

## The Common Law Endures in the Fourth Amendment

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## THE COMMON LAW ENDURES IN THE FOURTH AMENDMENT

George C. Thomas III\*

### ABSTRACT

The text of the Fourth Amendment provides no guidance about what makes a search unreasonable or when warrants are required to make a search reasonable. The Supreme Court has had to craft a doctrine based on intuition, policy goals, and half-hearted stabs at history. This Article argues that the Court's Fourth Amendment doctrine is stable when it roughly tracks the eighteenth-century common law protection of property, privacy, and liberty. When the Court has sought to provide more protection than the common law provided, the result has been an erratic doctrine that has gradually receded almost back to the common law contours. The most recent move away from a robust Fourth Amendment has been to reduce the application of the exclusionary rule. As there was no exclusionary rule at common law, and for over a century after the Fourth Amendment was ratified, further reductions in the rule's application can be expected.

### INTRODUCTION

To understand the Supreme Court's current Fourth Amendment doctrine, it is critical to understand the common law protection of privacy, property, and liberty that existed in colonial America and in eighteenth-century England. The thesis of this Article is that when the Court has expanded Fourth Amendment doctrine too far from the common law, that innovation becomes unstable and is later overruled or diminished. When the Court roughly follows the common law, however, the resulting doctrine in most cases is as strong today as it was when decided.

To be sure, as Donald Dripps points out, the common law was not static in 1791, and we have no reason to believe that the Framers intended the Fourth Amendment to protect the degree of privacy and liberty that the common law protected when the Fourth Amendment was drafted or ratified.<sup>1</sup> Moreover, the modern world, including the modern world of policing, is very different from the Framers' world.<sup>2</sup> Thus, a

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<sup>1</sup> Donald A. Dripps, *Responding to the Challenges of Contextual Change and Legal Dynamism in Interpreting the Fourth Amendment*, 81 *MISS. L.J.* 1085, 1088 (2012).

<sup>2</sup> *Id.* See generally George C. Thomas III, *Time Travel, Hovercrafts, and the Framers:*

literal originalism would sometimes create unacceptable results. For one example, a colonial officer who arrested the wrong person was strictly liable in trespass law even if the officer had an arrest warrant and the arrestee told the officer, falsely, that he was the person named in the warrant.<sup>3</sup> This result is required, Bacon's treatise tells us, because "the Officer is at his Peril to take Care that he arrests the right Person."<sup>4</sup> A clever person could thus create the basis for a tort suit against a completely innocent officer.

While the common law arrest-at-peril rule might have made sense in a world of small villages and farms, when the constable would know almost everyone, it makes little sense in today's world. If we transplanted that doctrine to today's world with exclusion of evidence as the principal remedy for Fourth Amendment violations, the State would lose evidence seized after the arrest of the wrong person no matter how reasonable was the officer's mistake. This mindless elevation of liberty at all costs simply does not fit our modern world.

Moreover, the common law transplanted literally to today would create a radically incomplete Fourth Amendment. What would the common law of tort say, for example, about attaching a GPS to a vehicle and monitoring that GPS? Justice Scalia's attempt to argue that this would have been a trespass at common law—a constable could have hidden in a coach and thus monitored the movement of the coach<sup>5</sup>—produced a funny riposte from Justice Alito: "this would have required either a gigantic coach, a very tiny constable, or both—not to mention a constable with incredible fortitude and patience."<sup>6</sup> Then there is electronic surveillance. Justice Black made a literalist claim on this point in his dissent in *Katz v. United States*.<sup>7</sup> Wiretapping is "nothing more than eavesdropping by telephone . . . an ancient practice which at common law was condemned as a nuisance. . . . There can be no doubt that the Framers were aware of this practice, and if they had desired to" include it in the Fourth Amendment, "they would have used the appropriate language to do so. . . ."<sup>8</sup>

The *Katz* majority ignored Black's originalism argument, but it seems to me far from clear that electronic listening is the same as listening under someone's window. For one thing, the common law eavesdropper who wanted to overhear conversations in a dwelling had to be a trespasser, at least on the curtilage if not inside the

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*James Madison Sees the Future and Rewrites the Fourth Amendment*, 80 NOTRE DAME L. REV. 1451 (2005) [hereinafter Thomas, *Time Travel*] (describing various categories of searches in the modern world that would have been unknown to the Framers and seeking to write a "new" Fourth Amendment to deal with those searches).

<sup>3</sup> 5 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 163 (1766).

<sup>4</sup> *Id.*

<sup>5</sup> *United States v. Jones*, 565 U.S. 400, 406 n.3 (2012).

<sup>6</sup> *Id.* at 420 n.3 (Alito, J., concurring).

<sup>7</sup> 389 U.S. 347, 366 (1967) (Black, J., dissenting).

<sup>8</sup> *Id.*

dwelling; today, words inside a home can be overheard without coming close to the home. And as Justice Douglas once remarked: “What the ancients knew as ‘eavesdropping,’ we now call ‘electronic surveillance’; but to equate the two is to treat man’s first gunpowder on the same level as the nuclear bomb.”<sup>9</sup> If Black’s eavesdropping analogy is unpersuasive, then the common law tells us nothing about how the electronic surveillance cases should be decided. Moreover, what would we make of vehicle inspection stops, drawing of blood, fingerprinting, and DNA databases? A Fourth Amendment world that looks only to originalism leaves much unclear, as even Justice Scalia implicitly acknowledged.<sup>10</sup>

My goal in this Article is thus not to create a comprehensive account of the Fourth Amendment that draws on some form of originalism. Rather, I wish to show that there were fundamental values that supported the common law, generally understood in the late eighteenth century. My basic theory is similar to one Dripps developed, based in part on one I offered in 2005.<sup>11</sup> Dripps argued that Fourth Amendment issues should be decided by asking “whether a ruling for one side or the other would move us closer to the privacy/security balance favored by the founders. Second, we can look to the specific rules and practices of the founding era as data points—as evidence of [this] aspirational balance of advantage.”<sup>12</sup>

The 2018 version of this theory advances the argument in two ways. First, I will argue that when the Court has invented doctrines that expand the common law protection, based on its view of sound policy, these innovations are often unstable. Second, I will argue that the Court is free to shrink the common law protection when two conditions are present: (1) the values that underlie the common law of tort have changed; and (2) the change meets the need for law enforcement in a modern, more complicated, and more dangerous world. We saw an example of appropriate shrinkage in the modern rejection of the rule that an officer arrested the wrong person at his peril. In sum, the common law superstructure provides a sort of upside limit for Fourth Amendment protection without also providing a floor.

## I. THE TEXT

The interpretation problem at the heart of the Fourth Amendment is profound. This is one, perhaps the greatest, reason courts and scholars are drawn to colonial history; they are searching for guidance. The amendment is curiously worded:

The right of the people to be secure in their persons, houses,  
papers, and effects, against unreasonable searches and seizures,

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<sup>9</sup> *United States v. White*, 401 U.S. 745, 756 (1971) (Douglas, J., dissenting).

<sup>10</sup> *Wyoming v. Houghton*, 526 U.S. 295, 299–300 (1999).

<sup>11</sup> Dripps, *supra* note 1, at 1130 (noting my contribution).

<sup>12</sup> *Id.* at 1129.

shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>13</sup>

Notice the passive voice in the first clause. Unlike the Sixth Amendment, which says that the accused “shall enjoy” a right to an impartial jury trial, to confront witnesses, and to have the assistance of counsel (among other rights),<sup>14</sup> the Fourth Amendment appears simply to *recognize* a pre-existing right: “The right of the people to be secure . . . shall not be violated.”<sup>15</sup> And though the second clause is very precise about *what* constitutes a valid warrant, nowhere does the amendment tell judges *when* warrants must be used to search or seize.<sup>16</sup> As far as the explicit text is concerned, Congress could authorize warrantless arrests, as the Court claims Congress did in 1792 and several times since.<sup>17</sup> On the Court’s account of congressional intent, an arrest did not always require a warrant.<sup>18</sup> On this account, and as far as the Fourth Amendment text is concerned, Congress could have authorized warrantless searches as well.<sup>19</sup>

Historians agree that the Framers had the English writs of assistance on their mind when they wrote the Fourth Amendment.<sup>20</sup> These hated writs permitted random, suspicionless customs searches of homes, ships, and warehouses. Indeed, the writs played a major role in fomenting the Revolution.<sup>21</sup> By statute, the writs expired on the death of the king, George II, in 1760 and had to be reauthorized.<sup>22</sup> When the Massachusetts Bay Colony petitioned the Superior Court in Boston to reauthorize the writs, James Otis was the Acting Advocate General for the Bay Colony and, in 1761, was asked to argue on behalf of reissuing the writs.<sup>23</sup> He refused, stepped down from his office, and instead represented the merchants who opposed the writs.<sup>24</sup> John Adams as a young man was in the room when Otis made his passionate argument against reauthorizing the writs of assistance.<sup>25</sup> Otis would, of course lose the

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<sup>13</sup> U.S. CONST. amend. IV.

<sup>14</sup> U.S. CONST. amend. VI.

<sup>15</sup> U.S. CONST. amend. IV.

<sup>16</sup> *See id.*

<sup>17</sup> *See United States v. Watson*, 423 U.S. 411, 415, 417, 418, 420–21 (1976). Thomas Davies disagrees with the Court’s reading of the 1792 Act. *See* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 611–12, 611–12 n.171 (1999).

<sup>18</sup> *Watson*, 423 U.S. at 415–16.

<sup>19</sup> *Id.*

<sup>20</sup> *See* Thomas, *Time Travel*, *supra* note 2, at 1466–67, 1488.

<sup>21</sup> *See id.*

<sup>22</sup> George C. Thomas III, *Stumbling Towards History: The Framers’ Search and Seizure World*, 43 TEX. TECH. L. REV. 199, 206 (2010) [hereinafter Thomas, *Stumbling Towards History*].

<sup>23</sup> M. H. SMITH, THE WRITS OF ASSISTANCE CASE 316 (1978).

<sup>24</sup> *Id.*

<sup>25</sup> DAVID MCCULLOUGH, JOHN ADAMS 61–62 (2001).

argument; the writs were authorized by Parliament, and English courts had (and have) no authority to strike down acts of Parliament.<sup>26</sup> But Adams would later say that Otis's argument was critical to the independence movement because every man in the crowded audience went away "ready to take up Arms against Writts of Assistants [sic] . . . . Then and there the child Independence was born."<sup>27</sup>

Early congresses would not have wanted to take any action that reminded the young nation of the writs of assistance. Congress has never authorized a general warrantless search or writ of assistance.<sup>28</sup> But there is nothing in the text of the Fourth Amendment that forbids this congressional action, nothing in the text that requires warrants.<sup>29</sup> Of course, even Justice Scalia conceded that one can read some kind of implicit warrant requirement or preference in the text.<sup>30</sup> Why put so much stress on the precise requirements of a valid warrant if Congress can simply ignore the Warrant Clause by authorizing warrantless searches?

But if there is a search warrant requirement, does it apply to all searches or only some? History teaches that the Framers could not have intended a search warrant requirement for all searches. We know, for example, that eighteenth-century common law permitted a constable without a warrant to "break open the doors [of a house] to keep the peace and prevent the danger" if his demand to enter was refused and he suspected there was "likely to be manslaughter or bloodshed."<sup>31</sup> Though the history is less certain here, it seems likely that the common law also permitted a warrantless search incident to arrest.<sup>32</sup>

If our search warrant requirement or preference applies only to some searches, we must identify that subset to which the requirement applies. Identifying that subset has been, as Donald Dripps notes, a "long struggle."<sup>33</sup> Nothing in the language of the amendment provides any guidance.

History is helpful. The text of the Fourth Amendment is not. Most of the Bill of Rights guarantees create a template of what is being guaranteed. We know what a right to a public trial before an impartial jury looks like.<sup>34</sup> We know what it means to be informed of the nature of the accusation against the defendant.<sup>35</sup> We might not

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<sup>26</sup> *Jackson v. Attorney General*, [2005] UKHL 56, para. 9, [2006] 1 AC 262 (appeal taken from Eng.).

<sup>27</sup> 2 LEGAL PAPERS OF JOHN ADAMS 107 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

<sup>28</sup> Thomas Y. Davies, *Can You Handle the Truth? The Framers Preserved Common-Law Criminal Arrest and Search Rules in "Due Process of Law"—"Fourth Amendment Reasonableness" Is Only a Modern, Destructive, Judicial Myth*, 43 TEX. TECH L. REV. 51, 104 (2010).

<sup>29</sup> U.S. CONST. amend. IV.

<sup>30</sup> *California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring).

<sup>31</sup> 2 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 95 (1736).

<sup>32</sup> See *infra* Section IV.C.

<sup>33</sup> Donald A. Dripps, *The Fourth Amendment and the Fallacy of Composition: Determinacy Versus Legitimacy in a Regime of Bright-Line Rules*, 74 MISS. L.J. 341, 355 (2004).

<sup>34</sup> U.S. CONST. amend. VI.

<sup>35</sup> *Id.*

know the precise parameters of the right not to be subjected to cruel and unusual punishment,<sup>36</sup> but we could confidently identify the core right—no public flogging, no cutting off of ears or hands, no drawing and quartering convicted prisoners. While difficult questions about providing counsel to indigent defendants lurk beneath the surface of the right to counsel, we know that, at a minimum, the Sixth Amendment guarantees defendants the right to counsel of their choice if they are paying for it.<sup>37</sup>

What does the Fourth Amendment template look like? When police obtain a warrant, we know what the warrant must be based on and what it must contain.<sup>38</sup> But as to when warrants are required and how police must conduct warrantless searches, all we know is that police must act reasonably.<sup>39</sup> And that means . . . what? It surely means police cannot act like the British customs officers in colonial America and search houses without specific cause. But that is a pretty narrow template. And the text does not really even tell us that. We again draw that template from history.<sup>40</sup> What about stopping and searching vehicles? What about stopping vehicles at a drunk driving checkpoint? What about searching a person who has been stopped on the street but not yet arrested? What does the text tell us about these police encounters?

The answer: nothing. We do not have a text that provides guidance, and the Court has had to construct a doctrine from other sources. As we will see, the early cases drew heavily on the common law and political theories that underlay the common law; later cases sought to freelance in ways that expand Fourth Amendment protection. The freelancing has been far less successful because it is not supported by a common law superstructure.

## II. THE COMMON LAW TORT OF TRESPASS

As I have demonstrated in more detail elsewhere,<sup>41</sup> the common law protection of property, privacy, and freedom from unlawful restraint in colonial America came from tort law, and only tort law. More importantly, this continued to be true for over a century after the Fourth Amendment was ratified.<sup>42</sup> Those charged with a crime based on what the government took in violation of tort law could offer no defense in a criminal prosecution.<sup>43</sup> The only remedy the criminal defendant could seek was a tort judgment.<sup>44</sup> The common law tort protection of privacy/property/restraint came

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<sup>36</sup> U.S. CONST. amend. VIII.

<sup>37</sup> U.S. CONST. amend. VI.

<sup>38</sup> U.S. CONST. amend. IV.

<sup>39</sup> *Id.*

<sup>40</sup> See Thomas, *Time Travel*, *supra* note 2, at 1767–68.

<sup>41</sup> See generally Thomas, *Stumbling Towards History*, *supra* note 22 (describing the tort of trespass that existed in colonial America).

<sup>42</sup> *Id.* at 209.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

of course from England.<sup>45</sup> This was the remedy John Wilkes sought when British Secretary of State Halifax authorized a general warrant to search for copies of a seditious newspaper edition, *North Briton* No. 45.<sup>46</sup>

Halifax's warrant authorized the king's messengers to search for the "Authors, Printers & Publishers" of *North Briton* No. 45 and to "apprehend & seize [them], together with their papers."<sup>47</sup> The warrant named no place to search or person to seize.<sup>48</sup> The messengers arrested forty-nine persons while searching for the author and publisher of *North Briton* No. 45, including, finally, John Wilkes.<sup>49</sup> The search for and seizure of his papers occurred on April 30, 1763.<sup>50</sup>

That *North Briton* No. 45 was seditious libel by the standards of 1763 is not open to serious doubt. The subtitle quoted Virgil—"our striking a laughing stock"—suggesting that the king's court had rendered England a "laughing stock" among civilized nations.<sup>51</sup> The text leveled charges against King George III's ministers;<sup>52</sup> John Wilkes was quite the rebel, but he wasn't suicidal enough to accuse George III directly. The king's ministers were an inviting target. Wilkes wrote that they were causing the king "to give the sanction of his sacred name to the most odious measures, and to the most unjustifiable public declarations;"<sup>53</sup> the ministers were using "foul dregs" of power and the "tools of corruption and despotism;"<sup>54</sup> they were "weak, disjointed,"<sup>55</sup> and deserving to be held in "contempt and abhorrence" by foreign leaders.<sup>56</sup> Seeking to curry favor, perhaps, with the king's House of Hanover, Wilkes wrote, "The *Stuart* line has ever been intoxicated with the slavish doctrines of *absolute, independent, unlimited* power of the crown."<sup>57</sup> King George III, of the House of Hanover, was an improvement over the Stuart monarchs: "The personal character of our present amiable sovereign makes us easy and happy, that so great a power is lodged in such hands," but his ministers have "given too just cause for him to escape the general odium."<sup>58</sup>

In the wake of the king's widespread search for the printer of *North Briton* No. 45, Wilkes and other plaintiffs sued the messengers who executed the general

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 213.

<sup>47</sup> ARTHUR H. CASH, JOHN WILKES: THE SCANDALOUS FATHER OF CIVIL LIBERTY 101 (2006).

<sup>48</sup> *Id.* at 2.

<sup>49</sup> *Id.* at 105.

<sup>50</sup> *Wilkes v. Wood*, 98 Eng. Rep. 489, 491 (1763) (Common Pleas).

<sup>51</sup> 2 THE NORTH BRITON No. 45 (title page) (1763). Not every issue had a subtitle and the one for No. 45 appears to have been chosen especially for that issue.

<sup>52</sup> *Id.* at 296–97.

<sup>53</sup> *Id.* at 296.

<sup>54</sup> *Id.* at 298.

<sup>55</sup> *Id.* at 300.

<sup>56</sup> *Id.* at 297.

<sup>57</sup> *Id.* at 300 (emphasis added).

<sup>58</sup> *Id.*



warrant, as well as Secretary Halifax who issued the warrant, and obtained judgments in tort of amounts that the crown considered outrageous.<sup>59</sup> The eighteenth-century historian, Thomas Erskine May, concluded that the total amount that the crown spent defending the suits and paying damages was one hundred thousand pounds in money of the time, or tens of millions of pounds in today's money.<sup>60</sup>

Plaintiff Wilkes's tort trial against Secretary Halifax and the messengers who executed the warrant began at 9:00 A.M. on December 6, 1763, and the jury returned its verdict at 11:20 P.M.<sup>61</sup> What almost no one remembers is that about six weeks later, Wilkes was prosecuted in absentia for treasonous libel for printing *North Briton* No. 45.<sup>62</sup> He was convicted in 1764 and sentenced to ten months in prison.<sup>63</sup> He returned to England from France in 1768 and served his sentence; it rendered him a broken man.<sup>64</sup>

The record of Wilkes's criminal case is clear that the contents of *North Briton* No. 45 were included in his trial for treasonous libel.<sup>65</sup> There was no rule of exclusion of evidence seized in violation of tort law.<sup>66</sup> It was tort law, and fear of civil tort judgments, that protected property, privacy, and freedom from unlawful restraint in eighteenth-century England and in the colonies. Thus, when I speak in this Article of the common law protection of property, privacy, and freedom from unlawful restraint, I refer to the law of the tort of trespass.

The eighteenth-century magistrate manuals are a good source for understanding the colonial era tort of trespass. One is *New Abridgement of the Law*, first published

<sup>59</sup> For the suits against the king's messengers, see *Wilkes v. Wood*, 98 Eng. Rep. 489, 499 (1763) (Common Pleas); *Money v. Leach*, 97 Eng. Rep. 1075, 1077 (King's Bench) (1765); *Huckle v. Money*, 95 Eng. Rep. 768, 768 (1763) (Common Pleas). The tort suit against Lord Halifax is not fully reported anywhere but a partial sketch appears in Addenda to the Nineteenth Volume, Howell's State Trials, 1381, 1406–1415 (1763–1770). The suit against Halifax was heard in November, 1769, or some six years after Wilkes sued Halifax's subordinate, Wood, who was in charge of the party that entered Wilkes's shop and seized his papers.

<sup>60</sup> 2 THOMAS ERSKINE MAY, *THE CONSTITUTIONAL HISTORY OF ENGLAND SINCE THE ACCESSION OF GEORGE THE THIRD 1760–1860* 249 (1865). The comparison of currencies over time varies tremendously depending on the method used, but tens of millions is a middle of the road, conservative estimate. See "Measuring Worth," <https://www.measuringworth.com/ukcompare/> [<https://perma.cc/4W5M-FA8G>].

<sup>61</sup> *Wilkes v. Wood*, 98 Eng. Rep. 489, 499 (1763) (Common Pleas).

<sup>62</sup> CASH, *supra* note 47, at 100–01.

<sup>63</sup> *The Case of John Wilkes, esq. on a Habeas Corpus*, 19 Howell's State Trials 982, 1132 (1768). He was sentenced to an additional twelve months for publishing an obscene poem, *An Essay on Woman*, and fined 500 pounds on each conviction.

<sup>64</sup> See CASH, *supra* note 47, at 328.

<sup>65</sup> See CASH, *supra* note 47, at 133.

<sup>66</sup> Whether the original seized copies were introduced in evidence, or republished copies, is a bit unclear. See *id.* at 134. Under long-standing principles of exclusion in the United States, however, evidence learned from an illegal seizure is also inadmissible. See *Silverthorne Lumber Company v. United States*, 251 U.S. 385 (1920).

in 1736. The 1766 version was the last published before the Bill of Rights was written. Though published in London, Bacon was widely read in the colonies and was influential with colonial lawyers and judges.<sup>67</sup> Bacon explains that the word “Trespass . . . signifies a going beyond what is lawful. It follows that every injurious Act is, in the large Sense of this Word, a Trespass.”<sup>68</sup> Bacon goes on to say that “many injurious acts” have acquired specific names like treason, murder, and rape; thus the generic tort of trespass is limited to “such injurious Acts as have not acquired a particular Name.”<sup>69</sup> Relevant to my article, the tort of trespass entailed a search, a restraint of liberty, or a taking of property, without justification.<sup>70</sup>

### III. IN THE BEGINNING: *BOYD V. UNITED STATES*

The Supreme Court essentially ignored the Fourth Amendment for the first century of its existence.<sup>71</sup> This is not surprising because it applied only to federal actors.<sup>72</sup> Federal criminal jurisdiction was tiny, and there were few opportunities for federal agents to commit torts while trying to solve crimes.<sup>73</sup> By far, the most common federal investigative activity involved customs law.<sup>74</sup> Those inspections were tightly regulated by comprehensively drafted statutes, which typically required probable cause and made clear that inspectors were liable in tort if they did not have probable cause.<sup>75</sup>

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<sup>67</sup> Julius Goebel, Jr., *Learning and Style in the Law—An Historian’s Lament*, 61 COLUM. L. REV. 1393, 1397–98 (1961).

<sup>68</sup> 5 BACON, *supra* note 3, at 150.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 162–73 (false imprisonment and taking of property).

<sup>71</sup> Two exceptions were the cases against two of Aaron Burr’s alleged co-conspirators, which required the Court to decide whether probable cause existed to bring charges against them, and dicta in an 1877 case to the effect that the Fourth Amendment required a search warrant to open mail. See *Ex parte Jackson*, 96 U.S. 727 (1877) (mail); *Ex parte Bollman*, 8 U.S. 75 (1807).

<sup>72</sup> See *Barron v. Baltimore*, 32 U.S. 243 (1833).

<sup>73</sup> Fabio Arcila, Jr., *The Framers’ Search Power: The Misunderstood Statutory History of Suspicion & Probable Cause*, 50 B.C.L. REV. 363, 421 n.273 (2009).

<sup>74</sup> *Id.* at 409–10.

<sup>75</sup> For an excellent treatment of the early customs statutes, see *id.* The early statutes include Act of May 22, 1824, ch. 136, § 5, 4 Stat. 25, 30; Act of Mar. 3, 1823, ch. 58, § 5, 3 Stat. 781, 782; Act of Mar. 1, 1823, ch. 21, § 35, 3 Stat. 729, 739; Act of Mar. 2, 1821, ch. 14, § 3, 3 Stat. 616, 617; Act of May 15, 1820, ch. 122, § 4, 3 Stat. 602, 604; Act of Mar. 3, 1819, ch. 82, § 4, 3 Stat. 515, 515; Act of Apr. 20, 1818, ch. 129, § 5, 3 Stat. 469, 470; Act of Apr. 20, 1818, ch. 103, § 4, 3 Stat. 460, 461; Act of Apr. 20, 1818, ch. 98, § 4, 3 Stat. 458, 459; Act of Apr. 20, 1818, ch. 79, § 25, 3 Stat. 433, 438; Act of Apr. 18, 1818, ch. 70, § 4, 3 Stat. 432, 433; Act of Mar. 1, 1817, ch. 31, § 2, 3 Stat. 351, 351; Act of Apr. 27, 1816, ch. 107, § 7, 3 Stat. 310, 314; Act of July 29, 1813, ch. 35, § 6, 3 Stat. 49, 51–52; Act of Apr. 4, 1812, ch. 49, § 4, 3 Stat. 700, 701; Act of June 28, 1809, ch. 9, § 4, 2 Stat. 550, 551; Act of

Decided in 1886, *Boyd v. United States*<sup>76</sup> was the first major Supreme Court case interpreting the Fourth Amendment.<sup>77</sup> Although there was no direct common law analogy, the Court relied heavily on common law values.<sup>78</sup> The defendants in *Boyd* were charged with importing plates of glass without paying the requisite duties.<sup>79</sup> The issue was the constitutionality of a statute requiring the production of “any business book, invoice, or paper belonging to, or under the control of, the defendant” that “will tend to prove any allegation made by the United States” in a proceeding under the revenue laws.<sup>80</sup> No such statute existed in colonial days, or in eighteenth-century England, and the Court could not draw on any common law parallels.<sup>81</sup> Nothing in the text of the Amendment told the Court whether this required production of papers was an unreasonable search or seizure.<sup>82</sup>

Lacking a common law map, the Court resorted to formalist reasoning, as Morgan Cloud has demonstrated,<sup>83</sup> relying heavily on the values that undergird *Entick v. Carrington*.<sup>84</sup> In November, 1762—six months before the search of Wilkes’s print shop—Lord Halifax issued a warrant to search John Entick’s print shop for specific issues of newspapers thought to be seditious.<sup>85</sup> The papers were found and seized.<sup>86</sup> Entick’s tort case was not brought until 1765, two years after Wilkes recovered large damages from the search of his print shop.<sup>87</sup> But it was Lord Camden’s<sup>88</sup> opinion in *Entick* that gained notoriety as establishing limits on government authority both in England and in the colonies.<sup>89</sup>

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Mar. 1, 1809, ch. 24, § 18, 2 Stat. 528, 532–33; Act of Apr. 25, 1808, ch. 66, § 14, 2 Stat. 499, 502; Act of Apr. 18, 1806, ch. 29, § 8, 2 Stat. 379, 380–81; Act of July 8, 1797, ch. 15, § 3, 1 Stat. 533, 534; Act of Jan. 29, 1795, ch. 17, § 6, 1 Stat. 411, 411; Act of June 7, 1794, ch. 54, § 6, 1 Stat. 390, 392; Act of May 22, 1794, ch. 33, § 4, 1 Stat. 369, 370; Act of Feb. 18, 1793, ch. 8, § 35, 1 Stat. 305, 317; Act of Dec. 31, 1792, ch. 1, § 29, 1 Stat. 287, 298–99; Act of Dec. 27, 1790, ch. 1, § 1, 1 Stat. 188, 188; Act of Sept. 1, 1789, ch. 11, § 21, 1 Stat. 55, 60.

<sup>76</sup> 116 U.S. 616 (1886).

<sup>77</sup> *See id.*

<sup>78</sup> *Id.* at 623.

<sup>79</sup> *Id.* at 617–18.

<sup>80</sup> *Id.* at 619–20 (quoting 18 Stat. 187, sec. 5 (1874)).

<sup>81</sup> *See id.* at 622–23 (“As before stated, the act of 1863 was the first act in this country or in England, so far as we have been able to ascertain . . .”).

<sup>82</sup> *See id.* at 622.

<sup>83</sup> Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 575 n. 90 (1996).

<sup>84</sup> *Id.*

<sup>85</sup> 19 Howell’s State Trials 1029 (1765).

<sup>86</sup> *Id.*

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

<sup>88</sup> Lord Camden was Charles Pratt, the Lord Chief Justice who instructed the jury in the 1763 Wilkes case. He was named Baron Camden, and elevated to the House of Lords, before he sat on Entick’s case.

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

The reason for its fame is easy enough to explain: Wilkes's legal argument was powerful and commonsensical: a general warrant that named neither Wilkes nor his print shop could not authorize seizure of his papers.<sup>90</sup> If that was not already the common law of England, it certainly should have been, and *Wilkes v. Wood* confirmed that it was the law.<sup>91</sup>

*Entick* is based on a much more libertarian, profound, anti-government notion.<sup>92</sup> The crown's defense in *Entick* was that the king's messengers had a specific warrant that named Entick and authorized a search for him and his papers.<sup>93</sup> That warrant would pass muster under our Fourth Amendment today. But it did not pass muster under eighteenth-century English law. Lord Camden held that a warrant *could not authorize a search for and seizure of Entick's papers*.<sup>94</sup> Private papers were beyond the power of government to seize. The government could search for and seize certain categories of property—stolen goods, for example—but it simply lacked the authority to search for and seize private papers stored on private premises, and a warrant could not create that authority.<sup>95</sup>

Tracking *Entick*, the *Boyd* Court struck down the statute permitting subpoenas for documents on the ground that the owner of books and papers had a property interest in those documents that was superior to that of the government.<sup>96</sup> The *Boyd* Court in effect created a hierarchy of property protected by the Fourth Amendment based on its function; books and papers created for the author's purposes were at the top.<sup>97</sup> The Court pointed out that even the hated writs of assistance did not require colonists to produce their books and papers, but only permitted wholesale search for dutiable items.<sup>98</sup>

The Court also noted a difference between statutes requiring the keeping of books and records by those who manufacture or import dutiable items and the statute at issue in *Boyd*.<sup>99</sup> The distinction between books required to be kept and

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<sup>90</sup> See *Wilkes v. Wood*, 98 Eng. Rep. 489 (1763).

<sup>91</sup> *Id.* at 499.

<sup>92</sup> See *Entick*, 19 Howell's State Trials at 1038 (“[N]o power can lawfully break into a man's house and study to search for evidence against him; this would be worse than the Spanish Inquisition; for ransacking a man's drawers and boxes to come at evidence against him, is like racking his body to come at his secret thoughts.”).

<sup>93</sup> See *id.* at 1033–34.

<sup>94</sup> To be sure, there were technical problems that prevented the warrant from serving as a justification, but Lord Camden was clear that even if the warrant was properly drawn and executed, it could not justify the seizure of Entick's papers: “Where is the written law that gives any magistrate such a power? I can safely answer, there is none . . .” *Id.* at 1066.

<sup>95</sup> *Id.*

<sup>96</sup> See *Boyd v. United States*, 116 U.S. 616, 630 (1886).

<sup>97</sup> See *id.*

<sup>98</sup> *Id.* at 623.

<sup>99</sup> *Id.* at 624.

books that might be relevant to a customs violation is critical to understanding the formalist reasoning in *Boyd*.<sup>100</sup> If I manufacture liquor, which requires a license, I voluntarily accept the record-keeping that the government requires. That gives the government a property interest in my records that is superior to my interest, at least if the government utilizes a subpoena or search warrant to obtain the records. But if the government seeks letters or diary entries that I created for my own purposes, my property interest is superior to that of the government even if the documents are relevant to whether I paid excise tax on imported plates of glass.

Although *Boyd* had no common law doctrine on which to draw, it had something more fundamental: the formalist notion that the right to own property is a natural right that predated governments.<sup>101</sup> Thus, with a few exceptions, the ownership of property carried with it the right to exclude government.<sup>102</sup> And the ownership of books and papers created for the author's own purposes were absolutely protected.<sup>103</sup> Neither a subpoena nor a search warrant could justify their seizure.<sup>104</sup> The government simply could not obtain private papers unless the owner voluntarily turned them over. This idea seems quaint today, but it was part of the evolving notion in English philosophy beginning in the seventeenth century that the crown's "subjects" existed independently of, and sometimes in opposition to, the crown.<sup>105</sup>

*Boyd* is based on the fundamental natural right to refuse government access to personal papers.<sup>106</sup> To be sure, the narrow holding in *Boyd* is based on "marrying" the Fifth Amendment right against compelled self-incrimination with the Fourth Amendment.<sup>107</sup> This "shotgun marriage" was necessary because there was no search in *Boyd*:

Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment.<sup>108</sup>

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<sup>100</sup> See generally *id.* at 623–26 (referencing English jurisprudence limiting the search and seizure of private papers).

<sup>101</sup> See *id.* at 627 (discussing Lord Camden's reasoning in *Entick v. Carrington* that the right to secure one's own property is "sacred").

<sup>102</sup> See *id.* at 623.

<sup>103</sup> *Id.* at 631–32.

<sup>104</sup> *Id.*

<sup>105</sup> See, e.g., John Locke, *An Essay Concerning the True Original, Extent, and End of Civil Government* (1690), para. 90 ("[A]bsolute monarchy . . . is indeed inconsistent with civil society, and so can be no form of civil government at all.").

<sup>106</sup> See *Boyd*, 116 U.S. at 631–32.

<sup>107</sup> *Id.* at 616.

<sup>108</sup> *Id.* at 630.

Then a colorful metaphor: “In this regard the Fourth and Fifth Amendments run almost into each other.”<sup>109</sup> Despite this unsatisfying analytical structure, *Boyd* was clear that privately created papers are absolutely protected from search and seizure by the Fourth Amendment.<sup>110</sup>

That *Boyd* drew on the *Entick* notion of property ownership as a natural right is not surprising. The Fourth Amendment by its terms applies to “persons, houses, papers, and effects.”<sup>111</sup> By its terms, it protects our persons and our property.<sup>112</sup> But a property understanding of the Fourth Amendment would not last. Justice Brandeis wrote, in dissent, an early opinion rejecting a property-only construction in favor of a construction that included a protection of privacy.<sup>113</sup> In *Olmstead v. United States*,<sup>114</sup> the government overheard conversations from inside private residences by tapping phone lines outside the homes.<sup>115</sup> There was, the Court observed, no trespass and thus no violation of the Fourth Amendment understood in the *Boyd* property law sense.<sup>116</sup> To get around the lack of a trespass, Brandeis’s dissent argued that the Fourth Amendment’s protection extended beyond property:

[The Framers] conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.<sup>117</sup>

To be sure, Brandeis did not reject *Boyd*.<sup>118</sup> Quite the contrary, he extolled the virtues of *Boyd*’s reasoning.<sup>119</sup> What he wanted was *Boyd* plus privacy, but once the Court shifted focus from property to privacy, the hierarchical notion of papers as the most protected form of property gradually disappears.<sup>120</sup> As Cloud has argued, aiding and abetting the loss of the privileged protection of papers was *Gouled v. United States*,<sup>121</sup> where the Court stated, in dicta, that there was “no special sanctity

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<sup>109</sup> *Id.*

<sup>110</sup> *See id.* at 624–25.

<sup>111</sup> U.S. CONST. amend. IV.

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

<sup>113</sup> *Olmstead v. United States*, 277 U.S. 438, 473, 475–76, 478 (1928).

<sup>114</sup> 277 U.S. 438 (1928).

<sup>115</sup> *Id.* at 438.

<sup>116</sup> *Id.* at 464.

<sup>117</sup> *Id.* at 478 (Brandeis, J., dissenting).

<sup>118</sup> *Id.* at 474.

<sup>119</sup> *Id.* at 474–75.

<sup>120</sup> *Id.* at 476.

<sup>121</sup> 255 U.S. 298 (1921).

in papers, as distinguished from other forms of property, to render them immune from search and seizure . . . .”<sup>122</sup> Rather than removing papers from their elevated status, *Gouled* extended *Boyd* to all evidence that was not contraband or fruit of a crime.<sup>123</sup> The *Gouled* Court provided a list of what could be searched for with an appropriately drafted search warrant;<sup>124</sup> notably missing from the list is evidence that might prove a crime.<sup>125</sup> This became known as the “mere evidence” rule—search warrants could not justify a search for and seizure of “mere evidence.”<sup>126</sup> A bloody shirt found at the murder suspect’s home could not be seized by warrant because it was “mere evidence.”

*Gouled* was a bridge too far. The Court was apparently not faced with a direct challenge to the “mere evidence” rule until 1967, when the Warren Court, in an opinion by Justice Brennan, overruled *Gouled* as providing too much protection from searches.<sup>127</sup> Three members of the Court (Warren, Fortas, and Douglas) complained that the Court should not have engaged in a complete rejection of the “mere evidence” rule,<sup>128</sup> but it is gone. What the Court now gives us is a literalist reading of “persons, houses, papers, and effects”<sup>129</sup>—treated the same in terms of degree of protection—that are protected by some nebulous notion of privacy.<sup>130</sup> So our conversations over a telephone in our home cannot be admitted unless the person to whom we are talking is recording or is permitting the police to record the conversation.<sup>131</sup> It is an odd notion of privacy but that discussion is beyond the scope of this Article.

Nothing survives of *Boyd*’s narrow holding that papers created for the author’s purpose are beyond the power of the government to seize. Rule 17 of the Federal Rules of Criminal Procedure permits courts to issue subpoenas that “order the witness to produce any books, papers, documents, data, or other objects the subpoena designates.”<sup>132</sup> Rule 41 permits search warrants for “documents, books, papers, any other tangible objects, and information.”<sup>133</sup> The natural law property notion of *Entick* has

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<sup>122</sup> *Id.* at 309.

<sup>123</sup> *Id.* at 308, 309, 310–11.

<sup>124</sup> *Id.* at 308.

<sup>125</sup> *See id.*

<sup>126</sup> *See id.* at 309.

<sup>127</sup> *See Warden v. Hayden*, 387 U.S. 294 (1967).

<sup>128</sup> Chief Justice Warren joined Justice Fortas’ concurring opinion, that reads more like concurring in the result, while Justice Douglas dissented. *Id.* at 310, 312. Justice Black concurred in the result, so there were really only five “clean” votes to overrule *Gouled*. *Id.* at 310.

<sup>129</sup> *See id.* at 301.

<sup>130</sup> *See id.* at 301–02.

<sup>131</sup> *Compare Katz v. United States*, 389 U.S. 347, 351 (1967), with *United States v. White*, 401 U.S. 745, 751–52 (1971) (plurality). A majority of the Court embraced *White* in *United States v. Caceres*, 440 U.S. 741, 744 (1979).

<sup>132</sup> FED. R. CRIM. P. 17(c)(1).

<sup>133</sup> FED. R. CRIM. P. 41(a)(2)(A).

not survived. But that is, in part, because the underlying conception of rights has changed. As Justice Scalia remarked in another context, even an originalist concedes that when the background law changes, the particular application of the Fourth Amendment to modern times can change.<sup>134</sup> The First Amendment provides American authors and publishers rights that were non-existent in King George III's England.<sup>135</sup> It is no longer necessary to privilege papers created for one's own purpose as a means to keep the government from shutting down criticism.<sup>136</sup> Once seditious libel passed from the scene, and the First Amendment received a robust interpretation, the common law of *Entick* was no longer necessary and yielded to a pragmatist reading of the Fourth Amendment that permits the prosecution of large scale conspiracies and other vast criminal enterprises that were unknown in 1792.<sup>137</sup> Dripps agrees that it was "legitimate" for the Court to retreat from overruling the *Entick* obsession with private papers, as well as the narrow holding of *Boyd* was "legitimate."<sup>138</sup>

And the overruling of *Gouled* is even easier to explain. It was an expansion of *Entrick* and the common law to non-papers. Search warrants for evidence of crime at common law were valid.<sup>139</sup> As I have noted, attempts at freelancing to expand the common law protections are unstable. Moreover, *Gouled* had to yield to the need to solve crimes.<sup>140</sup> Imagine a Fourth Amendment world in which a search warrant could not authorize the seizure of a bloody knife as part of a murder investigation.

#### IV. MODERN DOCTRINE

*Boyd* was the opening salvo in the Court's (still ongoing) attempt to create meaning from the unilluminating Fourth Amendment text. The notion that privately owned property is immune from government search because of the transcendent role of property in our everyday lives is no longer with us, and *Boyd* has largely been abandoned.<sup>141</sup> But much of the common law doctrine that Bacon and other commentators sketched in the eighteenth century is still with us. I begin with arrests.

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<sup>134</sup> *Georgia v. Randolph*, 547 U.S. 103, 143 (2006) (Scalia, J., dissenting).

<sup>135</sup> U.S. CONST. amend. I.

<sup>136</sup> I concede that my argument is an extension of Scalia's argument in *Randolph*. His argument was that changes in a free-standing law upon which the Fourth Amendment acts can change its application. *Randolph*, 547 U.S. at 144. My argument is that the conception of papers as a privileged class of property has changed, but this goes directly to the protection of "persons, houses, papers, and effects" and is not a free-standing law.

<sup>137</sup> Dripps, *supra* note 1, at 1129.

<sup>138</sup> *Id.*

<sup>139</sup> 2 HALE'S PLEAS OF THE CROWN 113 (1736). See also WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING 1602-1791, 582, 598 n.20 (2009).

<sup>140</sup> See *Gouled v. United States*, 255 U.S. 298, 301 (1921).

<sup>141</sup> See *Fisher v. United States*, 425 U.S. 391, 407-08 (1976).



*A. Arrests*

While the Court has sought to expand the common law by creating a comprehensive search warrant requirement as a way of understanding the linkage between the first clause of the amendment (the Reasonableness Clause) and the second clause (the Warrant Clause), it has made no similar attempt with arrest doctrine.<sup>142</sup> Thus, the Court's arrest doctrine has been stable over centuries. One of the earliest Fourth Amendment cases involved the arrest of two of the alleged co-conspirators of Aaron Burr, and the Court held in 1807 that probable cause to detain arrestees had to refer to a specific offense.<sup>143</sup> That was the common law of tort, the Court simply applied it as part of the Fourth Amendment, and it remains the law today.<sup>144</sup>

But the need for effective law enforcement has pushed the Court to cut back on the common law of tort where arrests are concerned. The common law required that a felony in fact have occurred before a warrantless arrest was valid.<sup>145</sup> That the arresting officer had "probable suspicion" that a felony had occurred was not sufficient to justify the arrest,<sup>146</sup> and the officer was liable in tort to the arrestee.<sup>147</sup> Today, the existence of probable cause both that a felony has occurred and that the arrestee committed it is sufficient to make an arrest valid.<sup>148</sup>

The common law rule might have made sense in a world of villages and farms, where the existence of a felony in fact would have been relatively easy to know, but it would make no sense in today's world. Indeed, English judges modified the common law in 1827 to remove the requirement that a felony in fact had to be committed before an arrest was valid.<sup>149</sup> As London became larger and more dangerous, English judges reacted to meet the needs of law enforcement.<sup>150</sup> The Supreme Court would do the same when confronted with this issue in 1925.<sup>151</sup>

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<sup>142</sup> Dripps, *supra* note 1, at 1093, 1093 n.31 (discussing jurisprudence finding that the "Fourth Amendment adopted the common-law arrest rules."). To be sure, the Court has required an arrest warrant for arrests in the home. *See Payton v. New York*, 445 U.S. 573 (1980), but this is the only time an arrest warrant is required.

<sup>143</sup> *See Ex parte Bollman & Ex parte Swartout*, 8 U.S. 75, 136 (1807).

<sup>144</sup> *See, e.g., Maryland v. Pringle*, 540 U.S. 366 (2003).

<sup>145</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES \*289.

<sup>146</sup> *Id.*

<sup>147</sup> *See 5 BACON, supra* note 3, at 163 (1766).

<sup>148</sup> *See, e.g., Brinegar v. United States*, 338 U.S. 160 (1949); *Carroll v. United States*, 267 U.S. 132 (1925).

<sup>149</sup> *See Beckwith v. Philby*, 108 Eng. Rep. 585, 586 (1827).

<sup>150</sup> Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista*, 37 WAKE FOREST L. REV. 239, 372 (2002). Davies' article is an excellent treatment of arrest law in the framing era.

<sup>151</sup> *Carroll v. United States*, 267 U.S. 132, 133 (1925).

### B. Searches of Homes

The one irreducible minimum requirement for a thorough<sup>152</sup> search of a home or print shop at common law was the presence of a non-general search warrant.<sup>153</sup> In some cases, as we saw in *Entick*, a warrant was not enough. But it was a necessary, if not sufficient, condition for a thorough search under the common law of trespass.<sup>154</sup> In *Chimel v. California*,<sup>155</sup> the Court held that a home could not be searched incident to arrest even though, as Justice White pointed out in his dissent, a valid arrest inside the home created an exigent circumstance that should (in his view) justify a search without a warrant.<sup>156</sup> The *Chimel* Court did permit a limited search of the arrestee and the area within his reach.<sup>157</sup> The permissible scope of the search incident to arrest, and when that scope should be determined, has caused much grief,<sup>158</sup> but the Court has never relaxed the requirement of a warrant for a thorough search of a home.<sup>159</sup> The common law provides sturdy support for this rule and it is as fixed as any doctrine about the Fourth Amendment can be.

### C. Search Incident to Arrest

The common law heritage of search incident to arrest is less clear. *Conductor Generalis*, a widely followed justice of the peace manual, included in its 1764 and 1788 editions an essay by Saunders Welch, former high constable of Middlesex, England, advising constables that:

a thorough search of a felon [who has been arrested] is of the utmost consequence to your own safety, and . . . by this means he will be deprived of instruments of mischief, and evidence may probably be found on him sufficient to convict him, of which, if

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<sup>152</sup> By thorough, I mean to exclude entries into the home to remedy an exigent circumstance. As Nelson put it in his 1704 treatise, constables “may break open the Doors to see the Peace kept” without a warrant. WILLIAM NELSON, *THE OFFICE AND AUTHORITY OF A JUSTICE OF PEACE* 148 (1704). Bacon agrees. 5 BACON, *supra* note 3, at 177. For the modern version, see *Brigham City, Utah v. Stuart*, 547 U.S. 398 (2006). Moreover, some treatises and manuals permitted forcible entries into homes to arrest felons. *See, e.g.*, 5 BACON, *supra* note 3, at 179. No treatise or manual, however, stated that a thorough search of a home could be justified by an entry to keep the peace or make an arrest for felony.

<sup>153</sup> 5 BACON, *supra* note 3, at 177–79 (1766) (by implication).

<sup>154</sup> *See Entick v. Carrington*, 19 Howell’s State Trials 1029 (1765).

<sup>155</sup> 395 U.S. 752 (1969).

<sup>156</sup> *See id.* at 780–81 (White, J., dissenting).

<sup>157</sup> *Id.* at 766.

<sup>158</sup> This grief is summarized in *Arizona v. Gant*, 556 U.S. 332 (2009).

<sup>159</sup> *See id.* at 339 (summarizing the holding in *Chimel* that a search incident to arrest is limited to the arrestee’s person and area within his immediate control) (internal quotations omitted).

he has either time or opportunity allowed him, he will be sure to find some means to get rid of . . . .<sup>160</sup>

That is clear enough, but it was a lonely view among the framing era materials.

The preeminent Fourth Amendment historian, Thomas Davies, noted that “the doctrine of search incident to arrest is not uniformly accorded importance in the framing-era materials . . . .”<sup>161</sup> I think a stronger claim can be made. William Cuddihy, who has written a massive volume devoted to the history of the Fourth Amendment, writes of search incident to arrest that “numerous legal manuals that appeared just before and after [1777–87] upheld the practice in almost identical language.”<sup>162</sup> When I checked his citations, however, I could not find any mention of the search-incident practice other than in the 1764 and 1788 editions of *Conductor Generalis*.<sup>163</sup> Instead, Cuddihy’s sources justify a warrantless *entry to arrest*. Cuddihy seems to assume that a justified entry to arrest carries with it the right to search, but nowhere is this stated in the materials he cites. I checked other framing era materials that Cuddihy did not cite.<sup>164</sup> These materials too are bare of any explicit authorization of search incident to arrest.<sup>165</sup>

It appears that *Conductor Generalis* is the sole explicit support for the Supreme Court’s boast in *Weeks v. United States*<sup>166</sup> that the right “to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime” was “always recognized under English and American law.”<sup>167</sup> The *Weeks* claim was clearly hyperbole, and the Court cites in support only nineteenth-century sources,<sup>168</sup> but *Conductor Generalis* perhaps makes the case that the Framers were aware of the search incident to arrest rule. As Davies points out, “[d]uring the framing era,

<sup>160</sup> CONDUCTOR GENERALIS 117 (James Parker ed., 1788); CONDUCTOR GENERALIS 117 (James Parker ed., 1764). That the quote appears on the same page in manuals separated by twenty-four years suggests that there were minimal changes in the later version.

<sup>161</sup> Davies, *supra* note 17, at 627 n.213.

<sup>162</sup> CUDDIHY, *supra* note 139, at 665.

<sup>163</sup> I checked Cuddihy’s pincites in JAMES DAVIS, THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE 15–16 (1774); CONDUCTOR GENERALIS 12, 25–28 (Hugh Gaine Printing, 1788); JOHN F. GRIMKE, THE SOUTH CAROLINA JUSTICE OF THE PEACE 20–21, 27 (1788); FRANCOISE-XAVIER MARTIN, THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE 46 (1791); RICHARD STARKE, THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE 6, 107 (1774); WILLIAM SIMPSON, THE PRACTICAL JUSTICE OF THE PEACE AND PARISH OFFICER 25–26 (1761).

<sup>164</sup> RICHARD BURN, THE JUSTICE OF THE PEACE AND PARISH OFFICER (1772 & 1793 editions) was a popular manual. I also searched WILLIAM WALLER HENING, NEW VIRGINIA JUSTICE (1794).

<sup>165</sup> See *supra* note 164.

<sup>166</sup> 232 U.S. 383 (1914).

<sup>167</sup> *Id.* at 392.

<sup>168</sup> See *id.* (citing 1 Bishop, Crim. Proc. § 211; Wharton, Crim. Pl. & Pr. 8th ed. § 60; Dillon v. O’Brien, 16 Cox, C. C. 245 (1887)).

Americans drew their understanding of common-law criminal procedure primarily from the leading treatises . . . as well as from a variety of derivative works, including especially justice of the peace manuals.<sup>169</sup> The earliest substantial justice of the peace manual published in America was *Conductor Generalis*, first published in New York in 1749. The 1749 version did not include the Welch essay, because he did not publish his essay until 1754,<sup>170</sup> and the first version of *Conductor Generalis* contains no mention of search incident to arrest.<sup>171</sup> But both the 1764 and 1788 manuals do include the Welch language urging constables to search incident to arrest.<sup>172</sup>

That the Welch essay appears in 1754 and then is incorporated into perhaps the leading American justice of the peace manual in 1764 and 1788 might suggest that search incident to arrest was a relatively new development in the colonial law of search and seizure. Davies believes, however, that search incident was simply part of the landscape and was rarely mentioned because it was understood to be but a petty additional invasion of one's liberty after one was arrested.<sup>173</sup> Like horse and wagon, the arrest and search were yoked together:

Because detaining a person to conduct a search would have constituted an arrest and trespass at common law, the critical legal issue was whether there were grounds for a warrantless arrest. If the arrest was justified, the search was not an additional trespass; if the arrest could not be justified, neither could the search.<sup>174</sup>

Cuddihy seems to believe the same, because he cites the common law rule justifying warrantless arrest as authorizing a search of the arrestee, though he never makes his view explicit.<sup>175</sup>

It seems likely that there were few searches incident to arrest in the colonial era. As Davies points out, beyond stolen goods and weapons, there was not much to be searched for in the colonial era.<sup>176</sup> Moreover, rather than overzealous like many of today's officers, colonial constables were reluctant to make arrests and searches, in large part because they feared the personal tort liability that we saw befall the king's messengers in the *Wilkes* and *Entick* cases.<sup>177</sup> Another reason not to make intrusive

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<sup>169</sup> Thomas Y. Davies, *Correcting Search-and-Seizure History: Now-Forgotten Common-Law Warrantless Arrest Standards and the Original Understanding of "Due Process of Law,"* 77 MISS. L.J. 1, 72–73, 72 n.220 (2007).

<sup>170</sup> SAUNDERS WELCH, OBSERVATIONS ON THE OFFICE OF CONSTABLE (Millar, 1754).

<sup>171</sup> See CONDUCTOR GENERALIS 117 (James Parker ed., 1749).

<sup>172</sup> See CONDUCTOR GENERALIS 117 (James Parker ed., 1788); CONDUCTOR GENERALIS 117 (James Parker ed., 1764).

<sup>173</sup> Davies, *supra* note 28, at 69.

<sup>174</sup> *Id.* at 70.

<sup>175</sup> See CUDDIHY, *supra* note 139, at 664–65.

<sup>176</sup> Davies, *supra* note 17, at 627.

<sup>177</sup> *Id.* at 624 n.203, 625, 630, 630 n.222.

searches was the generally prevailing attitude in the colonies that government should not interfere in private affairs unless absolutely necessary.<sup>178</sup> Constables would have partaken of this “Don’t Tread on Me” philosophy.

Indeed the tone of Welch’s comments on search incident suggests that constables were not searching arrestees often enough.<sup>179</sup> Doing a search incident, he said, was “of the utmost consequence.”<sup>180</sup> This fits with the picture that the practice had been available for a very long time and was just not used very often. Still, no other justice of the peace manual or treatise states the proposition—not Blackstone, not Coke, not Hale, not Hawkins, not Burn, not Bacon—which does seem odd if it were such an established practice. Moreover, neither the 1792 *Conductor Generalis*, published in Philadelphia, nor the 1794 *Conductor Generalis*, published in Albany, included the Welch essay or mentioned the practice of search incident to arrest.<sup>181</sup> The two lonely colonial references to search incident, that soon disappear, raise questions about the antiquity of the practice, questions that courts and commentators to date have ignored. But no manual or treatise in England or the colonies contradicted Welch on this point, and the Welch essay might have been omitted from the 1792 and 1794 editions of *Conductor Generalis* to save on printing costs.<sup>182</sup> On balance, it seems more likely than not that the Framers would have been aware of the right to search the arrestee. If that is correct, the Court’s view that the common law provides vindication for searching incident to arrest seems sound enough. Moreover, any other rule would be nonsensical. Imagine a world in which an officer has to stand guard over an arrestee until a search warrant is obtained.

#### *D. Consent Searches*

In *Entick*, Lord Camden spoke of granting a license to the government as a justification for a search.<sup>183</sup> Today the Court speaks of consent and has generally followed the common law,<sup>184</sup> though one can argue that it has defined consent in a more lenient way than the common law did. Consider Lord Camden’s famous *Entick* dicta:

By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my

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<sup>178</sup> See Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1325 (“The Framers . . . were even more hostile to government interference than their countrymen overseas.”).

<sup>179</sup> See Davies, *supra* note 17, at 627.

<sup>180</sup> CONDUCTOR GENERALIS 117 (James Parker ed., 1788); CONDUCTOR GENERALIS 117 (James Parker ed., 1764).

<sup>181</sup> CONDUCTOR GENERALIS (James Parker ed., 1794); CONDUCTOR GENERALIS (James Parker ed., 1792).

<sup>182</sup> I owe the printing cost insight to Tom Davies. Email to author, August 12, 2016.

<sup>183</sup> *Entick v. Carrington*, 19 Howell’s State Trials 1029, 1066 (1765).

<sup>184</sup> Thomas, *Stumbling Toward History*, *supra* note 22.

ground without my license, but he is liable to an action though the damage be nothing; which is proved by every declaration in trespass where the defendant is called upon to answer for bruising the grass and even treading upon the soil.<sup>185</sup>

“License” means an express permission to an act that would otherwise be illegal.<sup>186</sup> What Lord Camden thought it meant in *Entick* is unclear, but given the extreme deference to property rights at that date in England, it seems likely that he would have required more than the Supreme Court requires. In *Schneckloth v. Bustamonte*,<sup>187</sup> the Court held that consent to permit a search need only be voluntary, which it essentially defined as non-coerced.<sup>188</sup> So a hurried, “Mind if I check you?” followed by the seated suspect lifting his hand eight inches from his legs is good enough for the Supreme Court.<sup>189</sup> Would Lord Camden have understood that as license? It seems unlikely. But as is true with *Boyd*, the background assumptions in law likely changed in the time between the eighteenth and twentieth centuries. Property does not create quite the moat against the government as it did in the era of George III.

One thing is certain. Lord Camden would not have approved of *Illinois v. Rodriguez*,<sup>190</sup> where the Court held that someone could give valid consent even though she did not live in the apartment she permitted the police to enter.<sup>191</sup> The Court’s theory was that the Fourth Amendment only requires searches to be reasonable, and thus the Fourth Amendment is satisfied if the officer reasonably believed the person “consenting” had the authority to consent.<sup>192</sup> Whatever Lord Camden might have meant about the degree of assent required to constitute a license, no one who lacks legal authority to give a license can do so. So here we see a stark departure from the common law, one that, in my view, is not necessitated by law enforcement needs. Police had probable cause to enter the apartment in question and could have gotten a warrant rather than rely on fictional consent. But *Rodriguez* was a 6–3 decision,<sup>193</sup> and the Court has shown no inclination to revisit.

*Rodriguez* is a minor restriction of common law protection. But the Court in the twentieth century would expand the common law in two major ways, both of which have seen full-scale retreats. These retreats support my thesis that expanding too far beyond the common law superstructure leaves Fourth Amendment doctrine in a vulnerable state.

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<sup>185</sup> *Entick*, 19 Howell’s State Trials at 1066.

<sup>186</sup> *License*, BLACK’S LAW DICTIONARY 1059 (10th ed.).

<sup>187</sup> 412 U.S. 218 (1973).

<sup>188</sup> *Id.* at 248–49.

<sup>189</sup> *United States v. Drayton*, 536 U.S. 194, 199 (2002).

<sup>190</sup> 497 U.S. 177 (1990).

<sup>191</sup> *Id.* at 186.

<sup>192</sup> *Id.* at 188–89.

<sup>193</sup> Justice Marshall, joined by Justices Brennan and Stevens, dissented, without quoting *Entick*’s powerful language. *Id.* at 189.

*E. The Search Warrant “Requirement”*

As noted earlier, the Fourth Amendment is silent about the relationship between the first clause of the amendment, noting a pre-existing right to be free from unreasonable searches and seizures, and the second clause that creates specific requirements for a warrant to be valid.<sup>194</sup> Casting about for a theory of how best to read the Fourth Amendment, the Court in 1948 began to insist that there was some sort of search warrant “requirement.”<sup>195</sup> *Johnson v. United States*<sup>196</sup> stated the rationale for a search warrant “requirement” in stirring and oft-quoted words of Justice Jackson (just returned from his duties as chief prosecutor at the Nuremberg Nazi trials):

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate’s disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people’s homes secure only in the discretion of police officers. Crime, even in the privacy of one’s own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.<sup>197</sup>

From the hallway of a hotel, the officers in *Johnson* smelled burning opium and knocked on the door of the room from which they thought the smell was emanating.<sup>198</sup> A woman answered the door; one of the officers said he wanted to talk to

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<sup>194</sup> See U.S. CONST. amend. IV.

<sup>195</sup> *Johnson v. United States*, 333 U.S. 10, 13–15 (1948).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 13–14 (footnotes omitted).

<sup>198</sup> *Id.* at 12.

her; and she “stepped back acquiescently and admitted us.”<sup>199</sup> When the officers determined the woman who answered the door was the sole occupant of the room, they arrested her and found opium in a search of the hotel room.<sup>200</sup> The only justification for the warrantless search of the hotel room was incident to arrest:<sup>201</sup> though today this might or might not qualify as a valid search incident (depending on where the drugs were in relation to Johnson when she was arrested), the doctrine at the time permitted the search of the entire area under the control of the arrestee.<sup>202</sup>

The government conceded that the officers did not have probable cause to arrest Johnson until they determined that she was the sole occupant of the room.<sup>203</sup> The officers did not know that, of course, until they had entered the room.<sup>204</sup> The Court held that they had secured entry “under color of office.”<sup>205</sup> “It was granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right.”<sup>206</sup> Having thus ruled out consent, the Court held that the arrest was illegal because the entry was illegal; the search incident to arrest had to fall as well.<sup>207</sup> As there was no search incident basis to justify the search, it required a warrant.<sup>208</sup> Four members of the Court, including Chief Justice Vinson and Justice Black, dissented without opinion.<sup>209</sup>

The Court did not offer much in the way of a precise statement of the search warrant “requirement” in *Johnson*:

There are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate’s warrant for search may be dispensed with. But this is not such a case. No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate. These are never very convincing reasons and, in these circumstances, certainly are not enough to by-pass the constitutional requirement.<sup>210</sup>

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<sup>199</sup> *Id.* (quoting one of the officers who testified at trial).

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

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

<sup>202</sup> *Harris v. United States*, 331 U.S. 145 (1947) (upholding search incident to arrest of a four-room apartment).

<sup>203</sup> *Johnson*, 333 U.S. at 16.

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

<sup>205</sup> *Id.* at 10.

<sup>206</sup> *Id.* at 13.

<sup>207</sup> *Id.* at 16–17.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 17.

<sup>210</sup> *Id.* at 14–15.



Notice that the officers did have probable cause to get a search warrant to search the room, based on the odor emanating from the room.<sup>211</sup> While that smell would not justify an arrest of Johnson until police determined she was the sole occupant, it would have sufficed to obtain a warrant to search the room.<sup>212</sup> Notice, too, that Justice Jackson used the phrase “constitutional requirement” to express the need for a search warrant.<sup>213</sup>

Four months later, the Court attempted to create a more precise account of the search warrant “requirement.”<sup>214</sup> The rationale is, roughly, whether it was practicable to obtain a warrant.<sup>215</sup> A search warrant is necessary, the Court told us in *Trupiano v. United States*,<sup>216</sup> unless some factor “would make it unreasonable or impracticable to require” the officer “to equip himself with a search warrant.”<sup>217</sup> What makes *Trupiano* an easy case for a search warrant “requirement” phrased in terms of practicality is that the government had known for months about the illegal distillery business that was the subject of the search and the arrests.<sup>218</sup> Requiring agents to get a search warrant here, unlike *Johnson*, would not have required them to pause in their crime investigation.<sup>219</sup> It simply required them to walk down the hall and find a judicial officer before they went to the distillery; the Court noted archly that “various federal judges and commissioners [were] readily available.”<sup>220</sup>

That the search warrant “requirement” based on practicality was in trouble from the beginning is evident by the 5–4 margin in *Trupiano*, the perfect case for requiring a warrant where practicable.<sup>221</sup> Chief Justice Vinson is quite right when he says in dissent: “Nothing in the explicit language of the Fourth Amendment dictates” suppression of the evidence on the facts of *Trupiano*.<sup>222</sup> He, Justice Black, Justice Reed, and Justice Burton were unwilling to fasten a preference for judicial determination of probable cause on the vague commands of the Fourth Amendment: Requiring “an *ex post facto* judicial judgment of whether the arresting officers might have obtained a search warrant” can only be expected “to confound confusion in a field already replete with complexities.”<sup>223</sup>

While requiring police to obtain warrants when practical makes sense as a policy matter, Vinson is right that it would require courts to inquire into the facts of

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<sup>211</sup> *Id.* at 15.

<sup>212</sup> *Id.* at 13.

<sup>213</sup> *Id.* at 15.

<sup>214</sup> *Trupiano v. United States*, 334 U.S. 699 (1948).

<sup>215</sup> *Id.* at 705.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 708.

<sup>218</sup> *Id.* at 706.

<sup>219</sup> *Id.*; see *Johnson v. United States*, 333 U.S. 10 (1948).

<sup>220</sup> *Trupiano*, 334 U.S. at 703.

<sup>221</sup> *Id.* at 710.

<sup>222</sup> *Id.* at 711 (Vinson, C. J., dissenting).

<sup>223</sup> *Id.* at 716 (Vinson, C. J., dissenting).

each case, and the Court soon jettisoned that statement of the search warrant “requirement” for one that is presumably easier to apply.<sup>224</sup> In *Katz v. United States*,<sup>225</sup> the Court told the world in 1967 that “searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.”<sup>226</sup> The *Katz* analysis shifts the inquiry from the facts of a specific investigation to whether a particular category of searches should require a warrant.<sup>227</sup> Some obvious examples of searches that should not require warrants include, as we have seen, searches incident to arrest and consent searches.<sup>228</sup>

Though the Court has continued to pay lip-service to this search warrant “requirement,”<sup>229</sup> the current version is but a feeble reminder of cases like *Johnson* and *Trupiano*. The single biggest hole blown in the search warrant “requirement” was the shot *Chambers v. Maroney*<sup>230</sup> fired in 1970, only three years after *Katz* told us that warrantless searches are *per se* unreasonable.<sup>231</sup> In *Chambers*, the police seized a car based on probable cause, believing it contained evidence of a robbery.<sup>232</sup> Police placed the occupants under arrest and took the car to the police station.<sup>233</sup> Over a single dissent, the Court held that no warrant was required to search the car after it was safely secured at the police station.<sup>234</sup>

*Chambers* drew on a line of cases that permitted warrantless searches of vehicles stopped on the road.<sup>235</sup> The underlying notion, of course, is that a car stopped on the open road is mobile and if the police have probable cause to believe it contains evidence of a crime, police have three choices. They can seize the car and hold it until they get a warrant, they can search it on the spot, or they can let it proceed without being searched.<sup>236</sup> Given probable cause to believe evidence of crime is at hand, letting it proceed unmolested is an unappealing choice. As between the first two (seize and get a warrant or search without a warrant), the Fourth Amendment might be indifferent to which course of action is preferred.

The Fourth Amendment’s indifference between these choices is precisely the argument Justice White makes in *Chambers*.<sup>237</sup> But as Justice Harlan noted, the

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<sup>224</sup> See *Katz v. United States*, 389 U.S. 347 (1967).

<sup>225</sup> 389 U.S. 347 (1967).

<sup>226</sup> *Id.* at 357.

<sup>227</sup> *Id.* at 357–58.

<sup>228</sup> See *supra* Section IV.B–C.

<sup>229</sup> See, e.g., *Arizona v. Gant*, 556 U.S. 332, 335, 337 (2009).

<sup>230</sup> 399 U.S. 42 (1970).

<sup>231</sup> *Katz v. United States*, 389 U.S. 347, 357 (1967).

<sup>232</sup> *Chambers*, 399 U.S. at 44.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 52, 55.

<sup>235</sup> The first case in the line is *Carroll v. United States*, 267 U.S. 132 (1925).

<sup>236</sup> See *Chambers*, 399 U.S. at 51.

<sup>237</sup> *Id.* at 51–52.

decision to seize the car in *Chambers* had already been made, and the car was safely in police custody.<sup>238</sup> Thus, *Chambers* is unlike the seminal vehicle case, *Carroll v. United States*,<sup>239</sup> because there the police chose to search the car on the open highway.<sup>240</sup> Once the police decided in *Chambers* to arrest the occupants, seize the vehicle, and take it back to the station, there was no longer any difficult choice between searching it or letting the vehicle proceed without being searched.<sup>241</sup> Indeed, why not recognize, as a new category, searches of vehicles safely in police custody, a category that would require a warrant? Without explanation, Justices Douglas, Brennan, and Marshall joined Justice White's opinion that drove a stake through the heart of the search warrant requirement.<sup>242</sup>

Only Justice Harlan recognized the damage that *Chambers* did to the *Johnson-Trupiano* search warrant requirement:

In sustaining the search of the automobile I believe the Court ignores the framework of our past decisions circumscribing the scope of permissible search without a warrant. The Court has long read the Fourth Amendment's proscription of "unreasonable" searches as imposing a general principle that a search without a warrant is not justified by the mere knowledge by the searching officers of facts showing probable cause. The "general requirement that a search warrant be obtained" is basic to the Amendment's protection of privacy, and "the burden is on those seeking [an] exemption . . . to show the need for it."

Fidelity to this established principle requires that, where exceptions are made to accommodate the exigencies of particular situations, those exceptions be no broader than necessitated by the circumstances presented.<sup>243</sup>

But Harlan dissented alone.<sup>244</sup> *Chambers* is quite an expansion of the doctrine that recognized a warrant exception for searches of cars stopped on the open road.<sup>245</sup> *Chambers* is the final nail in the coffin of the *Johnson-Trupiano* warrant requirement. It was just as practicable for the police to get a warrant in *Chambers* as it was

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<sup>238</sup> *Id.* at 63.

<sup>239</sup> 267 U.S. 132 (1925).

<sup>240</sup> *Id.* at 134.

<sup>241</sup> *See Chambers*, 399 U.S. at 63.

<sup>242</sup> *Id.* at 43, 54, 55.

<sup>243</sup> *Id.* at 61 (Harlan, J., concurring in part and dissenting in part).

<sup>244</sup> *Id.* at 62 (Harlan, J., concurring in part and dissenting in part).

<sup>245</sup> *Id.*

in *Trupiano*. And there is no longer any *Johnson* requirement of an “exceptional circumstance” to justify dispensing with the warrant “requirement.”<sup>246</sup>

After *Chambers*, the Court relegated the search warrant requirement to only a few categories: searches of homes and commercial premises,<sup>247</sup> searches of smart phones,<sup>248</sup> searches inside the human body,<sup>249</sup> and, perhaps, searches of luggage that has been seized and taken to the police station.<sup>250</sup> We can debate (many law review articles have debated) whether the Court’s modern search warrant requirement represents good policy. That policy argument will not detain us here. Instead, we note that, once again, the common law endures. The common law of tort recognized a search warrant as a defense to a tort suit for searching a home, at least for items other than documents.<sup>251</sup> Documents are no longer offered special protection because the First Amendment now protects modern printers. The tort law of searches explains the modern Fourth Amendment search warrant requirement when homes and commercial premises are searched absent a warrant or consent.<sup>252</sup> A smart phone is a repository of many items; this makes a smart phone quite similar to a home, and the Framers would understand why a warrant is necessary to search a smart phone (after we explain to them what a smart phone is!). Luggage might be squeezed into this conceptualization, too; surely the crown could not have avoided the *Entick*

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<sup>246</sup> See generally *id.* at 52 (majority opinion) (noting that probable cause to search and mobility of a vehicle normally justify search without a warrant).

<sup>247</sup> See generally *Kyllo v. United States*, 533 U.S. 27 (2001) (home); *Murray v. United States*, 487 U.S. 533 (1988) (warehouse); *Chimel v. California*, 395 U.S. 752 (1969) (home).

<sup>248</sup> See generally *Riley v. California*, 134 S. Ct. 2473 (2014) (requiring a search warrant to search cellphone seized incident to arrest).

<sup>249</sup> See generally *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016) (requiring a search warrant to compel submission to drawing of blood).

<sup>250</sup> See generally *United States v. Chadwick*, 433 U.S. 1 (1977). *Chadwick* is in tension with *Chambers*, of course. Why is luggage that is seized and taken to a police station different from a car that is sitting in a police station parking lot? The Court justified the tension by noting that luggage does not suffer from a greatly reduced expectation of privacy that attends cars. See *id.* at 13–14 n.8. True enough, but there are echoes of *Trupiano* in *Chadwick*; because the luggage was at the federal building, it would have been easy for the agents to obtain a warrant. But *Trupiano* has been stamped out in all other contexts; why not here? Moreover, the luggage had a higher expectation of privacy the moment the agents seized it, but it is not clear that they could not have searched it on the spot. The Court subsequently held that police may seize a paper bag from a car and search it on the spot if they have probable cause to believe it contains contraband. *California v. Acevedo*, 500 U.S. 565, 579–80 (1991). Scalia assumed in his opinion concurring in the judgment in *Acevedo* that a briefcase could be searched if found in a car but not if seized from someone walking down the street. *Id.* at 581 (Scalia, J., concurring). Scalia cites no authority for that statement, and it is not clear to me that it is accurate. If police can seize a briefcase from someone walking down the street, based on probable cause, then all *Chadwick* stands for is that luggage at the police station cannot be searched without a warrant. But what is the non-*Trupiano* justification for that rule?

<sup>251</sup> See *supra* Part II (discussing the *Wilkes* and *Entick* cases).

<sup>252</sup> See *supra* notes 247–50 and accompanying text.

outcome if the messengers had seized a closed box and opened it later to discover that it contained private papers, which were then read.

There were no searches inside the human body in the colonial era, but a requirement for a warrant to search a home implies a similar requirement when searching inside the human body. The *Johnson* and *Trupiano* dicta were attempts to extend the search warrant requirement to searches in general, where it was practicable to obtain a warrant.<sup>253</sup> This was a policy-based extension of the common law. Attempts by Courts to extend the Fourth Amendment beyond the core common law tend to sputter and burn out. What we have today is the common law rule that searches of homes, smart phones, and luggage in the possession of the police (plus searches inside the human body) typically require a warrant.<sup>254</sup> This is as far as the common law will support the Fourth Amendment warrant “requirement,” and it is where the Court has settled.

#### *F. The Exclusionary Rule: Past and Present*

The most dramatic innovation in modern Fourth Amendment doctrine to date was the exclusionary rule. In its pristine form, the exclusionary rule is a doctrinal device designed to restore the status quo ante.<sup>255</sup> If the police had obeyed the Fourth Amendment and not searched, the reasoning goes, the government would not have found the evidence it now possesses. The way to remedy that violation is to deny the government the use of the evidence it found by means of the violation.<sup>256</sup>

As is obvious from my earlier description of the role of tort law in protecting privacy, property, and liberty, eighteenth century criminal defendants had no cards to play in their defense based on the illegality of the search or seizure.<sup>257</sup> As late as 1904 that remained the law. In 1904, the Court recognized in *Adams v. New York*<sup>258</sup> that the common law was indifferent to the way evidence was obtained.<sup>259</sup> The Court unanimously concluded that “the weight of authority as well as reason limits the inquiry to the competency of the proffered testimony, and the courts do not stop to inquire as to the means by which the evidence was obtained. The rule is thus laid down in Greenleaf, vol. 1, sec. 254a . . . .”<sup>260</sup>

There was a second option open to the *Adams* Court. The Fourth Amendment had not yet been incorporated into the Fourteenth Amendment, and the Court could

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<sup>253</sup> See *supra* notes 214–19.

<sup>254</sup> See *supra* notes 247–50. Of course, consent or exigent circumstances can also justify these searches. See *Brigham City, Utah v. Stuart*, 547 U.S. 398 (2006) (exigent circumstances); *supra* Section IV.D (consent).

<sup>255</sup> See, e.g., *United States v. Leon*, 468 U.S. 897, 906 (1984) (discussing the overall deterrent effect of the exclusionary rule).

<sup>256</sup> *Id.* at 906, 908.

<sup>257</sup> See *supra* notes 251–52 and accompanying text.

<sup>258</sup> 192 U.S. 585 (1904).

<sup>259</sup> *Id.* at 594–95.

<sup>260</sup> *Id.* at 594.

have rejected Adams's challenge to his state conviction on that ground. Adams raised the issue—he had to win on it to prevail in the Supreme Court—but the Court refused to consider his argument.<sup>261</sup> In the first sentence, the Court wrote: “We do not feel called upon to discuss” the incorporation issue.<sup>262</sup> Forty-five years later, the Court would reject the argument that the Fourth Amendment was included in the Fourteenth.<sup>263</sup> That the Court in 1904 thought the evidence rule from *Greenleaf* sufficient authority to reject Adams's appeal, with no need to rule against him on incorporation, suggests that there was just no appetite for a Fourth Amendment exclusionary rule. The unanimous *Adams* Court included Holmes and the first Justice Harlan.<sup>264</sup>

*Adams* was written by Justice Day.<sup>265</sup> Ten years later, in 1914, Day wrote *Weeks v. United States*,<sup>266</sup> the opinion that is given credit for creating the exclusionary rule.<sup>267</sup> The Court was again unanimous.<sup>268</sup> How could the entire Court have completely changed its mind in a decade? Moreover, *Weeks* does not overrule *Adams*.<sup>269</sup> How is all of that possible? The answer, which is usually glossed over by judges and commentators, is that the Court very much did not change its mind, and the narrow holding of *Weeks* did not create an exclusionary rule, at least not in the sense the term is used today. But to understand how *Adams* and *Weeks* can coexist requires us to return to the formalism of the eighteenth and nineteenth centuries.

We are back in 1765 with our friend, *Entick v. Carrington*.<sup>270</sup> As we saw earlier, *Boyd* drew on *Entick*'s view that the crown could never seize privately owned papers.<sup>271</sup> Near the beginning of the *Entick* quote in *Boyd*, we see the following:

The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole. . . . By the laws of England, every invasion of private property, be it ever so minute, is a trespass.<sup>272</sup>

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<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> See *Wolf v. Colorado*, 338 U.S. 25 (1949), overruled by *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>264</sup> *Fuller Court (1903–1906)*, OYEZ, <https://www.oyez.org/court/15155/fuller19> [<https://perma.cc/EEF9-7YHK>].

<sup>265</sup> *Adams*, 192 U.S. at 594.

<sup>266</sup> 232 U.S. 383 (1914).

<sup>267</sup> See George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145, 166 (2001).

<sup>268</sup> *Weeks*, 232 U.S. at 386.

<sup>269</sup> *Id.* at 396.

<sup>270</sup> 19 Howell's State Trials 1029, 1066 (1765).

<sup>271</sup> *Boyd v. United States*, 116 U.S. 616, 622–23 (1886).

<sup>272</sup> *Id.* at 627.

As this quote makes plain, the protection of *privacy* in eighteenth century England was a byproduct of the protection of *private property*. The lawyer who represented Weeks, Martin J. O'Donnell, must have realized this important fact about the formalist order of the day. Adams had waited until trial to ask that the papers seized from him be suppressed;<sup>273</sup> in short, he asked for the modern version of the exclusionary rule, which permits a motion to exclude evidence seized in violation of the Fourth Amendment.<sup>274</sup> Part of the rationale for rejecting Adams's argument was that to "stop and inquire as to the means by which the evidence was obtained" was an interference with the orderly trial process.<sup>275</sup>

Learning from the mistake of Adams's lawyer, O'Donnell filed a motion prior to trial asking that Weeks's private papers be returned to him. The question became not whether the papers should be excluded from trial, as in *Adams*, but, rather, whether the government had to return Weeks's *property* to him.<sup>276</sup> Because the federal officer who searched for and seized Weeks's papers had no search warrant, the government's property interest in the papers was inferior to that of Weeks.<sup>277</sup>

As the *Weeks* Court saw the issue, it "involves the right of the court in a criminal prosecution to retain for the purposes of evidence the letters and correspondence of the accused, seized in his house in his absence and without his authority" in violation of the Fourth Amendment.<sup>278</sup> Once the issue was phrased as who had the superior property right to the papers, Weeks would win in 1914. It was unclear at that point in the evolution of Fourth Amendment doctrine whether even a search warrant would justify seizure of private papers but, lacking a search warrant, the government had no way to win the property argument.

And once Weeks's papers were returned to him, they could not be introduced in evidence at his criminal trial because they were physically unavailable. Justice Day distinguished his opinion in *Adams*, easy enough to do, because Adams had not asked for his papers to be returned.<sup>279</sup> What *Weeks* established was not an exclusionary rule qua exclusionary rule (though there is dicta in the opinion consistent with that idea) but, rather, the right to the return of property that the government was holding without justification.<sup>280</sup> Notice that the *Weeks* narrow holding would not permit defendants to seek return of contraband or evidence of a crime (and most of the modern Fourth Amendment cases thus could not benefit from the *Weeks* narrow holding).

But *Weeks*, as a property-based case, was doomed by clever prosecutors. The real exclusionary rule came into being six years later in *Silverthorne Lumber Company*

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<sup>273</sup> *Adams v. New York*, 192 U.S. 585, 589 (1904) (argument for the plaintiff in error).

<sup>274</sup> *Id.*

<sup>275</sup> *Id.* at 594.

<sup>276</sup> *Weeks v. United States*, 232 U.S. 383, 389 (1914).

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* at 393.

<sup>279</sup> *See Adams v. New York*, 192 U.S. 585, 594–95 (1904).

<sup>280</sup> *Weeks*, 232 U.S. at 398.

*v. United States*.<sup>281</sup> Obviously aware of the narrow holding in *Weeks*, the prosecutor admitted the “outrage [of the seizure without a warrant] which the Government now regrets” and returned the documents seized in violation of the Fourth Amendment.<sup>282</sup> But the prosecutor had made copies that he used to craft subpoenas requiring the defendants to produce the original documents.<sup>283</sup> This, of course, avoids the narrow, property-based holding in *Weeks*. The copies belonged to the government, not the defendants, who now had their property back.<sup>284</sup> But the Court, speaking through Justice Holmes, was having none of the charade.<sup>285</sup> To permit the Government to do in “two steps” what it is forbidden to do in one “reduces the Fourth Amendment to a form of words. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.”<sup>286</sup> The Court thus read *Weeks* more broadly than its narrow holding. Now we have an exclusionary rule.<sup>287</sup>

The modern story is that *Weeks* established the exclusionary rule and *Silverthorne* is the case that established the doctrine of “fruit of the poisonous tree”—that the government cannot exploit the original Fourth Amendment violation to obtain evidence.<sup>288</sup> In a sense, the conventional wisdom is correct, but it misses a key part of the story. The narrow holding of *Weeks* was all about property. Holmes, a pragmatist, must have realized that the *Weeks* rule was useless in a world where prosecutors could make copies of papers they had seized unconstitutionally and use them to get back the originals they had returned.

Once the Court crossed the *Weeks* Rubicon, it had no choice but to go full bore on a modern exclusionary rule. Notice, however, that the exclusionary rule was born of what today we might view as a fetish about the property interest in personally created papers. That it today suppresses evidence of contraband and violent crime is an irony that surely would not be lost on Holmes. He joined the majority opinion in the next suppression case, the Prohibition-era case of *Carroll v. United States*,<sup>289</sup> which the defendant lost.<sup>290</sup> One basis to rule against *Carroll* would have been that the exclusionary rule did not apply to contraband alcohol, but the Court did not premise its

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<sup>281</sup> 251 U.S. 385 (1920).

<sup>282</sup> *Id.* at 391.

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at 391–92.

<sup>286</sup> *Id.* at 392.

<sup>287</sup> *Silverthorne*, unlike *Weeks*, was not unanimous. Chief Justice White and Justice Pitney dissented without opinion. *Id.* Presumably, they believed that the *Weeks* rule was appropriately limited to cases where the defendant sued for return of his property based on a superior interest to that of the Government’s.

<sup>288</sup> Robert M. Pitler, *The Fruit of the Poisonous Tree Revisited and Shepardized*, 56 CALIF. L. REV. 579, 589 (1968).

<sup>289</sup> 267 U.S. 132 (1925).

<sup>290</sup> *Id.* at 162.



holding on that ground.<sup>291</sup> Instead, as we saw earlier, it held that the search of the car for contraband liquor was constitutional without a warrant because cars are mobile and the agents had probable cause.<sup>292</sup>

To be sure, as Wes Oliver has demonstrated, resistance to Prohibition furthered the development of the exclusionary rule.<sup>293</sup> As long as defendants claiming the protection of the Fourth Amendment via suppression of evidence were “real” criminals, there was little incentive to provide much protection or to suppress evidence of a search.<sup>294</sup> But in a single stroke, the Eighteenth Amendment and the Volstead Act that followed made potential criminals of millions of Americans who thought drinking alcohol was a harmless diversion.<sup>295</sup> How much Prohibition affected the Court’s embrace of the exclusionary rule is impossible to know. It is probably only a coincidence, but an interesting one, that *Silverthorne* was argued mere weeks before Prohibition became effective.<sup>296</sup>

As long as the *Weeks-Silverthorne* rule applied only to federal trials, nobody on the Court seemed to mind that it had departed from the common law as exemplified in the 1760s cases of *Wilkes* and *Entick* and in the Greenleaf rule of evidence. Federal criminal law jurisdiction was quite small prior to the 1960s, and the FBI and other federal agents were generally professional in their investigations. In 1949, *Wolf v. Colorado*<sup>297</sup> held that Fourteenth Amendment due process of law did not include the right to have evidence excluded if the state or local police violated the Fourth Amendment.<sup>298</sup> Thus, states could make up their own mind whether to stick with the common law rule that tort law was the only, or at least the principal, means of redress for government actions that infringed property and privacy rights.

Along came *Mapp v. Ohio*,<sup>299</sup> decided in 1961, the first shot of the Warren Court’s criminal procedure “revolution.” Although only twelve years had passed since *Wolf*, the *Mapp* Court declared that “time has set its face against” *Wolf*’s rejection of the exclusionary rule.<sup>300</sup> The Court held “that the right to be secure against rude invasions of privacy by state officers” was enforceable in state court the same as in federal court.<sup>301</sup> The Court’s prediction that its holding would not fetter state law enforcement

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<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> WESLEY M. OLIVER, *THE PROHIBITION ERA AND POLICING: A LEGACY OF MISREGULATION* 6–9 (2018).

<sup>294</sup> *Id.* at 27–28.

<sup>295</sup> *Id.* at 39–41.

<sup>296</sup> *See* 251 U.S. 385 (noting argument on December 12, 1919); Volstead Act (effective date January 17, 1920).

<sup>297</sup> 338 U.S. 25 (1949).

<sup>298</sup> *Id.* at 33.

<sup>299</sup> 367 U.S. 643 (1961).

<sup>300</sup> *Id.* at 653.

<sup>301</sup> *Id.* at 660.

sounded perfectly plausible: Quoting from a case decided in the previous term, the Court noted that federal courts “have operated under the exclusionary rule of *Weeks* for almost half a century; yet it has not been suggested either that the Federal Bureau of Investigation has thereby been rendered ineffective, or that the administration of criminal justice in the federal courts has thereby been disrupted.”<sup>302</sup>

But the Court overlooked a critical difference between federal criminal trials in 1960 and state criminal trials, a difference that only became starker as the crime rate soared in the late 1960s. As I have argued, letting state criminal defendants walk free in the post-*Mapp* era because of a Fourth Amendment violation was a very different challenge to justice from letting federal defendants walk free.<sup>303</sup> Federal criminal trials in the pre-1970s era mostly involved small amounts of drugs, gambling, and white collar crime.<sup>304</sup> *Weeks* was prosecuted for use of the mails in carrying out a lottery scheme,<sup>305</sup> and the *Silverthorne* defendants had been indicted for some sort of business-related crime.<sup>306</sup>

A major pre-*Mapp* case limiting the power of federal officers to make arrests involved the crime of possessing counterfeit gasoline ration coupons; that defendant walked free.<sup>307</sup> Who cared? Other pre-*Mapp* exclusionary rule cases involved small amounts of narcotics or gambling offenses.<sup>308</sup> State crimes, by contrast, include murder, rape, robbery, kidnapping, and burglary.<sup>309</sup> Making it possible for even a small number of defendants charged with serious felonies to escape justice puts a much greater strain on the structure of Fourth Amendment doctrine than letting petty federal criminals escape justice.

Thus, when faced with excluding evidence of serious crimes, and letting obviously guilty criminals walk free, or reading the Fourth Amendment narrowly, courts for decades have read the Fourth Amendment narrowly. An irony of *Mapp* is that it restricted the substance of Fourth Amendment rights. For example, in *Illinois v. Gates*,<sup>310</sup> the Court radically reduced the Warren Court requirements for a search warrant to be valid.<sup>311</sup> If exclusion were not the remedy, or if the crime was a low-level

<sup>302</sup> *Id.* at 659–60 (quoting *Elkins v. United States*, 364 U.S. 206, 218–19 (1960)).

<sup>303</sup> Thomas, *supra* note 267, at 167–68.

<sup>304</sup> Thomas, *supra* note 267, at 172–74.

<sup>305</sup> *Weeks v. United States*, 232 U.S. 383, 386 (1914).

<sup>306</sup> *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 390 (1920).

<sup>307</sup> *United States v. Di Re*, 332 U.S. 581, 582 (1948).

<sup>308</sup> *See, e.g., Rios v. United States*, 364 U.S. 253, 254 (1960) (small package of heroin); *Jones v. United States*, 362 U.S. 257, 258 (1960) (sale of narcotics); *Henry v. United States*, 361 U.S. 98, 98 (1959) (possession of stolen radios); *Draper v. United States*, 358 U.S. 307, 308 (1959) (865 grams, about 30 ounces, of heroin); *Giordenello v. United States*, 357 U.S. 480, 482 (1958) (paper bag containing heroin).

<sup>309</sup> Thomas, *supra* note 267, at 151.

<sup>310</sup> 462 U.S. 213 (1983).

<sup>311</sup> *Id.* at 222–24.

federal gambling violation, it might have made sense to follow the *Spinelli v. United States*<sup>312</sup> regime, set out so painstakingly by Justice Harlan in a federal case in 1969.<sup>313</sup>

There are two reasons *Spinelli* was overruled. First, it is unclear whether any common law superstructure supported the search warrant rules Harlan teased from the Court's cases. The net effect of the *Spinelli* so-called "two pronged" test to be applied to warrant affidavits was to require a searching inquiry into the credibility of the source of the evidence and into whether it was sufficient to establish probable cause.<sup>314</sup> While the issue is not free from doubt, Lord Hale seems to say that a search warrant would issue based merely on the oath of one seeking the warrant.<sup>315</sup> Hale writes that a search warrant should be granted only upon "oath made before the justice of a felony committed, and that the party complaining hath probable cause to suspect they are in such house or place, and do shew his reasons of such suspicion."<sup>316</sup> As I read that passage, the process did not require any inquiry into whether the complainant's reasons were supported by evidence other than his oath.

As for colonial America, William Cuddihy concludes that search warrants typically issued upon the assertion by the complainant that he had "just" cause to suspect evidence of crime in a particular house.<sup>317</sup> Cuddihy said that the "general rule was that magistrates neither examined complaints independently to determine their adequacy for [search] warrants nor withheld warrants if the assessment was negative."<sup>318</sup> Fabio Arcila has shown that whatever some of the leading treatises might have said, magistrates on the ground did not "widely engage" in aggressive scrutiny of requests for search warrants.<sup>319</sup>

And there is a very good reason why magistrates might have typically been satisfied with the complainant's oath when requesting a search warrant. If the complainant was wrong—if, for example, no stolen goods were found where he said they would be found—the complainant was liable in tort "for as to him the breaking of the door is lawful, if the goods are there; unlawful if not there."<sup>320</sup> Thus, complainants had every incentive to provide only truthful information to the magistrate; to require him to make an independent inquiry would have been redundant.

To be sure, by 1969, complainants who provided information to the magistrate were no longer liable in tort if the information was wrong. This evolution in law calls

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<sup>312</sup> 393 U.S. 410 (1969).

<sup>313</sup> The Court reversed *Spinelli*'s federal conviction on the ground that the search warrant affidavit did not give the magistrate a basis to determine whether the agents had probable cause to search *Spinelli*'s apartment. *Id.* at 418.

<sup>314</sup> *Id.* at 413.

<sup>315</sup> 2 HALE, *supra* note 31, at 150.

<sup>316</sup> *Id.*

<sup>317</sup> CUDDIHY, *supra* note 139, at 582.

<sup>318</sup> *Id.*

<sup>319</sup> Fabio Arcila, Jr., *In the Trenches: Searches and the Misunderstood Common-Law History of Suspicion and Probable Cause*, 10 U. PA. J. CONST. L. 1, 5 (2007).

<sup>320</sup> 2 HALE, *supra* note 31, at 151.

for magistrates to make a more searching inquiry than they did in Lord Hale's day. But the issue became whether the *Spinelli* test required too much of magistrates. And since there was no common law support for any inquiry at all, the Court was free to retreat from *Spinelli*.

The second, and probably larger, threat to the continued reliance on the *Spinelli* two-pronged test was the *Mapp* exclusionary rule. William Spinelli was a numbers runner for the St. Louis mob;<sup>321</sup> who cared if he walked free?<sup>322</sup> On the other hand, in *Illinois v. Gates*, Lance and Sue Gates had 350 pounds of marijuana in their home.<sup>323</sup> A case the next year asked the Court to suppress evidence of a brutal murder because the police officer used the wrong search warrant form; the Court declined.<sup>324</sup> In sum, the Court needed a sound common law support to withstand the strain caused by potential exclusion in thousands of cases involving serious, often brutal, felonies. But there is no common law support for the exclusionary rule.

What happened to the exclusionary rule over the next fifty years has been the subject of several books and many, many articles. One of my favorites is Tracey Maclin's book that takes the reader inside the Supreme Court, drawing on the justices' papers to show the inexorable retreat that began only a few years after *Mapp*.<sup>325</sup> I will not detail that agonizing death march. Once the Court in the 1970s began to discuss the purpose of the rule as deterring police violations of the Fourth Amendment, it became possible to identify category after category of cases in which the marginal deterrence was not justified by the cost of exclusion. Thus, exclusion is unavailable (1) when police in good faith rely on an unconstitutional search or arrest warrant or an arrest warrant that has been withdrawn;<sup>326</sup> (2) in federal habeas corpus proceedings;<sup>327</sup> (3) in grand jury proceedings;<sup>328</sup> (4) in federal tax penalty proceedings;<sup>329</sup> (5) when police violate the requirement that they knock before entering a house to serve a warrant;<sup>330</sup>

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<sup>321</sup> See *Spinelli v. United States*, 393 U.S. 410, 422 (1969).

<sup>322</sup> In a delicious historical turn of events, by 1978 Spinelli became the gambling lieutenant of Anthony J. Giordano, who headed organized crime in St. Louis. *W. V. Spinelli; Was Gambler in St. Louis*, Obituaries, ST. LOUIS POST DISPATCH, Mar. 14, 1984, at 12. But neither the trial court nor the Supreme Court could of course have known history would play out that way.

<sup>323</sup> 462 U.S. 213, 227 (1983).

<sup>324</sup> *Massachusetts v. Sheppard*, 468 U.S. 981, 981–88 (1984).

<sup>325</sup> See generally TRACEY MACLIN, *THE SUPREME COURT AND THE FOURTH AMENDMENT'S EXCLUSIONARY RULE* 108–11 (2012) (arguing that *Linkletter v. Walker*, 381 U.S. 618 (1969), began the undoing of *Mapp* a mere four years after it was decided). For a review of Maclin's book, see George C. Thomas III, *Mapp v. Ohio: Doomed From the Beginning?* 12 OHIO ST. J. CRIM. L. 289 (2014).

<sup>326</sup> *Herring v. United States*, 555 U.S. 135, 136–37 (2009) (arrest warrant recalled); *United States v. Leon*, 468 U.S. 897, 905 (1984) (search warrant).

<sup>327</sup> *Stone v. Powell*, 428 U.S. 465, 468–69, 474 (1976).

<sup>328</sup> *United States v. Calandra*, 414 U.S. 338, 339, 342 (1974).

<sup>329</sup> *United States v. Janis*, 428 U.S. 433, 456–60 (1976).

<sup>330</sup> *Hudson v. Michigan*, 547 U.S. 586, 599 (2006).

(6) when police search based on a case that is subsequently overruled or a statute that is later held unconstitutional.<sup>331</sup>

Indeed, *Hudson v. Michigan* suggested in 2006 that the *Mapp* doctrine, necessary in its time, may no longer be necessary because of increased police professionalism and greater availability of tort remedies under current statutory schemes.<sup>332</sup> As the Court put it:

We cannot assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago. That would be forcing the public today to pay for the sins and inadequacies of a legal regime that existed almost half a century ago.<sup>333</sup>

After discussing the changes in federal law that makes it easier to bring a tort suit for a Fourth Amendment violation, the Court remarked, “As far as we know, civil liability is an effective deterrent here, as we have assumed it is in other contexts.”<sup>334</sup> Moving back in time a century, the *Hudson* Court seemed to think that tort might after all be the remedy of choice, at least for most Fourth Amendment violations.<sup>335</sup>

The Court followed up on that notion three years later in *Herring v. United States*<sup>336</sup> by suggesting that the exclusionary rule might be limited to cases of flagrant police misconduct.<sup>337</sup> Indeed, in *Herring*, the Court stated that the exclusionary rule is not even a right that belongs to defendants but, rather, “applies only where it ‘result[s] in appreciable deterrence.’”<sup>338</sup> And “‘appreciable deterrence’ results only when police knowingly or recklessly violate the Fourth Amendment.”<sup>339</sup> Putting these cases together, it is not a huge stretch to imagine a Fourth Amendment where tort law is the remedy for all but the most egregious Fourth Amendment violations. If that were to come to pass, we would be most of the way back to the common law!

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<sup>331</sup> *Davis v. United States*, 564 U.S. 229, 231–32 (2011) (case); *Illinois v. Krull*, 480 U.S. 340, 356–60 (1987) (statute).

<sup>332</sup> *Hudson*, 547 U.S. at 597–99.

<sup>333</sup> *Id.* at 597.

<sup>334</sup> *Id.* at 598.

<sup>335</sup> *Id.*

<sup>336</sup> 555 U.S. 135 (2009).

<sup>337</sup> *Id.* at 143.

<sup>338</sup> *Id.* at 141 (quoting *United States v. Leon*, 468 U.S. 897, 909 (1984), which in turn was quoting *United States v. Janis*, 428 U.S. 433, 454 (1976)). *Leon* held that an unconstitutional search warrant executed in good faith does not justify exclusion of evidence. *Leon*, 468 U.S. at 925–26. *Janis* held that exclusion is not available in a proceeding to determine whether *Janis* owed tax penalties. *Janis*, 428 U.S. at 459–60.

<sup>339</sup> *Herring*, 555 U.S. at 141, 143.

*G. The Exclusionary Rule: The Future*

Justice Scalia's death makes it impossible to assess the near-term movement in the exclusionary rule area. Both *Hudson* and *Herring* were 5–4 decisions with strident dissents and with Scalia in the majority (indeed, he wrote *Hudson*).<sup>340</sup> Thus, if Justice Gorsuch is a supporter of the exclusionary rule, the day of reckoning for *Mapp* might be put off for a very long time. But I doubt very much that Gorsuch is any more favorable to the exclusionary rule than the five justices who provided the majority in *Hudson* and *Herring*.

The Fourth Amendment, after all, provides a direct, discernible benefit only to criminals. This, of course, is why the Court quickly shifted from the exclusionary rule being a natural part of the Fourth Amendment to the view that it has to pay for itself by deterring police violations. Given the considerable negative hydraulic that attends application of the exclusionary rule to cases of serious felonies, the Fourth Amendment needs a strong superstructure to withstand the unrelenting pressure to narrow its protection. The common law provides that structure for most of the Court's Fourth Amendment doctrine. But there was no exclusionary rule at common law and for over a century after the Fourth Amendment was ratified.<sup>341</sup> Perhaps the Court will return to the common law.

That is one way to read *Utah v. Strieff*.<sup>342</sup> With Scalia gone from the Court, the conservatives still managed to muster five votes (Roberts, Kennedy, Thomas, Breyer, and Alito) for yet one more exception to the exclusionary rule.<sup>343</sup> The state conceded that the stop of Strieff was unconstitutional because the police lacked reasonable suspicion under the *Terry v. Ohio*<sup>344</sup> stop and frisk doctrine (though they had reason to be somewhat suspicious).<sup>345</sup> After Strieff had been unconstitutionally stopped, the officer discovered that there was an outstanding arrest warrant for him.<sup>346</sup> The Court held that the drugs found incident to the unlawful stop were admissible on the theory that the existence of the warrant was an intervening circumstance that somehow obviated the need to exclude the fruits of the search incident to arrest.<sup>347</sup>

As the dissenters pointed out, the officer would not have discovered the warrant at that time but for the illegal stop, which makes the notion of intervening circumstance quite odd if not incoherent.<sup>348</sup> That Justices Kennedy and Breyer joined the majority

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<sup>340</sup> *Id.* at 136; *Hudson*, 547 U.S. at 587.

<sup>341</sup> *See supra* notes 255–87 and accompanying text.

<sup>342</sup> 136 S. Ct. 2056 (2016).

<sup>343</sup> *Id.* at 2059–60.

<sup>344</sup> 392 U.S. 1 (1968).

<sup>345</sup> *Id.* (anonymous tip that house was being used for “narcotics activity” led to visual observation; frequent visitors came and stayed only a few minutes).

<sup>346</sup> *Id.* at 2060.

<sup>347</sup> *Id.* at 2064.

<sup>348</sup> *Id.* at 2066–67 (Sotomayor, J., dissenting) (joined by Ginsburg, J.). Justice Kagan dissented separately. *Id.* at 2071.

opinion perhaps suggests that there were five votes to restrict the exclusionary rule even further with Gorsuch as a potential sixth vote. The Court noted that while the officer did conduct an illegal stop, it was “at most negligent.”<sup>349</sup> It was not, therefore, flagrant. Perhaps the real holding in *Strieff* is that the exclusionary rule is simply not going to apply unless the government conduct is flagrant.

Justice Sotomayor’s dissent pointed out that *Strieff* permits stops and searches of anyone named on an outstanding warrant.<sup>350</sup> This is quite a limitation on the exclusionary rule. There were, she noted, over 180,000 misdemeanor arrest warrants in the Utah database at the time of the stop and search in 2006.<sup>351</sup> Utah’s population in 2006 was 2.5 million, roughly 1.5 million of whom were over 19 years of age.<sup>352</sup> Thus, the chance of anyone 20 or older being named on an arrest warrant was about 12%. Would police engage in “fishing” expeditions on the off chance that the person seized was named on a warrant? It seems unlikely because it is inefficient but, at a minimum, *Strieff* will function as a backstop to police who believe, wrongly, that they have reasonable suspicion to stop a suspect.

Now that Justice Kennedy’s seat is vacant, there is even more uncertainty about the future of the exclusionary rule. One thing is clear: The exclusionary rule of 2018 is far closer to the common law position than it was when *Mapp* was decided in 1961. Stay tuned.

#### CONCLUSION

If one lays the framework of the common law tort of wrongful search and seizure, and makes reasonable adjustments for changes in the way we live our lives (smart-phones as an analog to a home, for example), one finds that the framework maps most of the Court’s current doctrine. The one major area where it does not map is the exclusionary rule. Of course, as long as a majority of justices favor the exclusionary rule, it does not need support from a common law framework. For example, in a major expansion of the common law that we saw earlier, the Warren Court created a robust search warrant requirement in *Spinelli v. United States*,<sup>353</sup> one without any real support in the common law, because Justice Harlan provided the critical fifth vote (joined by Chief Justice Warren and Justices Douglas, Brennan, and White). But once that coalition unraveled, *Spinelli* could not survive.<sup>354</sup> When justices who favor more expansive police power are in the majority, Fourth Amendment doctrine needs a common law superstructure or backstop. Without that backstop for the exclusionary rule, and with President Trump in office, further limitations on the exclusionary rule seem likely.

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<sup>349</sup> *Id.* at 2063.

<sup>350</sup> *Id.* at 2068–69 (Sotomayor, J., dissenting).

<sup>351</sup> *Id.* at 2066.

<sup>352</sup> OFFICE OF PUBLIC HEALTH ASSESSMENT, CENTER FOR HEALTH DATA AND INFORMATICS, UTAH DEPARTMENT OF HEALTH (last visited Oct. 15, 2018), <http://ibis.health.utah.gov/query/builder/pop/PopMain/Count> [<https://perma.cc/Y4SL-QLWR>].

<sup>353</sup> 393 U.S. 410, 419 (1969).

<sup>354</sup> See *Illinois v. Gates*, 462 U.S. 213, 238 (1983).