks in the 1990s except Oklahoma City.").

65. Courts have differed as to whether race or ethnicity can be considered as one piece of evidence that, considered in tandem with other evidence, can supply reasonable suspicion or probable cause to justify a stop. Compare *United States v. Weaver*, 966 F.2d 391, 934 n.2 (8th Cir. 1992) ("As it is, . . . facts are not to be ignored simply because they are unpleasant—and the unpleasant fact in this case is that [the police officer] had knowledge . . . that young . . . black Los Angeles gangs were flooding the Kansas City area with cocaine."), with *United States v. Montero-Camargo*, 208 F.3d 1122, 1132 (9th Cir. 2002) ("The likelihood that in an area in which the majority—or even a substantial part—of the population is Hispanic, any given person of Hispanic ancestry is in fact an alien, let alone an illegal alien, is not high enough to make Hispanic appearance a relevant factor in the reasonable suspicion calculus."). See generally Randall S. Susskind, *Race, Reasonable Articulate Suspicion, and Seizure*, 31 AM. CRIM. L. REV. 327 (1994). For a criticism of ethnic and religious profiling, even after the September 11 attacks, see Samuel Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413 (2002).

66. See *Bush Angry About Pilot's Ejection of Agent*, WASH. POST, Dec. 29, 2001, at B3 (noting that President Bush was "angry" when he learned that an airline may have profiled a Secret Service agent of Arab descent as a possible risk); Jonathan D. Salant, *Officials Debate Use of Ethnicity in Profiling of Airline Passengers*, MIAMI HERALD, July 5, 2002, at 20A (discussing Secretary of Transportation Norman Mineta's opposition to profiling).

67. Dan Eggen, *Moussaoui Probe Pushed U.S. Limits; FBI Wanted to Deport Suspect to France to Access His Computer*, WASH. POST, Jan. 31, 2002, at A1.

68. *Id.*



had overstayed his visa by only a matter of months. In her memo, Rowley concedes that “Moussaoui’s overstay status was fortuitous.”⁶⁹

3. *Flight Instructor Information.*—Information provided by named citizens is treated as more reliable than information provided anonymously.⁷⁰ But even assuming the flight instructor’s reliability, what did his information prove? With respect to Moussaoui’s manner, we can surmise that he resented prying questions about his past. Such prickliness is, of course, consistent with criminal activity, although hardly very probative of it: Many people dislike snooping questions. Moussaoui’s determination to fly a 747 is odd, given his sketchy aviation skills. However, the lack of self-knowledge suggested by a misplaced confidence in one’s own abilities is, sadly, not uncommon. Combined with other information, Moussaoui’s insistence on flying a 747 might take on a more sinister cast, but taken alone, it is hardly very probative of criminal activity.

4. *Refused Consent to Search.*—According to Rowley, “The agents in particular believed that Moussaoui signaled he had something to hide *in the way* he refused to allow them to search his computer.”⁷¹ We know little, at this point, about the suspicious manner in which Moussaoui denied federal agents access to his laptop. Perhaps he asserted his rights⁷² with gusto,⁷³ or perhaps he did so with trepidation.⁷⁴ Infinite is the variety of human behavior that trained police officers have deemed suspicious.⁷⁵ (Alas, however, infinite is the variety of human criminality, so police suspicions are often justified.) But was it the manner in which Moussaoui refused consent, or the fact of his refusal, that set off the agents’ suspicions? The Rowley

69. Rowley Memorandum, *supra* note 1, para. 4.

70. See, e.g., *United States v. Blount*, 123 F.3d 831, 837 (5th Cir. 1997) (en banc) (holding that information from an identified citizen created probable cause because police “had no reason to disbelieve Ms. Cooksey, or to question her motives or credibility”). Compare *Illinois v. Gates*, 462 U.S. 213, 227 (1983) (holding that an anonymous letter “provides virtually nothing from which one might conclude that its author is either honest or his information reliable”), with *State v. Paszek*, 184 N.W.2d 836, 843 (Wis. 1971) (stating that a citizen informant is presumed to be motivated by “concern for society or for his own safety”).

71. Rowley Memorandum, *supra* note 1, para. 5 (emphasis added).

72. Some might question whether Moussaoui had *any* Fourth Amendment rights, given that he was present in the United States illegally, after his visa had lapsed. Cf. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 266 (1990) (holding that the Fourth Amendment’s use of the phrase “the people” includes only those “who are part of the national community or who have otherwise developed sufficient connection with this country to be considered part of that community”).

73. See *United States v. Hyppolite*, 65 F.3d 1151, 1160 (4th Cir. 1995) (holding that the defendant’s “pugnacious manner” contributed to probable cause).

74. See *United States v. Williams*, 271 F.3d 1262, 1271 (10th Cir. 2001) (holding that a “nervous” refusal of consent contributed to reasonable suspicion).

75. See *United States v. Sokolow*, 490 U.S. 1, 13 (1989) (Marshall, J., dissenting) (referring to a drug profile’s “chameleon-like way of adapting to any particular set of observations” (quoting *United States v. Sokolow*, 831 F.2d 1413, 1418 (9th Cir. 1987), *rev’d* 490 U.S. 1 (1989))).



Memorandum implicitly posits a manner of refusal that would be wholly consistent with innocence, but it is unclear precisely what such a manner would be, at least in the eyes of the federal agents.⁷⁶

Whether the manner of Moussaoui's refusal to consent can be considered in the probable cause assessment is, under existing law, uncertain.⁷⁷ Although some courts have suggested that the Supreme Court foreclosed any use of a consent refusal in *Florida v. Bostick*,⁷⁸ this is an extravagant reading of *Bostick*, which stated merely that "a refusal to cooperate, *without more*, does not furnish the minimal level of objective justification needed for a detention or seizure."⁷⁹ Other courts have suggested that allowing the police to weigh a refusal to consent impermissibly "burdens" the exercise of the Fourth Amendment right to be free from unreasonable searches.⁸⁰ This "constitutional penalty" argument draws sustenance from *Griffin v. California*,⁸¹ a Fifth Amendment case in which the Court held that permitting prosecutorial comment on a defendant's silence at trial would "cut[] down on the privilege [against self-incrimination] by making its assertion costly."⁸² Although the logic of

76. Professor Jonathan Turley has dismissed this portion of the Rowley Memorandum with the curt observation that "Moussaoui's assertion of a constitutional right cannot be used" in the probable cause calculus. Turley, *supra* note 9. Turley assumes this matter is a simple and settled one. *Id.* Many state and federal courts agree, holding briskly that a refusal to consent to a search cannot be weighed *at all* in the probable cause or reasonable suspicion balance. *E.g.*, *United States v. Machuca-Berrera*, 261 F.3d 425, 435 n.32 (5th Cir. 2001); *United States v. Moreno*, 233 F.3d 937, 941 (7th Cir. 2000); *United States v. Dozal*, 173 F.3d 787, 794 (10th Cir. 1999); *State v. Palenkas*, 933 P.2d 1269, 1279–80 (Ariz. Ct. App. 1996); *State v. Jennings*, 430 S.E.2d 188, 200 (N.C. 1993).

77. *See generally* Kenneth J. Melilli, *The Consequences of Refusing Consent to a Search or Seizure: The Unfortunate Constitutionalization of an Evidentiary Issue*, 75 S. CAL. L. REV. 901, 903–05 (2002) (noting that while most cases hold that a refusal may not be considered, some authority and the underlying case law refute these holdings).

78. 501 U.S. 429 (1991). *See, e.g.*, *State v. McGovern*, 45 P.3d 624, 627 n.18 (Wash. Ct. App. 2002) ("King had the right to refuse consent, and his exercise of that right may not be used to establish probable cause." (citing *Bostick*, 501 U.S. at 437)).

79. *Bostick*, 501 U.S. at 437 (emphasis added); *see also Florida v. Royer*, 460 U.S. 491, 498 (1983) (plurality opinion) ("[R]efusal to listen or answer does not, *without more*, furnish [probable cause].") (emphasis added).

80. *See Elson v. State*, 659 P.2d 1195, 1199 n.15 (Alaska 1983) (recognizing that allowing evidence of a refusal to consent "would create opportunities for abuse since in the future police might seek permission to search, even if they know consent is not required, in an effort to bait a defendant into incriminating himself by refusing consent" and that "[t]he defendant in that position would face a potential no-win situation"); *Whitehead v. State*, 698 A.2d 1115, 1118 (Md. App. 1997) ("For this Court, or any court, to condone the use of a citizen's reaction to a consent form as a litmus test to determine probable cause would be to render the Fourth Amendment a dead letter and the requirement of the police to secure a valid waiver a nullity."). Of course, the question is not whether a refusal to consent to a search *alone* creates probable cause. The question is whether police and magistrates can consider a refusal, *along with other pieces of evidence*, when determining whether probable cause exists.

81. 380 U.S. 609 (1965).

82. *Id.* at 614.



Griffin has occasionally been extended to other contexts,⁸³ the Court subsequently made clear that the Constitution does not “forbid[] every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.”⁸⁴ There is thus no requirement that every assertion of a constitutional right be costless.⁸⁵

Some judges have suggested that refusal to consent to a search should not be considered in the probable cause assessment because such a refusal is of no probative value.⁸⁶ This is debatable. To be sure, many innocent people value their privacy and would refuse to consent to a search. One may wonder, however, whether a person carrying evidence of a crime is more likely than an innocent person to refuse consent. Indeed, some courts have sanctioned the use of consent refusals in the probable cause or reasonable suspicion assessment when the nature of the refusal is especially vigorous⁸⁷ or takes a physical form.⁸⁸ It is thus possible that Moussaoui’s refusal to consent could be weighed in the probable cause balance if the “manner” of

83. See, e.g., *United States v. Jackson*, 390 U.S. 570, 583 (1968) (striking down the capital punishment provision of the federal kidnapping statute because it could be imposed only where the defendant had requested a jury trial).

84. *Chaffin v. Stynchcombe*, 412 U.S. 17, 30–31 (1973). The question, according to Justice Harlan, is whether “compelling the election [to assert a right or waive it] impairs to an appreciable extent any of the policies behind the rights involved.” *McGautha v. California*, 402 U.S. 183, 213 (1971) (emphasis added).

85. For example, courts have held that association with known criminals *by itself* cannot constitute probable cause. *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979). Yet associating with known criminals can be considered in the probable cause calculus. See, e.g., *State v. Milette*, 727 A.2d 1236, 1241 (R.I. 1999) (holding that evidence that a suspect belonged to a white supremacist group could be weighed).

86. See *State v. Humphrey*, 937 P.2d 137, 145 (Utah Ct. App. 1997) (Greenwood, J., dissenting) (“[The] defendant’s reaction could just as easily be attributed to indignation that an officer would request consent to search the car after having pulled the pair over for the minor violation of not having a front license plate attached.”).

87. See, e.g., *State v. Green*, 540 N.W.2d 649, 655–56 (Iowa 1995) (finding it relevant, although not dispositive, in deciding whether probable cause existed, that the defendant became “very agitated and upset” in response to a request to search); *State v. Humphrey*, 937 P.2d 137, 142 (Utah Ct. App. 1997) (finding it relevant, in deciding the existence of probable cause, that the suspect had “acted extremely nervous and became angry about a possible search of the car”). *But see Karnes v. Skrutski*, 62 F.3d 485, 495–96 (3d Cir. 1995) (finding that “argumentative and difficult” behavior when refusing consent was not relevant in deciding whether reasonable suspicion existed).

88. *United States v. Hyppolite*, 65 F.3d 1151, 1157 (4th Cir. 1995) (“Although we hold that an objectively reasonable officer should have known that the mere assertion of constitutional rights cannot establish probable cause, the question of whether the *form* of the assertion of those rights could be considered as a factor is less settled.”); *United States v. Batti*, No. 91-10318, 1992 U.S. App. LEXIS 4934, at *5 (9th Cir. Mar. 17, 1992) (holding that it was relevant, in deciding that reasonable suspicion existed, that the suspect “picked up the bag, put his arms through the handles, clutched the bag towards his body, and stepped a couple o[f] paces away from” the agent when the latter requested consent to search). Compare *State v. Brown*, 825 P.2d 282, 285 (Or. App. 1992) (dismissing the relevance of the nature of the suspect’s refusal to consent to a search), *with id.* at 286 (Rossman, J., dissenting) (finding it relevant, in concluding that probable cause existed, that the suspect clutched the keys in his fist in response to a request to search).



the refusal, to which Rowley refers, was truly out of the ordinary. If, however, Moussaoui simply articulated a preference to be left alone, most courts would likely conclude that this refusal is of no weight in the probable cause balance.⁸⁹

5. *Foreign Intelligence Information.*—Although Rowley and FBI headquarters agree that the French Intelligence Service reported that a man named “Zacarias Moussaoui” had a radical fundamentalist background,⁹⁰ they disagree as to the precise nature of the information. Rowley contends that the FIS linked Moussaoui to bin Laden; “intelligence sources,” however, have suggested that the FIS simply tied Moussaoui to anti-Russian Muslim rebels in Chechnya, and not to bin Laden or Al Qaeda.⁹¹ Those sources further argue that Rowley’s characterization of Moussaoui prior to September 11 reflected an unproven leap from abettor of Muslim rebels in Chechnya to terrorist associated with bin Laden.⁹²

Although Russia had long contended that the Chechen rebels were terrorists, the U.S. State Department had for many years resisted that characterization.⁹³ Furthermore, although Russian intelligence and press accounts had insisted that the Chechen rebels were funded by bin Laden,⁹⁴ the Chechens themselves⁹⁵ and some Western observers regularly discounted the claims.⁹⁶ To be sure, in a post-September 11 case, a federal district court

89. See *United States v. Prescott*, 581 F.2d 1343, 1351 (9th Cir. 1978) (holding that the “passive refusal to consent to a warrantless search is privileged conduct which cannot be considered as evidence of criminal wrongdoing”).

90. See *supra* notes 36–38 and accompanying text. In her memo, Rowley mocked the concern voiced by FBI headquarters that the name may have been a common Muslim name. See Rowley Memorandum, *supra* note 1, para. 6 n.6. However, courts have at times chided police for a failure to familiarize themselves with foreign names. See *United States v. Ornelas-Ledesma*, 16 F.3d 714, 715 (7th Cir. 1994) (criticizing police for confusing the Hispanic names “Miguel Ledesma Ornelas” and “Miguel Ornelas Ledesma”).

91. See *supra* notes 36–38 and accompanying text.

92. See *Hill Probers Upgrade Evidence Gathered from Moussaoui*, WASH. POST, June 6, 2002, at A18 (“Headquarters officials . . . insist that the French information detailed no direct ties between Moussaoui and any designated terrorist group, a requirement for obtaining a FISA warrant. The Chechen rebels, while believed to have links with bin Laden, were not considered a terrorist group by the State Department.”).

93. See Daniel Schorr, *Stateless Rogues*, CHRISTIAN SCI. MONITOR, June 14, 2002, at 11.

94. See, e.g., *Osama bin Laden Sponsors Cooperation Between Taliban, Chechens*, INTERFAX (Moscow), Dec. 9, 2000, available at 2000 WL 30076725 (“The office of the Kremlin[] . . . is in possession of information to the effect that the leadership of the Taliban movement in Afghanistan is strengthening its cooperation with the Chechen separatists and this cooperation is being underwritten by notorious terrorist Osama bin Laden.”).

95. In a letter to the Editor of the *Washington Times* on September 24, 2000, Ilyas Arkhmadov, self-described “Foreign Minister, Chechen Republic of Ichkeria,” wrote, “We again state emphatically that no official ties exist between our republic and the Taliban, much less with Osama bin Laden.” Ilyas Arkhmadov, Letter to the Editor, WASH. TIMES, Sept. 24, 2000, at B5.

96. In December 2000, for example, the Boston Globe dismissed Russian claims of a link between the Chechen rebels and bin Laden, arguing that the only thing they had in common was that “both [can] be described as Muslim.” Editorial, BOSTON GLOBE, Dec. 26, 2000, at A22.



credited the affidavit of an FBI agent linking an Islamic organization in the United States to terrorists in part based on its “dealings with the Chechen *mujahideen*”⁹⁷ Prior to September 11, however, the FBI and other federal agencies seemed reluctant to draw this conclusion. In short, then, the FIS information suggested that Moussaoui possibly had ties to groups that had used violence against Russians in Chechnya, but it is unclear whether those groups were, for our purposes, “terrorists,” or had violent plans against Americans.

6. *Other FBI Information (Not Shared with the Minneapolis Office).*—FBI agents in Oklahoma City and Phoenix had sent memos to FBI headquarters expressing the concern that Middle Eastern men with apparent ties to bin Laden had been taking flight training lessons.⁹⁸ This information, unaccountably, was not shared with the Minneapolis office, but it is worth briefly examining whether it would have materially changed the probable cause assessment.

As an initial matter, Moussaoui is a French citizen, and it may not be fair to lump him together with other “Middle Eastern men.”⁹⁹ Even assuming it is fair, many would question the appropriateness of triangulating with the other two memos to form probable cause in his particular case. Perhaps it is suspicious that many Middle Eastern (and presumptively Muslim) men were taking flight training classes in America, and perhaps this fact would enhance, if ever so marginally, the suspicious nature of any individual Middle Eastern man’s decision to take such classes. All of this assumes, however, that one can draw attention to a suspect’s ethnic or religious background in the probable cause assessment, an issue that is still unresolved.¹⁰⁰

7. *Hunches.*—Given the (relatively underwhelming) evidence, it is surprising that Rowley placed the odds of criminal activity at greater than fifty-fifty and that the Minneapolis office was so frantic about searching Moussaoui’s laptop. One explanation is that Rowley and her colleagues irrationally jumped to conclusions, and although they happened to be right in this particular instance, one might wonder how many other times they cried wolf. Another explanation is that the Minneapolis agents developed a hunch, based on collective years of experience, that Moussaoui’s was not just another immigration overstay case.

97. *Benevolence Int’l Found., Inc. v. Ashcroft*, 200 F. Supp. 2d 935, 937 (N.D. Ill. 2002).

98. See *supra* text accompanying notes 47–49.

99. Moussaoui is of Moroccan descent, but Morocco is, of course, in North Africa. In contrast, the 19 hijackers were all from the *Middle East*—Saudi Arabia, the United Arab Emirates, Lebanon, and Egypt. See Sheridan, *supra* note 61.

100. See *supra* note 65 and accompanying text.



The case law is littered with disparagement of police officers' "hunches."¹⁰¹ A burgeoning scientific literature suggests, however, that many unarticulated, and perhaps unarticulable, feelings reflect a dimension of real information, sometimes called "tacit knowledge."¹⁰² Rowley may have declined to express her inchoate suspicions about Moussaoui because she was well aware that judges unsparingly mock such feelings in judicial opinions. However reasonable hunches may in fact be, it would, of course, be impossible to provide meaningful checks on police behavior if courts credited police claims that "this guy looked fishy to me, but I can't tell you why." Still, it is worth acknowledging that a possibly valuable source of information is excised from the probable cause assessment when hunches, and the tacit knowledge they may reflect, are discarded.

8. *Gravity of Offense/Nature of Intrusion.*—Clearly, one factor that propelled the Minneapolis field office was the perception that Moussaoui may have been planning to hijack an airplane. The question never addressed by the Rowley Memorandum is whether probable cause should be a lower standard when the crime under investigation is such a grave one. Indeed, she implicitly assumes that probable cause is a fixed standard that applies equally to aircraft piracy and crimes of lesser seriousness.¹⁰³ This is, in fact, the view of the U.S. Attorney for Minneapolis, who stated, after the release of the Rowley Memorandum, that "[w]e apply the same standard of probable cause in every case."¹⁰⁴

Another nonfactor in the probable cause assessment was the intrusiveness of the proposed search. At issue here was not a search of Moussaoui's residence but, far more discretely, of his laptop computer.¹⁰⁵ Should the relative degree of the proposed invasion of privacy alter the probable cause calculus? Or, for probable cause purposes, can no distinction be drawn between a search of a computer, a house, a warehouse, and a car trunk? Courts regularly imply that, for probable cause purposes, a search is a search.¹⁰⁶ This Article argues that, in omitting the gravity of the offense and

101. See, e.g., *United States v. Chavez-Valenzuela*, 268 F.3d 719, 724 (9th Cir. 2001) (holding that a hunch "cannot withstand scrutiny under the Fourth Amendment"); *United States v. Salzano*, 158 F.3d 1007, 1111 (10th Cir. 1998) (stating that "inchoate suspicions and unparticularized hunches" do not provide reasonable suspicion of criminal activity); *United States v. Staples*, 194 F. Supp. 2d 582, 585 (W.D. Tex. 2002) ("[A]n officer's reliance on a mere 'hunch' is insufficient to justify a [traffic] stop.").

102. MICHAEL POLYANI, *THE TACIT DIMENSION* (1966). Polyani explores the experienced fact that we often know more than we can tell. *Id.* at 4. For example, we can often pick an acquaintance out of a crowd even if we cannot remember where we met, how we know the person, or even who the person is. *Id.*

103. See Rowley Memorandum, *supra* note 1, para. 5.

104. Frommer, *supra* note 12, para. 3.

105. To be sure, this is a fairly intrusive search. Indeed, several people whom I canvassed said that they would regard a search of their computer as *more* intrusive than a search of their home.

106. See *infra* notes 144–46.



the degree of the proposed intrusion, courts have cast probable cause in unreasonable terms.¹⁰⁷

9. *Conclusion.*—As stated at the outset of this analysis, the question is whether there was (1) probable cause under the FISA that Moussaoui was an agent of a foreign power and (2) probable cause under the Fourth Amendment that Moussaoui was engaged in criminal activity. Commentators sometimes suggest that the probable cause requirement imposed by FISA is a less rigorous showing than that imposed by the traditional warrant requirement.¹⁰⁸ The meaning of this claim is unclear. One suggestion might be that “probable cause” in the FISA context implies a lower burden of proof than in the ordinary warrant context, perhaps more akin to the *Terry* “reasonable suspicion” standard.¹⁰⁹ The difficulty with this suggestion is that in other statutes, Congress explicitly employs the standard of “reasonable suspicion.”¹¹⁰ Ordinary principles of interpretation would lead one to conclude that by failing to use the “reasonable suspicion” standard in the FISA, Congress did not intend for its application there.

Another suggestion might be that the FISA showing is a lesser one because the government need only show probable cause that the target is an agent of a foreign power and not that he or she has engaged in criminal activity. The difficulty with this argument is that it is hardly clear in all instances that the latter showing is an easier one to make. In the wake of the September 11 attacks, a *Wall Street Journal* op-ed called for jettisoning the FISA precisely because, according to the author, it is often harder to link the subject of a proposed search to a foreign power than it is to marshal evidence of criminal activity.¹¹¹

However the probable cause question is cast, when the evidence available to the Minneapolis office is totaled up, one may be struck by how little of it there was. Current case law may exclude some pieces of evidence altogether from the probable cause assessment (the FBI agents’ “hunch” about Moussaoui, his ethnic and religious status, the gravity of the offense,

107. See *infra* Part VI.

108. See Jeffrey Toobin, *Crackdown*, THE NEW YORKER, Nov. 5, 2001, at 60 (quoting Morton Halperin, a former member of the National Security Council, saying that “there is a lower standard to getting FISA taps”).

109. See *Terry v. Ohio*, 392 U.S. 1, 29–30 (1967) (holding that an officer was justified in searching for and confiscating a revolver when he “observe[d] unusual conduct which [led] him reasonably to conclude in light of his experience that criminal activity [was] afoot” and that the suspect was armed) (emphasis added).

110. See, e.g., 5 U.S.C. § 7301(b) (2000) (authorizing the Secretary of Defense to conduct drug testing upon “reasonable suspicion”); 18 U.S.C. § 1169(a)(2) (2000) (criminalizing the failure to report child abuse in Indian territories where there is “reasonable suspicion”); 29 U.S.C. § 2006(d)(3) (2000) (permitting employers to require employees to submit to polygraphs where the employer has “reasonable suspicion” that the employee engaged in theft).

111. Mark Riebling, *Uncuff the FBI*, WALL ST. J., June 4, 2002, at A20.



the nature of the intrusion, and possibly the refusal to consent); and some pieces are of negligible value (such as the immigration overstay). Essentially all that is left is the flight instructor's tip and the French intelligence information. Do these two facts, when coupled together, amount to probable cause, either that Moussaoui was an agent of a foreign power or that he was embarking on criminal activity?

Whichever answer one gives, there is, it must be acknowledged, the hovering and unpleasant aroma of "I know it when I see it" jurisprudence. Rowley argues that probable cause existed because the flight instructor's tip strongly suggested that Moussaoui had nefarious plans, and the FIS information cemented the issue by showing his proclivity to violence.¹¹² A critic responds that the FIS information shows nothing more than Moussaoui's involvement in a political cause, and the flight instructor's tip was wholly consistent with an innocent failure to recognize the limits of one's own abilities.¹¹³ ("I'm sorry, son, you'll never fly a 747, because you simply have no talent for this sort of thing.")

What we need is a theory of probable cause. Judicial debates about whether probable cause exists in any particular case are often mired in inconsequential details. We need to step back from the trees and assess the forest: Just how probable is probable cause?

III. Lessons from History?

A natural starting point for those trying to solve the various puzzles of the Fourth Amendment, including the meaning of probable cause, is in the English and American colonial past. And a natural citation for those embarking on such an historical inquiry is Justice Story's *Commentaries*, in which the Fourth Amendment is pronounced to be "little more than the affirmance of a great constitutional doctrine of the common law."¹¹⁴ Following Story, a long line of distinguished jurists have based their miscellaneous, and often contradictory, interpretations of the Fourth Amendment on the "common law," from Chief Justice Taft,¹¹⁵ to Justice Frankfurter,¹¹⁶ to Justice Scalia,¹¹⁷

112. Rowley Memorandum, *supra* note 1, para. 5.

113. See Turley, *supra* note 9 ("If this hunch amounted to probable cause, it is hard to imagine what would not satisfy such a standard.").

114. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 748 (Fred B. Rothman & Co. 1991) (1833).

115. See *Carroll v. United States*, 267 U.S. 132, 157 (1925) ("The reason for arrest for misdemeanors without warrant at common law was promptly to suppress breaches of the peace." (citing JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 193 (London, MacMillan 1883))).

116. See *United States v. Rabinowitz*, 339 U.S. 56, 68 (1950) (Frankfurter, J., dissenting) (criticizing the majority for its "disregard of the history embedded in the Fourth Amendment and the great place which belongs to that Amendment in the body of our liberties").

117. See *Riverside v. McLaughlin*, 500 U.S. 44, 61-62 (1991) (Scalia, J., dissenting) (discussing the traditional protections against unlawful arrest which are derived from the common

to Justice Thomas,¹¹⁸ and most recently Justice Souter.¹¹⁹ Could all of these jurists be wrong?¹²⁰ The first Part of this Article shows that they are. I then pirouette (although not quite 180 degrees) and offer some modest lessons from a study of the common law.

A. *Why Not to Study the Past*

An American who spends four weeks in Rome returns with various impressions, but with no plausible claim to understanding, through and through, the Italian people.¹²¹ By contrast, a jurist who spends four hours in the library (or delegates this irksome task to a clerk) emerges with definite opinions about a legal system that existed over 200 years ago. And upon these opinions, the court grounds its decisions. Yet, what is the competence of jurists to judge the distant past? There is little in a modern lawyer's training that prepares him or her to parse the meaning of eighteenth-century documents: only a small percentage of law students take a class in legal history, and a similarly small percentage majored in history in college.¹²²

Evidence of the modern jurist's doubtful competence in evaluating the past is found in the persistent references to "the common law," as if this constituted a unified doctrine of law. The more one learns about the common law, the less this view can be seriously maintained. Take, for example, the evidentiary standard for the issuance of an arrest or search warrant—in our terminology, "probable cause." Even among the great authorities on the common law, there were vigorous disagreements on precisely this point.¹²³

law, and citing Matthew Hale's *Pleas of the Crown* for the particular protection of bringing persons arrested without a warrant before a magistrate as soon as reasonably possible).

118. See *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995) (holding that, in interpreting the Fourth Amendment, the Court is guided by "the traditional protections against unreasonable searches and seizures afforded by common law at the time of the framing").

119. See *Atwater v. Lago Vista*, 532 U.S. 318, 334–40 (2001) (concluding that the founding-era common law authorized constables to make warrantless arrests for misdemeanors).

120. My suggestion is not that all of these judges embraced an identical methodology, but that all claimed to be guided, to some degree, by their assessment of the historical background to the Fourth Amendment. See David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1763–70 (2000) (contrasting the purposive historical studies of Frankfurter, the eclectic use of history by Taft, and the originalism of Scalia).

121. In this vein, English novelist Somerset Maugham commented that Henry James, who was born in America but lived virtually his entire adult life in England, "never managed to create an Englishman who was through and through English." SOMERSET MAUGHAM, *THE RAZOR'S EDGE* 3 (1944).

122. At George Mason University Law School, for example, about 20 students (or roughly nine percent of the graduating class) took a class in Legal History last year. About nine percent of the incoming class majored in history in college. George Mason University School of Law, Fall 2002 Matriculants (2002) (on file with the Texas Law Review) (indicating that 23 of 260 entering law students majored in history).

123. For sweeping surveys of the evolving law of probable cause, from the medieval ages to the present day, see BARBARA J. SHAPIRO, *BEYOND REASONABLE DOUBT AND PROBABLE CAUSE* 114–85 (1991); Jack K. Webber, *The Birth of Probable Cause*, 11 ANGLO-AM. L. REV. 155 (1982).



Coke, writing in the early seventeenth century, argued that a warrant could issue only after an indictment and not upon what he termed “bare surmise.”¹²⁴ This view was forcefully and repeatedly criticized in the mid-seventeenth century by Matthew Hale. In his *History of the Pleas of the Crown*, Hale argued that Coke’s restrictive approach to warrants “would be of public inconvenience,” which he considered especially problematic “in these times, where felonies and robberies are so frequent.”¹²⁵

The various enactments of the First Congress of the United States suggest, furthermore, that “probable cause was in a state of flux when the Fourth Amendment was framed.”¹²⁶ The historian William Cuddihy contrasts the Collection Act of 1789 and the Excise Act of 1791, which “embraced opposing concepts of judicial sentryship and different thresholds of reasonableness for search warrants.”¹²⁷ The former created a low evidentiary standard for the issuance of a warrant, removed altogether a magistrate’s discretion to refuse a warrant, and largely insulated the officer from suit if the search failed to uncover evidence of crime. The Excise Act, by contrast, created a higher evidentiary burden, invested magistrates with the discretion to refuse warrants, and was far more liberal in affording those searched with civil remedies.¹²⁸ Professor Thomas Davies has recently argued that the search and seizure law of Revolutionary America may have been trending in a certain direction and coalescing around certain principles.¹²⁹ And one should, in general, not fall into the trap of overstating the inconsistencies of the pre-industrial common law.¹³⁰ Still, judicial

Webber concludes that the “shifting standards as to the precise amount of cause needed does not conceal the fact that the insistence on probable cause is a glory of American legal history, and of the English and common law.” *Id.* at 166. See also SHAPIRO, *supra*, at 145 (stating that the current American probable cause standard represents the latest stage in a long historical evolution of the justification for arrest).

124. 4 EDWARD COKE, *INSTITUTES OF THE LAW OF ENGLAND* 176 (London, W. Clarke & Sons 1817) (1644).

125. 2 MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 149 (Professional Books Ltd. 1971) (1736). Hale died in 1676, and the work was published posthumously. The disagreement between Coke and Hale is noted in 1 JAMES F. STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 191–92 (London, MacMillan 1883).

126. William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning 1550* (1990) (unpublished Ph.D. dissertation, Claremont Graduate School) (on file with the Texas Law Review).

127. *Id.*

128. *Id.* at 1527–28, 1543.

129. See Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism, A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista*, 37 WAKE FOREST L. REV. 239, 281–82 (2002) (“[A]lthough there certainly are aspects of common-law criminal procedure doctrine that are problematic, if one actually examines the framing-era sources one finds they give essentially consistent accounts of the more salient aspects of criminal procedure.”).

130. Cf. PERRY MILLER, *THE LIFE OF THE MIND IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR* 164 (1965) (arguing that the common law “had grown up by accident”).



invocations of “*the* common law” seem comically facile the more one confronts that law’s richness and diversity.¹³¹

The foregoing, moreover, posits a judge who earnestly seeks out “the common law” but may be handicapped by his or her doubtful competence as a historian. This may have been a generous assumption. One might wonder precisely how many judges turn to the past with a genuine and objective desire to know it and have it guide and dictate their views of the Fourth Amendment (or any other constitutional provision). There are grounds for the suspicion that, in the context of modern legal debates, appeals to history are in fact purely forensic.¹³² Judge Richard Posner has dismissed the “originalist” enterprise as a sham, with a “judge . . . do[ing] the wildest things, all the while presenting himself as the passive agent of the sainted Founders—don’t argue with me, argue with Them.”¹³³

According to the pragmatist Posner, even assuming modern jurists could learn with certainty what the founding-era common law meant, there would remain the brutal question, “So what?”¹³⁴ Professor Akhil Amar has argued

131. Indeed, Story’s oft-repeated claim that the Fourth Amendment (in prohibiting general warrants) was simply a codification of the common law has been challenged in recent years. See William Cuddihy & B. Carmon Hardy, *A Man’s House Was Not His Castle: Origins of the Fourth Amendment to the Constitution*, 37 WM. & MARY Q. 371, 372 (1980) (“[T]he [Fourth] [A]mendment broke new ground. Its circumscriptions far exceeded the precedents of Anglo-American tradition.”) There was, in fact, no consensus in the common law prohibiting the issuance of general warrants. See Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1719 (1996) (“Warrantless general searches were common in England and America during the centuries preceding the adoption of the Fourth Amendment.”). The 1618 edition of Michael Dalton’s magistrate manual, still widely used in England and in the colonies throughout the 1700s, approved of house-to-house searches “[t]o Search for stolen goods” and “for a generall search fir Rogues.” Sklansky, *supra* note 120, at 1797–98. The only colony to abandon indiscriminate searches was Massachusetts, “which . . . began the process by rejecting the common law as a basis for search or seizure.” *Id.* at 1798. In response to Sklansky’s arguments, Professor Davies has recently drawn a distinction between the “origins” of the Fourth Amendment and the “original meaning” of the provision. Davies, *supra* note 129, at 281 n.123. The former—the common law generally—embraced several centuries of laws and precedents and of course reflected inconsistencies; the latter—the colonial-era common law—was, Davies argues, far less “unsettled” than Sklansky contends. See *id.* at nn.123 & 125.

132. See Cloud, *supra* note 131, at 1707–12 (criticizing “[l]awyers’ histories of the Fourth Amendment”).

133. RICHARD A. POSNER, *OVERCOMING LAW* 251 (1995). Posner’s account of originalism is somewhat more sympathetic in other writings. See Richard A. Posner, *Past Dependency, Pragmatism, and Critique of History in Adjudication in Legal Scholarship*, 67 U. CHI. L. REV. 573, 595–96 (2000) [hereinafter Posner, *Critique of History*] (“The originalists want to minimize judicial discretion and they have devised a kind of algorithmic mechanism in doing so Originalism is thus, in a queer but I think valid sense, a response to the difficulty of resolving contested historical issues rather than a school of historical jurisprudence.”).

134. As a gloss on Nietzsche, Posner has written,
 Historical knowledge . . . provide[s] good solutions to current problems only if the present resembles the past very closely. If it does not, then a person who “only repeats what he has heard, learns what is already known, imitates what already exists” will not be able to solve any of these problems. History provides a template for framing and “sizing” contemporary problems; but the template may prove to be a straitjacket. The



that the Framers did not intend the Amendment to require warrants and has adduced a variety of Framing-era materials to buttress his view.¹³⁵ In response, some have conceded,¹³⁶ perhaps unnecessarily,¹³⁷ the correctness of Amar's historical account, but have nonetheless argued that changed conditions—principally, the dramatic growth of the modern police force—force us to reassess the utility and even the necessity of warrants in checking the police.¹³⁸ For these and other reasons, Professor Anthony Amsterdam concluded that history provides “no help” in construing the Fourth Amendment.¹³⁹

B. Modest Lessons

Yet to say that history is of “no help” seems overstated. The past does not provide neatly packaged answers to the pressing criminal procedure questions that confront us today, but a familiarity with the past may help in stripping away some of the faulty assumptions that underlie our thinking. In this modest sense, the study of history may be valuable.¹⁴⁰ Contemporary thinking about probable cause and the Fourth Amendment is rife with faulty assumptions. Consider the statement in *Dunaway v. New York*¹⁴¹ that probable cause is “[a] long-prevailing” standard that has emerged from “the accumulated wisdom of precedent and experience” and which is readily

use of historical analogies (“another Munich”) is full of pitfalls. Hence the adage that the only lesson of history is that there are no lessons of history.

Posner, *Critique of History*, *supra* note 133, at 578–79 (quoting Friedrich Nietzsche, *On the Uses and Disadvantages of History for Life*, in FRIEDRICH NIETZSCHE, *UNTIMELY MEDITATIONS* 57 (R.J. Hollingdale, trans., 1983)).

135. See Akhil Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 762–71 (1994) (“[T]he Framers did say what they meant, and what they said makes eminent good sense: all searches and seizures must be reasonable.”).

136. See Carol Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 823 (1994) (“Even if I were convinced that one could derive plausible versions of the Framers’ intentions by viewing the Constitution’s text in historical context, I would question the programmatic implications of those intentions.”).

137. See Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 575–90 (1999) (criticizing Amar’s interpretation of the search and seizure provisions of the Excise Act and Collection Act each passed by the First Congress); Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925, 950–59 (1997) (criticizing Amar for ignoring the Framers’ apparent belief in the value of specific warrants).

138. See Steiker, *supra* note 136, at 830–38 (arguing that the rise of the modern police force, together with our country’s history of racial discrimination in law enforcement, make focusing on the Framers’ intentions shortsighted).

139. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 395 (1974) (stating that the Fourth Amendment’s “language is no help and neither is its history”).

140. Cf. Craig S. Lerner, *Impeachment, Attainder, and a True Constitutional Crisis: Lessons from the Strafford Trial*, 69 U. CHI. L. REV. 2057, 2095–2101 (2002) (drawing some modest lessons from English history for contemporary American impeachment debates).

141. 442 U.S. 200 (1979).



distinguished from a reasonableness balancing test.¹⁴² This terse statement is a rich source of historical inaccuracies.¹⁴³

1. “*Single.*”—Modern American courts tend to treat probable cause as the North Star of Fourth Amendment jurisprudence. It is depicted as a fixed point, indispensably guiding police officers as they navigate the treacherous terrain the Supreme Court has made of constitutional criminal procedure. Whether the police are making an arrest or conducting a search,¹⁴⁴ whether they are searching a car or a house,¹⁴⁵ probable cause is typically, though not always,¹⁴⁶ cast as a single evidentiary standard. To be sure, police need not obtain a warrant to make an arrest in public,¹⁴⁷ nor search a car,¹⁴⁸ but these are exceptions to the “warrant requirement,” not to a probable cause requirement. Even in exigent circumstances, at least in the view of some courts, police are excused from obtaining a warrant but are not cast free of the probable cause requirement.¹⁴⁹

This approach to probable cause—search, arrest, car, house, urgent, not urgent, one-size-fits-all—whatever its merits as a matter of policy, has

142. *Id.* at 208.

143. The remainder of this Part is a brief account of the English and colonial practice with respect to probable cause and its evidentiary antecedents. The subject has been treated more completely by historians such as William Cuddihy and Thomas Davies. *See generally* Cuddihy, *supra* note 126; Davies, *supra* note 137. Although not a historian by training, Joseph Grano also supplies a compelling account of the topic in Joseph D. Grano, *Probable Cause and Common Sense: A Reply to the Critics of Illinois v. Gates*, 17 U. MICH. J.L. REFORM 465, 478–88.

144. American courts tend to view “probable cause” as an equivalent standard for searches and arrests. *See* *Whitley v. Warden*, 401 U.S. 560, 564–66 (1971) (applying the same probable cause standard for an arrest warrant and for a warrantless arrest); *Spinelli v. United States*, 393 U.S. 410, 417 n.5 (1969) (“While *Draper* involved the question whether the police had probable cause for an arrest without a warrant, the analysis required for an answer to this question is basically similar to that demanded of a magistrate when he considers whether a search warrant should issue.”).

145. *See* *Cardwell v. Lewis*, 417 U.S. 583, 594 (1974) (equating the probable cause needed to search a house and a car). Unlike searches of homes, searches of cars do not require warrants; yet courts often suggest that the probable cause standard applies equally to both categories of searches. *See, e.g.,* *McNeal v. State*, 617 So. 2d 999, 1006 (Miss. 1993) (stating that, while a warrant is not required, the same probable cause considerations apply to issuing warrants and admitting evidence that is the product of a warrantless search); *State v. Eliason*, 544 P.2d 1124, 1127 (Ariz. Ct. App. 1976) (requiring probable cause for a vehicle search). *But see* *State v. Lesnick*, 530 P.2d 243, 251 (Wash. 1975) (Hale, C.J., dissenting) (“What is probable cause to search and seize an automobile may not rise to the standards of probable cause for the issuance of a warrant to search a house.”); *United States ex rel. Clark v. Mulligan*, 347 F. Supp. 989, 991 (D.N.J. 1972) (“As a general principle, automobile searches may not demand the same variety of probable cause required for a search of a home or other structure.”).

146. *See infra* subpart VI(A).

147. *See* *United States v. Watson*, 423 U.S. 411, 416–17 (1976) (summarizing cases upholding the constitutionality of warrantless arrests).

148. *Carroll v. United States*, 267 U.S. 132 (1925).

149. *See* *United States v. Winsor*, 846 F.2d 1569, 1571 (9th Cir. 1988) (en banc) (“[H]ot pursuit may excuse police from the Fourth Amendment’s warrant requirement, but never does it excuse the absence of the requisite degree of suspicion before effecting a search.”). *Winsor* and the Fourth Amendment law with regard to exigent circumstances are discussed *infra* subpart V(D).

doubtful support in history. The authorities on the common law did not embrace the one-size-fits-all approach. Much to the contrary, Hale's *History of the Pleas of the Crown*, for example, is replete with taxonomies of rules for arrests and searches, calibrated to the degree of suspicion present, as well as to the offense under investigation. For Hale, the evidentiary predicate required to justify an arrest was a separate issue from the evidentiary predicate required to justify a search or seizure.¹⁵⁰ Likewise, the Collection Act of 1789 distinguished between ships and houses not only for purposes of obtaining a warrant, but also with respect to the requisite degree of suspicion justifying a search.¹⁵¹

Moreover, the “centuries of precedent” to which the *Dunaway* Court refers does not reflect a “single” evidentiary standard for a search or arrest. The standard fluctuated over time. At times, it seems to have been, at least to the modern observer, astonishingly low. A thirteenth-century statute authorized town guards to arrest “any Stranger” walking the roads after sunset.¹⁵² Fifty years later, in the midst of crime wave, a 1331 statute went even further and authorized constables to arrest anyone, anytime, who showed an “evil suspicion” of having committed certain violent felonies.¹⁵³ The constable was commanded to bring the suspect to a magistrate, who conducted further inquiries to determine if the suspect had in fact committed a crime.¹⁵⁴ The 1331 statute drifted into obsolescence over the course of the next few centuries as more rigorous standards were employed to regulate the constable's arrest power.¹⁵⁵ Yet it is interesting to note that the seventeenth-century author Hale, responding to Coke, sought to shift the pendulum back, at least to some degree, “in these times, where felonies and robberies are so frequent.”¹⁵⁶ Probable cause, far from being a single standard, seems to have been a variable one, both across time and within a given time period.¹⁵⁷

150. See 2 HALE, *supra* note 125, at 85–98 (“Concerning arrests or apprehension of felons, or persons suspected of [a] felony by [an] officer.”); *id.* at 149–51 (“Concerning warrants to search for stolen goods, and seizing of them.”).

151. See Cuddihy, *supra* note 126, at 1529 (stating that in order to search a ship, a customs officer needed “reason to suspect,” but to search cargoes awaiting importation, “a suspicion of fraud” was required); Cloud, *supra* note 131, at 1740–41 (discussing the statute's three search and seizure categories and their varying requisite degrees of suspicion).

152. Statute of Winchester, 13 Edw. 1, stat. 2, c. 4 (1285) (Eng.), *cited and discussed in* Grano, *supra* note 143, at 479 n.80 and accompanying text (noting that “the statute was directed at ‘roberdsmen,’ men who patterned their behavior after Robin Hood”); see also *Atwater v. Lago Vista*, 532 U.S. 318, 333 (2001) (discussing the Statute of Winchester to illustrate that warrantless misdemeanor arrests at common law were not confined to breaches of the peace).

153. Statute of Westminster, 5 Edw. 3, c. 14 (1331) (Eng.), *cited and discussed in* Grano, *supra* note 143, at 479 n.81.

154. *Id.*

155. See 1 STEPHEN, *supra* note 125, at 189 n.2 (“[Although] [t]he Statute of Winchester was not repealed till 1828, it had for centuries before that time been greatly neglected.”).

156. 2 HALE, *supra* note 125, at 149.

157. See Cuddihy, *supra* note 126, at 863 (“No single limit applied universally . . . to define an unreasonable class of searches or seizures . . .”).



2. “*Familiar.*”—The *Dunaway* Court is surely correct that the probable cause standard is now a familiar one, thanks to its inclusion in the Fourth Amendment. Curiously, however, the precise phrase appears to have been relatively uncommon in colonial practice. As late as 1766, George Mason protested against a British revenue statute, which insulated customs officers from trespass claims in which there was “probable Cause of Complaint,” that the word probable was “a word before an unknown in the Language and Style of Laws!”¹⁵⁸

At the time of the Revolution, many states enacted declarations of rights to restrict the practice of general warrants, but none of these documents referenced a probable cause standard.¹⁵⁹ To the extent that the phrase “probable cause” was used, it appears to have been restricted to customs disputes.¹⁶⁰ Persons whose ships or property had been seized would bring an action for recovery of the seized goods, as well as for damages from the official who had executed the forfeiture. According to common practice, the official was immune from any claims if he could show that probable cause had existed. Madison may have drawn the phrase “probable cause” from this practice in customs disputes; but prior to the Fourth Amendment, few colonial or early American statutes drew upon this standard in restricting the issuing of warrants.¹⁶¹

3. *Probable Cause vs. Reasonableness.*—The relatively infrequent use of the probable cause standard brings us to another point: The contrast of probable cause and reasonable suspicion, to which the *Dunaway* Court referred, has little basis in history. Revolutionary-era statutes typically authorized warrants to search or execute an arrest whenever it was “reasonable” or the evidentiary predicate for such actions was “satisfactory,” rather than upon a showing of probable cause.¹⁶²

158. Letter from George Mason to the Committee of Merchants in London (June 6, 1766), in 1 PAPERS OF GEORGE MASON 65, 67 (Robert A. Rutland ed., 1970). As Professor Davies notes, “James Madison innovated when he used ‘probable cause’ as the standard for warrants in the pro-fourth amendment.” Davies, *supra* note 129, at 370.

159. For example, Pennsylvania’s Declaration of Rights condemned warrants issued “without oaths or affirmations first made, affording a sufficient foundation.” PA. CONST. of 1776, art. X, *quoted in* Davies, *supra* note 137, at 677. Massachusetts proscribed warrants “if the cause or foundation of them be not previously supported by oath or affirmation.” MASS. CONST. of 1780, pt. 1, art. XIV, *quoted in* Davies, *supra* note 137, at 684.

160. See Davies, *supra* note 129, at 370–71 (stating that the Framers of the Fourth Amendment “anticipated that custom warrants would be the primary sort of searches that federal officers might conduct”); Davies, *supra* note 137, at 703–06 (postulating that the adoption of the probable cause standard without the additional common-law requirement of an offense “in fact” suggests that the Framers were concerned with custom searches rather than criminal warrants).

161. Professor Davies notes that Madison’s usage of the phrase in the Fourth Amendment would seem to have a single precedent in colonial practice: a Pennsylvania customs statute. Davies, *supra* note 137, at 703 n.444.

162. A 1779 Connecticut statute authorized a magistrate to issue a warrant to search hoarded provisions if the magistrate considered it “reasonable.” An Act for Ascertaining the Quantity of



The best evidence of the Framers' understanding of probable cause is the Collection Act of 1789,¹⁶³ which was enacted contemporaneously with the passage of the Fourth Amendment.¹⁶⁴ As in prior American statutes, the 1789 statute essentially equated probable cause with some unscientific notion of reasonableness. The Collection Act authorized warrantless searches of vessels where officials had "reason to suspect" that illegal goods were aboard.¹⁶⁵ It also authorized searches of homes, with warrants, where officials had "cause to suspect" the presence of illegally concealed goods.¹⁶⁶ Another act of the First Congress, which imposed duties on alcohol products, authorized judges to issue search warrants "upon reasonable cause of suspicion."¹⁶⁷ Officials were authorized to "enter into all and every such place or places in which any . . . spirits shall be suspected . . ."¹⁶⁸

The contrast of probable cause on the one hand and reasonable suspicion or reasonableness on the other has become a cornerstone of the modern understanding of the Fourth Amendment. But this is the work of decades, not centuries, of precedent; it did not really take hold until the 1968 decision of *Terry v. Ohio*.¹⁶⁹ Probable cause in American courts has shown a remarkable ability to evolve over time, and there would seem to be little reason to think that its current meaning will be a permanent one. A survey of the development of probable cause in America, to which I now turn, underscores the doctrine's adaptability, and it may further help in suggesting avenues of departure, if needed, from the doctrine in its present form.

Grain, Ct. St., 7 Apr. 1779, Ct. State Recs., vol. 2 (1778–80), *quoted in* Cuddihy, *supra* note 126, at 1524. A 1782 New Jersey statute provided that a magistrate should issue a warrant when smuggling had been alleged after "due and satisfactory Cause and Suspicion" had been shown. N.J. St. 6th Gen. Assemb., 2nd Sitting, c. 32, sec. 18 (June 24, 1782), *quoted in* Cuddihy, *supra* note 126, at 1525. A 1784 New York statute approved warrants after a "reasonable cause of suspicion" had been stated, "of the sufficiency of which" the magistrate "were to judge." N.Y. St. sess. 7, c. 28 (April 13, 1784), *quoted in* Cuddihy, *supra* note 126, at 1524–25.

163. Collection Act of 1789 § 24, 1 Stat. 29 (repealed 1790).

164. *See* Amar, *supra* note 135, at 766 (noting that the act was "passed during the same session in which [the First Congress] adopted the Fourth Amendment"); Cloud, *supra* note 131, at 1740; Cuddihy, *supra* note 126, at 1556 (relying on the Collection Act as evidence of Framers' understanding of probable cause because it was passed contemporaneously with the Fourth Amendment).

165. Collection Act of 1789 § 24, 1 Stat. 29, 43 (repealed 1790).

166. *Id.*

167. Excise Act of 1791 § 32, 1 Stat. 207.

168. *Id.*

169. 392 U.S. 1, 27 (1968) (holding that a search conducted by an officer with reason to believe that he is dealing with a dangerous person was valid under the Fourth Amendment, regardless of whether the officer had probable cause to make an arrest). The birth of "reasonable suspicion" as a doctrine distinct from "probable cause" is discussed *infra* subpart V(B).



IV. The Ebb and Flow of American Probable Cause

After the Supreme Court decided *Illinois v. Gates*¹⁷⁰ in 1983, there was a great deal of gnashing of teeth in the legal academy. The professoriat surveyed the decision and pronounced it not good.¹⁷¹ A common theme in the criticisms was that the Court had diluted the probable cause requirement reflected in the 1969 decision, *Spinelli v. United States*.¹⁷² Although this was indisputably true, it is worth recalling that the American republic predates the Warren Court.¹⁷³ In certain respects, *Spinelli* reflected a high-water mark in the ebb and flow of probable cause in America. The *Gates* decision pulled back from the Court's 1960s decisions on probable cause, but it is doubtful that it retreated all the way to the views of Chief Justices Marshall or Taft.¹⁷⁴

The account below draws out the competing understandings of probable cause that coexisted in the same period. A court decision that suggested that probable cause was little more than the barest suspicion would soon be qualified by a decision casting the standard in more stringent language. A decision that suggested that any evidence could be weighed in the probable cause balance would soon be opposed by a decision limiting the evidence a magistrate or court could consider. Until the 1960s, however, a consistent theme seems to have been the interchangeability of terms like "probable cause," "reasonable cause," and "reasonable grounds"; it is only starting with *Terry v. Ohio* that the juxtaposition, so familiar today, firmly took hold.

A. Forfeiture Cases

The Supreme Court first explored the meaning of probable cause at length in an 1813 forfeiture case, *Locke v. United States*.¹⁷⁵ The 1799 Collection Act provided that a claimant of forfeited goods bore the burden of proof that his goods had been wrongfully seized, but only after the government had established probable cause.¹⁷⁶ (The phrases "probable

170. 462 U.S. 213 (1983).

171. See, e.g., Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 336–40 (1984) (criticizing the Court's revised definition of probable cause as providing insufficient protection for civil liberties); Yale Kamisar, *Gates, "Probable Cause," "Good Faith," and Beyond*, 69 IOWA L. REV. 551, 570–84 (1984) (denouncing the Court's adoption of the "totality of the circumstances" approach to probable cause as overly accommodating of law enforcement interests). But see Grano, *supra* note 143, at 512–19 (defending the *Gates* decision as in accord with historical understandings of probable cause and common sense).

172. 393 U.S. 410 (1969). For an example of one such criticism, see Kamisar, *supra* note 171, at 570–71.

173. But see Ronald J. Bacigal, *The Fourth Amendment in Flux: The Rise and Fall of Probable Cause*, 1979 U. ILL. L.F. 763, 767–76 (providing an insightful treatment of "traditional probable cause" but beginning with the Supreme Court's 1960s decisions).

174. For the view of Marshall, see *infra* text accompanying notes 182–85. For the view of Taft, see *infra* text accompanying notes 224–25, 227–28.

175. 11 U.S. (7 Cranch) 339 (1813).

176. Act of Mar. 2, 1799, ch. 22, § 71, 1 Stat. 627, 678 (regulating the collection of duties on imports and tonnage).



cause” and “reasonable cause of seizure” were used interchangeably in the Collection Act.)¹⁷⁷ In *Locke*, a claimant of goods forfeited under the Collection Act argued that officials had lacked probable cause when they had searched his ship. He contended that the various factors cited by customs officials to justify their antecedent suspicions were all amenable to innocent explanations.¹⁷⁸ The officials had maintained that probable cause had existed, in part, because the claimant (*Locke*) had used a “fictitious name[]” when shipping the goods.¹⁷⁹ To this, *Locke* answered that “[i]t was done to screen the goods from his creditors, he being in embarrassed circumstances at that time.”¹⁸⁰ More fundamentally, *Locke* urged the Court to embrace a theory of probable cause akin to a preponderance of the evidence standard: “[P]robable cause must mean presumptive evidence.”¹⁸¹

Chief Justice Marshall rejected all of the claimant’s arguments. He first noted that *Locke* had “reviewed [the] circumstances separately” and argued that “they are either indifferent in themselves—mere casualties—or are reasonably accounted for.”¹⁸² Marshall instead embraced a “combined circumstances” approach to probable cause, looking at the suspicious factors in the aggregate, rather than one by one.¹⁸³ Thus, *Locke*’s ability to offer an innocent explanation for each of the suspicious factors failed to negate the existence of probable cause: “It is certainly unusual for a merchant to cover his transactions with a veil of mystery,” and the fact that some innocent, albeit destitute, shippers employed this device did not deprive the evidence of its power to contribute to probable cause.¹⁸⁴

177. Compare *id.* (stating that the burden shifts to the claimant only after the prosecution shows “probable cause”), with *id.* § 89 (stating that the claimant has no cause of action for malicious prosecution if there was a “reasonable cause of seizure”). In construing these provisions, the Supreme Court later emphasized that “reasonable cause” and “probable cause” had identical meanings:

In the case before us, the certificate was of “probable cause of seizure.” The authorities we have cited speak of “probable” cause. The statute of 1799, however, uses the words “reasonable cause of seizure.” No argument is made that there is a substantial difference in the meaning of these expressions, and we think there is none. If there was a probable cause of seizure, there was a reasonable cause. If there was a reasonable cause of seizure, there was a probable cause. In many of these reported cases the two expressions are used as meaning the same thing.

Stacey v. Emery, 97 U.S. 642, 646 (1878).

178. For example, the claimant argued that his failure to produce a certificate of entry was not necessarily evidence that the goods were improperly imported and that the partial erasure of identifying marks on the goods was an innocent error. *Locke*, 11 U.S. at 342.

179. *Id.* at 344.

180. *Id.*

181. *Id.*

182. *Id.* at 345.

183. See *id.* at 347–48 (“If these circumstances were ever light, taken separately, they derive considerable weight from being united in the same case.”); accord *Illinois v. Gates*, 462 U.S. 213, 233 (1983) (holding that probable cause is a “totality-of-the-circumstances” analysis).

184. *Locke*, 11 U.S. at 346.



At the most fundamental level, Marshall took issue with the theory of probable cause advanced by the claimant:

It is contended, that probable cause means *prima facie* evidence, or, in other words, such evidence as, in the absence of exculpatory proof, would justify condemnation.

. . . [However,] *the term “probable cause,” according to its usual acceptation, means less than evidence which would justify condemnation; and, in all cases of seizure, has a fixed and well known meaning. It imports a seizure made under circumstances which warrant suspicion.*¹⁸⁵

The approach to probable cause advanced by Marshall in *Locke*—“circumstances which warrant suspicion”—is among the broadest ever articulated in an American court, and it has exerted a continuing power in debates over the doctrine’s meaning. In recent Congressional hearings on the FBI’s failure to search Zacarias Moussaoui’s laptop computer prior to the September 11 attacks,¹⁸⁶ Senator Arlen Specter advanced a concept of probable cause explicitly based on the *Locke* decision.¹⁸⁷ Citing Chief Justice Marshall, Specter argued that officials can form probable cause at a very early stage in an investigation, long before suspicion has necessarily focused on any particular person, and simply when circumstances “warrant suspicion” in a general sense.¹⁸⁸

Yet Marshall’s approach in *Locke* was soon qualified by the Supreme Court. In *The Apollon*,¹⁸⁹ an 1824 forfeiture case, the plaintiff again argued that customs officials had lacked probable cause when they had seized his ship.¹⁹⁰ The government countered that probable cause was present because the ship was traveling through an area which, according to “general notoriety,” was “infested, at different periods, by smugglers.”¹⁹¹ Although this rather inconclusive evidence might have satisfied Marshall’s approach to probable cause—it is a circumstance that warrants suspicion—Justice Story, writing for a unanimous court, rejected the government’s argument.¹⁹² Story wrote that the question whether probable cause was present “must be decided by the evidence in this record, and not by mere general suspicions drawn from other sources.”¹⁹³ It was, he noted, “perfectly lawful” to traverse the waters

185. *Id.* at 348 (emphasis added).

186. *See supra* Part II.

187. *See FBI Counterterrorism Hearings, supra* note 28, at 108 (arguing that, unlike the standard of proof required in an ordinary judicial proceeding, “probable cause” in a magistrate’s decision need only consist of “circumstances which warrant suspicion,” as stated in *Locke*).

188. *Id.*; *see also* Grano, *supra* note 143, at 490 (arguing that Marshall’s formulation of probable cause comported with the lenient common-law standard).

189. 22 U.S. (9 Wheat.) 362 (1824).

190. *Id.* at 367.

191. *Id.* at 374.

192. *Id.*

193. *Id.*



where the *Apollon* was seized, and the government could not establish probable cause on mere rumor and hearsay evidence.¹⁹⁴

Locke and *The Apollon*, when viewed together, suggest that probable cause had an ambiguous meaning even in the earliest days of the republic. Marshall's suggestion that probable cause consisted of little more than "circumstances which warrant suspicion," was rejected by Justice Story, who distinguished probable cause from "mere general suspicions." The tension between these two views would be played out in a series of legal contexts in ensuing years.

B. *Malicious Prosecution Cases*

Malicious prosecution cases provided one such context in the nineteenth century. These cases arose when a person who had been wrongfully arrested or searched brought an action against the individuals responsible for the issuance of the warrant initiating the criminal proceeding. A defendant in a malicious prosecution case could raise as a defense that probable cause had originally existed to believe the plaintiff guilty, even if he was later exonerated.

Lemuel Shaw, the renowned Chief Justice of the Supreme Judicial Court of Massachusetts, wrote one of the influential opinions on this issue. In *Bacon v. Towne*,¹⁹⁵ the plaintiff, who had been charged with arson and was ultimately acquitted, brought a malicious prosecution suit against those who had leveled the charges against him.¹⁹⁶ Appealing a jury verdict, the defendants argued that the trial court had improperly excluded evidence supporting the existence of probable cause.¹⁹⁷ This evidence included secondhand reports that the plaintiff had set fire to the factory and the plaintiff's unsavory reputation.¹⁹⁸ Shaw, agreeing with the defendants on both points, reversed the trial court's judgment and ordered a new trial.¹⁹⁹ With respect to the hearsay evidence, Shaw wrote that "in the ordinary transactions of life, men do not hesitate to act on information until they put their informants upon oath."²⁰⁰ And with respect to the evidence of the plaintiff's reputation, Shaw added that "[t]he same facts, which would raise a strong suspicion . . . against a person of notoriously bad character for honesty and integrity, would make a slighter impression if they tended to throw a charge of guilt upon a man of good reputation."²⁰¹

194. *Id.* at 374–75.

195. 58 Mass. (4 Cush.) 217 (1849).

196. *Id.* at 235.

197. *Id.* at 236–41.

198. *Id.* at 240.

199. *Id.* at 242.

200. *Id.* at 240.

201. *Id.* at 241.



The Apollon and *Bacon* cannot easily be reconciled. In the former, Story held that vague sorts of rumors, which would be inadmissible at trial (e.g., that the waters were “infested by smugglers”) were not relevant in the probable cause assessment;²⁰² in the latter, Shaw held that equally vague rumors (to the effect that the plaintiff had a bad character) could be weighed in the probable cause balance.²⁰³ Although this tension is significant, a common feature in the forfeiture and malicious prosecution cases was the interchangeable usage of “probable cause,” “reasonable cause,” and “reasonable belief.” There is no indication that probable cause had yet to suggest to the judicial mind an idea more sophisticated than a belief or suspicion that a reasonable person might entertain.²⁰⁴

C. *The Era of Boyd*

Justice Bradley’s decision in the 1886 case of *Boyd v. United States*²⁰⁵ is widely recognized as a broader reading of the protections of the Fourth and Fifth Amendments than any contemplated by the Warren Court.²⁰⁶ Although *Boyd* did not address the meaning of probable cause, several lower court decisions in the decades that followed did, and their language suggests a shift from Justice Marshall’s understanding in *Locke*.

*Veeder v. United States*²⁰⁷ is illustrative. The case involved the execution of a warrant issued pursuant to the Espionage Act of 1917.²⁰⁸ After an impassioned tribute to the Fourth Amendment as a protection against the prying eyes of government agents,²⁰⁹ the Seventh Circuit defined probable cause as follows:

202. See *supra* text accompanying notes 189–94.

203. See *supra* text accompanying notes 198–201.

204. “Probable cause,” Shaw wrote, “is such a state of facts in the mind of the prosecutor as would lead a man of ordinary caution and prudence to believe, or entertain an honest and strong suspicion, that the person arrested is guilty.” *Bacon*, 58 Mass. at 238–39; see also *Wheeler v. Nesbitt*, 65 U.S. 544, 550 (1861) (stating that everyone who “puts the criminal law in force maliciously, and without any reasonable or probable cause, commits a wrongful act; and if the accused is thereby prejudiced, . . . the injury and loss so sustained constitute the proper foundation of an action to recover compensation”).

205. 116 U.S. 616 (1886).

206. See, e.g., Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: “Here I Go Down That Wrong Road Again,”* 74 N.C. L. REV. 1559, 1565 (1996) (noting the Warren Court’s abandonment of *Boyd*).

207. 252 F. 414 (7th Cir. 1918).

208. Act of June 15, 1917, 40 Stat. 228, ch. 30 (repealed 1948). Section 3 of the Espionage Act provided, “A search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property and the place to be searched.” *Veeder*, 252 F. at 416.

209. The court in *Veeder* stated:

One’s person and property must be entitled, in an orderly democracy, to protection against both mob hysteria and the oppression of agents whom the people have chosen to represent them in the administration of laws which are required by the Constitution to operate upon all persons alike.

No search warrant shall be issued unless the judge has first been furnished with facts under oath—not suspicions, beliefs, or surmises—but facts which, when the law is properly applied to them, tend to establish the necessary legal conclusion, or facts which, when the law is properly applied to them, tend to establish probable cause for believing that the legal conclusion is right. The inviolability of the accused's home is to be determined by the facts, not by rumor, suspicion, or guesswork.²¹⁰

Applying this standard, the court concluded that the evidence supplied by the government—little more than rumor, suspicion, and guesswork—failed to constitute probable cause.²¹¹

On its facts, *Veeder* was a relatively easy case. The federal agent's terse affidavit in support of a warrant stated that "he [had] good reason to believe, and [did] verily believe" that the defendants had committed a financial crime, without providing any factual basis for the belief that the magistrate could independently evaluate.²¹² Most narrowly read, *Veeder* and a string of similar court of appeals decisions in the era²¹³ simply required federal agents to provide some, if minimal, factual support for their suspicions in warrant applications.²¹⁴ Yet the sweeping language in *Veeder* and other decisions, contrasting probable cause with "suspicions, beliefs, or surmises,"²¹⁵ reflected the evolution of a standard with far more vigor than the rather limp test—"circumstances which warrant suspicion"—set forth by Marshall in *Locke*.

D. Prohibition

Long before the "war on drugs," the National Prohibition (or "Volstead") Act²¹⁶ provided an engine for the expansion of federal criminal law enforcement. The 1921 amendment to the Volstead Act authorized warrantless searches of automobiles whenever government agents had

One's home and place of business are not to be invaded forcibly and searched by the curious and suspicious; not even by a disinterested officer of the law, unless he is armed with a search warrant.

Veeder, 252 F. at 418.

210. *Id.*

211. *Id.* at 419.

212. *Id.* at 416, 419.

213. *See, e.g.*, *Rice v. Ames*, 180 U.S. 371, 374 (1901) (stating that a warrant issued solely on information and belief is invalid); *United States v. Baumert*, 179 F. 735, 738 (1910) (holding that the information and belief of the U.S. Attorney is insufficient for probable cause and the issuance of a warrant); *United States v. Premises in Butte, Mont.*, 246 F. 185, 186 (1917) (stating that German heritage and suspicion of German sympathies were not sufficient for the issuance of a warrant).

214. *See Veeder*, 252 F. at 418 ("The finding of the legal conclusion of probable cause from the exhibited facts is a judicial function, and it cannot be delegated by the judge to the accuser.").

215. *Id.*

216. Ch. 85, 41 Stat. 305 (1919) (repealed 1933).



“reasonable cause” that alcohol was present.²¹⁷ In *Carroll v. United States*,²¹⁸ the Supreme Court held that “reasonable cause” in the Volstead Act had the same meaning as “probable cause” in the Fourth Amendment,²¹⁹ further evidence that the two terms had yet to assume distinct meanings.

Although *Carroll*’s lasting influence is in upholding the constitutionality of warrantless automobile searches, the decision also sheds light on the Court’s understanding of the probable cause standard in the 1920s. A brief synopsis of the facts of the case reveals Chief Justice Taft’s willingness to credit the government’s argument that probable cause existed on the basis of astonishingly flimsy evidence. On September 29, 1921, three undercover prohibition agents arranged to purchase alcohol from Carroll and two other persons in Grand Rapids, Michigan.²²⁰ After the price was fixed, Carroll drove off in an Oldsmobile to obtain the spirits, only to return empty-handed, explaining to the agents that he had been unable to locate his source.²²¹ Two months later, the agents observed Carroll and his two confederates in the same Oldsmobile about sixteen miles east of Grand Rapids.²²² Concluding that probable cause existed, the agents stopped the car, searched its interior, and discovered alcohol in the trunk.²²³

The evidence that alcohol was concealed in Carroll’s trunk was, to put it mildly, underwhelming, but Taft brushed aside the argument that the search was not supported by probable cause. After a thorough, if slanted, survey of nineteenth-century judicial pronouncements on the issue, Taft defined probable cause as simply a “reasonable ground for belief of guilt.”²²⁴ In the case before him, Taft held that the prohibition agents’ suspicions were reasonable given that the area between Detroit and Grand Rapids was “one of the most active centers for introducing illegally into this country spirituous liquors” and that Carroll and the other defendants had offered to sell liquor two months before the search.²²⁵ A dissenting Justice McReynolds criticized the majority’s theory of probable cause as overly broad and mocked its application in the case before the Court. “Has it come about,” McReynolds asked rhetorically, “that merely because a man once agreed to deliver whisky, but did not, he may be arrested whenever thereafter he ventures to drive an automobile on the road to Detroit!”²²⁶

217. Stanley Amendment, ch. 134, § 6, 42 Stat. 222, 223 (1921) (repealed 1933).

218. 267 U.S. 132 (1924).

219. *Id.* at 144–45 (summarizing the congressional debates about the language in the Stanley Amendment).

220. *Id.* at 134–35.

221. *Id.* at 135–36.

222. *Id.*

223. *Id.*

224. *Id.* at 161 (quoting *McCarthy v. DeArmit*, 90 Pa. 63, 69 (1881)).

225. *Id.* at 160.

226. *Id.* at 174 (McReynolds, J., dissenting).



Indeed, Taft's summary of the nineteenth-century treatment of probable cause failed to do justice to the nuances of that doctrine's development and strained all the evidence to support the broadest possible reading of the term. For example, Taft included a shorn quotation from *The Apollon* that mangled Justice Story's decision. Taft quoted Story's observation that "this remote part of the country has been infested . . . by smugglers,"²²⁷ as if Story relied on this piece of evidence in *upholding* a finding of probable cause to seize the ship. In fact, Story's conclusion was precisely the opposite, as the very next sentence in the opinion, omitted by Taft, illustrates: "But the question . . . must be decided by the evidence in this record, and not by mere general suspicions drawn from other sources."²²⁸ Story would thus have rejected the argument in *Carroll*, embraced by Taft, that probable cause could be based on the suspect's mere presence in an area reputed to be one favored by bootleggers.

Within a decade, the Court would cast the *Carroll* decision into doubt, at least with respect to its approach to probable cause. In *Grau v. United States*,²²⁹ the Court advanced a remarkably stringent understanding of probable cause.²³⁰ Reverting to Story's approach in *The Apollon*, the Court in *Grau* held that "a search warrant may issue only upon evidence which would be competent in the trial of the offense before a jury"²³¹ Thus, mere rumors or hearsay that a location was popular with bootleggers or smugglers, or that an individual was of ill repute, would be valueless in the probable cause calculus.

The approach to probable cause adopted by the *Grau* Court, in rigorously limiting the evidence that could be weighed in the probable cause balance by the trial rules of admissibility, proved difficult to administer, and the Court was impelled to overrule *Grau* seventeen years later. In *Brinegar v. United States*,²³² the facts of which closely resembled those of *Carroll*,²³³

227. *Carroll*, 267 U.S. at 159–60 (citing *The Apollon*, 22 U.S. 362, 374 (1824)).

228. *The Apollon*, 22 U.S. at 374.

229. 287 U.S. 124 (1932).

230. In *Grau*, a police officer filed an affidavit, in support of a warrant, claiming that he saw persons haul cans, commonly used in handling whisky, and what appeared to be corn sugar up to and into the place and saw the same car or truck haul similar cans, apparently heavily loaded away from there and smelled odors and fumes of cooking mash coming from the place, and he says there is a still and whisky mash on the premises.

Id. at 127. The Court found the affidavit insufficient: "While a dwelling used as a manufactory or headquarters for merchandising may well be and doubtless often is the place of sale, its use for those purposes is not alone probable cause for believing that actual sales are there made." *Id.* at 128–29.

231. *Id.* at 128.

232. 338 U.S. 160 (1949).

233. The defendant, who had been arrested for bootlegging five months previous, was spotted traveling near a city regarded as a source city for liquor. *Id.* at 162, 166. Two federal agents stopped him, searched his car, and found alcohol. *Id.* at 163. Although the court below had



the Court contrasted the hard and fast evidentiary rules that govern trial proceedings with the far more elastic rules that govern questions of probable cause:

In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.²³⁴

The emphasis on the nontechnical character of probable cause might have suggested a return to Marshall's approach in *Locke*, but the *Brinegar* Court was careful to prevent such a reading. Although the Court cited Marshall's observation that probable cause "means less than evidence that would justify condemnation," the majority acknowledged that "[s]ince Marshall's time . . . [probable cause] has come to mean more than bare suspicion."²³⁵ The majority was even candidly ambivalent about the results in both *Brinegar* and *Carroll*, which it noted fell on the "troublesome line . . . between mere suspicion and probable cause."²³⁶ Nor did the Court evince great enthusiasm for the *Carroll* decision, remarking that it could not "say that the conclusion [in *Carroll*] was [so] wrong . . . that it should now be overridden."²³⁷

Although the majority decision in *Brinegar* is still good law today, Justice Jackson's dissenting opinion continues to exert a persuasive power in discussions of probable cause.²³⁸ Jackson expressed dissatisfaction with the majority's rejection of *Grau* and its embrace of a nontechnical approach to probable cause.²³⁹ More interestingly, Jackson articulated the intuition that

excluded from *Brinegar*'s trial the evidence of the prior arrest (for which charges had been dropped), the officer was allowed to introduce that evidence to establish that he had had probable cause to make the stop in the first place. *Id.* at 163–64.

234. *Id.* at 175. I note in passing that one may wonder why criminal trials are not also governed by similarly nontechnical rules. Indeed, American criminal procedure seems, from a comparative perspective, cluttered with technical rules. See CRAIG M. BRADLEY, *THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION* 96–108 (1993) (comparing American criminal procedure to that of England and Wales); *id.* at 112–17 (comparing American criminal procedure to Canadian criminal procedure); Renée Lettow Lerner, *The Intersection of Two Systems: An American on Trial for an American Murder in the French Cour D'Assises*, 2001 U. ILL. L. REV. 791 (comparing American criminal procedure to French criminal procedure).

235. *Brinegar*, 338 U.S. at 175.

236. *Id.* at 176.

237. *Id.* at 177–78.

238. See, e.g., *Illinois v. Gates*, 462 U.S. 213, 274 (1983) (Brennan, J., dissenting) (beginning his dissenting opinion with the complaint that the majority "patently disregards Justice Jackson's admonition" in *Brinegar*); *State v. Yeargan*, 958 S.W. 626, 639 (Tenn. 1997) (seeking "guidance as to the circumstances in which an investigative stop is justified" in Jackson's dissent in *Brinegar*); Gross & Livingston, *supra* note 65, at 1429 (stating that Jackson's dissent in *Brinegar* may be the "most widely cited statement of [the] position" that "[t]he greater the threat, the more we are willing to accept restrictions on our liberty").

239. *Id.* at 186 (Jackson, J., dissenting) ("[T]he proof that *Brinegar* was trafficking in illegal liquor rests on inferences from two circumstances, neither one of which would be allowed to be proved at a trial.").



the societal interest in the apprehension of a mere bootlegger is less than the interest in the capture of a violent criminal. As a consequence, Jackson argued, a search that might be reasonable, given inconclusive evidence, for a kidnapped boy trapped in a trunk would not be reasonable, on the basis of the same evidence, when alcohol was suspected there.²⁴⁰ Jackson's sense that probable cause should fluctuate depending on the nature of the crime investigated is explored at length below.²⁴¹

E. Drugs

With the enactment of the Narcotic Control Act of 1956,²⁴² the problem of probable cause found yet another arena in federal courts. Although the statute authorized federal agents to "make [warrantless] arrests" when there were "reasonable grounds to believe" that a suspect was transporting drugs,²⁴³ the Supreme Court soon clarified that "[t]he terms 'probable cause' as used in the Fourth Amendment and 'reasonable grounds' as used in . . . the Narcotic Control Act . . . are substantial equivalents of the same meaning."²⁴⁴ Over the course of several decades, the Supreme Court debated, albeit in an oblique fashion, the meaning of probable cause. Instead of squarely addressing the issue of how probable "probable cause" really is, the Justices skirmished repeatedly, if inconclusively, as to the probative value of hearsay evidence, usually in the form of tips from informants, in determining whether probable cause existed in any particular case.

The first installment in this debate was the 1959 case of *Draper v. United States*.²⁴⁵ A previously reliable informant tipped police off that an African-American man of medium height, "wearing a light-colored raincoat, brown slacks and black shoes," would be arriving at a train station carrying heroin.²⁴⁶ A police officer corroborated the tip (a man, as described and as predicted, emerged from the train), and made an arrest. The Supreme Court affirmed the conviction, holding that there was probable cause, on the basis of the corroborated tip, to make the arrest.²⁴⁷ In emphasizing the "exact" and "precise" nature of the tip,²⁴⁸ the Court failed to recognize that the tip was in fact sufficiently generic that it could have been "corroborated" at any urban train station on any morning anywhere in America. At its core, then, the case turned on the trustworthiness of the informant, and on this point the Court

240. *Id.* at 183 (Jackson, J., dissenting).

241. *See infra* text accompanying notes 421–22; *infra* subpart VI(B).

242. Pub. L. No. 70-727, 70 Stat. 567 (1956).

243. *Id.* § 104(a).

244. *Draper v. United States*, 358 U.S. 307, 310 n.3 (1959).

245. 358 U.S. 307 (1959).

246. *Id.* at 309 & n.2.

247. *Id.* at 311–14.

248. *Id.* at 309.



was prepared to allow police to give great weight to a reliable informant's tip, at least for purposes of developing probable cause to make an arrest. Drawing extensively upon the *Brinegar* decision, the *Draper* Court stressed the difference between guilt in a criminal trial and a finding of probable cause and even suggested that hearsay evidence alone could amount to probable cause.²⁴⁹ A dissenting Justice Douglas responded that "the mere word of an informer" failed to supply reasonable grounds, or probable cause, to make an arrest.²⁵⁰

The Warren Court substantially undercut *Draper* (and implicitly *Brinegar* as well) in *Spinelli v. United States*.²⁵¹ In *Spinelli*, a previously reliable informant reported to the police that the defendant was using an apartment to conduct a gambling operation over the telephone.²⁵² Police confirmed that the defendant visited the apartment on a daily basis and that two telephone numbers, correctly identified by the informant, were in service there.²⁵³ The Court nonetheless held that the tip, even as partially corroborated, was insufficient to establish probable cause.²⁵⁴ The majority in *Spinelli* expressed doubts about the probative value of an informant's tip for purposes of establishing probable cause, and it insisted that police corroborate both the basis of the informant's knowledge as well as his credibility.²⁵⁵ Noting that the police had simply observed Spinelli engaged in "innocent-seeming activity,"²⁵⁶ the majority rejected the argument that probable cause existed to obtain a warrant.²⁵⁷ An odd trio of dissenting Justices (Black, Fortas, and Stewart) complained that the majority had converted probable cause into an overly technical and constraining standard.²⁵⁸ In effect, the *Spinelli* Court required law enforcement to develop a greater degree of certainty that criminal activity was afoot before taking action. Probable cause after *Spinelli* became relatively more probable.

249. "It is well settled that an arrest may be made upon hearsay evidence." *Id.* at 312 n.4 (quoting *United States v. Heitner*, 149 F.2d 105, 106 (2d Cir. 1945)).

250. *Id.* at 321 (Douglas, J., dissenting).

251. 393 U.S. 410 (1969).

252. *Id.* at 413-14.

253. *Id.*

254. *Id.* at 418.

255. *Id.* at 415 ("Where, as here, the informer's tip is a necessary element in a finding of probable cause, its proper weight must be determined by a more precise analysis.").

256. *Id.* at 414.

257. *Id.* at 418-19.

258. See *id.* at 431 (Black, J., dissenting) ("Although the statement [of the informant] is hearsay that might not be admissible in a regular trial, everyone knows, unless he shuts his eyes to the realities of life, that this is a relevant fact which, together with other circumstances, might indicate a factual probability that gambling is taking place."); *id.* at 438 (Fortas, J., dissenting) ("A policeman's affidavit [to obtain a warrant] is not to be judged in an essay contest. It is not 'abracadabra.'").

Spinelli was overturned two decades later in *Illinois v. Gates*.²⁵⁹ The Justices in *Gates* focused yet again on the narrow issue of the value of hearsay evidence and the necessary degree of police corroboration. The investigation in *Gates* began when the Bloomingdale, Illinois police received an anonymous letter stating that Lance and Sue Gates were drug dealers.²⁶⁰ The letter predicted that on May 3, Sue would drive to Florida, and Lance would join her two days later. According to the anonymous informant, Sue would then fly back to Illinois, and Lance would make the twenty-hour return drive by himself in a car loaded with drugs.²⁶¹ The police did not receive the letter until May 5 and were able to corroborate only portions of the letter. They observed Lance board a plane on May 5 to Florida and join Sue in a hotel in Miami, but they were unable to confirm that Sue had herself made the journey two days before.²⁶² On the morning of May 6, police observed the couple embark together on the northbound interstate highway in the direction of Chicago—contrary to the anonymous letter which had predicted that Lance would return in the car alone—and they obtained warrants to search the Gates’ car and home.²⁶³

Lower courts, applying *Spinelli*, found that the police had failed to establish probable cause because they had witnessed merely “innocent activity” on the Gates’ part.²⁶⁴ In reversing, the Supreme Court rejected the *Spinelli* test for evaluating hearsay information as overly rigid.²⁶⁵ Probable cause, Justice Rehnquist explained, “is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.”²⁶⁶ Drawing upon *Locke* and *Brinegar*, Rehnquist emphasized that “[f]inely tuned standards, such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in a magistrate’s decision [on probable cause].”²⁶⁷ Noting that “Florida is well known as a source of narcotics,” Rehnquist concluded that that Gates’ overnight stay in a hotel in Miami, combined with their immediate return north, amply supported a finding of probable cause.²⁶⁸

In dissent, Justice Brennan criticized the majority’s use of the words “practical,” “nontechnical,” and “common sense” as “code words for an

259. 462 U.S. 213, 238 (1983).

260. *Id.* at 225.

261. *Id.*

262. *Id.*

263. *Id.* at 226–27.

264. *Id.* at 269 (White, J., concurring) (quoting *People v. Gates*, 423 N.E.2d 887, 887 (Ill. 1981)).

265. *Id.* at 230–31.

266. *Id.* at 232.

267. *Id.* at 231, 235–36.

268. *Id.* at 243.



overly permissive attitude towards police practices.”²⁶⁹ Although Brennan suggested that the majority decision reflected a radically new interpretation of probable cause,²⁷⁰ he never acknowledged that much of Rehnquist’s language in *Gates* was drawn from *Brinegar*. Indeed, the *Gates* decision is best understood as a return to a pre-*Spinelli* vision of probable cause. Brennan was so focused on defending the *Spinelli* approach to corroborating hearsay evidence that he failed to articulate a positive theory of probable cause. Even if Rehnquist’s approach is “overly permissive . . . towards police practices,”²⁷¹ what would be an appropriate standard? After all, society presumably benefits when, at some point in an investigation collecting mounting evidence of wrongdoing, police conduct searches and make arrests. The hard question is how much, and what kind of, evidence we will require of them. In his majority opinion, Rehnquist argued that the *Gates* approach to probable cause “hold[s] the balance true,” recognizing on the one side the legitimate needs of law enforcement and on the other the privacy concerns of citizens.²⁷² Brennan would strike the balance differently, but where is unclear.

Justice Stevens’s dissenting opinion is far shorter and more persuasive than Justice Brennan’s, in part because it condescends to address the facts of the case. Stevens noted that police corroborated only two details from the anonymous letter—that Lance flew down on May 5 and that the couple started off the following morning northward, in the general direction of Illinois.²⁷³ The police did not confirm that Sue had driven down on May 3—she might, therefore, have resided in Florida for weeks or even years.²⁷⁴ And the police did not confirm that the couple drove all the way back to Illinois the next morning—when they obtained the warrant on the morning of May 6, police simply knew that the couple had started off on a northbound interstate (in the direction of Disney World and ultimately Illinois).²⁷⁵ Thus, an additional few hours of surveillance might have eliminated the innocent explanation that the Gates were bound for Disney World. A higher probable cause standard would mean a greater investment of law enforcement resources in any particular investigation, for before searching and seizing citizens, police would need to develop greater certainty that criminal activity is in fact afoot.

Unresolved in *Gates* is whether the degree of certainty needed to satisfy the probable cause standard might fluctuate from case to case. On the one

269. *Id.* at 290 (Brennan, J., dissenting).

270. *Id.* at 286–90 (Brennan, J., dissenting).

271. *Id.* at 290 (Brennan, J., dissenting).

272. *Id.* at 241.

273. *Id.* at 291 (Stevens, J., dissenting).

274. *Id.*

275. *Id.* at 291–92 (Stevens, J., dissenting).



hand, Rehnquist emphasized that probable cause involves an exercise of judgment, which “turn[s] on the assessment of probabilities *in particular factual contexts*.”²⁷⁶ On the other hand, although the majority opinion provides an engaging summary of the comings and goings of Lance and Sue Gates, the “factual context” does not include either the gravity of the crime under investigation or the nature of the search executed by the police. Nowhere in the majority opinion does the Court deem it necessary to refer, as it has in other cases, to the “severe and intractable nature of the drug problem.”²⁷⁷ Nor is it deemed relevant that the police had obtained a warrant to search not only the Gates’ car, but also their home.²⁷⁸ Would the case have been different if the warrant had authorized solely the search of a car trunk (obviously less intrusive than a house search) or the crime under investigation had been serial murder? There is not the slightest inkling that either of these facts would alter the analysis. Implicit is the assumption that probable cause is independent of both the crime under investigation and the nature of the proposed search.²⁷⁹

Although the dissenters in *Gates* lost the day, their arguments have found a receptive audience in a few state courts, which have retained the *Spinelli* test for evaluating hearsay evidence.²⁸⁰ More interestingly, if the Rowley Memorandum is at all a fair reflection of the prevailing norms in the federal system, warrant applications are now judged by a more stringent standard than what was intimated by the *Gates* decision. Although Rehnquist defined probable cause as merely a “substantial chance” of criminal activity, Rowley places probable cause at greater than fifty percent, and the U.S. Attorney’s Office in Minneapolis (in Rowley’s view) considers it a seventy-five to eighty percent likelihood of criminal activity.²⁸¹ It seems that

276. *Id.* at 232 (emphasis added).

277. *City of Indianapolis v. Edmond*, 531 U.S. 32, 42 (2000); *see also* *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985) (noting the “veritable national crisis in law enforcement caused by smuggling of illicit narcotics”); *United States v. Mendenhall*, 446 U.S. 544, 561 (1980) (Powell, J., concurring) (“Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances.”).

278. *See Gates*, 462 U.S. at 226 (mentioning, without further discussion, the fact that a warrant was issued for both the Gates’s home and their car).

279. This assumption is perhaps explicit in Justice Brennan’s dissenting opinion. He writes, “Everyone shares the Court’s concern over the horrors of drug trafficking, but under our Constitution only measures consistent with the Fourth Amendment may be employed by government to cure this evil.” *Id.* at 290 (Brennan, J., dissenting). Brennan seems to be suggesting that Fourth Amendment limits against searches do not vary with the gravity of the offense under investigation.

280. *See, e.g., Commonwealth v. Upton*, 476 N.E.2d 548, 557 (Mass. 1985) (retaining the *Spinelli* test because it “aids lay people, such as the police and certain lay magistrates, in a way that the ‘totality of the circumstances’ test never could”).

281. Rowley Memorandum, *supra* note 1, para. 7. It is worth noting that Rowley’s equation of the probable cause and preponderance of the evidence standards is fairly commonplace nowadays. Consider, for example, a warrant application in Washington, D.C., in which the Metropolitan Police



a “substantial chance” has morphed into a “preponderance of the evidence” or even a “clear and convincing evidence” standard. Perhaps the pendulum has swung back yet again toward a higher standard of probable cause.

V. The Vanishing Probable Cause Requirement

Courts often state that probable cause is the default standard by which a search is to be judged (even if, for whatever reason, a warrant is not required). Except in “limited circumstances,” the absence of probable cause is said to be the death knell of a search or seizure.²⁸² This depiction of the world of the Fourth Amendment is, however, at odds with reality. For most citizens, in the vast majority of searches to which they are subject (stop-and-frisks, airport searches, drug testing, DUI checkpoints, business inspections, etc.), the governmental search is supported not by probable cause, but on the basis of its reasonableness. The probable cause standard has retained its pristine quality, free of any tinge of a reasonableness balancing, but the necessary corollary is that it has become increasingly impractical and irrelevant in assessing the constitutionality of most searches or seizures. Indeed, an inflexible probable cause requirement has led to perplexing, and perhaps even perverse, results, foreclosing searches that seem eminently sensible and allowing searches that seem misguided. The first section below contrasts the probable cause standard with other common evidentiary standards. The following sections catalog a trio of doctrines that have eroded the reach of the probable cause standard: reasonable suspicion, “special needs,” and exigent circumstances.

A. *The Illusion of Mathematical Precision*

Perhaps it results from the influence of modern science, or perhaps it simply reflects a deep human need, but the impulse to quantify legal doctrines such as probable cause is a powerful one. Whatever the merits of such an impulse,²⁸³ the question inevitably arises in any discussion of probable cause: just *how* probable? There is the vague impression that, if law were truly a serious enterprise, the answer would be amenable to mathematical form.

Few courts have summoned the courage, or foolhardiness, to propose such a number (e.g., thirty percent probability) for probable cause. Loathe to say precisely what probable cause is, courts have instead told us what it is

Department Sergeant certified, in summing up the evidence, that “it [was] more probable than not that [the suspect] is in possession of illegal guns and ammunition.” Application and Affidavit of Sergeant Donald Gossage in Support of a Search Warrant 2 (Jan. 11, 1992) (on file with the author).

282. See *supra* notes 20–23 and accompanying text.

283. The attempt to express legal doctrines in mathematical terms is criticized in Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329 (1971).



not—that is, how probable cause compares to other evidentiary standards. For example, the Supreme Court has stated that while probable cause must be based on more than mere suspicion,²⁸⁴ it does not require “proof sufficient to establish guilt.”²⁸⁵

An image that easily, if speciously, comes to mind is a spectrum of certainty ranging from a zero likelihood of criminal activity to a total certainty. If an experienced police officer, in good faith, has a hunch that criminal activity is afoot, it seems only reasonable to assign some positive probability to that assessment, even if the number is placed as low as .01%.²⁸⁶ On the other hand, proof beyond a reasonable doubt is generally defined, insofar as it or any burden of proof can be quantified, as a percentage as high as 85% or 95%.²⁸⁷ Thus, the Court’s statement that probable cause is more than a suspicion and less than beyond a reasonable doubt places it somewhere between .01% and 90%, which, when all is said and done, is not all that helpful. Further guidance may be found in cases that define probable cause as less than the “more probable than not” or “preponderance of the evidence” standards.²⁸⁸ As these standards are widely assumed to be something around 51%,²⁸⁹ probable cause is thus a percentage nestled somewhere between .01% and 51%. This is a substantial improvement, but is still unlikely to impress a modern scientist as particularly precise.

Perhaps the most interesting marker for probable cause provided by modern courts is a comparison to the “reasonable suspicion” standard first articulated by the Supreme Court in *Terry v. Ohio*.²⁹⁰ Courts often opine that

284. *Henry v. United States*, 361 U.S. 98, 104 (1959).

285. *Draper v. United States*, 358 U.S. 307, 312 (1959) (quoting *Brinegar v. United States*, 338 U.S. 160, 173 (1949)); *see also* *United States v. Danhauer*, 229 F.3d 1002, 1005 (10th Cir. 2000) (holding that probable cause requires “more than mere suspicion but less evidence than is necessary to convict” (quoting *United States v. Burns*, 624 F.2d 95, 99 (10th Cir. 1980))).

286. *See supra* note 102 and accompanying text (discussing the phenomenon of “tacit knowledge”).

287. *See* *United States v. Fatico*, 458 F. Supp. 388, 410 (E.D.N.Y. 1978) (reporting that in a survey of ten judges in the Eastern District of New York, one said the standard of beyond a reasonable doubt was not quantifiable, and the mean percentage assigned by the remaining nine was 85%); C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 VAND. L. REV. 1293, 1332 (1982) (reporting that in a poll of 167 federal judges, the mean probability assigned to “beyond a reasonable doubt” was 90.28%); Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1311 (1977) (“[A]lmost a third of the responding judges put ‘beyond a reasonable doubt’ at 100%, another third put it at 90% or 95%, and most of the rest put it at 80% or 85%.”).

288. *See* *Samos Imex Corp. v. Nextel Communications, Inc.*, 194 F.3d 301, 303 (1st Cir. 1999) (stating that the “phrase ‘probable cause’ is used, in the narrow confines of Fourth Amendment precedent, to establish a standard less demanding than ‘more probable than not’”); *United States v. Limares*, 269 F.3d 794 (7th Cir. 2001) (“‘Probable cause’ is something less than a preponderance.”).

289. *See, e.g., Fatico*, 458 F. Supp. at 410 (noting that ten judges polled in the Eastern District of New York placed the preponderance of the evidence standard between 50–51%).

290. 392 U.S. 1, 10 (1968).



“[r]easonable suspicion is a less demanding standard than probable cause,”²⁹¹ thus allowing police to stop or frisk a suspect with less certainty of criminal activity than would be required to make an arrest. Yet there is no clear sense, and no offered guidance, as to how probable “reasonable suspicion” is, other than its being, like “probable cause,” more than a mere hunch.²⁹² Accordingly, its utility as a comparison point is undermined by its indeterminate nature.

The still more substantial difficulty with using reasonable suspicion as a marker on the spectrum of probability is that it is not a fixed point. It is, therefore, both an undefined and a moving target. Because, as shown below, reasonable suspicion has evolved into a variable standard, calibrated to the degree of both the privacy intrusion and the state interest, it is not simply a lower standard than probable cause, but a different kind of standard.²⁹³ Facile comparisons of the two evidentiary standards therefore bring to mind the proverbial apples and oranges. Although the disparagement of a reasonableness balancing in the context of the Fourth Amendment is a recurring theme in judicial opinions²⁹⁴ and scholarship,²⁹⁵ the effort to preserve the concept of probable cause in some mathematically fixed form has succeeded only in limiting it, and not the reasonableness approach, to narrowly defined circumstances.

B. *The Birth of Reasonable Suspicion*

The contrast of probable cause and reasonable suspicion is by now an established part of our Fourth Amendment jurisprudence. As was noted

291. *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000); *Alabama v. White*, 496 U.S. 325, 330 (1990); *see also* *United States v. Arvizu*, 534 U.S. 266, 274 (2002) (“Although an officer’s reliance on a mere ‘hunch’ is insufficient to justify a stop, the likelihood of criminal activity need not rise to the level required for probable cause, . . . and it falls considerably short of satisfying a preponderance of the evidence standard.”).

292. *See, e.g.*, *Florida v. J.L.*, 529 U.S. 266 (2000) (finding that an anonymous tip alone was insufficient to constitute reasonable suspicion).

293. *See infra* subpart V(B). Recent events in the Washington, D.C. area demonstrated how low a probability can justify a *Terry* stop when police are investigating a particularly serious crime. The area was paralyzed for several weeks by a series of “sniper” attacks on random individuals, principally at gas stations. A few witnesses reported a white van near a few of the shootings. After one murder, police stopped traffic on a major interstate and, with guns drawn, searched “hundreds of white vans.” Carol Morello & Josh White, *8th Killing Intensifies Search For Sniper, Pa. Father of 6 Slain at Spotsylvania Pump*, WASH. POST, Oct. 13, 2002, at A1. Obviously, the likelihood that any one van harbored the sniper was infinitesimal, but the compelling social interest was deemed to justify the broad search.

294. *See, e.g.*, *Dunaway v. New York*, 442 U.S. 200, 213–14 (1979) (rejecting a “multifactor balancing test” because a “single familiar standard is essential to guide police”).

295. *See, e.g.*, Amsterdam, *supra* note 139, at 393–94. Professor Amsterdam lamented an alleged judicial tendency to convert the Fourth Amendment into a “monstrous abyss.” *Id.* at 415. He described Fourth Amendment law as “splendid in its flexibility, awful in its unintelligibility, unadministrability, unenforceability and general oozyiness,” *id.*, and in sum, “an immense Rorschach blot.” *Id.* at 393.

earlier, however, at common law and for much of American history, the two phrases would likely have had, even to the discerning legal ear, roughly the same connotations.²⁹⁶ This would all begin to change with *Terry v. Ohio*.²⁹⁷

Such a development was hardly inevitable. Just a year before the *Terry* decision, the Supreme Court, in *Camara v. Municipal Court*,²⁹⁸ intimated that probable cause could be construed as a variable standard, lesser or greater depending upon the degree of the privacy intrusion imposed by a search or seizure.²⁹⁹ The Court there considered a challenge to a San Francisco housing code provision that authorized warrantless safety inspections.³⁰⁰ In such circumstances, the Court held that probable cause “involve[s] a balancing [of] the need to search against the invasion which the search entails.”³⁰¹ On the facts presented, the Court found that probable cause existed because safety inspections “involve a relatively limited invasion of the urban citizen’s privacy.”³⁰²

Camara is one of the doctrinal dead ends in American constitutional criminal procedure.³⁰³ The suggestion that probable cause might vary with the degree of the intrusion was implicitly rejected the following year in *Terry*. The Court there considered a stop-and-frisk situation in which a plainclothes detective frisked a man whom the officer reasonably believed was casing a store with two other men.³⁰⁴ When construing statutes with “reasonableness” requirements in the past, the Court had readily interpreted their meaning as roughly equivalent to “probable cause” as the phrase is used in the Fourth Amendment.³⁰⁵ And following *Camara*, the Court might have

296. See *supra* notes 177, 185, 202–04, 219, and accompanying text.

297. 392 U.S. 1 (1968).

298. 387 U.S. 523 (1967).

299. *Id.* at 538–39.

300. *Id.* at 525.

301. *Id.* at 527.

302. *Id.* The Court nonetheless invalidated the provision because it permitted city officials to conduct inspections without a warrant. *Id.* at 534.

303. Another noteworthy example is *Escobedo v. Illinois*, 378 U.S. 478 (1964), which extended the Sixth Amendment right to counsel to pre-arrest custodial interrogations. After *Miranda v. Arizona*, 384 U.S. 436 (1966), was decided, *Escobedo* slipped away into irrelevance. See *Moran v. Burbine*, 475 U.S. 412, 416 (1986) (pointing out that after *Miranda*, “subsequent decisions foreclose any reliance on *Escobedo*”).

304. *Terry v. Ohio*, 392 U.S. 1, 5–7 (1968). In a companion case to *Terry*, *Sibron v. New York*, 392 U.S. 40 (1968), the Court interpreted a New York statute authorizing a police officer to briefly detain and question a suspect the officer “reasonably suspects is committing, has committed, or is about to commit a felony.” *Id.* at 43 (quoting New York’s stop-and-frisk statute, N.Y. CODE CRIM. PROC. § 180-a (1967)). For a brief history of the New York stop-and-frisk statute, see Wayne R. LaFave, “Street Encounters” and the Constitution: *Sibron*, *Peters*, and *Beyond*, 67 MICH. L. REV. 39, 44 n.18 (1968). The medieval precursors to stop-and-frisk statutes permitted town guards to detain a suspect overnight where they had a “suspicion,” but required the suspect to be presented to a magistrate the next morning to determine whether the suspicion was justified. Grano, *supra* note 143, at 479–80.

305. See *supra* notes 177, 185, 202–04, 219, and accompanying text.



said, with respect to the stop-and-frisk statutes, that a police officer, having observed two or three men nervously pace up and down a street a dozen times, apparently “casing” a store, does have probable cause—if not to make an arrest, at least to question briefly and protectively frisk the individuals.³⁰⁶ Instead, the Court held that not probable cause, but “specific and articulable facts” supporting an inference of criminal activity, were required to justify the “invasion of . . . personal security” effected by a pat-down search.³⁰⁷ The degree of suspicion was less than probable cause, but so too, Chief Justice Warren emphasized, was the invasion of privacy that would have resulted from an arrest or full custodial search.³⁰⁸

Defenders of *Terry* have suggested that the creation of a reasonable-and-articulable-suspicion standard preserved probable cause in all its pristine glory. Had courts applied probable cause to street stops, the standard would possibly have been “water[ed] down.”³⁰⁹ Yet the balancing approach sanctioned by the *Terry* Court, weighing the degree of an intrusion against the state’s interest, would quickly prove imperialistic, colonizing vast reaches of police activity. Within a decade, courts would approve searches or seizures conducted with a lesser predicate than was present in *Terry* but where the degree of the intrusion was also less than a pat-down frisk.³¹⁰

As the influence of *Terry* and the reasonableness balancing of interests has spread throughout Fourth Amendment jurisprudence, the Court has proven determined to protect probable cause from any taint of balancing. A notable illustration is *Dunaway v. New York*,³¹¹ where the Court rejected the argument that police could, when they had reasonable suspicion, detain and question a suspect for several hours in a police station.³¹² Rejecting “a multifactor balancing test” of reasonable police conduct under the circumstances,³¹³ the Court held that “[a] single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific

306. A point made in *LaFave*, *supra* note 304, at 54–56.

307. *Terry*, 392 U.S. at 21. Chief Justice Warren elaborately cataloged the objective facts cited by Officer McFadden to justify his perception that the men he frisked were planning to commit armed robbery. *Id.* at 22–23.

308. *See id.* at 30 (“[Officer McFadden] never did invade [the suspect’s] person beyond the outer surfaces of his clothes [He] confined his search strictly to what was minimally necessary to learn whether the men were armed”).

309. Daniel Richman, *The Process of Terry-Lawmaking*, 72 ST. JOHN’S L. REV. 1042, 1047 (1998).

310. *See, e.g.*, *Pennsylvania v. Mimms*, 434 U.S. 106, 109–10 (1977) (conducting a *Terry* balancing and upholding a police officer’s right to order drivers out of their cars in the course of a legal stop); *United States v. Brignoni-Ponce*, 422 U.S. 873, 880 (1975) (“Because of the limited nature of the intrusion, stops [made by roving border patrols for illegal aliens] may be justified on facts that do not amount to the probable cause required for an arrest.”).

311. 442 U.S. 200 (1979).

312. *Id.* at 207.

313. *Id.* at 213 (referring to *People v. Morales*, 366 N.E.2d 248 (1977)).

circumstances they confront.”³¹⁴ Departures from such a standard should be adopted, the Court added, reluctantly and only in “narrowly defined” circumstances.³¹⁵

Such grandiose language was likely unnecessary to decide the case. The seizure effected by the police in *Dunaway* was far more invasive than a brief street stop and may have been tantamount to a full-fledged arrest.³¹⁶ Accordingly, it would have been appropriate to apply a rigorous evidentiary standard in assessing the constitutionality of the suspect’s seizure. Yet the *Dunaway* Court’s inflexible view of probable cause would find remarkable expression a decade later in *Arizona v. Hicks*,³¹⁷ where the Court suggested that the probable cause needed to nudge a piece of furniture was identical to that needed to make an arrest or enter a home.³¹⁸ In *Hicks*, police entered a squalid apartment after a gunshot had been fired and observed a pair of expensive stereos.³¹⁹ Suspecting that the stereos were stolen, a police officer moved the turntable in order to see the serial numbers, and subsequent investigation *revealed* that the stereos were indeed stolen.³²⁰ There was no question that the police were lawfully present in Hicks’s apartment (the exigency of the gunshot justified the warrantless entry); the issue concerned the manipulation of the stereo equipment. In a six-three decision, Justice Scalia suggested that, for purposes of determining probable cause, the relative degree of intrusion was of no moment whatsoever.³²¹ Police had seized and searched Hicks’s property, albeit briefly, to ascertain the serial numbers, and they had done so without probable cause.³²² A dissenting Justice O’Connor countered that reasonable suspicion should have sufficed to justify the brief search of the turntable, given the de minimis privacy intrusion.³²³

Applying *Hicks*, lower courts have repeatedly dismissed arguments that probable cause might entail a *lower* evidentiary predicate when the privacy intrusion resulting from a search or seizure is minimal.³²⁴ *United States v.*

314. *Id.* at 213–14.

315. *Id.* at 210.

316. See Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 245 (1984) (“[T]he detention in *Dunaway* was so little different from a ‘technical arrest’ that the state’s argument that it should be judged by an entirely different standard seemed strained.”).

317. 480 U.S. 321 (1987).

318. *Id.* at 324–26.

319. *Id.* at 323.

320. *Id.*

321. *Id.* at 326.

322. *Id.*

323. *Id.* at 333 (O’Connor, J., dissenting).

324. For example, in *United States v. Paulino*, 850 F.2d 93 (2d Cir. 1988), a police officer questioned passengers in a double-parked car at night in a high-crime area. *Id.* at 94. When a passenger in the back seat seemed to reach under a mat, the officer ordered all of the men out of the



*Winsor*³²⁵ is a wonderful illustration. The factual scenario of *Winsor* is of the sort that, had it not actually occurred, a law professor somewhere would have had to dream it up. Police officers followed a fleeing bank robber into a residential hotel, which had approximately twenty rooms on each of its two stories.³²⁶ The officers knocked on each door and commanded, “Police. Open the door.”³²⁷ After checking all the rooms on the first floor and a few on the second, the police came to Winsor’s room. When he opened the door, the officers recognized him and made an arrest.³²⁸

All parties conceded that exigent circumstances existed to search the hotel. Yet the Ninth Circuit held, and all parties seemed to agree, that “hot pursuit may excuse police from the Fourth Amendment’s warrant requirement, but never does it excuse the absence of the requisite degree of suspicion before effecting a search.”³²⁹ It was also common ground that, in the words of the majority, “at the time the police knocked on Winsor’s door, they had reasonable suspicion to believe that the suspected bank robber was inside, but did not have probable cause to believe so.”³³⁰ So the central issue was the level of suspicion needed to justify the search—that is, the non-consensual visual inspection of the room from the doorway. The majority concluded that the Supreme Court’s decision in *Hicks* established “a rule that the police violate the Fourth Amendment whenever they effect a search of a dwelling without probable cause.”³³¹

The government and the dissenting justices accepted the majority’s framing of the issue: everything turned on the evidentiary standard that would be applied.³³² If probable cause was required, then the search was illegal; if reasonable suspicion was applied, the search was valid.³³³ Neither the government nor the dissenters suggested that probable cause was present, albeit not to conduct a full-fledged search, but simply to conduct a visual inspection of each room from the doorway. In arguing that reasonable

car. He lifted up the mat and saw a roll of \$50 bills, which he picked up and quickly realized were counterfeit bills. *Id.* It was clear that the officer acted properly in lifting up the mat. *See Michigan v. Long*, 463 U.S. 1032, 1035 (1983) (authorizing searches of the passenger compartments of cars when an officer has reasonable suspicion that a weapon is hidden there). The *Paulino* case turned on the officer’s decision to pick up, and briefly study, the counterfeit bills. The Second Circuit held that, “[a]s *Hicks* makes clear, probable cause is required to move an object for purposes of a search—no matter how seemingly minor is the invasion of an individual’s possessory interest—beyond the justified bounds of the lawful search.” *Paulino*, 850 F.2d at 98 (emphasis added).

325. 846 F.2d 1569 (9th Cir. 1988) (en banc).

326. *Id.* at 1571.

327. *Id.*

328. *Id.*

329. *Id.* (quoting the previous panel’s decision in *United States v. Winsor*, 816 F.2d 1394, 1396 (9th Cir. 1987)).

330. *Id.* at 1572.

331. *Id.* at 1574.

332. *Id.* at 1573.

333. *Id.* at 1572.



suspicion justified the police actions, a dissenting judge emphasized the unreasonableness of applying probable cause (understood as some high and fixed standard) to the facts of the case.³³⁴ He noted that “the police could have waited indefinitely, as the majority would have them do, until probable cause arose. *This would have required the police to wait until they could pinpoint the room in which the suspect could be hiding.*”³³⁵ The majority would have agreed that probable cause meant “pinpoint[ing]” the room before any action was taken. But how much pinpointing was required? It is worth recalling that by the time the police knocked on Winsor’s hotel room, they had essentially eliminated all of the rooms on the first floor and a few (let us say five) rooms on the second floor. So in knocking on Winsor’s door and effectively searching his room from the doorway, police had a one in fifteen, or seven percent, chance of finding him. Although the majority conceded that a seven percent chance constituted reasonable suspicion, it gave no indication of what percentage would have qualified as probable cause. Would the result have been different had the police eliminated all but five or two of the rooms before arriving at Winsor’s door?³³⁶

In any event, as the dissent noted, “[t]he suspect knew that he was trapped . . . and he posed a grave danger to the occupants of the hotel and to the policemen pursuing him.”³³⁷ The majority offered no response to the dissent’s practical challenge—what would you have the police do in such a circumstance?—other than miscellaneous bromides about the price we pay for having a Fourth Amendment.³³⁸ *Winsor* illustrates the unreasonableness of requiring probable cause (understood as a fixed percentage, to some degree greater than seven percent) independent of the intrusiveness of the search and the intensity of the public interest in authorizing the search. It further highlights the importance of the divergent labels “probable cause” and “reasonable suspicion” in modern Fourth Amendment jurisprudence. If the latter label applies, then courts freely engage in a multifactor balancing test, weighing the privacy intrusion and the state’s interest, among other factors. If the former label applies, then police must have “pinpoint[ed]” suspicion corresponding to some fixed, but undefined, percentage higher than seven percent.

The importance of these labels was illustrated again in *United States v. Knights*,³³⁹ where the Supreme Court considered whether the warrantless search of a probationer’s home should be evaluated under a probable cause

334. *Id.* at 1581 (Farris, J., dissenting).

335. *Id.* (emphasis added).

336. For a discussion of *Winsor*, see STEPHEN A. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE* 221–22 (6th ed. 2000).

337. *Winsor*, 846 F.2d at 1581 (Farris, J., dissenting).

338. *Id.* at 1579.

339. 534 U.S. 112 (2001).

or reasonable suspicion standard.³⁴⁰ It was stipulated in the case that the police had reasonable suspicion, but not probable cause, that the defendant had committed a crime.³⁴¹ In explaining why probable cause was not required to search the probationer's home, Chief Justice Rehnquist offered the following thought: "Although the Fourth Amendment ordinarily requires the degree of probability embodied in the term 'probable cause,' a lesser degree satisfies the Constitution when the balance of governmental and private interests makes such a standard reasonable."³⁴² Rehnquist thus contrasts the higher (and inexorably fixed?) probable cause standard with reasonable suspicion, which involves a "balance of governmental and private interests." When is reasonable suspicion, and not probable cause, the appropriate standard? According to Rehnquist, the reasonable suspicion analysis is applied when it is "reasonable."

Among other difficulties, Rehnquist's sentence in *Knights* is hopelessly at odds with itself. On the one hand, he suggests that "ordinarily" the test of a search or seizure is probable cause; on the other hand, he concedes that the reasonable suspicion test applies whenever the application of "such a standard [is] reasonable."³⁴³ But if "reasonable suspicion" is the "reasonable" standard much of the time, it makes little sense to glorify probable cause as the ordinary standard. Indeed, in many instances, it would be unreasonable to apply the probable cause standard, as it has come to be understood, to police conduct.³⁴⁴ And the fact is that, with the exception of house searches and full custodial arrests, most Fourth Amendment events are evaluated not based on probable cause, but for their reasonableness.³⁴⁵ A major engine in this development has been the special needs doctrine, to which we now turn.

C. "Special Needs"

The Fourth Amendment does not, on its face, draw a distinction between searches and seizures intended to enforce the criminal law and those performed as part of a regulatory scheme. Yet the Court now regularly draws such a distinction. When the government's claimed need in conducting a search or seizure is somehow "special," distinct from a need to enforce the criminal law, a far lesser evidentiary showing is required. DUI

340. *Id.* at 120–21.

341. *Id.* at 116, 122.

342. *Id.* at 121.

343. *Id.*

344. See *infra* text accompanying notes 346–55.

345. See *infra* subparts V(C–D) (discussing the courts' use of a reasonableness test when the government has a "special need" to conduct a search or seizure and when there are "exigent circumstances").

checkpoints³⁴⁶ and airport magnetometer searches³⁴⁷ are perhaps the classic examples of such special needs searches, but the situations governed by this regime have multiplied to include drug testing (among schoolchildren³⁴⁸ and government employees³⁴⁹), regulatory inspections of businesses,³⁵⁰ safety inspections of homes,³⁵¹ searches of government offices,³⁵² searches of prisons,³⁵³ inventory searches,³⁵⁴ and border patrols.³⁵⁵

The rationales offered in support of the special needs doctrine do not fare well on close analysis, as the Supreme Court's latest effort illustrates. In *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*,³⁵⁶ the Court upheld mandatory drug testing of all schoolchildren participating in extracurricular activities.³⁵⁷ Explaining why such a search did not violate the Fourth Amendment, Justice Thomas wrote:

In certain limited circumstances, the Government's need to discover such latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion. Therefore, in the context of safety and administrative regulations, a search unsupported by probable cause may be reasonable when special needs, beyond the normal need for law

346. See *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (concluding that "the balance of the State's interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of the state program").

347. See *United States v. Edwards*, 498 F.2d 496, 500 (2d Cir. 1974) (stating that "the danger [of airplane hijacking] alone meets the test of reasonableness").

348. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661–63 (1995) (discussing the importance of the school's interest in preventing drug usage by school children and comparing this interest to other "special" interests).

349. See *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 666 (1989) (stating that a government agency's interest in enacting a drug-testing program for its employees qualifies as a "special need").

350. See *New York v. Burger*, 482 U.S. 691, 702 (1987) (concluding that the government's interest in regulatory inspections of businesses in a "closely regulated industry" is a "special need").

351. See *Frank v. Maryland*, 359 U.S. 360, 372–73 (1959) (holding that safety inspections of homes without a warrant are constitutional because of the important government interest involved).

352. See *O'Connor v. Ortega*, 480 U.S. 709, 725 (1987) (holding that the "special needs" of the government to search its employees' offices requires a reasonableness standard rather than probable cause).

353. See *Bell v. Wolfish*, 441 U.S. 520, 559–60 (1979) (holding that "visual body-cavity inspections [of inmates can] be conducted on less than probable cause").

354. See *South Dakota v. Opperman*, 428 U.S. 364 (1976) (holding that an inventory search following "standard police procedures . . . was not 'unreasonable' under the Fourth Amendment").

355. See *United States v. Ramsey*, 431 U.S. 606, 619 (1977) (reaffirming that border searches are "reasonable" and do not have to meet the Fourth Amendment's probable cause standard).

356. 122 S. Ct. 2559 (2002).

357. *Id.* at 2562.



enforcement, make the warrant and probable-cause requirement impracticable.³⁵⁸

Unlike Rehnquist's cryptic statement in *Knights* that "reasonable suspicion" is the appropriate standard when it is "reasonable,"³⁵⁹ the Court here attempts to provide some guideposts to establish when a reasonableness balancing of governmental and private interests, and not a probable cause analysis, is appropriate.

First is the suggestion that in certain situations there may be "latent or hidden conditions" that make it difficult to formulate any individualized suspicion, let alone probable cause. The "hidden conditions" rationale has been employed to remove searches from the probable cause analysis in the context of safety inspections³⁶⁰ and drug testing.³⁶¹ But it is unclear why the hidden conditions present in such cases are any different from the hidden conditions posed in the garden-variety criminal investigation. For good and obvious reasons, criminals tend to ply their trade in secret, which is precisely why considerable resources must often be expended to develop probable cause. Indeed, one may wonder whether the conditions the Court deems so hidden are less concealed than in many criminal enterprises. Evidence of safety code violations may be difficult to obtain without entering the home, but it is hardly impossible. Indeed, in the very case that established the "administrative search" doctrine, inspectors reported that the alley behind the house in question was infested with rats.³⁶² Furthermore, as a dissenting Justice O'Connor has noted, it is often easier to determine which children are using drugs in the highly supervised school setting than it might be in other contexts.³⁶³ To be sure, drug use and safety code violations may be hidden, but so too, all too often, is most crime; indeed, the more serious the crime, the greater the expected precaution costs incurred to conceal any evidence.

358. *Id.* at 2564 (internal quotations and citations omitted).

359. *United States v. Knights*, 534 U.S. 112, 121 (2001).

360. *See Lesser v. Espy*, 34 F.3d 1301, 1308 (7th Cir. 1994) (upholding a warrantless regulatory search because safety code violations are "quickly concealed").

361. *See Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668 (1989) (holding that "the Government's need to discover such latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify the intrusion on privacy by conducting such searches without any measure of individualized suspicion").

362. *See Frank v. Maryland*, 359 U.S. 360, 361 (1959) (noting that the inspector found evidence of decay and lack of sanitation, which were safety code violations, on the outside of the house).

363. *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 679 (1995) (O'Connor, J., dissenting). O'Connor claimed that

[t]he great irony of this case is that most (though not all) of the evidence the District introduced to justify its suspicionless drug testing program consisted of first- or second-hand stories of particular, identifiable students acting in ways that plainly gave rise to reasonable suspicion of in-school drug use—and thus that would have justified a drug-related search

Id.



The hidden conditions rationale thus inadequately explains why certain searches are not judged by the probable cause standard.

A second suggestion in the passage quoted from *Earls* is that certain searches are motivated by “special needs, beyond the normal need for law enforcement.”³⁶⁴ The thought seems to be that when the governmental interest is particularly robust or special, above and beyond the interest in the enforcement of the criminal law, the probable cause standard is so high as to be inappropriate. The problem is that when the special need is fleshed out, it almost always consists simply of health and safety. The special need said to justify DUI checkpoints is that of safety;³⁶⁵ the special need said to justify drug testing of schoolchildren is health.³⁶⁶ Yet surely an interest in health and safety is also implicit in the criminal law; after all, society has an interest in being protected from both drunk drivers and murderers. Indeed, the special needs doctrine is perplexing in that it seems to reverse the ordinary understanding of priorities. Isn’t the interest in the enforcement of the criminal code greater than the interest in the enforcement in the panoply of noncriminal regulations that are said to be outside the requirements of probable cause? It is worth noting that during the federal budget crisis of 1995–1996, the Department of Justice continued criminal prosecutions but placed all civil cases on indefinite hold.³⁶⁷

The methodical application of the special needs doctrine can generate bizarre results. Consider the case of *Lesser v. Espy*,³⁶⁸ especially against the backdrop of the Moussaoui episode and the conclusion in that investigation that the FBI lacked probable cause to search the suspected terrorist’s laptop computer.³⁶⁹ Craig Lesser started in the business of raising rabbits when he was a teenager and did so for twenty years with a virtually unblemished record for safety.³⁷⁰ When a new Department of Agriculture inspector was assigned to Lesser’s region in 1989, she began painstakingly citing him for the most trivial of infractions.³⁷¹ One day the inspector showed up and demanded entrance into the facilities, as was authorized by the Animal

364. Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. *Earls*, 122 S. Ct. 2559, 2564 (2002).

365. See *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 451 (1990) (“Drunk drivers cause an annual death toll of over 25,000 and in the same time span cause nearly one million personal injuries and more than five billion dollars in property damage.” (citing 4 WAYNE R. LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.8(d), at 71 (2d ed. 1987))).

366. See *Acton*, 515 U.S. at 661 (“School years are the time when the physical, psychological, and addictive effects of drugs are most severe.”).

367. Howard Gleckman, *What Bill Didn’t Tell You*, BUS. WK., Feb. 5, 1996, at 44.

368. 34 F.3d 1301 (7th Cir. 1994).

369. See *supra* Part II.

370. *Lesser*, 34 F.3d at 1303.

371. Among other reasons for citing *Lesser*, the inspector noted that “one bag of rabbit food was left open [and] the lighting was too dim for the rabbits’ comfort.” *Id.* at 1304.



Welfare Act.³⁷² Lesser granted the request, but on certain conditions, because of a professed fear that the inspector might contaminate his rabbits.³⁷³ The inspector stormed off, and Lesser was fined and his license to raise rabbits was revoked.³⁷⁴ In explaining why the Fourth Amendment did not foreclose the official from demanding unfettered access, the Seventh Circuit trotted out the powerful governmental interest at stake: “[T]he use of rabbits and other animals for research is instrumental in advancing knowledge of cures and treatments for diseases and injuries that afflict both humans and animals across the nation.”³⁷⁵ One can enthusiastically embrace the Seventh Circuit’s assessment of the nation’s keen interest in healthy rabbits. But was the interest in inspecting Lesser’s rabbit facilities really greater than the interest in a search of Moussaoui’s laptop computer?

But perhaps the special needs doctrine is something of a misnomer. Indeed, the Supreme Court at times has suggested that the principal justification for the doctrine is not that the supplied need is beyond or above the enforcement of the criminal law; rather, it is that the search is minimally intrusive—less intrusive, in fact, than the sorts of searches conducted in the criminal context.³⁷⁶ The logic would seem to be that when the state only minimally intrudes upon an individual’s privacy, the constitutionality of a search or seizure will be judged not by the probable cause standard, but by a reasonableness balancing (minimal privacy intrusion versus robust societal interest).

The difficulty with this argument is that special needs searches are often quite intrusive; indeed, they are often more intrusive than those analyzed under the probable cause rubric. Consider the manipulation of Hicks’s turntable,³⁷⁷ the inspection of Lesser’s farm,³⁷⁸ and drug testing of government employees.³⁷⁹ Although the first search seems to be the least intrusive

372. *Id.* The Animal Welfare Act is found at 7 U.S.C. §§ 2131–2159.

373. *Lesser*, 34 F.3d at 1304. Lesser’s concern may have been a reasonable one. When I recently visited a facility for raising pigs in Iowa, the owner required me to shower *before* I entered.

374. *Id.*

375. *Id.* at 1307.

376. See *Dunaway v. New York*, 442 U.S. 200, 212 (1979) (stating that a balancing test, rather than a Fourth Amendment probable cause standard, will be applied only when intrusions fall “far short of the kind of intrusion associated with an arrest”); *Camara v. Mun. Court*, 387 U.S. 523, 537 (1967) (finding that “inspections [that] are neither personal in nature nor aimed at the discovery of evidence of crime . . . involve a relatively limited invasion of the urban citizen’s privacy” and thus suggest that code-enforcement inspections are reasonable); Wayne R. LaFare, *Administrative Searches and the Fourth Amendment*, 1967 SUP. CT. REV. 1, 20 (noting that one of the proffered justifications for “special needs” searches is the “relatively minor invasion of personal privacy and dignity”).

377. *Arizona v. Hicks*, 480 U.S. 321, 323 (1987).

378. *Lesser*, 34 F.3d at 1303–04.

379. See *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 679 (1989) (upholding suspicionless drug testing of certain Customs Services agents).



of the three,³⁸⁰ it was the only one evaluated by the stringent probable cause standard. The explanation offered by the *Hicks* Court was that the search in that case occurred within a home; and the home, Justice Scalia argued, is different for Fourth Amendment purposes, for “[a] dwelling-place search [always] requires probable cause.”³⁸¹ More recently, in *Kyllo v. United States*,³⁸² Justice Scalia emphasized that “[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his home and there be free from unreasonable governmental intrusion.”³⁸³

Kyllo, which involved the use of a device that crudely measured heat dispelled from a home,³⁸⁴ exemplifies the menagerie of doctrinal boxes the Court has made for itself in the realm of the Fourth Amendment. The majority and dissent framed the issue in the case as whether the use of the thermal imaging device constituted a “search,” with Justice Scalia answering in the affirmative and Justice Stevens, in dissent, disagreeing. Stevens’s dissent is the most recent in a long line of judicial opinions that have strained credulity to define actions by the police plainly intended to gather evidence as somehow not searches and therefore outside Fourth Amendment scrutiny.³⁸⁵ A more common sense view would be that when the police directed the device at *Kyllo*’s home and gathered evidence about his domestic heat usage, they conducted a search of the interior of the home. With respect to the threshold question posed by the Court, Scalia has the better argument.

And yet how intrusive was the search? Although Scalia exercises his imagination by positing scenarios raising privacy concerns,³⁸⁶ the thermal imaging device used by the police would generally be unable to detect how many people were at home, let alone what they were doing. In the end, however, none of this matters to Scalia’s analysis, for he writes that “[t]he Fourth Amendment’s protection of the home has never been tied to measurement of the quality or quantity of information obtained,” and

380. Indeed, Justice Scalia essentially conceded that the search of the turntable was “minimally intrusive.” See *Hicks*, 480 U.S. at 325 (“Merely inspecting those parts of the turntable that came into view during the latter search would not have constituted an independent search, because it would have produced no additional invasion of [the] respondent’s privacy interest.”).

381. *Id.* at 328.

382. 533 U.S. 27 (2001).

383. *Id.* at 31 (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

384. *Id.* at 28–30.

385. See *id.* at 41–43 (Stevens, J., dissenting) (arguing that the thermal imaging device more closely resembles a search of property in plain view); see also *Florida v. Riley*, 488 U.S. 445, 451–52 (1989) (finding that aerial surveillance from a helicopter hovering at an altitude of 400 feet was not a search under the Fourth Amendment); *California v. Greenwood*, 486 U.S. 35, 37 (1988) (finding that a search of trash was not a search); *United States v. Dunn*, 480 U.S. 294, 303–04 (1987) (finding that a search of open fields was not a search); *United States v. Place*, 462 U.S. 696, 707 (1983) (finding that a dog-sniff is not a search).

386. See *Kyllo*, 533 U.S. at 38 (“The Agema Thermovision 210 might disclose, for example, at what hour each night the lady of the house takes her daily sauna or bath—a detail that many would consider intimate . . .”).



therefore “[i]n the home . . . all details are intimate details.”³⁸⁷ Whether police physically search a bedroom, nudge a turntable, or use a thermal detection device, it is all the same. Because they are all “dwelling-place search[es],”³⁸⁸ police can perform them only after obtaining a warrant. And the evidentiary predicate needed to obtain a warrant is the unvarying probable cause standard.³⁸⁹

The practical upshot of *Kyllo* is that thermal detection devices will seldom be used, at least for homes. Police need probable cause to search a home, however the search is framed and regardless of how unobtrusive it is. If police have probable cause to search a home, however, why will they bother using a thermal detection device? They will simply obtain a warrant to physically enter the premises. After all, there is no benefit (in terms of obtaining a warrant) in using the most minimally intrusive means to conduct the search. It is thus hardly clear that *Kyllo* will be, in practice, a triumph for civil liberties.³⁹⁰

The ultimate irony of the special needs doctrine is that its name belies its breadth. “Special” suggests out-of-the-ordinary: in the uncommon case, the argument seems to run, the state is liberated from the unyielding requirements of probable cause and permitted to engage in searches on the basis of their reasonableness (weighing the intrusiveness of the search and the gravity of the investigated offense). As Justice Scalia stated in *Vernonia School District 47J v. Acton*,³⁹¹ upholding drug testing of schoolchildren, “A search unsupported by probable cause can be constitutional . . . when special needs, beyond the normal need for law enforcement, make the warrant *and probable-cause requirement* impracticable.”³⁹² And yet, a moment’s reflection suggests that the *special* needs required to trigger this emancipation are so varied and numerous that they are hardly special or uncommon. When the so-called special needs doctrine is considered in tandem with *Terry* and its myriad applications, it no longer seems sensible to suggest that probable cause, and not reasonableness, is the default Fourth Amendment standard.

387. *Id.* at 37.

388. *Arizona v. Hicks*, 480 U.S. 321, 328 (1987).

389. *See Griffin v. Wisconsin*, 483 U.S. 868, 877–78 (1987) (rejecting the argument that constitutionally mandated judicial warrants can issue on reasonable suspicion rather than probable cause).

390. It is interesting to note that in *Kyllo*’s case the police had substantial grounds for suspecting him of criminal activity. Other drug dealers had apparently given police information raising suspicions about *Kyllo*, his electrical usage was high relative to his neighbors (consistent with the use of heat bulbs to grow marijuana), *Kyllo*, 533 U.S. at 29–30, and his wife had recently been arrested for dealing in drugs. *United States v. Kyllo*, 190 F.3d 1041, 1043 (9th Cir. 1999). After the *Kyllo* decision, police in such a circumstance will simply try to convince the prosecutor and the magistrate that probable cause exists on the basis of the evidence they have already gathered. Accordingly, they will not even bother to use a thermal detection device to confirm or dispel their suspicions before effecting a physical entry.

391. 515 U.S. 646 (1995).

392. *Id.* at 653 (emphasis added).



As if in acknowledgment of this reality, the Court has at times upheld the primacy of a reasonableness analysis. In *Acton*, for example, the Court stated that “[a]s the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is ‘reasonableness.’”³⁹³ This glimpse of reality is soon lost, however. Within a few sentences, Justice Scalia is parroting the standard line that “[a] search unsupported by probable cause can be constitutional . . . when *special* needs” are present.³⁹⁴ Likewise, Justice Rehnquist has written in *Knights* that “the Fourth Amendment ordinarily requires the degree of probability embodied in the term ‘probable cause.’”³⁹⁵

Such conflicting pronouncements point to a confusion at the core of the Supreme Court’s Fourth Amendment jurisprudence. There is, on the one hand, the lingering and comforting notion that probable cause is the predominant and ordinary standard in answering Fourth Amendment questions. Yet case after case exposes the inapplicability of probable cause, cast as a high and inflexible standard, to particular contexts. Thus, the Court has qualified the fairy tale account of the Fourth Amendment, emphasizing that reasonableness, and not probable cause, is in fact the ultimate measure. Cases such as *Hicks* and *Kyllo* nonetheless demonstrate that with respect to a fundamental category of searches—dwelling-place searches—probable cause is alive and well. And yet the next section, which takes up the doctrine of exigent circumstances, puts even this principle to the test.

D. Exigent Circumstances

In exigent circumstances, special Fourth Amendment rules apply. Where there is an “urgent need,” police are excused from obtaining a warrant before taking action.³⁹⁶ In measuring the intensity of the claimed justification for a warrantless search, courts have considered the gravity of the suspected offense, the possibility that the suspect is armed, and the likelihood that the suspect will escape or evidence will be destroyed.³⁹⁷ The

393. *Id.* at 652.

394. *Id.* at 653 (emphasis added).

395. *United States v. Knights*, 534 U.S. 112, 121 (2001).

396. *See Dorman v. United States*, 435 F.2d 385, 391 (D.C. Cir. 1970) (en banc) (holding that “a principle of urgent need . . . operates to justify warrantless entries with requisite need determined by an officer and not by a court”). For a compendium of exigent circumstances cases, see John F. Decker, *Emergency Circumstances: Police Responses, and Fourth Amendment Restrictions*, 89 J. CRIM. L. & CRIMINOLOGY 433 (1999).

397. *Dorman*, 435 F.2d at 392–93. *Dorman* set forth the factors to be considered in evaluating a warrantless entry as follows:

- (1) the gravity or violent nature of the offense with which the suspect is to be charged;
- (2) whether the suspect “is reasonably believed to be armed”;
- (3) “a clear showing of probable cause . . . to believe that the suspect committed the crime”;
- (4) “strong reason to believe that the suspect is in the premises being entered”;
- (5) “a likelihood that the suspect will escape if not swiftly apprehended”;
- and (6) the peaceful circumstances of the entry.



Supreme Court has generally resisted efforts to expand the exigent circumstances doctrine. In *Mincey v. Arizona*,³⁹⁸ the Court rejected a proposed “categorical exception to the warrant requirement” when a murder has occurred in a home. Instead, the Court emphasized that claims of exigency be evaluated on a case-by-case basis and sustained only when police “reasonably believe that a person . . . is in need of immediate aid.”³⁹⁹

Significantly, the exigent circumstances doctrine is styled as an exception to the warrant requirement and not to the probable cause requirement. Exigent circumstances thus resembles, in this respect, the doctrine authorizing police to use deadly force to stop certain fleeing suspects. Police can avail themselves of either doctrine only when they have probable cause plus something else. Police can use deadly force when they have probable cause to believe that a fleeing suspect committed a violent felony plus evidence that the suspect poses a threat to the safety of the police or the public.⁴⁰⁰ Likewise, police may effect a warrantless entry of a home only when there is probable cause that a crime has been or is about to be committed plus some reasonable basis for believing that exigent circumstances exist (e.g., that the suspect will flee or evidence will be destroyed).

Consider again the case of *United States v. Winsor*,⁴⁰¹ which involved an armed robber chased by police into a residential hotel.⁴⁰² The Ninth Circuit held that “[h]ot pursuit may excuse police from the Fourth Amendment’s warrant requirement, but never does it excuse the absence of the requisite degree of suspicion before effecting a search.”⁴⁰³ Accordingly, police were required to have probable cause, and not simply reasonable suspicion, to search the rooms of the hotel. At least to the dissenting judges in *Winsor*, a lesser evidentiary predicate should have sufficed given the

United States v. MacDonald, 916 F.2d 766, 769–70 (2d Cir. 1990) (summarizing and quoting *Dorman*, 435 F.2d at 392–93). The *Dorman* factors have been regularly followed in both federal and state courts. See 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 6.1(f), at 264–68 (3d ed. 1996) (citing numerous federal and state cases that apply the *Dorman* factors). One factor that the *Dorman* court omitted “but which is often of significance in this context concerns the preservation of evidence [I]t makes great sense to recognize that frequently an immediate entry to arrest is necessitated so that the defendant can be disabled from destroying or distributing evidence.” *Id.* § 6.1(f), at 274.

398. 437 U.S. 385 (1978).

399. *Id.* at 392–93.

400. See *Tennessee v. Garner*, 471 U.S. 1, 3 (1985) (holding that deadly force “may not be used unless it is necessary to prevent the escape [of a suspected felon] and the officer has probable cause to believe that the suspect poses a significant threat of death or serious injury to the officer or others”).

401. *United States v. Winsor*, 846 F.2d 1569 (9th Cir. 1988) (en banc).

402. See *supra* text accompanying notes 324–38.

403. *Winsor*, 846 F.2d at 1571.



robust societal interest in the immediate capture of the armed robber.⁴⁰⁴ Nonetheless, the *Winsor* majority correctly stated the law as it is now understood: Exigent circumstances authorize police to act without a warrant, but they do not authorize searches or seizures with less than probable cause.

Although probable cause is said to be an invariant standard, there is the sense that it would at times be unreasonable to require the identical evidentiary predicate in exigent and non-exigent circumstances. Indeed, as one reads exigent circumstances cases, the suspicion builds that courts sometimes apply not the same probable cause standard, but a lesser standard, when police confront an urgent need to act. In *Oliver v. United States*,⁴⁰⁵ for example, police entered the defendant's home when they suspected, with relatively flimsy evidence, that she was hiding a recently kidnapped baby.⁴⁰⁶ The D.C. Court of Appeals pondered the constitutionality of the search, and the result is so deeply unintelligible that it must be quoted at length:

We begin by examining the concept of "probable cause" as it relates to the application of the emergency doctrine. In that context, we interpret "probable cause" to mean "reasonable grounds to believe"—a formulation that says what we think the Supreme Court meant by "reasonable belief" in *Mincey*; a formulation that reflects the need for solid facts warranting probable cause, not mere reasonable suspicion (as in *Terry v. Ohio*); a formulation that is commonly used to mean probable cause; and a formulation that fits well with a perceived emergency, in contrast with a basis for prospective arrest, for which "probable cause" is the traditional language.⁴⁰⁷

The court at times suggests that probable cause might have a special (and lesser?) meaning in the emergency context: "reasonable grounds to believe." At other times, the court writes that this special standard is nothing more than the "formulation . . . commonly used to mean probable cause."

As the court embarks on its legal analysis, it seems to embrace the latter view, writing that police can engage in rescue operations only when "probable cause exists to believe that a kidnapping victim is being held on the premises."⁴⁰⁸ The court then sifts through the convoluted facts and concludes that probable cause *was* in fact present.⁴⁰⁹ The evidence offered to support probable cause was tenuous and often contradictory. Indeed, the existence of probable cause was not only persuasively challenged by a

404. *Id.* at 1581 (Farris, J., dissenting).

405. 656 A.2d 1159 (D.C. 1995).

406. *Id.* at 1161–62.

407. *Oliver*, 656 A.2d at 1166 (citations omitted).

408. *Id.* at 1168. The court then drew from classic probable cause cases such as *Illinois v. Gates*, 462 U.S. 213 (1983), and *Brinegar v. United States*, 338 U.S. 160 (1949), implying that probable cause, as articulated in these cases, and not some lower standard, is the appropriate test even in rescue operations. *Oliver*, 656 A.2d at 1169–70.

409. *Oliver*, 656 A.2d at 1170.



dissenting judge,⁴¹⁰ but also explicitly disavowed by a prosecutor in a pretrial hearing.⁴¹¹

The judicial impulse to find probable cause on doubtful facts runs through several exigent circumstances cases. Although courts claim that they are applying *the* probable cause standard, a fair appraisal of the facts suggests otherwise. In *State v. Boggess*,⁴¹² a social worker received an anonymous tip that children had been battered and needed immediate medical attention.⁴¹³ That evening, a social worker and police officer arrived at the apartment identified by the caller and forcibly entered.⁴¹⁴ The majority purportedly applied the Supreme Court's decision in *Gates* and concluded that probable cause existed on the facts presented. The court noted that the anonymous tip had been highly detailed, thus suggesting that it was credible. Furthermore, police had at least partially corroborated the tip when the man who answered the door upon their arrival acknowledged both that his name was as the tip had predicted and that children resided in the apartment.⁴¹⁵

The court's assertion that probable cause existed, at least as the term is used in non-emergency situations, is untenable. Imagine that a fulsomely detailed anonymous tip claimed that cocaine was present in a given apartment and that police had forced entry into the apartment when a man, with the name given by the informant, had answered the door. Is it even plausible to argue that reasonable suspicion, let alone probable cause, was present to justify the search?⁴¹⁶ Courts confronting genuinely exigent circumstances, as in *Winsor* and *Boggess*, thus all agree that the relevant test is probable cause. But whereas the *Winsor* court applied probable cause in all its rigor, the *Boggess* court imported the notion, melodramatically presented by Justice Jackson's dissent in *Brinegar v. United States*, that the intensity of the social interest in a police search must be weighed in the balance.⁴¹⁷ Probable cause, at least for courts following *Boggess*, means a lesser evidentiary predicate in

410. See *id.* at 1173–78 (Ferren, J., dissenting) (arguing that the police may have had *Terry* reasonable suspicion, but they did not have probable cause).

411. *Id.* at 1168. The prosecutor said, “I don’t think probable cause . . . existed at that time [when they took the defendant from her home].” *Id.* The state’s argument below was that the defendant consented to the search of her home, so there was no need for the lower court to address the issue of whether exigent circumstances justified a warrantless entry. *Id.* at 1177–78 (Ferren, J., dissenting).

412. 340 N.W.2d 516 (Wis. 1983).

413. *Id.* at 519.

414. *Id.* at 519–20. They claimed to be acting pursuant to the Wisconsin Children’s Code, but the court found that the provision did not authorize forced entry, and to the extent that it did, it would be contrary to the Wisconsin Constitution. *Id.* at 520.

415. *Id.* at 524.

416. See *Florida v. J.L.* 529 U.S. 266, 271 (2000) (holding that a tenuously corroborated anonymous tip did not constitute reasonable suspicion to conduct a pat-down frisk).

417. See *Brinegar v. United States*, 338 U.S. 160, 183 (1949) (Jackson, J., dissenting) (reasoning that, with the same evidentiary predicate, a police road block for the purpose of catching a child kidnapper would be permissible, while a road block to catch a bootlegger would not).



cases of exigency, because the social costs of not searching are potentially so high.⁴¹⁸

The idea that probable cause—though famously touted as a single standard—may in fact fluctuate is not an altogether alien notion in the case law. On the one hand, there is a scattering of court opinions suggesting that the probable cause needed to search a car is less than the predicate needed to search a home, precisely because one has a lesser expectation of privacy in a car.⁴¹⁹ On the other hand, courts as well as legislatures seem to apply a more stringent idea of probable cause when the search (e.g., of a lawyer's or reporter's office) is deemed more intrusive than a garden-variety search of a home.⁴²⁰ These cases, and exigent circumstances cases like *Bogges*, gnaw away at the notion of a singular probable cause standard.

VI. Probable Cause Reconsidered

This Part of the Article sketches an alternative approach to probable cause. The opening section discusses the sprinkling of support in the case law and academic literature for a more common sense approach to probable cause. The following section fleshes out this approach, proposing a reasonableness framework for analyzing questions of probable cause that draws upon Learned Hand's test for evaluating claims of negligence. The superiority of such a framework to the single standard approach is demonstrated in a trio of case studies, including that of the proposed search of Zacarias Moussaoui's laptop computer. As argued in the final section, a more reasonable approach to probable cause could enhance its relevance, as well as that of the warrant requirement, to various categories of police

418. *United States v. Richardson*, 208 F.3d 626 (7th Cir. 2000), is a good example in that the court is almost, but not quite, candid in its application of a lower evidentiary standard than probable cause as it is generally understood. See *id.* at 629 (“We find this to be a very close case.”). More typically, courts, as in *Bogges*, purport to apply *the* probable cause standard when the facts of the case make clear that a lesser standard is in fact being applied because of the exigency confronted by police. See, e.g., *People v. Sirhan*, 497 P.2d 1121, 1140 (Cal. 1972) (upholding a search of Sirhan's home after he assassinated Senator Robert Kennedy with little evidentiary predicate, but noting that the crime was one of “enormous gravity”). For an explicit embrace of the idea that exigent circumstances can result in the application of a lesser probable cause standard, see *Llaguno v. Mingey*, 763 F.2d 1560 (7th Cir. 1985) (en banc). For a discussion of *Llaguno*, see *infra* text accompanying notes 434–44.

419. See *State v. Lesnick*, 530 P.2d 243, 251 (Wash. 1975) (Hale, C.J., dissenting) (“What is probable cause to search and seize an automobile may not rise to the standards of probable cause for the issuance of a warrant to search a house.”); *United States ex rel. Clark v. Mulligan*, 347 F. Supp. 989, 991 (D.N.J. 1972) (“As a general principle, automobile searches may not demand the same variety of probable cause required for a search of a home or other structure.”).

420. See, e.g., *Gordon v. Superior Court*, 65 Cal. Rptr. 2d 53 (Cal. Ct. App. 1997) (applying section 1524(c) of the California Penal Code to extend greater protection to lawyers' offices); OR. REV. STAT. § 9.695 (2001) (protecting lawyers' offices from search and seizure by warrant or otherwise); 42 U.S.C. § 2000aa (extending greater protection to journalists).



activity. Indeed, one benefit of a recast probable cause framework, emphasizing its reasonableness, would be a revitalized warrant requirement.

A. *The Minority View*

Although probable cause is widely viewed, in both the courts and the academy, as a single and inflexible standard, there is a minority view. The most famous, if somewhat confused, articulation of this position is found in Justice Jackson's dissent in the *Brinegar* decision.⁴²¹ Jackson's starting point was the sensible premise that the social interest in searching a car trunk is greater when a kidnapped child, rather than bootlegged alcohol, might be hidden there. It logically followed, Jackson argued, that a search for a child would be reasonable on a lesser evidentiary predicate. This said, Jackson nonetheless conceded that *as a judge*, humbly obeying the letter of the Fourth Amendment, he could not permit a search on less than compelling evidence, even for the kidnapped boy. But *as a human being*, he would "strain" to make an "exception" to the Fourth Amendment to uphold the search.⁴²² This is a curious reading of the Constitution in that it intimates that the Fourth Amendment cannot accommodate extreme situations and that a judge must circumvent the Constitution to authorize certain extraordinary, albeit necessary, measures.

We earlier considered the Supreme Court's abortive attempt, in *Camara v. Municipal Court*,⁴²³ to calibrate probable cause to the degree of the privacy intrusion imposed by a search or seizure.⁴²⁴ The Court in *Camara* suggested that searches "involv[ing] a relatively limited invasion of the urban citizen's privacy" might satisfy probable cause, viewed in such circumstances as a lesser evidentiary standard.⁴²⁵ The *Camara* approach to probable cause,

421. *Brinegar v. United States*, 338 U.S. 160, 180–82 (1949) (Jackson, J., dissenting).

422. *See id.* Jackson said:

[I]f we are to make judicial exceptions to the Fourth Amendment for these reasons, it seems to me they should depend somewhat upon the gravity of the offense. If we assume, for example, that a child is kidnapped and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be a drastic and indiscriminating use of the search. The officers might be unable to show probable cause for searching any particular car. However, I should candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime. But I should not strain to sustain such a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger.

Id. at 183 (Jackson, J., dissenting).

423. 387 U.S. 523 (1967).

424. *See supra* text accompanying notes 298–302.

425. *See Camara*, 387 U.S. at 537 (stating that characteristics of an area-code inspection—e.g., they are not personal in nature, not aimed at discovering evidence of a crime, and relatively non-intrusive—are factors that support the reasonableness of such inspections). Of course, the flip side of this principle is that probable cause should be cast in stricter terms when the proposed search is particularly intrusive. In this vein, Justice Stewart wrote, with respect to wiretap searches, that because "electronic eavesdropping . . . involves a broad invasion of a constitutionally protected

adjusting the evidentiary predicate for a search to the degree of the privacy intrusion and the social interest, died off the following year in *Terry v. Ohio*,⁴²⁶ where the Court contrasted probable cause with a nuanced reasonable suspicion standard. However, echoes of *Camara* continue to reverberate, as two examples illustrate.

In the 1968 case *United States v. Soyka*,⁴²⁷ the Second Circuit cast probable cause in stringent terms to invalidate an arrest executed in a home for a minor narcotics violation.⁴²⁸ The evidence supporting the existence of probable cause was, in fact, compelling, and a dissenting Judge Henry Friendly was moved “to speculate how my brothers would dispose of a case precisely like this except that [the defendant was suspected of] purveying government documents.”⁴²⁹ Friendly added that “[a]pparent disfavor for certain felonies,” such as minor narcotics violations, seemed to be inclining courts to ratchet up the probable cause standard “to unrealistic levels.”⁴³⁰ “If decision were mine to make,” Friendly continued, “I would not be at all averse to straightforward recognition that the gravity of the suspected crime and the utility of the police action . . . are factors bearing on the validity of the search or arrest decision.”⁴³¹ The problem, according to Friendly, with the majority’s decision in *Soyka* to cast probable cause in stringent terms, even in a case involving a relatively minor crime and a relatively significant privacy intrusion, was that the precedent would not be limited to its facts—a more rigorous probable cause standard would be applied to *all* crimes. Friendly wrote:

If my brothers’ ruling could be confined to narcotics pushers, . . . I would hardly dissent. But that is not the received wisdom of today; at least in theory this decision would govern crimes of the greatest seriousness and cases where an arrest might lead to the recovery of stolen property or even a kidnapped child rather than of contraband.⁴³²

The “received wisdom,” which Friendly seemed to reject, equated probable cause in cases involving stolen property and a kidnapped child, a search of a home and a search of a car trunk. This wisdom would find expression a decade later in *Dunaway v. New York*, where the Supreme Court rejected a

area[,] [o]nly the most precise and rigorous standard of probable cause should justify an intrusion of this sort.” *Berger v. New York*, 388 U.S. 41, 69 (1967) (Stewart, J., concurring).

426. 392 U.S. 1 (1968). *See supra* text accompanying notes 304–08.

427. 394 F.2d 443 (2d Cir. 1968) (en banc).

428. *Id.* at 449.

429. *Id.* at 452 (Friendly, J., dissenting). Friendly added that he had “too much regard for their good sense to believe they would hold on such facts that the arrest was invalid and a code book found in the apartment must be returned.” *Id.*

430. *Id.*

431. *Id.*

432. *Id.* at 453.



graduated approach to probable cause, defining it instead as a “single . . . standard.”⁴³³

For a second example of a nuanced approach to probable cause, let us jump ahead to a 1985 opinion by Judge Richard Posner. In *Llaguno v. Mingey*,⁴³⁴ police confronted “an emergency . . . about as vivid . . . as can be imagined.”⁴³⁵ A shooting spree had left four people dead, others injured, and two armed suspects on the loose.⁴³⁶ On sketchy information,⁴³⁷ police searched a house for the suspects and detained all ten people there at the time.⁴³⁸ In a subsequent civil suit, the occupants of the home conceded that the police confronted exigent circumstances.⁴³⁹ For its part, the government conceded that the police lacked probable cause, at least in the stringent sense often ascribed to the term, to search the home and detain its occupants.⁴⁴⁰ The question, therefore, was whether the exigency of the situation—the extreme gravity of the investigated offense and the societal interest in the prompt capture of the murderers—could weigh in the probable cause balance.⁴⁴¹ Judge Posner, writing for a majority of the en banc Seventh Circuit, acknowledged that “[i]t is true that the gravity of the crime and the threat of its imminent repetition usually are discussed in relation to the existence of an emergency justifying a search or arrest without a warrant . . . rather than in relation to probable cause for the search or arrest.”⁴⁴² Undeterred, however, by the doubtful case law support and flouting what Friendly called the “received wisdom,”⁴⁴³ Posner concluded that probable cause, rightly understood, “is a function of the gravity of the crime, and especially the danger of its imminent repetition.”⁴⁴⁴

The suggestion that probable cause is a lesser evidentiary predicate in times of exigency sparked dissents from three judges. Labeling Posner’s view “dangerous,” the dissenting judges focused on the potential infringements on civil liberties when courts condone, even in exigent circumstances,

433. *Dunaway v. New York*, 442 U.S. 200, 208 (1979). For a discussion of *Dunaway*, see *supra* text accompanying notes 311–15.

434. 763 F.2d 1560 (7th Cir. 1985) (en banc).

435. *Id.* at 1564.

436. *Id.* at 1563.

437. Before fleeing on foot, the criminals had crashed a car registered to a Vilma Llaguno. The car had not been reported stolen, and the address listed for Llaguno was two miles from the crash scene. *Id.*

438. *Id.*

439. *Id.* at 1570.

440. *Id.* at 1565–66, 70.

441. *Id.* at 1566.

442. *Id.* (citations omitted).

443. See *supra* note 432 and accompanying text (quoting Judge Friendly’s dissent in *Soyka*).

444. *Llaguno*, 763 F.3d at 1566; see also *id.* at 1565 (defining probable cause as “not a point, but a zone”).



“the macho urge to charge.”⁴⁴⁵ Arguably, however, the dissenting judges failed to grasp the point that failing to authorize police to act in potentially exigent situations can imperil lives and property.

Imagine that police receive a 911 call in the middle of the night. They arrive at the scene and question the caller. He reports that he thinks he heard a woman’s screams and the sounds of a struggle in the apartment next door. Police bang on the door for several minutes, but no one answers. They circle around back and see no lights in the apartment and no evidence of forced entry. Should they just walk away? Plainly, probable cause is not present—in the strict sense that would satisfy the dissenting judges in *Llaguno*—to search the apartment. If we disregard the exigency of the situation, the only evidence of wrongdoing is the uncertain, and uncorroborated, testimony of the neighbor.

Police in Philadelphia received such a 911 call in 1998. As it transpired, the occupant of the apartment, Shannon Schieber, a student at the University of Pennsylvania, was raped and strangled to death the night police officers visited her apartment and left without entering.⁴⁴⁶ There is evidence that when the police arrived, the murderer was still in the apartment.⁴⁴⁷ The victim’s family has sued the police force for failing to force an entry, and although one’s sympathies are surely excited, one must recognize the difficulties confronted by police when probable cause is viewed as an inflexibly high barrier to police action.

The occasional academic observer, acknowledging this problem, has advocated a more flexible approach to probable cause. Professor Joseph Grano, for example, has argued that the judicial system should take the gravity of the investigated offense into account in the probable cause assessment.⁴⁴⁸ It is, he further contended, appropriate to consider the “nature of the intrusion” in such calculations, for “[c]ommon sense and experience teach that some intrusions are more burdensome than others.”⁴⁴⁹ Similarly, Professor Albert Alschuler, in urging courts to balance costs and benefits when addressing questions of probable cause, has taunted advocates of

445. *Id.* at 1578–79 (Wood, J., dissenting).

446. The facts are recounted in *Schieber v. City of Philadelphia*, 156 F. Supp. 2d 451, 455 (E.D. Pa. 2001).

447. Although police apparently found the sliding door on Schieber’s balcony closed that evening, the following morning, the neighbor saw that it was open. Clea Benson, *Murder Suspected in Death of Student: A 24-Year Old Woman’s Body Was Found in Her City Apartment*, PHILADELPHIA INQUIRER, May 8, 1998, at B1.

448. Grano, *supra* note 143, at 503–05. Grano adds that this point should not be taken “too far, lest it enable the judiciary to nullify criminal laws [like narcotics offenses] it dislikes.” *Id.* at 503–04. Nevertheless, “Justice Jackson’s point [in *Brinegar*] cannot be ignored, for intuitively we agree that less antecedent cause should be required as the need for the police conduct becomes more urgent.” *Id.* at 504.

449. *Id.*



“bright-line rules” in the context of the Fourth Amendment.⁴⁵⁰ As Alschuler noted, such scholars have “failed to indicate what the nonwoolly content” of probable cause is or could possibly be.⁴⁵¹

Alschuler’s point, of course, is not that probable cause should be abandoned, but that it should be recast. The probable cause standard, like the warrant requirement, surely serves a salutary social function in constraining discretionless police actions, which may be especially important in modern times given the size and firepower of the American police force.⁴⁵² The hard question, then, is not whether to constrain police, and to impose limits on their actions, but what form those restraints and limits should take.

B. *A Reasonableness Framework*

Supposing probable cause was reasonable—what then? In posing this question, we begin a journey on a less-traveled path. Before one leaves the mass of mankind behind, it is good to assess just who one’s fellow travelers will be. As the previous section indicates, ours will include Judges Friendly and Posner, and Professors Grano and Alschuler. Emboldened by the quality of the company, we can proceed.

What we need is a framework for thinking about probable cause that takes into account a host of variables excised from the conventional view. Such an approach might take its bearings from Learned Hand’s celebrated formula for evaluating claims of negligence.⁴⁵³ Hand’s formula provides that a party’s duty to take precautions to prevent accidents is a function of three variables: (1) the probability of the occurrence of an accident (P); (2) the social loss caused by the accident (L); and (3) the burden of taking

450. See Alschuler, *supra* note 316, at 229–31 (arguing that “[n]ot only do categorical Fourth Amendment rules often lead to substantial injustice, . . . their artificiality commonly makes them difficult, not easy, to apply”).

451. *Id.* at 255–56.

452. The Bureau of Justice notes that as of 1996, there were more than 700,000 police officers in the United States, which is roughly one police officer for every 400 citizens. BUREAU OF JUSTICE STATISTICS, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 1996 (1998), available at <http://virlib.ncjrs.org/Statistics.asp> (last modified Aug. 15, 1998). In contrast, in 1816, there was one constable in England for every 18,187 persons. Jerome Hall, *Legal and Social Aspects of Arrest Without a Warrant*, 49 HARV. L. REV. 566, 582 (1936); see also Roger I. Root, *Are Cops Constitutional?*, 11 SETON HALL CONST. L.J. 685, 686 n.1 (2001) (estimating that the police officer to citizen ratio in America today is approximately one officer for every 386 Americans); 1 STEPHEN, *supra* note 125, at 196 (discussing “the inefficiency of the constables and watchmen” in England in the eighteenth century).

453. I am grateful to Moin Yahya for the suggestion that Hand’s formula might be applied to questions of probable cause. When writing this Article, I discovered that the thought had already occurred to Professor Alschuler, who mentions the idea in passing. Curiously, Alschuler credits another person for mentioning the idea to him. Alschuler, *supra* note 316, at 252 n.82. For an entirely more elevated example of the same phenomenon, consider the simultaneous discovery of calculus by Newton and Leibniz. See ROBERT S. WESTFALL, *NEVER AT REST: A BIOGRAPHY OF ISAAC NEWTON* 514–20 (1980).



precautions to prevent an accident (B). When $B < P \cdot L$, a party is negligent if it fails to take precautions and an accident occurs.⁴⁵⁴

Applying Hand's formula to the Fourth Amendment, one might propose that probable cause exists to conduct a particular search whenever the expected social benefit or value exceeds the social cost. To the extent that formulae illuminate rather than obfuscate, a point as to which Hand himself remained doubtful, the model might be stated thus:

$$(1) P \cdot V > C,$$

where P is the probability of a successful search, V is the social benefit or value associated with the prevention or detection of a particular crime, and C is the social cost (or privacy intrusion) resulting from a particular kind of search.

The formula might be modified to take into account the Supreme Court's oft-stated position that there is no privacy intrusion with respect to contraband.⁴⁵⁵ Because there is a constitutionally recognized privacy intrusion only in the event of an unsuccessful search, the formula may be rewritten as follows:

$$(2) P \cdot V > (1 - P) \cdot C,$$

where $(1 - P)$ is the probability that the search will fail to uncover any evidence of crime. For example, assume that there is a twenty percent chance that police will uncover evidence of tax fraud among a suspect's personal papers in his home. The social benefit of a conviction is \$100,000, and the privacy intrusion associated with a search of one's personal papers is \$50,000. The expected benefit or value of a search would be \$20,000 ($\$100,000 \cdot .2$), which is less than the expected cost of \$40,000 ($\$50,000 \cdot .8$). Thus, the search would be unreasonable in these circumstances. These numbers are, of course, arbitrary.⁴⁵⁶ The broader point, however, is that the expected social benefit of a successful search increases if the crime under investigation is, say, aircraft piracy rather than tax fraud. Thus, a search that might fail to satisfy probable cause for one crime might be sufficient in another context.

One should recognize, moreover, that not all searches or seizures are equal in the resultant privacy intrusions. The probable cause required to search a car or warehouse might be insufficient to justify a house search or

454. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). The formula is said to result in an optimal level of precautions, for it induces actors to accurately weigh expected accident costs against accident-avoidance costs. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 6.1 (5th ed. 1998).

455. *See United States v. Place*, 462 U.S. 696, 707 (1983) (holding that a canine sniff "discloses only the presence or absence of narcotics, a contraband item" and therefore does "not constitute a 'search' within the meaning of the Fourth Amendment").

456. One might, however, imagine the development of some plausible estimates by looking at jury verdicts in civil cases (where searches have been found to be unreasonable) and the statutory penalties assessed for specific crimes.

an arrest. Indeed, one might tinker with the formula further to reflect the fact that not all seemingly identical searches are in fact identical, at least in the subjectively experienced intrusion on one's privacy. If police single me out for suspicion and pull my car over, the experienced intrusion is far greater than if, at a DUI checkpoint, I am randomly subject to an otherwise identical search. Furthermore, if police repeatedly stop an African-American man, the internalized cost escalates from the stigmatizing police practice.⁴⁵⁷ Thus, the formula might be rewritten,

$$(3) P \cdot V > (1 - P) \cdot (C \cdot m),$$

where m is a privacy multiplier. If a car search ordinarily imposes a \$1,000 intrusion, it may be only \$100 if the search is conducted in a random manner or \$2,000 if the cost of the intrusion is borne by an individual who has already been searched on multiple occasions.

This proposal might be criticized as too complicated for magistrates to administer, for it requires them to quantify a host of indeterminate variables. Such an objection both overstates the complexity of the proposal and understates (in some instances) the competence of the magistrates reviewing the warrant applications. Magistrates will not need to apply numerical values, but common sense, in addressing questions of probable cause. Furthermore, radical departures from the probable cause standard, as it has currently evolved, will for the most part not be required. The standard has evolved to address the paradigm search (of a home) for the paradigm crime (a narcotics violation). The suggestion here is simply that the standard bend when the proposed search or the alleged crime reflects a significant departure from these paradigms. In effect, then, this proposal breathes life into the suggestion in *Illinois v. Gates* that probable cause “turn[] on the assessment of probabilities *in particular factual contexts . . .*”⁴⁵⁸ Common sense demands that those contexts include the intrusiveness of the search (telephone wiretap versus search of car) and the gravity of the investigated offense (terrorism versus agricultural subsidy fraud).

With respect to the magistrate's competence to apply a more nuanced probable cause standard, it is worth recalling that magistrates in the federal system are selected by district court judges and are generally recognized as leading members of the local bar.⁴⁵⁹ As a practical matter, federal magistrates are entrusted with far more complicated legal issues than

457. See Gross & Livingston, *supra* note 65, at 1438 (“Investigative choices that are made on the basis of global assumptions about the criminal propensities of racial or ethnic groups are stigmatizing.”); cf. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (arguing that “[c]lassifications based on race carry a danger of stigmatic harm”).

458. *Illinois v. Gates*, 462 U.S. 213, 232 (1983) (emphasis added).

459. See 28 U.S.C. § 631(b)(5) (2000) (requiring federal district judges to appoint magistrate judges, consisting of persons in good standing for at least five years on the state bar and “competent to perform the duties of the office”).



applying the probable cause framework proposed in this Article.⁴⁶⁰ In state systems, by contrast, magistrates are of far more variable competence, with some states not even requiring magistrates to be members of the bar.⁴⁶¹ Such a state of affairs legitimately undermines any confidence in the warrant system in its current form, as well as in the alternative form proposed here. The obvious correction, however, is not to preserve an unreasonable version of probable cause, but to enhance the quality of the magistrates entrusted with reviewing warrant applications.⁴⁶²

C. Applications

Let us return, after a long detour, to the debate as to whether the FBI had probable cause to search Zacarias Moussaoui's laptop computer prior to September 11. As discussed earlier, the two most important pieces of evidence supporting the existence of probable cause were the flight instructor's tip and the French intelligence information.⁴⁶³ Even if some of the additional pieces of evidence (such as Moussaoui's religion and his refusal to consent to a search) could be considered in the probable cause assessment, which is doubtful under the current case law,⁴⁶⁴ Rowley's claim that there was a greater than fifty percent likelihood that Moussaoui intended to hijack a plane⁴⁶⁵ is hard to credit. Of course, this should not have disqualified the warrant application under *Illinois v. Gates*, for probable cause is there defined not as a preponderance of the evidence, but as a "fair probability" or "substantial chance" of criminal activity.⁴⁶⁶ Yet whatever the probability the *Gates* Court might have ascribed to probable cause (twenty percent?, thirty percent?), the conclusion reached by FBI headquarters that probable cause was not satisfied does not appear to be altogether unjustified, at least when the gravity of the suspected offense is not taken into account.

To illustrate this point, transpose the Moussaoui case to the drug context. A flight instructor reports to police suspicions that a student is using drugs. A foreign intelligence service then informs the police that the student

460. See, e.g., David W. Bell, *The Power to Award Sanctions: Does it Belong in the Hands of Magistrate Judges?*, 61 ALB. L. REV. 433, 433-34 (1997) (noting that federal magistrates are allowed to rule on discovery and suppression of evidence motions, adjudicate petty offenses, and, with consent, may preside over civil trials).

461. See *Shadwick v. City of Tampa*, 407 U.S. 345, 349 (1972) (upholding warrants issued by magistrates who had no legal training); *State v. Groff*, 323 N.W.2d 204, 213 (Iowa 1982) (upholding warrants issued by a nonlawyer magistrate).

462. In several localities, warrants are never issued except by duly appointed judges. See *Benner & Samarkos*, *supra* note 57, at 226 & n.21 (noting that in San Diego, "[o]ver 95% of the search warrants were issued by judges of the San Diego Municipal Court," and that "[t]he remaining 5% were issued by Superior Court judges").

463. See *supra* subpart II(B)(9).

464. See *supra* note 65 and accompanying text.

465. See Rowley Memorandum, *supra* note 1, para. 7.

466. 462 U.S. 213 (1983).



may have dealt drugs in the past. Would a magistrate, on these facts, issue a warrant to search the student's home? Almost surely not. The question is whether Moussaoui's case is different for probable cause purposes because the suspected crime—aircraft piracy or terrorism—is far graver than garden-variety drug trafficking. Although probable cause as traditionally understood treats this as a difference of no consequence, probable cause viewed reasonably, within the *Carroll Towing* framework, acknowledges that in such circumstances a lesser evidentiary predicate justifies a search.

More fundamentally, the flexibility of the *Carroll Towing* framework generates incentives, for police, prosecutors, and magistrates, to think more creatively about striking an appropriate balance between respecting a suspect's expectations of privacy on the one hand and on the other satisfying society's legitimate interest in the investigation of possible crime. During the investigation of Zacarias Moussaoui, for example, the FBI could have proposed a narrowly tailored search of his laptop computer that minimized its intrusiveness and in this way compensated for a possible deficiency in the evidentiary basis for the FBI's suspicions. The FBI might have proposed the following search to a magistrate: Only two agents would sift through the contents of the computer, and only if they discovered evidence of certain specified crimes (e.g., terrorism, aircraft piracy) could the information be shared with others in the FBI. If Moussaoui was a money launderer instead of a terrorist, the agents who had searched the computer would simply report no evidence of piracy or terrorism. In effect, then, the search would be framed as one without a "plain view" exception enlarging its possible scope: contrary to the otherwise governing rule, police could not make use of evidence of crime inadvertently discovered in the course of a lawful search.⁴⁶⁷ Thus, if Moussaoui were eventually charged with money laundering, the government would be forced to demonstrate in a pretrial hearing that none of its evidence was derived from the search of the laptop computer.⁴⁶⁸ Such an approach would ensure that police and prosecutors could not trumpet the gravity of an investigated offense only to get easy access to a suspect's belongings. And it would reward efforts by the police

467. See *Horton v. California*, 496 U.S. 128, 141–42 (1990) (upholding as lawful the warrantless seizure of criminal evidence in plain view in the course of a lawful search).

468. An analogy could be drawn to a *Kastigar* hearing. See *Kastigar v. United States*, 406 U.S. 441, 449–60 (1972). Such hearings typically arise after the government has indicted an individual after granting him immunity in return for compelled testimony; the government is forced to show that it has made neither direct nor indirect use of any compelled testimony. See, e.g., *United States v. North*, 910 F.2d 843, 872–73 (D.C. Cir. 1990) (holding that the District Court erred in failing to hold a full *Kastigar* hearing to ensure that the prosecution made "no use whatsoever" of any of the immunized testimony). Similarly, here, if the government eventually charged a suspect with crimes other than those alleged in the warrant application, it would need to show in a pretrial hearing that it made no use of the evidence inadvertently discovered in the course of the search.



to focus searches, for the less intrusive their proposed search, the more likely the court would be to find probable cause.⁴⁶⁹

Consider next the case of Shannon Schieber, the University of Pennsylvania student slain in her apartment.⁴⁷⁰ When a credible neighbor reports hearing screams from an apartment in the middle of the night, what should police do after banging on the door for minutes without result? In the absence of probable cause, rigidly viewed as some fixed percentage of criminal activity, one answer is simply to walk away. The *Carroll Towing* approach to probable cause provides a far more sensible framework for addressing the problem. First consider the social interest in a search of Schieber's apartment. Even a low probability that she had been assaulted would mean a robust interest in a protective sweep to ensure that no persons were hidden or injured in the apartment. Next consider, on the other side of the balance, the privacy intrusion. Although undoubtedly intrusive, the search could be cabined by its goals. It is, of course, possible that police, having entered an apartment to conduct a protective sweep, will see, in plain view, contraband of some altogether unrelated sort. The law governing such "rescue" situations could clarify that the search must be narrowly circumscribed, and "plain view" evidence would be inadmissible at a subsequent criminal trial.⁴⁷¹

Finally, the refusal to weigh the variable intrusiveness of police searches in the probable cause balance can have indefensible consequences in the context of the war on terrorism. Imagine that the National Security Agency intercepts a cell phone call revealing that terrorists are constructing a

469. See William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2185 (2002). There is nothing novel, in the context of the Fourth Amendment, in crediting efforts by the state to narrowly limit the uses made of any evidence that is obtained in the course of a search. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 650 (1995) (finding that it was significant that "the results of the tests are disclosed only to a limited class of school personnel who have a need to know; and they are not turned over to law enforcement authorities or used for any internal disciplinary function"); *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 122 S. Ct. 2559, 2566–67 (2002) ("[T]he test results are not turned over to any law enforcement authority. Nor do the test results here lead to the imposition of discipline or have any academic consequences."); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 663 (1989) (noting that "[t]est results may not . . . be turned over to any other agency, including criminal prosecutors, without the employee's written consent"). Compare *Rushton v. Neb. Pub. Power Dist.*, 844 F.2d 562, 567 (8th Cir. 1988) (approving the urine testing of nuclear power plant employees, and noting that "the results of urinalysis are being used solely to determine a person's fitness for work; they are not turned over to the police"), with *Ferguson v. City of Charleston*, 532 U.S. 67, 68 (2001) (finding it "critical" that "the immediate objective of the [urine testing] was to generate evidence for law enforcement purposes" (emphasis added)).

470. See *supra* notes 446–47 and accompanying text.

471. A further constraint on the intrusiveness of the police search would be to restrict the ability of police to publicize such private details. As Professor Stuntz writes, "[t]he historical norm has been to permit the police to do anything with information that they obtain legally, but of late, the Supreme Court seems to have taken an interest in limiting extraneous publicity." Stuntz, *supra* note 469, at 2184 n.145. Stuntz cites *Wilson v. Layne*, 526 U.S. 603 (1999), where the Court held a search unconstitutional when police officers invited journalists to join them.



radiological “dirty bomb” in an American city. The police, having focused the search on a section of the city with 100,000 homes, propose to criss-cross the area with a Geiger counter that measures the radiation released from each home.⁴⁷² Under the Supreme Court’s decision in *Kyllo*, such a search would be unconstitutional, for a Geiger counter, no less than a thermal detection device, allows police to learn details about the interior of the home “that could not otherwise have been obtained without physical intrusion.”⁴⁷³

Assuming that police flout the supposed commands of the Fourth Amendment and a Geiger counter search uncovered a “dirty bomb,” would a court really hold the evidence inadmissible? One should never underestimate the contortions courts perform in matters of the Fourth Amendment. It is possible that a court would analogize Geiger counters to drug-sniffing dogs and hold that, as one has no expectation of privacy in the scent of narcotics, neither does one have any legitimate privacy expectation in the radiation emitted from one’s house. Voila, the use of a Geiger counter is not a search at all and is therefore wholly outside the limitations of the Fourth Amendment.

Plainly, however, the use of drug-sniffing dogs and Geiger counters entails searches, for the police are affirmatively seeking to gather evidence of criminal activity. A far more sensible approach would be to concede that the Geiger counter is used to search, but to recognize that probable cause exists, for the privacy intrusion imposed by such a search is infinitesimal and the potential harm of a “dirty bomb” is so great.

D. Revitalizing the Warrant Requirement

An alternative defense of the roving Geiger counter search might purport to take its bearings from the plain text of the Fourth Amendment and the apparent absence of any warrant—or probable cause—requirement. The first clause of the Amendment forbids “unreasonable” searches, whereas the second simply prohibits warrants from being issued without probable cause.⁴⁷⁴ Professor Akhil Amar has argued that the error in the Court’s current Fourth Amendment jurisprudence is to insist on warrants (and thereby probable cause) when the Amendment, by its plain terms, imposes no

472. The scenario is posed in Eugene Volokh, *The Fourth Amendment Meets the War on Terror*, SLATE, June 17, 2002, at <http://www.slate.msn.com/id/2067037/>. Like Volokh, I ask the reader to “[a]ssume this is practically feasible, though there may be various potential difficulties with it.” *Id.*

473. *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

474. The text of the Fourth Amendment states:

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.



such requirement. Instead, Amar argues, the fundamental test should be one of reasonableness: Only when police get a warrant (in order to insulate themselves from civil liability) should probable cause be the standard.⁴⁷⁵ To return to the dirty bomb scenario, according to this line of argument, a roving Geiger counter search is plainly reasonable, weighing the social interest against the privacy intrusion, and there is no need to entangle the issue with questions of probable cause or warrants.

Amar presents his argument as a radical critique of the Court's jurisprudence.⁴⁷⁶ In fact, it is at bottom an elegant summary of the current state of the law. As discussed above, most searches and seizures are evaluated nowadays for their reasonableness and not according to a probable cause standard.⁴⁷⁷ The inevitable corollary of this development, however, is the much-lamented evisceration of the warrant requirement.⁴⁷⁸ Because probable cause is understood as a relatively high and inflexible standard, it can have no application to a vast range of police activity, from DUI checkpoints to a roving search for a dirty bomb. And because a warrant cannot issue "but upon probable cause,"⁴⁷⁹ the perverse consequence of an unreasonable reading of probable cause is that vast reaches of police activity have been, as a practical matter, liberated from any antecedent check by a magistrate.

Only if probable cause is understood reasonably can the warrant requirement be revitalized. The sort of easy escape from a warrant requirement taken by the Supreme Court in *Griffin v. Wisconsin*⁴⁸⁰ would no longer be available. The petitioner in *Griffin*, a probationer, conceded that police officers could enter his home with reasonable suspicion, but argued that a warrant was nonetheless required.⁴⁸¹ Justice Scalia, writing for the Court, rejected the argument, noting that "[t]he Constitution prescribes . . . that where the matter is of such a nature as to require a judicial warrant, it is also of such a nature as to require probable cause."⁴⁸² Although as a textual matter, Scalia was of course correct that warrants can issue only upon probable cause, he failed to consider that the term probable cause is not self-defining and may itself be imbued with an element of reasonableness. If probable cause were understood reasonably, then it would no longer be necessary to exempt police actions, at least those not justified by some

475. Amar, *supra* note 135, at 801–19.

476. *See id.* at 759 (stating that scholars and case law seem to think that the Fourth Amendment requires probable cause). *But see id.* at 760 n.4 (acknowledging that his proposed approach has substantial support in the case law).

477. *See supra* subparts V(B–D) (sketching the rise of the reasonableness inquiry in terms of reasonable suspicion, special needs, and exigent circumstances).

478. *See supra* note 19 (citing authority protesting the decline of the warrant requirement).

479. U.S. CONST. amend. IV.

480. 483 U.S. 868 (1987).

481. *Wisconsin v. Griffin*, 388 N.W.2d 535, 538 (Wis. 1986).

482. *Griffin*, 483 U.S. at 877.



exigency, from the preclearance check supplied by a warrant requirement. When police propose to conduct a search or seizure, they would need to demonstrate the reasonableness of their actions to a neutral magistrate, who could weigh, among other factors, the gravity of the investigated offense and the degree of the privacy intrusion.

One must acknowledge that regulating conduct through prescreening mechanisms is generally disfavored in our legal system, and the purported benefits of a warrant requirement may, in some instances, be overstated.⁴⁸³ There is, however, a benefit in forcing law enforcement officers to articulate their reasons *before* conducting a search: post hoc rationalizations will be curtailed and some illegal searches deterred.⁴⁸⁴ Even warrantless searches of minimal intrusiveness may excite a twinge of discomfort, if not for the intrusion that directly results, at least for the precedent that may result. It may be said that once police can wander through residential neighborhoods with Geiger counters, roving drug-sniffing canine searches are soon to follow. However implausible such sentiments may sometimes be,⁴⁸⁵ it is nonetheless useful, in all but nonexigent circumstances, that police supply an antecedent explanation for their actions.

The oddity of the Supreme Court's current Fourth Amendment jurisprudence is that searches conducted with warrants, precleared by a neutral and detached magistrate, are often held to a higher standard than searches conducted without warrants. Precisely the opposite ordering would seem sensible: When police take the trouble to establish their reasons to, and secure the approval of, a magistrate, they should be held to at least as generous an evidentiary standard as when they conduct a search without any prior approval from an authority outside the law enforcement community. The oddity of the Court's current jurisprudence stems from its disjunctive reading of the Amendment. The first clause, which broadly prohibits all "unreasonable" searches, is set in opposition to the second, which restricts the issuance of warrants to contexts where "probable cause" is present. But this opposition is more imagined than real: Probable cause is in fact a rea-

483. See William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 885-97 (1991) (discussing the costs of ex ante regulation and arguing that, outside the context of warrants, Fourth Amendment law follows the standard two-step process of most "regulatory regimes," first articulating standards of substantive conduct and then penalizing violations of those standards).

484. See *id.* at 915 (arguing that "warrants attack distortions that come with a suppression hearing by changing the timing of the relevant decision"); 2 WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 7.2(a), at 518 (1st ed. 1978) (noting that the warrant process is a meaningful device to protect Fourth Amendment rights against "those police practices which would be most destructive of Fourth Amendment values"); Bookspan, *supra* note 19, at 473-76 (stating that a "prior determination of probable cause and adherence to . . . procedures protect principles of government and individual freedoms").

485. On the overworked slippery slope metaphor, see Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. (forthcoming 2003).



sonable standard. The first clause states the general truth—that all searches must be reasonable—and the second clause clarifies that even searches precleared by magistrates must be reasonable, that is, supported by probable cause.

Professor Craig Bradley has observed that the Supreme Court's Fourth Amendment jurisprudence embraces two models, one of which can be summed up with the command, "Act reasonably," and the other with the instruction, "Get a warrant whenever you can."⁴⁸⁶ He adds that "[t]he Court's efforts to tread a tightrope between two extremes has resulted in a morass of confusion that can satisfy nobody."⁴⁸⁷ This Article has argued that the two commands need not be viewed as extremes, but in fact can be harmonized. The first step in such a harmonization is the realization that probable cause is best understood not as a fixed standard, but within a reasonableness framework.

VII. Conclusion

In the aftermath of September 11, several commentators mused that the Constitution would handicap our nation's efforts to combat terrorism.⁴⁸⁸ One observer wondered whether the Bill of Rights was so hopelessly out of touch with the reality and gravity of the threat to our nation that unless we "abandon[] key constitutional protections . . . deaths from terrorism [will number in the millions]."⁴⁸⁹ This Article takes as its starting point the following principle: Any interpretation that renders the Constitution a suicide pact is almost surely an erroneous interpretation.

The Fourth Amendment plainly imposes limits on the powers of the state to search private citizens. Yet those limits are not absolute. The first clause of the Amendment forecloses only unreasonable searches, and the second clause proscribes the issuance of warrants without probable cause. One possible solution to the problem of the Fourth Amendment is, in effect, to read the second clause into a nullity: Police would rarely be required to obtain a warrant, and only if they did would an antecedent showing of

486. Bradley, *supra* note 17, at 1501.

487. *Id.*

488. For example, Professor Alan Dershowitz has argued that we need to allow government officials to have the power to issue "an interrogation warrant" to force those strongly suspected of terrorist activity to answer questions, once they are afforded immunity. He noted, however, that such a procedure is "not currently permissible under our Constitution. And yet, I think that would probably be a good change . . ." *Talk of the Nation* (NPR radio broadcast, June 17, 2002), available at 2002 WL 3297027. The possibility of a tension between respecting the Constitution and credibly responding to the terrorist threat is arguably implicit in President Bush's statement, "We intend to honor our Constitution and respect the freedoms we hold so dear. . . . [At the same time,] we want to make sure we do everything we can to prevent a further attack." Gary Fields & John R. Wilke, *Bush Defends New Powers for FBI*, WALL ST. J., May 31, 2002, at A4.

489. John Derbyshire, *Unpleasant Truths*, NAT'L REV. ONLINE, at <http://olimu.com/WebJournalism/Texts/Commentary/UnpleasantTruths.htm> (Aug. 2, 2002).



probable cause be required. This Article rejects this suggestion, now associated with Akhil Amar,⁴⁹⁰ and seeks to preserve the warrant requirement as a vital check on the police.

To do so, however, we need to recognize the reasonableness of probable cause.

The paradox of probable cause is that, in binding us to this standard, the Framers were binding us to a standard that itself could adapt to changed circumstances. As this Article has shown, the concept of probable cause evolved over the course of centuries prior to 1791, and indeed likely failed to have a specific meaning even in the minds of the Framers themselves. Moreover, from the earliest years of the republic, the probable cause standard has proven to be a flexible one. Whether the Constitution is alive or dead, extinct or evolving, are questions I leave to those giants in the academy who study constitutional law. My narrow point is that any effort to cast “probable cause” in “constitutional amber”⁴⁹¹ is both unreasonable and untrue to the intent of the Framers of the Fourth Amendment.

Recasting probable cause within a reasonableness framework can open the way for more creative thinking about accommodating law enforcement priorities on the one hand and preserving civil liberties on the other. Perhaps the September 11 attacks can, in this way, provoke a more sensible discussion of the importance of criminal procedure rules in striking an appropriate balance.

490. See Amar, *supra* note 135, at 762.

491. *Id.* at 818.

