

WARRANTLESS HOUSE-TO-HOUSE SEARCHES AND FOURTH AMENDMENT ORIGINALISM: A REPLY TO PROFESSOR DAVIES

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The Fourth Amendment to the Federal Constitution declares 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, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹

I. THE DAVIES THESIS

In *Recovering the Original Fourth Amendment*, Professor Davies theorizes that the Amendment’s framers confined their understanding of unreasonable searches to, essentially, the general warrant:

The historical statements [of the framers] about search and seizure focused on condemning general warrants. In fact, the historical concerns were almost *exclusively* about the need to ban house searches under general warrants. Thus, the Framers clearly understood the warrant standards to be the operative content of the Fourth Amendment, as well as the earlier state search and seizure provisions. Moreover, the evidence indicates that the Framers understood “unreasonable searches and seizures” simply as a pejorative label for the inherent illegality of any searches or seizures that might be made under general warrants. In other words, the Framers did not address warrantless intrusions *at all* in the Fourth Amendment or in

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1. U.S. CONST. amend. IV.

the earlier state provisions; thus, they never anticipated that “unreasonable” might be read as a standard for warrantless intrusions.²

II. THE CONSENSUS AGAINST PROMISCUOUS HOUSE SEARCHES: DEPTH AND CONSISTENCY

By equating “unreasonable searches and seizures” exclusively with general warrants, the Davies paradigm introduces factual anomalies regarding the Amendment’s origins and definition.³ First, Davies contradicts centuries of history, which had deposited a far broader, nearly antithetical consensus on search and seizure.⁴ Unlike Davies’s contention, that consensus condemned promiscuous house searches globally and did not single out those that general warrants caused.⁵ Davies’s identification of the general warrant as the Amendment’s only “unreasonable” category in 1791 massively contradicts a pre-revolutionary consensus on search and seizure that anathematized all legal entities that incubated general house searches.⁶

A. Regarding the General Warrant

The identity of the general warrant as a trigger of capricious searches, seizures, and arrests has been driving criticism of it since its origin as an Elizabethan instrument of religious control in the 1580s.⁷ As early as 1590, Henry Barrow, a militant Protestant, condemned the authority of Crown searchers “to breake open and ransack . . . houses by day or by night, to spoile and carrie away what and whome they please without controulement, their warrants being made indefinite, *without anie certaine perscription or limitation.*”⁸

Sir Edward Coke’s prolonged indictment of the general warrant, which Davies illuminates in detail, had identified it as the paramount target of criticism long before the Virginia Constitution of 1776 and its sequels appeared.⁹ In 1646, *Mercurius Pragmaticus*, a secretive royalist press championed the defeated king, Charles I, and lamented that government agents with general search warrants

2. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 551 (1999) [hereinafter Davies, *Fourth Amendment*] (emphasis added).

3. *See id.*

4. *See id.* at 562-70.

5. *See id.*

6. *See id.* at 693.

7. *See* 3 ELIZABETHAN NON-CONFORMISTS TEXTS: THE WRITINGS OF HENRY BARROW 1587–1590, at 4 (Leland H. Canson ed. 1962).

8. HENRY BARROW, A BRIEF DISCOVERIE OF THE FALSE CHURCH 249 (1590), *reprinted in* 3 ELIZABETHAN NON-CONFORMISTS TEXTS, *supra* note 7, at 649 (emphasis added).

9. *See* Davies, *Fourth Amendment*, *supra* note 2, at 687-89.

smell out a Loyall-hearted man as soon as the best Bloodhound in the *Army*; not a Presse dares wagge her tayl, but one of these scumms of Raskallity come with a Warrant . . . to seize on our goods, and commit our Persons to their stinking Dungeons; others come in the Night, breake open doors, with naked swords, holding them to the throats of Women and Children, menacing, and frightening them, whi[ll]st others of their crew break open Chests, Boxes and the like, stealing what ever thing of value they can lay their theevish fingers on.¹⁰

In 1681, one allegation in the impeachment of Chief Justice Sir William Scroggs by the House of Commons was that he had “granted divers general warrants for attaching the persons, and seizing the goods of his Majesty’s subjects, not named or described particularly in the said warrants; by means whereof many . . . have been vexed, their houses entered into, and they themselves grievously oppressed contrary to law.”¹¹

In yet another instance, the law allowing such warrants for censorship expired in 1695.¹² Successfully opposing continuance of that act, a committee of the House of Commons objected that it “subjects all Mens Houses, as well Peers as Commoners, to be searched at any Time, either by Day or Night, by a Warrant . . . directed to any Messenger, if such Messenger shall, upon probable Reason suspect that there are any unlicensed Books there.”¹³

Precedents against general warrants of arrest and search are thus profuse and ancient. Davies believes, however, that they were not only *an* unreasonable category within the Amendment’s original meaning but that they were *the* only such category out of several methods of promiscuous house search resident on the Amendment’s doorstep.¹⁴ Davies emphasizes the words that the Amendment’s author, James Madison, chose to provide disconnected from the history of search and seizure that different words had already provided: “Because Madison’s text reached only warrant authority, he must have used ‘unreasonable’ to describe only those searches and seizures made under general warrants.”¹⁵

B. Regarding General House Searches Without Warrant

One problem with this thesis is that house-to-house searches without warrants, along with searches utilizing only general search warrants, had

10. Marchamont Nedham, Editorial, *MERCURIUS PRAGMATICUS*, Feb. 13-20, 1649, at 5-6.

11. 9 H.C. J. (1681) 697 (Eng.). For background on Scroggs and on his trial, see Alfred F. Havighurst, *Judiciary and Politics in the Reign of Charles II*, 66 L.Q. REV. 229, 239-40 (1950).

12. See *THE EIGHTEEN CENTURY CONSTITUTION: 1688-1815, DOCUMENTS AND COMMENTARY* 398 (E.N. Williams ed., 1st ed. 1960).

13. 15 H.L. J. (1695) 546 (Eng.).

14. See Davies, *Fourth Amendment*, *supra* note 2, at 693.

15. *Id.* at 699.

ignited the same objections long before the word “unreasonable” related to them. For example, in 1582, an anonymous Catholic critic of Elizabethan religious policies protested the house-to-house sweep and rigor of Crown searches, not the existence or absence of a warrant as their cause: “An *infinite* numbre of houses have bene by night searched, narowlie perused, ryfled and ransacked in everie corner: And all, but upon a light suspicion onlie”¹⁶

A half-century later, similar rhetoric greeted the efforts of King Charles II to tax without Parliament’s consent. In a passionate tract against the king’s “ship money” scheme in 1643, William Prynne, England’s legendary critic of government power, attacked agents of the Privy Council for “searching sundry studies” for a pamphlet of his authorship.¹⁷ He did not state whether warrants were responsible and obviously did not care. “Searching sundry studies,” not the involvement or absence of search warrants, was the rub.

The English excise tax, which originated in 1643 and employed only warrantless, general searches until 1698, generated much the same criticism as the general search warrant. John Lilburne, the leader of the Leveller sect, denounced the promiscuous searches that the excise tax on soap allowed as its most obnoxious feature. In 1649, Lilburne lamented that, because of that excise, “my House, which used to be my Castle . . . night or day *must be at the Knave Excise mans pleasure, to search and break open . . . when he pleaseth.*”¹⁸ In 1659, another critic denounced the “uncivill proceedings” of excise men “who *upon every suspition, and often malicious information, come unto our houses with armed men, and if not immediatly let in, violently break open our doors, to the great affrightment, and amazement of our wives, children, and families.*”¹⁹

Shortly after the Glorious Revolution of 1688, King William asked for the repeal of an act exposing all hearths to warrantless inspection as “very grievous to the People.”²⁰ Parliament complied and repealed the statute as “a Badge of slavery upon the whole people *Exposing every mans House to be Entered into and Searched . . . by Persons unknowne to him.*”²¹

An incident at Montrose, Scotland, in 1729 illuminated the preponderating illegitimacy of general searches per se, transcending even that of the general warrants facilitating them. A number of customs and excise officers had approached a local magistrate in Montrose, “desiring a

16. ALEXANDER BRIANT, AN EPISTLE OF THE PERSECUTION OF CATHOLICKES IN ENGLANDE 106-07 (1582) (emphasis added).

17. WILLIAM PRYNNE, AN HUMBLE REMONSTRANCE AGAINST THE TAX OF SHIP-MONEY, unpaginated preface (1643) (emphasis added).

18. JOHN LILBURNE, THE LEGAL FUNDAMENTAL LIBERTIES OF THE PEOPLE OF ENGLAND 62 (1649) (emphasis added).

19. Z. G., EXCISE ANATOMIZ'D 10 (1659) (emphasis added).

20. 2 THE HISTORY AND PROCEEDINGS OF THE HOUSE OF COMMONS 278 (1942).

21. 1 W. & M., c. 10, §§ 1-2 (1688) (emphasis added).

general warrant for Searching the whole town” for brandy that had been stolen from their custody.²² To the undoubted chagrin of the officers, the magistrate replied

that he was willing to give a warrant to search such houses as any of the said . . . of[f]icers would condescend on and make oath that he Suspected that some of the said brandy was therein[,] but that *he could not give order for a general search[,] that being unprecedented* and evidently tending to the disturbing of the peace and quiet of the burgh and the breach of the priviledges thereof²³

The town council compounded the insult by unanimously upholding the magistrate’s action and voting to sue the officers.²⁴ Warrantless excise searches generated similar rhetoric in the next century, in 1732–1733 and 1763.²⁵

In 1764, the British Privy Council expressed a similar dislike of general house searches without warrant. To retard game poaching in 1741, a New Hampshire statute had authorized two persons in each town “to Inspect and Search any suspected Houses or places.”²⁶ In 1758, the legislature went even further by empowering officials to open even locked receptacles within the houses they searched.²⁷ Such language was too much even for the Privy Council, which disallowed the Act of 1758 on grounds that, absent both information on oath and a search warrant, “the Power of searching . . . is so very extensive, that it is unsafe to be intrusted with any one.”²⁸

22. Procs., 11 Oct. 1729, Montrose, Scotland Town Council, “Minute Book of the Town Council of Montrose,” vol. 6 (1710-33), unfoliated, Archives Section, Angus District Library, County Buildings, Forfar, Bank Street, Brechin, Angus, Scotland, U.K.

23. *Id.* (emphasis added).

24. *Id.*

25. WILLIAM CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING*, 602–1791, at 274-75, 463-68 (2009).

26. N. H. Prov. St., 41st Gen. Assemb., 1st Sess., c.3 (17 Mar. 1740/1), *N. H. Laws*, vol. 2 (1702-45), p. 586.

27. N. H. Prov. St., 47th Gen. Assemb., 8th Sess., c.10 (1 Mar. 1758), *id.*, vol. 3 (1745-74), p. 174. Most New Hampshire towns were quite zealous in appointing personnel to enforce this law and its predecessor. For documentation from the towns of Canterbury, Concord, Dover, and Stratham, see William Cuddihy, *The Fourth Amendment: Origins and Original Meaning, 602–1791*, at 403 n.66 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School) (on file with author) [hereinafter Cuddihy, Ph.D. dissertation].

28. Order of the Privy Council, 1764, P. Colonial Series, vol. 4, 674, 677-78. I am indebted to Professor John Philip Reid for directing my attention to the Privy Council’s action on this matter. On the council’s power of disallowance, see ELMER B. RUSSELL, *THE REVIEW OF AMERICAN COLONIAL LEGISLATION BY THE KING IN COUNCIL* (1915); JOSEPH H. SMITH, *APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS* (1950). The colony ignored the disallowance, and the Act of 1758 was not repealed until 1792. N.H. Prov. St., 1st Gen. Ct., 1st Sess., c. 20 (20 June 1792), *N.H. Laws*, vol. 5 (1784-92), pp. 28 at 33.

Thus, by 1760, nearly two centuries of intellectual and political ferment had yielded a global consensus against general house searches that not only embraced but transcended a component consensus against general warrants. Such warrants had already shed every particle of legality, but also had their numerous warrantless affiliates. Davies posits, however, that in 1789, a constitutional outcome in which only the general warrant endured as an unreasonable search. An unbridgeable chasm separates the consensus on search and seizure in 1760 from the original meaning that Davies attributes to the framers only twenty-nine years later.

The unconstitutionality of promiscuous house searches without warrant intensified after 1760. On November 20, 1772, a British decision to pay the salaries of the judges of the local high court ignited a massive, comprehensive protest by Bostonians in town meeting.²⁹ Among Boston's grievances were Parliament's legislative supremacy, taxation without representation, the forced quartering of troops in colonial homes, the creation of a new and separate Board of Customs Commissioners for the colonies, and promiscuous house searches without warrant by commissions peculiar to the five commissioners:³⁰

These Officers are by their Commissions invested with Powers altogether unconstitutional, and entirely destructive to that Security which we have a right to enjoy; and to the last degree dangerous, not only to our property, but to our lives: For the Commissioners of his Majesty's Customs in America, or any three of them, are by their Commissions impowered . . . [to appoint subordinate officers]. Each of these petty officers so made is intrusted with Power more absolute and arbitrary than ought to be lodged in the hands of any Man or Body of Men whatsoever; for in the Commission aforementioned, his Majesty gives and grants unto his said Commissioners, or any three of them, and to all and every the . . . Deputy Collectors . . . full Power and Authority, from time to time, at their or any of their Wills and Pleasures, as well by Night as by Day, to enter and go on board any [local] Ship, Boat, or other Vessel . . . ; and also in the day-time to go into any House, Shop, Cellar, or any other Place, where any Goods, Wares or Merchandizes lie concealed, or are *suspected* to lie concealed, whereof the customs and other duties, have not been, or shall not be, duly paid . . . ; and the said House, Shop, Warehouse, Cellar, and other Place to search and survey, and all and every the Boxes, Trunks, Chests and Packs then and there found to break open.'

Thus our Houses, and even our Bed-Chambers, are exposed to be ransacked, our Boxes, Trunks and Chests broke open, ravaged and plundered, by Wretches, whom no prudent Man would venture to employ

29. CITY OF BOSTON, MASS., THE VOTES AND PROCEEDINGS OF THE FREEHOLDERS AND OTHER INHABITANTS OF THE TOWN OF BOSTON, IN TOWN MEETING ASSEMBLED, ACCORDING TO LAW 35-36 (1772) [hereinafter BOSTON VOTES].

30. See *id.* at 13-35 (giving the full list of grievances).

even as menial Servants; whenever they are pleased to say they *suspect* there are in the House, Wares, &c. for which the Duties have not been paid. Flagrant instances of the wanton exercise of this Power, have frequently happened in this and other seaport Towns. By this we are cut off from that domestic security which renders the Lives of the most unhappy in some measure agreeable. These Officers may under color of Law and the cloak of a general warrant, break through the sacred Rights of the *Domicil*, ransack Mens Houses, destroy their Securities, carry off their Property, and with little Danger to themselves commit the most horrid Murders.³¹

In earlier scholarship, I attached considerable significance to this protest, a small portion of which I quoted.³² Calling the Boston protest a “supposed grievance over warrantless house searches,” Davies rejected that significance in a recent article in this journal:

Even if this minimal number of complaints was about warrantless customs searches of houses, it would be rather meager evidence that warrantless house searches were actually a salient issue. But in reality, these complaints were actually only artful propaganda. The important fact is this discretionary search power was included only in the commissions of *the five “Commissioners of Customs”*—the bigwigs in the operation who were much too lofty to conduct searches themselves—but no such power was included in the commissions of the officers who would actually conduct any searches.³³

Davies also noted my observation that the protest erred in asserting that the commissioners could delegate their mandate to search without warrant because the commissions of subordinate customs officers predicated their house searches on writs of assistance. “Hence,” he concluded, “the complaint about the search powers of the ‘Commissioners’ was *symbolic, not a description of search abuses that actually occurred.*”³⁴ Davies asserted that in an earlier chapter I had “accurately characterized the 1774 complaints as part of the larger ‘debate on general warrants.’”³⁵

Davies’s comments invite several replies. First, the Bostonians denounced the commissions as unconstitutional *per se*, not merely unreasonable, with the power of promiscuous, warrantless house search at the very center: “These Officers are by their Commissions invested with

31. *Id.* at 15-17.

32. See CUDDIHY, *supra* note 25, at 780.

33. Thomas Y. Davies, *Can You Handle the Truth? The Framers Preserved Common-Law Criminal Arrest and Search Rules in “Due Process of Law”—“Fourth Amendment Reasonableness” Is Only a Modern Destructive Myth*, 43 TEX. TECH L. REV. 51, 89 n.189 (2010) [hereinafter Davies, *Can You Handle the Truth?*].

34. *Id.* (emphasis added).

35. *Id.*

Powers altogether unconstitutional”³⁶ A few lines later the point repeats, even more explicitly:

for in the Commission aforementioned, his Majesty gives and grants unto his said Commissioners . . . full Power and Authority . . . at their or any of their Wills and Pleasures . . . to enter and go . . . in the day-time . . . into any House, Shop, Cellar, or any other Place, where any Goods, Wares or Merchandizes lie concealed, or are *suspected* to lie concealed.³⁷

Second, whether or not Davies regards such rhetoric as “artful propaganda” does not disqualify it as an instrument of constitutional definition.³⁸ The bottom line was not what Davies perceived as propaganda in 2011, but what Boston perceived as unconstitutional in 1772, and it unanimously so perceived warrantless house searches via the commissions.³⁹

Third, of all the words execrating promiscuous search and seizure in the Boston protest of 1772, only “suspected” and “suspect” were italicized as preponderant.⁴⁰ Implying the autonomous illegitimacy of capricious searches per se, both selections invalidated the commissions, not general warrants, which were denounced only as an afterthought in the final sentence of those words.⁴¹ Contextualizing the critique of general search warrants does not diminish the significance of commensurate searches without warrant inhabiting that context.

Fourth, unlike Davies, the Bostonian protesters of 1772 did not trivialize the five customs commissioners and had no reason to regard the searches they might personally conduct as improbable or “symbolic.” For nearly a century before 1755, warrantless house searches by the customs service had been routine in Massachusetts.⁴² Moreover, the “bigwigs” of the customs establishment whom Davies dismissed as “too lofty” to conduct searches included the most notorious, accomplished, and ruthless searchers in revolutionary Massachusetts.⁴³

Charles Paxton of *Paxton’s Case*’s fame was the centerpiece of the five. Paxton received the first writ of assistance in Massachusetts in 1755 after he had unlawfully attempted to search a house without a writ of assistance by the authority of a warrant from the governor of no legal

36. BOSTON VOTES, *supra* note 29, at 15.

37. *Id.*

38. Davies, *Can You Handle the Truth?*, *supra* note 33, at 89 n.189.

39. *See* BOSTON VOTES, *supra* note 29, at 35.

40. *See id.* at 16.

41. *See id.* at 15-17.

42. *See* CUDDIHY, *supra* note 25, at 378-79.

43. *See* Davies, *Can You Handle the Truth?*, *supra* note 33, at 89 n.189; Francis Bernard, *A Proclamation*, BOSTON POST-BOY & ADVERTISER, Mar. 21, 1768, at 2 (naming the five most notorious searchers, including Paxton and Robinson).

standing.⁴⁴ Because the householder's brother-in-law had so informed Paxton and permitted entry, the result was a warrantless consent search.⁴⁵ Using his writ, Paxton had conducted all of the searches in Boston for six years, ripping off the merchants to the tune of 1,800 pounds in customs racketeering and triggering extensive litigation involving the governor, both houses of the legislature, and for good measure, the Boston town government.⁴⁶ *Paxton's Case* had only arisen because the death of George II in 1760 had obliged Paxton to obtain a new writ by extinguishing the longevity of the one he already had.⁴⁷

John Robinson, another commissioner, rang an even stronger bell regarding warrantless general house searches. In 1765, Robinson personally conducted one of the most disruptive searches in colonial history without either search warrant or writ of assistance.⁴⁸ Infuriated that a crowd in Taunton had "liberated" contraband that he had seized, he rounded up seventy armed marines and sailors, intending to get a warrant and, in his words, "search every house and store upon the River" for the loot.⁴⁹ After antagonizing everyone whom he encountered, Robinson searched without warrant "all the Houses and stores wherever he pleased, all the people [except one] readily submitting thereto."⁵⁰ In the process, he enraged not only the populace but also the governor, council, and five justices of the peace, one of whom, Samuel White, was the speaker of the assembly.⁵¹ The conduct of Robinson and Paxton illustrated that the "[f]lagrant instances of the wanton exercise of this Power" to which the Bostonians referred were palpable, visceral, and immediately real rather than symbolic.⁵²

Finally, "supposed," "meager," and "minimal" were singularly inaccurate descriptions of the Bostonian protest because it fueled a colony-wide plebiscite on warrantless general house searches via the hated commissions.⁵³ The Bostonians printed their protests in a pamphlet, distributed it to all towns in the colony, and requested their responses.⁵⁴ The result was a consensus against the constitutionality of such searches that reflected the will of the vast majority of Massachusetts voters.

44. See CUDDIHY, *supra* note 25, at 378-79.

45. See *id.* at 379-80.

46. *Id.* at 397-98, 807 n.117.

47. See *id.* at 380-81. Writs of assistance were among a host of legal processes that the Act terminated six months after each reigning sovereign's death. See 1 Ann., c. 8, § 5 (1701). The death of George II on October 25, 1760, meant that new writs of assistance had to issue by April 25, 1761. See CUDDIHY, *supra* note 25, at 380-81.

48. See CUDDIHY, *supra* note 25, at 491.

49. *Id.* at 429.

50. *Id.* at 493.

51. *Id.* at 491-96.

52. BOSTON VOTES, *supra* note 29, at 16-17.

53. Davies, *Can You Handle the Truth?*, *supra* note 33, at 89 n.189.

54. See BOSTON VOTES, *supra* note 29, at 36.

Within less than a year, most towns then in Massachusetts, at least 144 of 250, confirmed the Bostonian list of grievances through town meetings and committees of correspondence.⁵⁵ For example, Abington's citizens thanked Boston for "matters of great grievance justly pointed out to us," among which was the "exorbitant power" of the customs commissioners "to force from us our property."⁵⁶ Such grievances, protested Abington, were "a violent infraction of our natural and constitutional rights."⁵⁷

"[U]nited in sentiment" with the Bostonian protesters, Andover proffered its "sincere thanks . . . for their unwearied exertions in the cause of liberty."⁵⁸ After reading Boston's report several times in a town meeting, Concord concluded that the Bostonian grievances were "truly stated" and endorsed them "by a great majority in full town meeting."⁵⁹ Gorham resolved that the commission of the customs leaders "strip[ped] the honest Labourer of the Fruits of his Industry and his domestic Security, which is against the Principles of the Common Law."⁶⁰ Hopkinton told Bostonians of its "Pleasure . . . that we find the Opinions of many other Towns . . . exactly to coincide with yours, and ours do entirely harmonize therewith."⁶¹ In summarizing Marblehead's latest town meeting and its record turnout of voters, *The Essex Gazette* reported that only five Marblehead voters had rejected a resolve endorsing the Boston report; of Marblehead's 1,200–1,300 freeholders, the *Gazette* estimated that all but about eighty (i.e., 92–93 percent) aligned with Boston.⁶² Not just Boston the town but Massachusetts the colony had unequivocally defined promiscuous house searches as "unconstitutional," eight years before Adams introduced the term *unreasonable* into the constitutional vocabulary of search and seizure.

Moreover, the Boston blast at general house searches without warrant reverberated. In 1774–1775, numerous protests by official bodies beyond Massachusetts also extinguished the constitutionality of those searches,

55. RICHARD BROWN, *REVOLUTIONARY POLITICS IN MASSACHUSETTS: THE BOSTON COMMITTEE OF CORRESPONDENCE AND THE TOWNS, 1772–1774*, at 95 (1970). After noting that the towns differed on other issues, Brown concludes that "[g]enerally, however, the grievances of which the towns complained gave the Boston committee no cause for embarrassment. All complained of taxation without representation and then generally went on to recite abbreviated or slightly altered versions of the Boston list." *Id.* at 113.

56. Joseph Greenleaf, *The Abington Resolves*, *THE MASSACHUSETTS SPY OR, THOMAS'S BOSTON JOURNAL*, Apr. 1, 1773, at 1.

57. *Id.*

58. James Frye, *Andover Freeholder to Representative Moody Bridges, 1 June 1773*, *THE BOSTON-GAZETTE, AND COUNTRY JOURNAL*, July 12, 1773, at 1.

59. *Concord Proceedings, 31 Dec. 1772*, *THE MASSACHUSETTS SPY OR, THOMAS'S BOSTON JOURNAL*, Mar. 18, 1773, at 1; *Committee Report Number 2, 18 Jan. 1773*, *THE MASSACHUSETTS SPY OR, THOMAS'S BOSTON JOURNAL*, Mar. 18, 1773, at 1.

60. *Gorham Committee Resolves, 7 Jan. 1773*, *BOSTON EVENING POST*, Feb. 15, 1773, at 1.

61. Capt. Thomas Meden, *Hopkinton Proceedings, 4 and 18 Jan. 1773*, *BOSTON EVENING POST*, Apr. 5, 1773, at 2.

62. *A Letter to the Respectable Town of Boston*, *THE ESSEX GAZETTE*, Dec. 15, 1772, at 82.

with a heavy emphasis on the unique, *ex officio* search powers of the Commissioners of Customs.

A public meeting at Lewistown, Delaware, in 1774 likewise protested that the Townshend Revenue Act had violated “all English liberty” by allowing the customs commissioners to “plunder freemen’s houses, cellars, trunks, bed-chambers, &c.”⁶³ Also in 1774, addresses by the Continental Congress to the King and to the American people denounced the power of those commissioners “to break open and enter houses, without the authority of any civil magistrate founded on legal information.”⁶⁴ In 1775, the New Jersey assembly repeated the Congressional blast at the Customs Commissioners.⁶⁵ Once again, because the commissions in question vested a unique mandate for warrantless general house searches that only the commissioners of customs had received, none of these protests concerned ordinary customs officers bearing writs of assistance or search warrants.

In a bid for Canadian support in 1774, Congress also warned the inhabitants of Quebec that British excise legislation would invite “insolent” excise-men into “[your] houses, the scenes of domestic peace and comfort, and called the castles of English subjects in the books of their law.”⁶⁶ The Congressional warning to Quebecois was yet another denunciation of the general, warrantless searches with which excise searches were almost synonymous.⁶⁷ When Britain and her colonies parted in 1776, support for those searches had dissipated not only in Boston or Massachusetts but throughout Anglo-America.

63. A Brief Examination of American Grievances, Speech at Delaware, Lewistown General Meetings 659 (July 28, 1774).

64. CHARLES THOMSON, EXTRACTS 28 (William Bradford et al. eds., 1774); AMERICAN CONTINENTAL CONGRESS, THE PETITION OF THE GRAND AMERICAN CONTINENTAL CONGRESS TO THE KING’S MOST EXCELLENT MAJESTY 3 (Isaiah Thomas ed., 1774); *see also* CHARLES THOMSON, JOURNAL OF THE PROCEEDINGS OF THE CONGRESS, HELD AT PHILADELPHIA, SEPTEMBER 5, 1774, at 38, 51, 67-68, 78, 105, 136 (William Bradford et al. eds., 1774). In a letter to George Logan on October 11, 1804, John Dickinson of Pennsylvania claimed authorship of the address to the King. At Wilmington, Delaware, “Marie Dickinson Logan Papers,” box 1, Pa. Hist. Soc., Philadelphia. For the extended publication of these protests, *see infra* note 65. On the protests themselves and the background for them, *see* EDMUND CODY BURNETT, THE CONTINENTAL CONGRESS 50-51 (1941); Edwin Wolf, *The Authorship of the 1774 Address to the King Restudied*, 22 WM. & MARY Q. 189, 189-224 (1965); DAVID AMMERMAN, IN THE COMMON CAUSE 69 (1974); JACK N. RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS 52-59 (1979).

65. NEW JERSEY LEGISLATURE, VOTES AND PROCEEDINGS OF THE GENERAL ASSEMBLY OF THE COLONY OF NEW JERSEY 59 (Isaac Collins ed., 1775).

66. JOHN DICKINSON ET AL., A LETTER TO THE INHABITANTS OF THE PROVINCE OF QUEBEC: EXTRACTS FROM THE MINUTES OF CONGRESS 43 (William Bradford et al. eds., 1774); CHARLES THOMSON, JOURNAL OF THE PROCEEDINGS OF THE CONGRESS, HELD AT PHILADELPHIA, SEPTEMBER 5, 1774, at 56, 113 (William Bradford et al. eds., 1774). 5 CHARLES EVANS, AMERICAN BIBLIOGRAPHY 87 (1905) enumerated the pamphlets that reprinted this and the other two addresses of Oct. 1774. For the segments of those republications that concerned search and seizure and for newspaper reprints of those segments, *see* CUDDIHY, *supra* note 25, at 850-51; Cuddihy, Ph.D. dissertation, *supra* note 27, at vol. 3, 1635-36.

67. *See supra* notes 64-66 and accompanying text.

The seventeenth century exegesis of search and seizure by Coke and his admirers, however, is the lone segment of the pre-1760 legacy respecting those processes that Davies acknowledges.⁶⁸ Otherwise his article illuminates only the three decades from *Paxton's Case* in 1761 to the amendment's authorship and ratification in 1789–1791.⁶⁹ The implication is that Adams in 1780 and the framers of 1789–1791 constructed a right against search and seizure *tabula rasa* by discarding or disregarding all inherited parts of that legacy where words beyond “unreasonable” had illegitimated warrantless house-to-house searches. Such a constitutional *coup d'état*, however, would have generated commensurate documentation.

Davies assumes that by yoking general warrants to the term *unreasonable* in 1780–1789 as a new organizing terminology, the framers discarded the inherited unconstitutionality of promiscuous house searches without warrant. In his paradigm, the arrival of the term *unreasonable* in a centuries-long constitutional dialogue on search and seizure not only lodged general warrants at center stage but also dislodged all previous constitutional machinery operating to the same effect as those warrants.

Unlike Davies, however, neither the Bostonian protesters of 1772 nor their predecessors and contemporaries dichotomized general warrants from general house searches without warrant. Like their ancestors of the last two centuries, the framers of 1780–1789 regarded the two categories of promiscuous search as symbiotic companions, not antithetical opposites. In 1772–1773, the Massachusetts voters of Boston and beyond made no effort to identify sources for the unconstitutionality they attributed to promiscuous house searches without warrant.⁷⁰ Because the Massachusetts voters assumed the unconstitutionality of those searches, Davies's failure to acknowledge that they did so illustrates the prochronism he deplors and ignores the enormity of difference and effect in hermeneutical motifs that valued experience and ideas over disembodied words.

Moreover, the palpable unconstitutionality of those searches in the 1772 plebiscite preceded by eight years the unreasonable phrase in the search and seizure clause of the 1780 constitution. In that light, the belief that promiscuous, warrantless house searches were constitutionally unreasonable in 1780 and 1789 is not an assumption but a conclusion. To maintain otherwise, that those searches were not unreasonable in 1780–1789, requires the interpreter to attempt the oxymoronic coextension of the unconstitutional and the reasonable.

68. Davies, *Fourth Amendment*, *supra* note 2, at 578-79, 687-93.

69. *Id.* at 591-691.

70. *See supra* notes 56-65.

III. THE LEGAL INTEGRITY OF WARRANTLESS HOUSE-TO-HOUSE SEARCHES IN 1789

Crucial to the Davies thesis at this point is the contention that, when the amendment originated in 1789, the common law had long confined warrantless searches to what we now call an “exigent circumstances arrest.”⁷¹ The structure of Anglo-colonial law in the eighteenth century, however, reveals the robust endurance of warrantless, house-to-house searches in numerous enclaves of application.

Eighteenth-century British law used search and seizure extensively to enforce what is now known as “the police power.” For example, legislation to ensure the quality of bread in 1709 empowered various officials to search suspicious bakeries without warrant.⁷² Far more significant, however, were the laws allowing warrantless general searches of the general public.

By a statute of 1737, landlords could break open any dwelling house affording “a reasonable ground to suspect” it as a repository of property owed them by their tenants.⁷³ No warrant was required, although such landlords had to divulge their grounds of suspicion to a justice of peace under oath before breaking in.⁷⁴ Legislation against counterfeiting in 1695 that allowed promiscuous, warrantless searches for counterfeit currency by pairs of justices of the peace and other officials was still in force at least as late as 1750.⁷⁵

The legendary excise tax was the most significant. By 1763, just about everything a Briton ate, drank, wore, or otherwise consumed was either taxable under the excise or recently had been: leather, soap, paper, most alcoholic beverages, coffee, tea, candles, glass, and much, much more.⁷⁶

71. Davies, *Fourth Amendment*, *supra* note 2, at 624-42.

72. 8 Ann., c. 18, § 8 (1709) (Eng.). Search warrants on reasonable cause to suspect supplemented the *ex officio* method after 1758 and superseded it in 1763. 31 Geo. 2, c. 29, §§ 27-28 (1758) (Eng.); 3 Geo. 3, c. 11, § 10 (1763) (Eng.).

73. Distress For Rent Act, 11 Geo. 2, c. 19, § 7 (1737) (Eng.). The act of 1737 superseded one of 1623 that had allowed commissioners of bankrupts to break open any house or receptacle “reputed” to contain an absconding debtor or his possessions. 21 Jac. 1, c. 19, § 8 (1623) (Eng.). The law of 1623 was enforced until at least 1713. GILES JACOB, REVIEW 193 (1713).

74. *See* Distress For Rent Act, § 7.

75. *See* 6 & 7 W. & M., c. 17, § 8 (1695) (Eng.); JOSEPH HIGGS, GUIDE 43 (3d ed. 1750).

76. *See, e.g.*, 7 & 8 Will. 3, c. 30, §§ 12, 17 (1696) (Eng.) (allowing searches for beer and ale); 10 Will. 3, c. 4, § 4 (1698) (Eng.) (allowing searches for corn liquor); 1 Ann., c. 15, § 2 (1702) (Eng.) (allowing searches for salt); 9 Ann., c. 12, §§ 17, 30 (1710) (Eng.) (allowing searches for leather); 10 Ann., c. 18, §§ 13, 22, 25, 53, 59, 80, 185 (1711) (Eng.) (allowing searches for soap, paper, silk, linen, calicoes, and playing cards); 10 Ann., c. 26, §§ 14, 24, 52 (1711) (Eng.) (allowing searches for starch and gilt wire); 12 Ann., c. 2, §§ 4, 34 (1713) (Eng.) (allowing searches for malt, mum, cyder, and perry); 6 Geo. 1, c. 21, § 14 (1719) (Eng.) (allowing searches for brandy, arrack, rum, and spirits or “strong waters”); 10 Geo. 1, c. 10, § 12 (1723) (Eng.) (allowing searches for coffee, tea, cocoa, nuts, chocolate, and cocoa plate); 11 Geo. 1, c. 30, §§ 24-25 (1724) (Eng.) (allowing searches for candles); 9 Geo. 2, c. 23, § 9 (1736) (Eng.) (allowing searches for spirituous liquors generally); 19 Geo. 2, c. 12, § 9 (1746) (Eng.) (taxing glass); 3 Geo. 3, c. 12, §§ 10, 14 (1763) (Eng.) (allowing searches for wines). Another statute also subjected what are now called “bootleggers” to perpetual inspection for six months after

These taxes exposed all merchants licensed as the producers or vendors of the taxed items to perpetual warrantless search, night and day.

As the variety of excised articles multiplied in the first half of the eighteenth century, so did the commensurate populations vulnerable to promiscuous, *ex-officio* search. Eighteenth-century British privacy contracted as the excise dilated. In 1733, an anonymous article in the *Gentleman's Magazine* equated the growth of the excise to the progression of venereal disease.⁷⁷ When the excise reached beer and wine, another wag exclaimed:

*Grant these, and the glutton
Will roar out for mutton,
Your beef, bread and bacon to boot;
.....
He'll thrust down his gullet,
Whilst the labourer munches a root
.....
At first he'll begin ye
With a pipe of Virginie [tobacco],
Then search ev'ry shop in his rambles;
.....
Your cellars he'll range,
Your pantry and grange,
No bars can the monster restrain;
.....
Then sometimes he stoops
To take up the hoops
Of your daughters as well as your barrels[.]*⁷⁸

Between 1711 and 1757, these general methods of warrantless excise search also proliferated to various impost and impost-excise taxes on rope, linen, paper, velum, silk, and other products.⁷⁹ By 1760, the surveillance of excise officials had extended from the homes of the few to those of the many.

The New Hampshire poaching laws of 1741 and 1758 were only a few examples of the extensive colonial reliance on general warrantless house searches.⁸⁰ A typical Pennsylvania statute of 1727 regarding beef and pork destined for export empowered an official “without any further or other

conviction. 24 Geo. 2, c. 40, § 9 (1750) (Eng.).

77. *The Constitution Clapp'd, an Excise Ballad*, THE GENTLEMAN'S MAGAZINE: OR, MONTHLY INTELLIGENCER, Jan. 1773, at 41.

78. BRITAIN EXCISED, in CARICATURE HISTORY OF THE GEORGES, 1733, at 104-05 (Thomas Wright ed., 1876).

79. See 10 Ann., c. 19, §§ 12, 48, 98, 123 (1711) (Eng.); 3 Geo. 1, c. 7, §§ 1-3 (1716) (Eng.); 11 Geo. 1, c. 8, § 14 (1724) (Eng.); 16 Geo. 1, c. 26, § 4 (1742); 30 Geo. 2, c. 19, § 25 (1757) (Eng.).

80. See *supra* notes 26-28 and accompanying text.

warrant to enter on board any ship, sloop or vessel whatsoever . . . and into any house, store or places whatsoever within the province . . . to search.”⁸¹ In 1738, Virginia authorized every constable “to search in all suspected places” for poached deer skins.⁸² Such searches also characterized colonial legislation regarding Sabbatarian observance, the quality of merchandise, slave patrols, and southern tobacco production.⁸³

In addition, seven of the eighteenth-century colonies enacted warrantless, general excise searches: Massachusetts, Connecticut, Maryland, Rhode Island, New York, Pennsylvania, and New Jersey.⁸⁴ The first three of those colonies usually exposed only licensed professionals to such searches but, after 1739, the next three and New Jersey usually subjected the general public to them as well.⁸⁵ Thus, in 1750, Rhode Island empowered excise-men to inspect, without warrant, “the Houses of all such as are licensed, and of such as are suspected to sell without License.”⁸⁶

Only two of the colonies with excise legislation—Massachusetts and Pennsylvania—followed England’s lead and enacted supplementary search warrants.⁸⁷ Both colonies did so at the very end of the colonial period, Massachusetts in 1756 and Pennsylvania in 1772.⁸⁸

Revolutionary America also enacted general warrantless house searches to provision the armed services, catch deserters, and deter smuggling.⁸⁹ Moreover, colonial legislation affording such searches for slave management and other reasons endured into the revolution and afterward as well.⁹⁰ The thesis that the framers excluded warrantless house-to-house searches from the ambit of unreasonable search and seizure assumes that they suffered collective amnesia with respect to experience as well as thought.

81. Act of Aug. 18, 1727, ch. 295, § 5, *reprinted in* 4 JAMES TYNDALE MITCHELL ET AL., THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682-1801, at 75 (1897) (preventing unfair meat and pork packing destined for exportation).

82. Act of Nov. 12, 1738, ch. 14, § 6, *reprinted in* 5 WILLIAM WALLER HENING, THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 62 (W.W. Gray ed., 1819) (concerning the preservation of deer and prohibiting poaching).

83. See CUDDIHY, *supra* note 25, at 201-02, 215-27.

84. See *id.* at 202-03, 206-07, 210-12, 217-18.

85. See *id.*

86. J. FRANKLIN, ACTS AND LAWS OF HIS MAJESTY’S COLONY OF RHODE-ISLAND, AND PROVIDENCE-PLANTATIONS IN NEW ENGLAND IN AMERICA 89 (1849).

87. See Act of Feb. 28, 1756, ch. 31, § 24, *reprinted in* 3 ALBERT J. WRIGHT, THE ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF THE MASSACHUSETTS BAY 909-10, 915 (1878) (granting the king an excise upon distilled spirits, wine, limes, lemons, and oranges); Act of Mar. 21, 1772, ch. 657, § XIV, *reprinted in* 4 JAMES TYNDALE MITCHELL ET AL., THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682-1801, at 75 (1897) (preventing frauds and abuses in the manufacturing of leather).

88. See sources cited *supra* note 87.

89. See CUDDIHY, *supra* note 25, at 614-15, 621-22.

90. See *id.* at 624-26.

IV. A POLITICAL MANDATE FOR CONTINUITY

Another desideratum at this nexus is that the framers had no mandate to diminish the roster of rights that majority opinion had deposited even before the word “unreasonable” became significant to search and seizure in 1780. At the very core of American Revolutionary ideology was the passionate certainty that British government policy reflected a conspiracy to annihilate existing civil rights.

The pivotal denunciation of writs of assistance by James Otis in *Paxton's Case* (1761) is illustrative. Otis, a young Massachusetts lawyer, was probably the first to declare that only specific warrants were lawful.⁹¹ Writs of assistance of one kind were legal, declared Otis, “that is, *special writs, . . . to search certain houses, &c. especially set forth . . . upon oath made . . . by the person, who asks, that he suspects such goods to be concealed in THOSE VERY PLACES HE DESIRES TO SEARCH.*”⁹²

When codified in 1662, the writs adopted an established nomenclature and adapted techniques of promiscuous house search that had inhabited customs legislation and practice for centuries.⁹³ Moreover, a dozen other categories of contemporary English law authorized house-to-house searches.⁹⁴ General warrants were used not only to stop smuggling but also to deter vagrants, to recruit for the armed services, and to recover contraband lost through theft.⁹⁵ Otis, however, damned the writs as Star Chamber relics, as “instruments of slavery.”⁹⁶ Elsewhere, Otis blasted the writs as “destructive of English liberty, and the fundamental principles of the constitution.”⁹⁷ In his view, they reflected a Stuart absolutism that “cost one King of England his head and another his throne.”⁹⁸ Recalling *Paxton's Case* a few years later, Chief Justice Thomas Hutchinson charged that the opponents of the writs had injected “into the heads of the common people . . . [the idea] that these writs were contrary to their liberties as Englishmen.”⁹⁹

Likewise, in *Sewall v. Hancock* (1768), John Adams charged that a clause in a British statute of 1764 had divested Americans of the ancient right to trial by jury while preserving it for Englishmen:

91. See James Otis, *Against Writs of Assistance*, Address Before the Superior Court, February Term (1771), reprinted in 3 THE MASSACHUSETTS SPY OR, THOMAS'S BOSTON JOURNAL, Apr. 1, 1773; WRIGHT, *supra* note 88, at 909-10, 936-37; 4 WRIGHT, *supra* note 88, at 156-57.

92. Otis, *supra* note 91, at col. 1-2.

93. See 13 & 14 Car. 2, c. 11, § 5 (1662); CUDDIHY, *supra* note 25, at 154-57 (discussing the statute's terminology and legislation).

94. See, e.g., CUDDIHY, *supra* note 25, at 296-321.

95. *Id.*

96. Otis, *supra* note 91, at col. 1.

97. *Id.*

98. *Id.*

99. Hutchinson to the Earl of Kinnoull, 27 Oct. 1765, “Hutchinson Correspondence, 1761-70; Massachusetts Archives,” vol. 26, fol. 164, Massachusetts Archives, Boston.

Here is the Contrast that stares us in the Face! The Parliament in one Clause guarding the People of the Realm, and securing to them the Benefit of a Tryal by the Law of the Land, and by the next Clause, depriving all Americans of that Privilege. What shall we say to this Distinction? Is there not in this Clause, a Brand of Infamy, of Degradation, and Disgrace, fixed upon every American? Is he not degraded below the Rank of an Englishman? Is it not directly, a Repeal of Magna Charta, as far as America is concerned[?]¹⁰⁰

As Carl Ubbelohde has noted, however, vice-admiralty courts had hitherto been popular because their lack of juries afforded swift, professional adjudication that colonial merchants had desired.¹⁰¹ Only after the Sugar and Stamp Act Crises erupted in 1764–1766 did established fixtures of English law, such as writs of assistance and juryless trials, register as tyrannical in the American *mentalité*.¹⁰²

In 1772, the Bostonian protesters also saw themselves as “on the brink of Destruction, while the Iron Hand of Oppression is daily tearing the choicest Fruit from the fair Tree of Liberty, planted by our worthy Predecessors, at the Expence of their Treasure, and abundantly water’d with their Blood.”¹⁰³ In the same spirit, Andover denounced the powers of the customs commissioners as “despotic innovations.”¹⁰⁴ Responding to the Boston report, nearby Cambridge sought “Redress of those intolerable Grievances, which . . . if continued, must overthrow the happy civil Constitution of this Province.”¹⁰⁵ Dedham feared that British infringements of “invaluable rights . . . threaten this province and continent with certain and inevitable destruction.”¹⁰⁶ In distant Worcester County, Harvard desired “deliver[y] . . . from that abyss of infamy and slavery, which seems to be approaching . . . us.”¹⁰⁷

At a minimum, this apocalyptic mindset dictated the undiminished transmission of rights as history, not disembodied phraseology, had bequeathed them.¹⁰⁸ Immunity from promiscuous house searches, both without warrant and by general warrant, were two branches of Boston’s

100. John Adams, *Argument and Report, Sewall v. Hancock*, in 2 *LEGAL PAPERS OF JOHN ADAMS* 200 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

101. CARL UBBELOHDE, *THE VICE ADMIRALTY COURTS AND THE AMERICAN REVOLUTION* 20, 30 (1960).

102. *Id.* at 33-35, 61.

103. *BOSTON VOTES*, *supra* note 29, at 34.

104. *Abington Proceedings, 11 Jan. 1773*, 3 *THE MASSACHUSETTS SPY OR, THOMAS’S BOSTON JOURNAL* 1, Apr. 1, 1773.

105. *Cambridge Proceedings, 14 Dec. 1772*, *THE BOSTON-GAZETTE, AND COUNTRY JOURNAL*, Dec. 21, 1772, at 3.

106. *Dedham Proceedings, 4 Jan. 1773*, *THE BOSTON EVENING POST*, Jan. 4, 1773, at 2.

107. *Harvard Proceedings, 18 Feb. 1773*, *THE BOSTON-GAZETTE, AND COUNTRY JOURNAL*, Aug. 30, 1773, at 1.

108. See CUDDIHY, *supra* note 25, at 490-91.

“Tree of Liberty.”¹⁰⁹ By truncating the warrantless branch, the Davies iteration defied the mandate of undiminished transmission.¹¹⁰

Professor Davies has noted that:

People rarely write down what they do *not* think; hence, unexpected silences in historical statements indicate aspects of contemporary thought without analogs in historical thought. One can learn a good deal about what the Framers did not think about search and seizure by tracing modern concepts backwards in time—and finding they sometimes disappear from the historical record Dogs that do not bark in the night are essential guides to the past.¹¹¹

Therefore, tracing “unreasonable searches and seizures” backwards, Davies has concluded that, because the phrase vanishes from the historical record before 1780 (with the exception of Coke’s “against law”), the concept also had no substantive history before that date.¹¹² His second assumption is that the framers of 1780 and 1789 shared this first one.¹¹³

What Davies traced backwards, however, was only the phrase and not the concept of unreasonable search and seizure that the phrase inherited.¹¹⁴ The paranoid revolutionary mindset, however, operated at cross-purposes by emphasizing ineradicable concepts over philological methodology.¹¹⁵ Because the Massachusetts plebiscite of 1772–1773 had already bequeathed the unconstitutionality of warrantless house searches, the component words “unreasonable search and seizure” in the state constitutions of the 1780s necessarily embodied that bequest.¹¹⁶

According to professor Davies, I “have prochronistically imposed the *modern conception* of an overarching reasonableness standard on historical sources that never expressed any such notion.”¹¹⁷ The phrase “overarching reasonableness,” however, appears in nothing that I have ever published.

I have argued not for an overarching reasonableness, but for something quite different, an English concept of unreasonable search, for two reasons.¹¹⁸ First, the English inherited Greco-Roman concepts from the Roman occupation of Britain.¹¹⁹ With the Hebrews and Greeks, the Romans were among the few ancient peoples who invested the home with concepts of inviolability transcending the merely physical, or what we

109. *See id.* at 674, 687-93.

110. *See id.*; Davies, *Fourth Amendment*, *supra* note 2, at 699.

111. Davies, *Fourth Amendment*, *supra* note 2, at 591 n.105.

112. *Id.* at 591.

113. *See id.*

114. *See id.* at 595.

115. *See* CUDDIHY, *supra* note 25, at 175-231.

116. *See, e.g., Cambridge Proceedings*, *supra* note 105, at 3.

117. Davies, *Can You Handle the Truth?*, *supra* note 33, at 63.

118. *See* CUDDIHY, *supra* note 25, at lxi.

119. *See id.*

would today call privacy.¹²⁰ In the Talmud, circa 500 B.C.E., the Hebrews started the ball rolling, so to speak, by prohibiting “overlooking,” and the Greeks and Romans thought along similar lines.¹²¹ Although I never published this research, now some forty years old, I provided a small piece of it in my book in 2009.¹²²

Second, the whole history of Anglo-American search and seizure from 602 to 1791 can be summarized as the assumption that government access to the home was limited. Although Englishmen and Americans did not constitutionally marry “unreasonable” to “searches and seizures” until 1780, the unifying theme to the vast bulk of Anglo-colonial protest literature regarding search and seizure over the preceding two centuries was the consistently organizing assumption that government entrance into the private dwelling had boundaries.

Having studied the emergence of the English search process from the seventh century onwards, I saw both assumed and disputed categories of search and seizure accumulate, layer after layer. History viewed from back to front is not “prochronism” but its exact opposite.

The archaic concept of unreasonable search and seizure that I posited bore no relation to Davies’s description of it. At first, between 600 and 1500, Englishmen were interested in little more than the prevention of violent, life-threatening entry into their homes, and government, such as it was, was likewise uninterested. After the Reformation, that all changed rapidly, and long before 1791, the observable typologies of government search and seizure had polarized into fairly discrete categories of negative and positive. Arrest warrants and warrantless exigencies both afforded ambits of legitimate search about them, as did specific search warrants. Houses were immune to entry via general warrants and their warrantless cousins, and nocturnal and unannounced entries were likewise in the negative category. Both categories were few in number and quite discrete in description with no “overarching” attributions, assumptions, or ramifications.

Professor Davies embraces L.P. Hartley’s aphorism that “[t]he past is a foreign country: they do things differently there.”¹²³ Davies, however, overlooks the implications, which embrace not only conscious words and behavior but unarticulated assumptions, alternatives, methodology, and culture.

A crucial point is that the splenetic outrage of those who had endured or witnessed violent, house-to-house searches defined much of the resulting consensus on that subject by 1760. Unlike Professor Davies, they did not

120. *See id.* at lx-lxi.

121. *See id.*

122. *See id.* at xci-xciv.

123. *See* Davies, *Fourth Amendment*, *supra* note 2, at 547 n.aa1 (quoting L. P. HARTLEY, *THE GO-BETWEEN* 17 (1953)).

and could not exercise objective, dispassionate textual analysis. An enraged Elizabethan of 1582, who protested that his fellow Catholics could not enjoy an hour's immunity from the sudden, forcible invasion of their dwellings, epitomized the point:

For at midnight oure aduersaries oftentimes rushe in forcibly vpo[n] them, and sett a watche aboute the house, that none may escape: then they searche euery chamber, euen the bedchambers of wiues and maidens: aboute they goe through all the house from place to place, veweing, tossing, & rifeling in euery corner, chests, coffers, boxes, caskets, and closetts. And yf anie thing happen to be fownd that maye worcke some detection of religio[n], or may brede anie blame, or minister matter of surmise: as siluer chalices, patens, candlesticks, crosses, books, vestments, & other ornamets whiche are called churche stuffe: these they snatche away, by a priuilidge of robbetrie And lest anye thing els should be lost by negligence, they stick not to ryfle the bosomes, purses, and coffers of honest matrones, yea and to vncouer their verie innermost garments, & oftentimes to teare & re[n]t the[m] a sunder with violence, to see yf anye Agnus dei, crucifix, medalls, beads or anie halowed things doe lye hydd there.¹²⁴

Although this author did not use the word “unreasonable,” one does not have to pause a second to ask if he or countless successors thought conduct of this kind unreasonable. The vocabulary of pejoratives used to constrain objectionable searches and seizures was always infinite; every available word that could be employed was employed. The absence of “unreasonable” from the vocabulary of search and seizure before 1780 did not mean that promiscuous house searches without warrant or any other technique was considered reasonable but merely that no one had yet considered adding unreasonable to the roster of pejoratives.

That is the critical point. In two centuries of evolution, the architects of the right never limited the methodology of its construction to dispassionate textual analysis, nor in rejecting promiscuous house searches did they divorce those that general warrants caused from those caused without them. Unlike Davies, those architects did not rely exclusively on the dialectical reductionism of words read backwards in the quiet of a law school. From 1582 to 1780, most advocates of a right against house-to-house searches had experienced them horrifically, did not care whether their cause included or lacked a warrant, and had motives for redress as much visceral as Socratic. To ignore the experiential foundations of the right is to misconstrue its definition.

124. BRIANT, *supra* note 16, at 127-28.

One final point remains. Professor Davies consistently assumes that the amendment and the common law interpenetrate.¹²⁵ His thesis reflects the house-as-castle rhetoric and damnations of the general warrant that suffused the many *Wilkes Cases* and the concurrent debates in and out of Parliament throughout the 1760s.¹²⁶

In the dispositive holding of those cases, on June 18, 1765, however, Lord Mansfield of the King's Bench struck down the general warrant used to arrest John Wilkes and search multiple houses because no statute had authorized it.¹²⁷ Elsewhere, he noted "many instances" in which legislation had enabled general warrants to endure.¹²⁸ Hence, the common law did not extinguish all general warrants, only the category without a statutory foundation. By contrast, the Fourth Amendment does extinguish all such warrants regardless of category or foundation. Therefore, it was written not to embody the common law but to transcend its limitations.

125. Davies, *Fourth Amendment*, *supra* note 2, at 624-42.

126. CUDDIHY, *supra* note 25, at 443-64, 469-76.

127. *See Money v. Leach*, (1765) 97 Eng. Rep. 1075.

128. *Id.* Mansfield specifically upheld the legality of general writs of assistance under the customs laws and of general searches under the vagrancy laws. *Id.*