FOURTH AMENDMENT REMEDIES AS RIGHTS: THE WARRANT REQUIREMENT

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The constitutional status of the warrant requirement is hotly debated. Critics argue that neither the text nor history of the Fourth Amendment supports a warrant requirement. Critics also question the warrant requirement's ability to protect Fourth Amendment interests. Perhaps in response to these concerns, the Supreme Court has steadily degraded the warrant requirement through a series of widening exceptions. The result is an unsatisfying jurisprudence that fails on both conceptual and practical grounds.

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Finally, I would like to acknowledge the passing of Justice Antonin Scalia, who died as this article was going to press. In his academic writing and written opinions, Justice Scalia showed that originalism can be a powerful tool for Fourth Amendment progressives. We are all the poorer for losing the opportunity to know his views on many of the emerging questions likely to dominate Fourth Amendment conversations in the coming years.

These debates have gained new salience with the emergence of modern surveillance technologies such as stingrays, GPS tracking, drones, and Big Data. Although a majority of the Court appears sympathetic to the view that these technologies raise Fourth Amendment concerns, the Court has been wary about imposing a warrant requirement. As was made clear in the 2014 term during oral argument in California v. Riley*, part of that reserve reflects doubts among the justices about the warrant requirement's status and constitutional pedigree.*

This article takes a novel approach, using a conventional Fifth Amendment story to tell an unconventional Fourth Amendment story. In its landmark Miranda *decision, the Court held that prospective remedial measures were necessary to resolve pervasive threats to Fifth Amendment rights posed by the "inherently coercive atmosphere" of custodial interrogations. The Court held that* Miranda *warnings provide an effective, enforceable, and parsimonious means to resolve those constitutional concerns. In the intervening years, the Court has maintained the constitutional status of* Miranda *warnings even though they are not dictated by the text of the Fifth Amendment.*

The Fourth Amendment warrant requirement is a prospective constitutional remedy akin to the Miranda *prophylaxis. According to its text, and as it would have been understood in 1791, the Fourth Amendment establishes a collective right to remedies sufficient to guarantee the security of the people in their persons, houses, papers, and effects against threats posed by unconstrained governmental searches and seizures. The warrant requirement is just such a remedy, guaranteeing the security of the people against unreasonable search and seizure by interposing courts between citizens and law enforcement officers engaged in the "competitive enterprise of ferreting out crime."*

> 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.[1]

INTRODUCTION

In its most robust form, the warrant requirement holds that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."[2] Several sitting justices recently expressed doubts about whether this presumption in

[1] U.S. CONST. amend. IV.

[2] Katz v. United States, 389 U.S. 347, 357 (1967) (footnote omitted).

favor of the warrant requirement actually does or should exist.[3] Their doubts reflect long-standing debates about the constitutional status and practical value of the warrant requirement.[4]

The conventional understanding of the warrant requirement holds that it is implied by the warrant clause.[5] Critics such as Antonin Scalia, Telford Taylor, and Akhil Amar have long criticized this view, pointing out that neither the text of the Fourth Amendment nor its history supports a broad warrant requirement.[6] Critics also question the utility of the warrant requirement as a tool for protecting and vindicating Fourth Amendment rights.[7] They contend that our eighteenth-century forebears were skeptical of warrants because warrants immunized officers from common law remedies, including tort

[3] *See* Transcript of Oral Argument at 4, 20, 42-43, Riley v. California, 134 S. Ct. 2473 (2014) (No. 13-132) (highlighting Justices Scalia, Kennedy, Alito, and Sotomayor's concerns about shaping a new warrant requirement for the digital era). In reaching its holding, the *Riley* Court largely adopted a technology-centered approach to evaluating Fourth Amendment interests in quantitative privacy, *see generally Riley*, 134 S. Ct. 2473, first described in David Gray & Danielle Citron, *The Right to Quantitative Privacy*, 98 MINN. L. REV. 62, 103-25 (2013).

[4] *See, e.g.*, United States v. Place, 462 U.S. 696, 721-23 (1983) (Blackmun, J., concurring) (discussing tensions in the Court's Fourth Amendment jurisprudence between justices and opinions that maintain faith in the warrant requirement, and those who would maintain "that the Fourth Amendment requires only that any seizure be reasonable"); TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 19-50 (1969) ("[O]ur constitutional fathers were not concerned about warrantless searches, but about overreaching warrants."); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 761-81 (1994); William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 882 (1991) (explaining that the Court champions the warrant requirement in its rhetoric, but narrows the scope of the requirement in many cases).

[5] *See, e.g.*, *Place*, 462 U.S. at 721 (Blackmun, J., concurring) ("The Amendment generally prohibits a seizure unless it is pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized."); Silas J. Wasserstrom, *The Fourth Amendment's Two Clauses*, 26 AM. CRIM. L. REV. 1389, 1390 (1989) ("On the other view, the second clause helps explain the first; fourth amendment reasonableness turns on the presence of a validly issued warrant, except in certain exceptional circumstances when it would not be feasible to require one.").

[6] *See, e.g.*, California v. Acevedo, 500 U.S. 565, 581 (1991) (Scalia, J., concurring) ("The Fourth Amendment does not by its terms require a prior warrant for searches and seizures; it merely prohibits searches and seizures that are 'unreasonable.'"); TAYLOR, *supra* note 4, at 21, 23 (arguing that warrants do not make a search valid or invalid, and that the contrary view "is in dissonance with the teaching of history, and has led to an inflation of the warrant out of all proportion to its real importance in practical terms"); Amar, *supra* note 4, at 761-81 ("The words of the Fourth Amendment really do mean what they say. They do not require warrants, even presumptively, for searches and seizures."); *see also* Transcript of Oral Argument at 43, United States v. Wurie, 143 S. Ct. 2473 (2014) (No. 13-212) ("[T]he question is whether it's an unreasonable search, and the warrant clause follows much later.").

[7] *See generally* Amar, *supra* note 4; Stuntz, *supra* note 4.

actions.[8] In their view, the Fourth Amendment reflects that skepticism, setting strict limits on when and in what circumstances warrants may issue.[9] Reading a warrant requirement out of the warrant clause therefore appears to turn the Amendment on its head, preferring what the founding generation sought to restrain.[10]

Perhaps in response to these concerns,[11] the Court has degraded the warrant requirement by recognizing and amplifying a series of exceptions.[12] These exceptions threaten to swallow the rule, leaving most searches and seizures to the discretion of law enforcement officers in the first instance.[13] At the same

[8] *See Acevedo*, 500 U.S. at 581 (Scalia, J., concurring) ("For the warrant was a means of insulating officials from personal liability assessed by colonial juries."); TAYLOR, *supra* note 4, at 41; Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1178-81 (1991) ("A lawful warrant, in effect, would compel a sort of directed verdict for the defendant government official in any subsequent lawsuit for damages.").

[9] *Acevedo*, 500 U.S. at 581 (Scalia, J., concurring) ("What [the Fourth Amendment] explicitly states regarding warrants is by way of limitation upon their issuance rather than a requirement of their use."); Amar, *supra* note 4, at 771-72, 782, 785 (explaining that the Framers wanted to limit the warrant because of its "imperial and ex parte" nature); Richard Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 72 ("The natural reading is not that the Framers wanted to encourage the use of warrants but that they wanted to discourage their use by imposing stringent requirements on their issuance."); *see also* Thomas Y. Davies, *Can You Handle the Truth? The Framers Preserved Common-Law Criminal Arrest and Search Rules in "Due Process of Law"—"Fourth Amendment Reasonableness" Is Only a Modern, Destructive, Judicial Myth*, 43 TEX. TECH L. REV. 51, 57, 58-63 (2010).

[10] *See* TAYLOR, *supra* note 4, at 23, 44-46 (describing the evolution of the warrant from its original status as a "dangerous authorization" to its current status as a "safeguard against oppressive searches"); Amar, *supra* note 4, at 771-72 (explaining that the Framers wanted to limit warrants because warrants were issued by a "government official on the imperial payroll"); Posner, *supra* note 9, at 73 ("The use of the magistrate as a shield against liability would be the opposite of what the draftsmen of the warrant clause intended.").

[11] The Court frequently cites articles and books by Professors Amar and Taylor. *See, e.g.*, Riley v. California, 134 S. Ct. 2473, 2495 (2014) (Alito, J., concurring); Virginia v. Moore, 553 U.S. 164, 168-69 (2008); Atwater v. City of Lago Vista, 532 U.S. 318, 336 (2001); *Acevedo*, 500 U.S. at 582 (Scalia, J., concurring).

[12] *Acevedo*, 500 U.S. at 582 (Scalia, J., concurring) (describing the warrant as "basically unrecognizable" due to all the exceptions); United States v. Place, 462 U.S. 696, 721 (1983) (Blackmun, J., concurring); Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1475 (1985) (explaining that more searches are performed pursuant to an exception than a warrant); Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 34 (1988) ("[T]he rule is now so riddled with exceptions, complexities, and contradictions that it has become a trap for the unwary.").

[13] *See, e.g.*, Kentucky v. King, 131 S. Ct. 1849, 1864 (2011) (Ginsburg, J., dissenting) ("In lieu of presenting their evidence to a neutral magistrate, police officers may now knock, listen, then break the door down, nevermind that they had ample time to obtain a warrant."); United States v. Ross, 456 U.S. 798, 827-35 (1982) (Marshall, J., dissenting) ("By equating

time, the Court has expanded the immunity function of warrants, realizing our founders' fears by barring civil actions where officers violate the Fourth Amendment in "good faith."[14] The result is a wholly unsatisfying body of doctrine that fails on both conceptual and practical grounds.[15]

Debates about the warrant requirement, its extension, and its effects have gained new salience as law enforcement increases its reliance on modern surveillance and data aggregation technologies,[16] such as stingrays,[17] GPS

a police officer's estimation of probable cause with a magistrate's, the Court utterly disregards the value of a neutral and detached magistrate."); New York v. Belton, 453 U.S. 454, 463-69 (1980) (Brennan, J., dissenting); *see also Place*, 462 U.S. at 721 (Blackmun, J., concurring) (expressing concern over the Court's willingness to interpret the Fourth Amendment as requiring only that the search be reasonable).

[14] Anderson v. Creighton, 483 U.S. 635, 644 (1987) (establishing the good faith exception in civil actions); United States v. Leon, 468 U.S. 897, 925-26 (1984) (establishing the good faith exception in the suppression context). For critical examinations of the impact of these exceptions see David Gray, *A Spectacular Non Sequitur: The Supreme Court's Contemporary Fourth Amendment Exclusionary Rule Jurisprudence*, 50 AM. CRIM. L. REV. 1, 29-51 (2013), and Jennifer E. Laurin, *Trawling for* Herring*: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670, 739-43 (2011).

[15] *See Acevedo*, 500 U.S. at 582-84 (Scalia, J., concurring) (describing the Court's Fourth Amendment jurisprudence as inconsistent, moving back and forth between a strict warrant requirement and a reasonableness requirement); Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1610-11 (2012); Debra Livingston, *Police, Community Caretaking, and the Fourth Amendment*, 1998 U. CHI. LEGAL F. 261, 263 (arguing that the exceptions to the warrant requirement fail to accommodate all of the factual circumstances in which police intrude into private space); Stuntz, *supra* note 4, at 885 (arguing that the warrant tradition is nonsensical and that the reasons for its existence are not obvious); Wasserstrom & Seidman, *supra* note 12, at 34.

[16] *See, e.g.*, Marc Jonathan Blitz, *The Fourth Amendment Future of Public Surveillance: Remote Recording and Other Searches in Public Space*, 63 AM. U. L. REV. 21, 48-67 (2013); David Gray & Danielle Keats Citron, *A Shattered Looking Glass: The Pitfalls and Potential of the Mosaic Theory of Fourth Amendment Privacy*, 14 N.C. J.L. & TECH. 381, 422-28 (2013); Gray & Citron, *supra* note 3, at 103-25 ("Today, the risk of a surveillance state arises with law enforcement's unfettered access to advanced surveillance technologies, including aerial drones, GPS-enabled tracking devices, and data aggregation and mining projects . . . ."); Stephen E. Henderson, *Real-Time and Historic Location Surveillance After* United States v. Jones*: An Administrable, Mildly Mosaic Approach*, 103 J. CRIM. L. & CRIMINOLOGY 803, 823-25 (2013); Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311, 338-39 (2012); Paul Ohm, *The Fourth Amendment in a World Without Privacy*, 81 MISS. L.J. 1309, 1332 (2012) ("[E]ven if we increase probable cause and warrant requirements, we still will be subject to far too much arbitrary surveillance."); Christopher Slobogin, *Making the Most of* United States v. Jones *in a Surveillance Society: A Statutory Implementation of Mosaic Theory*, 8 DUKE J. CONST. L. & PUB. POL'Y 1, 16-28 (2012). For discussions of the role played by private entities in the expanding surveillance state, see Chris Jay Hoofnagle, *Big Brother's Little Helpers: How ChoicePoint and Other Commercial Data Brokers Collect and Package Your Data for Law Enforcement*, 29 N.C. J. INT'L L. & COM. REG. 595, 595-96 (2004); Natasha Singer, *You for*

devices,[18] cell-site tracking,[19] Radio-Frequency Identification ("RFID") tags,[20] "Big Data,"[21] and fusion centers.[22] Notoriously, documents leaked by Edward Snowden showed that the National Security Administration and the Federal Bureau of Investigation have been engaged in large-scale monitoring of internet activity[23] and the metadata associated with domestic telephone calls.[24]

Sale, N.Y. TIMES, June 17, 2012, at BU1 (analyzing the growth of database marketing, which collects information on consumers and sells it to retailers).

[17] *See, e.g.*, Ellen Nakashima, *Secrecy Around Police Surveillance Equipment Proves a Case's Undoing*, WASH. POST (Feb. 22, 2015), http://www.washingtonpost.com/world/national-security/secrecy-around-police-surveillance-equipment-proves-a-cases-undoing/2015/02/22/ce72308a-b7ac-11e4-aa05-1ce812b3fdd2_story.html?hpid=z1 [https://perma.cc/5G9U-HL9L] (explaining how a cell-tower simulator, also known as a stingray, works).

[18] *See, e.g.*, United States v. Jones, 132 S. Ct. 945, 949-53 (2012) (holding that the government's placement of a GPS tracking device on the defendant's wife's vehicle constituted a search under the Fourth Amendment).

[19] *Id.* at 955 (Sotomayor, J., concurring) (discussing new modes of surveillance that depend on electronic signals); *id.* at 963-64 (Alito, J., concurring) (describing the effects of technological advances, such as cellphone technology that allows a provider to track a phone's exact location, on our expectations of privacy).

[20] *See* Katherine Albrecht, *RFID Tag–You're It*, SCI. AM., Sept. 2008, at 72; Christopher Zara, *Disney World's RFID Tracking Bracelets Are a Slippery Slope, Warns Privacy Advocate*, INT'L BUS. TIMES (Jan. 8, 2013), http://www.ibtimes.com/disney-worlds-rfid-tracking-bracelets-are-slippery-slope-warns-privacy-advocate-1001790 [https://perma.cc/WG9D-AZ37].

[21] The term "Big Data" is used here to describe the combination of large-scale data aggregation and sophisticated data analysis in order to identify patterns. *See, e.g.*, FRANK PASQUALE, THE BLACK BOX SOCIETY 19-58 (2014); Gray & Citron, *supra* note 3, at 112-24 (describing data aggregation and mining technologies); David Gray, Danielle Keats Citron & Liz Clark Rinehart, *Fighting Cybercrime After* United States v. Jones, 103 J. CRIM. L. & CRIMINOLOGY 745, 765-70 (2013).

[22] *See, e.g.*, Danielle Keats Citron & Frank Pasquale, *Network Accountability for the Domestic Intelligence Apparatus*, 62 HASTINGS L.J. 1441, 1448-55 (2011) (describing domestic intelligence gathering and information sharing through fusion centers, and arguing that fusion centers not only encroach on civil liberties but are also wasteful); Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1083, 1084-89 (2002).

[23] *See, e.g.*, Barton Gellman & Laura Poitras, *U.S., British Intelligence Mining Data from Nine U.S. Internet Companies in Broad Secret Program*, WASH. POST (June 7, 2013), http://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf-11e2-8845-d970ccb04497_story.html [https://perma.cc/9SMJ-QDUJ]; Glenn Greenwald, *XKeyscore: NSA Tool Collects 'Nearly Everything a User Does on the Internet,'* GUARDIAN (July 31, 2013), http://www.theguardian.com/world/2013/jul/31/nsa-top-secret-program-online-data [https://perma.cc/4BQA-KZWR].

[24] *See* ACLU v. Clapper, 959 F. Supp. 2d 724, 749-52 (S.D.N.Y. 2013) (holding that a telephone subscriber "has no legitimate expectation of privacy in telephone metadata

Although several justices have indicated their willingness to modify Fourth Amendment doctrine[25]—such as the "third-party"[26] and "public observation"[27] doctrines—in order to bring these programs and technologies within the compass of Fourth Amendment regulation, none have indicated whether, why, or how warrants might play a role.[28]

created by third parties"); Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, GUARDIAN (June 6, 2013), http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order [https://perma.cc/6JEV-FM74]; Ellen Nakashima & Sari Horwitz, *Newly Declassified Documents on Phone Records Program Released*, WASH. POST (July 31, 2013), https://www.washingtonpost.com/world/national-security/governments-secret-order-to-verizon-to-be-unveiled-at-senate-hearing/2013/07/31/233fdd3a-f9cf-11e2-a369-d1954abcb7e3_story.html?hpid=z1 [https://perma.cc/R2JR-U8EU]; Dan Roberts & Spencer Ackerman, *Anger Swells After NSA Phone Records Court Order Revelations*, GUARDIAN (June 6, 2013), http://www.theguardian.com/world/2013/jun/06/obama-administration-nsa-verizon-records [https://perma.cc/RUN4-BG6K] ("[T]he order only relates to the so-called metadata surrounding phone calls rather than the content of the calls themselves.").

[25] *Cf.* United States v. Jones, 132 S. Ct. 945, 956-57 (2012) (Sotomayor, J., concurring) (suggesting that conceptions of privacy will need to evolve with the digital age); *id.* at 958, 962-64 (Alito, J., concurring) (discussing the difficulty of applying traditional legal doctrines, like trespass, to modern surveillance).

[26] The third-party doctrine holds that if a citizen shares information with a third party, then she has no Fourth Amendment complaint if that third party subsequently shares that information with the government. *See* Smith v. Maryland, 442 U.S. 735, 741-42 (1979) (holding that people willingly supply the numbers they dial to the phone company and thus have no expectation of privacy over those numbers); Cal. Bankers Ass'n v. Shultz, 416 U.S. 21, 54 (1974) (holding that a bank did not violate the Fourth Amendment when it gave a depositor's records to the government); United States v. White, 401 U.S. 745, 752 (1971) (holding that when a wrongdoer's accomplice records or transmits a conversation for authorities, no Fourth Amendment right has been violated); Hoffa v. United States, 385 U.S. 293, 302 (1966).

[27] The public observation doctrine holds that law enforcement officers can freely make observations from any place where they lawfully have a right to be. *See* Florida v. Riley, 488 U.S. 445, 449-50 (1989) (holding that the police did not need a warrant to inspect a backyard from a helicopter because the airways are public); Dow Chem. Co. v. United States, 476 U.S. 227, 251 (1986) ("We hold that the taking of aerial photographs of an industrial plant complex from navigable airspace is not a search prohibited by the Fourth Amendment."); California v. Ciraolo, 476 U.S. 207, 215 (1986); United States v. Knotts, 460 U.S. 276, 281-82 (1983) ("A person traveling in an automobile on public thoroughfare has no reasonable expectation of privacy in his movements from one place to another.").

[28] As these debates raged, the Court decided *Riley v. California*, 134 S. Ct. 2473, 2494 (2014) ("Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant."). Tracking a technology-centered approach, *see* Gray & Citron, *supra* note 3, the Court held that searches of "smartphones" do not fall within the scope of one important exception to the warrant requirement: the search incident to arrest rule. *Id.* at 2495. The Court did little to resolve debates about the warrant requirement or its application to contemporary surveillance

This article seeks both to resolve persistent debates about the warrant requirement and to set the stage for a productive, organized, coherent, and doctrinally responsible conversation about the role of warrants and other remedial[29] measures in an era of technologically enhanced surveillance. It does so by novel means, using a conventional Fifth Amendment story to tell an unconventional Fourth Amendment story.

In order to resolve Fifth Amendment concerns about the "inherently coercive atmosphere" endemic to custodial interrogations, the Court held in *Miranda v. Arizona*,[30] and again in *Dickerson v. United States*,[31] that officers must inform suspects that they have the right to remain silent, anything they say will be used against them in subsequent proceedings, they have the right to have an attorney present during questioning, and, if they cannot afford an attorney, that an attorney will be provided.[32] Although the Court has admitted that these prophylactic measures cannot be derived directly from the text of the Fifth Amendment, it nevertheless maintains that *Miranda* warnings are constitutional because they prescribe a prospective remedial structure that is effective in addressing constitutional concerns, are readily enforceable by

technologies, however. Despite skepticism expressed by several justices, the *Riley* Court simply assumed the warrant requirement's status as the Fourth Amendment default. *Id*. at 2482.

More importantly, however, the technology at issue in *Riley* was a consumer-owned smartphone, not a government-operated surveillance technology. *Id.* at 2477. Although smartphones are novel containers unforeseen by our eighteenth-century forebears, they are containers nonetheless, and therefore do not tax Fourth Amendment imagination or doctrine. *See, e.g.*, United States v. Flores-Lopez, 670 F.3d 803, 805 (7th Cir. 2012) (explaining that cellphones carry more personal information than the conventional "container"). By contrast, law enforcement's use of GPS tracking, drones, networked surveillance systems, and Big Data technologies raises serious questions about Fourth Amendment rights and remedies not readily answered by appeals to familiar forms. *See Jones*, 132 S. Ct. at 963-64 (Alito, J., concurring) ("In circumstances involving dramatic technological change, the best solution to privacy concerns may be legislative."). Some state courts have filled in the gap. *See, e.g.*, Commonwealth v. Augustine, 4 N.E.3d 846, 865-68 (Mass. 2014) (holding that Massachusetts citizens have a right under the Massachusetts constitution not to be tracked using cell-site location information absent judicial authorization).

[29] As used here, "remedy" and "remedial" mean "[t]he means of enforcing a right or preventing or redressing a wrong." *Remedy*, BLACK'S LAW DICTIONARY (10th ed. 2014). Under this definition, remedies may act prospectively to secure rights or retrospectively to address violations.

[30] 384 U.S. 436, 455 (1966); *see infra* Part II.

[31] 530 U.S. 428, 435 (2000) (describing custodial interrogations as inherently coercive).

[32] *Miranda*, 384 U.S at 478-79.

courts and law enforcement agencies, and are parsimonious[33] with respect to their impact on legitimate law enforcement pursuits.[34]

As is argued below, the warrant requirement is best understood as a constitutional remedy akin to the *Miranda* prophylaxis. Developed in response to emerging threats posed by the rise of professional, paramilitary police forces during the late nineteenth and early twentieth centuries, the warrant requirement helps guarantee the right of the people to security in their persons, houses, papers, and effects by imposing prospective constraints on law enforcement's ability to conduct physical searches of constitutionally protected areas. The argument proceeds in five parts. Part I provides a brief overview of conventional debates about the sources and constitutional status of the Fourth Amendment warrant requirement. It concludes by suggesting that these debates are misguided because they proceed on the assumption that, to claim constitutional status, the warrant requirement must be grounded in the warrant clause. Part II sets the stage for an alternative view of the warrant requirement as a constitutional remedy by revisiting the historical context of the Court's decision in *Miranda* and the standards elaborated by the Court for enforcing constitutional remedies. Part III engages in a close reading of the text and historical context of the Fourth Amendment. It concludes that the Fourth Amendment requires the enforcement of general remedies sufficient to preserve the security of the people in their persons, houses, papers, and effects from threats posed by the otherwise unconstrained authority or unlimited discretion of government agents to conduct searches and seizures. Part IV argues that the warrant requirement emerged as just such a remedy, responding to threats against the security of the people posed by the rise of professional, paramilitary police forces. Part V concludes by suggesting some of the ways this account of the Fourth Amendment can help guide courts and policy-makers as they contend with emerging surveillance and data aggregation technologies.[35]

I. THE WARRANT REQUIREMENT AND ITS CRITICS

The Supreme Court's first explicit acknowledgement of the warrant requirement was in *Agnello v. United States*,[36] decided in 1925. Writing for the

[33] Here and throughout this article, "parsimony" is used in the sense of "economy in the use of means to an end." *Parsimony*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/parsimony [https://perma.cc/4XA8-RQX3].

[34] *See, e.g.*, *Miranda*, 384 U.S. at 490-91. Critics vigorously contest the Court's views on the effectiveness of the prophylaxis. *See, e.g.*, Yale Kamisar, *The Rise, Decline, and Fall (?) of* Miranda, 87 WASH. L. REV. 965, 991-96 (2012).

[35] For a fuller account of how legislatures, executives, and courts might structure and enforce remedies capable of meeting constitutional demands in the twenty-first century, see David Gray & Danielle Citron, Fourth Amendment Remedies as Rights: Remedies and the Right to Quantitative Privacy (Mar. 1, 2015) (unpublished manuscript) (on file with author).

[36] 269 U.S. 20, 32 (1925).

Court, Justice Butler did not offer a textual or historical foundation for the warrant requirement. Rather, he suggested that "it has always been assumed that one's house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein."[37] It does not appear that this assumption met with much challenge or controversy at the time. That began to change in the last quarter of the twentieth century with the rise of originalism.[38]

The Court's Fourth Amendment jurisprudence has been a frequent target for originalists.[39] These critics have been particularly hard on Fourth Amendment remedies, including the warrant requirement.[40] Among them, Akhil Amar has been perhaps the most influential. According to Professor Amar, the warrant requirement stakes its constitutional bona fides in the Warrant Clause and "an implicit third [command] that no searches and seizures may take place except pursuant to a warrant."[41] Amar contends that this broad rule has no foundation in either the text or history of the Fourth Amendment.[42] For example, he points out that late eighteenth-century common law allowed for warrantless arrests in public, warrantless searches incident to arrest, and warrantless seizures of contraband.[43] From this historical evidence, he concludes that the Fourth Amendment would not have been read to impose a warrant requirement in 1791.[44] Amar also highlights laws passed by the early congresses authorizing naval inspectors to search ships and seize contraband without warrants, which, he concludes, shows that the founders did not embed a warrant requirement in the Fourth Amendment.[45] Finally, he scrolls through various "exceptions" to

[37] *Id*. The Court later withdrew from the exception identified by Justice Butler in *Agnello*. *See* Payton v. New York, 445 U.S. 573, 589-90 (1980) (holding that law enforcement must have an arrest warrant in order to conduct a search incident to arrest of a suspect's home).

[38] The foremost flag-bearers for originalism on the Court have been Justices Scalia and Thomas. *See, e.g.*, Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 37-47 (Amy Gutmann ed., 1997).

[39] *See, e.g.*, TAYLOR, *supra* note 4, at 38-46; Amar, *supra* note 4, at 757.

[40] *See, e.g.*, TAYLOR, *supra* note 4, at 23-49; Amar, *supra* note 4, at 761-81 ("[I]f a warrant requirement truly did go without saying, leading eighteenth- and nineteenth-century authorities did not think so.").

[41] Amar, *supra* note 4, at 762.

[42] *Id*. at 763-68.

[43] *Id*. ("[I]f any members of the early Congress objected to or even questioned these warrantless searches and seizures on Fourth Amendment grounds, supporters of the so-called warrant requirement have yet to identify them.").

[44] *Id*. at 764-68.

[45] *Id*. at 766-67 (explaining that these maritime statutes were passed during the same session in which the Fourth Amendment was adopted). Most of these laws were repealed—some as early as the very next congress after their passage. *See id.* at 766 nn.27-29. Amar

the warrant requirement, including exigency, consent, airport security, special needs searches, border searches, and "plain view" searches, which demonstrate that "it makes no sense to say that all warrantless searches and seizures are per se unreasonable."[46]

Unfortunately, Amar has an interlocutor problem. Nobody, or at least nobody he can cite, argues for the kind of broad, general warrant requirement targeted by his critique.[47] To the contrary, the warrant requirement has always been much narrower, applying only to homes and similar highly protected areas.[48] Amar rightly points out that even this more modest version of the warrant requirement finds no support in the Warrant Clause.[49] Here again, however, he has an interlocutor problem. Nobody who advocates for the warrant requirement, or at least nobody Amar can cite, purports to derive it from the Warrant Clause.[50] To be sure, Professor Amar is not entirely to blame

does not explain the impact of these rapid changes of heart on his interpretation of the Fourth Amendment.

[46] *Id*. at 768-70. This strategy for undermining constitutional rules was considered and rejected in *Dickerson v. United States*, 530 U.S. 428, 438, 441 (2000) ("No court laying down a general rule can possibly foresee the various circumstances in which counsel will seek to apply it, and the sort of modifications represented by these cases are as much a normal part of constitutional law as the original decision.").

[47] Amar, *supra* note 4, at 762 & n.8, 770 (failing to cite any proponents of the per se approach "that no searches and seizures may take place except pursuant to a warrant"). The cases Amar cites, *Mincey v. Arizona*, 437 U.S. 385, 390 (1978), *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971), and *Johnson v. United States*, 333 U.S. 10, 14-15 (1948), entailed searches of homes or their constitutional equivalent. Amar, *supra* note 4, at 762 n.7. The fact that officers intruded upon places traditionally granted the highest degree of Fourth Amendment protection played a critical role in all these cases. It would therefore be wrong to conclude that any of them relied upon a broad, general, per se warrant rule. It is true that *Mincey* and *Coolidge* repeat a line of purple prose from *Katz v. United States*, 389 U.S. 347, 357 (1967), reading "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment." *See Mincey*, 437 U.S. at 390; *Coolidge*, 403 U.S. at 454-55. In context, however, that quote looks like a throwaway line from Justice Stewart. In that portion of the opinion, he is responding to the government's argument that its agents could have secured a warrant if they had tried, and, therefore, no prejudice should befall the prosecution simply because the officers did not get a warrant. *Katz*, 389 U.S. at 356-57. As Justice Stewart points out, such a rule would fail to protect the security of the people. *Id*.

[48] *See, e.g.*, Camara v. Mun. Court, 387 U.S. 523, 528-29 (1967) ("[E]xcept in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant."); Agnello v. United States, 269 U.S. 20, 32 (1925); TAYLOR, *supra* note 4, at 49; Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 601-11 (1999) ("[B]ecause the house enjoyed special status at common law . . . a valid warrant was usually required to justify 'breaking' a house.").

[49] Amar, *supra* note 4, at 770-71.

[50] *Id.* at 770 (failing to cite any proponents of a "Modified Per Se Approach").

for this lack of argumentative clash. Both the literature and the case law are virtually devoid of robust textual, historical, or practical defenses of the warrant requirement.[51] Following Justice Butler in *Agnello*, courts and scholars simply assume the constitutional status of the warrant requirement.[52] The result is a rather dimly lit area of constitutional law. This article seeks to cast some light onto those shadows, defending the warrant requirement as a constitutional remedy grounded in the reasonableness clause.

II. *MIRANDA* AND THE CONCEPT OF CONSTITUTIONAL REMEDIES

The warrant requirement did not emerge in isolation. *Agnello* and its progeny were decided during an era when the Court was confronting a range of law enforcement excesses and working to develop responsive constitutional remedies.[53] Examining these parallel efforts offers valuable insight into the genesis and constitutional status of the warrant requirement. The Court's struggles to guarantee Fifth Amendment rights are particularly illuminating.

When it was ratified in 1791, the Fifth Amendment's prohibition on compelled self-incrimination was understood as a trial right.[54] There is no evidence in the text or history of the Fifth Amendment suggesting constraints on extra-judicial interrogations, much less a general right to remain silent or to have an attorney present during police questioning. In a series of early twentieth-century cases, the Court nevertheless guaranteed those subjected to custodial interrogation the right to remain silent, the right to an attorney, the right to terminate an interrogation, and the right to be apprised of these rights.[55] Despite the absence of clear textual or historical foundation, the Court was quite clear that these rights are constitutional and, therefore, cannot be abrogated by legislative or executive action.[56] The Court bridged the apparent gap by focusing on the changing nature of law enforcement and law enforcement practices during the late nineteenth and early twentieth centuries,

[51] *See* TAYLOR, *supra* note 4, at 44 (explaining that cases from the nineteenth century rarely "expound a general constitutional theory of search and seizure").

[52] *Id.* at 23.

[53] *See infra* Part IV.

[54] United States v. Patane, 542 U.S. 630, 641 (2004) (citing Withrow v. Williams, 507 U.S. 680, 691 (1993)).

[55] *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 478-79 (1966); Escobedo v. Illinois, 378 U.S. 478, 490 (1964) ("We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights.").

[56] *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 432 (2000); *Miranda*, 384 U.S. at 490-91 ("[T]he issues presented are of constitutional dimensions and must be determined by the courts. . . . Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them.").

and the practical effects of those changes on the Fifth Amendment privilege against compelled self-incrimination.

Professional police forces and custodial interrogations were largely unknown to Americans in 1791.[57] Private citizens investigated criminal offenses and witnesses were questioned under oath in open court by grand juries or magistrates.[58] Experiences with inquisitions and the Star Chamber provided ample demonstrations of opportunities to abuse procedural and substantive rights in these forums.[59] The Fifth Amendment responded to those known dangers by constitutionalizing the common law rule *nemo tenetur se ipsum accusare* ("no man is bound to accuse himself"), which was well established by the late eighteenth century.[60] By its text, and according to then-contemporary understandings, the Fifth Amendment did not and could not guard against unknown unknowns, however. Its compass and meaning were constrained by experience and imagination. The Fifth Amendment therefore did not reach into the sphere of custodial interrogations conducted by professional police officers because neither the practice nor the practitioners existed.

The law enforcement landscape had changed dramatically by the early years of the twentieth century.[61] Professional paramilitary police forces had become the norm.[62] Officers trained and experienced in the "art of interrogation" took over criminal investigations.[63] Either in the form of written and signed statements or through the testimony of officers, the fruits of their labors were routinely admitted at trial.[64] In the process, concerns about self-accusation migrated from the historically familiar territory of formal magisterial

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[57] Wesley MacNeil Oliver, *The Neglected History of Criminal Procedure, 1850-1940*, 62 RUTGERS L. REV. 447, 447-48 (2010).

[58] Davies, *supra* note 48, at 620-24, 640-42 ("[T]he mobilization of criminal justice depended almost entirely on private initiation of criminal prosecutions."); Oliver, *supra* note 57, at 453-56.

[59] *Miranda*, 384 U.S. at 458-60 (explaining that the Star Chamber Oath required those testifying to answer all questions on any subject); Brown v. Walker, 161 U.S. 591, 596-97 (1896) (recounting the historically harsh treatment of witnesses during inquisitions).

[60] *See Brown*, 161 U.S. at 596-97.

[61] *Miranda*, 384 U.S. at 445-46 (citing reports demonstrating the brutality of policing from 1931 through 1961).

[62] Oliver, *supra* note 57, at 459 (explaining that the structure of professional police forces by the early twentieth century provided incentives to aggressively investigate crime).

[63] *See id.* at 483 ("In the Progressive Era, courts . . . were willing to permit police officers discretion to engage in violence against suspected criminals.").

[64] *See, e.g.*, *id.* at 489 ("[T]he New York Court of Appeals . . . allow[ed] the admission of questionable confessions even in cases in which the allegations against the police were extreme and credible.").

proceedings to the dark backrooms of police stations, where officers routinely used "enhanced" interrogation techniques.[65]

By the early twentieth century, violence and intimidation had become familiar features of custodial police interrogations.[66] According to the famous Wickersham Report, commissioned by President Hoover and submitted to Congress in 1931, "the third degree—that is, the use of physical brutality, or other forms of cruelty, to obtain involuntary confessions or admissions—[was] widespread" in the early decades of the twentieth century.[67] Despite these widespread abuses, the political branches took little or no action. It therefore fell to the courts to impose constitutional constraints.[68]

Starting in 1936 with *Brown v. Mississippi*,[69] the Court began to exercise supervisory authority over custodial interrogations through the Due Process Clauses of the Fifth and Fourteenth Amendments.[70] In these cases, the Court held that involuntary confessions, along with any investigative fruits stemming from those confessions, must be excluded at trial.[71] By enforcing this ex post rule, the Court hoped to change officers' behavior by preventing the use of

[65] *See, e.g.*, Brown v. Mississippi, 297 U.S. 278, 285-86 (1936) (describing law enforcement officers' use of "[c]ompulsion by torture" to extract a confession).

[66] Oliver, *supra* note 57, at 483-85 (describing how courts allowed police to use violence against suspects to obtain information and confessions throughout the Progressive Era).

[67] NAT'L COMM'N ON LAW OBSERVANCE & ENF'T, No. 11, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 4 (1931) [hereinafter WICKERSHAM REPORT].

[68] *See* Miranda v. Arizona, 384 U.S. 436, 463 (1966) (explaining that while the Federal Rules of Criminal Procedure protected constitutional rights to an extent, the Court needed to deal with the constitutional issues surrounding interrogations).

[69] 297 U.S. 278, 286 (1936).

[70] *See, e.g.*, Leyra v. Denno, 347 U.S. 556, 561 (1954) ("We hold that use of confessions extracted [through physical violence] from a lone defendant unprotected by counsel is not consistent with due process of law as required by our Constitution."); Malinski v. New York, 324 U.S. 401, 410 (1945) ("Coerced confessions would find a way of corrupting the trial if we sanctioned the[ir] use . . . . Constitutional rights may suffer as much from subtle intrusions as from direct disregard."); Ashcraft v. Tennessee, 322 U.S. 143, 155 (1944) ("The Constitution of the United States stands as a bar against the conviction of any individual in an American court by means of a coerced confession."); Ward v. Texas, 316 U.S. 547, 555 (1942) ("The use of a confession obtained under such [coercive] circumstances is a denial of due process . . . ."); White v. Texas, 310 U.S. 530, 533 (1940) (holding that whipping a suspect until he gives a confession is clearly unconstitutional); Chambers v. Florida, 309 U.S. 227, 241 (1940) ("Due process of law, preserved for all by our Constitution, commands that no such [coercive interrogation] practice as that disclosed by this record shall send any accused to his death.").

[71] *See* Dickerson v. United States, 530 U.S. 428, 432-34 (2000) ("Over time, our cases recognized two constitutional bases for the requirement that a confession be voluntary to be admitted into evidence: the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fourteenth Amendment. . . . We have never abandoned this due process jurisprudence, and thus continue to exclude confessions that were obtained involuntarily.").

coercive techniques and intimidation during law enforcement interrogations. Unfortunately, that experiment failed.

As the Court reported in *Miranda v. Arizona*, decided in 1967, the use of coercive techniques and intimidation during custodial interrogations was still widespread well into the middle of the twentieth century.[72] Although many officers had moved away from physical violence, cases, training manuals, and unapologetic self-reports documented the ubiquitous use of threats, sleep deprivation, humiliation, psychological manipulation, and trickery.[73] Interrogators also made a habit of continuing interrogations after subjects expressed their desire to remain silent or asked for attorneys.[74] Law enforcement thus appeared to have acknowledged the letter of *Brown* and its progeny, but missed the spiritual message. Officers adjusted their practices only as much as was necessary "to avoid a charge of duress that [could] be technically substantiated."[75]

Confronted with widespread use of custodial interrogations dominated by professional police interrogators, the Court could not ignore the obvious: the Fifth Amendment prohibition on compelled self-incrimination was being circumnavigated on a daily basis in police stations around the country.[76] The only reasonable response, according to the Court, was to extend the Fifth Amendment into the interrogation room[77] by imposing prospective remedial measures sufficient "to dispel the compulsion inherent in custodial surroundings."[78] The Court's reasoning is both illuminating and instructive in the context of our present effort to understand the Fourth Amendment warrant requirement.

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[72] *Miranda*, 384 U.S. at 446-47 ("The use of physical brutality and violence is not, unfortunately, relegated to the past . . . . Only recently . . . the police brutally beat, kicked and placed lighted cigarette butts on the back of a potential witness under interrogation . . . .").

[73] *Id*. at 448-53 (explaining that training manuals had incorporated descriptions of the "most effective" interrogation techniques aimed at getting suspects to voluntarily give up their rights).

[74] *See id.* at 454 (describing a police interrogation manual, which recommended that interrogators suggest to subjects that they should not request an attorney because of the cost or because telling the truth is all that is necessary); Spano v. New York, 360 U.S. 315, 326 (1959) ("This *secret inquisition* by the police when defendant asked for and was denied counsel was a[] serious . . . invasion of his constitutional rights . . . .").

[75] *Miranda*, 384 U.S. at 451 (quoting CHARLES E. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 112 (1956)).

[76] *Id.* at 445, 457-58 ("The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself.").

[77] *Miranda*, 384 U.S. at 467 (holding that Fifth Amendment privileges are available outside of criminal court proceedings in settings such as custodial interrogations).

[78] *Id*. at 450, 458.

The *Miranda* Court denied that extending the Fifth Amendment outside the courtroom marked any "innovation in [the Court's] jurisprudence."[79] Rather, the Court characterized its holding as "an application of principles long recognized."[80] It nevertheless adverted to Chief Justice Marshall's frequently cited command that the Constitution must be read and applied in order that it shall "approach immortality as nearly as human institutions can approach it."[81] For the *Miranda* Court, obeying this command required not only extending the reach of the Fifth Amendment, but also imposing prospective remedies capable of curbing "broad . . . mischief"[82] and adapting to "what may be."[83] Absent such measures, the Court worried that constitutional rights themselves would be little more than "impotent and lifeless formulas," "declared in words [but] lost in reality"[84] through "subtle encroachments on individual liberty."[85]

As the Court noted in *Brown v. Walker*, and confirmed in *Miranda*, "subtle encroachments" on Fifth Amendment rights, occasioned by the rise of professional police forces and their expanding reliance on custodial interrogations, had reached a tipping point by the first half of the twentieth century.[86] These "deviations from legal modes of procedure"[87] were not caused by widespread malice or malfeasance. To the contrary, the Court regarded temptations to escalate questioning with undue pressure, browbeating, psychological trickery, and even violence, as inherent to the enterprise of custodial interrogations.[88] Even where officers were able to recognize and resist these temptations, the fact that interrogations were conducted incommunicado by trained police agents produced "inherently compelling pressures which work[ed] to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely."[89] In the Court's view, the Fifth Amendment mandated measures sufficient to address and curb these "overzealous police practices."[90] As final guardians of

[79] *Id*. at 442.

[80] *Id*.

[81] *Id*. (quoting Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 387 (1821)).

[82] *Id*. at 459-60, 490-91 (quoting Counselman v. Hitchcock, 142 U.S. 547, 562 (1892)).

[83] *Id*. at 443-44 (quoting Weems v. United States, 217 U.S. 349, 373 (1910)).

[84] *Id*.

[85] *Id*. at 459.

[86] *Id*. at 458-60; Brown v. Walker, 161 U.S. 591, 596-97 (1896); *see also* WICKERSHAM REPORT, *supra* note 67, at 5 (reporting the prevalence of violent police interrogation tactics in the early part of the twentieth century).

[87] *Miranda*, 384 U.S. at 459 (quoting Boyd v. United States, 116 U.S. 616, 635 (1886)).

[88] *Id*. at 442-43 (quoting *Brown*, 161 U.S. at 596-97).

[89] *Id*. at 467.

[90] *Id*. at 444; *see also* Dickerson v. United States, 530 U.S. 428, 435 (2000) ("We concluded [in *Miranda*] that the coercion inherent in custodial interrogation . . . heightens the risk that an individual will not be 'accorded his privilege under the Fifth

constitutional rights, it was the Court's duty to "insure that what was proclaimed in the Constitution had not become but a 'form of words' in the hands of government officials."[91] The result was the *Miranda* prophylaxis.[92]

The *Miranda* prophylaxis is familiar to any consumer of televised police procedurals:[93]

> [A suspect] must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.[94]

There are several characteristics of the *Miranda* prophylaxis that are important to highlight in the context of our archeological exploration of the warrant requirement. First, the Court regarded the prophylaxis as an effective measure closely tailored to meet its specific constitutional concerns.[95] As the Court pointed out, apprising a defendant of his rights is a "threshold requirement for an intelligent decision as to [their] exercise."[96] It also "overcom[es] the inherent pressures of the interrogation atmosphere."[97] "Further, the warning will show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it."[98] Informing a suspect of the consequences should he choose to speak—"that anything said can and will be used against the [suspect] in court"—further provides an "assurance of real understanding and intelligent exercise of the privilege."[99] Finally, the right to counsel "assure[s] that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process."[100]

Second, the prophylaxis is relatively easy to enforce in a reliable, predictable, and regular manner. The alternative considered and rejected by the Court was a totality of the circumstances test, which would have required

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Amendment . . . .' Accordingly, we laid down 'concrete constitutional guidelines for law enforcement agencies and courts to follow.'" (quoting *Miranda*, 384 U.S. at 439, 442)).

91 *Miranda*, 384 U.S. at 444, 479-81 (quoting Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)); *see also* TAYLOR, *supra* note 4, at 5.

92 *Miranda*, 384 U.S. at 444-45.

93 *See Dickerson*, 530 U.S. at 443 ("*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.").

94 *Miranda*, 384 U.S. at 479.

95 *See id.* at 467 ("It is impossible for [the Court] to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities.").

96 *Id.* at 468.

97 *Id.*

98 *Id.*

99 *Id.* at 469.

100 *Id.*

courts to determine, based on the facts in any given case, whether the suspect was aware of his rights and made a knowing, intelligent, and voluntary decision to give a statement.[101] Rules based on these kinds of fact-intensive inquiries are difficult to apply consistently and offer very little guidance to law enforcement officers.[102] By contrast, "the expedient of giving an adequate warning as to the availability of the privilege [is] simple"[103] and clear-cut, offering officers in the field "concrete constitutional guidelines."[104] The prophylaxis is also easier for courts to enforce than complicated, subjective assessments of defendants' "knowledge . . . age, education, intelligence, or prior contact with authorities," which often reduce to little "more than speculation."[105]

Third, the Court regarded the prophylaxis as parsimonious in that it struck a conservative balance between the constitutional rights of suspects and the legitimate interests of law enforcement. On this point, the Court described the warnings as "absolute prerequisite[s]" and "indispensable" to preserving Fifth Amendment rights.[106] By contrast, the burdens imposed on law enforcement are minimal and do not negate the opportunity to pursue voluntary confessions through lawful means.[107] By way of evidence, the Court cited the experience of the FBI, which had:

> [C]ompiled an exemplary record of effective law enforcement while advising any suspect or arrested person, at the outset of an interview, that he is not required to make a statement, that any statement may be used against him in court, that the individual may obtain the services of an attorney of his own choice and, more recently, that he has a right to free counsel if he is unable to pay.[108]

The experiences of courts and law enforcement in the decades following *Miranda* have proved that the prophylaxis does not unreasonably interfere with law enforcement.[109] To the contrary, officers often use the warnings to

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[101] *See id*. at 468-69.

[102] *Cf. id.* at 441-42 (explaining that the Court granted certiorari "to give concrete constitutional guidelines for law enforcement agencies and courts to follow").

[103] *Id*. at 468-69.

[104] *Id*. at 442.

[105] *Id*. at 468-69.

[106] *Id*. at 467-69, 471-73.

[107] *Id*. at 477-79, 481 ("Our decision is not intended to hamper the traditional function of police officers in investigating crime. . . . Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. . . . This Court, while protecting individual rights, has always given ample latitude to law enforcement agencies in the legitimate exercise of their duties.").

[108] *Id*. at 483-86.

[109] *See* Dickerson v. United States, 530 U.S. 428, 443-44 (2000) ("If anything, our subsequent cases have reduced the impact of the *Miranda* rule on legitimate law

establish rapport and trust with suspects.[110] To further emphasize the parsimonious nature of its interventions, the *Miranda* Court left the door open to "other fully effective means" that might be "devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it."[111] As the Court noted a generation later, that invitation remains open.[112]

The Court's reasoning in *Miranda* provides valuable insights into the warrant requirement, describing a framework for the development and enforcement of constitutional remedies. Specifically, the Court in *Miranda* took note of broad changes in the nature of state power, the terms of engagement between citizens and state officials, and relationships between law enforcement regimes and their subjects.[113] Principal among these changes was the advent of professional police forces engaged in investigating and prosecuting crime, their use of custodial interrogations designed to secure incriminating statements, and a pattern of abuses. In the Court's view, these developments posed a general and pervasive threat to the Fifth Amendment right against compelled self-incrimination. According to the Court, the only way to resolve these constitutional concerns was to implement a prospective remedy that would be effective in vindicating such concerns, enforceable by executive agents and courts, and parsimonious with respect to its impact on law enforcement's efforts to combat crime. According to the Court, the *Miranda* prophylaxis meets these requirements and is therefore a constitutional remedy to which each of us, and all of us, has a right under the Fifth Amendment. As Part III shows, there is a parallel story to be told about the warrant requirement.

III. FOURTH AMENDMENT RIGHTS TO CONSTITUTIONAL REMEDIES

As Part I recounts, debates about the warrant requirement traditionally focus on whether it can be read from the text of the Fourth Amendment or divined from its original semantic context. These conversations are just as irrelevant to

enforcement while reaffirming the decision's core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief.").

110 In his classic piece of narrative journalism, David Simon describes in compelling detail how officers use *Miranda* warnings to assist them in the interrogation process. *See* DAVID SIMON, HOMICIDE: A YEAR ON THE KILLING STREETS 193-207 (1991).

111 *Miranda*, 384 U.S. at 444, 467; *see also Dickerson*, 530 U.S. at 440 ("Additional support for our conclusion that *Miranda* is constitutionally based is found in the *Miranda* Court's invitation for legislative action to protect the constitutional right against coerced self-incrimination.").

112 *Cf. Dickerson*, 530 U.S. at 440, 443-44 ("[T]he Court [in *Miranda*] . . . opined that the Constitution would not preclude legislative solutions that differed from the prescribed *Miranda* warnings . . . . [O]ur subsequent cases have . . . reaffirm[ed] the decision's core ruling . . . .").

113 *Miranda*, 384 U.S. at 445-55.

understanding the Fourth Amendment warrant requirement as they are to understanding the Fifth Amendment *Miranda* prophylaxis. While the text does not prescribe a warrant requirement,[114] this Part argues that the Fourth Amendment guarantees a collective right to effective constitutional remedies. The Fourth Amendment does, after all, guarantee that the "*right of the people* to be *secure* in their persons, houses, papers, and effects, against unreasonable searches and seizures, *shall not be violated* . . . ."[115] As Part IV will argue, the warrant requirement is just such a constitutional remedy.

A. *"The right of the people . . ."*

There is a common myth which holds that the Bill of Rights is a vessel exclusively for individual rights.[116] Although the Constitution is not a blueprint for communist revolution, the document, inclusive of the Bill of Rights, describes an undeniably collective enterprise.[117] It recognizes the existence of "a people"[118] and guarantees rights designed to protect them from the natural tendency of governments and their agents to extend and abuse their powers.[119]

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[114] *See* Wolf v. Colorado, 338 U.S. 25, 28 (1949).

[115] U.S. CONST. amend. IV (emphasis added).

[116] *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 579 (2008) (asserting that "the right of the people" protected by the Fourth Amendment "unambiguously refer[s] to individual rights, not 'collective' rights, or rights that may be exercised only through participation in some corporate body"); Donald L. Doernberg, *"The Right of the People": Reconciling Collective and Individual Interests Under the Fourth Amendment*, 58 N.Y.U. L. REV. 259, 260 (1983) ("The [Supreme] Court has overtly espoused only an individualized view of the [Fourth] [A]mendment . . . ."). *But see Heller*, 554 U.S. at 580 (concluding that "the people" as used in the Fourth Amendment "refers to all members of the political community, not an unspecified subset").

[117] Donald Doernberg traces this collective dimension of the Constitution to John Locke and his influence on our revolutionary forebears and the framing generation. Donald L. Doernberg, *"We the People": John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CALIF. L. REV. 52, 57-68 (1985).

[118] *See, e.g.*, U.S. CONST. amend. IV.

[119] *See* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 399-401 (1974) (suggesting that the authors of the Bill of Rights were strongly influenced by their experiences with oppressive government); *cf.* N.H. CONST. pt. I, art. X ("Government being instituted for the common benefit, protection, and security, of the whole community, and not for the private interest or emolument of any one man, family, or class of men; therefore, whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought to reform the old, or establish a new government. The doctrine of nonresistance against arbitrary power, and oppression, is absurd, slavish, and destructive of the good and happiness of mankind."); PA. CONST. of 1776, pmbl. (asserting that "all government ought to be instituted and supported for the security and protection of the community as such, and to enable the individuals who compose it, to enjoy their natural rights, and the other blessings which the author of existence has bestowed upon man," but

This collective dimension is an essential feature of the Fourth Amendment, which secures a right "of the people."[120]

The American Revolution of 1776 was neither declared nor waged by a disconnected bunch of mutually alienated solipsistic reactionary libertarians.[121] Rather, the Revolution was fought by and for a people who were, in part, constituted by the conflict itself.[122] This is evident in the Declaration of Independence, which begins by imagining that the colonists comprised "a people" who must "dissolve the political bands which ha[d] connected them with another [people] . . . ."[123] The Preamble to the Constitution is clearer still, describing a collective enterprise by and for "the People."[124] That language

recognizing that "these great ends of government" are not always realized, requiring them to adopt a constitution in order to "promote the general happiness of the people of this state").

120 U.S. CONST. amend. IV; *see also* Amsterdam, *supra* note 119, at 433 ("The vice of a system of criminal justice that relies upon a professional police and admits evidence they obtain by unreasonable searches and seizures is precisely that we are all thereby made less secure in our persons, houses, papers and effects against unreasonable searches and seizures.").

121 *See, e.g.*, THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776) ("And for the support of this declaration, . . . we pledge to each other our lives, our fortunes, and our sacred honour."); PA. CONST. of 1776, pmbl. ("We, the representatives of the freemen of Pennsylvania, in general convention met, for the express purpose of framing such a government, confessing the goodness of the great governor of the universe (who alone knows to what degree of earthly happiness mankind may attain by perfecting the arts of government) in permitting the people of this state, by common consent and without violence, deliberately to form for themselves, such just rules as they shall think best for governing their future society; and being fully convinced, that it is our indispensable duty to establish such original principles of government, as will best promote the general happiness of the people of this state and their posterity, and provide for future improvements . . . do, by virtue of the authority vested in us by our constituents, ordain, declare and establish the following *Declaration of Rights*, and *Frame of Government*, to be the Constitution of this commonwealth . . . .").

122 *See* Doernberg, *supra* note 117, at 52 (discussing how the American Revolution uniquely resulted in "a government created by the people, not one existing independently of them or, in some respect, over them"). As Benjamin Franklin famously quipped, "we must . . . all hang together, or most assuredly we shall all hang separately." United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 235 (1984).

123 THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776); *cf.* Doernberg, *supra* note 117, at 65 (detailing John Locke's influence on the Declaration of Independence, including Locke's assertion that "the Governments of the World . . . were made by the Consent of the People"). The Declaration may well have been more aspirational than descriptive in this regard, but it is the aspiration that matters for present purposes because it is the aspiration that informs our understanding of original public meaning.

124 U.S. CONST. pmbl. ("We the People of the United States, in order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity . . . ."); *see also* District of Columbia v. Heller, 554 U.S. 570, 579 (2008) (conceding that "the people" as used in the Preamble "arguably refer[s] to 'the people'

carries through to Article I[125] and the Bill of Rights, which, inter alia, guarantees "the right of the people peaceably to assemble"[126] and "the right of the people to keep and bear Arms"[127] without "disparag[ing]" other,

acting collectively"). The Preamble's assumption that there is a "People of the United States" marks a critical departure from the 1781 "Articles of Confederation," which were premised on the independence and sovereignty of the states and their discrete peoples. *See* ARTICLES OF CONFEDERATION of 1781, art. II ("Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled."). As Justice Scalia noted, preambles are relevant sources for determining textual meaning. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 217-20 (2012) (discussing the "prefatory-materials" canon of interpretation).

125 U.S. CONST. art. I, § 2 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . ."); *see also Heller*, 554 U.S. at 579 (conceding that "the people" as used in Article I "arguably refer[s] to 'the people' acting collectively").

126 U.S. CONST. amend. I. The Court has left little doubt that these First Amendment rights of "the people" have a collective dimension. *See, e.g.*, Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) ("[T]he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here."). *But see Heller*, 554 U.S. at 579 (claiming in dicta that "the First Amendment's Assembly-and-Petition Clause . . . unambiguously refer[s] to individual rights, not 'collective' rights").

127 U.S. CONST. amend. II. In *Heller*, 554 U.S. at 579-81, the Court held that the Second Amendment right to bear arms "refer[s] to individual rights, not 'collective' rights, or rights that may be exercised only through participation in some corporate body." That holding, while expansive, was neither necessary nor does it directly contradict the thesis being developed here. The issue presented to the Court in *Heller* was whether the militia clause of the Second Amendment limited the right of "the people" to bear arms such that no individual could assert a right to bear arms outside the confines of a state-regulated militia. *Id.* at 577. On that reading, the Court rightly noted, the right to bear arms would be a right of the states or militias, not a right "of the people." *Id.* at 580-81. Unfortunately, the Court did not claim the obvious fruits of this point and, in failing to do so, indulged a false dichotomy between collective rights and the ability of an individual to claim or assert those rights. *See id.* at 579-81. This dichotomy is neither reflected in the rights literature nor in the great works of political philosophy that influenced the framers and the document they produced. *See, e.g.*, JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 12 (J.H. Burns & H.L.A. Hart eds., Clarendon Press 1996) (1789) ("The community is a fictitious *body*, composed of the individual persons who are considered as constituting as it were its *members*. The interest of the community then is what?—the sum of the interests of the several members who compose it."); WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 35-48 (1995) (explaining how group rights are consistent with, and often promote, individual liberty); Doernberg, *supra* note 117, at 57-68 (describing the influence of Locke's political

unenumerated rights, "retained by the people,"[128] and while reserving "powers not delegated to the United States . . . to the people."[129] Again, the point is not that the Constitution is a wholly collectivist document. Rather, the point is that the Constitution wrestles with fundamental and timeless political challenges and, in the process, instantiates a people who claim some rights for themselves as "one Body Politick"[130] and some rights for individual members of that whole.[131]

The Fourth Amendment describes a "right of the people"[132] not a right of "each person." That choice is not happenstance. Those who drafted the Fourth

philosophy and his conception of the "Body Politik" on the founding generation); *see also* Amsterdam, *supra* note 119, at 432-33 (discussing the collective threat addressed by the Fourth Amendment and the collective remedies it demands). Moreover, it is not clear that the *Heller* Court actually disagrees. As the majority points out, "the people" "unambiguously refers to all members of the political community." *Heller*, 554 U.S. at 580.

[128] U.S. CONST. amend. IX.

[129] *Id.* amend. X; *see also Heller*, 554 U.S. at 579 (conceding that "the people" as used in the Tenth Amendment "arguably refer[s] to 'the people' acting collectively").

[130] Doernberg, *supra* note 117, at 59-60 (quoting JOHN LOCKE, TWO TREATISES OF GOVERNMENT 331 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690)); *see also* United States v. Cruikshank, 92 U.S. 542, 549-50 (1875) ("Citizens are the members of the political community to which they belong. They are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as their collective rights. In the formation of a government, the people may confer upon it such powers as they choose. . . . The government thus established and defined is to some extent a government of the States in their political capacity. It is also, for certain purposes, a government of the people."); Doernberg, *supra* note 117, at 62-66 (describing how the framers of the Constitution relied upon the work of John Locke in understanding the interrelationships between citizens, the citizenry, and the state, and pointing out the primacy of "the people" as a "collective body" in both Locke's political philosophy and the constitutional framework of government).

[131] *See, e.g.*, U.S. CONST. art. III, § 3 (rights of those charged with treason); *id.* amend. III (quartering soldiers); *id.* amend. V (grand jury, due process); *id.* amend VI (criminal trial rights).

[132] *Id.* amend. IV. In *Heller*, the Court asserted that the Fourth Amendment "unambiguously refer[s] to individual rights, not 'collective' rights, or rights that may be exercised only through participation in some corporate body." *Heller*, 554 U.S. at 579. This, of course, is dicta—and dangerous dicta at that, insofar as the Court's pronouncement was made without the benefit of any record regarding the history of the Fourth Amendment. *See generally* David Gray, *Dangerous Dicta*, 72 WASH. & LEE L. REV. 1181 (2015). On a fuller record, the Court would have been hard-pressed to avoid the conclusion that the Fourth Amendment unambiguously refers to collective rights. For example, the dicta in *Heller* violates the first canon of textual interpretation: that words should be given their ordinary meaning. *See Heller*, 554 U.S. at 576 ("[W]e are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" (quoting United States v. Sprague, 282 U.S. 716, 731 (1931))); SCALIA & GARNER, *supra* note 124, at 69-77.

Amendment in 1791 had two models to choose from.[133] The first was offered by Article X of the Pennsylvania Constitution of 1776, which provided that "the people have a right to hold themselves, their houses, papers, and possessions free from search and seizure."[134] The second came from the Massachusetts and New Hampshire Bills of Rights, each of which provided that "[e]very subject has a right to be secure from all unreasonable searches[] and seizures."[135] John Adams is a particularly important figure in the history of the Fourth Amendment.[136] His work on search and seizure for the Massachusetts Constitution later served as a blueprint for the Fourth

Furthermore, both the historical record and the Court's own jurisprudence suggest that the Fourth Amendment unambiguously refers to individual rights that can only be exercised through membership in a group: "the people." *See, e.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259, 265-75 (1990) (holding that "the people" referenced in the Fourth Amendment refers only to the "class of persons who are part of a national community or who have a sufficient connection with this country to be considered part of that community"). Moreover, as the Court pointed out in *Verdugo-Urquidez*, the framers' use of "the people" in the First, Second, Fourth, Ninth, and Tenth Amendments strikes an important contrast between their use of "person" and "accused" in the Fifth and Sixth Amendments, further suggesting that the Fourth Amendment has critical collective dimensions. *Id.* at 265-66. This choice lines up with similar choices made in then-contemporary state constitutions, particularly the Pennsylvania Constitution of 1776. *See infra* notes 149-160 and accompanying text. The Court's contemporary exclusionary rule cases also focus on the collective dimensions of Fourth Amendment rights, maintaining that exclusion is justified only insofar as it can promote the general security of the people in their persons, houses, papers, and effects. *See infra* notes 174-175 and accompanying text. Ultimately, of course, it is not at all clear that the *Heller* Court would disagree. Just a few sentences after issuing its dangerous dicta, it adopts the more defensible view that "The People" "unambiguously refers to all members of the political community, not an unspecified subset." *Heller*, 554 U.S. at 580.

133 *See* 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION §§ 51:1-3 (7th ed., rev. vol. 2013) (pointing out that drafters of legislation are presumed to know relevant existing law).

134 PA. CONST. of 1776, art. X.

135 MA. CONST. pt. I, art. XIV. The New Hampshire Constitution uses "hath" rather than "has," but is in all other respects identical. N.H. CONST. pt. 1, art. XIX (amended 1792); *see also* RATIFICATION OF THE FEDERAL CONSTITUTION BY THE STATE OF NEW YORK (1788), *reprinted in* 2 DEP'T OF STATE, DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 193 (1894) [hereinafter DOCUMENTARY HISTORY] (recommending that the Constitution protect, inter alia, the right of "every freeman . . . to be secure from all unreasonable searches and seizures . . ."); RATIFICATION OF THE FEDERAL CONSTITUTION BY THE STATE OF NORTH CAROLINA (1789), *reprinted in* DOCUMENTARY HISTORY, *supra*, at 268 (same); RATIFICATION OF THE FEDERAL CONSTITUTION BY THE STATE OF VIRGINIA (1788), *reprinted in* DOCUMENTARY HISTORY, *supra*, at 379 (same).

136 Thomas K. Clancy, *The Framers' Intent: John Adams, His Era, and the Fourth Amendment*, 86 IND. L.J. 979, 979-80 (2011).

Amendment.[137] Despite his influence on the overall structure and content of the Fourth Amendment, the drafters ultimately chose to use "the people" rather than Adams's "every subject."[138] This choice should guide our understanding of the text.[139]

There is no surviving record of the deliberative process that led to the selection of "the people" over "every subject."[140] As Justice Scalia argued, however, this sort of legislative history is highly suspect as an interpretive resource.[141] Far more important is the plain meaning of the words that were chosen as opposed to those that were not.[142] As we do today, our late eighteenth-century forebears understood "the people" as referring to "a nation" or "those who compose a community."[143] By contrast, "person" was

[137] TAYLOR, *supra* note 4, at 42; Clancy, *supra* note 136, at 1046 (describing how, in drafting the Fourth Amendment, James Madison adopted the structure used by John Adams in Article XIV of the Massachusetts Declaration of Rights and copied Adams's language almost verbatim).

[138] *See* WILLIAM CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING 729 (2009) (identifying the Pennsylvania Constitution as the origin of the phrase "the right of the people" as used in the Fourth Amendment).

[139] *See* SINGER & SINGER, *supra* note 133, §§ 48:3, :8 (discussing the use of pre-enactment history and committee reports as aids in legislative interpretation); *see also* YULE KIM, CONG. RESEARCH SERV., 97-598, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 42 (2008), https://www.fas.org/sgp/crs/misc/97-589.pdf [https://perma.cc/2857-RJTB] (suggesting that the sequence of changes in a bill can have significance and may be used to resolve ambiguities in legislative text); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1194-1209, 1237-45 (1987) (examining different types of constitutional arguments and determining that arguments based on the text must be given the most weight, followed by arguments based on the framers' intent); Annotation, *Resort to Constitutional or Legislative Debates, Committee Reports, Journals, etc., as Aid in Construction of Constitution or Statute*, 70 A.L.R. 5 (1931); *cf.* United States v. Verdugo-Urquidez, 494 U.S. 259, 265-66 (1990) (assigning significance to choices made by the drafters to use "the people," "person," and "accused"); SCALIA & GARNER, *supra* note 124, at 256 ("If the legislature amends or reenacts a provision . . . a significant change in language is presumed to entail a change in meaning.").

[140] This is in contrast to the two-clause structure, which seems to be the product of Representative Egbert Benson's dogged efforts. *See* NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 101-03 (1970).

[141] Scalia, *supra* note 38, at 29-37.

[142] *See* District of Columbia v. Heller, 554 U.S. 570, 576 (2008) (asserting the primacy of plain meaning when interpreting the Constitution).

[143] SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (10th ed. 1792); *see also* SCALIA & GARNER, *supra* note 124, at 419 (citing JOHNSON, *supra*, as among "the most useful and authoritative ['contemporaneous-usage dictionaries'] for the English language generally and for the law").

understood to mean an "individual or particular man or woman."[144] As a matter of both plain meaning and *expressio unius est exclusio alterius*,[145] the Fourth Amendment should therefore be read as referring to collective rights of "the people" rather than individual rights of each "person" or "subject."

Relevant extrinsic evidence supports this reading.[146] The founding generation was influenced profoundly by the political philosophy of John Locke.[147] In keeping with that philosophy, the Pennsylvania Constitution of 1776 recognized the critical role of both collective interests and individual rights in the establishment of a just government.[148] The body of the document therefore protects both individual rights[149] and rights held by the people as a whole.[150] There is a clear pattern to the drafters' assignments of individual and

144 JOHNSON, *supra* note 143.

145 SCALIA & GARNER, *supra* note 124, at 107; SINGER & SINGER, *supra* note 133, § 45:14.

146 *See* Scalia, *supra* note 38, at 38 (recognizing the relevance of contemporary writings when determining original public meaning).

147 Doernberg, *supra* note 117, at 59-66; *see also, e.g.*, PA. CONST. of 1776, pmbl. (asserting that legitimate governmental authority is "derived from, and founded on the authority of the people only"); 5 THE COMPLETE ANTI-FEDERALIST 13 (Herbert J. Storing ed., 1981) (objecting to the federal constitution on the grounds that it contained no bill of rights, thereby denying citizens the ability to "plead . . . and produce Locke, Sydney, or Montesquieu as authority" in defense of a "natural right").

148 *See* PA. CONST. of 1776, pmbl. ("[A]ll government ought to be instituted and supported for the security and protection of the community as such, and to enable the individuals who compose it, to enjoy their natural rights . . . ."). Differences in phrasing among different provisions indicate differences in meaning. KIM, *supra* note 139, at 14 ("[W]here Congress includes particular language in one section of a statute but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quoting Keene Corp. v. United States, 508 U.S. 200, 208 (1993))). The language of the Pennsylvania Constitution also provides evidence that the drafters knew how to designate rights as individual and collective. *Id*. at 15 (discussing the "Congress knows how to say . . . " canon of statutory interpretation).

149 *See, e.g.*, PA. CONST. of 1776, art. I ("[A]ll men are born equally free and independent . . . ."); *id.* art. II ("[A]ll men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding . . . ."); *id.* art. VIII ("[E]very member of society hath a right to be protected in the enjoyment of life, liberty and property . . . [and] no part of a man's property can be justly taken from him or applied to public uses, without his own consent or that of his legal representatives . . . ."); *id.* art. IX ("[I]n all prosecutions for criminal offences, a man hath a right to be heard by himself and his council . . . ."); *id.* art. XI ("[I]n controversies respecting property, and in suits between man and man, the parties have a right to trial by jury . . . ."); *id.* art. XV ("[A]ll men have a natural inherent right to emigrate from one state to another that will receive them . . . .").

150 *See, e.g.*, *id.* art. III ("[T]he people of this state have the sole, exclusive and inherent right of governing and regulating the internal police of the same."); *id.* art. V ("[T]he community hath an indubitable, unalienable and indefeasible right to reform, alter, or

collective rights.[151] Rights assigned to individuals—such as the right to freedom of worship, the right to own property, and the right to fair criminal process[152]—secure freedoms necessary to projects of ethical development and individual engagements with the state. By contrast, rights secured for the people—such as the right to hold elections, the right to free speech, and the right to assemble[153]—comprise basic political rights essential to collective projects of self-governance.[154] This assignment of collective rights reflects eighteenth-century understandings of fundamental political concepts such as "commonwealth," "democracy," and "republican," as defined in relation to "the people."[155]

The United States Constitution follows this same pattern, resting Fourth Amendment rights with "the people" rather than "all men" or "every member of society." This choice bespeaks an understanding that security from unreasonable search and seizure is linked to collective projects of governance and politics.[156] This may seem counterintuitive to the modern mind, but

abolish government in such manner as shall be by that community judged most conducive to the public weal."); *id.* art. VI ("[T]he people have a right, at such periods as they may think proper, to reduce their public officers to a private station, and supply the vacancies by certain and regular elections."); *id.* art. XII ("[T]he people have a right to freedom of speech, and of writing and publishing their sentiments; therefore the freedom of the press ought not to be restrained."); *id.* art. XVI ("[T]he people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the legislature for redress of grievances by address, petition, or remonstrance.").

151 That this choice should be afforded significance when interpreting the text is a matter of in pari materia. *See* SCALIA & GARNER, *supra* note 124, at 252-55 (discussing the in pari materia or "related-statutes" canon of interpretation); *see also* KIM, *supra* note 139, at 13-14 ("A term appearing in several places in a statutory text is generally read the same way each time it appears." (quoting Ratzlaf v. United States, 510 U.S. 135, 143 (1994))).

152 PA. CONST. of 1776, arts. I, II, IX.

153 *Id.* arts. VI, XII, XVI.

154 This is a critical point missed by the majority in *Heller*, where it draws a distinction between uses of "the people" in the Preamble, Article I, and the Tenth Amendment, which "deal with the exercise or reservation of powers," and the First, Second, Fourth, and Ninth Amendments, which deal with "rights." *See* District of Columbia v. Heller, 554 U.S. 570, 579-80 (2008).

155 *See* JOHNSON, *supra* note 143 (defining "commonwealth" as "the general body of the people"; "democracy" as "a form of government, in which the sovereign power is lodged in the body of the people"; "nationalness" as "[r]eference to the people in general"; and "republican" as "[p]lacing the government in the people"); *cf.* Scalia, *supra* note 38, at 39 (recognizing the political dimension of "the people" as sovereign).

156 Goldman v. United States, 316 U.S. 129, 142 (1942) (Murphy, J., dissenting) ("The benefits that accrue from [the Fourth Amendment] and other articles of the Bill of Rights are characteristic of democratic rule. They are among the amenities that distinguish a free society from one in which the rights and comforts of the individual are wholly subordinated to the interests of the state. We cherish and uphold them as necessary and salutary checks on the authority of government. They provide a standard of official conduct which the courts

accurately reflects founding-era perceptions of the threats addressed by the Fourth Amendment. As Tony Amsterdam writes, "[t]he evil [targeted by the Fourth Amendment] was general: it was the creation of an administration of public justice that authorized and supported indiscriminate searching and seizing."[157] In light of this general threat, he concludes that "the phraseology of the amendment, akin to that of the first and second amendments and the ninth, [was not] accidental."[158]

The important role of the Fourth Amendment in protecting collective political interests is evidenced further in the history of events that gave rise to its inclusion in the Bill of Rights.[159] Like many provisions of the Bill of Rights, the Fourth Amendment was motivated by the experiences of colonials and their British brethren with abuses of power.[160] The Fourth Amendment's principal

must enforce. At a time when the nation is called upon to give freely of life and treasure to defend and preserve the institutions of democracy and freedom, we should not permit any of the essentials of freedom to lose vitality through legal interpretations that are restrictive and inadequate for the period in which we live."); *see also* Alexander A. Reinert, *Public Interest(s) and Fourth Amendment Enforcement*, 2010 U. ILL. L. REV. 1461, 1486 ("[T]he move to specific warrants required by the Fourth Amendment was a radical response to the English and colonial experience with general warrants, and the concern that they could be used abusively by the government to suppress pluralist political and religious discourse.").

157 Amsterdam, *supra* note 119, at 432-33.

158 *Id.* at 433. Bill Stuntz has reached a similar conclusion, pointing out that:

> Indeed, the real harm [illegal] searches cause, the harm that matters most to society as a whole, is the diminished sense of security that neighbors and friends may feel when they learn of the police misconduct. Totalitarian governments do not cow their citizens by regularly ransacking all their homes; the threat is usually enough. At their worst, illegal searches can represent such threats, sending a signal to the community that people who displease the authorities, whether or not they commit crimes, can expect unpleasant treatment.

Stuntz, *supra* note 4, at 902. So too has the Supreme Court, which noted in the *Keith* case that:

> "Historically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power." History abundantly documents the tendency of Government—however benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies.

United States v. U.S. District Court (*Keith*), 407 U.S. 297, 313-14 (1972) (quoting Marcus v. Search Warrant, 367 U.S. 717, 724 (1961)). Justice Sotomayor echoed the point recently, noting that law enforcement's unfettered access to contemporary surveillance technologies threatens to "alter the relationship between citizen and government in a way that is inimical to democratic society." United States v. Jones, 132 S. Ct. 945, 956 (2012) (Sotomayor, J., concurring) (quoting United States v. Cuevas-Perez, 640 F.3d 272, 285 (7th Cir. 2011) (Flaum, J., concurring)).

159 Boyd v. United States, 116 U.S. 616, 624-25 (1886) ("In order to ascertain the nature of the proceedings intended by the Fourth Amendment to the Constitution under the terms 'unreasonable searches and seizures,' it is only necessary to recall the contemporary or then recent history of the controversies on the subject, both in this country and in England.").

160 TAYLOR, *supra* note 4, at 27-43.

bêtes noires were general warrants, including writs of assistance.[161] By 1791, the common law had rejected general warrants.[162] Among English courts' primary reasons for outlawing general warrants was their effect on collective security.[163] The courts reasoned that nobody could feel secure if forced to live under a regime where executive agents had the authority to engage in programs of broad and indiscriminate search, limited only by their own unfettered discretion.[164] Thus, in the General Warrant cases,[165] which are widely

[161] Riley v. California, 134 S. Ct. 2473, 2494 (2014) ("Our cases have recognized that the Fourth Amendment was the founding generation's response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity."); *Boyd*, 116 U.S. at 624-25; Davies, *supra* note 48, at 601 ("The historical record . . . reveals that the Framers focused their concerns and complaints rather precisely on searches of houses under general warrants [when drafting the Fourth Amendment].").

[162] Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931) ("Since before the creation of our government, such [general] searches have been deemed obnoxious to fundamental principles of liberty."); 4 WILLIAM BLACKSTONE, COMMENTARIES *291 ("A *general* warrant to apprehend all persons suspected, without naming or particularly describing any person in special, is illegal and void for its uncertainty . . . ."); CUDDIHY, *supra* note 138, at 439-40, 446-52 (discussing the conditions that led to the General Warrant cases and the British rejection of general warrants); Davies, *supra* note 48, at 655 ("[C]ommon-law treatises clearly disapproved of [general] warrants as a doctrinal matter (even if such warrants had not been entirely eliminated in practice) by the mid-eighteenth century—and any lingering doubt was removed by the Wilkesite cases in the 1760s.").

[163] *See Boyd*, 116 U.S. at 630 ("The principles laid down in [Entick v. Carrington] affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life."); Amsterdam, *supra* note 119, at 366 (stating that, upon examination of "the specific incidents of Anglo-American history that immediately preceded the adoption of the [Fourth] amendment, we shall find that the primary abuse thought to characterize the general warrants and the writs of assistance was their indiscriminate quality, the license that they gave to search Everyman without particularized cause" which threatened "the whole English nation").

[164] *Cf.* Osborn v. United States, 385 U.S. 323, 329 n.7 (1966) ("[I]ndiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth and Fifth Amendments; and . . . these considerations impose a heavier responsibility on this Court in its supervision of the fairness of procedures . . . ."); Johnson v. United States, 333 U.S. 10, 17 (1948) ("An officer gaining access to private living quarters under color of his office and of the law which he personifies must then have some valid basis in law for the intrusion. Any other rule would undermine 'the right of the people to be secure in their persons, houses, papers, and effects,' and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police state where they are the law."); Gray & Citron, *supra* note 3, at 73-83.

[165] *See, e.g.*, Entick v. Carrington (1765) 95 Eng. Rep. 807 (KB); Wilkes v. Wood (1763) 98 Eng. Rep. 489 (KB); Wasserstrom, *supra* note 5, at 1392 n.15 (enumerating and summarizing each of the General Warrant cases).

recognized as signal events in the history of the Fourth Amendment,[166] Lord Camden notes that, if a government can grant "discretionary power . . . to messengers to search wherever their suspicions may chance to fall . . . it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject."[167] There is, moreover, no doubt that the liberties Lord Camden sought to protect had an important political dimension. After all, the plaintiffs in the General Warrant cases were dissidents targeted by the King's agents because they wrote and distributed pamphlets criticizing George III and his policies.[168]

Crafted in the context of this common law history, concerns for the general security of the people form the warp and weft of the Fourth Amendment.[169] By

[166] United States v. Jones, 132 S. Ct. 945, 949 (2012) (stating that *Entick* "is a case we have described as a 'monument of English freedom'" and is considered "'the true and ultimate expression of constitutional law' with regard to search and seizure" (quoting Brower v. City of Inyo, 489 U.S. 593, 596 (1989))); Berger v. New York, 388 U.S. 41, 49 (1967) (observing the influence of *Entick* on the authors of the Fourth Amendment); *Boyd*, 116 U.S. at 626-27 ("As every American statesmen [sic], during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom, and considered [*Entick*] as a true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the Fourth Amendment to the Constitution . . . ."); TAYLOR, *supra* note 4, at 19, 26, 38-41 (exploring the impact of the General Warrant cases on the authors of the Fourth Amendment); Amar, *supra* note 4, at 772 (stating that the Fourth Amendment was "undeniably designed to embody" the lessons of *Wilkes*); Wasserstrom, *supra* note 5, at 1393 ("These *General Warrant Cases* played an important role in the history of the fourth amendment, for they 'simultaneously uprooted the general warrant in England and planted the seed for the fourth amendment in this country.'" (footnote omitted) (quoting Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origin, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1370 (1983))).

[167] *Wilkes*, 98 Eng. Rep. at 498; *see also Entick*, 95 Eng. Rep. at 817 ("[W]e can safely say there is no law in this country to justify the defendants in what they have done; if there was, it would destroy all the comforts of society . . . ."); TAYLOR, *supra* note 4, at 34-35 (recounting how members of Parliament and other elites felt threatened by the use of general warrants in the *Wilkes* case); *cf.* Doernberg, *supra* note 117, at 57-58 ("[M]ost eighteenth-century liberal doctrines can be traced to Locke and his concept that community power resides in the majority.").

[168] TAYLOR, *supra* note 4, at 29-30, 32.

[169] *See* Go-Bart Importing Co. v. United States, 282 U.S. 334, 357 (1931) ("[General searches] are denounced in the constitutions or statutes of every State in the Union."); Marron v. United States, 275 U.S. 192, 195 (1927) ("General searches have long been deemed to violate fundamental rights. It is plain that the Amendment forbids them."); *Boyd*, 116 U.S. at 630; Wasserstrom, *supra* note 5, at 1393 ("[The framers] sought to prohibit the newly formed federal government from using general warrants, a device they believed jeopardized the liberty of every citizen."). In his famous argument in the writs of assistance cases, James Otis identified general warrants as "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was

its language, and understood in its original context, the Fourth Amendment recognizes and protects rights held by "the people"[170] against the government.[171] Those founding-era concerns have carried through to the modern era.[172] Thus, Justice Jackson advises in *Johnson v. United States* that "[t]he right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance."[173] The role of collective interests is particularly evident in the Court's exclusionary rule jurisprudence,[174] which focuses on securing the general right of the people by deterring law enforcement officers from engaging in unreasonable searches and seizures.[175]

found in an English lawbook." PAUL M. ANGLE, BY THESE WORDS: GREAT DOCUMENTS OF AMERICAN LIBERTY, SELECTED AND PLACED IN THEIR CONTEMPORARY SETTINGS 62-63 (1954). As Donald Doernberg points out, James Otis was among the many founding-era intellectuals who were deeply influenced by John Locke and his collectivist theories of government and political legitimacy. *See* Doernberg, *supra* note 117, at 66 n.86. Among the people in the audience during Otis's argument was John Adams, who would later identify Otis's speech as "the first scene of the first act of opposition to the arbitrary claims of Great Britain." Riley v. California, 134 S. Ct. 2473, 2494 (2014) (quoting 10 THE WORKS OF JOHN ADAMS 248 (Charles Francis Adams ed., Boston, Little, Brown & Co. 1856)).

[170] United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990) ("'[T]he people' protected by the Fourth Amendment . . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."); *cf.* District of Columbia v. Heller, 554 U.S. 570, 579-81 (2008).

[171] *See* Doernberg, *supra* note 116, at 260 (explaining that one objective of the Fourth Amendment was "to prevent the government from functioning as in a police state," and presenting the argument that the Amendment can be read "as a broad regulation of government conduct in society"); *see also* Brinegar v. United States, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting) ("[T]he [Fourth] Amendment was directed only against the new and centralized government, and any really dangerous threat to the general liberties of the people can come only from this source. We must therefore look upon the exclusion of evidence in federal prosecutions, if obtained in violation of the Amendment, as a means of extending protection against the central government's agencies.").

[172] Berger v. New York, 388 U.S. 41, 53 (1967) ("The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society." (quoting Wolf v. Colorado, 338 U.S. 25, 27 (1949))).

[173] Johnson v. United States, 333 U.S. 10, 14 (1948); *see also* Camara v. Mun. Court, 387 U.S. 523, 528 (1967); *Brinegar*, 338 U.S. at 180-81.

[174] Doernberg, *supra* note 116, at 273, 278-80 (suggesting that "the exclusionary rule was viewed as the only effective way to give life to the guarantees of the fourth amendment" and that the rule exists "to protect the collective interest of society in deterring fourth amendment violations").

[175] *See* Doernberg, *supra* note 117, at 105; Gray, *supra* note 14 (examining the Court's "recent insistence that the sole justification for excluding evidence seized in violation of the Fourth Amendment is the prospect of deterring law enforcement officers"); David Gray, Meagan Cooper & David McAloon, *The Supreme Court's Contemporary Silver Platter Doctrine*, 91 TEX. L. REV. 7, 9 (2012).

Of course, as a conceptual matter, any right of the people is also a right of each person.[176] All of us, and each of us, therefore have a right to be free from unreasonable search and seizure.[177] Consequently, whenever a member of "the people" challenges a governmental search or seizure, she stands not only for herself, but also for "the people" as a whole.[178]

[176] *See* PA. CONST. of 1776, pmbl. ("[A]ll government ought to be instituted and supported for the security and protection of the community as such, and to enable the individuals who compose it to enjoy their natural rights . . . ."); SCALIA & GARNER, *supra* note 124, at 129-31 (citing the canon of interpretation that the plural includes the singular); *cf.* District of Columbia v. Heller, 554 U.S. 570, 581 (2008) (concluding that "the people" as used in the Second Amendment describes rights "exercised individually and belong[ing] to all Americans"); *id.* at 636 (Stevens, J., dissenting) (arguing that "the people" in the Second Amendment describes a collective right, but "[s]urely it protects a right that can be enforced by individuals").

[177] Doernberg, *supra* note 116, at 260 (asserting that the Fourth Amendment has both individual and collective functions); *see also Camara*, 387 U.S. at 528 ("The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials. The Fourth Amendment thus gives concrete expression to a right of the people which is 'basic to a free society.'"); *Johnson*, 333 U.S. at 14 ("The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance."); Weeks v. United States, 232 U.S. 383, 391-92 (1914) ("[The Fourth Amendment's protection] reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws."). *But see* Minnesota v. Carter, 525 U.S. 83, 88 (1998) ("The [Fourth] Amendment protects persons against unreasonable searches of 'their persons [and] houses' and thus indicates that the Fourth Amendment is a personal right that must be invoked by an individual.").

[178] *See* Reinert, *supra* note 156, at 1487-91 ("[T]here is an interest in pluralist participation that is at stake in Fourth Amendment questions—when members of communities experience repeated invasions of their privacy on an individual level, it affects the level at which any member of the community is prepared to participate in collective activity that is beneficial to society."); *see also* White v. Texas, 401 U.S. 745, 790 (1970) (Harlan, J., dissenting); *Brinegar*, 338 U.S. at 181 (Jackson, J., dissenting) ("There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear. Courts can protect the innocent against such invasions only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty. . . . So a search against [the defendant's] car must be regarded as a search of the car of Everyman."); People v. Cahan, 282 P.2d 905, 907 (Cal. 1955) ("Thus, when consideration is directed to the question of the admissibility of evidence obtained in violation of the constitutional provisions, it bears emphasis that the court is not concerned solely with the rights of the defendant before it, however guilty he may appear, but with the constitutional right of all the people to be secure in their homes, persons, and effects."); Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1269-72 (1982) (discussing the social aspect of Fourth Amendment protections and suggesting that an innocent person should be

B. *". . . to be secure . . ."*

If the Fourth Amendment aims to protect collective interests, then the natural next question is how to accomplish that task. Here again, the answer lies in the text, which guarantees "the right of the people *to be secure*."[179] The only way to achieve this security is by the enforcement of constitutional remedies that restrain exercises of state power and limit the discretion of government agents.[180]

One of the principal concerns confronting those who met in Philadelphia during the hot summer of 1787 was controlling the newly constituted federal government. Conventioneers harbored particular concerns about the power and authority of the central government and its ability to override protections afforded by state constitutions and the common law.[181] Those worries carried over to the ratification debates.[182] Among the primary concerns of anti-Federalists and other constitutional critics was that the federal government might violate, ignore, or abrogate by statute the search and seizure rights guaranteed by state constitutions and the common law.[183]

Our eighteenth-century forebears understood that the road to tyranny is paved with the best of intentions. As the Maryland Farmer pointed out, general warrants are particularly tempting "in those cases which may strongly interest

able to "seek[] vindication for his personal fourth amendment rights or seek[] to exclude evidence wrongfully obtained from another, perhaps innocent, person"). This reading of the Fourth Amendment has obvious consequences for questions of standing, which I address in a forthcoming book. DAVID GRAY, THE FOURTH AMENDMENT IN AN AGE OF SURVEILLANCE (forthcoming 2016).

[179] U.S. CONST. amend. IV (emphasis added).

[180] *See Camara*, 387 U.S. at 528; *Weeks*, 232 U.S. at 391-92 ("The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects, against all unreasonable searches and seizures under the guise of law."). There is no doubt that some current Fourth Amendment remedies, such as the exclusionary rule and 42 U.S.C. § 1983, do less work than they could or ought to in guaranteeing the right of the people to be secure. *See generally* Gray, *supra* note 14; Gray, Cooper & McAloon, *supra* note 175; Laurin, *supra* note 14. Subsequent articles in this project address these deficits. *See* Gray, *supra* note 132.

[181] *See* Davies, *supra* note 48, at 658 ("[T]he Framers' constitutional concern was preventing the *legislature* from authorizing use of general warrants.").

[182] CUDDIHY, *supra* note 138, at 671-91; Davies, *supra* note 48, at 694-95.

[183] *See, e.g.*, THE COMPLETE ANTI-FEDERALIST, *supra* note 147, at 14 ("[S]uppose for instance, that an officer of the United States should force the house, the asylum of a citizen, by virtue of a general warrant, I would ask, are general warrants illegal by the constitution of the United States? Would a court, or even a jury, but juries are no longer to exist, punish a man who acted by express authority, upon the bare recollection of what once was law and right? I fear not, especially in those cases which may strongly interest the passions of government, and in such only have general warrants been used . . . .").

the passions of government."[184] Half a generation before him, the Canadian Freeholder offered similar observations in his commentaries on *Wilkes v. Wood*, noting that appointed members of the executive are "fond of the doctrines of reason of state, and state necessity, and the impossibility of providing for great emergencies and extraordinary cases, without a discretionary power in the Crown to proceed sometimes by uncommon methods not agreeable to the known forms of law."[185] Because they understood these natural, institutional motives, our founders sought to guarantee a general right of security from unreasonable searches and seizures through the enforcement of policies and procedures capable of constraining government agents and limiting the discretionary authority of those wielding the truncheon of state power.[186] The warrant clause provides a blueprint for what they had in mind.

General warrants are unreasonable.[187] By their very nature and existence, they threaten the security of the people. So too, warrants issued on nothing more than "information and belief," or other "allegation which, upon being sifted, may amount to nothing more than a suspicion" are likewise unreasonable.[188] Faced with threats of general warrants, and easy access to more specific warrants, our founders decided that the only way to guarantee the security of the people was to impose prospective remedies—remedies sufficient to guarantee a collective sense of security against "general exploratory searches" "based only on the eagerness of officers to get hold of whatever evidence they may be able to bring to light."[189] This is precisely what the warrant clause does. By banning general warrants and limiting access to

[184] *Id.*

[185] 2 FRANCIS MASERES, THE CANADIAN FREEHOLDER: IN THREE DIALOGUES BETWEEN AN ENGLISHMAN AND A FRENCHMAN, SETTLED IN CANADA 243-44 (London, B. White 1779) (commenting on Wilkes v. Wood (1763) 98 Eng. Rep. 489 (KB)); *see also* Boyd v. United States, 116 U.S. 616, 635 (1886).

[186] *See* Florida v. Royer, 460 U.S. 491, 513 (1983) (Brennan, J., concurring) ("We must not allow our zeal for effective law enforcement to blind us to the peril to our free society that lies in this Court's disregard of the protections afforded by the Fourth Amendment."); Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971) ("In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or 'extravagant' to some. But the values were those of the authors of our fundamental constitutional concepts."); Davies, *supra* note 48, at 578-83 (documenting the founders' concerns with executive discretion).

[187] Frisbie v. Butler, 1 Kirby 213, 215 (Conn. 1787) ("[T]he warrant in the present case, being general, to search all places, and arrest all persons, the complainant should suspect, is clearly illegal . . . .").

[188] Rice v. Ames, 180 U.S. 371, 374 (1901).

[189] United States v. Lefkowitz, 285 U.S. 452, 461-62 (1932) (quoting Lefkowitz v. U.S. Attorney, 52 F.2d 52, 54 (2d Cir. 1931)).

specific warrants, the warrant clause allows all of us and each of us to feel secure in ways that we otherwise could not and would not.[190]

The Fourth Amendment is not limited by the warrant clause, however. Quite to the contrary, the "touchstone" of the Fourth Amendment is reasonableness,[191] which casts a much longer shadow. Here again, the text tells the tale. Just as the drafters had a choice of models in terms of whether the Fourth Amendment would protect "each subject" or "the people," so too did they have a choice between simply barring general warrants or prohibiting unreasonable searches more generally. By the time of the First Congress, eight states had placed constitutional constraints on search and seizure.[192] Of these, six addressed general or deficient warrants only,[193] and two contemplated both unreasonable searches and deficient warrants.[194] Given these options, the most reasonable reading of the final text is that it prohibits more than just searches conducted pursuant to general or deficient warrants.[195] The Fourth Amendment was meant to (and does) prohibit unreasonable searches and seizures more generally.

The original text of the Fourth Amendment, proposed by James Madison to the House in 1789, reinforces the view that the reasonableness clause is meant to proscribe a broader range of governmental activity than just searches conducted pursuant to general warrants. The first draft Madison proposed provided that:

> The rights of the people to be secured in their persons, their houses, their papers, and their other property from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause,

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190 *See* Davies, *supra* note 48, at 576-77 ("[T]he Framers believed that the orderly and formal processes associated with specific warrants . . . provided the best means of preventing violations of the security of person or house.").

191 Brigham City v. Stuart, 547 U.S. 398, 403 (2006).

192 The eight colonies were Delaware, Maryland, Massachusetts, New Hampshire, North Carolina, Pennsylvania, Vermont, and Virginia. CUDDIHY, *supra* note 138, at 603-12. Connecticut and Rhode Island did not have constitutions in 1789. *Id.* at 852. Connecticut adopted its first constitution in 1818. *The Constitution of Connecticut (1818)*, CONN. GEN. ASSEMBLY, https://www.cga.ct.gov/asp/Content/constitutions/1818Constitution.htm [https://perma.cc/64VE-XFPT]. Rhode Island did not adopt a constitution until 1842. *Rhode Island Constitution, 1842*, RI.GOV, http://sos.ri.gov/archon/?p=digitallibrary/digitalcontent&id=435 [https://perma.cc/3SR6-73TT]. New York, New Jersey, South Carolina, and Georgia all had constitutions, but none addressed searches and seizures. *See* CUDDIHY, *supra* note 138, at 852-53.

193 These six colonies were Delaware, Maryland, North Carolina, Pennsylvania, Vermont, and Virginia. CUDDIHY, *supra* note 138, at 603-12.

194 These two colonies were Massachusetts and New Hampshire. *Id.*

195 *See supra* note 133.

> supported by oath or affirmation, or not particularly descr[i]bing the places to be searched, or the persons or things to be seized.[196]

By its plain meaning, this language would have limited the definition of unreasonable searches and seizures to searches conducted under the authority of deficient warrants.[197] Speaking on the floor of the First Congress, Representative Benson protested that this language was not sufficient, proposing instead the familiar conjunction "and no warrants shall issue."[198] Again applying well-established rules of textual interpretation, we ought not to ignore the fact that his proposal ultimately was adopted.[199] We should therefore conclude that the reasonableness clause was intended to do more than simply prohibit searches conducted pursuant to general warrants. Instead, contemporary readers would have understood the clause to protect against threats of unreasonable searches and seizures more generally, including those conducted pursuant to general warrants.

C. *". . . shall not be violated."*

The Fourth Amendment does not merely describe a general right of the people to be secure from unreasonable searches and seizures. It also provides that this right "shall not be violated."[200] This imperative can only be achieved by constitutional remedies that exert prospective force on government agents. As those who read the Fourth Amendment in 1791 understood, abstract commands are not enough to constrain governments against the temptations of

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196 CUDDIHY, *supra* note 138, at 692.

197 This language seems to have been modeled on the statements several states attached to their ratification votes in 1788. *See, e.g.*, RATIFICATION OF THE FEDERAL CONSTITUTION BY THE STATE OF NORTH CAROLINA, *supra* note 135, at 268-69 ("That every freeman has a right to be secure from all unreasonable searches, and seizures of his person, his papers, and property: all warrants *therefore* to search suspected places . . . or to apprehend any suspected person without specially naming or describing the place or person, are dangerous and ought not to be granted." (emphasis added)); RATIFICATION OF THE FEDERAL CONSTITUTION BY THE STATE OF NEW YORK, *supra* note 135, at 193 ("That every Freeman has a right to be secure from all unreasonable searches and seizures of his person his papers or his property, and *therefore*, that all Warrants to search suspected places or seize any Freeman his papers or property, without information upon Oath or Affirmation of sufficient cause, are grievous and oppressive . . . ." (emphasis added)); RATIFICATION OF THE FEDERAL CONSTITUTION BY THE STATE OF VIRGINIA, *supra* note 135, at 379 ("That every freeman has a right to be secure from all unreasonable searches and siezures [sic] of his person, his papers and his property; all warrants, *therefore*, to search suspected places, or sieze [sic] any freeman, his papers or property, without information upon Oath (or affirmation of a person religiously scrupulous of taking an oath) of legal and sufficient cause, are grievous and oppressive . . . ." (emphasis added)).

198 U.S. CONST. amend. IV; LASSON, *supra* note 140, at 101.

199 *See supra* notes 133, 139.

200 U.S. CONST. amend. IV.

power, privilege, and emergency.[201] Those readers knew that the only way to guarantee the right of the people against the threats of legislative encroachment and executive overreach was to establish a constitutional requirement with concrete constraints.[202] This is precisely what the Fourth Amendment does; "It erects a wall between a free society and overzealous police action—a line of defense implemented by the framers to protect individuals from the tyranny of the police state."[203]

The constitutional imperative that rights against unreasonable search and seizure "shall not be violated" acts as a pre-commitment, tethering us to the mast so we will not be tempted by the sirens' songs of political convenience or executive necessity to accept "too permeating police surveillance," even if it means living with some degree of risk.[204] The imperative also recognizes that the task of constraining the government against its natural tendency to pursue more expansive and invasive practices of search and seizure is an ongoing project that must respond to new, developing, and emerging threats.[205] Thus, the Fourth Amendment is not merely an instantiation of rights, it is a call to action—it demands that the political branches commit to policies of restraint. Where they fail to do so, the Fourth Amendment requires that courts, acting as constitutional guardians, impose remedial measures sufficient to effectively guarantee the people's security.[206] To be clear, this constitutional responsibility

[201] *See supra* notes 183-186 and accompanying text.

[202] Camara v. Mun. Court, 387 U.S. 523, 528 (1967) ("The Fourth Amendment thus gives concrete expression to a right of the people which 'is basic to a free society.'" (quoting Wolf v. Colorado, 338 U.S. 25, 27 (1949))); *see* Davies, *supra* note 48, at 576 ("The Framers sought to *prevent* unjustified searches and arrests from occurring, not merely to provide an after-the-fact remedy for unjustified intrusions.").

[203] Renée McDonald Hutchins, *Tied Up in* Knotts*? GPS Technology and the Fourth Amendment*, 55 UCLA L. REV. 409, 444 (2007); *see also* Doernberg, *supra* note 116, at 260 ("The fourth amendment was intended both to protect the rights of individuals and to prevent the government from functioning as in a police state.").

[204] United States v. Di Re, 332 U.S. 581, 595 (1948) ("[T]he forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment.").

[205] *Cf.* Weeks v. United States, 232 U.S. 383, 392 (1914) ("The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.").

[206] Berger v. New York, 388 U.S. 41, 50-51 (1967) (explaining that since neither the text of the Fourth Amendment nor any federal statute "carried . . . criminal sanction[s]" for violating the Amendment, the Supreme Court created the "federal exclusionary rule"); *see also* Boyd v. United States, 116 U.S. 616, 638 (1886) ("[T]he notice to produce the invoice

does not rise to the level of legislative authority. As the Court has explained in the context of its Fifth Amendment jurisprudence, effectiveness, enforceability, and parsimony mark the border between remedies as rights and political policy-making.[207]

* * *

At this point in the argument, it is worth pausing to summarize a bit. The Fourth Amendment guarantees rights that have a collective dimension. This is evident in the text, which guarantees a right of "the people" rather than rights of "each subject." The historical backdrop against which the Fourth Amendment is cast further illuminates the interests at stake. The principal historical motivations for the Fourth Amendment are found in the experiences of colonists and Englishmen with general warrants, including writs of assistance.[208] Although vanishingly few eighteenth-century Americans were subjected to searches conducted under writs of assistance, the very existence of these licenses to engage in broad and indiscriminate searches posed a general threat to the freedom and security of all in their persons and property. In ratifying the common law prohibition on general warrants, the Fourth Amendment serves the interests of all citizens by targeting policies and practices that grant unfettered discretion to executive agents or authorize programs of broad and indiscriminate search.[209]

Although founding-era experiences with general warrants motivated the Fourth Amendment, the text does not simply prohibit general warrants, as did the Virginia Declaration of Rights, for example.[210] Rather, the Fourth Amendment guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[211] This security can only be guaranteed by instituting and enforcing policies and practices that eliminate, restrain, or regulate threats against the privacy and security of the people.[212] The

in this case, the order by virtue of which it was issued, and the law which authorized the order, were unconstitutional and void . . . .").

[207] *See supra* notes 95-112 and accompanying text.

[208] CUDDIHY, *supra* note 138, at 231 ("The Fourth Amendment abrogated a legacy of the general warrant and its affiliates . . . ."); Davies, *supra* note 48, at 601 ("The American Whigs consistently aimed their complaints about search and seizure at general warrants.").

[209] *See* Gray & Citron, *supra* note 3, at 92-100.

[210] VA. CONST. art. I, § 10 ("That general warrants . . . are grievous and oppressive, and ought not to be granted.").

[211] U.S. CONST. amend. IV.

[212] *See* Byars v. United States, 273 U.S. 28, 33-34 (1927) ("The Fourth Amendment was adopted in view of long misuse of power in the matter of searches and seizures both in England and the colonies; and the assurance against any revival of it, so carefully embodied in the fundamental law, is not to be impaired by judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality but which, in

reasonableness clause therefore establishes a collective right to policies that preserve the people's security by effective, enforceable, and parsimonious means.[213] The warrant clause provides an illuminating example of just such a policy.[214]

The warrant clause reflects the drafters' considered judgment that, as a matter of policy, the only way to preserve the security of the people against the threat of general warrants was to establish a constitutional bar on general warrants, control access to warrants, mediate executive authority to conduct warranted searches, and limit the discretionary purview of agents who execute warrants.[215] The Warrant Clause prescribes a policy and process that serves these goals.[216] By requiring that warrants issue only upon a showing of probable cause, the Warrant Clause limits access to warrants and provides general assurances to most law-abiding citizens that their property and privacy are secure. By requiring that warrants issue only from detached and neutral magistrates, the Warrant Clause mediates executive authority, providing general assurances against the natural tendency of governments and their agents to indulge temptations of power and to succumb to seductive claims of

reality, strike at the substance of the constitutional right."); Davies, *supra* note 48, at 576-77 ("The preference for warrants is premised on the expectation that magistrates will be more likely than officers to perceive when justification for a proposed search is inadequate. The historical evidence indicates that the Framers preferred use of specific warrants rather than warrantless intrusions for essentially the same reason.").

[213] *See, e.g.*, Wolf v. Colorado, 338 U.S. 25, 28 (1949) (referring to "police incursion into privacy" as "arbitrary conduct," which "should be checked," and insisting that "remedies against it should be afforded"); *cf.* Atwater v. City of Lago Vista, 532 U.S. 318, 351-53 (2001) (pointing out that Fourth Amendment remedies should only be imposed when courts are faced with evidence of widespread abuse).

[214] *See* California v. Acevedo, 500 U.S. 565, 582 (1991) (Scalia, J., concurring) (arguing that the reasonableness clause incorporates common law constraints on search and seizure, including the prohibition on general warrants and, in certain instances, a warrant requirement).

[215] *E.g.*, Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931) ("[The Warrant Clause] prevents the issue of warrants on loose, vague or doubtful bases of fact. It emphasizes the purpose to protect against all general searches. Since before the creation of our government, such searches have been deemed obnoxious to fundamental principles of liberty. They are denounced in the constitutions or statutes of every State in the Union."); Marron v. United States, 275 U.S. 192, 195 (1927) ("General searches have long been deemed to violate fundamental rights. It is plain that the Amendment forbids them."); Davies, *supra* note 48, at 576-77 ("[T]he constitutional texts [the framers] wrote did not simply seek to provide a post-intrusion remedy or condemn only the actual use of a general warrant; rather, the constitutional texts adopted a preventive strategy by consistently prohibiting even the *issuance* of a too-loose warrant.").

[216] *See* Davies, *supra* note 48, at 576-77.

emergency and executive necessity.[217] Finally, by requiring specificity as to the places to be searched and the property to be seized, the Warrant Clause limits the discretion of agents acting under the authority of warrants, providing general assurances that officers or their designees cannot engage in general searches according to their whims.

Given their experiences with writs of assistance, our colonial forebears expected that threats to their security would come from the political branches.[218] They were concerned particularly about the capacity of executive agents to justify programs of broad and indiscriminate search by making claims of emergency or executive necessity.[219] They also worried about the willingness of legislatures to ratify executive demands for expansive search powers by passing laws overriding common law prohibitions on general warrants.[220] They therefore empowered the courts to restrain the political branches and provided a flexible constitutional resource with which to meet future challenges. As the next Part shows, the Court drew on those resources in the late nineteenth and early twentieth centuries to establish a constitutional warrant requirement in response to threats posed to the security of the people by the advent and expansion of professional police forces.

IV. THE WARRANT REQUIREMENT AS A CONSTITUTIONAL REMEDY

Contrary to the conventional view described in Part I, the warrant requirement is not derived from the warrant clause. It is, instead, a constitutional remedy—analogous to the *Miranda* prophylaxis—that is derived from the reasonableness clause[221] and emerged in response to threats against the security of the people in their persons, houses, papers, and effects posed by the rise of professional, paramilitary police forces in the late nineteenth and early twentieth centuries.

A. *Our Adaptable Fourth Amendment*

The temptations of historical solipsism are strong. We all have a natural and understandable tendency to assume that the standing features of the world around us are as they always have been. These are dangerous fictions in the

[217] *See id.* at 589 ("They valued the specific warrant, in large part, because the magistrate's judgment offered the best available protection against too-hasty invasions of houses.").

[218] *See id.* at 658 ("Thus, *legislation* posed the only plausible threat that general warrants might be made legal in the future.").

[219] *See supra* note 185 and accompanying text.

[220] Davies, *supra* note 48, at 658.

[221] At least one prominent former member of the Court, the late Justice Scalia, seemed to concur in this view. *See, e.g.*, California v. Acevedo, 500 U.S. 565, 582 (Scalia, J., concurring) ("Although the Fourth Amendment does not explicitly impose the requirement of a warrant, it is of course textually possible to consider that implicit within the requirement of reasonableness.").

context of constitutional interpretation, however. As Justice McKenna wrote for the Court in *Weems v. United States*:

> Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it." The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.[222]

In the case of the Fourth Amendment, the text itself ensures against impotent lifelessness at the altar of historicism by establishing a right to remedies sufficient to guarantee the security of the people from unreasonable governmental intrusions.[223]

To be sure, "[t]he Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted."[224] As Part III showed, however, meeting the uncompromising command that "the right of the people to be secure . . . shall not be violated" requires that courts act in a "manner which will conserve public interests as well as the interests and rights of individual citizens."[225] Courts fail to perform their constitutional duty to the people if they interpret and apply the Fourth Amendment in ways that ignore new threats to security in persons, houses, papers, and effects created by changing law enforcement techniques and capacities.[226] On this point, at least, the Court's leading originalist seems to agree.

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[222] Weems v. United States, 217 U.S. 349, 373 (1910); *see also* TAYLOR, *supra* note 4, at 5-6, 12-15 (discussing how the Constitution, and the Bill of Rights in particular, must be interpreted flexibly as the country evolves over time).

[223] *Cf.* United States v. Lefkowitz, 285 U.S. 452, 464 (1932) ("The Fourth Amendment forbids every search that is unreasonable and is construed liberally to safeguard the right of privacy."); Gouled v. United States, 255 U.S. 298, 304 (1921) ("It has been repeatedly decided that [the Fourth and Fifth] Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers."), *abrogated by* Warden v. Hayden, 387 U.S. 294 (1967).

[224] Carroll v. United States, 267 U.S. 132, 149 (1925).

[225] *Id.* at 143, 149.

[226] *See* Boyd v. United States, 116 U.S. 616, 635 (1886) ("Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet,

In *Kyllo v. United States*,[227] the Court asked whether the use of a heat detection device to monitor otherwise invisible thermal emanations from a home constituted a Fourth Amendment search.[228] Both the devices and the physics upon which they operate were unknown to those who wrote and read the Fourth Amendment in 1791.[229] It therefore would be folly to argue that the Fourth Amendment regulates the use of such devices according to either a strict reading of its text or its original public meaning. Writing for the Court in *Kyllo*, Justice Scalia nevertheless emphasized that the Court must not "permit police technology to erode the privacy guaranteed by the Fourth Amendment."[230]

Although the devices at issue in *Kyllo* were novel, our forebears knew well that general threats of governmental surveillance could compromise the security of the people.[231] Even though surveillance conducted with heat detection devices is surreptitious, preserving the illusion of privacy, allowing law enforcement unfettered access to that technology would leave all of us and each of us to wonder whether and when the government might be watching. It is hard to imagine anything more unsettling or disruptive to the domestic sanctity of the home and its inherent intimacy.[232] Writing for the majority in *Kyllo*, Justice Scalia therefore fashioned a prospective remedy that would guard the security of the people from threats posed by heat detection technology and "more sophisticated systems that are already in use or in development": the warrant requirement.[233] Justice Scalia's reasoning in *Kyllo* mirrors the Court's original reasoning for imposing the warrant requirement.

Most of the law enforcement institutions that now define our experience with state power simply did not exist in late eighteenth-century America.[234]

as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.").

[227] 533 U.S. 27 (2001).

[228] *Id.* at 31.

[229] *See id.* at 46 ("It is hard to believe that [concealing the heat escaping from one's house] is an interest the Framers sought to protect in our Constitution.").

[230] *Id.* at 34.

[231] *Cf. id.* at 31 ("'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" (quoting Silverman v. United States, 365 U.S. 505, 511 (1961))).

[232] *See id.* at 37-38 ("In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes.").

[233] *Id.* at 36.

[234] Thomas Y. Davies, *Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right Against Self-Incrimination as a "Trial Right" in* Chavez v. Martinez, 70 TENN. L. REV. 987, 1004 (2003) ("[A framing-era] constable had neither a duty nor the authority to investigate the possibility of uncharged crimes; in fact, in the absence of a warrant, the constable had little more arrest authority than any other person."); Davies,

There was no Federal Bureau of Investigation or anything remotely its equivalent.[235] There were no professional police forces or officers charged with detecting, investigating, preventing, and prosecuting crime.[236] Some municipalities had constables and night watchmen, but they were mostly a feckless bunch, criticized for sloth and ineptitude rather than overzealous use of power.[237] In fact, the detection, investigation, and prosecution of crimes in eighteenth-century America were mostly matters of private enterprise mediated by magistrates and grand juries.[238] A citizen might swear out a warrant,[239] which a magistrate would direct a sheriff to enforce,[240] but arrests and

supra note 48, at 620-21 ("Proactive criminal law enforcement had not yet developed by the framing of the Bill of Rights; in fact, even post-crime investigation by officers was minimal."); Oliver, *supra* note 57, at 447-48 ("Professional police departments did not exist in the eighteenth century . . . ."); Carol Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 824 (1994) ("[A]t the time of the drafting and ratifying of the Fourth Amendment, nothing even remotely resembling modern law enforcement existed."); Wasserstrom, *supra* note 5, at 1395 (explaining that at the time of the framing of the Constitution, law enforcement officials had very limited powers, unlike today).

235 PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, TASK FORCE REPORT: THE POLICE 6 (1967) [hereinafter COMMISSION REPORT] (explaining that the FBI was not formed until 1924).

236 TAYLOR, *supra* note 4, at 28; Oliver, *supra* note 57, at 447-48, 454-55 ("Until the latter half of the nineteenth century, victims and magistrates conducted investigations, not police officers."); Wasserstrom, *supra* note 5, at 1395 ("When the fourth amendment was written and ratified, there were no organized police forces even remotely like those we take for granted today.").

237 COMMISSION REPORT, *supra* note 235, at 4 ("[C]itizens who were bound by law to take their turn at police work gradually evaded personal police service by paying others to do the work for them."); VERN FOLLEY, AMERICAN LAW ENFORCEMENT 70 (3d ed. 1980) ("As in England, the early night watches were anything but effective. They had the appearance of vigilantes and were often lazy."); Davies, *supra* note 48, at 641 ("The principal historical complaint regarding constables was not their overzealousness so much as their inaction."); Oliver, *supra* note 57, at 451-52, 456 ("[W]atchmen were often shirk[ing] their duties and, not infrequently, were found sleeping."); *cf.* Wasserstrom, *supra* note 5, at 1395 ("The few law enforcement officials that there were—sheriffs, constables, and customs inspectors—had very limited power to search or seize without a warrant.").

238 Davies, *supra* note 48, at 622; Oliver, *supra* note 57, at 452-65.

239 TAYLOR, *supra* note 4, at 24-25 ("[The search warrant] practice allowed the victim of theft to make oath, before a justice of the peace, of probable cause . . . ."); Oliver, *supra* note 57, at 452-53 ("An application for a search or arrest warrant required an oath that a crime had in fact occurred, something that a victim could easily swear on the basis of the injury he suffered, an assault or missing good for instance.").

240 TAYLOR, *supra* note 4, at 24-25 ("[T]he justice [of the peace] would issue a warrant authorizing the victim to go with a constable to the specified place and, if the goods were found, to return the goods and the suspected felon before the justice, for decision and disposition of the matter."); Davies, *supra* note 48, at 623 ("[The justice of the peace] did not personally make arrests or searches; rather, he directed his constable . . . to perform those tasks.").

prosecutions were seldom, if ever, motivated, organized, or directed by law enforcement officials.[241] Interrogations, the defining concern in *Miranda*, were conducted by magistrates in open court, not by executive officials holding suspects incommunicado.[242]

Given the absence of any serious law enforcement presence during the founding era, it should come as no surprise that there was no generalized warrant requirement at common law.[243] That did not give private citizens, executive officials, or their agents unfettered discretion to conduct searches or seizures without review or consequence, however. As Professor Amar has pointed out, they, like everyone else, could be sued for trespass.[244] The combination of trespass actions, citizens' ability to obtain specific warrants, and the common law prohibition on general warrants were sufficient in the late eighteenth century to maintain the people's security in their persons, houses, papers, and effects. The world changed, however.[245] Principal among these changes was the emergence of professional, paramilitary police forces.[246]

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[241] Oliver, *supra* note 57, at 450-52, 455-56 (indicating that eighteenth-century rules of criminal procedure made it risky for officers to make arrests without warrants, that warrants were generally obtained by victims of crimes, and that constables had little incentive to perform any investigation unless offered a reward).

[242] *Id.* at 450-51, 455, 464 ("While no laws throughout the early nineteenth century prevented police interrogations, they do not appear to have occurred, at least not frequently, until after the creation of the Municipal Police Force. Magistrates alone conducted interrogations until the mid-nineteenth century."); *see also* Crawford v. Washington, 541 U.S. 36, 43 (2004) (pointing out that justices of the peace conducted examinations of witnesses in eighteenth-century England).

[243] California v. Acevedo, 500 U.S. 565, 582 (Scalia, J., concurring) (explaining that the common law recognized a warrant requirement only in certain cases); *see also* TAYLOR, *supra* note 4, at 44-45 (stating that while there was very little search and seizure litigation for a century after the Fourth Amendment was ratified, that began to change with "the growth of organized police forces"); Oliver, *supra* note 57, at 523-24 (explaining that common law rules "regulated a very different sort of police force and sought to achieve a very limited role for the officer in the criminal justice system").

[244] Amar, *supra* note 4, at 774-78 ("[A]ny official who searched or seized could be sued by the citizen target in an ordinary trespass suit—with both parties represented at trial and a jury deciding between the government and the citizen."). Professor Amar goes on to argue that warrants themselves were regarded as a threat to the security of the people in 1789. *Id.* at 772-74. On this point, he probably goes too far. *See* Gouled v. United States, 255 U.S. 298, 308 (1921) ("The wording of the Fourth Amendment implies that search warrants were in familiar use when the Constitution was adopted and, plainly, that when issued 'upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized,' searches, and seizures made under them, are to be regarded as not unreasonable, and therefore not prohibited by the Amendment."), *abrogated by* Warden v. Hayden, 387 U.S. 294 (1967); TAYLOR, *supra* note 4, at 41 ("It is perhaps too much to say that [the founders] feared the warrant more than the search . . . .").

[245] Amsterdam, *supra* note 119, at 400 (contrasting the framers' fear of a strong centralized government with our present-day view of "law enforcement as benign"); Oliver,

B. *An Emerging Threat: The Advent of Professional Law Enforcement*

Unlike its continental peers, "England, fearing the oppression [professional] forces had brought about in many of the continental countries, did not begin to create police organizations until the 19th century."[247] The colonists were similarly reserved.[248] During the early days of the nineteenth century, law enforcement in the United States remained a largely private affair.[249] As David Johnson reports, that began to change mid-century when "some citizens began agitating for a more immediate solution [to the problem of controlling crime] which necessitated a complete overhaul of the philosophy, organization, and techniques of policing."[250] Reformers had in mind a model of preventative policing pioneered by Sir Robert Peel in 1829.[251] Peel proposed establishing a

supra note 57, at 524 ("With the creation of modern police forces in the mid-nineteenth century, officers began to conduct investigations. Courts and legislatures gradually became more comfortable with granting officers more discretion."); Wasserstrom, *supra* note 5, at 1395-96 ("[T]he warrant process no longer functions as it did in the colonies, for when the fourth amendment was adopted, warrants were used to *confer* authority on law enforcement officials that they would not otherwise possess, while in today's world, the warrant requirement works to *limit* the sweeping authority that these officers would otherwise possess.").

[246] *See* TAYLOR, *supra* note 4, at 45.

[247] COMMISSION REPORT, *supra* note 235, at 3; *see also Crawford*, 541 U.S. at 53 ("England did not have a professional police force until the 19th century . . . ."); FOLLEY, *supra* note 237, at 43, 59 (detailing the history of citizens' private handling of disputes and the subsequent use of private police forces).

[248] Oliver, *supra* note 57, at 448 ("Modern police departments, charged with aggressively investigating and preventing crime, were created over strenuous objections that their very existence would undermine common-law limits on police conduct.").

[249] *See* COMMISSION REPORT, *supra* note 235, at 3-5 (describing the evolution of policing in America and England and the waning pledge system that relied on private citizens); Oliver, *supra* note 57, at 447-48, 450, 455.

[250] DAVID R. JOHNSON, POLICING THE URBAN UNDERWORLD: THE IMPACT OF CRIME ON THE DEVELOPMENT OF THE AMERICAN POLICE, 1800-1887, at 9 (1979); *see also* COMMISSION REPORT, *supra* note 235, at 5 ("As American towns grew in size and population during the first half of the 19th century, the constable was unable to cope with the increasing disorder. . . . [M]any American cities began to develop organized metropolitan police forces of their own."); FOLLEY, *supra* note 237, at 68-69 (explaining that the sharp population rise in America led to increased crime and unrest, which in turn led to the growth of police forces).

[251] FOLLEY, *supra* note 237, at 71 ("In 1844, finally recognizing the problem, New York followed the successful pattern set in England fifteen years earlier by Sir Robert Peel, and became the first city in the western hemisphere to establish a modern police department."); JOHNSON, *supra* note 250, at 9 ("[Citizens] proposed that cities adopt the idea of crime prevention embodied in Sir Robert Peel's reform of the London police in 1829."); *see also* COMMISSION REPORT, *supra* note 235, at 4 ("In 1822, Sir Robert Peel, England's new Home Secretary, contended that, while better policing could not eliminate crime, the poor quality of police contributed to social disorder."). Peel is familiar to criminal law students as the intended target of Daniel M'Naughten, of the eponymous *M'Naughten* standard that remains

uniformed police department, organized on a military command model,[252] "whose collective efforts to suppress crime depended upon their ability to establish a pervasive, visible presence in all areas of a city at all hours of the day or night."[253]

Peel's model of a centralized, bureaucratized, ever-present police force slowly took hold in mid-nineteenth-century America.[254] Led by New York, most of America's largest cities had police forces of some sort by 1870.[255] By the early twentieth century, the model of a professional, paramilitary police force had spread to almost every municipality.[256] Expanding police departments created new career pathways for young men in an increasingly urbanizing America.[257] Law enforcement agencies also began to assert their positions in the bureaucratic hierarchy of government, competing for resources, public attention, and political favor.[258]

The advent of professional police forces resulted in the creation of new disciplinary regimes[259] and dramatic changes to citizens' daily engagements

the predominate test for legal insanity. Bageshree V. Ranade, Note, *Conceptual Ambiguities in the Insanity Defense:* State v. Wilson *and the New "Wrongfulness" Standard*, 30 CONN. L. REV. 1377, 1379 (1998).

252 COMMISSION REPORT, *supra* note 235, at 4 ("[Peel] introduced . . . an 'Act for Improving the Police In and Near the Metropolis.' This led to the first organized British metropolitan police force. Structured along the lines of a military unit, the force of 1,000 was the first one to wear a definite uniform.").

253 JOHNSON, *supra* note 250, at 9.

254 *See id.* at 9; Oliver, *supra* note 57, at 459.

255 COMMISSION REPORT, *supra* note 235, at 5; *see also* Oliver, *supra* note 57, at 459 (stating that New York turned the Framers' law enforcement scheme upside down with the rise of professional police forces).

256 COMMISSION REPORT, *supra* note 235, at 5-6.

257 *See* JAMES F. RICHARDSON, THE NEW YORK POLICE: COLONIAL TIMES TO 1901, at 173 (1970) ("[P]olicemen were reasonably well paid, had a high degree of job security, some paid vacation, and the prospect of a pension while still fairly young."); Oliver, *supra* note 57, at 459 ("Law enforcement became a career, and one that paid better-than-average wages."); *see also* COMMISSION REPORT, *supra* note 235, at 6 (detailing the advent of merit employment and police training schools).

258 *See* EDWIN G. BURROWS & MIKE WALLACE, GOTHAM: A HISTORY OF NEW YORK CITY TO 1898, at 638 (1999) (describing how, unlike London's Metropolitan Police, after which New York's police force was modeled, New York's police officers were decentralized and therefore "inextricably enmeshed in local politics"); COMMISSION REPORT, *supra* note 235, at 6; *see also, e.g.*, Oliver, *supra* note 57, at 465-66 (describing how the New York Police Department succeeded in lobbying for a legislative amendment revoking its statutory power to detain material witnesses where other groups had failed).

259 *See* MICHEL FOUCAULT, DISCIPLINE AND PUNISH 21-28 (Alan Sheridan trans., Vintage Books 1979) (1977) (describing the new penal system and its reliance on extra-judicial factors in determining punishment).

with state power.[260] Before professional police forces existed, the state and its capacity to use force were largely an abstraction for most citizens.[261] With uniformed officers on the street, and cadres of professional investigators engaged in identifying and apprehending offenders, state power became a visible, visceral part of the daily tableaus of life in American cities.[262] Uniformed police officers populating the public sphere also provided the state with a new, far-reaching surveillance apparatus. State power was not merely present, it was watching.[263] Finally, officers and investigators asserted a broad license to use force.[264] Police claimed a right to command, employ violence, effect forcible seizures of persons, and enter and search property.[265] More and more, citizens lived with very real threats to security in their persons, houses, papers, and effects.

Police departments developed training models, internal standards, and cultural norms.[266] Officers were judged by these standards and norms for purposes of pay and promotion, which created incentives to be aggressive and shaped their professional personalities.[267] These developments also produced a degree of cultural separation between law enforcement and their communities.[268] Officers assumed a proprietary position as guardians of the

[260] *See* Oliver, *supra* note 57, at 460 (explaining that at the end of the nineteenth century, officers began intruding much more aggressively into citizens' lives).

[261] Colonial obsession with writs of assistance arose from entanglements between a relatively small number of merchants and customs or tax officials, not entanglements between citizens and police officers. *See* TAYLOR, *supra* note 4, at 35, 44; Oliver, *supra* note 57, at 450, 456-57 ("General warrants issued to customs officers allowed them to search wherever they suspected they might find violations . . . .").

[262] *Cf.* FOLLEY, *supra* note 237, at 73, 101-02.

[263] *See id.* at 156-57 ("In achieving [the] objectives [of safeguarding the public, apprehending criminals, and providing public services], the patrol force checks buildings, surveys possible incidents, questions suspicious persons, [and] gathers information . . . .").

[264] *See, e.g.*, Oliver, *supra* note 57, at 468-71 ("By the early twentieth century, an officer's use of his club to punish and intimidate those he identified as being part of the 'criminal element' was not only accepted, it was publicly encouraged.").

[265] *See, e.g.*, Johnson v. United States, 333 U.S. 10, 13 (1948) ("Entry to defendant's living quarters . . . was demanded under color of office. It was granted in submission to authority . . . .").

[266] *See* FOLLEY, *supra* note 237, at 78-79 (chronicling August Vollmer's establishment of the first police training school and his subsequent efforts to improve police education); Oliver, *supra* note 57, at 459 (explaining that the rise of professional police forces led to a culture of violence).

[267] *See* Oliver, *supra* note 57, at 459, 524 ("Professional police forces were . . . staffed with career officers who had incentives to aggressively investigate crime. . . . Ferreting out criminals led to retention and promotion.").

[268] *Cf. id.* at 469 ("The emerging culture of violence in the department then began to pose a threat to law-abiding citizens who crossed paths with the wrong officer.").

peace.[269] Unlike the lives of civilians, the daily experiences of police officers were defined by the potential for violence.[270] Success and survival were tied to an officer's ability to conform psychologically and socially to law enforcement culture.[271] To join the police department was to join a brotherhood. To be a member of the brotherhood carried with it duties of faith and fealty.[272] It also provided access to power and status, which, in turn, bred a sense of practiced entitlement[273] that often led to corruption and abuse.[274]

The rise of professional police forces also occasioned more expansive uses of police powers, including search and seizure.[275] Some of these developments were literally pedestrian, such as the advent of the beat cop,[276] but some cast a darker shadow, such as undercover investigations, investigative detention,[277]

[269] *Cf. id.* at 469-70.

[270] *Cf. id.* at 469.

[271] *Cf. id.* at 469-73.

[272] *Cf.* THOMAS REPPETTO, AMERICAN POLICE: THE BLUE PARADE 99-106 (2011).

[273] *Id.* at 110 (recounting Boston police officers who had reached a level of respect in the community and subsequently felt entitled to demand additional pay and threatened to strike); *see* Oliver, *supra* note 57, at 473 ("[T]his culture of corruption allowed improper police violence to flourish by insulating officers from internal discipline. Officers who used their power to pursue personal vendettas rather than punish criminals were safe in this system."). Officers' sense of entitlement and use of violence is described in the policing literature as the "command and control" model of police-citizen interactions. *See, e.g.*, Eric Miller, *Role-Based Policing: Restraining Police Conduct "Outside the Legitimate Investigative Sphere,"* 94 CALIF. L. REV. 617, 661-62 (2006); Tom Tyler, *Trust and Law Abidingness: A Proactive Model of Social Regulation*, 81 B.U. L. REV. 361, 364-65 (2001) ("[T]he style that the police bring to their interactions with people is that of command and control—they try to dominate people and situations by displays of force or the potential for the use of force.").

[274] BURROWS & WALLACE, *supra* note 258, at 638; MARILYNN S. JOHNSON, STREET JUSTICE: A HISTORY OF POLICE VIOLENCE IN NEW YORK CITY 63-69 (2003) (describing police brutality during a New York City riot and the police department's subsequent denial of wrongdoing); REPPETTO, *supra* note 272, at 120, 223 (recounting police departments' involvement in political corruption, violence, and abuse of citizens); Oliver, *supra* note 57, at 471-73 ("Corruption within the police department was widespread and well-known. A system of illegal tribute collection filtered down to the lowest levels of the force.").

[275] Oliver, *supra* note 57, at 460 ("Officers were given broader search and arrest powers, [and] began to routinely (and roughly) interrogate suspects and tap telephone wires with impunity." (footnote omitted)); Wasserstrom, *supra* note 5, at 1395 ("By contrast, today's law enforcement officials, by virtue of their commission alone, seem to have broad, inherent authority—or perhaps merely de facto power—to search and seize.").

[276] *Cf.* FOLLEY, *supra* note 237, at 72 ("The primary method of patrol in the early days was by foot . . . .").

[277] Oliver, *supra* note 57, at 465 ("Police used material witness detentions to hold uncooperative witnesses, provide better housing for cooperating suspects, and hold suspects that they lacked sufficient evidence to charge.").

custodial interrogation,[278] eavesdropping,[279] and wiretapping.[280] Police departments and their political supporters argued that these new techniques and technologies were necessary.[281] They also argued that police officers and their departmental supervisors should have broad discretion to determine when and how to use these techniques.[282] The results were entirely predictable: excess and abuse.[283] Some beat cops became little more than bullies[284] and extortionists.[285] Some investigators became kidnappers and torturers.[286] Even officers and departments acting with the best of intentions could not resist the logic of practical necessity or the adrenaline of the pursuit. In the process, the very existence of police forces became a threat to the people's sense of security in their persons, houses, papers, and effects.[287]

C. *A Constitutional Response to the Emerging Threat*

The political branches proved largely incapable of regulating the police forces that had become the model for law enforcement in the United States by

[278] *See* Miranda v. Arizona, 384 U.S. 436, 446 (1966) (summarizing cases dealing with custodial interrogations in which "the police resorted to physical brutality—beating, hanging, whipping—and to sustained and protracted questioning incommunicado in order to extort confessions").

[279] *See* Berger v. New York, 388 U.S. 41, 46-49 (1967) ("The telephone brought on a new and more modern eavesdropper known as the 'wiretapper.'").

[280] Oliver, *supra* note 57, at 466-68 ("The New York Police Department had been secretly conducting wiretap operations since 1895, using the evidence overheard to aid in further investigations, never revealing that telephone conversations had been overheard."); *see also* Olmstead v. United States, 277 U.S. 438, 476 (1928) (Brandeis, J., dissenting) ("As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire-tapping.").

[281] *See* Oliver, *supra* note 57, at 460-61, 478, 482 ("Politicians and judges over the course of the nineteenth and early twentieth century . . . grew ever more comfortable with the new powers police were exercising to discover evidence.").

[282] *See id.* at 460-61, 468-69.

[283] *See supra* note 274.

[284] *See, e.g.*, Oliver, *supra* note 57, at 469-70 (describing how one police captain armed squads of officers with clubs, ordering them to go into tough neighborhoods to beat known gang members).

[285] *Id.* at 472-73 (explaining that bribery of police officers was so prevalent in late nineteenth-century New York that estimated illegal contributions to police were listed in tourist guidebooks).

[286] *See id.* at 460 ("In the early years of the Progressive Era, officers were given a very public mandate to torture suspects in interrogation rooms and inflict unnecessary violence upon suspected criminals on the streets.").

[287] *See* Wasserstrom, *supra* note 5, at 1395 (discussing the lack of statutory, regulatory, and judicial controls on modern law enforcement's broad power to search and seize).

the early twentieth century.[288] Responsibility for protecting the security of the people from the threat of law enforcement excesses therefore fell to the courts.[289] The Supreme Court responded by reshaping the world of Fourth and Fifth Amendment remedies.[290] The warrant requirement was one of these efforts.[291]

Born in response to the expansion of police forces, the warrant requirement provided a renewed sense of security for the people by interposing the courts between officers and citizens, and setting prospective constraints on law enforcement's discretionary use of force to search and seize.[292] Post hoc

[288] *See* United States v. Boyd, 116 U.S. 616, 635 (1886) ("We have no doubt that the legislative body is actuated by [a desire to protect the constitutional rights of citizens]; but the vast accumulation of public business brought before it sometimes prevents it . . . from noticing objections which have become developed by time and the practical application of the objectionable law."); COMMISSION REPORT, *supra* note 237, at 6-7 ("[The Wickersham Commission] said that no intensive effort was being made to educate, train, and discipline prospective officers, or to eliminate those shown to be incompetent."); Oliver, *supra* note 57, at 448, 460-61, 478-82 (discussing the lack of any meaningful regulation of police forces until the Warren Court); Wasserstrom, *supra* note 5, at 1395 ("[Police] powers are, for the most part, subject to neither statutory nor regulatory control, and common law limitations are now generally ill-defined and ineffective.").

[289] *See, e.g.*, Weeks v. United States, 232 U.S. 383, 392 (1914) ("The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.").

[290] *Cf.* Oliver, *supra* note 57, at 448 ("[Modern criminal procedure] requires judges to supervise many police activities . . . . Contemporary rules of criminal procedure . . . have their origins in an express rejection of early common-law rules, followed by a series of reforms specifically designed to regulate modern police forces.").

[291] *See* TAYLOR, *supra* note 4, at 46 ("[T]he search warrant came to be looked on, for the first time, not as a dangerous authorization, but as a safeguard against oppressive searches, and the search incident to arrest encountered, for the first time, the judicial frown.").

[292] *See* Marron v. United States, 275 U.S. 192, 196 (1927) ("The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant."); Rice v. Ames, 180 U.S. 371, 374-75 (1901) ("A citizen ought not to be deprived of his personal liberty upon an allegation which, upon being sifted, may amount to nothing more than a suspicion. While authorities upon this subject are singularly few, it is clear that a person ought not to be arrested upon a criminal charge upon less direct allegations than are necessary to authorize the arrest of a fraudulent or absconding debtor."); Davies, *supra* note 48, at 657 (discussing the framers' motivation in adopting a constitutional ban on general warrants); *cf.* United States v. Cruickshank, 92 U.S. 542, 568-69 (1875) ("Descriptive allegations in criminal pleading are required to be reasonably definite and certain, as a necessary safeguard to the accused against surprise, misconception, and error in conducting his defence, and in order that the judgment in the case may be a bar to a second accusation for the same charge.").

review of law enforcement actions through the civil process may have been sufficient to guarantee the security of the people when the only threats came from phlegmatic constables and duty collectors.[293] By the late nineteenth century, however, those common law tools were no longer sufficient to control politically powerful law enforcement agencies or their zealous officers.[294] Something more was needed: an effective, enforceable, parsimonious, and therefore constitutional, remedy.

Unlike the *Miranda* prophylaxis, there is no signal case establishing the force and foundation of the warrant requirement. The warrant requirement instead evolved through a line of cases starting with *Boyd v. United States*[295] and culminating in *Johnson v. United States*.[296] In form, analysis, and rhetoric, these cases nevertheless foreshadowed the Court's defense of constitutional remedies in *Miranda*. Specifically, the Court first highlights the scope and importance of the Fourth Amendment as a "sacred right"[297] of the people and emphasizes the general threats posed by law enforcement practices to the

[293] *See* Amar, *supra* note 4, at 774-76 (discussing the centrality of civil juries in determining the reasonableness of searches and the heavy penalties attached to warrantless searches).

[294] Comment, *Judicial Control of Illegal Search and Seizure*, 58 YALE L.J. 144, 146 (1948) ("Police lawlessness excused as expediency has been encouraged by apathy and occasional affirmative support both from the public and its elected leaders. Defendants are to a large extent protected, for statutes generally provide that civil servants' salaries cannot be garnished in the event of a civil suit, and policemen are frequently indemnified from loss and defended without cost." (footnotes omitted)).

[295] 116 U.S. 616 (1886). Although *Boyd* does not state explicitly the existence of a warrant requirement, Justice Butler later credits *Boyd*, among other early cases, for ingraining the warrant requirement in Fourth Amendment law. *See* United States v. Agnello, 269 U.S. 20, 33 (1921) ("While the question has never been directly decided by this Court, it has always been assumed that one's house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein."). *Boyd*'s role in Fourth Amendment jurisprudence was recently revitalized by Chief Justice Roberts, who cited and quoted from *Boyd* in his majority opinion for the Court in *Riley v. California*, 134 S. Ct. 2473, 2494-95 (2014) (extending the warrant requirement to cellphones on the basis of the broad protection provided by the Fourth Amendment).

[296] 333 U.S. 10 (1948).

[297] *Boyd*, 116 U.S. at 630 ("The principles laid down in [Entick v. Carrington] affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment.").

people's privacy and security.[298] The Court then identifies concerns with physical searches and seizures, particularly when conducted in homes or other protected spaces.[299] It also rehearses the critical role of the Fourth Amendment as a protection against law enforcement regimes and zealous officers engaged in the "often competitive enterprise of ferreting out crime."[300] Faced with the expanding threat of physical search and seizure, the Court cites the necessity of giving 'liberal construction' to the Fourth Amendment "lest there shall be impairment of the rights for the protection of which it was adopted."[301] While acknowledging the validity of law enforcement goals advanced by physical search and seizure, the Court notes the constitutional role of the Fourth

[298] *See* Berger v. New York, 388 U.S. 41, 53, 63 (1967) ("This is no formality that we require today, but a fundamental rule that has long been recognized as basic to the privacy of every home in America."); Camara v. Mun. Court, 387 U.S. 523, 528 (1967) ("The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials."); *Johnson*, 333 U.S. at 14; Nardone v. United States, 308 U.S. 338, 340 (1939) ("[The decision in *Nardone v. United States*] was not the product of a merely meticulous reading of technical language. It was the translation into practicality of broad considerations of morality and public well-being."); Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931) ("[The Reasonableness Clause] is general and forbids every search that is unreasonable; it protects all, those suspected or known to be offenders as well as the innocent . . . ."); Weeks v. United States, 232 U.S. 383, 392 (1914); *Boyd*, 116 U.S. at 618 ("As the question raised upon the order for the production by the claimants of the invoice[,] . . . and the proceedings had thereon, is not only an important one in the determination of the present case, but is a very grave question of constitutional law, involving the personal security, and privileges and immunities of the citizen, we will set forth the order at large.").

[299] *See* Brinegar v. United States, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting) ("We must remember that the extent of any privilege of search and seizure without warrant which we sustain, the officers interpret and apply themselves and will push to the limit."); *Johnson*, 333 U.S. at 14 ("The right of officers to thrust themselves into a home is also a grave concern, not only to the individual, but to a society which chooses to dwell in reasonable security and freedom from surveillance."); United States v. Lefkowitz, 285 U.S. 452, 464 (1932); *Go-Bart*, 282 U.S. at 357 ("The need of protection against [general searches] is attested alike by history and present conditions."); *Weeks*, 232 U.S. at 392.

[300] *Johnson*, 333 U.S. at 14.

[301] *Go-Bart*, 282 U.S. at 357; *see also Lefkowitz*, 285 U.S. at 464 ("The Fourth Amendment forbids every search that is unreasonable, and is construed liberally to safeguard the right of privacy."); Gouled v. United States, 255 U.S. 298, 304 (1921) ("It has been repeatedly decided that [the Fourth and Fifth Amendments] should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well intentioned, but mistakenly overzealous, executive officers."), *abrogated by* Warden v. Hayden, 387 U.S. 294 (1967); *cf.* Scalia, *supra* note 38, at 37 ("[T]he context of the Constitution tells us to . . . give words and phrases expansive rather than narrow interpretation . . . ."); Wasserstrom, *supra* note 5, at 1396.

Amendment as a check on executive powers[302] and emphasizes the courts' duties to enforce those constraints.[303] The Court then highlights the role that warrants and the warrant requirement play in guaranteeing security in the home and other protected spaces by limiting the discretion of officers[304] and interposing courts between citizens and law enforcement.[305]

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[302] *See Berger*, 388 U.S. at 63 ("While '[t]he requirements of the Fourth Amendment are not inflexible, or obtusely unyielding to the legitimate needs of law enforcement,' it is not asking too much that officers be required to comply with the basic command of the Fourth Amendment before the innermost secrets of one's home or office are invaded." (quoting Lopez v. United States, 373 U.S. 427, 464 (1963) (Brennan, J., dissenting)); *Johnson*, 333 U.S. at 14 ("When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."); *Weeks*, 232 U.S. at 391-92; *cf.* United States v. Agnello, 269 U.S. 20, 33 (1921) ("Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause."); *Boyd*, 116 U.S. at 629 (finding unpersuasive the government's "argument of utility, that such a search is a means of detecting offenders by discovering evidence" (quoting Entick v. Carrington (1765) 95 Eng. Rep. 807 (KB))); United States v. Cruikshank, 92 U.S. 542, 549 (1875) ("In the formation of a government, the people may confer upon it such powers as they choose. The government, when so formed, may, and when called upon should, exercise all the powers it has for the protection of the rights of its citizens and the people within its jurisdiction; but it can exercise no other. The duty of a government to afford protection is limited always by the power it possesses for that purpose.").

[303] *See Johnson*, 333 U.S. at 14; *Weeks*, 232 U.S. at 392.

[304] *Berger*, 388 U.S. at 58 (finding unconstitutional a New York statute licensing broad use of electronic eavesdropping devices because the statute failed to limit law enforcement discretion, thereby permitting "general searches by electronic devices, the truly offensive character of which was first condemned in *Entick v. Carrington* and which were then known as 'general warrants.'" (citation omitted)); *Johnson*, 333 U.S. at 14 ("Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity, and leave the people's homes secure only in the discretion of police officers."); *Lefkowitz*, 285 U.S. at 464 ("Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime.").

[305] *See Berger*, 388 U.S. at 59-60; *Johnson*, 333 U.S. at 13-14 ("[The Fourth Amendment's] protection consists in requiring that [the usual inferences which reasonable men draw from evidence] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."); *Lefkowitz*, 285 U.S. at 464 ("[T]he informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests."); Kathleen Sullivan, *Under a Watchful Eye: Incursions on Personal Privacy*, *in* THE WAR ON OUR FREEDOM: CIVIL LIBERTIES IN AN AGE OF TERRORISM 128, 129 (Richard Leone & Greg Anrig, Jr. eds., 2003) (explaining that "[b]y permitting

Although the Court often draws on the wisdom of the warrant clause in elaborating the warrant requirement, the Court does not ground the warrant requirement in the warrant clause. Rather, the Court casts the warrant requirement as a prospective remedy grounded in the reasonableness clause.[306] There is, of course, a close linkage between the warrant requirement and the warrant clause. It is not one of implication however. The linkage is, instead, a matter of modeling. Although our founders did not mandate warrants, they understood the prospective remedial power of warrants and the warrant

searches and seizures only if reasonable, and interposing the courts between the privacy of citizens and the potential excesses of executive zeal," these constitutional protections help to protect against "dragnets, or general searches, which were anathema to the colonists who rebelled against the British crown"); *cf.* Brinegar v. United States, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting) ("We must remember, too, that freedom from unreasonable search differs from some of the other rights of the Constitution in that there is no way in which the innocent citizen can invoke advance protection. For example, any effective interference with freedom of the press, or free speech, or religion, usually requires a course of suppressions against which the citizen can and often does go to the court and obtain an injunction. Other rights, such as that to an impartial jury or the aid of counsel, are within the supervisory power of the courts themselves. Such a right as just compensation for the taking of private property may be vindicated after the act in terms of money. But an illegal search and seizure usually is a single incident, perpetrated by surprise, conducted in haste, kept purposely beyond the court's supervision and limited only by the judgment and moderation of officers whose own interests and records are often at stake in the search. There is no opportunity for injunction or appeal to disinterested intervention. The citizen's choice is quietly to submit to whatever the officers undertake or to resist at risk of arrest or immediate violence.").

[306] *E.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652-53 (1995) ("As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is 'reasonableness.' . . . Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, this Court has said that reasonableness generally requires the obtaining of a judicial warrant." (citation omitted)); California v. Acevedo, 500 U.S. 565, 583-84 (1991) (Scalia, J., concurring) ("[T]he 'reasonableness' requirement of the Fourth Amendment affords the protection that the common law afforded. I have no difficulty with the proposition that that includes the requirement of a warrant, where the common law required a warrant; and it may even be that changes in the surrounding legal rules . . . may make a warrant indispensable to reasonableness where it once was not." (citations omitted)); *see* Camara v. Mun. Court, 387 U.S. 523, 528-29 (1967) ("Though there has been general agreement as to the fundamental purpose of the Fourth Amendment, translation of the abstract prohibition against 'unreasonable searches and seizures' into workable guidelines for the decision of particular cases is a difficult task which has for many years divided the members of this Court. Nevertheless, one governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant."); *Agnello*, 269 U.S. at 32 ("The search of a private dwelling without a warrant is, in itself, unreasonable and abhorrent to our laws.").

process.[307] So too did twentieth-century courts.[308] It is no surprise, then, that the Court would draw on this wisdom and experience when fashioning a constitutional response to new and emerging threats posed by professional police forces.

There is little doubt that the warrant requirement effectively contributes to our collective security against government intrusion.[309] As the Court pointed out in *United States v. Lefkowitz*, "[s]ecurity against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime."[310] By interposing courts between citizens and law enforcement, the warrant requirement slows things down and imposes upon officers a duty of deliberation and care that is easy to forget in the heat of the chase.[311] It also forces officers to identify, organize, and externalize their reasons for wanting to conduct a search. This process of deliberation and public reason-giving effects a powerful moral force on government agents and action.[312] Finally, the warrant requirement guarantees that warrant applications will be judged by detached arbiters exercising neutral judgment.[313] This not only reduces the likelihood that law enforcement interests will overwhelm citizens' privacy interests, but it also dramatically

[307] *See* TAYLOR, *supra* note 4, at 38-42 (discussing the Framers' view that the warrant requirement was a license that must be strictly controlled because of the powers and protection that it conveyed); Davies, *supra* note 48, at 650-57.

[308] *See, e.g.*, Gouled v. United States, 255 U.S. 298, 308 (1921) ("The wording of the Fourth Amendment implies that search warrants[,] . . . when issued 'upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized,' searches, and seizures made under them, are to be regarded as not unreasonable, and therefore not prohibited by the amendment.").

[309] *E.g.*, United States v. White, 401 U.S. 745, 789-90 (1971) (Harlan, J., dissenting) ("The very purpose of interposing the Fourth Amendment warrant requirement is to redistribute the privacy risks throughout society . . . . Interposition of a warrant requirement is designed not to shield 'wrongdoers,' but to secure a measure of privacy and a sense of personal security throughout our society."); *see also* Bar-Gill & Friedman, *supra* note 15, at 1674 (stating that warrants lead to "better and more constitutional decisions").

[310] 285 U.S. at 464.

[311] *See* Davies, *supra* note 48, at 576-77, 589, 654 (discussing the framers' preference for specific warrants because of the attendant judicial review); Donald Dripps, *Living with* Leon, 95 YALE L.J. 906, 926-27 (1986) (highlighting the impact of the exclusionary rule on police behavior).

[312] *Cf.* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 107-08 (William Rehg trans., 1996) ("With moral questions, humanity or a presupposed republic of world citizens constitutes the reference system for justifying regulations that lie in the equal interest of all."); 1 JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY 8-42 (Thomas McCarthy trans., 1984).

[313] *Lefkowitz*, 285 U.S. at 464.

reduces error rates[314] and provides invaluable reassurance to the people that their rights are not subject to the whim of zealous officers charged with ferreting out crime.[315]

In addition to being effective, the warrant requirement is easy to administer and enforce. It starts with a simple rule: searches of homes or other protected areas are presumed to be unreasonable in the absence of a warrant.[316] That presumption can be overcome by showing consent or emergency.[317] If the presumption cannot be overcome, then the evidence seized, along with all investigative fruits, will be excluded from the prosecution's case-in-chief.[318] On the other hand, searches conducted under the auspices of a warrant are presumed to be reasonable.[319] Even where a warrant turns out to have been improvidently granted, the good faith exception excuses officers who act in good faith.[320]

Finally, the warrant requirement is parsimonious. As Justice Jackson points out in *Johnson v. United States*, it is hard to imagine a less burdensome remedial structure that is also sufficient to guarantee the right of the people.[321] As further evidence of its parsimoniousness, the warrant requirement is not absolute, but admits of exceptions where the balance between "the need for effective law enforcement [and] the right of privacy" suggests that the

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[314] *See* Max Minzner, *Putting Probability Back Into Probable Cause*, 87 TEX. L. REV. 913, 923-25 (2009) (presenting data tending to show a statistical correlation between obtaining a warrant and success in finding evidence).

[315] *See* Reinert, *supra* note 156, at 1500 (arguing that the Court's reasonableness balancing test should take into account a wider range of factors so that the warrant may "vindicate[] social interests in accuracy and efficiency"); Wasserstrom, *supra* note 5, at 1396 (stating that the warrant requirement functions to limit the broad authority conferred upon modern police forces); *see also* Johnson v. United States, 333 U.S. 10, 14 (1948).

[316] *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995) ("Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, this Court has said that reasonableness generally requires the obtaining of a judicial warrant." (citation omitted)).

[317] *Johnson*, 333 U.S. at 13-15 (discussing the general prohibition against warrantless searches except under exceptional circumstances).

[318] Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) ("The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.").

[319] Gouled v. United States, 255 U.S. 298, 308 (1921).

[320] *See* Gray, *supra* note 14, at 29-30 (discussing the establishment of the good faith exception and its justification). As Bill Stuntz has pointed out, the good faith exception plays an important role in reinforcing the systemic effectiveness of the warrant requirement as a constraint on law enforcement. *See* Stuntz, *supra* note 4, at 909 (discussing the complementary relationship between the good faith exception and the warrant requirement, and the benefits that this relationship can have in deterring police from acting in bad faith).

[321] *Cf. Johnson*, 333 U.S. at 14.

requirement can be "dispensed with."[322] In order for the warrant requirement to be effective, however, cases where the warrant requirement is dispensed with must be limited to "exceptional circumstances."[323] If warrants become the exception rather than the rule, then the goal of ensuring a general sense of security will be compromised.

V. A REMEDIES-AS-RIGHTS AGENDA FOR THE 21ST CENTURY

The foregoing account of the Fourth Amendment warrant requirement is valuable in a number of regards. Foremost, it brings conceptual and doctrinal clarity to persistent debates about the constitutional status of the warrant requirement. Although these pursuits make the game well worth the candle, the remedies as rights framework offered here also has important advantages as we seek to understand and address contemporary challenges to the security of the people brought by rapid advances in surveillance and data aggregation technologies.

Granting government agents unfettered discretion to deploy and use modern surveillance technologies—such as stingrays, GPS-enabled tracking, cell-site location, drones, and Big Data—poses general threats to the security of the people.[324] Although these challenges are novel in dimension, they are not incomprehensible to our existing constitutional regime.[325] In concept and principle, the Fourth Amendment questions raised by contemporary surveillance technologies have much in common with challenges confronted by our forebears in the late eighteenth century, when the security of the people was threatened by general warrants, and the early twentieth century, when the security of the people was threatened by the growth and expansion of law enforcement agencies. We may therefore turn to this history in order to draw wisdom and guidance for the present.

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[322] *Id.* at 14-15; *see also* Antonin Scalia, In Memoriam, *Edward H. Levi (1912-2000)*, 67 U. CHI. L. REV. 983, 985 (2000) ("The Fourth Amendment, after all, does not require a warrant; it requires reasonable searches and seizures, and in the intelligence field, reasonableness does not demand the service of a warrant.").

[323] *Johnson*, 333 U.S. at 14; *cf.* Bar-Gill & Friedman, *supra* note 15, at 1620-22 (contending that the warrant requirement has been weakened by an increasing number of exceptions).

[324] *See* Gray & Citron, *supra* note 3, at 65-67 (detailing the many new technologies and surveillance systems capable of monitoring citizens that "implicate individual and collective expectations of privacy").

[325] *See* City of Ontario v. Quon, 560 U.S. 746, 768 (2010) (Scalia, J., concurring) ("Applying the Fourth Amendment to new technologies may sometimes be difficult, but when it is necessary to decide a case we have no choice. The Court's implication that where electronic privacy is concerned we should decide less than we otherwise would (that is, less than the principle of law necessary to resolve the case and guide private action)—or that we should hedge our bets by concocting case-specific standards or issuing opaque opinions—is in my view indefensible. The-times-they-are-a-changin' is a feeble excuse for disregard of duty." (citation omitted)).

Although beyond the scope of this article, it is worth a few moments in closing to consider how these past experiences might assist law enforcement, legislatures, and courts as they confront constitutional challenges posed by contemporary surveillance technologies.[326] Foremost, the remedies as rights account of the Fourth Amendment makes clear that it would be unreasonable to bar law enforcement from using these technologies altogether. What is called for instead is a set of generally applied constitutional remedies that provide government agents with reasonable access, while still preserving the security of the people. The familiar standards of effectiveness, enforceability, and parsimony will be the constitutional standard-bearers.

Although a single remedial approach might be sufficient to meet the challenges posed by physical searches, the diversity of contemporary surveillance technologies, the range of threats they pose to the security of the people, and the different ways they serve government interests, suggest that meeting the demands of Fourth Amendment reasonableness in the twenty-first century likely will require more range and flexibility.[327] For example, some technologies, such as GPS-enabled tracking and cell-site location data, are most useful in the context of discrete investigations, but pose the greatest threat if their use is left to the unfettered discretion of law enforcement.[328] For these kinds of technologies, extension of the warrant requirement might strike the right balance.[329]

For many data aggregation technologies, however, a blanket warrant requirement would strike the wrong balance. That is because many of these technologies must be engaged and running constantly in order to serve

[326] For a fuller account of why the deployment and use of contemporary surveillance technologies constitute Fourth Amendment searches, see Gray & Citron, *supra* note 3, at 73-100. For a complete exploration of constitutional remedies that might be necessary and sufficient to restore the security of the people against threats posed by modern surveillance technologies, see Gray & Citron, *supra* note 35.

[327] *See* Wolf v. Colorado, 338 U.S. 25, 28 (1949) ("How such arbitrary conduct should be checked, what remedies against it should be afforded, the means by which the right should be made effective, are all questions that are not to be so dogmatically answered as to preclude the varying solutions which spring from an allowable range of judgment on issues not susceptible of quantitative solution.").

[328] *See* United States v. Jones, 132 S. Ct. 945, 956 (2012) (Sotomayor, J., concurring) (stating that the ubiquity of GPS-monitoring and its low cost could lead law enforcement to use this technology in a way that upsets the balance between the rights of citizens and the needs of government).

[329] *See* Commonwealth v. Augustine, 4 N.E.3d 846, 865 (Mass. 2014) (holding that gathering cell-site location information implicates an individual's reasonable expectation of privacy, but if the records sought are from a limited time-frame, doing so might not violate that expectation).

legitimate law enforcement interests.[330] For these technologies, reasonableness may require alternative regulatory structures, different timing of regulatory interventions, or some combination of both. For example, a law enforcement agency might be permitted to deploy a data aggregation technology on a showing of probable utility, but a court order or warrant might be required before accessing any of the information that it gathers. Reasonableness might also require setting limits on what kinds of data can be gathered, how long that data can be stored, and the kinds of algorithms that can be used to analyze the data, when, and by whom. Retrospective analysis would be critical. If it turned out that a remedial structure failed to preserve reasonable government interests, then it would fail the test of parsimony. Contrariwise, if a technology turned out not to appreciably advance government interests or impermissibly intruded on the people's right to be secure, then more stringent remedial controls would be necessary and appropriate.[331]

There is, of course, much more to be said about the constitutional status of contemporary surveillance technologies and the proper remedial structures for regulating law enforcement's use of these technologies. That discussion we must leave for another day.[332]

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[330] *See* Gray & Citron, *supra* note 3, at 112-24 (discussing how the vast scope of data aggregation and data mining technologies creates a risk of infringing on an individual's expectation of privacy in unprecedented ways).

[331] The NSA's telephonic metadata program is just such a technology. Despite its massive scale and the universal threat it poses to privacy, it does not appear to offer law enforcement any advantage over traditional methods in detecting, preventing, or prosecuting terrorists. *See* Klayman v. Obama, 957 F. Supp. 2d 1, 40 (D.D.C. 2013) ("[T]he Government does *not* cite a single instance in which analysis of the NSA's bulk metadata collection actually stopped an imminent attack, or otherwise aided the Government in achieving any objective that was time-sensitive in nature."), *vacated*, 800 F.3d 559 (D.C. Cir. 2015); DAVID MEDINE ET AL., PRIVACY & CIVIL LIBERTIES OVERSIGHT BD., REPORT ON THE TELEPHONE RECORDS PROGRAM CONDUCTED UNDER SECTION 215 OF THE USA PATRIOT ACT AND ON THE OPERATIONS OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT 11 (2014), http://www.pclob.gov/library/215-Report_on_the_Telephone_Records_Program.pdf [https://perma.cc/N7GP-7FCP] ("Based on the information provided to the Board, including classified briefings and documentation, we have not identified a single instance involving a threat to the United States in which the [NSA metadata] program made a concrete difference in the outcome of a counterterrorism investigation."). This should not come as a surprise—law enforcement and threat detection are seldom advanced by having massive amounts of aggregated information. To the contrary, data overload can dramatically compromise these legitimate governmental interests. *See* Julia Angwin, *NSA Struggles to Make Sense of Flood of Surveillance Data*, WALL STREET J. (Dec. 25, 2013, 10:30 PM), http://www.wsj.com/articles/SB10001424052702304202204579252022823658850 [https://perma.cc/6SPR-X27G] ("The agency is drowning in useless data . . . . Analysts are swamped with so much data that they can't do their jobs effectively, and the enormous stockpile is an irresistible temptation for misuse.").

[332] *See* Gray & Citron, *supra* note 35.