VOLUME 107 FEBRUARY 1994 NUMBER 4

HARVARD LAW REVIEW

ARTICLE

FOURTH AMENDMENT FIRST PRINCIPLES

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The Fourth Amendment today is an embarrassment. Much of what the Supreme Court has said in the last half century — that the Amendment generally calls for warrants and probable cause for all searches and seizures, and exclusion of illegally obtained evidence — is initially plausible but ultimately misguided. As a matter of text, history, and plain old common sense, these three pillars of modern Fourth Amendment case law[1] are hard to support; in fact, today's Supreme Court does not really support them. Except when it does. Warrants are not required — unless they are. All searches and seizures must be grounded in probable cause — but not on Tuesdays. And unlawfully seized evidence must be excluded whenever five votes

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I am also most grateful for the responses this Article has elicited from Professor Carol Steiker. *See* Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820 (1994). I shall not in this Article attempt to respond directly to her many important arguments — today, she deserves the last word.

This Article is dedicated to Professor Telford Taylor, with respect and admiration for his pioneering contributions to Fourth Amendment scholarship.

[1] *See, e.g.*, Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 257–59 (1984) (describing the warrant requirement, the probable cause requirement, a broad definition of "searches and seizures," and the exclusionary rule as the basic elements of modern Fourth Amendment case law).

say so. Meanwhile, sensible rules that the Amendment clearly does lay down or presuppose — that all searches and seizures must be reasonable, that warrants (and only warrants) always require probable cause, and that the officialdom should be held liable for unreasonable searches and seizures — are ignored by the Justices. Sometimes. The result is a vast jumble of judicial pronouncements that is not merely complex and contradictory, but often perverse. Criminals go free, while honest citizens are intruded upon in outrageous ways with little or no real remedy. If there are good reasons for these and countless other odd results, the Court has not provided them.

Nor has the academy. Indeed, law professors have often been part of the problem, rather than the solution. Begin in the classroom. The Fourth Amendment is part of the Constitution yet is rarely taught as part of Constitutional Law. Rather, it unfolds as a course unto itself, or is crammed into Criminal Procedure. The Criminal Procedure placement is especially pernicious. For unlike the Fifth, Sixth, and Eighth Amendments, which specially apply in criminal contexts,[2] the Fourth Amendment applies equally to civil and criminal law enforcement. Its text speaks to all government searches and seizures, for whatever reason. Its history is not uniquely bound up with criminal law. (Does it matter whether British customs laws were criminal or civil?) And the Amendment presupposes a civil damage remedy, not exclusion of evidence in criminal trials; its global command that all government searches and seizures be reasonable sounds not in criminal law, but in constitutional tort law.[3]

Placing the Fourth Amendment in Criminal Procedure thus distorts, causing us to see things that are not there. It also obscures, leading us to miss things that are there — as does teaching the Amendment in a stand-alone course. What we miss is how the Fourth Amendment connects up with the rest of the Constitution, procedurally and substantively. From a legal-process perspective, we fail to focus clearly on basic constitutional questions like: Who should decide whether a search or seizure is reasonable? Legislatures? Administrators? Judges? Juries? Some combination? Who should be allowed

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[2] The Fifth Amendment prescribes grand juries for "infamous *crime*," bars double jeopardy for "the same *offense*," and prohibits compelled self-incrimination "in any *criminal* case." U.S. CONST. amend. V (emphasis added). The Sixth Amendment guarantees "the *accused*" a host of procedural rights in "all *criminal* prosecutions," and the Eighth Amendment bars "cruel and unusual *punishments*." *Id.* amends. VI, VIII (emphasis added). Punishment is quintessentially, even if not exclusively, a criminal law concept.

[3] I am not the first modern scholar to observe this point. *See, e.g.*, Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 49–58; *see also* BRADFORD P. WILSON, ENFORCING THE FOURTH AMENDMENT: A JURISPRUDENTIAL HISTORY 9–19 (1986) (providing historical support for a tort-law remedial model in Fourth Amendment cases).

to issue warrants and how should their decisions be reviewed? From a substantive perspective, we give short shrift to questions like: How should searches and seizures outside the criminal context be constitutionally regulated? What makes a search or seizure substantively unreasonable? How should other constitutional principles — protecting speech, privacy, property, due process, equality, and the like — inform the reasonableness determination?

When we move from law school classrooms to law reviews and legal treatises, things do not improve. Leading scholars ponder every nuance of the latest Supreme Court case, but seem unconcerned about the Amendment's text, unaware of its history, and at times oblivious or hostile to the common sense of common people. Like the Justices, leading scholars seem to think the Amendment requires warrants, probable cause, and exclusion but then often abandon all this to avoid absurdity. Fourth Amendment case law is a sinking ocean liner — rudderless and badly off course — yet most scholarship contents itself with rearranging the deck chairs.

There is a better way to think about the Fourth Amendment — by returning to its first principles. We need to read the Amendment's words and take them seriously: they do not require warrants, probable cause, or exclusion of evidence, but they do require that all searches and seizures be reasonable. While keeping our eyes fixed on reasonableness, we must remember the historic role played by civil juries and civil damage actions in which government officials were held liable for unreasonable intrusions against person, property, and privacy. Thus, we need to recover the lost linkages between the Fourth and Seventh Amendments — linkages obscured by teaching the Fourth in Criminal Procedure and the Seventh in Civil Procedure. Also, we must self-consciously consult principles embodied in other parts of the Constitution to flesh out the concrete meaning of *constitutional* reasonableness. Finally, we must use twentieth-century legal weaponry like *Bivens* actions, class actions, structural injunctions, entity liability, attorney's fees, administrative regulation, and administrative remedies, to combat twentieth-century legal threats — technology and bureaucracy — to the venerable values protected by the Fourth Amendment.

In what follows, I shall first critique the current doctrinal mess and then attempt to sketch out a better way — a package that, taken as a whole, strikes me as far superior to the status quo along any number of dimensions. It is more faithful to constitutional text and history. It is more coherent and sensible. It is less destructive of the basic trial value of truth seeking — sorting the innocent from the guilty. It is more conducive to the basic appellate value of truth speaking; it will help courts to think straight and write true, openly identifying criteria of reasonableness rather than mouthing unreason-

able principles that are blindly followed, and then blandly betrayed.[4]

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[4] My approach cannot make perfect sense of all that the modern Court has said and done. No approach can. As the leading champion of stare decisis on the current Court has noted, when precedents conflict we must choose among them, and such a choice must, to some extent, be shaped by factors other than precedent. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2248 (1993) (Souter, J., concurring in part and concurring in the judgment).

My approach does, however, strive to keep faith with — indeed to build an overall framework uniting — many of the finest judicial utterances on the Amendment found in modern volumes of *U.S. Reports* and authored by a wide range of Justices. For example, in trying to take constitutional text and history seriously, I follow the lead of Justices Black and Scalia. *See, e.g.*, California v. Acevedo, 111 S. Ct. 1982, 1992 (1991) (Scalia, J., concurring in the judgment); Coolidge v. New Hampshire, 403 U.S. 443, 509 (1971) (Black, J., concurring and dissenting). In writing that the ultimate touchstone of the Amendment is not a warrant or probable cause, but reasonableness, I echo Chief Justice Rehnquist and Justices Black, Harlan, White, Scalia, and Kennedy. *See Acevedo*, 111 S. Ct. at 1992 (Scalia, J., concurring in the judgment); National Treasury Employees Union v. Von Raab, 489 U.S. 656, 665 (1989) (Kennedy, J.); Robbins v. California, 453 U.S. 420, 437–38 (1981) (Rehnquist, J., dissenting); Cady v. Dombrowski, 413 U.S. 433, 439 (1973) (Rehnquist, J.); *Coolidge*, 403 U.S. at 509 (Black, J., concurring and dissenting); Chimel v. California, 395 U.S. 752, 772–73 (1969) (White, J., dissenting); Cooper v. California, 386 U.S. 58, 62 (1967) (Black, J.); *cf. Coolidge*, 403 U.S. at 492 (Harlan, J., concurring) (citing the work of Telford Taylor critiquing the warrant requirement). In pointing out that, historically, warrants were disfavored devices, because they immunized government searchers and seizers from later liability, I build on the work of Justices White and Scalia. *See, e.g.*, *Acevedo*, 111 S. Ct. at 1992 (Scalia, J., concurring in the judgment); Payton v. New York, 445 U.S. 573, 607–08 (1980) (White, J., dissenting). In reiterating that ex parte warrants were intended to be limited devices, used only against a locus of wrongful or dangerous activity, and only after meeting the explicit standard of probable cause, I track the views of Justice Stevens. *See, e.g.*, Zurcher v. Stanford Daily, 436 U.S. 547, 577–83 (1978) (Stevens, J., dissenting); Marshall v. Barlow's Inc., 436 U.S. 307, 326–28 (1978) (Stevens, J., dissenting). In suggesting that the seriousness of a crime is relevant in assessing reasonableness, I openly embrace what Justice Jackson admitted made consummate common sense. *See, e.g.*, Brinegar v. United States, 338 U.S. 160, 183 (1949) (Jackson, J., dissenting); McDonald v. United States, 335 U.S. 451, 459–60 (1948) (Jackson, J. concurring). In advocating a broad definition of searches and seizures and special sensitivity in free expression cases, I embrace the instincts of Justice Stewart. *See, e.g.*, Katz v. United States, 389 U.S. 347, 350–53 (1967) (Stewart, J.); Stanford v. Texas, 379 U.S. 476, 482–85 (1965) (Stewart, J.). In calling for candid discussion of the racial issues posed by search and seizure policies, I salute the honesty exemplified by both Chief Justice Warren and Justice Marshall. *See, e.g.*, Florida v. Bostick, 111 S. Ct. 2382, 2390 n.1, 2394 n.4 (1991) (Marshall, J., dissenting); United States v. Sokolow, 490 U.S. 1, 12 (1989) (Marshall, J., dissenting); Terry v. Ohio, 392 U.S. 1, 14–15 & n.11 (1968) (Warren, C.J.). In registering grave doubts about the exclusionary rule, I extend the arguments of Chief Justice Rehnquist and Justices White, Blackmun, and O'Connor. *See, e.g.*, Immigration & Naturalization Serv. v. Lopez-Mendoza, 468 U.S. 1032, 1040–50 (1984) (O'Connor, J.); United States v. Leon, 468 U.S. 897, 905–13 (1984) (White, J.); New York v. Quarles, 467 U.S. 649, 664–72 (1984) (O'Connor, J., concurring in the judgment in part and dissenting in part); California v. Minjares, 443 U.S. 916, 916–28 (1979) (Rehnquist, J., dissenting from the denial of a stay); United States v. Janis, 428 U.S. 433, 443–60 (1976) (Blackmun, J.). In stressing the need for injunctive relief to address systematic police brutality, I embrace opinions authored by Justices Marshall and Blackmun. *See, e.g.*, City of Los Angeles v. Lyons, 461 U.S. 95, 113–37 (1983) (Marshall, J., dissenting); Rizzo v. Goode, 423 U.S. 362, 381–87 (1976) (Blackmun, J., dissenting). In championing civil damage actions against wayward officials, I build on the views of Justices Brennan and Harlan. *See, e.g.*, Bivens v. Six Unknown Named Agents of

Finally, my package, taken as a whole,[5] can be understood by, and draws on the participation and wisdom of, ordinary citizens — We the People, who in the end must truly comprehend and respect the constitutional rights enforced in Our name.

Make no mistake: I come to praise the Fourth Amendment, not to gut it. It is a priceless constitutional inheritance, but we have not maintained it well. Refurbished, it is a beauty to behold, for it was once — and can once again be — one of our truly great Amendments.

I. THE MESS: A CRITIQUE

The words of the Fourth Amendment really do mean what they say. They do not require warrants, even presumptively, for searches and seizures. They do not require probable cause for all searches and seizures without warrants. They do not require — or even invite — exclusions of evidence, contraband, or stolen goods. All this is relatively obvious if only we read the Amendment's words carefully and take them seriously:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[6]

Fed. Bureau of Narcotics, 403 U.S. 388, 389–97 (1971) (Brennan, J.); *id.* at 398–411 (Harlan, J., concurring in the judgment). In championing the role of the civil jury in deciding reasonableness, I resonate with Chief Justice Rehnquist and Justice Scalia. *See, e.g., Acevedo*, 111 S. Ct. at 1992 (Scalia, J., concurring in the judgment); *Minjares*, 443 U.S. at 926 (Rehnquist, J., dissenting from the denial of a stay); *see also* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180–86 (1989) (providing a similar discussion of the civil jury).

[5] I emphasize that my package of criticisms and alternatives is offered as a whole. Because I believe my package has internal analytic integrity, I would resist partisan or ideological efforts to pick and choose, using part of my analysis while ignoring the rest. For example, "conservatives" might be tempted to use this essay to gut the exclusionary rule further while ignoring the need to build up civil remedies. But this "conservative" move would break faith with constitutional text and history. It would also leave the people less "secure in their persons, houses, papers, and effects." This would be a perversion of my purpose. "Liberals," by contrast, might be tempted to beef up both civil remedies and exclusion. But any effort to prop up or expand the exclusionary rule would also break faith with the Amendment's text and history. What's more, it too would leave the people less secure in their persons, houses, papers, and effects by (first) rewarding crimes against persons and property; (second) generating bad law, as judges strain to keep material evidence in by claiming searches were constitutional, in precedents that may then become stumbling blocks against recovery by law-abiding civil plaintiffs; and (third) rendering the Fourth Amendment contemptible in the eyes of most Americans.

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

A. Warrant Requirement?

The modern Supreme Court has claimed on countless occasions that there is a warrant requirement in the Fourth Amendment.[7] There are two variants of the warrant requirement argument — a strict (per se) variant that insists that searches and seizures always require warrants, and a looser (modified) variant that concedes the need to craft various common-sense exceptions to a strict warrant rule. Both variants fail.

1. The Per Se Approach. — The first (per se) variant interpolates but nevertheless purports to stay true to the text. The Amendment contains two discrete commands — first, all searches and seizures must be reasonable; second, warrants authorizing various searches and seizures must be limited (by probable cause, particular description, and so on). What is the relationship between these two commands? The per se approach reasons as follows: Obviously, the first and second commands are yoked by an implicit third that no searches and seizures may take place except pursuant to a warrant.[8] Although not expressing the point in so many words, the Amendment plainly presumes that warrantless searches and seizures are per se unreasonable. Surely executive officials should not be allowed to intrude on citizens in a judicially unauthorized manner. And the mode of proper judicial authorization is the warrant. Why else would the Warrant Clause exist?

Standing alone, this line of argument is initially plausible. But when all the evidence is in, we shall see that it is plainly wrong. Begin by noting that the per se interpolation is only one of several possible ways of understanding the relationship between the Amendment's two commands. Perhaps, for example, there is no logical relationship between the two: the first speaks globally to all searches and seizures whereas the second addresses the narrower issue of warrants. Or, if this reading seems insufficiently holistic, the same result obtains under a more aesthetic reformulation: warrants are not required, but any warrant that does issue is per se unreasonable if not supported by probable cause, particular description, and the rest. As we shall see, this reading ultimately squares more snugly with the Amendment's specific words, harmonizes better with its historic context, and makes considerably more common sense.[9]

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[7] *See, e.g.*, Mincey v. Arizona, 437 U.S. 385, 390 (1978); Coolidge v. New Hampshire, 403 U.S. 443, 454–55 (1971); Johnson v. United States, 333 U.S. 10, 14–15 (1948).

[8] Most proponents of the warrant requirement appear to concede that this implicit command should yield in the face of extreme urgency or necessity — as should, the proponents argue, even explicit constitutional commands.

[9] Yet another possible reading would be to infer that a search or seizure pursuant to a warrant supported by probable cause, particular description, and the other Warrant Clause requirements is per se reasonable. Although I once suggested as much, *see* Akhil Reed Amar,

If a warrant requirement was intended but not spelled out — if it simply went without saying — we might expect to find at least some early state constitutions making clear what the federal Fourth Amendment left to inference. Yet although many states featured language akin to the Fourth Amendment, none had a textual warrant requirement.[10] Of course, it could be argued that here, too, a warrant requirement was generally presumed — it went without saying. But in leading antebellum cases, the state supreme courts of Pennsylvania, New Hampshire, and Massachusetts briskly dismissed claims of implied warrant requirements under state constitutional provisions that were predecessors of, and textually quite similar to, the federal Fourth Amendment.[11] And these cases harmonize with nineteenth-century opinions from many other states.[12] Supporters of the warrant requirement have yet to locate any antebellum cases contra.

Nor have proponents of a warrant requirement uncovered even a handful of clear statements of the "requirement" in common law treatises, in the debates over the Constitution from 1787 to 1789, or in the First Congress, which proposed the Fourth Amendment. On the contrary, when we consult these and other sources, we see a number of clear examples that disprove any implicit warrant requirement.

The Bill of Rights as a Constitution, 100 YALE L.J. 1131, 1179–80 (1991), I now confess error. The requirements set out in the Warrant Clause are an absolute minimum, but the text nowhere says that warrants must issue whenever these requirements are met, or that warrants may issue when these requirements are met, even if the search or seizure would otherwise be unreasonable. The global reasonableness command applies to all searches and seizures, and in some circumstances, this command will have independent bite, precluding the issuance of a warrant even when the Warrant Clause requirements are satisfied. For an example and discussion, see p. 780 below.

[10] The following are the state predecessors of the Fourth Amendment, in order of enactment: VA. CONST. of 1776 (Declaration of Rights) § 10; PA. CONST. of 1776 (Declaration of Rights) art. X; DEL. CONST. of 1776 (Declaration of Rights) § 17; MD. CONST. of 1776 (Declaration of Rights) art. XXIII; N.C. CONST. of 1776 (Declaration of Rights) art. XI; VT. CONST. of 1777, ch. 1, § XI; MASS. CONST. of 1780, pt. I, art. XIV; N.H. CONST. of 1784, pt. I, art. XIX; VT. CONST. of 1786, ch. 1, § XII. The language from Pennsylvania, Vermont, Massachusetts, and New Hampshire most closely anticipated the eventual language of the federal Fourth Amendment.

[11] *See* Jones v. Root, 72 Mass. (6 Gray) 435, 436, 439 (1856) (upholding a warrantless seizure of liquors); Rohan v. Sawin, 59 Mass. (5 Cush.) 281, 284–85 (1850) (holding that a warrant is not required for arrest under either the national or the Massachusetts Constitution); Mayo v. Wilson, 1 N.H. 53, 60 (1817) (stating that New Hampshire's counterpart to the Fourth Amendment "does not seem intended to restrain the legislature from authorizing arrests without warrant, but to guard against abuse of warrants issued by Magistrates"); Wakely v. Hart, 6 Binn. 314, 318 (Pa. 1814) ("[I]t is nowhere said, that there shall be no arrest [i.e., seizure] without warrant. To have said so would have endangered the safety of society.").

[12] *See, e.g.*, State v. Brown, 5 Del. (5 Harr.) 505, 506–07 (Ct. Gen. Sess. 1853); Johnson v. State, 30 Ga. 426, 429–32 (1860); Baltimore & O.R.R. Co. v. Cain, 81 Md. 87, 100, 102–03 (1895); Reuck v. McGregor, 32 N.J.L. 70, 74 (Sup. Ct. 1866); Holley v. Mix, 3 Wend. 350, 353 (N.Y. Sup. Ct. 1829); Wade v. Chaffee, 8 R.I. 224, 225 (1865). These cases, from the original thirteen states, were all cited in United States v. Watson, 423 U.S. 411 (1976). *See id.* at 420.

(a) Arrests Without Warrants. — At common law, arrests — seizures of persons — could take place without warrants in a variety of circumstances. So said the major founding-era commentators.[13] In 1792 — one year after ratification of the Fourth Amendment — the Second Congress explicitly conferred this common law arrest power on federal marshals.[14] Relying on this and other broad historical evidence, the modern Supreme Court in *United States v. Watson*[15] carved out an "arrest exception" to its so-called "warrant requirement."[16] But all this raises an obvious logical problem with the "requirement" itself. If an arrest — one of the most intrusive kinds of seizures imaginable — does not require a warrant, why do less intrusive searches and seizures?[17]

(b) Searches Pursuant to Arrests. — In his brilliant study of the Fourth Amendment, Professor Telford Taylor reminds us that, since at least the seventeenth century, the common law has recognized broad authority to search an arrestee and his immediate surroundings without a search warrant, and even when the arrest itself was warrantless:

> Whether the chase was in hot pursuit, by hue and cry, or by a constable armed with an arrest warrant, the object was the person of the felon, and the weapon he had used or the goods he had stolen. A seventeenth-century work on the function of constables gives a broad description of the power of search incident to arrest. . . .
>
> Neither in the reported cases nor the legal literature is there any indication that search of the person of an arrestee, or the premises in which he was taken, was ever challenged in England until the end of the nineteenth century. When the power was belatedly contested, . . . the English courts gave the point short shrift. That the practice had the full approval of bench and bar, in the time of George III when Camden and Mansfield wrote, and when our Constitution was adopted, seems entirely clear.[18]

Indeed, Taylor goes on to remark that, even at a time when other searches for "mere evidence" were disallowed by American courts,

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[13] *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *286–92; 2 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN *85, *88–92 (Professional Books Ltd. 1987) (1736); 1 *id.* *587–88; 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 74–86 (Professional Books Ltd. 1973) (1721).

[14] *See* Act of May 2, 1792, ch. 28, § 9, 1 Stat. 264, 265 (repealed 1795).

[15] 423 U.S. 411 (1976).

[16] *See id.* at 414–24.

[17] Justice Powell justified an arrest exception on policy grounds as well as historical grounds: arrest warrants should not be required because they can grow "stale." *See id.* at 431–32 (Powell, J., concurring). But so can search warrants; thus, the double standard remains unjustified. Indeed, the policy argument boomerangs because, as a category, search warrants, which identify a place where goods are *now* believed to be, rather than a person believed to have *already committed* a crime, are more likely to grow stale than arrest warrants.

[18] TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 28–29 (1969) (footnotes omitted).

officers without warrants could search an arrestee for "mere evidence."[19]

On the basis of this and other data, the modern Supreme Court has carved out an "incident to arrest exception" to its so-called "warrant requirement" for all searches.[20] But once again, this exception seems to *dis*prove the rule: why should various less intrusive, nonarrest searches be subject to requirements that arrest searches are not?

Not only were warrants unnecessary for "mere evidence" arrest searches; but also warrants could not, historically speaking, support a search for certain types of "mere evidence." The common law search warrants referred to in the Warrant Clause were solely for stolen goods;[21] various early American statutes extended warrants to searches for smuggled or dangerous goods (gunpowder, diseased and infected items, and the like), contraband, and criminal instrumentalities.[22] If there was probable cause to believe that a place contained these items, an ex parte warrant could issue, without notice to the owner of the place, lest he be tipped off and spirit away the goods, or lest the items cause imminent harm. Even if ultimately innocent, mere possession of these items was suspicious or dangerous enough to justify summary process, and the standard for this process was probable cause. But once searches for mere evidence are allowed, wholly innocent and unthreatening citizens are much more likely to be implicated.[23] With modern forensic techniques, virtually any place could yield "evidence" of some offense, civil or criminal — fingerprints of a next door neighbor suspected of a traffic offense, carpet fibers relevant to products liability issues, and so on. Under these circumstances, the summary and ex parte procedures underlying warrants become quite problematic on due process grounds. Strictly read, the Warrant Clause applies only to search warrants akin to traditional search warrants — warrants for contraband, stolen goods, and the like.[24] Once uprooted from this soil, the Amendment's "probable cause" formulation becomes

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[19] *Id.* at 57.

[20] *See* Chimel v. California, 395 U.S. 752, 762–63 (1969).

[21] *See* TAYLOR, *supra* note 18, at 24–25; Eric Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 VA. L. REV. 869, 903 (1985) ("It must either be sworn that I have certain stolen goods, or such a particular thing that is criminal in itself, in my custody, before any magistrate is authorized to grant a warrant to any man to enter my house and seize it." (quoting a 1765 English pamphlet by the Father of Candor)).

[22] *See* TAYLOR, *supra* note 18, at 44–45, 62, 98–99.

[23] *See* Entick v. Carrington, 19 Howell's State Trials 1029, 1073 (C.P. 1765) (Camden, C.J.) ("I wish some cases had been shewn, where the law forceth evidence out of the owner's custody by process. . . . [A] search for evidence is disallowed upon the [principle that] the innocent would be confounded with the guilty.").

[24] The Amendment also applies, of course, to arrest warrants and other warrants authorizing "seizure" of the "person." Here I consider only search warrants. For more discussion of search warrants for "mere evidence," see note 26 and p. 780 below.

awkward and oppressive. (There is always probable cause to believe the government will find *something* in a house — walls, for example — yet surely *that* kind of probable cause cannot suffice to support an ex parte warrant.) The upshot is not that government may never conduct reasonable searches for "mere evidence" like a murderer's bloodstained shirt, believed to be stashed in the car of an unsuspecting neighbor — that would be silly[25] — but that the *Warrant Clause* cannot always be stretched to reach these searches.[26] And this straightforward result is yet another signal that many of the most important searches and seizures can and must take place without warrants.

(c) Searches of Ships Under the Act of 1789. — In a statute passed during the same session in which it adopted the Fourth Amendment, the First Congress pointedly authorized federal naval inspectors to enter ships without warrants and, again without warrants, to search for and to seize any goods that they suspected violated customs laws.[27] Similar provisions were contained in congressional acts passed in 1790, 1793, and 1799.[28] Other provisions of the 1789 Act authorized, but did not require, warrants to search houses, stores, and buildings; the statute did not say that no search or seizure could occur without a warrant, but only that, under certain conditions, naval officers and customs collectors would "be entitled to a warrant."[29]

If any members of the early Congresses objected to or even questioned these warrantless searches and seizures on Fourth Amendment

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[25] Though silly, this was apparently the rule announced in Gouled v. United States, 255 U.S. 298 (1921), *see id.* at 308–11, which stood until overruled in Warden v. Hayden, 387 U.S. 294 (1967), *see id.* at 300–10.

[26] Thus, the facts of *Gouled*, which involved a search warrant, should have led the Court to rein in search warrants for mere evidence in the possession of innocent third parties. Because the *Gouled* Court seemed to think that searches generally required warrants, *see Gouled*, 255 U.S. at 308, it apparently misframed its "mere evidence rule" as a silly ban on all searches for mere evidence, rather than as a sensible ban on all ex parte warrants for wholly innocent evidence held by an unsuspecting third party. *See infra* p. 780. In fact, the key language of *Gouled* is ambiguous — the Court repeatedly speaks of the law applicable to "search warrants," *see id.* at 308–11. Later courts would have done well to read its rule as limited to search warrants.

Nor does the early landmark case of Entick v. Carrington, 19 Howell's State Trials 1029 (C.P. 1765), support a broad ban on warrantless searches for mere evidence, for the facts of that case also involved a warrant, and Lord Camden's key phrase declared only that the law does not "force[] evidence out of the owner's custody *by process*," *id.* at 1073 (emphasis added). Professor Taylor has noted that there has never been a general rule in England against seizures of purely evidentiary material. *See* TAYLOR, *supra* note 18, at 61; *see also id.* at 53 ("Camden was simply observing . . . that neither statute nor common law authorized the use of *search warrants* to obtain evidence of crime." (emphasis added)); *infra* note 87.

[27] *See* Act of July 31, 1789, ch. 5, § 24, 1 Stat. 29, 43 (repealed 1790).

[28] *See* Act of Mar. 2, 1799, ch. 22, § 68, 1 Stat. 627, 677 (repealed 1922); Act of Feb. 18, 1793, ch. 8, § 27, 1 Stat. 305, 315; Act of Aug. 4, 1790, ch. 35, § 48, 1 Stat. 145, 170 (repealed 1799).

[29] Act of July 31, 1789, ch. 5, § 24, 1 Stat. 29, 43 (repealed 1790).

grounds, supporters of the so-called warrant requirement have yet to identify them.

(d) Successful Searches and Seizures. — At common law, it seems that nothing succeeded like success. Even if a constable had no warrant, and only weak or subjective grounds for believing someone to be a felon or some item to be contraband or stolen goods, the constable could seize the suspected person or thing. The constable acted at his peril. If wrong, he could be held liable in a damage action. But if he merely played a hunch and proved right — if the suspect *was* a felon, or the goods *were* stolen or contraband — this ex post success apparently was a complete defense.[30] Variants of the ex post success defense appeared prominently in several landmark English cases that inspired the Fourth Amendment[31] and in the 1818 Supreme Court case of *Gelston v. Hoyt*,[32] authored by Justice Story.[33] We shall return to this point later, but for now it is yet another historical example casting doubt on the so-called warrant requirement.

Other historical examples exist, but the four we have already considered suffice to make clear that, if a warrant requirement truly did go without saying, leading eighteenth- and nineteenth-century authorities did not think so.

Of course, this hardly ends the matter. Perhaps early judges and lawmakers simply misunderstood the true spirit of the principles the Constitution embodied. For example, less than a dozen years after the adoption of the Constitution and the ratification of the Bill of Rights, Congress passed and federal judges upheld the now-infamous Sedition Act. Surely this Act was unconstitutional in any number of ways. And surely the self-serving actions of early Congresses and judges do not end the matter. Is it possible that in the Fourth Amendment, too, the early implementation betrayed the underlying principle?

No. The problem with the so-called warrant requirement is not simply that it is not in the text and that it is contradicted by history. The problem is also that, if taken seriously, a warrant requirement

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[30] *See* Gelston v. Hoyt, 16 U.S. (3 Wheat.) 246, 310 (1818) (Story, J.) ("At common law, any person may at his peril, seize for a forfeiture to the government; and if the government adopt his seizure, and the property is condemned, he will be completely justified . . . ."); 2 HAWKINS, *supra* note 13, at 77 ("And where a Man arrests another, who is actually guilty of the Crime for which he is arrested, it seems, That he needs not in justifying it, set forth any special Cause of his Suspicion, but may say in general, that the Party feloniously did such a Fact, for which he arrested him . . . ." (citation omitted)).

[31] *See, e.g.*, Entick v. Carrington, 19 Howell's State Trials 1029, 1067 (C.P. 1765); Money v. Leach, 97 Eng. Rep. 1075, 1082–83 (K.B. 1765); Wilkes v. Wood, 19 Howell's State Trials 1153, 1166 (C.P. 1763), 98 Eng. Rep. 489, 498.

[32] 16 U.S. (3 Wheat.) 246 (1818).

[33] *See id.* at 310. For further illustrations of the ex post defense, see Johnson v. Tompkins, 13 F. Cas. 840, 845, 849 (C.C.E.D. Pa. 1833) (No. 7416) (Baldwin, Cir. J.); Rohan v. Sawin, 59 Mass. (5 Cush.) 281, 284–85 (1850); Wakely v. Hart, 6 Binn. 316, 318–19 (Pa. 1814).

makes no sense. Consider just a few common-sense counterexamples to the notion that all searches and seizures must be made pursuant to warrants.

(e) Exigent Circumstances. — In a wide range of fast-breaking situations — hot pursuits, crimes in progress, and the like — a warrant requirement would be foolish. Recognizing this, the modern Supreme Court has carved out an "exigent circumstances exception" to its so-called warrant requirement.[34]

(f) Consent Searches. — If government officials obtain the uncoerced authorization of the owner or apparent owner, surely they should be allowed to search a place, even without a warrant. And the modern Supreme Court has so held. It is tempting to claim that this is no exception to a warrant requirement but merely a "waiver" of Fourth Amendment rights by the target of a search. However, the waiver argument surely cannot justify *A*'s "waiving" *B*'s Fourth Amendment rights, and yet the Court has allowed searches when a wife consented to a search of her husband's property.[35] It has also upheld searches when the consenting party did not really have authority to permit the police to search — because, say, someone else was the true owner — but the police reasonably thought the consenter was the owner.[36] The explicit logic here has been that, even though the police had neither a true warrant nor a true waiver, they acted *reasonably*.[37] But this is a recognition that reasonableness — not a warrant — is the ultimate touchstone for all searches and seizures.

(g) Plain View Searches. — When a Secret Service agent at a presidential event stands next to her boss, wearing sunglasses and scanning the crowd in search of any small signal that something might be amiss, she is searching without a warrant. Yet surely this must be constitutional, and the Supreme Court has so suggested. At times, however, the Court has played word games, insisting that sunglass or naked-eye searches are not really searches.[38] But if high-tech binoculars, or x-ray glasses are used, then maybe . . . .[39]

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[34] *See* Warden v. Hayden, 387 U.S. 294, 298–300 (1967).

[35] *See, e.g.*, United States v. Matlock, 415 U.S. 164, 169–71 (1974).

[36] *See, e.g.*, Illinois v. Rodriguez, 497 U.S. 177, 183–86 (1990).

[37] *See id.* at 183, 186.

[38] *See, e.g.*, Arizona v. Hicks, 480 U.S. 321, 328 (1987) (holding that merely looking at a turntable is not a "search"). Perhaps merely looking without touching is not a "seizure," but it surely should count as a "search" for one who believes in plain meaning, as does Justice Scalia, the author of *Hicks*. *See infra* note 40.

A far more egregious example comes from the Court's so-called open-field doctrine, whereby trespassing on a person's property, climbing over her fences and peering into her barns is somehow not a search; nor, apparently, is hovering over an enclosed backyard with a helicopter. *See* United States v. Dunn, 480 U.S. 294, 297–98, 300–01 (1987); California v. Ciraolo, 476 U.S. 207, 215 (1986).

[39] *See* Dow Chem. Co. v. United States, 476 U.S. 227, 238 (1986); United States v. Karo, 468 U.S. 705, 716 (1984).

These word games are unconvincing and unworthy. A search is a search, whether with Raybans or x-rays.[40] The difference between these two searches is that one may be much more reasonable than another. In our initial hypothetical, the search is public — the agent is out in the open for all to see; nondiscriminatory — everyone is scanned, not just, say, blacks; unintrusive — no x-ray glasses or binoculars here; consented to — when one ventures out in public, one does assume a certain risk of being seen; and justified — the President's life is on the line. But change these facts, and the outcome changes — not because a nonsearch suddenly becomes a search, but because a search at some point becomes *unreasonable*. (Imagine, for example, a government policy allowing government officials, as a perk of power, to stand unobservably under bleachers and take snapshots of women's panties.[41])

Because it creates an unreasonable mandate for all searches, the warrant requirement leads judges to artificially constrain the scope of the Amendment itself by narrowly defining "search" and "seizure." If a "search" or a "seizure" requires only reasonableness rather than warrants, however, judges will be more likely to define these terms generously.[42] (Interestingly, in the landmark *Katz* case, the Court, perhaps unconsciously, smuggled reasonableness into the very definition of the Amendment's trigger: the Amendment comes into play whenever government action implicates a "reasonable expectation of privacy."[43])

(h) Real Life. — Finally, consider the vast number of real-life, unintrusive, non-discriminatory searches and seizures to which modern day Americans are routinely subjected: metal detectors at airports, annual auto emissions tests, inspections of closely regulated industries, public school regimens, border searches, and on and on. All of these occur without warrants. Are they all unconstitutional? Surely not, the Supreme Court has told us, in a variety of cases.[44] What the

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[40] Or with the naked eye. The *Oxford English Dictionary* includes the following definition, among others, of the verb "search": "To look scrutinizingly at." 14 OXFORD ENGLISH DICTIONARY 806 (2d ed. 1989). The dictionary then proceeds to feature examples from O.W. Holmes: "He searched her features through and through;" and Augusta Wilson: "While he drank, his eyes searched her face, and lingered admiringly on her beautiful hand." *Id.*

[41] The example is intentionally gendered. *See infra* p. 809.

[42] Thus, Justice Scalia's repudiation of the warrant requirement in California v. Acevedo, 111 S. Ct. 1982 (1991), *see id.* at 1992 (Scalia, J. concurring in the judgment) frees him to adopt a more straightforward definition of "search" than the one his acceptance of the requirement shoehorned him into in *Hicks*, *see supra* note 38.

[43] Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). Although the phrase comes from Justice Harlan's concurring opinion, later Court opinions have taken it to distill the essence of the *Katz* majority. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 9 (1968).

[44] *See, e.g.*, National Treasury Employees Union v. Von Raab, 489 U.S. 656, 675 n.3 (1989) (airline passenger search); New Jersey v. T.L.O., 469 U.S. 325, 337–43 (1985) (public school search); Delaware v. Prouse, 440 U.S. 648, 660 (1979) (annual auto safety inspection); United

Court has not clearly explained, however, is how all these warrantless searches are consistent with its so-called warrant requirement.

It is no answer to point out that most of these searches are designed to enforce not "criminal" but "civil" laws — safety codes, pollution laws, and the like. The text of the Amendment applies equally to both civil and criminal law.[45] The unsupported idea that the "core" of the Amendment is somehow uniquely or specially concerned with criminal law is simply an unfortunate artifact of the equally unsupported exclusionary rule. If two searches are equally unintrusive to the target, why should the criminal search be more severely restricted than the civil search — especially if the target is not herself a suspect, but merely, say, an innocent possessor of evidence?[46] In any event, aren't metal detectors there to detect and deter crimes like attempted hijacking? And what about warrantless weapons frisks conducted by police officials as a routine part of their criminal enforcement policy?[47]

We have now seen at least eight historical and commonsensical exceptions to the so-called warrant requirement. There are many others[48] — but I am a lover of mercy. And by now I hope the point is clear: it makes no sense to say that all warrantless searches and seizures are per se unreasonable.

2. The Modified Per Se Approach. — At this point, a supporter of the so-called warrant requirement is probably tempted to concede some exceptions and modify the per se claim: warrantless searches and seizures are per se unreasonable, save for a limited number of well-defined historical and commonsensical exceptions.

This modification is clever, but the concessions give up the game. The per se argument is no longer the textual argument it claimed to

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States v. Martinez-Fuerte, 428 U.S. 543, 564–66 (1976) (border crossing search); United States v. Biswell, 406 U.S. 311, 316 (1972) (inspection of pervasively regulated business). In *T.L.O.*, the warrantless search was arguably both selective and intrusive; a fortiori, unintrusive and nondiscriminatory searches in public schools would seem permissible.

[45] As we have seen, the Warrant Clause does plainly presuppose a search for items akin to contraband or stolen goods. *See supra* pp. 765–66. But the possession of these items may be unknowing and wholly innocent; and the search warrant, strictly speaking, does not run against a criminal suspect, but against a place. *See* TAYLOR, *supra* note 18, at 60. As Professor Taylor notes, a search warrant is quasi-in-rem. *See id.* Most important, the first Clause of the Fourth Amendment explicitly addresses *all* searches and seizures, not just criminal ones. *See* U.S. CONST. amend. IV.

[46] It will not do to point to the greater trial protections accorded criminal defendants over civil litigants (proof beyond reasonable doubt, and so on). These procedural rights do not even begin to attach until one becomes "accused" in some way; and many searches and seizures, even of criminal suspects, occur well before this point.

[47] *See* Terry v. Ohio, 392 U.S. 1, 30–31 (1968).

[48] Consider, for example, grand jury and legislative subpoenas, *see* Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 208–09 (1946); automobile searches, *see* Carroll v. United States, 267 U.S. 132, 147–53 (1925); and prison searches, *see* Hudson v. Palmer, 468 U.S. 517, 522–30 (1984).

be; it no longer merely specifies an implicit logical relationship between the reasonableness command and the Warrant Clause. To read in a warrant requirement that is not in the text — and then to read in various non-textual exceptions to that so-called requirement — is not to read the Fourth Amendment at all. It is to rewrite it. What's more, in conceding that, above and beyond historical exceptions, common sense dictates various additional exceptions to the so-called warrant requirement, the modification seems to concede that the ultimate touchstone of the Amendment is not warrants, but reasonableness.[49]

According to the modified approach, the Framers did not say what they meant, and what they meant — warrants, always — cannot quite be taken seriously, so today we must make reasonable exceptions. On my reading, the Framers did say what they meant, and what they said makes eminent good sense: all searches and seizures must be reasonable. Precisely because these searches and seizures can occur in all shapes and sizes under a wide variety of circumstances, the Framers chose a suitably general command.

3. The Per Se Unreasonableness of Broad Warrants. — If all this is so, why has the Court continued to pay lip service to the so-called warrant requirement? What *is* the purpose of the Warrant Clause, and how does it relate to the more general command of reasonableness? And what is wrong with the logic that drives the warrant requirement — namely, that executive officials should be prohibited from searching and seizing without judicial approval, and that the Warrant Clause specifies the proper mode of this approval?

To anticipate my answers to these related questions: Perhaps the Justices have been slow to see the light because they do not understand that juries, not judges, are the heroes of the Founders' Fourth Amendment story. Indeed, at times, the Founders viewed judges and certain judicial proceedings with suspicion; this unflattering truth may not immediately suggest itself to modern-day judges.[50] The Amendment's Warrant Clause does not require, presuppose, or even encourage warrants — it *limits* them. Unless warrants meet certain strict standards, they are per se unreasonable. The Framers did not exalt warrants, for a warrant was issued ex parte by a government official on the

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[49] Although the text of the Fourth Amendment speaks of the reasonableness of the underlying search or seizure, the modification shifts the focus to the reasonableness of bypassing the warrant. The textual and historical basis for this shift is shaky. Searches under warrants that meet all the conditions of the Warrant Clause are not per se reasonable. *See supra* note 9; *infra* p. 780. Nor are they somehow "preferred" — a word nowhere in the Fourth Amendment. As we shall see, the Framers most clearly did not prefer a warrant regime to the civil jury regime that warrants were designed to displace. *See infra* pp. 774–79.

[50] For a more charitable explanation of how judges came to stand the Fourth Amendment on its head, see TAYLOR, cited above in note 18, at 44–46.

imperial payroll and had the purpose and effect of precluding any common law trespass suit the aggrieved target might try to bring before a local jury after the search or seizure occurred. The logic driving the warrant requirement is doubly flawed: it sees warrants as judicial, when they often lack judicial attributes, and it ignores the after-the-fact judicial review that the common law furnished against warrantless intrusions, in which the jury loomed large.

Begin with the doubly flawed logic driving the warrant requirement. Consider the person who issues the warrant. In England, certain Crown *executive* officials regularly exercised this warrant power.[51] We need only recall the facts of the 1763 English case, *Wilkes v. Wood*,[52] whose plot and cast of characters were familiar to every schoolboy in America, and whose lessons the Fourth Amendment was undeniably designed to embody. *Wilkes* — and not the 1761 Boston writs of assistance controversy, which went almost unnoticed in debates over the federal Constitution and Bill of Rights[53] — was *the* paradigm search and seizure case for Americans. Indeed, it was probably the most famous case in late eighteenth-century America, period.[54] In *Wilkes*, a sweeping warrant had been issued by a Crown officer, Secretary of State Lord Halifax. In colonial America, Crown executive officials, including royal Governors, also claimed authority to issue warrants.[55] Well into the twentieth century, states

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[51] *See id.* at 26–27.

[52] 19 Howell's State Trials 1153 (C.P. 1763), 98 Eng. Rep. 489.

[53] The leading historical account of the Fourth Amendment found only a single reference to the writs of assistance in debates leading up to the Amendment, and that reference came from the pen of Mercy Otis Warren, the sister of the colonial lawyer James Otis, who argued the writs of assistance case. For details, see Amar, *supra* note 9, at 1176 n.208. *Cf.* Wasserstrom, *supra* note 1, at 285 n.149 (citing evidence questioning the importance of Otis's speech).

[54] John Wilkes, a flamboyant member of Parliament, published an anonymous attack on the majesty and ministry of King George III in a 1763 pamphlet, *The North Briton Number 45*. The pamphlet enraged the ministry, which issued a general search and arrest warrant against the pamphlet's publishers and printers. No names were listed in the warrants; it authorized henchmen to round up the usual suspects and gave the henchmen discretion to decide who those suspects were. Wilkes's house was broken into; his private papers were rifled, read, and seized; and he was arrested and imprisoned in the Tower of London. After winning release on habeas corpus, Wilkes and some of the other fifty or so search targets brought hugely successful civil damage suits against the offending agents. The *Wilkes* case was a cause célèbre in the colonies, where "Wilkes and Liberty" became a rallying cry for all those who hated government oppression. Americans across the continent named cities, counties, and even children in honor of Wilkes and the libertarian judge, Lord Camden. Witness, for example, Camden, New Jersey; Camden, South Carolina; Wilkes-Barre, Pennsylvania; Wilkes County, Georgia; Wilkes County, North Carolina; and of course, John Wilkes Booth. For more on Wilkes, see PAULINE MAIER, FROM RESISTANCE TO REVOLUTION 162–69 (1972); RAYMOND W. POSTGATE, THAT DEVIL WILKES (1929); GEORGE RUDÉ, WILKES AND LIBERTY (1962); and Pauline Maier, *John Wilkes and American Disillusionment with Britain*, 20 WM. & MARY Q. 373 (1963).

[55] Consider, for example, Massachusetts Governor William Shirley's efforts in 1753 to issue gubernatorial warrants. *See* Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 221 (1992).

vested warrant-issuing authority in justices of the peace — even when such justices also served as prosecutors — and today, states confer warrant authority on clerks and "magistrates" who are neither lawyers nor judges[56] and who at times look rather like police chiefs.[57]

Even when a judge issued a warrant, revolutionary Americans greeted the event with foreboding. Prior to the Revolution, American judges lacked the independence from the Crown that their British brothers had won after the Glorious Revolution.[58] Sitting at the pleasure of the monarch, the King's judicial magistrates in America were at times hard to distinguish from His executive magistrates — especially when a single Crown lackey wore several hats, as often occurred.[59] Nor did the foreboding disappear after the Revolution, when American judges won a measure of institutional independence from the executive branch. Even an Article III judge, after all, had been appointed by the President, looked to the President for possible promotion to a higher court, and drew his salary from the government payroll. What's more, such a judge was an official of the central government — perhaps not so imperial as his Crown-directed colonial predecessors, but suspicious nonetheless. Would the handful of elite federal judges truly be able to empathize with the concerns of ordinary folk? And a single bad apple could spoil the bunch; if even one federal judge was a lord or a lackey, executive officials shopping for easy warrants would know where to go. Far more trustworthy were twelve men, good and true, on a local jury, independent of the government, sympathetic to the legitimate concerns of fellow citizens, too numerous to be corrupted, and whose vigilance could not easily be evaded by governmental judge-shopping.

Consider next the process by which warrants issued in eighteenth-century America. This, too, was hardly likely to inspire enthusiasm for a blanket warrant requirement. The typical search warrant for stolen goods or contraband was issued at the request of an accuser or the government, ex parte, with no notice or opportunity to be heard afforded the target.[60] Lacking the adverse presentation characteristic

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[56] *See, e.g.*, Shadwick v. City of Tampa, 407 U.S. 345, 347–54 (1972) (upholding a nonlawyer-clerk-as-magistrate scheme); Coolidge v. New Hampshire, 403 U.S. 443, 449–53 (1971) (imposing some limits on who could issue warrants, but falling far short of banning all nonjudicial warrants).

[57] Actually, this description may not be quite fair to police chiefs, who probably have more direct, routine contact with the citizenry subject to search and seizure than do warrant clerks, who typically hear only the cops' side of the story.

[58] *See* BERNARD BAILYN, THE ORIGINS OF AMERICAN POLITICS 68 (1968).

[59] *See* William E. Nelson, *Emulating the Marshall Court: The Applicability of the Rule of Law to Contemporary Constitutional Adjudication*, 131 U. PA. L. REV. 489, 489 (1982) (book review).

[60] *See, e.g.*, Act of July 31, 1789, ch. 5, § 24, 1 Stat. 29, 43 (repealed 1790); TAYLOR, *supra* note 18, at 24–25.

of Anglo-American judicial proceedings, the summary warrant procedure was justified only because of a unique combination of highly suspicious or dangerous circumstances: there was very good reason — probable cause — to think that an owner, however ultimately innocent of personal wrongdoing, was harboring something he had no right to have in the first place. Outside this narrow situation — particular description, probable cause, and items akin to contraband or stolen goods — the ex parte search warrant had the potential to become an engine of great oppression.

What would happen if no warrant issued? Here we come to the second big error in the doubly flawed logic driving the warrant requirement. Warrantless intrusions were hardly immune from judicial review in the early years of the Republic. Rather, any official who searched or seized could be sued by the citizen target in an ordinary trespass suit — with both parties represented at trial and a jury deciding between the government and the citizen. If the jury deemed the search or seizure unreasonable — and reasonableness was a classic jury question[61] — the citizen plaintiff would win and the official would be obliged to pay (often heavy) damages. Any federal defense that the official might try to claim would collapse, trumped by the finding that the federal action was unreasonable, and thus unconstitutional under the Fourth Amendment, and thus no defense at all.

Fearing this, federal officials would try to get ex parte warrants whenever they could, for a lawful warrant would provide — indeed, was designed to provide — an absolute defense in any subsequent trespass suit.[62] Warrants then, were friends of the searcher, not the searched. They had to be limited; otherwise, central officers on the government payroll in ex parte proceedings would usurp the role of the good old jury in striking the proper balance between government and citizen after hearing lawyers on both sides.

Now we can see why the Fourth Amendment text most emphatically did not require warrants — why, indeed, its reference to warrants is so plainly negative: "*no* Warrants shall issue, but . . . ."[63] The Warrant Clause says only when warrants may not issue, not when they may, or must. Even if all the minimum prerequisites spelled out in the Warrant Clause are met, a warrant is still unlawful, and may not issue, if the underlying search or seizure it would authorize would be unreasonable.

The history of the federal Bill of Rights powerfully supports this textual analysis. In every state constitution prior to the federal Bill, "the warrant is treated as an enemy, not a friend."[64] No state con-

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[61] *See infra* pp. 776, 818–19.

[62] *See infra* pp. 778–79.

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

[64] TAYLOR, *supra* note 18, at 41.

vention proposes a warrant requirement for the federal Bill of Rights.[65] And in early drafts of the federal Fourth, it is the loose warrant, not the warrantless intrusion, that is explicitly labeled "unreasonable."[66]

History also reveals strong linkages between the Fourth and Seventh Amendments that previous clause-bound scholarship about each Amendment in isolation has overlooked. All the major English cases that inspired the Fourth Amendment were civil jury actions, in which defendant officials unsuccessfully tried to use warrants as shields against liability.[67] Indeed, in *Wilkes v. Wood* itself, plaintiff's attorneys went out of their way to stress the jury's role:

> That the constitution of our country had been so fatally wounded, that it called aloud for the redress of a jury of Englishmen . . . . He then congratulated the jury, that they now had in their power, the present cause . . . . [T]he jury would effectually prevent the question

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[65] *See* 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 665, 733–34, 841–42, 913, 968 (1971) (recording the proto-Fourth Amendments proposed in Pennsylvania, Maryland, Virginia, New York, and North Carolina).

[66] *Id.* at 1027; *see also* Entick v. Carrington, 19 Howell's State Trials 1029, 1039 (C.P. 1765), 95 Eng. Rep. 807, 812 (labeling overbroad warrants "unreasonable or unlawful" (reporting the oral argument of the plaintiff's counsel)).

This seems a good place to attack the widespread canard that the ultimate wording of the Fourth Amendment need not be taken seriously, because it was a result of happenstance, not careful consideration. The final language of the Amendment, the story goes, was initially proposed by New York Congressman Egbert Benson and voted *down* by the first Congress. Later, Benson, as chairman of the style committee, stubbornly rewrote the Amendment in his pet language, and slyly slipped it past an inattentive House. *See, e.g.*, Maclin, *supra* note 55, at 208–09 (repeating the canard and labeling it "undisputed history").

The canard is triply troubling. First, it is quite possible that Benson's initial proposal *passed*, and that the House reporter Thomas Lloyd misrecorded the vote — as he did on several other occasions, involving other provisions of the Bill of Rights. *See, e.g.*, EDWARD DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 35 n.6, 41 n.28, 42 n.32 (1957). Scribal error is highly consistent with everything serious historians know about Lloyd. *See* James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 35–38 (1986). Contrary to the canard, the House and Senate treated the final wording of their proposed amendments with great care, as is obvious from many other textual fine-tunings. *See* 2 SCHWARTZ, *supra* note 65, at 1145–67. Second, the canard fails to do justice to the Constitution's textuality and to its text — a text adopted by supermajorities of both houses and ratified by a supermajority of states. Third, if the lack of an explicit warrant requirement were simply a drafting accident in the first Congress, we still could not easily account for the widespread absence or explicit rejection of the warrant requirement everywhere else — in common law treatises, state constitutions, early state cases, early federal cases, founding era deliberations generally, state ratifying conventions, and so on.

[67] *See* Wilkes v. Halifax, 19 Howell's State Trials 1406 (C.P. 1769); Entick v. Carrington, 19 Howell's State Trials 1029 (C.P. 1765), 95 Eng. Rep. 807; Money v. Leach, 19 Howell's State Trials 1001 (K.B. 1765), 97 Eng. Rep. 1075; Beardmore v. Carrington, 19 Howell's State Trials 1405 (C.P. 1764), 95 Eng. Rep. 790; Wilkes v. Wood, 19 Howell's State Trials 1153 (C.P. 1763), 98 Eng. Rep. 489; Huckle v. Money, 19 Howell's State Trials 1404 (C.P. 1763), 95 Eng. Rep. 768.

> from being ever revived again. He therefore recommends it to them to embrace this opportunity . . . of instructing those great officers in their duty, and that they (the jury) would now erect a great sea mark, by which our state pilots might avoid, for the future, those rocks upon which they now lay shipwrecked.[68]

A companion case featured the following noteworthy passage: "'Whether there was a probable cause or ground of suspicion' was a matter for the jury to determine: that is not now before the Court. So [too with the issue] 'whether the defendants detained the plaintiff an *unreasonable* time.'"[69] Here we have clear evidence of the role of the civil jury in deciding the reasonableness of government searches and seizures — and from none other than Lord Mansfield, a judge with notoriously statist sympathies.[70]

On this side of the Atlantic, Americans enthusiastically embraced the role of the civil jury in government search and seizure cases. Consider, for example, the words of a Pennsylvania Anti-Federalist in a 1787 essay:

> [If a federal constable searching] for stolen goods, pulled down the clothes of a bed in which there was a woman and searched under her shift . . . a trial by jury would be our safest resource, heavy damage would at once punish the offender and deter others from committing the same; but what satisfaction can we expect from a lordly [judge] always ready to protect the officers of government against the weak and helpless citizens . . . .[71]

In the Pennsylvania ratifying convention, Robert Whitehill made a similar point, though less colorfully, by invoking "the Case of Mr. Wilkes" — a trespass action that had been tried to a jury — and reminding his audience that "the Doctrine of general Warrants show[s] that Judges may be corrupted."[72] To similar effect was the Anti-Federalist essayist Hampden: "Without [a jury] in civil actions, no relief can be had against the High Officers of State, for abuse of

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[68] *Wilkes*, 19 Howell's State Trials at 1154–55, 98 Eng. Rep. at 490.

[69] *Leach*, 19 Howell's State Trials at 1026, 97 Eng. Rep. at 1087 (quoting the plaintiff's allegations (emphasis added)).

[70] *See* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 123 (1967); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 10, 299 n.66 (1969); Alan H. Scheiner, Note, *Judicial Assessment of Punitive Damages, The Seventh Amendment, and the Politics of Jury Power*, 91 COLUM. L. REV. 142, 150 n.40 (1991).

[71] PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787–1788, at 154 (John B. McMaster & Frederick D. Stone eds., 1888). This essay has recently been reprinted, *see Essay of A Democratic Federalist, reprinted in* 3 THE COMPLETE ANTI-FEDERALIST 58, 61 (Herbert J. Storing ed., 1981).

[72] PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787–1788, *supra* note 71, at 782; 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 526 (Merrill Jensen ed., 1976).

private citizens . . . ."[73] Government officials shared Hampden's sense of the importance of the civil jury in proto-Fourth Amendment cases, as shown by a mournful 1761 comment of Massachusetts royal Governor Bernard in response to a citizen trespass suit: "A Custom house officer has no chance with a jury."[74]

The Fourth-Seventh Amendment linkage was especially visible in the Maryland ratification debates. The prominent Anti-Federalist essayist, Maryland Farmer, set the tone:

> [S]uppose for instance, that an officer of the United States should force the house, the asylum of a citizen, by virtue of a general warrant, I would ask, are general warrants illegal by the [C]onstitution of the United States? . . . [N]o remedy has yet been found equal to the task of deterring and curbing the insolence of office, but a jury — [i]t has become an invariable maxim of English juries, to give ruinous damages whenever an officer had deviated from the rigid letter of the law, or been guilty of any unnecessary act of insolence or oppression. [By contrast,] an American judge, who will be judge and jury too [would probably] spare the public purse, if not favour a brother officer.[75]

The firebreathing Luther Martin also clearly had in mind what we now call "Fourth Amendment cases" in emphasizing the importance of juries

> [in] every case, whether civil or criminal, between government and its officers on the one part and the subject or citizen on the other.
>
> [Without civil juries] every arbitrary act of the general government, and every oppression of [its officers] for the collection of taxes, duties, imports, excise, and other purposes must be submitted to by the individual . . . .[76]

Notes from a speech delivered by Marylander Samuel Chase suggest that the future Justice likewise saw juries and warrants as linked and stressed the need for civil juries in trespass suits against government "officers."[77] In response, a Maryland ratifying convention committee recommended a federal constitutional amendment requiring civil jury trial in "all cases of trespasses" — plainly contemplating *government*

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[73] *Essays by Hampden, reprinted in* 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 71, at 198, 200.

[74] *Notes on* Erving v. Cradock, *in* JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY BETWEEN 1761 AND 1772, at 553, 557 (1865).

[75] *Essays by a Farmer (I), reprinted in* 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 71, at 5, 14.

[76] *Genuine Information of Luther Martin, in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 71, at 27, 70–71. Publius's discussion of the civil jury directly responds to this passage, *see* THE FEDERALIST NO. 83, at 500 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[77] *Notes of Samuel Chase (IIB), in* 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 71, at 82, 82.

officer trespasses — and prohibiting appellate relitigation of the jury's factual findings.[78] Committee members went on to warn that loose warrants should be "forbidden to those magistrates who are to administer the general government."[79]

Whereas the modern Court has described how a warrant reassures a search target,[80] earlier judges understood how it barred a target from suing after the fact. Indeed, the immunity it conferred was part of its very purpose, its definition; as Lord Mansfield put it in 1785, it would be a "solecism" if "the regular execution of a legal warrant shall be a trespass."[81] Speaking not merely of general warrants, but of all warrants, the Supreme Court of Kentucky in 1829 described search warrant process as uniquely "distressing to the citizen" because of its "humiliating and degrading effects."[82] In 1859, the Massachusetts Supreme Judicial Court, with Lemuel Shaw presiding, proclaimed that the purpose of the state counterpart to (and prototype of) the federal Fourth was not to encourage or require warrants, but "strictly and carefully to limit, restrain and regulate" them.[83] And both the nineteenth- and twentieth-century editions of Judge Thomas Cooley's monumental treatise on constitutional law describe *all* search warrants as:

> a species of process exceedingly arbitrary in character, and which ought not to be resorted to except for very urgent and satisfactory reasons, the rules of law which pertain to them are of more than ordinary strictness . . . .[84]

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[78] 2 SCHWARTZ, *supra* note 65, at 733.

[79] *Id.* at 733–34. For further, more subtle, linkages between what would become the Fourth and Seventh Amendments, see the back-to-back references to these ideas in Letter from James Madison to George Eve (Jan. 2, 1789), *in* 2 SCHWARTZ, *supra* note 65, at 997; *Letters of Centinel* (I), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 71, at 136; *Letters from the Federal Farmer (IV), reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 71, at 249; *Essays of Brutus (II), reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 71, at 375; *An Old Whig (V), reprinted in* 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 71, at 37; *Objections of a Son of Liberty, reprinted in* 6 THE COMPLETE ANTI-FEDERALIST, *supra* note 71, at 34–35.

[80] *See* Michigan v. Tyler, 436 U.S. 499, 508 (1978); Camara v. Municipal Court, 387 U.S. 523, 532 (1967).

[81] Cooper v. Boot, 99 Eng. Rep. 911, 916 (K.B. 1785); *see also* Johnson v. Tompkins, 13 F. Cas. 840, 845 (C.C. E.D. Pa. 1833) (No. 7416) (Baldwin, Cir. J.) (describing the immunity from trespass liability conferred by "lawful warrant" as "an incontestable principle of the law"). The word "warrant," as used in the Fourth Amendment, thus fused together preclearance with immunity. On the possibility today of requiring forms of judicial preclearance that would not necessarily immunize, see p. 810 below.

[82] Reed v. Rice, 25 Ky. (2 J.J. Marsh.) 44, 46 (1829).

[83] Robinson v. Richardson, 79 Mass. (13 Gray) 454, 457 (1859).

[84] 1 THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 618 (8th ed. 1927); THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON

Indeed, even some modern Justices have at times understood that at least arrest warrants were friends of the government, not the citizen:

> Far from restricting the constable's arrest power, the institution of the warrant was used to expand that authority by giving the constable delegated powers of a superior officer such as a justice of the peace. Hence at the time of the Bill of Rights, the warrant functioned as a powerful tool of law enforcement rather than as a protection for the rights of criminal suspects.[85]

What was true of warrants to arrest persons was likewise true of warrants to search and seize property. As Blackstone put it, "a lawful warrant will at all events indemnify the officer, who executes the same ministerially."[86]

But what, precisely, *is* a lawful warrant under the Fourth Amendment? Beneath this seemingly simple question lurks considerable complexity, especially at the remedial level. These issues are not free from all doubt, and some interpolation between the points pricked out thus far may be necessary.

At a minimum, of course, a lawful warrant can issue only from one duly authorized, and only if it meets the explicit textual requirements of probable cause, oath, particular description, and so forth. By analogy to the traditional eighteenth-century search warrant, and in order to avoid serious due process concerns, an ex parte search warrant arguably should be allowed only for items akin to contraband and stolen goods, for the probable cause test and the ex parte process both presuppose this limited context; if extended to warrants for "mere evidence," the Warrant Clause at a minimum should require "probable cause" to believe that the custodian would defy a subpoena or —

THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION at *303 (1st ed. 1868) [hereinafter COOLEY, FIRST EDITION].

[85] Payton v. New York, 445 U.S. 573, 607–08 (1980) (White, J., dissenting) (joined by Burger, C.J., and Rehnquist, J.); *see also* Caroll v. United States, 267 U.S. 132, 156 (1925) (recognizing that a properly issued judicial warrant "protects the seizing officer against a suit for damages").

[86] 4 BLACKSTONE, *supra* note 13, at *286–90. For further support, see 1 RICHARD BURN, THE JUSTICE OF THE PEACE AND PARISH OFFICER 295 (7th ed. 1762); MICHAEL DALTON, THE COUNTREY JUSTICE 300–06 (photo. reprint 1972) (1622); 2 HALE, *supra* note 13, at 119; and 2 HAWKINS, *supra* note 13, at 82–83. For representative restatements of the basic principle in American law, see Bell v. Clapp, 10 Johns. 263, 265–66 (N.Y. 1813); COOLEY, FIRST EDITION, *supra* note 84, at *307; and WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW 92 (1975). As stated by Justice Wilson in his famous *Lectures on Law*:

> With regard to process issuing from the courts of justice, . . . though the writ be illegal, the sheriff is protected and indemnified in serving it. From this general rule, however, one exception must be taken and allowed. He must judge, at his peril, whether the court, from which the process issued, has or has not jurisdiction of the cause.

THE WORKS OF JAMES WILSON 552 (Robert G. McCloskey ed., 1967); *see also id.* at 568, 684 (containing similar language).

stricter still — would destroy the evidence.[87] It also seems clear that no warrant should issue if the underlying search or seizure would be unreasonable, even if the minimal elements of the Warrant Clause are met. (Consider, for example, a strip search of high school girls to be conducted by an individual policeman with a fifty-five percent probability of finding tobacco cigarettes.[88])

But who should decide what is unreasonable, or for that matter, whether probable cause is truly met? In the first instance, of course, the issuing magistrate. But what if the citizen target disagrees, and tries to (re)litigate the matter by bringing it before a jury?

If an executive (or only quasi-judicial) magistrate issued the warrant, the verdict of *Wilkes v. Wood* and of Blackstone seems clear. Just as in England, where a general warrant issued by Lord Halifax was "no warrant at all" (Blackstone's phrase),[89] so too, in America, an unreasonable executive warrant or one without probable cause (from the perspective of the civil jury) is no warrant at all and should therefore support a cause of action against the executive issuer himself.

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[87] For more analysis, see the extraordinarily thoughtful remarks of Justice Stevens in dissent in *Zurcher*. *See* Zurcher v. Stanford Daily, 436 U.S. 547, 577–83 (1978) (Stevens, J., dissenting). For a statutory response to *Zurcher* that is attentive to some of Justice Stevens's concerns, see the Privacy Protection Act of 1980, Pub. L. No. 96-440, 94 Stat. 1879 (codified at 42 U.S.C. §§ 2000aa, 2000aa-5 to 2000aa-7, 2000aa-11, 2000aa-12 (1988)). *Cf.* 18 U.S.C. § 3144 (1988) (stating that a "judicial officer may order the arrest" of a material witness upon showing that "it may become impracticable to secure the presence of the person by subpoena"). And for an earlier recognition of similar concerns, see Robinson v. Richardson, 79 Mass. (13 Gray) 454 (1859):

> [I]t cannot be doubted [that the Massachusetts Fourth Amendment counterpart and prototype] was intended strictly and carefully to limit, restrain and regulate the granting and issuing of warrants . . . to the general class of cases, in and to the furtherance of the objects of which they had before been recognized and allowed . . . , and certainly not so to vary, extend and enlarge the purposes for and occasions on which they might be used . . . .
>
> . . . Certainly no person ought to be compelled to disclose any facts or information to be given as evidence . . . until he has at least had an opportunity of urging his objections [before] some competent judicial tribunal . . . .

Id. at 457–58. Therefore, a state statute allowing search warrants for discovering concealed property or assets of a debtor's estate was held unconstitutional. Further important analysis and documentation may be found in COOLEY, FIRST EDITION, *supra* note 84, at *305–07. Consider also Entick v. Carrington, 19 Howell's State Trials 1029 (C.P. 1765). As we have seen, *see supra* note 26, it appears that Lord Camden was speaking only of ex parte warrants for "mere evidence" and not of warrantless searches or subpoenas, in which the target could challenge the intrusion in a subsequent judicial proceeding. *See Entick*, 19 Howell's State Trials at 1064, 1066 (noting that an ex parte warrant "is executed against the party before he is heard or even summoned" and that "he has no power to reclaim his goods, even after his innocence is cleared by acquittal").

[88] *Cf.* Winston v. Lee, 470 U.S. 753, 763–66 (1985) (holding that compelling the surgical removal of a bullet was, on the facts of the case, unreasonable, despite judicial authorization and probable cause). Once again, the example in the text is intentionally gendered. *See infra* p. 809.

[89] 4 BLACKSTONE, *supra* note 13, at *288.

(In England, Wilkes recovered the princely sum of 4,000 pounds from Lord Halifax.[90]) Because the defect of "unreasonableness" or "improbable cause" typically does not appear on the face of the warrant — unlike the defect in the *Wilkes* warrant — inferior officers who merely execute the warrant ministerially might escape liability altogether; if held liable, they should probably be able to implead the executive issuer for indemnification.[91]

When an unreasonable or improbable warrant (from the jury's perspective) issues from a judge — a member of a court of general jurisdiction — things take on a different hue. For unlike an executive official, the judge can claim that, in issuing the warrant, he made the requisite findings of reasonableness and probability and that these findings are res judicata and thus cannot be questioned by a jury but can be overturned only by a higher court. Surely the officials who executed this judicial warrant must be held immune — this immunity is of course why they sought the judicial warrant in the first place — for even if the search was *substantively* incorrect (from the jury's perspective), it was *jurisdictionally* authorized.[92] The usual remedy for an incorrect judicial act is an appeal to a higher court, but this remedy rings hollow in certain contexts, like search warrants and ex parte temporary restraining orders; much of the damage is done before the target has had any real day in court.

This last result should trouble us. From the perspective of the later civil jury, an unreasonable search *has* occurred, or a warrant *has* issued without probable cause. Arguably, the Fourth Amendment was designed to privilege the perspective of the civil jury. If so, perhaps the fairest solution — though one not provided by the common law — would be for the government itself to make amends. After all, its officials sought and executed the warrant, and its judges approved it. An analogy to modern-day inverse condemnation law under the Just Compensation Clause suggests itself — an analogy perhaps strengthened by the textual parallels between the Fourth Amendment's ban on "seizures" of "papers, houses, and effects" and the Fifth Amendment's rules regarding "tak[ings]" of "private property."

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[90] *See* Wilkes v. Halifax, 19 Howell's State Trials 1406, 1407 (C.P. 1769). Wilkes had asked for even more. *See id.* at 1407.

[91] For emphasis on the importance of the facial regularity of warrants, see, for example, Grumon v. Raymond, 1 Conn. 40, 47–48 (1814); Ortman v. Greenman, 4 Mich. 291, 293 (1856); and Mangold v. Thorpe, 33 N.J.L. 134, 138 (1868). For the theory that would underlie any indemnification action and distinguish it from the general rule against contribution among tortfeasors, see JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY § 339, at 347 (1839); and note 200 below.

[92] *See, e.g.*, *Grumon*, 1 Conn. at 47–48; *Ortman*, 4 Mich. at 293; *Mangold*, 33 N.J.L. at 138; 2 HALE, *supra* note 13, at 119; 2 HAWKINS, *supra* note 13, at 82–83; THE WORKS OF JAMES WILSON, *supra* note 86, at 552.

B. Probable Cause Requirement?

In recognizing various exceptions to its so-called warrant requirement, the modern Court has routinely said that even warrantless searches and seizures ordinarily must be backed by "probable cause."[93] But like its kindred warrant requirement, the probable cause requirement stands the Fourth Amendment on its head.

Begin with the text. The "probable cause" standard applies only to "warrants," not to all "searches" and "seizures." None of the other warrant rules — oath or affirmation, particular description, and so forth — sensibly applies to all searches and seizures; and the Court, bowing to the text and common sense, has never so applied them.[94]

Why, then, has the Court tried to wrench the words "probable cause" from one Clause and force them into another? Because of the "fundamental and obvious" notion that "less stringent standards for reviewing the officer's discretion in effecting a warrantless arrest and search would discourage resort to the procedures for obtaining a warrant."[95] In the words of a leading commentator, "the concept of probable cause lies at the heart of the fourth amendment," and it would be "incongruous" if police officers have "greater power to make seizures than magistrates have to authorize them."[96]

But this is simply our old friend, the doubly flawed logic driving the warrant requirement, now dragging along its yoked mate, the probable cause requirement. Contrary to this flawed logic, the Framers did not mind "discourag[ing] resort to . . . a warrant." They wanted to *limit* this imperial and ex parte device, so they insisted on a substantial standard of proof — and even that standard, understood in context, justified searches only for items akin to contraband or stolen goods, not "mere evidence." Precisely because officers carrying out warrantless searches and seizures would be accountable to judges and juries in civil damage actions after the fact, no fixed constitutional requirement of probable cause was imposed on all these searches and seizures; they simply had to be reasonable.

Of course, certain intrusive subcategories of warrantless action — arrests, for example — might generally require "probable cause" at common law, but this is a far cry from the idea that *all* searches and seizures must meet this standard to be reasonable. Supporters of a global probable cause requirement have yet to identify even a single

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[93] *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 340 (1985); Almeida-Sanchez v. United States, 413 U.S. 266, 269–73 (1973). *See generally* Wasserstrom, *supra* note 1, at 304–09 (discussing the probable cause requirement).

[94] *Cf.* TAYLOR, *supra* note 18, at 49–50 (convincingly critiquing the efforts of Learned Hand and Felix Frankfurter to limit warrantless searches to the same scope as warranted searches).

[95] Whiteley v. Warden, 401 U.S. 560, 566 (1971).

[96] Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 243, 263 (1984).

early case, treatise, or state constitution that explicitly proclaims "probable cause" as the prerequisite for all "searches and seizures." And let us recall once again the apparent common law rule that a warrantless intrusion could be justified after the fact, even in the absence of objective probable cause ex ante, if it succeeded in turning up an actual felon.

So much for text and history. Now consult common sense. If "probable cause" is taken seriously — a good probability of finding items akin to contraband or stolen goods — surely it cannot provide the standard for all searches and seizures. What happens when the government wants to search or seize other items? Here the probable cause test is unilluminating and we need to revert instead to the real "heart of the fourth amendment": reasonableness. In other situations, a "probable cause" test is not merely unilluminating but downright silly. Must a search that has been consented to by the apparent owner be backed by probable cause? How about a search of items in plain, public view, as when our Secret Service agent scans the crowd, searching for anything unusual? What about metal detector and x-ray searches at airports? Or building code inspections? Or weapons pat-downs by police officers who legitimately fear for their personal safety? Or prison searches? What if a grand jury subpoenas a person precisely to determine whether there may be probable cause to believe a crime has occurred?

Justices and other supporters of the so-called probable cause requirement have only two responses. The first is to claim that all these things are not really "searches" or "seizures." But a search is a search even if consented to, or of an item in plain view, or if conducted via modern magnetic or x-ray technology, or if part of noncriminal law enforcement, or if no more intrusive than a frisk, or if done in prison. And if successfully commanding someone, upon pain of contempt and imprisonment, to appear downtown before the grand jury on Monday at nine o'clock a.m. does not "seize" that "person," I do not know what does. Beneath the Justices' unconvincing and unworthy word game, we see again how unjustified expansions of constitutional rights often lead to dangerous and unjustified contractions elsewhere. To avoid some of the absurdities created by the so-called warrant and probable cause requirements, the Justices have watered down the plain meaning of "search" and "seizure."[97]

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[97] *See supra* p. 768. Consider also United States v. Place, 462 U.S. 696 (1983). When it held that a dog sniff was not a "search," *see id.* at 706–07, the Court was pointedly aware that a contrary result would require "probable cause," *see id.* at 707. Further evidence that the "probable cause" test drives Justices into strained and stingy definitions of "search" appears openly in Arizona v. Hicks, 480 U.S. 321 (1987), in which Justice O'Connor states that, because "cursory inspection" without probable cause was "reasonable," it should not be labeled a "full-blown search," *see id.* at 333 (O'Connor, J., dissenting).

The second response also involves a possible watering down of the text — here, the "probable cause" idea itself. At first blush, the phrase seems to connote a standard akin to more than fifty percent, or at least something higher than, say, one percent: a warrant should issue only if it is "probable" — more likely than not, or at least not highly *un*likely — that the search will turn up the goods. And if limited to the context that gave it birth — the common law search warrant — these words could probably (!) be taken at face value.[98] The words would, no doubt, strictly limit the number of ex parte warrants that could issue; but of course, that was just the point of the Warrant Clause. However, once wrenched from the Warrant Clause and (wrongly) proclaimed the "heart" of the Fourth Amendment, these words must be defined differently.

To begin with, probable cause cannot be a *fixed* standard. It would make little sense to insist on the same amount of probability regardless of the imminence of the harm, the intrusiveness of the search, the reason for the search, and so on. Also, probable cause cannot be a *high* standard. It would make no sense to say that I may not be searched via metal detectors and x-ray machines at JFK unless there is a high likelihood — over fifty percent, or at least more than one percent — that I am toting a gun.[99]

In effect, this approach reads "probable cause" as "reasonable cause."[100] Is it not easier to read the words as written, and say that

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[98] After quoting the Fourth Amendment, circuit judge and Supreme Court reporter William Cranch declared in an early case: "The cause of issuing a warrant of arrest, is a crime committed by the person charged. Probable cause, therefore, is a probability that the crime has been committed by that person." United States v. Bollman, 24 F. Cas. 1189, 1192 (C.C.D.C. 1807) (No. 14,622).

[99] One possible rejoinder to this last point might be that, although the probability for each individual citizen is quite low, the probability that some citizen will be carrying a gun into JFK today — or this year! — is high enough to satisfy the strict 50% standard. This rejoinder is even more ominous. Government can always achieve a high enough overall probability of finding something if it searches *everyone* for *everything*. But such a total search, in many contexts, would hardly be reasonable. (Put another way, probable cause alone cannot be the heart of the Amendment, because it focuses on only one component — probability — of an overall search equation whose reasonableness also depends on other components, such as the sheer magnitude of search.) In the warrant context, the government's effort to cumulate probabilities is constrained by the particular description mandate. Once wrenched from its warrant context and adjoining safeguards, the probable cause requirement yet again reveals itself to be unhelpful or perverse.

[100] *See* Camara v. Municipal Court, 387 U.S. 523, 535–38 (1967); Alschuler, *supra* note 96, at 252. For a thoughtful effort to provide historical support for this approach, see Joseph D. Grano, *Probable Cause and Common Sense: A Reply to the Critics of* Illinois v. Gates, 17 U. MICH. J.L. REF. 465, 478–95 (1984). But even Grano's own evidence shows that "probable cause" was associated with individualized suspicion of wrongdoing. Given the limited and ex parte nature of traditional search warrants for items akin to contraband or stolen goods, individualized suspicion makes sense as a prerequisite for warrants, but it does not make sense as the test for all searching and seizing — outside the criminal context, for example.

warrantless searches must simply be "reasonable"? For unlike the seemingly fixed and high standard of "probable cause," reasonableness obviously does require different levels of cause in different contexts, and not always a high probability of success, if, say, we are searching for bombs on planes.

More than intellectual honesty and interpretive aesthetics are at stake, for once "probable cause" is watered down for warrantless searches, how can it be strictly preserved in the Warrant Clause itself? If 0.1% is good enough for airports, why not for warrants? The watering down of "probable cause" necessarily authorizes ex parte warrants on loose terms that would have shocked the Founders. Indeed, the modern Court has explicitly upheld "newfangled warrants" on less than probable cause in explicit violation of the core textual command of the Warrant Clause.[101] History has been turned on its head, and loose, ex parte warrants — general warrants, really — now issue from central officialdom. Once again, apparent textual expansion leads to contraction elsewhere in an inversion of the original Amendment's first principles.

C. Exclusionary Rule?

The modern Court has not only misunderstood the nature of Fourth Amendment rights, but has also distorted Fourth Amendment remedies. This distortion has pushed in many directions at once. The Court has failed to nurture and at times has affirmatively undermined the tort remedies underlying the Amendment, has concocted the awkward and embarrassing remedy of excluding reliable evidence of criminal guilt, and has then tried to water down this awkward and embarrassing remedy in ad hoc ways.[102]

Let us return once again to the text of the Fourth Amendment. Its global command that all searches and seizures be reasonable applies equally to civil and criminal searches. And its reference to Americans' right to be "secure in their persons, houses, papers, and effects" should remind us of background common law principles protecting these interests of personhood, property, and privacy — in a word, the law of tort.[103]

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[101] *See* Marshall v. Barlow's, Inc., 436 U.S. 307, 320 (1978); *Camara*, 387 U.S. at 535–38. Justice Stevens has valiantly and persuasively attacked these newfangled warrants as wholly counter to the Fourth Amendment's text and spirit. *See* Michigan v. Clifford, 464 U.S. 287, 299, 302 (1984) (Stevens, J., concurring in the judgment); *Barlow's*, 436 U.S. at 325–28 (Stevens, J., dissenting) (joined by Blackmun and Rehnquist, JJ.).

[102] On the undermining of the tort model, and what must be done now to undo the damage, see Part IIB below; on the twists and turns in the road to exclusion, see Silas Wasserstrom & William J. Mertens, *The Exclusionary Rule on the Scaffold: But Was It a Fair Trial?*, 22 AM. CRIM. L. REV. 85 *passim* (1984).

[103] The word "tort" might be thought anachronistic, as a late nineteenth-century word pulling

Typically, if one's person or house or papers or effects are unreasonably trespassed upon, one can bring a civil action against the trespasser. And this is exactly what happened in pre-Revolutionary England and America. In a series of landmark English cases — most famously, *Wilkes v. Wood* — oppressive general warrants were struck down in civil-jury trespass actions brought against the officials who committed or authorized the unreasonable searches and seizures.[104] In America, both before and after the Revolution, the civil trespass action tried to a jury flourished as the obvious remedy against haughty customs officers, tax collectors, constables, marshals, and the like.[105]

Tort law remedies were thus clearly the ones presupposed by the Framers of the Fourth Amendment and counterpart state constitutional provisions. Supporters of the exclusionary rule cannot point to a single major statement from the Founding — or even the antebellum or Reconstruction eras — supporting Fourth Amendment exclusion of evidence in a criminal trial. Indeed, the idea of exclusion was so implausible that it seems almost never to have been urged by criminal defendants, despite the large incentive that they had to do so, in the vast number of criminal cases litigated in the century after Independence. And in the rare case in which the argument for exclusion was made, it received the back of the judicial hand. Consider carefully the words of Justice Joseph Story in a famous circuit court opinion in 1822:

> In the ordinary administration of municipal law the right of using evidence does not depend, nor, as far as I have any recollection, has ever been supposed to depend upon the lawfulness or unlawfulness of the mode, by which it is obtained. . . . [T]he evidence is admissible on charges for the highest crimes, even though it may have been obtained by a trespass upon the person, or by any other forcible and illegal means. . . . In many instances, and especially on trials for crimes, evidence is often obtained from the possession of the offender by force or by contrivances, which one could not easily reconcile to a delicate sense of propriety, or support upon the foundations of municipal law. Yet I am not aware, that such evidence has upon that account ever been dismissed for incompetency.[106]

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together under one roof various earlier noncontractual civil causes of action — trespass, assault, trover, and so on. Yet Lord Chief Justice George Pratt (soon to become Lord Camden) uses the word "tort" over and over in Huckle v. Money, 95 Eng. Rep. 768 (C.P. 1763), *see id.* at 768–69; and Beardmore v. Carrington, 95 Eng. Rep. 790 (C.P. 1764), *see id.* at 791–93, two of the leading English cases presaging our Fourth Amendment. Nothing, however, turns on the word "tort" as opposed to the underlying causes of action it now encompasses — trespass, invasion of privacy, and so on.

[104] These cases are collected above at note 67.

[105] *See* WILSON, *supra* note 3, at 9–33. For a smattering of nineteenth-century cases, see TAYLOR, *supra* note 18, at 188 n.71.

[106] United States v. La Jeune Eugenie, 26 F. Cas. 832, 843–44 (C.C.D. Mass. 1822) (No. 15,551).

When the bookish Story tells us that he has never heard of a case excluding evidence because it was "obtained by a trespass [or] illegal means," surely we should sit up and take notice. A generation after Story's remarks, the Supreme Judicial Court of Massachusetts reached a similarly brisk result under its state constitutional predecessor of the federal Fourth:

> If the search warrant were illegal, or if the officer serving the warrant exceeded his authority, the party on whose complaint the warrant issued, or the officer, would be responsible for the wrong done; but this is no good reason for excluding the papers seized as evidence . . . .[107]

As late as 1883, the leading evidence treatise clearly proclaimed illegally procured evidence admissible,[108] a result that universally obtained in America before 1886, according to Dean Wigmore's definitive scholarship.[109]

1. Lochner*'s Legacy.*[110] — How then, did exclusion creep into American law? — by a series of missteps and mishaps. Because the detailed story has been well told by others,[111] I shall only summarize.

The confusion began with the Supreme Court's landmark 1886 case, *Boyd v. United States.*[112] Collapsing the Fourth Amendment rule against unreasonable seizures into the Fifth Amendment ban on compelled self-incrimination, the *Boyd* Court excluded various papers that the government had in effect subpoenaed and sought to use in a quasi-criminal case against the target of the subpoena. The Fourth Amendment's Reasonableness Clause and the Fifth Amendment's Incrimination Clause, said the Court, "run almost into each other" and "throw great light on each other."[113] Continuing this conflation of Clauses, later cases expanded exclusion to searches and seizures in

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[107] Commonwealth v. Dana, 43 Mass. (2 Met.) 329, 337 (1841).

[108] *See* 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 254a (Simon G. Croswell ed., 14th rev. ed. 1883).

[109] *See* 4 JOHN H. WIGMORE, WIGMORE ON EVIDENCE §§ 2183–84, at 626–39 (2d ed. 1923). Bradford P. Wilson has collected supporting material from 14 states in the late nineteenth and early twentieth century. *See* WILSON, *supra* note 3, at 68 n.12. Subsequent to the U.S. Supreme Court's opinion in Boyd v. United States, 116 U.S. 616 (1886), a few states at the turn of the century began to drift away from the well established rule against exclusion. *See* WILSON, *supra* note 3, at 72 n.60.

[110] With thanks to Cass Sunstein's extraordinary Samuel Rubin Lecture. *See* Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873 (1987).

[111] *See, e.g.*, WILSON, *supra* note 3, at 45–112; Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search and Seizure Cases*, 83 COLUM. L. REV. 1365, 1372–77 (1983).

[112] 116 U.S. 616 (1886).

[113] *Id.* at 630, 633.

which the compelled self-incrimination of subpoenas was wholly absent.[114]

Boyd and its immediate progeny involved corporate and regulatory offenses, rather than violent crime. These cases took root in a judicial era that we now know by the name *Lochner*,[115] and the spirit inspiring *Boyd* and its progeny was indeed akin to *Lochner*'s spirit: a person has a right to his property, and it is unreasonable to use his property against him in a criminal proceeding.

Several things can be said about this intriguing claim. For starters, it surely cannot explain excluding contraband or stolen goods, which were never one's property to begin with — and the Court's eventual expansion of exclusion, four decades after *Boyd*, to cover these categories occurred without cogent explanation.[116] Next, this claim has a certain initial plausibility in the context in which it arose, involving personal papers. To introduce a man's diary as evidence against him is perilously close to forcing him to take the stand himself.[117] In both cases he is being done in against his will by his own words, words which he has never chosen to share with anyone else. Through a diary, a defendant in a sense becomes an involuntary "witness" — one whose words testify against himself at trial. But whatever one thinks of a diary or personal papers, where Fourth and Fifth Amendment concerns may overlap and reinforce, a bloodstained shirt is something else entirely. Diaries and personal papers arguably testify — in the defendant's words, as might the defendant himself as an actual "witness" at trial — but a bloody shirt does not. Only the most peculiar property fetishist could say that everything one owns, bloody shirts and all, is simply an extension of the "person" protected by the Fifth Amendment, in the same way that a diary or a personal paper arguably is.

Property worship was of course once in vogue, but this aspect of the *Lochner* era was supposedly laid to rest in the 1930s. If a person's very blood can be forcibly taken and used against him because it is not "testimonial" — as Justice Brennan held for the modern Court in *Schmerber*[118] — it is hard to understand why his bloody shirt is entitled to greater protection. Indeed, much of *Boyd* has been explicitly repudiated by modern Supreme Court decisions.[119]

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[114] The most important cases here are Weeks v. United States, 232 U.S. 383, 393, 398 (1914); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920); and Gouled v. United States, 255 U.S. 298, 311 (1921).

[115] Lochner v. New York, 198 U.S. 45 (1905).

[116] The turning point was Agnello v. United States, 269 U.S. 20 (1925), which excluded unlawfully seized cocaine by fusing together the Fourth and Fifth Amendments, *see id.* at 33–35.

[117] *See* TAYLOR, *supra* note 18, at 67.

[118] *See* Schmerber v. California, 384 U.S. 757, 760–72 (1966).

[119] *See, e.g.*, United States v. Leon, 468 U.S. 897, 905–06 (1984); United States v. Doe, 465

Once we reject *Lochner*-era property worship, none of the arguments in *Boyd* or its exclusionary offspring holds water. *Boyd* claimed roots in a landmark English case that followed *Wilkes v. Wood*, but Professor Taylor has shown that the murky dictum on which *Boyd* relied was most probably off point.[120] In any event, and no matter how we parse this single ambiguous passage, exclusion is not and never has been the British rule.[121]

Despite *Boyd*'s expansive vision of the right against compelled self-incrimination, leading nineteenth-century cases in America and England viewed the right as exceedingly narrow outside the context of political crime and thought crime, as the right was in derogation of truth. Indeed, before *Boyd*, the dominant American view took the wording of the right seriously and even allowed into evidence fruits of the defendant's compelled pre-trial disclosures. Under the logic of a landmark New York opinion decided in 1861,[122] which construed a state constitution whose language tracked the federal Fifth Amendment almost verbatim, the suspect could be obliged to tell the grand jury where the body was buried, and at trial the body itself (but not the suspect's words) could be introduced. A defendant did indeed enjoy a right not to "be compelled in any criminal case to be a witness against himself," but this right applied only when the government introduced a defendant's own words — testimony — against him at trial.[123]

U.S. 605, 610 n.8 (1984); Andresen v. Maryland, 427 U.S. 463, 471–73 (1976); Fisher v. United States, 425 U.S. 391, 405–14 (1976). For a careful narrative of *Boyd's* demise, see Note, *The Life and Times of* Boyd v. United States *(1886–1976)*, 76 MICH. L. REV. 184, 190–211 (1977) (authored by Stan Krauss).

[120] *See* TAYLOR, *supra* note 18, at 52–53 (analyzing Entick v. Carrington, 19 Howell's State Trials 1029, 1073 (C.P. 1765)).

[121] *See infra* note 123.

[122] *See* People v. Kelly, 24 N.Y. 74, 83–84 (1861).

[123] In other words, prior to trial, a suspect could be made to sing, with only a guarantee of "testimonial" rather than "use-fruits" or "transactional" immunity. Broader ideas of immunity derive from *Boyd* itself, via its kindred spirit, Counselman v. Hitchcock, 142 U.S. 547 (1892). The original view laid down by *Kelly* bears a striking resemblance to Justice O'Connor's proposed rule regarding "mere *Miranda*" violations. *See* New York v. Quarles, 467 U.S. 649, 665–69 (1984) (O'Connor, J., concurring in the judgment in part and dissenting in part). *Kelly* was widely followed in other states. For some kind words for *Kelly* and a catalog of like-minded cases, see 4 WIGMORE, cited above in note 109, § 2283, at 965–72.

In England, the rule laid down by a 1783 case was that, "when a coerced confession leads to recovery of stolen property, the confession will be suppressed but the property will be admitted in evidence." Gordon Van Kessel, *The Suspect as a Source of Testimonial Evidence: A Comparison of the English and American Approaches*, 38 HASTINGS L.J. 1, 29 & n.129 (1986) (citing The King v. Warickshall, 1 Leach 263, 264–65, 168 Eng. Rep. 234, 235 (1783)). Van Kessel also notes that there is no English exclusionary rule for search and seizure violations, if evidence is reliable: "It matters not how you get it; if you steal it even, it would be admissible." *Id.* at 32 (quoting Regina v. Leatham, 8 Cox Crim. Cas. 498, 501 (Q.B. 1861) (Crompton, J.)).

Boyd's effort to fuse the Fourth and Fifth Amendments has not stood the test of time and has been plainly rejected by the modern Court. *Boyd*'s mistake was not in its focus on the concept of Fourth Amendment reasonableness, nor in its laudable effort to read the Fourth Amendment Reasonableness Clause in light of other constitutional provisions. (Indeed, I shall later call for just such an approach.) Rather, *Boyd's* mistake was to misread both the Reasonableness Clause and the Incrimination Clause by trying to fuse them together. At heart, the two provisions are motivated by very different ideas; they do not "run almost into each other" as a general matter. The Fourth, unlike the Fifth, applies equally to civil searches, and the Fifth, unlike the Fourth, is strictly limited to compelled testimony. Even with compelled testimony, it is hard to see what transcendent constitutional norm is served by the Incrimination Clause outside the context in which it arose — political and religious thought crime and speech crime.[124] When it comes to murders and rapes, the intuitive appeal of the Incrimination Clause drops dramatically. In ordinary morality, people are encouraged and often obliged to admit their misdeeds, and the law requires a person to testify truthfully even against her dearest childhood friend (when her reluctance to testify is supported by more worthy motives than the urge of thugs to save their skins).[125] To expand the Fifth beyond compelled testimony by fusing it with the Fourth does not serve any overarching constitutional value, apart from now-discredited property fetishism. As we shall see later, it is far more sensible to try to read the Fourth in light of other norms that do embody our overall constitutional structure today — free speech, free press, privacy, equal protection, due process, and just compensation.[126]

Even if ultimately wrong, *Boyd*'s Fourth-Fifth fusion at least had an internal logic that could explain the source, scope, and limits of

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[124] *See* LEONARD W. LEVY, THE ORIGINS OF THE FIFTH AMENDMENT 331–32 (1968).

[125] *See* Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 679–80 (1968). Perhaps the best justification for the Fifth Amendment is that testimony compelled from a criminal defendant or suspect is inherently unreliable and poses an intolerable risk of convicting the innocent. But this logic surely argues against a rule excluding reliable physical evidence — a rule whose primary beneficiaries are overwhelmingly guilty.

The point here extends beyond the Fifth Amendment. The deep logic of the criminal procedure provisions of the Bill of Rights is not to protect truly guilty defendants — especially those who have committed violent crimes — from conviction, but primarily to protect truly innocent defendants from *erroneous* conviction.

[126] Thus, the provision of the Fifth Amendment that does "run almost into" the Fourth is not the Incrimination Clause, but the Just Compensation Clause. Both the Fourth Amendment and the Just Compensation Clause transcend the civil/criminal distinction. Both paradigmatically speak to governmental grabbing of tangible things. Both are property-focused, in large part. Note the obvious textual parallels between "seizures" of "houses, papers, and effects" and "tak[ings]" of "private property."

the so-called exclusionary rule. For example, even if ultimately incorrect, the fusion was an intelligible and principled response to the claim that, by excluding highly relevant evidence of criminal guilt, judges were simply conjuring up out of thin air a wholly unprecedented and nontraditional Fourth Amendment remedy. Under the Fifth Amendment, excluding evidence is not a *remedy* for an earlier constitutional violation, but a *prevention* of the violation itself. A Fifth Amendment wrong occurs only at trial, when testimony is introduced "*in a*[] *criminal case.*"[127] (It was no Fifth Amendment violation to force Oliver North to testify before Congress; but it would have been to introduce that compelled testimony, over North's objection, in his criminal trial.) Likewise, the Fifth Amendment's explicit reference to "criminal" cases can explain why evidence must be excluded from criminal trials, but not from civil trials.[128] Standing alone, the Fourth Amendment cannot justify this difference, for its global command of reasonableness nowhere distinguishes between "criminal" searches and seizures and "civil" ones. The Fifth Amendment further explains why unlawful arrests do not require releasing the suspect, whereas unlawful searches of property require exclusion of evidence:[129] compelling the defendant himself to appear at trial has never been seen as raising a Fifth Amendment problem.[130] So too, the Fourth Amendment, standing alone, cannot explain why an unconstitutional search of *A*'s home that uncovers criminal evidence against both *A* and *B* calls for exclusion in *A*'s criminal trial, but not *B*'s.[131] The Fifth helps explain this, for *A* may be compelled to testify against *B* but not against himself. The Fourth-Fifth fusion — our old friend, *Lochner*-era property fetishism, dressed up as a textual argument — treats *A*'s property like *A* himself.

2. Modern Moves. — Once we reject the Fourth-Fifth fusion, we are left with a variety of slogans wholly inadequate to the task at hand. These slogans — "judicial integrity and fairness," "preventing government from profiting from its own wrong," and "deterrence" — cannot explain the doctrine.[132] They cannot explain where this non-

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[127] U.S. CONST. amend. V (emphasis added).

[128] *Cf.* United States v. Janis, 428 U.S. 433 (1976) (refusing to exclude evidence in a civil prosecution).

[129] Ker v. Illinois, 119 U.S. 436 (1886), and Frisbie v. Collins, 342 U.S. 519 (1952), both hold that illegal seizure and transfer of a suspect does not deprive a court of jurisdiction to try him as a criminal defendant. *See Ker*, 119 U.S. at 444; *Frisbie*, 342 U.S. at 522. Immigration and Naturalization Serv. v. Lopez-Mendoza, 468 U.S. 1032 (1984), reached a similar holding on explicitly Fourth Amendment grounds, *see id.* at 1039–40.

[130] *See* Holt v. United States, 218 U.S. 245, 252–53 (1910).

[131] *See* Agnello v. United States, 269 U.S. 20, 35 (1925) (suggesting, apparently on Fourth-Fifth fusion grounds, that introduction of evidence illegally obtained from *A* does not violate *B*'s "constitutional rights"); *cf.* Alderman v United States, 394 U.S. 165, 171–76 (1969) (reaching a similar result on Fourth Amendment grounds).

[132] My categorization and description of the standard slogans are themselves quite standard.

textual and unprecedented remedy comes from. They cannot explain why it applies only in criminal and not civil cases. They cannot explain why unlawful arrests are different from unlawful searches. They cannot explain Fourth Amendment standing doctrine. In short, they prove too much — and also too little, for each slogan sits atop a pile of dubious assumptions and inferences.

Consider first "judicial integrity and fairness." Do courts in England — and many other countries, for that matter — lack integrity and fairness because they generally allow material and relevant evidence of criminal guilt?[133] Surely the practices of other civilized and respected judicial systems should give pause to those who claim exclusion is mandated by basic notions of fair play. Do all American courts lack integrity and fairness in civil cases brought by the government as plaintiff? Given that civil exclusion is not the rule, never has been the rule, and shows little sign of becoming the rule, it seems that the near unanimous verdict of the American bench is that integrity does not invariably require exclusion. If the primary justification for exclusion is that federal judges have inherent power over what happens inside their own courtrooms, whence their authority to impose the exclusionary rule on the states? It is hard to attribute any exclusionary purpose to the Fourteenth Amendment Framers, given the universal law against exclusion in the 1860s and the utter absence of any challenge to this universal practice by the Reconstruction Republicans.[134] More generally, we must remember that integrity and fairness are also threatened by excluding evidence that will help the

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See, e.g., Randy E. Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 EMORY L.J. 937, 938–39 (1983).

[133] On the English rejection of exclusion over the centuries, see Van Kessel, cited above in note 123, at 28–34; on the Canadian rejection of blanket exclusion, see POLYVIOS G. POLYVIOU, SEARCH AND SEIZURE 328 (1982); and The Queen v. Collins, [1987] 1 S.C.R. 265, 280 (Can.); on the rejection of the American model (circa 1974) in other countries, see John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1031 (1974).

[134] *See supra* pp. 786–87. It is also hard to attribute to the Fourteenth Amendment any design to impose a warrant or probable cause requirement on states in the process of making the federal Fourth applicable against state action; for this reason, my earlier discussion of warrants and probable cause largely ignored the Fourteenth Amendment. The "privileges" and "immunities" that "no state shall abridge" under the Reconstruction Amendment were indeed designed to encompass rights and privileges declared in the federal Fourth, but these rights were rights against unreasonable searches and overbroad warrants, not against warrantless searches per se. Because the federal Fourth closely tracked counterpart clauses in many state constitutions, it would be odd indeed if federalization of these state rules somehow suddenly turned them upside down.

Of course, the Equal Protection Clause of the Fourteenth Amendment does attune us to the evil of discrimination — a key point in giving concrete meaning to the reasonableness command, *see infra* pp. 808–09.

There is also a fascinating story to be told about how the fugitive slave experience may have increased fondness for warrants among some early abolitionists — but the telling of that tale must await another day.

justice system to reach a true verdict. Thus, the courts best affirm their integrity and fairness not by closing their eyes to truthful evidence, but by opening their doors to any civil suit brought against wayward government officials, even one brought by a convict.

Consider next the nice-sounding idea that government should not profit from its own wrongdoing. Our society, however, also cherishes the notion that cheaters — or murderers, or rapists, for that matter — should not prosper. When the murderer's bloody knife is introduced, it is not only the government that profits; the people also profit when those who truly do commit crimes against person and property are duly convicted on the basis of reliable evidence. When rapists, burglars, and murderers are convicted, are not the people often *more* "secure in their persons, houses, papers, and effects?"[135]

The classic response is that setting criminals free is a cost of the Fourth Amendment itself, and not of the much-maligned exclusionary

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[135] It is no answer to say that the Fourth Amendment, as originally designed, was intended to protect only against intrusions by government, rather than by private thugs. First, if we look at the original design of the Fourth Amendment, we see that its text, history, structure, and early implementation do not support the exclusionary rule. *See supra* pp. 785–87. The argument in this section seeks to refute modern-day policy arguments for exclusion, and surely it is fair on policy grounds to point out the modern-day threat posed by private violence unleashed by the exclusionary rule. As Professor Mary Becker has trenchantly noted, the focus only on government intrusions has often left women today especially vulnerable to private violence perpetrated by boyfriends, husbands, and men generally. Following the old line that "a man's house is his castle," modern-day policemen have too often declined to get involved to protect women against domestic abuse. *See* Mary E. Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 U. CHI. L. REV. 453, 507–09 (1992).

Second, the Founding generation was acutely aware of the threat posed by unregulated private violence. Social contract theory, exemplified by Hobbes and Locke, focused precisely on how government — although threatening to liberty and security — might often be less threatening than unregulated private violence in the state of nature. Perhaps the primary duty of government was to protect loyal citizens against such violence. *See* Steven J. Heyman, *The First Duty of Government: Protection, Liberty, and the Fourteenth Amendment*, 41 DUKE L.J. 507, *passim* (1992); *cf.* Entick v. Carrington, 19 Howell's State Trials 1029, 1074 (C.P. 1765) ("[T]yranny, bad as it is, is better than anarchy; and the worst of all governments is more tolerable than no government at all."). In assessing the "reasonableness" of any Fourth Amendment government intrusion, we should consider whether an incremental government intrusion will be more than offset by a likely diminution in intrusion from private violence. *See, e.g.*, National Treasury Employees Union v. Von Raab, 489 U.S. 656, 675 n.3 (1989) (suggesting that governmental metal detectors at airports are reasonable if they reduce the threat posed by skyjackers). If the reality of private violence threatening the security of the citizens' "persons, houses, papers, and effects" may be considered in determining when Fourth Amendment rights are violated, why can't it also be considered in fashioning Fourth Amendment remedies?

Of course, in claiming that private violence may be relevant to Fourth Amendment analysis, I am not making the outlandish claim that the Amendment itself creates a legal right against wholly private action. Nor am I claiming here that the Amendment requires government action to protect against private violence; only that it permits such action, if reasonable. Likewise, I am not claiming that the Fourth Amendment requires introduction of evidence that will make us more secure against private violence, only that it permits introduction.

rule.[136] If the government had simply obeyed the Fourth Amendment, it would never have found the bloody knife. Thus, excluding the knife simply restores the status quo ante and confers no benefit on the murderer. The classic response is too quick.

In many situations, it is far from clear that the illegality of a search is indeed a but-for cause of the later introduction into evidence of an item found in the search. Suppose the police could easily get a warrant, but fail to do so because they think the case at hand falls into a judicially recognized exception to the so-called warrant requirement. A court later disagrees — and so, under current doctrine, the search was unconstitutional. But if the court goes on to exclude the bloody knife, it does indeed confer a huge benefit on the murderer. The police could easily have obtained a warrant before the search, so the illegality is not a but-for cause of the introduction of the knife into evidence.

This causation gap would remain even if the Court sensibly abandoned its so-called warrant and probable cause requirements. Suppose the police search without enough justification to be "reasonable," and five minutes later, independent information comes to the police station that would have nudged the probability needle enough to make the search "reasonable." Here, too, the illegality of the search when conducted is not a but-for cause of the later introduction of the bloody knife, and exclusion makes the murderer better off than he would have been had no Fourth Amendment violation ever occurred. Once tipped off that the cops are onto him, the suspect may well destroy other evidence that the police might have found, had the illegal search not occurred. Here, too, exclusion makes the criminal better off.

The point is generalizable and raises big questions concerning burdens of proof. Given the almost metaphysical difficulties in knowing whether the bloody knife or some evidentiary substitute would have come to light anyway, should not the law strongly presume that somehow, some way, sometime, the truth would come out? Criminals get careless or cocky; conspirators rat; neighbors come forward; cops get lucky; the truth outs; and justice reigns — or so our courts should presume, and any party seeking to suppress truth and thwart justice should bear a heavy burden of proof.[137]

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[136] *See* Yale Kamisar, *"Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule*, 86 MICH. L. REV. 1, 36 n.151, 47–48 (1987); Yale Kamisar, *Remembering the "Old World" of Criminal Procedure: A Reply To Professor Grano*, 23 U. MICH. J.L. REF. 537, 568–69 (1990).

[137] In essence, I am suggesting that the Court's "inevitable discovery" doctrine be vastly widened. *See* Murray v. United States, 487 U.S. 533, 536–44 (1988). The civil damage action in general does not suffer from an equal causation gap. The citizen need only prove that the government committed an illegal intrusion; subsequent developments are often irrelevant. The classic argument for exclusion, by contrast, depends on the additional assumption that, in the months or years after the search, the truth would not somehow have come to light. Nor should

But even if a defendant could conclusively establish but-for causation, the bloody knife should still come in as evidence. Not all but-for consequences of an illegal search are legally cognizable. If the police buy fancy surveillance equipment from HiTek, Inc. to conduct illegal searches, and competitor Low-Tech Corp. is thereby driven into bankruptcy, Low-Tech's *factual* harm — though (by stipulation) a but-for consequence of the illegal searches — does not constitute *legally* cognizable injury. Now for a far more vivid example: if an illegal search turns up a ton of marijuana, the government need not return the contraband even if the government's possession of the marijuana is clearly a but-for consequence of its illegal search. Indeed, the government may sell the marijuana (say, for legitimate medical uses) and use the proceeds to finance the continued war on drugs. In a very real way, the government *has* "profited from its own wrong." Put differently, just as the illegality in the HiTek example was in unreasonably searching — and not in bankrupting Low-Tech — so here the illegality was in unreasonably searching prior to finding the marijuana, and not in seizing the marijuana itself, once found. And what is true of seizing should also be true of using the marijuana — or some noncontraband item like the suspect's bloodstained shirt — as evidence.

This last point is not merely wishful thinking or a personal view. It is the residue of a two-century tradition of civil damage actions in America. Consider the following situation. Police suspect two identical twins, who live in identical, adjoining houses. Police search both equally with equal but insufficient justification. In twin Adam's house, they find nothing; in twin Bob's, the bloodstained shirt. The shirt is introduced as evidence in Bob's murder trial, and he gets twenty years. Now, both Adam and Bob bring independent civil actions for damages. The result: under traditional principles, Adam and Bob recover equal amounts.[138] Bob does not recover more for

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we unthinkingly say that, because the government was a wrongdoer, all doubt should be resolved against it, for the truly guilty defendant is also a wrongdoer.

Admittedly, a civil damages model raises genuine valuation difficulties — how to translate into dollars constitutional interests in privacy, personhood, and property — that require crude approximations. But equally crude approximations must be made in an exclusionary rule system. How far should we trace the chain of but-for causation? To the introduction of civil evidence? Of *A*'s evidence in *B*'s trial? Of evidence that possibly, but not certainly, might have come to light anyway? And so on.

[138] The old common law rule of ex post defense, *see supra* p. 767, is not applicable here because the shirt is, by hypothesis, neither contraband nor a stolen good. But suppose it were. The old common law rule is, of course, nowhere frozen into the Fourth Amendment's text. I invoked it earlier simply to suggest that, if the Amendment was understood by the Founders to require warrants and probable cause, it is odd that no one addressed the possible tension with the extant common law. The best modern-day reading of the old rule would not say that a successful search is necessarily reasonable, but that a trespass action for the *seizure* cannot lie when one does not own the thing seized. Trespass could still lie for the prior unreasonable

his twenty years. The factual harms of seizure, evidentiary use, conviction, and sentence are not *legally* cognizable; only the prior unconstitutional search is.[139]

This brings us, finally, to deterrence. Government must be deterred from violating the people's Fourth Amendment rights. But the exclusionary rule is a bad way to go about this.

For starters, note that, unlike "integrity and fairness," or the "nonprofit" principle, deterrence does not posit some inherent right in the criminal defendant. Deterrence is concerned with the government; it is concerned with systematic impact. It treats the criminal defendant merely as a surrogate for the larger public interest in restraining the government. The criminal defendant is a kind of private attorney general.

But the worst kind. He is self-selected and self-serving. He is often unrepresentative of the larger class of law-abiding citizens, and his interests regularly conflict with theirs. Indeed, he is often despised by the public, the class he implicitly is supposed to represent. He will litigate on the worst set of facts, heedless that the result will be a bad precedent for the Fourth Amendment generally. He cares only about the case at hand — his case — and has no long view. He is not a sophisticated repeat player. He rarely hires the best lawyer. He cares only about exclusion — and can get only exclusion — even if other remedies (damages or injunctions) would better prevent future violations. He is, in many ways, the exact opposite of the litigants the NAACP sought out in its carefully orchestrated campaign to revive the Equal Protection Clause in the 1930s through the 1960s. He is, in short, an awkward champion of the Fourth Amendment.

He is also overcompensated. In an antitrust or securities class action, we must give the private attorney general enough to induce her to bring the suit, but a small percentage of the total take will suffice. In a criminal case, if we insist on using criminal defendants as private attorneys general, why not give a defendant who successfully establishes a Fourth Amendment violation only a ten percent sentence discount — surely a tangible incentive — and substitute for the remaining ninety percent some other structural remedy, injunctive or damages, that will flow to the direct benefit of law-abiding citi-

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search, though proving unreasonableness might require showing that the searchers knew that one's possession of the contraband or stolen item was unknowing and wholly innocent. And since *Katz* and *Bivens*, of course, a suit may lie even if no technical trespass occurred. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 393–94 (1971); Katz v. United States, 389 U.S. 347, 353 (1967).

[139] *See* John C. Jeffries, Jr., *Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts*, 75 VA. L. REV. 1461, 1474–76 (1989); Posner, *supra* note 3, at 50–53; William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 900–01 (1991).

zens?[140] (Floating class actions and fluid recovery in antitrust and consumer-fraud cases are the model here.[141])

Put differently, if deterrence is the key, the idea is to make the government pay, in some way, for its past misdeeds, in order to discourage future ones. But why should that payment flow to the guilty? Under the exclusionary rule, the more guilty you are, the more you benefit. And when we think about this clearly, our minds balk — just as they did when we focused clearly on the notion that Bob should somehow recover higher damages than Adam simply because Bob was a murderer. Instead of excluding the bloodstained shirt, why not assess damages against the police department set at a level to achieve the same quantum of total deterrence, and use the money as a fund to educate the police and the citizenry about the Fourth Amendment, or to comfort victims of violent crime, or to build up neighborhoods that have borne the brunt of police brutality?[142] (All of these would conduce better to making the people "secure in their persons, houses, papers, and effects" than would freeing murderers and rapists.)[143] In sum, when it comes to private attorneys general, the exclusionary rule's deterrence rationale looks in the wrong place — to paradigmatically guilty criminal defendants rather than to prototypically law-abiding civil plaintiffs.[144]

The Framers understood the deterrence and private attorney general concepts perfectly. As civil plaintiffs, John Wilkes and company, after all, had recovered a King's ransom from civil juries to teach arrogant officialdom a lesson and to deter future abuse.[145] In *Wilkes*

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[140] If this scheme seems contrived or wacky, I can only say that it is no more contrived than the exclusionary rule, and 90% less wacky.

[141] *See* Six (6) Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301, 1305 (9th Cir. 1990); State v. Levi Strauss & Co., 715 P.2d 564, 570–71 (Cal. 1986); CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY K. KANE, 7B FEDERAL PRACTICE AND PROCEDURE § 1784, at 81–88 (2d ed. 1986).

[142] Some might argue that medicine must taste bad to be good — that the beneficiary class of any Fourth Amendment scheme must be vile persons, else their recovery will not shock the government into complying with the Constitution. This, however, is not the theory of constitutional remedies outside the Fourth Amendment — under § 1983, for example. The police department will surely not like to see its budget being depleted, even for socially beneficent purposes. For a discussion of why deterrence theory should focus on the governmental "department" rather than the individual "officer" or the "government" more abstractly, see PETER H. SCHUCK, SUING GOVERNMENT 102–09 (1983).

[143] *See supra* note 135.

[144] Of course, I do not here challenge or betray the defendant's legal presumption of innocence and its doctrinal entailments — for example, that the prosecutor must prove the defendant's guilt beyond reasonable doubt with reliable evidence. I merely claim that, as a factual matter, the subcategory of criminal defendants who seek Fourth Amendment exclusion of reliable evidence are likely to have committed the criminal acts charged (or something close) — as is also true of, say, the subcategory of criminal defendants who claim entrapment.

[145] "The government undertook the responsibility of defending all actions arising from the warrant and the payment of all judgments. The expenses incurred were said to total £100,000."

v. Wood itself, Lord Chief Justice Camden proclaimed in a famous passage that:

> a jury have it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, *to deter from any such proceeding for the future*, and as a proof of the detestation of the jury to the action itself.[146]

And we have already encountered clear Founding references in America to the "invariable maxim" of "ruinous damages" for government "insolence or oppression"[147] and "heavy damages . . . [to] punish the offender *and deter others* from committing the same."[148] The point is not simply that these civil forms of deterrence and private attorney generalship are deeply rooted in our Fourth Amendment tradition whereas criminal exclusion is wholly unprecedented (once we abandon Fourth-Fifth fusion). The point is also that these traditional forms make much more sense, *as deterrence*.

On distributional grounds, the traditional civil model is not skewed to reward the guilty. Murderer Bob does not get more than innocent Adam. On efficiency grounds, money damages are often far superior to exclusion. Money is infinitely divisible; exclusion is clunky. If less deterrence is desired, the punitive damages multiplier can be ratcheted down; but under an exclusion scheme, a Tuesday exception tends to look unprincipled. Money is more visible and quantifiable, and therefore democratic; the public can more easily see the costs of bad police conduct. And many of the advantages of money also apply to standard injunctive relief.

Of course, the traditional eighteenth-century civil model must be brought into the twenty-first century. Time-honored rules of trespass need to be supplemented to deal with new technology like wiretapping, as the Court held in *Katz*.[149] State common law suits must be joined by the more modern *Bivens* action.[150] The increased bureaucratic density of government officialdom calls for government-entity rather than individual-officer liability. Widespread, low-grade Fourth Amendment violations provide a textbook example of the need for modern class action aggregation techniques. Civil injunctions have

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NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 45 (De Capo Press 1970) (1937).

[146] Wilkes v. Wood, 19 Howell's State Trials 1153, 1167 (C.P. 1763), 98 Eng. Rep. 489, 498–99 (emphasis added).

[147] *Essays by a Farmer (I)*, *supra* note 75, at 14.

[148] PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787–1788, *supra* note 71, at 154 (emphasis added).

[149] *See* Katz v. United States, 389 U.S. 347, 352–53 (1967).

[150] *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971).

become a more routine regulatory mechanism elsewhere; why not here too? And here, as elsewhere, a civil jury model must make its peace with the modern administrative state. I shall have more to say about all this later. But for now, the basic point is that faithful interpretation upgrades the civil model rather than inventing out of whole cloth a criminal one. The modern-day equivalent of a horse and buggy is a car, not an Andy Warhol poster.[151]

"But," someone unconcerned about text and history might ask, "why not keep both the poster and the car (and the buggy as well)? The more the merrier! To be sure," the argument might run, "if forced to choose between civil and criminal deterrence, clearly we must choose civil, not merely on grounds of text and tradition, but on grounds of common sense. Much government searching and seizing is not motivated by an effort to secure criminal convictions, and even traditional criminal law enforcement officers may often seek to harass or brutalize rather than convict. Civil deterrence is the only game in town, much of the time. But why abandon or even trim the exclusionary rule rather than supplement it?"

Perhaps there is no logical or causal connection between the attention lavished on the exclusionary rule in the twentieth century and the woeful failure to nurture the civil model, not to mention the affirmative efforts to weaken this model with newfangled immunities. Perhaps the judges' positioning of themselves as exclusionary guardians of the Amendment is unrelated to the diminished role of the civil jury. Perhaps the rise of exclusion as a Fourth Amendment remedy has nothing to do with the coincidental mess that has been made in defining the meaning of Fourth Amendment rights.

I am doubtful. The exclusionary rule renders the Fourth Amendment contemptible in the eyes of judges and citizens. Judges do not like excluding bloody knives, so they distort doctrine, claiming the Fourth Amendment was not really violated. In the popular mind, the Amendment has lost its luster and become associated with grinning criminals getting off on crummy technicalities. When rapists are freed, the people are *less* secure in their houses and persons[152] — and they lose respect for the Fourth Amendment. If exclusion is the remedy, all too often ordinary people will want to say that the right was not really violated. At first they will say it with a wink; later, with a frown; and one day, they will come to believe it. Here, too, unjustified expansion predictably leads to unjustified contraction elsewhere.

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[151] In this paragraph, I self-consciously echo the wide-ranging and sophisticated observations in Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993). In Lessig's terminology, my claim here is that switching to the criminal exclusion model rather than refurbishing the civil remedial model violates the principle of "conservativism." *See id.* at 1213–14.

[152] *See supra* note 135.

Thus, even if exclusion achieves short-term deterrence, it creates long-term instability, driving a wedge between We the People and Our Constitution. We have never enshrined Fourth Amendment exclusion in Our Constitution, nor sanctioned its root norm that the guilty should benefit more than the innocent. In the long run, popular sentiment will (quite literally) have its day in court, for the people elect Presidents, who in turn appoint federal judges. Judges who value long-run stability and sustainability should prefer institutions that connect the People to Our Constitution, rather than ones that alienate Us from it.

II. THE BETTER WAY: A PROPOSAL

As announced at the outset, my aim here is to provide a way out of the mess that is the current Fourth Amendment. Implicit in my critique are the basic elements of an attractive alternative approach. In developing this approach, we need not abandon all that the modern Court has said and done. To be sure, we should reject the extravagant textual and historical claims that the Court has at times made — that the Amendment's words implicitly require warrants; that all warrantless searches require probable cause, lest warrants be discouraged; that the Incrimination and Reasonableness Clauses "run almost into each other" as a general matter; and that Founding history supports all this. But beneath this sloppy textual and historical analysis lay genuine concerns to which the Justices were probably responding. As government power became increasingly bureaucratic, and as highly organized paramilitary police departments emerged, perhaps the Justices sensed a need to go beyond the common law jury system of policing the police — and so they latched onto the warrant, and modified the notion of probable cause. And beneath *Boyd*, we find a praiseworthy effort to look to other clauses of the Constitution to inform the idea of Fourth Amendment reasonableness,[153] and to press the Fourth Amendment into the service of the organizing constitutional idea of the era: property.[154]

As it turns out, however, there is a better way to adapt to changes in the structure of government, and to bring the Fourth Amendment into the center of constitutional discourse today. And this better way does not require us to twist the text, or to manhandle the historical evidence. Let us now assemble the elements of this better model, by considering in turn Fourth Amendment rights, remedies, and regimes of enforcement.

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[153] *See* Boyd v. United States, 116 U.S. 616, 630, 633 (1886).

[154] *See id.* at 627–28.

A. Rights

Rights first. The core of the Fourth Amendment, as we have seen, is neither a warrant nor probable cause, but reasonableness. Because of the Court's preoccupation with warrants and probable cause — ordaining these with one hand while chiseling out exception after exception with the other — the Justices have spent surprisingly little time self-consciously reflecting on what, exactly, makes for a substantively unreasonable search or seizure.[155]

1. Common-Sense (Tort) Reasonableness. — Consider ordinary common-sense reasonableness. Probability — "probable cause" or something more or less — is obviously only one variable in a complex equation. To focus on probability alone as the sine qua non of reasonableness would be a mistake. Sometimes 0.1% is more than enough — consider bombs on planes — and other times 100% may still be unreasonable. (Even if the government knows with certainty that honest Abe's business log is in his bedroom and contains a notation relevant to a civil suit between Betty and Carol, a surprise nighttime search — as opposed to a subpoena — would typically be unreasonable.) Common sense tells us to look beyond probability to the importance of finding what the government is looking for, the intrusiveness of the search, the identity of the search target, the availability of other means of achieving the purpose of the search, and so on.

As obvious as all this seems, the Court's obsession with warrants, probable cause, and criminal exclusion has often made it difficult for the Justices to admit what common sense requires. At times, the Court has suggested that, because the core of the Amendment involves criminal investigation, exceptions to strict probable cause should be specially disfavored here.[156] If taken seriously, this would mean that, as between two equally unintrusive but low-probability searches, the search justified by a *more* compelling purpose — criminal enforcement to protect person and property — is *less* constitutionally proper.[157]

On the other hand, on those occasions when common sense breaks through into the *United States Reports*, it often comes wrapped in a sheepish, apologetic tone. Here, for example, are two of the most noted judicial statements — both from the pen of Justice Robert Jackson — that argue that more serious crimes may justify more expansive searches:

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[155] This point emerges strikingly in Silas J. Wasserstrom & Louis M. Seidman, *The Fourth Amendment As Constitutional Theory*, 77 GEO. L.J. 19, 30–31, 38, 43 (1988).

[156] *See* Zurcher v. Stanford Daily, 436 U.S. 547, 555 (1978) (describing pre-1967 case law).

[157] Again, it is no answer to point to the special procedural safeguards enjoyed by criminal defendants. *See supra* note 46.

> I should be human enough to apply the letter of the law with some indulgence to officers acting to deal with threats or crimes of violence which endanger life or security.[158]
>
> But if we are to make judicial exceptions to the Fourth Amendment . . . , it seems to me they should depend somewhat upon the gravity of the offense. If we assume, for example, that a child is kidnaped and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be a drastic and undiscriminating use of the search. The officers might be unable to show probable cause for searching any particular car. However, I should candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime. But I should not strain to sustain such a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger.[159]

In remarkable imagery, Justice Jackson "candidly" confesses that as a "human" (rather than as a judge) he would "strive" to stretch and "strain" the law — "to apply the letter of law with some indulgence," to "make judicial exceptions to the Fourth Amendment" — in cases of serious crime. Lost in these commonsensical but confused confessions is the idea that, in upholding a "reasonable" roadblock to find kidnappers and save kids, judges would be sticking strictly to "the letter of the law" rather than "mak[ing] judicial exceptions to the Fourth Amendment."

If Justice Jackson's language is too embarrassed, at least it is not embarrassing. It clearly states a global truth that makes intuitive sense to police officials and citizens alike: serious crimes and serious needs can justify more serious searches and seizures. Consider, by contrast, the way that the modern Court recently articulated this insight when it recognized yet another epicycle in its Ptolemaic system of Fourth Amendment rules. Because the seriousness of a crime matters, the Court in *Welsh v. Wisconsin*[160] in effect proclaimed that there should be a "minor offense" (*Welsh*) exception to the "exigent circumstances" (*Warden*) exception to the "home arrest" (*Payton*) exception to the usual "arrest" (*Watson*) exception to the so-called "warrant requirement" (*Johnson*).[161] Got that?

For another example of how common-sense reasonableness could straighten out Fourth Amendment thinking and writing, consider electronic surveillance. In love with the warrant, the Court has blessed

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[158] McDonald v. United States, 335 U.S. 451, 459–60 (1948) (Jackson, J., concurring).

[159] Brinegar v. United States, 338 U.S. 160, 183 (1949) (Jackson, J., dissenting).

[160] 466 U.S. 740 (1984).

[161] *See id.* at 750–53; Payton v. New York, 445 U.S. 573, 585–600 (1980); United States v. Watson, 423 U.S. 411, 414–24 (1976); Warden v. Hayden, 387 U.S. 294, 298–99 (1967); Johnson v. United States, 333 U.S. 10, 14–15 (1948).

hidden audio and video bugs — apparently even ones that must be installed by secret physical trespass — so long as these bugs are approved in advance by judicial warrant.[162] The problem here is not in considering audio bugs Fourth Amendment "searches" — by ears rather than eyes — of the target's home, and "seizures" of some of her most valuable "effects," namely, her private conversations. The problem is trying to stretch the Warrant Clause to cover these things. It is not simply that, as Justice Black pointed out in *Katz*, the words of the Warrant Clause do not seem to fit, contemplating as they do physical things already in existence that can be "particularly described," rather than intangible conversations that do not yet exist.[163] Rather, the problem is that these words, as we have seen, presuppose a search for items akin to contraband or stolen goods, not "mere evidence" such as where the target was and when she was there, which video surveillance could establish.

Moreover, even though the warrant contemplated by the Fourth Amendment would be issued ex parte, it would be served on the owner or occupant of the searched premises, or left there, giving the target clear notice of what had been searched or seized, and when. This notification was contemporaneous with the intrusion itself. By contrast, targets of audio and video warrants may never learn that they have been searched and that their words have been seized — or they may find out years after the fact.[164] (As Telford Taylor has noted, such "warrants" severely strain the paradigmatically adversarial nature of Anglo-American judicial proceedings and traditional Article III notions of "case" or "controversy."[165])

Now secrecy does not necessarily equal unconstitutionality. But it does raise a problem. And if the answer to our problem does not lie in a secret newfangled warrant, neither does it lie in probable cause. It lies in reasonableness. Simply put, are secret searches and seizures reasonable? Regardless of one's answer, at least one will be asking the right question[166] — talking sense rather than nonsense.

Once we see that secrecy is a key issue raised by electronic surveillance, we also see that the issue arises in many other contexts, too. Consider the undercover cop who poses as someone she is not. From one perspective, whether she carries a bug or not, she is acting

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[162] *See* United States v. United States District Court, 407 U.S. 297, 314–24 (1972); Katz v. United States, 389 U.S. 347, 354–59 (1967).

[163] *Katz*, 389 U.S. at 364–66 (Black, J., dissenting).

[164] The *Katz* Court tried to downplay this concern. *See id.* at 355 n.16. For sharp criticism, see TAYLOR, cited above in note 18, at 113–14.

[165] *See* TAYLOR, *supra* note 18, at 85–89.

[166] *See* United States v. Nates, 831 F.2d 860, 867 (9th Cir. 1987) (Kozinski, J., dissenting) ("Being subject to a secret search and then never being told about it is something I think most people would find especially offensive, and this then bears on the reasonableness of the procedure employed by the government.").

openly, not secretly. The target who speaks with our agent and lets her into his confidence knows that his eyes are being "searched" and his words "seized" by his conversation partner. What he does not know, however, is that she is a government official. So here, too, we have an element of secrecy and deception.

When is such deception permissible? Is winning a suspected hit man's confidence by posing as a mobster different from winning entrance into someone's home or car by posing as a stranded motorist? If so, what are the factors that distinguish among deceptions?[167] Once again, the issues here must be organized not around warrants or probable cause, but around reasonableness.

Just as a more secret search may be more unreasonable, so too with a more intrusive search. Today's Court recognizes that intrusiveness can make a difference, but the language of warrants and probable cause does not easily accommodate this insight. As we have seen, intrusiveness at times sneaks sub rosa into the judicial definition of what counts as a "search" or "seizure." But once we focus on reasonableness, we can more easily admit the truth: metal detection is often more acceptable than a strip search, not because the former is not a "search," but because it is less intrusive and thus more reasonable. All other things being equal, a compulsory urine test is more problematic if government officials insist on monitoring the production of the specimen. Greater intrusiveness requires greater justification. Only by keeping our eyes fixed on reasonableness as the polestar of the Fourth Amendment can we steer our way to a world where serious, sustained, and sensible Fourth Amendment discourse can occur.

2. Constitutional Reasonableness. — Fourth Amendment reasonableness is not simply a matter of common sense: it is also an issue of constitutional law. For the Fourth Amendment is not merely tort law (in which issues of common-sense reasonableness loom large); it is also emphatically constitutional law.[168] Of course, many obvious intuitions may resonate in both common sense and constitutional law. For example, the common-sense intuition about the special intrusiveness of monitored urine tests can easily be packaged in the language of constitutional privacy.

With this caveat in mind, let us recall a standard technique of constitutional interpretation: parsing one provision — especially if

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[167] For a nice discussion of some possible distinctions, see James B. White, *The Fourth Amendment as a Way of Talking About People: A Study of* Robinson *and* Matlock, 1974 SUP. CT. REV. 165, 227–31. Alas, White then goes on (unsuccessfully in my view) to try to press warrants and probable cause into service as the appropriate regulatory devices. *See id.* at 231.

[168] Here, I break with Judge Posner, who seems to me to reduce the Fourth Amendment to mere tort law, and therefore (in his hands) a kind of crude cost-benefit analysis. *See* Posner, *supra* note 3, at 50, 56, 74–75.

somewhat open-ended — in light of other constitutional provisions.[169] In thinking about the broad command of the Fourth Amendment, we must examine other parts of the Bill of Rights[170] to identify constitutional values that are elements of *constitutional* reasonableness. These other Clauses at all times stand as independent hurdles, above and beyond composite reasonableness, that every search or seizure must clear, but the Clauses can also serve other functions. They can furnish benchmarks against which to measure reasonableness and components of reasonableness itself. A government policy that comes close to the limit set by one of these independent clauses can, if conjoined with a search or seizure, cross over into constitutional unreasonableness.[171]

For example, a search or seizure of newspaper files should cause special alarm and require special safeguards. The *Wilkes v. Wood* case should have taught us all about the special dangers posed by the government's searching and seizing documents from the press, but the lesson was lost on the Court in *Zurcher v. Stanford Daily*,[172] a 1978 case involving Stanford University's student newspaper. Law enforcement officials wanted evidence against violent student protesters and thought they would find some in the files of the *Stanford Daily*. There was no claim that the *Daily* had been part of the protests, but the paper had covered the events and was believed to have photographs and other material in its files that might help to identify the culprits. Armed with an ex parte warrant, police officers searched the *Daily*'s offices. The *Daily* then brought a civil suit for declaratory and injunctive relief, and the Supreme Court sided with the government,[173] thereby blessing the search and inviting others like it.

The facts in *Zurcher* cried out for comparison with *Wilkes* — a civil suit brought to challenge a search carried out under an oppressive warrant for inflammatory newspaper articles — yet the greatest search and seizure case in Anglo-American history went unmentioned and unanalyzed. Warrants were good — required — said the Court, and this search had a warrant. Bowing to this Fourth Amendment worship of the warrant, Justice Stewart, joined by Justice Marshall, dissented solely on First Amendment grounds.[174]

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[169] For an exemplary application of this approach, see JOHN H. ELY, DEMOCRACY AND DISTRUST (1980), in which Ely uses the values underlying more specific constitutional Clauses to inform more open-textured language of Ninth and Fourteenth Amendments, *see id.* at 87–101.

[170] I include here the Fourteenth Amendment, which is very much part of our Bill of Rights today. *See* Amar, *supra* note 9, at 1136–37; Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1266–84 (1992).

[171] Telford Taylor saw this point early on. *See* TAYLOR, *supra* note 18, at 66–68.

[172] 436 U.S. 547 (1978).

[173] *See id.* at 567–68.

[174] *See id.* at 570–71 & n.1 (Stewart, J., dissenting). Justice Stevens also dissented in a

What was missing was a way of integrating First Amendment concerns explicitly into the Fourth Amendment analysis. And the vehicle for this integration is of course not the warrant, not probable cause, but constitutional reasonableness. Indeed, the *Zurcher* majority mouthed the right words, but then proceeded to ignore them:

> Where the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with "scrupulous exactitude." *Stanford* v. *Texas*, [379 U.S. 476, 485 (1965)]. "A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material." *Roaden* v. *Kentucky*, 413 U.S. 496, 501 (1973).[175]

Under this approach, First Amendment concerns could well trigger special Fourth Amendment safeguards — heightened standards of justification prior to searching, immediate (pre-search) appealability of any proposed search (with the premises sealed to prevent interim destruction of evidence), specially trained nonpartisan marshals or magistrates or masters to carry out the search, and so on.[176]

The First Amendment lesson can be generalized. For example, searches of attorneys' offices implicate special concerns of attorney-client privilege protected by the Sixth Amendment. Unless these searches are conducted with special precautions — say, an on-the-scene special master to screen out privileged material before any document is probed by police eyes — they, too, should be deemed constitutionally unreasonable.[177]

As we have already seen, the Fifth Amendment's Incrimination Clause arguably counsels special sensitivity when the government is trying to seize a personal diary to testify against its author in a

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brilliant opinion that his fellow Justices simply ignored. *See id.* at 577–83 (Stevens, J., dissenting). But his dissent largely sidestepped the special issues of press freedom posed by the case. Following Justice Stevens's insights, I have argued above that, as a general matter, ex parte warrants for mere evidence should not issue against parties believed wholly innocent. *See supra* pp. 765–66, 779–80.

[175] *Zurcher*, 436 U.S. at 564.

[176] This approach, building on Justice Stewart's thoughtful analysis in Stanford v. Texas, 379 U.S. 476 (1965), *see id.* at 481–86, would have enriched Justice Kennedy's heartfelt intuition that permanently destroying books is a more constitutionally unreasonable seizure than temporarily closing a book store. *See* Alexander v. United States, 113 S. Ct. 2766, 2779 (1993) (Kennedy, J., dissenting).

[177] Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979), which invalidated an open-ended warrant enforced by an on-site inspection, *see id.* at 325, 329, should not stand in the way of a sensibly administered scheme designed to reduce intrusiveness by bringing the in-camera review to the target, rather than requiring a mountain of sealed files to come to the judicial Mohammed. The system proposed in the text seems far more protective of privacy and privilege than the *Zurcher*-like search of an attorney's office approved in Andresen v. Maryland, 427 U.S. 463 (1976), *see id.* at 472–73.

criminal case.[178] Any search for such a diary will often be especially intrusive, involving governmental perusal of various personal papers in ways that also implicate the First Amendment and more general privacy principles.[179] Note that the Reasonableness Clause singles out "papers" for explicit protection above and beyond all other "effects," and seems especially concerned with the private domain — "houses" as opposed to other "buildings," following the Third Amendment's explicit reference to "house[s]."

So, too, the Fifth Amendment's Takings Clause reminds us that governmental compensation can sometimes render an otherwise illegitimate seizure constitutionally acceptable. Although textually limited to property, perhaps the Clause's underlying principle — that an innocent individual not be singled out to bear a special burden for the benefit of the entire community — radiates further. Imagine, for example, an apathetic grand jury under the thumb of a malicious prosecutor. The grand jury subpoenas a witness of modest means to appear before it, at her own expense, for weeks upon end. Surely, this is a Fourth Amendment "seizure," and even if the Takings Clause does not strictly apply — the grand jury is seizing and using a person, not property[180] — could the Clause not inform a ruling that, at some

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[178] Even if the testimonial diary is treated as the equivalent of the owner, a strict view of the Fifth Amendment's principles would allow a subpoena of the diary, and evidential use of any fruits of the diary as long as the diary itself was not introduced as testimony in the courtroom. *See supra* p. 789. An even more narrow view would allow both a subpoena and the introduction of the diary as testimony on the theory that, because the diary was written prior to any government compulsion, it is free from the inherent unreliability of government-compelled self-incrimination — unreliability that (according to this theory) is the only true concern of the Fifth Amendment. *See supra* note 125. On this view, even though compelled production of the diary involves both compulsion and testimony, it does not involve compelled testimony within the spirit of the Fifth. The logic of Fisher v. United States, 425 U.S. 391 (1976), seems to lean this way, but the Court took special care to reserve the issue of private papers and diaries, *see id.* at 401 n.7, 414.

[179] In the most famous case following *Wilkes*, Lord Camden declared that "papers are the owner's . . . dearest property [and] will hardly bear an inspection; . . . where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass." Entick v. Carrington, 19 Howell's State Trials 1029, 1066 (C.P. 1765). *See also id.* at 1063 (stating that the Halifax warrant threatens "the secret cabinets and bureaus of every subject in this kingdom"). The special concern for "*private* papers" recurs in Wilkes v. Halifax, 19 Howell's State Trials 1406 (C.P. 1769), *id.* at 1408 (emphasis added); *see also* Beardmore v. Carrington, 19 Howell's State Trials 1405, 1406 (C.P. 1764), 95 Eng. Rep. 790, 793–94 ("Can we say that 1000 pounds are monstrous damages as against him, who has granted an illegal warrant to a messenger who enters into a man's house, and pries into all his secret and private affairs . . . ?").

[180] *Cf.* Hurtado v. U.S., 410 U.S. 578, 588–91 (1973) (holding that the Takings Clause did not require the government to pay anything to indigent material witnesses incarcerated in order to assure their presence at trial, upholding a statute that authorized the payment of one dollar per day, and opining that the "ultimate fairness of the compensation" was irrelevant to the Fifth Amendment claim before the Court). For discussion of the often unreasonable seizures of material witnesses, see Ronald L. Carlson & Mark S. Voelpel, *Material Witnesses and Material*

point, minimum compensation would be required to render the Fourth Amendment "seizure" "reasonable"?[181]

Consider next equal protection. Even if racially disparate impact alone does not violate the Constitution, surely equal protection principles call for concern when blacks bear the brunt of a government search or seizure policy. Thus, in a variety of search and seizure contexts, we must honestly address racially imbalanced effects and ask ourselves whether they are truly reasonable. As long as courts organize Fourth Amendment discourse around warrants, probable cause, and exclusion, rather than reasonableness, this open engagement of race will likely not occur in Fourth Amendment case law. Indeed, it is probably no coincidence that one of the most open Fourth Amendment discussions of race to date occurred in *Terry v. Ohio*,[182] in which Chief Justice Warren carved out exceptions to both the probable cause and the warrant requirements, and self-consciously focused instead on the Amendment's "general proscription against unreasonable searches and seizures."[183]

To justify a search or seizure that lands with disproportionate impact on poor persons, or persons of color, the government may at times claim that the poor or the non-white are also disproportionate *beneficiaries* of the scheme, because the government search is designed to reduce the risk that they will be victimized by violent crime, or drugs, or what have you. The interests of victims are hard to squeeze into the language of probable cause and warrants but comfortably fit under the canopy of reasonableness. Make no mistake, the issues of race and class — of both the target of the search or seizure and the victim of the crime[184] — will not be easy to sort out, but once again we will be asking the right questions, honestly and openly.

As with race and class, so too with sex. Searches and seizures that create opportunities for sexual oppression, harassment, or embarrassment are unreasonable both as a matter of common sense and

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Injustice, 58 WASH. U. L.Q. 1, *passim* (1980); Comment, *Pretrial Detention of Witnesses*, 117 U. PA. L. REV. 700, *passim* (1969).

[181] Whereas *Boyd* gave property the rights of persons, this approach would more sensibly accord persons the same solicitude given to property.

[182] 392 U.S. 1 (1968).

[183] *Id.* at 14–15 & n.11, 20. I thus applaud Professor Maclin's recent efforts to restore race to a central place in the Fourth Amendment discourse but suggest that his emphasis on warrants and probable cause, and away from reasonableness, undercuts his larger purpose. *See* Tracey Maclin, *"Black and Blue Encounters" — Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, *passim* (1991); *see also* Sheri L. Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, *passim* (1983) (emphasizing the importance of race in Fourth Amendment contexts).

[184] For rich discussions of the importance of crime victims' race, see Stephen L. Carter, *When Victims Happen to Be Black*, 97 YALE L.J. 420, *passim* (1988); Randall L. Kennedy, McKlesky v. Kemp*: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1388–95, 1421–22 (1988).

constitutional morality, whether one uses the language of privacy or equality or both. Throughout my remarks, I have intentionally traded on these intuitions, purposely using gendered hypotheticals to illustrate quintessentially unreasonable searches.[185] These intuitions are neither merely personal, nor of recent vintage. Recall, for example, the striking language used by a Pennsylvania Anti-Federalist to conjure up a nightmarish search: an obviously male federal constable might invade the bedroom and the bed of a "woman," "pull[] down the clothes of [her] bed" and "search[] under her shift."[186] These remarks appeared in 1787.

As the Equal Protection Clause should remind us, constitutional reasonableness encompasses procedural regularity as well as substantive fairness, and the two are often tightly intertwined. Rule-of-law values affirmed in various constitutional ways — the Due Process, Equal Protection, and Attainder Clauses, and the more general separation of powers — teach us to be especially wary of searches and seizures that allow too much arbitrariness and ad hocery, unbounded by public, visible rules promulgated in advance by legislatures and executive agencies. Recall here Justice Jackson's confession, in which he described searches of "every outgoing car," if "executed fairly and in good faith," as possibly "reasonable" even if "undiscriminating."[187] I would say that such a search might well be constitutionally reasonable *precisely because* it is "undiscriminating." A broader search is sometimes better — fairer, more regular, more constitutionally reasonable — if it reduces the opportunities for official arbitrariness, discretion, and discrimination. If we focus only on probabilities and probable cause, we will get it backwards. The broader, more evenhanded search is sometimes more constitutionally reasonable even if the probabilities are lower for each citizen searched.[188]

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[185] *See supra* pp. 769, 780.

[186] PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787–1788, *supra* note 71, at 154.

[187] Brinegar v. United States, 338 U.S. 160, 183 (1949) (Jackson, J., dissenting).

[188] The same logic underlies Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990), which upheld a sobriety checkpoint in contradistinction to random stops that leave too much discretion to officers, *see id.* at 452–55.

The remedial logic undergirding the Fourth Amendment is also relevant here. Especially in a system in which damages are used as central remedies, it makes little sense to oblige every taxpayer to pay, say, $100 in order for each to receive, say, $30 in Fourth Amendment damages. (The other $70, of course, gets lost in the system.) And the same is true for the Takings Clause — if a burden is widely shared, we tend to label it a "tax" not a "taking," and no compensation is due. So here, a search or seizure that is truly spread across the citizenry will often seem reasonable — or at least not to require a judicial as opposed to a political remedy. But when a search or a seizure or a taking falls unevenly — on only a few, or on a discrete subset of the general population — the issue is quite different.

Note that here, too, we see striking connections between the Fourth Amendment and the Takings Clause, and the internal coherence of Fourth Amendment rights and remedies.

Due process values may even call for judicial preclearance of certain types of government searches and seizures, if there are good reasons for suspecting strong and systematic over-zealousness on the part of certain segments of executive officialdom. In some situations, a search or seizure could be deemed constitutionally unreasonable because no prior approval was sought from a more neutral and detached decisionmaker. Preclearance might also help firm up the record of what facts the government had before the intrusion, thereby preventing officials from dreaming up post hoc rationalizations.[189] But this selective judicial preclearance is a far cry from the warrant requirement I have been attacking so insistently. Judicial preclearance would not be a per se requirement of all searches and seizures, nor even a presumptive mandate, subject to well-defined categorical exceptions. Rather it would apply only when it was reasonable — and only *because* it was reasonable. This determination of reasonableness would be pragmatic, contingent, and subject to easy revision. It would not apply specially to criminal law enforcement under the unsupportable claim that the Fourth Amendment was somehow at its core about criminal rather than civil searches and seizures. (It could, however, apply specially to police departments on the pragmatic and empirical claim that these paramilitary organizations[190] do pose a qualitatively different threat than do other government officials.[191]) Most importantly, judicial preclearance would be in addition to, rather than instead of, after-the-fact review in civil actions brought by the citizen target. Unlike a warrant, judicial preclearance would offer absolutely no immunity for a search later deemed unreasonable. (This immunity is, of course, precisely the point — the definition, really — of a judicial warrant.[192]) Judicial preclearance, even if sometimes necessary, would never be sufficient.[193] Of course, a later civil jury would remain free to take the fact of preclearance into account, and in an otherwise close case, preclearance could, in the jury's mind, tip the balance in favor of reasonableness.

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[189] For elaboration, see Stuntz, *supra* note 139, at 914–18.

[190] My description of the modern-day police as paramilitary does indeed suggest the relevance of Second Amendment concerns about standing armies, as Professor Steiker perceptively notes. *See* Steiker, *supra* note *, at 837–38. After noting that police officials are now more tightly organized — and thus dangerous — than in the 1780s, we should further ask whether violent criminals are also more organized and dangerous; threats to security come from both government and criminals, *see supra* note 135.

[191] Thus, the results of many "warrant requirement" cases need not necessarily be jettisoned, although their logic would need to be reconceptualized. This point may be especially important to those Justices who care most about precedent and stability.

[192] *See supra* pp. 778–79.

[193] The lack of res judicata effect and the ex parte nature of the proceedings might raise "case" or "controversy" concerns were preclearance sought from Article III judges. But these Article III constraints would not apply to non-Article III magistrates.

The above examples show just how broad and powerful constitutional reasonableness could become as a way of talking and thinking about the Fourth Amendment. Indeed the potential breadth and power of this new tool will no doubt trouble some. But it should surprise no one. For the Fourth Amendment, literally and in every other way, belongs at the center of the Bill of Rights and discussion about the Bill — in civil cases as well as criminal, on matters of both constitutional procedure and constitutional substance. By focusing on constitutional reasonableness, we restore the Fourth to its rightful place. To be sure, the Amendment is triggered only by a "search" or "seizure," and to ignore these triggers is to rewrite the Amendment into a global command of reasonableness. Yet a great many government actions can be properly understood as "searches" or "seizures," especially when we remember that a person's "effects" may be intangible — as the landmark *Katz* case teaches us.[194] Unlike the Due Process Clause, in whose name so much has been done, the Fourth Amendment clearly speaks to substantive as well as procedural unfairness and openly proclaims a need to distinguish between reasonable and unreasonable government policy. For those who believe in a "substantive due process" approach to the Constitution, the Fourth Amendment thus seems a far more plausible textual base than the Due Process Clause itself.[195] For those who believe in general rationality review, the Fourth, here too, is more explicit than its current doctrinal alternative, the Equal Protection Clause.[196]

B. Remedies

Fixated on the exclusionary rule, the twentieth-century Supreme Court has betrayed the traditional civil-enforcement model, through acts of omission and commission. What follows are illustrative but not exhaustive suggestions for refurbishing the traditional civil-enforcement model.

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[194] *See* Katz v. United States, 389 U.S. 347, 350–53 (1967).

[195] For example, in the so-called right-to-die case, could not Missouri's policy have been seen as unreasonably seizing Nancy Cruzan, in effect chaining her to her death bed? *See* Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 288 (1990) (O'Connor, J., concurring) (invoking "Fourth Amendment jurisprudence"); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 795 (1989) (suggesting that, when the government prevents life-support disconnection in right-to-die cases, the government is in effect affirmatively seizing and occupying the patient's body); *cf.* Winston v. Lee, 470 U.S. 753, 766–67 (1985) (holding that government-compelled surgery to remove bullet from a suspect for evidentiary purposes would be an "unreasonable" intrusion under the Fourth Amendment). And note the prominent invocation of the Fourth Amendment in Justice Douglas' opinion for the Court in Griswold v. Connecticut, 381 U.S. 479 (1965). *See id.* at 484–85.

[196] *Cf.* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1704–27 (1984) (championing rationality review, and canvassing various doctrinal bases and analogues, but not the Fourth Amendment).

1. Entity Liability and Abolition of Immunity. — Eighteenth-century common law allowed suit against the officers personally, but everyone understood that the real party in interest was the government itself, which would typically be forced to indemnify officials who were merely carrying out government policy. (Without indemnification, who would agree to work for the government?) Thus, we have already seen the Maryland Farmer speaking of damage awards deriving from "the public purse"[197] — no doubt a reference to the notorious fact that the English government had indemnified all the government officials in the Wilkes affair, to the tune, it appears, of £100,000.[198] In modern parlance the Framers, well before Coase, understood the Coase Theorem.[199] Precisely because officials would be indemnified, it was not unfair to hold them strictly liable for constitutional torts, even if they acted in the good faith belief that their behavior was fully constitutional.[200] Recall, for example, the Maryland Farmer's insistence on "ruinous damages whenever an officer had deviated from the rigid letter of the law"[201] — and recall further that heavy damages were assessed in the Wilkes affair, even though the officials there had followed an executive practice stretching back seventy years.[202]

In our century, however, judges for the first time have created wide zones of individual officer immunity for constitutional torts. Within these zones, the innocent citizen victim is in effect "held liable" and left to pay for the government's constitutional wrong. The Framers would have found the current remedial regime, in which a victim of constitutional tort can in many cases recover from neither the officer nor the government, a shocking violation of first principles, trumpeted in *Marbury v. Madison*,[203] that for every right there must be a remedy.[204]

The best way to close this shocking remedial gap today would be to recognize direct liability of the government entity.[205] (Of course, in keeping with Coase, the government could seek indemnification

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[197] *Essays by a Farmer (I)*, *supra* note 75, at 14.

[198] *See* Wilkes v. Halifax, 19 Howell's State Trials 1406, 1407 (C.P. 1769); LASSON, *supra* note 145, at 45.

[199] *See* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

[200] *See* Luther v. Borden, 48 U.S. (7 How.) 1, 87–88 (1849) (Woodbury, J., dissenting); David E. Engdahl, *Positive Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 17–18 (1972); *see also* NELSON, *supra* note 86, at 17–18 (noting the lack of government officer immunity, but not discussing indemnification).

[201] *Essays by a Farmer (I)*, *supra* note 75, at 14.

[202] *See* Wilkes v. Halifax, 19 Howell's State Trials 1406, 1408–09 (C.P. 1769).

[203] 5 U.S. (1 Cranch) 137 (1803).

[204] *See id.* at 162–63. For more elaboration of the claims in this paragraph, see Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1484–92 (1987).

[205] For detailed discussion, see SCHUCK, *supra* note 142, at 55–121.

from, dock the pay of, or otherwise discipline, any officers who triggered the government's liability; this would most likely occur if officials were violating the entity's own internal policies.) If the search or seizure is ultimately deemed unreasonable, the government entity should pay. And the damages assessed will be a visible sign to legislators and the general public of the true costs of unreasonable government conduct.

Strict entity liability in the twentieth century makes perfect sense as the substitute for — indeed, the exact equivalent of — strict officer liability in the eighteenth century. The intervening years have brought us vastly increased bureaucratic density. The Framers' constables have become our police *departments*; their watchmen, our environmental protection *agencies*; and so on. The true locus of decisionmaking authority has shifted from the individual to the organization. The deterrence concept implicit in both the text and history of the Amendment[206] calls for placing (initial) liability at the level best suited to restructure government conduct to avoid future violations. For the Framers, that level was the constable; for us, the police department.

This system of liability could be fashioned by legislatures, and in fact bears a striking resemblance to Congress's Privacy Protection Act of 1980,[207] passed to undo the damage done by *Zurcher*.[208] But courts need not await legislative action. They need only interpret section 1983 to mean what it says — strict government-entity liability[209] — and exercise their traditional remedial powers against federal officialdom in keeping with the promise of *Marbury* and its modern descendant, *Bivens*.[210] The deeply rooted power of judges to infer damage remedies for violations of constitutional norms was of course a strong theme of Justice Harlan's careful and traditional concurring opinion

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[206] For historical evidence of the importance of deterrence, see *supra* pp. 797–98. Textually, the Amendment proclaims that the right of the *people* against unreasonable intrusions *shall not be violated*. *See* U.S. CONST. amend. IV.

[207] Privacy Protection Act of 1980, Pub. L. No. 96-440, 94 Stat. 1879 (codified at 42 U.S.C. §§ 2000aa, 2000aa-5 to 2000aa-7, 2000aa-11, 2000aa-12 (1988)).

[208] *See* 42 U.S.C. § 2000aa (1988). The Act also provides for attorney's fees and minimum damages. *See id.* § 2000aa-6(f).

[209] *See* 42 U.S.C. § 1983; Will v. Michigan Dep't of State Police, 491 U.S. 58, 77–85 (1989) (Brennan, J., dissenting) (correctly arguing that the plain words of § 1983, in combination with the Dictionary Act, recognize government liability for deprivations of constitutional rights). Of course, Justice Brennan's position lost (5–4) in *Will*, but stare decisis has not barred libertarian overrulings of other incorrectly decided § 1983 cases — see, for example, Monell v. Department of Social Servs., 436 U.S. 658 (1978), which overruled in part Monroe v. Pape, 365 U.S. 167 (1961), *see Monell*, 436 U.S. at 663 — and should not do so here, in light of the constitutional overtones of the remedial issue (stretching back to *Marbury*) and the broad judicial authority traditionally exercised over fashioning remedies.

[210] Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

in *Bivens*;[211] and properly understood, sovereign immunity principles do not bar damage actions for constitutional violations. Such actions enforce, rather than offend, the sovereignty of the People over officialdom.[212]

2. Punitive Damages. — Because only a fraction of unconstitutional searches and seizures will ever come to light for judicial resolution, merely compensatory damages in the litigated cases would generate systematic underdeterrence. The problem is hardly unique to the Fourth Amendment, and a widespread technique today is to use multipliers and punitive damages. As we have seen, the Framers were well aware of these techniques of "heavy" and "ruinous" damages. By 1789, punitive damages in search and seizure cases were "an invariable maxim."[213] In fact, Lord Camden's explicit approval of punitive damages in *Wilkes v. Wood* and two companion search and seizure cases in the 1760s[214] appears to mark the first clear acknowledgment in English case law of the very concept of punitive damages.[215] *Wilkes*'s lesson for us here is that modest and thoughtful remedial creativity *within the civil model* is in the truest spirit of the cases that gave birth to our Fourth Amendment.[216] And in keeping

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[211] *See id.* at 398–411 (Harlan, J., concurring in the judgment).

[212] *See* Amar, *supra* note 204, at 1484–92.

[213] *Essays by a Farmer (I)*, *supra* note 75, at 14.

[214] *See* Wilkes v. Wood, 19 Howell's State Trials 1153, 1167 (C.P. 1763) (quoted *supra* p. 798); Huckle v. Money, 95 Eng. Rep. 768, 768–69 (C.P. 1763); Beardmore v. Carrington, 19 Howell's State Trials 1405, 1406 (C.P. 1764), 95 Eng. Rep. 790, 794 ("It is an unlawful power assumed by a great minster of state. Can any body say that a guinea per diem is sufficient damages in this extraordinary case, which concerns the liberty of every one of the king's subjects? We cannot say the damages of 1,000 [pounds] are enormous.").

In *Huckle v. Money*, Camden declared:

> [I]f the jury had been confined by their oath to consider the mere personal injury only, perhaps 20 [pounds] damages would have been thought damages sufficient; but the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life did not appear to the jury in that striking light in which the great point of law touching the liberty of the subject appeared to them at the trial; they saw a magistrate over all the King's subjects, exercising arbitrary power, violating Magna Charta, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this general warrant before them; they heard the King's Counsel, and saw the solicitor of the Treasury endeavouring to support and maintain the legality of the warrant in a tyrannical and severe manner. These are the ideas which struck the jury on the trial; and I think they have done right in giving exemplary damages [of 300 pounds].

Huckle, 95 Eng. Rep. at 768–69.

[215] *See* Colleen P. Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 GEO. WASH. L. REV. 723, 799–800 & n.435 (1993); Leslie E. John, Comment, *Formulating Standards for Awards of Punitive Damages in the Borderland of Contract and Tort*, 74 CAL. L. REV. 2033, 2039 (1986).

[216] Remedial evolution must remain within the civil model to avoid the charge that judges have simply imported new principles into the Constitution in the guise of fashioning remedies. The Fourth Amendment clearly does presuppose full civil remedies — the only question is how to implement that requirement today. By contrast, the criminal exclusion model cannot be found underlying the Fourth Amendment. Its root norm that the guilty benefit more than the

with that spirit of modest remedial creativity, we should note an insight of modern tort theory: deterrence requires that the defendant must pay more than the plaintiff suffered, but not all this amount need go directly to the plaintiff. (This insight is actually implicit in Lord Camden's initial formulation, if read with care.) Perhaps some portion of punitive damages could flow to a "Fourth Amendment Fund" to educate Americans about the Amendment and comfort victims of crime and police brutality, and thereby promote long term deterrence, compensation, and "security."

3. Class Actions, Presumed Damages, and Attorney's Fees. — Large categories of unreasonable searches and seizures — street harassment, for example — will affect many persons, but each only a little. The offenses may be largely dignitary, and the citizen's out-of-pocket losses may be small or nonexistent. Here too, the problem is hardly unique to the Fourth Amendment, and modern law has developed general tools to address it. Class action aggregation techniques and minimum presumed damages are often the answer. Presumed damages are especially appropriate in Fourth Amendment cases, given Lord Camden's explicit embrace of an award of 300 pounds to a journeyman printer — a small fry of low "station and rank" caught up in the Wilkes affair — who had suffered in "mere personal injury only, perhaps 20 [pounds] damages," but whose case raised a "great point of law touching the liberty" of "all the King's subjects."[217]

In an isolated Fourth Amendment wrong involving a small dollar amount but large dignitary concerns, any plaintiff who proves a violation should receive reasonable attorney's fees, even if the fees bulk larger than the plaintiff's out-of-pocket damages, unless the government was willing to concede that a Fourth Amendment violation had indeed occurred.[218]

4. Injunctive Relief. — Early prevention is often better than after-the-fact remedy. The Fourth Amendment says its right "shall not be violated." When judges can prevent violations before they occur, they

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innocent is not only perverse, but contrary to the substantive and remedial logic of the Bill of Rights. *See supra* note 125.

The point here is severable from my arguments on behalf of a role for the civil jury. If a civil jury model were deemed unworkable for twenty-first-century America, faithful interpreters would be obliged, if at all possible, to substitute other civil remedial models — administrative and judicial — before conjuring up a wholly extra- and counter-constitutional scheme of criminal exclusion.

[217] *See Huckle*, 95 Eng. Rep. at 768. Note also how the court in *Huckle* used certain aggregation techniques to resolve the claims of many other printers, whose cases were similar to Huckle's. *See id.* at 769.

[218] *But cf.* Farrar v. Hobby, 113 S. Ct. 566, 575 (1992) (holding that a civil rights litigant who was in it only for the money was not automatically entitled to attorney's fees under 42 U.S.C. § 1988 if only nominal damages are awarded).

should do so — especially if after-the-fact damages could never truly make amends. Damages cannot bring back African-American males killed as a result of the unreasonable chokehold policy of the Los Angeles police department in the 1970s and 1980s.[219] And yet in 1983, the Supreme Court in *Los Angeles v. Lyons*[220] prevented federal courts from enjoining various forms of racially discriminatory police brutality.[221] Like *Zurcher*, *Lyons* was a sad entry in the annals of the Fourth Amendment. One can only wonder how much of the racial tragedy visited upon Los Angeles in recent years might have been avoided had the Supreme Court done the right thing a decade ago and sent a different signal to the LAPD.[222]

5. Administrative Relief. — The traditional judicial system is slow and cumbersome. Executive departments are typically the source of unconstitutional searches and seizures; is it too much to expect them to establish internal mechanisms to process citizen complaints quickly? Citizen review panels could serve a function akin to a traditional jury,[223] and in many cases, victims of government unreasonableness might willingly forego a judicial lawsuit in favor of a cheaper, less adversarial, quicker administrative solution that would vindicate their dignitary claims.

C. Regimes

At least four overlapping, reinforcing, and non-mutually exclusive enforcement regimes should exist to enforce the reasonableness norm.

Consider first a regime of *legislative* reasonableness. Legislatures are, and should be, obliged to fashion rules delineating the search and seizure authority of government officials. General rule of law, structural due process, and separation of powers principles frown on broad legislative abdications. In cases of borderline reasonableness, the less specifically the legislature has considered and authorized the practice in question, the less willing judges and juries should be to uphold the practice.

Now consider *executive/administrative* reasonableness. Professors John Kaplan, Anthony Amsterdam, and Kenneth Culp Davis, and

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[219] For the grim statistics, see Los Angeles v. Lyons, 461 U.S. 95, 115–16 & n.3 (1983) (Marshall, J., dissenting).

[220] 461 U.S. 95 (1983).

[221] *See id.* at 101–13.

[222] Lest I be accused of Monday morning quarterbacking, let the record show that I sharply attacked *Lyons* in 1987, in the first paragraph of the first article I ever wrote as a law professor. *See* Amar, *supra* note 204, at 1425.

[223] *See* Ronald F. Wright, *Why Not Administrative Grand Juries?*, 44 ADMIN. L. REV. 465, 510–11 (1992). Citizen review panels can thus be seen as an excellent example of "fidelity" in "translation" as American law becomes more bureaucratized, yet continues to pledge allegiance to the democratic and participatory ethos underlying the jury system at the Founding. On "fidelity," see generally Lessig, *supra* note 151, *passim*.

Judge Carl McGowan have generated thoughtful blueprints for this regime,[224] and they deserve our most serious attention. Even if a search or seizure is broadly authorized by statute, administrators and agencies — including police departments — should promulgate implementing guidelines that publicly spell out more concrete search and seizure policies for recurring fact patterns. Advisory input from citizen panels may be particularly helpful here,[225] but even if citizens do not participate in initial policy formation, public promulgation of agency guidelines will enable the citizenry to better assess things done in their name. Agencies should not only lay down substantive rules and standards, but also implement these policies through good faith training programs and disciplinary mechanisms. Once again, judges and juries should be less willing to defer to official intrusions in borderline cases in which the agency fails to live up to this regime of reasonableness.

Next consider a regime of *judicial* reasonableness. Judges should continue to build up doctrine specifying certain actions that, as a matter of law, violate the Fourth Amendment.[226] But unlike the current doctrinal mess, this new edifice would be built on the foundation of reason, not probability or warrant. Although no clear line divides common-sense reasonableness from constitutional reasonableness, judges should concentrate their doctrinal energies on the latter, especially in cases in which searches or seizures implicate constitutional principles beyond the Fourth Amendment, or in which judges have strong reasons to suspect unjustified jury insensitivity to certain claims or claimants. Although judicial preclearance may at times be appropriate, courts must strictly limit warrants. Civil litigation after the fact, with both citizen and government represented in the courtroom, would be far more deliberative and reviewable than the current system of practically unreviewable rubberstamp magistrates acting ex parte.

Last, but most emphatically not least, imagine a regime of *jury* reasonableness. Even when legislature, administrator, and judge have all accepted a search or seizure as reasonable, the government often must also be able to convince a civil jury of this. In the criminal context, the government may not prevail if the citizen can win over a jury under the Sixth Amendment. In the civil context, the parties'

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[224] *See* KENNETH C. DAVIS, DISCRETIONARY JUSTICE 52–161 (1969); KENNETH C. DAVIS, POLICE DISCRETION 98–138 (1975); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 416–28 (1974); Kaplan, *supra* note 133, at 1050–55; Carl McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659, *passim* (1972).

[225] *See* Wright, *supra* note 223, at 512–14.

[226] Doctrine can be built up in a traditional common law fashion or in a more openly regulatory way. The former model is fact-specific, with the Court writing an opinion that says, "in this case, the search was unreasonable because . . . " The latter model is more rule-like: "In this entire subcategory, searches are per se unreasonable." Both models are, of course, ideal types, and a dialectic exists between them.

positions are reversed — the citizen is plaintiff, the government, the defendant — but a basic principle that governs the Sixth should inform the Seventh:[227] the government should generally not prevail — at least on the issue of reasonableness — if the citizen can persuade a jury of her peers.[228] "Reasonableness" is largely a matter of common sense, and the jury represents the common sense of common people.[229] Threats to the "security" of Americans come from both government and thugs; the jury is perfectly placed to decide, in any given situation, whom it fears more, the cops or the robbers. This judgment, of course, will vary from place to place and over time. "Reasonableness" is not some set of specific rules, frozen in 1791 or 1868 amber, but an honest and sensible textual formula to organize candid jury deliberations and fair jury decisions.[230] And in the course of deliberating and

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[227] Of course, in a criminal case, the government prosecutor bears the burden of proof beyond reasonable doubt, whereas in a civil case, the citizen plaintiff typically bears the burden of proof, under a preponderance of evidence standard.

[228] In certain contexts, judges might be able to declare a government action not a "search" or "seizure" — or not "unreasonable" — as a matter of law. Whereas the Sixth Amendment does not allow a directed verdict or JNOV against the citizen, the Seventh does, in order to limit the jury's role to finding facts and not declaring law. (Unlike the Sixth, the Seventh explicitly privileges only jury factfinding.)

There is considerable evidence verifying the reasonableness role of the civil jury in search and seizure cases throughout the nineteenth century. Here I shall present only a smattering. *See* Simpson v. McCaffrey, 13 Ohio 509, 517 (1844) ("It is further a rule that the circumstances which would render a search reasonable are for the jury to judge." (quoting the statement of John C. Tidball and William Kennon, Jr., attorneys for the plaintiff)); Luther v. Borden 48 U.S. (7 How.) 1, 87 (1849) (Woodbury, J., dissenting) ("And if the sanctity of domestic life has been violated, the castle of the citizen broken into, or property or person injured, without good cause, in either case a jury of the country should give damages, and courts are bound to instruct them to do so, unless a justification is made out fully on correct principles."); Allen v. Colby, 47 N.H. 544, 549 (1867) ("The provision of the constitution against unreasonable searches and seizures cannot be understood to prohibit a search or seizure . . . when the jury under correct instructions from the court, have found that the seizure was proper and reasonable . . . ."); 2 FREDERICK SACKETT, BRICKWOOD'S SACKETT ON INSTRUCTIONS TO JURIES § 2449(a) (3d ed. 1908) ("The Court instructs the jury that an officer or private individual may arrest without a warrant, one whom he has reasonable ground to suspect of having committed a felony."). I am indebted to Alex Azar for much of the material in this paragraph.

[229] For a brilliant and historically powerful celebration of the civil jury, see Note, *supra* note 70, at 148–60. And for intriguing efforts to integrate juries into an exclusionary rule scheme, see Ronald J. Bacigal, *A Case for Jury Determination of Search and Seizure Law*, 15 U. RICH. L. REV. 791, *passim* (1981); and George C. Thomas III & Barry S. Pollack, *Saving Rights from a Remedy: A Societal View of the Fourth Amendment*, 73 B.U. L. REV. 147, *passim* (1993). Finally, note how the jury satisfies several of the concerns about current Fourth Amendment theory. *See* Wasserstrom & Seidman, *supra* note 155, at 48–50, 102–03, 107 (noting the fact-dependency of reasonableness, its value-laden quality, the unrepresentative nature of judges, and the lack of a need for legal expertise on many issues).

[230] In a recent opinion, Justice Scalia at times seemed to veer close to this "frozen in amber" approach to Fourth Amendment reasonableness. *See* Minnesota v. Dickerson, 113 S. Ct. 2130, 2139 (1993) (Scalia, J., concurring). His earlier formulations strike me as less frozen, and more attractive. *See e.g.*, California v. Acevedo, 111 S. Ct. 1982, 1992–94 (1991) (Scalia, J., concurring in the judgment); Scalia, *supra* note 4, at 1180–86.

deciding, citizen jurors will become educated — will educate each other — about the meaning of the Constitution, about government policy, about competing conceptions of reasonableness, and about citizenship in a self-governing republic.[231] The jurors will become participants in the ongoing enterprise of constitutionalism, and will come over time to better appreciate how the Fourth Amendment, rightly understood, protects *them*. To discharge this weighty representative, educative, and policy-making function, the civil jury must be made truly inclusive along race, gender, and class lines. Recent developments in the Supreme Court give ground for hope here.[232]

And this seems a good note on which to end. For I hope it is not too late to remember that the Fourth Amendment boldly proclaims a right of "the people." What better body than a jury of "the people" — a jury that truly looks like America — to cherish and protect this precious right?[233]

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[231] *See* Amar, *supra* note 9, at 1183–91.

[232] For an example, see the extraordinarily lyric and powerful vision of an inclusive jury summoned up at the outset of Justice Kennedy's opinion for the Court in Powers v. Ohio, 111 S. Ct. 1364, 1366–70 (1991). For post-*Powers* cases promoting jury inclusivity, see Georgia v. McCullum, 112 S. Ct. 2348, 2351–54 (1992); and Edmonson v. Leesville Concrete Co., Inc., 111 S. Ct. 2077, 2080 (1991).

The Rodney King affair, of course, does not discredit the jury system, but only serves to remind us of the importance of true jury inclusivity. Excluding parts of the community from the jury box is akin to excluding them from the ballot box; the right to vote applies to voting in juries every bit as much as to voting for candidates and must not be abridged on the basis of race, sex, class, or age. *See* U.S. CONST. amends. XV, XIX, XXIV, XXVI; Amar, *supra* note 9, at 1202–03. Jury exclusions brought about by private manipulation — venue transfers, peremptory challenges, and the like — are thus no less troubling than, say, white primaries.

[233] Compare Thomas Jefferson's exuberant 1789 definition of jury trial as trial "by the people themselves." Letter from Thomas Jefferson to David Humphreys (Mar. 18, 1789), *in* 5 THE WRITINGS OF THOMAS JEFFERSON, 1788–1792, at 90 (Paul Leicester Ford ed., 1895).

To repeat: my proposed model does not place sole reliance on civil juries, and welcomes a vigorous role for judges in civil cases, based on constitutional reasonableness, especially if judges suspect systematic jury undervaluation of important constitutional values, or illegitimate prejudice against certain Fourth Amendment claimants. (For example, if the key issue is ex ante reasonableness, judges can disallow testimony of ex post success if they believe the prejudicial effect of this testimony would prevent juries from treating Adam and Bob equally. *See supra* notes 138–139 and accompanying text.)