

# STUMBLING TOWARD HISTORY: THE FRAMERS' SEARCH AND SEIZURE WORLD

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I.	THE UNILLUMINATING TEXT .....	202
II.	THE COLONIAL HISTORY .....	206
III.	THE ENGLISH TORT “REVOLUTION” AGAINST GEORGE III.....	210
IV.	FROM THEN TO NOW: FRAMING-ERA RULES AND MODERN DOCTRINE .....	214
	A. <i>Tort Damages as a Sole Remedy for a Fourth Amendment Violation</i> .....	215
	B. <i>Framing-Era Search and Seizure Rules</i> .....	219
	1. <i>Tort of Trespass</i> .....	219
	2. <i>Values Protected by Common-Law Search and Seizure Rules</i> .....	221
	3. <i>A Primer on Trespass by Force Resulting in Harm</i> .....	225
	C. <i>Today’s Court and the Framing-Era Rules</i> .....	228

Most of what you think you know about the Fourth Amendment is wrong—at least as a matter of what the Framers intended. The problem begins with the text, which does not provide a workable metric for a general theory of the appropriate limits on government searches and seizures. Indeed, reading the text without the gloss supplied by history or the Court’s doctrine reveals that it provides almost no guidance on any issue except the contents of a warrant. In Tony Amsterdam’s famous words from 1974, the Fourth Amendment text is “brief, vague, general, unilluminating.”<sup>1</sup> To remedy the emptiness of the text, the Court has created a doctrine that draws on history, even though the core of the doctrine for the last forty years cannot be reconciled with history.

The goal of this essay is to recover the eighteenth-century world of search and seizure and then to show that the Court has “stumbled” into at least a few categories of Fourth Amendment doctrine that bear a fairly close doctrinal relationship to the Framers’ search and seizure world. Given that

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1. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 353-54 (1974).

the law enforcement regime of 2010 is radically different from what the Framers knew, the similarities in these categories are striking. As Thomas Davies points out in his article for this symposium, however, the Court has hollowed out the doctrines that it took from history, and it is fair to conclude that the Fourth Amendment today provides substantially less protection than the common law provided in 1791.<sup>2</sup>

I should be clear about the limitations of my project. Though Arnold Loewy invited us to consider what role history *should* play in construing the Fourth Amendment, and there exists a vast literature debating originalist theories that would make history central to the modern Court's work, David Sklansky, for example, has argued that any attempt to understand "unreasonable searches and seizures" by reference to the substantive common law of the time should be rejected in favor of simply relying on the Court's traditional Fourth Amendment doctrine and the common law methodology of *stare decisis*. I offer no opinion on Sklansky's thesis or the competing thesis put forth by recent Supreme Court opinions.<sup>3</sup> Indeed, I offer no opinion about how a court should approach the historical evidence I present here. There are two reasons for my cautious approach.

First, most common-law rules could be altered by statute. Whether that was true about some, all, or none of the framing-era search and seizure rules is a question that I'm not prepared to answer at this time. The famous English tort cases from the 1760s, surveyed in Part III, suggest that at least the core of the common-law search and seizure rules might have been beyond the reach of Parliament. But if some, or all, of the common-law search and seizure rules were subject to legislative override, then there is no direct comparison to the constitutional regime in which we live today.

The second way my project is limited is in the transferability of common-law search and seizure rules to today's law enforcement world. It is difficult to convey how different "law enforcement" was in 1791 from today's para-military investigative operation. There were no police in 1791. Sheriffs were responsible for holding suspects who could not make bail until their trials, which came days rather than months or years after arrest.<sup>4</sup> Sheriffs sometimes served warrants, writs, and other legal process.<sup>5</sup>

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

<sup>3</sup> David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1809-13 (2000). For the Supreme Court opinions offering a competing thesis, see *infra* notes 42-51 and accompanying text.

4. CONDUCTOR GENERALIS 22 (2d ed. 1749); see George C. Thomas III, *Colonial Criminal Law and Procedure: The Royal Colony of New Jersey 1749-57*, 1 N.Y.U. J. L. & LIBERTY 671, 675-79 (2005) (discussing mid-eighteenth century New Jersey criminal cases, showing that defendants were often tried to verdict in the afternoon after they were indicted that morning).

5. See 5 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW 163, 177 (1766).

Constables also served writs and warrants.<sup>6</sup> In addition, unlike sheriffs, constables were responsible for maintaining order in the streets.<sup>7</sup> They could make arrests for breaches of the peace committed in their presence and could even break doors to enter homes to “see Peace kept.”<sup>8</sup> Constables could arrest for felonies “upon Suspicion,” though the validity of a warrantless arrest was generally conditioned on a felony having been committed in fact.<sup>9</sup> They could put those who refused to comply with an order in the stocks until they agreed to comply.<sup>10</sup> They were responsible for fining unlicensed ale-houses and could whip those convicted of operating without a license on orders from a justice of the peace.<sup>11</sup> Constables could be fined and even jailed if they did not do their duty.<sup>12</sup>

The constable’s oath from the leading eighteenth-century justice of the peace manual, *Conductor Generalis*, gives us a picture of the life of the constable.<sup>13</sup> They swore: “Armed men to arrest . . . Bloodshed to prevent [prevent?] . . . Felons to apprehend. . . Hue-and-Cry to see made. Idle persons punished. Night-walkers to punish. Peace to keep, &c. . . Riot to suppress and apprehend. Rogues to punish. Vagabonds to apprehend. Warrants to execute. Watch to keep.”<sup>14</sup>

What constables did *not* do was investigate crime.<sup>15</sup> They reacted to events that unfolded before them or to complaints related to them, and they served legal process issued by courts.<sup>16</sup> Unlike modern police, constables had no incentive to search for evidence of crime unless ordered to do so, usually in the nature of a warrant to search for stolen goods.<sup>17</sup> But in the absence of a warrant, constables reacted to events rather than seeking to solve crime.

Thus, the only claim I make for my essay is that the men who wrote and ratified the Fourth Amendment would have known the common-law rules about search and seizure. To the extent that they intended the Fourth Amendment, or some other part of the Constitution, to limit the power of

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6. See *CONDUCTOR GENERALIS*, *supra* note 4, at 59, 61-62.

7. See *id.* at 56-60.

8. *Id.* at 56.

9. *Id.* at 58; 2 WILLIAM HAWKINS, *A TREATISE OF THE PLEAS OF THE CROWN: OR A SYSTEM OF THE PRINCIPAL MATTERS RELATING TO THAT SUBJECT, DIGESTED UNDER PROPER HEADS* 76, ch. 12, sect. 15 (1721) (stating general rule); *id.* at 82, ch. 13, sect. 11 (stating that an arrest pursuant to a warrant ought not require that a felony in fact be committed).

10. *CONDUCTOR GENERALIS*, *supra* note 4, at 57.

11. *Id.* at 57, iii-iv.

12. *Id.*

13. See *id.* at 60-62.

14. *Id.* at 60.

15. See *id.* at 56-60 (discussing all of the constable’s duties without mentioning the investigation of crime).

16. See *id.*

17. See *id.*

government to search and seize, it seems likely that the Framers would have had the common-law rules in mind.

### I. THE UNILLUMINATING TEXT

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.<sup>18</sup>

Notice that the first clause tells us *nothing* about what qualifies as a reasonable search. Nor does either clause tell us *when* warrants are required. The second clause tells us that *when warrants issue*, there are requirements of probable cause and particularity. But if there is no requirement that warrants issue, Congress could presumably authorize all searches to be conducted without warrants and thus avoid the second clause entirely. While Akhil Amar does not go that far, he does argue that the Framers viewed warrants as potentially undermining the rights guaranteed by the Fourth Amendment, and thus, would have wanted warrants used less rather than more frequently.<sup>19</sup>

To avoid admitting that the Fourth Amendment text is woefully incomplete, the Court has long insisted that the second clause somehow gives meaning to the first clause.<sup>20</sup> As early as 1925, the Court claimed that the “Fourth Amendment guaranty” requires that warrants must be used “where the securing of a warrant is reasonably practicable.”<sup>21</sup> Justice Frankfurter “was perhaps the most articulate proponent of that view” in dissents in the 1940s and 1950s.<sup>22</sup> In the 1960s, the Court began to speak of a “search warrant requirement” with exceptions for particular categories.<sup>23</sup> In 2010, the Court was still insisting that “warrantless searches ‘are *per se* unreasonable under the Fourth Amendment,’” subject to “‘a few specifically established and well-delineated exceptions.’”<sup>24</sup>

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18. U.S. CONST. amend. IV.

19. See AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 10-13 (1997).

20. See *id.* at 3-4.

21. *Carroll v. United States*, 267 U.S. 132, 156 (1925).

22. THOMAS K. CLANCY, *THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION* 472 (2008) [hereinafter CLANCY, *THE FOURTH AMENDMENT*].

23. A Westlaw search turned up seventeen cases. The earliest case to use a “search warrant requirement” was a concurring opinion in *Warden v. Hayden*, 387 U.S. 294, 312 (1967) (Fortas, J., concurring). Less than a month later, the Court used the term in *Camara v. San Francisco*, 387 U.S. 523, 533 (1967). The most recent usage was *Brigham City, Utah v. Stuart*, 547 U.S. 398, 398 (2006).

24. *City of Ontario v. Quon*, 130 S. Ct. 2619, 2630 (2010) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). A more elaborate statement of the “search warrant requirement” can be found in *Arizona v. Gant*, 129 S. Ct. 1710, 1716 (2008).

While some kind of search warrant preference is linguistically plausible, the problem is that the only metric in the text that might tell us when a warrant is required, or an exception justified, is “unreasonable searches and seizures.”<sup>25</sup> But the word “unreasonable” in the abstract—divorced from history or normative judgments—tells us nothing about how to sort searches into categories that require a warrant and categories that do not. To see the vacuity of the first clause of the Fourth Amendment, compare it with other Bill of Rights criminal procedure guarantees. Despite difficulties at the margin, we have a pretty good idea what a “speedy and public trial, by an impartial jury” means.<sup>26</sup> A defendant’s right “to be confronted with the witnesses against him” has, as the Court discovered, some lurking complications, but the central idea is clear enough.<sup>27</sup> Defining the full parameters of being “compelled in any criminal case to be a witness against himself” is no easy feat, but the reader at least has a template in mind of what the Fifth Amendment privilege prohibits.<sup>28</sup> Even the famously vague “due process of law” tells us that defendants have a right to some kind of process before they are deprived of life, liberty, or property.<sup>29</sup> Some meaning, however murky, is conveyed by the text of all the other criminal procedure guarantees.

Not so for “unreasonable searches and seizures.” A moment’s reflection makes plain how unhelpful it is as a metric. Is it reasonable to search an arrestee incident to a lawful arrest without a warrant? Yes.<sup>30</sup> Is it reasonable to search a home without a warrant, consent, or exigent circumstances? No.<sup>31</sup> But there is nothing inherent in the term “unreasonable” that produces these results. Rather, the historic value that the common law placed on property and privacy associated with homes dictates that a warrant is generally required. The arrestee, on the other hand, has lost much of his liberty and privacy because of the lawful arrest. Given the legitimate interest in seizing evidence and weapons before transporting arrestees to a custodial setting, the Court has long sanctioned

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

26. U.S. CONST. amend VI. Defining “speedy” has proven to be the principal difficulty. The unanimous opinion in *Barker v. Wingo*, 407 U.S. 514 (1972), obscures more than it informs, as *Doggett v. United States*, 505 U.S. 647 (1992), makes plain.

27. U.S. CONST. amend. VI. The difficulties of the text are manifest in *Crawford v. Washington*, 541 U.S. 36 (2004), where the Court rejects decades of dicta about how to understand the Confrontation Clause.

28. U.S. CONST. amend. V. The Court was hopelessly fractured in *Chavez v. Martinez*, 538 U.S. 760 (2003), when it tried to interpret the Fifth Amendment privilege in the context of civil liability under 42 U.S.C. § 1983.

29. U.S. CONST. amend. V & amend. XIV. The difficulties here are manifested early, in *Hurtado v. California*, 110 U.S. 516 (1884), where the Court tied itself in knots trying to apply the Magna Carta, the Assize of Clarendon (1166), and Lord Coke to the problem of whether due process includes the right to an indictment. Even though Coke said the law of the land did include a right to an indictment, the Court held that our Due Process Clause does not. *Hurtado*, 110 U.S. at 537-38.

30. *Chimel v. California*, 395 U.S. 752, 762-63 (1969).

31. *Vale v. Louisiana*, 399 U.S. 30, 33-34 (1970).

searches incident to lawful arrests.<sup>32</sup> But to claim that the word unreasonable does any work in this analysis is to engage in fancy.

Tom Davies has argued that the Framers would have used unreasonable as a synonym for “gross[ly] [ ] or . . . inherently illegal.”<sup>33</sup> In 1814, the Supreme Court of Connecticut considered a warrant that permitted the constable to search A’s house or anywhere in town for stolen goods.<sup>34</sup> The court held that “[t]his is a general search-warrant, which has always been determined to be *illegal*, not only in cases of searching for stolen goods, but in all other cases.”<sup>35</sup> The warrant was illegal, the court said, even though the stolen goods were found in A’s house because the warrant should never have been issued as drafted.<sup>36</sup>

If we read “unreasonable” as “illegal,” today we would say, “The right of the people to be secure in their persons, houses, papers, and effects, against illegal searches and seizures, shall not be violated.”<sup>37</sup> This reading either states the obvious and tells us nothing, or it tells us *why* the specific requirements of the Warrant Clause are there—to prevent general warrants. To be sure, the second clause says nothing about general searches conducted via legislative authorization, but a simple analogy works here. If general warrants are considered illegal under the first clause, and banned by the second, legislative authorization of general searches would be illegal as well.<sup>38</sup> But to tell us that general searches are illegal says nothing about what other searches and seizures, if any, the Framers considered illegal.

Davies has offered considerable evidence that the only target of the Fourth Amendment was the general search, and by implication, a legislatively authorized writ of assistance.<sup>39</sup> Amar, Clancy, Cuddihy, and earlier scholars disagree, insisting that though the evidence is sketchy, the Framers would have wanted the Fourth Amendment to ban other kinds of illegal searches.<sup>40</sup> Davies’ reading of the history is one solution to the

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

33. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 686-93 (1999) [hereinafter Davies, *Recovering*]; Thomas Y. Davies, *Correcting Search-and-Seizure History: Now-Forgotten Common-Law Warrantless Arrest Standards and the Original Understanding of “Due Process of Law”*, 77 MISS. L.J. 1, 116-17 (2007) [hereinafter Davies, *Correcting Search-and-Seizure History*].

34. *Grumon v. Raymond & Betts*, 1 Conn. 40, 48 (1814).

35. *Id.* at 43 (emphasis added).

36. *Id.* at 47-48.

37. Cf. U.S. CONST. amend. IV (replacing the word “unreasonable” in the Constitutional text with the word “illegal”).

38. How the Framers intended the illegality of writs of assistance to be remedied is a nice problem beyond the scope of this essay, though the Due Process Clause is a good candidate.

39. Davies, *Recovering*, *supra* note 33, at 604.

40. AMAR, *supra* note 19, at 31-40; Thomas K. Clancy, *The Framers’ Intent: John Adams, His Era, and the Fourth Amendment*, 86 IND. L.J. (forthcoming 2010) [hereinafter Clancy, *Adams and the Fourth Amendment*]; WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING* 1602-1791, at 601-782 (2009); see also NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 81 (1937).

riddle of why the Framers did not tell us about any other category of unreasonable searches and seizures or when warrants are necessary.<sup>41</sup> If general illegal warrants were the only target of the Fourth Amendment, it was not badly drafted or vague, just remarkably narrow. But there is another solution to the unilluminating text problem.

As Justice Scalia has recognized, Fourth Amendment reasonableness *can* be uncovered in history.<sup>42</sup> We could reconstruct what searches and seizures the Framers would have viewed as illegal by “returning to the first principle that the ‘reasonableness’ requirement of the Fourth Amendment affords the protection that the common law afforded.”<sup>43</sup> Scalia concedes that changes in the legal and social world might require changes in the framing-era common law, but for him, looking at history at least provides a starting place.<sup>44</sup> The Court essentially agrees.<sup>45</sup> In perhaps the Court’s most ambitious (though ultimately flawed) attempt to recover framing-era rules, the Court said: “An examination of the common-law understanding of an officer’s authority to arrest sheds light on the obviously relevant, if not entirely dispositive, consideration of what the Framers of the Amendment might have thought to be reasonable.”<sup>46</sup>

More recently, Scalia said in *Wyoming v. Houghton* that if an “action was regarded as an unlawful search or seizure under the common law when the Amendment was framed,” that is the end of the inquiry.<sup>47</sup> As Tom Clancy has observed, this was a new use of history, and the novelty of the *Houghton* inquiry did not escape the attention of the concurring and dissenting opinions.<sup>48</sup> Breyer’s concurring opinion begins, “I join the Court’s opinion with the understanding that history is meant to inform, but not automatically to determine, the answer to a Fourth Amendment question.”<sup>49</sup> Justice Stevens’s dissent, joined by Justice Souter and Justice Ginsburg, cautions, “To my knowledge, we have never restricted ourselves to a two-step Fourth Amendment approach wherein the privacy and governmental interests at stake must be considered only if 18th-century common law ‘yields no answer.’”<sup>50</sup>

By the time we get to *Virginia v. Moore*, however, eight members of the Court accepted the proposition that “[w]hen history has not provided a conclusive answer, we have analyzed a search or seizure in light of

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41. Davies, *Recovering*, *supra* note 33, at 723-24.

42. *California v. Acevedo*, 500 U.S. 565, 583 (1991) (Scalia, J., concurring).

43. *Id.*

44. *Id.*

45. *See id.*

46. *Payton v. New York*, 445 U.S. 573, 591 (1980); *see infra* Part IV.C.

47. *Wyoming v. Houghton*, 526 U.S. 295, 299-300 (1999).

48. CLANCY, *supra* note 22, at 507-09.

49. *Houghton*, 526 U.S. at 307 (Breyer, J., concurring).

50. *Id.* at 311 n.3 (Stevens, J., dissenting).

traditional standards of reasonableness . . . .”<sup>51</sup> That sounds a lot like the *Houghton* inquiry in different words. In any event, in honor of the theme of the Texas Tech University School of Law symposium, I will take my challenge to be to set out the framing-era common law that regulated searches and seizures.

## II. THE COLONIAL HISTORY

The history is clear that the colonists were hostile to British searches under the infamous writs of assistance.<sup>52</sup> These searches required neither a warrant nor probable cause.<sup>53</sup> The writs expired only when the monarch expired, and thus, were always available during the life of George II.<sup>54</sup> In one of the first openly-hostile acts against the British, the colonies protested against re-authorization of the writs early in George III’s reign.<sup>55</sup> The opposition failed, the writs were re-authorized, and the colonists fumed.<sup>56</sup> This history explains the detail offered in the second clause. The Framers wanted to be certain that Congress could not authorize writs of assistance and that judges could not issue general warrants.

Whether or not Davies is correct that the Framers intended only to ban general searches, it is clear that general searches were their principal concern. The Framers did not have in mind the kinds of ordinary criminal arrests and searches that fill thousands of pages of our law reports today. By “ordinary criminal arrests and searches” I mean those connected with common-law crimes like larceny and robbery, rather than customs or excise searches. There is no mention of ordinary criminal arrests and searches in the debates that led to the Bill of Rights.

To be sure, there were plenty of fireworks directed at the specter of powerful federal officers invading the privacy of ordinary citizens.<sup>57</sup> But all of these remarks were directed at officers who ransacked homes with impunity.<sup>58</sup> For example, in 1788, a Federalist writer who published under the pseudonym “FOREIGN SPECTATOR” imagined “the dreadful giant Congress storming our domestic castles” and “searching our cellars, garrets,

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51. *Virginia v. Moore*, 553 U.S. 164, 171 (2008). *Moore* was decided after Clancy’s book was published.

52. M. H. SMITH, *THE WRITS OF ASSISTANCE CASE* 96 (1978).

53. *See id.* at 59.

54. *Id.* at 130. The writs were first applied to the colonies by the Act of Frauds, 1696. *See id.* at 108-11.

55. *Id.* at 125-386.

56. *Id.* at 453-519.

57. *See CUDDIHY*, *supra* note 40, at 674-79.

58. *See id.* at 676-79.



bed-chambers and closets by a cursed host of excise-men worse than the Prussian Death-Heads or the Emperour's Pandours."<sup>59</sup>

The ratification debates in the Virginia convention were among the most intense, in large part because of the fiery Patrick Henry. On June 5, 1788, Henry predicted that the proposed Constitution would create:

[T]wo sets of tax-gatherers—the state and the federal sheriff. This, it seems to me, will produce such dreadful oppression as the people cannot possibly bear. The federal sheriff may commit what oppression, make what distresses, he pleases, and ruin you with impunity; for how are you to tie his hands?<sup>60</sup>

In a different speech, Henry predicted that “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.”<sup>61</sup> In yet another speech, Henry thundered:

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>62</sup>

George Mason expressed a similar concern, predicting that excise taxes “will carry the exciseman to every farmer's house who distills a little brandy, where he may search and ransack as he pleases.”<sup>63</sup> Pamphleteers and essayists also painted nightmarish futures.<sup>64</sup> Excisemen were the “scurf and refuse of mankind” who would “not hesitate to search the petticoats of the fair sex in pursuing their office.”<sup>65</sup> They would search “our bed-chambers” by “the brutal tools of power,” subjecting “the most delicate part of our families . . . to every species of rude or indecent treatment.”<sup>66</sup> “A

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59. See *id.* at 679 (quoting “Remarks on the Amendments to the Federal Constitution . . . by a FOREIGN SPECTATOR,” no. 12, *The Federal Gaz.*, and *Philadelphia Evening Post*, December 2, 1788, at p. 2, col. 2).

60. 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 57 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott Co. 1836) [hereinafter Elliot's DEBATES] (Patrick Henry, June 5, 1788, the Virginia ratification convention).

61. *Id.* at 588 (Patrick Henry, June 24, 1788, Virginia ratification convention).

62. *Id.* at 448-49 (Patrick Henry, June 14, 1788, Virginia ratification convention).

63. *Id.* at 209 (George Mason, June 11, 1788, Virginia ratification convention).

64. See CUDDIHY, *supra* note 40, at 673-80.

65. *Id.* at 678 (quoting *An Essay by a Farmer and Planter*, MARYLAND J. & BALT. ADVERTISER, Apr. 1, 1788, at 2).

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

Son of Liberty” warned of “the insolence” and “daring brutality” of the tax collector.<sup>67</sup> Writs of assistance were condemned as a “detestable instrument of arbitrary power” that “invited capricious house searches by insolent officers of the new central government.”<sup>68</sup>

These were the government actions that the Framers had in mind when they drafted the Fourth Amendment and sent it to the states. They were not concerned about the arrests and searches of those suspected of ordinary crimes like theft and robbery, or about warrants issued to search for evidence of ordinary crimes. There are at least three reasons the Framers’ concerns were largely, if not exclusively, with general searches rather than ordinary criminal arrests and searches.

First, as is implied in the attacks just quoted, excise searches could be used by the newly-minted, powerful federal government to cripple or destroy its enemies.<sup>69</sup> Thus, that power had to be restrained. Second, the Fourth Amendment only applied to the federal government, and the government created by the Constitution was truly (in those days) a government of limited powers.<sup>70</sup> It had little to do with ordinary crimes. The Constitution gave Congress power to create federal crimes of counterfeiting, piracy, felonies on the high seas, offenses against the law of nations, and treason.<sup>71</sup> The first federal criminal code defined these crimes and added a few common-law crimes, like larceny and murder, if committed on a federal enclave.<sup>72</sup> But the ordinary robbery, larceny, or homicide was the sole province of the states.<sup>73</sup> There was no need to limit the power of officers in the pursuit of those crimes because they would not have been federal officers, and their acts, therefore, fell outside the Fourth Amendment.<sup>74</sup>

Third, the Framers would have wanted ordinary criminals to be caught and punished. Unlike today, the Framers would not have confused the need to prevent arbitrary uses of government power with the need to shield criminals from the reach of the law. The federal government was, to the Anti-Federalists, the most feared enemy, but criminals were also a potential threat to order and the economy. As long as the powerful federal

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67. *Id.* at 677 (quoting “Cato Uticensis,” VIRGINIA INDEPENDENT CHRONICLE, Oct. 17, 1787, at 1).

68. *Id.* (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)).

69. *See* U.S. CONST. art I, art. III.

70. *See* *Barron v. Baltimore*, 32 U.S. 243, 250-51 (1833) (declaring, in a unanimous opinion authored by Chief Justice Marshall, that private property shall not be taken for public use without just compensation, is intended as a check on the federal government, but is not applicable to the states).

71. *See* U. S. CONST. art. I, § 8 (enumerating the authority to punish counterfeiting, piracy, felonies on the high seas, and offenses against the law of nations); *see also id.* at art. III, § 3 (enumerating the authority to punish treason).

72. *See* Crimes Act of April 30, 1790, ch. 9, 1 Stat. 112.

73. *Id.* at 113.

74. *See id.*

government could be prevented from conducting general searches and seizures, the Framers would have been satisfied that they had taken care of the most serious problem of aggressive government searches and seizures.

To the extent that the Fourth Amendment was meant to regulate the conduct of federal officers investigating ordinary crimes on federal property, there was no reason to say anything about that in the Fourth Amendment because the common-law search and seizure rules were “settled and noncontroversial,” and thus, it would not have occurred to the Framers that there was any need to state them.<sup>75</sup> As we will see, the law of trespass visited draconian penalties on constables and complainants guilty of being too aggressive in searching and seizing.<sup>76</sup> If the law of trespass had been sufficient to rein in King George III when he tried to mute criticism of the crown, and we will see that it was, trespass was strong enough to keep federal officers in line when dealing with ordinary crime.<sup>77</sup>

Davies argues that the Framers incorporated the framing-era rules about arrests and searches in the Fifth Amendment Due Process Clause.<sup>78</sup> Unlike Davies, I think the Framers probably left the day-to-day protection of privacy and property to the law that had governed search and seizure for many centuries—tort law and, specifically, the law of trespass. Davies himself notes the “crucial fact about the early state declarations and the Federal Bill of Rights is that they were framed in the era of common law. The principles and rules of common law were generally regarded as settled and permanent.”<sup>79</sup> Because the Framers were crafting rights to exist alongside the permanent common law, “the American declarations of rights were not framed to be comprehensive catalogs of procedural rights.”<sup>80</sup>

One fact we know for certain: the extremely narrow scope of federal law enforcement meant that the regulation of almost all search and seizure activity was left to the common law and not the Fourth Amendment.<sup>81</sup> Even today, state and local officers conduct the vast majority of ordinary criminal arrests and searches.<sup>82</sup> The Fourth Amendment applies to them

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75. Davies, *Correcting Search-and-Seizure History*, *supra* note 33, at 20.

76. *See id.* at 30.

77. *See id.* at 157.

78. *Id.* at 39-86.

79. *Id.* at 18.

80. *Id.*

81. *See id.* at 18-19.

82. *See* Heather C. West & William J. Sobol, *Prison Inmates at Midyear 2008—Statistical Tables*, BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, 2-21 (Apr. 8, 2009), <http://bjs.ojp.usdoj.gov/content/pub/pdf/pim08st.pdf>. Prison populations are a rough proxy for the incidence of search and seizure activity although they probably overstate the number of federal searches and seizures. *Id.* A substantial number of federal crimes would not qualify as “ordinary crimes” and are investigated by wiretapping, informants, subpoena, and grand jury proceedings rather than searches and seizures. *Id.* In 2005, federal prisoners were approximately 12% of the total prison population. *Id.* Thus, we can safely conclude that state and local officers conduct approximately 88% of all searches and seizures. *Id.*

today, of course, via the Fourteenth Amendment.<sup>83</sup> The extent to which the Framers of the Fourteenth Amendment had a more robust role in mind for the Constitution in regulating ordinary criminal arrests and searches is unknown. Andrew Taslitz offers a detailed treatment of this issue, concluding “that the Fourth Amendment was so fundamental a guarantee that the Reconstruction Congress expected it to be protected against individual state infringement as a consequence of the Fourteenth Amendment’s ratification.”<sup>84</sup> I am skeptical. To me, the congressional debate over the Fourteenth Amendment was a cacophony, and the yawning silence in the country prior to ratification suggests that the state legislatures did not intend to affix the Bill of Rights onto their existing criminal processes.<sup>85</sup> But for purposes of this essay, to keep things simple, I am happy to assume that the Fourteenth Amendment applied the Fourth Amendment to the states just as it applied to the federal government in 1791.

That brings us back to the framing-era search and seizure rules. Whether Davies is right that the framing-era common law is part of due process of law, or I am right that the Framers expected the common law to continue to regulate ordinary criminal arrests and searches, it is beyond doubt that the Framers wrote the Bill of Rights with these framing-era rules as a backdrop.<sup>86</sup> To set the stage for the framing-era rules, I begin with a brief trip through the use of tort law to restrain King George III in the 1760s.

### III. THE ENGLISH TORT “REVOLUTION” AGAINST GEORGE III

That tort law provided protection against illegal searches and seizures should not surprise. The most famous colonial-era search case, *Entick v. Carrington*, was in one way a routine application of tort law of the time.<sup>87</sup> If an eighteenth-century constable searched a house without a valid warrant, and found no stolen goods or other contraband, he was strictly liable to the owner for the tort of trespass.<sup>88</sup> In John Entick’s case, the King’s

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83. See *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (holding that the Fourteenth Amendment prohibits evidence obtained in violation of the Fourth Amendment from being used in criminal prosecutions in state court, as well as federal court).

84. ANDREW E. TASLITZ, *RECONSTRUCTING THE FOURTH AMENDMENT* 256 (2006).

85. See George C. Thomas III, *Newspapers and the Fourteenth Amendment: What Did the American Public Know About Section 1?*, 18 J. CONTEMP. LEGAL ISSUES 323 (2009) (expressing skeptical thoughts on these issues); George C. Thomas III, *The Riddle of the Fourteenth Amendment: A Response to Professor Wildenthal*, 68 OHIO ST. L.J. 1627 (2007); George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers’ Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145 (2001).

86. See Davies, *Correcting Search-and-Seizure History*, *supra* note 33, at 8.

87. See *Entick v. Carrington*, (1765) 95 Eng. Rep. 807 (C.P.), 19 Howell’s State Trials 1029.

88. See 2 MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 151, ch. XVIII, II.3. (1736) (by implication).

messengers had a warrant issued in November 1762, by the Earl of Halifax, who was Secretary of State.<sup>89</sup>

The jury returned a special verdict, awarding Entick a judgment in the amount of 300 pounds if the court found that the warrant was invalid.<sup>90</sup> In a wide-ranging opinion of over forty pages, Lord Camden, Chief Justice of the Court of Common Pleas, distinguished an opinion of The Twelve Judges on the ground, essentially, that their statement of a rule outside the context of treason was dicta.<sup>91</sup> Then Camden held that no common-law authority existed for a warrant like the one Halifax had issued, at least in part because the description of what was to be seized—“his books and papers”—was to general.<sup>92</sup> As no stolen goods were found, but only private papers, the King’s messengers could defend only if they had a valid warrant.<sup>93</sup> They did not.<sup>94</sup> Thus, they were liable to Entick in tort.<sup>95</sup>

In a separate case arising out of the same general warrant, a lawyer named Beardmore recovered 1,000 pounds for the acts of the King’s messengers.<sup>96</sup> They “broke and forced open several doors of the rooms, and broke and spoiled the locks, bolts and bars thereof, and broke and forced open many boxes, chests, bureaus, scrutores, writing-desks, drawers, and cupboards.”<sup>97</sup> They “read over, pryed into, and examined all the private papers, books, letters, and correspondences of the plaintiff and his clients, whereby the secret and private affairs, concerns, businesses, and circumstances of the plaintiff and his clients, became and were wrongfully discovered and made public.”<sup>98</sup>

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89. 2 THOMAS ERSKINE MAY, *THE CONSTITUTIONAL HISTORY OF ENGLAND, 1760-1860*, 259 (1865).

90. *Entick*, 19 Howell’s State Trials at 1036.

91. *See id.* at 1058. The Twelve Judges was a “sacred institution” in English law, consisting of the four judges who presided over each of the three royal courts—the King’s Bench, the Common Pleas, and Exchequer. EDWARD FOSS, *Preface to A BIOGRAPHICAL DICTIONARY OF THE JUDGES OF ENGLAND FROM THE CONQUEST TO THE PRESENT* vii (1870). “When a point of difficulty arose that a trial judge was reluctant to decide on his own, especially when capital sanctions were involved and the convict would otherwise be promptly executed, the judge could defer sentencing” and refer the question to The Twelve Judges, whose decision “would clarify future practice.” JOHN H. LANGBEIN, *THE ORIGINS OF THE ADVERSARY CRIMINAL TRIAL* 212-13 (2003).

92. *Entick*, 19 Howell’s State Trials at 1031, 1072. To be sure, as Morgan Cloud and Tom Clancy note, there is language in *Entick* suggesting that the problem with the warrant went beyond the general description of what could be seized; there is a suggestion that no warrant could ever justify the seizure of papers because the government could have no interest in them that was superior to that of the owner. *See CLANCY, FOURTH AMENDMENT, supra* note 22 at 38; Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 *STAN. L. REV.* 555, 596 (1996). But the point of this essay is that the warrant was invalid.

93. *Entick*, 19 Howell’s State Trials at 1074.

94. *Id.*

95. *Id.*

96. *Beardmore v. Carrington*, (1764) 95 Eng. Rep. 790 (C.P.), 2 Wils. 244.

97. *Id.* at 790.

98. *Id.*

The search took six and one-half days, during which the messengers confined Beardmore in another location, and the messengers seized “500 printed charts, and a great many other papers, printed and written.”<sup>99</sup> The issue in the Court of Common Pleas was whether the 1,000 pound judgment in favor of Beardmore was excessive.<sup>100</sup> The court held in favor of Beardmore, noting that the damages resulted from “an illegal warrant” issued to a messenger “who enters into a man’s house, and prys into all his secret and private affairs, and carries him from his house and business and imprisons him for six days.”<sup>101</sup> This was, the court said, an “extraordinary case, which concerns the liberty of every one of the King’s subjects.”<sup>102</sup>

But the dustup over the seizure of Entick’s papers was nothing compared to the saga the next year of *North Briton*, No. 45, a newspaper issue highly critical of George III and his ministers.<sup>103</sup> At least four tort suits arose out of the King’s search for copies, and the author, of this allegedly libelous issue.<sup>104</sup> The author was John Wilkes—a political enemy of the King whom modern historian Arthur Cash calls the “scandalous father of civil liberty.”<sup>105</sup>

*North Briton*, No. 45 contained “page after page of invectives and sarcasms against the [King’s] ministers.”<sup>106</sup> But the part that probably most upset the King was a response to a speech the King gave to the final session of Parliament on April 19, 1763.<sup>107</sup> In the speech, the King called for a “spirit of concord” and “obedience to the laws, which is essential to good order.”<sup>108</sup> Wilkes seized on the notion of “concord” to call for resistance to the law and, perhaps, rebellion.<sup>109</sup> How can there be concord, he argued, when “private houses are now made liable to be entered and searched at pleasure?”<sup>110</sup> Continuing:

The *spirit of concord* hath not gone forth among them; but the *spirit of liberty* has, and a noble opposition has been given to the wicked instruments of oppression. A nation as sensible as the *English*, will see that a *spirit of concord*, when they are oppressed, means a tame submission to injury, and that a *spirit of liberty* ought then to arise, and I am sure ever will, in proportion to the weight of the grievance they feel.

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99. *Id.*

100. *Id.* at 792.

101. *Id.* at 793-94.

102. *Id.* at 794.

103. See ARTHUR H. CASH, JOHN WILKES, THE SCANDALOUS FATHER OF CIVIL LIBERTY 99-100 (2006).

104. See MAY, *supra* note 89, at 257-61.

105. See CASH, *supra* note 103, at title.

106. *Id.* at 100.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

*Every legal attempt of a contrary tendency to the spirit of concord will be deemed a justifiable resistance, warranted by the spirit of the English constitution.*<sup>111</sup>

To bolster a weak case against Wilkes, Secretary of State Halifax planned “to arrest first the printer and publisher, to examine them, and to seize and examine their papers so as to find evidence of Wilkes’s authorship.”<sup>112</sup> This they accomplished, arresting forty-nine along the way, pursuant to a warrant authorizing them to search for the “Authors, Printers & Publishers” of *North Briton*, No. 45 and to “apprehend & seize [them], together with their papers.”<sup>113</sup> Two days later, the King’s messengers arrested Wilkes in his home and searched for and seized his papers.<sup>114</sup> But Lord Halifax and King George III had used a cannon to attack a fly. As Arthur Cash summed up the consequences of the attempt to squelch those who wrote and published *North Briton*, No. 45:

Many legal precedents would eventually be set as a result of these events. Following the public outcry over the messengers’ arresting of forty-nine people when they were searching for only three, general warrants would be outlawed. Indignation over the seizure of papers would lead to suits that established the rights of privacy that have been treasured in American and English law . . . .<sup>115</sup>

In his tort suit against the King’s messengers, Wilkes attacked the warrant that did not name him or specify which papers to seize.<sup>116</sup> He argued that the acts of the messengers in arresting him and searching his papers under that warrant had “fatally wounded” the English constitution and “called aloud for the redress of a jury of Englishmen.”<sup>117</sup> This “redress” required “large and exemplary damages” because “trifling damages would put no stop at all to such proceedings.”<sup>118</sup> The point is clear: It was tort damages that served as a deterrent to searches and seizures not authorized by law.<sup>119</sup> The jury returned a verdict in favor of Wilkes and ordered damages of 1,000 pounds.<sup>120</sup> Total verdicts in all of the *North Briton*, No. 45 cases came to 5,700 pounds, or roughly two million pounds

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111. 2 THE NORTH BRITON 227, 236 (1763) (emphasis in original).

112. CASH, *supra* note 103, at 102.

113. *Id.* at 101, 105.

114. *Wilkes v. Wood*, (1763) 98 Eng. Rep. 489, 489 (C.P.).

115. CASH, *supra* note 103, at 105.

116. *Wilkes*, 98 Eng. Rep. at 490.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 499.

in today's money.<sup>121</sup> The eighteenth-century historian, Thomas Erskine May, drew on correspondence from Wilkes to assert that the total amount that the crown spent defending the suits and paying damages was 100,000 pounds—or perhaps 50 million pounds in today's money.<sup>122</sup> Who needed an exclusionary rule?

We can be certain that the Framers were aware of the John Wilkes cases, if not that of John Entick. A case report of *Entick v. Carrington* was published in England in 1779.<sup>123</sup> The John Wilkes case resulted in intense publicity, with letters, pamphlets, plays, and poems written about it.<sup>124</sup> The legality of general warrants was “repeatedly discussed in Parliament” in 1764.<sup>125</sup> In 1766, a bill to outlaw general warrants passed the House of Commons but failed in the House of Lords.<sup>126</sup>

Perhaps more importantly, Wilkes became an ally of the colonies in their dispute with the crown. On April 7, 1775, he presented a petition on behalf of American traders to King George III (a meeting agreed to by the king on the condition that he would not speak to Wilkes!).<sup>127</sup> Thanks to Tom Clancy's thorough research, we know that John Adams owned a book that contained one of the Wilkes cases and that he wrote Wilkes a letter expressing support and admiration for him.<sup>128</sup> The John Wilkes cases, if not *Entick*, would have defined the English search and seizure world of the Framers.<sup>129</sup> The protective cocoon of tort law would have been uppermost in the minds of the Framers as they conceived the Fourth Amendment.

#### IV. FROM THEN TO NOW: FRAMING-ERA RULES AND MODERN DOCTRINE

Because we just “toured” the famous English tort cases of 1762 and 1763, I begin with the issue of remedy. The English cases involving Wilkes and Entick have profound implications for 2010. The power of George III

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121. See *Money v. Leach*, (1765) 97 Eng. Rep. 1075, 1077 (K.B.); *Huckle v. Money*, (1763) 95 Eng. Rep. 768, 768 (C.P.). The printer, Dryden Leach, recovered 400 pounds; his assistant recovered 300 pounds—upheld against a claim that it was an “outrageous” amount for a mere “journeyman”—and Wilkes recovered 4,000 pounds in a false imprisonment suit. See *Leach*, 97 Eng. Rep. at 1077; *Huckle*, 95 Eng. Rep. at 768; MAY, *supra* note 89, at 259. A dollar grew by over 500 times between 1774 and 2008. See Samuel H. Williamson, *Seven Ways to Compute the Relative Value of a U.S. Dollar Amount, 1774 to Present*, MEASURING WORTH (Sept. 22, 2010), <http://www.measuringworth.com/calculators/uscompare/>. I assume a rough equivalence for the pound.

122. MAY, *supra* note 89, at 259.

123. GEORGE WILSON, REPORTS OF CASES IN THE KING'S COURTS AT WESTMINSTER 275-92 (1779).

124. See, e.g., Letter to John Wilkes published by “The Authors,” and “Patriotism: A Farce,” (1763) (on file with author).

125. MAY, *supra* note 89, at 261 n.2 (citing six instances).

126. *Id.* at 262.

127. CASH, *supra* note 103, at 320.

128. Clancy, *Adams and the Fourth Amendment*, *supra* note 40, manuscript at 39, 45.

129. AMAR, *supra* note 19, at 11 (“*Wilkes v. Wood* . . . whose lessons the Fourth Amendment was undeniably designed to embody . . . was the paradigm search and seizure case for Americans.”).



was far greater than what the American executive has today. And, tort law brought the king, his ministers, and his secretary of state to their knees. It was viewed by American courts as a critical part of the English constitution. The Court's first major Fourth Amendment case, *Boyd v. United States*, said in 1886 that "the law, as expounded" in *Entick*, "has been regarded as settled from that time to this."<sup>130</sup> The judgment in *Entick* "is considered as one of the landmarks of English liberty. It was welcomed and applauded by the lovers of liberty in the colonies as well as in the mother country. It is regarded as one of the permanent monuments of the British constitution."<sup>131</sup> To be sure, John Wilkes and John Entick were much more attractive "victims" of the State's search power than a drug dealer, murderer, or rapist would be. I'll return to this point in a moment.

*A. Tort Damages as a Sole Remedy for a Fourth Amendment Violation*

The tort law remedy of *Wilkes* and *Entick* is consistent with a decades-long trend in the Court's Fourth Amendment doctrine that has gradually separated the remedy of exclusion from the Fourth Amendment violation. That trend began in a series of cases in the 1970s. By 1976, the Court had refused to apply the exclusionary rule in grand jury hearings and in civil cases, which included parole revocation hearings, deportation hearings, and civil tax assessment suits.<sup>132</sup> A profound separation was *Stone v. Powell*, where the Court stressed that the "exclusionary rule was a judicially created means of effectuating the rights secured by the Fourth Amendment."<sup>133</sup> *Stone* held that "a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial," as long as "the State has provided an opportunity for full and fair litigation of [that] Fourth Amendment claim."<sup>134</sup> The inevitable implication of *Stone*, as Justice Brennan pointed out in his dissent, was that refusing to apply the exclusionary rule does not violate the Constitution.<sup>135</sup>

The separation of the remedy from the right gathered force in 1984 in *United States v. Leon*, where the Court refused to exclude evidence an officer found when executing in good faith a search warrant that turned out to be defective.<sup>136</sup> The trend recently accelerated in *Hudson v. Michigan*

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130. *Boyd v. United States*, 116 U.S. 616, 626 (1886).

131. *Id.*

132. *See* Pa. Bd. of Probation & Parole v. Scott, 524 U.S. 357, 359 (1998) (parole); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1034 (1984) (plurality opinion) (deportation); *United States v. Janis*, 428 U.S. 433, 454 (1976) (tax); *United States v. Calandra*, 414 U.S. 338, 338 (1974) (grand jury).

133. *Stone v. Powell*, 428 U.S. 465, 482 (1986).

134. *Id.* at 494.

135. *Id.* at 506 (Brennan, J., dissenting).

136. *United States v. Leon*, 468 U.S. 897 (1984).

and *Herring v. United States*.<sup>137</sup> *Hudson* found yet one more exception to the exclusionary rule.<sup>138</sup> In *Herring*, the Court held that the exclusionary rule should not apply when the reason for the unconstitutional arrest was an apparently isolated police record-keeping error.<sup>139</sup> Both *Hudson* and *Herring*, like *Leon*, held that these particular Fourth Amendment violations would not cause evidence to be excluded in a criminal case.<sup>140</sup>

*Herring* utilized a utilitarian cost-benefit analysis.<sup>141</sup> When the Fourth Amendment violation was “the result of negligence . . . rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence [from exclusion] does not ‘pay its way.’”<sup>142</sup> *Hudson* made plain that a tort remedy could fill in any gaps left by the Court’s refusal to apply exclusion in some cases.<sup>143</sup> *Hudson* acknowledged that *Mapp v. Ohio* found tort remedies insufficient to vindicate Fourth Amendment rights in 1961.<sup>144</sup> But the *Hudson* Court indicated that it might be willing to balance the need for an exclusionary rule versus the harm in suppressing reliable evidence differently than *Mapp* did.<sup>145</sup>

We cannot assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago. That would be forcing the public today to pay for the sins and inadequacies of a legal regime that existed almost half a century ago. Dollree Mapp could not turn to Rev. Stat. § 1979, 42 U.S.C. § 1983 for meaningful relief . . . . It would be another 17 years before the § 1983 remedy was extended to reach the deep pocket of municipalities . . . . Citizens whose Fourth Amendment rights were violated by federal officers could not bring suit until 10 years after *Mapp* . . . .<sup>146</sup>

The Court also questioned the twin arguments that lawyers would not take tort cases against police and that juries would not award damages in sufficient amounts to deter police violations of the Fourth Amendment.<sup>147</sup>

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137. *Herring v. United States*, 129 S. Ct. 695 (2009); *Hudson v. Michigan*, 547 U.S. 586 (2006).

138. See *Hudson*, 547 U.S. at 600-02. The *Hudson* exception, like *Leon*, involved a search pursuant to a warrant. *Id.* The Fourth Amendment defect in *Hudson* was the failure to “knock and announce” before entering to execute the warrant. See *id.*; *infra* part IV.B.3 (discussing knock and announce). Other exceptions to the exclusionary rule already uncovered include when the Fourth Amendment violation resulted from clerical errors by court employees in *Arizona v. Evans* and when evidence is used for impeachment in *Walder v. United States*. See *Arizona v. Evans*, 514 U.S. 1, 17-18 (1995); *Walder v. United States*, 347 U.S. 62, 64-65 (1954).

139. *Herring*, 129 S. Ct. at 698.

140. See *id.* at 698; *Hudson*, 547 U.S. at 600-02.

141. See *Herring*, 129 S. Ct. at 700-01.

142. *Id.* at 704.

143. See *Hudson*, 547 U.S. at 610.

144. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

145. See *Hudson*, 547 U.S. at 591-92.

146. *Id.* at 597.

147. *Id.* at 598.

Noting that Congress has provided for attorney's fees in § 1983 cases, which was not the law in 1961, the Court continued:

Even if we thought that only large damages would deter police misconduct (and that police somehow are deterred by “damages” but indifferent to the prospect of large § 1988 attorney's fees), we do not know how many claims have been settled, or indeed how many violations have occurred that produced anything more than nominal injury.<sup>148</sup>

It is difficult to avoid Donald Dripps's claim that *Hudson* is “a brief for abolition” of the exclusionary rule.<sup>149</sup> As the law stands today, unlike Justice Scalia, I am not optimistic that guilty criminals can bring successful tort suits against police officers in sufficient numbers to create much deterrence. But the law does not have to stay as it is. A jurisdiction that wanted to accept *Hudson*'s brief for abolition could create a new Fourth Amendment tort and a new set of procedures to allow tort violations to be vindicated. Perhaps the most profound problem identified with tort remedies for Fourth Amendment violations is the likelihood of low damages. What is the value of the privacy of a murderer? As Sherry Colb has taught us, under one plausible model of the Fourth Amendment, the value of a criminal's privacy is zero.<sup>150</sup> Or to use Dripps's example: if police legally arrest someone and exceed the scope of the search incident to arrest, “what damages might she expect from the police rummaging through a gym bag in the back seat of her car, given the legality of the arrest?”<sup>151</sup>

Another obstacle to a successful tort suit against a police officer is the Court-made rule of qualified immunity.<sup>152</sup> Roughly, this provides a defense unless the constitutional violation is of a “clearly-established rule.”<sup>153</sup> Other problems include sympathy for the police rather than the “victim” of the tort violation, who was, after all, found in possession of evidence of the crime and the relatively judgment-proof status of defendants if the employer is not liable for the judgment against the officers.<sup>154</sup>

As Dripps recognized in 2001, it is indeed possible to make tort suits “into effective deterrents.”<sup>155</sup> If legislatures “provided by statute for

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148. *Id.*

149. Donald Dripps, *The Fourth Amendment, The Exclusionary Rule, and the Roberts Court: Normative and Empirical Dimensions of the Over-Deterrence Hypothesis*, 85 CHI.-KENT L. REV. 209, 212 (2010) [hereinafter Dripps, *Over-Deterrence Hypothesis*].

150. Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456, 1476-85 (1996).

151. Dripps, *Over-Deterrence Hypothesis*, *supra* note 149, at 236.

152. See Stephen R. McAllister & Peyton H. Robinson, *The Potential Civil Liability of Law Enforcement Officers and Agencies*, 67 J. KAN. BAR ASS'N 14, 31 (1998).

153. See *id.*

154. See *id.*

155. Donald Dripps, *The Case for the Contingent Exclusionary Rule*, 38 AM. CRIM. L. REV. 1, 19 (2001).

substantial liquidated and punitive damages in constitutional tort suits, accepted entity liability or explicitly indemnified individual officers, abrogated immunity defenses and limited character evidence about plaintiffs,” the new tort would create substantial deterrence.<sup>156</sup> If a state wanted more deterrence, I suggest having judges hear the cases. This would reduce the risk that a jury might “nullify” the violation because the police officer is more sympathetic than the tort victim. In this world, most defendants could find a lawyer willing to take the case and might recover more than a modest judgment.

Having put in place the new Fourth Amendment tort, a legislature could declare that its courts will no longer apply the exclusionary rule. To show that it is not engaged in 1960s style repudiation of the Court’s authority, the bill can quote from *Hudson* and make plain that the legislature believes its new tort regime will provide at least as much deterrence of Fourth Amendment violations as the exclusionary rule.<sup>157</sup> Then, the inevitable court case will allow the Supreme Court to decide whether the tort remedy is a suitable replacement for suppression.

Of course, as Dripps points out, at some point increased incentives for Fourth Amendment tort actions “really does run the risk of over-deterrence.”<sup>158</sup> He argues that keeping some form of immunity for officers whose violation was not of a clearly-established rule might be the best compromise.<sup>159</sup> What a legislature presumably wants is optimal deterrence—to deter most of the unlawful searches while discouraging as few lawful searches as possible. Dripps is correct that the problem with seeking optimal deterrence in the Fourth Amendment context is that there is “no symmetry between the gains the regulated actors secure from violations and the cost of those violations.”<sup>160</sup> But there is no reason to believe that the Court’s current doctrine achieves anything close to optimal deterrence, and legislatures should feel free to take a shot at an improved system based on something like eighteenth-century tort remedies.

Having moved back in time to reprise the eighteenth-century remedy, I now turn to the substance of eighteenth-century tort law. First, I will examine the framing-era rules and then illustrate parallels in several doctrinal areas of current law.

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156. *Id.* at 18-19.

157. See George C. Thomas III, *Islands in the Stream of History: An Institutional Archeology of Dual Sovereignty*, 1 OHIO STATE J. CRIM. L. 345, 353-57 (2003) (discussing *Cooper v. Aaron*, 358 U.S. 1 (1958), where the Court was forced to assert that its judgments bound officials in Arkansas who were resisting federal desegregation orders).

158. Dripps, *Over-Deterrence Hypothesis*, *supra* note 149, at 234.

159. See *id.*

160. *Id.* at 215.

### B. Framing-Era Search and Seizure Rules

To stand a chance at recovering authentic history, one must attempt to see the world through the eyes of those who lived at the time. Recovering the framing-era law that regulated searches and seizures is a complex endeavor. There were relatively few reported English trespass cases and far fewer colonial cases. The great treatise writers of the era—Coke, Hale, Hawkins, and Blackstone—paid relatively little attention to trespass when compared to other issues they viewed as more fundamental.<sup>161</sup> Some of the eighteenth-century abridgements, digests, and justice of the peace manuals do treat search and seizure in considerable detail, though the rules are sometimes scattered under separate headings such as “constable,” “arrest,” and “warrant.”

But I wish to be clear. Studying framing-era tort rules is simply the other side of the coin of the rules about arrest and search. As one of the eighteenth-century abridgements put it, “any unlawful act . . . with actual or implied [f]orce” was a trespass.<sup>162</sup> One advantage to focusing on trespass law rather than the common law of arrest and search is that it offers a different perspective and also focuses on remedies as well as rights.

#### 1. Tort of Trespass

I rely heavily in this part on an eighteenth-century English legal encyclopedia, *A New Abridgement of the Law*—probably the first true legal encyclopedia.<sup>163</sup> Volume 5 in the first edition contains the law of trespass; it appeared in 1766 and lists the author as “a Gentleman of the *Middle Temple*.”<sup>164</sup> The second edition of the trespass volume, now Volume 6, was published in 1798 and lists Matthew Bacon as author.<sup>165</sup> Apparently, Bacon drew heavily from a manuscript that Sir Geoffrey Gilbert left at death, and much of the credit for organizing the law into discrete categories and then reducing each category to a series of rules probably should go to Gilbert.<sup>166</sup> Moreover, Bacon died before Volume 5 was completed, and the trespass section was written by Joseph Sayer.<sup>167</sup> Nonetheless, I shall refer to the encyclopedia by Bacon’s name. All references will be to the 1766 edition unless stated otherwise.

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161. See *infra* Part IV.B.I and accompanying text.

162. 5 BACON, *supra* note 5, at 152.

163. *Id.* at 155; Julius Goebel, Jr., *Learning and Style in the Law—An Historian’s Lament*, 61 COLUM. L. REV. 1393, 1397-98 (1961).

164. 5 BACON, *supra* note 5, at title.

165. 6 MATTHEW BACON, *A NEW ABRIDGEMENT OF THE LAW* (1798) (“With Considerable Additions, Including the Latest Authorities; By Henry Gwillim”).

166. A. W. B. SIMPSON, *BIOGRAPHICAL DICTIONARY OF THE COMMON LAW* 27 (1984).

167. *Id.*

Some trespasses “are not accompanied by any Force.”<sup>168</sup> But Bacon concerned himself only with “Trespass Vi et Armis [trespass with force resulting in harm].”<sup>169</sup> And, there was yet one more division. The remedy for trespasses that injured only the “Publick”—treason, contempt, disturbing the peace, and “all other Misdemeanors . . . of a publick evil”—was indictment.<sup>170</sup> Trespasses that injured individuals, as today, could give rise both to an indictment and a private tort action.<sup>171</sup> As Bacon put it, the “private Person, who has received any Injury from such Trespass,” could “recover a Satisfaction for the same by an Action of general Trespass.”<sup>172</sup> Though we often forget, all common-law crimes—robbery, larceny, battery, rape, murder—were, and are, also torts.<sup>173</sup> Think “O.J. Simpson.”

While Julius Goebel claimed that Bacon’s abridgement was sometimes less than accurate, proof of that claim is sketchy at best.<sup>174</sup> Bacon was widely read and was influential in the colonies.<sup>175</sup> Goebel himself admits that Bacon was “long the darling of American courts.”<sup>176</sup> John Marshall, while a college student in 1780, compiled notes from Blackstone, Bacon, and Virginia statutes.<sup>177</sup> Those notes reveal Marshall’s “close study of Matthew Bacon’s *New Abridgement of the Law*.”<sup>178</sup> John Adams wrote the Massachusetts search and seizure provision that James Madison drew from in writing the Fourth Amendment.<sup>179</sup> Adams had a copy of Bacon in his library, as did Thomas Jefferson and Alexander Hamilton.<sup>180</sup> According to one commentator, the “principal textbooks of the colonial lawyers were Sir Edward Coke’s *Institutes on the Laws of England* and Matthew Bacon’s *A New Abridgment of the Law*.”<sup>181</sup> Thus, to the extent we are searching for the Framers’ understanding of the law of search and seizure, rather than its abstract, Platonic essence, Bacon is a good choice.

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168. *Id.*

169. *Id.*

170. 3 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW 96 (1740) (listing some “publick” offenses).

171. 5 BACON, *supra* note 5, at 150.

172. *Id.*

173. *Cf.* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM 1 (2010) (discussing liability for bodily injury and property damage).

174. Goebel, *supra* note 163, at 1398 (noting that not all of the cases Bacon cites “will support his text” without citing authority).

175. *See id.* at 1397-98.

176. *Id.*

177. *See* Brian J. Moline, *Early American Legal Education*, 42 WASHBURN L. J. 775, 786 (2004).

178. Timothy S. Huebner, *Lawyer, Litigant, Leader: John Marshall and His Papers—A Review Essay*, 48 AM. J. LEGAL HIST. 314, 318 (2006); Moline, *supra* note 177, at 786.

179. *See* ANDREW E. TASLITZ, *supra* note 84, at 302 n.5.

180. *See* LIBRARYTHING, <http://www.librarything.com/catalog/JohnAdams&deepsearch=bacon;http://www.librarything.com/author/baconmatthew&norefer=1> (last visited July 15, 2010).

181. Moline, *supra* note 177, at 786. Moline claims that the first volume of Coke was “by far the most studied text in colonial America.” *Id.*

Bacon also has the virtue of clarity in his expression of eighteenth-century law. Unlike Nelson's treatise, which merely offers a series of case summaries, Bacon presents a set of rules accompanied by citations to cases.<sup>182</sup> This thoroughly modern format, perhaps supplied by Gilbert's original ordering of the materials, makes Bacon as accessible as Blackstone, Hale, or Hawkins, while Bacon provides much more detail on trespass law.<sup>183</sup> He also offers more detail than Comyns's contemporary digest (1767), more detail than Lilly's earlier abridgement (1745), and far more detail than Wood's earlier institute (1720).<sup>184</sup>

## 2. Values Protected by Common-Law Search and Seizure Rules

Unlike the Court's modern conception of the Fourth Amendment that is centered on privacy, framing-era search and seizure rules principally developed to protect property and liberty.<sup>185</sup> Of course, many rules that protect property and liberty also protect privacy, but it was mostly an incidental effect rather than the goal.<sup>186</sup> While contemporary Americans still value liberty, it is difficult for us to appreciate how important the protection of property was to the conception of rights in English and American political theory. When noting the "relationship between property rights and liberty" that "was outcome determinative in some of the Court's most important [early Fourth Amendment] decisions," Morgan Cloud observes that modern readers would probably find that conception "archaic" and "wrong."<sup>187</sup>

To begin to appreciate the role that property played in tort law, return to *Entick v. Carrington*. In deciding that the general search violated English tort law, Lord Camden began his argument this way: "The great end, for which men entered into society, was to secure their property."<sup>188</sup> He continued: "By the laws of England, every invasion of private property, be it ever so minute, is a trespass."<sup>189</sup> Then turning to Entick's claim that

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182. See 3 WILLIAM NELSON, AN ABRIDGEMENT OF THE COMMON LAW 374 (1724) [hereinafter NELSON, ABRIDGEMENT]; 5 BACON, *supra* note 5, at 150.

183. See 5 BACON, *supra* note 5, at 150-216.

184. See 5 JOHN COMYNS, A DIGEST OF THE LAWS OF ENGLAND 534-43 (1767) (ten pages on trespass law); 2 JOHN LILLY, A GENERAL ABRIDGEMENT OF THE LAW 727-39 (1745) (thirteen pages on trespass); 2 THOMAS WOOD, AN INSTITUTE OF THE LAWS OF ENGLAND 945-47 (1720) (three pages). Bacon, by comparison, devoted sixty-seven pages to trespass. See 5 BACON, *supra* note 5, at 150-216. Viner is much longer than Bacon but, I think, less accessible, in part because Viner tends toward case summaries rather than rules and in part because it exalts pleading rules over substance. See CHARLES VINER, A GENERAL ABRIDGEMENT OF LAW AND EQUITY 421-576 (1742) (one hundred fifty-six pages on trespass).

185. Cloud, *supra* note 92, at 578.

186. See *id.*

187. *Id.*

188. *Entick v. Carrington*, (1765) 95 Eng. Rep. 807 (C.P.), 19 How. St. Tr. 1029, 1066.

189. *Id.*

the seizure of his papers was a trespass, Camden wrote, "Papers are the owner's goods and chattels: they are his dearest property; and so far from enduring a seizure, that they can hardly bear an inspection."<sup>190</sup> Thus, when Entick's papers were "removed and carried away," it was a trespass, not because his privacy was wrongfully invaded, but because his property had been illegally seized.<sup>191</sup>

Consider the trespass rules about when a house could be entered through an open door. If A entered B's house through an open door to look for lost property "commonly reported" to be in the house, A was guilty of trespass.<sup>192</sup> It was not, however, a trespass if A's goods had been *stolen*, rather than lost, and he "knows that these Goods are in the House" that he entered.<sup>193</sup> Now testing the readers' recollection of property law, it was also not a trespass if A owned a remainder in the property and was entering "to see if any Waste has been done."<sup>194</sup> B's privacy interests are infringed to the same degree in all three cases. The difference is that in the last two examples, A infringed no superior property interest of B's, and thus there was no trespass, while in the lost property case, B's possession of the goods could give him a superior property interest until a court had ruled in favor of A.

Once we recognize that, at least for seizures, common-law trespass was a property-based rule of law, an odd Supreme Court case suddenly makes sense. *Gouled v. United States* held in 1921 that the common law did not permit even a search warrant to be used to search for and seize "mere evidence" of crime, such as papers or records.<sup>195</sup> A search warrant could justify a seizure only of contraband and evidence of a crime.<sup>196</sup> Thus, "mere evidence" could *never* be obtained via a search warrant, as hard as that might be for us to believe today. The rationale was that no right to search existed unless "the interest which the public or the complainant may have in the property to be seized" is greater than the interest of the one possessing the property.<sup>197</sup> And that would never be true unless the items to be seized were evidence of a crime or contraband.<sup>198</sup>

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190. *Id.* Davies has pointed out that some of the language often quoted from *Entick*, including that in the paragraph in the text above, appeared in Howell's State Trials but not in the English Reports. Davies, *Recovering*, *supra* note 33, at 727 n.512. Howell's version was not published until 1781, and the Framers might not have seen it. *Id.* While that claim is relevant to an originalist, it has no bearing on my attempt to recreate tort law at the end of the eighteenth century. The writer who added language to Howell's version of *Entick* was reflecting his understanding of tort law in 1781.

191. *Entick*, 19 Howell's State Trials at 1066.

192. 5 BACON, *supra* note 5, at 177.

193. *Id.*

194. *Id.*

195. *Gouled v. United States*, 255 U.S. 298, 309 (1921).

196. *See id.* at 308.

197. *Id.* at 309.

198. *Id.*



A warrant that could justify a thorough search of a home, and invasion of the homeowner's privacy, for evidence of contraband or evidence of a crime could equally well justify a search for mere evidence if the critical issue was privacy. Thus, only a property-based rationale of trespass law can justify holding that "mere evidence" cannot be seized even with a warrant.<sup>199</sup> That the Court was still following the property-based trespass doctrine, and specifically relying on common law, as late as 1921, shows that framing-era trespass law was the protector of what we think of today as Fourth Amendment interests for over a century after the amendment was ratified.<sup>200</sup> Indeed, the "property-based theory of substantive restrictions on searches or seizures" did not end as a formal matter until *Warden v. Hayden* in 1967, at the hands of Justice Brennan.<sup>201</sup>

To be sure, however accurately *Gouled* described the common law, it is an odd interpretation of the Fourth Amendment, which specifically mentions "papers" as one of the items that, presumably, could be described in a search warrant.<sup>202</sup> Indeed, William Rawle in 1825 wrote that pursuant to a legal warrant "not only other effects, but the papers of the accused [may] be taken into the custody of the law."<sup>203</sup> *Gouled* follows *Boyd*, and Amar's dismissal of *Boyd* as based on "Lochner-era property worship" seems right.<sup>204</sup> Still, as Morgan Cloud has demonstrated, the property-based conception of the Fourth Amendment was a more predictable and secure protection of rights than today's privacy-based conception.<sup>205</sup>

Outside the context of the seizures of property, the framing-era law protected liberty of persons. Blackstone said that, next to personal security, English law most values "personal liberty," which "consists in the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law."<sup>206</sup> As this quote implies, a liberty interest naturally gives rise to the tort of false imprisonment if it is violated. As Bacon put it, "An Action of Trespass *Vi et Armis* lies for every false Imprisonment."<sup>207</sup> Similarly, "Every unlawful Restraint of Liberty is a false

199. *See id.* at 303-05.

200. *Id.*

201. CLANCY, FOURTH AMENDMENT, *supra* note 22, at 470 (citing *Warden*, 387 U.S. 294 (1967)).

202. *Gouled*, 255 U.S. at 303-05.

203. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 124 (1825).

204. AMAR, *supra* note 19, at 23.

205. Morgan Cloud, *A Liberal House Divided: How the Warren Court Dismantled the Fourth Amendment*, 3 OHIO ST. J. CRIM. L. 33, 34 (2005).

206. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 130 (Univ. of Chicago Press 1979).

207. 5 BACON, *supra* note 5, at 162. The text is identical in the 1798 edition of Bacon. *See* 6 BACON, *supra* note 165, at 162. Indeed, the pagination of the entire entry on trespass appears to be identical even though sixty-two years had elapsed.

Imprisonment.”<sup>208</sup> And: “If a Man is unlawfully arrested in the Street, this, although he is not carried into any House, is a false Imprisonment.”<sup>209</sup> Indeed, even an arrest by process—usually a warrant—was a false imprisonment by the one who initiated the suit if the process was issued “irregularly” because “it was incumbent on him to take Care that it issued regularly.”<sup>210</sup> But the officer who executed the process was not guilty of false imprisonment because he was merely doing the bidding of the court that issued it.<sup>211</sup>

The importance of protecting liberty and property explains what, at first glance, is a puzzling omission in the various treatments of the law of trespass. There are relatively few mentions of searches. The eighteenth-century law of trespass was largely about seizures of property, as was true of Entick’s papers and seizures of one’s person, as we saw in the law of false imprisonment.<sup>212</sup>

But, privacy concerns can also be seen in some of the framing-era rules. So, for example, the law of trespass recognized what courts now call “curtilage.” If a barn or outhouse was “adjoining to or Parcel of a House, the Privilege of the House extends to both [of] these,” and a warrant was necessary to enter the structure.<sup>213</sup> But if the barn or outhouse “extends at some Distance from a House,” the structure lost its protection.<sup>214</sup> Because a barn is equally the owner’s property whether it is close to his house or at some distance, it would seem that privacy concerns were driving this particular doctrine. And if a barn “some Distance from a House” could be searched without running afoul of the trespass rules, then it follows that an open public shed was fair game as well.<sup>215</sup>

Privacy concerns probably underlie a “scope of search” rule that appears in Bacon.<sup>216</sup> As we saw earlier, the Anti-Federalists used the image of the dreaded exciseman searching the petticoats worn by the “fairer sex.”<sup>217</sup> One of Bacon’s trespass rules was that a warrant to search a house for stolen goods did not confer authority to search under the shift of a woman found in bed.<sup>218</sup> Indeed, the way the rule is stated, it might also have forbidden pulling “down the Cloaths of a Bed in which there was a Woman.”<sup>219</sup> By this “Abuse of his Authority,” the constable who was

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208. 6 BACON, *supra* note 165, at 162.

209. *Id.*

210. *Id.*

211. *Id.*

212. *See supra* note 121 and accompanying text; 6 BACON, *supra* note 165, at 162.

213. 5 BACON, *supra* note 5, at 177.

214. *Id.*

215. *Sailly v. Smith*, 11 Johns. 500 (N.Y. Sup. Ct. 1814).

216. 5 BACON, *supra* note 5, at 155.

217. *See CUDDIHY, supra* note 40, at 678.

218. 5 BACON, *supra* note 5, at 155.

219. *Id.*

lawfully in the house and bedroom by warrant “became a Trespasser with Force *ab initio*.”<sup>220</sup> Viner states the same rule, though he added that the constable was also guilty of a misdemeanor.<sup>221</sup>

### 3. *A Primer on Trespass by Force Resulting in Harm*

The emphasis on protecting liberty in framing-era seizure law can be seen in a host of doctrines that held complainants and officers strictly liable for making a mistake that resulted in the arrest, search, or prosecution of the wrong person.<sup>222</sup> Justices of the peace were cautioned “to examine under oath the party requiring a warrant,” particularly in cases of mere “suspicion of felony,” and they could lawfully issue a warrant only after “examining the person who required it upon Oath, and binding him over to give Evidence.”<sup>223</sup> The evidence had to include an allegation that a felony in fact had occurred and also “some special matter to induce a belief of [his] suspicion.”<sup>224</sup> Hale’s *Pleas of the Crown* said that when a constable searched A’s house for stolen goods by warrant, the complainant who swore that the goods were there was strictly liable to A if the stolen goods were not found.<sup>225</sup> The officer was “excused” because “he searcheth by warrant.”<sup>226</sup> “[B]ut it seems the party, that made the suggestion is punishable in such case, for as to him the breaking of the door is *in eventu* [in the event] lawful . . . if the goods are there; unlawful, if not there.”<sup>227</sup> Hening’s *New Virginia Justice*, published in 1795, agrees that the officer is innocent because of the warrant but “he that made the suggestion, is punishable.”<sup>228</sup> This was also the holding in an 1817 Delaware case.<sup>229</sup>

If an officer arrested the wrong person, he was strictly liable to him in trespass.<sup>230</sup> It did not matter that the constable had a writ from a magistrate, and it did not matter that the person arrested looked like the one named in the writ; it did not even matter that someone identified the one arrested as the person named in the writ.<sup>231</sup> Nor did it matter that the person arrested

220. *Id.*

221. VINER, *supra* note 184, at 503.

222. See 2 HALE, *supra* note 88, at 110; WILLIAM NELSON, THE OFFICE AND AUTHORITY OF A JUSTICE OF PEACE 500 (1704) [hereinafter NELSON, JUSTICE OF PEACE (1704)]; *Grumon v. Raymond*, 1 Conn. 40, 43-44 (Conn. 1814); *Perkin v. Proctor & Green*, (1768) 81 Eng. Rep. 874 (K.B.), 2 Wils. 382; *Martin v. Marshall*, (1582) 81 Eng. Rep. 691 (K.B.), 2 Rolle. 109.

223. See 2 HALE, *supra* note 88, at 110-11, 117; NELSON, THE OFFICE AND AUTHORITY OF A JUSTICE OF PEACE 718 (1729).

224. NELSON, JUSTICE OF PEACE (1704), *supra* note 222, at 500.

225. 2 HALE, *supra* note 88, at 151.

226. *Id.*

227. *Id.*

228. WILLIAM WALLER HENING, THE NEW VIRGINIA JUSTICE, COMPRISING THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE 38 (1795).

229. *Simpson v. Smith*, 2 Del. Cas. 285, 1817 WL 1440, \*3 (1817).

230. NELSON, JUSTICE OF PEACE (1704), *supra* note 222, at 499.

231. 5 BACON, *supra* note 5, at 163.

was the actual offender if the warrant named someone else.<sup>232</sup> And, though it is hard to believe, Bacon claims that if the constable had a writ to arrest B, and A told the constable that he was B, the constable was liable to A for false imprisonment, even though the arrest was based on A's lie, because "the Officer is at his Peril to take Care that he arrests the right Person."<sup>233</sup> According to *Conductor Generalis*, it was false imprisonment if the constable arrested the wrong person by warrant even if there were two by the same name, although it was a defense if they had the same rank or other designation after their name.<sup>234</sup> Nelson is to the same effect.<sup>235</sup>

A constellation of doctrines required action to prevent or halt crimes. Constables or private parties could, without a warrant, arrest anyone seen fighting "and keep them in Custody till their Passion is over."<sup>236</sup> If a constable had notice of an "affray in a house, where the doors are shut," and there is "likely to be manslaughter or bloodshed," he could "break open the doors to keep the peace and prevent the danger"—if his demand to enter is refused.<sup>237</sup> Nelson put it more simply: Constables "may break open the Doors to see the Peace kept."<sup>238</sup> Anyone could arrest those "whom he sees upon the Point of committing a Treason or Felony, or doing any Act which may endanger the Life of any Person."<sup>239</sup> It was not a trespass, Bacon said, if a private citizen entered a home "to part two who are fighting: Because this is for the Publick Good."<sup>240</sup> More broadly, Nelson wrote in 1704 that in "all Criminal cases where anyone is in danger of life or member, any private man may Arrest another without Presentment, Process or Warrant."<sup>241</sup>

Constables were required to "cause Night-watches to be set" and watch for "night-walkers"—persons who appeared suspicious.<sup>242</sup> Coke said that only watchmen could make night-walker arrests.<sup>243</sup> Bacon claimed, however, that any person could arrest a "Night-Walker" without a warrant "for that the doing of this is for the good of the Commonwealth."<sup>244</sup> A private person making the arrest was required to bring suspected night-walkers "to the Constable" or to the justice of the peace for "their

232. NELSON, JUSTICE OF PEACE (1704), *supra* note 222, at 500.

233. 5 BACON, *supra* note 5, at 163.

234. CONDUCTOR GENERALIS, *supra* note 4, at 62, 67 (by implication).

235. NELSON, JUSTICE OF PEACE (1704), *supra* note 222, at 156.

236. 5 BACON, *supra* note 5, at 165.

237. 2 HALE, *supra* note 88, at 95.

238. NELSON, JUSTICE OF PEACE (1704), *supra* note 222, at 148. See VINER, *supra* note 184, at 507.

239. 5 BACON, *supra* note 5, at 165.

240. *Id.* at 177.

241. *Id.* at 48.

242. *Id.* at 156.

243. 2 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 52, cap. 29 (1644).

244. 5 BACON, *supra* note 5, at 166. Viner is to the same effect though less clear. VINER, *supra* note 184, at 476.

commitment.”<sup>245</sup> Hawkins said “it is holden by some, that any private Person may lawfully arrest a suspicious Night-walker, and detain him till he make it appear, that he is a Person of good Reputation.”<sup>246</sup>

The person making the night-walker arrest needed grounds to believe that the person was a night-walker.<sup>247</sup> That could either consist of seeing him commit a “disorderly Act” or having “good grounds of suspicion; and the cause of his suspicion must be shewn.”<sup>248</sup> More broadly, Nelson concluded in 1704 that constables should “endeavour to seize Rogues, Vagabonds, & etc. wandring [sic] and begging.”<sup>249</sup> Viner said that anyone could “arrest a *Vagrant* and send him to Gaol.”<sup>250</sup>

Constables could arrest, without a warrant, anyone “against whom a Hue and Cry has been levied.”<sup>251</sup> Davies questions how often the hue and cry was used in late eighteenth-century America.<sup>252</sup> But however often it was used, hue and cry appeared for years after the ratification of the Bill of Rights in almost all of the justice of the peace manuals as one way an arrest could be made without a warrant, suggesting that it would have informed the Framers’ thinking on seizures.<sup>253</sup>

Officers could break doors to enter homes, either to make an arrest or serve a process, as long as they had the proper writ, made a demand to have the door opened, and waited in vain for it to be opened.<sup>254</sup> But there were ways, like today, that entry to a house to make an arrest could be legitimate without a warrant or other process. For example, colonial law recognized a form of hot pursuit: “If a Person, who has in the Presence of a Constable made an Affray, flies into a House, it is lawful for the Constable, after a Demand to have it opened has been in Vain made, to break open the Door of this House in order to arrest him.”<sup>255</sup>

In sum, the framing-era rules of search and seizure put a premium on protecting one’s interest in property—principally, homes and papers—and on protecting the freedom from seizure of one’s person.<sup>256</sup> Unless protected by a warrant, an officer’s mistakes that resulted in the wrongful seizure of a person or wrongful entry into a house usually resulted in the officer being

245. NELSON, JUSTICE OF PEACE (1704), *supra* note 222, at 49.

246. 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN, ch. 12, § 20, at 77 (reprint ed. 1972).

247. 5 BACON, *supra* note 5, at 166.

248. *Id.* (explaining a disorderly act); R. v. Tooley, Arch, & Lawson, (1709) 88 Eng. Rep. 1015, 1020 (explaining grounds of suspicion).

249. NELSON, JUSTICE OF PEACE, *supra* note 222, at 155.

250. VINER, *supra* note 184, at 489.

251. 5 BACON, *supra* note 5, at 166.

252. Davies, *Recovering*, *supra* note 33, at 622 n.198.

253. *See, e.g.*, HENRY POTTER, OFFICE AND DUTY OF A JUSTICE OF THE PEACE 19 (1816); JOHN A. DUNLAP, THE NEW YORK JUSTICE 31 (1815).

254. 5 BACON, *supra* note 5, at 177-78.

255. *Id.* at 179.

256. *See id.* at 168, 180

strictly liable in trespass.<sup>257</sup> Even a complainant was liable if he swore out a warrant not based on his personal knowledge and the defendant was acquitted.<sup>258</sup> Judges who issued process outside their jurisdiction were probably liable in trespass.<sup>259</sup> Given the strong, perhaps too strong, disincentives to swear out complaints and to make warrantless arrests that existed in the eighteenth century, the Framers and Anti-Federalists would not have had concerns about ordinary criminal arrests and searches.

The reader has probably already noted for herself some rather strong parallels with modern doctrine, but I will lay them out explicitly in the next part.

### C. Today's Court and the Framing-Era Rules

The most obvious parallel with modern doctrine is the central role for search warrants in searching homes. Today, homes are protected by a warrant requirement, but the existence of a "consent search" exception makes the rule less firm than it perhaps was in the eighteenth century.<sup>260</sup> The Court permits consent of a co-occupant to suffice, at least as long as the other co-occupant is not present and objecting to the search.<sup>261</sup> Moreover, consent suffices to permit the search of a residence even if the one giving consent does not have authority to consent as long as it reasonably appears that she does.<sup>262</sup> Finally, the Court today recognizes acquiescence as consent as long as police do not use express or implied coercion.<sup>263</sup>

I have elsewhere argued that consent, as understood today, was probably not recognized as an exception to the warrant rule for searches of homes until the twentieth century.<sup>264</sup> In my current research, I found a single reference to a wrongful entry of a house of another "without his Consent," implying that consent would be a defense to a trespass action.<sup>265</sup> But I also found references to giving a license for someone to enter a house.<sup>266</sup> License requires far more to prove than acquiescence, which is

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257. *See id.* at 180-81.

258. *Id.* at 181.

259. *See Grumon*, 1 Conn. at 43-44; *Perkin*, 81 Eng. Rep. at 874; *Martin*, 81 Eng. Rep. at 691; 5 BACON, *supra* note 5, at 181.

260. *See, e.g., Bumper v. North Carolina*, 391 U.S. 543, 548 (1968) (holding that prosecution has burden of proving that consent was given freely and voluntarily).

261. *See Georgia v. Randolph*, 547 U.S. 103, 106 (2006).

262. *See Illinois v. Rodriguez*, 497 U.S. 177, 186-87 (1990).

263. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973).

264. *See George C. Thomas III, The Short, Unhappy Life of Consent Searches in New Jersey*, 36 RUTGERS L. REC. 1, 4 (2009) [hereinafter Thomas, *Short, Unhappy Life*].

265. 5 COMYNS, *supra* note 184, at 535.

266. 2 WOOD, *supra* note 184, at 947. For example, when speaking of "Entry, Authority or Licence" to enter a building, Wood later uses the term "licence" to describe what has been given. *Id.* Viner used the term "license" when explaining how A could enter B's house to reclaim his goods. VINER, *supra* note 184, at 508.

roughly today's consent standard, and I still think the best reading of the framing-era law is that the modern version of consent would not justify a warrant-less entry into a house.<sup>267</sup> If it is true that consent is far more easily obtained and proved today than in colonial law, then the modern era is much more permissive in practice in allowing officers to search homes without warrants, despite the identical black letter rules.

The standing and curtilage rules are quite similar across the centuries. A plaintiff had to allege a property interest in the item seized to maintain an action for trespass.<sup>268</sup> The modern Court has suggested, though never held, that a lawful property interest in the item seized is also sufficient to allow the owner to contest the seizure.<sup>269</sup> Eighteenth-century rules protected a structure as long as it was the home or was adjoining to or connected to the home.<sup>270</sup> Though the Court has not defined curtilage as clearly as did Bacon's encyclopedia, the four-factor balancing test announced in *United States v. Dunn* probably yields results quite similar to the "adjoining to or connected to the house" eighteenth-century rule.<sup>271</sup>

The modern Court has struggled to define the appropriate scope of search authorized by a lawful arrest.<sup>272</sup> The only "scope of search" rule I found in trespass law held that a constable was a trespasser *ab initio* even though he had a warrant if he searched under a woman's nightgown while she was in bed.<sup>273</sup> A somewhat similar modern rule appears in *Safford v. Redding*.<sup>274</sup> While the school authorities had adequate suspicion to justify the search of a student's backpack and her outer clothes, the Court held that their suspicion did not justify making her expose her breasts and pelvic area.<sup>275</sup> The eighteenth-century rule appeared to admit of no exceptions, unlike *Safford*, which implies that cases could arise with sufficient suspicion to justify searching intimate areas.<sup>276</sup> Today,

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267. See Thomas, *Short, Unhappy Life*, *supra* note 264, at 3-4.

268. 3 NELSON, ABRIDGMENT, *supra* note 182, at 388, 395.

269. See *Rakas v. Illinois*, 439 U.S. 128, 148 (1978) (finding no standing where defendants "asserted neither a property nor a possessory interest in the [area searched], nor an interest in the property seized"). Cf. *Rawlings v. Kentucky*, 448 U.S. 98, 105-06 (1980) (claiming ownership of contraband did not create standing to contest search of area not owned by defendant).

270. 5 Bacon, *supra* note 5, at 177.

271. *United States v. Dunn*, 480 U.S. 294, 301 (1987) (summarizing test as "whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection").

272. See *Arizona v. Gant*, 129 S. Ct. 1710, 1716 (2009). The intertwined issues are the spatial and temporal scope of the permitted search. See *New York v. Belton*, 453 U.S. 454, 465 (1981) (Brennan, J., dissenting). For the tortured history, see the various opinions in *Arizona v. Gant*, 129 S. Ct. 1710 (2009), and *Chimel v. California*, 395 U.S. 752 (1969).

273. *Wilson v. Ellis*, 28 Pa. 238, 241 (Pa. 1857).

274. See *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2637-38 (2009).

275. *Id.* at 2638.

276. *Compare Read v. Case*, 4 Conn. 166, 168-69 (Conn. 1822) (stating "there is no authority for making an exception to the rule"), with *Safford*, 129 S. Ct. at 2644 (concluding some courts might find justification for intimate searches).

as in the eighteenth century, an officer who wishes to enter a dwelling to execute an arrest or search warrant must knock, announce his presence, and await a response.<sup>277</sup> The common-law rule mentioned no exceptions.<sup>278</sup> But the Court was not willing to apply the history fully.<sup>279</sup> Instead, *Wilson v. Arkansas* created an exception for situations that present “a threat of physical violence.”<sup>280</sup> Because most felony arrests or searches present a threat of physical violence, the modern exception largely swallows the rule.<sup>281</sup> *Wilson* is a good example of the difficulty of making history dispositive.<sup>282</sup> Though knocking on doors of those for whom a warrant had issued was, in the eighteenth century, not without danger, it is surely more dangerous today.<sup>283</sup> Indeed, a state court as early as 1822 held that an exception existed to a similar “knock and announce” rule for cases of “high necessity,” which included “[i]mmminent danger to human life, resulting from the threats and intended violence” of the person apprehended in his home.<sup>284</sup> It seems that the absolute nature of the common law rule might have already been evolving toward one that recognized an exception for danger to officers as early as 1791.

Most of the trespass rules were directed at arrests rather than searches.<sup>285</sup> Here, there is considerable overlap with modern doctrine.<sup>286</sup> Hot pursuit and exigent circumstances entries into homes are largely the same.<sup>287</sup> Exigent circumstances, such as breaking up a fight inside a home or pursuing inside a home to make an arrest, could permit entry into a home without a warrant.<sup>288</sup> The same rules hold today.<sup>289</sup> The difference is that even where exigent circumstances existed, the eighteenth-century constable had to demand entry and wait in vain for the door to open.<sup>290</sup> There is no similar requirement today.<sup>291</sup> As with “knock and announce,” the increased danger to officers from modern weapons probably justifies departing from

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277. *Richards v. Wisconsin*, 520 U.S. 385, 387 (1997); *Wilson v. Arkansas*, 514 U.S. 927, 931, 934 (1995).

278. *See Read*, 4 Conn. at 168.

279. *See Wilson*, 514 U.S. at 934.

280. *Id.* at 936.

281. *See Richards*, 520 U.S. at 393.

282. *See Wilson*, 514 U.S. at 931-37.

283. *See Read*, 4 Conn. at 166-67; *Wilson*, 514 U.S. at 929.

284. *See Read*, 4 Conn. at 170. The case involved someone who had posted bail for a defendant and who had come to take him back to jail, a right given under the law then, as long as he demanded entry and was refused. *Id.* at 167-68.

285. *See Wilson*, 514 U.S. at 934-36.

286. *See id.*

287. *See id.* at 936.

288. *Id.*; 5 BACON, *supra* note 5, at 177.

289. *See Mincey v. Arizona*, 437 U.S. 385, 392 (1978) (stating that police can enter a home without a warrant or consent if necessary to render aid or investigate a crime); *United States v. Santana*, 427 U.S. 38, 43 (1976) (concluding that an arrest begun in public can continue if the arrestee flees into her home).

290. 5 BACON, *supra* note 5, at 179.

291. *See Wilson v. Arkansas*, 514 U.S. 927, 934-36 (1995).



the eighteenth-century trespass law here.<sup>292</sup> In two other categories, the Fourth Amendment provides different protection from the tort of trespass, in one category less protection and in one category more protection. One of the remarkable features about eighteenth-century trespass law is the extent to which it held officers and complainants strictly liable for mistakes that led to wrongful arrests or searches that turned up no stolen goods.<sup>293</sup> If the constable searched a house as directed by a warrant, and no stolen goods were found, only the complainant was potentially liable in tort because the officer was merely doing his duty.<sup>294</sup> But if he arrested the wrong person, then the error was his and he was strictly liable.<sup>295</sup>

Today, the Fourth Amendment tolerates mistakes. In 1971, the Court held that the Fourth Amendment is not violated when an officer makes a reasonable, good-faith mistake about the identity of the person he is arresting.<sup>296</sup> “[S]ufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment and on the record before us the officers’ mistake was understandable and the arrest a reasonable response to the situation facing them at the time.”<sup>297</sup> Neither Justice Scalia nor Justice Thomas was on the Court at the time, and none of the opinions mention history.<sup>298</sup> Whether or not it makes sense to reshape the framing-era rules that rejected a defense of officer mistake, it remains true that the Court’s mistaken arrest doctrine is a substantial hollowing-out of the common-law seizure rules. Now I turn to a category where the Court probably gave more protection than the framing era did, or at least provided a different kind of protection. The issue in *Payton v. New York* was whether police need a warrant to make an arrest in the home.<sup>299</sup> Though the Court is correct that history does not speak with a single voice on this issue, it preponderates in favor of the view that warrants were not necessary for arrests in the home if the officer had adequate cause to suspect that the arrestee had committed a felony.<sup>300</sup> The Court managed to call history a “draw” by taking some authorities out of context or ignoring them and just plain mis-representing others.<sup>301</sup>

The Court conceded that Hale, Chitty, and Blackstone read the common law to permit warrant-less felony arrests in the home.<sup>302</sup> Hale and

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292. *See id.*

293. *See supra* Part IV.B.3.

294. *See supra* notes 225-35 and accompanying text.

295. *See supra* notes 230-35 and accompanying text.

296. *Hill v. California*, 401 U.S. 797, 804 (1971).

297. *Id.*

298. *See id.* at 797.

299. *Peyton v. New York*, 445 U.S. 573, 574 (1980).

300. *Id.* at 581 n.14.

301. *See id.* at 597-98.

302. *Id.* at 595. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 289 (1969); 1 J. CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 23 (1816); 2 HALE, *supra* note 88, at 583.

Blackstone are giants, and as White's dissent pointed out, Blackstone should be given particularly great weight "in light of his profound impact on the minds of the colonists at the time of the framing of the Constitution and the ratification of the Bill of Rights."<sup>303</sup> The Court sought to undermine Blackstone by claiming that he relied on Hale and that Hale's view was not "unequivocally expressed."<sup>304</sup> This is shoddy reasoning. First, it would not matter if Blackstone completely mis-read Hale. What counts is that Blackstone *said* that warrant-less felony arrests in the home were permissible, and the Framers would have read Blackstone and thus would have known that as the framing-era rule.

But the Court also mischaracterizes Hale. The Court stresses that, in Volume 2, Hale states a rule about making a hot pursuit arrest in a home without a warrant.<sup>305</sup> The reader is invited to assume that hot pursuit was part of the justification of the warrant-less arrest in the home.<sup>306</sup> But this ignores Hale's more general statement in Volume 1: "A man, that arrests upon suspicion of felony, may break open doors, if the party refuse upon demand to open them, and much more may be it be done by the justice's warrant."<sup>307</sup> It is difficult to be much clearer. Anyone can break doors to arrest upon suspicion of felony, and a warrant could justify even more violent, albeit unspecified, acts if needed to gain entry.

And the evidence the Court offers on the other side is weaker than it admits. First, two of the treatises cited in support of requiring a warrant—East and Russell—conceded that the entry is lawful without a warrant if the suspect turned out to be guilty.<sup>308</sup> This is the same "at one's peril" rule that applied to arresting the wrong person, and the same rule would logically apply to warrant-less home arrests.<sup>309</sup> But the effect of the "at one's peril" rule was not to bar warrant-less home arrests, but rather, to permit and regulate them.<sup>310</sup> Moreover, East and Russell were relative late-comers to the treatise business. The first edition of East was published in 1803 while Russell first appeared in 1819.<sup>311</sup>

The Court also relies on Burn and Foster, claiming that they agree with Coke that, "a warrantless entry for the purpose of arrest [was] illegal."<sup>312</sup> While the Court's reading of Burn is accurate, Foster simply does not make

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303. *Payton*, 445 U.S. at 606 (White, J., dissenting).

304. *Id.* at 595.

305. *Id.* at 595 n.41.

306. *See id.*

307. 2 HALE, *supra* note 88, at 583.

308. *Payton*, 445 U.S. at 595.

309. *See* EDWARD HYDE EAST, A TREATISE OF THE PLEAS OF THE CROWN 322 (1803); W. RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS 745 (1819).

310. *See id.*

311. *See id.*

312. *Payton*, 445 U.S. at 594.

the blanket claim the Court ascribes to him.<sup>313</sup> Foster states the general rule as: “[W]here a Felony hath been Committed or a dangerous Wound given . . . the Party’s own House is no Sanctuary for him; Doors may in any of these Cases be forced . . . .”<sup>314</sup> There is no mention of a warrant. To be sure, Foster later says that “bare Suspicion” will not justify an entry without a warrant.<sup>315</sup> It is possible to reconcile those statements, I think, by adopting the “at one’s peril” rule. If the person arrested had committed a felony, then the breaking of the doors to arrest him was justifiable without a warrant. However those statements are reconciled, to reference the second sentence without the first is terribly sloppy history.

So the evidence in favor of the Court’s rule comes down to Burn and Hawkins. East, Foster, and Russell actually embrace the at one’s peril rule that permitted the breaking of doors if the arrestee turned out to be guilty of a felony.<sup>316</sup> And the Court ignored some pretty powerful evidence in favor of a blanket rule that doors could be broken based on mere suspicion.<sup>317</sup> Viner, whose abridgement was perhaps the most well-known in the colonies, stated in a section listing entries that are justifiable without warrants: “A Man may break a House *to take a Felon, or for Suspicion of Felony.*”<sup>318</sup> A leading justice of the peace manual, *Conductor Generalis*, stated a similar rule: “A Constable is bound, *ex Officio*, to endeavor the taking of Felons, and may raise Men to assist him; he may likewise apprehend upon Suspicion; and upon Complaint or common Fame [i.e., reputation], may search suspicious Houses.”<sup>319</sup>

Bacon also recognizes warrant-less entries of homes.<sup>320</sup> In a list of categories where it is lawful for an officer “to break open the Door of a House,” the first two involve warrants.<sup>321</sup> The third and fourth categories involve exigent circumstances, and naturally, do not mention warrants.<sup>322</sup> The fifth category is a sort of catch-all; it does not mention warrants.<sup>323</sup> I quoted it earlier but repeat it here: “It is lawful for any Person, after a Demand to have it opened has been in Vain made, to break open the Door of a House, in order to arrest a Person who is justly suspected of having

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313. See RICHARD BURN, *THE JUSTICE OF THE PEACE AND PARISH OFFICER* 87 (6th ed. 1758); MICHAEL FOSTER, *CROWN LAW* 320 (1762).

314. FOSTER, *supra* note 313, at 320.

315. *Id.* at 321.

316. See EAST, *supra* note 309, at 322; FOSTER, *supra* note 313, at 320; RUSSELL, *supra* note 309, at 745.

317. See *Payton*, 445 U.S. at 594-96.

318. VINER, *supra* note 184, at 507; see Robert G. Natelson, *The Legal Meaning of “Commerce” in the Commerce Clause*, 80 ST. JOHN’S L. REV. 789, 804 (2006).

319. CONDUCTOR GENERALIS, *supra* note 4, at 58. While the second part of the sentence speaks of searching “suspicious” homes, in context, I believe it refers to searching for felons to apprehend.

320. See 5 BACON, *supra* note 5, at 178.

321. *Id.* at 178-79.

322. See *id.*

323. See *id.*

committed a Felony: For the good of the Publick requires this to be done.”<sup>324</sup> Nelson’s justice of the peace manual does not state a blanket rule but does join East, Russell, and Foster in favor of the at one’s peril rule, stating that a constable “may break open a Door to take an offender, but then some Felony must be committed.”<sup>325</sup>

But two points caution against concluding that there was a clear answer to the question of whether doors could be broken in the eighteenth century to make a felony arrest without a warrant. First, Burn’s four-volume justice of the peace manual may have had more influence in actual cases than any other source, perhaps even Blackstone, and Burn endorsed Hawkins’s rule that a warrant was required.<sup>326</sup> Second, as Tom Davies has demonstrated, differences in the arrest rules across the centuries make comparisons perilous, even if we could agree on a statement of the common-law rule.<sup>327</sup> The most significant difference relates to the arrest at one’s peril rule.<sup>328</sup> The authorities who appear to say that doors could be broken on suspicion of felony without a warrant also insisted that the arrest was illegal, and hence a trespass, if there had been no felony or if the constable arrested the wrong person.<sup>329</sup>

Today, police can arrest on mere suspicion and even if they arrest the wrong person, search the wrong apartment, or rely on consent by someone who was not authorized to consent, the Fourth Amendment is not violated.<sup>330</sup> Thus, *Payton* can be viewed as a trade-off. In exchange for more lax rules about mistake, the Court required a warrant for an in-home arrest. Moreover, *Payton* has attractive symmetry with the modern rule that search warrants are required to search a house.<sup>331</sup> And it fits with the modern Court’s view that privacy is at the core of the Fourth Amendment protections.<sup>332</sup>

Other comparisons can be made between the framing-era trespass rules and modern doctrine. I now think, for example, that the stop-and-frisk doctrine announced in *Terry v. Ohio* is a pretty reasonable “translation” of

324. *Id.* at 179.

325. NELSON, JUSTICE OF PEACE (1704), *supra* note 222, at 48.

326. See Thomas Y. Davies, *Not “the Framers’ Design”: How the Framing-Era Ban Against Hearsay Evidence Refutes the Crawford-Davis “Testimonial” Formulation of the Scope of the Original Confrontation Clause*, 15 J.L. & POL’Y 349, 415 (2007) (concluding that the “leading English justice of the peace manual during the last half of the eighteenth century was Richard Burn’s . . .”); *id.* at 427 (Burn’s manual appears “to have been imported by Americans in significant numbers” during colonial period.).

327. Davies, *Correcting Search-and-Seizure History*, *supra* note 33, at 5.

328. See *supra* note 316 and accompanying text.

329. See, e.g., 4 BLACKSTONE, *supra* note 302, at 289 (discussing warrant-less arrest as justified only in cases when “felony actually committed”).

330. See *Hill v. California*, 401 U.S. 797, 805-06 (1971) (arrested wrong person); *Maryland v. Garrison*, 480 U.S. 79, 87-88 (1987) (searched wrong apartment); *Illinois v. Rodriguez*, 497 U.S. 177, 188-89 (1990) (used un-authorized consent to gain entry to a home).

331. See *Payton*, 445 U.S. at 586-87.

332. See *id.*

several framing-era rules.<sup>333</sup> I have mentioned two of these rules in this essay: the hue and cry that permitted the arrest of one suspected of felonies, and the night-walker statutes that permitted arrest based only on generalized suspicion. But that argument, which is contrary to one I made before I delved as deeply into the common-law world of search and seizure, would take an entire essay; I leave it for another day.<sup>334</sup>

I close this essay by noting that just about everyone agrees that the framing-era rules are relevant to the regulation of search and seizure in the years just after 1791—either as part of the understanding of what was a reasonable search (the Court’s view), as part of due process of law (Davies’ view), or standing alone as a tort adjunct to the Fourth Amendment (my view). If I am right, the changes in tort and constitutional law of the last two centuries would have required, at some point, the transmogrification of the trespass rules into some other legal vehicle. So even if the Framers did not intend the Constitution to regulate ordinary criminal arrests and searches, the Court had to find a home for the framing-era tort rules in the Constitution. That process seems to have begun in earnest in *Gouled* in 1921 when the Court relied on the common law as well as the Constitution.<sup>335</sup>

How the common law transmogrified into Fourth Amendment doctrine is also a study for a later day. In this essay, I have sought to clarify eighteenth-century trespass law and to show its central role in protecting property and liberty. Trespass law restrained George III when he sought to destroy his enemies, and it was the sole protector of property and liberty against excessive ordinary searches and seizures until well into the twentieth century.

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333. See *Terry v. Ohio*, 392 U.S. 1, 10 (1968).

334. See George C. Thomas III, *Time Travel, Hovercrafts, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment*, 80 NOTRE DAME L. REV. 1451, 1495-96 (2005). One of my criticisms of *Terry* in 2005, however, I stand by, that “‘unreasonable’ is just too amorphous to provide a workable standard.” *Id.* at 1495.

335. See *Gouled v. United States*, 255 U.S. 298, 312-13 (1921).