The Bilateral Fourth Amendment and the Duties of Law-Abiding Persons

Lawrence R Atkinson, V, United States Court of Appeals for the Sixth Circuit
THE BILATERAL FOURTH AMENDMENT AND
THE DUTIES OF LAW-ABIDING PERSONS

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The Fourth Amendment protects the innocent only from “unreasonable” searches. In lieu of the limited nature of this constitutional safeguard, law abiders consistently take precautions to avoid government searches. This Article considers why constitutional jurisprudence limits the protection of the innocent to “unreasonable” searches, thereby forcing them to alter their behavior. The most satisfying answer derives from an often overlooked fact: Searches of innocent persons are often “bilateral accidents,” meaning that both the innocent suspect and the police can affect the likelihood of an erroneous search occurring. In bilateral conditions, a reasonableness rule induces both the searcher and searched to take optimal care to avoid mistaken searches, while other rules embodied in constitutional protections—like that within the Takings Clause—cannot.

By assigning costs for erroneous-but-reasonable searches to the innocent, the Fourth Amendment functions as an important regulatory device, channeling law abiders away from activity that unintentionally masks others’ criminal enterprises. Thus, the Amendment regulates the very people that it protects from governmental intrusions. This Article refers to this duality as the “bilateral Fourth Amendment,” and argues the Amendment’s incentives for the innocent are best understood as a duty for law-abiding people to act reasonably.

At the same time, identifying the “bilateral” nature of searches should influence the legal rules dictating what evidence police may use as grounds to search a suspect. Because the innocent alter their behavior based on which activities the government deems “suspicious,” rules about cause and suspicion cannot singly turn on evidence’s probative value; they must also account for the socially beneficial activity that is reduced by labeling behavior “suspicious.”

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INTRODUCTION

Ordinary people take countless measures to avoid being searched by police or other government agents. Microsoft manager Ahmad Hashem, for instance, leaves his Arabic-language books at home and dresses more formally when he flies,1 and journalist Salim Muwakkil avoids wearing his cherished black beret while he drives.2 Bear Pond Books of Montpelier, Vermont, purged records of its readers’ club and offered to erase customers’ purchase records in response to Patriot Act provisions permitting the expedited subpoenaing of bookstore records.3 Children in heavily policed neighborhoods avoid certain playgrounds and parks.4 These individual behavioral changes aggregate to produce pronounced economic and social effects. For example, studies show that after the United States implemented new airline security measures in 2001, thousands of travelers avoided flying in order to bypass the delays and inconvenience resulting from increased searches;5 this combined response costs certain industries billions of dollars and has been linked to dozens of vehicular deaths.6

Few if any of the people described above adjust their behavior for criminal purposes; rather, their shared goal is to avoid the inconvenience and costs of what this Article calls “empty” searches—errant searches by

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1 Vanessa Ho, Arab Americans Are Newly Uncomfortable Faces in the Crowd, SEATTLE POST-INTELLIGENCER, NOV. 2, 2001.
3 David Gram, Patriot Act Fears Lead Bookseller to Purge Lists of Customers, MIAMI HERALD, FEB. 23, 2003, at 15A.
4 See, e.g., Matt O’Connor, ACLU Hits at Cabrini, CHI. TRIBUNE, DEC. 1, 1992, at 5 (“Since the most recent security ‘sweeps’ at Cabrini [housing project], some children are unwilling to leave their apartments or to play outside of their building for fear of being searched by [Chicago Housing Authority] officers . . . .”).
5 Macwade v. Kelly, 460 F.3d 260, 263 (2d Cir. 2006) (noting that members of the public had refused to be searched in New York subways and had consequently been required to exit the subway system); Michelle Garcia, New York Police Sued over Subway Searches, WASH. POST, AUG. 5, 2005, at A3 (reporting Macwade plaintiff’s claims of actions he took to avoid subway searches by police); Colleen Long, Stop and Frisk: Police Question More than 1 Million People on Street, Mostly Black, Hispanic Men, ASSOC. PRESS, OCT. 8, 2009 (describing how innocent persons altered daily commutes in order to avoid avenues they believed police patrolled more frequently).
6 See infra notes 16, 46, and accompanying text (describing studies of post-9/11 travel patterns).
government officials of innocent persons. The precautions taken by the innocent to avoid empty searches can be traced in part to the Fourth Amendment, which protects persons—even those who are innocent—only from “unreasonable” searches. By affording law abiders only this limited protection, the Amendment effectively regulates those persons it is generally thought to protect: Faced with the prospect of bearing the costs generated by empty searches, the innocent are incentivized to act in a “nonsuspicious” manner in order to mitigate private costs. The limited nature of constitutional protections against government searches, therefore, deters law-abiding persons from engaging in behavior that is not barred under the criminal code.

Why is the Fourth Amendment’s protection limited to “unreasonable” searches? Moreover, why is the constitutional protection from government searches different from the constitutional protection against government takings? As this Article explains, the Fourth Amendment (regulating government searches) and the Takings Clause of the Fifth Amendment (regulating government takings) are different types of legal regimes: The Fourth Amendment is analogous to a negligence regime common in torts, while the Takings Clause follows more of a strict liability rule. Some have mentioned the similarities between these constitutional rules and their tortious counterparts, but no one to date has explained the logic behind using two different regimes to regulate government intrusions.

This Article concludes that the most satisfying explanation stems from the different roles that the “victim” plays in each scenario. Empty searches are often “bilateral accidents,” where both the injurer (the government) and the victim (the private entity) can affect the likelihood of an accident. When both the injurer and the victim can take care to avoid an accident (like an empty search), negligence is a superior rule to strict liability. In contrast, government takings are largely “unilateral” events, where the person whose land is seized cannot affect the likelihood of a taking. In unilateral scenarios, strict liability has many advantages over a negligence regime.

Drawing attention to the “bilateral” nature of empty searches forces
us to reexamine our understanding of rights created by the Fourth Amendment. Rather than bestowing unequivocal protections upon the people, it is better to think of the Amendment as a subtle regulation of innocent behavior as well as the main bulwark against government intrusion. In more traditional doctrinal terms, this Article suggests that the Fourth Amendment creates a duty for the innocent to act “reasonably” in order to help minimize the social costs of crime and errant police searches.

At the same time, noting the bilateral elements of searches should also influence what we consider “suspicious” and what evidentiary rules we employ to regulate when police can search a person or place. Just as the Fourth Amendment’s reasonableness standard writ large affects innocent activity, individual judicial rules pertaining to suspicion also affect innocent activity. In short, if a court permits activity X to be grounds for suspicion, then everyone, including the innocent, has incentive to reduce activity X. A problem arises, however, when activity X is legitimately suspicious but also is a socially useful activity when done by innocent persons. The existence of these dual-natured activities, therefore, complicates traditional approaches to evaluating suspicion (sometimes called Bayesian analyses) and requires courts undertake a more rigorous examination of the evidence that police use to support a claim of reasonable suspicion or probable cause.

This Article proceeds as follows. Part I explores the costs of empty searches and the extent to which the innocent take care to avoid being searched. Part II explores the difference between the protections of the Fourth Amendment and the Takings Clause, and it considers why the former offers limited protection from government searches. Part III assesses the doctrinal implications of the “bilateral Fourth Amendment.” Finally, Part IV examines how the bilateral nature of empty searches should affect how the adequate grounds for police searches are established.

I. EMPTY SEARCHES AND CURBED INNOCENT BEHAVIOR

This Part examines the effects of “empty searches” upon law abiding citizens. Part I.A illustrates the variety of innocent activity changed by the threat of a police search and discusses how some groups are particularly deterred from innocent activity. Part I.B discusses the costs generated by “empty searches” and the magnitude of innocent activity altered by these expected costs. Part I.C steps back momentarily and considers the legitimacy of discussing searches’ effects on “the innocent,” and whether conceptions of guilt and innocence are inconsistent with the
Fourth Amendment.

A. Steps the Innocent Take to Avoid Government Searches

1. The Scope of Curbed Innocent Behavior

   The inclination to avoid empty searches affects a spectrum of activities. It alters what the innocent wear and what law abiders purchase. The costs and inconvenience of government searches similarly influence whether and where the innocent travel, and where they meet and congregate. Other changes in behavior are more subtle; law abiders consciously shape mannerisms and posture in an effort to dispel the chance they are stopped and searched. Some changes are quite clever: Certain

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9 See, e.g., Mucchetti, supra note 13, at 18 (“Others . . . avoid dressing flamboyantly so as to attract as little unwanted [police] attention as possible.”); Kit R. Roane, Minority Private-School Students Claim Police Harassment, N.Y. TIMES, Mar. 26, 1999, at 5 (“Brother Tyrone Davis . . . has grown so tired of being stopped by [New York City] police that he now rarely leaves work without donning his religious collar.”); REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT 75 (1991) (describing similar behavior by Los Angeles religious leader); see also Trymaine Lee, As Officers Stop and Frisk, Residents Raise Their Guard, N.Y. TIMES, Feb. 4, 2007 (noting one resident commented that youths’ wearing “with their pants down to their ankles” brings “the unwanted attention of police on them”).

10 See, e.g., Fletcher, supra note 2 (describing how some drivers avoid renting and buying “slick-looking” luxury cars in order to reduce their chances of being searched).

11 See, e.g., Russell Grantham & Kelly Yamanouchi, Screenings Raise Privacy Concerns, ATL.JOURNAL-CONSTITUTION, Jan. 10, 2010, at A4 (reporting predictions that more time-consuming screenings would prompt passengers to forego shorter flights); see also David A. Harris, The Stories, the Statistics, and the Law: Why “Driving While Black” Matters, 84 Minn. L. Rev. 265, 273–74 & n.48 (describing interviews with drivers who avoid certain neighborhoods to avoid police stops); Mucchetti, supra note 13, at 18 (noting “many Latinos desire to avoid interaction with the police to such an extent that they modify their daily routines and behaviors,” including “altering their driving routes so as to avoid all-white neighborhoods or places where they might ‘stand out,’ even though this may add to their commuting time”); Ho, supra note 1 (reporting claims that as a result of extra scrutiny “many people of Arab descent have postponed travel” out of fear that government searches will “humiliate[]” them).

12 E.g. TODD D. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE 143–144 (2007) (reporting interviewees suggested doing interviews off the street in order to avoid police stops); Roane, supra note 10, at 4 (reporting that some men “just try to stay indoors” to avoid police encounters); O’Connor, supra note 4 (reporting how police searches deter children from playing outside).

13 Anthony E. Mucchetti, Driving While Brown: A Proposal for Ending Racial Profiling in Emerging Latino Communities, 8 HARV. LATINO L. REV. 1, 18 (2005) (“Deborah Ramirez has already considered what she will tell her son when he reaches the appropriate age: “Sit up straight. If you slouch to the right or the left, the police are gonna think you’re carrying a gun. Put both hands on the wheel so the police can see you don’t have a weapon in your hands.”). Of course, the desire to avoid being stopped can shape innocent behavior even when the government is not involved. See, e.g., LU-INT WANG, DISCRIMINATION BY DEFAULT
law abiders, for instance, use car stickers displaying professional credentials or alma maters to dispel suspicion. One study even reported that an innocent driver kept his radio set to a classic music station as a signal intended to avoid prolonged stops.

To get an inkling of how frequently the innocent alter their behavior, consider the responses of law-abiding people to recently enacted counterterrorism programs. When faced with delays and discomfort caused by more rigorous baggage screening procedures in airports after the September 11 attacks, thousands of travelers elected to use cars instead of flying on short-haul flights; economic studies of the resulting traffic patterns attribute scores of deaths to the resulting increase in vehicular traffic. In the wake of FBI prosecutions of Muslim charities for assisting terrorist organizations, private philanthropic donations to Islamic organizations decreased as a result of fears that giving will raise red flags and warrant FBI interviews. Similarly, the government’s “Terrorist

74–75 (2006) (describing how persons “dress[] in their finest clothes, use[] sophisticated language and mannerisms, buy[] things they don’t really want,” and take other actions in order to avoid being stopped by private security forces at stores).

14 RUSSELL, supra note 2, at 34; cf. Latino Community—Is It under Siege by the Police?, SYRACUSE HERALD AMERICAN, Jan. 7, 1990, at C2 (“Some Latinos say they’ve removed Puerto Rico stickers from their cars to avoid harassment.”).

15 RUSSELL, supra note 2, at 34.

16 Garrick Blalock, Vrinda Kadiyali & Daniel H. Simon, The Impact of Post-9/11 Airport Security Measures on the Demand for Air Travel, 50 J. LAW & ECON. 731, 733 (2007) [hereinafter Blalock et al., 9/11 Airport Security] (concluding the “substitution of driving by travelers seeking to avoid the inconvenience of security measures likely led to over 100 driving-related fatalities” after September 11); see also Garrick Blalock, Vrinda Kadiyali & Daniel H. Simon, Driving Fatalities after 9/11: A Hidden Cost of Terrorism, 41 APPLIED ECON. 1717, 1728 (2009) (finding up to 2,300 driving deaths were attributable to the September 11 attacks, and suggesting the behavior was induced in part by “the increased inconvenience of stricter airport security led many travellers to drive rather than fly.”). New York City’s suspicionless subway searches—enacted in the wake of the July 2005 London bombings—similarly have deterred law abiding citizens from riding public transit. Macwade v. Kelly, 460 F.3d 260, 263 (2d Cir. 2006) (noting that members of the public had refused to be searched in New York subways and had consequently been required to exit the subway system).

Surveillance Program”—the warrantless wiretapping program—allegedly forced some journalists, lawyers, and academics to forego using phones for professional business activities.  

Perhaps the most pervasive example of an activity that law-abiding persons take to avoid a search is, ironically, consenting to a search. As the examples above show, the innocent alter their behavior regardless of the method of police search—whether it be a full search subject to a warrant, a frisk on the street, a stop while driving, or a simple checkpoint. Different search methods, however, have varying costs associated with them; stops are considered less intrusive than full searches, for instance, and therefore the threat of a full search poses a greater risk to the innocent than a stop does. In order to dispel suspicion that may lead to a very intrusive stop, the innocent may consent to a less intrusive search by police. By taking on a limited cost—being frisked, for instance—law abiders signal their innocence to the police. Though consent searches are subject

18 In litigation challenging the TSP, the District Court summarized the various types of behavior affected:

[T]he TSP has had a significant impact on [plaintiffs’] ability to talk with sources, locate witnesses, conduct scholarship, engage in advocacy and communicate with persons who are outside of the United States, including in the Middle East and Asia. . . . All of the Plaintiffs contend that the TSP has caused clients, witnesses and sources to discontinue their communications with plaintiffs out of fear that their communications will be intercepted. They also allege injury based on the increased financial burden they incur in having to travel substantial distances to meet personally with their clients and others relevant to their cases.

ACLU v. NSA, 438 F. Supp. 2d 754 (E.D. Mich. 2006), rev’d 493 F.3d 644 (6th Cir. 2007) (citations omitted). Other law abiding persons have claimed that government monitoring programs forced them to curb anonymous speech and private association. See, e.g., Plaintiffs’ Opposition to Motion to Dismiss Amended Complaint by Defendant AT&T at *16, Hepting v. AT&T Corp., 439 F. Supp. 2d 974 (June 23, 2006) (claiming AT&T’s complicity in the TSP “chilled [plaintiffs’] First Amendment rights to speak and receive speech anonymously, and to associate privately”).

19 Consent is likely the most common example of altered innocent behavior, since most government searches are consent searches. See Ric Simmons, Not “Voluntary” but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine, 80 Ind. L.J. 773, 773 (2005) (estimating that 90% of warrantless police searches are done via consent from the searched).

20 See, e.g., Long, supra note 5 (describing effects that risk of stop and frisks have on law abiders); Ho, supra note 1 (describing airport searches’ influences on innocent behavior).

21 4 WAYNE LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.1 (4th ed. 2004) (arguing a stop is “relatively short, less conspicuous, less humiliating to the person, and offers less chance for police coercion” than a full search).

22 See Schneckloth v. Bustamonte, 412 U.S. 218, 228 (1973) (“If the [consented to] search is conducted and proves fruitless, that in itself may convince the police that an arrest with its
to particular criticism in the literature, many incidents of consent are no different than taking a train to avoid airport security or driving a less flashy car—a rational strategy in order to mitigate private costs. Altering behavior to avoid government searches is a strategy common among law-abiding people. It is not, however, a tactic employed with equal frequency by all innocent persons.

2. The Distribution of Curbed Innocent Behavior

The most significant scrutiny of the Fourth Amendment’s effect on innocent behavior dwells on the distributive effects. Professor William Stuntz, for instance, has focused on the class effects of the Fourth Amendment, noting that the poor receive fewer protections and therefore are more constrained in the costless activities they can pursue.23 Similarly, scholars focusing on the racial disparities in the frequency of stops or arrests have asserted that minorities must take more steps to avoid harassment by the police.24 The additional measures African-Americans take to avoid searches have been described as a “tax” by some academics.25 More recently, increased security after September 11 has coincided with reports of other innocent minorities and foreigners curbing travel and other possible stigma and embarrassment is unnecessary.”). Others, however, have contested how often consent is a rational response of the innocent. See Janice Nadler, No Need to Shout: Bus Sweeps and the Psychology of Coercion, 2002 SUP. CT. REV. 153, 156 (2002) (attacking the “the fiction of consent . . . under coercive circumstances”); Marcy Strauss, Reconstructing Consent, 92 J. CRIM. L. & CRIMINOLOGY 211, 252 (2002) (arguing for the abolition of consent searches since “the determination of voluntariness is currently confused, misapplied, and based on a fiction”).


24 See, e.g., Wang, supra note 13, at 105 (noting that members of minority groups bear particular costs because “efforts to avoid being detained become a part of their daily lives”); Lu-In Wang, “Suitable Targets”? Parallels and Connections Between “Hate” Crimes and “Driving While Black,” 6 MICH. J. RACE & L. 209, 232 (2001) (“Even while recognizing that they cannot totally avoid discriminatory traffic stops, members of the target group may adjust numerous aspects of their daily lives in order to minimize their chances of being noticed and stopped . . . .”) (citation omitted); Devon W. Carbado, (E)racing the Fourth Amendment, 100 MICH. L. REV. 946, 1017–19 (2002) (arguing that African Americans must consent to more searches than white suspects in order to signal “counter-stereotypical information” to avoid intrusive searches).

activities in order to avoid searches in order to avoid searches.  

To understand the distribution of curbed behavior, it helps to distinguish between endogenous evidence of suspicion—activities that persons can change—and exogenous evidence of suspicion—immutable qualities that persons cannot alter. (In addition to purely exogenous factors, other markers of suspicion, such as residence in high-crime neighborhoods, are de facto exogenous, since persons cannot easily change these circumstances.). When courts allow certain exogenous factors to be used to establish suspicion—such as race, gender, and

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26 See, e.g., Louise Cainkar, The Impact of the September 11 Attacks on Arab and Muslim Communities in the United States, in THE MAZE OF FEAR 229 (John Tirman ed., 2004) (reporting that a study of September 11’s impact on Muslim and Arab communities in metropolitan Chicago found Arab American women had changed their domestic travel patterns out of fear of “humiliation if they attempted to board an airplane”); Brad Foss, Keeping a Low Profile: Some Air Travelers Changing Behavior to Avoid Hassles, MILWAUKEE J. & SENTINEL, Sept. 1, 2002, at 10 (“Interrogations, body searches and suspicious stares are common these days for air passengers with darker complexions and foreign names. In response, many air travelers of Arab, Middle Eastern, South Asian and even South American backgrounds have changed their behavior just to get through the experience with a minimum of inconvenience and embarrassment.”); Annie Nakao, Arab Americans Caught in Profile Snare, S.F. GATE, Sept. 28, 2001 (reporting decisions of minorities not to fly in the wake of September 11 out of fear of empty searches and that immigrant-rights groups were urging clients not to attempt to fly at the time); Cindy Rodriguez, Arabs Say Airport Checks Single Them Out, BOSTON GLOBE, Sept. 2, 2000, at A1 (“Arab-American advocates say the targeting is so pervasive that some Arab-Americans alter their behavior to avoid being searched. Some don’t bring carry-on bags. Men shave their facial hair. Others arrive early, believing they’re more likely to be questioned, frisked, detained.”).

27 Interestingly, a number of judges on the Sixth Circuit previously claimed the use of “immutable” characteristics was unconstitutional. See United States v. Williams, 949 F.2d 220, 223 (6th Cir. 1991) (Jones, J., dissenting); United States v. Taylor, 956 F.2d 572, 582 (6th Cir. 1992) (Keith, J., dissenting). These objections, however, have not won the day in any of the federal circuits or the Supreme Court.

28 See, e.g., Illinois v. Williams, 528 U.S. 119, 124 (2000) (“[W]e have previously noted the fact that the stop occurred in a ‘high crime area’ among the relevant contextual considerations in a Terry analysis.”); Adams v. Williams, 407 U.S. 143, 147 (1972) (noting the investigation of a suspect “reported to be carrying narcotics and a concealed weapon and who was sitting alone in a car in a high-crime area at 2:15 in the morning” gave officer reasonable suspicion to execute frisk); see also Commonwealth v. Thompson, 985 A.2d 928, 936 n.10 (Pa. 2009) (permitting “the nature of an area” to be weighed as “indicia of criminality” but counseling caution in its weight).

29 See, e.g., United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (permitting race as one of multiple factors to support reasonable suspicion of being undocumented workers); United States v. Collins, 532 F.2d 79, 82 (8th Cir. 1976) (upholding search of African-American traveler done in part based on his race, and claiming race was probative evidence of narcotics trafficking); United States v. Travis, 62 F.3d 170, 174 (6th Cir. 1995) (“In some instances, officers may decide to interview a suspect for many reasons, some of which are legitimate and some of which may be based on race.”). But see Farag v. United States, 587
age—a risk to which innocent persons with these innate characteristics are at the highest
degree of risk of empty searches. Consequently, these groups are most likely to
curb endogenous activities—factors they can control, like clothing and
and cars—to avoid empty searches. The admitting of exogenous factors to
evaluate suspicion, therefore, directly impacts the extent to which a person
will alter their conduct to avoid empty searches.

The legitimacy or appropriateness of using exogenous factors is
vigorously debated in the public and the academy alike, but it lies
largely beyond the scope of this Article. Here, it is important to note that
using exogenous factors to establish suspicion has a distinct effect on the
level of endogenous factors that the innocent engage in. The focus of this
Article, however, lies primarily on endogenous factors—suspicious indicia
that those at risk of being searched can alter. The link between the use of
exogenous markers and levels of endogenous markers, however, is
unavoidable.

B. Costs of Empty Searches

The measures that law-abiding persons take to avoid searches are
symptomatic of the costs that empty searches generate. These costs have
various components. Most tangibly, empty stops and searches cost
innocent persons time and sometimes result in damage to their personal
property. Empty searches can also lead to “false positive” costs.

F. Supp. 2d 436 (E.D.N.Y. 2008) (holding a suspect’s Arab ethnicity was not a relevant
consideration in assessing the likelihood that a suspect was engaging in airline terrorism).
See, e.g., United States v. Michael R., 90 F.3d 340, 346 (9th Cir. 1996) (noting young
males with short hair was a “defining characteristic” of some of area gang members); State
v. Nguyen, 878 P.2d 1183, 1186-87 (Utah Ct. App. 1994) (holding gender of suspects was
probative in establishing reasonable suspicion).

(discussing why defendant’s youth, along with his behavior, was indicative of intent to
distribute narcotics); United States v. Jackson, 835 F.2d 1195, 1199 (7th Cir. 1987) (Posner,
J., concurring) (discussing relationship between criminality and age).

See JEROME SKOLNICK, JUSTICE WITHOUT TRIAL 218 (2d ed. 1975) (“If an honest citizen
resides in a neighborhood heavily populated by criminals, just as the chances are high that
he might be one, so too are the chances high that he might be mistaken for one. . . .
About him, more errors will necessarily be made under a ‘reasonableness’ standard.”);
Sheri Lynn Johnson, Race and the Decision to Detain a Suspect, 93 YALE L.J. 214, 222 (1983)
(“Although courts consistently deem crime rates relevant, commentators have expressed
concern over the adverse effect on honest citizens living in high crime areas.”) (footnote
omitted).

Blalock, Kadiyali and Simon estimated that if increased security procedures added 30
minutes to a passenger’s travel time, it would increase the actual cost of a trip by an average
of $12.50 per person, or 3.8 percent. Blalock et al., 9/11 Airport Security, supra note 16, at
Innocent persons, for instance, can be suspended or fired from government jobs when false positive results—negative samples incorrectly reported as positive—come back from government-administered drug tests. Being searched also increases one’s chance of being falsely arrested and even falsely convicted, both of which impose enormous private costs.

The literature generally agrees that the greatest costs of empty searches are intangible. These intangible costs include loss of bodily integrity, dignity costs, violation of personhood, loss of freedom, damage to reputation, and loss of privacy. The magnitude of these costs is highly variable based on personal characteristics; persons of historically

750. Some cases have quantified the time costs of police searches and seizures. See, e.g., Randall v. Prince George’s County, 302 F.3d 188, 209–10 (4th Cir. 2002) (affirming award to plaintiff for “time lost,” when plaintiff “was rousted naked from a bathtub at gunpoint and forced to kneel outside . . . for approximately sixty minutes in his boxer shorts”).

34 In Skinner v. Railway Labor Executives’ Association, the Supreme Court held that drug tests without individualized suspicion could be constitutional “administrative searches.” 489 U.S. 602 (1989). At the time of Skinner, evidence showed that drug testing had extremely high error rates, sometimes as high as 37%. Stephen J. Schulhofer, On the Fourth Amendment Rights of the Law-Abiding Public, 1989 SUP. CT. REV. 87, 123.


37 Silas J. Wasserstrom & Louis Michael Seidman, The Fourth Amendment as Constitutional Theory, 77 GEO. L.J. 19, 61 (1988). (“Kantian scholars who think about privacy have argued that there is a privacy right best understood as an aspect of respect for personhood.”).

38 Richard A. Posner, Rethinking the Fourth Amendment, 1981 SUP. CT. REV. 49, 58 (“[I]nnocent suspects] presumably also value freedom from capricious police conduct.”).

39 Hugo H. Mialon & Paul H. Rubin, The Economics of the Bill of Rights, 10 AM. L. & REV. REV. 1, 27 (2008) (“If citizens are searched by police and the details of that search are subsequently made public, they may suffer a loss of reputation, which might result in the loss of a job or a spouse.”).

persecuted affinity groups, for instance, are likely to experience higher costs than others.\textsuperscript{41} Though hard to quantify, courts have nonetheless permitted juries to award significant compensation to victims of unconstitutional searches for these less tangible injuries, commonly under the heading of “pain and suffering.”\textsuperscript{42}

Empty searches do not impose costs just on the searched parties; certain industries and regions are significantly affected when the innocent are faced with the prospect of bearing more empty search costs. A 10% decline in foreign tourism in the wake of September 11, for instance, was partially attributed to the increased scrutiny that travelers faced; the decline in tourism harmed companies ranging from Walt Disney World to mom-and-pop bed and breakfasts.\textsuperscript{43} Efforts to increase the scrutiny that airline passengers receive have been protested by the airline industry, which argues that searches inevitably cause more delays, prompting passengers to forego shorter flights.\textsuperscript{44} Industry predictions in 2002 attributed a $2.5 billion loss in airline revenue to the “hassle factor” associated with new aviation security\textsuperscript{45}; a more recent study estimated that baggage screening procedures after the September 11 attacks produced a 6% drop in total U.S. passenger volume, a decrease that cost the airline industry $1.1 billion.\textsuperscript{46}

\textsuperscript{41} See, e.g., National Center for Transgender Equality, \textit{Air Travel Tips for Transgender People}, Dec. 12, 2004, \textit{available at www.nctequality.org/Resources/airtravel.pdf} (suggesting that new search methods, such as new body scanners, impose unique costs on transgendered individuals by drawing attention to “genitals . . . as well as any binding or prostheses”).

\textsuperscript{42} See, e.g., McCabe v. Mais, 602 F. Supp. 2d 1025, 1030 (N.D. Iowa 2008) (affirming jury award in a Fourth Amendment case for “loss of full mind,” and “mental pain and suffering”).


\textsuperscript{44} Micheline Maynard, \textit{Airlines Struggle Anew with Flier Frustrations}, \textit{N.Y. TIMES}, Dec. 30, 2009, at A12 (reporting that airline executives voiced “concern[] about the impact of increased security on travelers taking short trips—Boston to New York, New York to Washington, Chicago to Detroit,” and that executives claimed increased security had curbed local flights in the wake of September 11); see also Tom Belden, \textit{Drive Instead of Fly? Maybe a Good Idea}, \textit{PHIL. INQUIRER}, May 12, 2002, at M10 (describing the effects of the “hassle factor” on airline flights); Grantham & Yamanouchi, \textit{supra} note 11, at A4.


\textsuperscript{46} See generally Blalock et al., \textit{9/11 Airport Security}, \textit{supra} note 16; see also Harumi Ito & Darin Lee, \textit{Assessing the Impact of the September 11 Terrorist Attacks on U.S. Airline Demand}, \textit{57 J. ECON. & BUS.} 75, 94 (2005) (attributing a 7.4% drop in airline demand to the
Other firms have do not lose customers but nonetheless incur costs associated with their employees’ business travels. Companies, for instance, pay a premium to expedite movement through airline security checkpoints. Similarly, new laptop searches at border checkpoints (which increase the risk data will be disclosed, corrupted or lost) have forced firms to employ “costly supplementary measures to ensure that important business information will make it past the border.”

Though economic studies of the airline industry in the wake of September 11 hint at how massive the costs of empty searches might be, there is little direct evidence of total costs generated by other policies. The sheer number of empty searches every year suggests that costs are quite significant. From 2005 through June 2008, for instance, the New York Police Department effectuated approximately 1.6 million stops; 97.6 percent of those searches failed to yield weapons or contraband. In 2005, the Department of Justice estimated that 2.4 million persons were detained by police through traffic stops but received no enforcement action—not even a verbal or written warning. Different search methods have higher combination of “more rigorous security screening and passengers’ [altered] perceptions of the risk of flying”).

47 A Airlines commonly offer travelers the option of paying a fee to jump to the front of security lines. United Airlines, for instance, sells a “Premier Line” service, starting at $19 per flight, that offers travelers priority at check-in, security, and boarding (note only the fraction of this service dealing with security is a cost created by empty government searches). Airlines have the right to sell priorities in security lines because the federal government only claims responsibility for the actual screening “lanes” and not the queuing “lines.” Scott McCartney, A New Low in Airline Fees: $10 to Cut in Line, WALL ST. J., June 24, 2010, at D1, D3; see also Christopher Caldwell, First-Class Privilege, N.Y. TIMES, May 11, 2008 (“Many first- and business-class passengers, as well as frequent fliers, zip right to the metal detectors while coach passengers snake through lines for waits that can exceed half an hour.”).


49 CENTER FOR CONSTITUTIONAL RIGHTS, RACIAL DISPARITY IN NYPD STOPS-AND-FRISKS 4, 13 (2008), available at http://ccrjustice.org/files/Report_CCR_NYPD_Stop_and_Frisk_0.pdf. Obviously, it is unlikely all 97.6% of people searched without result were innocent, but the low “hit rate” suggests that thousands of innocent persons are searched yearly in New York.

50 U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2005, at 5 (2007) (reporting for 13.5% of the 17.8 million drivers stopped nationally, “no enforcement action was taken, meaning they did not receive a verbal or written warning nor were they ticketed or arrested”).
rates of success in avoiding empty searches, but no method is perfect.\footnote{According to at least one scholar, searches pursuant to warrants issued on a probable cause standard recover evidence at very high rates, usually exceeding 80%; warrantless searches are less successful, sometimes recovering evidence as infrequently as 12% of the time. Max Minzner, \textit{Putting Probability Back into Probable Cause}, 87 Tex. L. Rev. 913, 914 (2009).}

Empty searches impose a variety of costs, and persons take real and significant steps to avoid such searches. The Fourth Amendment offers protection from these empty searches, but only in a limited number of cases. Part II begins to discuss the Fourth Amendment’s protections for innocent persons, but it is first important to consider the distinction between searches of the innocent and searches of the guilty.

C. Searches of the Innocent versus Searches of the Guilty

The concept of “empty searches” implicitly invokes ideas of guilt and innocence that may seem awkward in the Fourth Amendment context. The Amendment makes no reference to innocence, and the Court avoids using the searched party’s guilt or innocence as a constitutionally relevant factor when assessing civil rights claims or suppression motions.\footnote{Even when the search was undisputedly “empty,” the Court’s analysis remains unchanged. See, e.g., Graham v. Connor, 490 U.S. 386 (1989) (employing standard reasonableness test to evaluate claims by an innocent diabetic who, while suffering an insulin attack, was seized and searched upon suspicion that he was drunk).}

Similarly, some language in judicial opinions rejects the notion that the Fourth Amendment is merely a right of the innocent. In \textit{United States v. Sokolow}, a dissenting Justice Marshall argued that “[b]ecause the strongest advocates of Fourth Amendment rights are frequently criminals, it is easy to forget that our interpretations of such rights apply to the innocent and the guilty alike.”\footnote{490 U.S. 1, 11 (1989) (Marshall, J., dissenting).}

While the Amendment extends to all “persons,”\footnote{United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (holding the Fourth Amendment only applies to “persons” with sufficient relationship to United States).} the activities protected by the Fourth Amendment are singly innocent in nature.\footnote{See Loewy, supra note 7, at 1229 (“[T]he right of the people to be secure in their persons, houses, papers, and effects does not include the right to be secure from the government’s finding evidence of a crime.”).} The Court has repeatedly noted that the Fourth Amendment does not extend to protect criminal enterprises. From the time of the founding, for instance, the Fourth Amendment’s protection did not prevent the government’s...
seizure of contraband, stolen goods, and instrumentalities of crime.\textsuperscript{56} In explaining the rationale, Justice Bradley noted a fundamental difference between illegally possessed items and legal items:

The search for and seizure of stolen or forfeited goods . . . are totally different things from a search for and seizure of a man’s private books and papers . . . . The two things differ \textit{toto coelo}.

In the one case, the government is entitled to the possession of the property; in the other it is not.\textsuperscript{57}

Though these old seizure rules have less relevance today with the Court’s expansion of the items that can be seized and admitted at trial,\textsuperscript{58} other doctrinal developments have been careful to avoid extending Fourth Amendment protection to criminal enterprises. The Court’s “reasonable expectation of privacy” test, for instance, does not protect criminal enterprises. In \textit{United States v. Jacobsen}, Justice Stevens explained that “a ‘legitimate’ expectation of privacy by definition means more than a subjective expectation of not being discovered. A burglar plying his trade in a summer cabin during the off season may have a thoroughly justified subjective expectation of privacy, but it is not one which the law recognizes as ‘legitimate.’”\textsuperscript{59} In both \textit{Jacobsen} and \textit{United States v. Place}, the Court held there is no Fourth Amendment protection from a search that “discloses only the presence or absence of narcotics.”\textsuperscript{60} Most recently, in \textit{Illinois v. Caballes} the Court held that a search that only detects drugs “does not rise to the level of a constitutionally cognizable infringement” and suggested that hiding narcotics from police detection was not a “legitimate privacy interest[].”\textsuperscript{61}

\textsuperscript{56} See, e.g., Boyd v. United States, 116 U.S. 616, 623 (1886) (noting “[t]he seizure of stolen goods is authorized by the common law”); Warden v. Hayden, 387 U.S. 294, 303 (1967) (noting modern law permits seizure of any “property in which the private citizen was not permitted to possess, which included instrumentalities of crime . . . and contraband”).

\textsuperscript{57} Boyd, 116 U.S. at 623.

\textsuperscript{58} Warden, 387 U.S. at 300–01 (rejecting the old doctrinal distinction between “items of evidential value only” and “seizures of instrumentalities, fruits, or contraband”). Still, the permitted seizure of contraband continues to have some relevance. See Cleary v. Bolger, 371 U.S. 392, 395 (1962) (noting the district court denied the defendant’s motion to return seized property on the grounds that it was contraband).

\textsuperscript{59} 466 U.S. 109, 122 n.22 (1984).

\textsuperscript{60} Jacobsen, 466 U.S. at 123 (discussing in context of police test to determine if suspicious substance is cocaine); United States v. Place, 462 U.S. 696, 707 (1983) (noting that dog sniffs for narcotics “does not expose noncontraband items that otherwise would remain hidden from public view” and “discloses only the presence or absence of narcotics, a contraband item”).

\textsuperscript{61} 543 U.S. 405, 409 (2005).
Of course, the guilty enjoy some Fourth Amendment protections; as the Sixth Circuit noted recently, “[a] criminal may assert a violation of the Fourth Amendment just as well as a saint.” To understand what exactly the Fourth Amendment protects with respect to criminals, however, one must remember that no criminal is all bad and not everything she does is illegal—to use the old Quaker tenet, there is that of God in everyone. Many of any criminal’s activities are themselves innocent. If a trafficker transports drugs across state lines, for instance, her movement of drugs is illegal, but her traveling in and of itself is not illegal—indeed, it is constitutionally protected. Deciding to engage in criminal enterprise does not forfeit the constitutional protection of her innocent interests.

The rights criminals enjoy under the Fourth Amendment, then, are not rights they enjoy by virtue of their criminality; rather they are rights they enjoy as criminals-qua-innocents. A hypothetical scenario helps illustrate the rights of a criminal under the Fourth Amendment. Imagine a narcotics dealer is standing on a corner and is searched by the police without adequate cause (meaning the search is unconstitutional). During the search, two things happen: the suspect’s jacket rips during the search, and the narcotics she is selling are seized. Were the suspect to file a claim against the government alleging the violations of her rights, she could recover for the jacket (because wearing a jacket is not illegal) but not for the seizure of the narcotics.

Despite the Court’s interpretation of the Fourth Amendment as not

64 Kent v. Dulles, 357 U.S. 116, 126 (noting freedom of movement is “part of our heritage”).
65 See, e.g., United States v. Washington, 573 F.3d 279, 283 (6th Cir. 2009) (“[T]he notion that drug use or illegal activity eviscerates any right to challenge a search cannot possibly be sustained.”).
66 Neither are the guilty merely “incidental beneficiar[ies] of a rule designed to protect the innocent.” Loewy, supra note 7, at 1264. On the other hand, the exclusionary rule bestows more benefits on criminals than the Amendment’s entitlements (i.e. the rights within the Fourth Amendment) bestow.
67 Posner, supra note 38, at 52 (“[Criminals] may invoke [the Fourth Amendment] only on behalf of a lawful interest, that is, an interest distinct from their interest in not being punished for their crimes.”).
68 This extension of the Fourth Amendment diverges from the common law practice. Akhil Reed Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757, 767 (1994) (“At common law, it seems that nothing succeeded like success. . . . [If the constable] merely played a hunch and proved right—if the suspect was a felon, or the goods were stolen or contraband—this ex post success apparently was a complete defense.”)
protecting interests in illicit activities, it may appear that the activities most protected by the Fourth Amendment are criminal enterprises. The primary cause of this feeling is, of course, the exclusionary rule, which prohibits many uses of illegally seized evidence at trial and thus hinders a variety of prosecutions.\(^69\) It is important to remember, however, that the exclusionary rule is a remedial rule intended to ensure the police are properly incentivized to respect the rights protected by the Fourth Amendment, rather than being a right in and of itself.\(^70\) The need for the exclusionary rule is really a mere consequence of inadequate litigation by the innocent against the police when law enforcement impairs their constitutionally protected activities.\(^71\) Justice Jackson defended the rule with explicit reference to the veracity of litigation by the innocent:

If the officers raid a home, an office, or stop and search an automobile but find nothing incriminating, this invasion of the personal liberty of the innocent too often finds no practical redress. 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.\(^72\)

\(^{69}\) See Charles Alan Wright, Must the Criminal Go Free if the Constable Blunders?, 50 TEX. L. REV. 736 (1972) (“Hundreds or thousands of criminals go free each year because the police are found to have violated, in one way or another, the intricate body of law on when and how they may search.”); Peter F. Nardulli, The Societal Costs of the Exclusionary Rule Revisited, 1987 U. ILL. L. REV. 223, 233 (finding in a study of exclusionary rule litigation in Chicago that the majority of successful motions to suppress physical evidence resulted in dismissal or acquittal). But see Thomas Y. Davies, A Hard Look at What We Know (and Still Need to Learn) about the ‘Costs’ of the Exclusionary Rule: The NIJ Study and Other Studies of ‘Lost’ Arrests, 1983 AM. BAR FOUND. RESEARCH 611 (finding only 0.8% of all felony arrests and 2.4% of drug arrests were lost due to exclusionary rule).

\(^{70}\) Elkins v. United States, 364 U.S. 206, 217 (1960) (“The [exclusionary] rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.”).

\(^{71}\) Posner, supra note 38, at 59 (noting objectors to enforcing the Fourth Amendment through torts claim that compensation is too low to “to motivate the plaintiff to sue even if he has a good claim”); cf. Linkletter v. Walker, 381 U.S. 618, 636 (1965) (“Mapp had as its prime purpose the enforcement of the Fourth Amendment through . . . the exclusionary rule, which, it was found, was the only effective deterrent to lawless police action . . . .”); Minnesota v. Carter, 525 U.S. 83, 110 (1998) (Ginsburg, J., dissenting) (“Fourth Amendment protection, reserved for the innocent only, would have little force in regulating police behavior toward either the innocent or the guilty.”).

The ultimate goal of the Fourth Amendment, then, remains to ensure the protection of innocent interests, which both the innocent and guilty possess. Criminals’ criminal-qua-innocent interests are often marginal in comparison to their larger interest in the gains from criminal enterprises. Consequently, to simplify the analysis here I often discount the interests of the guilty-qua-innocent. For those that object to this formulation, one can alternatively interpret this Article’s use of “innocent” to include both those persons entirely innocent—not involved in crime—and the guilty to the extent that their activities are non-criminal.

II. THE FOURTH AMENDMENT AND THE INNOCENT: WHY REASONABLENESS?

Part I diagnosed the costs of empty searches that innocent persons try to avoid. The size of the costs generated by empty searches, in turn, dictates the magnitude of any search’s deterrent—that is, the amount of innocent activity reduced by the prospect of that search. If a law-abiding person expects to bear a cost $X$ as a result of an errant search by the police, she is willing to spend up to $X$ in order to avoid that cost-generating search. In the search context, the most common form of “payment” comes in the abatement of innocent activity privately valued by the innocent. If a person thinks she will be searched because she is standing on a street corner, she will avoid that street corner if the utility she derives from standing on the corner (call this $Y$) is less than costs she expects to accumulate from the resulting empty search, $X$. As Part I illustrated, these types of “payments” by law-abiding persons come in a variety of forms.

An innocent person, however, will only reduce activity if she personally expects to bear the cost of an empty search. For instance, law enforcement wastes certain resources during the course of a search, but the innocent are not likely to forego privately valued activities in order to conserve these police resources. Similarly, if the innocent party expects to be compensated by the government for being errantly searched, the amount of innocent activity reduced out of fear of empty searches will be

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73 Cf. Hugo M. Mialon & Sue H. Mialon, The Effects of the Fourth Amendment: An Economic Analysis, 24 J.L. Econ. & Org. 22, 27 (2008) (claiming the dignitary cost generated by searching the guilty is small because “they cannot feel as badly that this penalty was not deserved”).

74 The fraction of an empty search’s costs borne by an innocent person is her “private cost,” as opposed to the “total social cost.”

75 See infra notes 168–169 (discussing the effects of wasted police resources).
much less.

This Part evaluates how Fourth Amendment jurisprudence affects the behavior of innocent persons. Specifically, this Part examines how the Amendment divides the costs of empty searches between the searcher (i.e. the government and its officials) and the searched party (which, in the case of empty searches, are all law-abiding persons). From the law-abiding citizen’s perspective, the question here is how much compensation she will receive when errantly searched by the police; the expected compensation, in turn, affects how much the innocent alters her behavior.

A. Two Constitutional Tort Rules

To protect persons against government intrusion, the First Congress could have implemented any of a variety of rules. Consider the following two rules that would protect the innocent from unreasonable searches:

(1) The government shall be liable for all damage to innocent activity resulting from searches.

(2) The government shall be liable for all damage to innocent activity resulting from unreasonable searches.

These two rules constitute the most common classes of rules existing in tort law: The first is a rule of strict liability, the second a negligence rule. The second rule also happens to be the effective rule embodied by the Reasonableness Clause of the Fourth Amendment—“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”

Others have noted that the Fourth Amendment effectively functions as a negligence regime, and with the diminishing importance of the Warrant Clause today the Amendment functions more and more

76 U.S. CONST., amend. IV.

identically to traditional tortious regimes. Under this constitutional provision, the government is only liable for damages when its agents fail to exercise the constitutionally mandated standard of “reasonableness.” (The warrant requirement, which operates more as a strict liability rule, is left aside momentarily but discussed below). Moreover, even when the government fails to exercise a reasonable amount of care, the injured only have a right to compensation for their injured innocent activity. As discussed above, when a drug dealer is frisked by police lacking sufficient cause, the Fourth Amendment only permits recovery for his innocent activities harmed by the search; he cannot, for instance, demand the drugs found on him be returned to him.

From the perspective of innocent persons, protection from government intrusions by only a negligence regime has significant effects. As the doctrine has developed in the courts, innocent persons are compensated for intrusions only when the government activity was (1) sufficiently intrusive to constitute a “search” within the development of the doctrine and (2) without sufficient cause. If both conditions are not satisfied, the innocent must bear the costs of empty searches. The zone of protection under negligence, then, is comparatively small.

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<th>Reasonableness Regime</th>
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<tr>
<td>Insufficient Intrusion (no search)</td>
<td>Innocent bear costs of empty search</td>
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<tr>
<td>Sufficient Intrusion (search)</td>
<td>Innocent bears costs of empty search</td>
<td>Government liable for costs of empty search</td>
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78 See infra note 120 and accompanying text (describing evolution of warrant requirement).
80 See infra notes 120–123 and accompanying text.
81 See supra Part I.C. The exclusionary rule complicates the analysis. But as noted above, the exclusionary rule is in of itself not a right but rather a penalty imposed upon the police to compensate for an inadequate rate of litigation by searched parties. See supra notes 69–73 and accompanying text.
82 See Anthony G. Amsterdam, Perspectives on the Fourth Amendment, 58 MINN. L. REV. 349, 403–406 (1977) (discussing and criticizing limited understanding of what constitutes a “search” within Fourth Amendment doctrine).
83 If cause existed, the ultimate harm is irrelevant for purposes of legal liability. See, e.g., Hill v. California, 401 U.S. 797 (1971) (noting if police have probable cause to arrest defendant and probable cause to believe suspect is defendant, then there is no liability for arresting suspect); Brinegar v. United States, 338 U.S. 160, 176 (1949) (police are not liable for mistakes if they are “those of reasonable men, acting on facts leading sensibly to their conclusions of probability”).
In contrast, strict liability regimes, like the first hypothetical rule above, offer more robust compensation for the innocent; regardless of the circumstances, the government would be liable for the costs of empty searches. Of course, the government action would have to be deemed a “search” within the meaning of the term under Fourth Amendment jurisprudence. Consequently, the innocent would still bear liability under the hypothetical rule for costs associated with minimal government intrusions.

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<th>Strict Liability Regime</th>
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<td>Insufficient Intrusion (no search)</td>
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<td>Government bears costs of empty search</td>
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In practice, the difference between strict liability and negligence is more than just semantics. A strict liability regime like the one described above would require compensation for every house search, every Terry stop, every police frisk, every airport or subway stop, every DUI checkpoint, and so on. Moreover, compensation would be required regardless of the level of suspicion the police had before effectuating the search, eliminating the ability for police to insulate themselves from liability by claiming probable cause or reasonable suspicion.

No one to date has considered why the Founders opted for a negligence rule in the Fourth Amendment. The concept of strict liability was not foreign to the Founders or the First Congress. Indeed, the first Congress adopted a strict liability rule within the Bill of Rights—specifically, within the Takings Clause of the Fifth Amendment. Under the Takings Clause, the government must compensate an injured party whose land is “taken,” regardless of the reasons for the exercise of eminent power.

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84 Investigative techniques that would not require compensation under the modern doctrine include plain view searches, dog sniff searches, searching of financial records, and basic “encounters” between police and persons. See, e.g., Cal. Bankers Ass’n v. Shultz, 416 U.S. 21 (1974) (no reasonable expectation of privacy in financial records); United States v. Mendenhall, 446 U.S. 544 (1980) (finding no seizure of person if a reasonable person would have felt he was “free to leave”); Illinois v. Caballes, 543 U.S. 405 (2005) (affirming use of narcotics-detection dog is not a constitutional “search”).

85 Abraham Bell, Not Just Compensation, 13 J. CONTEMP. LEGAL ISS. 29, 35 (2003) (“Takings law requires the government to pay compensation under a strict liability regime, with no defense of contributory or comparative negligence.”).
Thus, even if the seizure of land is completely reasonable, the government remains liable for the costs it has imposed. It seems strange, then, that the First Congress would select different legal regimes to protect the citizenry from these government intrusions. Many academics prefer to think that these types of intratextual distinctions within the Constitution are not accidental or arbitrary. Moreover, to the extent that the Fourth Amendment is thought to have origins in the common law, at least one strain of legal scholarship prefers to believe that these common law origins should endow it with some sort of “efficiency.” Even without adopting either of these positions, it seems worthwhile to examine whether there is a rationale underlying the differences between these two rules.

B. Strict Liability’s Social Advantages

The innocent would prefer the Fourth Amendment embodied a rule that...
of strict liability, because it would increase their protection from costly government searches. Well-established economic analysis of tort law, however, gives us reason to think that strict liability also would be a socially preferred rule. Assume, for instance, that the social goal of the Fourth Amendment is to limit searches to instances when the “marginal gain in crime reduction that would flow from such a search is greater than the sum of (1) the marginal cost of such a search to an ordinary law-abiding citizen in X’s shoes, and (2) any external costs the search entails.”

This interpretation of the Amendment suggests it aims to reduce total social costs, thereby maximizing social welfare. Assume also (for the moment) that the Fourth Amendment only aims to regulate government behavior and has no interest in regulating what the innocent do.

This scenario begins to look similar to the standard account of tortious relationships between strangers—the basic story that motivates, for instance, accident law and toxic torts. Like stranger tort law, in the search context there are “injurers” (the government) and “victims” (law abiders), and the number of “accidents” (empty searches) vary based on the amount of care that the injurer takes. In the Fourth Amendment context, the government can adjust the level of “care” that its officers take by limiting searches to instances when a certain level of cause (reasonable suspicion, probable cause, etc.) is established.

Based on this analogy, the standard economic account predicts both negligence and strict liability regimes could be used to induce “injurers” to take the socially optimal level of care. Strict liability rules

\[91\] Stuntz, *Implicit Bargains*, supra note 76, at 556; see also Posner, *supra* note 38, at 71 (“Only if the costs of a particular method of search are disproportionate to the benefits in more effective law enforcement is a search unreasonable.”).

\[92\] See STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* § 2.1.1 (1987) (“The socially optimal level of care will clearly reflect both the costs of exercising care and the reduction in accident risks that it would accomplish.”); see also Jean-Pierre Benoit & Lewis A. Kornhauser, *Game Theoretic Analysis of Legal Rules and Institutions*, in 3 *HANDBOOK OF GAME THEORY* 2229 (Robert Aumann & Sergiu Hart eds., 1998) (noting the minimization of expected social costs of accidents is generally held assumption by economic analysts of law but arguing that this does not necessarily have to fall from legal analysis).

\[93\] This assumption is relaxed below. See infra notes 135–136 and accompanying text.


\[95\] SHAVELL, *supra* note 92, at § 2.1.5 (“Both forms of liability result in the same, socially
induce the socially optimal level of care by forcing the injurer to internalize all of the costs of her activity. In a negligence regime, the court can set the socially optimal level of care and injurers will follow court-set standard because it mitigates their liability for the costs of future accidents. If the Fourth Amendment was only intended to ensure that the proper amount of cause was established, then, the Founders should have been indifferent between the reasonableness rule and the strict liability regime because both would result in the government taking the optimal level of care—meaning the difference between the constitutional protections in the Fourth and Fifth Amendments remains puzzling.

The negligence regime within the Fourth Amendment is puzzling for other reasons. While both negligence and strict liability can theoretically induce injurers to take the optimal level of care, strict liability has a number of administrative advantages that increase the likelihood that the socially optimal level of care is taken. First, negligence regimes rely heavily on the judiciary to set the standard of care and identify violations of this standard. Strict liability regimes reassign this balancing to the potential wrongdoers (here, the executive agents performing the search), who are often better informed about valuation questions (i.e. how effectively different levels of suspicion reduce error rates) and therefore better able to balance the costs of searches versus the potential social gains from searching. The Supreme Court has previously noted the relative expertise of law enforcement in knowing what is “reasonable” and socially advantageous, so full deference to these actors will more likely result in socially optimal levels of searches than reliance on courts. Taking standard setting out of the hands of the judiciary is also advantageous if we suspect courts of being systematically biased in favor of one party.

Second, strict liability dispenses with the need to worry about the

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96 Id. at § 2.1.3.
97 Id. at § 2.1.4.
98 Schäfer & Schönenberger, supra note 94, at 605 ("Another advantage of the rule of strict liability is that it is the injurer who has to bear the cost of searching for the optimal level of care . . . . In many cases, he is better at deciding what precautions to exercise . . . . because he is likely to be familiar with the activity that can cause an accident.").
99 See infra note 216 and accompanying text (discussing traditional deference to law enforcement in Fourth Amendment context).
100 Cf. Stuntz, Warrants, supra note 76, at 911 (discussing pro-police judicial bias in evaluating reasonableness, in the context of suppression motions).
applicable legal standard of care when a search is conducted,\textsuperscript{101} all discussion of whether the search requires probable cause, reasonable suspicion, or no suspicion at all would be bypassed under a strict liability regime.\textsuperscript{102} Law enforcement would simply be responsible for its errors, and therefore it would be up to the police to consider how much cause to establish before searching. Given that modern jurisprudence is nearly obsessed with the need to give officers clear rules to follow,\textsuperscript{103} it seems extraordinary that few have ever suggested strict liability, as it is the simplest legal regime in terms of clarity.

Third, adjudication in strict liability cases does not need to inquire into how much cause the law enforcement actually had at the time of the stop.\textsuperscript{104} As a result, strict liability disincentives “testilying” about the amount of cause the officers had at the time of the search.\textsuperscript{105} Cases would become more streamlined, with the legal inquiry limited almost entirely to issues involving the amount of injury the searched party suffered as a result of the empty search.

Fourth, negligence regimes can induce the optimal level of care but not necessarily the optimal level of activity.\textsuperscript{106} While a negligence rule leads injurers to take the due level of care (i.e. search only when probable cause exists, etc.), it actually can lead to more searches than is socially

\textsuperscript{101} Abolishing these suspicion issues would not eliminate the precedential question of whether a search was conducted at all. Because Fourth Amendment doctrine has evolved such that certain investigative techniques are not considered “searches” for Fourth Amendment purposes, this issue would continue to be the subject of litigation.

\textsuperscript{102} Cf. Shavell, supra note 92, § 2.1.5 (noting that only under negligence regimes do courts “calculate the socially optimal level of due care,” which requires courts applying negligence rules “to know the cost and effectiveness of taking different levels of care in reducing accident risks”).


\textsuperscript{104} The only judicial inquiry would be into whether a “search” occurred and, if so, the actual cost of the empty search. Cf. Schäfer & Schönberger, supra note 94, at 613 (“Under strict liability, all the courts need to do is to determine the size of the damage, whereas, under the negligence rule, the courts also need to determine the level of due care . . . for the socially optimal level, and . . . the level of care actually taken . . . . These information requirements are difficult and costly to acquire.”); Shavell, supra note 92, § 2.1.5 (to same effect).

\textsuperscript{105} Cf. Christopher Slobogin, Testilying: Police Perjury and What To Do About It, 67 U. COLO. L. REV. 1037 (1996) (discussing prevalence of testilying). Strict liability does not disincentivize officers from lying about whether there was a search at all, however.

\textsuperscript{106} Shavell, supra note 92, at § 2.3 (discussing levels of activity versus levels of care).
A rule requiring probable cause, for instance, induces police to ensure they have probable cause before every search; but every time they have probable cause, the search becomes effectively costless for the police, thereby incentivizing them to maximize the number of searches they conduct once the level of suspicion is met. We might believe that it is socially inoptimal for the police to search whenever they have adequate suspicion. A veteran police officer, for instance, may be able to distinguish between “good probable cause” and “bad probable cause,” such that she knows when a search is likely to come up empty. But allowing police free rein whenever cause is established permits harassment and abuse, giving us pause about the amount of discretion they have under negligence regimes. Strict liability still gives officers discretion to search, but it is “costly discretion” (as opposed to negligence’s “costless discretion”) that minimizes the opportunity for the officers to harass the innocent. Therefore, only strict liability achieves both the appropriate level of care and the appropriate level of activity in the search context.

For these four reasons, regulating government intrusions by strict liability appears advantageous from a societal perspective. Given that the innocent—those primarily protected by the Fourth Amendment—also prefer strict liability because it increases their compensation for government intrusions, the fact that the Fourth Amendment follows a negligence model only seems more puzzling. In the next two subsections, I explore possible explanations.

**C. Possible Explanations for the Fourth Amendment’s Negligence Regime**

There are various possible explanations as to why the Fourth

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107 This outcome occurs, for instance, if utility is an increasing function of activity. Schäfer & Schönenberger, *supra* note 94, at 602. Because injurers are not liable for any costs they cause once the legally required level of care is followed, they have no incentive to consider the effect that engaging in their activity has socially; consequently, they will choose to maximize their levels of searches regardless of the social costs it creates.

108 In a negligence regime, police will conduct a search whenever the utility they derive from a search, minus the cost of establishing adequate suspicion and conducting the search, is positive.

Amendment elects for a negligence regime rather than strict liability. In this section, I consider two explanations that have been proposed in the context of torts’ embrace of negligence for various scenarios. Though these explanations have some purchase in tort law, they are ultimately unpersuasive in the Fourth Amendment context.

1. Subsidizing Officers

One explanation for the Fourth Amendment’s negligence regime might be that the reasonableness rule aims to subsidize the government and police forces (because they are socially valuable), much like negligence rules are sometimes thought to be a subsidy of industries. The analogy seems plausible but requires some refinement. First, one must offer an explanation as to why the first Congress would find reason for the citizenry to subsidize federal law enforcement but not the federal legislature exercising eminent domain (which has to pay for all takings under the strict liability rule embodied in the Takings Clause). The most likely reason would be that at the time members of law enforcement were often held personally liable for searches of innocent persons, while legislators were personally immune for decisions of the legislature. Thus, just as Professor Amar has proposed that warrants were a way to shield officers from lawsuits resulting from searches, the reasonableness standard could have been a partial protection of federal officials from lawsuits intended as a way to subsidize their socially useful activity.

The historical record suggests that the Founders may have had concerns about the scope of officer liability. The choice of remedy, however, was not to alter the legal rules governing liability between the officers and the searched; instead, Congress elected to allow officers to

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111 Amar, supra note 68, at 774 (noting in the Republic’s early years “any 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”).

112 Id.; Amar, supra note 35, at 1111 (“[W]arrants, by definition, conferred certain immunities on government searches and seizures that did not come into play when these intrusions occurred without a warrant.”); see also California v. Acevedo, 500 U.S. 565, 581–82 (1991) (Scalia, J., concurring) (arguing colonial warrants were not prerequisite for search but rather immunized officers against civil liability later deemed by a jury to be “unreasonable”).
indemnify the federal government through private bills or other practices. In a forthcoming article, James Pfander and Jonathan Hunt document how common indemnification was; according to their research, government officers succeeded in securing indemnifying private legislation in roughly sixty percent of the cases in which officers petitioned for such relief. Subsidizing officers through indemnification, rather than by changing the rules governing the “reasonableness” of searches, maintained a system that ensured victims of searches remained compensated.

Even if officer subsidization explains the origins of the reasonableness standard, changes in the doctrine covering immunity makes this explanation at best ahistorical. As Amar has noted, while at the Founding officers were individually liable for damages caused by their constitutional violations, “[t]oday, most individual government officers enjoy either qualified or absolute immunity from personal liability.” In a related vein, modern judgments for constitutional injuries are paid largely by the government. Consequently, eminent domain compensation and compensation for Fourth Amendment violations come from the same government coffers, abolishing any reason to differentiate the two.

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114 Id.
115 Id.
116 Id. at 1487; see also Harlow v. Fitzgerald, 457 U.S. 800 (1982) (holding government officials enjoy qualified immunity in § 1983 actions); John C. Jeffries, Jr., Compensation for Constitutional Torts: Reflections on the Significance of Fault, 88 MICH. L. REV. 82, 86 (1989) (“Under the latest precedents, it seems likely that summary judgment will be granted . . . where the [official] defendant can show that a reasonable official in his or her situation could have believed the conduct lawful.”).
117 State and federal immunity doctrines circumscribe the scope of government liability, but these protections are limited. Local police forces do not enjoy state sovereign immunity, meaning suits against many police forces can reach into the financing government’s pockets. See Jeffries, supra note 116, at 86–87 (noting “the Supreme Court has moved aggressively to compensate persons injured by an official ‘policy or custom’ of local government.”). The federal government has also waived sovereign immunity for some claims against law enforcement officials. See, e.g., 28 U.S.C.A. § 2680(h) (2006) (providing that immunity shall be waived “with regard to acts or omissions of investigative or law enforcement officers of the United States Government” for claims “of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution”); Cross v. United States, 159 Fed. Appx. 572, 576 (5th Cir. 2005) (“The intentional tort exception to the [Federal Tort Claims Act] contains a law enforcement proviso, which provides that sovereign immunity is waived for ‘acts or omissions of investigative or law enforcement officers of the United States Government.’”) (quoting 29 U.S.C.A. § 2680(h)).
118 Constitutional rules’ “stickiness” means a completely efficient Fourth Amendment doctrine is unlikely. But the doctrine governing the Amendment has been fluid, and the
this case, we would expect the search doctrine to move towards strict liability, given the social efficiencies discussed above. The modern Court, however, has gone in almost the opposite direction, increasingly embracing “reasonableness” as the operative standard for the Fourth Amendment.

The modern minimization of the warrant requirement exemplifies this trend away from strict liability. The Warren Court momentarily appeared as if it would adopt a strict liability rule to regulate warrantless searches when it announced in *Katz* that “searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment.” A rule of per se unreasonableness makes the police responsible for all searches performed without a warrant, forcing them to fully internalize the costs of empty searches. Today, however, the Court has used exceptions to *Katz* to swallow the strict liability rule. In practice, the overwhelming majority of searches are warrantless, with negligence continuing to function as the legal regime.

These doctrinal developments do not refute the possibility that reasonableness was initially a subsidy for officers. The expansion of officer immunity, however, suggests that the modern Fourth Amendment’s negligence regime adds no protection for officers, but is responsible for inducing a socially inoptimal number of searches. If officer subsidization

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119 The Amendment’s “reasonableness” language does not necessarily impair movement towards strict liability. A court, for instance, could establish such a high “reasonable” standard of care that it no longer behooved the injurer to follow the standard. Such a rule would function as a *de facto* strict liability rule.

120 See *Terry v. Ohio*, 392 U.S. 1, 19 (1968) (noting “the central inquiry under the Fourth Amendment [is] reasonableness”); *see also Amar*, supra note 35, at 1101 (noting *Terry*’s “embrace of reasonableness”); Silas J. Wasserstrom, *The Court’s Turn Toward a General Reasonableness Interpretation of the Fourth Amendment*, 27 AM. CRIM. L. REV. 119 (1989) (documenting Court’s turn to reasonableness since the Warren Court).


122 *Acevedo*, 500 U.S. at 585 (Stevens, J., dissenting) (arguing Court “pays lipservice” to *Katz*’s *per se* unreasonable rule); *California v. Acevedo*, 500 U.S. 565, 582–83 (1991) (Scalia, J., concurring in judgment) (noting at least twenty-two exceptions to the Warrant Clause) (citing Bradley, supra note 77).

were the only explanation, therefore, the court’s continuing embrace of negligence is at best ahistorical and in the modern era inadequate.

2. Reducing the Subsidization of Criminals

Alternatively, the Fourth Amendment’s negligence regime might stem from a fear that the Amendment subsidizes criminal activity. The reasonableness rule, therefore, might be an attempt to cabin this subsidy. Today, criminals are the primary beneficiaries of the Fourth Amendment. The irony, however, is that the reasonableness standard itself is partially responsible for the Court’s current subsidization, and strict liability would reduce our subsidization of criminals.

In practice, criminals primarily benefit from the Fourth Amendment by way of the exclusionary rule. The exclusionary rule, however, is only a remedial rule fashioned because the Supreme Court concluded Fourth Amendment violations were not litigated with sufficient frequency or vigor, thereby providing too little incentive for the government to take the judicially mandated level of care. The low level of litigation, in turn, is partially the result of the reasonableness standard itself. The administrative difficulties of negligence rules discussed above—ranging from uncertainty about the amount of care required for a valid search to the factual disputes about the care actually taken—increase the costs of litigation, which reduces the number of illegally searched persons willing to pursue their cases. A rule of strict liability would reduce the need to rely on the exclusionary rule to provide law enforcement

124 See, e.g., Posner, supra note 38, at 51–52 (arguing enforcing the Fourth Amendment through the exclusionary rule benefits criminals only); Christopher Slobogin, Why Liberals Should Chuck the Exclusionary Rule, 1999 U. ILL. L. REV. 363, 443 (noting the “huge benefit criminals receive when the cases against them are dismissed or damaged by exclusion”).

125 See supra Part I.C.

126 Of course, 42 U.S.C. § 1988(b) provides that successful plaintiffs’ may recover attorney’s fees for civil rights claims. See Hudson v. Michigan, 547 U.S. 586, 597–98 (2006) (emphasizing the ability of parties to recover attorney’s fees for Fourth Amendment claims). But § 1988(b) only allows recovery if the plaintiff is successful, and the likely outcome of Fourth Amendment cases is often unclear. Therefore, plaintiffs still have expected litigation costs.

127 Schäfer & Schönemberger, supra note 94, at 613–14 (“Moreover, the average costs of resolving claims tend to be higher under negligence.”); Posner, supra note 90, at 164 (“The trial of a strict liability case is simpler than the trial of a negligence case because there is one less issue, negligence.”); A. Mitchell Polinsky, An Introduction to Law and Economics 51 (2d ed., 1989) (arguing trials under strict liability are less costly than negligence trials). But see Victor P. Goldberg, Litigation Costs under Strict Liability and Negligence, 16 RESEARCH IN LAW & ECON. 1, 2 (1994) (questioning the traditional understanding of “[s]trict liability’s perceived cost advantage.”).
officers with proper incentives by encouraging more suits by the innocent.

Because strict liability would reduce the reliance on the exclusionary rule, we should expect critics of the rule to champion movement towards a strict liability standard.\textsuperscript{128} However, we have seen almost the opposite approach, with the justices most fervently opposed to the exclusionary rule also being among the most vocal in moving the Fourth Amendment to a general reasonableness standard.\textsuperscript{129}

D. A Bilateral Theory of the Fourth Amendment

Both theories above offer a plausible explanation as to why the Fourth Amendment employs a negligence regime. Each, however, paints the negligence rule as a second-best solution. If the reasonableness regime was intended to subsidize officers, it remains unclear why modern Fourth Amendment doctrine has not gravitated towards a strict liability regime. Explanations that focus on the subsidization of criminal behavior misunderstand how the reasonableness regime compounds the need for an exclusionary rule, which is the greatest method of criminal subsidization. If either or both of these theories were the totality of the reasoning behind the negligence regime, we should give serious thought to reforming the rules towards the simpler and more reliable strict liability regime. In this section, I offer another explanation of why the Fourth Amendment follows a negligence regime. In contrast to the previous explanations, this theory suggests why reasonableness is superior to strict liability for regulating searches and seizures.

In the previous section discussing the social advantages of strict liability rules over negligence rules, the analysis assumed the Fourth Amendment was focused solely on regulating the activity of the injurers—here the government.\textsuperscript{130} Regulations that focus solely on curbing the activities of injurers often do so under the implicit assumption that only one agent (the injurer) is responsible for causing harm to another (the victim),

\textsuperscript{128} The exclusionary rule, of course, is not constitutionally mandated if the government implements a program that provides an adequate substitute. Wolf v. Colorado, 338 U.S. 25 (1949).

\textsuperscript{129} Justice Scalia, for instance, has been critical of the exclusionary rule but has also called for a return to “reasonableness” in the Fourth Amendment. Compare Hudson, 547 U. S. at 591–99 (emphasizing the social costs of the exclusionary rule and the modern tort remedies that serve as alternative deterrent mechanisms) with United States v. Acevedo, 500 U.S. 565, 581 (1982) (Scalia, J., concurring in judgment) (noting Fourth Amendment “prohibits searches and seizures that are ‘unreasonable’”).

\textsuperscript{130} See supra note 93 and accompanying text.
and the probability of an accident occurring is solely under the control of that agent. Economists call this class of accidents “unilateral” or “one-actor” conditions. Certain types of traffic accidents and products liability, for instance, have been described as unilateral accidents.

In contrast to unilateral scenarios, “bilateral” (or “two-actor”) scenarios are conditions where both the injurer and victim have the ability to control the rate at which accidents occur. If both a pedestrian and a motorist can take care to avoid a pedestrian-automobile accident, the scenario is bilateral rather than unilateral. Similarly, if a homeowner can choose to live closer or farther from a toxin-producing factory, the risk of the homeowner becoming poisoned is a bilateral condition. Bilateral conditions are as common, if not more frequent, than unilateral conditions.

Though courts and authors rarely make the assumption explicit, most descriptions of the Fourth Amendment assume governments searches are unilateral conditions, where only the government can affect the probability of empty searches. The Fourth Amendment is commonly thought of as “tort law for police,” without considering that the Amendment might take into account how a searched party’s actions affect and success rate of the frequency of searches. William Stuntz, for instance, describes the Fourth Amendment as “designed to approximate a negligence standard—to ensure that the police behave reasonably,” but makes no

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131 Lewis A. Kornhauser & Andrew Schotter, An Experimental Study of Two-Actor Accidents 1 (Working Paper No. 91-60, New York University, Dep’t of Economics, 1992) (“In one-actor accidents, one agent (an injurer) is responsible for causing harm to another (the victim) and the probability of an accident occurring is solely under the control of that agent.”); Shavell, supra note 92, at 6–7 (noting unilateral accidents are those where “the victims presumably could not have done much to prevent harm”); Schäfer & Schönenberger, supra note 94, at 599 (describing unilateral accidents in same terms).

132 See Shavell, supra note 92, at 7 (noting unilateral accidents include cases where “an airplane crashes into a building” or “a break in a water main causes a flood in a basement”).

133 Kornhauser & Schotter, supra note 131, at 1 (“In two-actor accidents, the probability of an accident is determined by the two agents.”); Steven Shavell, Foundations of Economic Analysis of Law 199 (2004) (referring to such cases as “bilateral” accidents).

134 True unilateral accidents—situations where only the injurer is responsible for the probability of an accident—are relatively rare. Schäfer & Schönenberger, supra note 94, at 606–07.

135 See, e.g., RONALD JAY ALLEN ET AL., CRIMINAL PROCEDURE: INVESTIGATIONS AND RIGHT TO COUNSEL (2d ed., 2005) 333 (“The Fourth Amendment applies to all government actors, but it is almost always enforced against police officers. . . . [T]he Fourth Amendment functions as a kind of tort law for the police, the chief source of legal regulation of criminal law enforcement.”); Stuntz, Warrants, supra note 76, at 899 (“[F]ourth Amendment law is, essentially, tort law for police . . . .”).
reference to whether the Amendment considers the activities of the searched parties. Orin Kerr similarly writes that “the modern Supreme Court has used the text of the Fourth Amendment to craft a comprehensive set of rules regulating law enforcement,” but never suggests that the rules influence the activities of the innocent or other parties at risk of search.

In reality, persons potentially subject to search—including the innocent—can take a variety of actions to limit the likelihood of searches. Refraining from standing on street corners helps avoid being mistaken for a drug dealer; not carrying Arabic texts on an airplane is thought to reduce suspicion of being a terrorist; avoiding luxury cars lessens suspicion that one is driving a stolen car. Based on the evidence of what the innocent do to avoid being searched, searches appear to commonly occur in bilateral, rather than unilateral, scenarios.

When both the “injurer” and the “victim” can take steps to avoid accidents, the nature of regulation changes dramatically. Bilateral conditions require taking into account the likely responses of two parties. Moreover, regulators must account for the fact that actors will not just respond exclusively to the legal rules set by the government; actors in bilateral conditions will also shape their behavior based on how they believe other actors will respond. If a pedestrian believes a driver will exercise an abundance of caution to avoid hitting pedestrians, the pedestrian has less incentive to exercise her own care; if the same pedestrian thinks a driver will blow through crosswalks without care, the pedestrian will rationally use greater vigilance when crossing.

Based on the likely strategic responses of actors in a bilateral scenario, a strict liability regime cannot induce actors to exercise the socially optimal level of care. This result applies in the search as well as

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136 Stuntz, Implicit Bargains, supra note 76, at 553.
137 Orin S. Kerr, Searches and Seizures in a Digital World, 119 HARV. L. REV. 531, 536 (2005); see also Maclin, supra note 109, at 242–43 (describing a model where only relevant actor was officer).
138 See supra notes 1–5, 13–22, and accompanying text.
139 See supra Part I.A (providing examples of changes in innocent behavior to avoid government searches).
140 Shavell, supra note 92, at 10 (“[T]he way in which injurers choose to behave may depend on the way victims behave, and conversely”).
141 Stephen G. Gilles, Negligence, Strict Liability, and the Cheapest Cost-Avoider, 78 VA. L. REV. 1291, 1308 (1992) (“Imposing strict liability on one of two injurers who should have taken care, or on either the injurer or the victim if both should have taken care, will yield inefficient results.”).
tort context. Consider, for instance, the hypothetical rule offered above: The government is liable for all damage to innocent activity resulting from searches.\textsuperscript{142} Because the innocent will be fully compensated by the government for all losses resulting from empty searches, law abiders are indifferent to the number of empty searches that occur—they lose nothing.\textsuperscript{143} As a result, the innocent take no precautions to avoid empty searches, refusing to reduce their suspicious behavior in any way. In order to avoid liability for searching the increasing number of suspicious-but-innocent people, the police may respond by taking \textit{too much} care—that is, searching only when they have significant suspicion of a suspect’s guilt. As a consequence, the level of care will be socially inoptimal because too few searches will be performed, and not enough criminals will be apprehended.\textsuperscript{144} Stephen Gilles named this result the “Joint-Care Problem” in the torts context, and the principle applies with equal force in the search context.\textsuperscript{145}

In bilateral scenarios, negligence legal regimes generally perform better than strict liability rules in inducing both parties to take the socially optimal level of care. Under a negligence rule, the injurer takes the degree of care required by the judicially established standard of care, meaning that here the government will search only when it satisfies the required level of suspicion; law abiders, now facing the possibility of bearing the costs of the empty searches, reduce their suspicious activity in order to reduce the chances of the police satisfying that threshold.\textsuperscript{146} Negligence, then, can

\textsuperscript{142} See text accompanying note 76 (discussing two theoretical rules to govern searches).
\textsuperscript{143} Shavell, supra note 133, at 184 (“Because the victims will be fully compensated by injurers for accident losses, however, victims will be indifferent to the occurrence of accidents.”). This assumes compensation through the legal process is perfect. The legal system, of course, may not or cannot fully compensate victims. It is often thought, for instance, that victims cannot receive adequate compensation for death or serious personal injury. Shavell, supra note 92, at § 3.2.3 n.9. In the search context, one might argue that the mental anguish and embarrassment of errant searches cannot be adequately compensated.
\textsuperscript{144} The bilateral scenarios in accident and search contexts vary in one notable way. When the police do not search enough, it places the victims of empty searches at a greater risk of being a victim of crime. In contrast, when injurers in accidents take too much care, potential victims are not suddenly subject to another threat. These circumstances, however, change the basic analysis only marginally. In most cases the incremental risk of being a victim of crime is so small that it would not outweigh the utility the innocent derives from pursuing the activity. In many “victimless” crimes like narcotics sales, the innocent is placed at no additional risk.
\textsuperscript{145} Gilles, supra note 141, at 1308.
\textsuperscript{146} This outcome is a Nash equilibrium that can be expected to emerge immediately (i.e. without the need for repeated play) because both rational self-interested actors assume the
induce both parties to adapt their behavior, a result strict liability regimes fail to achieve.\footnote{Id.} If the judiciary is able to set the required level of care at the socially optimal level this will impel not only government but also the innocent to take the socially optimal level of care.

The distinction between unilateral and bilateral scenarios, therefore, provides an alternative explanation of why the Fourth Amendment adopts a negligence regime: The Amendment presumes that it is regulating a bilateral, rather than unilateral, relationship where both the searcher and the searched can be induced to take care to avoid empty searches. Similarly, the difference between the Takings Clause and the Fourth Amendment can be explained by the unilateral/bilateral distinction. In cases of eminent domain, the landowning “victim” whose land is seized was envisioned by the First Congress to have little control over the exercise of eminent domain exercised and the probability of the land seized. Given the fact that eminent domain is primarily a legislative decision, the owner’s power over the likelihood of eminent domain’s exercise is nearly non-existent, because he has only one vote.\footnote{Id.} In contrast, the relationship between constables and innocent persons is different in kind; both actors can take a variety of precautions to ensure that the socially preferred level of searches occurs.

The “bilateral” Fourth Amendment theory offers the strongest explanation of why the constitutional protection against government searches is limited by a rule of negligence. Such a presumption, however, contradicts much of the literature to date about the nature of searches by the government. In the next section, I consider whether the Fourth Amendment’s presumption of a bilateral relationship has intuitive appeal and the possible implications for our understanding of the nature of the constitutional protection.

III. Analyzing the Bilateral Fourth Amendment

other has decided to exercise the efficient level of precaution. Schäfer & Schönenberger, supra note 94, at 609.

The “bilateral Fourth Amendment” offers a different explanation as to why the Amendment employs a negligence regime, as opposed to one that fully compensates the innocent for the costs of errant searches. This Part has three foci. First, it considers in more detail how common the conditions of a police search are bilateral, that is, a scenario where both the searcher and searched can affect the frequency of searches. Second, it distills the Article’s economic explanation of the Fourth Amendment into two possible doctrinal formulations. The weaker claim is that there is no absolute constitutional right to engage in activities that are inherently suspicious, even if the person and the activity are ultimately innocent. The stronger doctrinal claim is that the Fourth Amendment imposes a duty upon the innocent to act in a “reasonable” manner. Finally, I discuss the advantages of the bilateral Fourth Amendment as a regulatory tool and suggest that regulating innocent behavior through a negligence regime avoids excessive criminalization of ultimately innocent behavior, thereby preserving the legitimacy of the criminal code.

A. The Scope of the Bilateral Fourth Amendment

While this Article identifies a variety of ways persons can reduce the chances of their being searched,149 not all government searches are conducted in bilateral conditions; sometimes, only the police can control the likelihood that a search will take place. It is worth pausing, then, to consider what proportion of searches are bilateral.

The bilateral model does not apply where one of two actors affected by the rule is unable to alter her behavior in response to the rule. In some cases, the citizenry is rather impotent to change those characteristics that arouse suspicion, which limits the Amendment’s ability to shape and regulate innocent behavior. The innocent, for example, cannot protect themselves from searches when exogenous or de facto exogenous characteristics like are sufficient to warrant a search.150 In addition, where suspicion motivating a search rests entirely on evidence gathered from sources other than the suspect’s behavior (for instance, from informants’ tips), the searched party similarly lacks control over the occurrence of a search.151 When law abiders are limited in their ability to

149 See supra notes 1–5, 13, and accompanying text.
150 See supra Part I.B (explaining the difference between endogenous and exogenous markers of suspicion).
take precautions, searches are in effect “unilateral” with only the police able to affect the number of empty searches conducted.

Alternatively, when rules about what constitutes suspicion are not clearly articulated to the innocent by the police or the courts, the innocent have limited capacity to avoid searches by changing their behavior. The government might decide not to publicly reveal rules about suspicion for a number of reasons. It might not have an opportunity to communicate this information to the public, given that a vast number of activities can contribute to suspicion and what constitutes suspicion can change relatively quickly. Alternatively, alerting the public might also alert criminals, who could change their behavior. Drug courier profiles, for instance, are often not published publicly out of fear that the couriers will alter their behavior. Regardless of the motive for not publicly disclosing the rules of suspicion, withholding the information reduces the ability of the innocent to avoid searches. If the police have reason to believe that wearing red is evidence of criminality (for example, if it is used to signal gang affiliation) but does not make this rule public, then the innocent cannot avoid the color in order to reduce suspicion in order to reduce suspicion.

Even with these unilateral conditions, bilateral search scenarios abound. While the court and police do not routinely make explicit what they consider to be suspicious activity, in many cases the general public becomes aware of the distinguishing features of criminality through
experience and informal social circles. People who live in neighborhoods occupied by gangs know their distinguishing markers and which public areas are favorites for criminal activity. Other suspicious activities are intuitive if not explicitly stated by the government. In an example from this Article’s Introduction, no one told Ahmad Hashem that Arabic-language texts might raise suspicion in airports, but his intuition about their suspicion was probably a rather easy divination. Therefore, despite the meager direction by the Court as to what constitutes suspicion, the law-abiding persons nevertheless are able to alter their behavior through informal cues.

Moreover, bilateral scenarios exist because the innocent can commonly take precautions to distinguish themselves from the guilty. In many cases, law abiders can take actions to avoid garnering suspicion and empty searches, while criminals cannot alter their behavior because the suspicious activity is inherent in certain criminal enterprises. The innocent can choose whether to avoid congregating on public corners, but open market drug sales require dealers stand out in public to hawk their wares. The innocent have some freedom to choose which the neighborhoods they frequent, but high-end burglaries often require travel to affluent neighborhoods.

The number of suspicious markers that are inherent among criminals but discretionary among the innocent is larger than one might expect. In many cases, criminals cannot change avoid these markers without curbing their criminal activity or making crime less profitable.

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157 See supra note 1 and accompanying text.

158 Open-air drug markets, for instance, operate in well-defined geographic locales so buyers and sellers can locate one another with ease. Compared to other methods of low-level narcotic distribution, open-air drug markets reduce the time and transaction costs of narcotics sales, thereby increasing a dealer’s relative competitiveness vis-à-vis other dealers. Such presentation can have a pronounced effect on sales; one law enforcement tactic commonly employed is “inconvenience policing,” which aims to increase buying time and search costs associated with narcotics purchases in order to reduce demand. Mike Hough & Mangai Natarajan, *Illegal Drug Markets, Research and Policy*, 11 CRIME PREVENTION STUD. 1, 10–11 (2005).
Wearing gang colors is clearly a choice criminals can change without difficulty, but colors are integral for certain criminal enterprises (to maintain criminal group cohesion, to signal their enterprise to drug purchasers, etc.) and continue to be worn despite the notoriety of these markers. 159 Both criminals and the innocent can avoid wearing headwear, but criminals have an incentive to keep their face covered to avoid recognition and inadvertent photographing.

Bilateral searches, therefore, are sufficiently common that doctrinal rules have to acknowledge this relationship in order to achieve socially efficient rules. Consequently, the bilateral Fourth Amendment offers a reason why negligence can be understood as a “first-best” rule rather than a second-best rule, as other explanations of the Fourth Amendment’s reasonableness standard suggested.

B. Rights and Obligations of the Bilateral Fourth Amendment

Once one understands the bilateral nature of the Fourth Amendment, it becomes worthwhile to inquire how this appreciation can be translated into the language of rights and obligations used in constitutional doctrine. I suggest two possible doctrinal formulations that might result from the recognition of the bilateral Fourth Amendment.

1. The Right to Limited Suspicious Activity

The weaker doctrinal claim presented here is that the innocent possess no constitutional right to act suspiciously. Appreciating the bilateral nature of the Amendment offers a slightly more workable understanding of what is and is not protected, an issue scholars and courts have struggled to pinpoint. 160 Most simply, persons protected by the Fourth Amendment are entitled to engage in behavior that falls below the established standard of suspicion without molestation. Because a person’s behavior is a combination of different activities, the Fourth Amendment in a sense operates like an allowance for law abiders: There are a vast number of activities in which an innocent person may legally engage, but

159 Gregory W. O’Reilly, Illinois Lifts the Veil on Juvenile Conviction Records, 83 ILL. BAR J. 402, 407 (1995) (“Generally speaking, gangs want their acts, their territory, and their members known. This is why they wear gang colors, tattoo members, ‘tag’ or spray-paint their symbols on buildings, ‘sign’ or signal their affiliation, and cock their hats in certain ways.”).

the Fourth Amendment will protect the innocent only when the actor limits her activity to a certain quantum below the Fourth Amendment threshold. If the innocent chooses to engage in a number of activities beyond her allocation, she is responsible for the costs she incurs as a result of the erroneous police searches she attracts. (A rule of strict liability, in contrast, would protect all innocent activities, whether suspicious or not.).

The Fourth Amendment, therefore, protects Citizen Jane’s right to stand on a corner, if she avoids other markers of suspicion.\textsuperscript{161} If she elects to engage in other markers of suspicion—wearing gang colors, associating with known criminals, continuously approaching slowly passing cars, etc.—at some point Jane exhausts the credits the Fourth Amendment grants her. At this point, Jane bears the costs from the resulting searches until the suspicion her activity generates is dissipated.

From this perspective, the Fourth Amendment permits innocent persons a certain level of discretion to participate in suspicious activities. The Amendment does not operate in a command-and-control capacity; it does not explicitly dictate to the innocent what is and is not off limits. Rather, the Amendment affords each law abider a certain amount of freedom to determine in what enterprise they shall engage. Consider, for example, innocent persons Joe, who likes to wear baggy clothes when he flies, and Jane, who prefers to travel light with almost no luggage. Both of these activities arouse suspicion of drug smuggling but it is likely neither is independently adequate to permit a stop.\textsuperscript{162} Rather than outlawing either wearing baggy or traveling light clothing, however, the Fourth Amendment’s protection of a limited amount of freedom permits Jane to fly light and Joe to wear baggy clothes so long as they refrain from other suspicious acts during their travels. In this way, the Fourth Amendment acts as an allowance that citizens can employ as they see fit and remains a significant protection for the innocent.

2. The Duty to Act Reasonably

In a stronger vein, the bilateral Fourth Amendment can be understood as imposing reciprocal duties upon both the police and the general citizenry: Police are obliged not to search unless there is adequate suspicion, and individuals are obliged to avoid cumulative behavior that is

\textsuperscript{161} Illinois v. Wardlow, 528 U.S. 119, 124 (2000) ("[A]n individual's presence in the area of expected criminal activity, standing alone, is not enough to support reasonable particularized suspicion that [a] person is committing a crime").

\textsuperscript{162} See Cole, supra note 154, at 1077–78 (noting both characteristics have been deemed indicia of suspicion by DEA agents).
inherently suspicious. Put another way, both actors have a duty to act reasonably. The claim here is stronger than the rights conception of the bilateral Fourth Amendment because it adds a normative element to the analysis. Not only does the Fourth Amendment in practice regulate the activity of law-abiding persons and channel them away from certain actions, but it should regulate these activities. Just as before, comparing the Fourth Amendment to torts regimes illustrates the point; the dissimilarities between the relationships regulated by these fields, however, reveals the rationale behind the “duty of the innocent” conceptualization.

In tortious negligence regimes, the victim is not thought of as having a duty to conform to some standard of care. If a trespasser is only liable for disobeying “no trespassing” signs, landowners wanting to deter trespassers will erect more signs than they would in a regime holding trespassers strictly liable regardless of signage. Sign-posting is a rational response to an enacted legal rule, but a landowner has no duty to enact signs. After all, the landowning “victim” is the one who bears the brunt of the costs when a trespass occurs, so the decision to enact signs or not should fall within her discretion.

Jurisdictions with contributory negligence defenses occasionally reference a “victim’s duty” in assessing whether a plaintiff took the care required by law in order to recover. But even in contributory negligence cases, the victim’s “duty” is not the same as the duty of the injurer. Fleming James notes that the victim’s standard of care is not a Hohfeldian duty, since a breach of the standard of care often does not give another

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163 This class of relationships is different from conditions where two parties have reciprocal duties towards one another. For instance, modern jurisprudence recognizes that landowners have some duty of upkeep owed to all persons, including those who trespass upon the land. Fleming James, Jr., Tort Liability of Occupiers of Land: Duties Owed to Trespassers, 63 YALE L.J. 144, 148–59 (1953). In that case, the parties owe various duties to one another, and both could pursue different claims against one another.

164 Jason M. Salomon, Judging Plaintiffs, 60 VAND. L. REV. 1749, 1763 (2007) (noting that in many cases a victim’s conduct “only risks harm to himself”). This discretion accommodates the victim’s tastes. If the landowner prefers trespassers to signs on her lands, the law permits this choice. See id. at 1785 (noting the “state does not itself undertake to repair the [tortious] harms for money damages, nor does it coerce private parties to do so” but rather merely “empowers private parties . . . with a right of action that they can choose to bring in order to obtain a remedy”).

165 See, e.g., Williams v. First Sec. Bank of Searcy, Ark., 738 S.W.2d 99, 102 (Ark. 1987) (discussing “victim’s duty” to take care while a pedestrian); Hildebrandt v. City of Fairbanks, 863 P.2d 240, 243–44 (Ak. 1993) (barring recovery when plaintiff did not fulfill his “duty” to yield to defendant police car).
Kenneth Simons similarly argues that an injurer’s behavior “would [be] enjoin[ed] if it were feasible” but even if a victim’s level of care is below that which we prefer she take, the victim’s behavior would not be enjoined even if potentially possible. The potential trespasser above should not be able to judicially compel the landowner to erect signs; because the trespasser is never injured, there is no reason to make the courts available to her. The difference between the duties of plaintiffs and defendants, therefore, dovetails with the initial distribution of an accident’s costs.

In the search context, however, the entire costs of empty searches are not initially borne by the innocent as they are by victims of torts. The stigma of the Fourth Amendment searches—the costs to dignity and personhood—are imposed primarily upon the law-abiding persons errantly searched by police. But other costs arising from empty searches are more dispersed. Empty searches, for instance, increase the costs of finding criminals; if the police must search innocent persons to find a criminal, it drains government resources and reduces law enforcement’s effectiveness. Reducing the effectiveness of the police force, in turn, increases the amount of crime the rest of the population bears.

In theory, the searched party might already take the increase in crime into account. For instance, if law-abiding Jane thought her innocent activity inhibited police efforts to catch a criminal specifically targeting Jane, then we expect Jane to balance the two considerations—her value of the innocent-but-suspicious activity and the costs of the increased crime—when deciding whether to pursue certain innocent activities. Realistically, however, Jane is not the only potential victim of the resulting increase in crime, so she bears only a fraction of the cost of increased crime and consequently engages in a socially undesirable level of innocent-but-suspicious activities.

To illustrate, imagine if Jane’s standing on a street corner hinders law enforcement by diverting resources—police may suspect Jane is selling narcotics, for instance, and spend time surveilling her. Police ineffectiveness means criminals are more successful. In this case, assume

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166 Fleming James, Jr., Contributory Negligence, 62 YALE L.J. 691, 708 (1953).
167 Kenneth W. Simons, Puzzling Doctrine of Contributory Negligence, 16 CARDOZO L. REV. 1693, 1705 (1995). Therefore, Simons deems the victim’s duty under a contributory negligence regime “conditional” rather than a “duty” in the traditional sense. Id. at 1707.
168 Alternatively, the government can respond by increasing the police budget; this solution imposes its own social costs through increased taxes or decreased funding for other services.
the expected social costs of crime increase by 5 as a result. Jane personally enjoys a benefit of 1 by standing on the corner, but she bears only a fraction of the increased social cost of crime (if there were 100 people in society that were all equally likely to bear the 5 cost, then her expected cost is .05). Without government regulation, then, Jane engages in a socially unproductive activity—standing out on the corner—while others bear the cost of her activity.

Innocent activity, therefore, generates significant costs that other members of society bear. These negative externalities are as real as the costs of errant searches described above, and to avoid more crime and to achieve socially efficient outcomes, the state must regulate the law-abiding citizens’ masking behavior. In particular, when the increase in crime resulting from innocent persons’ masking behavior generates costs greater than the value the innocent derive from such activity, the state should regulate the innocent to deter such masking behavior. Though Fourth Amendment jurisprudence is not the only way to regulate masking behavior, the next Section demonstrates that the reasonableness regime is often preferable because it is the least costly regulatory mechanism for the innocent.

Because the costs of empty searches are not completely internalized by the innocent “victims,” we have a scenario different-in-kind from tortious “victims.” Even though the innocent rarely have an intention of inhibiting law enforcement, activities that are inherently suspicious have this effect and therefore require regulation. And were it possible, we would enjoin certain innocent activities in order to avoid empty searches that waste resources and impede law enforcement (indeed, this last point is reinforced in the next section). For these reasons, it is proper to think of the innocent as having a genuine duty to act reasonably, even when we do not impose such a responsibility on analogous victims.

Federal courts have made little reference to the masking behavior of the innocent, the social costs that such behavior imposes, or any

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170 See infra Part III.C.
obligations that the innocent might bear. Weighing the negative externalities of law-abiding behavior, however, provides support for the burdens already placed upon the innocent. In the case Illinois v. Wardlow, for instance, the Court considered whether “unprovoked flight” from the police could by itself amount to reasonable suspicion.\textsuperscript{171} Chief Justice Rehnquist’s opinion focused on the probative value of flight, suggesting there were few innocent explanations for such behavior.\textsuperscript{172} The majority overlooked a second point in their favor: Even if flight is innocent, the social costs that law abiders cause by fleeing officers are undeniable; innocent flight distracts law enforcement from other possible criminal activity in the area, minimizing the effectiveness of any patrol.\textsuperscript{173} The social effect of flight, therefore, affirms the notion that law abiders should bear costs that their activities generate.

Describing the Fourth Amendment as imposing a duty upon the law-abiding public may seem perverse, given that the innocent are thought to be the primary rights bearers under the Amendment and the government the typical party upon which the Bill of Rights imposes obligations.\textsuperscript{174} But appreciating that innocent activity masks criminality gives us reason to think that this behavior should be regulated and sometimes even stopped. Inefficacious searches are not simply the fault of law enforcement, despite the general assumption that they are to blame, and the searched are not the only party to be hurt by them. Instead, both the searcher and searched bear responsibility for reducing empty searches.

\textbf{C. The Bilateral Fourth Amendment as a Regulatory Tool }

The “duty” conceptualization of the Fourth Amendment’s incentives for the innocent is bolstered by recognizing legislatures often impose similar obligations upon the innocent, particularly through the

\textsuperscript{171} 528 U.S. 119 (2000).

\textsuperscript{172} Id. at 125 (“Flight, by its very nature, is not ‘going about one’s business’; in fact it is just the opposite.”). The dissent contested this point fervently, offering innocent motives for fleeing officers. Id. at 131.

\textsuperscript{173} Such movement’s distracting effect is evidenced by the fact that criminals use similar interference techniques, commonly called “heat runs.” See, e.g., Alvarez v. State, 813 S.W.2d 222, 223 (Tex. App. 1991) (describing how traffickers used a speeding truck for “‘running counter surveillance’ or conducting ‘heat runs’ in an effort to distract the attention of peace officers or to expose their presence”).

\textsuperscript{174} This subject is surveyed in Nicholas Quinn Rosenkranz, The Subjects of the Constitution, 62 STAN. L. REV. 1209 (2010).
criminalization of morally neutral conduct. These statutes—often called “quality-of-life” laws—include curfews and anti-loitering ordinances. They are quite common and often part of modern community policing efforts. It is these types of laws that affirm our notion that some innocent behavior “would be enjoined if it were feasible,” giving us reason to think that law abiders do in fact have a duty to act reasonably.

For certain quality-of-life laws, society is largely unconcerned with the activity directly regulated by the law; rather, the goal is to reduce preexisting crime that the police have been unable to halt. Curfews and anti-loitering laws pursue these goals in two different ways. First, these regulations become pretextual grounds to interfere with criminal enterprises by permitting officers to stop, search, and move criminals without significant evidence of guilt concerning the underlying enterprise. Second, these regulations help remove law abiders from the area, thereby eliminating innocent behavior that camouflages criminal activity. Eliminating the innocent from street corners through anti-loitering laws, for instance, leads police to rationally conclude the remaining congregators have nefarious purposes, such as drug selling (as

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175 As Professor Stuntz has noted, “[t]here is no constitutional rule concerning how bad something must be before it is criminalized.” William J. Stuntz, Substance, Process, and the Civil-Criminal Line, 7 J. Contemp. Legal Iss. 1, 6 (1996) [hereinafter Stuntz, Substance].


179 See supra note 167.

180 Stuntz, Substance, supra note 175, at 10 (arguing goal of enforcing laws like jaywalking is to pursue “‘real’ crimes”).

181 The Supreme Court, of course, sanctioned such pretextual investigations in Whren v. United States. 517 U.S. 806 (1996).

explained above, criminals often cannot reduce certain behaviors without suffering a cost their enterprises\textsuperscript{183}). Through a combination of pretext and removing the innocent, these laws have proven very effective at reducing traditional categories of crime.\textsuperscript{184}

While the bilateral Fourth Amendment does not permit pretextual searches like quality-of-life laws, it does similarly reduce innocent-but-suspicious activity that hampers efforts to police traditional crimes. The bilateral Fourth Amendment, however, does so without criminalizing otherwise innocent activity. Consider a person who the police see loitering with criminals and exhibiting other indicia suggesting she is involved in a criminal enterprise.\textsuperscript{185} Rather than imposing a cost through a misdemeanor conviction, the police may search the person to dissipate suspicion; because this search carries its own costs, without compensation the searched party is deterred \textit{ex ante} from engaging in suspicious activity that masks others’ criminality. In this way, government searches impose a Pigouvian tax, forcing the searched to internalize some of the social costs she creates through her (albeit innocent) activity.

Regulating through searches may seem a strange method of inducing parties to take the socially optimal level of care, but it has many advantages when compared to criminalization. First, it avoids unnecessary stigmatization for activity that we find not offensive but merely inconvenient.\textsuperscript{186} While the stigma associated with empty searches is significant, it seems clearly less than that of criminal conviction, regardless of the underlying crime.\textsuperscript{187} Second, avoiding the criminalization of benign activity helps preserve the effectiveness of laws geared towards “true

\textsuperscript{183} See supra note 160 and accompanying text (describing how criminal profitability relies in part on being able to engage in behaviors that the innocent are less constrained to reduce).

\textsuperscript{184} Morales, 527 U.S. at 49 n.7 (“The city believes that the ordinance resulted in a significant decline in gang-related homicides. It notes that in 1995 . . . the gang-related homicide rate fell by 26%. In 1996, the year after the ordinance had been held invalid, the gang-related homicide rose 11%.”).

\textsuperscript{185} To be constitutional definite, loitering laws must require the loiterer display some other evidence of criminal enterprise. See id. at 57–58 (“[S]tate courts have uniformly invalidated laws that do not join the term ‘loitering’ with a second specific element of the crime.”).

\textsuperscript{186} Quality-of-life statutes often offend our notion of desert. See, e.g., Morales, 527 U.S. at 57–58 (noting worries about desert raised by anti-loitering ordinance).

\textsuperscript{187} Indeed, since arrests usually include searches, the cost of searching is not avoided. For discussion of the costs of convictions, see David Wolitz, The Stigma of Conviction: \textit{Coram Nobis, Civil Disabilities, and the Right to Clear One’s Name}, 2009 B.Y.U. L. REV. 1277, 1309–1316.
crimes.”

Paul Robinson, for instance, notes that “[a]s the label ‘criminal’ is increasingly applied to minor violations of a merely civil nature, criminal liability will increasingly . . . will lose its particular stigma.”

Third, avoiding broad criminal laws reduces the need to give officers extensive discretion regarding enforcement. Legislatures rarely enact quality-of-life laws intending for officers to prosecute every infraction to the full extent permitted; laws that necessarily empower the police with significant discretion can be abused. Fourth, minimizing the criminal code reduces the chances of cascading behavior, where conviction for a lesser offense, like loitering, leads a person to future criminality as the erstwhile innocent person is marginalized by conviction. Research in the fields of sociology and criminology has found significant support for “labeling theory,” the postulation that “formal labeling (arrest and formal sanctions)” significantly influences the subsequent behavior of the “labeled.” And finally, regulating the innocent through the criminal law may prove ineffectual. Noting that criminal laws are the “heavy artillery” of the government, Francis Allen argues that the use of criminal laws to regulate innocent behavior can cause a mismatch of penalty and offense that spurs government agents to withhold punishment, even when some sort of sanction is necessary. This type of nullification causes inadequate deterrence, and the innocent consequently resume or continue their masking behavior.

188 See Sanford H. Kadish, Legal Norm and Discretion in the Police and Sentencing Process, 75 Harv. L. Rev. 904, 910 (1962) (“Insofar as such laws purport to bring within the condemnation of the criminal statute kinds of activities whose moral neutrality, if not innocence, is widely recognized, they raise basic issues of a morally acceptable criminal code.”).

189 Paul H. Robinson, Moral Credibility and Crime, Atl. Monthly, Mar. 1995, at 72, 77; see also Paul H. Robinson & John M. Darley, Justice, Liability and Blame: Community Views and the Criminal Law 201–02 (1995) (“[D]iscrepancies between the criminal code and the community tend to undercut the law’s moral credibility . . . . As the law’s moral credibility decreases, so too does its power to set authoritative standards of conduct to which people are willing to conform.”);

190 Livingston, supra note 176, at 615 (“[P]olice officers enforcing specific rules against conduct like public drinking, jaywalking, and unlicensed street vending have substantial opportunity to abuse their authority by enforcing these rules in discriminatory ways.”).

191 See generally Kadish, supra note 188 (discussing the potential abuses of discretion by police officers when given authority under broad statutes).


There are limits to regulating the innocent though the bilateral Fourth Amendment. For instance, if deterring an innocent activity requires the threat of high costs, we likely would prefer criminalization of the behavior rather than permitting officers to purposely increase the costs of a search (e.g., through offensive language or physical force). But when officers do not have to resort to such extreme tactics, regulating the innocent by allocating costs of a search to law abiders seems preferable to the prospect of overcriminalization. Even from the perspective of the innocent, being searched rather than being arrested seems preferable: The collateral consequences of regulation through quality-of-life laws seem less appealing than those of being searched. The bilateral Fourth Amendment, therefore, imposes some costs upon the law-abiding public, but it shields them from greater legislative intrusion into their lives.

IV. SUSPICION IN A BILATERAL WORLD

Prior sections explained the bilateral nature of searches regulated by the Fourth Amendment, referring to the fact that both the police and the innocent can take precautions to reduce the number of “empty” searches that occur. This bilateral nature became the crux of a theory as to why the Amendment follows a “reasonableness” rule rather than a strict liability rule embodied in the Takings Clause.

The bilateral nature of searches, however, also influences the optimality of the specific rules used to establish suspicion. In other words, law abiders’ ability to adjust their behavior based on the likelihood of being searched should inform our very notion of what “suspicion” is. This Part argues that the traditional method of assessing the suspiciousness of circumstances—what economists refer to as Bayesian updating—can be socially inoptimal in bilateral conditions. Instead, a better rule requires the police and courts also consider what innocent activity risks being deterred, and the social value of this deterred activity.

Examining the social value of innocent activity is necessary because all legal activities are not equal. Some are especially valuable to society and deserve extra protections to ensure they are not deterred. Conversely, some activities are socially valueless, if not costly, and we should have less hesitation deeming these activities “suspicious.” Without

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194 Such unnecessary tactics also would run afoul of the Fourth Amendment. See Graham v. Connor, 490 U.S. 386 (1989) (holding excessive force claims are properly analyzed under the Fourth Amendment’s “objective reasonableness” standard).
taking into account the value of the innocent activity being deterred, in
certain cases searches will be socially unproductive because the costs of
deterrence outweigh the socially productive reduction in crime. 195
Assessing the social value of deterred activity is the only way society can
optimize the rules governing what we deem “suspicious.”

A. Suspicion and Statistics

While the precise amount of suspicion varies based on
circumstances, the Court never requires absolute confidence that a suspect
is guilty before a search is conducted. 196 Similarly, Fourth Amendment
jurisprudence does not require police only rely on one piece of evidence;
police instead may aggregate all information collected about a scenario in
order to make a more informed decision about the likelihood of recovering
evidence. 197 Thus, the government does not decide to search or not search
based on the suspect’s presence on a high-crime neighborhood corner
alone; it looks at her clothes, her demeanor, the time of day, others around
her, and so on. Establishing the adequate level of suspicion consequently
becomes an exercise of assessing, as Judge Randolph of the D.C. Circuit
once wrote, “conditional probabilities: if one event occurs, how likely is it
that another event will occur?” 198

The conventional method of assessing “conditional probabilities” is
through the use of Bayesian statistics. Bayes’s theory states “[t]he

195 Colb, supra note 40, at 1645 (proposing the Supreme Court doctrine “recognize that an
‘unreasonable’ search in violation of the Fourth Amendment occurs whenever the
intrusiveness of a search outweighs the gravity of the offense being investigated”).
denial of certiorari) (“[A]n officer is not required to eliminate all innocent explanations for a
suspicious set of facts to have probable cause to make an arrest.”); United States v. Arvizu,
534 U.S. 266, 277 (2002) (“[R]easonable suspicion . . . need not rule out the possibility of
innocent conduct.”).
197 Minzner, supra note 51, at 920.
198 United States v. Prandy-Binett, 995 F.2d 1069, 1070 (D.C. Cir. 1993); see also United
assessment of probabilities in particular factual contexts”). Some have attacked statistical
analyses used to establish cause, arguing that such approaches ignore the individualistic
inquiry required by the cause. Charles Nesson, The Evidence or the Event? On Judicial
verdict may not be acceptable, and an acceptable verdict may not be probable.”). As Ronald
Bacigal has recently noted, however, “[o]nce we acknowledge that innocents may be
searched and seized, any differentiation between ‘individualized’ case-specific evidence and
‘statistical’ evidence is largely illusory.” Ronald J. Bacigal, Making the Right Gamble: The
probability of event $G$ conditional on the occurrence of event $H$ is . . . the probability of the joint occurrence of $G$ and $H$ divided by the probability of $H$.” In simpler terms, Bayesian statistics confirms the intuition that if the police simultaneously observe two pieces of evidence that independently suggest a suspect committed a crime (e.g., bloody clothes and a fingerprint at the crime scene), observing both pieces of evidence gives us more confidence of her guilt than finding only one (e.g., the fingerprint alone). Bayesian analysis further “confirm[s] our intuitive notion that a trait need not be unique in the population in order to have probative significance”; if enough non-unique traits are independently weak indicia of guilt, their combination can establish significant confidence about a subject’s guilt.

While the Supreme Court has never formally employed Bayesian statistics, the Court’s “totality of the evidence” approach to establishing suspicion is an informal practice of the same principle. In *United States v. Arvizu*, for instance, the defendant was caught smuggling narcotics across the Mexico-United States border after being pulled over by the police. The defendant challenged the search, arguing the police lacked probable cause. The Court, in finding the search constitutional, noted the following indicia of suspicion: The suspect was identified traveling on back roads that bypassed checkpoints, his traveling coincided with a police shift change (a common technique to evade suspicion), the suspect was driving a minivan commonly used to transport narcotics but ill-equipped for back roads, passengers in the vehicle behaved oddly as the police approached, and the vehicle was registered to an address “notorious for alien and narcotics smuggling.” The lower court, in holding the police lacked reasonable suspicion for the search, analyzed each piece of evidence independently and found “each observation by [the officer] was by itself readily susceptible to an innocent explanation” and therefore “entitled to ‘no weight.’” The Supreme Court rejected “this sort of divide-and-conquer analysis,” finding that even though “each of these factors alone is


\[ P(G|H) = \frac{P(G,H)}{P(H)} \]

200 *Id.* at 516.

201 The “totality of the evidence approach” was formally established in *Illinois v. Gates*. 462 U.S. at 233.


203 *Id.* at 269–71.

204 *Id.* at 274 (quoting 232 F.3d, at 1249–51).
susceptible of innocent explanation” together “they sufficed to form a particularized and objective basis” for a search.\textsuperscript{205} Such conditional analysis of evidence, therefore, informally approximates Bayesian calculations.\textsuperscript{206}

Establishing suspicion through conditional probabilities—whether Bayesian or informal “totality of circumstances” estimations—has obvious benefits because it allows the police to search suspects that have not left a “smoking gun.” The approach, however, has its own costly consequences. For one, use of conditional probabilities affects the measures the innocent must take to avoid costly empty searches. Because these measures can be so dramatic,\textsuperscript{207} a policymaker must consider how parties at risk of being searched will react to rules governing suspicion in order to fashion a socially optimal rule.

B. The Inadequacy of Exclusively Focusing on Suspicion

Using conditional probabilities is more than a means to establish the required level of suspicion for a valid search; it affects the scope of evidence that law enforcement can use to establish “suspicion.”\textsuperscript{208} To illustrate, consider a suspect’s presence on a corner in a high-crime neighborhood. This behavior alone is insufficiently probative to sustain a search based on “reasonable suspicion,”\textsuperscript{209} and so without the ability to establish suspicion through conditional probabilities, the fact has no evidentiary weight if the officer wanted to conduct a stop-and-frisk. Consequently, an innocent person would have no reason to fear that standing in the area would increase their risk of having to bear the cost of an empty search. Officers in jurisdictions that permit the use of conditional probabilities, in contrast, may use a suspect’s presence as evidence

\textsuperscript{205} 534 U.S. at 274, 277–78; see also Terry v. Ohio, 392 U.S. 1, 22 (1968) (noting that while each of defendants’ acts was “perhaps innocent in itself,” together they “warranted further investigation”).

\textsuperscript{206} Other courts have more formally embraced Bayesian statistics. See, e.g., United States v. Shnoubi, 895 F. Supp. 460, 484 (E.D.N.Y. 1995) (discussing judicial use of Bayesian updating); United States v. Davis, 200 F.3d 1053, 1054–55 (7th Cir. 2000) (referencing Bayesian statistics).

\textsuperscript{207} See supra Part I.


\textsuperscript{209} Illinois v. Wardlow, 528 U.S. 119, 124 (2000) (holding presence in high-crime area is not sufficient to establish reasonable suspicion).
supporting a stop. But because this factor is now relevant, law abiders in this same jurisdiction may vacate street corners to avoid costly empty searches.\footnote{210}

Allowing the use of conditional probabilities, therefore, not only changes the evidentiary value of certain facts; it also changes the scope of activities that law abiders sacrifice to avoid empty searches.\footnote{211} In certain cases, the cost of chilled innocent activities, combined with the costs of empty searches, will outweigh the value of searching those with the distinguishing characteristic in question. For instance, consider the factor “associates with known criminals.” This characteristic increases the likelihood that searching a suspect will uncover criminal evidence, though its probative value is too weak to be the only grounds for a search requiring probable cause or reasonable suspicion.\footnote{212} Its weak probative value, however, means it could be considered as evidence in a jurisdiction that employs conditional probabilities. In the same jurisdiction, however, some innocent persons will reduce their associations with known criminals in order to avoid empty police searches. The consequences of law abiders’ response could have an isolating effect upon at-risk members of society, increasing the chance of recidivism and escalating criminality. So while using the evidence may lead to an additional search that reveals crime, allowing consideration of the evidence may have the net effect of increasing criminality.

These types of perverse outcomes do not mean that conditional probability analyses need to be abandoned; rather, evidentiary rules pertaining to suspicion merely need to be tempered with an inquiry about what innocent behavior is likely to be curbed if an activity is considered “suspicious,” and what the social value of that curbed innocent behavior is.

\footnote{210}{See, e.g., supra note 12 and accompanying text (describing how some innocent persons avoid public areas to minimize the risk of police searches).}

\footnote{211}{This concern parallels a prior criticism of Bayesian updating made by Judge Posner. In an early edition of his seminal law and economics textbook, Posner argued that using evidence of firms’ market shares would dislocate the market by burdening larger firms and insulating smaller competitors from liability. If the evidence reduces the chances that smaller firms are held liable, smaller companies have less incentive to take adequate care; conversely, if evidence about market share increases larger firms’ liability, big companies will take greater than optimal care. \textsc{Posner}, supra note 90, at §21.2; see also \textsc{Nesson}, supra note 198, at 1381 (discussing Posner’s objection); Eleanor Swift, Abolishing the Hearsay Rule, 75 CAL. L. REV. 495, 504 n.28 (1987) (same).}

\footnote{212}{See \textit{United States v. Sibron}, 392 U.S. 40, 73 (1968) (Harlan, J., concurring in result) (“[A]lthough association with known criminals may . . . properly be a factor contributing to the suspiciousness of circumstances, it does not, entirely by itself, create suspicion adequate to support a stop.”).}
The social value of some curbed activity is marginal, and the crime reduced by considering an activity “suspicious” is likely greater than the social value of the marginal activity reduced. For instance, the “unprovoked flight” deemed suspicious in Illinois v. Wardlow seems unlikely to have a large social value, and the balancing of the two types of costs points to considering the activity suspicious.213

On the other hand, other equivocal activities have greater social value. Take the example of curbed donations to Muslim charities mentioned in Part I:214 the social value of charitable giving seems uncontestable, and the chilling effect that evidentiary rules deeming this philanthropy “suspicious” might impose costs far greater than any law enforcement benefit gained. Admittedly, the social values of many innocent activities are contestable. Wearing “gang colors” in certain neighborhoods has expressive value but also likely masks certain criminal enterprises in these neighborhoods.215 Despite the real uncertainties in pricing value, however, ignoring the subject completely will lead to perverse rules about suspicion, so some inquiry must be made.

Finally, it is worth asking who should inquire into the social value of activity curbed by search rules. In inquiries into the probative value of evidence, the Supreme Court has repeatedly counseled deference to “observations of a trained, experienced police officer who is able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer.”216 The relative expertise of the police force, however, only applies to inquiries about suspiciousness alone—officers do not develop any special appreciation of the social value of innocent behavior. The judiciary, therefore, should consider itself the institution that examines this facet of searches’ “reasonableness.” The bilateral nature of government searches, therefore, reinvigorates the role the judiciary must play in regulating searches.

214 See supra note 17 and accompanying text.
215 See United States v. Malone, 886 F.2d 1162, 1164-65 (9th Cir. 1989) (finding suspicion in part established because the suspect wore a jacket bearing a Los Angeles gang’s colors); United States v. DeJear, 552 F.3d 1196, 1200–01 (10th Cir. 2009) (finding reasonable suspicion to detain a suspect existed in part because he emerged from a house with “people standing outside of it wearing colors affiliated with local gangs”).
216 Brown v. Texas, 443 U.S. 47, 52 n.2 (1979); see also United States v. Mendenhall, 446 U.S. 544, 564 (1980) (“[I]t is important to recall that a trained law enforcement agent may be able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer.”) (quotations omitted).
C. Chilled Activity, Current Doctrine, and an Alternative Approach

To date, the Supreme Court has not shaped the “reasonableness” doctrine in a way that accounts for the value of the innocent activity curbed by evidentiary rules. Some members of the Court seem concerned about the implications of certain rules for the innocent, but the response has been to attack the probative value of the evidence rather than discussing the social costs of the proposed evidentiary rule. At the same time, some lower courts have become aware of the social costs that evidentiary rules can have, and they have begun to shape rulings to address these effects.

Supreme Court opinions often refer to the “innocent explanations” for the equivocal activity that the government considered suspicious. In Illinois v. Wardlow, a dissenting Justice Stevens discussed the “diversity and frequency of possible motivations for flight” from police officers, and argued that these innocent explanations made flight alone insufficiently probative to warrant reasonable suspicion. In Florida v. Royer, a Court plurality found the State’s use of a drug profile insufficiently precise to establish probable cause: “We cannot agree with the State . . . that every nervous young man paying cash for a ticket to New York City under an assumed name and carrying two heavy American Tourister bags may be arrested and held to answer for a serious felony charge.”

In these cases, opinions singly inquire into the veracity of the evidence offered, without regard to the social costs that allowing law enforcement to deem certain conduct “suspicious” might have. Ignoring the likely response of the innocent, however, overlooks the significant indirect costs that can result from affirming an officer’s claim that an activity is suspicious. One might assume that the more socially valuable an activity, the more innocent persons would engage in it—and the less probative that evidence would be. If that were the case, focusing on “innocent explanations” would account for the social costs of curbed innocent behavior by proxy. In practice, however, there is a large disconnect between the private value of conduct (which motivates individuals to act) and social value; private individuals do plenty of socially

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218 Wardlow, 528 U.S. at 129 (2000).

219 Id. at 138.

valueless things and ignore other socially valuable activities. Consequently, the social costs of reduced conduct must be made separate from inquiries about the probability of a search turning up criminal activity.

The inclination to account for the social costs of curtailed activity seems to have trickled down recently to at least one district court. In *United States v. Magana*, the Western District of Texas recently considered a motion to suppress evidence found during the search of a defendant’s car.221 At trial, the searching officer testified that among the factors he considered suspicious was the presence of a religious icon (a Virgin Mary statute) on the dashboard, and, “in his experience and opinion, religious symbols are used to dispel suspicion of wrongdoing and are usually indicative of drug activity.”222 Without discounting the possible probative value of the religious iconography, the court held that the display of the Virgin Mary could not be used to generate reasonable suspicion of drug dealing or general criminality. In its reasoning, the Court worried about the possible chilling effect a contrary rule would impose. “To [allow the display of religious items to be considered evidence of criminality] would be a *de facto* mandate for all citizens to remove any indicia of religion from their vehicles or else possibly face a governmentally sanctioned inference of criminality.”223

The *Magana* court’s inquiry into the chilling effects of using religious iconography to establish suspicion reflects the type of inquiry that courts must consider if Fourth Amendment doctrine is to adequately account for all the costs and benefits of searches. Undoubtedly, inquiring into the social value of activities is a difficult assessment for courts to make. The *Magana* court dealt with a relatively easy case, because the equivocal behavior in question—the display of religious icons—is constitutionally protected.224 For socially optimal results, however, courts need to extend this inquiry to all activities that are offered by the government as being suspicious. Some activities will have little redeeming social value, and therefore the prospect of restraining these activities should not be grounds for discounting the probative value of the activity.225 Other

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222 Id. at 560.
223 Id. at 571.
224 Indeed, the court recognized and emphasized the unique nature of the activity. Id. at 567.
225 Take, for example, the government’s evidence offered in one recent Supreme Court case: “two men on a street corner [in a high-crime area]—with no apparent familiarity or prior interaction—make a quick hand-to-hand exchange of cash for ‘small objects.’”
evidence will risk curbing important social activity, even if it is not constitutionally protected. And, of course, the social value of some behavior will be debated and disagreed upon by justices. But these arguments do not seem any more difficult than the debates currently held over the probative value of evidence offered by the government.\textsuperscript{226}

Will the Supreme Court have the opportunity to embrace such an inquiry? Existing disagreements among lower courts may eventually present themselves in the Supreme Court and provide an opportunity to adopt an approach similar to \textit{Magana}. The Court, for instance, may choose to resolve the disagreement among lower courts as to whether the avoidance of DUI checkpoints, without more, constitutes reasonable suspicion to stop the vehicle;\textsuperscript{227} analyzing the social value of avoiding checkpoints (for innocent reasons) may help clarify the stakes at issue. National security and counterterrorism programs—such as suspicionless searches in public arenas—may also eventually raise questions about what productive activity is chilled by instituting such security measures.\textsuperscript{228} Any regular search-and-seizure case, of which the Supreme Court sees a significant number, could also provide the opportunity to establish a second prong investigating the innocent activity chilled by deeming activity “suspicious.”\textsuperscript{229}

\textbf{CONCLUSION}

This Article identifies how the innocent respond to rules fashioned by the Supreme Court, and some implications of this reactionary ability.


\textsuperscript{226} To the extent that justices have made determinations about the probative value of evidence based in part on the activity that is likely to be affected, the judicial debates may become clearer.


\textsuperscript{228} The Second Circuit, for instance, recently opined on the chilling effect of New York City’s subway searches. Macwade v. Kelly, 460 F.3d 260, 263 (2d Cir. 2006). The court, however, never considered the social value of the innocent activity chilled, though it did consider the value of the terrorist activity that might be chilled by the program. \textit{Id.} at 274–75.

\textsuperscript{229} The Supreme Court’s docket is consistently speckled with Fourth Amendment cases. See Orin Kerr, Where is the Fourth Amendment Docket?, Scotusblog, http://www.scotusblog.com/2010/04/where-is-the-fourth-amendment-docket/ (Apr. 14, 2010, 00:48 EST).
The bilateral nature of searches, and specifically the ability of law abiders to reduce the chances of being erroneously searched, provides a central reason why the Fourth Amendment must regulate searches under a “reasonableness” regime rather than a strict liability one. However, once we understand that a rule of reasonableness is necessary, the “standard of care” set by the Court—what we know doctrinally as “probable cause” or “reasonable suspicion”—is only socially optimal if the Court appreciates the effects its rules have on the innocent. Consequently, the Court must fashion rules that weigh both the probative value of the activity and the marginal activity that will lost if the Court accepts certain evidence as grounds to satisfy the standard of care.

To date, Fourth Amendment scholarship has focused on the Amendment’s effects on the police and criminals. The commentary’s focus on the criminal-police relationship may stem in part from concern about the expected value of criminal activity—most likely a concern that criminals are underdeterred from crime. While the issue is an important one, the Fourth Amendment seems clearly designed for the judiciary to regulate innocent-police relationship. This task is a difficult one, given the dual concerns of (1) empty searches and (2) negative externalities generated by the innocent’s masking behavior. Both courts and the academy, therefore, should no longer overlook the role that the innocent play in criminal procedure.

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