

## The Fourth Amendment, Boston, and the Writs of Assistance\*

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It's good to be back in Boston, where I spent the 1984-85 year working (or so I claimed) as a law clerk to Judge Stephen Breyer—who of course is known to you all now not merely as Justice Breyer, but as Donahue Lecturer Breyer.<sup>1</sup> Whenever I return to Boston, I feel a thrill not only as a former Bostonian, but also as a professional student of the Bill of Rights. For example, it's hard for me to think of the Second Amendment, and its original vision, without thinking of the Minutemen of Lexington and Concord—a well-regulated, locally organized militia of yeomen guarding fellow citizens against central tyranny. (In the 1770s, that tyranny came from London, and in the 1780s and 1790s, many feared that Washington, D.C. might take up where London had left off.) So too, it's hard to think of the Third Amendment without thinking of this city, which lived under, and yet resisted, the intolerable Quartering Act of 1774.

But the relationship between Boston and the *Fourth* Amendment is more vexing. Many judges and scholars have claimed, or assumed, that the Amendment was drafted with the now-famous 1761 Boston writs-of-assistance case, argued by the great Boston lawyer James Otis, centrally in mind.<sup>2</sup> And yet, as I have noted elsewhere, one finds remarkably little mention of this case in debates over the ratification of the Federal Constitution and the drafting of the Bill of Rights.<sup>3</sup> The vexed question about

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1. See Stephen Breyer, *The Donahue Lecture Series: "Administering Justice in the First Circuit"*, 24 SUFFOLK U. L. REV. 29 (1990).

2. See, e.g., *Stanford v. Texas*, 379 U.S. 476, 481-82 (1965); *Davis v. United States*, 328 U.S. 582, 604 (1946) (Frankfurter, J., dissenting); *Boyd v. United States*, 116 U.S. 616, 624-25 (1886); see also Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 218-28 (1993) [hereinafter Maclin, *Central Meaning*].

3. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1176 n.208 (1991) [hereinafter Amar, *Bill of Rights*].

the link (or lack thereof) between this city and that Amendment in turn connects up to other vexed questions about the Amendment. On the “rights” side, does the Amendment create or presuppose a warrant requirement—a rule that all (or almost all) searches and seizures be preceded by warrants? Must all searches or seizures be justified by “probable cause,” whatever that means? (By the way, what *does* “probable cause” mean?) And on the “remedy” side, does the Amendment require or presuppose the so-called exclusionary rule, which demands that evidence obtained in violation of the Amendment be suppressed in criminal cases? These are questions close to my heart, questions that I have publicly spoken on here in this city (in historic Faneuil Hall)<sup>4</sup> and written about in a law review headquartered just on the other side of the Charles.<sup>5</sup> But they are questions that I would like to revisit. No place seems better than this place—this special place—to do so. And, with your indulgence, no time seems better than now.

### I. THE FOURTH AMENDMENT

Let us begin with the words of the Fourth Amendment itself:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>6</sup>

Thus far the reading. Now, the sermon.

Modern debate about the Fourth Amendment swirls around three big sets of questions. First, what exactly is the relationship between the Fourth Amendment’s first clause, which bans “unreasonable searches and seizures,” and its second clause, which addresses warrants? Are all warrantless searches and seizures ipso facto unreasonable? If so, why doesn’t the Amendment say this explicitly? If, however, the Amendment simply means what it says, and does not require warrants, what exactly is the purpose of the warrant clause?

Second, what precisely does the second clause mean when it speaks of “probable cause”? Does the Amendment mean what it says in limiting this standard to warrants? If so—and if some warrantless searches are permitted—then does the Amendment really mean to authorize some warrantless

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4. The occasion was a panel discussion on “The History and Legacy of the Writs of Assistance,” on Feb. 7, 1993, sponsored by the American Bar Association. The proceedings were later broadcast by C-SPAN, as part of its “America and the Courts” series, in late summer, 1993.

5. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994) [hereinafter Amar, *Fourth Amendment*].

6. U.S. CONST. amend. IV.

searches lacking in probable cause? Why should all searches with warrants be held to a higher standard than some searches without warrants? And whenever the “probable cause” standard does apply, how probable must probable be? Fifty-one percent? Does this mean that if there is only a thirty-three percent likelihood that a suspected terrorist is building a bomb in his house, a warrant may not issue, or a warrantless search would be per se unreasonable? If all searches and seizures must have probable cause, what about metal detectors at airports? And what *kind* of probable cause must the government have? If the government can prove that there is a seventy percent likelihood that I am a terrorist, or that illegal machine guns and bombs are stashed in my house, a warrant to arrest me or to search my house seems sensible. But what if the government merely proves that there is a seventy percent—or one hundred percent!—likelihood that I am a professor, or that my name is Akhil Reed Amar, or that I have hair on my head, or that skim milk and frozen yogurt are stashed in my house? Seventy percent is probable, but is that *kind* of probable cause enough?

Third, however we define the Fourth Amendment’s rules on the “rights” side, what should happen as a remedial matter when the government violates these rights? Does the Amendment require exclusion of illegally obtained evidence? If so, why doesn’t it say so clearly? If not, what remedies *are* presupposed by the Amendment, which proclaims so emphatically that the rights it recognizes “shall not be violated”?

Each of these three sets of questions has generated its own quite considerable debate in the judiciary and in the academy. In my earlier remarks at Faneuil Hall, and my earlier article published just across the Charles, I tried to show how the right answers to these three sets of questions were interlinked. I also tried to show how the text of the Amendment really does mean what it says, and how what it says makes good common sense.

To begin with, the Amendment does not require a warrant for each and every search or seizure. It simply requires that each and every search or seizure be reasonable. In the language of the first clause, the Amendment affirms the basic “right of the people to be secure . . . against unreasonable searches and seizures.”<sup>7</sup> An implicit warrant requirement runs counter to text, history, and common sense.

Textually, as we have seen, the Amendment contains no third clause explicitly stating that “warrantless searches and seizures are inherently unreasonable” or explicitly barring all “warrantless searches and seizures.” Many early state constitutions featured search-and-seizure language rather similar to the Fourth Amendment’s, yet none of these constitutions proclaimed an explicit warrant requirement.<sup>8</sup> In cases construing these state

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7. *Id.*

8. *See* DEL. CONST. of 1776 (Declaration of Rights) § 17; MD. CONST. of 1776 (Declaration of

constitutions, state court after state court explicitly rejected the claim that, by implication, warrants were required for all searches and seizures.<sup>9</sup> No leading English or early American commentator, so far as I know, ever claimed that all searches and seizures required a warrant. No leading framer, so far as I know, ever explicitly articulated a global warrant requirement.

Various forms of warrantless searches and seizures were commonplace at common law and in early America. At common law, according to Blackstone, a constable by dint of his office had

great original and inherent authority with regard to arrests. He may, without warrant, arrest anyone for a breach of the peace, committed in his view, and carry him before a justice of the peace. And, in case of felony actually committed, or a dangerous wounding whereby felony is likely to ensue, he may upon probable suspicion arrest the felon; and for that purpose is authorized (as upon a justice's warrant) to break open doors.<sup>10</sup>

One modern scholar, Professor Thomas Y. Davies, has argued that these warrantless arrests and intrusions incident to arrest do not squarely rebut an implicit warrant requirement. Professor Davies' argument, it seems, is that these arrests and intrusions did not really count as state action, because they were no greater than a private person's power to make a "citizen's arrest."<sup>11</sup> But to the extent that the government authorizes "citizen's arrests," I should think that such arrests are indeed a form of state action; the government is in effect deputizing its citizens, just as it does when it uses the militia or the posse to enforce its laws, or when it commissions privateers through letters of marque and reprisal.<sup>12</sup> Even if mere governmental permission to effect a "private" arrest is not state ac-

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Rights) art. XXIII; MASS. CONST. of 1780, pt. I, art. XIV; N.H. CONST. of 1784, pt. I, art. XIX; N.C. CONST. of 1776 (Declaration of Rights) art. XI; PA. CONST. of 1776 (Declaration of Rights) art. X; VA. CONST. of 1776 (Declaration of Rights) § 10; VT. CONST. of 1786, ch. I, § XII; VT. CONST. of 1777, ch. I, § XI.

9. See Amar, *Fourth Amendment*, *supra* note 5, at 763 nn.11-12 (citing cases).

10. 4 WILLIAM BLACKSTONE, COMMENTARIES \*292. The clause, "committed in his view," was first added by Blackstone in his fifth edition, published in 1773.

11. Statement of Professor Thomas Y. Davies, Hearing before the Senate Judiciary Committee on Bill to Abolish Fourth Amendment Exclusion of Unconstitutionally Seized Evidence and to Create a Tort Remedy, March 7, 1995, at 6-8, 11 [hereinafter Davies Testimony] (on file at Suffolk University Law Review) (an incomplete version of the testimony is available in 1995 WL 231846). Professor Davies' testimony contains a good many claims about the Fourth Amendment and its history, and about my own work, that are in my view untrue or unfair. Today, I shall mention only a few, and my silence on other issues should not be taken as assent.

12. See U.S. CONST. art. I, § 8, cl. 11. (outlining Congressional power to issue letters of marque and reprisal); *id.* cls. 15-16 (outlining Congressional power over the militia); see also Amar, *Bill of Rights*, *supra* note 3, at 1165-73 (discussing the militia); THE FEDERALIST NO. 29 (Alexander Hamilton) (discussing the militia and the "posse comitatus").

tion, surely a government *requirement* to arrest is state action; and at common law, constables were often required to arrest in situations where truly private persons were, at most, permitted to do so.<sup>13</sup>

Most important, contrary to Professor Davies, Blackstone clearly says that a constable has inherent arrest powers, *by dint of his office*, that range beyond the citizen's arrest powers of ordinary folk. Blackstone organizes his discussion of arrest powers as follows: "[I]n general, an arrest may be made four ways: 1. By warrant; 2. By an officer without a warrant; 3. By a private person also without a warrant; 4. By an hue and cry."<sup>14</sup> The entire structure of Blackstone's analysis thus focuses on the *special* arrest powers of certain officers such as sheriffs, justices of the peace, coroners, constables, and watchmen—these special powers are what separate categories 2 and 3. This is what Blackstone means when he speaks of the "great original and inherent authority" of the constable, in contradistinction to the arrest powers of "a private person,"<sup>15</sup> powers discussed in a separate passage. For example, we have seen that a constable could, for felonies, "break open doors"<sup>16</sup>—but a private person generally could not, according to Blackstone: "Upon probable suspicion also a private person may arrest the felon or other person so suspected. But he cannot justify breaking open doors to do it."<sup>17</sup> And for more minor breaches of the peace, a private person could intervene to separate combatants, but a constable on the scene had the far greater authority to arrest and imprison the fighters even after the fisticuffs had ended. Thus, in the above-quoted passage, Blackstone affirms the *constable's* right to "without warrant, arrest anyone for a breach of the peace committed in his view, and carry him off before a justice of the peace,"<sup>18</sup> but he makes clear in his very next paragraph that *private* persons may generally arrest only for *felonies*.<sup>19</sup> Consider

13. See *Davis v. Russell*, 5 Bing. 354, 365, 80 Eng. Rep. 1098, 1102 (C.P. 1829), 7 L.J.M.C. (O.S.) 52, 59; *Cowles v. Dunbar*, 2 Car. & P. 565, 567-68, 172 Eng. Rep. 257, 258 (K.B. 1827); *Samuel v. Payne*, 1 Dougl. 359, 360, 99 Eng. Rep. 230, 231 (K.B. 1780); 2 MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* \*82, \*84-85, \*91-92 (Professional Books Ltd. 1971) (1736).

14. 4 BLACKSTONE, *supra* note 10, at \*289; see also 2 HALE, *supra* note 13, at \*72 (similar).

15. See *supra* notes 10, 14 and accompanying text. Similarly, Hale distinguishes between the arrest powers of private persons and those of officers by virtue of their office, "*virtute officii*." 2 HALE, *supra* note 13, at \*72.

16. *Supra* note 10 and accompanying text.

17. 4 BLACKSTONE, *supra* note 10, at \*293; see also 2 HALE, *supra* note 13, at \*92 (discussing "the difference between private persons arresting upon suspicion and constables": "the constable may break open the door, tho he have no warrant" but "private persons . . . cannot break open doors" upon suspicion); *id.* at \*82 (similar). But see 1 *id.* at \*588 (muddying the waters on this point). As the more modern and more consistent commentator on this issue, Blackstone (who had many years to revise his treatise, once published) is a more reliable compiler of common law circa 1780 than Hale, whose notes from the 1670s were published many years after his death.

18. 4 BLACKSTONE, *supra* note 10, at \*289.

19. *Id.* at \*292-93; see also *id.* at \*142, \*146-53 (making clear that many breaches of the peace are not felonies). Here too, Hale's analysis closely tracks Blackstone's. See 2 HALE, *supra* note 13, at

also the following Blackstone passage, explicitly distinguishing the search and seizure powers of ordinary citizens from those of constables:

The remaining offences against the public peace are merely misdemeanors, and no felonies: as, . . . Affrays. . . . Affrays may be suppressed by any private person present, who is justifiable in endeavouring to part the combatants, whatever consequence may ensue. But more especially the constable, or other similar officer, however denominated, is bound to keep the peace, and to that purpose may break open doors to suppress an affray, or apprehend the affrayers, and may either carry them before a justice, or imprison them by his own authority for a convenient space till the heat is over.<sup>20</sup>

Later English case law powerfully supports and sharpens Blackstone's distinction between the arrest powers of officers and those of citizens. In the 1780 case of *Samuel v. Payne*,<sup>21</sup> the King's Bench held, in the words of the reporter, that "A peace officer may justify an arrest on a reasonable charge of felony, without a warrant, although it should afterwards appear that no felony had been committed; but a private individual cannot."<sup>22</sup> The *Samuel* Court invoked and extended the analysis of Hale's landmark treatise, *The History of the Pleas of the Crown*, which, like Blackstone, emphasized the many special *ex officio* arrest powers enjoyed by certain officers.<sup>23</sup> Five years later, Lord Mansfield proclaimed in *Cooper v. Boot*<sup>24</sup> that "when a felony has been committed, any person may arrest on reasonable suspicion. When no felony has been committed, an officer may arrest on a charge."<sup>25</sup> *Samuel* and *Cooper*, it appears, were the leading

\*88-89 (describing "the original and inherent power in the constable" to "imprison a person" for "breach of the peace and some misdemeanors, less than felony" and to "arrest suspicious night-walkers" and "men[] that ride armed" though no felony be committed or proved); see also 1 *id.* at \*587 (offering other examples of constable's power to make "arrests *ex officio* without any warrant").

20. 4 BLACKSTONE, *supra* note 10, at \*146; see also 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 81 (Arno Press 1972) (1721) (the "Constable hath Authority not only to arrest those whom he shall see actually engaged in an Affray, but also to detain them till they find Sureties of the Peace . . . whereas a private Person seems to have no other Power in a bare Affray, not attended with the Danger of Life, but only to stay the Affrayers till the Heat be over, and then deliver them to the Constable") (footnotes omitted).

21. 1 Dougl. 359, 99 Eng. Rep. 230 (K.B. 1780).

22. *Id.* at 359, 99 Eng. Rep. at 230 (footnote omitted).

23. *Id.* at 360, 99 Eng. Rep. at 231; see generally 1 HALE, *supra* note 13, at \*587; 2 HALE, *supra* note 13, at \*85, \*88-98; see also 2 HALE, *supra* note 13, at \*83 (noting that an innocent arrestee is not bound to submit to a citizen's arrest, but is obliged to submit to "a constable arresting in the king's name"). Blackstone offers a similar account. 4 BLACKSTONE, *supra* note 10, at \*292-93.

24. 4 Dougl. 338, 99 Eng. Rep. 911 (K.B. 1785).

25. *Id.* at 343, 99 Eng. Rep. at 913; see also *Lawrence v. Hedger*, 3 Taunt. 14, 14, 128 Eng. Rep. 6, 6 (C.P. 1810) ("Watchmen and beadles have authority at common law to arrest and detain in prison for examination, persons walking in the streets at night, whom there is reasonable ground to suspect of felony, although there is no proof of a felony having been committed") (reporter's case summary). For similar discussions of the special *ex officio* arrest and detention powers of watchmen, see 4

English cases on the subject at the time of the adoption of the Fourth Amendment.

Thus we find the New York Supreme Court, in a learned 1829 opinion by Chief Justice Savage, explicitly invoking *Samuel* and other authorities to make clear that a constable, without warrant, could arrest in situations where private persons could not.<sup>26</sup> The precise location of the line separating the arrest powers of private citizens from those of officers, *by virtue of their office*, was at times blurry, as the line gradually shifted over the decades. But the fact that such a line existed—that constables, watchmen, and others had certain *special* powers of warrantless arrest—was a basic feature of the leading common law treatises in the late eighteenth century—Blackstone, Hale, Hawkins, and so on.

When an arrest did occur, the arresting officer was free to search the person of the arrestee for evidence or stolen goods, and to do so without a warrant—even if the arrest was itself warrantless.<sup>27</sup> And, at common law, if a constable without a warrant arrested a person on a mere subjective hunch, rather than objective probable cause, and the person turned out to be a felon, the constable's *ex post* success was an absolute defense against any trespass or false imprisonment suit.<sup>28</sup>

Other historical exceptions to a blanket warrant requirement come from the First Congress—the same body that drafted the Fourth Amendment itself. One early statute authorized both warrantless searches of certain ships and warrantless seizures of various items suspected in connection with customs violations.<sup>29</sup> Another early statute authorized warrantless entry into and inspection of all “houses” and buildings that had been registered (as required by law) as liquor storerooms or distilleries.<sup>30</sup> If any member of Congress objected to or even questioned these warrantless searches and seizures on Fourth Amendment grounds, supporters of a warrant requirement have yet to identify him.

So much for text and history. Now let's consult common sense. Does it really make sense to insist that each and every search or seizure must be preceded by a warrant? What about cases of hot pursuit, and other exigent circumstances? Or when a wife authorizes police to search her husband's car, and the police reasonably rely upon her authorization? Consider also the case where security agents look unobtrusively for things in plain, public view—say, scanning the crowd at an Olympic event for anything that

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BLACKSTONE, *supra* note 10, at \*292; 2 HALE, *supra* note 13, at \*98.

26. *Holley v. Mix*, 3 Wend. 350, 353-55 (N.Y. Sup. Ct. 1829).

27. TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 28-29 (1969).

28. Amar, *Fourth Amendment*, *supra* note 5, at 767 & nn.30-33.

29. Act of July 31, 1789, ch. 5, § 24, 1 Stat. 29, 43 (repealed 1790). Similar provisions were passed in 1790, 1793, and 1799. Amar, *Fourth Amendment*, *supra* note 5, at 766.

30. Act of Mar. 3, 1791, ch. 15, §§ 25, 29, 1 Stat. 199, 205-06.

might be suspicious. Or think about the vast number of real-life, unintrusive, nondiscriminatory—reasonable!—searches and seizures to which modern-day Americans are routinely subjected: metal detectors at airports, annual auto emissions tests, inspections of closely regulated industries, public school regimens, border searches, and so on.

But if a warrant requirement makes no textual, historical, or practical sense, I hear you saying, surely the warrant clause of the Fourth Amendment must mean something. What *does* the warrant clause mean, and what is the relation between it and the earlier reasonableness clause?

Just this: broad warrants—warrants that fail to meet the various specifications of clause two—are inherently unreasonable under clause one. The Amendment in its words and grammar does not require or prefer warrants: it *limits* them. “No Warrants shall issue, but . . . .”<sup>31</sup>

Why did the framers seek to limit warrants? Because a lawful warrant could *immunize* the officer who carried it out from the trespass suit that the citizen victim might otherwise have been free to bring. Indeed, immunity was part of the very definition—the purpose—of a lawful warrant.<sup>32</sup>

Thus, if an officer searched or seized without a warrant, he could be sued in tort by the citizen whose person, house, papers, or effects had been trespassed upon. In this tort suit, if the officer’s intrusion were deemed unreasonable, the intrusion would, under Fourth Amendment clause one, be unconstitutional—and thus any governmental authorization the officer might claim would fall to the ground. But if the officer could get a lawful warrant before searching and seizing, he could escape this tort liability and after-the-fact judicial review. Warrants then, were friends of the officer, not the citizen; and so warrants had to be strictly limited under clause two.

A valid warrant, then, was not merely a *preclearance* of a search or seizure, but also a *preclusion* of later tort suits that an outraged citizen might seek to bring. And note the many advantages of the tort suit over the warrant. A tort suit would be presided over by a judge; but, in England and America, various *executive* officials claimed the authority to issue warrants. Even if issued by a judge, a warrant lacked the traditional judicial safeguards of notice and the opportunity to be heard, and adversarial presentation of argument and evidence by both sides of a dispute. A warrant issued *ex parte*, without the citizen target or his lawyer in the courtroom to challenge the government’s case. (If law professors taught about warrants in civil procedure courses, rather than criminal procedure courses, the due process issues raised by *ex parte* warrants would be easier to see.) Note also that, in a warrant proceeding, the government could forum-shop

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31. U.S. CONST. amend. IV.

32. See *infra* notes 115, 121-22 and accompanying text.



by seeking out the most pro-government magistrate to issue the warrant. In a tort suit, by contrast, citizen plaintiffs would have more choice. Note also that a typical warrant proceeding is secretive—closed to the public—in contrast to the open, public tort trial, with ordinary citizens able to monitor the affair.<sup>33</sup> Finally, remember that in a tort suit the key question of reasonableness is not always a pure question of law, but at times a question of fact, too, at least in part. And so in our tort suit, key questions about the reasonableness of government conduct might be decided not by a single judge, but by a judge sitting with a local jury, twelve good men and true.

An 1827 King's Bench case, *Beckwith v. Philby*,<sup>34</sup> is illuminating here. In a trespass suit brought against a constable for a warrantless arrest, Lord Tenterden C.J. followed *Samuel v. Payne*, holding that—unlike a private citizen's arrest where an actual felony must be proved—the constable's warrantless arrest was justified if the constable merely had a "reasonable ground to suspect that a felony had been committed" by the arrestee.<sup>35</sup> The Chief Justice also proclaimed that:

Whether there was any reasonable cause for suspecting that the plaintiff had committed a felony, or was about to commit one, or whether he had been detained in custody an unreasonable time, were questions of fact for the jury, which they have decided against the plaintiff, and in my judgment most correctly.<sup>36</sup>

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33. On the importance of public trials to monitor possible abuse and corruption, see Akhil Reed Amar, *Foreword: Sixth Amendment First Principles*, 84 GEO. L.J. 641, 677-81 (1996) [hereinafter Amar, *Sixth Amendment*].

34. 6 B. & C. 635, 108 Eng. Rep. 585 (K.B. 1827). For parallel reports of this case, see 5 L.J.M.C. (O.S.) 132, 9 D. & R. 487.

35. 6 B. & C. at 638-39, 108 Eng. Rep. at 586. In holding that reasonable suspicion alone would uphold a constable's arrest, Lord Tenterden went one step beyond *Samuel* and *Cooper*, which spoke of a "charge" of felony. The Court drew support on this point from *Lawrence v. Hedger*. *Id.* at 637, 108 Eng. Rep. at 586, 9 D. & R. at 491; see also *supra* note 25 (discussing *Lawrence* holding).

36. 6 B. & C. at 638, 108 Eng. Rep. at 586. Lord Tenterden's analysis here is strikingly similar to the one I earlier attributed to Lord Mansfield in *Money v. Leach*, 19 Howell's State Trials 1001, 1026 (K.B. 1765), 97 Eng. Rep. 1075, 1087. See Amar, *Fourth Amendment*, *supra* note 5, at 776 & n.69. Professor Davies has sharply criticized me for perverting this passage. See Davies Testimony, *supra* note 11, at 12 n.12 (describing me as "flat-out wrong"). But, a parallel report of this case, authored by Blackstone, strongly confirms my initial reading, as do later opinions like Lord Tenterden's. See *Money v. Leach*, 1 Black. W. 555, 560, 96 Eng. Rep. 320, 323 (K.B. 1765) ("Lord Mansfield, C.J.—What is a probable cause of suspicion, and what is a reasonable time of detainer, are matters of fact to be determined by a jury.") In other cases, as I have noted elsewhere, Lord Mansfield was not always a champion of the jury.

For a case remarkably similar to *Beckwith*, where Abbott, C.J. (soon-to-become Lord Tenterden), made a very similar point, see *Cowles v. Dunbar*, 2 Car. & P. 565, 567, 172 Eng. Rep. 257, 258 (K.B. 1827) ("A constable is obliged to act if there is a reasonable charge of felony: whether there was such here, is for the jury to say."). Elsewhere in *Cowles*, the Chief Justice sharply distinguished between constables' and private persons' arrest powers. *Id.* at 568, 172 Eng. Rep. at 258.

Even if a post-search civil suit were tried to a judge, rather than a jury, we have seen several reasons why the framers preferred open tort suits to secret warrants. But the jury point is worth emphasizing, for it illustrates how the Fourth Amendment connects to other parts of our Bill of Rights. No idea was more central to our Bill of Rights than the idea of the jury—featured explicitly in the Fifth Amendment Grand Jury Clause, the Sixth Amendment Petit Jury Clause, and the Seventh Amendment Civil Jury Clause, and implicitly in many other provisions, from due process to double jeopardy.<sup>37</sup> Twelve heads in the jury box would often be better—less idiosyncratic, more representative, less corruptible—than one head on the judicial bench.<sup>38</sup> Juries drawn from local communities might be more skeptical of imperial edicts than might a federal judge appointed in Washington.<sup>39</sup> Jurors were independent citizens, not on the government payroll.<sup>40</sup> To the extent “reasonableness” turned on questions of common sense, the jury represented the common sense of common people. To the extent “reasonableness” implicated legal issues, jurors could learn from judges and help give them feedback that would keep the Constitution in touch with the people.<sup>41</sup> Like the militia of Lexington and Concord, the jury embodied the spirit of the American Revolution as a local, populist institution of ordinary folk checking paid, professional officers of the central government—armies, prosecutors, customs officials, judges, and so on.

Warrants ran counter to this and so they had to be limited. Why allow them at all? A good modern-day analogy is the temporary restraining order. Sometimes, emergency action must be taken to freeze the status quo and prevent future harm, and so judges may act *ex parte*, without the traditional safeguards of adversarial adjudication. But precisely because of the due process dangers it poses, an *ex parte* TRO is strictly limited to situations where there is a risk of “irreparable injury” and a high likelihood of “success on the merits.” At common law, a warrant could likewise issue when there was a high likelihood—“probable cause”—that a particular place contained stolen goods. The whole point of the *ex parte* warrant was to authorize a search that would bring the stolen goods before the magistrate. To give the owner of the hideaway a heads-up in advance of the surprise search might enable him to whisk the goods away—a kind of irreparable injury to the truth, to the justice system, and to the victim of the theft seeking to recover his goods.<sup>42</sup> The need for a surprise search on

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37. See generally Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1169-72 (1995).

38. Amar, *Sixth Amendment*, *supra* note 33, at 680-84.

39. Amar, *Bill of Rights*, *supra* note 3, at 1186.

40. *Id.* at 1183-85.

41. *Id.* at 1186-87.

42. See *Bostock v. Saunders*, 3 Wils. K.B. 434, 440-42, 95 Eng. Rep. 1141, 1145 (C.P. 1773); 2

these facts is obviously strong; but without the absolute guarantee of immunity provided by a warrant, an officer might hesitate to perform the surprise search for fear of a future lawsuit.<sup>43</sup>

But once extended beyond the limited context of the common law warrant for stolen goods, warrants had the potential for great evil. If authorized on less than probable cause, they would give government henchmen absolute power to “round up the usual suspects,” rousting political enemies or unpopular groups. And so too if warrants were allowed for items other than stolen goods or things closely akin to stolen goods—contraband, smuggled items, dangerous explosives, and so on. If a warrant could issue because there was probable cause to believe that there was (innocent) skim milk in a given house, then no one would be safe.

And so broad warrants had to be banned; this is the meaning of clause two. But warrantless searches did not pose the same threat precisely because they were not immune from after-the-fact review of the general reasonableness of the government intrusion. If a particular warrantless search were too intrusive; or if the government policy gave officials too much discretion; or if the search threatened other constitutional values such as freedom of the press; or if the government policies seemed targeted at certain powerless or unpopular minorities; or if in any number of other ways the search offended what I have called “constitutional reasonableness” or common-sense reasonableness, judicial review after the fact would invalidate the search under clause one, and trespass damages, compensatory and punitive, would deter future violations. And so, to repeat, the Fourth Amendment did not require warrants; it limited them.

Once we see that this is the right answer to our first set of questions, about whether the Fourth Amendment requires warrants, we also see how the right answers to our second and third set of questions—about probable cause and the exclusionary rule—fall into place.

The Amendment means what it says: all warrants must have probable cause, and warrantless searches need not always have probable cause, so long as they are reasonable.<sup>44</sup> Ex parte warrants must be limited—just like ex parte TROs—but the limits applicable to warrants do not always sensibly apply to all other searches. Particular description, oath or affirmation, and so on are necessary features of warrants, but not of all searches and seizures. So too with probable cause. Indeed, to limit warrants, we

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Black. W. 912, 914-16, 96 Eng. Rep. 539, 540 (C.P. 1773) (recording remarks of De Grey, C.J.).

43. See William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 883, 907, 917 (1991) (portraying warrant as a “safe harbor” insulating police from liability). Stuntz’s imagery was beautifully foreshadowed by Lord Mansfield: “The statute has chalked out a way by which [the government searcher] may be safe.” *Cooper v. Boot*, 4 Dougl. 339, 349, 99 Eng. Rep. 911, 916 (K.B. 1785).

44. See U.S. CONST. amend. IV.

must insist that a certain *kind* of probable cause exists, as well as a certain *level* of probability. To support an ex parte warrant without notice to the citizen target, there must be probable cause to believe that a given place contains something very suspicious—like stolen goods—and that the owner of the premises, if given notice in advance, would spirit away the goods, or defy a subpoena. But even if ex parte warrants should almost never issue for innocent mere evidence (say, skim milk in refrigerators) often government will properly want to search for or seize such things with advance notice—inspecting restaurant food for contamination, or wires for electrical safety, or cars for emissions, or in a thousand other cases. And so, once again, we see that the “probable cause” test for stolen goods cannot be a *global* test for all searches and seizures. Of course, in some particular contexts—the inherently intrusive arrest of one’s “person” for example—even a warrantless intrusion might generally call for probable cause, or more, in order to be reasonable overall.

History strongly supports this textual and structural analysis. No leading framer or founding era commentator, so far as I have seen, ever proclaimed that every search or seizure required probable cause. On the contrary, the First Congress clearly authorized various suspicionless searches of ships and liquor storehouses; and we have already noted the common law rule allowing an officer without ex ante probable cause to justify an arrest if he played a mere subjective hunch and turned up an actual felon.<sup>45</sup>

Our reading also squares with common sense and modern life. Every day, modern government officials engage in a vast number of relatively unintrusive and nondiscriminatory searches without probable cause and often without individualized suspicion: border searches, metal detectors, OSHA audits, building code inspections, emissions tests, and so on. Surely these are not all unconstitutional.

Our analysis of Fourth Amendment rights also clarifies Fourth Amendment remedies. Here too the Amendment means what it says. It does not call for exclusion of evidence in criminal cases but rather presupposes civil trespass suits. The “right of the people to be secure in their persons, houses, papers, and effects” presupposes and conjures up *tort law*, which protects persons and property from unreasonable invasions. Here too, textual analysis is strongly supported by history—no framer ever argued for exclusion, nor did any early commentator, or judge—and by common sense: unlike tort law, exclusion rewards the guilty but gives absolutely zilch to the innocent citizen, whom the government seeks to hassle. (If officers expect to find nothing and indeed find nothing, there is nothing to exclude, and no deterrence under an exclusionary rule.)<sup>46</sup>

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45. See *supra* notes 28-30 and accompanying text.

46. For a general discussion of this “upside-down effect,” see Akhil Reed Amar, *The Future of*

If we seek a paradigmatic illustration of all of these themes in action, we should ponder two related English cases handed down in the 1760s, *Wilkes v. Wood*<sup>47</sup> and *Entick v. Carrington*.<sup>48</sup> These cases, decided by Lord Camden,<sup>49</sup> were, I submit, the most famous colonial-era cases in all America—the O.J. Simpson and Rodney King cases of their day. Armed with sweeping warrants issued by executive officials, various government henchmen broke into Englishmen's houses, searched their papers, arrested their persons, and rummaged through their effects, in hopes of finding the authors and publishers of anti-government pamphlets. The citizens trespassed upon brought tort suits against the henchmen, who tried to hide behind their sweeping warrants. But Lord Camden found these warrants—which lacked (among other things) probable cause under oath, and which had issued not for stolen goods but for private papers—null and void. Since the warrants were illegal, civil juries, aided by Camden's instructions, found the intrusions unjustified, and piled on massive punitive damages against the henchmen to send a message to the government and deter future abuse.

## II. BOSTON

What, you might ask, does any of this have to do with Boston, Massachusetts, or the writs of assistance? Let me first trace the elements of my story that link up to Boston and Massachusetts generally; and then, in closing, I shall say a few words about the writs of assistance.

I have sometimes said that the three best things about my job are June, July, and August. This is not quite true, of course, but the summer months do give me a chance to catch my breath each year. And this summer, my wife and I spent a few days visiting friends in Maine—a state, you will all recall, that began as a district of Massachusetts. You will not be surprised to hear that I insisted that we visit the beautiful seaport town of Camden, Maine, where I confirmed that the township was indeed named in honor of Lord Camden in the late 1760s.<sup>50</sup> In fact the new Town of Camden seal, chosen in a competition held in June, 1994, features a quite handsome portrait of Lord Camden. Massachusetts was hardly alone in honoring the judge of *Wilkes* and *Entick*. Consider, for example, Camden, New Jersey and Camden, South Carolina. And—although I love the Red Sox, and have spent some of my happiest moments in Fenway—I should remind you that the Baltimore Orioles play their home games in Maryland's

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*Constitutional Criminal Procedure*, 33 AM. CRIM. L. REV. (forthcoming 1997).

47. 19 Howell's State Trials, 1153 (C.P. 1763), 98 Eng. Rep. 489.

48. 19 Howell's State Trials, 1029 (C.P. 1765), 95 Eng. Rep. 807.

49. Technically, Chief Justice Charles Pratt did not become Lord Camden until after *Wilkes*.

50. REUEL ROBINSON, HISTORY OF CAMDEN AND ROCKPORT MAINE 85-86 (1907).

historic Camden Yards. Let us also remember the other major figure in these cases, the plaintiff John Wilkes. Americans across the continent adored this champion of liberty, as any map will show: consider Wilkes-Barre, Pennsylvania; Wilkes County, Georgia; and Wilkes County, North Carolina. If an American family had a son in 1800, three of the most popular names around were Jefferson, Franklin, and Wilkes. (Yes, John Wilkes Booth was indeed named after the plaintiff in *Wilkes v. Wood*.<sup>51</sup>)

If we count Maine as part of Massachusetts in 1769 (as indeed it was) we have already covered seven of the original thirteen colonies. This, it seems to me, rather powerfully supports my claim about the prominence of these two men, and of these two paradigm cases, in British North America.

As we shall see in a few moments, the 1761 Boston writs of assistance case, though important, may well have been less significant in the immediate debates leading up to the Fourth Amendment. Part of the reason is geographic. Boston has long fancied itself as “the Hub”—of Massachusetts; of New England; of the American Revolution; of the medical profession; indeed, of the world. But in the early 1760s, before a continental consciousness swept the land, *London* was “the Hub.” Each American colony had its own unique founding, history, charter, and relationship with England. Americans in diverse and far-flung British North American colonies were tied together in a hub-and-spoke configuration, with the mother country and King at the center—rather like the early twentieth-century British Commonwealth of Nations including Canada, India, Australia, New Zealand, and so on. In 1760, Boston, New York, Philadelphia and Charleston often followed legal and political events in London at least as closely as they followed developments in each other, or in other colonies. Of course, all this began to change in the 1760s, but the 1761 Boston writs of assistance case looms larger in retrospect than it did in its day, outside Boston.

But even if Boston is not the Hub of the Universe, surely it is the hub of this state. Let us now turn to a few general items from this city and this state and see how they fit into our story.

Begin with the words of the 1780 Massachusetts Constitution, drafted by a convention that sat first across the Charles in Cambridge and then here in Boston:

Every subject has a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation, and if the order in the warrant to a civil officer, to make search in suspected places,

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51. 19 Howell's State Trials, 1153 (C.P. 1763), 98 Eng. Rep. 489.

or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities, prescribed by the laws.<sup>52</sup>

The language, logic and structure of the Massachusetts Constitution's Article XIV rather clearly foreshadow the federal Fourth Amendment. (In turn Article XIV itself borrowed from and clarified the language of the Pennsylvania Constitution of 1776.) The first clause of Article XIV affirms a right to be secure against *unreasonable* intrusions, and later clauses seek to limit warrants, not require or prefer them. The pivotal word "therefore" logically linking the two halves of Article XIV rather clearly says that overbroad warrants—not warrantless searches—are per se unreasonable. Nowhere is there a third clause in Article XIV requiring warrants for all searches and seizures, and the clear tone of the Article seems skeptical towards warrants. "All warrants . . . are contrary to . . . right [un-]less] . . . ; and no warrant ought to be issued but . . . ."<sup>53</sup> Warrants here are heavies, not heroes. And the clear language of the first sentence of Article XIV—a complete and self-contained legal command—gives the lie to those scholars who dismiss the clear general rule of "reasonableness" in the federal Fourth as a drafting mistake, or an ill-considered textual hiccup.<sup>54</sup>

Massachusetts' Article XIV was later borrowed virtually verbatim by the New Hampshire Constitution of 1784, and served as a prototype for

52. MASS. CONST. of 1780, pt. I, art. XIV.

53. *Id.*

54. See Maclin, *Central Meaning*, *supra* note 2, at 208-10; Davies Testimony, *supra* note 11, at 11-16. For especially vivid examples of a standalone reasonableness requirement for all searches and seizures, omitting all mention of warrants, see 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 239 (John P. Kaminski & Gaspare J. Saladino eds., 1981) (recording Richard Henry Lee's proposed amendments, September 27, 1787) ("That the Citizens shall not be exposed to unreasonable searches, seizures of their papers, houses, persons, or property"); *Letters from the Federal Farmer* (VI), reprinted in 2 THE COMPLETE ANTI-FEDERALIST 256, 262 (Herbert J. Storing ed., 1981) (stating a man should be "subject to no unreasonable searches or seizures of his person, papers or effects"); DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS HELD IN THE YEAR 1788, at 86-87 (Boston, William White, Printer to the Commonwealth, 1856) (February 6, 1788 amendment proposing that the people should be protected against "unreasonable searches and seizures of their persons, papers or possessions").

Professor Maclin tries to downplay the status of the reasonableness clause of the Fourth Amendment by arguing that "undisputed history" shows that the Amendment's final wording was due to "a single congressman" who rewrote the Amendment in a last-minute style committee and slipped his rewrite past an unwary House. See Maclin, *Central Meaning*, *supra* note 2 at 208-09. In fact, however, House records contradict Maclin's account: the Amendment contained an independent reasonableness clause *before* the style committee was even created. See 3 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1789-91: HOUSE OF REPRESENTATIVES JOURNAL 159 (Linda Grant DePauw ed., 1977) (recording independent reasonableness clause, as in the Amendment's final version, in place as of August 21, 1789); *id.* at 165 (appointing style committee on August 22, 1789).

early versions of the federal Fourth. Thus, the Virginia ratifying convention of 1788 called for a federal amendment affirming that “every freeman has a right to be secure from all unreasonable searches and siezures [sic] of his person, his papers and his property.”<sup>55</sup> Ratifying conventions in New York and North Carolina proposed virtually identical language, and all three states went on to condemn overbroad warrants—not warrantless searches—as “therefore” unreasonable—“grievous,” “oppressive,” and “dangerous.”<sup>56</sup> In his first draft of the federal Fourth in the First Congress, James Madison likewise spoke of the people’s right “to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures.”<sup>57</sup>

The first clause of Article XIV also plainly foreshadows the “persons, houses, papers, and effects” language of the federal Fourth, with “possessions” used as the Massachusetts residual catch-all—all other important stuff—instead of its close cousin “effects.” This confirms that we should indeed construe “effects” generously, to avoid gaping holes in Fourth Amendment coverage. Professor Thomas Y. Davies has recently argued that “ships” were simply not “effects” under the Fourth Amendment.<sup>58</sup> His motivation, it seems, is to explain how the Amendment could indeed require warrants despite the clear early history of warrantless searches of ships. But I have not seen any major founding-era statements making this argument about ships and the Fourth Amendment; and the “*all* possessions” language of Article XIV clearly suggests a broad scope for the principle banning unreasonable searches and seizures—as does the analogous sweeping catchall “property” language of the Virginia, New York, and North Carolina ratifying conventions, and of Madison’s first draft. The “effects” gambit tries to save a warrant requirement, but ends up dismembering the Fourth Amendment. Taken to its logical conclusion, the refusal to give effect to the broad intended sweep of “effects”<sup>59</sup> would leave us with an Amendment that applies only to persons, houses and papers. The Supreme Court has, thank goodness, never thought so; nor, so far as I am aware, has any state or lower federal court. Shall we say that office buildings are not protected by the Fourth Amendment because they are not “houses”? Or that computers and floppy disks are wholly outside the scope of the Amendment because they are not “papers”? Or that cars are wholly unprotected because they are like ships? Surely true friends of the

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55. EDWARD DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 184 (1957).

56. *Id.* at 184, 191, 200-01.

57. *Id.* at 207.

58. Davies Testimony, *supra* note 11, at 5 & n.2.

59. See BLACK’S LAW DICTIONARY 605 (4th ed. 1968) (offering one quote that the word “effects” is a term “more comprehensive than the word ‘goods’”; and another definition of “effects” as “every kind of property, real and personal”).



Amendment should reject such an outlandish and crabbed approach.

Professor Davies' gambit, I fear, would truly be the worst of all worlds, for even if we accepted his invitation, it cannot lead to a warrant requirement. Such a requirement would still lack affirmative textual, historical, and practical support: if the Amendment really always requires warrants, why does it not say so, why did no framer or early commentator say so, and how are we to deal with metal detectors of persons, building code inspections of houses, and regulatory oversight of business papers? And even if "ships" somehow weren't "effects," "persons" on ships surely were "persons"; and they, too were detained—seized, temporarily—without warrants under early ship statutes. (And in arrests, and in border searches, and so on.) So too, early statutes authorized warrantless searches of "houses" storing liquor, as we have seen. Rather than claiming that all of these searches and seizures were simply beyond the Fourth Amendment's scope, surely it makes more sense to say that the Amendment applies broadly, but does not always require warrants.

But the Davies gambit is nevertheless illuminating because it illustrates something I have argued all along: the overreading of some clauses often leads to the underprotection of others, and a rigorous warrant requirement creates hydraulic pressure to deny that certain intrusions are indeed Fourth Amendment searches and seizures.<sup>60</sup>

If "effects" and "all possessions" really are best read as rather sweeping catchalls, why did both Massachusetts' Article XIV and the federal Fourth bother to specify "persons," "houses," and "papers"? Precisely to remind us, I suggest, of the heightened sensitivity government should show towards searches and seizures of these three specially-named items. Houses are often more private than other buildings; diaries and other private papers are often our dearest possessions (and raise large issues of free expression, as do all political papers); and searches and seizures of our bodies—our persons—obviously call for special sensitivity. Note how, in *Wilkes* and *Entick*, intrusions occurred against persons, houses, *and* papers—with bodily arrests and the ransacking of secret cabinets in homes in search of personal and political papers—and so here, too, we see the obvious prominence of these paradigm cases in both the Massachusetts and the federal Constitutions. (Personal and political papers were not really at issue in the Boston writs-of-assistance case; and the main focus of concern seems to have been searches of buildings rather than persons.) Note also that both constitutions speak of "warrants" and not "writs"—yet again highlighting the English general warrant cases more than the Boston writ case.

When we turn from the Massachusetts Constitution to early judicial

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60. See Amar, *Fourth Amendment*, *supra* note 5, at 768-69, 783 & n.97.

pronouncements in Massachusetts, we find further confirmation of our general story. In the 1850 case of *Rohan v. Sawin*,<sup>61</sup> the Supreme Judicial Court, meeting here in Boston, held that a warrant was not required for arrest under either the national or the Massachusetts Constitution.<sup>62</sup> The *Rohan* Court, presided over by the great Chief Justice Lemuel Shaw, made clear that the “private” citizen’s arrest power was “much more restricted” than the power of “constables, and other peace-officers, acting officially,” to effect warrantless arrests.<sup>63</sup> *Rohan* cited the landmark *Samuel v. Payne* case of 1780, and quoted with approval as “direct authority” a key passage of Lord Tenterden’s opinion in *Beckwith v. Philby*.<sup>64</sup> The *Rohan* Court also invoked another English case, involving a warrantless arrest by a constable, for the proposition that in such cases a *jury* should consider “whether the circumstances . . . [in the case] afforded the [constable] *reasonable* ground to suppose that the . . . [arrestee] had committed a felony.”<sup>65</sup> Finally, the *Rohan* Court made clear that, as a matter of law, an officer could arrest without warrant even in a case where a warrant would have been easy to get; warrants were not preferred.<sup>66</sup>

Six years after *Rohan*, the same Massachusetts high court upheld a warrantless seizure of liquors from a wagon.<sup>67</sup> The statute involved in this case, *Jones v. Root*,<sup>68</sup> vested special warrantless seizure and arrest power in certain officers. The court briskly upheld the statute and affirmed the trial court’s instruction that the *jury* should find for the plaintiff only if it determined that the defendant officers detained the plaintiff’s innocent horse and wagon “for a longer time than was *reasonably* necessary” to remove the offending liquors from the wagon.<sup>69</sup>

Three years after that, in 1859, the court re-emphasized that Article XIV did not prefer warrants, or require them; it sought to limit them. And so the court rejected the idea that an *ex parte* warrant could issue based on probable cause to believe that a debtor was concealing assets or property. That *kind* of probable cause, suggested the court, was not close enough to

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61. 59 Mass. (5 Cush.) 281 (1850).

62. *Id.* at 285.

63. *Id.*

64. *Id.* at 284.

65. *Id.* at 284 (emphasis added) (citing *Davis v. Russell*, 5 Bing. 354, 365, 130 Eng. Rep. 1098, 1102 (C.P. 1829)). Elsewhere, the *Davis* Court Chief Justice had this to say: “For though a private individual cannot arrest upon bare suspicion, a constable may. This has been decided in so many cases, that it is unnecessary to refer to them; and unless the law were so, there would be no security for person or property.” 5 Bing. at 363-64, 130 Eng. Rep. at 1101.

66. 59 Mass. (5 Cush.) at 285-86; *see also* *Holley v. Mix*, 3 Wend. 350, 353 (N.Y. Sup. Ct. 1829) (affirming power of warrantless arrest “whether there is time to obtain [a warrant] or not”).

67. *Jones v. Root*, 72 Mass. (6 Gray) 435, 439 (1856).

68. 72 Mass. (6 Gray) 435 (1856).

69. *Id.* at 436 (emphasis added).

the kind of probable cause supporting warrants for stolen goods. Here is what the court said:

[I]t cannot be doubted that by adoption of the 14th article of the Declaration of Rights it was intended strictly and carefully to limit, restrain and regulate the granting and issuing of warrants . . . to the general class of cases, in and to the furtherance of the objects of which they had before been recognized and allowed . . . , and certainly not so to vary, extend and enlarge the purposes for and occasions on which they might be used. . . .

. . . .  
. . . Certainly no person ought to be compelled to disclose any facts or information to be given as evidence . . . until he has at least had an opportunity of urging his objections . . . [before] some competent judicial tribunal.<sup>70</sup>

So much for search and seizure *rights*. On the *remedy* side, this is what the great Justice Joseph Story, who would later become the Dane Professor of Law at Harvard, had to say in a famous circuit case decided here in Boston in 1822:

In the ordinary administration of municipal law the right of using evidence does not depend, nor, as far as I have any recollection, has ever been supposed to depend upon the lawfulness or unlawfulness of the mode, by which it is obtained. . . . [T]he evidence is admissible on charges for the highest crimes, even though it may have been obtained by a trespass upon the person, or by any other forcible and illegal means. . . . In many instances, and especially on trials for crimes, evidence is often obtained from the possession of the offender by force or by contrivances, which one could not easily reconcile to a delicate sense of propriety, or support upon the foundations of municipal law. Yet I am not aware, that such evidence has upon that account ever been dismissed for incompetency.<sup>71</sup>

Nineteen years later, the Massachusetts Supreme Judicial Court, sitting here in Boston, in a case from Suffolk(!) and Nantucket counties, also flatly rejected the exclusionary rule:

If the search warrant were illegal, or if the officer serving the warrant exceeded his authority, the party on whose complaint the warrant issued, or the officer, would be responsible for the wrong done; but this is no good reason for excluding the papers seized as evidence.<sup>72</sup>

(Elsewhere in the opinion, the court quoted extensively from *Entick v.*

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70. *Robinson v. Richardson*, 79 Mass. (13 Gray) 454, 457, 458 (1859).

71. *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 843, 844 (C.C.D. Mass. 1822) (No. 15,551).

72. *Commonwealth v. Dana*, 43 Mass. (2 Met.) 329, 337 (1841).

*Carrington*<sup>73</sup> and paid tribute to “the able opinion of Lord Camden.”<sup>74</sup> The Court also passingly mentioned the writs of assistance, but not Otis by name.)<sup>75</sup>

As late as 1883, the leading evidence treatise in America, published—you guessed it—here in Boston, proclaimed illegally obtained evidence universally admissible in English and American courts.<sup>76</sup> (The treatise was authored by Cambridge resident Simon Greenleaf, who succeeded Story to the Dane Professorship at Harvard.) And the greatest evidence scholar of the twentieth century, and one of the most distinguished legal scholars ever—the Harvard-educated giant John Henry Wigmore—led a lifelong crusade against the illogic and injustice of the exclusionary rule. His encyclopedic, multivolume treatise was of course published—where else?—in Boston.<sup>77</sup>

More recently, alas, one of Boston’s main contributions to Fourth Amendment scholarship has, I think, missed the mark. I have in mind a recent article authored by Professor Tracey Maclin of the Boston University Law School. Now, I admire much of Professor Maclin’s earlier work, and was privileged to share the stage with him, and several others, in Faneuil Hall in early 1993. But I am afraid I cannot accept many of the things Professor Maclin has written in a 1994 article in the *Southern California Law Review*, in direct response to my own article published earlier that year.<sup>78</sup>

In a nutshell, here are a few of my biggest objections. Professor Maclin argues that the Fourth Amendment embodies a “warrant preference” rule.<sup>79</sup> But where, precisely, does this come from as a binding constitutional principle? Not from the text, Professor Maclin admits.<sup>80</sup> If it comes from history—and Professor Maclin himself invokes a good deal of history, at a certain level of generality—it would be nice to see a stream of early statements that “warrants are preferred.” This is exactly the evidence I challenged scholars to uncover, and in a seventy-two page article, Pro-

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73. 19 Howell’s State Trials, 1029 (C.P. 1765), 95 Eng. Rep. 807.

74. 43 Mass. (2 Met.) at 334; see also *id.* at 334-36.

75. *Id.* at 336.

76. See 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 254a, at 325-26 (Simon Greenleaf Croswell ed., 14th rev. ed. 1883).

77. See JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW (3d. ed. 1940).

78. See generally Tracey Maclin, *When the Cure for the Fourth Amendment is Worse Than the Disease*, 68 S. CAL. L. REV. 1 (1994) [hereinafter Maclin, *Fourth Amendment*].

79. *Id.* at 6-7.

80. *Id.* at 7. According to Professor Maclin, “[t]he text, of course, provides no answers” to many Fourth Amendment questions. *Id.* at 9. I suggest that it does provide formulas—like constitutional reasonableness, and strict limits on warrants—and that it most clearly does not support Professor Maclin’s general “warrant preference” rule.

fessor Maclin cites no such statement. Not one! In fact, as we have seen, the framers did *not* require or “prefer” warrants. They sought to limit them.<sup>81</sup> In trying to minimize various obvious historical exceptions to a warrant requirement or preference, Professor Maclin says that “early Americans did not always practice what they preached.”<sup>82</sup> But as noted, we have no evidence that they *preached* a “warrant preference” or a “warrant requirement,” and lots of evidence *contra*. Professor Maclin offers an analytic argument that those framers who hated general warrants would likely have despised “*warrantless* searches exhibiting *the same characteristics* that marked general warrants.”<sup>83</sup> But my analytic counter-argument is that lawful warrants necessarily immunized—by definition—and warrantless searches did not. Thus, warrantless searches *never* shared this “*same characteristic*.” Professor Maclin, I think, fails to come to grips with this basic logic (or with my related discussion of how a modern judicial *preclearance* as opposed to *preclusion* system might sometimes be appropriate<sup>84</sup>).

Over and over, Professor Maclin proclaims that my reading leaves warrantless searches unregulated—that federal officers can search “whenever and wherever they want” with “absolutely no criteria” under my model.<sup>85</sup>

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81. Professor Maclin mocks my focus on a “warrant requirement” rather than a “warrant preference”—a warrant requirement is, he says, a “straw man.” *Id.* at 6, 7. But many respected scholars and judges have indeed read the Fourth Amendment to implicitly require warrants. See *Trupiano v. United States*, 334 U.S. 699, 705 (1948); *Johnson v. United States*, 333 U.S. 10, 13-14 (1948); *Harris v. United States*, 331 U.S. 145, 161-62 (1947) (Frankfurter, J., dissenting); *Davis v. United States*, 328 U.S. 582, 595, 602, 605, 609 (1946) (Frankfurter, J., dissenting); see also *Carroll v. United States*, 267 U.S. 132, 156 (1925); Lloyd L. Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 47-48 (1974) (describing the logic of a “thoughtful and strict grammarian”). A recent LEXIS search revealed 60 times more Supreme Court cases referring to a “warrant requirement” than to a “warrant preference.” For legal scholarship, the ratio was 40 to 1. In general, the Constitution requires things—even though these requirements are not always absolute. It rarely “prefers” things—a word not in the Fourth Amendment, or in the relevant passages of the Frankfurter opinions Professor Maclin himself cites. See Maclin, *Fourth Amendment*, *supra* note 78, at 7 n.28. These opinions rest on a syntactical inference—that warrantless searches are per se unreasonable, and that warrants are thus *required*. But believers in this implied textual requirement usually concede that this implicit requirement must yield in truly exceptional or exigent cases, as must even explicit textual requirements, in their view. See Amar, *Fourth Amendment*, *supra* note 5, at 762 n.8. Far from being a “straw man,” this implicit textual argument—vividly championed by Felix Frankfurter—is in fact the doctrinal font of whatever warrant requirement or warrant preference still exists in today’s caselaw. It is also the most plausible textual argument for warrants—even though, in the end, it is wrong.

82. Maclin, *Fourth Amendment*, *supra* note 78, at 11.

83. *Id.* at 12.

84. Compare *id.* at 7 (chiding me for never discussing or confronting the ways in which a warrant preference rule might restrain the police), with Amar, *Fourth Amendment*, *supra* note 5, at 800, 810 (discussing and confronting just this issue, and explaining how a suitably tailored preclearance system might be reasonable, and far better than a global warrant requirement scheme); compare Maclin, *Fourth Amendment*, *supra* note 78, at 5 n.22 (making a similar suggestion without realizing its connection to my preclearance argument), with *id.* at 32 n.142 (partially describing my preclearance argument and labelling it “nonsense”).

85. Maclin, *Fourth Amendment*, *supra* note 78, at 19, 33. For similar claims, see *id.* at 40 (Amar’s

This is a rather serious misstatement of my views; I offered up many pages of analysis mapping out various regimes and rules for implementing a reasonableness requirement with bite—what I have called “constitutional reasonableness”.<sup>86</sup> (He also attributes to me a simple “cost-benefit” approach that I explicitly rejected.)<sup>87</sup> Contrary to Professor Maclin’s repeated assertions, I never claimed that the framers were “unconcerned” about warrantless intrusions;<sup>88</sup> the whole point of the Fourth Amendment’s first clause, I have stressed, was precisely to regulate these intrusions and thus constrain every species of arbitrary or oppressive government. Elsewhere, he repeatedly claims that “Amar says civil juries should decide”<sup>89</sup> the meaning of reasonableness, but in at least a half-dozen places,<sup>90</sup> I made clear that legislators, administrators, and judges would also play key roles under my reading of the Amendment—and that in many situations, juries should *not* decide.

Professor Maclin seems to prefer a (presumptive) probable cause rule for all searches and seizures, but here too he fails to show where this rule or preference *comes from* as a constitutional principle.<sup>91</sup> The text does not

“model provides no criteria or standards”); *id.* at 42 (Amar’s “model will not restrain police power and discretion”); *id.* at 66 (“Under Amar’s proposal, all standards and procedural safeguards would be cast to the winds”); see also *id.* at 13 (Amar is convinced “that warrantless searches are generally constitutional”). I believe that warrantless searches are not per se unreasonable; but of course I never suggested that they are per se reasonable. And under my model, even when government gets a piece of paper it calls a “warrant,” with “probable cause” that would satisfy Professor Maclin’s “warrant preference” scheme and his definition of “probable cause,” government should sometimes *lose*, as I make clear in analyzing and criticizing *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978). See Amar, *Fourth Amendment*, *supra* note 5, at 805-06. Professor Maclin nowhere mentions this.

86. See Amar, *Fourth Amendment*, *supra* note 5, at 804-11, 816-19. Professor Maclin shields all this from his readers; remarkably, he nowhere describes or even mentions my model of “constitutional reasonableness.”

87. Compare Maclin, *Fourth Amendment*, *supra* note 78, at 12 n.46, with Amar, *Fourth Amendment*, *supra* note 5, at 804 n.168.

88. See Maclin, *Fourth Amendment*, *supra* note 78, at 9-10, 12 & nn.47, 49, 16, 19 & n.84.

89. *Id.* at 32; see also *id.* at 3, 9, 12 n.46, 27 n.121, 31, 40, 65-67.

90. See Amar, *Fourth Amendment*, *supra* note 5, at 759 (calling on appellate judges to openly fashion “criteria of reasonableness”), 782 (speaking of “judges and juries”), 810 (proposing “judicial preclearance”), 814 n.216 (discussing “administrative and judicial” substitutes for juries), 816 (endorsing “[a]t least four overlapping . . . non-mutually exclusive enforcement regimes,” only one of which focused on juries), 817 (encouraging judges to rule certain intrusions unreasonable as a matter of law, especially in situations involving possible jury insensitivity to certain constitutional values), 817 n. 226 (elaborating this point), 817 (describing role for jury only if “legislature, administrator, and judge have all accepted a search or seizure as reasonable”), 819 n.233 (reiterating, in my final footnote, that my proposed model “does not place sole reliance on civil juries”); see also *id.* at 758 (foreshadowing role of legislatures, administrators, and judges, as well as juries).

91. Maclin, *Fourth Amendment*, *supra* note 78, at 25-28. The question of where constitutional principles come from is obviously a fundamental one. Professor Maclin’s general proposals lack *textual* support; are contradicted by *history*; require rejecting the results of many *precedents*; and often make little *practical* sense as strongly presumptive rules. They also fail to connect the Fourth Amendment *structurally* to other constitutional clauses and principles. Government must be limited, but Professor Maclin’s rules fail to limit it in the *right* ways, as measured by all these met-

provide such a global rule, and again he points to no explicit framing statement. And if it *is* a constitutional rule, why and how may it sometimes be ignored, as Professor Maclin seems in passing to concede it sometimes must? On his premises, exigency might explain why a “warrant requirement” should yield if there is truly no time to get a warrant; but temporal exigency cannot explain why a warrantless search should ever be allowed on something less than “probable cause,” if “probable cause” really is a global rule. Why, in Professor Maclin’s world, should a warrantless search ever require less than does a search under warrant? His explicit answer in a footnote is that a truly global probable cause rule would not be “reasonable” for things like metal detectors.<sup>92</sup> But to say this is to concede one of my main points and to accept the ultimate touchstone of reasonableness. Elsewhere, Professor Maclin garbles my discussion of the *kind* of probable cause that the warrant clause presupposes. Because of the garbling, he errs when he says that I have “ignore[d] the text of the Warrant Clause.”<sup>93</sup> (Is it possible that this shoe is on his foot?)

Professor Maclin also makes many troubling claims about Fourth Amendment remedies—and in the process at times misstates my position and at other times ignores my counterarguments. But rather than dwelling on all this, let me in closing turn to an issue that Professor Maclin has induced me to rethink: the 1761 writs-of-assistance controversy.

Professor Maclin thinks that this controversy was rather central to the thinking that underlay the Fourth Amendment.<sup>94</sup> In the past, I have been, for reasons I shall soon explain, more dubious of this. But nothing in my general analytic argument hinges on minimizing the 1761 writs-of-assistance affair or, for that matter, the later writs-of-assistance cases in other colonies. Indeed, I believe that a careful look at writs of assistance can actually bolster my analytic claim that warrants were dangerous devices rather than globally preferred instruments. And so, in the spirit of the Hub, let me close my remarks here in Boston by accepting the invitation of one of Boston’s leading Fourth Amendment scholars to say a few new words

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rics—modalities—of constitutional interpretation. His basic approach is to “limit” government by yanking words and concepts from one clause, and trying to stuff them in another where they do not fit—textually, historically, structurally, practically, and so on. My own model of constitutional reasonableness also limits government, but, I submit, in a more fitting way, as measured by the proper modalities of constitutional argument.

92. *Id.* at 27 n.121. His only other argument is that somehow metal detector searches and the like are not “typical.” *Id.* Why not? As a matter of numbers, searches and seizures without probable cause loom large today. A better approach, I suggest, is to say that such cases are, in today’s world, quite typical, but that *other features* of these searches—their unintrusiveness, their evenhandedness, their legitimate justifications, and so on—may render them constitutionally reasonable.

93. *Id.* at 6 n.25. For more discussion of why and how the text of the warrant clause presupposes only a certain kind of probable cause, see *supra* notes 44-45 and accompanying text.

94. Maclin, *Fourth Amendment*, *supra* note 78, at 13-25; Maclin, *Central Meaning*, *supra* note 2, at 218-28.

about the Boston writs-of-assistance controversy, commonly (if somewhat loosely) known as *Paxton's Case*.<sup>95</sup>

### III. WRITS OF ASSISTANCE

Let me begin by explaining why I spent so little time addressing *Paxton's Case*<sup>96</sup> and Otis in my earlier article on the Fourth Amendment. So far, scholars seem to have uncovered only one major direct reference to *Paxton* in the debates about the ratification of the Constitution and the drafting of the Bill of Rights. And the sole major reference came from a pseudonymous pamphlet that we now know was authored by Mercy Otis Warren, the sister of the great Boston lawyer James Otis, who argued *Paxton's Case*.<sup>97</sup>

It is often noted that John Adams wrote the following about Otis' argument: "Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born."<sup>98</sup> What is less often noted is that Adams wrote these words more than fifty years after the event. Sometimes, the first act of a grand historical drama is much more clear in retrospect than at the time. And if Boston has long fancied itself the Hub, so too John Adams at times fancied himself the Hub, the Center of All Things. Surely, the first act of the Revolution, in Adams' mind, had to take place in Boston, with Adams in the room.<sup>99</sup> (Never mind how many others were watching; indeed, Adams may have preferred to see himself as one of a select few "in" at the beginning.) In a similar vein, one historian has noted that Otis's speech "was not reported in the newspapers of the period and circulated to the 99.9 percent of the population that surely did not hear it. Of those present, apparently John Adams was the only one who was sufficiently impressed to take notes on what was said and he gave us the full account of it some fifty years after Otis delivered it."<sup>100</sup>

To be sure, later writs-of-assistance controversies arose in other colo-

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95. See *Paxton's Case of the Writ of Assistance*, in JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY BETWEEN 1761 AND 1772 at 51 (Boston, Little, Brown & Co., 1865) [hereinafter QUINCY'S REPORTS]; *id.* app. I at 395-540 (recording Horace Gray's notes) [hereinafter Gray's notes]; *Davis v. United States*, 328 U.S. 582, 604 (1946) (Frankfurter, J., dissenting) (alluding to *Paxton's Case*); Maclin, *Fourth Amendment*, *supra* note 78, at 13 (discussing *Paxton's Case*). On the slight imprecision of label here, see M.H. SMITH, THE WRITS OF ASSISTANCE CASE 147 n.35, 397 (1978).

96. QUINCY'S REPORTS, *supra* note 95, at 51-57.

97. For details, see Amar, *Bill of Rights*, *supra* note 3, at 1176 n.208.

98. See *supra* note 2 (listing sources quoting Adams).

99. For a somewhat similar suggestion, see SMITH, *supra* note 95, at 250-54, 380, 384, 466, 508, 518.

100. See O.M. Dickerson, *Writs of Assistance as a Cause Of the Revolution*, in THE ERA OF THE AMERICAN REVOLUTION 40, 43 (Richard B. Morris ed., 1939).



nies after the 1767 Townshend Act.<sup>101</sup> These cases were, I think, more significant at the time than the 1761 Boston case, but I suspect that it is probably most plausible to see all of these later cases as powerfully shaped by America's interest in the intervening and far more famous English cases of *Wilkes* and *Entick*.<sup>102</sup>

This seems more consistent with various data. Both the words of the Massachusetts and federal Constitution seem to track *Wilkes* and *Entick* more than *Paxton*; they speak of *warrants* not *writs*, and highlight *persons* and *papers* as well as houses. Many references to *Wilkes* and *Entick*, and to their principles, appear in debates surrounding the Constitution and Bill of Rights; not so with the writs of assistance. The Declaration of Independence makes no mention of abusive searches and seizures in America—an omission hard to explain if the American *Paxton's Case* was on everyone's mind and lips, but wholly consistent with the fame of the English *Wilkes* and *Entick* cases. And "Wilkes" and "Camden" undoubtedly dot the map of early America more than "Otis."<sup>103</sup>

It remains to ask two questions about the writs of assistance themselves. First, why did Otis and other Bostonians object so much to these devices? And second, why, in England, did judges strike down general warrants but uphold the writs of assistance?

The general writs and the Parliamentary statutes that underlay them, as many of you will no doubt recall, authorized customs officers—without probable cause, or individualized suspicion—to break and enter houses, shops, and "any . . . other place" in search of uncustomed goods.<sup>104</sup> Such a regime seems offensive on several counts. First, it provided next to no guidance constraining the discretion of officers, thus inviting discrimination against government enemies and favoritism towards friends.<sup>105</sup> Second, it authorized intrusions into houses—the most private buildings imaginable. Third, the writ of assistance scheme theoretically authorized customs officers to commandeer—to dragoon, or impress—ordinary passersby to aid them in their invasions.<sup>106</sup> This "assistance" power added a vague

101. See *id* at 49-75.

102. See SMITH, *supra* note 95, at 6, 462, 476, 497.

103. Yet another clue: In Joseph Story's landmark 1833 treatise on the Constitution (published in Boston and Cambridge) the great Justice (then a Cambridge resident) highlights the 1763 English general warrants controversy but makes no mention of Otis or the writs of assistance in his brief discussion of the Fourth Amendment. See 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1895, at 748-50 (Fred B. Rothman & Co. 1991) (1833).

104. See Dickerson, *supra* note 100, at 45 n. 6.

105. See SMITH, *supra* note 95, at 101-02, 122, app. M at 563.

106. See SMITH, *supra* note 95, at 29-30, 33, 277 n.8; Dickerson, *supra* note 100, at 45 n.6 (writ commanding assistance of "all others"); Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 284 n.148 (1984); cf. Jon C. Blue, *High Noon Revisited: Commands of Assistance by Peace Officers in the Age of the Fourth Amendment*, 101 YALE L.J. 1475 (1992).

and possibly tyrannical new layer of bodily intrusion and unchecked discretion into the system. Finally, the objects of the search—relatively innocent “uncustomed” goods like tea and sugar—were not nearly so compelling as stolen goods, at least in a town, like colonial Boston, where customs evasion and tax evasion were practically a way of life, implicating a good many otherwise law-abiding folk.<sup>107</sup> In other words, untaxed sugar in homes seems more like skim milk than like bombs. All of the foregoing factors, I suggest, would be relevant to a proper reasonableness analysis, under the Fourth Amendment.

In light of all this, we must ask ourselves why some of the very same English judges who struck down general warrants upheld writs of assistance. At one level, the answer may be obvious: Parliament had not explicitly authorized general warrants, but it had by statute authorized writs of assistance. English judges, in general, had no authority to invalidate Acts of Parliament. But this pushes the question up one level: why did Parliament continue to permit writs of assistance even after Parliament went on record, shortly after *Wilkes* and *Entick*, as opposed to certain types of warrants?<sup>108</sup>

Part of the answer may be that the *Wilkes* and *Entick* warrants were directly aimed at political dissenters and political papers.<sup>109</sup> As I have already noted, free expression concerns should loom large in any framework organized around constitutional reasonableness rather than a warrant requirement or a probable cause requirement. But if my overall analysis is right, we should also look closely at the immunity issue. For I have suggested that lawful warrants—because they immunized—had to be strictly limited. If, however, the writs of assistance offered less immunity, perhaps this might explain why they were somewhat less offensive.

Evidence from several English cases supports this hypothesis. In the first, decided in 1769 in the Court of Common Pleas, one Redshaw brought a trespass suit against Brook and other defendants. Defendants were “custom-house officers” who conducted a suspicionless search for prohibited and uncustomed goods in Redshaw’s house, and came up empty. The jury awarded a whopping 200 pounds to plaintiff, and the Lord Chief Justice upheld the verdict: “I cannot say the jury have done wrong.”<sup>110</sup>

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107. See William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 404-09 (1995).

108. On Parliament’s condemnation of certain warrants in 1766, see TAYLOR, *supra* note 27, at 34-35. On Parliament’s reaffirmation of writs of assistance in 1767, see SMITH, *supra* note 95, at 438-64.

109. Two of the three Parliamentary resolutions condemning certain warrants after *Wilkes* and *Entick* highlighted issues of papers and expression. See Eric Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 VA. L. REV. 869, 909-10 (1985). For a general overview, see *id.* at 869-915.

110. *Redshaw v. Brook*, 2 Wils. K. B. 405, 405, 95 Eng. Rep. 887, 888 (C.P. 1769).

The brief report in *Redshaw* does not make clear whether defendants sought to hide behind a writ of assistance, but the issue arose again a year later in the Common Pleas case of *Bruce v. Rawlins*.<sup>111</sup> Here, the defendants broke into a house, found nothing, and left saying—and this is a direct quote from the case—“Damn it, there are no goods!”<sup>112</sup> When sued in trespass, they tried to hold up a writ assistance as a shield, but the jury found for plaintiff, and awarded 100 pounds of damages. The Court upheld the verdict, following *Redshaw*. Only Justice Gould explicitly discussed the writ defense, and he stressed that defendants had failed to strictly comply with the writ, since they had not brought a constable along with them.<sup>113</sup>

Neither *Redshaw* nor *Bruce* carefully discussed writs of assistance, but the issue resurfaced and was crisply addressed in a 1785 King’s Bench case. In *Cooper v. Boot*,<sup>114</sup> Lord Mansfield observed in dicta that writs—unlike warrants—did not immunize for unsuccessful searches:

We think the Excise officer cannot be guilty of a trespass, either in procuring or executing the warrant. . . . It is a solecism [that is, a contradiction in terms] to say that the regular execution of a legal warrant shall be a trespass. . . . The case of the writ of assistance is not applicable. There is no warrant, and all is left to the discretion of the officer; besides, which is *very material*, there is a positive clause in the Statute of Charles 2, which makes the whole depend on the *actual finding* of goods.<sup>115</sup>

As Lord Mansfield pithily put the point earlier, from the bench, “*under a writ of assistance you must find the goods, but not under a warrant.*”<sup>116</sup>

This line of analysis was foreshadowed in the argument of Otis’s colleague, Oxenbridge Thacher, in *Paxton’s Case* itself,<sup>117</sup> and also appeared in a key footnote drafted by “Horace Gray, Jr., Esq., of the Boston

111. 3 Wils. K. B. 61, 61-64, 95 Eng. Rep. 934 (C.P. 1770).

112. *Id.* at 61, 95 Eng. Rep. at 934-35.

113. *Id.* at 63, 95 Eng. Rep. at 935.

114. 4 Dougl. 339, 99 Eng. Rep. 911 (K.B. 1785).

115. *Id.* at 348-49, 99 Eng. Rep. at 916 (emphasis added); *cf.* *Cooper v. Booth*, 3 Esp. 135, 145-46, 170 Eng. Rep. 564, 568 (K.B. 1785) (same case) (reporting similar language of Lord Mansfield).

116. *Cooper v. Boot*, 4 Dougl. at 343, 99 Eng. Rep. at 913 (emphasis added); *see also* *Cooper v. Booth*, 3 Esp. at 138, 170 Eng. Rep. at 565 (Lord Mansfield) (“the distinction I have always taken is this, that to justify under a writ of assistance, the officer must find the goods he searches for; but a warrant will justify without”). *Cooper v. Boot*’s holding—that a proper warrant immunized the officer for a search that turned up nothing—was applied to *seizures* under warrant, where the officer seized goods that ultimately turned out to be innocent, in the 1800 Court of Common Pleas case *Price v. Messenger*, 3 Bos. & Pul. 158, 158 n.(a), 126 Eng. Rep. 1213, 1213 n.(a) (C.P. 1800).

117. *See* Gray’s Notes, *supra* note 95, app. I at 471 & n.(9). For discussion, *see* SMITH, *supra* note 95, at 13 n.9, 310. Otis made a similar suggestion in an anonymous essay. *See id.* at 424, app. M at 563; *see also id.* at 333 n. 3, app. G at 538 (noting similar suggestion in an influential 1760 London Magazine article).

Bar,” in his celebrated Notes on the writs of assistance in the famous volume, *Quincy’s Reports*. (Need I say where this volume was published?) According to Gray—who would go on to become Chief Justice of Massachusetts and an Associate Justice of the United States Supreme Court—“it was well settled law that a person searching under a writ of assistance and finding nothing was not justified.”<sup>118</sup> This was, apparently, also Lord Camden’s view in an unpublished case, *Shipley v. Redmain*, which was described by counsel in *Cooper*,<sup>119</sup> and it was the view put forth by Chief Justice De Grey in the 1774 case of *Bostock v. Saunders*.<sup>120</sup> By contrast, as Blackstone made clear both in his treatise and on the bench in *Bostock*<sup>121</sup>, a lawful *warrant* “will at all events indemnify [that is, immunize] the officer.”<sup>122</sup>

Now, for the reasons I have already mentioned, this difference between *writs* and *warrants* is not in my view enough to render the writs of assistance constitutionally reasonable: the writ immunized whenever an officer found untaxed sugar or tea in a home, and I would consider such intrusive, ill-justified, and probably discriminatory searches unreasonable even if successful. (And of course, no one in America ever voted for the law in the first place.) But the English cases, I suggest, do help explain why general warrants were in one key way even worse than general writs. This key difference—immunity—fits nicely into my overall analytic and historical argument about why warrants were so dangerous. Thus, I am grateful to Boston’s Professor Maclin for prodding me to revisit the issue of writs and warrants. And I am grateful to you all for giving me a fitting occasion to do so—and for inviting me back to one of my favorite cities.

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118. Gray’s Notes, *supra* note 95, app. I at 533 n.41; see also SMITH, *supra* note 95, at 128 n.5.

119. *Cooper v. Boot*, 4 Dougl. at 347, 99 Eng. Rep. at 915 (recording argument of Plumer).

120. 2 Black W. 912, 914-16, 96 Eng. Rep. 539, 540 (C.P. 1773).

121. See *id.* at 915-16, 96 Eng. Rep. at 540 (opinion of Blackstone, J.) (instrument at hand “is improperly called a warrant” and thus it does not immunize at all events).

122. 4 BLACKSTONE, COMMENTARIES, *supra* note 10, at 288 (1st ed. 1765). Later editions refined and expanded this language to make clear that under English statutes even certain defective warrants could immunize. American law, it seems, tracked the more narrow first edition formulation. See Amar, *Fourth Amendment*, *supra* note 5, at 779-81 & nn.86, 89, 91-92; cf. Davies Testimony, *supra* note 11, at 10 n.9, 23 n.21 (seriously misstating my position on this issue).