

TIME TRAVEL, HOVERCRAFTS, AND THE  
FRAMERS: JAMES MADISON SEES THE FUTURE  
AND REWRITES THE FOURTH AMENDMENT

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INTRODUCTION

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, the Federal Hall was chosen by the New York City Common Council to house the new federal government.<sup>1</sup> Congress commissioned Pierre L'Enfant to convert the building into "an elegant meeting place for Congress."<sup>2</sup> When completed, the three story building measured ninety-five feet in width and 145 feet at its deepest point.<sup>3</sup> A handsome building in the federal style (naturally), its main entrance was on Wall Street off a covered walk that paralleled the street.<sup>4</sup> 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."<sup>5</sup>

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1 Diary of William Maclay (Apr. 24, 1789), in 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 1789–91, at 3, 3 n.1 (Kenneth R. Bowling & Helen E. Veit eds., 1988).

2 *Id.*

3 *Id.*

4 For a drawing of the Federal Hall, courtesy of the New York Historical Society, see First Fed. Cong. Project, *Birth of the Nation: The First Federal Congress 1789–1791: Setting Precedent*, at <http://www.gwu.edu/~ffcp/exhibit/p3/index.html> (last visited Feb. 21, 2005).

5 Diary of William Maclay, *supra* note 1, at 3 n.1. The Federal Hall was torn down in 1812. *Id.*

In this room, the House is debating the Bill of Rights. Representative Elbridge Gerry rises to say that his smallpox inoculation<sup>6</sup> gave him a high fever, during which he saw elephants on the ceiling and then glimpsed what appeared to be the future. I indulge this fiction to penetrate, however imperfectly, the opaqueness of history on what the Framers meant when they wrote the Fourth Amendment. As Professor Yale Kamisar has concluded, the Framers “could hardly have been expected to foresee the current state of affairs.”<sup>7</sup> My fiction will permit the Framers to see the future and then to adjust their Fourth Amendment to meet that future.

Gerry’s fevered brain contains the vision of federal police who are always seeking to uncover criminal activity. Gerry said it looked to him just like the British customs officials and militia in the years before the Revolution. But the federal officers have developed miraculous devices that Gerry cannot understand even as he struggles to describe them to his fellow legislators. Federal police use hovercrafts that suspend themselves over the homes of citizens, allowing the officers to see through cracks in the roofs. After hovering over one home for a time, they can move to the next. And the next. And the next. Gerry asks Representative James Madison whether the Fourth Amendment would forbid this conduct.

Before Madison can answer, Gerry tells of another vision of the future. In this one, 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 and question the occupants. They are also authorized to stop vehicles anywhere in the country<sup>8</sup>

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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, the 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.*

7 Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a “Principled Basis” Rather than an “Empirical Proposition”?*, 16 CREIGHTON L. REV. 565, 571 (1983).

8 This involves a bit of hyperbole. Police must have at least grounds to make a traffic stop. But the New Jersey Supreme Court commented recently that, given the various traffic offenses, it is “virtually impossible to drive and not unwittingly commit some infraction of our motor vehicle code.” *State v. Carty*, 790 A.2d 903, 908 (N.J. 2002).

and seek consent to search the vehicle. And they are authorized to approach individuals who are on trains and buses (he would have to explain to the Framers what trains and buses are) and ask 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 armed militiaman, his belongings can be ransacked and any evidence found can be used to convict him of one of hundreds of federal crimes. A gasp comes from the crowd. Yes, Gerry informs the shocked audience, in the year 2002, the federal criminal code will contain roughly 3500 criminal offenses and another 10,000 or so criminal prohibitions are in federal regulations.<sup>9</sup>

The final vision of 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 2005, and the audience gasps again. The state and city militia who navigate this unimaginable expanse of steel and concrete 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. Possessing a weapon violates several state laws, and if the state militia 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, Representative Madison, would the Fourth Amendment permit these acts of the state militia?

What would Madison answer?

Madison might, of course, tell Gerry to go home, get some rest, and recover from his smallpox inoculation and the horrific nightmare of national and state militias that exist not to protect the citizens from foreign enemies but, instead, 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 in 2005 the citizens fear criminals and terrorists more than they fear the government. For the most part, American citizens living in alien-looking places clamor for the pres-

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9 Paul Rosenzweig, Heritage Found., *Congress Clogs Courts with too Many Federal Crimes*, at <http://www.heritage.org/Press/Commentary/ed072402.cfm> (July 24, 2002).

ence of heavily armed police and support wholeheartedly the fight against crime and, especially, against terrorists determined to destroy America. While there is less support for the war on drugs, a “war” that Gerry explains to the disbelieving audience, Congress and most of the state legislatures are committed to that one too. The check on government investigative activity, developed by the Supreme Court from 1886 to 1921,<sup>10</sup> had largely disappeared by the middle of the twentieth century. There was this one moment, Gerry recounts, in the 1960s when a liberal Supreme Court tried to stem the tide in favor of the police, but the moment passed, the barriers put in place were too weak, technology flourished, and privacy was lost.

Madison might wonder what happened to the common law, some of which was enacted into federal law as early as 1789, that required individual cause and warrants before customs officials could search our warehouses and homes, and placed other restrictions on the power of these officials to rummage through our belongings. Though customs officials could inspect and record the containers found in ships that docked at our ports, a more thorough search required “reason to suspect” that goods subject to customs duties were being concealed.<sup>11</sup> What happened to that kind of solicitude for property and privacy?

Those of us alive in 2005 know that Gerry’s dream is all too accurate. And there is more. Imagine a typical day. Assume that the police have no solid evidence against you, nothing that would approach probable cause for a search warrant or for the police to arrest you. Perhaps they have heard a rumor or perhaps they have targeted you because of your friends or because of your race or ethnicity. What follows, Mr. Madison, is the world permitted by your Fourth Amendment. It is what your handiwork has wrought.

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10 This covers the period from *Boyd v. United States*, 116 U.S. 616 (1886), to *Gouled v. United States*, 255 U.S. 298 (1921), and includes *Weeks v. United States*, 232 U.S. 383 (1914), and *Silverthorne v. United States*, 251 U.S. 385 (1920). By the time we get to 1922, the government was forbidden to search for and seize records, papers, and documents located in a home or office even if the police had a valid search warrant. *Gouled* built upon *Boyd*’s foundation to arrive at this rule. See *Gouled*, 255 U.S. at 306–13. Moreover, *Silverthorne* built upon *Weeks* to hold that evidence seized in violation of the Fourth Amendment, or any evidence derived from it, could not be used in the government’s case. See *Silverthorne*, 251 U.S. at 391–92.

11 Compare Collection Act of 1789, ch. 5, § 15, 1 Stat. 29, 40, with *id.* § 24, 1 Stat. at 43.

## I. SEARCH AND SEIZURE: 2005 MODEL

You call your office while eating breakfast. The police can record the number you dial.<sup>12</sup> You access the weather on your computer. The police can record what web sites you visit and how long you stay.<sup>13</sup> You drive to the newsstand where you buy a cup of coffee. Undercover police have installed a beeper in a false bottom of the cup.<sup>14</sup> They can use this beeper to follow you on your sales route.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup> 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 the curb next to your property.<sup>18</sup>

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.<sup>19</sup> As long as the officers do not prolong the traffic stop longer than necessary to accomplish these purposes, they can deploy a drug-sniffing dog to walk around your vehicle and sniff for contraband drugs.<sup>20</sup> If you live near the border with Mexico, you can be stopped at a fixed roadblock by the immigration authorities.<sup>21</sup> 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.)

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

13 This follows by necessary implication from *Smith*.

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

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

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

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

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

19 See *Mich. Dept. of State Police v. Sitz*, 496 U.S. 444, 447 (1990) (holding that sobriety checkpoints do not violate the Fourth Amendment); *Delaware v. Prouse*, 440 U.S. 648, 656–57 (1979) (stating in dicta that police may stop vehicles at inspection checkpoints as long as police do not exercise discretion in deciding what vehicles to stop).

20 *Illinois v. Caballes*, 125 S. Ct. 834, 838 (2005).

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

Whatever they find in this excavation can be used to prosecute you.<sup>22</sup> 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.<sup>23</sup> They can “wire” this person so that the police can listen and record what you say.<sup>24</sup> The police can do all the things in this and the previous paragraph, plus the hovercraft and the bus encounter described earlier, without the slightest shred of suspicion.<sup>25</sup>

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.<sup>26</sup> 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.”<sup>27</sup> One question left from the history of the Fourth Amendment is whether the Fram-

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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 because it protects only “persons, houses, papers, and effects.” *Id.* at 176. 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. *Id.* at 179. 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. Perhaps this is the same as saying that one would not have a Fourth Amendment interest in the shape of a container placed in public but could have a Fourth Amendment interest in the contents.

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

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

25 If the reader suspects that this description of Fourth Amendment protection outrages me, she would be correct. I am in good company. See, e.g., Tracey Maclin, *Justice Thurgood Marshall: Taking the Fourth Amendment Seriously*, 77 CORNELL L. REV. 723, 811 (1992) (noting that the Court’s Fourth Amendment model “allows coercive police tactics and permits violations of personal dignity”); Scott E. Sundby, “Everyman’s” Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?, 94 COLUM. L. REV. 1751, 1789–90 (1993) (setting out the “Accidental Tourist’s Guide to Maintaining Privacy Against Government Surveillance,” a wonderful tongue-in-cheek criticism of the scope of the modern Fourth Amendment).

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

27 U.S. CONST. amend. IV.

ers wanted that clause to have independent significance and, if so, what it would prohibit. One possibility, endorsed by Professor Thomas Davies after a careful and exhaustive review of the relevant history, is that the first clause both defines the scope of the Fourth Amendment and tells us that it is a fundamentally important right that should be kept safe from general warrants.<sup>28</sup> That business, of course, is taken care of in the Warrant Clause.<sup>29</sup>

For decades, the modern 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 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 that time, the Court began with the cardinal principle that a warrantless 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?<sup>30</sup> What about a footlocker that was placed into the trunk of a car moments before the suspects were arrested?<sup>31</sup> What about a box discovered during the search of a car?<sup>32</sup> 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 sought to apply the Reasonableness Clause to a large expanse of government conduct. What the Court failed to appreciate is that, outside the warrant requirement, no rules could be deduced from the requirement that a search be reasonable. Reasonableness lies in the eye of the beholder. The Court’s current Fourth Amendment methodology is essentially 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

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28 Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 724 (1999).

29 U.S. CONST. amend. IV.

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

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

32 *See Robbins v. California*, 453 U.S. 420 (1981) (plurality opinion) (stating that a warrant was required).

least cynical reader will appreciate that this kind of balance will almost always come out in favor of a narrow Fourth Amendment. And it did, even in the hands of the Warren Court<sup>33</sup> and more so in the hands of the Burger and Rehnquist Courts.<sup>34</sup> Unlike the early twentieth century, when the Fourth Amendment protection was narrow but deep, we now have a broad layer of Fourth Amendment protection that is as thin as ice on a warming pond.

I seek a simplified, reformulated vision of the Fourth Amendment. I should be clear that my Article will not address the appropriate remedy for a Fourth Amendment violation. I agree with William Cuddihy that the Amendment, by default, incorporated the English law denying the availability of exclusion as a remedy.<sup>35</sup> Thus, history can tell us nothing useful on this issue, which remains a highly contentious policy decision. I will restrict myself to topics about which history might provide insight.

The method of inquiry will be to understand the common law relevant to search and seizure and the political context in which the Fourth 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 have seen 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 minds 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.

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33 See, e.g., *Terry v. Ohio*, 392 U.S. 1 (1968) (permitting a “stop and frisk” when police have reasonable suspicion that a suspect was armed and dangerous and about to commit a crime); *McCray v. Illinois*, 386 U.S. 300 (1967) (upholding a conviction even though the arrest was based on information from an unnamed informant and the state court refused to permit the defendant to learn the identity of the informant).

34 The Burger and Rehnquist Courts greatly expanded the *Terry* stop and frisk regime that seemed limited to violent crimes about to occur. See, e.g., *United States v. Place*, 462 U.S. 696, 706 (1983) (stating in dicta that *Terry* sometimes allows temporary seizures of luggage). Later courts also expanded the Warren Court’s search incident to arrest doctrine. See, e.g., *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 or near the car).

35 3 William John Cuddihy, *The Fourth Amendment: Origins and Original Meaning* 602–1791, 1531 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School) (on file with UMI Dissertation Services).



Though my “new” Fourth Amendment contains nine clauses rather than two, 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 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 cause to believe that a crime had been committed. The modern Court has read individualized cause 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. My new Fourth Amendment is based mostly on the notion of probable cause.<sup>36</sup> As Scott Sundby has put it so well, “probable cause must be the center of the Fourth Amendment universe.”<sup>37</sup> I would apply that principle as follows: police may search for and seize evidence when they have probable cause. If they do not

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36 I do not claim that the common law used the locution “probable cause” or that a requisite level of cause played exactly the role that it does today. The use of “probable cause” as the sole standard for warrants was Madison’s innovation. Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista*, 37 WAKE FOREST L. REV. 239, 370 (2002). But this innovation made the issuance of warrants easier, not more difficult, than under the common law. The common law required, for an arrest or search warrant, that a complainant make a sworn accusation that a crime had occurred *and* that the complainant “possessed probable cause of suspicion regarding the perpetrator’s identity.” Davies, *supra* note 28, at 651–52. Lord Hale put it this way when describing what the magistrate must do before issuing an arrest warrant: “to examine upon oath the party requiring a warrant [complainant], as well whether a felony were done, as also the causes of his suspicion.” 2 SIR MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* \*110. Thus to permit a warrant only on “probable cause” was a substantial lessening of the burden that government faced at common law.

When the Framers thought “search and seizure,” they almost certainly thought “customs.” The Fourth Amendment applied only to federal officers, and customs was about the only duty they had that would give rise to search or arrest. Davies speculates, therefore, that the Framers wanted federal customs agents to be able to use the “probable cause” defense to a trespass suit, permitted under English law, if the seized goods turned out not to be subject to forfeiture. Davies, *supra*, at 370.

37 Scott E. Sundby, *An Ode to Probable Cause: A Brief Response to Professors Amar and Slobogin*, 72 ST. JOHN’S L. REV. 1133, 1138 (1998). I do not mean to imply that Sundby goes as far as I do. Indeed, he contemplates “departures” from the Fourth Amendment norm of probable cause. *Id.* Thomas Clancy also goes almost, but not quite, as far as I do. See Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 634 (1995) (concluding that “[e]xceptions to the requirement of individualized suspicion should only be justi-

have probable cause, they may not search for or seize evidence. Police may arrest if they have probable cause. If they do not have probable cause, they may not seize a person. To be sure, sometimes police will also need a warrant to search or arrest, but probable cause is the “king” of the Amendment that I will write for the Framers. 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 to look to history when construing the Fourth Amendment include the textually uncertain meaning of a right against “unreasonable searches and seizures” and the easily documented abuses of the British in the colonial period. Perhaps the chief abuse was the attempt to use writs of assistance to enforce increasingly unpopular customs laws, which contributed to the general resentment of British power during this period. It is fair to say that the Court uses Fourth Amendment 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. Kathryn Urbonya’s recent analysis makes this point vividly.<sup>38</sup> Some scholars use the same methodology, engaging in what Morgan Cloud calls “lawyer’s histories.”<sup>39</sup> These histories, on Cloud’s account, “have been partial in two ways: they 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.”<sup>40</sup>

Several problems attend any “reading” of Fourth Amendment history. I ignore here, because it is not relevant to my project, the question of whether and how history should constrain the Court. This deep methodological question must be addressed in any attempt to use history to create constitutional doctrine, but my project seeks merely to ask what Fourth Amendment the Framers might have written could they have seen the future. For the reader interested in the

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fied by a showing of necessity, which is to say that exceptions to that requirement should be few”).

38 Kathryn Urbonya, *Rhetorically Reasonable Police Practices: Viewing the Supreme Court’s Multiple Discourse Paths*, 40 AM. CRIM. L. REV. 1387 (2003).

39 Morgan Cloud, *Searching Through History, Searching for History*, 63 U. CHI. L. REV. 1707, 1707 (1996).

40 *Id.* at 1708.

deep methodological question, no better account of it exists than David Sklansky's.<sup>41</sup>

The remaining problems in “reading” Fourth Amendment history have been ably articulated by Cloud, Davies, and Tracey Maclin. First, there is the complexity of the history leading up to the Fourth Amendment. As Maclin puts it, the Supreme Court “mistakenly distills the Fourth Amendment’s rich and complex history” into rules.<sup>42</sup> There were, after all, thirteen colonies, an evolving common law, and the British abuses of their own rules. “Common-law rules, like constitutional principles, do evolve with time,” and when a common law norm is evolving, “disagreement among common-law scholars on the authority of a particular legal norm should be expected.”<sup>43</sup>

Even if we could isolate some clear common law rules about search and seizure, we face daunting problems trying to “translate” those rules into what the Framers might have intended. To begin, the most dominant intent of the Framers had *nothing to do with the content of the rights in the Bill of Rights*. What modern scholars often fail to take into account is that in 1789 the Republic was in danger of falling apart rather than uniting into a single country. When the First Congress took up Madison’s proposed bill of rights on June 8, 1789, only eleven states had ratified the Constitution. The margin of victory in the three most populous and important states—Virginia, New York, and Massachusetts—was less than three percent beyond a majority.<sup>44</sup> Four states had endorsed “plans for a second convention to dilute the powers that the federal government had obtained at Philadelphia.”<sup>45</sup> The extreme Antifederalists were using the lack of a bill of rights as a way to attack the Constitution. Thus, “Madison designed the Bill of Rights as a wedge between the moderate and radical factions of Antifederalists.”<sup>46</sup> Moreover, Madison feared that the Antifederalists would introduce their own amendments that would cripple the central government. Thus, the true “intent” of the Framers was to isolate the extreme Antifederalists and to “impale[ ]” the Antifederalist move-

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41 David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739 (2000).

42 Tracey Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. REV. 895, 971 (2002). Maclin had in mind the rule in *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), permitting a state to authorize a custodial arrest for any offense, but his point has general applicability.

43 Maclin, *supra* note 42, at 954–55.

44 3 Cuddihy, *supra* note 35, at 1432 & n.135.

45 3 *id.* at 1429.

46 3 *id.* at 1437.

ment “on the very weapon, the clamor for a bill of rights, that it had thrust at its opponents.”<sup>47</sup>

But assume we can surmount all of those problems and gain a glimmer of insight into what was actually going on in the minds of the men who wrote and ratified the Fourth Amendment. We have a final, and ultimately insurmountable, problem, as Davies has shown with painstaking care. Almost nothing about the Framers’ Fourth Amendment is relevant to modern policing.<sup>48</sup> The problems the Framers sought to remedy were eighteenth-century problems. The problems we face are twenty-first-century problems. 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.

For example, the common law limited arrests and searches in ways that would be unacceptable in the world of modern policing. The cornerstone of common law arrest and search procedure was not a prediction of probability that the suspect was involved in criminal activity. A lawful arrest or search could not occur in the absence of *proof* that a crime in fact had been committed.<sup>49</sup> A warrant required an accusation by a named complainant that a crime had been committed.<sup>50</sup> In effect, common law crime detection was based on an accusatorial system, unlike modern policing where the government can seek out evidence of crime on its own. The difference between these two approaches is enormous, and I cannot imagine we are ready to return to the common law accusatorial model of crime detection.

The approach most faithful to conventional historical methodology is to set out the history as accurately as possible without trying to fit the history somehow into today’s doctrine. This is the “damn the torpedoes” method, most effectively used by Davies<sup>51</sup> and Cuddihy.<sup>52</sup> Much of the Fourth Amendment scholarship ignores the central mystery that Davies identifies. The Fourth Amendment sets out with great detail *what* warrants must contain and says nothing about *when* warrants must be obtained. For decades the Court tried to fill this vacuum, spasmodically and without a clear pattern, as I will describe

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47 3 *id.* at 1440.

48 See, e.g., Davies, *supra* note 28, at 724–41.

49 See Davies, *supra* note 28, at 627–39; Davies, *supra* note 36, at 321–26, 368–73.

50 See Davies, *supra* note 28, at 650–54. A valid warrant also required, to be sure, a showing of “probable cause of suspicion regarding the perpetrator’s identity.” *Id.* at 651–52. But by itself, this would have been insufficient to justify issuance of a warrant. *Id.*

51 See Davies, *supra* note 28.

52 See Cuddihy, *supra* note 35.

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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.”<sup>53</sup> Ultimately, Davies is “skeptical . . . whether even clear history can provide much positive guidance for shaping specific responses to modern search and seizure issues.”<sup>54</sup> 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.”<sup>55</sup> 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.”<sup>56</sup>

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, 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 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. NEUMAN<sup>57</sup> 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

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53 Davies, *supra* note 28, at 724.

54 *Id.* at 736.

55 *Id.* at 741.

56 *Id.* at 740–41.

57 A reader of a 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?”

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.”<sup>58</sup>

Thomas Davies argues that the Framers used the Fourth Amendment to abolish general warrants and that was all they intended the Amendment to do.<sup>59</sup> For my purposes, I need only show that the Fourth Amendment was aimed principally at general warrants and that the Framers did not think much, if at all, about 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. I will write that Amendment for them.

The point of writing a new Fourth Amendment is to show the failures of the Court’s Fourth Amendment doctrine, failures that I believe were inevitable given what the Court has to work with. The Fourth Amendment has detailed requirements to ensure that warrants are specific rather than general: “[n]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”<sup>60</sup> 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.”<sup>61</sup> 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.

But Davies believes that the Framers used “unreasonable searches and seizures” to describe searches and seizures pursuant to general warrants. “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.”<sup>62</sup>

58 2 Cuddihy, *supra* note 35, at 759. Cuddihy concludes that this understanding violated both local law and British law. *Id.*

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59 Davies, *supra* note 28, at 619–68. Kamisar and others disagree. *See, e.g.*, Kamisar, *supra* note 7, at 574–79.

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60 U.S. CONST. amend. IV.

61 *Id.* amend. IV.

62 Davies, *supra* note 28, at 693. David Sklansky disagrees, arguing that “unreasonable . . . almost always meant in the late-eighteenth-century what it means today: contrary to sound judgment, inappropriate, or excessive.” Sklansky, *supra* note 41, at 1780.

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Whether “unreasonable searches and seizures” included more than general warrants, the state constitutions in place in 1791 show that the principal concern was the general warrant. Eight states had constitutional provisions relating to search and seizure.<sup>63</sup> Four mention only rights against general warrants. Virginia’s provision can stand as an example of all four:

That general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.<sup>64</sup>

Four state constitutional provisions contain a reference to a right to “be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions,” though all four then go on to condemn general warrants as “contrary to this right.”<sup>65</sup> Perhaps the best way to read the four states that speak generally of a right against search and seizure is that they reference a fundamental right against unreasonable searches and seizures, the general warrant subset of which was forbidden by the state constitutions.

James Otis drew on an argument from “natural Equity” in his oral argument against the writs of assistance in 1761, concluding that any act of Parliament that ran afoul of that “natural Equity . . . would be void.”<sup>66</sup> Indeed, seeing the right against general warrants as a subset of some larger fundamental right against unreasonable searches and

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63 In this count, I include Vermont as a state although when it ratified its Constitution in 1777 it was an independent province. It joined the United States in 1791, the first state to join the original thirteen. See The US50 Inc., *Vermont State History*, at <http://www.theus50.com/vermont/history.shtml> (last visited Feb. 22, 2005). Of the original thirteen colonies, then, only seven had constitutions forbidding certain kinds of search and seizure. Four had constitutions granting rights but did not include any rights concerning search and seizure: New York, New Jersey, South Carolina, and Georgia. 3 Cuddihy, *supra* note 35, at 1637. Two, Rhode Island and Connecticut, had no constitutions at that time. *Id.*

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64 VA. CONST. OF 1776, art. I, § 10. North Carolina, Maryland, and Delaware are similar. See THE COMPLETE BILL OF RIGHTS 234 (Neil H. Cogan ed., 1997).

65 MASS. CONST. art. XIV. Two other state constitutions had similar language. See THE COMPLETE BILL OF RIGHTS, *supra* note 64, at 234–35 (citing New Hampshire and Pennsylvania). Vermont had a similar provision in its 1777 Constitution. See *supra* note 63 for the status of Vermont in 1777.

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66 See John Adams’s Report of the First Argument in February, 1761, in QUINCY’S MASSACHUSETTS REPORTS 474 (Samuel M. Quincy ed., Boston, Little Brown & Co. 1865) (quoting Otis’s oral argument: “[A]n act against natural Equity Is void: and if an Act of Parliment should be made, in the very Words of this Petition, it would be void”).

seizures is a plausible interpretation of Madison's original formulation of the Fourth Amendment:

The rights of the people to be secured in their persons, their houses, their papers, and their other property from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.<sup>67</sup>

The Amendment as adopted, of course, has two clauses rather than one—"shall not be violated, and no Warrants shall issue." The one clause construction—"shall not be violated by warrants issued"—suggests that there is a larger right, which would be violated by general warrants. Thus, general warrants are forbidden, whatever else might be contained in the larger right to be free of 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 was 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.<sup>68</sup>

Other types of searches would have concerned the Framers, one of which is resolved by implications from the Warrant Clause. The law was evolving to condemn various kinds of general searches without warrants.<sup>69</sup> A particular kind of general search was the slave patrols authorized by some of the Southern states.<sup>70</sup> It would, as Kamisar has noted, make little sense to bar searches conducted under general warrants and then to permit general searches to be made *without warrants*.<sup>71</sup>

Moreover, Cloud pointed out to me that if the Framers intended only to prevent the problems that the British had caused, they would have barred writs of assistance.<sup>72</sup> Writs of assistance were at least as

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67 1 ANNALS OF CONG. 452 (Joseph Gales ed., 1789).

68 The argument against Madison's language was that "by warrants issued" was not a "sufficient" ban against general warrants. Diary of William Maclay, *supra* note 1, at 1291. The motion "therefore proposed to alter it so as to read 'and no warrant shall issue.'" *Id.*

69 See 3 Cuddihy, *supra* note 35, at 1375 (noting criticism of general searches without warrants); 3 *id.* at 1402 (remarking on the increasing condemnation of general excise searches and search warrants issued groundlessly).

70 2 *id.* at 1150 (noting authorization in Virginia, South Carolina, and Georgia).

71 See Kamisar, *supra* note 7, at 575 (arguing that the "colonists would have vigorously opposed *warrantless* searches exhibiting the *same characteristics* as general warrants and writs and thus impairing privacy and freedom to the same degree").

72 Attachment to e-mail from Morgan Cloud to George C. Thomas, III (Dec. 20, 2004, 5:11 PM EST) (on file with the author).

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great a problem as general search warrants in the years leading up to the Revolution,<sup>73</sup> yet the Fourth Amendment makes no mention of them. It would be bizarre to read the Fourth Amendment not to bar writs of assistance. Thus, I am happy to concede that “unreasonable searches and seizures” included any type of general search, whether by warrant or not.

At least four other potential search issues existed in the pre-Framing days. Concerns were raised with unannounced searches and nocturnal searches,<sup>74</sup> as well as official entries into homes without announcing the official business that justified the entry.<sup>75</sup> In addition, though there is no evidence of concern on the part of the Framers, searches incident to arrest were a type of search that existed at that time. Could the Framers have intended the answers to these questions to be found in the concept of “unreasonable searches and seizures”? Of course. Did the Framers intend the answers to these issues to be found in that language? I doubt it. I think it far more likely that the Framers intended “unreasonable searches and seizures” to be a rhetorical weapon that could be used to help work out answers to questions outside the general search category.<sup>76</sup>

From all of this, I infer that the Framers wrote the following Amendment, which I have rephrased in modern style:

The people have a fundamental right to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. To keep the federal government from infringing that right, no general searches shall occur and 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.

If this is the right reading of history, we search that history in vain for a meaning of “unreasonable” that extends beyond the condemnation of general searches.

But why would *that* be the exclusive focus of men who were very suspicious of the new central government? Why not have a more gen-

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73 See M. A. SMITH, WRITS OF ASSISTANCE 17–40 (1978).

74 3 Cuddihy, *supra* note 35, at 1344–46; see also 2 *id.* at 1169 (stating concern with searches at night).

75 2 *id.* at 1169.

76 I don’t have a fully developed theory about what institutions or actors the Framers would have wanted to work out the details of “unreasonable searches and seizures.” The most obvious candidate to us today is the courts. I think that is the one institution the Framers would *not* have wanted to infuse meaning into “unreasonable searches and seizures.” As this is outside the scope of this Article, I’ll keep my thoughts on it to myself until my next article!

eral protection of privacy? The answer here is that, like all of us, the Framers were a product of their times. The nature of eighteenth-century crime and policing did not produce much in the way of searches without warrants. And the first clause of the Amendment created a powerful rhetorical weapon that could be brought to bear on searches and seizures outside the context of general searches.

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.”<sup>77</sup> 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 as watchmen 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.<sup>78</sup>

But these 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 [constable].”<sup>79</sup>

A paramilitary operation designed to keep the streets safe at night is a world removed from proactive policing designed to solve crimes that are already complete. What was the colonial approach to completed crimes? The answer was that for the most part citizens initiated criminal prosecutions. Putting aside for the moment homicides and the crimes that threatened the social or economic order—for example, riot, treason, and counterfeiting<sup>80</sup>—“the initiation of arrests and searches commenced when a crime victim either raised the ‘hue and cry’ or made a sworn complaint.”<sup>81</sup> The difference between these

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77 Davies, *supra* note 28, at 621–22.

78 Douglas Greenberg, *The Effectiveness of Law Enforcement in Eighteenth-Century New York*, in 1 CRIME AND JUSTICE IN AMERICAN HISTORY 264, 266 (Eric H. Monkkonen ed., 1991).

79 JAMES RICHARDSON, *THE NEW YORK POLICE, COLONIAL TIMES TO 1901*, at 18 (1970). Richardson used “police officer” where I substituted “constable.” “Police officer” is confusing because Richardson does not mean a modern proactive police officer. He uses “police officer” interchangeably with “peace officer,” by which he means marshals and constables.

80 See *infra* notes 105–107 and accompanying text for a discussion of these crimes.

81 Davies, *supra* note 28, at 622.

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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 at least some doubt that searches incident to arrest occurred routinely.<sup>82</sup>

The hue and cry was an ancient common law process that obligated anyone who knew of a completed felony to raise the hue and cry “with horn and with voice” to put the village on notice of the felony.<sup>83</sup> 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.”<sup>84</sup> 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.”<sup>85</sup> A later statute made a village liable for 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.”<sup>86</sup>

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.<sup>87</sup> One advantage to the hue and cry was that it gave constables “the same powers, protection, and indemnification, as if acting under the warrant of a justice of the peace.”<sup>88</sup> So warrantless *arrests* undoubtedly occurred as a consequence of the hue and cry, and perhaps the Constable would search the suspect to disarm him, but constables had no incentive to make any other kind of search. As Thomas Clancy concludes: “Law enforcement officials in America and in England in the period preceding the American Revolution did not have broad inherent authority to search and seize; such actions required authorization, and the warrant system was used primarily to confer that authority.”<sup>89</sup>

The Justice of the Peace could issue a “hue and cry” warrant,<sup>90</sup> apparently for cases where fresh pursuit was no longer possible. An early example (1716–1717) is a New York hue and cry warrant

82 See *infra* note 121 and accompanying text.

83 4 WILLIAM BLACKSTONE, COMMENTARIES \*290.

84 *Id.*

85 *Id.* at \*291 (citing An Act for the Following of Huye and Crye, 27 Eliz., c. 13 (Eng.)).

86 *Id.* (citing An Act for the Amendment of the Law Relating to Actions on the Statute of Hue and Cry, 8 Geo. 2, c. 16 (Eng.)).

87 Greenberg, *supra* note 78, at 266.

88 4 BLACKSTONE, *supra* note 83, at \*291.

89 Clancy, *supra* note 37, at 490–91.

90 JULIUS GOEBEL JR. & T. RAYMOND NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK 420–21 (1944); 2 Cuddihy, *supra* note 35, at 1143–45.

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presented by a mother for the murder of her bastard child.<sup>91</sup> 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.”<sup>92</sup> The records in New York indicate that the hue and cry warrant was not used very often,<sup>93</sup> but the “ancient practice of [warrantless] actual hot pursuit persisted.”<sup>94</sup>

Another form of search when fresh pursuit was not possible was the search for escaped prisoners. This search could be authorized by legislative bodies. 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.”<sup>95</sup> These searches, like the hue and cry, were searches for people, not for evidence. And these searches all took place as a reaction to a crime or escape that had occurred in public rather than, as is often the case today, in trying to solve a crime or build a case.

The closest to modern police officers were the constables and marshals. They exercised “the common law duties and powers” involved with enforcing the criminal law.<sup>96</sup> Moreover, unlike the night watchmen, whose sole duty was to keep the peace, constables and marshals were also charged with being “‘vigilant in detecting and bringing to justice all Murderers, Robbers, Thieves and other Criminals.’”<sup>97</sup>

It is important to distinguish between searching for robbers, thieves, and escaped prisoners, all of which the Framers would have endorsed,<sup>98</sup> and the writs of assistance that precipitated the Fourth Amendment. 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.”<sup>99</sup> But a general search for a horse thief, a murderer, or a jail

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91 GOEBEL & NAUGHTON, *supra* note 90, at 420 n.202.

92 2 Cuddihy, *supra* note 35, at 1144.

93 GOEBEL & NAUGHTON, *supra* note 90, at 420.

94 *Id.* at 420 n.202. How and how often (if at all) the hue and cry was used in late-eighteenth-century America is not well understood, but it appears to have been reserved primarily as a response to “fresh” crimes, especially robbery and escapes.

95 7 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 1052 (Worthington Chauncey Ford ed., Gov’t Printing Office 1906) (1777).

96 RICHARDSON, *supra* note 79, at 17.

97 *Id.* at 18 (quoting SIDNEY POMERANTZ, NEW YORK: AN AMERICAN CITY, 1783–1803, at 302–03 (1938)).

98 See Kamisar, *supra* note 7, at 572 (noting that arrest and “arrest searches” pursuant to hot pursuit, the hue and cry, and arrest warrants “did not trouble the framers”).

99 2 Cuddihy, *supra* note 35, at 1143.

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breaker was designed to protect public safety, making the threat to privacy more justifiable. Moreover, a search for a particular individual, general though it may be in some sense, is not nearly as destructive of privacy as the writs of assistance used to enter and inspect any house, or general warrants instructing officers to look not for particular felons or even for evidence of a particular crime, but more generally to suppress crimes. Cuddihy uncovered “[w]arrants, orders, and executive proclamations in New Hampshire, Pennsylvania, and South Carolina” issued in the period from 1766 to 1773 that “told enforcers to ‘make Search’ or to ‘make diligent Search’ to suppress counterfeiting, arson, and insurrection.”<sup>100</sup> These warrants were condemned and abolished by the Warrant Clause. By comparison, 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 liberty and would not have intended to regulate it in the Fourth Amendment. Why regulate a process that is proceeding in an acceptable manner?

Another 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.<sup>101</sup> These warrants were typically (though not always) specific in nature.<sup>102</sup> When warrants authorized the Constable or Marshal to arrest a particular individual or search a particular place, the Framers would not have objected.<sup>103</sup> When the warrants were general in nature, the Warrant Clause took care of that problem.

And what of homicides and the crimes that threatened government—riot, treason, and counterfeiting? Homicides were not likely to be discovered by the hue and cry, nor was there a victim to prosecute. The answer, then as now, is that homicides could be “inquired into by a coroner’s inquest or grand jury.”<sup>104</sup>

The prosecution of crimes that threatened the social order was by government rather than citizens. Though treason prosecutions were

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100 2 *id.* at 1144–45.

101 See Davies, *supra* note 28, at 623.

102 For an example of a magistrate-issued search warrant that was general, see 2 Cuddihy, *supra* note 35, at 1142 (noting a warrant that ordered “every constable in Princess Anne County to ‘search every Suspected House’ in his district that he or Dunbar [the owner of stolen wheat] thought ‘convenient to search’”).

103 Cuddihy demonstrates an unmistakable trend away from general warrants and toward specific between 1776 and 1787. See 3 *id.* at 1298–341.

104 Davies, *supra* note 28, at 622.

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rare in colonial America,<sup>105</sup> prosecutions for riot and counterfeiting were common. No evidence exists of warrantless searches for evidence of these crimes, but general warrants were used to some extent in colonial America, as we saw a moment ago with the “[w]arrants, orders, and executive proclamations . . . to ‘make diligent Search’ to suppress counterfeiting, arson, and insurrection.”<sup>106</sup> More tightly focused on counterfeiting was a 1764 Connecticut warrant that 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.”<sup>107</sup> But the prohibition against general warrants in the Fourth Amendment took care of the problems presented by these warrants and orders.

In sum, the Warrant Clause took care of almost all search and seizure problems that the Framers could envision. As long as the Constable had a specific warrant to arrest or search, 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. Did peace officers make arrests outside the hue and cry and without a warrant? The answer, while not completely clear, is probably not very many. Others have noted that the common law created a major disincentive to making arrests without a warrant. In colonial times, “the officer arrested without a warrant at his peril because if a felony had, in fact, not been committed, he would be liable in fact to the arrested person” regardless of the quantum of evidence that supported the arrest.<sup>108</sup> In England, the King’s Bench changed the rule in 1780 to provide that the officer was not liable in damages if he made a warrantless arrest based on a charge of felony made by another person.<sup>109</sup> The strict liability rule continued for night watchmen and citizens who made arrests pursuant to the hue and cry.

It is not clear when the English change in the strict liability rule first appeared in the United States. I could find no evidence of it prior to an 1829 New York case that approved the change.<sup>110</sup> An 1814 Pennsylvania case still stated the rule as an officer arrested at his

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105 See JAMES WILLIARD HURST, *THE LAW OF TREASON IN THE UNITED STATES* 82 (1945).

106 2 Cuddihy, *supra* note 35, at 1144–45.

107 2 *id.* at 1145.

108 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) (citing Samuel v. Payne, 99 Eng. Rep. 230 (K.B. 1780)).

109 Samuel v. Payne, 99 Eng. Rep. 230 (K.B. 1780).

110 See *Holley v. Mix*, 3 Wend. 350 (N.Y. Sup. Ct. 1829).

peril.<sup>111</sup> In any event, the experience of the constable or marshal on the ground would not likely have been changed by the new rule from England.

A pragmatic disincentive to illegal arrests existed alongside 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 New York, the social fabric during the eighteenth century was frayed and sometimes close to tearing. Rather than too much “law,” the colonists had too little. The law was often not enforced because the state lacked the capacity or the will to confront lawbreakers. Constables were often “assaulted and resisted when they attempted to make an arrest.”<sup>112</sup> Over seventy percent of the eighteenth-century cases of contempt of authority collected by historian Douglas Greenberg “involved attacks by citizens on officers of the law.”<sup>113</sup>

Though “it is still difficult to explain the 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.<sup>114</sup> At times, New York was unable to fill positions with anyone, qualified or not. “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.’”<sup>115</sup> The prisoners were hung only when “a party of his Majesty’s Forces” was called out “to guard the Sheriff and Civil Officers against any Insult.”<sup>116</sup> 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 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.”<sup>117</sup>

Moreover, “respect for authority of government seems often to have been lacking.”<sup>118</sup> The most intriguing reason offered by Greenberg to explain the difficulty of enforcing the law is the existence of a “‘common Error generally prevailing among the Lower Class of Man-

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111 See *Wakely v. Hart*, 6 Binn. 315, 317–18 (Pa. 1814).

112 Greenberg, *supra* note 78, at 267.

113 *Id.*

114 *Id.*

115 *Id.* at 271 (quoting New York State Library, Mss., XC. 66 (Jan. 18, 1762)).

116 *Id.* (quoting New York State Library, Mss., XC. 66 (Jan. 18, 1762)).

117 *Id.* at 268.

118 *Id.* at 267.

kind 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.’”<sup>119</sup> Peace officers who faced angry suspects willing to oppose their arrest by any means could not have been eager to make many arrests.

It is difficult for us in the twenty-first century to appreciate this kind of social disorder. Outside the context of general warrants and writs of assistance, taken care of in the Warrant Clause, the Framers would have had no conception of aggressive policing. They simply had no template in their heads for officers of the law going out on their own to seek evidence of crime or even aggressively to arrest ordinary criminals. To the extent the New York experience can be generalized,<sup>120</sup> the Framers would likely have wished for *more* policing, not less, as long as it was done by local (not federal) officers and was directed at robbers and thieves.

And what of searches incident to arrest? 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.”<sup>121</sup> The only authorities he cites for this proposition are letters, memoranda, depositions, and newspaper accounts. Perhaps the proposition was so well accepted that it was simply not raised in cases. It seems to me that the reluctance to make arrests would also cause a reluctance to search the arrestee beyond what was necessary to disarm him. Perhaps the news accounts and correspondence found by Cuddihy describe not a routine practice but something so unusual it merited mention. Officers who were afraid to arrest might want to keep their hands out of the mouths of arrestees. Whether or not search incident to arrest was a routine practice, it was not controversial and was therefore unlikely to be in the minds of the men who wrote the Fourth Amendment.

From this evidence, I conclude that when writing the Fourth Amendment, the Framers would not have worried about warrantless 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 customs laws. The Framers took care of that problem with the Warrant Clause. But on the reasonably safe bet that the

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119 *Id.* at 267–68 (quoting from the pardon of James Wilkes, presumably written by the Governor of the Colony of New York, Sir Charles Hardy 163 (Feb. 5, 1756) (New York State Library Manuscript Collections, vol. 82)).

120 Historians suggest that New York was more lawless than most other colonies because of its “factiousness” and “turbulent” society and politics. Greenberg, *supra* note 78, at 279.

121 2 Cuddihy, *supra* note 35, at 847–48.



Framers would have created protection against some types of aggressive 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 Antifederalists. I will then seek answers to the questions I posed in the beginning about what the Framers might have said if they could have seen the future.

#### IV. WHAT ALFRED E. NEUMAN *SHOULD* HAVE BEEN WORRYING ABOUT IN 1789

While fighting to keep the Constitution from being ratified, the Antifederalists often turned their rhetorical guns on the lack of a bill of rights that would restrain the powerful federal government. As noted earlier, at least some of the Antifederalists did not want a bill of rights at all. They wanted to defeat the ratification of the Constitution; when that failed they sought to undo it. In one sense the extreme Antifederalists are the worst source we could find for the intent of the Framers. Yet the Antifederalists naturally looked for the most powerful rhetorical weapons they could find. They sought to voice the greatest fears of the colonists. Thus, it is reasonable to assume that those fears would have moved the Framers to write a different amendment if they could have seen the future.

One strand of Antifederalist attitude toward the new government can be discerned from remarks made at the Virginia state convention considering ratification of the Constitution. George Mason, on June 11, 1788, made antitax remarks in the Virginia ratifying convention that included the following prediction about excise taxes: “[T]his will carry the exciseman to every farmer’s house, who distils a little brandy, where he may search and ransack as he pleases.”<sup>122</sup> Patrick Henry amplified on the concern about the excisemen: “Suppose an exciseman will demand leave to enter your cellar, or house, by virtue of his office; perhaps he may call on the [federal] militia to enable him to go.”<sup>123</sup> 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 of people will be most

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122 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 265 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott Co. 1836) [hereinafter ELLIOT’S DEBATES] (reporting George Mason’s June 11, 1788, remarks at the Virginia ratification convention).

123 3 *id.* at 412 (reporting Patrick Henry’s June 11, 1788, remarks at the Virginia ratification convention).

shamefully robbed.”<sup>124</sup> In Henry’s view, without some constitutional limit on federal searches, general warrants would be authorized, and consequently

any man may be seized, any property may be taken, in the most arbitrary manner, without any 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*.<sup>125</sup>

In another speech, Henry articulated the same concerns in an even more colorful manner. Without a Bill of Rights, he argued:

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.<sup>126</sup>

Among other inferences one can draw from Henry’s speech, his distaste for federal customs agents is almost palpable!

An unnamed Antifederalist went further, calling excisemen the “scruf [sic] and refuse” of mankind who would not hesitate to search the petticoats of women.<sup>127</sup> Mercy Otis Warren, the sister of James Otis, wrote a pamphlet condemning general searches as a “detestable instrument of arbitrary power.”<sup>128</sup> Another Antifederalist warned of

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124 3 *id.* at 57 (reporting Patrick Henry’s June 5, 1788, remarks at the Virginia ratification convention).

125 3 *id.* at 588 (reporting Patrick Henry’s June 24, 1788, remarks at the Virginia ratification convention). I found puzzling Henry’s argument that Americans should fear general warrants more because in England liberty could be “quickly obtained” by writ of habeas corpus. Habeas corpus was also part of American common law and is recognized in Article I, section 9 of the Constitution. Tom Davies suggested that the explanation could be found in the word “quickly”—the frontier nature of much of America meant that a judge who had the power to grant a writ of habeas corpus might be a long distance from the place of confinement. E-mail from Tom Davies to George C. Thomas III (March 15, 2005 1:12 PM EST) (available from author).

126 3 ELLIOT’S DEBATES, *supra* note 122, at 448–49 (reporting Patrick Henry’s June 14, 1788, remarks at the Virginia ratification convention). R

127 3 Cuddihy, *supra* note 35, at 1375–76 (quoting *An Essay by a Farmer and Planter*, MARYLAND J. & BALT. ADVERTISER, Apr. 1, 1788, at 2). R

128 3 *id.* at 1374 (quoting MERCY OTIS WARREN, OBSERVATIONS ON THE NEW CONSTITUTION BY A COLUMBIAN PATRIOT § 14, at 12 (1788), *reprinted in* 4 THE COMPLETE ANTI-FEDERALIST 270, 278 (Herbert Storing ed., 1981)).

“the insolence of office” and “daring brutality” of the publican.<sup>129</sup> “*A Son of Liberty*” worried that “our bed-chambers” would be “searched by the brutal tools of power” when the excisemen went about their business.<sup>130</sup>

The Antifederalist concern was the power to search “by virtue of office” backed by the power of the federal government. In the 1789 and 1790 Collection Acts, Congress both empowered and restrained 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, wares or merchandise subject to duty shall be concealed.”<sup>131</sup> The same section provided that with “*cause to suspect* a concealment thereof, in any particular dwelling-house, store, building, or other such place,” customs officers “shall, upon application on oath or affirmation to any justice of the peace, be entitled to a warrant to enter such house, store, or other place (in the day time only) and there to search for such goods.”<sup>132</sup> In this statute, 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 statute included the common law requirement that a home could be searched only during the daytime.

To be sure, both Collection Acts also permitted the routine inspection of the contents of ships that docked at a port. The point to these inspections was to ensure that duties were collected. The inspectors’ task included “specifying the marks and numbers of each package, and a description thereof.”<sup>133</sup> As soon as the ship was unloaded, within fifteen days of docking, the customs official was required to compare the record of the goods taken off the ship with the manifest he had created onboard the ship,<sup>134</sup> the purpose being of course to keep goods from disappearing from the hold of the ship while she was in port. But to note this suspicionless inspection

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129 3 *id.* at 1375.

130 3 *id.* at 1377 (quoting *A Son of Liberty*, N.Y. J. & WKLY. REG., Nov. 8, 1787, at 3).

131 Collection Act of 1789, ch. 5, § 24, 1 Stat. 29, 43 (repealed by Act of Aug. 4, 1790, ch. 35, § 74, 1 Stat. 145, 178) (emphasis added). The analogous provision of the Collection Act of 1790 is found at Collection Act of 1790, ch. 35, § 48, 1 Stat. 145, 170 (repealed by Act of Mar. 2, 1799, ch. 22, § 112, 1 Stat. 627, 704). Beyond one additional comma in the Act of 1790, and spelling “day time” as two words rather than one, the only difference is that the latter Act omitted the “or affirmation” from the warrant application procedure.

132 Collection Act of 1789 § 24, 1 Stat. at 43.

133 *Id.* § 15, 1 Stat. at 40.

134 *Id.*, 1 Stat. at 40.

scheme is merely to say that customs searches were *sui generis* in 1789 as they are today.

Four principles emerge from this history. First, the Framers feared that government actors would abuse their office to force compliance with searches. Second, the Framers believed that searches (other than routine customs inspections) 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's 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. Unlike the "real" Fourth Amendment, which is elegant and opaque, my "new" amendment is nonelegant (clunky might be the best word) but seeks to provide clear norms.

[1] The right of the people to be secure in their persons, houses, papers, written communications, and personal property, against unreasonable searches and seizures, shall not be violated [2] by Warrants issuing without probable cause, supported by oath or affirmation from a named person, 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] warrants are required for searches of a structure, except as permitted in [9], or of the inside of the human body, but are not required for any other searches; [5] searches of structures and arrests inside a structure shall occur in the daytime and pursuant to notice to occupants, unless to give notice would expose the officer to grave danger; [6] property may be seized only when discovered during a lawful search and when police have probable cause to believe that it is evidence of a crime; [7] no arrests or other seizure of the person shall be made on less than probable cause; [8] warrants are required for all arrests in the home unless the arrest is made in hot pursuit or to protect life or property; and [9] all arrests permit the arresting officer to search the arrestee and the area of his immediate control.

Clause [1] sets out a slightly altered version of the first clause of the Framers' Fourth Amendment. I think "papers" in its modern form includes all forms of written communication, but I added "written communications" to be clear. I used "personal property" rather than "effects" to make clear what I think the history shows: the Fram-

ers did not intend to bestow Fourth Amendment protection on real property. *Oliver v. United States*<sup>135</sup> gets this aspect of Fourth Amendment history right, in my view.

Though the risk of Congress or a state authorizing general warrants, or a magistrate issuing one, is pretty low, no reason suggests ignoring the risk. Moreover, the specific requirements for warrants in clause<sup>136</sup> [2] provide helpful guidance to courts in evaluating warrants. My clause [2] is the Framers' language, with one important change. I required that the oath or affirmation supporting the warrant application come "from a named person," thus superseding one of the Warren Court's worst opinions, *McCray v. Illinois*.<sup>137</sup> The effect of *McCray* is to permit "confidential reliable sources," whose identity never need be revealed, to serve as the sole basis for issuing a warrant.<sup>138</sup> If the law of search and seizure permits warrants to be based on sources who may very well be fictitious, there is little reason to require warrants at all. More importantly, my working assumption in this Article is to follow history as closely as feasible given the modern world of technology and policing. In the "confidential source" context, history tells a very clear story, as I will make plain later.

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 suspicionless searches is avoided and the risk that officials will abuse their power to achieve compliance by coercion or trickery is minimized. 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.

Clause [4] is roughly the Court's current warrant requirement and is consistent with the common law that the Framers knew. The Framers were likely unaware of searches of the interior of the human body, but if they thought structures could be searched only by warrant, it follows that they would have felt the same way about our body cavities—with the possible exception of the mouth during searches incident to arrest.<sup>139</sup> Unlike the Fourth Amendment that Madison wrote, clause [4] makes clear that warrants are *not* required for

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135 466 U.S. 170 (1984).

136 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 sake of symmetry.

137 386 U.S. 300 (1967).

138 *Id.* at 311.

139 *See supra* note 121 and accompanying text.

searches outside the house,<sup>140</sup> an area of the law that has been in flux for the last twenty-five years.

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 far from self-defining.<sup>141</sup> Whether these rights create substantial problems for police I will take up below.

Clause [6] restates the modern Court’s rule about seizure of property discovered during a lawful search. Police do not need a warrant to seize property if the search is lawful and they have probable cause to believe that the property is evidence of a crime. This makes good sense and here I simply adopt the Court’s doctrine.

Clause [7] embodies the common law that individualized 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. It is possible that temporary seizures as part of the nightwatch were permissible at common law. But as I shall argue shortly, at least some common law sources suggest that as much individualized cause was needed for seizures of “night walkers” as for arrests. Deciding what

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140 One reader worried about the effect of my restriction of warrants to the home, using the following hypothetical. An accountant walks down the street, carrying a briefcase, and police seize the briefcase based on probable cause to think that it contains documents incriminating someone else. Let us assume that the police believe the accountant is innocent of any wrongdoing and thus do not have probable cause to arrest her. But when the police search her briefcase, they also find her cocaine. My Fourth Amendment would permit the cocaine to be introduced against the accountant because no warrant is required to search outside the home.

In *Chadwick v. United States*, 433 U.S. 1 (1977), federal agents seized a footlocker and took it to the federal building. The Court held that the agents should have obtained a warrant to search the footlocker that was already safely in their possession. *Id.* at 15. Whether the agents could have searched the footlocker at the scene is unclear from the opinion. On the facts of *Chadwick*, where the police decided to seize the object and take it back to a secure location, to require a warrant seems unexceptional. But to require the police to seize the accountant’s briefcase and hold it while applying for a warrant is less obviously the right answer. Cases of that description are pretty rare because usually the probable cause that the person has evidence of a crime on her person would justify her arrest and a search incident to arrest. I prefer the “bright line” of restricting warrants to the home rather than trying to develop a principle that would require police sometimes, but not always, to seize an object and get a warrant before searching.

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

constitutes a “seizure of the person” is not, of course, easy, but the Court’s definition in *Terry v. Ohio*<sup>142</sup> makes good sense: “[W]henver a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ the person.”<sup>143</sup>

Clause [8] is based on the Court’s reading of history.<sup>144</sup> History is less than clear that warrants were required for arrests in the home,<sup>145</sup> but the Court’s doctrine makes good sense even if history is a bit opaque. Clause [9] embraces the search incident to arrest doctrine, despite a lack of solid historical evidence. History aside, the policy considerations are so strong here—especially protecting the arresting officer—that any 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.

## 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 [6]: Property May Be Seized Only When Discovered During a Lawful Search and When Police Have Probable Cause to Believe that It Is Evidence of a Crime*

History is indirectly helpful here. When the First Congress intended to authorize seizures, it required cause for the seizure. The 1789 and 1790 Collection Acts are again illuminating. Customs officials were authorized to seize goods when they had “reason to suspect” that the goods were “subject to duty.”<sup>146</sup> Upon reflection, any other regime is unthinkable. To enter and inspect is one kind of regime, and customs agents could do those acts without individualized suspicion when ships docked in our harbors, but the Framers would recoil at the idea that a customs official could seize property without suspecting that it was subject to the customs laws. The standard for

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142 392 U.S. 1 (1968).

143 *Id.* at 16.

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

145 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.

146 Collection Act of 1789, ch. 5, § 24, 1 Stat. 29, 43 (repealed by Act of Aug. 4, 1790, ch. 35, § 74, 1 Stat. 145, 178).

seizure was “reason to suspect” that the goods are “subject to duty.”<sup>147</sup> The Court’s modern doctrine parallels the history,<sup>148</sup> probably because any other rule would make nonsense of a right against unreasonable searches and seizures.

Save seizures based on consent, which I will consider later, no other mechanism for seizure is mentioned in the treatises, colonial law, or early federal statutes. The law required “reason to suspect” that the item was subject to seizure. As Justice Holmes once remarked in another context, “[i]t is a short point.”<sup>149</sup>

*B. Clause [4]: Warrants Are Required for Searches of a Structure, Except as Permitted in [9], or of the Inside of the Human Body, but Are Not Required for Any Other Searches*

Colonial search warrants were sometimes broader than a search of a structure,<sup>150</sup> yet it is difficult to imagine what would be searched other than a structure, a ship or other vehicle, an open space, or a person. Whatever the common law, the language of the Amendment (“persons, houses, papers, and effects”) excludes open spaces and ships. One could, of course, consider a ship an “effect,” but that seems unlikely. Davies concludes that ships, governed by admiralty law, were *sui generis* and not included in the language of the Fourth Amendment.<sup>151</sup> I see no reason to disagree.

That leaves structures, other vehicles, and persons. Unlike ships, other vehicles would be considered an “effect,” but clause [4] makes clear that no warrant is required, thus adopting the doctrine the Court finally developed after some fits and starts. The search of persons incident to arrest is covered by clause [9]. 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, outbuildings, and commercial premises as well as houses. Davies concludes that the Framers would have envisioned much less protection for commercial premises than for homes.<sup>152</sup> That may be right, though the first customs law required warrants to search for concealment in a “dwelling-house, store, building, or other

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147 *Id.*

148 *See Arizona v. Hicks*, 480 U.S. 321 (1987).

149 *United States v. Adams*, 281 U.S. 202, 204 (1930). Holmes’s “short point” was to reject the government’s argument that two false entries in bank books, relating to the same deposit and credit, were two offenses of fraud against the bank.

150 *See supra* text accompanying note 100.

151 Davies, *supra* note 28, at 604–08.

152 *Id.* at 608.



place.”<sup>153</sup> That seems sufficient historical 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 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.”<sup>154</sup> To be sure, this is a weak form of a warrant requirement as no sanction applies 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.

The search warrant requirement I propose is a robust version of the Court’s current warrant requirement. The Court held in 1914 that a search warrant was required to search a home<sup>155</sup> and it has repeated that statement of the core Fourth Amendment protection in many cases.<sup>156</sup> My formulation is a robust version of the Court’s rule because clause [4] permits no exceptions. All searches of structures must be by warrant. No exception exists for exigent circumstances because, I will argue later, any exigency can be thoroughly mitigated through the exigent exception for warrantless 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.<sup>157</sup> My reconstructed Fourth Amendment rejects consent as a justification for any kind of 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.<sup>158</sup> The same justifications that undergird the argument in the clause [3] context apply to the warrant requirement here.

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153 Collection Act of 1789, ch. 5, § 24, 1 Stat. 29, 43 (repealed by Act of August 4, 1790, ch. 35, § 74, 1 Stat. 145, 178).

154 7 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, *supra* note 95, at 117.

155 *Weeks v. United States*, 232 U.S. 383, 393 (1914).

156 *See, e.g., Coolidge v. New Hampshire*, 403 U.S. 445 (1971); *Johnson v. United States*, 333 U.S. 10 (1948); *Agnello v. United States*, 269 U.S. 20 (1925).

157 *See, e.g., Illinois v. Rodriguez*, 497 U.S. 177 (1990) (using apparent consent to justify the search of an apartment); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (using consent to justify the search of a car).

158 *See infra* notes 285–314 and accompanying text.

*C. Clause [5]: Searches of Structures and Arrests Inside a Structure Shall Occur in the Daytime and Pursuant to Notice to Occupants, Unless to Give Notice Would Expose the Officer to Grave Danger*

The daytime requirement appears in the first federal customs law and makes good sense. If an emergency justifies entry into a home in the nighttime, clause [8] permits an entry to make an arrest, assuming the probable cause requirement in [7] is met. If the suspect is arrested, clause [9] permits police to search the area of the arrestee's immediate control. Police can thus take actions to protect themselves from danger arising from the exigency that justified the entry in the first place; nothing in my reconstructed Amendment would forbid this. Moreover, nothing in my Fourth Amendment would forbid securing the premises so that no one can leave or enter until the next day when a warrant can justify a thorough search.<sup>159</sup> Thus, no reason suggests permitting entry into a home at night merely to make a search that could be made during the day.

The notice requirement is solidly embedded in the common law. It appears in a 1603 case that considered it already part of the common law when codified in 1275!<sup>160</sup> In *Wilson v. Arkansas*, the Court cited several Framing-era sources,<sup>161</sup> which shows that it was still followed in the eighteenth century. 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.<sup>162</sup> But the 1603 case that traced the rule back to 1275 stated the rule to include "other execution of the K[ing]'s process."<sup>163</sup> And it makes no sense to require notice for 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. Here is his formulation of the principle:

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,

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<sup>159</sup> See *Segura v. United States*, 468 U.S. 796 (1984) (plurality opinion). The Court has held that the Fourth Amendment requires a warrant to search after the exigency has ceased. See *Mincey v. Arizona*, 437 U.S. 385 (1978).

<sup>160</sup> *Wilson v. Arkansas*, 514 U.S. 927, 932 n.2 (1995) (citing *Semayne's Case*, 77 Eng. Rep. 194, 196 (K.B. 1603), which concludes that the 1275 statute was "but an affirmance of the common law" (referring to 3 Edw., ch. 17 (Eng.), in 1 STATUTES AT LARGE 6 (Owen Ruffhead ed., London, M. Basket 1769))).

<sup>161</sup> *Id.* at 932-34.

<sup>162</sup> 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN ch. 14, § 1, at 136 (John Curwood ed., 8th ed., London, C. Roworth 1824) (1721).

<sup>163</sup> *Semayne's Case*, 77 Eng. Rep. 194, 195 (K.B. 1603).

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.<sup>164</sup>

As Davies has noted, none of the Framing-era sources admit of exceptions, though the Court, in this instance ignoring history, has conveniently read the Fourth Amendment "reasonableness" requirement in the first clause "not . . . to mandate a rigid rule of announcement that ignores countervailing law enforcement interests."<sup>165</sup> The Court is right that strong policy grounds favor an exception when giving notice would expose the officers to danger. Indeed, Hawkins's statement of the rule speaks of "Necessity." Whether or not the common law recognized grave danger to the officer as a "Necessity" that would obviate the need to give notice, we should today. I think it is a much harder question whether destruction of evidence is a sufficient "Necessity" to justify not giving notice. Given the Framers' feelings about law officers invading the security of the home,<sup>166</sup> the Framers might have rejected out of hand an exception for destruction of evidence. Since the policy reasons are weaker for that one, I decided to include an exception only for the times when giving notice would expose the officer to grave danger. If notice permits a suspect to destroy evidence, so be it.

The other issue posed by this clause is how long the officer must wait for an answer to the notice before he can force entry. Tracey Maclin has demonstrated that the Framing-era sources state or imply that an officer must be refused entry before he can force entry.<sup>167</sup> Cuddihy notes: "The statutes or legal manuals of at least seven states limited forcible entry [at least in some categories of cases] to cases of resistance."<sup>168</sup> As in the creation of exceptions to the knock and announce rule, the Court conveniently ignores this aspect of search and seizure history.<sup>169</sup> Again, policy reasons are on the Court's side. To

164 2 HAWKINS, *supra* note 162, ch. 14, § 1, at 136.

165 *Wilson*, 514 U.S. at 934–35. Davies concludes that this exception was "a departure from historical doctrine." Davies, *supra* note 28, at 742 n.561. The cases that the Court cites fail to establish any general rule of reasonableness from the common law.

166 *See supra* text accompanying notes 122 and 123.

167 Maclin, *supra* note 42, at 903–17, 904 n.37 (citing 1 HALE, *supra* note 36, at \*582; 3 Cuddihy, *supra* note 35, at 1512–13). Hawkins states the resistance principle explicitly. *See* 2 HAWKINS, *supra* note 162, ch. 14, § 1, at 136.

168 3 Cuddihy, *supra* note 35, at 1344.

169 *See* Maclin, *supra* note 42, at 904–05 (noting that "[a]t key places in his opinion [for the Court], Justice Thomas omits" this part of the common law rule).

require the officer to wait until an answer is given is plainly unworkable. Suspects could remain holed up in their homes for days or weeks. It is one kind of problem not to be able to arrest a smuggler or counterfeiter in 1792 because he remained in his home for weeks, if that was the colonial-era law. It is a completely different kind of problem not to be able to arrest a murderer, robber, or terrorist because he refuses to say “no” when the officer demands entry. At some point, saying nothing should be construed as saying “no.” The Court held that a fifteen-to-twenty-second wait can satisfy the Fourth Amendment on this point.<sup>170</sup> I suspect the best answer is somewhere between the apparent Framing-era rule of “forever” and the Court’s fifteen seconds. That level of detail, however, is beyond the scope of my current project.

*D. Clause [9]: 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,”<sup>171</sup> support for that proposition is surprisingly hard to find. Davies cites a single colonial-era source, an essay by a former High Constable of Middlesex, England, reprinted in a manual for justices of the peace. It advised 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.’”<sup>172</sup> Davies then observed that “the doctrine of search incident to arrest is not uniformly accorded importance in the Framing-era materials,” noting that there is no mention of the doctrine in a Virginia justice of the peace manual published around the time of the Framing.<sup>173</sup>

We have already seen Cuddihy’s conclusion that colonial-era arrestees 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.”<sup>174</sup> He cites no American, and only three English,<sup>175</sup> cases. He does refer to many letters, memoranda, deposi-

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170 *United States v. Banks*, 540 U.S. 31 (2003).

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

172 Davies, *supra* note 28, at 627 n.213 (quoting *An Essay on the Office of Constable*, Saunders Welch, reprinted in *CONDUCTOR GENERALIS* 109, 117 (James Parker ed., New York, John Patterson 1788)).

173 *Id.* (referring to *WILLIAM WALLER HENING, NEW VIRGINIA JUSTICE* (Richmond, Aug. Davis 1799)).

174 2 Cuddihy, *supra* note 35, at 847–48.

175 2 *id.* at 847.

tions, and newspaper accounts. He also refers to “numerous legal manuals” recognizing the principle that authorities can search someone who has been arrested after an officer has forced entry.<sup>176</sup> But as Cuddihy himself seems to recognize at a later point in his dissertation, most of these manuals 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 [they could search].”<sup>177</sup>

Whatever the best reading of history, the policy reasons supporting this type of search are overwhelming. To expect an officer to place an arrestee in the back of his patrol car without checking to see if he is armed is to expect more than humans can deliver. And if the police are permitted to search for weapons, they will often come upon evidence of a crime, and it would be bizarre to say that they must pretend they did not see it. Moreover, permitting a search incident to arrest does not ignore probable cause. There must be probable cause to make the arrest, after all. Rare will be the arrest based on probable cause that does not automatically give rise to probable cause to search the person and his area of control, as Justice Scalia implied in a recent concurring opinion.<sup>178</sup> The arrest of those suspected of robbery, burglary, and all crimes of violence would likely give rise to probable cause to search for weapons. 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?<sup>179</sup> The history is certainly not contrary to this rule.

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176 3 *id.* at 1352 (citing seven legal manuals in note 240).

177 3 *id.* at 1552.

178 See *Thornton v. United States*, 124 S. Ct. 2127, 2135–36 (2004) (Scalia, J., concurring in the judgment). That rare case does indeed exist, however. It is the case where the Court made clear the automatic nature of the right to search incident to arrest. In *United States v. Robinson*, 414 U.S. 218 (1973), the defendant was arrested for operating a motor vehicle after revocation of his operator’s permit. The Court permitted a search of his person incident to that arrest.

179 Justice Marshall has argued, in dissent, that the question of whether the officer could search an arrestee for weapons or evidence should be litigated in every case. See *Robinson*, 414 U.S. at 248–59 (Marshall, J., dissenting, joined by Douglas and Brennan, JJ.). Thomas Clancy has suggested that perhaps only certain categories of offenses should give rise to a bright-line rule permitting a full search of the arrestee. Thomas K. Clancy, *What Constitutes an “Arrest” Within the Meaning of the Fourth Amendment?*, 48 VILL. L. REV. 129, 178–79 (2003).

*E. The Right . . . Shall Not Be Violated by [2] Warrants Issuing Without Probable Cause, Supported By Oath or Affirmation from a Named Person, and Particularly Describing the Place to Be Searched, and the Persons or Things to Be Seized*

The problems the Framers sought to remedy were the writs of assistance and general warrants. Writs of assistance permitted British customs officials to enter and inspect any house.<sup>180</sup> Examples of general warrants that we saw earlier included 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.”<sup>181</sup> Compared to the writs of assistance or general warrants, the Warrant Clause problems the Court has had to police are of a smaller scale.

Few cases manifest a failure of the formal requirements of the Warrant Clause. One is *Coolidge v. New Hampshire*,<sup>182</sup> where a peculiar New Hampshire statute permitted prosecutors and police to be justices of the peace and thus authorized them to issue warrants.<sup>183</sup> The police testified at Coolidge’s trial that the police never went outside the police department or the prosecutor’s office to get warrants issued.<sup>184</sup> The crime being investigated was a horrific one, the brutal murder of a child, in a state that is relatively crime free (New Hampshire). While one would think the State Attorney General would be extra cautious in a case like this, he nonetheless issued the warrant to search Coolidge’s home and car.<sup>185</sup> Nothing in the Fourth Amendment says explicitly that warrants have to be issued by a neutral and detached magistrate, but one does not have to strain too hard to see that requirement as implicit. As the Court put it, “it is too plain for extensive discussion that this now abandoned New Hampshire method of issuing ‘search warrants’ violated a fundamental premise of

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180 Once authorized by the English monarch, the authority did not lapse during the life of the monarch. They could be issued by various officials during the monarch’s reign without any further authorization. Prior to the Revolution, writs of assistance had been understood to authorize British customs officers “to enter and inspect all houses without any warrant.” 2 Cuddihy, *supra* note 35, at 759. Cuddihy concludes that this understanding violated both local law and British law. 2 *id.*

181 2 *id.* at 1144–45.

182 403 U.S. 443 (1971).

183 *Id.* at 447.

184 *Id.* at 452.

185 *Id.* at 447.

both the Fourth and Fourteenth Amendments”—that the magistrate who issues the warrant must be “neutral and detached.”<sup>186</sup>

Another failure involved the odd case of *Lo-Ji Sales, Inc. v. New York*.<sup>187</sup> 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.”<sup>188</sup> 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,”<sup>189</sup> and the warrant application asked the Justice to accompany the investigator to the store when the warrant was executed. The warrant authorized the seizure of “[t]he following items that the Court independently [on examination] has determined to be possessed in violation of” state law, with no items listed at the time the Justice signed the warrant.<sup>190</sup> What the Court called a “search party” of eleven investigators, including the Justice and three members of the local prosecutor’s office, then “converged on the bookstore.”<sup>191</sup>

After the Justice’s inspection of the various items for sale, the state police seized twenty-three films, four coin-operated projectors, 397 magazines, and 431 reels of film.<sup>192</sup> These items were later added to the warrant, expanding it to sixteen pages.<sup>193</sup> 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,”<sup>194</sup> 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 warrant that permitted a search for more of the items listed. There is no particularity problem here. Perhaps the problem is that the search party did not pay for the items, and so they were seized when they were viewed or had the plastic wrappers pulled

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186 *Id.* at 453.

187 442 U.S. 319 (1979).

188 *Id.* at 321.

189 *Id.*

190 *Id.* at 321–22.

191 *Id.* at 322.

192 *Id.* at 322–23.

193 *Id.* at 324.

194 *Id.* at 325.

off for inspection. But if this is the Fourth Amendment violation, it is based on the failure to have a warrant at the moment of seizure and not, as the Court maintains, the failure of the warrant particularly to describe. It seems that the real flaw is that the search was “reminiscent” of the general warrant.

Moving beyond form, the Warrant Clause has caused the Court at least one problem with substance: how to define “probable cause” so that the Magistrate’s issuance of the warrant can be reviewed by other courts. The probable cause issue has been difficult for the Court. The Warren Court developed an “*Aguilar-Spinelli*”<sup>195</sup> two-pronged test that led to a conceptual and somewhat finely-spun doctrine of probable cause. Whether the Supreme Court was right in *Illinois v. Gates*<sup>196</sup> to reject the *Aguilar-Spinelli* two-pronged test, the fine distinctions would likely have struck the Framers as much ado about nothing (indeed, it might strike modern readers that way too!).<sup>197</sup>

Blackstone stated that a justice of the peace could issue an arrest warrant based on the sworn testimony of the party praying for the warrant because the justice “is a competent judge of the probability offered to him of such suspicion.”<sup>198</sup> He continued:

[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.<sup>199</sup>

What counted for Blackstone and for the Framers was that a justice of the peace inquire into the sworn testimony of the complainant and issue or not issue the warrant. The precise nature of the “probability of suspecting the party”<sup>200</sup> could be safely left to justices of the peace. The Fourth Amendment, of course, requires probable cause and explicitly gives magistrates the power to refuse to issue warrants. It would please the Framers that magistrates today examine the warrant application and the affiant and require a showing of probable cause by whatever quantum of evidence.

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195 The name derives from two Warren Court cases that sought to provide guidance to lower courts in search warrant cases, *Spinelli v. United States*, 393 U.S. 410 (1969), and *Aguilar v. Texas*, 378 U.S. 108 (1964).

196 462 U.S. 213 (1983).

197 For a detailed exegesis of this issue, I recommend Yale Kamisar, Gates, “*Probable Cause*,” “*Good Faith*,” and *Beyond*,” 69 IOWA L. REV. 551 (1984).

198 4 BLACKSTONE, *supra* note 83, at \*287.

199 4 *id.*

200 *See* 4 *id.* at \*287.



I doubt that it would please the Framers that warrants can issue solely on the basis of “a confidential, reliable” informant, as the Supreme Court permitted in *McCray v. Illinois*.<sup>201</sup> Not only is an unnamed source sufficient to demonstrate probable cause, in the Court’s view, but also the government never need divulge the identity of the informant. The Court did all of this without even a nod at the common law history that required, before an arrest warrant could issue on suspicion of felony, a complaining party to make an accusation to the Magistrate that a felony had occurred; the common law also required the Magistrate to “examine upon oath” the one making the accusation so that the Magistrate can be a “competent judge of those circumstances, that may induce the granting of a warrant to arrest.”<sup>202</sup>

To be sure, Madison lessened the common law requirements for search and arrest warrants by substituting “probable cause” for the more rigid accusatorial requirement that a complainant swear that a crime had occurred *and* that he “possessed probable cause of suspicion regarding the perpetrator’s identity.”<sup>203</sup> But to eliminate the allegation that a crime in fact had occurred says nothing about whether Madison intended to eliminate the requirement that the “Oath or affirmation” be made by a known complainant. The common law went so far as to consider the complainant a trespasser if the property turned out not to be where the complainant swore. As Lord Hale put it, the “party that made the suggestion [in the accusation] is punishable in such a case” because the breaking of the door to execute the warrant was unlawful if the goods are not there.<sup>204</sup> It would be difficult indeed to punish a “confidential, reliable informant” whose identity is never divulged.

Given the common law position on the role and accountability of the complaining party who offers justification for issuing the warrant, I believe that when Madison wrote the words “supported by Oath or affirmation,” he had in his mind the words “by a named person.” Any other reading is too severe a departure from the common law. I thus added those words in my reformulated Fourth Amendment, rectifying what I believe was Madison’s failure to make his meaning explicit. In my world, *McCray* no longer lives.

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201 386 U.S. 300 (1967).

202 2 HALE, *supra* note 36, at \*110. *McCray* involved a warrantless arrest, but its probable cause principle is not limited to the warrantless context. Thus, police can now make up an informer, “Old Reliable,” and use him to support probable cause for a search or arrest warrant. See Craig M. Bradley, *Murray v. United States: The Bell Tolls for the Search Warrant Requirement*, 64 IND. L.J. 907, 915–18 (1989).

203 Davies, *supra* note 28, at 651–52.

204 2 HALE, *supra* note 36, at \*151.

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*F. Clause [8]: Warrants Are Required for All Arrests in the Home Unless the Arrest Is Made in Hot Pursuit or to Protect Life or Property*

Here I follow the Court's doctrine in *Payton v. New York*.<sup>205</sup> 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 far from clear.<sup>206</sup> Blackstone declared that the law permitted a warrantless arrest in the home upon hot pursuit<sup>207</sup> and in the "prosecution" of a hue and cry.<sup>208</sup> Hawkins devoted an entire chapter to arrest in the home, and the best reading of Hawkins is that only three exceptions existed to the requirement that a warrant, a *capias*, or some other kind of process was required to force entry into a structure and make an arrest.<sup>209</sup> Other than hot pursuit, Hawkins stated 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.<sup>210</sup>

Thus, it seems to me that the majority in *Payton* is right to read the common law as requiring a warrant except for hot pursuit and other exigencies. Because the Court requires a search warrant to search a home, and because an arrest is at least as great an invasion of one's liberties as a search, 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."<sup>211</sup> I see no reason to disagree with the policy implicit in the Court's rhetoric.

*G. Clause [9]: No Arrests or Other Seizure of a Person Shall Be Made on Less than Probable Cause*

The common law was clear that individualized cause was needed to make an arrest.<sup>212</sup> As early as the thirteenth century, the common law required some level of cause to force a defendant to prove his

<sup>205</sup> 445 U.S. 573 (1980).

<sup>206</sup> The King's Bench in *Semayne's Case*, 77 Eng. Rep. 194, 195–96 (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.

<sup>207</sup> 4 BLACKSTONE, *supra* note 83, at \*290.

<sup>208</sup> 4 *id.* at \*291.

<sup>209</sup> 2 HAWKINS, *supra* note 162, ch. 14, §§ 1–4, 10.

<sup>210</sup> *See* 2 *id.* ch. 14, §§ 7–9, at 136–37.

<sup>211</sup> *Payton v. New York*, 445 U.S. 573, 601 (1980).

<sup>212</sup> Clancy agrees. *See* Clancy, *supra* note 37, at 493.

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innocence. Bracton reported that a belief of guilt held by “worthy and trustworthy persons” was sufficient to justify an indictment but “the idle talk of the people is not to be heeded.”<sup>213</sup> At least by 1611, the common law required “good cause” to make an arrest for a felony, though this could be satisfied by “the common fame and voice.”<sup>214</sup> 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.<sup>215</sup> Moreover, every man “may arrest suspicious persons that be of ill fame” as long as there was “some felony committed in deed.”<sup>216</sup> 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.<sup>217</sup>

By Blackstone’s day, 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 that the arresting party must have.<sup>218</sup> The common law might not have vested much significance in the quantum or quality of the suspicion because the arrested individual would be brought before a justice of the peace, who was “bound immediately to examine the circumstances of the crime alleged.”<sup>219</sup> “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.”<sup>220</sup> Thus, mistakes made at the arrest stage could be quickly corrected.

The Continental Congress in 1774 condemned customs searches without warrants based on “legal information.”<sup>221</sup> The Framers, of course, used probable cause in the Warrant Clause, and the Court’s assumption that the same standard should govern arrests is a sound one. Thus, I include the principle of no arrests without probable cause.

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213 2 HENRICI DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 404 (Samuel E. Thorne trans., 1977) (1569).

214 Sir Anthony Ashley’s Case, 77 Eng. Rep. 1366, 1368 (K.B. 1611); see also 2 HALE, *supra* note 36, at \*81 (giving “common fame” as a basis for “probable cause” to arrest). **R**

215 MICHAEL DALTON, THE COUNTRY JUSTICE 308 (Morton J. Horowitz ed., Arno Press 1972) (1622).

216 *Id.*

217 *Id.*

218 4 BLACKSTONE, *supra* note 83, at \*290. **R**

219 4 *id.* at \*293.

220 4 *id.*

221 Davies, *supra* note 28, at 604. **R**

But my clause is concerned with more than just arrests 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*,<sup>222</sup> 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 in the Reasonableness 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.”<sup>223</sup> But, the Court hastened to add, “that is not the case” when an officer makes a temporary “stop” rather than an arrest. With the Warrant Clause rendered inoperative, the Court was free to wander about the Reasonableness Clause: “[T]he conduct involved in this case must be tested by the Fourth Amendment’s general proscription against unreasonable searches and seizures.”<sup>224</sup>

*Terry* seemed a narrow exception to probable cause, limited to cases where a police officer has reasonable suspicion to believe that a violent crime is about to occur. In that situation, who (except for Justice Douglas) would not want the officer to intervene? Moreover, Chief Justice Warren sought to hedge the *Terry* rule with a set of requirements, all of which were essential to the holding. Here is the Court’s statement of its holding:

We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others’ safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.<sup>225</sup>

That holding seems inoffensive enough. But the Court has discarded one after another of the limitations, almost always without even acknowledging that it was expanding *Terry*. Today, *Terry* has fundamentally changed the Fourth Amendment map. As Scott Sundby put it:

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222 392 U.S. 1 (1968).

223 *Id.* at 20.

224 *Id.*

225 *Id.* at 30.

Instead of carving out a narrow exception to probable cause, reasonable suspicion became a valid compromise standard that comports with the fourth amendment if the Court decides that, after balancing the interests, it is reasonable. The government no longer argues against a presumed starting point of probable cause but rather argues for reasonable suspicion as a reasonable accommodation of competing interests. Probable cause becomes merely one point on a continuum of reasonableness.<sup>226</sup>

The reader will not be surprised by this point that I level two criticisms at *Terry*. First, “unreasonable” is just too amorphous to provide a workable standard. Whatever it might have meant to the Framers, 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.<sup>227</sup> It means that a tip offered by someone whose only other tip had proven to be wrong can justify ordering a driver out of his car.<sup>228</sup> It means that “unprovoked flight” after the appearance of a police caravan in a high-crime neighborhood can justify forcibly stopping an individual.<sup>229</sup> *Terry*, in short, is “one immense Rorschach blot.”<sup>230</sup>

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; a search that is admittedly not the kind of search that a warrant can authorize. In 1622, *The Country Justice* stated 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.”<sup>231</sup> To Blackstone, it was clear that “no man is to be arrested, unless charged with such a crime, as will at least

226 Scott Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383, 402 (1988).

227 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. *Id.* at 327. 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. *Id.* Before the driver gave any direct indication that Dobey’s Motel was her destination, however, the officer pulled her over, obtained consent to search, and found marijuana in her attache case. Only three milligrams of cocaine were found. *Id.*

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

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

230 Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 393 (1974). For a brave, but to me ultimately unpersuasive, effort to unravel the Rorschach blot by creating “tiers of proportionality,” see Christopher Slobogin, *Let’s Not Bury Terry: A Call for Rejuvenation of the Proportionality Principle*, 72 ST. JOHN’S L. REV. 1053, 1093–95 (1998).

231 DALTON, *supra* note 215, at 306.

justify holding him to bail, when taken.”<sup>232</sup> Moreover, 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.<sup>233</sup> Even “night walkers” whose offense seems to have been to “sleep in the day time and go abroad in the nights”<sup>234</sup> were to be arrested and held in custody until morning<sup>235</sup> when they, presumably, would face an examination by the Justice of the Peace like any other arrested person.<sup>236</sup>

In sum, the common law authorized an “all or nothing” interference with the liberty of those suspected of felony when a felony had occurred. The Constable, or a private citizen, could arrest someone on probable suspicion that he had committed the 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.”<sup>237</sup> 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.’”<sup>238</sup> 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 Justice 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.<sup>239</sup>

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232 4 BLACKSTONE, *supra* note 83, at \*286.

233 4 *id.* at \*293.

234 DALTON, *supra* note 215, at 76.

235 4 BLACKSTONE, *supra* note 83, at \*289.

236 This is the implication from DALTON, *supra* note 215, at 77–78. 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 BLACKSTONE, *supra* note 83, at \*289.

237 4 BLACKSTONE, *supra* note 83, at \*293.

238 *Terry v. Ohio*, 392 U.S. 1, 36 (1968) (Douglas, J., dissenting).

239 *Id.* at 38 (Douglas, J., dissenting).

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*H. Clause [1]: The Right of the People to Be Secure in their Persons, Houses, Papers, Written Communications, and Personal Property, Against Unreasonable Searches and Seizures, Shall Not Be Violated*

Whether or not the Framers intended the first clause of the Fourth Amendment to have any substantive content,<sup>240</sup> it functions to define the scope of the Amendment. I added “written communications” on the ground that we do a lot of writing today without the use of paper. In the Framing era, indeed until very recently, all written communication had to be made on paper and thus would qualify as an “effect” in the Framers’ Fourth Amendment or as “personal property” in my revised Fourth Amendment. I wanted to be clear that e-mail should not be unprotected simply because it is not on paper.

That an item is included in the list of protected items does not mean that a particular use of that item will be protected. My e-mail to the dean should be protected from the prying eyes of the police unless they have probable cause, but if I broadcast the e-mail to everyone in the university, I have waived my Fourth Amendment protection. I will return to this point shortly.

First, the easy cases. Personal property includes all personalty that it is legal to possess. This requirement is implicit in the notion of a right “to be secure in *their* . . . personal property.” If it is not legal to own the property, then it is not “their” property. This category thus includes cars, luggage, containers, and computers but does not include contraband.

“Papers” overlaps to a large degree, but not entirely, with “written communications.” An e-mail is not a paper, and a diary is not a written communication. Personal property includes vehicles, of course, so my Fourth Amendment, like the one the Framers wrote, has to deal with car searches. To be secure in our “persons” means our liberty not to be restrained or have our persons searched unless the police have complied with the relevant parts of my Fourth Amendment. “Houses” is a clear enough concept, though the Court has not offered much help in defining the curtilage that is protected along with our houses.<sup>241</sup> Whether barns are included as “houses” seems questiona-

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240 For an exacting argument that the Framers intended only the Warrant Clause to have substantive content, see Davies, *supra* note 28, at 619–724.

241 Curtilage is an area adjacent to the house that is protected along with the house. See, e.g., *United States v. Dunn*, 480 U.S. 294 (1987). A garage is, I suppose, an easy example. The Court assumed in its “fly-over” cases that a greenhouse and a backyard protected by two tall fences were part of curtilage. See *Florida v. Riley*, 488 U.S. 445 (1989) (assuming a greenhouse is a part of curtilage); *California v. Ciraolo*, 478 U.S. 207 (1986) (assuming a backyard is a part of curtilage).

ble. What is pellucidly clear, in my view, is that real property that is not a home or near a home is not protected.

History agrees with the Court's holding in *Oliver v. United States*<sup>242</sup> 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.<sup>243</sup> 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."<sup>244</sup> 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 real property other than houses while "effects" referred to personal property is irresistible.<sup>245</sup> Thus, when the House Committee reported out "effects" in place of "other property,"<sup>246</sup> 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.<sup>247</sup>

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, papers, and effects" in the minds of the Framers as anything but property concepts. And the Court continued to consider 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. United States*.<sup>248</sup> A "spike mike" inserted into the

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242 466 U.S. 170 (1984).

243 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.

244 1 ANNALS OF CONG. 452 (Joseph Gales ed., 1789).

245 Davies, *supra* note 28, at 708–09.

246 THE COMPLETE BILL OF RIGHTS, *supra* note 64, at 223–24.

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

248 316 U.S. 129 (1942).



wall from an adjoining room was, however, within the scope of the Fourth Amendment if it made physical contact with the defendant's premises.<sup>249</sup> 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.<sup>250</sup>

Justice 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*,<sup>251</sup> the Court faced a case that the parties thought represented 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.<sup>252</sup> Katz argued that a public phone booth was a constitutionally protected space and urged the Court to overrule *Goldman's* holding that the Fourth Amendment does not prohibit a listening device on the wall of an adjoining room.<sup>253</sup> The government agreed with that phrasing of the issue but, of course, argued that *Goldman* was correctly decided.<sup>254</sup>

The Court threw both parties a curve, concluding that "constitutionally protected space" and the degree of invasion of property interests were not the right metrics for finding the edges of the Fourth Amendment.<sup>255</sup> For the relatively clear, if sometimes unsatisfying, property-based edge, the Court substituted the hopelessly vague notion 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.<sup>256</sup> 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.<sup>257</sup> Justice 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 permit-

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

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

251 389 U.S. 347 (1967).

252 *Id.* at 348.

253 *See id.* at 349–50.

254 *See id.* at 352–53.

255 *Id.* at 353.

256 *See id.* at 351–52.

257 *Id.* at 360.

ted 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, and the inside of one's home when viewed from a helicopter or low-flying plane. As Justice Scalia has remarked, the expectations of privacy that pass the *Katz* test "bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable."<sup>258</sup> As Christopher Slobogin and Joseph Schumacher have demonstrated, the views of the Court on this issue do not bear a very close resemblance to the views of the American people.<sup>259</sup>

A lot of people have criticized *Katz*, but most, like Wayne LaFave, blame the Court for a "parsimonious" application that has led to an "unrealistically circumscribed" scope of Fourth Amendment protection.<sup>260</sup> Yale Kamisar concluded that the Court has taken a narrow, stingy view of what amounts to a "search" or "seizure."<sup>261</sup> Melvin Gutterman concluded that the Court has "pervert[ed] the doctrinal basis of *Katz*."<sup>262</sup> Stated differently, the Court's application of the *Katz* test, in his view, "totally ignores the teachings of *Katz*."<sup>263</sup>

Like Susan Bandes, Raymond Ku, Scott Sundby, and others, I think *Katz*, as the Court has come to understand it, has nothing to teach us.<sup>264</sup> The "expectation of privacy" notion is flawed to the core. Bandes and Ku think that the Amendment protects against misuse of

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258 *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring).

259 See Christopher Slobogin & Joseph E. Schumacher, *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).

260 Wayne R. LaFave, *Computers, Urinals, and the Fourth Amendment: Confessions of a Patron Saint*, 94 MICH. L. REV. 2553, 2558 (1996) (calling the application "unrealistically circumscribed"); Wayne R. LaFave, *The Present and Future Fourth Amendment*, 1995 U. ILL. L. REV. 111, 113 (calling the application "parsimonious"); see also Lewis R. Katz, *In Search of a Fourth Amendment for the Twenty-First Century*, 65 IND. L.J. 549, 563-75 (1990) (arguing that Court has not followed *Katz*'s intended meaning); John B. Mitchell, *What Went Wrong with the Warren Court's Conception of the Fourth Amendment?*, 27 NEW ENG. L. REV. 35, 47-53 (1992) (arguing that the Court missed a chance to connect the *Katz* test to broader societal values).

261 Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 TULSA L.J. 1, 35 (1995).

262 Melvin Gutterman, *A Formulation of the Value and Means Models of the Fourth Amendment in the Age of Technologically Enhanced Surveillance*, 39 SYRACUSE L. REV. 647, 715 (1988).

263 *Id.* at 730.

264 See, e.g., Susan Bandes, *Power, Privacy and Thermal Imaging*, 86 MINN. L. REV. 1379 (2002); Raymond Shih Ray Ku, *The Founders' Privacy: The Fourth Amendment and the Power of Technological Surveillance*, 86 MINN. L. REV. 1325 (2002); Sundby, *supra* note 25.

government power. Sundby argues that Fourth Amendment questions should be examined in a framework in which we test whether the government action manifests the level of trust that citizens have a right to expect. Unlike these abstract propositions, a return to the language of the Amendment and to Justice Stewart's opinion for the Court in *Katz* is, in my view, the best road to travel.

I think Justice Black had the right approach, if not the right result, in his *Katz* dissent. He 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." To substitute a "right to privacy" for the specific words of the Fourth Amendment, Justice Black worried, would make the Court "a continuously functioning constitutional convention."<sup>265</sup>

Justice Scalia has essentially adopted Justice Black's position. Calling the *Katz* test "self-indulgent," Justice Scalia concludes that the Fourth Amendment "did not guarantee some generalized 'right to privacy' and leave it to this Court to determine which particular manifestations of the value of privacy 'society is prepared to regard as "reasonable."'"<sup>266</sup> Instead, Justice Scalia, as Justice Black before him, argues that the Amendment protects "persons, houses, papers, and effects."<sup>267</sup>

I think Justices Black and Scalia are right on this point, 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 hotel rooms, and they are protected by the Fourth Amendment.<sup>268</sup> 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 of the "uninvited ear."<sup>269</sup> 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 the Fourth Amendment does not, on Justice Black's and Justice Scalia's view, protect privacy. In their view, and mine, a privacy metric is meaningless. The relevant comparison is whether *Katz* treated the space around him as his, however temporarily.

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265 *Katz v. United States*, 389 U.S. 347, 373 (1967) (Black, J., dissenting).

266 *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring) (quoting *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

267 *Id.* at 92 (Scalia, J., concurring).

268 *See Johnson v. United States*, 333 U.S. 10 (1948).

269 *Katz*, 389 U.S. at 352.

On this view, Katz should win his argument by claiming that the phone booth was, in effect, momentarily his house. To be sure, the Court in *Katz* is correct that I can waive or forfeit my Fourth Amendment right by knowingly exposing those activities to the public. Relying on Justice Harlan's expectation of privacy test, the Court has read "knowingly expose" very broadly. In *Smith v. Maryland*,<sup>270</sup> the suspect, by dialing a phone in his home, knowingly exposed the numbers he dialed to the phone company and thus forfeited the protection of the Fourth Amendment. Because I believe the Framers intended a robust protection of the home, I would read "knowingly exposes" narrowly. I would require that the activities be exposed to the public at large. Thus, I would draw a distinction between "exposing" phone numbers to the telephone company and putting my marijuana Christmas tree in front of my picture window and opening the curtains.

The expectation of privacy test has led to some pretty odd results. For example, the issue in *Smith v. Maryland* 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.<sup>271</sup> I have no idea whether that is the right application of the malleable *Katz* test, but I think it is the wrong question. The right question is whether Smith knowingly exposed the phone numbers to the public. And I think the answer is that he did not.

My reading of "knowingly expose" explains *Kyllo v. United States*<sup>272</sup> much more effectively than the Court's tortured analysis. The issue in *Kyllo* was whether the Fourth Amendment protected heat waves leaving a home. If telephone numbers that leave the home are not protected by the Fourth Amendment, as *Smith* reads *Katz*, why would heat waves be protected? Indeed, between the two, it seems to me that the *Katz* expectation of privacy test would be more likely to protect phone numbers. Until I read *Smith*, I did not know that the phone company could record local calls; I assumed the company used special equipment to record long-distance calls. But I knew, because snow melts on my roof, that heat waves emanate from my house. The *Kyllo* majority gives the holding of *Smith* when surveying the *Katz* cases<sup>273</sup> but makes no effort to distinguish it.

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270 442 U.S. 735 (1979).

271 *Id.* at 742-43.

272 533 U.S. 27 (2001).

273 *Id.* at 33.

Commentators have suggested that the cases can be reconciled by reference to the Court's qualification of the *Kyllo* principle. In defining what constitutes a search, the Court wrote: "We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area,' constitutes a search—at least where (as here) the technology in question is not in general public use."<sup>274</sup> If one believes that the "general public use" phrase constitutes a limiting principle, the Court has sent lower courts into a bewildering thicket, as Christopher Slobogin has ably demonstrated.<sup>275</sup> A small telescope is likely technology that is in "general public use," but what about a sophisticated, expensive telescope that can see a quarter at 100 yards?

But I do not think the "general public use" phrase is a meaningful limitation. It is simply there because courts are conservative by nature and do not wish, generally, to go beyond the facts of the case before them. I agree with Slobogin: "To the extent [*Kyllo*] endorses the general public use concept or the related idea that details viewable by the naked eye without physical intrusion also may be viewed with technology, the ruling in *Kyllo* is seriously flawed."<sup>276</sup>

In my mind, *Smith* and *Kyllo* simply cannot coexist. Of course, given the 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? Did *Kyllo* knowingly expose to the public the heat waves that emanate from his home? To ask the question is, I believe, to answer it.

Thus, I think the Court went astray in the fly-over cases (or hovercraft cases, as I described them in my introduction). Do we have a reasonable expectation of privacy against being observed through holes in our roof from a helicopter flying in permitted airspace? I have no idea. The Court split 5-4 on that question, ruling that the observation was not a Fourth Amendment search.<sup>277</sup> If we ask whether someone has knowingly exposed the interior of his house to

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<sup>274</sup> *Id.* at 34 (citations omitted) (quoting *Silverman v. United States*, 365 U.S. 505, 512 (1961)).

<sup>275</sup> Christopher Slobogin, *Peeping Techno-Toms and the Fourth Amendment: Seeing Through *Kyllo*'s Rules Governing Technological Surveillance*, 86 MINN. L. REV. 1393 (2002).

<sup>276</sup> *Id.* at 1411.

<sup>277</sup> *Florida v. Riley*, 488 U.S. 445 (1989) (involving a partially-covered greenhouse that the Court assumed was protected by the Fourth Amendment). Though there was no majority opinion, Justice O'Connor's opinion concurring in the judgment agreed with Justice White's opinion for four justices that the observation was not a search.

the public by leaving holes in his roof, I think the answer both easier and different from the Court's. If the risk of disclosure is trivial, I don't think anything is knowingly exposed. I would distinguish having a skylight in my bathroom from opening my curtains to display my Christmas tree. In the former case, the risk of being observed from a helicopter is trivial. In the latter case, presumably I want my beautifully decorated Christmas tree to be seen by passersby.

To limit the "knowingly exposes" principle to cases where the risk is nontrivial is consistent with the Framers' intent to protect homes from government inspection. Virtually every surviving polemic against unreasonable searches that the Framers uttered revealed a deep-seated fear of government intrusion into our homes and government meddling with our personal property inside the home. Patrick Henry said that federal agents "may, unless the general government be restrained by a bill of rights, or some similar restriction, go into your cellars and rooms, and search, ransack, and measure, every thing you eat, drink, and wear."<sup>278</sup> If agents search or measure from outside the house, and I have not knowingly exposed the interior, how is it any different from agents being inside the house when they search and measure?

The robust "knowingly exposes" principle solves at least some cases outside the house. Consider the garbage case, *California v. Greenwood*.<sup>279</sup> In applying its expectation of privacy test, the *Greenwood* Court made 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."<sup>280</sup> But is this a trivial risk? I believe the answer is yes. If the risk were anything more than trivial, if we fully expected sometimes to discover that our trash was strewn all over the street, no one would put garbage in plastic bags.

Scott Sundby concluded that the Court's discussion of privacy in trash was "surreal" because "a far more important principle was at stake, but the *Katz* test as it was being used was unable to ferret it out."<sup>281</sup> Sundby would analyze the garbage question by asking "whether government agents going through trash cans looking for evidence of wrongdoing is consistent with a constitutional system based on government-citizen trust."<sup>282</sup> Though Sundby's approach is a vast

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278 3 ELLIOT'S DEBATES, *supra* note 122, at 448–49 (reporting Patrick Henry's June 16, 1788, remarks at the Virginia ratification convention). R

279 486 U.S. 35 (1988).

280 *Id.* at 40–41.

281 Sundby, *supra* note 25, at 1792. R

282 *Id.*

improvement over *Katz*, it still seems too fuzzy to me. I think we get a clearer answer if we ask whether those who put trash in opaque plastic bags have created a nontrivial risk that its contents will be exposed to the general public.<sup>283</sup>

And what is the cost of saying that the Fourth Amendment protects garbage on our premises, the telephone numbers we dial, and the insides of our houses from helicopters? I see only an insignificant cost to legitimate law enforcement. My narrow definition of “knowingly exposes” does not deny the police the option to rummage at will through our garbage, record the phone numbers we dial inside our home, or stare into our houses from helicopters. It simply means the police must have probable cause in all three cases and a warrant in the latter two, because they involve searches of a house.<sup>284</sup> Is that such a draconian limitation on the police? It is, I believe, much more in keeping with the Fourth Amendment that the Framers created. Of course, it was not just suspicionless searches that drew expressions of concern from the Antifederalists. They were also worried that customs officials might abuse their office to obtain evidence. I now turn to that dimension of current Fourth Amendment doctrine.

*I. Clause [3]: Other than Searches Incident to Arrest, No Searches Shall Be Conducted on Less than Probable Cause to Believe that the Search Will Produce Evidence of Crime*

Recall Patrick Henry’s speech to the Virginia ratifying convention. 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.”<sup>285</sup> 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,”<sup>286</sup> the police have adopted a strategy of implied coercion that, I believe, is the twenty-first century equivalent to a demand.

Indeed, this strategy has proved so successful that it has largely replaced other justifications for searching a suspect such as incident to arrest or in a *Terry* stop and frisk. One police detective said that as

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283 At least one state supreme court agrees that it is an unreasonable search to open a closed, opaque trash container on the curb. *See* *State v. Hempele*, 576 A.2d 793 (N.J. 1990).

284 I assume the garbage is not on the curtilage. *See supra* note 241.

285 3 ELLIOT’S DEBATES, *supra* note 122, at 412 (reporting Patrick Henry’s June 15, 1788, remarks at the Virginia ratification convention).

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

many as ninety-eight percent of the searches he conducts are consent searches.<sup>287</sup> Arnold Loewy has concluded that “truly voluntary consent, while perhaps not oxymoronic, certainly does not seem to be the rule, at least according to the defendants in the litigated cases.”<sup>288</sup> 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.”<sup>289</sup> The court cited a study that found ninety-five percent of motorists gave written consent to police after being notified of their right to refuse consent.<sup>290</sup>

The state 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”<sup>291</sup>—and totally unchecked discretion in deciding which drivers to ask for consent. This discretion, of course, opens the door to racial profiling. As Tracey Maclin writes:

Three hundred years ago colonial officials ordered the arbitrary seizure of both slave and free blacks for “gadding abroad” the streets. Before the Constitution recognized blacks as citizens of the United States, protest against arbitrary intrusions was futile because blacks “had no rights which the white man was bound to respect.” For black motorists, things have not changed significantly. Police are free to target blacks for traffic seizures and use those intrusions to initiate unwarranted criminal investigations.<sup>292</sup>

It is no exaggeration to say that the Court’s consent search doctrine enables racial profiling in traffic stops. Without a consent search doctrine, police will be far less likely to “fish” for drug suspects by making traffic stops. If Tracey Maclin is right that “minority persons, particularly black men, are deemed second-class citizens in the eyes of law enforcement,”<sup>293</sup> it stands to reason that police will stop more minority motorists so that they can ask for consent. Thus, although ra-

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287 RICHARD VAN DUIZEND ET AL., *THE SEARCH WARRANT PROCESS* 21 (1984).

288 Arnold H. Loewy, *Cops, Cars, and Citizens: Fixing the Broken Balance*, 76 ST. JOHN’S L. REV. 535, 553 (2002).

289 *State v. Carty*, 790 A.2d 903, 911 (N.J. 2002).

290 *Id.* at 910–11 (citing Monitors’ Fourth Report, Long Term Compliance Audit, at 15 (July 21, 2001) (Civil No. 99-5970), available at [http://nj.gov/lps/monitors\\_report\\_4.pdf](http://nj.gov/lps/monitors_report_4.pdf)).

291 *Id.* at 908.

292 Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 392 (1998) (quoting *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 407 (1857)).

293 *Id.*



cial profiling is not the only problem raised by the Court's consent search doctrine, the almost complete discretion it provides state troopers certainly makes racial profiling extremely easy to accomplish and virtually impossible to detect. How could a driver ever prove that the officer asked him for consent because of his race?

The New Jersey Supreme 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 riding around on the New Jersey Turnpike?'"<sup>294</sup> 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."<sup>295</sup> A third technique is "use of 'hypothetical' consent requests" such as "if I asked for consent to search your car, would you sign it?"<sup>296</sup>

A dramatic example can be seen in the facts from a recent United States Supreme Court case, *United States v. Drayton*.<sup>297</sup> Because everything about consent is also about context, I quote at length from the Court's recitation of the facts. Three police officers boarded a 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 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.

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294 *Carty*, 790 A.2d at 911 (quoting Monitors' Fourth Report, Long Term Compliance Audit at 11–12 (July 21, 2001) (Civil No. 99-5970), available at [http://nj.gov/lps/monitors\\_report\\_4.pdf](http://nj.gov/lps/monitors_report_4.pdf)).

295 *Id.* (quoting Monitors' Fourth Report, Long Term Compliance Audit at 11–12 (July 21, 2001) (Civil No. 99-5970), available at [http://nj.gov/lps/monitors\\_report\\_4.pdf](http://nj.gov/lps/monitors_report_4.pdf)).

296 *Id.* (quoting Monitors' Fourth Report, Long Term Compliance Audit at 11–12 (July 21, 2001) (Civil No. 99-5970), available at [http://nj.gov/lps/monitors\\_report\\_4.pdf](http://nj.gov/lps/monitors_report_4.pdf)).

297 536 U.S. 194 (2002).

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 patdown 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.<sup>298</sup>

The district judge did not grant the motion to suppress, finding it “‘obvious that [respondents] can get up and leave, as can the people ahead of them.’”<sup>299</sup> The judge then concluded: “‘[E]verything that took place between Officer Lang and [Mr. Drayton and Mr. Brown] suggests that it was cooperative and there was nothing coercive [or] confrontational about the encounter.’”<sup>300</sup>

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?

Leave Brown to one side because his case is harder. How could Drayton be said to have voluntarily consented when he just saw what happened when Brown “consented”? It is plausible to think that someone who is carrying contraband will voluntarily consent on the ground that the officer may take the consent as proof of innocence and decide not to search. But having discovered contraband on Brown, there is simply no way that the officer was going to assume that Drayton’s consent manifested innocence. Thus, Drayton must have felt he had no choice. It borders on ludicrous to say that Drayton consented. But the Court’s consent doctrine is so malleable that a majority reached precisely that conclusion, indulging in what Janice

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298 *Drayton*, 536 U.S. at 197–99 (citations omitted) (quoting Joint App., *Drayton* (No. 01-631)).

299 *Id.* at 200 (quoting Joint App. at 132, *Drayton* (No. 01-631)).

300 *Id.* (quoting Joint App. at 132, *Drayton* (No. 01-631)).

Nadler calls “a fictional standard for the definitions of seizure and voluntary consent.”<sup>301</sup>

Of course, if one defines “consent” as the lack of overt coercion, which is ultimately what the Court has done in the Fourth Amendment, perhaps *Drayton* makes sense. It would not, however, have made sense to Patrick Henry. It seems to me that what Officer Lang did was no different from the exciseman’s feared “demand . . . to enter your cellar, or house, by virtue of his office.” 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 militiaman.

While one can obviously never know, I am confident that if we described the facts of the search of *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 Antifederalists viewed the exciseman’s search for dutiable items.<sup>302</sup> 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 almost 800 grams (twenty-seven 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 *Drayton*’s “consent” is consent only in the most academic sense. Defining “consent” as the lack of overt coercion is a pretty impoverished notion when one is facing armed police who appear to be blocking egress from a bus. Given what we

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301 Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 218.

302 See, e.g., *id.* at 221 (noting that it might be “desirable to permit police to board intercity buses and pose questions to passengers and, in some circumstances, conduct searches of baggage and persons”).

are learning about the reaction of citizens to civilian authority,<sup>303</sup> and remembering that the ones requesting consent in drug cases are officers who carry guns and have the power to arrest, a definition of consent that includes every noncoerced act is unrealistic. Moreover, Janice Nadler raises the provocative possibility that while the police officer perceives a friendly conversation, the suspect may perceive coercion.<sup>304</sup> So whose perspective “counts”?

The New Jersey Supreme Court held in *State v. Carty*<sup>305</sup> that, in some situations, genuine 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*,<sup>306</sup> might not be “voluntary or otherwise reasonable” when the state police seek that consent from a motorist who has been stopped on the highway.<sup>307</sup>

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.<sup>308</sup>

The state court then held that a request for consent in the absence of a reasonable and articulable suspicion<sup>309</sup> violated the state’s version of the Fourth Amendment.<sup>310</sup> I have elsewhere questioned whether the New Jersey Supreme Court went far enough to solve the problem of “consent” that is implicitly coerced by police.<sup>311</sup> But the state court was right to require individualized suspicion. My Fourth Amendment does not say police cannot search a drug courier’s car, only that they

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303 See, e.g., *id.* at 165–97 (summarizing the social science studies).

304 *Id.* at 197–201.

305 790 A.2d 903 (N.J. 2002).

306 346 A.2d 66 (N.J. 1975).

307 *Carty*, 790 A.2d at 911. Nadler agrees, relying on data from Ohio. Nadler, *supra* note 301, at 205–06.

308 *Carty*, 790 A.2d at 911.

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

310 *Carty*, 790 A.2d at 911–12.

311 See George C. Thomas III, *Terrorism, Race and a New Approach to Consent Searches*, 73 Miss. L.J. 525 (2003).

must have probable cause to do so. *State v. Carty* is support for my argument.

If police had probable cause to believe that Brown (the other suspect in *Drayton*) was a drug courier, they can arrest him and search incident to arrest. Once they find drugs on Brown, they surely have probable cause to believe that Drayton is part of the drug trafficking. They can then arrest and search him. But when police do not have probable cause, under my Fourth Amendment, they may not search based on consent.

I have no doubt that if Patrick Henry saw a videotape of even run-of-the-mill requests 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 “dutiabale items” (contraband) are being “smuggled” (transported) in the vehicle. Instead, we today have a Fourth Amendment that, in Arnold Loewy’s words, “seriously undervalues the security of citizens traveling the highways.”<sup>312</sup>

To require probable cause as the only justification for a search may seem draconian. Yet there is no evidence of consent searches in the colonial era. As Thomas Clancy puts it: “One stark conclusion should be drawn from the history preceding the Amendment and the drafting process of the Amendment: particularly described persons, places, or things based on individualized suspicion were considered inherent characteristics of reasonable searches and seizures by the framers. Individualized suspicion was considered an element of reasonableness.”<sup>313</sup> Clancy concludes that we should follow history on this point:

There must be a return to the central importance given to individualized suspicion by the framers. A reasonableness inquiry is not an unprincipled balancing of competing interests. Rather, it is a weighted inquiry: one starts with a conception of what reasonableness is. It is, at least in part, a search or seizure based on individualized suspicion that the object of the intrusion has characteristics that justify the intrusion.<sup>314</sup>

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312 Loewy, *supra* note 288, at 565.

313 Clancy, *supra* note 37, at 632–33.

314 *Id.* at 634. Clancy does not similarly reject consent searches (he doesn’t mention consent searches), leaving the way clear for me on that issue. He does concede that there might be exceptions to his requirement of individualized suspicion, based on “necessity,” *id.*, and perhaps he thinks consent searches are an appropriate exception to the individualized suspicion principle.

What is so draconian about requiring individualized suspicion before police can search? Perhaps banning consent searches is draconian because the war on drugs requires we allow the police to use subtle coercion to get evidence, but I am unpersuaded.

## VI. 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*<sup>315</sup> and *Gouled v. United States*,<sup>316</sup> 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.<sup>317</sup> 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 allegation in the motion. The Court made much of the privacy associated with personal papers, concluding that the Fourth Amendment protected against “the invasion of [the] indefeasible right of personal security, personal liberty, and private property.”<sup>318</sup>

In *Gouled*, papers were taken from the defendant’s office under the authority of two search warrants.<sup>319</sup> 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.<sup>320</sup> In the Court’s view, warrants could be used to justify seizure of property inside a home or office

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.<sup>321</sup>

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315 116 U.S. 616 (1886).

316 255 U.S. 298 (1921).

317 116 U.S. at 620.

318 *Id.* at 630.

319 255 U.S. at 303.

320 *Id.* at 309–10.

321 *Id.* at 309.

That extremely deferential approach to lawfully possessed 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. Whether the Framers intended some kind of warrant requirement, as Tracey Maclin concludes,<sup>322</sup> or intended the Reasonableness Clause to stand separate from the Warrant Clause, as Akhil Amar and Telford Taylor claim,<sup>323</sup> the Court began ever so tentatively to develop a warrant requirement in the 1940s. We have already seen that the Court continues to be committed to a warrant requirement for searches of a home, albeit one in which consent can replace a warrant.

But outside the home, the warrant requirement was splintering as early as 1971. The issue in *Coolidge v. New Hampshire*<sup>324</sup> 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. The key parts of *Coolidge* seeking to clarify twenty years or so of labor in the Fourth Amendment warrant vineyard were endorsed by only four justices.<sup>325</sup> Today, it makes nonsense of the word "requirement" to argue that a warrant requirement exists outside the home. There is no longer any meaningful presumption against warrantless searches conducted outside the home.

Today, the Court sees the two clauses as separate, at least outside the home, and the question of whether a search is reasonable is a freestanding inquiry that has nothing to do with whether police should have gotten a warrant. In essence, the Court is developing a common law of Fourth Amendment reasonableness. So the road went from the *Boyd-Gouled* fetishism of private papers to the warrant requirement and then merged onto the autobahn of reasonableness.

The best example of this Fourth Amendment common law returns us to *Terry v. Ohio*, where the Court explicitly tested the officer's conduct "by the Fourth Amendment's general proscription against unreasonable searches and seizures."<sup>326</sup> The Framers would have understood the notion that an officer can stop a night walker to inquire

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322 See, e.g., Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925 (1997).

323 See, e.g., AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 10–11 (1997); TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 43 (1969). For a devastating critique of the Taylor-Amar argument, see Davies, *supra* note 28, at 575–90.

324 403 U.S. 443 (1971).

325 Justice Harlan, who provided the critical fifth vote for reversing *Coolidge*'s conviction, did not join the part of the Court's opinion most clearly setting out the scope of the warrant requirement. *Id.* at 490–92. (Harlan, J., concurring).

326 392 U.S. 1, 20 (1968).



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 saw,<sup>327</sup> Justice Douglas was also baffled that the Court permitted the police to do on the street what a justice of the peace could not authorize by warrant.

Is *Terry* open to a challenge, after almost four decades on the books? Perhaps. In a thoughtful concurring opinion in *Minnesota v. Dickerson*,<sup>328</sup> 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.”<sup>329</sup> But he found no “precedent for a physical search of a person thus temporarily detained for questioning.”<sup>330</sup> The lack of precedent caused Justice Scalia to “doubt . . . 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.”<sup>331</sup>

As Justice 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. As to the right to detain a suspicious person, Hawkins stated the rule as “every private person may by the common law arrest any suspicious night-walker, and detain him till he give a good account of himself.”<sup>332</sup> Hale agreed that “suspicious night-walkers”<sup>333</sup> could be arrested, but he cautioned that the “suspicion must not be a mere causeless suspicion, but must be founded upon some probable reason.”<sup>334</sup>

Whether night walkers could be detained on a lesser standard than required for arrest for other crimes is unclear to me. If so, then Justice Scalia is right that the “stop” part of *Terry* might be consistent with the Fourth Amendment. If not, if the same “probable reason” was required to detain night walkers, then *Terry* is flawed all the way down. Its authorization of a seizure on less than a magistrate would

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327 See *supra* notes 238–39 and accompanying text.

328 508 U.S. 366 (1993).

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

330 *Id.* at 381 (Scalia, J., concurring).

331 *Id.* (Scalia, J., concurring).

332 2 HAWKINS, *supra* note 162, ch. 12, § 20, at 120.

333 2 HALE, *supra* note 36, at \*89.

334 *Id.* at 89, n.f.

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require for an arrest warrant is as historically flawed as its authorization of a search on less than probable cause.

*Terry* is not the only casualty of my probable cause principle. In *United States v. Martinez-Fuerte*,<sup>335</sup> 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*,<sup>336</sup> 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 Justice Thomas. He has raised the possibility of revisiting and overruling the roadblock cases. In *City of Indianapolis v. Edmond*,<sup>337</sup> Justice 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 “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.<sup>338</sup>

I think Justice Thomas is right. The Framers would not have permitted routine stops based on no suspicion at all. Of course, to overrule *Martinez-Fuerte* is not to render the government powerless to regulate who and what enters our country from abroad. We would still have the customs inspections similar to those authorized by the Collection Acts of 1789 and 1790.

I leave for another day the issue of administrative searches outside the context of customs searches. The history that Justice Frankfurter marshaled in *Frank v. Maryland*<sup>339</sup> tends to show that the colonists permitted health and safety inspections without any showing of cause or a warrant.<sup>340</sup> But the question of what constitutes a health and safety measure is immensely complex, as the Court’s labored opinion in *Ferguson v. City of Charleston*<sup>341</sup> makes plain. The current

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335 428 U.S. 543 (1976).

336 496 U.S. 444 (1990).

337 531 U.S. 32 (2000).

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

339 359 U.S. 360 (1959).

340 *Id.* at 363–65.

341 532 U.S. 67 (2001).

Article is both long enough and controversial enough without adding that headache.<sup>342</sup>

The glue holding together my proposal to revamp the Fourth Amendment is that all seizures and all searches save the search incident to arrest must be based on individualized cause (and the search incident to arrest will almost always in fact be justified by cause that runs parallel to the suspicion that justifies the arrest). 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 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 inspections of the contents of ships for customs violations. Beyond that, searches of ships were permitted only when the customs officials had “reason to suspect any goods, wares or merchandise subject to duty shall be concealed.”<sup>343</sup> Searches of dwelling houses, stores, buildings, and “other such place[s]” required “cause to suspect a concealment” of dutiable items.<sup>344</sup>

To reject *Terry* and *Martinez-Fuerte* is to reaffirm the Framers’ view requiring probable cause. The principle underlying my Fourth Amendment, therefore, 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.

#### CONCLUSION: A “DO-OVER” FOURTH AMENDMENT DOCTRINE

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 wrongheaded to me: first, the narrowing of the scope of the Fourth Amendment by reference to expectations of privacy, and second, the Court’s refusal to require particularized suspicion in many cases.

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<sup>342</sup> This means I also get to avoid the difficult question posed by *South Dakota v. Opperman*, 428 U.S. 364 (1976), where the Court upheld inventories of cars that have been lawfully impounded.

<sup>343</sup> Collection Act of 1789, ch. 5, § 24, 1 Stat. 29, 43, *repealed by* Act of Aug. 4, 1790, ch. 35, § 74, 1 Stat. 145, 178.

<sup>344</sup> *Id.*

As to the first test, I concluded (here I have lots of company)<sup>345</sup> 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. And I would construe forfeiture of my right to be secure narrowly, requiring the state to prove a knowing exposure to the public at large. After all, 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 except customs searches and, perhaps, some administrative inspection schemes. Some examples of doctrines inconsistent with Fourth Amendment history include the *Terry* stop and frisk regime, the permanent checkpoints near, but not on, the Mexican border, and the movable drunk driving checkpoints.

The sturdy principle that all searches require probable cause leads naturally to the abolition of consent as a freestanding justification for a search. Here the history is less clear but is at least consistent with my position. We see nothing in the Framing history about consent searches because the proud Americans of that era would not have understood the notion that they should surrender their property or privacy at the request of a lowly constable. What we do see in the history of search and seizure is that individual cause was required before a search could proceed. With that principle firmly in place, consent searches cannot pass muster. It is 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.

I have no illusion that any court anywhere will read this Article and adopt my reconstructed Fourth Amendment. My hope, instead, is to stimulate a discussion among scholars and even among judges about better ways of understanding the “right of the people to be secure in their persons, houses, papers, and effects.”

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345 See, e.g., Slobogin & Schumacher, *supra* note 259.