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Time Travel, Hovercrafts, and the Fourth Amendment:

If James Madison Could Have Seen The Future

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Abstract

Recent historical work has raised the intriguing possibility that the Framers meant to accomplish only one goal in the Fourth Amendment: to forbid general warrants. On this historical account, the first clause stating a right of the people to be “free from unreasonable searches and seizures” is merely declaratory of the principle that led the Framers to ban general warrants. Rephrased to be true to this history, the Fourth Amendment would say: “The right of the people to be secure in their persons, houses, papers, and effects against general warrants shall not be violated, and no general warrants *have* issued in the last two centuries, limiting the current Fourth Amendment to its historical roots would deprive it of any effect. When constructing Fourth Amendment doctrine, the Supreme Court has thus been faced with language that is hopelessly vague and with history that is of no help. The result is a Fourth Amendment without coherence. But what if the Framers could have seen modern policing? Given the values that underlie the Fourth Amendment, how would the Framers have written it with the modern context in mind? This article transposes the Framers to the turn of the twenty-first century and then asks them to return to the eighteenth century and rewrite the Fourth Amendment. The result is an Amendment that would produce a doctrine that is both clearer and more elegant than the Court’s haphazard Fourth Amendment.

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If James Madison Could Have Seen The Future

Imagine it is August 17, 1789 and we are walking on the dirt streets of New York City toward the Federal Hall. Constructed over five years beginning in 1699, Federal Hall was chosen by the New York City Council to house the new federal government.¹ Congress commissioned Pierre L'Enfant to convert the building into "an elegant meeting place for Congress."² When completed, the three story building measured 95 feet in width and 145 feet at its deepest point.³ A handsome building in the Federal style (naturally), its main entrance was on Wall Street off a covered walk that paralleled the street.⁴ From the plainly appointed hall just inside the entrance, we enter "the central three-story vestibule, which ha[s] a marble floor and an ornamented skylight under a cupola. Off this vestibule [stands] the House of Representatives chamber, a two-story richly decorated octagonal room."⁵

In this room, the House is debating the Bill of Rights. When the Tenth Amendment (now

¹ Documentary History of the First Federal Congress, vol. IX, 1789-91.

² Id. at 3, n.1

³ Id.

⁴ For a drawing of the Federal Hall, courtesy of the New York Historical Society, see <http://www.gwu.edu/~ffcp/exhibit/p3/index.html>.

⁵ Documentary History, supra note 1, at 3 n.1. The Federal Hall was torn down in 1812. Id.

the Fourth) is read to the body, Eldridge Gerry rises to say that his smallpox inoculation⁶ has given him such a high fever that he glimpsed what appeared to be the future. In two hundred years we have federal officers who are always seeking to uncover criminal activity. Mr. Gerry said it looked to him just like the British customs officials in the years before the Revolution. But the federal officers have developed miraculous devices that Gerry cannot understand as he struggles to describe them to his fellow legislators. For one, federal officers use hovercrafts that suspend themselves over the homes of citizens, allowing the officers to see through cracks in the roofs or observe anything outside the house. After hovering over one home for a time, they can move to the next. And the next. And the next. Mr. Gerry asks Madison whether the Fourth Amendment would forbid this conduct.

Before Madison could answer, Mr. Gerry tells of another vision of the future. In this one, the federal officers are given the task of catching smugglers. Because many smugglers avoid interdiction at the borders, the officers seek to find them inside the country by targeting certain highways and other modes of transportation for close observation. These heavily armed officers are authorized to stop vehicles traveling on particular roads near the border. They are also broadly authorized to stop vehicles anywhere in the country and seek consent from the drivers to search the vehicles. And they are authorized to approach individuals who are on trains and buses

⁶ Inoculation against smallpox had been practiced in America since the early eighteenth century. John and Abigail Adams and their children were inoculated. David McCullough, *John Adams* 142 (2001). According to McCullough, “[t]he idea had come from a slave belonging to Cotton Mather, an African named Onesimus, who said the practice was long established in Africa” *Id.* A small incision was made in the healthy patient and then ‘pus from the ripe pustules’ of a smallpox patient” was scooped “into the open cut. A generally mild case of smallpox would result, yet the risk of death was relatively slight.” *Id.*

(yes, he would have to explain to the Framers what trains and buses are) and ask them for identification. While blocking the aisle in a bus or train, the officers ask to search the persons and belongings of the passengers, all without any suspicion that anyone is guilty of smuggling. If the person acquiesces in the request from the officers, his belongings can be ransacked and any evidence found can be used to convict him of one of thousands of federal crimes. Yes, Mr. Gerry informs the shocked audience, in 2002 the federal criminal code will contain roughly 3,500 criminal offenses and another 10,000 or so criminal prohibitions can be found in federal regulations.⁷ Thirteen thousand federal crimes, compared to the roughly two dozen created by the First Congress!!⁸

The final vision of Mr. Gerry's fever-deranged mind is of a similar force, this time under the authority of a State and named "police." The idea of state or city police is an alien concept that he must explain. Then he would describe what New York City looks like in 2004, and the room falls silent. These state and city police, he tells the audience, are looking for suspicious conduct of any nature, not just related to various smuggling enterprises. When they see suspicious conduct, they can seize the individual and frisk him for weapons, without probable cause to think that he is committing a crime.⁹ Possessing a weapon violates several state laws and if the police officer finds a weapon, the State can use it to convict the suspect of one or more of these crimes. Leaving aside the issue of what happened to the Second Amendment, Mr.

⁷ Paul Rosenzweig, Congress Clogs Courts with too Many Federal Crimes, July 24, 2002, <http://www.heritage.org/Press/Commentary/ed072402.cfm>

⁸ 2 Stat., ch. 8, sect. 1 - sect. 23 (1790).

⁹ Terry v. Ohio, 392 U.S. 1 (1968), explicitly rejected probable cause as the proper standing for making a "stop and frisk," instead finding "reasonable suspicion" to be sufficient.

Madison, would the Fourth Amendment permit these acts of the state militia?

What would Madison answer?

Madison might, of course, tell Mr. Gerry to go home, get some rest, and recover from his smallpox inoculation. Madison might reject the horrific nightmare of national and state militias that do not exist to protect citizens from foreign enemies but, rather, to insinuate themselves into our homes, our travel, and our cities. It can never happen, Madison might say, so long as we have a republican form of government. The citizens will always keep the dreaded central government, and the state governments, in check.

But Gerry tells Madison that what the Framers could not anticipate was that by the twentieth century, the citizens fear criminals more than they fear the government. For the most part, citizens welcome the war on drugs, the presence of heavily-armed police in the cities, and the fight against organized crime and terrorism. The check on the government, at all levels, in the area of search and seizure had largely disappeared by the middle of the twentieth century.

Madison might wonder what happened to the common law, some of which was enacted into federal law as early as 1789, that required individualized suspicion and placed other limitations on the power of the customs officials to rummage at will through our belongings.¹⁰ Customs officials had to have individualized suspicion even to search ships docked in our harbors. So what happened?

¹⁰ See 1 Stat., ch.5, sect. 24 (1789), discussed at note 42 and accompanying text.

Those of us alive in 2004 know that Gerry's fever dream was accurate.¹¹ And there is more. Imagine a typical day. (We will, of course, have much to explain to Madison about the conveniences of modern life.) We will assume that the police have no solid evidence against you, nothing that would approach probable cause for a search warrant or for an arrest. Perhaps they have heard a rumor or perhaps have targeted you because of your friends or associates or because of your race or ethnicity. Here is what your world could look like if your only protection against these militia-like police was the Fourth Amendment.¹²

I. Search and Seizure: 2004 Model

You call your office while eating breakfast. The police can record the number you dial.¹³ You access the weather on your computer. The police can record what web sites you visit and

¹¹ See, e.g., *Drayton v. United States*, 536 U.S. 194 (2002) (upholding bus sweep in which the police obtained "consent" as described in the second of Mr. Gerry's nightmares in the text); *Ohio v. Robinette*, 519 U.S. 33 (1996) (permitting police to ask a motorist for consent to search even after the traffic ticket is issued and thus the justification for the stop has ended); *Whren v. United States*, 517 U.S. 806 (1996) (permitting police to stop a vehicle for a trivial traffic violation even if the traffic stop is a pretext for an unarticulated suspicion that would not permit a stop); *Florida v. Riley*, 488 U.S. 445 (1989) (approving visual surveillance from a helicopter hovering 400 feet over defendant's greenhouse); *Terry v. Ohio*, 392 U.S. 1 (1968) (upholding seizure and frisk of person for weapons on reasonable suspicion to believe that crime was afoot and the suspect was armed).

¹² I consider in this paper only the limitations placed on police conduct by the Fourth Amendment. Congress and the states have in a few cases placed more stringent restrictions on police than the Court has found in the Fourth Amendment.

¹³ *Smith v. Maryland*, 442 U.S. 735 (1979).

how long you stay.¹⁴ You drive to the news stand where you buy a cup of coffee. Undercover police have installed a beeper in a false bottom of the cup.¹⁵ They can use this beeper to follow you on your sales route today.¹⁶ If you stop by the home of a drug dealer or a lover, the police will know that. When you arrive at work, the numbers you dial on the phone there, too, can be recorded. At any time during the day, or night, the police can come to your work or your home and ask for permission to search.¹⁷ When you look over your canceled checks for your business or home, you should know that the police can examine those in the hands of your bank.¹⁸ If you decide to throw away old canceled checks (or letters from a lover or gambling slips from your bookie), you should know that the police can rummage through your garbage when it is sitting on your property.¹⁹

If you drive home to avoid being cornered on a bus or train, you can be stopped at a roadblock for the police to inspect your driver's license and car registration or to talk to you to see if you are intoxicated.²⁰ If you live near the border with Mexico, you can be stopped at a

¹⁴ This follows by necessary implication from *Smith*, supra note 13.

¹⁵ This is not a Fourth Amendment seizure. See *United States v. Karo*, 468 U.S. 705 (1984).

¹⁶ This is not a search. See *United States v. Knotts*, 460 U.S. 276 (1983).

¹⁷ See, e.g., *United States v. Matlock*, 415 U.S. 164 (1974).

¹⁸ *United States v. Miller*, 425 U.S. 435 (1976).

¹⁹ *California v. Greenwood*, 486 U.S. 35 (1988).

²⁰ *Delaware v. Prouse*, 440 U.S. 648 (1979) (vehicle inspection checkpoints) (dicta); *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990) (sobriety checkpoints).

fixed roadblock by the immigration authorities.²¹ When you get home, you may be surprised to discover that the authorities have used a backhoe to dig up your entire two acre backyard (they were careful not to dig up your shrubs or the area adjacent to your house).²² Whatever they find in this excavation can be used to prosecute you. At any time, police can “plant” an undercover agent in your business or pleasure activities to spy on you and report back what you said and did.²³ They can “wire” this person so that the police can listen and record what you say.²⁴ The police can do all the things in this and the last paragraph, plus the hovercraft and the bus encounter, without the slightest shred of suspicion.

²¹ United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

²² This might be a stretch of *Oliver v. United States*, 466 U.S. 170 (1984), depending on which of the Court’s two rationales is the principal one. The first justification for approving an entry onto and examination of a farm was that the Fourth Amendment simply does not apply to open fields. On that reasoning, there is no reason to believe that what is under the surface of the fields is protected. But the Court also concluded that a property owner would not have a reasonable expectation of privacy in his fields. *That* reasoning might create Fourth Amendment protection if the Court was willing to hold that one can reasonably expect privacy in what one buries in an open field.

²³ *Hoffa v. United States*, 385 U.S. 293 (1966).

²⁴ *United States v. White*, 401 U.S. 745 (1971) (plurality).

What say you, now, Mr. Madison?

The Fourth Amendment was, in one sense, too successful. Written to ensure that Congress could not authorize general searches, the second clause of the Amendment is so clear and categorical that the Court only once has had to deploy the Amendment to strike down an Act of Congress and even there the Court had to enlist the Fifth Amendment right against compelled self-incrimination to justify its holding.²⁵ The first clause is, however, phrased at a high level of abstraction, identifying a “right of the people in their persons, houses, papers, and effects to be free from unreasonable searches and seizures” and specifying that it “shall not be violated.” One question left from the history of the Fourth Amendment is whether the Framers wanted that clause to have independent significance and, if so, what it would prohibit. One possibility, endorsed by Professor Thomas Davies after a careful review of the relevant history, is that the first clause is merely declaratory of the right that underlies the requirements in the Warrant Clause.²⁶

For decades, the Court read the Fourth Amendment as if the only real issue was whether the police had to have a warrant. This methodology transferred meaning about what searches and seizures are “reasonable” into a question about the need for a warrant. This is consistent with the notion that the real Fourth Amendment requirement is in the Warrant Clause and we merely need

²⁵ *Boyd v. United States*, 116 U.S. 616 (1886) (striking down an Act of Congress that construed the refusal to provide documents as demanded by the government as an admission of the allegations in the demand).

²⁶ Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547 (1999).

to identify the class of searches to which that Clause applies. If the police needed a warrant, and did not have one, the conduct was unreasonable. If they did not need a warrant, the police conduct was automatically reasonable.

During this time, the Court began with the cardinal principle that a warrant-less search of a home is unconstitutional. The Court sought to build a warrant requirement using this principle as the base of a logical pyramid. So, for example, if police had to have a warrant to search a house, what about a car parked in a driveway?²⁷ What about a footlocker that was placed into the trunk of a car moments before the suspects were arrested?²⁸ What about a box discovered during the search of a car?²⁹ That methodology worked pretty well, but in the late 1960s, the Warren Court (yes, the Warren Court) began to favor a more nuanced approach that relegated the warrant “requirement” to a subcategory of cases and found meaning in the Reasonableness Clause to cover a large expanse of police conduct. What the Court failed to appreciate is that outside the warrant requirement no rules existed to decide when a search was reasonable. What developed was a balancing test with the public interest in admitting reliable evidence of guilt on one side and the suspect’s privacy on the other. Even the least cynical reader will appreciate that this kind of balance will almost always come out in favor of a narrow Fourth Amendment. And it has. The Warren Court expanded greatly the scope of Fourth Amendment protection but the depth of

²⁷ *Coolidge v. New Hampshire*, 403 U.S. 445 (1971) (holding that a warrant was required).

²⁸ *Chadwick v. United States*, 433 U.S. 1 (1977) (holding that a warrant was required).

²⁹ *Robbins v. California*, 453 U.S. 420 (1981) (plurality) (warrant required).

protection began to shrink even on the watch of the Warren Court³⁰ and more so in the hands of the Burger and Rehnquist Courts.³¹

Here, I seek a simplified, reformulated vision of the Fourth Amendment. The method of inquiry will be to understand the common law relevant to search and seizure and the political context in which the Amendment was proposed and debated. Against this background, I will propose a series of modifications based on what I think the Framers would have said if they could see particular modern police methods. Of course, my conclusions are tentative and open to refutation. Nonetheless, I believe some fairly solid “proof” comes of this exercise. Despite the impossibility of putting ourselves truly into the mind of men who lived 220 years ago, I believe we can recover enough of the context and politics of that time to create a Fourth Amendment more consistent with the principles that led to its creation.

My “new” Fourth Amendment contains eight clauses rather than two, but my proposed reforms can be grouped under three heads. First, the Court’s attempt to expand the coverage of the Fourth Amendment by restating it as protecting privacy is a failure. We need to return to the

³⁰ See, e.g., *Terry v. Ohio*, 392 U.S. 1 (1968) (permitting a “stop and frisk” without probable cause); *Warden v. Hayden*, 387 U.S. 294 (1967) (overruling *Gouled v. United States*, 255 U.S. 298 (1921), to permit police to search for any kind of evidence, not just contraband).

³¹ *New York v. Belton*, 453 U.S. 454 (1981) (permitting police to search a car “incident to arrest” even though the arrestees were no longer in the car).

plain meaning of “persons, houses, papers, and effects” as those items would be understood by the Framers in the context of modern life. Second, the most important requirement for searches and seizures in colonial times was individualized suspicion. The modern Court has read individualized suspicion out of the Fourth Amendment in a variety of ways and those doctrines should be abandoned. Third, as a corollary of the second principle, consent should never be permitted to satisfy the Fourth Amendment. In the context of justifications for a search, my new Fourth Amendment is elegant: police may search or seize when they have probable cause. If they do not have probable cause, they may not search or seize.

First, I briefly describe and “locate” my methodology in the scholarly field.

II. A Word on Methodology

History has probably been used (and misused) more frequently in seeking to understand the Fourth Amendment than all other criminal procedure rights combined. Reasons for the extensive use of history here include the unknowable “edges” of a right against “unreasonable searches and seizures,” the flagrant abuses of the British in using writs of assistance to attempt to enforce increasingly unpopular customs laws, and the general resentment of British power that manifested itself during this period. The Supreme Court uses history when convenient, dipping its toe into the waters here and there to support a decision that the Court has surely made on other grounds. Some scholars use the same methodology, engaging in what Morgan Cloud calls “lawyer’s histories.”³² These histories, on Cloud’s account, “have been partial in two ways: they

³² Morgan Cloud, *Searching Through History, Searching For History*, 63 U. Chi. L. Rev.

have been incomplete, reviewing only a small fraction of the relevant historical data, and they have been partisan, selectively deploying fragments of the historical record to support their arguments about the Amendment's meaning."³³

But a more fundamental problem attends Fourth Amendment history, as Tom Davies shows most clearly. Almost nothing about the Framers' Fourth Amendment is relevant to modern policing. Those who seek to build a current doctrine on a foundation of history must shape the history in awkward if not downright perverse ways to make it fit. It is as if one were trying to make a jet fighter from oak timbers.

The approach most faithful to conventional historical methodology is to set out the history as accurately as possible without regard to what it means to today's doctrine. This is the "damn the torpedoes" method, most effectively used by Professor Tom Davies.³⁴ William Cuddihy essentially uses the same methodology though he ultimately makes an argument that the Framers preferred specific warrants.³⁵ While this is probably true, it does not solve the central mystery that almost every Fourth Amendment scholar has ignored. If specific warrants were the constitutionally preferred method of searching, why did the Framers fail to tell us *when* warrants are required? The Fourth Amendment sets out with great detail *what* search warrants must

1707, 1707 (1996).

³³ *Id.* at 1708.

³⁴ Davies, *supra* note 26.

³⁵ William John Cuddihy, *The Fourth Amendment: Origins and Original Meaning*, 602-1791 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School).

contain and says nothing about *when* warrants must be used. For decades the Court tried to fill this vacuum, spasmodically and without a clear pattern, as I will describe later. Today, however, the Court has given up the game and lacks any coherent schema for what constitutes an “unreasonable search and seizure.”

After setting out the most exhaustive history to date of the Fourth Amendment, Davies describes the conundrum faced by serious historians: “That the original meaning of the Fourth Amendment sounds so strange to modern ears demonstrates the degree and depth of change that has occurred in constitutional search and seizure doctrine since the framing.”³⁶ Ultimately, Davies is “skeptical . . . whether even clear history can provide much positive guidance for shaping specific responses to modern search and seizure issues.”³⁷ This is because “[i]n a very real sense, the modern mystery associated with the two-clause text of the Fourth Amendment is the product of the Framers' inability to gauge how criminal justice institutions would actually evolve.”³⁸ Thus, “[a]pplying the original meaning of the language of the Fourth Amendment in a completely changed social and institutional context would subvert the purpose the Framers had in mind when they adopted the text.”³⁹

I agree with Davies that even the clearest history of how the Framers meant the Fourth Amendment to operate would be essentially meaningless in today’s constitutional world. I seek,

³⁶ Id. at 724.

³⁷ Id. at 736.

³⁸ Id. at 741.

³⁹ Id. at 740-41.

instead, to offer the piece of the puzzle that is missing in our Fourth Amendment universe. How would the Framers have written the Fourth Amendment if they could have foreseen modern police methods? To accomplish this goal, the reader must be grounded in the pre-Framing era and the values held by the Framers. This is the task of Part III. In Part IV, I will write the Fourth Amendment that I think the Framers would have written if they could have seen the future. In Part V, I will briefly describe the Court's alternative vision of the Fourth Amendment. Part VI asks the reader to choose which one seems better.

III. Alfred E. Neuman⁴⁰ in 1789: What Me Worry About Searches?

The historical record is clear: the experience with British rule left the Framers terrified of general searches. General searches on land were typically conducted pursuant to writs of assistance. From roughly the middle of the seventeenth century until the Revolution, writs of assistance had been understood to authorize British customs officers “to enter and inspect all houses without any warrant.”⁴¹ But the Framers also feared general searches of ships for dutiable items. While the record is less clear on this point, Davies argues that ships were *sui generis* and not covered by the Fourth Amendment.⁴²

⁴⁰ A reader of an early draft worried that some readers would not know Alfred E. Neuman. I was tempted to say “so be it” but caution prevailed. He is the “poster child” for *Mad Magazine* and his motto in the face of sure disaster is “what me worry”?

⁴¹ Cuddihy, *supra* note 35, at 759. Cuddihy concludes that this understanding violated both local law and British law. *Id.*

⁴² Davies, *supra* note 26, at 603-608. One additional piece of evidence in favor of Davies's position is that the Framers abolished general searches of ships about two months before debating the Fourth Amendment. The first federal statute regulating customs searches required

The correct resolution of the ship issue is not germane to my project because whether ships were included or not, the Framers sought to abolish general warrants. And that is all the Framers sought to do in the Fourth Amendment. I will offer a short proof of the proposition that the Fourth Amendment was aimed only at general warrants. Then I will ask why the Framers did not concern themselves with other types of searches and seizures. This discussion leads, I believe, to the conclusion that had the Framers seen the future, they would have written a different Fourth Amendment. If I am right on this point, I am open to attack from originalists. To conclude that the Framers wrote the wrong Fourth Amendment might move the originalist to say that the people should amend the Constitution to get the right Fourth Amendment; otherwise the Fourth Amendment condemns general warrants and that's all. To satisfy the originalist, I can perhaps claim that these nascent rights are in the Ninth Amendment and the Fourteenth. Thus, technically, what follows might be an argument for finding a right against unreasonable searches and seizures in the Ninth and Fourteenth Amendments. But those kinds of distinctions are less important to me than getting the right in question defined properly, and I will situate the argument in the Fourth Amendment. Indeed, if compelled to choose between originalism and a modern reading of the Fourth Amendment consistent with the Framers' values, I choose the latter.

The Fourth Amendment has detailed requirements to ensure that warrants are specific rather than general: “no Warrants shall issue, but upon probable cause, supported by Oath or

customs officers to have “reason to suspect any goods or merchandise subject to duty shall be concealed” before they could enter any ship or vessel” to search. 1 Stat., ch.5, sect. 24 (1789). The Framers obviously knew of the problem of suspicion-less searches of ships and how hard would it have been to include “ships” in the first clause of the Amendment?

affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” The first clause contains a vague observation that the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”⁴³ Thomas Davies has concluded that “unreasonable” meant something quite different to the Framers than it does to us today. Today, it has a relativistic meaning -- roughly, conduct that is inappropriate in the particular circumstances.⁴⁴ One may act reasonably, under tort law, by driving 80 miles an hour to get a badly injured person to the hospital but not by driving 80 miles an hour on icy roads for the thrill of it.

The Framers, according to Davies, understood the term in a much more formal way. Lord Coke used it as a synonym for “unconstitutional.” In the seventeenth and eighteenth centuries, “To say that a statute was ‘against reason’ was to say that it violated basic principles of legality.”⁴⁵ When James Otis argued against the writs of assistance in 1761, he cited, and probably quoted, an opinion by Lord Coke that used “against reason” to mean “so contrary to the principles of common law as to be ‘void.’”⁴⁶ John Adams was in the audience that day and his notes of Otis’s speech include the citation to the Lord Coke opinion.⁴⁷ Adams wrote the Massachusetts constitutional provision condemning unreasonable searches and seizures, and the Framers of the

⁴³ U.S. Const. amend. IV.

⁴⁴ Davies, *supra* note 26, at 686.

⁴⁵ *Id.* at 688.

⁴⁶ *Id.* at 690. Davies concludes that Otis would have read Coke’s “against reason” language because he spoke for four hours. *Id.*

⁴⁷ *Id.*

Fourth Amendment drew from Adams's provision. "Because 'unreasonable' was a pejorative synonym for gross illegality or unconstitutionality, . . . the Framers would have understood 'unreasonable searches and seizures' as the pejorative label for searches or arrests made under that most illegal pretense of authority -- general warrants."⁴⁸

Further evidence supporting Davies's reading of history is that the only right against unreasonable searches and seizures created in state constitutions or charters prior to the drafting of the Fourth Amendment was the right not to have a general warrant issued.⁴⁹ An example is the Massachusetts provision that John Adams wrote:

Every subject has a right to be secure from all unreasonable searches, and seizures of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities, prescribed by the laws.⁵⁰

The "therefore" that connects the general condemnation of unreasonable searches and seizures to

⁴⁸ *Id.* at 693.

⁴⁹ Neil H. Cogan, ed., *The Complete Bill of Rights* 234-35 (1997).

⁵⁰ Massachusetts Constitution, XIV (1780).

the specific limitation on warrants makes plain that the John Adams had in mind only general warrants in the first sentence.

The focus on general warrants can be seen in Madison's original formulation of the Amendment: that the right of the people to be free from unreasonable searches and seizures "shall not be violated by warrants issuing without probable cause" ⁵¹ This locution can only be read, I think, to create a right against general warrants rather than a broader right against unreasonable searches and seizures. To be sure, Madison's locution was changed to the form we have today, with two independent clauses joined by "and," and ratified in that form. But the evidence we have suggests that the change was intended to make the ban on general warrants stronger, rather than to create a free-standing protection in the first clause.

Mr. Benson made the motion to change the wording to the current form. His argument was that "by warrants issued" was not a "sufficient" ban against general warrants. ⁵² He "therefore proposed to alter it so as to read 'and no warrant shall issue.'" ⁵³ "No warrant shall issue" is a stronger locution than "the right . . . shall not be violated by warrants issued" and there is no reason to think that uncoupling of the clauses did anything more than strengthen the prohibition against general warrants.

The other evidence that the Framers worried only about general searches comes from the

⁵¹ Documentary History of the First Federal Congress, vol. IV, 1789-91, 11.

⁵² Id. at vol. XI, 1789-91, 1291.

⁵³ Id.

debates in the state conventions and from the pamphlets and newspapers of the era. In giving an example of the deficiencies of the new government, Patrick Henry said on June 24, 1788, that many “valuable things are omitted” -- for example:

general warrants, by which an officer may search suspected places, without evidence of the commission of a fact, or seize any person without evidence of his crime, ought to be prohibited. As these are admitted, any man may be seized, any property may be taken, in the most arbitrary manner without evidence or reason. Every thing the most sacred may be searched and ransacked by the strong hand of power. We have infinitely more reason to dread general warrants here than they have in England, because there, if a person be confined, liberty may be quickly obtained by the writ of habeas corpus.⁵⁴

Henry had earlier held up the Virginia Bill of Rights as a model. Again, he described only the right against general warrants when discussing “those indefeasible rights which ought ever to be held sacred!” A fuller quote follows:

In the present [Virginia] Constitution, they are restrained from issuing general warrants to search suspected places, or seize persons not named, without evidence of the commission of a fact, etc. There was certainly some celestial influence governing those who deliberated on that Constitution; for they have, with the most

⁵⁴ 3 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787*, 588 (1847) (June 24, 1788).

cautious and enlightened circumspection, guarded those indefeasible rights which ought ever to be held sacred! The officers of Congress may come upon you now, fortified with all the terrors of paramount federal authority. Excisemen may come in multitudes; for the limitation of their numbers no man knows. They may, unless the general government be restrained by a bill of rights, or some similar restriction, go into cellars and rooms, and search, ransack, and measure every thing you eat, drink, and wear.⁵⁵

Among other inferences one can draw from the above quote, Patrick Henry's distaste for federal customs agents is almost palpable!

The Philadelphia Independent Gazetteer on October 5, 1787 described the rights afforded under the state constitution (called here a "frame of government") as a model for what should be included in the Bill of Rights.

Your present frame of government, secures you to hold yourselves, houses, papers and possessions free from search and seizure, and therefore warrants granted without oaths or affirmations first made, affording sufficient foundation for them, whereby any officer or messenger may be commanded or required to search your house or seize your persons or property, not particularly described in such warrant, shall not be granted. . . . How long those rights will appertain to you, you yourselves are called upon to say, whether your *houses* shall continue to be your

⁵⁵ Id. at 448-449 (June 16, 1788).

castles; whether your *papers*, your *persons*, and your *property*, are to be held sacred and free from *general warrants*, you are now to determine.⁵⁶

While there are clearly values being protected here that transcend guaranteeing specific warrants -- for example, requiring a "sufficient foundation" to allow authorities to search and seize -- it is equally clear that the writer had only general warrants in mind as the evil to be forbidden.

Rephrased in modern style the original meaning of the Fourth Amendment is: "The right of the people to be secure in their persons, houses, papers, and effects against general warrants 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." So we search history in vain for a meaning of "unreasonable" that extends beyond the condemnation of general warrants.

But why would *that* be the exclusive focus of men who were very suspicious of the new central government? Why not have a more general protection of privacy? The answer here is that, like all of us, the Framers were a product of their times. No general limitation on warrantless searches would be needed because the nature of crime and policing did not produce much in the way of searches without warrants.

⁵⁶ Id. at 239, quoting 13 John P. Kaminski & Gaspare J Saladino, eds. *The Documentary History of the Ratification of the Constitution* 328-29 (1981-1995).

The Framers would not have known the “police” that we have today. “Constables were expected to preserve order by keeping an eye on taverns, controlling drunks, apprehending vagrants, and responding to ‘affrays’ (fights) and other disturbances—but they were not otherwise expected to investigate crime.”⁵⁷ To supplement the constables, most cities employed the nightwatch. Designed to disrupt ongoing crimes and prevent crimes about to happen, the nightwatches in New York City, for example, were sometimes composed entirely of civilians forced either to take their regular turn or pay for a substitute to replace them. At other times, especially during wars, the militia took over the watch. At still other times, a paid constables’ watch was used or citizens themselves were paid to guard the city.⁵⁸ ““Night watchmen did not have police powers and could arrest with impunity only if a crime were committed before their eyes or if they were acting under the direction of a police officer.”⁵⁹

Obviously, a para-military operation designed to keep the streets safe at night is a world removed from pro-active policing designed to solve crimes that are already complete. What was the colonial approach to this problem? The answer was that for the most part citizens initiated criminal prosecutions. Putting to one side homicides⁶⁰ and the crimes that threatened the social or economic order -- for example, riot, treason, and counterfeiting -- “the initiation of arrests and searches commenced when a crime victim either raised the ‘hue and cry’ or made a sworn

⁵⁷ Davies, *supra* note 26, at 621-22.

⁵⁸ *Id.*

⁵⁹ James Richardson, *The New York Police, Colonial Times to 1901*, at 18. Richardson uses “police officer” interchangeably with “peace officer,” by which he means marshals and constables.

⁶⁰ Homicides could be “inquired into by a coroner’s inquest or grand jury.” Davies, *supra* note 26, at 622.

complaint.”⁶¹ The difference between these approaches to completed crimes and modern policing, as I shall explain, is that colonial crime-solving would not be helped by warrantless searches other than the search incident to arrest, and there is considerable doubt about the extent to which searches incident to arrest occurred routinely.⁶²

The hue and cry was an ancient common law process that obligated anyone who knew of a felony to raise the hue and cry “with horn and with voice” to put the village on notice of the felony.⁶³ Then “they that keep the town” (all able bodied men) shall follow “from town to town, and from county to county” until the felon “be taken and delivered to the sheriff.”⁶⁴ The hue and cry dates back to Edward I (around 1300) and evolved over the centuries into a more elaborate process. A statute during Elizabeth’s reign required that it be conducted “with both horsemen and footmen.”⁶⁵ A later statute made a village liable to a fine (to being “amerced according to the law of Alfred”) upon a constable or “like officer refusing or neglecting to make hue and cry.”⁶⁶

In the eighteenth century, the “hue and cry” was “the major instrument of police protection in New York City” and in the other major cities of Europe and America.⁶⁷ One

⁶¹ Id.

⁶² See *infra* notes 130-36 and accompanying text.

⁶³ 4 W. BLACKSTONE’S COMMENTARIES *290

⁶⁴ Id.

⁶⁵ Id. at *291 (citing 27 Eliz. c. 13).

⁶⁶ Id. (citing 8 Geo. II. c. 16).

⁶⁷ Douglas Greenberg, *The Effectiveness of Law Enforcement in Eighteenth-Century New York*, in 1 *The Colonies and Early Republic*, vol 1, at 266, *Crime and Justice In American*

advantage to the hue and cry is that “constables and his attendants” had “the same powers, protection, and indemnification, as if acting under the warrant of a justice of the peace.”⁶⁸ So warrantless arrests could be made, based on probable cause, and searches incident to arrest, perhaps, but constables had no incentive to make any other kind of warrantless search. A variation on hue and cry was the search for escaped prisoners, which could be authorized without a warrant. For example, on December 30, 1776, the Continental Congress requested Baltimore county “to direct immediate and strict search for the prisoners, who last night escaped from the gaol in Baltimore.”⁶⁹

By the eighteenth century, the justice of the peace could issue a hue and cry warrant,⁷⁰ apparently for cases where fresh pursuit was no longer possible. An early example (1716-17) is a New York hue and cry warrant presented by a mother for the murder of her bastard child.⁷¹ Between 1767 and 1775, “six typical Virginia warrants ordered peace officers to search diligently for a horse thief, fugitive servants and slaves, a counterfeiter, a murderer, and a jailbreaker.”⁷² The records in New York indicate that the hue and cry warrant was not used very often,⁷³ but the

History (ed. Eric H. Monkkonen 1991).

⁶⁸ Id.

⁶⁹ Journals of the Continental Congress, 1774-1789, at 1052.

⁷⁰ Cuddihy, *supra* note 35, at 1143-45; Julius Goebel Jr. & T. Raymond Naughton, *Law Enforcement in Colonial New York* 420-21 (1970).

⁷¹ Goebel & Naughton, *supra* note 70, at 420 n.202.

⁷² Cuddihy, *supra* note 35, at 1144.

⁷³ To be sure, hue and cry warrants might escape detection today if they were included “with the usual order of ‘common process.’” Goebel & Naughton, *supra* note 70, at 420 & n.202.

“ancient practice of [warrantless] actual hot pursuit persisted.”⁷⁴

The closest to modern police officers were the constables and marshals. They “had the common law duties and powers” of peace officers.⁷⁵ Only they could legally execute arrest warrants, and they “had more latitude than the private citizen in making an arrest without a warrant.”⁷⁶ Private citizens “could be sued by an innocent man even if [the citizen] had acted on reasonable grounds and in good faith; a peace or police officer could be sued by an innocent man only if the officer acted frivolously or with deliberate intent to oppress.”⁷⁷ Moreover, unlike the night watchmen, whose duty was to keep the peace, constables and marshals were charged with being “vigilant in detecting and bringing to justice all Murderers, Robbers, Thieves and other Criminals.”⁷⁸

The Framers would have endorsed constables, marshals, and citizens searching for robbers, thieves, and escaped prisoners. To be sure, the hue and cry warrant had some of the attributes of general warrants in that the authorities could search wherever the felon might be hiding, though the treatises of the time “frequently advised against forcible entry unless the suspect was inside.”⁷⁹ But a general search for a horse thief, a murderer, or a jail breaker was

⁷⁴ *Id.* at n.202.

⁷⁵ Richardson, *supra* note 59, at 17.

⁷⁶ *Id.* at 18.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Cuddihy, *supra* note 35, at 1143.

designed to protect public safety, and the threat to privacy was considered more justifiable. Moreover, a search for a particular individual, general though it may be in some senses, is not nearly as destructive of privacy as the writs of assistance that authorized inspection of any house or truly general warrants instructing officers to look not for particular felons but more generally to suppress particular crimes.⁸⁰ Most importantly, the hue and cry arrest was either on hot pursuit or pursuant to a warrant. The Framers would not have thought this practice to be threatening to privacy and would not have intended to regulate it in the Fourth Amendment. Why regulate a process that is proceeding in an acceptable manner?

The other way a citizen could initiate the criminal process in the eighteenth century was by filing a complaint with a local justice of the peace. The justice of the peace could issue arrest and search warrants, to be served by the constable or marshal.⁸¹ These warrants were typically (though not always) specific in nature. When they authorized the constable or marshal to arrest a particular individual or search a particular place, the Framers would not have objected.⁸² When the warrants were general in nature, the Warrant Clause took care of that problem.

And what of the crimes that threatened government -- riot, treason, and counterfeiting? The prosecution of these crimes was by government rather than citizens. Riot was not a crime that would have required a search to obtain evidence of guilt. Evidence of treason might be

⁸⁰ Id. at 1144-1145.

⁸¹ See Davies, *supra* note 26, at 625.

⁸² See Cuddihy, *supra* note 35, at 1494-99.

found by warrant, but treason prosecutions were rare in colonial America,⁸³ and no evidence exists of colonial era warrants in treason cases. Counterfeiting was of course precisely the kind of crime for which a search warrant would be highly useful. And it appears that they were used at least to some extent in colonial America. “Warrants, orders, and executive proclamations in New Hampshire, Pennsylvania, and South Carolina . . . told enforcers to ‘make Search’ or to ‘make diligent Search’ to suppress counterfeiting, arson, and insurrection.”⁸⁴ A 1764 Connecticut warrant ordered “‘diligent Search in all places’ where the informant and the New Haven County Sheriff suspected that counterfeit coins or the machinery for manufacturing them might be found.”⁸⁵ But the prohibition against general warrants in the Fourth Amendment took care of the problems presented by these warrants and orders.

As long as the constable had a specific warrant to search or arrest, the Framers would not have objected. As long as an arrest was made by the hue and cry in hot pursuit, the Framers would not have cared. What of the problem of peace officers making arrests outside the hue and cry and without a warrant? Many have noted that the common law created a major disincentive to making arrests without a warrant. Until 1783, “the officer arrested without a warrant at his peril because if a felony had, in fact, not been committed, he would be liable to the arrested person” regardless of the quantum of evidence that supported the arrest.⁸⁶ In England, the King’s

⁸³ See James Williard Hurst, *The Law of Treason in the United States* 82 (1945).

⁸⁴ *Id.* at 1144-1145.

⁸⁵ *Id.* at 1145.

⁸⁶ Joseph J. Stengel, *The Background of the Fourth Amendment to the Constitution of the United States*, 3 *U. Rich. L. Rev.* 278, 290 n.66 (1969).

Bench changed the rule in 1783 to provide that the officer was not liable in damages if he made a warrantless arrest on a “reasonable and probable ground of suspicion.”⁸⁷ The strict liability rule continued for night watchmen and citizens who made arrests pursuant to the hue and cry. While it is not clear when the change in the rule about officers first appeared in the United States, no evidence of it exists prior to an 1829 New York case that approves the change.⁸⁸ The experience of the constable or marshal, and the view of the Framers, would not likely have been changed by the new rule from Britain. In 1783, we were not taking many lessons from Britain. Thus, the Framers would have assumed that the tort law effectively deterred warrantless arrests unless pursuant to the hue and cry.⁸⁹

But a much larger disincentive to illegal arrests existed than the one created by the common law tort liability. What has escaped the attention of most legal historiographies to date is the political and personal risks that constables ran when serving warrants. At least in eighteenth century New York, the social fabric was frayed and sometimes close to tearing. Law was often not enforced because the State lacked the force or the will to confront lawbreakers. Constables were often “assaulted and resisted when they attempted to make an arrest.”⁹⁰ Over 70% of the seventeenth century cases of contempt of authority collected by one researcher “involved attacks by citizens on officers of the law.”⁹¹ Though “it is difficult to explain the

⁸⁷ Samuel v. Payne, 99 Eng. Rep. 280 (K.B. 1783).

⁸⁸ See Holley v. Mix, 3 Wend. 350 (N.Y. Sup. 1829).

⁸⁹ See Cuddihy, *supra* note 35, at 1532-45.

⁹⁰ Greenberg, *supra* note 67, at 267.

⁹¹ *Id.*

frequency of these attacks on law enforcement,” likely reasons include that the constabulary was largely drawn from artisans and tradesmen, with no training in being a peace officer, and “that respect for authority of government seems often to have been lacking.”⁹² The most intriguing reason is offered by historian Douglas Greenberg: the existence of a “common Error generally prevailing among the Lower Classes of Mankind in this part of the world that after warning the Officer to desist and bidding him to stand off at his Peril, it was lawful to oppose him by any means to prevent the arrest. . . .”⁹³ Peace officers who faced angry suspects willing to oppose the arrest by any means could not have been eager to make many arrests.

This reluctance to make arrests suggests that officers would have also been reluctant to search incident to arrest, at least beyond what was necessary to disarm the suspect. Cuddihy suggests that colonial peace officers routinely searched the person, effects, and even the mouth of the suspect.⁹⁴ But he cites no cases for the proposition and there is no way to know whether the newspaper accounts and correspondence describe a routine practice or something so out of the ordinary as to merit mention. It seems to me that officers who are afraid to arrest would want to keep their hands out of the mouth of the arrestee!

Part of the problem faced by constables and sheriffs is that they lacked the force to overcome resistance. When the Attorney General of New York was faced in 1765 with mobs of up to 200 people ousting families from their homes in Dutchess County, he “found that it was

⁹² *Id.*

⁹³ *Id.* at 267-68 (quoting from the pardon given by the governor of the colony of New York to the murderer of the Sheriff of New York in 1756).

⁹⁴ Cuddihy, *supra* note 35, at 847-48. For a more detailed discussion of colonial era search incident to arrest, see *infra* notes 130-36 and accompanying text.

simply too difficult to arrest 200 men -- or even ten. Indeed, it was dangerous enough to apprehend just one offender. New York society in the eighteenth century simply lacked the resources to resist such disorder.”⁹⁵ In addition, New York was unable to fill constable, sheriff, and other criminal justice positions with qualified men. “For example, two prisoners who had been sentenced to hang on January 18, 1762 were reprieved until February 19 because ‘the sheriff cannot find any person to act as hangman.”⁹⁶ The prisoners were hung only when “a party of the Majesty’s Forces” was called out “to guard the Sheriff and Civil Officers against any Insult.”⁹⁷

It is difficult for us in the twenty-first century to appreciate this kind of social disorder. As we have seen, outside the context of general warrants and writs of assistance, the Framers would have had no conception of aggressive policing. They simply had no template in their head for officers of the law seeking to gather evidence of crime, or even aggressively to arrest ordinary criminals. To the extent the New York experience can be generalized,⁹⁸ the Framers would likely have wished for *more* aggressive policing, not less, as long as it was done by local (not federal) officers and was directed at robbers and thieves.

⁹⁵ Id. at 268.

⁹⁶ Id. at 271 (quoting N.Y.S.L. Mss., XC. 66 (Jan. 18, 1762)).

⁹⁷ Id.

⁹⁸ Historians suggest that New York was more lawless than most other colonies because

When writing the Fourth Amendment, the Framers would not have worried about the arrests and searches for evidence of “ordinary” crime. What they did think about were the searches and seizures that the British had used to enforce the increasingly-unpopular customs laws. This history suggests that the search-related evil that the Framers would have perceived was the general search. Reading the Fourth Amendment with this history in mind makes it plain that an unreasonable search was a general search and an unreasonable seizure was a seizure pursuant to a general warrant.

The Framers took care of that problem with the Warrant Clause. If we had asked them, “What else does the Fourth Amendment protect against?” they would not have understood the question. But on the reasonably safe bet the Framers would have created protection against some types of aggressive modern policing if they could have seen the future, we can examine the context of the passage of the Fourth Amendment and some of the remarks made by the anti-Federalists. Here, I will seek answers to some of the questions I posed in the beginning.

IV. What Alfred E. Neuman *Should* Have Been Worrying About in 1789

of its “extraordinarily volatile” society and politics. Greenberg, *supra* note 67, at 280.

In 1789, the anti-Federalists intended to keep the central government from using general warrants to pursue and punish its enemies. Given that aggressive policing in the modern style was unknown to the Framers, they could not have had any intent about the appropriate balance between aggressive policing and the right to be “secure in [our] persons, houses, papers, and effects from unreasonable searches and seizures.” To get some idea how the Framers might have reacted had they known the kind of policing that would evolve over time, we can examine the debate about the need for the Fourth Amendment and the contemporaneous congressional statutes. One strand of their attitude can be discerned from remarks made at the Virginia state convention considering ratification of the Constitution. George Mason on June 11, 1788 made anti-tax remarks in the Virginia ratifying convention that included the following prediction about excise taxes: “this will carry the exciseman to every farmers house, who distills a little brandy, where he may search and ransack as he pleases.”⁹⁹

Patrick Henry amplified on the concern about the excisemen when he spoke of a “government of force” that the Constitution might create. Congress may declare war, and “the President shall command the regular troops, militia, and navy.”¹⁰⁰ Part of Henry’s concern about a “government of force” was with the power to search. “Suppose an exciseman will demand leave to enter your cellar, or house, by virtue of his office; perhaps he may call on the militia to enable him to go.”¹⁰¹ On another occasion, Henry warned of federal sheriffs who may “ruin you by impunity” by “sucking your blood by speculations, commissions, and fees.” “Thus, thousands

⁹⁹ Elliot, *supra* note 54, at 265.

¹⁰⁰ *Id.* at 411.

¹⁰¹ *Id.* at 412.

of people will be most shamefully robbed.”¹⁰² In the same speech, he said the federal Constitution “squints toward monarchy” with a president who “may easily become king” and a senate where “your dearest rights may be sacrificed by what may be a small minority” that may “continue forever unchangeably [sic] this government, though horridly defective.”¹⁰³

The Henry-Mason concern is the power to search “by virtue of office” backed by the power of the president and the federal army. A second concern appears, quite clearly, in a statute Congress passed before it acted on the proposed Bill of Rights. In a statute designed both to give power to and to restrain the dreaded “excisemen,” Congress gave customs officers the “full power and authority, to enter any ship or vessel, in which they *shall have reason to suspect* any goods or merchandise subject to duty shall be concealed.”¹⁰⁴ The same section provided that with “*cause to suspect* a concealment thereof, in any particular dwelling-house, store, building, or other such place,” the customs officers were “entitled to a warrant to enter such house, store, or other place (in the daytime only) and there to search for such goods.”¹⁰⁵ In sum, the Framers envisioned searches requiring in all cases a “reason to suspect” or “cause to suspect,” and when the cause focused on structures on land, a warrant was required. Moreover, the common law requirement that a home could be searched only during the daytime was included in the statute.

Four principles emerge from this history. First, the Framers feared that government

¹⁰² Id. at 57 (speech of Patrick Henry, Thursday, June 5, 1788).

¹⁰³ Id. at 58-59.

¹⁰⁴ 1 Stat., ch.5, sect. 24 (1789) (emphasis added).

¹⁰⁵ Id. (emphasis added).

actors would abuse their office to force compliance with searches. Second, the Framers believed that searches required individualized cause or suspicion. Third, searches of structures required a warrant. Fourth, the Framers embraced at least some of the common law—for example, the daytime requirement for searches of structures.

If these principles are fairly deduced from the Fourth Amendment history, then we can write the Fourth Amendment that the Framers would have written if they had known that the future problem with searches would not be general searches but, rather, countless warrantless searches sanctioned by a twentieth century Court that had no coherent theory of the Amendment. Here is my effort at that “new” Fourth Amendment:

[1] The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated [2] by Warrants issuing without probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized; [3] other than searches incident to arrest, no search shall be conducted on less than probable cause to believe that the search will produce evidence of crime; [4] search warrants are required only for searches of a structure or of the inside of the human body; [5] searches of structures shall be conducted in the daytime and pursuant to notice to occupants; and [6] no arrests or other seizure of the person shall be made on less than probable cause, [7] warrants are required for all arrests in the home unless the arrest is made in hot pursuit or to protect life or property; and [8] all arrests permit the arresting officer to search the arrestee and the area of his immediate control.

Clauses [1] and [2]¹⁰⁶ are the Fourth Amendment that Madison proposed. Though the risk of Congress or a state authorizing general warrants is pretty low, no reason suggests ignoring the risk. Moreover, the specific requirements for warrants in clause [2] provide helpful guidance to courts in evaluating warrants. Clause [3] has a single requirement that addresses the first two concerns manifest in the history of the Fourth Amendment. By requiring probable cause to make a search, the harm of suspicion-less searches is avoided, and the risk that officials will abuse their power to cause compliance by coercion or trickery is minimal. If the officer has probable cause to search, then he need not force acquiescence to his authority. He has the right to make the search. I exempted searches incident to arrest from this requirement because, even though the evidence is far scarcer than the Supreme Court would have us believe, there is some evidence that colonial law recognized the right to make this kind of search for protection of the arresting officer and to find evidence.¹⁰⁷

Clause [4] is roughly the Court's current warrant requirement and is consistent with the common law that the Framers knew. I assume that the interior of the body is equally as private as inside a structure. Unlike the Fourth Amendment that Madison wrote, this clause makes clear that warrants are *not* required for searches outside the house, an area of the law that has been in flux for the last 25 years.

¹⁰⁶ As a former high school and college English teacher, I am compelled to note that "clause" [2] is actually a phrase because it lacks a subject and predicate. I trust the reader will forgive my referring to it as "clause" in the text for the sake of symmetry.

¹⁰⁷ See *infra* notes 130-36 and accompanying text.

Clause [5] contains a daytime and notice requirement for execution of warrants to search structures. These are the least important rights in my “new” Fourth Amendment. But the notice requirement was well established at common law, and the First Congress saw fit to include the daytime requirement in the first customs search law. Both seem salutary and unlikely to create many problems for courts, though the question of how much notice to give, in terms of time, is from self-defining.¹⁰⁸

Clause [6] embodies the common law that probable cause is needed to arrest. I added “or other seizure of the person” to make clear that the Amendment should apply to more than formal arrests. I could find no evidence either way as to whether temporary seizures as part of the nightwatch were permissible at common law. But as I shall argue shortly, I am convinced that the common law would not have permitted the kind of temporary stop the Court permits under Madison’s Fourth Amendment in *Terry v. Ohio*.¹⁰⁹ Deciding what constitutes a “seizure of the person” is not, of course, easy, but the Court’s definition in *Terry* makes good sense: “whenever a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ the person.”¹¹⁰

Clause [7] is based on the Court’s reading of history and the resulting doctrine.¹¹¹ History

¹⁰⁸ See *Richards v. Wisconsin*, 520 U.S. 385 (1997).

¹⁰⁹ 392 U.S. 1 (1968). For my argument that *Terry* permits more than the common law, see *infra* notes 130-36 and accompanying text.

¹¹⁰ *Id.* at 16.

¹¹¹ See *Payton v. New York*, 445 U.S. 573 (1980).

is less than clear that warrants were required for arrests in the home,¹¹² but the Court's doctrine makes good sense even if history is a bit opaque. Clause [8] embraces the search incident to arrest doctrine, despite, again, a lack of solid historical evidence. History aside, the policy considerations are so strong here -- especially protecting the arresting officer -- that any interpretation of a limitation on searches simply must include this exception.

From here, my plan is to show how my reconstructed Fourth Amendment compares with what the Court has done. First I will defend my reconstructed Fourth Amendment in more detail.

V. Arguments for a Reconstructed Fourth Amendment

I shall proceed in a different order than the clauses are listed in my reconstructed Fourth Amendment. It makes sense to dispose of the three clauses that do not involve complicated issues before proceeding to the ones that are both complicated and contentious.

A. *Clause [4]: Search warrants are required only for searches of a structure or of the interior of the human body.*

¹¹² In a rare serious treatment of history by the Court, the *Payton* majority and dissent engage each other in a thoughtful and well-researched discussion of this point.

Colonial search warrants were sometimes broader than a search of a structure—for example, a warrant commanding the constable to “diligently search every suspected House and place within your Parish”¹¹³—yet it is difficult to imagine what would be searched other than a structure, a ship, an open space, or a person. Whatever the common law, the language of the Amendment (“persons, houses, papers, and effects”) seems to exclude ships and open spaces. That leaves structures and persons. The search of persons incident to arrest is covered by Clause [8]. All other searches of persons are covered by Clause [3], which requires probable cause but no warrant. As to the nature of structures, I intend to cover all structures—barns, outbuilding, and commercial premises as well as houses. Davies concludes that the Framers would have envisioned much less protection for commercial premises than for homes.¹¹⁴ That may be right, though the first customs law made a point to include as protected places “house, store, or other place.” Moreover, Cuddihy noted the existence of several pre-Framing state statutes that protected warehouses, storehouses, barns, and out-houses along with houses.¹¹⁵ As Cuddihy puts it, “The sanctity of the American house was spreading to the outbuildings and to the things that they contained.”¹¹⁶ This seems sufficient evidence to use the word “structure” in place of “home” in clause [4].

Additional evidence that warrants were required for searches of structures can be found in

¹¹³ Conductor Generalis 93 (1722).

¹¹⁴ Davies, *supra* note 26, at 608.

¹¹⁵ Cuddihy, *supra* note 35, at 1342-43 (noting statutes from Delaware, Virginia, Massachusetts, and Rhode Island).

¹¹⁶ *Id.* at 1344.

the actions of the Continental Congress. At the height of the Revolutionary War, the Continental Congress recommended to the various States that they make it a crime to harbor deserters. Part of the recommended law was to fine “any commissioned officer, constable, or other person” who “shall break open any dwelling House, or outhouse under pretense to search for deserters, without warrant from a Justice of the Peace . . . if no deserter shall be found therein.”¹¹⁷ To be sure, this is a weak form of a warrant requirement as it does not apply unless the searcher was mistaken about the presence of deserters but it nonetheless shows that warrants were important when officers sought to justify entry into homes or even outbuildings.

¹¹⁷ Journals of the Continental Congress, 1774-1789 at 117 (Thursday, February 13, 1777).

If Cuddihy is right, colonial officers sometimes searched the mouth of the arrestee.¹¹⁸ But the Framers would not likely have thought of other body cavity searches or the extraction of blood for analysis. Nonetheless, as the Court has suggested, if a warrant is required for the search of a house, the Fourth Amendment should require at least that much to search under the skin of a person:

Search warrants are ordinarily required for searches of dwellings, and, absent an emergency, no less could be required where intrusions into the human body are concerned The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great.¹¹⁹

The search warrant requirement here is a robust version of the Court's current warrant requirement. The Court held in 1925 that a search warrant was required to search a home¹²⁰ and it has repeated that statement of the core Fourth Amendment protection in many cases.¹²¹ My formulation is a robust version of the Court's rule because it lacks any exception. All searches of structures must be by warrant. No exception exists for exigent circumstances because, as just noted, any exigency can be thoroughly mitigated through the exigent exception for warrant-less

¹¹⁸ Cuddihy, *supra* note 35, at 847-48.

¹¹⁹ *Schmerber v. California*, 384 U.S. 757, 770 (1966). See also *Winston v. Lee*, 470 U.S. 753 (1985).

¹²⁰ *Agnello v. United States*, 269 U.S. 20 (1925).

¹²¹ See *Coolidge v. New Hampshire*, 403 U.S. 445 (1971); *Johnson v. United States*, 333 U.S. 10 (1948).

arrests in the home.

More controversially, there is no exception for consent. Consent is offered to justify searches of homes and of persons and vehicles. My reconstructed Fourth Amendment rejects consent as a justification for a search. Because consent comes up much more frequently as a justification to search persons or vehicles than homes, I defer defending its elimination until I discuss the clause [3] requirement of probable cause. The same justifications that undergird the argument in the clause [3] context apply to the warrant requirement here.

B. Clause [5]: searches of structures shall be conducted in the daytime and pursuant to notice to occupants.

The daytime requirement comes from the first federal customs law and makes good sense. If an emergency justifies entry into a home in the nighttime, clause [5] permits an entry to make an arrest, assuming probable cause. If the suspect is arrested, police can secure the premises (nothing in my reconstructed Amendment would forbid this) and make a thorough search the next day with a warrant.¹²² Thus, no reason suggests itself to permit entry into a home at night merely to make a search that could be made during the day.

¹²² The Court agrees that the Fourth Amendment requires a warrant to search after the exigency has ceased. See *Mincey v. Arizona*, 437 U.S. 385 (1978).

The notice requirement is solidly embedded in the common law. It appears in a 1603 case that refers to it as already part of the common law when it appeared in a statute in 1275!¹²³ Whether it goes back before 1275, it was well established in the eighteenth century. The Court cites several framing era sources. William Hawkins, one of the most influential commentators in the years leading up to the Bill of Rights, stated the rule clearly and noted no exceptions although, to be sure, his rule was limited to making arrests inside a structure.¹²⁴ But the 1603 case articulated the rule to include “other execution of the K[ing]’s process.”¹²⁵ And it makes no sense to require notice to make an arrest inside a structure and not require notice for a thorough search of the premises, so we should read Hawkins to include the execution of search warrants:

And now I am to consider in what Cases it is lawful to break open Doors to apprehend Offenders; and to this Purpose I shall premise, That the Law doth never allow of such Extremities but in Cases of Necessity; and therefore, That no one can justify the Breaking open another’s Doors to make an Arrest, unless he first signify to those in the House the cause of his Coming and request them to give him Admittance.¹²⁶

As Davies first noted, the framing-era sources articulating the notice rule do not admit of exceptions, though the Court has conveniently read the Fourth

¹²³ *Wilson v. Arkansas*, 514 U.S. 927, 932 n.2 (1995).

¹²⁴ 2 William Hawkins, *Pleas of the Crown*, ch. 14, p. 86, sect. 1 (1726).

¹²⁵ *Seymane’s Case*, 77 Eng. Rep. 194, 195 (K.B. 1603).

¹²⁶ 2 William Hawkins, *Pleas of the Crown*, ch. 14, p. 86, sect. 1 (1726).

Amendment “reasonableness” requirement in the first clause “not to mandate a rigid rule of announcement that ignores countervailing law enforcement interests.”¹²⁷ Of course there are policy grounds in favor of permitting courts to craft exceptions when giving notice would expose the officers to danger or, perhaps, when notice would permit destruction of evidence. But Clause [1] relates only to searches and if we are really trying to write the Fourth Amendment the Framers would have written had they seen the future, I doubt that they would have wanted courts ignoring the notice requirement just to make it easier for the customs officers to find evidence inside a man’s home. So I will go with history here and permit no exceptions to protect against destruction of evidence.

The only other issue posed by this clause is how long must the officer wait for an answer to the notice before he can force entry. Read literally, Hawkins would seem to require that the officer must wait for an answer, however long it takes. He wrote: “But where a person authorized to arrest another who is sheltered in a House, is denied quietly to enter it, in Order to take him; it seems generally to be agreed, That he may justify Breaking open the Doors in the following Instances”¹²⁸ But to require the officer to wait until an answer is given seems an unjustified reading of Hawkins. On the other hand, the Court has not required very much,

¹²⁷ Wilson v. Arkansas, 514 U.S. 927, 934-35 (1995). Davies concludes that this exception was “a departure from historical doctrine.” Davies, supra note 26, at 742, n.561. The cases that the Court cites fail to establish any general rule of reasonableness from the common law.

¹²⁸ Hawkins, supra note 124, at ch. 14, p. 86, sect. 2.

holding that a 15 to 20 second wait can satisfy the Fourth Amendment.¹²⁹ That level of detail is beyond the scope of my current project.

C. Clause [8]: all arrests permit the arresting officer to search the arrestee and the area of his immediate control.

Despite the Court's oft-repeated assurance that this mode of search has been "always recognized under English and American law,"¹³⁰ support for that proposition is surprisingly hard to find.¹³¹ Davies cites a single source, an essay by a former high constable of Middlesex England that advises constables that "a thorough search of the [arrested] felon is of the utmost consequence to your own safety, and . . . by this means he will be deprived of instruments of mischief, and evidence may probably be found on him sufficient to convict him."¹³² Davies then

¹²⁹ United States v. Banks, 540 U.S. ____ (2003).

¹³⁰ See, e.g., Weeks v. United States, 232 U.S. 383, 392 (1914).

¹³¹ For this proposition, *Weeks*, at id. cited 1 Bishop. Crim. Proc. § 211 (2d ed. 1872); Wharton, Crim. Pl. & Pr. 8th ed. § 60; *Dillon v. O'Brien*, 16 Cox 245, I. R. L. R. 20 C. L. 300 (Ireland C. C. 1887); 7 Am. Crim. Rep. 66. The problem is that *Dillon* is the only case cited (the Court cites two different reports of *Dillon*); it is an Irish case, not English or American; it is from the late nineteenth century not the eighteenth; and the Irish court rejects the incident to arrest proposition on the facts presented (but acknowledges in dicta that some form of the right to search an arrestee exists). The treatises are from many years after the Framing. Moreover, the edition of Bishop the Court cited, published in 1872, says, "Let the reader understand, that the author has before him no case in which this exact proposition is stated" 1 Bishop, 2d ed., 127.

¹³² Davies, *supra* note 26, at 627 n.213 (citing essay in *Conductor Generalis*, 445 (James Parker ed., New York 1788)). Written by Saunders Welch, former high constable of Middlesex, England, the essay advises constables that "a thorough search of the [arrested] felon is of the utmost consequence to your own safety, and... by this means he will be deprived of instruments of mischief, and evidence may probably be found on him sufficient to convict him").

noted that “the doctrine of search incident to arrest is not uniformly accorded importance in the framing-era materials; for example, there is no mention of that doctrine in” a Virginia Justice of the Peace manual published around the time of the Framing.¹³³

Cuddihy concludes, “Anyone arrested [in the colonial era] could expect that not only his surface clothing but his body, luggage, and saddlebags would be searched and, perhaps, his shoes, socks, and mouth as well.”¹³⁴ But the only authorities he cites for this proposition, and there are many of them, are letters, memoranda, depositions, and newspaper accounts. Does the existence of this documentary record show that these searches were routine or, rather, that they were noteworthy enough to be recorded? In a later part of his dissertation, Cuddihy notes that “numerous legal manuals” from the time of the framing recognized the practice of searching someone who has been arrested by warrant after the officer has forced entry.¹³⁵ Still later in his dissertation, Cuddihy concedes that these treatises stand only for the proposition that “officials could force open doors to serve arrest warrants, not [that] they could search after achieving entrance or how far.”¹³⁶ Perhaps the narrow proposition can be generalized to the broad one he makes earlier. Perhaps the broader principle was so well accepted that it was simply not raised in cases or mentioned in the treatises. Perhaps.

¹³³ Id. (referring to William Waller Hening, *New Virginia Justice*, entered for publication in 1794).

¹³⁴ Cuddihy, *supra* note 35, at 847-48.

¹³⁵ Id. at 1352, citing seven legal manuals at n.240.

¹³⁶ Id. at 1552.

Of course, the policy reasons supporting this type of search are overwhelming. Moreover, it is not true that to permit this kind of search ignores the probable cause requirement. There must be probable cause to make the arrest, after all. Moreover, rare will be the arrest based on probable cause that does not automatically give rise to probable cause to search the person and area of control of the arrestee.¹³⁷ The arrest of all felons would likely give rise to probable cause to search for weapons. The arrest for any drug offense would surely create probable cause to search for drugs. Rather than litigate this issue in every case, why not have a bright line rule permitting what sound policy suggests?

D. The right . . . shall not be violated by [2] Warrants issuing without probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This clause has been a resounding success. Cuddihy's exhaustive search of treatises and legal manuals from 1792-1820 turned up "[o]nly a few general search warrants in this literature, all commanding their bearers 'to make diligent search' for a fugitive."¹³⁸ The Supreme Court has never decided a case involving a general warrant. A few cases raise the issue of whether the description is particular enough. So, for example, the Court had to decide whether a description of the suspect's premises as the "third floor apartment" was sufficiently particular when it turned

¹³⁷ That rare case does exist. Indeed, the case where the Court made clear the automatic nature of the right to search incident to arrest is such a case. In *Robinson v. United States*, 414 U.S. 218 (1973), the defendant was arrested for operating a motor vehicle after revocation of his operator's permit.

¹³⁸ Cuddihy, *supra* note 35, at 1695.

out, unbeknownst to the police when they secured the warrant, that the third floor contained two apartments.¹³⁹ The Court upheld the warrant because the record disclosed no basis to conclude that the officers knew, or should have known, that the third floor contained two apartments.

But the problem the Framers sought to remedy were the writs of assistance and general warrants. Even worse than general warrants, writs of assistance were used by British customs officials to enter and inspect any house. Examples of general warrants that we saw earlier were a warrant “to suppress counterfeiting, arson, and insurrection” and a warrant to search “in all places’ where the informant and the Sheriff suspected that counterfeit coins or the machinery for manufacturing them might be found.”¹⁴⁰ Compared to the writs of assistance or these warrants, the problems of particularly the Court has had to police are pretty trivial.

Only two cases manifest a failure of the formal requirements of the Warrant Clause and neither violates the “letter” of the Warrant Clause. In *Coolidge v. New Hampshire*,¹⁴¹ a peculiar New Hampshire statute permitted prosecutors and police to be justices of the peace and thus permitted them to issue warrants. Testimony at Coolidge’s trial was that the police never went outside the police department or the prosecutor’s office to get warrants issued. In Coolidge’s case, despite the notorious nature of the brutal rape and murder of a child, the State Attorney General issued the warrant to search Coolidge’s home and car. Nothing in the Fourth Amendment says explicitly that warrants have to be issued by a neutral and detached magistrate,

¹³⁹ *Maryland v. Garrison*, 480 U.S. 79 (1987).

¹⁴⁰ *Cuddihy*, *supra* note 35, at 1144-1145.

¹⁴¹ 403 U.S. 445 (1971).

but one does not have to strain too hard to see that requirement as implicit: “But it is too plain for extensive discussion that this now abandoned New Hampshire method of issuing ‘search warrants’ violated a fundamental premise of both the Fourth and Fourteenth Amendments”—that the magistrate who issues the warrant must be “neutral and detached.”¹⁴²

The other failure involved the odd case of *Lo-Ji Sales v. New York*.¹⁴³ The Town Justice viewed two films that an investigator had purchased from the local “adult” bookstore and determined them to be obscene. The Town Justice issued a warrant “authorizing the search” of defendant’s store “and the seizure of other copies of the two files exhibited to the Town Justice.”¹⁴⁴ So far, so good. But the affidavit also asserted that “similar” items could be found in the adult book store, items that affiant believed “were possessed in violation of the obscenity laws.”¹⁴⁵ Perhaps this passes muster, too, though the obvious difficulty is the vagueness of the notion of “similar” items. How can a member of the state police make that legal determination? Presumably to finesse this problem, the warrant application asked the Town Justice to accompany the investigator to the store when the warrant was executed. The affidavit authorized the seizure of “[t]he following items that the Court independently [on examination] has determined to be possessed in violation of Article 235 of the Penal Law,” with no items listed at the time the Town Justice signed the warrant.¹⁴⁶ What the Court called a “search party” of eleven

¹⁴² *Id.* at 453.

¹⁴³ 442 U.S. 319 (1979).

¹⁴⁴ *Id.* at 321.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 321-22.

investigators, including the Town Justice and three members of the local prosecutor's office, “converged on the bookstore.”

After the Town Justice’s inspection of the various items for sale, the warrant affidavit grew to 16 pages, and the state police seized 23 films, 4 coin-operated projectors, 397 magazines, and 431 reels of film.¹⁴⁷ In a unanimous, and not very illuminating, opinion, the Court held the warrant unconstitutional. Sniffing that it was “reminiscent of the general warrant or writ of assistance,” the Court found a failure of the particularity requirement. But except for the involvement of the Town Justice at the scene of the search, it is not clear what was wrong with the procedure. Imagine that the investigator purchased one each of the items seized and took each to the Town Justice, who added the names of the films and magazines to the affidavit. There is no particularity problem here. The only difference is that the Town Justice was on the scene in the actual case. But why should this matter? The Court offers no explanation. But the case is a clear reminder that the fear of the general warrant lives on.

Moving beyond form, the Warrant Clause has caused the Court one problem with substance: how does one define “probable cause” so that the magistrate’s issuance of the warrant can be evaluated on its substance. The probable cause issue has been difficult for the Court, but the Framers would not likely have cared much about the fine distinctions drawn in the cases. For the common law, the significant distinction was between suspicion-less searches or arrests and those founded on individual suspicion, without regard to the level of suspicion or, indeed, even the source of the suspicion. Blackstone stated that a justice of the peace could issue a warrant

¹⁴⁷ Id. at 322-24.

based on suspicion of the party praying for the warrant because the justice “is a competent judge of the probability offered to him of such suspicion.”¹⁴⁸ Blackstone cautioned that the party praying the warrant (whom we call the “affiant”) should “examine upon oath the party requiring a warrant, as well to ascertain that there *is* a felony or other crime actually committed.”¹⁴⁹ There is an assumption here, of course, that the peace officer would fairly consider whether a crime had been committed, but it is not a flawed assumption, even by today’s standards. Police would not want to seek evidence of a crime that has not in fact occurred. But once the peace officer thought a crime had been committed, Blackstone was willing to defer to the justice’s determination of probability of suspicion directed at a particular person to be arrested or place to be searched.

The “ancient common law rule” was that a peace officer was permitted to arrest “for a felony not committed in his presence if there was reasonable ground for making the arrest.”¹⁵⁰ Blackstone used the term “probable suspicion” for making a warrant-less arrest.¹⁵¹ A 1722 handbook for justices of the peace, published in Philadelphia, included a sample warrant for a search of “every suspected House and place” in search of stolen goods.¹⁵² While the standard for “suspected” is not given in that warrant, the sample warrant to search for a felon recites that the affiant has “great cause to suspect” a particular suspect.¹⁵³ A sample warrant in a 1754 handbook

¹⁴⁸ 4 W. BLACKSTONE’S COMMENTARIES * 287.

¹⁴⁹ *Id.*

¹⁵⁰ *Watson v. United States*, 423 U.S. 411, 418 (1976).

¹⁵¹ 4 W. BLACKSTONE’S COMMENTARIES * 289.

¹⁵² *Conductor Generalis* 93 (1722).

¹⁵³ *Id.* at 92.

authorized a warrant based on a robbery victim's allegation of "just Cause to suspect" that the house contained his property.¹⁵⁴ These handbooks, separated by three decades, show an evolution in the direction of requiring particularized suspicion.

The common law did not invest much significance in the quantum or quality of the suspicion because the arrested individual would be brought before a justice of the peace, who is "bound immediately to examine the circumstances of the crime alleged."¹⁵⁵ "If upon this enquiry it manifestly appears, either that no such crime was committed, or that the suspicion entertained of the prisoner was wholly groundless, in such cases only it is lawful totally to discharge him."¹⁵⁶ Thus, mistakes made at the arrest stage could be quickly corrected. Nor were the Framers likely concerned about the mistaken search that did not lead to seizure of goods or an arrest. Whether the Supreme Court was right in *Illinois v. Gates*¹⁵⁷ to reject the so-called *Aguilar-Spinelli* two pronged test for measuring probable cause would likely have struck the Framers as much ado about nothing (indeed, it might strike modern readers that way too!). It is clear that what counted for Blackstone and for the Framers was that a justice of the peace inquire into the grounds for suspicion and issue or not issue the warrant. The precise nature of "probable cause" could be safely left to justices of the peace.¹⁵⁸

¹⁵⁴ Cuddihy, *supra* note 35, at 856 (quoting Thomas Pearce, Justice 80 (1754)).

¹⁵⁵ 4 W. BLACKSTONE'S COMMENTARIES * 293.

¹⁵⁶ *Id.*

¹⁵⁷ 462 U.S. 213 (1983).

¹⁵⁸ See Cuddihy, *supra* note 35, at 1550 (noting that "probable cause was in a state of flux

Moreover, although this was a departure from Blackstone's view of the common law, many warrants "issued reflexively on complaint" in the colonies in the mid-eighteenth century. "For the most part, judges took the word of informants at face value or initiated the warrant themselves on the basis of hear-say."¹⁵⁹ Massachusetts in this period "fined any justice of the peace up to fifty pounds for refusing to issue a warrant for military deserters."¹⁶⁰ To be sure, colonial authorities sometimes rejected warrants. Cuddihy reports that the New York council in 1745 "found 'no foundation for a warrant' because the informant was "able to Sware only to hare Says [hearsay]."¹⁶¹ Ultimately this view, Blackstone's view, prevailed in the Fourth Amendment's requirement of probable cause based on oath or affirmation. It would please the Framers that magistrates today examine the warrant application and the affiant, require a showing of probable cause, and that magistrates have the power to refuse the warrant.

E. Clause [7]: warrants are required for all arrests in the home unless made in hot pursuit or to protect life or property.

when the Fourth Amendment was framed").

¹⁵⁹ Cuddihy, *supra* note 35, at 856.

¹⁶⁰ *Id.* at 860.

¹⁶¹ *Id.* at 862 (quoting a letter from Jonathan Law to William Shirley, June 19, 1745).

Here I follow the Court's doctrine in *Payton v. New York*.¹⁶² As *Payton* concedes, the common law is less than clear that warrants were required for arrests in the home. The most famous rule from the English cases is actually dictum and is less than crystal clear.¹⁶³ Lord Coke stated the rule as forbidding an arrest unless the defendant has been indicted. Blackstone derided Coke's rule as allowing "felons to escape without punishment" and noted that Matthew Hale "combated it with invincible authority, and strength of reason."¹⁶⁴ But to reject the rule that an indictment is required is not to reject the rule that a warrant is required. Blackstone declared that the law permitted a warrant-less arrest upon hot pursuit¹⁶⁵ and in the "prosecution" of a hue and cry.¹⁶⁶ Matthew Hale's rejection of Lord Coke's rule also seems by its terms limited to hot pursuit,¹⁶⁷ though as the Court notes it has not "typically been read that way."¹⁶⁸ Hawkins devoted an entire chapter to arrest in the home and the best reading of Hawkins is that only a few exceptions existed to the requirement that a warrant, a *capias*, or some other kind of process was

¹⁶² 445 U.S. 573 (1980).

¹⁶³ *The King's Bench in Semayne's Case*, 5 Co.Rep. 91a, 91b, 77 Eng. Rep. 194, 195-196 (K.B.1603), said: "In all cases when the King is party, the Sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K.'s process, if otherwise he cannot enter." The majority thought that "other execution of the King's process" implied that the Sheriff was there pursuant to a warrant. But it is only an inference.

¹⁶⁴ 4 W. BLACKSTONE'S COMMENTARIES * 287.

¹⁶⁵ *Id.* at * 290.

¹⁶⁶ *Id.* at * 291.

¹⁶⁷ "[I]f the supposed offender fly and take house, and the door will not be opened upon demand of the constable and notification of his business, the constable may break the door, tho he have no warrant." 445 U.S. at 595 n.41 (quoting 2 M. Hale, *Pleas of the Crown* 92 (1736)).

¹⁶⁸ *Id.*

required to force entry into a structure and make an arrest.¹⁶⁹ Other than hot pursuit, Hawkins notes exceptions for when a lawfully arrested person escapes and retreats to a house and when an “affray” occurs in a house in the view or hearing of a constable.¹⁷⁰

Thus, it seems to me that the majority is right to read the common law was that a warrant was required except for hot pursuit and other exigencies. The dissent disagreed. Both symmetry and policy suggests that the majority’s conclusion is better than the dissent’s. As the Court requires a search warrant to search a home, however, and as an arrest is at least as great an invasion of one’s liberties, symmetry suggests requiring a warrant for an arrest in the home. The Court said that to do otherwise would be to “disregard the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic.”¹⁷¹ I see no reason to disagree with the policy implicit in the Court’s rhetoric.

F. Clause [6]: no arrests or other seizure of a person shall be made on less than probable cause.

¹⁶⁹ 2 William Hawkins, Pleas of the Crown, ch. 14, p. 86-87, sections 1, 2, 3, 4, 10 (1726).

¹⁷⁰ See *id.* at 87, sections 7-9.

¹⁷¹ *Id.* at 601.

The common law was clear that individualized suspicion was needed to make an arrest. As early as the thirteenth century, the common law required cause to make an arrest. Bracton reported that the knights and others in the hue and cry “will arrest as best they can those they suspect.”¹⁷² Another way to effect an arrest in Bracton’s day was on the oath of twelve knights that someone is “suspected of some crime.”¹⁷³ One formulation of the cause needed to arrest for a felony was “good cause,” though this could be satisfied by “the common fame and voice.”¹⁷⁴ Michael Dalton’s 1622 handbook for Justices of the Peace noted that every man may arrest another whom he knows to have committed a felony.¹⁷⁵ Moreover, every man “may arrest suspicious persons that be of ill fame” as long as there was “some felony committed in deed.”¹⁷⁶ Dalton also states a requirement that the one making the arrest personally knows of the suspicion and that the suspicion be for a particular felony.¹⁷⁷

By Blackstone’s day, however, the notion of “ill fame” as a basis for suspicion had disappeared. Blackstone used the term “probable suspicion” at one point to describe the cause

¹⁷² 2 Henrici de Bracton, *De Legibus Et Consuetudinibus Angliae* 328 (Woodbine edition, Thorne trans. 1977).

¹⁷³ *Id.* at 329.

¹⁷⁴ *Sir Anthony Ashley’s Case*, 12 Coke 90, 92, 77 Eng. Rep. 1366, 1368 (1611). See also 2 Hale’s *Pleas of the Crown* 80 (1736).

¹⁷⁵ Michael Dalton, *The Countrey Justice* 308 (1622).

¹⁷⁶ *Id.*

¹⁷⁷ “Also the party that shall arrest such suspected person, must have a suspicion of him himself, and for the same felony, or otherwise suspicion generally is no cause to arrest another.” While it is far from clear what “suspicion of him himself” means, a later passage permits arrest on the “common voice and same” that the arrestee committed the felony. *Id.* If “common voice” justifies an arrest, “suspicion of him himself” seems to mean only that the person making the arrest know of this “common voice,” not that he personally know the facts giving rise to the suspicion (which is the rule today).

that the arresting party must have¹⁷⁸ and when describing the role of the justice of the peace in ascertaining whether the affiant showed sufficient cause, it is plain that rumor and reputation would not suffice.

[I]t is fitting to examine upon oath the party requiring a warrant, as well to ascertain that there *is* a felony or other crime actually committed, without which no warrant should be granted; as also to *prove* the cause and probability of suspecting the party, against whom the warrant is prayed.¹⁷⁹

The Continental Congress in 1774 condemned suspicion-less searches by customs and excise officers.¹⁸⁰ The Framers, of course, used probable cause in the Warrant Clause. If we accept that the Fourth Amendment was aimed only at general warrants, the “seizures” of “persons” referred to in the initial clause would be limited to seizures under general warrants of arrest, condemned by Blackstone as “illegal and void for . . . uncertainty.”¹⁸¹ But drawing on our operating premise that the Framers would have written a different amendment if they could have

¹⁷⁸ 4 W. BLACKSTONE’S COMMENTARIES * 290.

¹⁷⁹ *Id.* at * 287 (emphases in original).

¹⁸⁰ Cuddihy, *supra* note 35, at 1500 (citing October 21, 1774 proceedings in the Continental Congress).

seen modern police methods, it is a safe inference that the Framers would have wanted to make the common law of arrest part of our constitutional protections. Thus, I include the principle of no arrests without probable cause.

¹⁸¹ 4 W. BLACKSTONE'S COMMENTARIES * 288.

But my clause is broader because it says “no arrests or other seizure of the person shall be made on less than probable cause.” This is a direct attack on *Terry v. Ohio*,¹⁸² where the Court held that a seizure and limited search could be made on less than probable cause. It should not be surprising that my reconstituted Fourth Amendment has no room for *Terry*. *Terry*, after all, cleanly severs the Reasonableness Clause from the Warrant Clause and seeks to find doctrinal implications from the Reasonable Clause. The Court conceded, “If this case involved police conduct subject to the Warrant Clause of the Fourth Amendment, we would have to ascertain whether 'probable cause' existed to justify the search and seizure which took place.”¹⁸³ But, the Court hastened to add, “that is not the case.” With the Warrant Clause rendered inoperative, the Court was free to wander about the Reasonable Clause: “the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures.”¹⁸⁴

The reader will not be surprised by this point that I level two criticisms at *Terry*. First, unlike the Framing era, when “unreasonable” had a definite meaning, today it means what five members of the Court agree that it means. It means, for example, that an anonymous tip only vaguely verified, *and that turned out to be incorrect*, can justify a stop of a vehicle.¹⁸⁵ It means

¹⁸² 392 U.S. 1 (1968).

¹⁸³ *Id.* at 20.

¹⁸⁴ *Id.*

¹⁸⁵ In *Alabama v. White*, 496 U.S. 325 (1990), the anonymous tip was that Vanessa White, possessing an ounce of cocaine, would leave a certain apartment building in a particular vehicle and go to Dobey's Motel. The officers verified that the vehicle was in front of the apartment building. They saw a woman leave the building, get in the vehicle, and start driving toward Dobey's Motel. Before the driver gave any direct indication that the Doby Motel was her

that a tip offered by someone whose only other tip had proven to be wrong can justify ordering a driver out of his car.¹⁸⁶ It means that “unprovoked flight” after the appearance of a police caravan can justify forcibly stopping an individual.¹⁸⁷

My most fundamental criticism, though, is that the Framers would not have understood this amphibian event -- a seizure that is, by the Court’s own admission, not an arrest; and a search that is admittedly not the kind of search that can accompany an arrest. In 1622, it was perfectly clear in *The Country Justice* that an arrest is the “first restraining of a mans person, depriving it of his own will and liberty; and may be called the beginning of imprisonment.”¹⁸⁸ To Blackstone it was perfectly clear that “no man is to be arrested, unless charged with such a crime, as will at least justify holding him to bail, when taken.”¹⁸⁹ Moreover, it was clear to Blackstone that once arrested, he was a prisoner and the justice of the peace must either release him as wrongly arrested, give him bail, or commit him to prison.¹⁹⁰ Even “night walkers” whose offense seems to have been to “sleep in the day time and go abroad in the nights”¹⁹¹ were to be arrested and held in custody until morning¹⁹² when they, presumably, would face an examination by the justice of

destination, however, the officer pulled her over, obtained consent to search, and found marijuana in her attache case. No ounce of cocaine was found.

¹⁸⁶ *Adams v. Williams*, 40 U.S. 143 (1972).

¹⁸⁷ *Illinois v. Wardlow*, 528 U.S. 119 (2000).

¹⁸⁸ *Dalton*, supra note 175, at 306.

¹⁸⁹ 4 W. BLACKSTONE’S COMMENTARIES * 286.

¹⁹⁰ *Id.* at * 293.

¹⁹¹ *Dalton*, supra note 175, at 77.

¹⁹² 4 W. BLACKSTONE’S COMMENTARIES * 289.

the peace like any other arrested person.¹⁹³

In sum, the common law authorized an “all or nothing” interference with the liberty of those suspected of crimes.¹⁹⁴ The constable, or a private citizen, could arrest someone on probable suspicion that he had committed a felony. This event began the process of imprisonment, though the justice of the peace could discharge the arrestee if he found the charge to be “wholly groundless.”¹⁹⁵ As Justice Douglas pointed out in his *Terry* dissent, the effect of the “stop-and-frisk” regime is to permit police to seize and search in situations when magistrates would be forbidden to authorize an interference with liberty. “Had a warrant been sought, a magistrate would . . . have been unauthorized to issue one, for he can act only if there is a showing of ‘probable cause.’”¹⁹⁶ Isn’t that an odd way to read the Fourth Amendment? Well, it is if one seeks an authentic Fourth Amendment with its abhorrence of general warrants based on loose suspicion. In Douglas’s somewhat purplish prose, “To give the police greater power than a magistrate is to take a long step down the totalitarian path. Perhaps such a step is desirable to cope with modern forms of lawlessness. But if it is taken, it should be the deliberate choice of the people through a constitutional amendment.”¹⁹⁷

¹⁹³ This is the implication from Dalton, supra note 175, at 77. Dalton did not distinguish these arrests from any other kind of arrest. Though Dalton refers to arrests of night walkers by order of a justice of the peace, Blackstone is clear that these arrests could occur without a warrant. 4 W. BLACKSTONE’S COMMENTARIES * 289.

¹⁹⁴ Justice Scalia reads the history a bit differently than I do. I will discuss our differences in Part V.

¹⁹⁵ 4 W. BLACKSTONE’S COMMENTARIES * 293.

¹⁹⁶ *Terry*, 392 U.S. at 36 (Douglas, J., dissenting).

¹⁹⁷ *Id.* at 38.

G. Clause [1]: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.

I have assumed that Davies is correct in reading the history to render this clause merely the stated justification for banning general warrants. It might seem, therefore, that this clause is superfluous in my reconstructed Fourth Amendment. But its function in my account, which is *one* of its functions in the Court's Fourth Amendment, is to define the scope of the Amendment. I will discuss the Court's approach to this quite complicated question and evaluate current doctrine using the Fourth Amendment history I developed in Part III.

History agrees with the Court's holding in *Oliver v. United States*¹⁹⁸ that the Fourth Amendment does not protect a marijuana field that was several hundred yards from the road despite the existence of a fence, a locked gate, and a "No Trespassing Sign."¹⁹⁹ It probably seems self-evident that a field several hundred yards from a house is not a "house." If one needs more evidence, consider that Madison's original draft of the Fourth Amendment protected "their persons, their houses, their papers, and their other property."²⁰⁰ The locution "other property" was changed to "effects." Though there is precious little legislative history on point, "effects" is a smaller universe than "other property." Indeed, the inference that "other property" would include

¹⁹⁸ 466 U.S. 170 (1984).

¹⁹⁹ These are the facts of one of the two companion cases. The facts of the other case demonstrated less effort to keep the marijuana patch private.

²⁰⁰ 1 Cong. Register 428 (June 8, 1789).

real property other than houses while “effects” referred to personal property is irresistible.²⁰¹ Thus, when the House Committee reported out “effects” in place of “other property,”²⁰² one must assume that the Framers intended to exclude real property other than houses.

Most contemporary cases in which the Court seeks to determine the scope of the Fourth Amendment by finding its “edges” are not as easy as *Oliver*. The Court initially saw the question as whether the authorities invaded one’s property interest in the item seized or the area searched. So if the authorities seized some papers from the defendant’s office, he could claim Fourth Amendment protection both because the papers were his and because he had a property interest in the office “space” as well.²⁰³ A harder case was presented when an Act of Congress required a defendant in a forfeiture case to comply with the demand of the prosecutor to produce books, invoices, or other papers.²⁰⁴ I will return to this case shortly.

By making the Fourth Amendment depend on property interests, the Court was almost surely replicating the Framers’ Fourth Amendment. It is difficult to imagine “persons, houses, persons, and effects” in the minds of the Framers as anything but property concepts. And the Court continued to look for property interests as the “edges” of the Fourth Amendment for many decades. Thus, a listening device attached to the wall of an adjoining room that did not belong to the defendant was outside the scope of the Fourth Amendment, the Court held in *Goldman v.*

²⁰¹ Davies, *supra* note 26, at 708-09.

²⁰² Cogan, *supra* note 50, at 223-24.

²⁰³ *Gouled v. United States*, 255 U.S. 298 (1921).

²⁰⁴ *Boyd v. United States*, 116 U.S. 616 (1886).

United States.²⁰⁵ A “spike mike” inserted into the wall from an adjoining room was, however, within the scope of the Fourth Amendment if it made physical contact with the defendant’s premises.²⁰⁶ But this is a pretty thin distinction. Justice Douglas, concurring, complained about the Court’s reliance on the “trivialities of local law of trespass,” and argued that the “depth of the penetration of the electronic device -- even the degree of its remoteness from the inside of the house -- is not the measure of the injury. There is in each such case a search that should be made, if at all, only on a warrant issued by a magistrate.”²⁰⁷

Douglas’s legitimate concern with measuring the extent of the injury led the Court to abandon a property based perimeter of the Fourth Amendment. In *Katz v. United States*,²⁰⁸ the Court faced a case that the parties thought called for an extension of the “spike mike” case. Federal agents put a “bug” on a public phone booth that Katz was using to convey gambling information. Thus, Katz argued that a public phone booth was a constitutionally protected space and urged the Court to overrule the case that found no Fourth Amendment protection against a listening device on the wall of an adjoining room. The government argued that whatever the right disposition of *Goldman*, a phone booth was not a constitutionally protected space.

The Court threw both parties a curve, concluding that “constitutionally protected space” and the degree of invasion of property interests were just not the right metrics for finding the

²⁰⁵ 316 U.S. 129 (1942).

²⁰⁶ *Silverman v. United States*, 365 U.S. 505 (1961).

²⁰⁷ *Id.* at 513 (Douglas, J., concurring).

²⁰⁸ 389 U.S. 347 (1967).

edges of the Fourth Amendment. For the relatively clear, if sometimes unsatisfying, property-based edge, the Court substituted the hopelessly vague notion of a “legitimate” or “reasonable” expectation of privacy. It held that one who has closed the door of the public phone booth and paid for his call has not knowingly exposed to the public the contents of the call. Justice Harlan, concurring, rephrased the majority’s analysis as whether Katz had an expectation of privacy when he made the call and whether that expectation was a reasonable one. Harlan’s test became the one the Court would use to police the boundaries of the Fourth Amendment.

While the result in *Katz* seems intuitively right, the Court’s vague and elastic notion of “reasonable expectation of privacy” has permitted the Court to refuse Fourth Amendment protection to banking records, garbage placed in an opaque plastic bag and left for collection on one’s property, telephone numbers dialed from inside one’s home, or the inside of one’s home from a helicopter or low-flying plane. These results make me wonder if Justice Black had the right approach, if not the right result, in his *Katz* dissent. Black grumpily contended that the Court did not need a magic formula for measuring the scope of the Fourth Amendment. He argued that the Court had what it needed in the language of the Fourth Amendment protecting our “persons, houses, papers, and effects.” As he put it

While I realize that an argument based on the meaning of words lacks the scope, and no doubt the appeal, of broad policy discussions and philosophical discourses on such nebulous subjects as privacy, for me the language of the Amendment is the crucial place to look in construing a written document such as our

Constitution.²⁰⁹

To substitute a “right to privacy” for the specific words of the Fourth Amendment, Black worried, would make the Court “a continuously functioning constitutional convention.”²¹⁰

I think Black was right in his approach, both for historical and jurisprudential reasons. But I think Katz should have won his case on the theory that he urged—that the Court should hold that a phone booth is a constitutionally protected space. We rent homes, apartments, and hotel rooms and all of them are protected by the Fourth Amendment. When we close the door to the phone booth and put our dime (in the old days) into the machine, why not simply say we are renting the phone booth? A phone booth is not unlike a hotel room with respect to the key question about what the Court called the “uninvited ear.” One who picks up a telephone in a hotel room or in a pay phone booth is renting the space around the phone. The hotel occupant is renting more space but why should that matter? The hotel room is more private but that is not to say that the phone booth is not private. On this view, Katz should win his argument by claiming that the phone booth was, in effect, his house.

If this is the right way to analyze *Katz*, then the pen register case, *Smith v. Maryland*, is also easily resolved, but the outcome is different from the one the Court reached. In *Smith*, the

²⁰⁹ *Id.* at 365 (Black, J., dissenting).

²¹⁰ *Id.* at 373.

issue was whether the Fourth Amendment protected the telephone numbers dialed on a phone inside a home. The Court consulted the information pages of the telephone book and its own knowledge about how the telephone business works to conclude that Smith did not have a reasonable expectation of privacy in the numbers he dialed. I have no idea whether that is the right application of the malleable *Katz* test, but I think the right question is whether activities carried on in private in the home are protected by the Fourth Amendment. And I think the answer is yes. So *Smith* was wrongly decided.

The *Smith* principle -- that activities carried on in private in the home are protected by the Fourth Amendment -- provides a much easier analytical framework to reach the same result the Court reached recently in *Kyllo v. United States*.²¹¹ The issue in *Kyllo* was whether the Fourth Amendment protected from scrutiny heat waves leaving a home. If telephone numbers that leave the home are not protected by the Fourth Amendment, why would heat waves be protected? Indeed, between the two, it seems to me that the expectation of privacy test would be more likely to protect phone numbers. Until I read *Smith*, I did not know that the phone company recorded local calls. But I knew, because snow melts on my roof, that heat waves emanate from my house. Yet in *Kyllo* the Court ruled that heat waves are not protected. The majority gives the holding of *Smith* when surveying the *Katz* cases²¹² yet makes no effort to distinguish it. The *Kyllo* dissent is surely right to observe that under *Smith* it would have been constitutional to put a listening device on the phone booth that simply measured “the relative volume of sound leaving

²¹¹ 533 U.S. 27 (2001).

²¹² *Id.* at 33.

the booth.”²¹³ And if that is constitutional under *Smith*, it is not clear why the police cannot measure “the relative amounts of heat radiating from the house.”²¹⁴

In truth, *Smith* and *Kyllo* simply cannot co-exist. Of course, given the extreme malleability of the *Katz* test, a future Court could candidly concede that *Smith* (or *Kyllo*) made the wrong judgment. But how much better to have a test that doesn’t depend on the makeup of the Court for its application. The Framers would have expected activities carried on in private in the home to be beyond the eyes of government. Whether one is dialing phone numbers, sitting in a hot sauna, or growing marijuana plants (as *Kyllo* was), those are activities carried on in private in the home and are protected by the Fourth Amendment without regard to one’s expectation of privacy.

Other cases are far more easily resolved by my plain meaning Fourth Amendment theory than by the *Katz* test. As noted earlier, the holding in *Oliver v. United States*²¹⁵ that a field is not a house makes good sense. It makes far better sense than the Court’s alternative rationale -- that the defendant did not have a reasonable expectation of privacy in his carefully guarded marijuana patch. This analytical move left the majority open to a withering critique from the dissent. What is the best source of reasonable expectations of privacy involving real property? Surely it is the state law about trespassing. The state law in *Oliver* made it a crime to do what the police did. Yet the majority, with a straight face, concluded that state positive law about one’s property

²¹³ *Id.* at 49-50 (Stevens, J., dissenting).

²¹⁴ *Id.* at 49 (Stevens, J., dissenting).

²¹⁵ 466 U.S. 170 (1984).

rights did not necessarily determine whether a property owner had a reasonable expectation of privacy. The idea is laughable. Yet, on my reading of the Fourth Amendment history, the outcome in *Oliver* is correct. A marijuana patch that far from the house is not a house.

In *United States v. Knotts*,²¹⁶ federal agents installed a “beeper” in a can of chloroform that Knotts purchased. Agents used the beeper to ascertain later that the can was sitting outside Knotts’s cabin. Was this a search? The Court held no, because all that was learned could have been learned by visual surveillance and thus Knotts had no reasonable expectation of privacy in the route taken to this cabin or the fact that the can was sitting in his yard. That, it seems to me, is the right result but reached more easily by asking whether there was a search of Knotts’s house or effects? His house was not searched because the can was in the yard. His effects were not searched because nothing was learned about the inside of the can. End of case.

What if the can had been taken inside and the agents later learned that it was still inside the house by listening to the beeper? This is a search of the house because the agents are learning about activities occurring in the house. The Court agreed, in *United States v. Karo*,²¹⁷ phrasing its holding in terms of expectations of privacy. But why bother? Did the activity occur in private in a home? If yes, the Fourth Amendment protects the area.

²¹⁶ 460 U.S. 276 (1983).

²¹⁷ 468 U.S. 705 (1984).

Other cases where my theory produces a different result include the fly-over cases (or hovercraft cases as I described them in my introduction). If we ask whether one has a reasonable expectation of privacy against a helicopter flying in permitted airspace, the answer is probably unknowable. The Court split 5-4. If we ask a different question -- whether the interiors of our houses are protected by the Fourth Amendment -- the answer is easy: "houses" appears in the Fourth Amendment. Of course, plain meaning does not solve all the problems even with houses. Surely, we could act in a way that exposes the interior of our house and thus forfeits the protection of the Fourth Amendment. If we, for example, played poker in a brightly lit room with no curtains on our window in a jurisdiction where it is unlawful to gamble,²¹⁸ it seems likely that the police would not violate the Fourth Amendment by looking from the sidewalk and noticing that money was changing hands. So there will be difficult questions about forfeiture or waiver. Yet I think these questions easier to answer than the amorphous "reasonable expectation of privacy" question. If I have a sky light in my bathroom, I think I have not forfeited the protection of the Fourth Amendment regardless of what my expectation might be about hovercrafts. The Court disagrees, using its expectation of privacy test.²¹⁹

Similarly, I think a plain meaning of "persons, houses, papers, and effects" makes the garbage case easier, too. In applying its expectation of privacy test, the *Greenwood* Court made

²¹⁸ I did this in Tennessee shortly after moving to a new, small town, where I knew almost no one. It occurred to me later that this was not my brightest move but I was not arrested.

²¹⁹ To be sure, I have put together two cases, neither one of which is on point, to come up with a prediction of what the Court would do in my hypothetical case. The helicopter case involved a flyover of a greenhouse, not a home. *Florida v. Riley*, 488 U.S. 445 (1989). The case involving curtilage was *California v. Ciraolo*, 476 U.S. 207 (1986), and even it did not involve peering into a home (the area seen from the airplane was the backyard). Yet nothing in the analysis of the majority in either case turned on whether the area seen was in the house or within the curtilage of the house. The Court has assured us in dicta that curtilage is treated just as a house. See *Oliver v. United States*, 466 U.S. 170 (1984).

much of the possibility that “plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public.”²²⁰

While this may be true enough, and may be relevant to whether the home owner had a reasonable expectation of privacy in the contents of the trash container, it all seems beside the point if we ask whether the home owner's trash is an “effect.” Surely it is. The next question is forfeiture. Has the home owner forfeited his right to the contents of the trash by placing it on his property for the trash collector. While a closer question than whether the trash was his “effect,” it seems to me that one does not forfeit the contents of the trash until the collector has reduced it to his possession. Imagine a homeowner who discovers something valuable missing and rushes to the curb where the trash collector has arrived and is about to put her hand on the garbage bag. The home owner demands the trash. Who has a property right to the trash? This sounds a little like the wild fox case from the first day of property, though I guess trash is not wild, but a common sense solution is that my property remains my property until you have possession of it. As long as it is on my property, which the trash was in *Greenwood*, I think I am still the owner. This is another case the Court got wrong, in my view, and several states agree.

And what is the cost of saying that the Fourth Amendment protects garbage on our premises, the telephone numbers we dial, and the inside of our houses from helicopters? Does it mean that the police cannot rummage through our garbage, record our phone numbers, or stare down at our houses? No. It simply means the police have to have a warrant in the two latter cases, because they involve searches of a house, and probable cause to seize and examine our garbage. Is that such a draconian limitation on the police? It is, I believe, much more in keeping

²²⁰ *Greenwood*, 486 U.S. at 40-41.

with the Fourth Amendment that the Framers created. Of course, it was not just suspicion-less searches that drew expressions of concern from the anti-Federalists. They were also worried that customs officials might abuse their office and obtain evidence from that abuse. I now turn to that dimension of current Fourth Amendment doctrine.

H. Clause [3]: other than searches incident to arrest, no searches shall be conducted in any case on less than probable cause to believe that the search will produce evidence of crime

Recall Patrick Henry's speech to the Virginia State Convention contemplating a Bill of Rights. Part of Henry's concern about a "government of force" was with the power to search. He wrote, "Suppose an exciseman will demand leave to enter your cellar, or house, by virtue of his office; perhaps he may call on the militia to enable him to go."²²¹ Today's "excisemen" are the federal and state police charged with the war on drugs. While the Court's doctrine does not permit police to "demand leave to enter,"²²² the police have adopted a strategy of implied coercion that, I believe, is the twenty-first century equivalent to a demand.

²²¹ Elliot, *supra* note 54, at 412 (Patrick Henry addressing Virginia Convention, June 15, 1788).

²²² See, e.g., *Bumper v. North Carolina*, 391 U.S. 543 (1968).

Indeed, this strategy has proved so successful that it has largely replaced other justifications for searching a suspect (incident to arrest or in a *Terry* stop and frisk.). One police detective said that as many as 98% of the searches he conducts are consent searches.²²³ The New Jersey Supreme Court characterized police requests for consent from motorists as a “widespread abuse of our existing law that allows law enforcement officers to obtain consent searches of every motor vehicle stopped for even the most minor traffic violation.”²²⁴ The court cited a study that found 95% of motorists gave written consent to police (written consent is required in New Jersey).²²⁵ The Court noted that police have almost unchecked discretion in deciding what drivers to stop -- because it is “virtually impossible to drive and not unwittingly commit some infraction of our motor vehicle code”²²⁶ -- and totally unchecked discretion in deciding which drivers to ask for consent. Thus, though racial profiling is not the only problem raised by the Supreme Court’s consent search doctrine, the almost complete discretion it provides state troopers certainly makes racial profiling extremely easy to accomplish and impossible to detect. How could a driver ever prove that the officer asked him for consent because of his race?

The New Jersey court described categories of methods for securing this “voluntary” consent. One is to use “extended detention and questioning regarding issues not related to the reason for the stop, such as “How much money do you have in your pocket?” and “Why are you

²²³ Richard Van Druizen, L. Paul Sutton & Charlotte A. Carter, *The Search Warrant Process* 21 (1984).

²²⁴ *State v. Carty*, 790 A.2d 903 (N.J. 2002).

²²⁵ *Id.* at 910-11.

²²⁶ *Id.* at 908.

riding around on the New Jersey Turnpike?” A second strategy is to use “intimidating statements to obtain consent to search”—, for example “ the drug dog's on the way,” and “once the drug dog gets here, everybody gets arrested.” A third technique is to “use ‘hypothetical’ consent requests” such as “if I asked for consent to search your car, would you sign it?”²²⁷

An even more dramatic example can be seen in the facts from a recent United States Supreme Court case, *United States v. Drayton*.²²⁸ Because everything about consent is also about context, I quote at length from the Court’s recitation of the facts. The bus driver

allowed three members of the Tallahassee Police Department to board the bus as part of a routine drug and weapons interdiction effort. The officers were dressed in plain clothes and carried concealed weapons and visible badges.

Once onboard Officer Hoover knelt on the driver's seat and faced the rear of the bus. He could observe the passengers and ensure the safety of the two other officers without blocking the aisle or otherwise obstructing the bus exit. Officers Lang and Blackburn went to the rear of the bus. Blackburn remained stationed there, facing forward. Lang worked his way toward the front of the bus, speaking with individual passengers as he went. He asked the passengers about

²²⁷ *Id.* at 911.

²²⁸ 536 U.S. 194 (2002).

their travel plans and sought to match passengers with luggage in the overhead racks. To avoid blocking the aisle, Lang stood next to or just behind each passenger with whom he spoke.

According to Lang's testimony, passengers who declined to cooperate with him or who chose to exit the bus at any time would have been allowed to do so without argument. In Lang's experience, however, most people are willing to cooperate. Some passengers go so far as to commend the police for their efforts to ensure the safety of their travel. Lang could recall five to six instances in the previous year in which passengers had declined to have their luggage searched. It also was common for passengers to leave the bus for a cigarette or a snack while the officers were on board. Lang sometimes informed passengers of their right to refuse to cooperate. On the day in question, however, he did not.

Respondents were seated next to each other on the bus. Drayton was in the aisle seat, Brown in the seat next to the window. Lang approached respondents from the rear and leaned over Drayton's shoulder. He held up his badge long enough for respondents to identify him as a police officer. With his face 12- to-18 inches away from Drayton's, Lang spoke in a voice just loud enough for respondents to hear:

"I'm Investigator Lang with the Tallahassee Police Department. We're conducting bus interdiction [sic], attempting to deter drugs and illegal weapons

being transported on the bus. Do you have any bags on the bus?"

Both respondents pointed to a single green bag in the overhead luggage rack. Lang asked, "Do you mind if I check it?," and Brown responded, " Go ahead." Lang handed the bag to Officer Blackburn to check. The bag contained no contraband.

Officer Lang noticed that both respondents were wearing heavy jackets and baggy pants despite the warm weather. In Lang's experience drug traffickers often use baggy clothing to conceal weapons or narcotics. The officer thus asked Brown if he had any weapons or drugs in his possession. And he asked Brown: "Do you mind if I check your person?" Brown answered, "Sure," and cooperated by leaning up in his seat, pulling a cell phone out of his pocket, and opening up his jacket. Lang reached across Drayton and patted down Brown's jacket and pockets, including his waist area, sides, and upper thighs. In both thigh areas, Lang detected hard objects similar to drug packages detected on other occasions. Lang arrested and handcuffed Brown. Officer Hoover escorted Brown from the bus.

Lang then asked Drayton, "Mind if I check you?" Drayton responded by lifting his hands about eight inches from his legs. Lang conducted a pat-down of Drayton's thighs and detected hard objects similar to those found on Brown. He arrested Drayton and escorted him from the bus. A further search revealed that

respondents had duct-taped plastic bundles of powder cocaine between several pairs of their boxer shorts. Brown possessed three bundles containing 483 grams of cocaine. Drayton possessed two bundles containing 295 grams of cocaine.²²⁹

Brown and Drayton were charged with possession of cocaine and possession with intent to distribute. The district court judge refused to grant their motion to suppress, finding it "obvious that [respondents] can get up and leave, as can the people ahead of them." The judge then concluded: "[E]verything that took place between Officer Lang and Mr. Drayton and Mr. Brown suggests that it was cooperative. There was nothing coercive, there was nothing confrontational about it."²³⁰

Nothing coercive? To be sure, Officer Lang made no explicit "demand" that Brown and Drayton permit him to search their persons yet the aroma of coercion is unmistakable. One officer stood in the front of the bus. Another officer stood in the rear of the bus. A third officer began working his way from the back of the bus to the front. Though the officers testified that anyone seeking to leave the bus could do so, on this day no one left the bus. If you were sitting in that bus, under police observation from front and rear, would you think you could simply get up and leave the bus? I doubt it. Moreover, though Lang sometimes informed passengers of their right to refuse consent, he did not inform anyone on that particular day. Trapped on the bus, with no idea that they could refuse consent, did Brown and Drayton experience a "demand" that they permit the search. It seems to me that what Officer Lang did was no different from the

²²⁹ *Drayton*, 536 U.S. at 197-99.

²³⁰ *Id.* at 200.

exciseman's feared "demand . . . to enter your cellar, or house, by virtue of his office."²³¹ Henry feared that the exciseman might "call on the militia to enable him to go" where he pleased. In Henry's day, the exciseman was not armed. Today, of course, the state and federal police are heavily armed. When seeking to interdict the flow of contraband, today's police are a combination of exciseman and militia man.

While one can obviously never know, I am confident that if we described the facts of the search of Brown and Drayton to Patrick Henry, and described the purpose of the bus interdiction and the arms carried by police, Henry would exclaim that his worst fears had been realized. Most citizens today probably view Officer Lang's bus interdiction more favorably than the anti-Federalists viewed the exciseman's search for dutiable items. It is this evolution of middle America toward fear of crime and criminals and away from fear of government that has contributed to a steady erosion of the Fourth Amendment. But it is the role of the Fourth Amendment (indeed most of the Bill of Rights) to restrain popular government behavior when it intrudes too far into the core rights created by the Framers. One example is the Court's willingness to impose what it perceived as the Framers' "wall of separation" between church and state even though prayer in school and various forms of public aid to parochial schools were quite popular.

I suppose it is more difficult to work up enthusiasm to protect those who are carrying

²³¹ Elliot, *supra* note 54, at 412 (Patrick Henry addressing Virginia Convention, June 15, 1788).

almost 800 grams (27 ounces) of cocaine. After all, atheists may challenge our belief structure but drug dealers threaten us and our children with addiction and death. Yet I cannot resist the conclusion that the “consent” of Brown and Drayton is consent only in the most academic sense. Did Lang employ explicit coercion? No. If that is the test of consent, and from the Court’s opinion that is roughly what it amounts to, then Brown and Drayton should lose. But isn’t that a pretty impoverished view of consent when one is facing armed police who appear to be blocking egress from a bus? Given what we are learning about the reaction of citizens to authority, leaving aside authorities who happen to carry guns and have the power to arrest, a definition of consent that includes every non-coerced act seems unrealistic.

And the New Jersey Supreme Court agrees, holding in *State v. Carty*²³² that in some situations, true consent is simply not possible. The court concluded that even a signed, written consent, as the state court had earlier required in *State v. Johnson*,²³³ might not be “voluntary or otherwise reasonable” when the state police seek that consent from a motorist who has been stopped on the highway.

²³² 790 A.2d 903 (N.J. 2002).

²³³ 346 A.2d 66 (N.J. 1975).

What can be synthesized from a review of scholarly articles, cases from around the country, and the empirical data referred to in this opinion, is that despite use of the first-tell-then-ask rule or the voluntary and knowing standard adopted in *Johnson*, consent searches following valid motor vehicle stops are either not voluntary because people feel compelled to consent for various reasons, or are not reasonable because of the detention associated with obtaining and executing the consent search. Stated differently, hindsight has taught us that the *Johnson* standard has not been effective in protecting our citizens' interest against unreasonable intrusions when it comes to suspicionless consent searches following valid motor vehicle stops.²³⁴

The state court then held that a request for consent in the absence of a reasonable and articulable suspicion²³⁵ violated the state's version of the Fourth Amendment.²³⁶ I have elsewhere questioned whether the New Jersey Supreme Court goes far enough to solve the problem of "consent" that is implicitly coerced by the situation in which the suspect finds himself.²³⁷ That question is not germane to this paper. Here, I argue that "consent" defined as the absence of explicit coercion is an inappropriate way of determining when the "excisemen"

²³⁴ *Carty*, 790 A.2d at 911.

²³⁵ This is the standard from *Terry v. Ohio*, 392 U.S. 1 (1968).

²³⁶ *Carty*, 790 A.2d at 911-12.

²³⁷ See George C. Thomas III, *Terrorism, Race, and a New Approach to Consent Searches*, ___ Miss. L.J. ___ (2003).

have effectively made a “demand . . . to enter your cellar, or house, by virtue of his office.”²³⁸

State v. Carty is more than ample support for my argument. I have no doubt that if Patrick Henry viewed even the run of the mill request for consent made by armed officers who have detained a person on the side of the road, he would conclude that the “request” was a “demand” made “by virtue of his office” -- that is, by virtue of the power the officer has to detain the motorist until he is satisfied that no “dutiable items” (contraband) are being “smuggled” (transported) in the vehicle.

V. The Court’s Competing Fourth Amendment Vision

The Court has tried two approaches to Fourth Amendment interpretation and is currently shifting to a third. Neither of the first two proved successful and the third is probably the worst of all. The first approach, seen in *Boyd v. United States*²³⁹ and *Gouled v. United States*,²⁴⁰ had the Court privileging the privacy of books, records, and other papers. In *Boyd*, the Court struck down an Act of Congress that permitted a United States attorney in forfeiture cases to make a motion requiring the defendant to produce any “book, invoice, or paper” that supported the government’s allegations.²⁴¹ At that point, the defendant had a choice between producing the “book, invoice, or paper” or having his failure to produce be taken as a confession of the

²³⁸ Elliot, *supra* note 54, at 412 (Patrick Henry addressing Virginia Convention, June 15, 1788).

²³⁹ 116 U.S. 616 (1886).

²⁴⁰ 255 U.S. 298 (1921).

²⁴¹ 116 U.S. at 620.

allegation in the motion. The Court made much of the privacy associated with personal papers, first quoting from the famous English case of *Entick v. Carrington*²⁴²:

Papers are the owner's goods and chattels; they are his dearest property, and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect."²⁴³

Then the Court tried its hand at ringing phrases in praise of the privacy of personal papers:

It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony, or of his private papers to be used as evidence to convict him of crime, or to forfeit his goods, is within the condemnation of that judgment [in *Entick v. Carrington*].²⁴⁴

²⁴² 19 How. St. Tr. 1029 (C. P. 1765).

²⁴³ 116 U.S. at 627-28 (quoting from *Entick v. Carrington*).

²⁴⁴ *Id.* at 630.

In *Gouled*, papers were taken from the defendant's office under the authority of two search warrants. Despite the authorization given the officers in the search warrants, the Court held that the papers were seized in violation of the Fourth Amendment. The problem the Court saw was that Gouled's interest in his private papers was greater than the government's interest. Thus no authorization could justify seizure of the papers. Here is the way the Court put it:

Although search warrants have . . . been used in many cases ever since the adoption of the Constitution, and although their use has been extended from time to time to meet new cases within the old rules, nevertheless it is clear that, at common law and as the result of the *Boyd* and *Weeks* Cases, they may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding, but that they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken.²⁴⁵

That extremely deferential approach to searches and seizures of private papers would not last. In its place, the Court groped its way toward a Fourth Amendment in which warrants would play a critical role. We have already seen that the Court is committed to a warrant requirement for searches of a home, albeit one in which consent can replace a warrant. But what about

²⁴⁵ 255 U.S. at 309.

outside the home? *Coolidge v. New Hampshire*²⁴⁶ sought to provide guidance. The issue in *Coolidge* was whether a warrant was necessary to conduct a series of searches of the defendant's car, seized from the driveway of his home after his arrest. What comes pretty clearly out of *Coolidge* is that a search warrant is needed for the search of a home.²⁴⁷ What gave the Court trouble, and was joined only at the highest level of generality by Justice Harlan as the fifth vote,²⁴⁸ was whether a "warrant requirement" exists outside the home. The notion is that the Fourth Amendment implicitly creates a preference for warrants and the State must show a compelling reason to dispense with this preference. This idea began tentatively to develop in the 1940s²⁴⁹ and is still occasionally spouted as dictum but plays no real role in shaping doctrine.

Whether the Court's mid-century warrant requirement was defensible as a matter of the construction or history of the Amendment, even Justice Scalia agrees that "it is of course textually possible to consider [a warrant requirement] implicit within the requirement of reasonableness."²⁵⁰ But the warrant requirement was already splintering by the time we get to *Coolidge*. The key parts of *Coolidge* seeking to clarify twenty years or so of labor in the Fourth

²⁴⁶ 403 U.S. 445 (1971). Another example is *Chadwick v. United States*, 433 U.S. 1 (1977), where seven members of the Court joined Chief Justice Burger's opinion requiring a warrant to open a footlocker. Though *Chadwick* manifested more consensus than *Coolidge*, the opinion in *Coolidge* is a much grander attempt to state a general principle about search warrants.

²⁴⁷ *Id.* at 474.

²⁴⁸ 403 U.S. at 491 (Harlan, J., concurring in part and concurring in the judgment.).

²⁴⁹ For a good explanation of the "warrant requirement" as well as the contrasting way to read the Fourth Amendment, now favored by the Court, see Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. Rev. 925, 927-929 (1997).

²⁵⁰ *California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring in the judgment).

Amendment vineyard were endorsed by only four justices.²⁵¹ Today, it makes nonsense of the word “requirement” to argue that a warrant requirement exists outside the home. *Coolidge* has been overruled, albeit implicitly,²⁵² and there is no longer any meaningful presumption against warrant-less searches conducted outside the home.

So the road went from the *Boyd-Gouled* fetishism of private papers to the *Coolidge* warrant requirement and then moved into the autobahn of reasonableness. Today the Court sees the two clauses as separate, again outside the home, and the question of whether a search is

²⁵¹ Justice Harlan, who provided the critical fifth vote for reversing *Coolidge*'s conviction, did not join any of the parts of the Court's opinion specifically rejecting the State's arguments that a warrant was unnecessary. He did join, “although not without difficulty,” a lengthy and general statement of Fourth Amendment principles that expressed a strong preference for a search warrant. 403 U.S. at 491 (Harlan, J., concurring in part and concurring in the judgment.).

²⁵² I suppose *California v. Carney*, 471 U.S. 386 (1985) is technically distinguishable but I believe it effectively overrules *Coolidge*. The Court in *Carney* held that a search of a motor home that Carney was using as a home did not require a warrant. It was parked on public property, to be sure, and in that way is distinguishable from *Coolidge* because his car was in his driveway. But Carney was using his vehicle as a home and if that does not require a search warrant it is difficult to know why a car that is used as a car requires a warrant. Assuming the driveway is not part of the curtilage, it falls into the open fields doctrine, see *supra* notes accompanying notes 198-99, and thus is no more private than a public street.

reasonable is a free-standing inquiry that has nothing to do with whether police should have gotten a warrant.

If there is no preference for a warrant outside the home, what values guide the Court's analysis? The answer is that the Court has identified no values. It occasionally lurches in the direction of relying on history, usually indulging a simplistic reading. Beyond that, the Court is developing a common law of Fourth Amendment reasonableness. The best example of this common law returns us to *Terry v. Ohio*. The Framers would have understood, if not approved, the notion that an officer can stop a nightwalker to inquire into his business. And the Court did require "reasonable suspicion" to make a forcible stop. But it also permitted a thorough frisk of the person based on the same standard, This would have baffled the Framers. As we have seen Justice Douglas was also baffled that the Court permitted the police to do on the street, in the interest of fighting crime, what a justice of the peace could not authorize by warrant.

For my purpose, the significance of *Terry* is that it embraced a free-standing rule of reasonableness. Here is the Warren Court's explanation, written by Chief Justice Warren:

If this case involved police conduct subject to the Warrant Clause of the Fourth Amendment, we would have to ascertain whether 'probable cause' existed to justify the search and seizure which took place. However, that is not the case. We do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure, or that in most instances failure to comply with the warrant requirement can only

be excused by exigent circumstances. But we deal here with an entire rubric of police conduct -- necessarily swift action predicated upon the on-the-spot observations of the officer on the beat -- which historically has not been, and as a practical matter could not be, subjected to the warrant procedure. Instead, the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures.

So at least when it is not practicable to get a warrant, *Terry* abandons the warrant and probable cause requirements and substitutes a free-standing test of reasonableness.

In a thoughtful concurring opinion in *Minnesota v. Dickerson*,²⁵³ Justice Scalia examined the Framing era history and concluded that the stop of a suspicious person “accords with the common law -- that it had long been considered reasonable to detain suspicious persons for the purpose of demanding that they give an account of themselves. This is suggested, in particular, by the so-called night-walker statutes, and their common-law antecedents.”²⁵⁴ But he found no “precedent for a physical search of a person thus temporarily detained for questioning.”²⁵⁵ As Scalia reads the history (and as I read the history) a search, even a frisk, of a suspicious person on the street requires probable cause.

²⁵³ 508 U.S. 366 (1993).

²⁵⁴ *Id.* at 380 (Scalia, J., concurring).

²⁵⁵ *Id.* at 381.

The common law gave constables, night watchmen, and probably private persons²⁵⁶ the right to arrest a suspicious night-walker, though the authorities are less than clear about what happened next. Both Hale and Hawkins refer to these detentions of suspicious night-walkers as “arrests.” So do East,²⁵⁷ Blackstone,²⁵⁸ and Michael Dalton’s *Countray Justice*.²⁵⁹ East says that the suspicious person may be detained until he give a good account of himself.²⁶⁰ Blackstone and Hale say that the suspicious person shall be held in custody until the morning.²⁶¹ What happens next is not stated.

Hawkins says that a private party may arrest a night-walker “till he make it appear, that he is a Person of good Reputation.” But in a later section, he notes that the night watch shall arrest strangers until morning. “And if no Suspicion be found, he shall go quit; and if they find Cause

²⁵⁶ Hawkins says “it is holden by some” that private parties can arrest a night-walker. 2 William Hawkins, *A TREATISE OF THE PLEAS OF THE CROWN* 77, sect. 20 (2d ed. 1724-26). Hale mentions only the right of the constable and the night watchman to arrest “suspicious night-walkers,” 2 Matthew Hale, *HISTORY OF THE PLEAS OF THE CROWN* 89 (1847 ed.). The distinction between private parties generally and the night watch was probably insignificant in the seventeenth and eighteenth centuries. Moreover, it is entirely beside the point for my project because the Court’s Fourth Amendment jurisprudence is premised on the notion of official interventions in the liberty of suspects.

²⁵⁷ See *Dickerson*, 508 U.S. at 380 (quoting 1 E. East, *Pleas of the Crown* ch. 5, § 70, p. 303 (1803) (“It is said . . . that every private person may by the common law arrest any suspicious night-walker, and detain him till he give a good account of himself”).

²⁵⁸ 4 W. BLACKSTONE’S COMMENTARIES * 289.

²⁵⁹ Dalton, *supra* note 175, at 76.

²⁶⁰ See *supra* note 257.

²⁶¹ See 4 W. BLACKSTONE’S COMMENTARIES * 289; 2 Hale, *supra* note 256, at 98. *Terry* permits less than the common law allowed in terms of detention because the length of the *Terry* stop must be measured in minutes rather than hours to be constitutional.

of Suspicion, they shall forthwith deliver him to the Sheriff.”²⁶² As the authorities agree that private persons can have no greater authority to arrest than constables and the night-watch, arrest until morning seems to be Hawkin’s statement of the rule as well.

Dalton does not state what happens after arrest, but he mentions arrest of night-walkers only on a warrant issued by a justice of the peace.²⁶³ All the authorities thus treat the detention of a night-walker as an arrest -- like all other warrant-less arrests based on suspicion rather than on an observation of a crime taking place. The failure of the authorities to distinguish the detention of the night-walker from any other arrest suggests that Scalia is wrong to read the common law as permitting a temporary detention of nightwalkers until they gave a good account of their activities to the constable or the night watch. Instead, the most natural way to read the history is that night-walkers would appear before the justice of the peace the next morning, just like someone arrested on a warrant or by virtue of the hue and cry.

Support for this reading can be found by comparing the standards required for arrest for felony not committed in the officer’s presence and for the arrest of the night-walker. As we saw earlier, the “good cause” the common law required for felony arrests could be satisfied by “the common fame and voice.”²⁶⁴ Moreover, Hale, Blackstone, and Hawkins fail to distinguish between the standard required for an arrest of a night-walker and for the arrest of anyone who has

²⁶² Hawkins, *supra* note 124, at 80. sect. 6.

²⁶³ Dalton, *supra* note 170, at 76.

²⁶⁴ Sir Anthony Ashley’s Case, 12 Coke 90, 92, 77 Eng. Rep. 1366, 1368 (1611). See also 2 Hale’s Pleas of the Crown 80 (1736).

not committed an offense in the officer's presence. Indeed, the common law seemed to require a pretty high quantum of suspicion to justify the arrest of a night-walker. A 1709 case involved a woman "taken up" by a constable for walking the street "upon suspicion, as being a woman of ill fame."²⁶⁵ Chief Justice Holt held that it was "not lawful even for a legal constable to take up a woman upon bare suspicion only, having been guilty of no breach of the peace nor any unlawful act."

As I read the history, the arrests of nightwalkers were not treated any differently than arrests for other offenses not committed in the officer's presence. Thus, *Terry* is flawed all the way down. Its authorization of a seizure on less than a magistrate would require for an arrest warrant is as historically flawed as its authorization of a search on less than probable cause.

And where are we today? The "reasonableness" test that dispenses with a warrant and probable cause has expanded to the every-day situations that I sketched in Part I. The reader is encouraged to re-read that Part. The Framers would not be pleased.

²⁶⁵ 2 Hale, *supra* note 256, at 89 n.f. (referring to *Queen v. Tooley*, Mich. 1709).

The glue holding together my proposal to revamp the Fourth Amendment is the notion that all seizures and all searches save the search incident to arrest must be based on probable cause (and the search incident to arrest will almost always in fact be justified by probable cause to search that runs parallel to the probable cause to arrest). The Court has far too often dispensed with the requirement of probable cause. I think the Framers would have looked askance at any doctrine that permitted the police (the excisemen and the militia) to search without having “reason to suspect.” We saw that the First Congress, acting prior to the writing and ratification of the Fourth Amendment, permitted searches of ships for dutiable items only when the customs officials had “reason to suspect any goods or merchandise subject to duty shall be concealed.”²⁶⁶ Searches of dwelling houses, stores, buildings, and “other such place[s]” required “cause to suspect a concealment” of dutiable items.

To reject *Terry* is to reaffirm the Framers’ view requiring probable cause. If a constable required more than “bare suspicion” to arrest a night-walker in 1709 in England, we should require more than “reasonable suspicion” today. Moreover, if I read the history correctly that an arrest of a night-walker was treated no differently than any other arrest on suspicion, whatever cause is required for an arrest should be required for any “seizure” of the person. The Court uses “probable cause” as the minimum required for an arrest. This makes good sense because the Fourth Amendment requires probable cause for search and arrest warrants. The principle here is that probable cause is required for government to perform a Fourth Amendment search or seizure. It’s simple. It’s profound. It’s what the Framers would have wanted.

²⁶⁶ 1 Stat., ch.5, sect. 24 (1789).

In support of my rejection of *Terry*, I enlist Justice Scalia. As noted a moment ago, Scalia has questioned whether *Terry* was an appropriate interpretation of the Fourth Amendment when it authorized a frisk of a suspect in search of weapons or evidence of a crime. He wrote: “I frankly doubt, moreover, whether the fiercely proud men who adopted our Fourth Amendment would have allowed themselves to be subjected, on mere *suspicion* of being armed and dangerous, to such indignity”

Terry is not the only casualty of the probable cause principle. In *United States v. Martinez Fuerte*,²⁶⁷ the Court approved permanent checkpoints near the border that monitor for illegal aliens by stopping cars with no suspicion at all. In *Michigan Department of State Police v. Sitz*,²⁶⁸ the Court approved movable roadblocks to search for drunk drivers. These roadblock cases cannot coexist with the historic probable cause principle. Here, I can enlist the help of the only other justice on the current Court who takes history seriously: Justice Thomas. He has raised the possibility of revisiting and overruling the roadblock cases. In *Indianapolis v. Edmond*,²⁶⁹ Thomas concluded that the roadblock cases permit a narcotics roadblock. But he offered the following tantalizing observation:

I am not convinced that *Sitz* and *Martinez-Fuerte* were correctly decided. Indeed, I rather doubt that the Framers of the Fourth Amendment would have considered

²⁶⁷ 428 U.S. 543 (1976).

²⁶⁸ 496 U.S. 444 (1990).

²⁶⁹ 531 U.S. 32 (2000).

“reasonable” a program of indiscriminate stops of individuals not suspected of wrongdoing. Respondents did not, however, advocate the overruling of *Sitz* and *Martinez-Fuerte*, and I am reluctant to consider such a step without the benefit of briefing and argument.²⁷⁰

I think Thomas is right. The Framers would not have recognized routine stops based on no suspicion at all.

But not every kind of regulatory inspection would fall in my reconstructed Fourth Amendment. To reject *Terry* and *Michigan v. Sitz* is not to reject the notion that health inspectors have a right to enter our homes. I would resurrect *Frank v. Maryland*. Indeed, I would adopt the first half of the *Frank* Court’s rationale as a principle for limiting the scope of the Fourth Amendment generally. If the purpose of the government conduct is something other than uncovering evidence of crime, the Fourth Amendment simply does not provide protection. To the extent this is inconsistent with the history in England of protecting printers who were accused of libel, the First Amendment provides that kind of protection today. There is no reason to duplicate that protection in the Fourth Amendment.

I admit that deciding what is a “crime” is far from easy. Moreover, determining the “purpose” of schemes that in fact produce evidence of crime is both philosophically and pragmatically difficult. The Court has recently tried this on for size in *Ferguson v. City of*

²⁷⁰ *Id.* at 56 (Thomas, J., dissenting).

Charleston, over the protest of Justice Kennedy who denied that it is a useful distinction. I will return to Ferguson shortly. Despite the difficulty of both dimensions of the Frank principle, I think some rough distinctions can be drawn.

Checking train engineers for evidence of drugs in their system strikes me as not included within the *Frank* universe of Fourth Amendment events. Same with school athletes. The purpose is not to prosecute those identified but to ensure the safety of the trains and to limit drug use in schools. Using checkpoints to determine if drivers have a license and registration falls outside of both dimensions of *Frank*. The point is not to prosecute drivers who fail to have the right papers but to ensure the safety of the roads. Moreover, driving without a license or vehicle registration does not seem like a “crime” to me. One metric to separate “crime” from other offenses against the public order is the existence of a sanction that includes jail time. The Court has already used this metric to identify a criminal prosecution for purposes of the Sixth Amendment. Using the authorized incarceration metric, even drunk driving would not constitute a crime if the State chose not to authorize jail time as a sanction. In those states, if any still exist, drunk driving roadblocks would be constitutional under my reconstructed Fourth Amendment.

The reader might react that the Fourth Amendment should not vary from state to state depending on authorized sanctions. Perhaps. But I think the experience of having one’s liberty curtailed by a roadblock where the worst that can happen is a traffic fine is substantially different from facing a roadblock with jail time as one of the possible outcomes. One experience is similar to facing a health and safety code inspection. The other is similar to the roadblock where the

police are looking for narcotics.²⁷¹ The Court held the narcotics roadblock unconstitutional, distinguishing the drunk driving roadblock case on the ground that it, but not the narcotics roadblock, was designed to improve highway safety. That is true enough but if one adopts the *Frank* principle, one need not rely on highway safety. Instead, a court could simply say that the police were not searching for evidence of a crime. The *Franks* principle suggests that the Court was wrong, and Justice Rehnquist right, in *Delaware v. Prouse*.²⁷² When police pull a car over to check for license and registration, they are not searching for evidence of a crime.

Of course there will be close cases. Would my reconstructed Fourth Amendment permit police to inventory the contents of automobiles lawfully impounded? The Court approved these inspections in *South Dakota v. Opperman*,²⁷³ crediting the non-search rationales offered by the State: to protect the valuables of the car's owner, to protect the police from trumped-up lawsuits, and to protect against potential danger to police from items in the car. Those have always seemed like make-weight arguments to me, particularly the latter two. But if one accepts that the inventory is not a search, then it falls outside the *Frank* principle that I have been developing.

Another close case is *Ferguson*, where the Court employed something like my *Frank* principle to decide whether the state conduct violated the Fourth Amendment. Simplifying somewhat, Charleston had a policy seeking to identify pregnant women who were using cocaine. Once identified through a blood test, the mothers were given the choice of a drug treatment

²⁷¹ See *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

²⁷² 440 U.S. 648 (1979). Rehnquist was the lone dissenter.

²⁷³ 428 U.S. 364 (1976).

program or prosecution for drug use. Deciding that whatever the ultimate goal, the immediate objective (sometimes called the “primary purpose”) was to “generate evidence *for law enforcement purposes*,” the Court held that the procedure implicated and violated the Fourth Amendment.²⁷⁴ Although I agree with Justice Kennedy that making the determination of which purpose is “primary” pretty much depends on who is doing the determining, the Court’s solution makes sense.

Close cases are not unique to my Fourth Amendment. There are plenty of close cases in the Court’s doctrine and no overarching principles by which to decide close cases. Indeed, when you consider that the modern Court has made it “open season” on the air space above our homes, our banking records, the phone numbers we dial, and our use of the highways and buses—all without any suspicion of criminal wrongdoing whatsoever²⁷⁵ -- I think the modern Court has failed the test of history. I hope my reconstructed Fourth Amendment gets at least a C in history.

VI. A “Do-Over” Fourth Amendment Doctrine

As noted earlier, I think the Court’s requirement of warrants to search homes is consistent with the Framers’ values. Beyond that, I used the Framers’ values to test two aspects of Fourth Amendment doctrine that seem particularly wrong-headed to me: first, the narrowing of the scope

²⁷⁴ If it implicated the Fourth Amendment, it necessarily violated the Fourth Amendment because a search of bodily fluids requires either an exigency or a warrant.

²⁷⁵ Stopping of a vehicle requires probable cause to suspect a motor vehicle violation but no suspicion of a criminal violation. And as the New Jersey Supreme Court noted, “it is virtually impossible to drive and not unwittingly commit some infraction of our motor vehicle code.” *Carty*, 790 A.2d at 908.

of the Fourth Amendment by reference to expectations of privacy; and, second, the Court's refusal to require particularized suspicion in many cases.

As to the first test, I concluded (here I have lots of company)²⁷⁶ that the *Katz* reasonable expectation of privacy test is a failure. It is too malleable and in the hands of a law and order Court has produced results difficult to comprehend, or at least I think they would be difficult for Patrick Henry and the First Congress to comprehend. In its place, I would go back to the text of the Fourth Amendment, like Justice Black, and ask whether the police searched the person, house, paper, or effect of the defendant. Even my garbage is my effect and no amount of Katzian analysis can persuade me otherwise. Again to claim that the Fourth Amendment protects my garbage is merely to require the police to have probable cause to seize and search it.

The second radical change that follows from my historical thought experiment is to require probable cause for all seizures and for all searches for evidence of crime, except searches incident to arrest. All the many exceptions to the Fourth Amendment that do away with probable cause should be abolished as long as the government conduct in question entails searching for evidence of a crime. Some examples include the *Terry* stop-and-frisk regime, the permanent checkpoints near the Mexican border, and the movable drunk driving checkpoints. If we limit the Fourth

²⁷⁶ See, e.g., Christopher Slobogin, Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society," 42 Duke L.J. 727 (1993).

Amendment to searches for evidence of crime, as the Court once did in *Frank v. Maryland*, many of the regulatory Fourth Amendment “exceptions” would not be included in the scope of the Fourth Amendment. Thus, government could continue to conduct health and safety inspections of homes, and vehicle registration checks by roadblock or by stopping cars at random.

What history suggests, and what I have attempted to craft into doctrine, is to give more Fourth Amendment protection against searches for evidence of crime while withdrawing Fourth Amendment protection entirely from regulatory schemes that are not intended to produce evidence of crime. As a policy matter, I think it makes good sense to trade protection against regulatory schemes for a more protective Fourth Amendment when police seek evidence of crime. The Warren Court, in my judgment, made a huge historical and policy mistake that later Courts have simply made worse. It assumed that the Fourth Amendment was a general protection of privacy and thus shielded us from regulation as well as from investigation of crime. This mistake has warped Fourth Amendment doctrine.

The sturdy principle that all searches require probable cause leads naturally to the abolition of consent as a free-standing justification for a search. Here the history is less clear but is at least consistent with my position. We see nothing in the pre-Framing history about consent searches because the proud Americans and Brits of that era would not have understood the notion that they should surrender their property or privacy to a lowly constable. What we do see in the history of search and seizure is that individual suspicion was required before a search could proceed. With that principle firmly in place, consent searches cannot pass muster. It is really a simple idea. If police have probable cause to search, they can search, without a warrant outside of

structures. If police do not have probable cause to search, they cannot search.

Recall the Framers' hostility toward the hated excisemen and militia. We have seen Patrick Henry's concern that "exciseman will demand leave to enter your cellar, or house, by virtue of his office; perhaps he may call on the militia to enable him to go."²⁷⁷ An unnamed anti-Federalist went further, calling excisemen the "scruf [sic] and refuse" of mankind who would not hesitate to search the petticoats of women.²⁷⁸ Mercy Otis Warren, the sister of James Otis, wrote a pamphlet condemning general searches as a "detestable instrument of arbitrary power" and "invited capricious house searches by insolent officers of the new central government."²⁷⁹ Another anti-Federalist warned of "the insolence of office" and "daring brutality" of the publican, "perhaps offered to the wife of thy bosom."²⁸⁰ "A Son of Liberty" worried that "our bed-chambers" would be "searched by the brutal tool of power" when the excisemen went about their business.²⁸¹ We need to strengthen the Fourth Amendment when the police are doing today what the excisemen and militia did during the pre-framing era.

I have no illusion that any court will read this article and adopt my reconstructed Fourth Amendment. My hope, instead, is to stimulate a discussion among scholars and judges about

²⁷⁷ Elliot, *supra* note 54, at 412 (Patrick Henry addressing Virginia Convention, June 15, 1788).

²⁷⁸ Cuddihy, *supra* note 35, at 1376.

²⁷⁹ *Id.* at 1374. The first quotes indicate a source of Warren, *Columbia Patriot*, p. 12 sec. 14 (from Cuddihy at 1374). The source of the second set of quotes is Cuddihy at 1374.

²⁸⁰ *Id.* at 1375.

²⁸¹ *Id.* at 1377.

better ways of understanding the “right of the people to be secure in their persons, houses, papers, and effects.”