

The Substantive Origins of Criminal Procedure

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I. INTRODUCTION

Consider the following anomaly: The law of criminal procedure closely regulates when a police officer can look in the glove compartment of my car or ask me questions about a crime, but it pays almost no attention to when (or how often or how hard or with what weapon) he can strike me. We have very

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detailed law governing a host of evidence-gathering issues, but surprisingly little—and surprisingly lax—legal regulation of police coercion and violence. This state of affairs is both strange and wrong. It is also a product of criminal procedure's odd history.

One aspect of that history is familiar. Fourth and Fifth Amendment law are the traditional guardians of a particular kind of individual privacy—the ability to keep secrets from the government. The most famous and important search and seizure cases of the eighteenth, nineteenth, and twentieth centuries involve government officials rummaging through private papers, subpoenaing private documents, or eavesdropping on telephone conversations.¹ Similarly, the privilege against self-incrimination arose in part from claims that one should not be required to disclose one's thoughts or beliefs under pain of criminal punishment.² This strand of thought about the privilege has mostly died out today, but as recently as a generation ago privacy was the dominant explanation for why the privilege existed.³ And the privilege at its heart has always protected a form of secrecy—the right not to share one's testimony with the government.

But there is another, less noticed strand of Fourth and Fifth Amendment history. Privacy protection in the past had little to do with ordinary criminal procedure. The Fourth and Fifth Amendments arose out of heresy investigations and seditious libel cases, not murders and robberies. In the late nineteenth century, when the Supreme Court first took a hand in crafting Fourth and Fifth Amendment law, the key cases involved railroad regulation and antitrust—again, a far cry from ordinary criminal litigation. In both the eighteenth and nineteenth centuries, the law's primary effect seems to have been to make it harder to prosecute objectionable crimes—heresy, sedition, or unpopular trade offenses in the seventeenth and eighteenth centuries, regulatory offenses in the late nineteenth century. To a surprising degree, the history of criminal procedure is not really about procedure at all but about substantive issues, about what conduct the government should and should not be able to punish.

1. See *Katz v. United States*, 389 U.S. 347 (1967) (wiretap of public telephone); *Mapp v. Ohio*, 367 U.S. 643 (1961) (seizure of obscene literature found during search of boarding house); *Olmstead v. United States*, 277 U.S. 438 (1928) (wiretap of suspect's telephone); *Boyd v. United States*, 116 U.S. 616 (1886) (subpoena for customs invoices); *Entick v. Carrington*, 19 Howell's State Trials 1029 (C.P. 1765) (search and seizure of papers found in suspect's home); *Wilkes v. Wood*, 19 Howell's State Trials 1153 (C.P. 1763) (same).

2. See *infra* note 81 and accompanying text (discussing Coke's argument for the privilege).

3. See, e.g., *California v. Byers*, 402 U.S. 424, 450–51 (1971) (Harlan, J., concurring); Robert S. Gerstein, *Privacy and Self-Incrimination*, 80 ETHICS 87 (1970); Robert B. McKay, *Self-Incrimination and the New Privacy*, 1967 SUP. CT. REV. 193. Not coincidentally, it was conventional to see the privilege as closely tied to constitutional restrictions on searches and seizures. See *Mapp* 367 U.S. at 656–57; *id.* at 661–66 (Black, J., concurring).

Fourth and Fifth Amendment history thus has more in common with the First Amendment and *Lochner v. New York*⁴ than with criminal procedure as we know it today. Fourth and Fifth Amendment law has traditionally limited government evidence gathering in order to guard individual privacy, but the limits and the protection have mattered most in settings in which there have been serious concerns about the government's power to regulate the relevant conduct. Meanwhile, those bodies of law had only a small effect on run-of-the-mill criminal investigations and prosecutions. It is as if privacy protection were a proxy for something else, a tool with which courts or juries could limit the government's substantive power.⁵

This system began to break down near the turn of this century, with the advent of the Interstate Commerce Act, the Sherman Act, and other statutes designed to regulate business. These statutes dramatically altered the substantive effect of constitutional privacy protection, transforming it into a tool for preventing unwelcome regulation of business. Some courts embraced this transformation (this was, after all, the *Lochner* era), but by the end of Theodore Roosevelt's presidency that path was already largely abandoned. Foreshadowing the switch in time of 1937, the Supreme Court began to erect unprincipled boundaries around Fourth and Fifth Amendment protections in order to limit their restrictive effect on regulatory statutes. Yet the underlying focus of the law—the idea that the Constitution places great value on one's ability to keep information out of the government's hands—remained, setting the stage for the conflicts and inconsistencies that riddle Fourth and Fifth Amendment law today.

The results of this history can be seen today both in what the law regulates and in what it leaves alone. If the law of search and seizure now seems obsessed with evaluating the privacy interest in jacket pockets or paper bags, that is a consequence of the strong tradition of using Fourth and Fifth Amendment law as a shield against government information-gathering—a tradition that has more to do with protecting free speech than with regulating the police. If privacy seems surprisingly *unprotected* when government agencies search regulated businesses or when government employers search their employees, that is a consequence of the early twentieth-century conflict between privacy protection and the emerging regulatory state. Finally, if the law all but ignores police violence outside of interrogation rooms, if it pays more attention to what police officers can *see* than to what they can *do*, that too is a consequence of the Fourth and Fifth Amendments' odd history. Except for the last generation or so, that history has had surprisingly little to do with

4. 198 U.S. 45 (1905).

5. For an argument that significant privacy protection *always* places serious limits on the government's substantive power, and that the need to escape those limits helps to explain much of the chaos in Fourth Amendment law, see William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016 (1995).

the police. It has had more to do with the substantive law of crimes, with what activities the government should and should not be able to punish.

Of course, the substantive issues that shaped Fourth and Fifth Amendment law are long since settled. The government cannot prosecute people for sedition or heresy. Regulatory crimes abound, and few people think they raise serious constitutional problems.⁶ Meanwhile, the law of criminal procedure still follows the path marked out by these old battles. We have taken a privacy ideal formed in heresy cases and railroad regulation disputes, an ideal that had no connection to ordinary criminal law enforcement, and used it as the foundation for much of the vast body of law that polices the police. Predictably, the combination has not worked out very well.

Part II of this Article discusses the Fourth Amendment's eighteenth-century roots. Part III turns to the origins of the privilege against self-incrimination. Part IV examines the role both doctrines played during the late nineteenth and early twentieth centuries. Finally, Part V offers an account of how we got to where we are, of the transition from *Lochner*-era Fourth and Fifth Amendment law to the Warren Court, and from the Warren Court to today. These discussions are not detailed, and there are no impressive new discoveries. The basic outlines of Fourth and Fifth Amendment history have long been fairly clear. I wish only to suggest that those basic outlines, especially the eighteenth-century disputes that led to the Fourth Amendment together with *Boyd v. United States* and its nineteenth-century progeny, paint a different picture than the one we usually see.

II. THE SUBSTANTIVE ORIGINS OF THE FOURTH AMENDMENT

The literature on the Fourth Amendment's origins is sparse, but that may be because agreement is so widespread. Like the rest of the Bill of Rights, the Fourth Amendment was prompted by complaints pressed during the Constitution's ratification.⁷ Also like other items in the Bill of Rights, the Fourth Amendment echoed several state constitutional provisions.⁸ But its real source, historians seem to agree, was the same as the source of those state provisions: a trio of famous cases from the 1760s, two in England and one in the colonies.⁹ All of the literature on the Fourth Amendment's origins focuses

6. At least that was so until *United States v. Lopez*, 115 S. Ct. 1624 (1995) (invalidating federal criminal prohibition of gun possession in vicinity of school).

7. See, e.g., EDWARD DUMBAULD, *THE BILL OF RIGHTS: AND WHAT IT MEANS TODAY* 3-33 (1957); JACOB W. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT* 39-41 (1966); Osmond K. Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361, 361-62 (1921). During the ratification debates in 1787 and 1788, five states proposed a constitutional amendment barring unreasonable searches and seizures. See DUMBAULD, *supra*, at 33.

8. See, e.g., LANDYNSKI, *supra* note 7, at 38; Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1176 (1991); Fraenkel, *supra* note 7, at 362.

9. The three cases are *Entick v. Carrington*, 19 Howell's State Trials 1029 (C.P. 1765), *Wilkes v. Wood*, 19 Howell's State Trials 1153 (C.P. 1763), and the *Boston Writs of Assistance Case*, see M.H.

on these three cases, which were not only well known to the men who wrote and ratified the Bill of Rights, but famous throughout the colonial population. Any effort to understand the Fourth Amendment's roots, then, must start with these cases and the legal context within which they operated.

A. *John Entick and John Wilkes*

Two of the three cases can be usefully paired, since they have so much in common. John Entick and John Wilkes were both authors of political pamphlets critical of the King's ministers. As a consequence, both suffered the ransacking of their homes and the seizure of all their books and papers, both sued the officials who ordered or carried out the searches, both won (and collected substantial damages), and in both cases Chief Justice Pratt (later Lord Camden) offered ringing declarations about the importance of limiting executive power to search for and seize private papers in private homes.¹⁰ Though all these events took place in England, Entick, Wilkes, and Camden became quite famous throughout the colonies.¹¹

Entick authored a series of pamphlets that authorities thought libelous. In 1762, Lord Halifax, the British secretary of state, issued a warrant authorizing the seizure of Entick and all his books and papers. Four "messengers," agents of the Crown, executed the warrant. Entick sued them in trespass and won a verdict of three hundred pounds.¹²

Camden's opinion upholding the jury verdict in *Entick v. Carrington* is stunningly broad. As Eric Schnapper has noted, Camden did not rest his decision on any technical defect in the warrant (though he did identify problems with the process that produced it¹³); rather, he held that the search

SMITH, THE WRITS OF ASSISTANCE CASE (1978). Both of the standard histories of the Fourth Amendment focus on these three. See LANDYNSKI, *supra* note 7, at 19–48; NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 13–78 (1937). Most other writers have agreed. See, e.g., TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 24–44 (1969); Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 283–86 (1984). The only real dispute in the contemporary literature has been whether the writs of assistance were as important as *Entick* and *Wilkes*. Compare Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 772 (1994) (describing writs of assistance dispute as "almost unnoticed in debates over the federal Constitution and Bill of Rights") with Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 97, 223–28 (1993) (finding disputes over writs of assistance key to colonial understanding of unreasonable searches and seizures). My argument does not depend on how this disagreement is resolved, so for purposes of this Article, I will adopt the more common view, which treats the *Writs of Assistance Case* as part of the Fourth Amendment canon.

10. See *Entick*, 19 Howell's State Trials 1029; *Wilkes*, 19 Howell's State Trials 1153.

11. See Amar, *supra* note 8, at 1177 & n.209, and sources cited therein. Amar describes Wilkes and Camden as "folk heroes in the colonies." *Id.* at 1177.

12. *Entick*, 19 Howell's State Trials at 1029–36; See LASSON, *supra* note 9, at 47.

13. E.g., *Entick*, 19 Howell's State Trials at 1045 (speaking of secretary who issued warrant in *Entick*: "The power of this minister . . . is pretty singular."); *id.* at 1045–51 (explaining why secretary could not fairly be deemed equivalent to a magistrate).

and seizure of the papers was itself impermissible, even with an otherwise valid warrant:¹⁴

Papers are the owner's goods and chattels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect.¹⁵

Camden arrived at this conclusion notwithstanding the defendants' claim that the search was necessary to gather evidence that was in turn necessary to enforce the law against seditious libel:

[I]t is urged as an argument of utility, that such a search is a means of detecting offenders by discovering evidence. I wish some cases had been shewn, where the law forceth evidence out of the owner's custody by process. There is no process against papers in civil causes. It has been often tried, but never prevailed. . . .

In the criminal law such a proceeding was never heard of; and yet there are some crimes, such for instance as murder, rape, robbery, and house-breaking, to say nothing of forgery and perjury, that are more atrocious than libelling. But our law has provided no paper-search in these cases to help forward the convictions.¹⁶

The decision in Wilkes's case was less sweeping only because the facts were more egregious. John Wilkes was more than an ordinary pamphleteer; he was a well-known Member of Parliament. He anonymously authored a series of pamphlets called *The North Briton*. Number 45 of the series sharply criticized the King's speech to Parliament and, as with Entick, Lord Halifax responded by initiating proceedings for seditious libel.¹⁷ (The warrants in the two cases were issued six months apart.¹⁸) While the warrant in Entick's case focused on Entick himself, the warrant in Wilkes's case named no search target. It directed the messengers "to make strict and diligent search for the authors, printers and publishers of a seditious and treasonable paper, intituled, The North Briton, No 45 . . . and them, or any of them, having found, to apprehend and seize, together with their papers"¹⁹

14. See Eric Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 VA. L. REV. 869, 881-84 (1995).

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

16. *Id.* at 1073.

17. See LANDYNSKI, *supra* note 7, at 28; LASSON, *supra* note 9, at 43; GEORGE RUDÉ, *WILKES AND LIBERTY* 22-23 (1962). By claiming that the King's speech was traditionally viewed as emanating from the King's ministers, Wilkes tried to avoid directly attacking the King himself. *Id.* at 22.

18. See LASSON, *supra* note 9, at 47; Schnapper, *supra* note 14, at 886.

19. The Case of John Wilkes, 19 Howell's State Trials 982, 982 (C.P. 1763).

The messengers carried out their task with enthusiasm, arresting some forty-nine suspects,²⁰ including Wilkes, and hauling away all Wilkes's papers and manuscripts in a large sack.²¹ Several of the arrestees, again including Wilkes, then sued in trespass. Wilkes's case came before Chief Justice Pratt (soon to be Lord Camden—this was shortly before the trial in *Entick's* case), who instructed the jury as follows:

The defendants claimed a right, under precedents, to force persons' houses, break open escrutores, seize their papers, &c. upon a general warrant, where no inventory is made of the things thus taken away, and where no offenders' names are specified in the warrant, and therefore a discretionary power given to messengers to search wherever their suspicions may chance to fall. If such a power is truly invested in a secretary of state, and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject.²²

The jury, "after withdrawing for near half an hour," found for Wilkes, awarding him one thousand pounds in damages;²³ a separate suit against Lord Halifax led to an award of four thousand pounds.²⁴ Wilkes's colleagues were similarly successful, though the damage awards were smaller.²⁵ Wilkes's fame and popularity grew dramatically, as much on this side of the Atlantic as in England.²⁶

Two themes connect these cases. First and foremost, both decisions emphasize the importance of the privacy interest in homes and papers. This was the main focus of Camden's opinion in *Entick*, and though it was less critical to Wilkes's success, the quoted portion of Pratt's jury instruction plainly strikes the privacy chord. This interest was, to be sure, wrapped up with *Entick's* and Wilkes's property interests—the word "property" appears more often than "privacy" in these cases. Yet the key to the cases was not the fact that the papers seized *belonged* to *Entick* and Wilkes; rather, the chief emphasis was on the fact that they were *papers*, and papers were of such a private nature that "so far from enduring a seizure, . . . they will hardly bear an inspection."²⁷ Second, both decisions express concern with official

20. See LASSON, *supra* note 9, at 43–44; RUDÉ, *supra* note 17, at 23–24.

21. *Wilkes v. Wood*, 19 Howell's State Trials 1153, 1157 (C.P. 1763).

22. *Id.* at 1167.

23. *Id.* at 1168.

24. See LASSON, *supra* note 9, at 45.

25. See *id.* at 44. According to Lasson, the expense to the government of defending *Wilkes* and related cases, together with the expense of paying the judgments, amounted to roughly one hundred thousand pounds. *Id.* at 45.

26. For the best account of Wilkes's reception by his fellow Englishmen, see RUDÉ, *supra* note 17. For the best account of his reception by the American colonists, see R.W. POSTGATE, *THAT DEVIL WILKES* (1929). See also Amar, *supra* note 9, at 772 n.54 (noting naming of American towns and counties in Wilkes's honor).

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

discretion, a concern reflected particularly in Pratt's rejection of the general warrant used against Wilkes. The set of cases arising out of *The North Briton No. 45* episode came to stand for the proposition that such warrants are invalid²⁸—a proposition later explicitly enshrined in the Fourth Amendment²⁹—and that arrests must be grounded in some cause to suspect the arrestee personally of a crime.³⁰ Together, these concerns seem to capture the essence of the Fourth Amendment, at least from the perspective of the men who wrote and ratified it.

That much is conventional wisdom. But consider what the first of these two themes—the idea of a broad right of privacy against the government, a right focused on personal papers and books—must have meant in practice.

Or, consider what it did *not* mean. Protecting privacy in cases like *Entick* and *Wilkes* had no effect on the mass of ordinary criminal cases. This seems counterintuitive: *Entick* and *Wilkes* arose out of criminal investigations, and the Fourth Amendment, which is in a sense their progeny, is a core part of criminal procedure. But there are at least two reasons why this pair of decisions must have been largely irrelevant to day-to-day law enforcement. First, *Entick* and *Wilkes* were not themselves criminal cases; both were civil actions for damages against public officials. They created no entitlement enforceable in a criminal case; the exclusionary rule was unknown at the time.³¹ Thus, nothing in these cases directly changed criminal litigation. If the target of an illegal search wished to challenge it, he had to sue in trespass. To be successful he had to have clean hands: in the civil damages action, the constable could defend himself by showing that the search was successful, even if it was also illegal.³² (Of course, it was up to the jury to decide success.³³) This remedial structure ensured that the limits placed on government investigation in *Entick* and *Wilkes* would not affect criminal cases where (1) the critical evidence was in fact found, or (2) the search target was too poor or too disreputable to make suing for damages a sensible course of action. These categories must have covered the great majority of criminal cases.

28. See, e.g., LANDYNSKI, *supra* note 7, at 28–29. Note that in Howell's State Trials, *Wilkes v. Wood* is labelled "The Case of General Warrants." *Wilkes*, 19 Howell's State Trials at 1153.

29. The text of the Fourth Amendment states in part that "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." U.S. CONST. amend. IV.

30. Note that the warrant in *Wilkes* was general *both* as to the persons to be arrested *and* as to the places to be searched. See LASSON, *supra* note 9, at 43. Condemnation of that warrant thus tended to imply condemnation of arrest on mere whim or suspicion, which the warrant authorized.

31. See Amar, *supra* note 9, at 786–87 (noting Joseph Story's 1822 statement that he had never heard of a case excluding illegally seized evidence).

32. See *id.* at 767 & nn.30–33 (citing sources).

33. Thus, in his instruction to the jury in *Wilkes v. Wood*, Pratt essentially invited the jury to find that the material found either was not libelous or was not sufficiently tied to Wilkes to exculpate the defendants. See *Wilkes*, 19 Howell's State Trials at 1166–68.

The second reason is more subtle, and probably more important. *Entick* and *Wilkes* did not cover the kinds of searches that mattered in ordinary criminal cases, and the kinds of searches that those decisions *did* cover rarely occurred in ordinary criminal cases. Consider some basic features of the law and practice of eighteenth-century criminal investigation. The power to search incident to arrest—a search of the arrested suspect’s person and (if arrested there) his home—was well established in the mid-eighteenth century, and nothing in *Entick* or *Wilkes* or, indeed, the Fourth Amendment changed that.³⁴ Searches for bloody shirts, murder weapons, and stolen goods, as long as they were incident to arrest, remained legal, indeed unchallenged.³⁵ Meanwhile, prearrest searches and seizures played a small role in the investigation of ordinary crimes. There were no police forces, so the government (in the form of either the constable or the magistrate) tended to enter the picture no earlier than the time of arrest, after private citizens had identified the suspected perpetrator.³⁶ Thus, coercive government searches in ordinary criminal cases tended to happen after a suspect was identified and an arrest made, not before—and once an arrest was made, the power to search incident to arrest allowed the government to gather the physical evidence it needed. Last but not least, pretrial questioning by magistrates was a central feature of eighteenth-century criminal procedure. The questioning quite commonly led to a confession, so gaps in the physical evidence could usually be filled with the suspect’s own testimony.³⁷ All these features of the process show why *Entick*

34. For the most famous exposition of this point, see TAYLOR, *supra* note 9, at 27–29.

35. Telford Taylor says they were first challenged in England in the late *nineteenth* century. *Id.* at 29; see also *Weeks v. United States*, 232 U.S. 383, 392 (1914) (characterizing search incident to arrest as a “right on the part of the Government” that was “always recognized under English and American law” and “has been uniformly maintained in many cases”); cf. JAMES BOYD WHITE, *JUSTICE AS TRANSLATION* 191–92 (1990) (arguing that authority to search incident to arrest may have been available only for certain purposes, though such purposes included the need to gather evidence).

36. See, e.g., JULIUS GOEBEL, JR. & T. RAYMOND NAUGHTON, *LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE, 1664–1776*, at 387 (1944) (noting that process of initiating criminal proceedings was much like process by which civil proceedings were initiated); *id.* at 419–31 (emphasizing use of arrest warrants, which tended to rule out arrest based on constable’s suspicion); ARTHUR P. SCOTT, *CRIMINAL LAW IN COLONIAL VIRGINIA 51–55* (1930) (describing process of identification and arrest in terms that emphasize role of private citizens and that paint constables and magistrates as essentially reactive). It is worth noting that the constable himself was more like a private citizen than like a modern-day police officer. One study of law enforcement in colonial North Carolina notes that “[c]onstables were local men, from all indications of humble background,” and they rarely served more than a year in office. See Donna J. Spindel & Stuart W. Thomas, Jr., *Crime and Society in North Carolina, 1663–1740*, 49 J. S. HIST. 223, 227 (1983); see also *infra* note 59 (discussing colonial evidence gathering).

In short, criminal investigation was mostly privatized, and even the portion that was not privatized was, by contemporary standards, the work of amateurs. For a rare (and very good) discussion of this point in the Fourth Amendment literature, see Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 830–32 (1994).

37. Indeed, if one were to compare eighteenth-century criminal investigation to contemporary practice, at least with respect to the colonies, pretrial questioning by the justices of the peace seems to have combined the roles that police investigation and plea bargaining play today—it was the stage at which most cases were resolved. For two good discussions, see PETER C. HOFFER & WILLIAM B. SCOTT, *CRIMINAL PROCEEDINGS IN COLONIAL VIRGINIA* at xxxv–xliv (1984) and Eben Moglen, *Taking the Fifth*:

and *Wilkes* had little to do with the kinds of evidence gathering that took place in typical criminal cases.

This is not to say that the privacy protection offered by those cases was unreal or hypocritical. It is perfectly plausible to conclude that papers as a category are significantly more private—more the sort of thing that innocent people would want to keep secret, at least from the government—than the bloody shirts or contraband one might find in a search of a suspected felon's home. Camden's famous claim that a man's papers would "hardly bear an inspection" suggests this point. The fact that cases like *Entick* and *Wilkes* existed shows that the point mattered.

It mattered, however, only in a small slice of cases. *Entick* and *Wilkes* were not suspected robbers; they were pamphleteers. That is no coincidence: it explains why the government seized their papers and not weapons or stolen goods. Documents were crucial to the investigation and proof of seditious libel cases, but they were not an important part of the investigation and proof of run-of-the-mill crimes. For ordinary criminal cases, or at least the overwhelming majority of them, the power to search incident to arrest, coupled with questioning by the magistrate, sufficed to give the government what it needed to convict—even with a bar on paper searches.

This casts an interesting light on Camden's argument about ordinary criminal investigation: "[M]urder, rape, robbery, and house-breaking . . . are more atrocious than libelling. But our law has provided no paper-search in these cases . . ."³⁸ One might fairly say the observation is beside the point. There is no reason to suppose the government *needed* paper searches in such cases. Documentary evidence is the key to solving white-collar crime (to use the modern terminology), not street crime. And white-collar crime in the eighteenth century had a very different cast than today. It included much less in the way of business crime, because the mass of regulatory statutes that define such crimes today did not exist. On the other hand, it did include seditious libel, a political crime. (It also included trade offenses, which are addressed in the next section.) Forbidding the search and seizure of *Entick's* and *Wilkes's* papers made these problematic crimes harder to prosecute, without casting too large a shadow on other, "more atrocious" offenses. Camden noted this substantive connection, at least indirectly. One portion of his opinion in *Entick* discussed the scope of the prohibition of seditious libel—in particular, the opinion of some authorities that the prohibition might

Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination, 92 MICH. L. REV. 1086, 1094–1104 (1994).

38. *Entick*, 19 Howell's State Trials at 1073.

extend to simple possession of libelous material.³⁹ At the close of that discussion, Camden stated:

If all this be law, and I have no right at present to deny it, whenever a favourite libel is published (and these compositions are apt to be favourites) the whole kingdom in a month or two becomes criminal, and it would be difficult to find one innocent jury amongst so many millions of offenders.⁴⁰

Camden could not bar the government from exploiting such an overbroad, substantively unjust prohibition; hence the interjection, “I have no right at present to deny it.”⁴¹ A ban on paper searches, however, would place a major obstacle in the government’s path, making prosecution significantly harder, and thereby preventing some of the worst abuses.

What happened to *Entick* and *Wilkes* was not purely a problem of substance. The searches and seizures in those cases did indeed raise procedural concerns,⁴² and those concerns surely mattered to the courts and people who embraced the decisions. But two points about this pair of cases stand out in stark relief. First, *Entick* and *Wilkes* are classic First Amendment cases in a system with no First Amendment, no vehicle for direct substantive judicial review. Restricting paper searches had the effect of limiting government power in a class of cases that were, even at the time, deemed seriously troubling in substantive terms, as shown not only by Camden’s remarks in *Entick* but also by the public’s embrace of the two decisions.⁴³ Second, we have no evidence of important contemporaneous search and seizure litigation arising out of run-of-the-mill criminal investigations, investigations of “more atrocious” crimes. And there is a thoroughly plausible explanation for why such litigation would

39. *See id.* at 1071.

40. *Id.* at 1072.

41. To be sure, Camden did not believe in doing away with seditious libel, and was eager to avoid any appearance to the contrary. Thus, he closed his opinion in *Entick* with a peroration against libels, *see id.* at 1074 (“I will always set my face against them, when they come before me; and shall recommend it most warmly to the jury always to convict when the proof is clear.”), and licentiousness, *see id.* (“When licentiousness is tolerated, liberty is in the utmost danger; because tyranny, bad as it is, is better than anarchy; and the worst of governments is more tolerable than no government at all.”). Still, he seems to have found the broadest version of the offense quite problematic on essentially substantive grounds.

42. Particularly the concern with government discretion, a problem to which I will return below. *See infra* Section II.B (discussing the *Writs of Assistance Case*).

43. This connection between substance and process holds true not only for *Entick* and *Wilkes*; it also holds true for much of the early history of American civil liberties. Consider the following discussion of early Pennsylvania law and its grant of a range of liberties to that colony’s residents:

The various frames of government, concessions, and grants of liberties that Penn issued during the 1680s, 1690s, and into the early eighteenth century contained what amounted to a bill of rights, including a guarantee of jury trial, counsel, and freedom from illegal search and seizure.

The ill-usage of the Quakers in England by officers of the law bent on rooting out the sect influenced Penn’s plan, as did a vision of a good society open to all peaceful emigrants.

PETER C. HOFFER, *LAW AND PEOPLE IN COLONIAL AMERICA* 31 (1992). Once again, what we would see as First Amendment problems led to the creation of procedural rights because there was no legal tradition that allowed direct substantive limitation on government power.

not have existed. Given the absence of an exclusionary rule, the legality of searches incident to arrest, and the prevalence of uncounseled questioning by magistrates prior to trial, the government could get what it needed to convict without the use of searches of the sort that led Entick and Wilkes to sue.

B. *The Writs of Assistance*

The third canonical case took place in America, not England, and it was a defeat for those who sought protective search and seizure rules. Nevertheless, the argument that lost in the courtroom in the famous Boston *Writs of Assistance Case* prevailed with the men who later wrote the Bill of Rights.⁴⁴

The dispute concerned the enforcement of British customs laws in colonial ports, and especially in Boston. There were two major sets of rules, both probably designed more to restrict trade than to raise revenue. The colonists had to pay high duties on any molasses imported from the non-British West Indies. Molasses was of course key to the rum trade, and it was available in greater quantities and at better prices from the French- and Spanish-ruled islands. The British duties sought to discourage the trade between those islands and New England. The second set of rules, known as "the staple," required that goods imported from continental Europe be shipped through British ports.⁴⁵

British statutes appeared to give customs officials almost unlimited authority to search for and seize goods imported in violation of these rules. The Act of Frauds of 1662 authorized customs officers

to enter, and go into any House, Shop, Cellar, Warehouse or Room, or other Place, and in Case of Resistance, to break open Doors, Chests, Trunks and other Package, there to seize, and from thence to bring, any Kind of Goods or Merchandize whatsoever, prohibited and uncustomed⁴⁶

The Act of Frauds of 1696 applied this authority to customs enforcement in the colonies.⁴⁷ And this power was indeed exercised, albeit only sporadically, during the first half of the eighteenth century. Before writs of assistance made their first appearance in Boston in 1756, customs searches in the colonies were based on statutory authorization alone, on some conception of inherent power,

44. See sources cited *supra* note 9.

45. The two best-known sources on the *Writs of Assistance Case* are SMITH, *supra* note 9, and O.M. Dickerson, *Writs of Assistance as a Cause of the Revolution, in THE ERA OF THE AMERICAN REVOLUTION* 40 (Richard B. Morris ed., 1939). Much of the discussion in this section relies heavily on these two sources, especially Smith's thorough book.

46. Act of Frauds § 5(2) (1662), reprinted in SMITH, *supra* note 9, at 25. This Act codified already existing authority. See William Cuddihy & B. Carmon Hardy, *A Man's House Was Not His Castle: Origins of the Fourth Amendment to the United States Constitution*, 37 WM. & MARY Q. 371, 380-81 (1980).

47. See SMITH, *supra* note 9, at 51-58.

or even on general warrants issued by colonial governors.⁴⁸ But while customs searches existed, they must have been rare: enforcement of the trade rules was lax, and violations were both rampant and blatant. It is not too much to say that Boston's economy in this period was grounded on an illegal trade.⁴⁹ Moreover, for much of this time, goods could not be forfeited except on a jury verdict, and New England jurors were unfriendly to strict enforcement of the customs laws. Thus, even when goods were seized, there was a fair chance that the seizure would quickly be undone.⁵⁰

Three things happened beginning in the mid-1750s to change this picture. First, British trade policy shifted. War with France raised concerns about trade protection and revenue, and these concerns prompted stricter enforcement of customs rules. The second development was the fortification of a system of vice-admiralty courts that could decide condemnation (i.e., forfeiture) proceedings without the aid of a jury.⁵¹ Third, the colonial courts began to issue writs of assistance. These writs, authorized by the two Acts of Frauds, were not themselves a grant of authority; rather, they enabled customs officers to compel others—constables, local officials, or even private citizens—to assist in carrying out the necessary searches and seizures. They did not purport to create authority but to confirm it, and to render its use easier. But the writs became wrapped up with the search authority they sought to confirm. And the scope of that authority was very broad indeed: language in the writs harked back to the Act of Frauds of 1662, permitting searches of any place where prohibited goods or goods subject to duties might be, based solely on the suspicion of the customs officer. To top it all off, each writ ran for the life of the King.⁵²

48. See *id.* at 115–23; see also LASSON, *supra* note 9, at 55 (these searches “seem[] to have been unopposed for a long period of time”). But see Maclin, *supra* note 9, at 218–22 (arguing that searches were quite controversial). From the incidents reported in the major secondary sources, it seems that customs searches became a *cause célèbre* only in the mid-eighteenth century.

49. As Smith puts it:

But the [Molasses Act] could never have worked anyway. The aim was to break and recast a firmly established pattern of commerce in a region with not much diversification of economy—far more than the modest custom house staffs, even though expanded a little for the purpose, could possibly have accomplished.

SMITH, *supra* note 9, at 61. The predictable consequence was lax enforcement: “[U]ntil the 1750s, when in desperation for revenue London began thinking hard, the men at the top gave not two straws about the Molasses Act and how it was working” and hence “turn[ed] a blind eye [to] the minuscule receipts” collected by the customs officials. *Id.*

50. A portion of the 1696 Act was designed to eliminate the jury's role in these cases, but Smith argues that poor drafting and colonial resistance prevented this change from taking root. See *id.* at 52–57. The result was that the vice-admiralty courts created following 1696 were largely ineffective. See *id.* at 70–71 (discussing non-enforcement of the staple).

51. The fortification came chiefly through judicial appointments favorable to more rigorous enforcement of the trade laws. See *id.* at 86–87, 93–94.

52. See *id.* app. L at 559–61 for a specimen, and *id.* at 95–124 for discussion of the writs used in Massachusetts in the 1750s. On the writs as confirming authority but not creating it, see Dickerson, *supra* note 45, at 45–46.

Beginning in 1756, several writs were issued to various officials in and near Boston. In late 1760, after the appearance of a London magazine article suggesting that the writs were incompatible with British practice,⁵³ one of them was challenged. The challenge took on special importance when, shortly thereafter, King George II died, meaning that existing writs would shortly expire absent judicial reauthorization.⁵⁴ The Superior Court in Boston heard the case, in which James Otis famously represented the merchants (and likely smugglers) who sought to eliminate the writs, and along with them the broad power to search for customs violations.

Otis's argument was partly statutory; he claimed that the Acts of Frauds did not confer the broad authority that their language seemed to suggest. But he also argued that if the statutes did authorize suspicionless searches, they were not good law. The substance of the argument reads like a precursor to *Wilkes v. Wood*:

Now one of the most essential branches of English liberty, is the freedom of one's house. A man's house is his castle; and while he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Custom house officers may enter our houses when they please—we are commanded to permit their entry—their menial servants may enter—may break locks, bars and every thing in their way—and whether they break through malice or revenge, no man, no court can inquire—bare suspicion without oath is sufficient.⁵⁵

The argument lost; the writs were upheld. But Otis and his argument became famous. John Adams later said that Otis had, in effect, fired the first shot of the Revolution.⁵⁶

Otis's argument raises the same pair of concerns as *Wilkes*: privacy in the home coupled with a fear of unbridled official discretion. These concerns are

53. See SMITH, *supra* note 9, at 132–34, 142–43. The article, copies of which apparently circulated widely in Boston in 1760 and 1761, stated that the writs should be granted only when the authorities had reason to believe that the prohibited or dutiable goods would be found in the place to be searched. LONDON MAG., Mar. 1760, reprinted in SMITH, *supra* note 9, at 537–39. Moreover, it went on to say that “if such a warrant should be granted without any reasonable or solid ground of suspicion, and no such goods should upon search be found, I am apt to suspect, that an action would lie against the *grantors*, and that the plaintiff, in that action would recover damages & costs.” *Id.* at 538.

54. See SMITH, *supra* note 9, at 134–40. It was not the case that the writs were only challenged after George II had died; the challenge had already been lodged. But the death of George II made the existing case a good deal more important, because now the validity of all *other* writs in Massachusetts was at stake. *Id.* at 142–43.

55. James Otis, Address, reprinted in SMITH, *supra* note 9, at 344.

56. As Adams put it, “Then and there the child Independence was born.” Letter from John Adams to William Tudor (Mar. 29, 1817), reprinted in SMITH, *supra* note 9, at 253. Otis's fame is partly due to Adams's later account of the case, and Adams's account—especially his conclusions about the contemporaneous importance of Otis's speech—is subject to serious challenge. See SMITH, *supra* note 9, at 248–52; see also Dickerson, *supra* note 45, at 42–43 (noting that speech was not widely reported when it was given).

obviously procedural in nature, for they go to the manner of criminal investigation rather than the substance of the crimes being investigated. Yet as with *Entick* and *Wilkes*, opposition to the writs of assistance cast no great shadow on ordinary criminal investigation; also as with *Entick* and *Wilkes*, opposition to the writs *did* cast a shadow, and a very large one, on a substantively troubling kind of government regulation. Both points follow from the key difference between law enforcement in the eighteenth century and law enforcement today. For us, policing is the job of the police. In Otis's day it was the job of the whole citizenry, because police forces did not exist.

Today, the law of search and seizure largely adopts Otis's argument by requiring probable cause and a warrant (or a good excuse for not getting one) for a legal search of a home.⁵⁷ These rules unquestionably limit the investigation of ordinary crimes. Police decide when and whom to arrest, and those decisions often come after a good deal of investigation. That investigation, in turn, is again driven by the police, for they are the ones who decide when and where to search. Since evidence of ordinary crimes can often be found in people's homes, the probable cause and warrant requirements for house searches significantly limit police discretion, and tend at the margins to push the police toward other forms of evidence gathering.

In mid-eighteenth-century America, on the other hand, someone reported a crime to the constable or magistrate and the constable made the arrest, or private parties arrested the culprit on their own.⁵⁸ Arrests were sometimes unjustified. Yet there was no serious problem of seizures based on nothing but the desire of the police to harass, for there were no police. Nor, for the same reason, were there many prearrest searches, justified or not: the government's agents usually did not enter the picture until arrest or shortly before.⁵⁹ Most

57. Indeed, the law has gone further, requiring probable cause and a warrant in order to make an arrest in a private home as well. See *Steagald v. United States*, 451 U.S. 204 (1981); *Payton v. New York*, 445 U.S. 573 (1980).

58. See SCOTT, *supra* note 36, at 50–55. The line between private parties and the constable was a fine one, given the system of private “watchmen” who policed the cities. See DOUGLAS GREENBERG, *CRIME AND LAW ENFORCEMENT IN THE COLONY OF NEW YORK, 1691–1776*, at 156–58 (1974). The watchmen were in effect acting constables. Throughout much of the eighteenth century, at least in New York, there was a serious shortage of real constables, *id.* at 167, making the role of the watchmen especially important.

59. Thus, accounts of colonial criminal justice tend to emphasize three kinds of evidence gathering, none of which is analogous to modern-day prearrest police investigation. The first is private—the “evidence” comes from the knowledge common to neighbors in what were usually very small communities. See, e.g., HOFFER & SCOTT, *supra* note 37, at xxvii–xxviii, which describes the role of the grand jury in one colonial Virginia county:

Their eyes and ears went where the justices' did not When Christopher Pridham made unwanted advances to his maidservant or Thomas Livack threatened to “do some bodily hurt” to a neighbor, they knew and presented the culprits to the court.

See also SCOTT, *supra* note 36, at 52–53 (noting that colonial Virginia arrests usually took place when private party reported crime and suspected criminal to justice of the peace, who then issued warrant for suspect's arrest); GOEBEL & NAUGHTON, *supra* note 36, at 337–38 (same in colonial New York). The second is the search incident to arrest. See TAYLOR, *supra* note 9, at 27–29. The third is examination by the magistrate. See HOFFER & SCOTT, *supra* note 37, at xxx, xxxv–xliv; Moglen, *supra* note 37, at 1094–1104. The basic picture seems clear. Prearrest evidence gathering was delegated to the community

searches were probably incident to arrest, and *those* searches were legal even when the search was of the arrestee's home.⁶⁰ Nothing in Otis's argument would have changed that conclusion. The problem of discretionary, suspicionless searches and seizures in ordinary criminal cases is an incident of organized police forces—of a system that gives to police officers the job of investigating crimes, identifying suspects, and choosing which suspects to pursue. James Otis's America did not have organized police forces. Consequently, the central evil that infected the writs of assistance, the evil that Otis so vigorously and eloquently attacked, cannot have been a significant feature of day-to-day criminal law enforcement.

Where, then, did Otis's argument matter? Precisely in the setting in which he made it: the enforcement of unpopular victimless crimes, prohibitions that both lacked public support and created no aggrieved private party who wished to have the wrongdoer caught and punished. Even *with* public support, such offenses are hard to enforce, for without a victim the system cannot readily know when an offense is committed. That is as true of drug offenses today as it was of adultery or trade offenses in 1760. Twentieth-century police, however, have an advantage in enforcing the drug laws that eighteenth-century officials did not have: the manpower and resources to infiltrate the citizenry. The cooperation of private citizens always makes law enforcement easier, but a significant level of enforcement of the drug laws is possible without *any* cooperation from private parties, simply because of the size and strength of police forces. That was not the case two-and-a-half centuries ago. Without the help of ordinary citizens who reported offenses and identified offenders, criminal law enforcement could not go forward, because there were no police forces to make it go forward. With respect to victimless crime, such cooperation can only flow from a general desire to see the law enforced. So, for example, if adultery and blasphemy laws were enforced to any substantial extent in the American colonies, it was because a large enough portion of the community generally agreed with the norms on which those offenses rested. When the support faded, enforcement faded with it.⁶¹

This acceptance of the law must have been a prerequisite for vigorous enforcement of any victimless offense in the eighteenth century. If the public thought the law wrong, no crimes would be reported, no arrests made, and the system would break down. That is essentially what happened to the trade laws

at large; *government* evidence gathering was designed to fill gaps in the evidence and took place after arrest, not before.

60. See TAYLOR, *supra* note 9, at 27–29. The legality of searches incident to arrest is probably a large part of the reason why, as Cuddihy and Hardy show, discretionary searches of private homes remained common even after *Wilkes v. Wood*, both in England and in the American colonies. See Cuddihy & Hardy, *supra* note 46, at 385–91.

61. On the enforcement of such laws generally, see David H. Flaherty, *Law and the Enforcement of Morals in Early America*, 5 PERSP. AM. HIST. 203 (1971). See also *id.* at 233–39 (noting connection between declining enforcement of morals laws and declining public support for them).

that the colonists opposed. Those laws were unenforceable by the usual procedures because the population did not think the prohibited conduct bad. That is why the vice-admiralty courts were necessary: juries would not condemn the seized property. It is also why the writs of assistance were necessary: customs officers needed to draft help because voluntary aid was scarce. Finally, without the help of private citizens, officials were not likely to know where smuggled goods were hidden, making the power to follow hunches and to conduct suspicionless searches essential.

So Otis's argument had bite, but—like Camden's opinions in *Entick* and *Wilkes*—it had bite in a narrow class of cases. If the writs were not valid, the trade laws would be much harder to enforce. Little else would change. The dispute over the writs, in short, had at least as much to do with the regulation of trade—with the substance of the rules being enforced—as with general principles of search and seizure. After all, broad search authority for customs officers had been around for a long time before anyone heard of James Otis. It only became contentious in the 1750s and 1760s because that is when British trade policy changed course. Had Otis's argument been adopted, its practical effect would have been to restrict the enforcement of unpopular trade rules while leaving the rest of the criminal justice system untouched.

C. *Warrants and the Role of Juries*

All three of the Fourth Amendment's canonical cases involved some kind of search warrant. To a reader familiar with late twentieth-century criminal procedure, that should seem odd. Today most disputed Fourth Amendment issues concern warrantless searches and seizures. Warrants are supposed to protect citizens—when the police have one, that usually means they did what they were supposed to do. Cases involving warrants are the least likely to raise serious legal issues.

This reaction is exactly backward when one turns to the eighteenth century. As Akhil Amar has noted, the Fourth Amendment was phrased as a limitation on warrants rather than a warrant requirement because of the colonists' hostility to the use of warrants as a defense to trespass litigation.⁶² Warrants were seen to provide inappropriate refuge for government misbehavior. This view seems strange today because Fourth Amendment law

62. For the best exposition of this point, see Amar, *supra* note 8, at 1178–81. The Fourth Amendment reads, in its entirety, as follows:

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.

U.S. CONST. amend. IV. There is no warrant requirement to be found in this language. Nor was the idea of a broad modern-style warrant requirement a part of the Founders' picture of search and seizure law, as Telford Taylor made clear a quarter-century ago. See TAYLOR, *supra* note 9, at 23–50.

is enforced primarily in suppression hearings, so that warrants serve as an additional hoop the government must jump through in order to avoid having evidence excluded. In the eighteenth century limits on search and seizure were enforced, if at all, in trespass actions, and warrants were raised, if at all, as a defense. Warrants were a pro-government tool, not a protection for the citizenry.⁶³

A warrant provided an effective defense against a trespass claim because it established the legality of the search, creating a kind of legal "safe harbor." Thus, warrants in the eighteenth century, where valid, transferred the issue of the legality of the search from the jury in a subsequent trespass action to a judge or executive official (the secretary of state in *Wilkes* and *Entick*), acting both *ex parte* and *ex ante*. Hostility to warrants meant hostility to this procedural shift, to taking power away from civil juries.

Conversely, decisions like *Entick* and *Wilkes*, by rejecting the use of warrants to authorize certain types of searches, empowered juries to decide whether the government's conduct was justified. As Amar again has argued, that power was quite open-ended.⁶⁴ The best analogy is not modern suppression hearings where judges decide whether the police had probable cause—i.e., whether there was a sufficiently high likelihood that they would find evidence of a crime. Instead, the right analogue is negligence cases, where juries make substantive judgments about whether the defendant's behavior was reasonable under the circumstances. Juries had something akin to a power of substantive review; they were free to impose liability based in part on the nature of the offense being enforced, not just the likelihood that the search would turn up evidence.⁶⁵ Such broad authority gave juries the ability to separate cases like *Entick* and *Wilkes* from cases involving more ordinary crimes.

Juries' role in enforcing search and seizure law did not dictate that that law would affect only investigations of pamphleteers or smugglers. But broad jury power did make this kind of separation possible. As with *Entick's* bar on paper searches, and as with Otis's argument in the *Writs of Assistance Case*,

63. This is almost a logical necessity—in *any* damages system warrants are likely to be a pro-government tool, for that is the only normatively plausible role they can play where damages are the chief remedy for illegal searches. See William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 899–910 (1991) (explaining how warrants serve as safe harbor for government officials in damages liability regimes).

64. See Amar, *supra* note 9, at 774–78.

65. And they did so. For examples, see Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 874–75 (1994). For a sampling of the large literature on eighteenth-century juries as finders of law as well as fact, see WILLIAM E. NELSON, *THE AMERICANIZATION OF THE COMMON LAW* 20–30 (1975); Morris S. Arnold, *A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation*, in *THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING* 399, 401–04 (Eugene W. Hickok, Jr., ed., 1991); Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 171–76 (1964). See also JEFFREY ABRAMSON, *WE, THE JURY* 24 (1994) (in the colonial period, "local juries outranked Parliament when it came to announcing what the law was in Massachusetts").

the colonists' hostility to warrants fit neatly with a system in which search and seizure law served mostly to restrict the investigation of "crimes" that much of the population thought should not have been crimes to begin with.

Meanwhile, limits on the use of search warrants probably had no effect on more run-of-the-mill criminal investigations. In a system with no police forces, prearrest investigation (such as it was) was essentially privatized; coercive government searches happened at arrest. The combination of the search incident to arrest and questioning by the justice of the peace must have been enough to satisfy the government's evidentiary needs in all but a few cases. Search warrants in ordinary criminal cases were apparently unknown.⁶⁶ Limiting them may have made it harder to prosecute people like Entick and Wilkes, but it cannot have made much difference in bringing murderers or robbers to justice.

III. THE SUBSTANTIVE ORIGINS OF THE FIFTH AMENDMENT

The Fifth Amendment's origins are a good deal harder to pin down than the Fourth's, which is why the former has generated so much more literature than the latter. Among historians there are basically two schools of thought. According to the first, the privilege against self-incrimination entered the common law in seventeenth-century England. Its adoption was prompted by practices that smacked of political or religious persecution, but it was applied across the board in criminal cases. This is the view of Dean Wigmore,⁶⁷ and more recently of Leonard Levy,⁶⁸ author of the leading book on the subject. According to the second school of thought, the seventeenth-century adoption of the privilege was more sham than real, at least in the colonies, and probably in England as well. This is the view taken by Julius Goebel and T. Raymond Naughton in their study of criminal procedure in colonial New York,⁶⁹ more recently, John Langbein has extended the argument to England and connected the privilege's supposed irrelevance with the absence of defense counsel in seventeenth- and eighteenth-century criminal litigation.⁷⁰

These positions do not really contradict one another.⁷¹ On the contrary, taken together they paint a picture that strikingly resembles the development of restrictions on searches and seizures. The privilege entered the law in response to practices that were troubling in large part because of the crimes

66. See GOEBEL & NAUGHTON, *supra* note 36, at 428–29.

67. See 3 JOHN H. WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2250, at 3078–92 (1904).

68. See LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT (1968).

69. GOEBEL & NAUGHTON, *supra* note 36, at 652–59.

70. John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047 (1994); see also Moglen, *supra* note 37, at 1112–21 (arguing that rise of privilege against self-incrimination and rise of trial by jury are intimately connected).

71. Though to read these writers' references to each other's work, one might think otherwise.

being prosecuted—crimes of religious belief or political expression. It was applied to *all* crimes, but it made no practical difference in ordinary criminal litigation because of the way such litigation was conducted. The picture is of a procedural device that served substantive ends.

A. *The Sources of the Privilege*

On the Levy-Wigmore view, the chief spur to the creation of the privilege was the oath *ex officio*, a practice employed by English ecclesiastical courts in the sixteenth and seventeenth centuries that engendered great controversy and was eventually abandoned under fire.⁷² Though hotly criticized, the oath *ex officio* was really quite ordinary; it was nothing more than an oath administered to the accused by which the accused swore to answer truthfully the questions put to him. The controversy stemmed not so much from what the oath demanded as from the context in which it was used. As objectors ceaselessly pointed out, the accused was given the oath before he was told what, if any, charges were to be lodged against him. Indeed, the “charges” might be mere rumors since no accuser need be called to testify. And while the oath *ex officio* may have been used in a variety of cases, it prompted protest mostly in heresy prosecutions. In these cases, according to the common practice, the accused—invariably suspected of being either a Catholic or a Puritan, and hence an opponent of the Church of England⁷³—would be sworn, asked questions about his own religious views and practices, and then (sometimes) asked about the views and practices of his acquaintances. The court would pass judgment, often branding the suspect a heretic based on his own sworn testimony. A great many of these cases, leading to a great many imprisonments and executions, took place in the sixteenth and seventeenth centuries during the period spanning the reigns of Henry VIII and Charles I.⁷⁴

What, precisely, was wrong with this procedure? Opponents of the oath often claimed it involved a species of torture, that it “put the conscience upon the rack.”⁷⁵ There was something to this complaint, especially in a time when people took oaths and swearing a good deal more seriously than they might today. But it is hard to believe that the sustained criticism of the oath *ex officio* rested primarily on the cruelty of the choice it posed; after all,

72. One problem with this view is that it downplays the privilege's sources in medieval Church law, which held that a Christian who confessed his sin to a priest was not thereby obliged to confess the same sin (even if it was legally punishable) to the civil authorities. See Richard H. Helmholz, *Origins of the Privilege Against Self-Incrimination: The Role of the European Ius Commune*, 65 N.Y.U. L. REV. 962, 982 (1990). Langbein emphasizes this point in criticizing the Levy-Wigmore view. See Langbein, *supra* note 70, at 1072.

73. Except, of course, during the reign of Queen Mary, when persecution was turned on Anglicans.

74. The uses and criticisms of the oath *ex officio* are surveyed in LEVY, *supra* note 68, at 43–204.

75. *Id.* at 177 (quoting statement made around 1591 by Thomas Cartwright and eight Puritan colleagues on oath *ex officio*).

this was an era when real racks, not metaphorical ones, were employed with some regularity, and where filthy, cold dungeons or hangmen's nooses awaited those judged guilty. The cruelty of hard questions pales next to other practices that prompted no outcry. Critics also made much of the oath's timing, which gave the accused no notice of what he was to be asked. This made it easier, so the claim went, for the interrogators to "entrap" the victim with unexpected questions.⁷⁶ Yet this feature of the oath does not distinguish it from ordinary pretrial questioning in the seventeenth and eighteenth centuries or, for that matter, from police interrogation today.⁷⁷ Moreover, in many of the cases Levy recounts the victims knew well what they were suspected of. Absence of notice often seems to have been a formal complaint only.

Contrast the weakness of these claims with the strength of the standard defense of the oath: it could hold no terror for the innocent, since only those with crimes to confess needed to fear questioning, and *they* feared questioning only because of their crimes. On this argument, complaining about the oath was a little like a thief complaining about the search of his knapsack because it uncovered stolen goods. The innocent suspect would welcome the search as long as it was motivated by the genuine desire to catch a thief, because it would clear him of suspicion. The guilty suspect deserved no sympathy for having his crime uncovered.⁷⁸

The real answer to this argument, one that crops up again and again in Levy's account, was substantive. Those who were being questioned were more like the innocent suspect than the thief, because the "crimes" in question should not have been crimes.⁷⁹ This was so in at least three distinct senses. First and most obviously, the proceedings in question involved the punishment of religious expression—expression that the suspects saw as compelled by God. As with *Entick* and *Wilkes*, these were First Amendment cases in a system without a First Amendment. Complaints about the oath thus served as a procedural substitute for a freedom of religious expression that did not exist. Second, as applied by the High Commission under Queen Elizabeth or King James, heresy covered masses of ordinary citizens. That is why questioning could easily entrap generally innocent parties: they might not know where their practices crossed the line into heresy, because the crime was so protean.⁸⁰

76. See, e.g., *id.* at 150 (quoting 1586 statement of Giles Wigginton, a Puritan hauled before the High Commission who refused to answer questions).

77. On the breadth of the power of pretrial examination by justices of the peace in colonial America, see Moglen, *supra* note 37, at 1094–1104. On the legality of using surprise in police interrogation today, see generally *Colorado v. Spring*, 479 U.S. 564 (1987) (authorizing police questioning about crimes other than ones for which suspect was arrested, without any advance warning to suspect, and without invalidating suspect's earlier waiver of his *Miranda* rights).

78. For a good discussion of this argument, see LEVY, *supra* note 68, at 159–61.

79. For some examples of this claim, see *id.* at 138, 141–42, 269, 279.

80. In his *Commentaries*, Blackstone attributed past abuses in the prosecution of heretics largely to the "uncertainty of the crime," to its lack of clear definition. 4 WILLIAM BLACKSTONE, COMMENTARIES *45.

Here the attack on the oath *ex officio* played something like the role vagueness doctrine (or the due process concern with fair notice) plays today.

Third and finally, the offense had a large element of pure thought to it—hence Coke’s complaint that “no free man should be compelled to answer for his secret thoughts and opinions.”⁸¹ Coke’s complaint is couched in privacy language; it is also an attack on the substance of the crime of heresy. The overlap is no accident. Heresy could only be enforced with procedures that intruded unacceptably on individual privacy. A crime of religious observance, heresy was classically victimless. And like all victimless crimes, it had an obvious enforcement problem. Heretics were not likely to generate a pool of accusers eager to ferret out the criminals and publicly finger them in court. There were only two ways to enforce such an offense: get the perpetrators to confess or get their confederates to turn state’s evidence. The perpetrator, of course, did not wish to confess, and his confederates did not wish to accuse him, since they were engaged in the same activity as he, and did not believe it wrong.

These features of the crime are precisely what made the oath *ex officio* necessary. As Thomas More wrote (before the procedure was turned on him), if the oath procedure were abandoned, “the stretys were lykely to swarme full of heretykes.”⁸² Archbishop Whitgift, leader of the High Commission in Queen Elizabeth’s day, explained that heretics “spread their poison in secrete, making it nearly impossible to produce witnesses against them.”⁸³ Absent the ability to put suspects under oath (so they would fear lying even more than they would fear confession—remember that these “criminals” were profoundly religious people) and force them to answer questions about themselves and their coreligionists, heresy could not be proved, at least not often enough to make it worthwhile for the government to prosecute.

Thus, the government used the procedure that prompted the claim that “no man is bound to accuse himself”—the claim that later became our privilege against self-incrimination—for some of the same reasons that made the crime of heresy objectionable. Like the trade laws in eighteenth-century New England, heresy was a “crime” committed by men and women who considered themselves law-abiding and were probably so considered by their communities.

81. LEVY, *supra* note 68, at 245 (quoting Jenner’s Case, Stowe MS. 424, fols. 159b-160a (1611)); see also Edward’s Case, 77 Eng. Rep. 1421, 1422:

And in cases where a man is to be examined upon his oath, he ought to be examined upon acts or words, and not of the intention or thought of his heart; and if every man should be examined upon his oath, what opinion he holdeth concerning any point of religion, he is not bound to answer the same And so long as a man doth not offend neither in act nor in word any law established, there is no reason that he should be examined upon his thought or cogitation: for as it hath been said in the proverb, *thought is free*

82. LEVY, *supra* note 68, at 65 (quoting THOMAS MORE, APOLOGY OF SYR THOMAS MORE KNYGHT 219a-227b (1533)).

83. *Id.* at 139 (quoting document sent from John Whitgift to Lord Treasurer Burghley (July 15, 1584) in 1 JOHN STRYPE, THE LIFE AND ACTS OF JOHN WHITGIFT 321-22 (Oxford, Clarendon 1822)).

Consequently, like Boston's smugglers, heretics could only be caught and punished by special procedures that allowed the government to gain access to private material (in 1750s Boston, people's homes and warehouses; in the High Commission and Star Chamber, suspects' testimony about their religious beliefs) by force, and without showing probable cause or specifying the basis for the investigation. In both instances the procedures led to a great deal of public criticism; in both instances the criticism had a strong substantive undertone. As Levy puts it: "Powerless to redefine the substantive law that made their activities criminal, the Puritans turned to the common law courts and to legal obstructionism"—to procedural arguments, and especially to arguments against the oath—"as a means of self-defense."⁸⁴ As was true of James Otis's arguments about the law of search and seizure, the privilege claims made by religious dissidents dragged before the High Commission were bound up with concerns about the crime for which those dissidents were being punished—and those concerns were in turn bound up with the manner in which the crime in question had to be enforced. The arguments were about procedure, but in this context procedure and substance were inseparable.

This connection between procedure and substance held true as well in the later cases that, according to Levy and Wigmore, solidified the privilege's hold in English law. John Lilburne regularly claimed the privilege in his famous mid-seventeenth-century trials for seditious libel. According to Levy, his jury acquittals should be taken, in part, as validation of those claims.⁸⁵ While Lilburne was not a heretic, he was a political figure, a pamphleteer, a critic of the government, and a very popular man.⁸⁶ His popularity—shown by the fact that a jury acquitted him of authoring seditious material, some of which bore his name⁸⁷—must have made it quite important for the government to get damning statements from his own mouth, since a jury might seize on any excuse for acquitting him. If this is what Lilburne's prosecutors feared, their fears were borne out: Lilburne refused to answer questions about authorship of the seditious material that was the basis of the charge against him; he argued, implausibly, that the material might well be forged, and the jury acquitted.⁸⁸

So too with John Entick. Entick's case, the reader will recall, involved the search and seizure of books and papers, not compelled testimony in court. Entick sued the officials who had performed the search for trespass. In his

84. *Id.* at 216.

85. *See id.* at 271–313; *see also* 3 WIGMORE, *supra* note 67, § 2250, at 3088–89.

86. *See* G.P. GOOCH, *ENGLISH DEMOCRATIC IDEAS IN THE SEVENTEENTH CENTURY* 124 (1927) (referring to Lilburne as the "most popular man in England"). He was also given to picking fights: "He was obstreperous, fearless, indomitable, and cantankerous, one of the most flinty, contentious men who ever lived. As one of his contemporaries said, if John Lilburne were the last man in the world, John would fight with Lilburne and Lilburne with John." LEVY, *supra* note 68, at 272.

87. *See* LEVY, *supra* note 68, at 307–09.

88. *See id.* at 307.

famous opinion upholding the jury verdict in Entick's favor, Lord Camden declared such "paper searches" unlawful, in part because they amounted to compelled self-incrimination:

It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle.⁸⁹

This prohibition could not have affected the mass of criminal cases, where paper searches were unnecessary, but it did make it more difficult to punish seditious pamphleteers like Entick. Here, as in Lilburne's case and the High Commission's many heresy trials, the argument for the privilege served as an obstacle to the prosecution of substantively problematic crimes.

B. *The Privilege's Procedural Setting*

Even if the privilege was born in cases involving heretics or pamphleteers, it was never framed in substantive terms. The claim was not that suspected heretics should be free from compelled self-incrimination, but that everyone should be. Accordingly, one might reasonably expect the privilege to have worked a revolution in criminal procedure as it was applied to run-of-the-mill cases of murder, rape, or robbery.

That did not happen. The procedural setting in which the privilege arose dictated that it would make no difference in most cases, especially given the way criminal procedure worked in the American colonies. There are two key points here. First, the privilege was a trial right. It did not affect pretrial questioning, which was not conducted under oath.⁹⁰ Second, at the trial itself, the privilege mattered little unless the defendant had a lawyer—someone who could speak for him without the defendant having to speak for himself.⁹¹ As John Langbein has noted, defendants were not *allowed* to have lawyers in many cases until the early to mid-eighteenth century.⁹² Even after that, the use of lawyers at trial was rare—again especially in America, where lawyers were often in short supply.⁹³

89. Entick v. Carrington, 19 Howell's State Trials 1029, 1073 (1765).

90. See Langbein, *supra* note 70, at 1059–62; E.M. Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 14–22 (1949). Note that notwithstanding the absence of a strong privilege in pretrial examination, the state was constrained in the methods it could use to induce confessions, *see id.* at 18—just as, prior to *Miranda v. Arizona*, 384 U.S. 436 (1966), the police were constrained by due process voluntariness doctrine in their efforts to get suspects to confess.

91. This is the central argument of Langbein, *supra* note 70.

92. See John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263 (1978).

93. Of course lawyers were rarest in the seventeenth-century American colonies. *See, e.g.,* HOFFER, *supra* note 43, at 40–42. Throughout the eighteenth century the right to counsel spread, and the use of

Thus, the picture in all but a few criminal cases looked like this:⁹⁴ Defendants were questioned by a magistrate without benefit of counsel, and at this questioning the defendant usually confessed. It was often suggested that if the defendant resisted the charges the system would go much harder on him. The trial was usually a formality. Even if the defendant refused to confess, any slip-ups he made in the course of pretrial questioning would be used against him at trial. Magisterial questioning functioned as police interrogation does today; it offered the government an opportunity to get whatever information it could from an uncounseled, and frequently frightened and confused, defendant. The difference is that today, defendants can stop all questioning and get legal help before any further conversation with the government.⁹⁵ Although many defendants do not exercise this right, at least some do, and the prospect surely affects the course of questioning even in the many cases where *Miranda* rights are never invoked. No such entitlement existed in the eighteenth century, and the privilege did not alter that picture in the slightest.

Of course, the privilege presumably did apply at trial, and that ought to have made a difference in some cases. As Langbein rightly emphasizes, however, a right to remain silent at trial means little without a lawyer: if the defendant does not have a spokesman, his silence leaves the government's case unanswered.⁹⁶ This might be a plausible strategy (albeit a risky one) in a highly formalized system with elaborate trial procedures and a beyond-a-reasonable-doubt standard of proof. Eighteenth-century American criminal procedure did not have these features. Trials were quick and casual, and the beyond-a-reasonable-doubt standard did not exist.⁹⁷ In such a system,

defense counsel became more common, *id.* at 85–87, but they remained the exception rather than the rule. Hoffer sums up his discussion of the advancing right to counsel in these terms: “[B]y the 1760s, counsel was *permitted* felony suspects in *more than half* the colonies,” *id.* at 86 (emphasis added)—hardly a picture of a lawyer-dominated criminal process like the one we know today. See also GOEBEL & NAUGHTON, *supra* note 36, at 573 (noting that “counsel was only occasionally employed in criminal cases” in eighteenth-century New York); *id.* at 574 (“[O]nly on points of law could counsel appear in felony cases, and there is no evidence that the colonial judges indulged prisoners beyond this limit as sometimes occurred in England.”). Perversely, the use of counsel was more common in misdemeanor cases, where the right to counsel had deeper roots, than in felony cases, where defendants presumably needed help the most. *Id.*

94. For a fairly standard picture of the process, see LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 24–27 (1993). The great variable from place to place and time to time seems to have been the use of juries—rare in some colonies at some times but commonplace in others. See *id.* at 26; see also DAVID J. BODENHAMER, *FAIR TRIAL: RIGHTS OF THE ACCUSED IN AMERICAN HISTORY* 24 (1992) (noting that defendant's request for jury in New England was often held against him at sentencing).

95. See *Edwards v. Arizona*, 451 U.S. 477 (1981) (holding that if defendant invokes his *Miranda* right to counsel, questioning must cease and may not resume except at defendant's initiation); see also *Arizona v. Roberson*, 486 U.S. 675 (1988) (holding that *Edwards* rule applies even to questioning about different crimes).

96. Langbein, *supra* note 70, at 1054 (“The right to remain silent when no one else can speak for you is simply the right to slit your throat, and it is hardly a mystery that defendants did not hasten to avail themselves of such a privilege.”).

97. See *id.* at 1056–57. For the most thorough discussion of the history of the beyond-a-reasonable-doubt standard, see BARBARA J. SHAPIRO, “BEYOND REASONABLE DOUBT” AND “PROBABLE CAUSE”: HISTORICAL PERSPECTIVES ON THE ANGLO-AMERICAN LAW OF EVIDENCE 1–41 (1991). Shapiro's account

decisionmakers' likeliest assumption is that the charge is true unless it is effectively answered. From the defendant's point of view, silence was a bad idea; indeed, as Langbein and Eben Moglen note, the entire system seemed designed to get the accused to talk.⁹⁸

When, in such a system, would a privilege against self-incrimination have mattered? Only when a defendant had (1) a great deal of fortitude (for standing up to the magistrate under questioning); (2) either a lawyer to speak for him at trial (and hence the money to hire a lawyer) or enough education to speak for himself without answering incriminating questions (like Lilburne, that amazingly talkative claimant of the right of silence⁹⁹); and (3) lastly, some hope of success from silence, meaning enough popular support to negate the system's ordinary bias toward conviction. Not everyone accused of religious or political offenses satisfied these conditions, but some did. Men charged with murder or theft did not. It is no coincidence that the privilege's origins read like a catalogue of religious and political persecution.¹⁰⁰ It was potentially a valuable right in such cases, and it was almost meaningless in others.

C. *Privacy, Substance, and the Privilege*

In theory, the privilege covered all incriminating information; some even argued that it covered all embarrassing information, whether incriminating or not.¹⁰¹ In practice, its scope was smaller. Most incriminating testimony was

suggests that the governing standard throughout the eighteenth century was unclear: "The most common directives to the jury included phrases like 'if you believe' or 'if you believe on the evidence,' 'if you believe what the witness swore,' and 'if the evidence is sufficient to satisfy your conscience.'" *Id.* at 14. These vague formulations were gradually replaced by the familiar reasonable doubt rule beginning late in the eighteenth century. *See id.* at 21–25.

98. Hence their label for the seventeenth- and eighteenth-century criminal process: the "accused speaks" trial. *See* Langbein, *supra* note 70, at 1048; Moglen, *supra* note 37, at 1094. This is the real basis for Goebel and Naughton's conclusion that the privilege in its essentials did not exist in colonial New York. *See* GOEBEL & NAUGHTON, *supra* note 36, at 652–59. For a sharp criticism of that conclusion, see Leonard W. Levy & Lawrence H. Leder, "Exotic Fruit": *The Right Against Compulsory Self-Incrimination in Colonial New York*, 20 WM. & MARY Q. 3 (1963).

99. *See, e.g.,* The Trial of Lieutenant-Colonel John Lilburne, 4 Howell's State Trials 1270 (1649), where Lilburne claims his right of silence with astonishing verbosity.

100. For the same reason, it is probably no coincidence that claims of the privilege declined after the Glorious Revolution. The privilege was chiefly an obstacle to the punishment of dissidents, and such punishment declined after 1689. *See* LEVY, *supra* note 68, at 323–24.

101. *See* Ullman v. United States, 350 U.S. 422, 445–54 (1956) (Douglas, J., dissenting) (endorsing and discussing history of this argument). Douglas maintained that the privilege protected any information that would subject the witness to "infamy," a term that seemed to encompass almost anything that would be harmful to the witness, even if the harm was intangible. For an earlier judicial argument along the same lines, see *Brown v. Walker*, 161 U.S. 591, 631–35 (1896) (Field, J., dissenting). Note that some of the Puritans harassed by the High Commission also argued for a privilege that would protect them from being forced to testify in ways harmful to others. *See, e.g.,* LEVY, *supra* note 68, at 163 (discussing testimony of one witness who "refused to answer any question concerning herself, because, she said, 'she would not be her own Hangman,' nor would she implicate confederates because 'she could not in her conscience, be an Accuser of others'"). Of course, the "infamy" argument made by Douglas and Field and the claim that the privilege forbade compelling people to inform on their neighbors tended to reinforce each other—both suggest a privilege that would prevent compelled disclosure of anything private.

unaffected by the privilege for the procedural reasons discussed above. Still, the privilege did effectively protect some testimony, testimony that (again for procedural reasons) would tend to arise in prosecutions for political or religious belief. As the many challenges to the oath *ex officio* showed, questioning in such cases had a strong tendency to focus on the suspect's thoughts.¹⁰² At least after *Entick v. Carrington*, the privilege affected another category of evidence as well. Searches of suspects' private papers were apparently forbidden in part because they violated the privilege.

Just as paper searches probably constituted a greater privacy intrusion than other searches, questioning of the sort done by the High Commission in heresy cases probably invaded privacy more than other questioning. In other words, the privilege at its inception seemed to protect the most private sorts of potentially incriminating information, while leaving the rest largely untouched. And as we have seen, the most private sorts of information tended to be used in the most substantively problematic prosecutions. The suspect's testimony about his thoughts mattered more in heresy prosecutions than in robbery cases. A robber's state of mind could be proved by his conduct; this was less true where the crime itself hinged on belief. Similarly, paper searches mattered most when the crime involved possession or authorship of seditious or heretical writing. In other cases, the government would rarely need a defendant's books or correspondence.

Thus, perhaps even more so than with search and seizure law, the privilege's origins show that in the era leading up to independence there was a near identity between protecting informational privacy and hindering the prosecution of objectionable crimes. It may not be clear which was the chicken and which was the egg, but it seems clear enough that privacy protection and substantive constraints on government power traveled together. To put it differently, privacy protection always limits the government's substantive power,¹⁰³ and if that limit was not the prime reason for these restrictions on criminal law enforcement, it was at least a happy byproduct.

IV. THE FOURTH AND FIFTH AMENDMENTS IN THE *LOCHNER* ERA¹⁰⁴

Fourth and Fifth Amendment law was not terribly important during America's first century. Federal criminal prosecutions were rare, and federal prosecutions were the only ones to which the Fourth and Fifth Amendments applied.¹⁰⁵ Even if one considers state law restrictions on evidence gathering, nineteenth-century search and seizure and self-incrimination doctrine did not

102. Recall Coke's criticism of the punishment of citizens for their "secret thoughts and opinions." See *supra* text accompanying note 81.

103. For a discussion of why this is so, see Stuntz, *supra* note 5, at 1029-34.

104. A condensed version of the discussion in this part appears in *id.* at 1049-54.

105. See *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

have a major impact on the criminal justice system. Search-incident-to-arrest doctrine and pretrial questioning continued to ensure that in most ordinary criminal cases the government could obtain evidence from the accused fairly easily without raising serious constitutional issues. The law of search and seizure and self-incrimination might have played the same role it did in the eighteenth century, inhibiting the prosecution of political crimes—for such crimes existed, especially at the state level.¹⁰⁶ But political prosecutions in the nineteenth century do not seem to have prompted *Entick*- or *Wilkes*-style claims.¹⁰⁷ With a couple of notable exceptions (for instance, the scope of Fifth Amendment immunity¹⁰⁸), the law governing search and seizure and self-incrimination was basically dormant, both at the federal level and in the states.

Of course, the picture was not quite that simple. The criminal justice system was undergoing great changes. Defense lawyers came to play a much more significant role in ordinary criminal cases than at the time of the nation's founding.¹⁰⁹ This meant that the privilege against self-incrimination could seriously affect the way such cases were adjudicated: if represented, defendants could feasibly stay silent and let their lawyers do the talking. Moreover, the beyond-a-reasonable-doubt standard had become fairly well entrenched in the law by the mid-nineteenth century.¹¹⁰ This too rendered silence a more plausible strategy for defendants, which in turn made the privilege something more than just window dressing. By the same token, one can find a scattering of early nineteenth-century trespass suits against sheriffs for illegal searches or arrests that arose out of ordinary investigations¹¹¹—quite unlike *Entick* or

106. Political crimes existed briefly at the federal level, during the short life of the Sedition Act of 1798. See generally JOHN C. MILLER, *CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS* (1951). The phenomenon was more widespread at the state level, given the Southern desire to suppress antislavery speech. See, e.g., RUSSEL B. NYE, *FETTERED FREEDOM: CIVIL LIBERTIES AND THE SLAVERY CONTROVERSY, 1830–1860*, at 80–85 (1963) (discussing prosecutions of Southern whites for possession or distribution of antislavery literature). But cf. WILLIAM W. FREEHLING, *THE ROAD TO DISUNION: SECESSIONISTS AT BAY, 1776–1854*, at 98–118 (1990) (arguing that out-of-court coercion dwarfed sedition laws in importance in suppressing white antislavery speech).

107. The absence of early nineteenth-century analogues to *Entick* and *Wilkes* is no great surprise. *Entick* and *Wilkes* (and John Lilburne, for that matter) succeeded in large part because their position was popular. The political criminals of the first half of the nineteenth century were mostly antislavery agitators in the South, see *supra* note 106—not a group likely to engender much public sympathy.

108. The relevant cases are surveyed in *Counselman v. Hitchcock*, 142 U.S. 547, 565–86 (1892).

109. FRIEDMAN, *supra* note 94, at 245 (noting that lawyers in felony cases were increasingly common, especially late in the nineteenth century when a number of states began to offer state-paid counsel). Even toward the end of the nineteenth century, however, counsel remained the exception rather than the rule. See LAWRENCE M. FRIEDMAN & ROBERT V. PERCIVAL, *THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN ALAMEDA COUNTY, CALIFORNIA, 1870–1910*, at 185 (1981) (noting that over one-fourth of all felony defendants in Alameda County were given appointed counsel).

110. For a contemporaneous discussion that both traces and bemoans the advent of the reasonable doubt standard, see *Some Rules of Evidence: Reasonable Doubt in Civil and Criminal Cases*, 10 AM. L. REV. 642, 651–64 (1876).

111. Most of the cases involve the search of the plaintiff's home pursuant to a warrant. The usual result was a victory for the defendant on the ground that a valid warrant absolved the one performing the search of any civil liability. See, e.g., *Walker v. Hampton*, 8 Ala. 412 (1845); *Beaty v. Perkins*, 6 Wend.

Wilkes. To some degree, the privacy protective rules spawned by *Wilkes*, *Entick*, and *Lilburne* were becoming part of ordinary criminal procedure.

Yet if restrictions on search and seizure and self-incrimination had penetrated criminal procedure to a much greater extent than in the eighteenth century, those restrictions were still at the margins of the system. Even in cases tried to juries, defendants were often unrepresented, and where they *were* represented, pretrial questioning afforded a way of honoring privilege claims without disabling the government from using the defendant's own incriminating statements. And trespass actions were probably too expensive to be anything other than rare. Though the law of search and seizure and self-incrimination mattered, there is no evidence that it mattered much.

Boyd v. United States,¹¹² decided in 1886, changed all that. *Boyd* inaugurated an era in which criminal procedure again played a critical role and, as in the eighteenth century, the role was substantive. But the nature of the substantive restraint was quite different. In the eighteenth century, the substantive implications of protecting privacy in general, and privacy in documents in particular, mostly bore on political crimes. In the late nineteenth century, privacy protection cast a large shadow on the regulation of business.

Fourth and Fifth Amendment law thus fit the larger pattern of constitutional law in the late nineteenth and early twentieth centuries. The standard story about constitutional law between 1880 and 1940 runs about like this: The court system, with the Supreme Court taking the lead, constitutionalized *laissez-faire*, then, yielding to political pressure, did an about-face and left economic regulation to the politicians. As an account of the flow of constitutional law in general, this story is exaggerated at best.¹¹³ As a picture of Fourth and Fifth Amendment law it is closer to the truth, though the dates are not quite right. Through *Boyd* and subsequent decisions, the

382 (N.Y. 1831). Where the plaintiff prevailed, one of two factors was usually present: The warrant was outside the scope of the issuing magistrate's authority (and so could not provide a defense to the sheriff), or the sheriff carried out the search in an impermissible fashion. For an example of the first situation, see *Thurston v. Adams*, 41 Me. 419 (1856) (holding that warrant authorizing search for liquor kept for personal use, where possession of liquor for personal use was not crime, did not absolve officer of liability). For an example of the second, see *Malcom v. Spoor*, 53 Mass. (12 Met.) 279 (1847) (holding that constable who attached plaintiff's furniture pursuant to valid warrant, but then left furniture with an intoxicated deputy, abused warrant and therefore was not protected by it).

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

113. In fact, during this period most regulatory measures were upheld; cases like *Lochner* were more exceptional than conventional wisdom suggests. See Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897*, 61 J. AM. HIST. 970, 978-81 (1975) (noting that even Justice Field—the progenitor of aggressive substantive due process—took care not to constrict government power too much). In addition, the goal of *Lochner*-style substantive due process was not to bar all regulation (or even all legislative regulation), but to ensure that regulation served the public interest and was not merely redistributive. For two quite divergent discussions of the period that nevertheless reach these same conclusions, see HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1993) and HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW, 1836-1937*, at 171-204 (1991).

Supreme Court adopted a view of the Fourth and Fifth Amendments that might have made a great deal of economic regulation constitutionally impossible at the federal level.¹¹⁴ Then, faced with growing political pressure for regulation, the Court yielded—not during the Great Depression, but during the administration of the *first* President Roosevelt.

In fact, the progress of Fourth and Fifth Amendment law in the late nineteenth and early twentieth centuries closely parallels the conventional *Lochner*¹¹⁵ story. Yet there is one important difference. When the Court did its about-face, it did not abandon privacy in the way that the New Deal Court abandoned laissez-faire constitutionalism. Privacy was not cast aside, but cabined within arbitrary boundaries that limited its substantive reach. This set the stage for the tension—one that pervades Fourth Amendment law today—between privacy protection and the post-New Deal constitutional order.

A. *The House that Boyd Built*

Though it is a landmark of Fourth and Fifth Amendment law, *Boyd* was not a typical criminal case; in fact, it was not a criminal case at all. Boyd imported glass to be used in the construction of some government buildings. As part of his agreement with the government, he was permitted to bring some of the glass into the country without payment of import duties. According to Boyd, early shipments had a great deal of breakage, so later shipments were brought in duty-free to compensate. The government believed otherwise, and proceeded to seek forfeiture of thirty-five cases of glass under a federal statute that permitted forfeiture in cases where import taxes were evaded through misrepresentation. The proceeding was civil and *in rem*; Boyd was not a named party and the only possible penalty was loss of title to the thirty-five cases of glass.¹¹⁶

The statute authorized subpoenas for relevant documents in such cases, and the government obtained a subpoena for the invoices on twenty-nine cases of glass that had been shipped earlier. (Depending on the quantity and value of these earlier shipments, Boyd might not have been entitled to bring the later shipments in tax-free.) Boyd objected that the subpoena was unconstitutional,

114. It might have made a difference at the state level as well, since some state courts were following the same path as a matter of state law. See *infra* notes 126–28 and accompanying text (discussing *Boyle v. Smithman*, a late nineteenth-century Pennsylvania case that adopted an extreme version of *Boyd* as a matter of state law).

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

116. See *Boyd*, 116 U.S. at 617–18; Brief for Plaintiffs, *Boyd v. United States*, 116 U.S. 616 (1886) (No. 983), reprinted in 8 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 479, 480–85 (Philip B. Kurland & Gerhard Casper eds., 1975); Brief for the United States, *Boyd v. United States*, 116 U.S. 616 (1886) (No. 983), reprinted in 8 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES, *supra*, at 505, 506–09.

but was nevertheless ordered to produce the invoices. He did so, and the thirty-five cases were then found to be forfeitable.¹¹⁷

The Supreme Court overturned this judgment, holding that the subpoena for the invoices violated the Fourth and Fifth Amendments. Justice Bradley's majority opinion dealt with three issues. First, the Court held that because the production was compelled rather than voluntary, the subpoena was the functional equivalent of a search or seizure and hence was covered by the Fourth Amendment.¹¹⁸ Second, the Court found that this "search" was unreasonable.¹¹⁹ The Court said, basically, that the Fourth Amendment adopted *Entick v. Carrington*, and *Entick* expressly barred the search and seizure of documents as evidence.¹²⁰ At the close of several pages of near-continuous quotes from Camden's opinion, Bradley stated:

The principles laid down in [*Entick*] affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employ[ees] of the sanctity of a man's home and the privacies of life.¹²¹

As in *Entick*, this protection of "the privacies of life" was linked not only to restrictions on search and seizure but also to the privilege against self-incrimination. The Court likened a subpoena for documents to the "compulsory extortion of a man's own testimony,"¹²² and regarded both as violating the privilege so long as the case qualified as criminal. As Bradley put it, "In this regard the Fourth and Fifth Amendments run almost into each other."¹²³

The third and final issue was whether those amendments could have any application in what was, after all, civil litigation. The Court found this issue easy, holding that all "suits for penalties and forfeitures incurred by the commission of offences against the law, are of [a] quasi-criminal nature,"¹²⁴ and that this was enough to bring them within the spirit of the Fourth and Fifth Amendments (though concededly not within those amendments' "literal terms"¹²⁵).

Boyd was a radical decision, though not in terms of its effect on ordinary criminal cases: subpoenas for documents, like paper searches, were surely a marginal feature of criminal law enforcement. (The case law of the following

117. See *Boyd*, 116 U.S. at 617–20.

118. *Id.* at 621–22.

119. *Id.* at 622–35.

120. *Id.* at 626–30.

121. *Id.* at 630.

122. *Id.*

123. *Id.*

124. *Id.* at 634.

125. *Id.* at 633.

two decades provides some negative evidence for this proposition. Although many cases, state and federal, dealt with variations on the *Boyd* scenario or applied *Boyd* to various fact settings, almost none involved ordinary crime, unless one counts fraud prosecutions.) But *Boyd's* reasoning had potentially huge effects on business regulation. Consider *Boyle v. Smithman*,¹²⁶ an 1892 Pennsylvania case that adopted *Boyd*-style reasoning—though without citing *Boyd*, since the relevant law was state rather than federal. Pennsylvania had a statute requiring persons in the business of transporting and storing oil to keep records of how much oil they had on hand, where it was stored, and so forth. Boyle, a newspaper publisher, tried to force Smithman, an oil merchant, to produce the required records.¹²⁷ The court might have held that only the government was entitled to enforce the statute, but it instead found for Smithman on a much broader ground. It held that forcing Smithman to produce the relevant records would violate the privilege against self-incrimination because the statute specified penalties for any defaults in record-keeping.¹²⁸ In other words, Smithman could not be required to disclose his records because the records themselves might be inadequate, and if they were, Smithman might have to pay a fine. This holding apparently applied no matter what the nature of the proceeding or who asked for the records. The documents in question were papers, they were therefore private, they belonged to Smithman, and their disclosure might subject him to regulatory penalties. That was that.

Boyle shows nicely just what *Boyd* might have meant for the emerging regulatory state. If people could not be forced to disclose records because they might have violated a record-keeping rule, the government could not *have* record-keeping rules, at least not meaningful ones. And if requiring the keeping of records was impermissible, a good deal of regulation would be, in practical terms, impermissible as well. Meanwhile, more direct disclosure—asking someone to turn over documents in order to show whether the suspect had violated some conduct rule—was barred by *Boyd* itself. Nor could the government get around this restriction by searching for the documents rather than issuing a subpoena: *Boyd* treated searches and subpoenas the same. Nor was oral testimony an acceptable substitute, because its use would violate the privilege against self-incrimination. People like Boyd and Smithman were, potentially, immune from a great deal of compelled disclosure, and consequently exempt from a great deal of government regulation.

The two arguments most commonly made by opponents of an income tax throughout this period—that such a tax was “inquisitorial” and that it promoted perjury¹²⁹—demonstrate the breadth of this line of reasoning. These are

126. 23 A. 397 (Pa. 1892).

127. *Id.* at 397.

128. *Id.* at 398.

129. See ROBERT STANLEY, DIMENSIONS OF LAW IN THE SERVICE OF ORDER: ORIGINS OF THE FEDERAL INCOME TAX, 1861–1913, at 47 (1993).

classic self-incrimination arguments; they recall the language used by Puritans hauled before the High Commission. The same arguments support the position the *Boyd* Court took: that the government should neither seize nor compel the production of a citizen's records or papers, even when the government's regulatory interest is strong. And *Boyd* was itself a tax case.

Nor is *Boyd* aberrational in this respect. A striking development in the nature of Fourth and Fifth Amendment litigation seems to have taken place in the two decades following *Boyd*. The reported cases, both state and federal, are filled with disputes about business regulation. There are a number of bankruptcy cases in which the bankrupt sought to avoid certain kinds of compelled disclosure.¹³⁰ Antitrust cases began to crop up following the Sherman Act in 1890, with defendants raising Fifth Amendment objections to subpoenas or questioning.¹³¹ Railroad regulation disputes were especially common and especially high profile, as several such cases made their way to the Supreme Court.¹³² These cases were not all resolved in defendants' favor; not all courts carried *Boyd's* logic as far as the Pennsylvania Supreme Court in *Boyle*.¹³³ Yet the potential for serious interference with government regulation—interference whose source was not the Due Process Clause but the Fourth and Fifth Amendments—was plainly present.

The railroad cases are particularly interesting. The year after *Boyd* was decided, Congress passed the Interstate Commerce Act, which prohibited some forms of price discrimination by railroads and shippers. Five years later, the Supreme Court decided *Counselman v. Hitchcock*.¹³⁴ In the course of a grand jury investigation into illegal price discrimination, Counselman was asked whether he had ever transported grain into Chicago for less than the posted rate. He declined to answer, claiming his Fifth Amendment privilege.¹³⁵ The Court reaffirmed and extended its *Boyd* holding that the privilege applied outside the bounds of an actual criminal prosecution,¹³⁶ but it did not stop there. The Act already provided that Counselman's testimony could not be

130. *E.g.*, *In re Harris*, 164 F. 292 (S.D.N.Y. 1908); *In re Hess*, 134 F. 109 (E.D. Pa. 1905); *Potter v. Beal*, 49 F. 793 (C.C.D. Mass. 1892).

131. The most famous of these was *Hale v. Henkel*, 201 U.S. 43 (1906).

132. The railroad cases constitute the bulk of the Court's Fourth and Fifth Amendment caselaw in the two decades after *Boyd*. See *ICC v. Baird*, 194 U.S. 25 (1904); *Brown v. Walker*, 161 U.S. 591 (1896); *ICC v. Brimson*, 154 U.S. 447 (1894); *Counselman v. Hitchcock*, 142 U.S. 547 (1892).

133. For example, in *In re Harris*, 164 F. at 294, the court held that the debtor in a bankruptcy proceeding should turn over his books and papers to the trustee, and if the government ever wished to use them as evidence in a criminal case, the trustee would not surrender them until the bankrupt had been able to invoke his constitutional privilege just as if his books and papers had remained in his possession. *Harris* makes an interesting pair with *In re Tracy & Co.*, 177 F. 532 (S.D.N.Y. 1910), in which the recently appointed Judge Learned Hand ruled that where the debtor already *had* turned over his books to the trustee, he had thereby waived any claim of privilege he otherwise might make, *id.* at 534–35.

134. 142 U.S. 547 (1892).

135. See *id.* at 548–50.

136. *Id.* at 562–64. "Extended" is the appropriate word here. *Boyd* left open the possibility that its restrictions would apply to trial proceedings but not to preliminary proceedings like the grand jury investigation in *Counselman*. The Court's decision in *Counselman* foreclosed that possibility.

used against him in any subsequent criminal prosecution; the government maintained that this statutory use-immunity satisfied the privilege, and that Counselman should therefore have to answer the questions put to him.¹³⁷ The Court disagreed and held that Fifth Amendment immunity must be absolute, barring any subsequent prosecution for anything about which the defendant testified, even if the government relied on other evidence.¹³⁸ Congress answered with a new immunity provision, specifying that no one could be prosecuted for any transaction covered by compelled testimony (or, of course, by documents produced under subpoena) in any Interstate Commerce Commission (ICC) investigation.¹³⁹ In *Brown v. Walker*, the Court upheld this provision, but (in dicta) construed it to bar prosecutions for state as well as federal crimes.¹⁴⁰ The combination of *Counselman* and *Brown* made it possible for the ICC to obtain documents and testimony from railroad officials and their customers, but only at the cost of wholly immunizing the witness or the party producing the documents. The immunity applied not only to direct criminal punishment, state or federal, but to forfeitures (as in *Boyd*) or, presumably, other civil penalties that the government might seek to impose. Since the immunity came with the testimony and since the privilege applied to ICC or grand jury proceedings as well as formal trials, these holdings forced the ICC to immunize potential wrongdoers before it could know who was guilty and who was innocent—that is, it had to immunize wrongdoers as the cost of investigating wrongdoing. No wonder that some judges concluded that if the logic of these cases were to be followed, the ICC would be disabled from doing its job.¹⁴¹

137. See Brief for Appellee at 10–19, *Counselman* (No. 1026), in 10 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES, *supra* note 116, at 591, 601–10.

138. *Counselman*, 142 U.S. at 585 (“We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States.”); *id.* at 586 (“[A] statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offence to which the question relates.”). The Court went on to note that the statute in question impermissibly allowed the government to use the compelled testimony to “gain[] therefrom a knowledge of the details” of the case and then to use that “knowledge” in prosecuting the witness. *Id.*

139. See Act of Feb. 11, 1893, 27 Stat. 443. The new statute provided on the one hand that “no person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, . . . on the ground . . . that the testimony or evidence . . . required of him, may tend to criminate him” *Id.* at 443–44. On the other hand, it added: “But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena” *Id.* at 444.

140. See 161 U.S. 591, 606–08 (1896).

141. See, e.g., *United States v. Price*, 96 F. 960, 962 (D. Ky. 1899) (restricting scope of defendant’s Fifth Amendment immunity under Interstate Commerce Act, and noting that if immunity were not so restricted, defendants would find it easy to immunize themselves for wrongdoing by getting themselves summoned as witnesses). Note that in *Brown v. Walker* itself, four Justices were prepared to strike down even the revised immunity statute—i.e., to hold that the ICC could not compel testimony or the production of documents even if full transactional immunity were granted the witness. See 161 U.S. at 610, 627–28

There was an obvious, if partial, response to this problem. The key to railroad regulation—perhaps the key to almost all economic regulation—was the ability to direct the conduct of corporations. *Boyd* and *Counselman* made it much harder to punish corporate officers, but they did not necessarily hamper the regulation of the corporations themselves—as long as Fourth and Fifth Amendment protection covered natural persons but not artificial ones.

Yet a turn-of-the-century observer might well have thought that *Boyd* and *Counselman* would apply to corporations, that the privilege against self-incrimination—with its attendant limits on the compelled production of documents—would cover institutions as well as individuals. Wigmore, a careful and astute reader of the cases, thought so,¹⁴² and there were strong arguments to support his position. The same year it decided *Boyd*, the Supreme Court held that corporations were “persons” for purposes of the Fourteenth Amendment.¹⁴³ The Fifth Amendment, including the privilege against self-incrimination, protected “persons” as well,¹⁴⁴ and the Fourth Amendment protected the rights of “the people.”¹⁴⁵ If artificial persons counted in the later Amendment, it seemed plausible to suppose that they would count in the earlier ones as well.

Protecting corporations was also consistent with the privacy/property value that *Boyd* identified as the foundation of the Fourth and Fifth Amendments. The corporate form is, after all, a means by which a group of people collectively hold property and make contracts. Requiring the corporation to produce records is no different from requiring the corporation’s shareholders to produce records that the shareholders jointly own.¹⁴⁶ Or, to focus less on property and more on privacy, documents that belong to the corporation

(Shiras, J., joined by Gray and White, JJ., dissenting); *id.* at 628, 630–33 (Field, J., dissenting). The Court responded:

If, as was justly observed in the opinion of the court below, witnesses standing in Brown’s position were at liberty to set up an immunity from testifying, the enforcement of the Interstate Commerce law or other analogous acts, wherein it is for the interest of both parties to conceal their misdoings, would become impossible, since it is only from the mouths of those having knowledge of the inhibited contracts that the facts can be ascertained.

Id. at 610.

142. See 3 WIGMORE, *supra* note 67, § 2259, at 3116 (calling the issue “plain”).

143. See *Santa Clara County v. Southern Pac. R.R.*, 118 U.S. 394 (1886).

144. U.S. CONST. amend. V.

145. *Id.* amend. IV.

146. This functional argument, the idea that one had to protect the corporation to protect the shareholders, may have been the basis on which corporations were initially treated as “persons” under the Fourteenth Amendment. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 69–70* (1992). According to Horwitz, the pure legal fiction of corporate personality, the idea that corporations were no different than natural persons under the law, did not take hold until the end of the nineteenth century. See *id.* at 70–74. Of course, the fiction did not completely take hold even then; states continued to regulate corporations differently from natural persons. See Charles W. McCurdy, *The Knight Sugar Decision of 1895 and the Modernization of American Corporation Law, 1869–1903*, 53 BUS. HIST. REV. 304, 314–19 (1979). Even if one treated corporations and natural persons differently for some purposes, however, it was hard to justify treating them differently for purposes of *Boyd*, which itself involved documents used in the course of running a business.

necessarily contain private information about the corporation's owners or employees; it seems formalistic to deny *both* the employees *and* the owners control over the information solely because it is held in the corporate form.

As the twentieth century approached, these arguments looked more than plausible; they looked *right*. Yet if they had been adopted, the modern regulatory state would have been dead almost before it was born. Indeed, it may be fair to say that at about the time of *Lochner v. New York*, Fourth and Fifth Amendment law posed a greater threat to activist government, at least at the federal level, than did substantive due process. *Boyd*, like *Entick*, treated the search and seizure of papers as at least presumptively impermissible, on the ground that papers were both private and the legitimate property of their owner, and *Boyd* took the further (wholly logical) step of applying *Entick*'s rule to subpoenas. It would take another step, though again a logical and easily imaginable one, to apply that rule to institutions as to individuals. Had such a step been taken, the result would have been, as in *Entick*, a substantial restraint on the power of government to regulate wherever regulation had to be enforced through the compulsory use of the regulated party's documents. Though *Boyd* had led to significant restrictions on federal railroad regulation and sporadic limits in other areas, it had not yet transformed the regulatory landscape. Transformation was, however, just around the corner.

This shadow on economic regulation highlights the key difference between *Boyd* and *Entick*. Like *Entick*, *Boyd* mattered most to cases far removed from ordinary criminal law. But *Boyd*'s substantive shadow was much more controversial. *Entick* affected seditious libel prosecutions and little else, and by the mid-eighteenth century seditious libel was probably already fading. *Boyd*-era Fourth and Fifth Amendment law cast a shadow on a host of regulatory arrangements at a time when the popularity of such arrangements was rising, not falling.

B. *Boyd's Collapse*

The conflict between *Boyd*'s protection of "the privacies of life" and the government's authority to regulate business came to a head in 1906 in *Hale v. Henkel*.¹⁴⁷ *Hale* involved a grand jury investigation of possible Sherman Act violations. Hale, the secretary-treasurer of the MacAndrews & Forbes Company, was asked to turn over all documents concerning MacAndrews & Forbes's relationship with six other firms.¹⁴⁸ Hale objected on three main grounds:¹⁴⁹ (1) the grand jury had no general authority to inquire into

147. 201 U.S. 43 (1906).

148. *Id.* at 45; Brief for Appellant at 1-4, *Hale* (No. 340).

149. *Hale*'s brief contains a laundry list of overlapping arguments; the categorization used in the text is accurate but simplified, and it omits some claims. *See, e.g., id.* at 58-63 (arguing that proceedings below violated Tenth Amendment).

possible crimes absent particularized suspicion;¹⁵⁰ (2) the subpoena constituted an unreasonable search and seizure;¹⁵¹ and (3) turning over the documents would violate the corporation's privilege against self-incrimination.¹⁵² Each argument looked quite plausible. The government's claim that grand juries had broad inquisitorial power sounded uncomfortably similar to the claims of the special tribunals that had used the oath *ex officio*. The grand jury's witnesses were not told about possible charges, because the charges were to arise out of the documents and testimony collected by the grand jury. The search and seizure claim seemed a natural outgrowth of *Boyd*. Indeed, if corporations were covered by the Fourth Amendment, *Boyd* appeared to dictate the result in Hale's case.¹⁵³ Finally, the corporate privilege argument, as I have already noted, was embraced by no less an authority than Wigmore.¹⁵⁴

Nevertheless, Hale's first and third arguments lost, and the second won only the smallest of victories. On the first claim, the Court invoked the tradition of broad grand jury power and concluded that while "[d]oubtless abuses of this power may be imagined," courts would "be alert" to deal with them when they arose.¹⁵⁵ This was, of course, more an assertion than an argument. The Court was even more dismissive of the claim that Hale's corporate employer had its own privilege against self-incrimination (a privilege that its agent Hale could presumably invoke). The Court rejected that claim in a single result-oriented paragraph,¹⁵⁶ the key passage of which reads as follows: "[T]he privilege claimed would practically nullify the whole act of Congress. Of what use would it be for the legislature to declare these combinations unlawful if the judicial power may close the door of access to every available source of information upon the subject?"¹⁵⁷ The Court made the same point when it rejected the claim that *any* subpoena for corporate documents would violate the corporation's Fourth Amendment rights, adding that corporations, unlike individuals, were creatures of the state and hence not ordinarily the bearers of constitutional protections.¹⁵⁸ Because this reasoning

150. See *id.* at 12–41. This was the central point of Hale's brief; throughout the discussion Hale placed great emphasis on the inquisitorial nature of the grand jury and its consequent potential for compelled self-incrimination.

151. *Id.* at 63–87.

152. In part this argument was subsumed within the Fourth Amendment argument since, under *Boyd*, searches and seizures were "unreasonable" when they tended to compel self-incrimination. However, both the main brief and the reply brief raised the corporation's Fifth Amendment claim directly. See *id.* at 85–87; Appellant's Brief in Reply at 15–21, *Hale* (No. 340).

153. *Boyd*, like *Hale*, was a case involving a subpoena for documents, and *Counselman v. Hitchcock*, 142 U.S. 547 (1892), already had held that the Fifth Amendment applied to such subpoenas in grand jury proceedings. The only way to distinguish *Boyd*, therefore, was to deny that its protection extended to corporations.

154. See *supra* note 142 and accompanying text.

155. *Hale*, 201 U.S. at 65.

156. *Id.* at 69–70.

157. *Id.* at 70.

158. *Id.* at 73–75.

was at least in some tension with the many cases protecting corporations under the Fourteenth Amendment's Due Process Clause, the Court backtracked a little, concluding that *MacAndrews & Forbes* was entitled to be free from *unreasonable* searches and seizures (but hinting that reasonableness meant something different here than in *Boyd*) and that the subpoena in this case had been unreasonably overbroad.¹⁵⁹ Although this sounds like a major victory for Hale's position, the Court closed its opinion with an admonition that seemed designed to protect broad subpoena power in future cases: "[W]e do not wish to be understood as holding that an examination of the books of a corporation, if duly authorized by act of Congress, would constitute an unreasonable search and seizure within the Fourth Amendment."¹⁶⁰ If this language was meant to prevent future claims like Hale's, it did the trick. From then on, subpoenas for corporate documents were quashed only when compliance was too burdensome or when the subpoenas asked for irrelevant materials.¹⁶¹ The notion of any *Boyd*-type protection for corporations, whether grounded in the Fourth Amendment or the Fifth, was dead.

This decision prompted a sharp dissent by Justice Brewer and Chief Justice Fuller.¹⁶² The dissenters argued that if corporations were "persons" under the Fourteenth Amendment, they surely were "persons" under the Fifth,¹⁶³ and relied on *Boyd* for the proposition that the Constitution barred subpoenas for documents as evidence.¹⁶⁴ Judged by the use of conventional legal authorities and analysis, the dissent had the better argument on both points. But the strength of the dissent's position only highlights the odd nature of the *Hale* majority's reasoning. The Court did not reject constitutional privacy protection for corporations because such protection was unnecessary, or because the owners' and employees' privacy was already sufficiently protected, or for any other principled reason. The Court rejected Hale's main arguments because doing otherwise "would practically nullify" the Sherman Act—and, one might add, a great deal else. The principle of *Boyd* ran squarely into the emerging regulatory state, and the principle lost.

159. *Id.* at 75–77.

160. *Id.* at 77.

161. *See, e.g.,* *Wilson v. United States*, 221 U.S. 361, 375–76 (1911). The upshot is that subpoenas are subject to only the weakest of legal constraints. *See generally* SARA S. BEALE & WILLIAM C. BRYSON, *GRAND JURY LAW AND PRACTICE* §§ 6:09, 6:26–27 (1986); 2 CHARLES A. WRIGHT, *FEDERAL PRACTICE AND PROCEDURE* §§ 274–275 (1982) (summarizing federal law on production of documents and motions to quash).

As if to seal the point that *Hale* limited Fourth and Fifth Amendment claims alike, the second edition of Wigmore's treatise, published seventeen years after *Hale*, notes that the corporate officer who is directed to produce the document might possibly have a Fifth Amendment claim, and notes further that the corporation itself does not have such a claim; however, Wigmore makes no mention of the possibility that the corporation might have a Fourth Amendment claim. *See* 4 JOHN H. WIGMORE, *A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* § 2200, at 672–73 (2d ed. 1923).

162. *Hale*, 201 U.S. at 83 (Brewer, J., joined by Fuller, C.J., dissenting).

163. *See id.* at 83–88.

164. *Id.* at 88.

Hale's timing is interesting. The case followed the Court's decision in *Lochner v. New York* by only a year. It might seem odd that the same Court that decided *Lochner* would backtrack on a constitutional protection—especially over a vigorous dissent by Brewer and Fuller, two members of the *Lochner* majority—on the ground that the constitutional protection might disable the government from regulating business. Yet the relationship between *Hale* and *Lochner* may not be so odd after all. The initial decade of the twentieth century saw the beginnings of a substantial political challenge to the minimalist state. Theodore Roosevelt was President, progressivism was politically ascendant, Congress was about to pass the Food and Drug Law, and states were passing workers' compensation statutes and other regulatory legislation.¹⁶⁵ In 1906, Congress and state legislatures were obviously more interested in regulation than their counterparts had been two decades earlier, when *Boyd* was decided.

These developments might have undercut *Lochner* as much as *Boyd*, but *Lochner*-style substantive due process had a major advantage that *Boyd* lacked—flexibility. Substantive due process allowed room for maneuver in defining what was a public purpose within the police power, and what was mere wealth transfer and hence unconstitutional.¹⁶⁶ As the Court soon showed in the famous “Brandeis Brief” cases,¹⁶⁷ substantive due process could be quite discriminating; if the Court determined that there was a genuine health or safety interest, the state's desire to regulate might easily be accommodated. This allowed the Court to strike down *some* regulation without striking down *all* (or even most). With *Lochner*, the Court could pick and choose.

Boyd, on the other hand, was indiscriminate: the concern with protecting the secrecy of one's papers applied across the board. Nothing in the nature of the privacy interest suggested a distinction between good regulation and bad. To be sure, there is a way Fourth and Fifth Amendment doctrine might have developed that would have made *Boyd* very *Lochner*-like. The Court might have retreated from *Boyd's* absolute protection to a balanced protection,

165. For good general discussions, see ARTHUR A. EKIRCH, JR., *PROGRESSIVISM IN AMERICA* (1974); RICHARD HOFSTADTER, *THE AGE OF REFORM* (1955); GEORGE E. MOWRY, *THE ERA OF THEODORE ROOSEVELT, 1900–1912* (1958).

166. See sources cited *supra* note 113. The line between legitimate regulation of health, safety, or public morals and illegitimate “taking from A to give to B” was a fine one, as the less famous of the two *Lochner* dissents shows. Justice Harlan, joined by two of his colleagues, wrote a sharp and powerful dissent arguing that the regulation of bakers' hours was a permissible means of protecting public health. See *Lochner v. New York*, 198 U.S. 45, 65–74 (1905) (Harlan, J., dissenting). Unlike Holmes's more famous opinion, see *id.* at 74–76 (Holmes, J., dissenting), Harlan's dissent did not argue that the entire enterprise of substantive due process was flawed but rather that that enterprise was consistent with the state regulation at issue. Harlan's argument suggests that substantive due process could be more accommodating of efforts to regulate the economy than is sometimes supposed.

167. See *Bunting v. Oregon*, 243 U.S. 426 (1917) (upholding maximum hours for manufacturing employees); *McLean v. Arkansas*, 211 U.S. 539 (1909) (upholding regulation of means by which miners' wages were calculated); *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding maximum hours for women).

weighing the government's interest in regulation against the claimant's interest in nondisclosure. In *Hale*, this would have meant a decision to uphold the subpoena power because of the importance of antitrust regulation, leaving the Court free to strike down other regulatory regimes because the government's interest in having them could not outweigh the privacy intrusion that would attend their enforcement. Had the Justices adopted this approach, *Lochner* and *Boyd* might have merged. Both would have allowed for "retail" rather than "wholesale" invalidation of government regulation, based largely on judges' and Justices' assessment of the plausibility and strength of the government's reasons for regulating.¹⁶⁸ But constitutional interest balancing was foreign to the legal culture of the time.¹⁶⁹

Barring the balancing option, and given the desire not to "practically nullify" legislation like the Sherman and Interstate Commerce Acts, the Court had only two options in *Hale*. One was to do what a later Court would do with *Lochner* itself: an about-face, repudiating the doctrine that generated conflict with the political branches.¹⁷⁰ In *Hale*, that would have meant undoing the emphasis, which dated back to *Entick*, on protecting the privacy of one's papers from government snooping. The other option was the one *Hale* embraced: keep *Boyd* and *Entick* but cabin them with illogical boundaries, making the protection non-threatening (or at least non-fatal) to the emergence of the regulatory state.

The next few decades saw this choice repeated many times. In *Marron v. United States*, the Supreme Court held that instrumentalities of crime could be seized without violating the Fourth or Fifth Amendments, and that instrumentalities could include documents.¹⁷¹ In *Shapiro v. United States*, the Court held that the privilege was not violated by asking someone to produce required records—i.e., any records that the government ordered him to keep—no matter how incriminating the records' contents might be.¹⁷² Unlike *Hale*, these rules applied to searches and subpoenas directed at *individuals*. Together with *Hale*, they left *Boyd* largely inapplicable to the burgeoning world of government regulation. Even the records in *Boyd* itself might plausibly have been instrumentalities under *Marron*, and the documents sought in the various ICC cases of the 1890s might well have been judged required records a half century later.

These restrictions on *Boyd's* scope may have been a good thing. They were surely necessary if the New Deal was to avoid Fourth and Fifth Amendment challenge. But they are not consistent with the privacy norm that

168. See Stuntz, *supra* note 5, at 1031–34.

169. See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 948–52 (1987).

170. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

171. 275 U.S. 192, 198–99 (1927).

172. 335 U.S. 1, 32–35 (1948).

Boyd—and *Wilkes* and *Entick* before it—sought to protect. *Shapiro*'s required records doctrine makes the point most plainly, since it allows the government to obtain anything, however private, by the simple expedient of making its existence mandatory. Tellingly, Supreme Court opinions applying *Hale*, *Marron*, and *Shapiro* have the same result-oriented character as Justice Brown's majority in *Hale*. The opinions barely take a stab at justifying curbs on Fourth and Fifth Amendment protection, aside from noting the obvious fact that without the curbs, government regulation of business would be a good deal harder.¹⁷³

Hale set the tone for Fourth and Fifth Amendment law in the twentieth century. Privacy retained a place of honor, but only within boundaries that had nothing whatever to do with privacy, boundaries that made sense precisely as a means of de-fanging privacy protection. It is as if in the decades after 1937, instead of repudiating *Lochner*,¹⁷⁴ the Court had repeatedly reaffirmed it—but applied it only to laws regulating bakers. *Hale* and its progeny resolved the conflict between privacy protection and substantive government power, but only by fiat.

V. FROM *BOYD* TO INCORPORATION AND BEYOND

Today, Fourth and Fifth Amendment law has almost nothing to do with the ICC or antitrust investigations. The main point of those bodies of law is to regulate the police. This regulation is no small affair; modern Fourth and Fifth Amendment law governs the day-to-day decisions about how police make arrests and gather evidence and question suspects. It has gone from being nearly irrelevant to ordinary criminal investigation to dominating ordinary criminal investigation. How this came about is a large part of the story of twentieth-century criminal procedure.

That story contains an important twist. A new and different kind of constitutional criminal procedure arose during the twentieth century, and almost displaced the privacy-protective law spawned by *Entick* and *Wilkes* and

173. An unusually blunt example is the Court's explanation in *United States v. White*, 322 U.S. 694 (1944), of why officials of a labor union are not entitled to claim the privilege with respect to documents that belong to the union:

The reason underlying the restriction of this constitutional privilege to natural individuals acting in their own private capacity is clear. The scope and nature of the economic activities of incorporated and unincorporated organizations and their representatives demand that the constitutional power of the federal and state governments to regulate those activities be correspondingly effective. The greater portion of evidence of wrongdoing by an organization or its representatives is usually to be found in the official records and documents of that organization. Were the cloak of the privilege to be thrown around these impersonal records and documents, effective enforcement of many federal and state laws would be impossible.

Id. at 700. At the close of this discussion, the Court cited *Hale*. *See id.*

174. Though *Lochner* was plainly dead after *West Coast Hotel*, the Court did not repudiate it by name for some time. *See Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 535–36 (1949).

Boyd. The rise of police forces—the great story of *nineteenth*-century criminal justice¹⁷⁵—predictably led courts to worry not about the seizure of papers but about coercion and violence. Police officers do not just look for evidence; they force people to do things. The force may be gentle or subtle, or it may be harsh, even brutal. By the mid-twentieth century, a growing body of due process case law reflected courts' concern with this danger. Thus, by about 1950, Fourth and Fifth Amendment law was almost an empty shell (due to cases like *Shapiro*, *Marron*, and *Hale*), while due process cases concerned with regulating police coercion seemed about to take over the law of criminal procedure.

Yet the takeover never happened. The due process cases all but died out, and Fourth and Fifth Amendment law suddenly became the chief vehicle for regulating the police. In the 1960s, *Boyd's* concern with shielding evidence from the government's prying eyes came to dominate the law of police investigation of crime. That development produced a strange state of affairs. The Fourth Amendment, now the primary body of law that regulates day-to-day police work, is anchored in the same privacy value that protected eighteenth-century pamphleteers and nineteenth-century railroads—a privacy value that originally had nothing to do with ordinary criminal law enforcement. Meanwhile, police coercion and violence, which have a lot to do with ordinary law enforcement, are mostly ignored; they lie at the fringes of constitutional regulation. Privacy lies at the core.

A. *From Boyd to Mapp and Miranda*

After *Hale v. Henkel* and decisions like it, Fourth and Fifth Amendment law did not matter much to ordinary criminal cases, for reasons that are by now familiar. Search-incident-to-arrest law, combined with *Marron's* instrumentalities rule and *Shapiro's* required records doctrine, meant that the Fourth and Fifth Amendments almost never prevented the government from getting the information it wanted. This was true even of federal investigations (the only thing *Boyd* and its progeny directly limited), and it was true even though the exclusionary rule became a part of federal criminal procedure not long after *Hale*.¹⁷⁶ A standard argument in the pre-*Mapp v. Ohio* debate about the exclusionary rule was that it had caused no significant disruption to

175. See generally DAVID R. JOHNSON, *POLICING THE URBAN UNDERWORLD: THE IMPACT OF CRIME ON THE DEVELOPMENT OF THE AMERICAN POLICE, 1800-1887* (1979) (tracing rise of police to changes in nature and complexity of urban crime); ERIC MONKKONEN, *POLICE IN URBAN AMERICA, 1860-1920* (1981) (emphasizing shift in police function from provision of social services to crime control). For the best discussion of the implications of the rise of police forces for Fourth Amendment law and theory, see Steiker, *supra* note 36, at 832-38.

176. See *Weeks v. United States*, 232 U.S. 383 (1914).

federal criminal investigations.¹⁷⁷ This argument was apparently right, based on the absence of any sustained complaint about the exclusionary rule's effects. Probably the biggest difference the exclusionary rule made where it applied (as it did in a number of states by the 1950s) was in forcing officers to get warrants for house searches. Yet that effect alone was probably not very important. It never has been clear that the warrant requirement itself matters much, at least if it is limited to houses and other buildings,¹⁷⁸ and in any event house searches are only a small part of criminal law enforcement. The bottom line is that the presence or absence of the exclusionary rule did not matter much because the underlying Fourth and Fifth Amendment law did not matter much.

Into this vacuum came the new law of criminal procedure. The growth of police forces throughout the nineteenth century brought in its wake some disturbing patterns of evidence gathering, patterns that looked quite different from the kinds of cases that dominated Fourth and Fifth Amendment law.¹⁷⁹ The courts responded—slowly, but eventually. In 1931, the Wickersham Commission published a report discussing “the third degree;”¹⁸⁰ a portion of the report catalogued many then-recent state court decisions suppressing confessions because of the violent methods by which those confessions had been obtained.¹⁸¹ A law of confessions, generated by state courts and quite independent of *Boyd*-style self-incrimination doctrine, was evolving in the early decades of this century.

For a long time this development did not touch federal constitutional law.¹⁸² That changed in 1936 with *Brown v. Mississippi*.¹⁸³ Beginning with *Brown* and continuing over the course of the next two decades, the Supreme Court incorporated the essence of these state court decisions into federal constitutional law through the Due Process Clause of the Fourteenth

177. See, e.g., *Elkins v. United States*, 364 U.S. 206, 218–19 (1960) (“The federal courts themselves have operated under the exclusionary rule of *Weeks* for almost half a century; yet it has not been suggested . . . that the Federal Bureau of Investigation has thereby been rendered ineffective . . .”).

178. See Stuntz, *supra* note 63, at 885–97.

179. See, e.g., Mark H. Haller, *Historical Roots of Police Behavior: Chicago, 1890–1925*, 10 LAW & SOC'Y REV. 303, 317–21 (1976) (discussing patterns of police violence).

180. Zechariah Chafee, Jr., Walter H. Pollak & Carl S. Stern, *The Third Degree*, in WICKERSHAM COMMISSION, NO. 11: REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 13 (1931) (discussing state confessions cases). The Wickersham Commission, appointed by President Hoover, investigated a number of aspects of criminal law enforcement, most famously the breakdown in enforcement of the Prohibition laws.

181. *Id.* at 52–83 (discussing appellate decisions from 1920s).

182. The great exception is *Bram v. United States*, 168 U.S. 532 (1897), in which the Court reversed a federal conviction on the ground that the defendant's confession “must necessarily have been the result of either hope or fear, or both, operating on the mind.” *Id.* at 562. *Bram* was a Fifth Amendment case, and it might have represented the merger of Fifth Amendment law with the state voluntariness cases later surveyed in the Wickersham Commission report. But *Bram* was simply ignored; it basically lay dormant until shortly before *Miranda v. Arizona*, 384 U.S. 436 (1966), when the Fifth Amendment was again applied to ordinary police interrogation.

183. 297 U.S. 278 (1936).

Amendment. This line of criminal due process cases was new in two respects. The cases applied to the state courts, where the great majority of day-to-day criminal litigation takes place.¹⁸⁴ More important still, *Brown* and its progeny arose out of and were designed to regulate police behavior in ordinary criminal investigations. And the regulation was aimed at a particular *kind* of police behavior. These cases were not at all about privacy protection; one sees no paeans to *Boyd* and *Entick* and “the privacies of life” here. Nor did they have anything to do with the scope of government power to define crimes. Most of the major decisions were in homicide cases, hardly an area where government regulation is thought to be a problem. Instead, the point of this line of cases was to limit police coercion and violence.

The cases eventually covered both police interrogation and searches and seizures, though more attention was paid to the former than to the latter. In *Brown* itself, the police beat a confession out of the defendant and, tellingly, barely bothered to hide their behavior;¹⁸⁵ the Court found the confession inadmissible because it was involuntary.¹⁸⁶ Subsequent confessions cases tended to involve allegations of beatings together with other kinds of physical intimidation, such as the denial of sleep or food¹⁸⁷ or extended incommunicado incarceration.¹⁸⁸ By the late 1950s the cases started to shift ground, with the Court taking *Boyd*-style privacy and autonomy arguments and claims of “psychological coercion” more seriously.¹⁸⁹ But for most of the 1940s and 1950s, the due process confessions cases focused squarely on whether the police had used too much force—and in this context “force” had an overtly physical cast.

The due process search and seizure cases, though fewer, fit the same pattern. In *Rochin v. California*, the police had the defendant’s stomach

184. The line of criminal due process cases dated back to *Hurtado v. California*, 110 U.S. 516 (1884), which held that the Due Process Clause did not require the use of grand juries. For a long time *Hurtado* generated little law, but that began to change early in the twentieth century. See *Tumey v. Ohio*, 273 U.S. 510 (1927) (holding that biased judge denies due process); *Moore v. Dempsey*, 261 U.S. 86 (1923) (holding that mob-dominated trial denies due process). *Brown*’s innovation was to apply this line of cases to police practices.

185. 297 U.S. at 281–85.

186. *Id.* at 285–86.

187. *E.g.*, *Ashcraft v. Tennessee*, 322 U.S. 143 (1944) (defendant questioned continuously for 36 hours); *Lisenba v. California*, 314 U.S. 219 (1941) (defendant questioned continuously, save for meal breaks, from Sunday evening until early Tuesday morning).

188. *E.g.*, *Davis v. North Carolina*, 384 U.S. 737 (1966) (defendant held for 16 days with no outside contact before confessing); *Watts v. Indiana*, 338 U.S. 49 (1949) (defendant held for a week with no outside contact before confessing).

189. See, *e.g.*, *Rogers v. Richmond*, 365 U.S. 534 (1961) (remanding for determination of voluntariness of defendant’s confession because assistant police chief, in defendant’s presence, pretended to order officers to arrest defendant’s wife); *Spano v. New York*, 360 U.S. 315 (1959) (finding defendant’s confession involuntary partially on grounds of false sympathy aroused when police officer, a childhood friend of defendant, falsely claimed to face job trouble if defendant failed to confess); *Fikes v. Alabama*, 352 U.S. 191, 198 (1957) (finding confession involuntary notwithstanding absence of any evidence of physical mistreatment in light of defendant’s “weak[ness] of will or mind” and hence his susceptibility to psychological pressure).

pumped in order to recover two morphine capsules.¹⁹⁰ The Supreme Court reversed the defendant's conviction on drug charges on the ground that such a search "shocks the conscience."¹⁹¹ The defendant in *Irvine v. California* used *Rochin* to argue that *his* conviction should be overturned, but the Court rejected Irvine's argument, even though the police had repeatedly entered his home and tapped his phone illegally.¹⁹² *Rochin* and *Irvine* suggested that the Justices' consciences would be shocked only where some grossly improper use of physical force was involved. Stealth and snooping, even when plainly illegal, would not be enough to violate due process.¹⁹³

By the 1950s, then, there was a body of constitutional doctrine that posed an alternative to the *Entick-Boyd* tradition of privacy-based criminal procedure. Unlike Fourth and Fifth Amendment law, that doctrine had nothing to do with substantively problematic crimes or regulatory disputes. Also unlike Fourth and Fifth Amendment law, that doctrine applied to run-of-the-mill criminal cases. Indeed, the due process cases of the 1930s and after were the first body of constitutional law to govern ordinary police work. But in the late 1950s and early 1960s, just as it was picking up steam, the new due process of criminal investigation came under sustained attack, both from some of the Justices¹⁹⁴

190. 342 U.S. 165 (1952).

191. *Id.* at 172.

192. 347 U.S. 128, 133 (1954) (plurality opinion).

193. This was the explicit justification for the decision in *Irvine*. See *id.* (emphasizing that *Rochin* involved "coercion . . . applied by a physical assault upon [defendant's] person"); *id.* at 139 (Clark, J., concurring) (declining to extend *Rochin* "beyond the clear cases of physical coercion and brutality" like *Rochin* itself).

194. For an early example, see Justice Black's stinging separate opinion in *Rochin*, which highlighted the contentless character of the "shock the conscience" standard. 342 U.S. at 175-77 (Black, J., concurring). See also Justice Clark's concurrence in *Irvine*, 347 U.S. at 138-39 (Clark, J., concurring), which characterized the Court's approach as follows:

[T]his makes for such uncertainty and unpredictability that it would be impossible to foretell—other than by guesswork—just how brazen the invasion of the intimate privacies of one's home must be in order to shock itself into the protective arms of the Constitution. In truth, the practical result of this *ad hoc* approach is simply that when five Justices are sufficiently revolted by local police action, a conviction is overturned and a guilty man may go free. . . . We may thus vindicate the abstract principle of due process, but we do not shape the conduct of local police one whit; unpredictable reversals on dissimilar fact situations are not likely to curb the zeal of those police and prosecutors who may be intent on racking up a high percentage of successful prosecutions.

This argument seems to have played a substantial role in the Court's decision in *Mapp v. Ohio*, 367 U.S. 643 (1961), to apply the exclusionary rule—and thus, in practice, the Fourth Amendment—to the states. See *id.* at 664-66 (Black, J., concurring) (praising Court's decision to "clear up th[e] uncertainty" surrounding *Rochin* and *Irvine* and to rely on "the precise, intelligible and more predictable constitutional doctrine enunciated in the *Boyd* case").

There was a parallel development in the confessions cases. Beginning in 1958, Justice Douglas, usually joined by Chief Justice Warren and Justices Black and Brennan, argued repeatedly that the voluntariness test should be replaced with a right-to-counsel analysis. See *Culombe v. Connecticut*, 367 U.S. 568, 637-41 (1961) (Douglas, J., concurring); *Spano v. New York*, 360 U.S. 315, 324-26 (1959) (Douglas, J., concurring); *Crooker v. California*, 357 U.S. 433, 441-48 (1958) (Douglas, J., dissenting). A major attraction of the right to counsel seems to have been its perceived rule-like quality. See *Culombe*, 367 U.S. at 637 (Douglas, J., concurring) (highlighting ease of applying proposed right to counsel rule); *Crooker*, 357 U.S. at 443-45 (Douglas, J., dissenting) (noting difficulty of deciding whether confession is coerced). This strand of argument, of course, leads directly to the trio of major confessions cases of the mid-1960s,

and in the law reviews.¹⁹⁵ The attack followed these lines: Standards like "voluntariness" and "shock the conscience" are impossibly vague, so much so as to be almost without content. Because the law has no content, the police ignore it and do what they want. Rules are needed, and the rules must have bite.¹⁹⁶ Always somewhere near the surface of this criticism was an image: a black suspect being roughed up by white police officers.¹⁹⁷ This is of course no surprise; critics of the new criminal procedure were writing only a few years after another, more famous *Brown* decision. And the specter of black suspects abused by white cops was quite real.¹⁹⁸ It lent great force to the claim that constitutional regulation of the police was necessary, and that the sort of regulation provided by the due process cases was much too thin.

This was an argument perfectly designed for a Supreme Court that had just struck down school segregation, and was about to rewrite several other areas of law on thinly veiled racial grounds.¹⁹⁹ Asked to do something about police

all of which used the right to counsel to regulate the interrogation process. See *Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Massiah v. United States*, 377 U.S. 201 (1964).

195. The attacks in the literature were generally aimed at the Court's confessions cases. See, e.g., Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, in *CRIMINAL JUSTICE IN OUR TIME 1* (A.E. Dick Howard ed., 1965); Yale Kamisar, *What Is an "Involuntary" Confession? Some Comments on Inbau and Reid's Criminal Interrogation and Confessions*, 17 *RUTGERS L. REV.* 728, 735-59 (1963); Arthur E. Sutherland, Jr., *Crime and Confession*, 79 *HARV. L. REV.* 21 (1965); Note, *Developments in the Law—Confessions*, 79 *HARV. L. REV.* 935 (1966). For an early example of the same sorts of criticisms, see Monrad G. Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 *STAN. L. REV.* 411 (1954) (emphasizing both evanescence of voluntariness standard and gap between "law in the books" and law as applied in police stations). For a similar criticism applied to the Court's due process methodology in general, see Sanford H. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 *YALE L.J.* 319 (1957).

Most of the literature prior to the 1960s expressed no view as to the wisdom of the Court's confessions cases, though (oddly to modern eyes) the tone of the discussion usually suggested concern that the Court was being too interventionist. See JOHN M. MAGUIRE, *EVIDENCE OF GUILT* 121-54 (1959); Francis A. Allen, *Due Process and State Criminal Procedures: Another Look*, 48 *NW. U. L. REV.* 16 (1953); Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 *HARV. L. REV.* 1, 10-14 (1956).

196. This view led to a number of academic calls for "codes" of one sort or another to solve the police interrogation problem. See, e.g., Paul M. Bator & James Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel*, 66 *COLUM. L. REV.* 62 (1966); Arnold N. Ender & Sheldon H. Elsen, *Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois*, 49 *MINN. L. REV.* 47 (1964).

197. See, e.g., Yale Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 *MINN. L. REV.* 1083, 1095-96 (1959) (noting that it is often "good politics" for police to flout civil liberties because victims are so often minorities). Of course, the same image played a large part in the Court's early voluntariness decisions. See Bennett Boskey & John H. Pickering, *Federal Restrictions on State Criminal Procedure*, 13 *U. CHI. L. REV.* 266, 283-86 (1946) (highlighting role of race in Court's post-*Brown v. Mississippi* voluntariness decisions).

198. See, e.g., TASK FORCE ON THE POLICE, PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 146-48, 164-65, 167-69 (1967).

199. See, e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (constitutionality of poll taxes); *Henry v. Mississippi*, 379 U.S. 443 (1965) (definition of adequate and independent state ground of decision); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (First Amendment application to libel law); *Fay v. Noia*, 372 U.S. 391 (1963) (waiver of claims in habeas corpus); *NAACP v. Alabama*, 357 U.S. 449 (1958) (right of free association). It cannot be proven that these cases are all "about" race, and some do not involve black litigants. But the facts of *NAACP v. Alabama* and *New York Times Co. v. Sullivan* powerfully suggest institutionalized racism; it seems hard to imagine the Court taking such aggressive First Amendment stands were that not so. In *Fay v. Noia* and *Henry v. Mississippi*, the Court dramatically expanded the power of federal courts to review state court decisions, a logical step in a world in which some state court systems could not be trusted to play fair in cases with black criminal defendants. Lastly,

misconduct, the Court responded with enthusiasm. Beginning in 1961 with *Mapp v. Ohio* and extending through the rest of that eventful decade, the Court created a constitutional code of police conduct. In the place of the fuzzy and lax “voluntariness” and “shocks the conscience” standards the Court established rules, and the rules did have bite.

That part of the story is familiar, but there is a feature of the story we tend to ignore today. The Court’s intervention in criminal procedure took an extremely important but not at all inevitable turn. Perhaps because the due process cases had been discredited by the critics of the 1950s and early 1960s, the idea of serious constitutional regulation of the police did not build on the due process cases of the 1930s, 1940s, and 1950s—notwithstanding the fact that those cases were the *only* body of constitutional law aimed, start to finish, at the police. Instead, constitutional regulation of the police came to be linked to incorporation of the Bill of Rights, particularly the Fourth and Fifth Amendments. The Court followed this strategy in both *Mapp v. Ohio* (which made incorporation of the Fourth Amendment meaningful),²⁰⁰ and *Miranda v. Arizona* (applying the Fifth Amendment to police interrogation).²⁰¹ Throughout the 1960s, the Justices who sought greater restrictions on the police did so through the Bill of Rights, and the Justices who challenged those restrictions rested their arguments on the due process cases of the 1930s, 1940s, and 1950s.²⁰²

Notice where this left matters. The Fourth and Fifth Amendment law that the Court applied to the states in the 1960s was the Fourth and Fifth Amendment law that had been shaped by *Boyd*. Accordingly, along with the Fourth and Fifth Amendments, the Court incorporated *Boyd*’s focus on privacy protection. When the Court intervened aggressively in criminal procedure, it did more than increase the level of regulation. It changed the *purpose* of constitutional regulation, from the due process cases’ focus on police coercion and violence to the Fourth and Fifth Amendments’ traditional emphasis on privacy, autonomy, and the ability of individuals to keep information to themselves.

The change in purpose may well have been an accident. There is no evidence that the Court was engaged in a serious rethinking of the point of regulating day-to-day police work, no evidence of a conscious decision to

Harper v. Virginia Board of Elections invalidated a system of regulating voter qualifications that had historically been used to disenfranchise black voters throughout much of the South.

200. 367 U.S. 643 (1961).

201. 384 U.S. 436 (1966).

202. Thus Justice Harlan became the great adversary of interventionist criminal procedure—he dissented in both *Mapp* and *Miranda*, and in most of the other major criminal procedure decisions of the decade as well—and the same Justice Harlan was also the great defender of case-by-case due process adjudication. See *Duncan v. Louisiana*, 391 U.S. 145, 173–93 (1968) (Harlan, J., dissenting); *Miranda*, 384 U.S. at 506–14 (Harlan, J., dissenting); *Malloy v. Hogan*, 378 U.S. 1, 17–27 (1964) (Harlan, J., dissenting). Meanwhile, almost all the major new rules of criminal procedure—the rules whose creation Harlan opposed—were crafted under the Fourth, Fifth, or Sixth Amendments.

deemphasize coercion and stress privacy. Incorporation seems to have flowed out of a desire to rein in state criminal justice systems, while the emphasis on privacy flowed out of incorporation, almost as an afterthought. Not that the text of the Fourth and Fifth Amendments dictated this emphasis. The Fifth Amendment reads more naturally as a limit on police coercion, since the text bars only “compelled” self-incrimination.²⁰³ Meanwhile, the Fourth Amendment protects not only “houses, papers, and effects” (the stuff of privacy), but “persons” as well.²⁰⁴ And it forbids “unreasonable” searches and seizures without specifying what makes a search or seizure unreasonable. Nothing in the constitutional text dictates that reasonableness should turn on what a police officer saw and what he knew when he saw it rather than on how much force he used. Fourth and Fifth Amendment law in the 1960s focused on protecting privacy not because the text required it, but because *Boyd* and *Entick* required it. Of course, privacy protection in *Boyd* and *Entick* had no more to do with the problems of police misconduct in the 1960s than *Lochner* or the First Amendment have to do with the Rodney King incident. Nevertheless, after the incorporation cases, *Boyd* defined what the law that governed ordinary police investigation of crime was about.

To see what this shift in focus meant, one need only look at the two most important confessions cases of the 1960s, *Massiah v. United States*²⁰⁵ and *Miranda v. Arizona*.²⁰⁶ In *Brown v. Mississippi* and its progeny, the Court sometimes talked about suspects’ wills being overborne, but the dominant focus was always on police tactics, on the amount of force and pressure used. There was rarely any pretense that the suspect might be entitled to have *no* pressure put on him to confess, to act as a completely free and informed agent in deciding whether to talk to the police. *Massiah* and *Miranda* made a sharp break with this pattern. The majority opinions in both cases were just as concerned with suspects being tricked into confessing as with more brutal methods. In *Massiah*, the defendant spoke to a colleague who was working as an undercover government agent.²⁰⁷ Notwithstanding that the defendant had been under no pressure to talk at all, the Court suppressed the statements because formal criminal proceedings had begun and the government “questioning” violated *Massiah*’s Sixth Amendment right to counsel.²⁰⁸ In *Miranda*, the Court based its holding on the Fifth Amendment rather than the Sixth, so naturally there was more talk about police coercion. The Court made clear, however, that “coercion” in this setting meant anything that impeded a rational, informed choice by the suspect—hence the famous warnings,

203. U.S. CONST. amend. V.

204. *Id.* amend. IV.

205. 377 U.S. 201 (1964).

206. 384 U.S. 436 (1966).

207. 377 U.S. at 201–03.

208. *Id.* at 204–06.

combined with the admonition that the government bore a “heavy burden” of showing that any waiver of the *Miranda* rights must be made “voluntarily, knowingly and intelligently.”²⁰⁹ Both *Massiah* and *Miranda* treated police questioning much the way *Boyd* had treated the subpoena for customs invoices: the information belonged to the defendant, it was private, and the government had no right to get it unless the defendant chose—*really* chose—to give it up.

Boyd's rebirth was even more visible in search and seizure law. Before the 1960s, the Fourth Amendment imposed no meaningful limits on local police;²¹⁰ for them, the constitutional law of search and seizure came from *Rochin* and *Irvine*, the pair of 1950s due process cases that barred police conduct that shocked judicial consciences. *Rochin* and *Irvine* forbade extreme forms of police coercion but ignored privacy; pumping the suspect's stomach to retrieve swallowed drugs was shocking but illegally entering his apartment was not.²¹¹ After the 1960s, the threshold question in search and seizure analysis was whether the police had infringed a “reasonable expectation of privacy.”²¹² And the first two Supreme Court decisions defining that standard concerned electronic eavesdropping.²¹³ The focus was on what the police could see and hear, not on the amount of force they could use.

The shift from *Rochin* and *Irvine* to *Boyd*-style privacy protection in search and seizure law was accompanied by two other developments that dramatically increased the law's effect on ordinary police practices. First, the Court decoupled privacy protection from property rights, holding that electronic eavesdropping would constitute a “search” even if it involved no trespass.²¹⁴ Second, old-style vagrancy and loitering laws were invalidated, practically across the board.²¹⁵ (The ostensible reason was that they were too vague, but the atmosphere of the cases suggests the real reason was fear that these laws were being used in racially discriminatory ways.²¹⁶) These laws had in effect

209. 384 U.S. at 444, 475.

210. Under *Wolf v. Colorado*, 338 U.S. 25 (1949), the Fourth Amendment technically applied to the states, but because there was no constitutionally required remedy for Fourth Amendment violations, *Wolf* made little practical difference to the police. The real decision to apply the Fourth Amendment to local police came in *Mapp v. Ohio*, 367 U.S. 643 (1961).

211. See *supra* notes 190–93 and accompanying text.

212. The test comes from *Katz v. United States*, 389 U.S. 347, 360–62 (1967) (Harlan, J., concurring).

213. See *United States v. White*, 401 U.S. 745 (1971); *Katz*, 389 U.S. 347 (1967).

214. *Katz*, 389 U.S. at 353. At the same time, the Court did away with the so-called “mere evidence” rule, which barred the seizure of evidence that did not fall into some unprotected category, such as contraband, instrumentalities of crime, or required records. See *Warden v. Hayden*, 387 U.S. 294, 309–10 (1967) (overruling *Gouled v. United States*, 255 U.S. 298 (1921)). The effect of *Katz* and *Warden v. Hayden* was to convert *Boyd* from an absolute protection of a limited category of evidence to a balanced protection that applied essentially across the board.

215. See *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Coates v. City of Cincinnati*, 402 U.S. 611 (1971).

216. See John C. Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 218–19 (1985). Note that in *Papachristou*, the “crime” consisted of two white women and two black men riding around Jacksonville together. 405 U.S. at 158–59.

allowed the police to arrest almost anyone, at least on the street.²¹⁷ Given the longstanding legality of the search incident to arrest, broad arrest power had translated into equally broad power to search. Once vagrancy and loitering statutes began to fall, this picture changed; ordinary street stops and searches were now subject to constitutional limits that meant something.²¹⁸

Privacy protection thus became the centerpiece of the law of criminal investigation just as that law became a powerful force for regulating ordinary police behavior. Plausibly enough, the Court of the 1960s had decided that serious constitutional regulation was needed and had looked around for the most available doctrinal tools. The most obvious choice was to build on the due process cases, since those cases were designed to get at the worst kinds of police misconduct. But the due process cases looked like the old “separate but equal” rule—another doctrine that promised more protection than it delivered. So the Court seized on the most available alternative: the Bill of Rights, and especially the Fourth and Fifth Amendments. *That* doctrine, however, had its roots not in police misconduct but in concerns about the scope of government power, concerns that had been largely abandoned since the “switch in time” of 1937. In short, the 1960s left criminal procedure firmly anchored in a privacy value that had already proved inconsistent with the modern state. The problem of *Hale v. Henkel*—what to do when privacy protection runs into the government’s desire to regulate—was now posed all over again, and on many different fronts.

B. *The Aftermath of Incorporation*

After the 1960s, Fourth and Fifth Amendment cases diverged in how they approached that problem. Police interrogation law was reshaped; the privacy-autonomy value that lay at the core of *Miranda* was abandoned. The law of search and seizure, meanwhile, kept its focus on privacy.

The shift in police interrogation doctrine basically took *Miranda*’s rules and turned them to *Brown v. Mississippi*’s ends. From the outset, *Miranda* applied only to custodial interrogation. In a series of cases beginning in 1980, the Court defined “interrogation” to mean only tactics that looked to the suspect like police questioning—leaving the police free to engage in deceptive questioning, including the use of undercover agents, without being subject to

217. For the usefulness of vagrancy and loitering laws as a blanket authorization to arrest, see William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1 (1960). Cf. JOHNSON, *supra* note 175, at 132 (noting that nineteenth-century police “interpreted vagrancy statutes liberally as a means of regulating the conduct of professional thieves”).

218. See *Terry v. Ohio*, 392 U.S. 1 (1968); William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 560 n.29 (1992) (discussing relationship between *Terry* doctrine and constitutional challenges to vagrancy and loitering laws).

Miranda's restrictions.²¹⁹ Moreover, the Court made clear that mistakes and misunderstandings by the suspect would not invalidate a waiver of *Miranda* rights, as long as the suspect knew that he did not have to talk.²²⁰ The police are now free to “persuade, trick or cajole” the suspect into talking.²²¹ But they are not free to coerce confessions: if the suspect calls a halt to questioning it must cease,²²² and if he asks for a lawyer it may not resume save at the suspect’s instigation.²²³ These rules make sense only as tools for regulating the level of pressure the police may use (hence the suspect’s ability to stop questioning, combined with the officer’s ability to use deceptive tactics to get him to talk). *Miranda* doctrine has survived, but its goal is now the same as the goal of the pre-1966 voluntariness cases.

This fits a larger pattern in Fifth Amendment law. Thirty years ago *Boyd* still dominated thinking about the privilege; privacy talk was common in Fifth Amendment law and literature.²²⁴ Today the cases focus much more on preventing the state from putting defendants to the choice between confession and perjury.²²⁵ Thus, the privilege no longer protects physical evidence;²²⁶

219. See *Illinois v. Perkins*, 496 U.S. 292 (1990); *Arizona v. Mauro*, 481 U.S. 520 (1987); *Rhode Island v. Innis*, 446 U.S. 291 (1980). In *Innis*, two police officers exchanged comments in the suspect’s presence about the danger that some child might happen on the missing murder weapon if it were not found; the suspect broke into this “conversation” to tell the officers where the gun was. 446 U.S. at 294–95. The Court found no interrogation. *Id.* at 302–03. In *Mauro*, the defendant, charged with killing his son, was put in a room with his wife, who was also a prime suspect. The police placed an officer and a tape recorder in the room to monitor the conversation, which predictably produced incriminating statements by the defendant. 481 U.S. at 522–23. Once again, the Court found no interrogation, emphasizing (significantly) that the police had done nothing coercive. *Id.* at 527–30. *Perkins* seals the point. There the government placed an undercover agent in the suspect’s jail cell; the resulting conversation and questions once again did not count as interrogation, once again because they were not coercive. 496 U.S. at 296–300.

220. See, e.g., *Connecticut v. Barrett*, 479 U.S. 523 (1987); *Moran v. Burbine*, 475 U.S. 412 (1986). In *Barrett*, the suspect told his interrogators that he would talk (with a tape recorder in the room) but would make no written statement. 479 U.S. at 525–26. This choice either rested on a serious misunderstanding—Barrett probably thought that the oral statement wouldn’t count for as much as something on paper, when in fact a taped confession would be *better* for the government than a typed one—or it was simply foolish. The Court nevertheless found Barrett’s waiver of his *Miranda* rights valid, saying: “The fact that some might find Barrett’s decision illogical is irrelevant, for we have never ‘embraced the theory that a defendant’s ignorance of the full consequences of his decisions vitiates their voluntariness.’” *Id.* at 530 (footnote omitted) (quoting *Oregon v. Elstad*, 470 U.S. 298, 316 (1985)). *Burbine* is to the same effect. There the police failed to tell the suspect that a lawyer had been hired for him and was trying to contact him. 475 U.S. at 416–18. The Court nevertheless found the suspect’s waiver “knowing” and “intelligent” because he understood that he did not have to talk, and the police were under no obligation to tell him things that might bear on his decision. *Id.* at 421–23.

221. Of course, *Miranda* itself says the opposite. See *Miranda v. Arizona*, 384 U.S. 436, 455 (1966) (suggesting that police may not “persuade, trick, or cajole [the suspect] out of exercising his constitutional rights”). That is a good indication of the change the last three decades have wrought in *Miranda* doctrine.

222. See *Michigan v. Mosley*, 423 U.S. 96, 103–04 (1975).

223. *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981); cf. *Davis v. United States*, 114 S. Ct. 2350 (1994) (invocation of right to counsel must be unequivocal in order to trigger *Edwards* rule).

224. See sources cited *supra* note 3.

225. A good example of the change is *Pennsylvania v. Muniz*, 496 U.S. 582 (1990). In *Muniz*, the Court was forced to decide whether a particular question asked during the course of “booking” the defendant called for a testimonial response. After reciting the laundry list of purposes for the privilege, the Court proceeded to analyze the question in terms of whether it put the defendant to a choice among confession, perjury, and contempt. *Id.* at 596–99. The dissent disagreed with the Court’s bottom line, but not with the approach. The dissent merely argued that the defendant had *not* been put to the “cruel

even documents—the heart of *Boyd's* concern—are unprotected.²²⁷ In Fifth Amendment law, *Boyd's* shadow has all but disappeared.

But not in the law of search and seizure, where privacy remains the law's focus. There, the law has seen a repeat of the early twentieth-century cases that limited *Boyd*—irrational doctrinal lines that cabin privacy protection so as not to cast too large a shadow on the state's many activities outside of criminal law enforcement. The examples are almost endless. In *United States v. Miller*, the Court held, implausibly, that police requests for individuals' banking records do not infringe a "legitimate expectation of privacy" and so are not "searches" covered by the Fourth Amendment.²²⁸ In terms of privacy protection, *Miller* seems ridiculous—people's finances are a lot more private than other things the Fourth Amendment protects—but if the case were decided otherwise it might be hard to justify the ease with which *other* government regulators can force banks to turn over detailed information about depositors and investors. In *United States v. Dionisio*, the Court confirmed that subpoenas for documents are subject to no serious Fourth Amendment constraints.²²⁹ Shortly thereafter, *Fisher v. United States* removed most of the remaining Fifth Amendment constraints on subpoenas by holding that the privilege against self-incrimination protects only the act of producing subpoenaed evidence and not the evidence itself.²³⁰ This left subpoenas practically unregulated; as long as the request is relevant to some legitimate investigation and compliance is not too burdensome, the target of the subpoena must hand over the goods (or the papers).²³¹ Once again, this bottom line is nonsense in privacy terms. Subpoenas can and do require disclosure of material that is much more private than the sorts of things police officers find in car searches, yet the subpoenas are much less heavily regulated than the searches. On the other hand, given the reliance of administrative agencies on the subpoena power, any other decision

trilemma" of confession, perjury, or contempt. See *id.* at 606–08 (Rehnquist, C.J., concurring in part and dissenting in part).

226. See *Schmerber v. California*, 384 U.S. 757 (1966) (compelled blood test does not violate privilege). Interestingly, *Schmerber*, which inaugurated the privilege's shift away from privacy, was decided the same month as *Miranda*, a classically privacy-protective decision.

227. Under *Fisher v. United States*, 425 U.S. 391 (1976), documents are not protected, though the act of producing them is protected if it has testimonial content. For a good explanation of what this means, see Robert P. Mosteller, *Simplifying Subpoena Law: Taking the Fifth Amendment Seriously*, 73 VA. L. REV. 1 (1987). Note that the nonprotection of the documents themselves apparently applies even to the most private sorts of papers. See *In re Grand Jury Subpoena Duces Tecum Dated October 29, 1992*, 1 F.3d 87 (2d Cir. 1993) (rejecting argument that personal calendar was protected, notwithstanding assumption that calendar was an extremely personal document); Senate Select Comm. on Ethics v. Packwood, 845 F. Supp. 17 (D.D.C. 1994) (rejecting argument that Senator Packwood's diaries are protected by Fifth Amendment against subpoena by Senate Ethics Committee during course of investigation of sexual harassment claims).

228. 425 U.S. 435, 442–43 (1976).

229. 410 U.S. 1 (1973). *Dionisio* limits Fourth Amendment challenges to cases in which the subpoena is "too sweeping in its terms 'to be regarded as reasonable.'" *Id.* at 11 (quoting *Hale v. Henkel*, 201 U.S. 43, 76 (1906)). There is no requirement of probable cause or reasonable suspicion.

230. 425 U.S. 391 (1976).

231. See sources cited *supra* note 161.

would pose real problems for much of the government *outside* the realm of ordinary criminal procedure. *Dionisio* and *Fisher* are modern-day analogues to *Hale*, cases that protect the government's ability to regulate by protecting its ability to subpoena documents.

Finally, in a series of cases involving searches by government officials other than police officers—principals searching students,²³² government employers searching employees' offices,²³³ government regulators searching businesses²³⁴—the Court has consistently declined to apply ordinary Fourth Amendment standards, adopting instead a kind of rational basis scrutiny that holds the (non-police) search legal unless it was outrageous.²³⁵ This too flies in the face of privacy protection, since one's privacy interest does not depend on whether one is being searched by a police officer or a school principal. Any other result, however, would embroil the Court in constitutional regulation of a wide range of government activities, regulation that might look suspiciously *Lochner*-like. If government regulators had to have probable cause before searching a regulated business, the regulators could simply make their regulations more extensive and detailed so that probable cause would always be present. The only way to stop this end run would be to restrain the regulators' ability to regulate as they wish. If government employers could not search employees' file cabinets, the file cabinets could be moved elsewhere or taken away, or the employers could act on unverified suspicions of employee misconduct. In order to restrict the employers' search authority, the law would have to restrict their authority to allocate assignments and resources among employees. And if school principals were forbidden to open secure lockers to look for drugs, secure lockers might disappear, and the principals might detain or suspend some students without resolving their doubts through a search. Meaningful restraints on searches in schools would be impossible unless principals' substantive power were curtailed. In all these areas the relevant government officials can evade search and seizure restrictions by other means. Thus, serious regulation of searches and seizures would have to be accompanied by serious limits on those "other means"—that is, limits on the relevant officials' substantive authority.²³⁶

The fundamental problem in these cases is essentially the same as the problem with *Boyd*. Strong privacy protection naturally implies strong limits

232. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

233. *O'Connor v. Ortega*, 480 U.S. 709 (1987).

234. *New York v. Burger*, 482 U.S. 691 (1987).

235. See, e.g., Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 42-43 (1991) (emphasizing laxity of Court's Fourth Amendment review in these cases); Stuntz, *supra* note 218, at 553-54 (equating Fourth Amendment standard in these cases with rational basis constitutional review). For criticism of the lenient standards adopted in the various non-police search cases, see 3 & 4 WAYNE R. LAFAYE, SEARCH AND SEIZURE §§ 10.2(a), 10.3(d), 10.10(d), 10.11(b) (2d ed. 1987 and Supp. 1995).

236. This argument is developed in Stuntz, *supra* note 218, at 562-67, 576-85.

on government power, limits that we have rejected for at least the past half century. The only way out of that problem is to place arbitrary bounds on privacy protection. And there is another legacy of *Boyd* and the incorporation cases. By focusing on privacy, Fourth Amendment law has largely abandoned the due process cases' concern with coercion and violence. Not until 1985 did the Supreme Court define Fourth Amendment limits on the use of deadly force by the police,²³⁷ and even now the case law is thin.²³⁸ Meanwhile, the case law on the use of *non*-deadly force is close to nonexistent. Current doctrine consists of the vacuous principle that the legality of police use of force depends on "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."²³⁹ One searches in vain for a body of law that gives this "standard" some content.

The result is that police violence is regulated when it occurs in the interrogation room and somewhat regulated when it causes someone's death, but otherwise is pretty much left alone. The vast majority of the many rules that govern how the police deal with suspects do not concern the level of force the police can apply. Rather, those rules govern what the police can see or hear.²⁴⁰ *Boyd* may be dead in Fifth Amendment law, but its spirit lives on in the law of search and seizure.

We are left with a very odd set of constitutional rules for police work. Privacy is protected, but only sometimes, and force and violence are usually ignored. This is the upshot of a regime grounded on norms that do not have

237. See *Tennessee v. Garner*, 471 U.S. 1 (1985).

238. See 2 LAFAVE, *supra* note 235, § 5.1(d), and cases cited therein (discussing deadly force claims).

239. See, e.g., *Graham v. Connor*, 490 U.S. 386, 396 (1989). The only other legal principle to come out of *Graham* is the proposition that the governing Fourth Amendment standard is objective. See *id.* at 397.

240. For another discussion of this point, along with an argument that the law should refocus its attention on violence and coercion, see Stuntz, *supra* note 5, at 1062–77. For an argument that the law already *does* focus predominantly on violence and coercion, see Louis Michael Seidman, *The Problems with Privacy's Problem*, 93 MICH. L. REV. 1079, 1086–92 (1995).

Interestingly, the Supreme Court's most recent foray into original intent in the law of search and seizure cuts *against* the usual focus on protecting privacy. In *Wilson v. Arkansas*, 115 S. Ct. 1914 (1995), a unanimous Court held that the Fourth Amendment imposes a modest "knock and announce" requirement on police officers forcibly entering private homes, on the ground that such a requirement existed at common law when the Fourth Amendment was written and ratified. Though this requirement has to do with house searches, it does not protect privacy, at least not in the usual sense: *Wilson* does not limit what police officers can see; it limits the level of violence with which they carry out searches. That makes the decision a far cry from cases like *Entick v. Carrington* or *Wilkes v. Wood*.

Not that *Wilson* represents a major departure in Fourth Amendment law. The rule it states—the police must knock and announce before entering *if* such notice is necessary to make the search reasonable (and the Court expressly avoids saying what reasonableness means in this context), 115 S. Ct. at 1918–19—will likely prove trivial in practice. Officers will usually find it easy to argue that it was reasonable not to give notice of entry. Probably the most important feature of *Wilson* is methodological: the contemporary Court has rarely paid much explicit attention to history in its Fourth and Fifth Amendment decisions. Perhaps *Wilson* signals a change in that regard. If so, given how little Fourth and Fifth Amendment history has to do with the real problems of police work, it is a change for the worse.

their origin in ordinary criminal procedure, norms that are themselves grounded on a hostility to broad government regulatory power—the *Lochner* battle, having been fought and won elsewhere in constitutional law, must be refought, albeit under the table, throughout Fourth Amendment law. Of course, given that law’s history, its problems are hardly surprising. *Boyd*, *Entick*, and *Wilkes* were not in any realistic sense criminal procedure cases. No wonder they have proved a poor foundation for the real-world law of police investigation of crime.

VI. CONCLUSION

The current law of criminal procedure is indeed about *procedure*— about how the police can enforce the law, how they can find evidence and question suspects, and so forth. But its origins lie in cases that worried little about these sorts of issues, cases that seem more concerned with what the government could criminalize or regulate. Functionally, *Entick v. Carrington* and *Wilkes v. Wood* belong together with the debates over the Alien and Sedition Acts and the prosecution of anarchists and communists earlier this century: all are really about the protection of political dissent. Functionally, *Boyd v. United States* belongs with *Lochner v. New York*: both are really about placing limits on the regulatory state. All of these cases have a lot to do with the substantive scope of government power. None of them has much to do with the police or ordinary criminal law enforcement. Yet we have constructed a vast system of rules that still harks back to *Entick*, *Wilkes*, and *Boyd*, rules whose primary audience is the police and whose primary beneficiaries are criminal suspects.

To put it another way, the part of criminal procedure that concerns evidence gathering rests on a paradigm—the ransacking of a home, with an emphasis on rummaging through the occupant’s private papers. That paradigm looks like a police misconduct problem, but historically it has more to do with the kinds of things government tries to regulate. After all, *Mapp v. Ohio*, like *Entick* and *Wilkes*, was a house search case that raised free speech issues. (Remember, *Mapp* was litigated as a *First* Amendment case.²⁴¹) The real problem of police misconduct is best captured by another paradigm: the Rodney King beating. The law has little to do with *that* problem. The reason is that criminal procedure is too true to its history.

241. See *Mapp v. Ohio*, 367 U.S. 643, 672–75 (1961) (Harlan, J., dissenting) (complaining about majority’s decision to “reach[] out” and decide exclusionary rule issue in case that was litigated as First Amendment case). The First Amendment issue in *Mapp* was whether the state could criminalize the knowing possession of obscene literature in one’s own home. See *id.* at 673. That issue was resolved against the state eight years after *Mapp*, in *Stanley v. Georgia*, 394 U.S. 557 (1969).

