

## The Originalist Case for the Fourth Amendment Exclusionary Rule

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### ABSTRACT

The Fourth Amendment exclusionary rule has been the law of the land in all federal jurisdictions since 1914<sup>1</sup> and in all state jurisdictions since 1961.<sup>2</sup> Yet critics continue to question the rule's constitutional pedigree. Generations of conservative jurists and scholars have called for the rule's abolition on "originalist" grounds.<sup>3</sup> These scholars argue that the rule is of recent vintage,<sup>4</sup> unsupported in the Fourth Amendment's text, and disloyal to the Amendment's original intent.<sup>5</sup> In this paper, the author argues that exclusion is actually an ancient remedy, widely applied by courts in various contexts since the dawn of American history. Contrary to the writings of anti-exclusion scholars, the basic framework for the exclusionary rule was well established in the regular practices of Founding-era judges and lawyers. Indeed, the idea that exclusion or exclusion-like remedies were required by the search and seizure protections of the Founding period almost certainly predates by many years the earliest American holdings opposing exclusion.

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1. See *Weeks v. United States*, 232 U.S. 383, 398 (1914).

2. See *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (extending the federal exclusionary rule to state court practice under the Fourteenth Amendment).

3. See generally Yale Kamisar, *The Writings of John Barker Waite and Thomas Davies on the Search and Seizure Exclusionary Rule*, 100 MICH. L. REV. 1821 (2002) (discussing the history of criticism of the exclusionary rule).

4. Jerry E. Norton, *The Exclusionary Rule Reconsidered: Restoring the Status Quo Ante*, 33 WAKE FOREST L. REV. 261, 264 (1998) (writing of the "newly discovered exclusionary rule").

5. See generally Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994) [hereinafter Amar I]; AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* (1997) [hereinafter Amar II]; AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998) [hereinafter Amar III]; Akhil Reed Amar, *Against Exclusion (Except to Protect Truth or Prevent Privacy Violations)*, 20 HARV. J. L. & PUB. POL'Y 457 (1997) [hereinafter Amar IV].

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## I. INTRODUCTION

Perhaps no criminal procedure topic has enjoyed as much fiery debate in legal scholarship as the Fourth Amendment exclusionary rule.<sup>6</sup> Exclusion—the rule

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6. Even a partial list of articles discussing this debate would take up many pages. *See, e.g.*, Randy E. Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 EMORY L.J. 937, 941-42 (1983) (calling for an alternative to the exclusionary rule); Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: “Here I Go Down that Wrong Road Again”*, 74 N.C. L. REV. 1559, 1563 (1996) (detailing the long history of criticisms of the exclusionary rule and other criminal procedure protections); Yale Kamisar, *In Defense of the Search and Seizure Exclusionary Rule*, 26 HARV. J. OF L. & PUB. POL’Y 119, 119 n.1 (2003) (citing dozens of articles); Randall R. Rader, *Legislating a Remedy for the Fourth Amendment*, 23 S. TEX. L.J. 585, 606-07 (1982) (discussing the abolition or replacement of the exclusionary rule); William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 897-918 (1991) (discussing remedies for warrant violations); Malcolm R. Wilkey, *Constitutional Alternatives to the Exclusionary Rule*, 23 S. TEX. L.J. 531, 539 (1982) (criticizing the

requiring that evidence seized in violation of the Fourth Amendment<sup>7</sup> may not be used against a defendant in a subsequent criminal case—has been attacked for decades by police organizations, attorneys general, and conservative legal scholars.<sup>8</sup> Opponents of the rule argue that exclusion benefits only criminals,<sup>9</sup> keeps juries from seeing and hearing “the truth,”<sup>10</sup> and sometimes allows “guilty” offenders to escape conviction.<sup>11</sup>

But by far, the most powerful rhetorical argument against the rule involves its origins. Anti-exclusion scholars allege that “for one hundred years after the passage of the Fourth Amendment, evidence of the defendant’s guilt was never excluded just because it was obtained illegally.”<sup>12</sup> Consequently, exclusion of wrongly seized evidence is said to have no constitutional foundation. According to Yale law professor Akhil Amar, “[n]o state court . . . ever excluded evidence in [the] first century” of American history,<sup>13</sup> and “nothing in the text, history, or structure of the Fourth Amendment” supports such a remedy.<sup>14</sup>

The claim that exclusion of illegally seized evidence represents a stark reversal of widespread Founding-era jurisprudence is one that has gone largely unchallenged.<sup>15</sup> This may be because the self-described social liberals, who generally

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exclusionary rule and recommending alternatives); Jeffrey Gittins, Comment, *Excluding the Exclusionary Rule: Extending the Rationale of Hudson v. Michigan to Evidence Seized During Unauthorized Nighttime Searches*, 2007 BYU L. REV. 451, 451 (2007) (discussing the exclusionary rule controversy); Matt J. O’Laughlin, Comment, *Exigent Circumstances: Circumscribing the Exclusionary Rule in Response to 9/11*, 70 UMKC L. REV. 707, 708 (2002); Aloysius T. Webster, Comment, *Protecting Society’s Rights While Preserving Fourth Amendment Protections: An Alternative to the Exclusionary Rule*, 23 S. TEX. L.J. 693, 706 (1982) (advocating abandonment of the modern exclusionary rule).

7. Of course, rules of exclusion also apply in Fifth and Sixth Amendment jurisprudence, but are less controversial in those contexts. In a broader sense, the law of evidence is riddled with “exclusionary rules” that govern such matters as hearsay and unauthenticated records.

8. See *supra* note 6 and accompanying text.

9. See Amar II, *supra* note 5, at 156 (“[T]he exclusionary rule rewards the guilty man, and only the guilty man, precisely because he is guilty.”).

10. See Patrick Tinsley et al., *In Defense of Evidence and Against the Exclusionary Rule: A Libertarian Approach*, 32 S.U. L. REV. 63, 64 (2004).

11. See *id.* at 68.

12. *Id.* at 64.

13. Amar IV, *supra* note 5, at 459.

14. Amar II, *supra* note 5, at 91 (saying the exclusionary rule “create[s] what I shall call an upside-down effect, providing the guilty with more protection than, and often at the expense of, the innocent.”).

15. See, e.g., Michael J. Zydney Mannheimer, *Coerced Confessions and the Fourth Amendment*, 30 HASTINGS CONST. L.Q. 57, 61 (2002) (arguing in support of the exclusionary rule as a result of a relationship between the Fourth and Fifth Amendments, but making “no pretense that [this opinion] is supported by an originalist view . . . .To the contrary, I readily concede that it might not have occurred to the Framers that coerced confessions are a Fourth Amendment issue.”). *But see*

support and promote the exclusionary rule, tend to eschew the cape of “originalism” and cede the originalist high ground to their “conservative,” tough-on-crime opponents.<sup>16</sup> Yet as this paper will establish, the Fourth Amendment exclusionary rule is soundly based in the original understandings of the Constitution and the practices of the Founding period.

## II. THE EXCLUSIONARY RULE IN CONTEMPORARY FOURTH AMENDMENT JURISPRUDENCE

The Fourth Amendment states that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures” shall not be violated, and that “no Warrants shall issue” without sworn, particularized affirmations of probable cause.<sup>17</sup> Although a number of jurists and scholars have suggested that exclusion is required by their reading of the Fourth Amendment,<sup>18</sup> most have declared that exclusion is not invoked by the plain language of the amendment. Thus, the applicability of the rule is said to be at the pleasure, or sufferance, of the nation’s contemporary policymakers, who may opt to abolish the rule when they please.<sup>19</sup>

The Supreme Court majority that imposed the rule on all American jurisdictions in 1961 did so because it viewed exclusion as required by either the Fourth Amendment or a union of the Fourth Amendment with the principles of the Fifth

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Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 663-66 (1999). Although Davies touched upon various overstatements made by modern anti-exclusion scholars regarding Founding-era Fourth Amendment remedies, he did not delve deeply into them. *Id.*

16. Cf. Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista*, 37 WAKE FOREST L. REV. 239, 273-74 (2002) (documenting the Supreme Court’s use of deceptive history to uphold an arrest for a non-jailable seat-belt violation in 2002); Roger Roots, *Are Cops Constitutional?*, 11 SETON HALL CONST. L.J. 685, 722-24 (2001) (comparing the admiration of policing by modern “conservatives” with the dearth of support for modern-style law enforcement in early America).

17. U.S. CONST. amend. IV.

18. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 648 (1961) (majority opinion) (saying without the exclusionary rule, the Fourth Amendment “might as well be stricken from the Constitution” (quoting *Weeks v. United States*, 232 U.S. 383, 393 (1914))); see also *Wolf v. Colorado*, 338 U.S. 25, 44 (1949) (Murphy, J., dissenting) (saying that the conclusion is “inescapable that but one remedy exists to deter violations of the search and seizure clause,” namely, “the rule which excludes illegally obtained evidence”); William C. Heffernan, *On Justifying Fourth Amendment Exclusion*, 1989 WIS. L. REV. 1193, 1224 (1989) (concluding that the exclusionary rule is implicitly required by the text and history of the Fourth Amendment).

19. Justice Hugo Black, widely known as the arch-textualist of his era, expressed the opinion this way: “[T]he federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate.” *Wolf*, 338 U.S. at 39-40 (Black, J., concurring).

Amendment.<sup>20</sup> However, later Supreme Court opinions have tended to paint the rule as the application of a temporary cost-benefit analysis. Accordingly, the rule might be abolished when the costs and benefits are reevaluated.<sup>21</sup>

Criticisms of the rule have generated a steady advance against its application in recent years.<sup>22</sup> Members of Congress have repeatedly attempted to limit the rule and, occasionally, even to abolish it.<sup>23</sup> Some state judges have openly proclaimed that they are not bound by the exclusionary rule and have undertaken efforts to override the rule in state courts.<sup>24</sup> Moreover, at least four members of the contemporary Roberts Court have signaled that they would abolish the rule completely.<sup>25</sup>

This paper will not delve deeply into the social costs or benefits of exclusion as many informed books and articles have.<sup>26</sup> Rather, it will address the specific question

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20. *Mapp*, 367 U.S. at 660. *Mapp* was actually a plurality decision with two concurrences, one dissent and one memorandum aligned with the dissent. Justice Harlan's dissent summed up the crude alliance that was forged among the five victorious justices: "For my Brother Black is unwilling to subscribe to [the four-member plurality's] view that the *Weeks* exclusionary rule derives from the Fourth Amendment itself, but joins the majority opinion on the premise that its end result can be achieved by bringing the Fifth Amendment to the aid of the Fourth." *Id.* at 685 (Harlan, J., dissenting) (citation omitted).

21. *See* *Herring v. United States*, 129 S.Ct. 695, 699-701 (2009) (discussing *United States v. Leon*, 468 U.S. 897 (1984)); *see also* L. Timothy Perrin et al., *It Is Broken: Breaking the Inertia of the Exclusionary Rule*, 26 PEPP. L. REV. 971, 979-87 (1999) (suggesting the exclusionary rule should be abandoned upon reevaluating its costs and impacts).

22. *See* Heather A. Jackson, *Arizona v. Evans: Expanding Exclusionary Rule Exceptions and Contracting Fourth Amendment Protection*, 86 J. CRIM. L. & CRIMINOLOGY 1201, 1218 (1996).

23. *See generally* *The Jury and the Search for Truth: The Case Against Excluding Relevant Evidence at Trial: Hearing on S.3 Before the S. Comm. on the Judiciary*, 104th Cong. 104-724 (1995) (debating bill proposing to eliminate the exclusionary rule in federal courts entirely).

24. *See, e.g.,* *Hernandez v. State*, 60 S.W.3d 106, 112-14, 115 (Tex. Crim. App. 2001) (Keller, J., dissenting) (contending that the states are not bound by *Mapp v. Ohio* because it was a mere plurality opinion and because "modern cases have rejected the notion that the Fourth Amendment requires exclusion and have instead described the rule as a judicially created prophylactic").

25. *See* Adam Liptak, *Supreme Court Edging Closer to Repeal of Evidence Ruling*, N. Y. TIMES, Jan. 31, 2009, at A1 (naming Justices Roberts, Alito, Scalia and Thomas as justices willing to abolish the exclusionary rule entirely).

26. *See, e.g.,* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.2 (1978); Fletcher N. Baldwin, Jr., *Due Process and the Exclusionary Rule: Integrity and Justification*, 39 U. FLA. L. REV. 505, 539 (1987); Donald Dripps, *The Case for the Contingent Exclusionary Rule*, 38 Am. Crim. L. Rev. 1 (2001); Jackson, *supra* note 22, at 1221-24; Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565, 620-21 (1983); Yale Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083, 1145-50 (1959); Thomas S. Schrock & Robert C. Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251, 308-09 (1975); Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in*

of whether the Framers of the Fourth Amendment envisioned its likely remedies to include exclusion of evidence obtained in its violation. To this question the answer must certainly be yes, in accordance with statements of Founding-era spokesmen and court rulings generated by American jurists during the first three generations after ratification. Such rulings either applied versions of exclusion (such as discharge of defendants) or voiced the opinion that unconstitutionally obtained evidence vitiated the criminal proceedings. The evidence supporting this conclusion is overwhelming, and contrary to claims by modern anti-exclusion scholars that “a strict nonexclusionary rule” prevailed in nineteenth-century jurisprudence, driven by “the common law courts’ paramount concern with truth-seeking and punishing the guilty.”<sup>27</sup>

As this paper illustrates: (1) there were few or no published cases on search and seizure questions in most states prior to the late nineteenth century; (2) those published cases that do exist show that searches for physical evidence were very rare because criminal trial evidence was for the most part testimonial; (3) the only exception to this dearth of early published search and seizure decisions occurred in cases of warrantless or otherwise improper arrests of suspects; and (4) in these cases, early American courts did in fact apply the remedy of exclusion by discharging the suspects entirely. Moreover, (5) the “guilt” or “innocence” of an arrestee—though often undeterminable in any case—was irrelevant to the application of such exclusionary remedies. The originalist case for the Fourth Amendment exclusionary rule is further bolstered by (6) dicta in early court opinions and non-judicial texts indicating that exclusion was the appropriate remedy in cases of illegally seized physical evidence, and (7) the strong relationship between silence rights and search and seizure protections (hence, the “intimate relation”<sup>28</sup> between the Fourth Amendment and the Fifth Amendment exclusionary rule), which was recognized in pre-ratification publications discussing search and seizure issues in depth.

Having sifted through reams of antebellum documents, the author suggests that exclusion was not only considered by the Fourth Amendment’s Framers, but that exclusion was almost certainly among the remedies for Fourth Amendment violations intended by the Amendment’s Framers in 1791. In contrast to the claims of modern anti-exclusion scholars such as Professor Amar,<sup>29</sup> *almost everything* in the “text, history, [and] structure of the Fourth Amendment” supports exclusionary remedies.<sup>30</sup>

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*Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1392 (1983).

27. Sanford E. Pitler, Comment, *The Origin and Development of Washington’s Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy*, 61 WASH. L. REV. 459, 466 (1986).

28. *Boyd v. United States*, 116 U.S. 616, 633 (1886).

29. Amar IV, *supra* note 5, at 459.

30. See Amar II, *supra* note 5, at 91 (saying that “nothing in the text, history, or structure of the Fourth Amendment supports” the exclusionary rule).

## III. THE ANTI-EXCLUSION ARGUMENT

Conventional wisdom holds that exclusion of illegally seized evidence originated in 1886 with the U.S Supreme Court's decision in *Boyd v. United States*<sup>31</sup> and was imposed as a rule governing Fourth Amendment outcomes in all federal courts in 1914 with *Weeks v. United States*.<sup>32</sup> Prior to *Boyd*, it is alleged that no jurist ever voiced the suggestion that exclusion was required where government agents violated the Constitution to obtain evidence.

Professor Amar, one of the most outspoken critics of the exclusionary rule, has authored a number of books and articles attacking the Supreme Court's rulings in *Boyd* and *Weeks*.<sup>33</sup> A renowned constitutional scholar, Amar's self-styled "originalist" interpretation of the Fourth Amendment has been recited in a number of published court opinions.<sup>34</sup>

Amar's argument is essentially that the Founders merely intended that searches and seizures be "reasonable" (apparently as determined on a case-by-case basis).<sup>35</sup> Accordingly, those who contended they were searched or seized unreasonably could only sue in *civil* court, where warrants (which Amar claims were never required to search) could be used by police to defend themselves against such lawsuits.<sup>36</sup> Instead

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31. 116 U.S. at 634-35.

32. 232 U.S. 383, 398 (1914). See D. Shane Jones, *Application of the "Exclusionary Rule" to Bar Use of Illegally Seized Evidence in Civil School Disciplinary Proceedings*, 52 WASH. U. J. URB. & CONTEMP. L. 375, 376 (1997) (claiming the Supreme Court created the exclusionary rule in *Weeks*); James Stribopoulos, *Lessons From the Pupil: A Canadian Solution to the American Exclusionary Rule Debate*, 22 B.C. INT'L & COMP. L. REV. 77, 94 (1999) (claiming the Supreme Court "introduced the exclusionary rule to American law through its 1914 decision in *Weeks*"); Captain Douglas R. Wright, *How to Improve Military Search and Seizure Law*, 116 MIL. L. REV. 157, 171 (1987) (stating *Weeks* "originated" the exclusionary rule); Christopher A. Harkins, Note, *The Pinocchio Defense Witness Impeachment Exception to the Exclusionary Rule: Combating a Defendant's Right to Use with Impunity the Perjurious Testimony of Defense Witnesses*, 1990 U. ILL. L. REV. 375, 378 (1990) (saying the Supreme Court announced the Fourth Amendment exclusionary rule in *Weeks*).

33. See, e.g., Amar I, *supra* note 5, at 788; Amar II, *supra* note 5, at 22; Amar IV, *supra* note 5, at 460-61.

34. See, e.g., *Virginia v. Moore*, 128 S.Ct. 1598, 1603-04 (2008) (citing Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 764 (1994), for the proposition that warrantless arrests were "taken for granted" by early judges); *Atwater v. City of Lago Vista*, 532 U.S. 318, 332 n.6 (2001) (citing Amar's Fourth Amendment commentary as authoritative); *City of West Covina v. Perkins*, 525 U.S. 234, 247 n.2 (1999) (Thomas, J., concurring) (citing Amar's Fourth Amendment scholarship); *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1212 (10th Cir. 2003) (citing AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 7-19 (1997), for the proposition that "[n]ot all searches lacking warrants or consent are unconstitutional under the Fourth Amendment").

35. Cf. Amar III, *supra* note 5, at 71.

36. See *id.* at 69.

of excluding incriminating evidence from the trials of “guilty” defendants, according to this argument, the Founders merely intended to compensate “innocent” victims by allowing them to seek civil damages for their troubles. The “guilty,” according to anti-exclusion scholars, had no remedy, either in their own criminal prosecutions or in any civil suit, because recovery would be prohibited by the reasonableness of an officer’s actions, and the fact of guilt would categorize a seizure as reasonable by definition.<sup>37</sup>

While some of Amar’s generalizations have been discredited,<sup>38</sup> there is much in his critique to be taken seriously.<sup>39</sup> It is true, of course, that government agents who engaged in illegal searches and seizures in the early republic were held liable for civil damages with great regularity.<sup>40</sup> In general, these lawsuits were framed not as

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37. See *supra* notes 35-36.

38. See Davies, *supra* note 15, at 573-74 (criticizing Amar’s claims that early courts applied a “generalized reasonableness” test for determining Fourth Amendment violations). Amar’s argument that the Framers of the Fourth Amendment did not intend to require warrants in any circumstances has also been thoroughly undermined by countervailing scholarship. See, e.g., Dripps, *supra* note 6, at 1603-08 (1996) (criticizing Amar’s claims); Roots, *supra* note 16, at 729-31. No scholar familiar with Founding-era law would support Amar’s claims that warrants were not required for early searches and seizures. Dozens of published antebellum decisions refute this claim alone. The citizens of early America were known to be so insistent upon the warrant requirement that they would occasionally stop an officer in the act of executing an arrest and demand to see his warrant. The 1820 South Carolina case of *City Council v. Payne*, 11 S.C.L. (2 Nott & McC.) 475 (S.C. 1820), is illustrative of a common attitude of the citizenry regarding the warrant requirement. In *City Council*, a private citizen physically rescued a suspect from a city guard, vowing that “whilst he drew the breath of life, no guard should carry a citizen to the guard-house” without a warrant. *Id.* at 476. The rescuer (*Payne*) was convicted of obstructing an officer only because the officer had arrested the suspect pursuant to a recognized exception to the warrant requirement. *Id.* at 478-79.

39. One published Founding-era case that appears to give partial support to Amar’s thesis is *Wrexford v. Smith*, 2 Root 171 (Conn. 1795). In *Wrexford*, a thief who stole tobacco from a store and ran off was pursued and arrested without warrant by a person responding to an “advertisement from the owner of the store.” *Id.* at 171. (From the given facts, it is not clear how much time elapsed between the theft and the pursuit.) When the thief sued for assault and battery and false imprisonment (after being “prosecuted and convicted of the theft”), the arrestor was found not liable. *Id.* An arrestor, wrote the court, “will be excusable provided the person taken is found guilty.” *Id.* “Stealing is a crime so odious in itself and so destructive to the well being of society, that every good citizen ought to assist in arresting the thief in his flight.” *Id.*

In general, warrants immunized searchers and seizers from civil liability. See, e.g., *Horn v. Boon*, 34 S.C.L. (3 Strob.) 307 (S.C. 1848) (refusing to hold complainants liable for initiating a prosecution against a woman accused of selling liquor without a license). But even facially valid warrants did not immunize authorities who carried out searches or seizures in an improper manner. See, e.g., *McElhenny v. Wylie*, 34 S.C.L. (3 Strob.) 284 (S.C. 1848) (holding searcher civilly liable for search carried out late at night in which sleeping couple were awakened in their bed, and a home was searched by a citizen posse unnecessarily). An otherwise lawful search would be “a mere naked trespass, under color but without the sanction of law,” if executed with unnecessary harshness and disruptiveness. *Id.* at 288.

40. In fact, early American law imposed much greater civil liability upon actors in the

constitutional claims but as tort claims such as trespass, assault and battery, false imprisonment,<sup>41</sup> or malicious prosecution.<sup>42</sup> Yet taking Amar's argument at face value essentially writes the Fourth Amendment out of the Constitution altogether, or reduces it to a "truism" in the model of the Supreme Court's occasional interpretations of the Ninth and Tenth Amendments.<sup>43</sup> Without a warrant requirement and an exclusionary rule, the Fourth Amendment becomes merely an awkwardly rewritten statement of the law of trespass, which exists in common law independent of the Constitution.<sup>44</sup>

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criminal justice system than does contemporary law. *See, e.g.,* Roots, *supra* note 16, at 733-35. Founding-era law made even judges liable for search and seizure violations. *See, e.g.,* Taylor v. Alexander, 6 Ohio 144, 147 (1833) ("And if the magistrate proceed unlawfully in issuing the process, he, and not the executive officer, will be liable for the injury."). Indeed, warrants offered no protection from civil liability in certain cases. *See* Duckworth v. Johnston, 7 Ala. 578, 580, 582 (1845) (a warrant issued pursuant to an accusation that did not constitute a crime exposed the constable, the court, and the complainant to liability; even the original complainants were liable for the execution of some improper warrants); Randall v. Henry, 5 Stew. & P. 367 (Ala. 1834) (involving a prosecutor held liable for a defective complaint); Scott v. McCrary, 1 Stew. 315 (Ala. 1828) (civil suit against arrestors); Backus v. Dudley, 3 Conn. 568 (1821) (upholding judgment in favor of pauper who was arrested without warrant by town selectmen); Pearce v. Atwood, 13 Mass. 324, 353 (1816) (upholding judgment against officer who unnecessarily executed arrest warrant on the Sabbath); Holley v. Mix, 3 Wend. 350, 353-55 (N.Y. 1829) (upholding judgment and award against constable and complainant for arresting an accused felon pursuant to a warrant that did not specifically name the party to be arrested); State v. Curtis, 2 N.C. (1 Hayw.) 543, 543 (1797) (stating officer is liable if executing a warrant beyond his jurisdiction).

41. *See* Lawson v. Buzines, 3 Del. (3 Harr.) 416, 416 (1842); Boggs v. Vandyke, 3 Del. (3 Harr.) 288, 288 (1840); Hall v. Hall, 6 G. & J. 386, 409 (Md. 1834) (holding that "[t]he constable in execution of a warrant to arrest a party, breaks another's house at his peril").

42. *See* Roots, *supra* note 16, at 729-49 (discussing numerous early state cases).

43. *Cf.* United Public Workers of America v. Mitchell, 330 U.S. 75, 95-96 (1947) (treating both the Ninth and Tenth Amendments as mere truisms without substantive power to limit Congress); United States v. Darby, 312 U.S. 100, 124 (1941) (in which the Supreme Court dismissed the Tenth Amendment as "but a truism"); *see also* Kurt T. Lash, *James Madison's Celebrated Report of 1800: The Transformation of the Tenth Amendment*, 74 GEO. WASH. L. REV. 165, 192-94 (2006) (describing the Supreme Court's occasional treatment of the Ninth and Tenth Amendments as "mere truisms," i.e., statements of the existing relationships among the states, the people, and the national government, without any distinct authority to limit government).

44. It seems axiomatic that the Framers intended the Fourth Amendment to enshrine the body of search and seizure protections, which were glorified in the most illustrious decisions and statements of the period, rather than continuing practices that were widely criticized in common discourse. *Cf.* ANDREW E. TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE 1789-1868, at 41 (2006) ("The Fourth Amendment ultimately embodied therefore a repudiation rather than a celebration of colonial search and seizure precedent."). Post-Founding jurisprudence also made clear that the Fourth Amendment (or, more properly speaking, constitutional protections against unreasonable searches and seizures at both state and federal levels) offered greater protection than the law of trespass. For example, in the 1854 Alabama case of Thompson v. State, a defendant convicted of assault for invading the home of a slave without a

Founding-era case reporters are indeed filled with civil court decisions stemming from wrongful searches and seizures, trespasses by law enforcers and false arrests.<sup>45</sup> But these published civil cases rarely indicate what pretrial or evidentiary rulings (if any) were made in their underlying criminal prosecutions (if any).<sup>46</sup> As demonstrated

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warrant argued that the slave owner's ratification of the warrantless search should make the search legal in case of criminal prosecution. 25 Ala. 41, 44 (1854). "If the search *was* unlawful, [the slave owner]'s acquiescence in and approval of it made it lawful, as in the beginning it was a mere civil trespass; and [the slave owner] being the prosecutor, whatever affects him affects the State." *Id.* Thus, the argument was that just as after-the-fact consent by the slave owner was a good defense to a civil action, "so it is to an indictment" for "[i]f, upon the facts, [the slave owner] could not recover damages, the State ought not to convict upon the same facts, because the State would get an advantage of its citizen if it were otherwise." *Id.* Yet, the Alabama Supreme Court held that it made "not the slightest difference[] that the owner of the premises consented to or acquiesced in the search." *Id.* at 48.

45. See *Findlay v. Pruitt*, 9 Port. 195, 200 (Ala. 1839) (upholding liability of arrestor for trespass and assault for arrest with insufficient cause); *Braveboy v. Cockfield*, 27 S.C.L. (2 McMul.) 270, 273 (S.C. 1841) (holding that words on the arrest warrant were insufficient to justify an arrest, thus placing liability on constable); *Colvert v. Moore*, 17 S.C.L. (1 Bail.) 549, 549 (S.C. 1830) (action against arrestor for assault and false imprisonment); *Garvin v. Blocker*, 4 S.C.L. (2 Brev.) 157, 158 (S.C. 1807) (successful suit against constable and justice of the peace). During the early 1800s, there was virtual strict liability for every search and seizure violation. See *Randall v. Henry*, 5 Stew. & P. 367 (Ala. 1834) (suggesting that someone—the magistrate, the complainant or the arrestor—was liable for every false arrest); *Reed v. Legg*, 2 Del. (2 Harr.) 173, 176 (1837) (holding that complainants are liable for procuring a search warrant that turns up nothing, even if an executing officer is protected by the warrant); *Simpson v. Smith*, 2 Del. Cas. 285 (1817) (holding person who swore out search warrant application liable, regardless of the existence of probable cause and the procedural propriety of his claims, when the arrestee was found innocent); *State v. McDonald*, 14 N.C. (3 Dev.) 468, 471-72 (1832) (officer and other defendants liable for searching a house upon inaccurate search warrant); *Harmon v. Gould, Wright* 709, 710 (Ohio 1834) (all parties responsible for invalid process were liable). Warrants were illegal if they lacked formal seals, but the lack of such seals was no defense for a complainant who instigated the issuance of a warrant. See, e.g., *Kline v. Shuler*, 30 N.C. (8 Ired.) 484, 486 (1848) (upholding liability of complainant even though constable should not have served the defective warrant).

In contrast to the legal regime of today, even the magistrates who signed invalid warrants were held liable in the civil courts of the nineteenth century. See *Hall v. Hall*, 6 G. & J. 386, 412 (Md. 1834) ("The law anxiously regards the security of a ministerial officer in serving process directed to him . . . [but] a magistrate issuing a warrant may act illegally and subject himself to an action or to a prosecution . . ."); *Miller v. Grice*, 31 S.C.L. (2 Rich.) 27 (S.C. 1845) (holding a magistrate liable for false arrest if he knowingly signs arrest warrant for a crime committed outside his jurisdiction); *Perrin v. Calhoun*, 4 S.C.L. (2 Brev.) 248, 250 (S.C. 1808) (holding magistrate liable for aiding in a trespass for wrongly endorsing an out-of-state warrant); see also *Roots*, *supra* note 16, at 698-99 (discussing gradual abandonment of the rule of strict liability for false arrest). If an officer was immunized from suit by a valid warrant, a victim had recourse against those who swore out a fruitless affidavit upon which the warrant was based. See, e.g., *Reed*, 2 Del. (2 Harr.) at 175.

46. See, e.g., *Hall v. Hall*, 6 G. & J. 386 (Md. 1834) (involving appeal of civil suit for trespass by constable and posse, with little mention of what happened in underlying prosecution); *Price v. Graham*, 48 N.C. (3 Jones) 545, 546 (1856) (saying only that the arrestee was "brought

below, the absence of a large corpus of published criminal cases voicing exclusion-type holdings should not be read as indicating that civil suits were the sole remedy for search and seizure violations. In many cases, underlying criminal cases, which generally did not survive into publication, for reasons explained below, may have been dismissed due to applications of exclusion or exclusion-like remedies (such as pretrial discharge).

Criminal procedure in the United States has literally been transformed over the course of American history.<sup>47</sup> During the late eighteenth century, when the Constitution was debated and ratified, there were no professional police officers to enforce criminal laws.<sup>48</sup> Criminal law enforcement was mostly the province of private citizens, who conducted investigations, made arrests and initiated complaints in criminal court.<sup>49</sup> Constables and sheriffs were not salaried but instead paid by user fees.<sup>50</sup> When a crime was alleged, a sheriff or constable might be given a warrant to arrest a suspect and draw upon other citizens in a *posse comitatus* to assist him.<sup>51</sup>

At the time of the American Revolution, many criminal cases were privately prosecuted without government attorneys general.<sup>52</sup> The distinction between civil and criminal cases was still emerging, and most criminal accusations were simply controversies between private parties.<sup>53</sup> Citizen grand juries investigated and indicted suspected criminals without the assistance—or even the approval—of government prosecutors.<sup>54</sup> Searches and seizures by state officials were rare because the domain of the state was substantially smaller than it is today.<sup>55</sup> Usually, a private person

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before two justices of the peace [and] discharged”).

47. See generally HANS-HERMANN HOPPE, *DEMOCRACY: THE GOD THAT FAILED* (2001) (describing growth of government as a component of democratization).

48. See *Roots*, *supra* note 16, at 687.

49. See *id.* at 687 (“Initiation and investigation of criminal cases was the nearly exclusive province of private persons. . . . The courts of that period were venues for private litigation—whether civil or criminal—and the state was rarely a party.”).

50. *Id.* at 687 & n.5.

51. See, e.g., *Hallett v. Lee*, 3 Ala. 28, 29 (1841) (holding it is the duty of a sheriff to gather as many citizen deputies as it takes to execute court mandates); *McElhenny v. Wylie*, 34 S.C.L. (3 Strob.) 284, 286 (S.C. 1848) (stating that a sheriff or deputy has power to call out a posse “whenever he is resisted, or has reasonable grounds to suspect and believe that such assistance will be necessary”).

52. See *Randall v. Henry*, 5 Stew. & P. 367 (Ala. 1834) (involving private prosecutor who launched complaint); see also *Roots*, *supra* note 16, at 689.

53. See generally LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* (1968) (indicating that the distinction between civil and criminal cases grew steadily between the sixteenth and eighteenth centuries).

54. See, e.g., *State v. Evans*, 1 Del. Cas. 251 (1800).

55. See *Roots*, *supra* note 16, at 698 (“The Framers lived in an era in which much less of the world was in ‘plain view’ of the government and a ‘stop and frisk’ would have been rare indeed.”); see also Donald A. Dripps, *Reconstruction and the Police: Two Ships Passing in the Night?*, 24 CONST. COMMENT. 533, 535 (2007) (book review) (discussing the book’s argument that “modern

would complain to a justice of the peace or a grand jury and occasionally accompany constables on the search if a warrant was issued.<sup>56</sup> When no constable was available, a justice or magistrate would deputize a private citizen to perform executive duties such as searches and arrests.<sup>57</sup> Occasionally, private citizens served and executed their own search warrants after magistrates signed them.<sup>58</sup>

Professor Thomas Y. Davies, who has studied the origins of the Fourth Amendment for many years, reminds us that the criminal justice machinery in existence in the late 1700s and early 1800s did not employ government law enforcement agents on the general scale we know today.<sup>59</sup> Many searches and arrests were in fact executed by private citizens under the authority of warrants issued by regional magistrates or pursuant to state statutes or ancient common law principles.<sup>60</sup> Because the Bill of Rights was a restriction on government, the Founders probably did not foresee that the focus of Fourth Amendment violations would someday shift from judges and legislatures to (mostly private) law enforcers themselves.<sup>61</sup> Rather, legislatures and judges were viewed as the most likely violators of the Fourth Amendment (and its state corollaries).<sup>62</sup> According to Davies, this may account for the relatively late introduction of the issue of whether to exclude wrongly seized

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law's tolerance of broad police powers conflicts with founding-era values" (citing ANDREW E. TASLITZ, *RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789-1868* (2006)).

56. See, e.g., *Reed v. Legg*, 2 Del. (2 Harr.) 173, 173, 176 (1837) (complainant liable for swearing out an affidavit for a search warrant which turned up no stolen goods; complainant accompanied officers on the search); *Simpson v. Smith*, 2 Del. Cas. 285 (1817) (complainant was sued for seeking search warrant which uncovered no stolen goods; the complaining citizen actually accompanied the officer during the search); *State v. McDonald*, 14 N.C. (3 Dev.) 468, 469 (1832).

57. See *State v. Dean*, 48 N.C. (3 Jones) 393, 395 (1856).

58. See *Reed v. Legg*, 2 Del. (2 Harr.) 173, 173, 176 (1837) (indicating that a private individual sought out and then accompanied the execution of a search warrant); *State v. Hancock*, 2 Del. Cas. 249 (1802). The search and seizure provisions of early state constitutions and the federal constitution were intended to apply to private individual searchers and seizers as well as government actors. See *Roots*, *supra* note 16, at 735.

59. Davies, *supra* note 15, at 660 ("[T]he Framers likely perceived the threat to the right to be secure in house and person in very specific terms—they feared the possibility that future legislatures might authorize the use of general warrants for revenue searches of houses.").

60. *Id.*

61. See generally *Roots*, *supra* note 16; see also Russell W. Galloway, Jr., *The Intruding Eye: A Status Report on the Constitutional Ban Against Paper Searches*, 25 *HOW. L.J.* 367, 377 n.44 (1982) ("The *Boyd* case was the first Supreme Court case to discuss the issue of paper searches because between 1790 and the Civil War, federal statutes did not authorize such searches."). The *Boyd* Court addressed the rarity of the seizure in its consideration: "[T]he act of 1863 was the first act...in this country or in England, so far as we have been able to ascertain, which authorized the search and seizure of a man's private papers . . ." *Boyd v. United States*, 116 U.S. 616, 622-23 (1886).

62. See Davies, *supra* note 15, at 660.

physical evidence into the jurisprudence of the criminal law.<sup>63</sup> Nonetheless, the broad principles upon which exclusion of physical evidence is grounded were certainly ever-present in the Founders' constructions of search and seizure protections.

#### IV. FOURTH AMENDMENT REMEDIES IN THE CONSTITUTION'S TEXT

Every originalist analysis must, of necessity, begin with scrutiny of constitutional text. It is often said that the Fourth Amendment does not lay out or prescribe its own remedy.<sup>64</sup> However, scrutiny of the Constitution as a whole provides clues to the Framers' intended remedies. There are at least three sources of potential remedies that are explicit in the Constitution: (1) the habeas corpus clause, article I, section 9, clause 2; (2) the Seventh Amendment right to civil jury trials—and its implication of civil remedies; and (3) the Fifth Amendment's description of an exclusionary rule in the context of self-incriminatory statements.<sup>65</sup>

*The Federalist* contains an enunciation of a fourth possibility: criminal charges against officials who violate the Constitution's search and seizure protections.<sup>66</sup> In *Federalist* No. 83, Alexander Hamilton (writing as Publius) indicated that "[w]ilful abuses of a public authority [such as the aggressive revenue searches that the Framers were familiar with], to the oppression of the subject, and every species of official extortion," should be remedied by "indict[ment] and punish[ment] according to the circumstances of the case."<sup>67</sup>

Scrutiny of early primary sources does indeed unearth cases in which authorities were criminally prosecuted for violating search and seizure standards.<sup>68</sup> In some cases, wrongful arrestors were charged with assault and battery upon arrestees.<sup>69</sup> In

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63. *See id.* at 663.

64. *See* Bradford P. Wilson, *The Fourth Amendment as More Than a Form of Words: The View from the Founding*, in *THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING* 151, 154 (Eugene W. Hickock, Jr. ed., 1991).

65. U.S. CONST. amend. V ("[N]or shall [any person] be compelled in any criminal case to be a witness against himself....").

66. *THE FEDERALIST* NO. 83, at 563 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

67. *Id.*; *see also* TASILITZ, *supra* note 44, at 57.

68. *See* *State v. Wagstaff*, 105 S.E. 283, 283-84 (S.C. 1920) (holding official criminally liable in a prosecution for assault); *State v. Armfield*, 9 N.C. (2 Hawks) 246, 246-47 (1822) (finding constable criminally liable for being too forceful and going beyond the scope of a warrant).

69. *State v. Brown*, 5 Del. (5 Harr.) 505, 506 (1854) (involving an officer who was criminally indicted and convicted for entering an occupied dwelling at night without warrant while chasing a fleeing felon); *State v. Mahon*, 3 Del. (3 Harr.) 568, 569 (1841) (finding arrestor lacked sufficient authority and was unduly forceful); *Long v. State*, 12 Ga. 293, 295-96 (1852) (involving vigilantes who were criminally charged with theft for wrongly taking property from a suspected criminal without warrant).

other cases, even magistrates and complainants were criminally prosecuted for violating the search and seizure rights of arrestees.<sup>70</sup>

It is noteworthy that Blackstone's *Commentaries*, published in the 1760s and read widely by the Framers, suggested that an appropriate remedy against officials who wrongfully seized persons and sent them to overseas penal colonies was the penalty of *praemunire*, the "incapacity to hold any office, without any possibility of pardon."<sup>71</sup> Blackstone wrote that lesser degrees of false imprisonment should be punished by criminal indictment, fines and imprisonment.<sup>72</sup> These suggested remedies should be kept in mind when more recent scholars and jurists such as Chief Justice Warren Burger describe the exclusionary rule as a "drastic" remedy.<sup>73</sup>

The suggested remedies described above all further the aim of the Fourth Amendment that people be "secure" from the threat of unreasonable search and seizure. But the exclusionary rule is distinguishable from other collateral remedies in that it impedes or halts criminal prosecutions *before* illegally seized evidence can be used at a trial. Only exclusion—or exclusion-like remedies such as total discharge—truly "secures" people from illegal searches and seizures by restoring the *status quo ante*.<sup>74</sup>

#### V. SEARCH AND SEIZURE REMEDIES OF THE FOUNDING ERA ARE DIFFICULT TO ASCERTAIN BY READING CASE LAW

For a variety of reasons, the evidentiary rulings applied in the criminal courts of early America are difficult to know.<sup>75</sup> For one thing, the law of evidence itself was relatively new and in a stage of rapid development during the period.<sup>76</sup> According to Professor Frederick Schauer, "There was no systematic attempt to compile the various bits and pieces of evidentiary rulings into a distinct topic until well into the

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70. *Jones v. Commonwealth*, 40 Va. (1 Rob.) 748, 753 (1842) (upholding criminal liability for the informer and the constable, but overturning conviction of magistrate who issued invalid warrant).

71. 4 WILLIAM BLACKSTONE, *COMMENTARIES* \*218.

72. *Id.*

73. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 413 (1971) (Burger, C.J., dissenting) (writing that society pays a high price "for such a drastic remedy").

74. Thus, John H. Wigmore (author of the foremost treatise on evidence) complained that the remedy of exclusion "rests on a reverence for the Fourth Amendment so deep and cogent that its violation will be taken notice of, at any cost of other justice, and even in the most indirect way." John H. Wigmore, *Using Evidence Obtained by Illegal Search and Seizure*, 8 A.B.A. J. 479, 482 (1922).

75. Cf. David E. Steinberg, *The Original Understanding of Unreasonable Searches and Seizures*, 56 FLA. L. REV. 1051, 1072 (2004) ("Prior to *Boyd v. United States*, constitutional search and seizure provisions probably were discussed in fewer than fifty opinions.").

76. Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 168 (2006).

eighteenth century.”<sup>77</sup> And it is often forgotten that judicial doctrines now taken for granted—such as, judicial review of legislation or *stare decisis*—were fledgling notions at the time of the Founding.<sup>78</sup>

Most state criminal cases of the period were overseen and disposed of by justices of the peace who did not preside over courts of record.<sup>79</sup> Even judgments and verdicts were recorded only haphazardly, and an offender could easily escape the shame of conviction in one community by relocating to another.<sup>80</sup>

Of course, it is from published case reports that modern legal researchers obtain most of their knowledge about rules of law and evidence that were applied in early American courts. But reports of pre-Revolutionary American appellate cases were virtually nonexistent in most of the American colonies.<sup>81</sup> More importantly, *appellate* courts of the late eighteenth and early nineteenth centuries often had little or no jurisdiction over criminal cases,<sup>82</sup> even where legal systems offered appellate review of civil cases.<sup>83</sup> Thus, appellate *criminal* opinions on *evidentiary* matters were rare even when decisions in criminal trial courts were otherwise recorded.<sup>84</sup> Of the paltry set of published criminal cases from the antebellum period dealing with

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77. *Id.*

78. *See* Commonwealth v. Carver, 26 Va. (5 Rand.) 660, 661-62 (1827) (holding that decisions of higher courts are binding on lower courts).

79. *See, e.g.*, Ellis v. White, 25 Ala. 540, 541-42 (1854).

80. *See* Roger Roots, *When the Past is a Prison: The Hardening Plight of the American Ex-Convict*, 1 JUST. POL'Y J., Fall 2004, at 8, <http://www.cjcj.org/jpj/2007/08/justice/policy/journal/3> (offering some early American anecdotes).

81. BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 7 (1993) (saying “no meaningful reporting of cases in the modern sense existed” during the late eighteenth or early nineteenth centuries). *See* EPHRAIM KIRBY, REPORTS OF CASES ADJUDGED IN THE SUPERIOR COURT OF THE STATE OF CONNECTICUT FROM THE YEAR 1785, TO MAY, 1788, WITH SOME DETERMINATIONS IN THE SUPREME COURT OF ERRORS (1789) (the first full-fledged official case reporter published in the colonies); John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 573 (1993) (referring to Kirby’s Reports as America’s first case reports). KIRBY’S REPORTS published rulings from 1785 to 1788, an important period. Aside from KIRBY’S REPORTS, only a handful of ratification-era lawyers’ journals have been preserved, and collections of reports of trials reported in early newspapers or books are found here and there. *See, e.g.*, THE SUPERIOR COURT DIARY OF WILLIAM SAMUEL JOHNSON 1772-1773 (John T. Farrell ed., 1942) (published diary of a judge and authentic Framers of the Constitution).

82. *See* Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLAL. REV. 503, 503 (1992) (conventional wisdom is that “[c]riminal appeals did not exist at the time of the Founding”).

83. *See, e.g., id.*; 6 Del. (1 Houst.) intr. n. (1920) (stating that Delaware offered no appeal whatsoever from its criminal courts until the late nineteenth century).

84. *See, e.g.*, Ned v. State, 7 Port. 187, 201 (Ala. 1838) (stating appellate jurisdiction is reserved for civil cases); Humphrey v. State, Minor 64, 65 (Ala. 1822) (holding that the Alabama Supreme Court has no general criminal appellate jurisdiction without passage of a specific act granting such jurisdiction by the state legislature).

evidence, the number with discernable search and seizure issues is smaller still.<sup>85</sup> And remember that the U.S. Supreme Court lacked general appellate jurisdiction over even federal criminal cases for almost the entire first century of the Bill of Rights.<sup>86</sup>

There is another reason for the paucity of early published cases involving the admission of unconstitutionally seized physical evidence: the fact that criminal prosecutions *almost never utilized physical evidence at all*.<sup>87</sup> Law enforcers of the early Republic rarely executed searches for physical property except when the property was alleged to be stolen, and then only for the purpose of returning it to its owner(s).<sup>88</sup>

Thus, almost nothing is easier for a scholar than to proclaim that a given evidentiary doctrine is not found in published criminal cases from the Founding period.<sup>89</sup> Yet consider the *hauteur* with which modern-day originalists assert a claim of early ubiquity for their “strict nonexclusionary rule” under the “common law”:<sup>90</sup>

Supporters of the exclusionary rule cannot point to a single major statement from the Founding—or even the antebellum or Reconstruction eras—supporting Fourth Amendment exclusion of evidence in a criminal trial.<sup>91</sup>

Not even a “single major statement” “supporting” Fourth Amendment exclusion? This is a challenge that deserves a response. As a preliminary matter, the seemingly broadly worded boast above is actually quite conditional. Every Fourth Amendment scholar recognizes that a vast majority of early recorded statements about the Fourth Amendment (or, in the broader sense, search and seizure law) involved arrest warrants or seizures of persons rather than search warrants or searches

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85. Steinberg, *supra* note 75, at 1072 (“Prior to *Boyd v. United States*, constitutional search and seizure provisions probably were discussed in fewer than fifty opinions.”).

86. See Amar II, *supra* note 5, at 146.

87. Davies, *supra* note 15, at 627 (“In the late eighteenth century, searches were still of limited utility to criminal law enforcement. The principal possessory offense was possession of stolen property. In the absence of forensic science, items other than stolen property would usually have been of limited evidentiary value.”). Nor is this proposition only of recent notice. See 2 JAMES WILSON, THE WORKS OF JAMES WILSON 163 (James DeWitt Andrews ed., Chicago, Callaghan & Co. 1896) (authored circa 1790) (“The principal species of evidence, which comes before juries, is the testimony of witnesses.”).

88. Consider the example of *Reed v. Legg*, 2 Del. (2 Harr.) 173, 173-74 (Del. 1837), where the facts indicate that allegedly stolen goods recovered during a search were immediately returned to their alleged rightful owner.

89. Sources of law known to the Framers themselves consisted primarily of treatises by English jurists such as Hale and Blackstone. In colonial America “the reporting of any decision was unusual,” and “this state of affairs lasted well into the early national period.” Langbein, *supra* note 81, at 572-73 (citation omitted).

90. Pitler, *supra* note 27, at 466.

91. Amar I, *supra* note 5, at 786.

for physical evidence.<sup>92</sup> And even where early search warrants sought physical property, they almost always involved searches for stolen property—again, not to be used for “evidence” so much as to be returned to its rightful owner.<sup>93</sup> Moreover, the decision whether to exclude the ill-gotten gains of searches or seizures—both today and in the past—rarely occurs “in a criminal trial” but generally occurs in pretrial proceedings.

As shown below, *major statements* supporting the concept of Fourth Amendment exclusion and suggesting that such a remedy must naturally develop within the then-gestational law of evidence *abound* in writings and decisions of the Founding era, as well as in the antebellum and Reconstruction eras. Such statements can chiefly be categorized as accompaniments to a trio of jurisprudential doctrines that have long been lost to history (or consolidated into the modern exclusionary rule): (1) pretrial habeas corpus discharge as a search and seizure remedy, which has now been abolished, (2) the “mere evidence rule,” which forbade searches for property owned by another person unless it was stolen or contraband (and has likewise been abolished) and (3) numerous evidentiary privileges that disqualified large amounts of early trial evidence, privileges which—in some applications—operated as exclusionary rules (and which have since been abolished or severely limited).<sup>94</sup>

Consider the 1787 Connecticut Superior Court decision in *Frisbie v. Butler*. *Frisbie* was published in the *first volume* of the *first case reporter* ever printed in America.<sup>95</sup> It involved a search warrant issued upon the complaint of a private person (Butler) who lost “about twenty pounds of good pork” under suspicious circumstances.<sup>96</sup> Butler suspected Benjamin Frisbie of nearby Harwinton, but the search warrant was written out in very general terms.<sup>97</sup> It commanded another private person, John Birge, to accompany Butler and “search all suspected places and persons that the complainant thinks proper” until the pork was found and a suspect was made to “appear before some proper authority.”<sup>98</sup> They arrested Frisbie “[b]y

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92. See Davies, *supra* note 15, at 627.

93. See *id.*

94. See generally *infra* notes 292-314 and accompanying text.

95. See Langbein, *supra* note 81, at 573 (referring to KIRBY’S REPORTS as the first American case reporter).

96. *Frisbie v. Butler*, 1 Kirby 213, 213 (Conn. 1787).

97. Constitutional search and seizure provisions require warrants to state with specificity “the place to be searched, and the persons or things to be seized.” U.S. CONST. amend. IV. However, the warrant in *Frisbie v. Butler* gave searchers authority to “search all suspected places and persons that the complainant thinks proper” and to arrest unnamed perpetrators. 1 Kirby at 213-14.

98. *Frisbie*, 1 Kirby at 213-14.

virtue of this warrant” and “brought [him] before the [issuing] justice,” who found him guilty of theft.<sup>99</sup>

On appeal by writ of error (there being no direct appeals from Connecticut criminal judgments at the time), Frisbie argued six grounds of illegal procedure—three of which involved flaws in the search warrant.<sup>100</sup> A unanimous panel of the Connecticut Superior Court<sup>101</sup> reversed Frisbie’s conviction—apparently on grounds that the facts alleged did not rise to the level of theft: “The complaint . . . contained no direct charge of theft, . . . nor, indeed, does it appear to have been theft that [Frisbie] was even suspected of, but only a taking away of the plaintiff’s property, which might amount to no more than a trespass.”<sup>102</sup>

In dicta, the Court observed that the search warrant was “clearly illegal” because it did not specify the places to be searched or the person(s) to be seized.<sup>103</sup>

By its own terms, the *Frisbie v. Butler* Court recognized that an illegal search warrant “vitiate” proceedings in a criminal case in 1787. Is this not a “major statement” “supporting” Fourth Amendment exclusion? Certainly, the *Frisbie* dicta contradict the assertions of modern anti-exclusionists that jurists of the Founding period considered a “doctrine of non-exclusion” as well settled. Indeed, the *Frisbie* case establishes that exclusion, or remedies similar to exclusion which “vitiate the proceedings upon the arraignment,” were on the table for consideration at the time of the Fourth Amendment’s ratification. *Frisbie* predated the first case generally cited as representing the “common law rule” of nonexclusion by more than a half century.<sup>104</sup>

Major statements supporting the Fourth Amendment exclusionary rule were much more than mere dicta; early courts did in fact exclude unconstitutionally seized persons from criminal actions. Dozens of early reported cases find judges imposing the ultimate exclusionary sanction: discharge.<sup>105</sup> Such discharges occurred both as applications of that powerful yet murky remedy known as habeas corpus as well as by impositions of courts’ inherent powers to manage and dispose of matters improperly brought before them.<sup>106</sup>

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99. *Id.* at 214.

100. *Id.*

101. The opinion states it was issued “[b]y the whole Court,” although it is not clear how many judges participated. *Id.* at 215.

102. *Id.*

103. *Id.*

104. See Pitler, *supra* note 27, at 466 n.36 (“The earliest statement of the common law rule came in *Commonwealth v. Dana*, 43 Mass. 329 (2 Met. 1841)...”); Davies, *supra* note 15, at 664 n.318 (identifying the 1841 case of *Commonwealth v. Dana* as the first American appearance of a court holding suggesting that courts may admit illegally seized evidence).

105. See, e.g., *Sturdevant v. Gaines*, 5 Ala. 435, 436 (1843) (upholding judgment for malicious prosecution where a criminal suspect had been arrested without probable cause and released by pretrial habeas corpus).

106. See generally Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735 (2001).

An 1814 Connecticut case entitled *Grumon v. Raymond* illustrates the Founders' interpretation of search and seizure protections. *Grumon* involved a criminal complaint alleging a theft of goods and a search warrant directing investigators to search "the premises of Aaron Hyatt . . . and other suspected places, houses, stores or barns . . . and also to search such persons as are suspected . . . and arrest the person suspected" if the stolen goods were found.<sup>107</sup> The stolen goods were apparently located at Hyatt's store in Wilton, Connecticut, and five suspects were arrested and brought before the issuing justice.<sup>108</sup> But the search warrant was clearly too general, and the prosecution apparently ended then and there *as a consequence of the flawed warrant*.<sup>109</sup> "The persons arrested demurred to the complaint and warrant; and the justice adjudged the same to be insufficient, and taxed costs against the complainant."<sup>110</sup>

These stated facts leave many questions about the criminal proceedings unanswered. (The published *Grumon v. Raymond* opinion stemmed from an appeal of a civil judgment that followed the dismissal of the original criminal case.) However, we know that (1) both the physical evidence and the suspects were apparently discharged entirely when the illegality of the search warrant was recognized, (2) even though the recovered evidence was apparently the stolen property which was sought.<sup>111</sup> Moreover, (3) one of the arrestees successfully sued both *the justice of the peace* who issued the warrant and *the constable* who executed the warrant for trespass, and (4) Connecticut's highest court upheld a civil judgment against both the justice and the constable.<sup>112</sup> Thus, both exclusionary remedies and civil remedies were applied—and with much more force than the way they operate today.

Such extreme applications of exclusionary and civil remedies would be unimaginable in today's legal practice. But they clearly illustrate the remedies intended or sanctioned by the Founding generation. The Connecticut Supreme Court panel that upheld the civil judgment against the constable and justice was staffed by *bona fide* Founding Fathers such as Zephaniah Swift, who had been a member of the Connecticut legislature when it voted to approve the U.S. Constitution in 1788.<sup>113</sup> Justice Simeon Baldwin, also on the *Grumon* panel, was the son-in-law of Roger Sherman, a delegate to the federal Constitutional Convention of 1787 and the only man to sign all four of America's great Founding documents: the Articles of

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107. *Grumon v. Raymond*, 1 Conn. 40, 41 (1814).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 40-41.

112. *Id.* at 40-41, 54.

113. See George E. Hinman, *Zephaniah Swift, in FOUNDERS AND LEADERS OF CONNECTICUT 1633-1783*, at 293, 294 (Charles Edward Perry ed., 1934) (describing Zephaniah Swift's early political career).

Association, the Declaration of Independence, the Articles of Confederation and the Constitution.<sup>114</sup> Another member of the panel, John Trumbull, had studied law under John Adams and attended the Continental Congress in Philadelphia.<sup>115</sup> Chief Justice Tapping Reeve founded the first proprietary law school in the United States, the Litchfield Law School in Litchfield, Connecticut, an institution that trained three future Supreme Court justices and future Vice Presidents Aaron Burr (Reeve's brother-in-law) and John C. Calhoun.<sup>116</sup> The attorney for the plaintiff in the *Grumon* case was Roger Minott Sherman, whose uncle was the Roger Sherman already mentioned.<sup>117</sup> If these justices and lawyers disagreed with the exclusionary remedies that were applied in the underlying criminal proceedings, or knew John Adams or Roger Sherman (both of whom were drafters of language that became parts of the Constitution, if not the Fourth Amendment)<sup>118</sup> to be of the opinion that "a strict nonexclusionary rule" required the admission of "all competent and probative evidence regardless of its source,"<sup>119</sup> the *Grumon* case would have provided a good opportunity to say or write so.

#### VI. PRETRIAL WRITS OF HABEAS CORPUS

Lost in the modern discussion of Fourth Amendment remedies is the fact that one ancient remedy—the pretrial writ of habeas corpus—once operated as something of an exclusionary rule in search and seizure cases but has since been stripped of its Founding-era substance. Today we know habeas corpus as a narrow, post-conviction remedy applied mostly as a sentence-review mechanism.<sup>120</sup> But the Framers viewed habeas corpus as primarily a pretrial remedy that was often applied in search and

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114. LEWIS HENRY BOUTELL, *THE LIFE OF ROGER SHERMAN* 165 (Chicago, A.C. McClurg & Co. 1896).

115. *The Connecticut Wits: John Trumbull (1750-1831), Timothy Dwight (1752-1817), Joel Barlow (1754-1812)*, in *AMERICAN LITERATURE SURVEY: COLONIAL AND FEDERAL TO 1800*, at 483, 484 (Milton R. Stern & Seymour L. Gross eds., 1968).

116. *See generally* MARIAN C. MCKENNA, *TAPPING REEVE AND THE LITCHFIELD LAW SCHOOL* (1986).

117. WILLIAM A. BEERS, *A BIOGRAPHICAL SKETCH OF ROGER MINOTT SHERMAN* (Bridgeport, J.H. Cogswell 1882).

118. John Adams was overseas serving as Ambassador to England during the Constitutional Convention. However, the Fourth Amendment contains language originally drafted by Adams which first appeared in the 1780 Massachusetts Constitution. *See* Davies, *supra* note 15, at 566 n.25 (stating that "virtually all of the language in the Fourth Amendment, including 'unreasonable searches and seizures,' had appeared as of the 1780 Massachusetts provision" drafted by Adams).

119. Pitler, *supra* note 27, at 466.

120. Allen E. Shoenberger, *The Not So Great Writ: The European Court of Human Rights Finds Habeas Corpus an Inadequate Remedy: Should American Courts Reexamine the Writ?*, 56 *CATH. U. L. REV.* 47, 56 (2006) ("[T]he ambit of the writ has been greatly limited—some would say to the virtual vanishing point.").

seizure cases.<sup>121</sup> Two centuries of relentless legislative attacks upon the “Great Writ” have confined this remedy to an increasingly narrow corner.<sup>122</sup>

As Professor Amar himself acknowledges, habeas corpus was “the original Constitution’s most explicit reference to remedies.”<sup>123</sup> The habeas corpus clause—which appears in Article I of the Constitution and thus preceded the Bill of Rights by two years—provided that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the Public Safety may require it.”<sup>124</sup> For generations prior to 1789, habeas corpus was the means for challenging unlawful detention procedures and demanding the release of inmates.<sup>125</sup> More importantly for our present discussion, habeas corpus operated as an antebellum exclusionary rule—except that it was *more powerful* than the modern exclusionary rule, which functions as a mere rule of evidence.

Under the common law, an inmate seized or held illegally could petition the nearest court for a writ of habeas corpus to release him.<sup>126</sup> In cases where the inmate had no access to a court, a friend or representative could step in and file such a petition.<sup>127</sup> A court receiving a habeas petition generally called an immediate hearing to inquire into the lawfulness of the inmate’s custody.<sup>128</sup> Typically, the official having custody of the inmate would be called upon to bring the inmate before the court and

121. See Arkin, *supra* note 82, at 535, 536 (finding that “habeas corpus was primarily a pretrial remedy” during the early 1800s); ROLLIN C. HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY, AND ON THE WRIT OF HABEAS CORPUS AND THE PRACTICE CONNECTED WITH IT: WITH A VIEW OF THE LAW OF EXTRADITION OF FUGITIVES 182 (Albany, W.C. Little & Co. 1858) (quoting *In re Carlton*, 7 Cow. 471 (1827)) (“Any person illegally detained has a right to be discharged, and it is the duty of this court to restore him to his liberty.”).

122. See James Robertson, Lecture, Quo Vadis, *Habeas Corpus?*, 55 BUFF. L. REV. 1063, 1080 (2008) (saying that after 1920, habeas corpus “began its transition into what it mostly is today—a legal tool for bringing post-conviction, collateral challenges in criminal cases.”).

123. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1509 n.329 (1987).

124. U.S. CONST. art. I, § 9, cl. 2.

125. WILLIAM S. CHURCH, A TREATISE ON THE WRIT OF HABEAS CORPUS § 87 (2d ed., San Francisco, Bancroft-Whitney 1893).

126. See, e.g., *Porter v. Porter*, 53 So. 546, 547 (Fla. 1910) (“The writ of habeas corpus is a common-law writ of ancient origin designed as a speedy method of affording a judicial inquiry into the course of any alleged unlawful custody of an individual or any alleged unlawful actual deprivation of personal liberty.”); *Ex parte Sullivan*, 138 P. 815, 821 (Okla. Crim. App. 1914) (saying the writ is granted to inquire into all cases of illegal imprisonment); see also *Sims v. M’Lendon*, 34 S.C.L. (3 Strob.) 557, 557 (S.C. 1849) (involving suspect released from jail without indictment after a defective arrest).

127. See Caroline Nasrallah Belk, Note, *Next Friend Standing and the War on Terror*, 53 DUKE L.J. 1747, 1750-54 (2004) (discussing the history of so-called next-friend standing in habeas corpus cases).

128. See *People ex rel. McCanliss v. McCanliss*, 175 N.E. 129, 129 (N.Y. 1931) (“By immemorial tradition the aim of habeas corpus is a justice that is swift and summary.”).

explain the situation.<sup>129</sup> The merits of a criminal accusation—any issues relating to the guilt of the offender—were irrelevant to a habeas corpus proceeding.<sup>130</sup> If a court found a constitutional or legal violation regarding an inmate's custody, it could release the inmate from custody.<sup>131</sup>

In eighteenth- and early nineteenth-century American jurisdictions, someone who was improperly arrested, such as by unnecessary violence or an incomplete or invalid warrant, had the right to demand his release from incarceration via habeas corpus.<sup>132</sup> Thus, in 1796, only five years after the Fourth Amendment became part of the Constitution, the North Carolina Supreme Court upheld the discharge of a debtor arrested pursuant to an illegal warrant.<sup>133</sup> Because the warrant in *Lutterloh v. Powell* did not specify that the debtor owed enough funds to qualify for arrest and detention (although he may have owed a sufficient amount), “the arrest was illegal, and releasing the Defendant in the warrant was proper and what [the trial judge] ought to have done.”<sup>134</sup>

Surviving records suggest that such discharges were fairly routine although cases were reported only sporadically.<sup>135</sup> Persons were released, for example, when

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129. See *Porter v. Porter*, 53 So. 546, 547 (Fla. 1910) (“The writ requires the body of the person alleged to be unlawfully held in custody or restrained of his liberty to be brought before the court that appropriate judgment may be rendered upon judicial inquiry into the alleged unlawful restraint.”).

130. See *Ex parte Tong*, 108 U.S. 556, 559 (1883) (the purpose of a habeas inquiry “is not to inquire into the criminal act which is complained of, but into the right to liberty notwithstanding the act”); 20 AM. JUR. *Trials* § 3, at 13 (1973) (“Moreover, the guilt or innocence of the petitioner is in no way brought into question . . .”).

131. See 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 119 (2d ed., London, Samuel Brooke 1826). As stated by Chitty:

Indeed whenever a person is restrained of his liberty, by being confined in a common gaol [jail], or by a private person, whether it be for a criminal or civil cause, and it is apprehended that the imprisonment is illegal, he may regularly by habeas corpus have his body, and the proceedings under which he is detained, removed to some superior jurisdiction, having authority to examine the legality of the commitment; and on the return, he will be either discharged, bailed, or remanded.

*Id.*

132. See *Ex parte Beatty*, 12 Wend. 229, 231-33 (N.Y. 1834) (involving suspect discharged due to irregular process); *Nelson v. Cutter*, 17 F. Cas. 1316, 1316 (C.C.D. Ohio 1844) (No. 10,104) (discharging defendants due to defect in arrest affidavit); *Commonwealth v. Alexander*, 6 Binn. 176, 176-77 (Pa. 1813) (discharging debtor due to wrongful arrest).

133. See *Lutterloh v. Powell*, 2 N.C. (1 Hayw.) 307, 307-08 (1796).

134. *Id.* at 307, 308.

135. See *Arkin*, *supra* note 82, at 535-36 (“The difficulty in ascertaining state habeas practice in the antebellum period partly results from the fact that habeas decisions were reported sporadically at best, especially by the lower courts where petitions for the writ were entertained most frequently.”); see also *In re Reynolds*, 20 F. Cas. 592, 595 (N.D.N.Y. 1867) (No. 11,721) (“During my own service as judge in a state court, I exercised the power of discharging minors held under

warrants failed to specify their names or the amount of their debts or were otherwise in improper form.<sup>136</sup> Discharge was also warranted if an arrest was executed outside the territorial jurisdiction where the arrest warrant had been issued.<sup>137</sup>

In 1812, the Supreme Court of Appeals of Virginia considered the case of a debtor arrested for debts without a proper warrant.<sup>138</sup> A defense attorney named Wickham argued that “[t]he defendant is entitled to a writ of habeas corpus if there be no written warrant justifying his detention.”<sup>139</sup> The Court held that without sufficient warrant of detention the debtor-prisoner was entitled to complete discharge.<sup>140</sup>

In *Jones v. Commonwealth*, an 1842 Virginia case, a suspect arrested and jailed for perjury pursuant to an invalid warrant challenged the seizure of his person.<sup>141</sup> A Virginia judge granted the writ, excluding the wrongfully seized person from custody based on the illegality of the warrant: “Whereupon, it appearing to the court that the said warrant had been illegally issued, and that [the suspect] was illegally detained in custody thereon, it was ordered that he be discharged out of the custody of [the constable] and that the said [constable] pay the costs . . . .”<sup>142</sup> The defendant later succeeded in having the constable who arrested him, the magistrate who issued the warrant and the original complainant charged with criminal assault.<sup>143</sup>

Defects in warrants issued during the early nineteenth century generally justified the dismissal of all proceedings.<sup>144</sup> The Supreme Court of Alabama, in *Hemphill v. Coates* (1833), even struck down the application of a statute that purported to require adjudication of matters regardless of “defects or informality” of process.<sup>145</sup> Early American courts routinely discharged defendants arrested by authorities lacking proper paperwork, or who were arrested on charges for which the courts did not have

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invalid enlistments in repeated instances . . . In most of these instances not even a newspaper notice of the case was ever published.”)

136. See *Sims v. M'Lendon*, 34 S.C.L. (3 Strob.) 557, 557 (S.C. 1849) (involving suspect released from jail without indictment after a defective arrest); *M'Clintic v. Lockridge*, 38 Va. (11 Leigh) 253, 253, 258 (1840) (upholding issuance of habeas corpus writ for a prisoner arrested pursuant to an invalid escape warrant).

137. See *Miller v. Grice*, 30 S.C.L. (1 Rich.) 147, 147 (S.C. 1844) (describing habeas corpus discharge of defendant arrested on a South Carolina warrant for a crime committed in North Carolina; defendant later sued and recovered against the magistrate who signed the warrant, *Miller v. Grice*, 31 S.C.L. (2 Rich.) 27, 31-32, 36 (S.C. 1845)).

138. See *Green v. Garrett*, 17 Va. (3 Munf.) 339 (1812).

139. *Id.* at 343 (argument of Wickham).

140. *Id.* at 344.

141. 40 Va. (1 Rob.) 748 (1842).

142. *Id.* at 750.

143. *Id.*

144. *Hemphill v. Coates*, 4 Stew. & P. 125 (Ala. 1833) (quashing and dismissing case after judgment on ground that underlying arrest warrant was irregular and defective).

145. *Id.* at 128.

jurisdiction.<sup>146</sup> There were also antebellum cases in which failure to introduce an arrest warrant at trial resulted in total discharge.<sup>147</sup>

If ever there were “major statements” supporting the proposition that the Founders intended and assumed that wrongly seized persons, papers and effects should be excluded from use by authorities in subsequent criminal prosecutions, they can be found in the first two Supreme Court cases ever to mention the Fourth Amendment. In the 1806 case of *Ex parte Burford*, the Supreme Court was asked to grant the release of a local scoundrel from incarceration via habeas corpus on grounds that the man had suffered a combination of constitutional improprieties.<sup>148</sup> Burford, who was apparently a vice merchant of some type in the District of Columbia,<sup>149</sup> was arrested pursuant to a warrant alleging he was “an evil doer and disturber of the peace” and demanding that he provide sureties or bond money before he was released.<sup>150</sup>

Because this case arose in the District of Columbia, where federal courts had jurisdiction, *Burford* provides a rare (and often overlooked) glimpse into how the Framers viewed the scope of the Fourth Amendment. The Marshall Court was “unanimously of opinion that the warrant of commitment was illegal for want of stating some good cause certain, supported by oath,” and ordered Burford released.<sup>151</sup> It was the first Supreme Court decision ever to mention the Fourth Amendment, which the Court referred to as “the 6th article of the amendments.”<sup>152</sup> While the written order in *Burford* can be interpreted in different ways, it must certainly be read as a *major statement supporting* the proposition that jurists of the Founding Era—indeed, the Founders themselves<sup>153</sup>—regarded Fourth Amendment violations (at least

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146. See, e.g., *In re Stacy*, 10 Johns. 328, 334 (1813) (per curiam) (releasing civilian arrested for treason by military authorities due to lack of jurisdiction); *Miller v. Grice*, 30 S.C.L. (1 Rich.) 147, 147-48 (S.C. 1844) (describing habeas corpus discharge of defendant arrested by warrant outside the jurisdiction where the alleged crime was committed).

147. For example, in 1850, the Georgia Supreme Court reversed the murder conviction of an African-American slave because no evidence of a valid charging warrant was admitted into evidence during the prosecution’s case at trial. *Judge v. State*, 8 Ga. 173 (1850). Although a valid warrant charging murder existed, the warrant was not introduced until after the defense moved for a directed verdict after the closing of the prosecution’s case. *Id.* at 176. The trial court admitted the warrant; the Supreme Court reversed. *Id.* at 176-77.

148. *Ex parte Burford*, 7 U.S. (3 Cranch) 448 (1806).

149. *Id.* at 449-50. The opinion provides few specific details of Burford’s allegedly objectionable conduct; however, the Court at one point addresses the issue of how authorities should properly deal with a “person of ill fame.” *Id.* at 452-53.

150. *Id.* at 450-52.

151. *Id.* at 453.

152. *Id.* at 451.

153. The panel of justices that decided *Burford* included William Cushing, William Paterson, Bushrod Washington, Samuel Chase, John Marshall and William Johnson. Cushing had been a Massachusetts judge during the Revolutionary and ratification periods. Paterson actually signed the

in cases of wrongful seizures of persons) as meriting total exclusion from custody, regardless of the “guilt” of suspects.<sup>154</sup> At the very least, *Burford* mocks and refutes pronouncements of the more recent Roberts Court, in cases such as *Hudson v. Michigan*<sup>155</sup> and *Herring v. United States*,<sup>156</sup> that exclusion “has always been our last resort, not our first impulse.”<sup>157</sup>

Barely a year after its decision in *Burford*, the Supreme Court briefly addressed the Fourth Amendment a second time in a case entitled *Ex parte Bollman*.<sup>158</sup> *Bollman* involved the contentious treason accusations by the Jefferson Administration against former Vice President Aaron Burr, following Burr’s exploits in Louisiana Territory and the western frontier.<sup>159</sup> Modern legal scholars cite *Bollman* mostly for its narrow construction of treason and its broad construction of habeas corpus.<sup>160</sup> For our purposes, the majority opinion provides insight into the original intended remedies for Fourth Amendment violations.

The majority opinion, authored by Chief Justice Marshall, ordered two acquaintances of Burr (*Bollman* and *Swartwout*) released via writ of habeas corpus after examining the stated grounds for arresting the men for treason.<sup>161</sup> Marshall

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Constitution as a convention delegate from New Jersey. Chase had been a member of the Continental Congress during the Revolution and signed the Declaration of Independence. Bushrod Washington was George Washington’s nephew. John Marshall had been a member of the Virginia Convention that ratified the Constitution. William Johnson was the son of a Revolutionary War hero and studied law in the office of Charles Cotesworth Pinckney, an influential delegate at the Constitutional Convention of 1787. *See generally* GUSTAVUS MYERS, HISTORY OF THE SUPREME COURT OF THE UNITED STATES (1912).

154. That the Marshall Court assumed *Burford* may have been a real offender is clear from the penultimate sentence in the opinion: “If the prisoner is really a person of ill fame, and ought to find sureties for his good behavior, the [lower court] justices may proceed *de novo*, and take care that their proceedings are regular.” *Burford*, 7 U.S. at 453.

155. 547 U.S. 586 (2006).

156. 129 S.Ct. 695 (2009).

157. *Hudson*, 547 U.S. at 591.

158. 8 U.S. (4 Cranch) 75 (1807).

159. *See generally* ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY 20-35 (2001) (providing detailed analysis of the proceedings in *Bollman*).

160. *See id.*

161. *Bollman*, 8 U.S. (4 Cranch) 75. It was a practice in early American criminal litigation for defendants to “demur” to the charges against them rather than tendering a plea when challenging warrants or charging instruments. Upon a defendant’s demur, a court would inquire into the validity of the complaint and other documents and conduct whatever proceedings were necessary to examine the propriety of the accusations. In the case of *Grumon v. Raymond*, for example, the demurrals of five arrested suspects apparently led to a summary discharge of the suspects as a consequence of an illegal general warrant. 1 Conn. 40, 41 (1814) (describing a pretrial discharge after the five suspects demurred to the charges).

suggested that the stated evidence hardly rose to the level required to prove treason.<sup>162</sup>

Charles Lee, the attorney for Swartwout, specifically recited the Fourth Amendment in his argument that the arresting and charging instruments in the case “did not show probable cause.”<sup>163</sup> Although the Court’s ruling did not specifically invoke the Amendment in its order to discharge Bollman and Swartwout, Marshall’s pronouncement that there was “want of precision in the description of the offense which might produce some difficulty in deciding what cases would come within it”<sup>164</sup> was a clear, plain and “major statement” supporting the Fourth Amendment exclusionary rule. It was the second pronouncement regarding the Fourth Amendment in Supreme Court history, and again it ordered the exclusion, or total discharge, of wrongly seized persons.<sup>165</sup>

Reasonable minds can quibble over the precise scope of the Fourth Amendment’s treatment in *Burford* and *Bollman*.<sup>166</sup> At minimum, both cases support the proposition that the Founding Fathers (several of whom were on the very

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162. See *Bollman*, 8 U.S. (4 Cranch) at 125 (“If . . . upon this inquiry it manifestly appears that no such crime has been committed, or that the suspicion entertained of the prisoner was wholly groundless, in such cases only is it lawful totally to discharge him.”) (quoting a “very learned and accurate commentator”) (internal quotation marks omitted).

163. *Id.* at 109-10 (argument of C. Lee).

164. *Id.* at 136.

165. It should be noted that in earlier proceedings in the *Bollman* case, the D.C. Circuit Court, also represented by *bona fide* Founding Fathers such as William Cranch, a nephew of John Adams, had written that the issuance of arrest warrants against the men was inconsistent with the Fourth Amendment. See *United States v. Bollman*, 24 F. Cas. 1189, 1190, 1192-93 (C.C.D.C. 1807) (No. 14,622).

166. Even those Fourth Amendment scholars who are aware of *Burford* and *Bollman* don’t seem to find their words to be as significant as I do. See Wayne R. LaFave, *Pinguitudinous Police, Pachydermatous Prey: Whence Fourth Amendment “Seizures”?*, 1991 U. ILL. L. REV. 729, 764 (1991) (saying “the very first Fourth Amendment case of any consequence to reach the Supreme Court” was *Boyd v. United States* in 1886). Davies discusses *Burford* and *Bollman* in a lengthy footnote but doesn’t seem to regard the cases as making any important statements about the Fourth Amendment or the exclusionary rule. See Davies, *supra* note 15, at 613 n.174. Certainly, statesmen of the nineteenth century regarded *Bollman* as an important precedent, which supported exclusionary remedies for illegal seizures of persons. See, e.g., James Asheton Bayard, *Executive Usurpation: Speech of Hon. James A. Bayard, of Delaware, in the Senate of the United States* 15 (July 19, 1861) (transcript available in the Harvard College Library) (addressing Fourth Amendment law). Bayard stated that:

There must be probable cause of guilt, and without that supported by oath, the court will discharge. There must also be authority for the arrest and commitment, or the court will discharge. If an offense be not charged, if there is no oath, or the oath does not show probable cause in support of the charges, as in the case of Swartout [sic] and Bollman, the court will discharge.

*Id.*

Supreme Court panels that considered the cases),<sup>167</sup> rather than rejecting exclusion and exclusion-like remedies, accepted and embraced them at their “first impulse.”<sup>168</sup> These cases illustrate that the faux originalism of modern anti-exclusionists is largely a projection of contemporary punitive and statist political views onto an invented past.

The idea that wrongful seizure of a person should merit discharge from prosecution, a notion which has been lost to constitutional history,<sup>169</sup> was hardly confined to the halls of judges and lawyers. The first federal arrest of great notoriety in American history—that of former Vice President Aaron Burr for treason in 1807—resulted in a grand jury’s public condemnation of Burr’s warrantless arrest and the grand jury’s refusal to indict Burr, in part, because Burr was arrested without warrant.<sup>170</sup> Burr had been arrested under cloudy allegations that his independent explorations in what was then the western United States constituted a treasonous conspiracy to (in the words of one commentator) “seize New Orleans, attack Mexico, assume Montezuma’s throne, add Louisiana to [Burr’s] empire, and then add the North American states from the Allegheny Mountains west.”<sup>171</sup> President Jefferson, who was a hated rival of Burr after the contentious election of 1800, insisted upon the prosecution.<sup>172</sup>

A federal grand jury in the Mississippi Territory shrugged off attempts by the Jefferson Administration to indict Burr on charges relating to Burr’s trip down the Mississippi River.<sup>173</sup> Furthermore, the grand jury declared that the arrests of Burr and his co-travelers had been made “without warrant, and . . . without other lawful authority,” and dismissed the entire matter.<sup>174</sup> Burr’s warrantless arrest and the illegal arrests of Burford, Bollman and Swartwout were the first notorious violations of the Fourth Amendment in American history. And voices of the period—from the highest judges in the country to the common citizenry—regarded these violations as meriting the *application of exclusionary remedies*.

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167. See *supra* notes 153, 167. After the Court’s decision in *Burford*, but before the Court’s decision in *Bollman*, Justice Paterson died. His seat was taken by Henry Brockholst Livingston, another Founder who had been a Revolutionary War officer.

168. Again, the quotation marks frame a rebuttal to the Supreme Court’s recent claims regarding the exclusionary rule. See *supra* notes 155-157 and accompanying text.

169. See *infra* Part VIII and accompanying notes.

170. Roger Roots, *If It’s Not a Runaway, It’s Not a Real Grand Jury*, 33 CREIGHTON L. REV. 821, 840-41 (2000).

171. Robertson, *supra* note 122, at 1074.

172. See generally WALTER FLAVIUS McCaleb, Ph.D., *THE AARON BURR CONSPIRACY* (New York, Wilson-Erickson 1936) (1903).

173. See 1 J.F.H. CLAIBORNE, *MISSISSIPPI, AS A PROVINCE, TERRITORY AND STATE* 284 (La. State Univ. Press 1964) (1880) (reprinting the grand jury’s presentment). Burr was later rearrested on essentially the same charges, tried, and acquitted. See McCaleb, *supra* note 172.

174. Roots, *supra* note 170, at 841.

As far as we know, Burford, Burr, Bollman and Swartwout never sued their arrestors in civil court. But the fact that they *could have* sued illustrates an important point. The record of such civil suits does not establish that a civil suit was the only remedy recognized by the Framers of the Fourth Amendment.<sup>175</sup> Many published *civil* cases may hide underlying exclusionary remedies in unpublished *criminal* cases.<sup>176</sup> In early civil suits where wrongful seizure or malicious prosecution was alleged, little was written of the underlying criminal cases. Most antebellum civil decisions involving trespass by authorities, false arrest or malicious prosecution offered only fleeting references to the criminal proceedings.<sup>177</sup> Thus, the very civil cases referenced by anti-exclusion scholars as supporting the supposed existence of a “strict nonexclusionary rule”<sup>178</sup> may also support the possibility of exclusion in the underlying criminal cases.<sup>179</sup> Again, this is much more than speculation; perhaps

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175. See, e.g., *Treadaway v. Finney* (Conn. Super. Ct. 1773), in AMERICAN HISTORICAL ASSOCIATION, SUPERIOR COURT DIARY OF WILLIAM SAMUEL JOHNSON, 1772-1773, at 206 (1942) (conceding that plaintiff recovering damages for false arrest “does not say what has been the Event or is become of the information”).

176. Cf. *Sims v. M'Lendon*, 34 S.C.L. (3 Strob.) 557, 557 (S.C. 1849) (involving suit over defective prosecution; the underlying charge was dismissed without clear procedural narrative); *Cleek v. Haines*, 23 Va. (2 Rand.) 440, 440 (1824) (involving false arrest case over an arrest which was discharged by justice of the peace without prosecution). *Taylor v. Alexander*, 6 Ohio 144 (1833), an 1833 Ohio Supreme Court decision, provides an example of a case in which exclusion may have gone unrecorded. Taylor was arrested after a flawed search warrant was executed on his residence. *Id.* The warrant was flawed in that the underlying affidavit claimed the alleged crime—stealing buckwheat—was committed by either Taylor or his wife, but the warrant required that only Taylor answer for the crime if the goods were found. *Id.* at 145-46. The allegedly stolen items sought by the search warrant were found in Taylor’s possession, and he was arrested and brought before a magistrate. *Id.* at 144, 148. Little further is known of the criminal prosecution (if any). Taylor later sued his arrestors for trespass, assault and battery, and false imprisonment based on the flawed warrant, but he did not recover. *Id.* at 144-45. From the reported facts on appeal we know: (1) Taylor was found in possession of purportedly stolen goods sought by the (invalid) search warrant; (2) any criminal case against Taylor ended in Taylor’s exoneration (perhaps because of the invalidity of the search warrant); and (3) Taylor later sued his arrestors for torts arising from the invalid search warrant. *Id.* at 144-45, 148.

Consider also the case of *State v. Brown*, 5 Del. (5 Harr.) 505, 505 (1854), involving criminal charges against a town watchman who illegally entered a home without warrant while chasing a chicken thief. The case mentions the underlying arrests of “three negroes” who were “taken before the Mayor next morning and discharged” due to the illegality of the warrantless arrests. *Id.* at 506.

177. See *Reed v. Legg*, 2 Del. (2 Harr.) 173, 174 (1837) (stating only that “[t]he prosecution of course failed” after the suspect’s possession of allegedly stolen goods was found to have an innocent explanation, “and these actions were brought . . . for the alledged trespass”); *Johnson v. Chambers*, 32 N.C. (10 Ired.) 287, 290 (1849) (saying only that “magistrate had dismissed the warrant, on which the plaintiff had been arrested”); *Murray v. Lackey*, 6 N.C. (2 Mur.) 368, 368-69 (1818) (involving malicious prosecution suit where evidence of underlying discharge was not recorded).

178. Pitler, *supra* note 27, at 466.

179. See *Price v. Graham*, 48 N.C. (3 Jones) 545, 546-47 (1856) (suggesting that man

dozens of published antebellum civil suits over wrongful searches or seizures suggest that exclusionary remedies were applied in their underlying criminal proceedings.<sup>180</sup>

Although modern anti-exclusionists insist that a “strict common law rule”<sup>181</sup> mandated that civil suits were the only remedy available to early search and seizure victims,<sup>182</sup> we know that nineteenth-century courts often applied *multiple* remedies for search and seizure violations.<sup>183</sup> During the American Civil War, after President Lincoln ordered the suspension of habeas corpus, a federal judge ruled in a case entitled *McCall v. McDowell* that a wrongfully imprisoned detainee could sue his captors even if habeas corpus was lawfully unavailable.<sup>184</sup> The court explicitly stated that, had the illegal detention occurred without the wartime suspension of habeas corpus, *both remedies* (habeas corpus and civil suit) would have applied: “The writ of habeas corpus is the remedy by which a party is enabled to obtain deliverance from a false imprisonment. Ordinarily, *every one imprisoned without legal cause or warrant is entitled to this remedy...*”<sup>185</sup>

In another Civil-War-era case, entitled *Griffin v. Wilcox*, the Indiana Supreme Court ruled that a wrongfully arrested person could sue his captors despite Lincoln’s pronouncement that habeas corpus was suspended.<sup>186</sup> “[C]an Congress enact that the citizen shall have no redress for a violation of his rights, secured to him by . . . amendments 4 and 5[?],” asked the Court.<sup>187</sup> The answer was no.<sup>188</sup>

Similarly, the U.S. Circuit Court for the District of Vermont, in an 1862 case entitled *Ex parte Field*, held that Vermont residents arrested without warrant were

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arrested under an invalid warrant and immediately discharged upon appearance was released apparently because of the invalidity of the warrant; the accused murderer later sued the complainant for malicious prosecution).

180. See *supra* Part VI and accompanying notes.

181. Pitler, *supra* note 27, at 466.

182. The discussion on this topic is dominated by voices calling for one Fourth Amendment remedy exclusive of all others: “With respect to Fourth Amendment remedies, almost all commentators take for granted that either liquidated damages or exclusion will be exclusively applied.” Alan Dalsass, Note, *Options: An Alternative Perspective on Fourth Amendment Remedies*, 50 RUTGERS L. REV. 2297, 2298 n.8 (1998).

183. Cf., e.g., Letter from Charles Francis Adams to Hon. William H. Seward (Feb. 25, 1864), in PAPERS RELATING TO FOREIGN AFFAIRS, ACCOMPANYING THE ANNUAL MESSAGE OF THE PRESIDENT TO THE SECOND SESSION THIRTY-EIGHTH CONGRESS (1864 pt. 1) 230-31 (1865) (quoting “Sir H. Cairns” as saying, “The moment you arrest [a criminal suspect] you have made the seizure, and the law also says in the interests of justice that the magistrate may remand him within certain limits . . . and, moreover, there are safeguards in the *habeas corpus* against the abuse of authority there. . . . *It is no answer to say that the individual may have his action for damages* where there has been a breach of the law.”) (emphasis added).

184. *McCall v. McDowell*, 15 F. Cas. 1235 (C.C.D. Cal. 1867) (No. 8,673).

185. *Id.* at 1242 (emphasis added).

186. 21 Ind. 370, 372, 383 (1863).

187. *Id.* at 373.

188. *Id.*

entitled to release via habeas corpus upon a showing that their Fourth Amendment rights were violated, despite the suspension orders issued by Congress and the President that applied to battlefield theaters.<sup>189</sup>

*McCall*, *Griffin* and *Field* all illustrate the nineteenth-century view that habeas corpus is inextricably linked to the Fourth Amendment as the Amendment's preferred remedy. Habeas corpus discharge—a form of exclusion by another name—was thought to be required under the Fourth Amendment.<sup>190</sup>

## VII. ANALOGIES BETWEEN HABEAS CORPUS AND EXCLUSION

The law of habeas corpus has been markedly scaled back in recent generations even as increasing numbers of Americans have been prosecuted and imprisoned.<sup>191</sup> Prior to the Civil War, habeas corpus was invoked mostly to attack pretrial proceedings, and search and seizure issues were among the most common matters that were remedied by the Great Writ.

Consider how closely the early law of pretrial habeas corpus paralleled the modern doctrine of Fourth Amendment exclusion. Habeas corpus operated as a (1) collateral (separate from other issues in a case), (2) pretrial, (3) mechanism for reviewing seizures, with no consideration given to the merits of any criminal case-in-chief.<sup>192</sup> In fact, the procedural course of pretrial habeas corpus hearings was almost *identical* to the procedural course of modern evidence-suppression hearings. The legal practitioners of 1791 would probably feel quite at home in a twenty-first-century pretrial evidence-suppression hearing.

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189. See *Ex parte Field*, 9 F. Cas. 1, 9 (C.C.D. Vt. 1862) (No. 4,761) (releasing inmate charged with discouraging enlistment and fining a marshal for failing to produce the inmate upon receipt of the habeas corpus writ).

190. *Id.* at 3-4. Judge Smalley drew a clear conceptual nexus between habeas corpus as a remedy for search and seizure violations and the paper seizures condemned in the English decision of *Wilkes v. Wood* that guided the Framers who drafted the Fourth Amendment. See *Wilkes v. Wood*, (1763) 98 Eng. Rep. 489 (K.B.); *infra* notes 242-251 and accompanying text. “If the arrest and detention in this case be sustained,” wrote Judge Smalley, “it strikes a much more deadly and fatal blow to civil liberty, than did the general warrants which the British cabinet ordered to be issued against the printers and publishers of the *North Briton*, number 45 . . . .” *Ex parte Field*, 9 F. Cas. at 6 (citing the search of the residence of House of Commons member John Wilkes in 1763).

191. See Bennett L. Gershman, *The Gate is Open But the Door is Locked—Habeas Corpus and Harmless Error*, 51 WASH. & LEE L. REV. 115, 124 (1994) (“Each Term [of the Supreme Court] seems to bring several new decisions that further restrict the availability of the writ.”); Robertson, *supra* note 122, at 1084 (remarking that federal judges now “expend a lot more energy” dismissing habeas petitions by applying the numerous statutory and doctrinal limitations of contemporary habeas practice than they would if they ever reached the merits of such petitions).

192. See, e.g., *Lacey v. Palmer*, 24 S.E. 930, 931 (Va. 1896) (“[T]he . . . writ of habeas corpus is not to determine the guilt or innocence of the prisoner.”).

Remember that the text of the Fourth Amendment draws no distinction between the treatment of persons and the treatment of “houses, papers, and effects.”<sup>193</sup> Because the Founders viewed habeas corpus discharge as one of the remedies (along with civil suit) for wrongful searches and seizures of persons, they would logically have intended that exclusion be an appropriate remedy (along with civil suit) for wrongful searches and seizures of houses, papers and effects. What, after all, is exclusion if not an evidence-specific application of the principles of habeas corpus? As even Akhil Amar concedes, “Dismissal with prejudice is indeed an exclusionary rule of sorts.”<sup>194</sup> Except that pretrial habeas corpus was a more powerful remedy than exclusion; it often mandated the end to an entire prosecution.

#### VIII. JUDGE WILKEY’S INADVERTENT ARGUMENT IN FAVOR OF FOUNDING-ERA EXCLUSION

It seems startling that any scholar might suggest that no Founding-era jurists ever thought to exclude wrongfully gained evidence when they clearly did exclude wrongfully arrested individuals. But many anti-exclusion scholars appear to be ignorant of such cases.

United States Judge Malcolm Richard Wilkey of the D.C. Circuit unknowingly conceded this point while arguing against the exclusionary rule in a 1978 *Judicature* article.<sup>195</sup> Wilkey claimed that “[i]t makes no sense to argue that the admission of illegally seized evidence somehow signals the judiciary’s condonation of the violation of rights when the judiciary’s trial of an illegally seized *person* is not perceived as signaling such condonation.”<sup>196</sup> “Why should there be an exclusionary rule for illegally seized evidence,” asked Wilkey, “when there is no such exclusionary rule for illegally seized people?”<sup>197</sup> Wilkey cited the 1886 *Ker v. Illinois* decision<sup>198</sup> (holding that a defendant kidnapped in Peru and brought without warrant to Illinois had no right to release), the 1888 decision in *Mahon v. Justice*<sup>199</sup> (refusing to release a suspect illegally captured in West Virginia for trial in Kentucky), and the 1952 case of

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193. U.S. CONST. amend. IV (“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.”).

194. Amar II, *supra* note 5, at 113.

195. Malcolm Richard Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 *JUDICATURE* 214, 215–32 (1978).

196. Malcolm Richard Wilkey, *Why Suppress Valid Evidence?, as reprinted in TAKING SIDES: CLASHING VIEWS ON CONTROVERSIAL LEGAL ISSUES* 264, 269 (M. Ethan Katsh ed., 5th ed. 1993).

197. *Id.*

198. *Ker v. Illinois*, 119 U.S. 436, 445 (1886).

199. 127 U.S. 700, 715 (1888).

*Frisbie v. Collins*<sup>200</sup> (upholding forcible seizure of a defendant in Illinois for trial in Michigan) for support.<sup>201</sup>

But as already demonstrated, *Ker*, *Mahon* and *Frisbie* represented clear departures from the constitutional understandings of 1791.<sup>202</sup> The jurists who took seats on benches in the late nineteenth and twentieth centuries were apparently oblivious to the rule of pretrial discharge that prevailed during the Founding period. Judge Wilkey was echoing half-truths that had been mistakenly pronounced by generations of judges who preceded him. Justice Hugo Black, writing in *Frisbie v. Collins* in 1952, stated that “[t]his Court has never departed from the rule announced in *Ker v. Illinois* . . . .”<sup>203</sup> The Supreme Court, in *Adams v. New York* (the 1904 case often cited by anti-exclusionists as validating their view of exclusion as an orphaned, discredited remedy), cited *Ker* for the same points made by Judge Wilkey in 1978.<sup>204</sup> The 1886 *Ker* Court, for its part, had claimed that the illegality of a capture should not impact the merits of a prosecution.<sup>205</sup>

Of course, as already established, the holding in *Ker* was an abandonment of common law.<sup>206</sup> The rule announced in *Ker* was not even shared by all courts during the late 1800s. Only seven years before the *Ker* decision, the Michigan Supreme Court ordered the release of a vagrant after Detroit police arrested her without a warrant in circumstances requiring a warrant.<sup>207</sup> “[I]t is the duty of all courts,” wrote the Court, “to prevent good or bad citizens from being unlawfully molested.”<sup>208</sup> In another decision in 1888, the Michigan Supreme Court ordered the discharge of a

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200. 342 U.S. 519, 522-23 (1952).

201. Professor Amar has made the same assertion as Wilkey. See Amar II, *supra* note 5, at 108 (citing *Frisbie v. Collins* for the claim that “an exception for unconstitutional seizures of persons was always recognized”).

202. See, e.g., *Miller v. Grice*, 30 S.C.L. (1 Rich.) 147, 147-48 (S.C. 1844) (describing habeas corpus discharge of a defendant arrested by warrant outside the jurisdiction where the alleged crime was committed); *In re Stacy*, 10 Johns. 328, 333-34 (N.Y. Sup. Ct. 1813) (Kent, C.J.) (releasing civilian arrested for treason by military authorities due to lack of jurisdiction).

203. *Frisbie*, 342 U.S. at 522 (citing *Ker*, 119 U.S. at 444).

204. See *Adams v. New York*, 192 U.S. 585, 596 (1904) (saying *Ker* established that an illegal arrest “would not prevent the trial of the person thus abducted in the state wherein he had committed an offense”).

205. *Ker*, 119 U.S. at 444; see also Annotation, *Right to Try One Brought within Jurisdiction Illegally or as a Result of a Mistake as to Identity*, 165 A.L.R. 947, 948 (1946). Only Kansas, it was said, adhered to precedents “contrary to the general rule.” 165 A.L.R. at 950.

206. See *supra* notes 141-146 and accompanying text. The case of *In re Pleasants*, 11 AM. JURIST & L. MAG. 257 (1834), almost directly contradicted the ruling in *Ker*. In *Pleasants*, an inmate arrested upon a warrant issued in the D.C. Circuit but executed in the Eastern District of Virginia was ordered discharged, on grounds that the warrant was without validity in Virginia. *Id.* at 257-59.

207. *In re May*, 1 N.W. 1021, 1021, 1024 (Mich. 1879) (ordering release of prostitute arrested without warrant).

208. *Id.* at 1024.

defendant arrested pursuant to an unsigned warrant.<sup>209</sup> A Kansas Supreme Court decision entitled *State v. Simmons*, in 1888, struck down the conviction of a defendant arrested by Kansas officers outside their jurisdiction in the state of Missouri.<sup>210</sup> The court wrote: “It would not be proper for the courts of this state to favor, or even to tolerate, breaches of the peace committed by their own officers in a sister state . . .”<sup>211</sup>

John E. Theuman entitled a 1983 *A.L.R.* article he authored on the topic, “*Modern Status of Rule Relating to Jurisdiction of State Court to Try Criminal Defendant Brought within Jurisdiction Illegally.*”<sup>212</sup> The very first *A.L.R.* article on the topic, published in the 1920s, cited cases announcing a doctrine contrary to that of the late nineteenth century.<sup>213</sup> Thus, although the 1886 *Ker* decision reflected the consensus of nondischarge that prevailed at that time (and forever after), it gave short shrift to an immense body of discharge cases, flowing backward in time to the releases of Burr, Bollman, Burford and beyond, wherein criminal defendants won release by showing that their Fourth Amendment (or respective jurisdictional search and seizure corollary) rights were violated.

Judge Wilkey’s 1978 ruminations were not just historically inaccurate. When considered in light of the true history of pretrial habeas corpus, they greatly *undermine* a central argument of anti-exclusion scholars.<sup>214</sup> Therefore, Wilkey’s question should be inverted and rephrased: Why would the Founders *not* have sanctioned an exclusionary rule for illegally seized physical evidence *when they clearly sanctioned just such an exclusionary rule for illegally seized people?*

These remarks may be extended even more boldly. The pretrial discharge of defendants who were improperly arrested represented the *only* “*rule*” of search and seizure remedies that was generally applied in criminal cases at the time the Fourth Amendment was proposed and ratified in the late 1700s. Thus, to the extent that there was any “common law rule” governing search and seizure remedy practices in the Founding period, *it was a rule of exclusion.* It seems axiomatic, therefore, that the Framers of the Fourth Amendment must have intended and anticipated that exclusion be applied to remedy all other Fourth Amendment violations.

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209. *People v. Crocker*, 1 Mich. 31, 31 (1869).

210. 18 P. 177, 178-79 (Kan. 1888).

211. *Id.* at 178.

212. John E. Theuman, Annotation, *Modern Status of Rule Relating to Jurisdiction of State Court to Try Criminal Defendant Brought within Jurisdiction Illegally or as a Result of Fraud or Mistake*, 25 *A.L.R.* 4th 157 (1983) (emphasis added).

213. Annotation, *Right to Try One Brought within Jurisdiction Illegally or as a Result of Mistake as to Identity*, 18 *A.L.R.* 509, 512 (1922) (citing *State v. Simmons*, 18 P. 177 (Kan. 1888); *State v. Garrett*, 45 P. 93 (Kan. 1896); *In re Robinson*, 45 N.W. 267 (Neb. 1890)).

214. Judge Wilkey’s argument often recurs in anti-exclusion scholarship. See, e.g., Amar II, *supra* note 5, at 108 (citing *Frisbie v. Collins* for the proposition that “even at the height of the exclusionary rule, an exception for unconstitutional seizures of persons was always recognized”).

IX. EARLY PRIVILEGES TO RESIST ILLEGAL ARREST SUPPORT  
EXCLUSIONARY REMEDIES

The Founders lived in a period when even “guilty” people were privileged to use violence against government officials who forcefully violated their Fourth Amendment rights.<sup>215</sup> It has been noted that “[a]t the time of the nation’s founding, any person was privileged to resist arrest if, for example, probable cause for arrest did not exist or the arresting person could not produce a valid arrest warrant where one was needed.”<sup>216</sup> Even fugitive criminals were entitled to use deadly force to resist violent arrests by law enforcement officers.<sup>217</sup>

Early American law also allowed third-party intermeddlers to “rescue” an arrestee from authorities by force—either during or after an improper arrest.<sup>218</sup> And if a rescuer killed a sheriff while freeing an arrestee from unlawful arrest, the rescuer was guilty of only manslaughter.<sup>219</sup> The 1820 South Carolina case of *City Council v.*

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215. See David B. Kopel, *The Self-Defense Cases: How the United States Supreme Court Confronted a Hanging Judge in the Nineteenth Century and Taught Some Lessons for Jurisprudence in the Twenty-First*, 27 AM. J. CRIM. L. 293, 302 (2000) (footnotes omitted) (“At common law, it was well-settled that if a person was attacked by a peace officer, and the person did not know that the attacker was a peace officer acting with a proper warrant, the person could resist the attack. If necessary, deadly force was permitted.”). Even fugitive criminals who jumped bail were privileged to shoot to kill officers who employed improper force against them. See *id.* at 302-03.

216. *Roots*, *supra* note 16, at 701 (citing *Coyle v. Hurin*, 10 Johns. 85 (N.Y. 1813)); see also *McGehee v. State*, 26 Ala. 154, 154 (1855) (holding that resistance to fatally defective indictment was justified); *State v. Crocker*, 6 Del. (1 Houst.) 434, 434-35 (1874) (exonerating a defendant who resisted a constable “with great force and violence” when the constable sought to arrest him without a warrant); *Rex v. Gay*, Quincy Mass. Rep. 1761-1772, at 91-92 (1763) (Boston, Little, Brown & Co. 1865) (acquitting defendant who battered sheriff when sheriff attempted an arrest with a facially irregular warrant); *State v. Worley*, 33 N.C. (11 Ired.) 242, 243 (1850) (“If there be no seal, the precept is void and affords no protection to the officer attempting to execute it; and, if its execution is resisted by the defendant, he is guilty of no offence against the law, though, in doing so, the person of the officer be assaulted.”); *State v. Curtis*, 2 N.C. (1 Hayw.) 543, 543 (1797) (“[A]s the officer did not tell Curtis for what he arrested him, and the warrant he had was not under seal, Curtis who resisted, and beat him for making the arrest, was acquitted.”).

217. See *Starr v. United States*, 153 U.S. 614, 623, 628 (1894) (overturning murder conviction of bail jumper Henry Starr on grounds that the jury had not been instructed on the privilege to resist a false arrest).

218. See *Adams v. State*, 48 S.E. 910, 911-12 (Ga. 1904) (indicating third-party intermeddlers were privileged to forcibly liberate wrongfully arrested persons from unlawful custody).

219. See 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 103-04 (John Curwood ed., 8th ed., London, S. Sweet 1824); see also *Roberts v. State*, 14 Mo. 138 (1851) (reversing murder conviction on grounds that a person killing an officer who is arresting him illegally is guilty of only manslaughter). When a posse of marshals attempted to arrest a suspected train robber near Checotah, Oklahoma Territory in 1895, the suspect shot and killed a Cherokee Indian policeman. GLENN SHIRLEY, LAW WEST OF FORT SMITH: A HISTORY OF FRONTIER JUSTICE IN THE INDIAN TERRITORY, 1834-1896, at 73 (1957). At the suspect’s trial for murder, Judge Isaac Parker

*Payne* illustrates a common attitude among early Americans regarding search and seizure: a private citizen physically rescued a suspect from a city guard, vowing that “whilst he drew the breath of life, no guard should carry a citizen to the guard-house” without a warrant.<sup>220</sup> The rescuer (*Payne*) was convicted of obstructing an officer only because the officer had arrested the suspect pursuant to a recognized exception to the warrant requirement.<sup>221</sup>

This largely forgotten line of cases<sup>222</sup> illustrates the Founders’ high regard for the protective technicalities of Fourth Amendment law.<sup>223</sup> Yet when anti-exclusion scholars depict the Founding period, they consciously or subconsciously replace the Founders’ values with those drawn from the legal-cultural milieu of the present, with its leviathanic state institutions, massive public budgets and professional police forces.<sup>224</sup> In the Founders’ world, aggression by the state was presumed unlawful and could be justified only if there was strict adherence to prescribed procedures.<sup>225</sup> Entick’s counsel argued this point in the famed English 1765 *Entick v. Carrington* case: “[i]f a man be made an officer for a special purpose to arrest another, he must shew his authority; and if he refuses, it is not murder to kill him.”<sup>226</sup> Such were the words the Framers contemplated as they debated and approved the Fourth Amendment.<sup>227</sup> For a century afterward, citizens had the right to shoot to kill law enforcement authorities who employed violence to execute illegal arrests.<sup>228</sup>

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instructed the jury to acquit the defendant of the murder charge, *based on an unlawful arrest attempt* without a warrant. *Id.* No verdict on the robbery charge was reported. *Id.*

220. *City Council v. Payne*, 11 S.C.L. (2 Nott & McC.) 475, 476 (S.C. 1820).

221. *See id.* at 477-79.

222. *See* Andrew P. Wright, *Resisting Unlawful Arrests: Inviting Anarchy or Protecting Individual Freedom?*, 46 DRAKE L. REV. 383, 388 (1997) (discussing the states’ gradual departure from recognizing the right to resist unlawful arrests).

223. *Cf.* *State v. M’Lain*, 4 S.C.L. (2 Brev.) 443, 443-44 (S.C. 1810) (quashing indictment of a purported pig thief because the word *pig* does not appear in the statute criminalizing *hog* stealing).

224. *See* *Roots*, *supra* note 16, at 697 (emphasis omitted) (describing the “slow alteration of the criminal courts into a venue only for the government’s claims against private persons”).

225. The Magna Carta’s due process clause recognized the importance of procedural sequence as early as 1215. Authorities could move on the people only after strictly following the law of the land; otherwise, the people had every right to resist authority and demand restoration of the *status quo ante*. *See* MAGNA CARTA, para. 39 (1215), available at [http://www.bl.uk/treasures/magnacarta/translation/mc\\_trans.html](http://www.bl.uk/treasures/magnacarta/translation/mc_trans.html) (last visited Dec. 1, 2009) (“No free man shall be seized or imprisoned, or stripped of his rights or possession, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land.”) (British Library translation).

226. *Entick v. Carrington*, 19 How. St. Tr. 1029, 1042 (1765) (argument of plaintiff’s counsel).

227. *See infra* notes 239-253 and accompanying text.

228. *See* *Bad Elk v. United States*, 177 U.S. 529, 537 (1900) (holding that an arrestee, in some circumstances, may shoot to kill an officer who displays a gun with intent to commit a warrantless arrest based on insufficient cause).

Preventive remedies like exclusion—those that flow from the right to be free from government intrusion and interference, to refuse to submit to government demands, to shoot to kill when government authorities attempt illegal arrests with violent force, and to use violence to spring friends and neighbors wrongly seized by government agents—were enshrined in Founding-era criminal procedure.<sup>229</sup> Notions that government may trump the rights of the people, if acting in “good faith” or in furtherance of “truth-seeking” or “punishing the guilty,” came much later.<sup>230</sup>

#### X. MERE EVIDENCE AND EXCLUSION

Another reason why we know that the Founders almost certainly intended that Fourth Amendment violations be remedied with exclusionary rules involves the Founders’ conception of property rights. According to the original understanding of the Constitution’s Framers, individual property rights trumped any interest the government had in property for use as mere evidence in court cases.<sup>231</sup> Because people held title to their property superior to that held by government officials, search warrants could be issued only for contraband or stolen property.<sup>232</sup> Personal property

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229. *Cf.* *Noles v. State*, 26 Ala. 31, 40 (1855) (defense counsel citing more than a dozen cases). The court stated that:

Every arrest of a freeman without warrant, unless it be under a charge of felony, is unlawful, and he may use as much force as is necessary either to prevent the arrest, or to effect his escape if arrested; and if he cannot prevent this unlawful arrest, or regain his liberty, but by slaying the aggressor, he has the right to do so . . . .

*Id.*; *see also* *Woodruff v. Woodruff*, 22 Ga. 237, 241, 245-46 (1857) (standing for the general proposition that an individual may display a firearm upon the approach of investigators and threaten to shoot the investigators if they continue forward unless the investigators have some lawful authority to do so).

230. The doctrines imposed by modern courts to immunize prosecutors, police and judges were unheard of in early America. *See, e.g.,* *Burlingham v. Wylee*, 2 Root 152, 152-53 (Conn. Super. Ct. 1794) (holding both the justice who issued a *capias* warrant and the constable who arrested a Connecticut resident without proper jurisdiction civilly liable for trespass, false imprisonment and assault and battery); *Percival v. Jones*, 2 Johns. Cas. 49, 49 (N.Y. 1800) (holding justice of the peace liable for ordering imprisonment without taking proper steps, despite the justice’s claims of good faith). If an arrest warrant varied from its underlying affidavit (or alleged a crime not justified by facts stated in the affidavit), the issuing magistrate was liable. *See* *Randall v. Henry*, 5 Stew. & P. 367 (Ala. 1834); *Bennett v. Black*, 1 Stew. 494 (Ala. 1828) (involving magistrate held liable for warrant charging offense different from offense alleged in affidavit); *Grumon v. Raymond*, 1 Conn. 40, 47-48 (1814) (upholding liability of the justice of the peace who issued an imprecise warrant and the constable who executed it); *Morgan v. Hughes*, 2 T.R. 225, 100 Eng. Rep. 123 (K.B. 1788) (involving magistrate held liable for issuing a defective warrant).

231. *See* *Galloway*, *supra* note 61, at 372 (“[T]he mere evidence rule...prohibited government seizure of objects merely because of their evidentiary value in proving an individual guilty of a crime.”).

232. *See, e.g.,* *Cohon v. Speed*, 47 N.C. (2 Jones) 133, 135 (1855) (search warrants are valid only when larceny is charged, and such warrants cannot be used to search for other evidence); *State*

rightfully belonging to a defendant could never be taken from him without due process and then introduced at his criminal trial.

This rule—known as the “mere evidence rule”—existed for two centuries in Anglo-American jurisprudence.<sup>233</sup> It was voiced in history’s greatest search and seizure decisions and restated in treatises published on both sides of the Atlantic.<sup>234</sup> The Supreme Court of the United States abandoned this rule in 1967.<sup>235</sup> For most of American history, however, the rule meant that an immense sphere of information could not be made known by the powers of government, no matter how urgent the state’s claim of need.<sup>236</sup> Private diaries, for example, were considered off-limits to the state even if obtained by valid warrants stating probable cause.<sup>237</sup>

The mere evidence rule has troubled some so-called originalists among today’s scholars to no end. While acknowledging the mere evidence rule’s existence in early American jurisprudence, they simultaneously claim that the Founders sanctioned the admission of illegally seized property into evidence in order to convict people of crimes.<sup>238</sup> And while anti-exclusion scholars present their vision as consistent with

v. McDonald, 14 N.C. (3 Dev.) 468, 470 (1832) (“A search warrant in this state, is to be granted only where a larceny is charged to have been committed.”); *see also* FATHER OF CANDOR, A LETTER CONCERNING LIBELS, WARRANTS, AND THE SEIZURE OF PAPERS; WITH A VIEW TO SOME LATE PROCEEDINGS, AND THE DEFENCE OF THEM BY THE MAJORITY 47 (2d ed., London, J. Almon 1764) [hereinafter A LETTER CONCERNING LIBELS] (“Nothing, as I apprehend, can be forcibly taken from any man, or his house entered, without some specific charge under oath. . . . It must either be sworn that I have certain stolen goods, or such a particular thing that is criminal in itself . . . . Without these limitations, there is no liberty or free enjoyment of person or property . . .”).

233. *See* Galloway, *supra* note 61, at 390, 390 n.100 (discussing the long history of the constitutional ban on the seizure of private papers).

234. Chitty’s *Treatise on the Criminal Law*, published in various editions at the beginning of the nineteenth century, enunciated the mere evidence rule as described in *Entick v. Carrington*. *See* 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW: COMPRISING THE PRACTICE, PLEADINGS, AND EVIDENCE, WHICH OCCUR IN THE COURSE OF CRIMINAL PROSECUTIONS, WHETHER BY INDICTMENT OR INFORMATION; WITH A COPIOUS COLLECTION OF PRECEDENTS 65 (London, n. pub., 2d ed., corr., enlrg. 1826) (citing 11 St. Tr. 313, 321) (“But a search warrant for libels and other papers of a suspected party is illegal; for . . . the difference between seizing stolen goods and private papers of the party accused is apparent. In the one, I am permitted to seize my own goods . . . . In the other, the party’s own property would be seized . . .”).

235. *See* *Warden v. Hayden*, 387 U.S. 294, 298-301 (1967).

236. *See* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 365 (Boston, Little, Brown & Co., 5th ed. 1883) (1874) (stating that the common law “secures to the citizen immunity in his home against the prying eyes of the government, and protection in person, property, and papers, *against even the process of the law, except in a few specified cases*”) (emphasis added); *see also* *Jeter v. Martin*, 4 S.C.L. (2 Brev.) 156, 157 (S.C. 1807) (saying that account books of common citizens were considered inadmissible due to lack of reliability).

237. *See* Roots, *supra* note 16, at 734.

238. It appears that Professor Davies and this author disagree over the definition of the term “mere evidence rule.” In Davies’ seminal Fourth Amendment article, he suggested that the mere

the Framers' intent, they resort to decidedly non-originalist tactics to evade the mere evidence rule's implications vis-à-vis the modern exclusionary rule. Professor Amar, for example, sidesteps this dilemma by accusing the Framers of "property worship"<sup>239</sup> and saying that the mere evidence rule was just "silly."<sup>240</sup>

#### XI. WILKES V. WOOD AND ENTICK V. CARRINGTON: PRECURSORS TO EXCLUSION?

The Founding-era basis for the Fourth Amendment exclusionary rule becomes plain when we examine the mere evidence rule in combination with the Founders' view of the right to remain silent against government demands. Consider the two most revered search and seizure cases known to the Framers of the American Constitution.

It is universally acknowledged that the British cases of *Wilkes v. Wood* in 1763 and *Entick v. Carrington* in 1765 were the most famous search and seizure cases known to the drafters of the Fourth Amendment.<sup>241</sup> The *Wilkes* case involved a wide-

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evidence rule was first articulated in *Boyd v. United States* in 1886. See Davies, *supra* note 15, at 727, 726 n.511. Davies seems to define the mere evidence rule as something akin to the exclusionary rule itself. The distinction may not be important, except our differing views of the *Boyd* decision flow from it. In my reading, the mere evidence rule was alive and well in 1791 when the Fourth Amendment was ratified, leading American jurists down a clear path toward the *Boyd* and *Weeks* decisions; while in the view of Davies (as I read it), *Boyd* represented more of a "novel and sweeping" departure from the jurisprudence which preceded it. Davies, *supra* note 15, at 726.

239. Amar II, *supra* note 5, at 23.

240. See *id.* at 6.

241. See Amar I, *supra* note 5, at 772 (describing *Wilkes v. Wood* as the case "whose lessons the Fourth Amendment was undeniably designed to embody"); see also *Berger v. New York*, 388 U.S. 41, 49 (1967) (citation omitted) ("Almost a century thereafter this Court took specific and lengthy notice of *Entick v. Carrington*, finding that its holding was undoubtedly familiar to and 'in the minds of those who framed the Fourth Amendment....'" (quoting *Boyd v. United States*, 116 U.S. 616, 626-27 (1886))); *Stanford v. Texas*, 379 U.S. 476, 484 (1965) (describing *Entick* as a "wellspring of the rights now protected by the Fourth Amendment"); *Lopez v. United States*, 373 U.S. 427, 454 (1963) (Brennan, J., dissenting) (citation and footnote omitted):

In the celebrated case of *Entick v. Carrington*, Lord Camden laid down two distinct principles: that general search warrants are unlawful because of their uncertainty; and that searches for evidence are unlawful because they infringe the privilege against self-incrimination. Lord Camden's double focus was carried over into the structure of the Fourth Amendment.

*Marcus v. Search Warrant*, 367 U.S. 717, 728 (1961) (discussing "the great case of *Entick*"); *Frank v. Maryland*, 359 U.S. 360, 363 (1959) (citation omitted) ("In 1765, in England, what is properly called the great case of *Entick v. Carrington* announced the principle of English law which became part of the Bill of Rights..."); *United States v. Lefkowitz*, 285 U.S. 452, 466 (1932) (stating "Lord Camden declared that...the law of England did not authorize a search of private papers to help forward conviction even in cases of most atrocious crime.... The teachings of that great case were cherished by our statesmen when the Constitution was adopted."); *Boyd v. United States*, 116 U.S. 616, 626 (1886) (calling *Entick* "one of the landmarks of English liberty" and holding that the Fourth

ranging investigation into the authorship of an anonymous pamphlet that harshly criticized the King and other high-ranking British officials.<sup>242</sup> London investigators questioned a number of printers in the city and quickly zeroed in on John Wilkes, a member of the House of Commons, as the author.<sup>243</sup> Wilkes's home was searched pursuant to a very general warrant.<sup>244</sup> A mountain of his papers were haphazardly bagged up and seized, including writings indicating Wilkes's guilt in the affair.<sup>245</sup> Wilkes was subsequently arrested and charged with seditious libel, a misdemeanor.<sup>246</sup>

*Entick* similarly involved an author of publications critical of the Crown and its officers. John Entick was an associate of Wilkes who authored and published a scathing political periodical known as *The Monitor*.<sup>247</sup> As in *Wilkes*, Entick's papers were bagged up and seized in a haphazard manner—yet pursuant to a more specific search warrant that at least named him and described the papers' location.

The *Wilkes* and *Entick* cases were of great renown in the American colonies.<sup>248</sup> Americans of the Founding period named several towns and counties for John Wilkes, including Wilkes-Barre, Pennsylvania; Wilkes County, Georgia; and Wilkes County, North Carolina.<sup>249</sup> Lord Camden, the judge who presided over the *Wilkes* and *Entick* cases and authored two of the “most famous search and seizure opinions in the history of Anglo-American law,”<sup>250</sup> was also honored by the naming of

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Amendment was intended to incorporate its rulings).

242. See OTIS H. STEPHENS & RICHARD A. GLENN, UNREASONABLE SEARCHES AND SEIZURES: RIGHTS AND LIBERTIES UNDER THE LAW 32-34 (2006) (providing an overview of *Wilkes v. Wood*).

243. HORACE BLEAKLEY, LIFE OF JOHN WILKES 94 (1917) (describing the investigation as “a perfect orgy of arrest” as authorities apprehended “no fewer than forty-nine persons, mostly journeymen printers, in the space of three days”).

244. A general warrant is a warrant that does not sufficiently specify by name or other details the person or persons to be arrested or the places and things to be searched or seized. See *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971) (saying a general warrant authorizes “a general exploratory rummaging” through a person's property).

245. See generally PETER D.G. THOMAS, JOHN WILKES: A FRIEND TO LIBERTY (1996) (detailing the litigation, the politics and much of the evidence involved in the *Wilkes* prosecution).

246. See generally *Wilkes v. Wood*, 98 Eng. Rep. 489 (K.B.) (1763); see also Davies, *supra* note 15, at 562-64 (describing the travels of Wilkes' case).

247. See TASLITZ, *supra* note 44, at 21.

248. See, e.g., Amar I, *supra* note 5, at 772 (describing *Wilkes v. Wood* as the “paradigm search and seizure case” for the Founding generation). The *Wilkes* case has been cited by the Supreme Court as providing guidance for interpreting the Fourth Amendment on many occasions. See, e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318, 332 n.6 (2001).

249. Amar I, *supra* note 5, at 772 n.54.

250. Galloway, *supra* note 61, at 369. Lord Camden, whose name was originally Charles Pratt, authored both the *Wilkes v. Wood* and *Entick v. Carrington* decisions in his capacity as Chief Justice of Common Pleas.

American cities such as Camden, New Jersey and Camden, South Carolina<sup>251</sup> (as well as Camden Yards, where the Baltimore Orioles play baseball).<sup>252</sup>

Because *Wilkes* and *Entick* successfully sued their searchers and seizers, *Wilkes v. Wood* and *Entick v. Carrington* are sometimes referenced by “law and order originalists”<sup>253</sup> as supporting the proposition that the Founding generation viewed civil litigation as the sole appropriate remedy for search and seizure violations.<sup>254</sup> But such a conclusion ignores language in both cases (especially in *Entick*) explicitly recognizing that *the right to remain silent* is implicated by the search and seizure of papers and other evidence.<sup>255</sup> “It is very certain that the law obligeth no man to accuse himself,” wrote Lord Camden in *Entick*,<sup>256</sup> “and it should seem, that *search for evidence* is disallowed upon the same principle.”<sup>257</sup> Thus, exclusion, the “same principle” applied in cases of compelled oral statements since time immemorial, should likewise be applied in cases of illegally taken writings and other evidence. “Nothing can be more unjust in itself,” the *Wilkes* opinion proclaimed, “than that the proof of a man’s guilt shall be extracted from his own bosom,” in specific reference to the seizure of *Wilkes’ papers*.<sup>258</sup>

*Entick* and *Wilkes* clearly propounded a rule depriving the state of any power to possess and use personal property taken illegally from crime suspects “to help forward the[ir] conviction[s].”<sup>259</sup> There is no denying that the exclusion principle, *Entick’s* “same principle,” was embedded in the Fourth Amendment from its

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251. Amar I, *supra* note 5, at 772 n.54.

252. See Timothy Lynch, *In Defense of the Exclusionary Rule*, 23 HARV. J. L. & PUB. POL’Y 711, 723 n.67 (2000).

253. This phrase is attributable to the eminent Fourth Amendment scholar Thomas Y. Davies. See Davies, *supra* note 16 (documenting how the Supreme Court used false and distorted history to uphold an arrest for a non-jailable seatbelt violation).

254. See, e.g., Amar I, *supra* note 5, at 786.

255. See TASLITZ, *supra* note 44, at 21 (pointing out that Lord Camden drew a link between search and seizure principles and the right against self-incrimination in *Entick v. Carrington*).

256. A footnote is in order here to point out some oddities in the writing, editing and publication of the *Entick* opinion. Francis Hargrave, editor of the “long version” of the *Entick* opinion that was published in Volume 11 of *State Trials* in 1781, reconstructed the opinion from Lord Camden’s written notes. “It was not without some difficulty,” Hargrave wrote in his introduction to the case, “that the copy of this judgment was obtained by the editor.” 11 FRANCIS HARGRAVE, *STATE TRIALS* 313 (London, T. Wright 1765). “He has reason to believe,” wrote Hargrave, “that the original, most excellent and most valuable as its contents are, was not deemed worthy of preservation by its author [Camden] but was actually committed to the flames.” He continued: “Fortunately, the editor remembered to have formerly seen a copy of the judgment in the hands of a friend; and upon application to him, it was immediately obtained, with liberty to the editor to make use of it at his discretion.” *Id.*

257. *Entick v. Carrington*, 19 How. St. Tr. 1029, 1073 (1765) (emphasis added).

258. *Wilkes v. Wood*, 98 Eng. Rep. 489, 490 (K.B. 1763).

259. *Entick*, 19 How. St. Tr. at 1073.

beginning.<sup>260</sup> And for a hundred years thereafter, every court opting to deny exclusion either distinguished *Entick* or violated *Entick's* stated principles. The 1841 *Commonwealth v. Dana* decision in Massachusetts, often cited by anti-exclusionists

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260. Davies has questioned whether the Framers of the Fourth Amendment actually read the language in *Entick*, which linked search and seizure protections to silence rights. See Davies, *supra* note 15, at 727. According to Davies, the *Entick* opinion referenced by the *Boyd* Court was a longer version (*Entick v. Carrington*, 11 State Trials 313 (decided in 1765 but published in 1781)) of the *Entick* opinion first circulated in the American colonies (2 Wils. 275, 95 Eng. Rep. 807) (published in 1770) that the Framers were more likely to have read. See *id.* Only the longer version contained Lord Camden's pronouncement that "the law obligeth no man to accuse himself . . . and it should seem, that search for evidence is disallowed upon the same principle." *Entick v. Carrington*, 11 Harg. St. Tr. 313, 323 (1765) (emphasis added). For this reason, Davies argues that the Fourth Amendment's Framers and ratifiers did not have *Entick's* coupling of search and seizure protections with silence rights in mind when they approved the Fourth Amendment. In fact, Davies suggests that the intent behind the Fourth Amendment was essentially the same as that behind the Massachusetts Fourth Amendment corollary—drafted by John Adams in 1780—since the wording of the two provisions is quite similar. See Davies, *supra* note 15, at 566 n.25 ("[V]irtually all of the language in the Fourth Amendment, including 'unreasonable searches and seizures,' had appeared as of the 1780 Massachusetts provision; hence, it is unlikely that Camden's statements in the longer version of *Entick* influenced the Framers' views.").

Such a problem of temporal order, if valid, does indeed undermine the long-held view that the Framers in Philadelphia relied on *Entick* as their wellspring of principles behind the Fourth Amendment. But Davies' argument relies on the notion that the Framers of the Fourth Amendment were oblivious to a famous English opinion that had been published and circulated in 1781, more than five years before the constitutional debates in Philadelphia and ten years before ratification of the Fourth Amendment. We know that many American Founding-era lawyers kept fairly up-to-date libraries of English cases and even spent much of their time hand-copying legal rulings and statutes. See generally MARY SARAH BILDER, *THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE* (2004) (documenting the informal system of copying and transcribing laws applicable to the Colonies beginning in the 1600s). Moreover, the set of books containing the longer version (Hargrave's *A Complete Collection of State-Trials and Proceedings For High-Treason, and other Crimes and Misdemeanours* (known as *State Trials*, 4th edition (1781)) was a fixture of late-eighteenth-century law libraries. Over a hundred of these sets survive in the rare book collections of American libraries today, and several libraries (e.g., Yale's and Harvard's) hold more than one complete set. The notion that all of these book sets, published in 1781, crossed the Atlantic only after the Fourth Amendment was proposed and ratified (between September 1787 and December 1791) seems highly unlikely.

In any case, there is no denying that the conceptual link between silence rights and search and seizure protections was enunciated in documents other than the *Entick* opinion and featured in the most widely circulated pre-ratification texts that addressed search and seizure issues in any depth. See *infra* notes 264-266 and their accompanying text. The *Wilkes v. Wood* opinion itself, which was printed in *Wilson's Reports* (1770) as well as widely republished and discussed in newspapers on both sides of the Atlantic, associated silence rights and search and seizure protections. See *Wilkes v. Wood*, 98 Eng. Rep. 489, 490 (K.B. 1763) (referring specifically to the seizure of *Wilkes' papers*: "Nothing can be more unjust in itself, than that the proof of a man's guilt shall be extracted from his own bosom.").

as representative of some vast jurisprudence of nonexclusion decisions, clearly distinguished its own holding from the exclusionary call of *Entick*.<sup>261</sup>

*Entick* and *Wilkes* were not the only sources suggesting the exclusion remedy among Founding-era documents. The most important pre-Founding pamphlets and letters addressing search and seizure topics also linked search and seizure protections with exclusion remedies. A widely circulated 1764 pamphlet by “Father of Candor,” entitled *A Letter concerning libels, warrants, and the seizure of papers*, probably the most popular tract on the topic in England and the American Colonies,<sup>262</sup> made the connection throughout its pages.<sup>263</sup> Another widely published letter, *A Reply to the Defence of the Majority, on the Question Relating to General Warrants* by Sir William Meredith, published in 1764 (and sometimes circulated along with the “Father of Candor” pamphlet), drew the same legal conclusions:

[O]f all those laws, under which we live and are protected, there is none more sacred than that law, which says, that no man shall be obliged to furnish evidence against himself. In felony, you may search for stolen goods, but not for other evidence against the thief. In treason, you may search for and seize papers, in order to discover treason, *but cannot use those papers in evidence* against the man in whose custody they are found.<sup>264</sup>

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261. *Commonwealth v. Dana*, 43 Mass. (2 Met.) 329, 335-36 (1841) (admitting lottery evidence on grounds that the principles of *Entick* “have but little bearing on the present case” and “the warrant in this case is in conformity with all the . . . [Massachusetts] declaration of rights”).

262. See 3 *ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES 1749* (Paul Finkelman ed., 2006) (calling the Father of Candor letter “one of the more remarkable documents in all of English political and legal thought”). “The book went through several editions,” Finkelman continued, “was read on both sides of the Atlantic,” and was “well-known to Patriot leaders by the time the Continental Congress met in Philadelphia.” *Id.*; see also LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 163 (1999) (saying Americans of the Founding period knew well the arguments in the Father of Candor pamphlet); William James Smith, 3 *Grenville Papers* clviii (William J. Smith ed., London, Woodfall & Kinder 1853) (“The letter concerning Libels, Warrants, &c., was one of the most important of the political pamphlets which were written in that very pamphlet-writing age. . .”).

263. *A LETTER CONCERNING LIBELS*, *supra* note 232, at 44-45. Father of Candor also made the point that:

The laws of England are to tender to every man accused, even of capital crimes, that they do not permit him to be put to torture to extort a confession, nor oblige him to answer a question that will tend to accuse himself. How then can it be supposed, that . . . any common fellows under a general warrant . . . [may] seize and carry off all his papers; and then at his trial produce these papers . . . in evidence against himself. . . . This would be making a man give evidence against and accuse himself, with a vengeance. And this is to be endured, because the prosecutor wants other sufficient proof, and might be traduced for acting groundlessly, if he could not get it; and because he does it truly for the sake of *collecting evidence*.

*Id.*

264. SIR WILLIAM MEREDITH, *A REPLY TO THE DEFENCE OF THE MAJORITY, ON THE QUESTION*

Not much support for the anti-exclusionists' notion of a "universal law against exclusion" there!<sup>265</sup> This exclusion-requiring conceptualization of the right to be secure from unreasonable searches and seizures was embedded in the Fourth Amendment from its inception.<sup>266</sup> And in 1886, *Entick's* "same principle" language became formally enshrined in Fourth Amendment jurisprudence in the *Boyd v. United States* decision. In *Boyd*, the Supreme Court conceptually married the Fourth Amendment to the exclusionary remedy of the Fifth Amendment after finding the amendments were already in an "intimate relation."<sup>267</sup> From this union was born the exclusionary rule in its modern form.<sup>268</sup>

Because the *Fifth* Amendment's exclusionary remedy is explicit and unchallengeable ("No person . . . shall be compelled in any criminal case to be a witness against himself"),<sup>269</sup> anti-exclusion scholars recognize the danger to their position posed by any link between the Fourth and Fifth Amendments.<sup>270</sup> Consequently, anti-exclusionists have been trying to divorce the pair for over a century, despite the clarity with which Founding-era sources linked silence rights to search and seizure protections.<sup>271</sup> And in their zeal to narrow and deaden the Fourth Amendment, the anti-exclusionists have likewise had to distort the history and intent of the Fifth Amendment as well—imaginatively claiming (as they must) that the Fifth

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RELATING TO GENERAL WARRANTS 21-22 (1764) (emphasis added and capitalization altered).

265. Amar II, *supra* note 5, at 25 (speaking of a "universal law against exclusion" that allegedly prevailed prior to the *Boyd* decision).

266. That Founding-era observers of search and seizure debates were well-versed in *Entick's* and *Wilkes's* subtle dimensions is shown by recurring references to the *Entick* and *Wilkes* cases when search and seizure principles were discussed. Whenever nineteenth-century courts interpreted the Fourth Amendment (and its state corollaries), they invariably looked to *Entick* and *Wilkes* for guidance. For example, in the case of *Ex parte Field*, the court explicitly linked *Wilkes's* treatment of illegally seized papers to the exclusionary application of habeas corpus discharge of persons ("If the arrest and detention in this case be sustained, it strikes a much more deadly and fatal blow to civil liberty, than did the general warrants [in *Wilkes v. Wood*]."). *Id.* at 6.

267. *Boyd v. United States*, 116 U.S. 616, 630, 633 (1886).

268. Anti-exclusion scholars claim that *Boyd's* "fusion" of Fourth Amendment protections and Fifth Amendment silence principles was a "landmark" holding in 1886. *See Pitler, supra* note 27, at 467 n.43 (stating *Boyd's* "convergence of the two amendments resulted in exclusion").

269. U.S. CONST. amend. V.

270. *See, e.g., Pitler, supra* note 27, at 467 n.43 (referring to *Boyd's* recognition of an intimate relationship between the Fourth and Fifth Amendments as "convergence theory").

271. It may be argued that the Supreme Court briefly separated the wedded Fourth and Fifth Amendments in *Adams v. New York*, 192 U.S. 585 (1904), where the Court upheld the admission of illegally seized evidence in a state trial. While the holding of *Adams* rejected arguments for applying the Fourth Amendment exclusionary rule, *id.* at 597-99, its basis for distinguishing *Boyd* has been widely debated. Did *Adams* merely decline to incorporate the Fourth Amendment rule into state practice under the Fourteenth Amendment? Or did *Adams* make deeper cuts into the operability of exclusion? In either case, *Adams* turned out to be a "wild turn in the exclusionary rule roller coaster track," according to Supreme Court Justice Potter Stewart. Stewart, *supra* note 26, at 1374.

Amendment privilege was intended to apply only to oral testimony, only to in-court testimony, only after a formal prosecution has begun, *et cetera*. Ultimately, this tortured and inaccurate view of the Bill of Rights seems remarkably activist despite the veil of “strict constructionism” that the anti-exclusionists cast over it.<sup>272</sup>

It is undeniable that the most widely circulated texts that discussed search and seizure law in any depth during the Founding period drew a clear connection between silence rights and search and seizure protections. Yet beginning in the first decade of the twentieth century, scholars such as John Wigmore began claiming that *Boyd*'s finding of an “intimate relation” between the Fourth and Fifth Amendments was based on a “radical fallacy.”<sup>273</sup>

By the 1970s, Supreme Court Chief Justice Warren Burger and other anti-exclusionists were claiming that the two amendments (and their ancient doctrinal bases) were distinguishable on reliability grounds.<sup>274</sup> Burger included a paragraph in his 1976 *Stone v. Powell* concurrence suggesting that the Framers distinguished coerced oral statements from illegally seized physical evidence because coerced oral statements are “inherently dubious” while “[t]he reliability of [physical evidence illegally seized] is beyond question.”<sup>275</sup> Professor Amar has argued in several books and articles that *Boyd*'s “fusion” of the Fourth and Fifth Amendments was “a plain misreading” of both Amendments.<sup>276</sup> Sanford E. Pitler called the notion that the Fifth Amendment's exclusionary rule might apply to Fourth Amendment violations “the convergence theory” and pronounced that scholars and judges “almost universally rejected” the “theory” soon after *Boyd*.<sup>277</sup>

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272. The law-and-order originalists' interpretations of the Fifth Amendment Self-Incrimination Clause are so plainly irreconcilable with the known practices and interpretations of earlier courts that such scholars must resort to tricks of rhetoric to sustain them. Amar, for example, introduces the Clause as “an unsolved riddle of vast proportions, a Gordian knot in the middle of [the] Bill of Rights.” Amar II, *supra* note 5, at 46. While acknowledging early precedents excluding all manner of compelled out-of-court statements, Amar paints them as the product of confusion and illogic. *See id.* Much more logical, according to this view, are interpretations that severely limit the protections of the Self-Incrimination Clause in a manner consistent with prosecution advocacy. *See generally* Dripps, *supra* note 6 (criticizing Amar's Fifth Amendment scholarship).

273. 4 JOHN H. WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2264, at 3126 (1904) (“the radical fallacy of the [*Boyd*] opinion lies in its attempt to wrest the Fourth Amendment to the aid of the Fifth”).

274. Burger drew from anti-exclusion “originalists” of his era and referred to the Fourth Amendment exclusionary rule as a “Draconian, discredited device” and a “judicially contrived doctrine.” *Stone v. Powell*, 428 U.S. 465, 500, 501 (1976) (Burger, C.J., concurring).

275. *Id.* at 496, 497.

276. Akhil Reed Amar & Renée B. Lettow, *Self-Incrimination and the Constitution: A Brief Rejoinder to Professor Kamisar*, 93 MICH. L. REV. 1011, 1013 (1995).

277. Pitler, *supra* note 27, at 467. Pitler claimed that “[t]he common law rule of nonexclusion remained unchallenged until 1886 when the United States Supreme Court reached its landmark decision in *Boyd v. United States*.” *Id.* at 466.

When these anti-exclusion writers do acknowledge the *Entick* “same principle” language, they employ various means to suggest that the Framers were not aware of or influenced by it. Amar repeatedly cites *Entick* as authoritative for several of his arguments, yet skips over *Entick*’s “same principle” language with palpable discomfort: “*Boyd* claimed roots in a landmark English case that followed *Wilkes v. Wood*, but [others] ha[ve] shown that the murky dictum on which *Boyd* relied was most probably off point.”<sup>278</sup>

## XII. THE TROUBLING PRESENCE OF THE WORD “PAPERS”

There is also the troubling presence of the word *papers* in the Fourth Amendment (“persons, houses, papers, and effects”).<sup>279</sup> The use of this word by the Framers can only support a connection between the Fourth Amendment and the compelled-witness prohibitions of the Fifth Amendment, its ancestors and progeny. Papers have little intrinsic value as property but may have immense evidentiary value because of the words written upon them. Indeed, their only true value to would-be searchers and seizers lies in their informational content.

It is through the word *papers* that the Fourth Amendment becomes conceptually linked with the word *witness* in the Fifth Amendment.<sup>280</sup> “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,” wrote Lord Camden, one of the most respected jurists in English history, in the *Entick* decision.<sup>281</sup> If the state allows its agents to rifle through people’s personal papers, wrote Camden, “the secret cabinets and bureaus of every subject in this kingdom will be thrown open” to government inspection, and such a practice “would be subversive of all the comforts of society.”<sup>282</sup> Camden noted that such a power is “unsupported by one single citation from any law book.”<sup>283</sup> Later, in *Commonwealth v. Dana*, the court

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278. Amar II, *supra* note 5, at 23 (referencing Telford Taylor’s *Two Studies in Constitutional Interpretation: Search, Seizure, and Surveillance* (1969)).

279. U.S. CONST. amend. IV.

280. As Richard A. Nagareda points out, “[t]he most plausible construction of the phrase ‘to be a witness’ [in the Fifth Amendment] is as the equivalent of the phrase ‘to give evidence’ found in contemporaneous state sources.” Richard A. Nagareda, *Compulsion “To Be a Witness” and the Resurrection of Boyd*, 74 N.Y.U. L. REV. 1575, 1605 (1999). The Framers’ use of the word *witness* elsewhere in the Constitution likewise indicates a general evidentiary construction rather than one limited to mere oral witnessing. *See id.* at 1609-15 (discussing the meaning of the word “witness” in the Confrontation Clause, the Treason Clause and the Compulsory Process Clause—each of which suggests an analogy to “providing evidence” rather than mere testifying).

281. *Entick v. Carrington*, 19 How. St. Tr. 1029, 1066 (1765).

282. *Entick*, 19 How. St. Tr. at 1063, 1066.

283. *Id.* at 1064; *see also* Galloway, *supra* note 61, at 422.

recognized that Camden's opinion displayed conclusively that "the right to search for and seize private papers is unknown to the common law."<sup>284</sup>

Yet the construction of the Fourth Amendment suggested by law-and-order originalists denies the special importance of papers that the Framers obviously intended.<sup>285</sup> According to Amar, the Fourth Amendment is only "about things—houses, papers, effects, stuff—but it is not about exclusion."<sup>286</sup> In contrast, Amar claims that "[t]he Fifth Amendment is about exclusion in criminal cases—but only about excluding words, because they can be unreliable."<sup>287</sup> Amar reads several limitations into the Fourth and Fifth Amendments that the Amendments' Framers did not.<sup>288</sup>

Law enforcement agents of the Founding period were barred entirely from searching for or seizing papers which were not themselves contraband. According to Professor Russell W. Galloway, at the time of the Founding, the constitutional bar on searching for or seizing papers was solidly grounded on three separate and distinct doctrines: the mere evidence rule; silence rights; and the prohibition against general warrants (which originally barred investigators from even perusing through papers to locate incriminating documents or statements).<sup>289</sup> Over the course of the twentieth century, each of these three doctrinal bases was undermined and then abandoned, and today the agents of government regularly search for and seize papers, records of conversations, and electronic writings with great regularity and often without warrants.

As Galloway showed in 1982, the Fourth Amendment's invocation of the word *papers* was meant to establish an outright ban on the seizure of personal papers, rather than a weaker requirement that authorities could seize papers only when reasonable.<sup>290</sup> Indeed, the 1765 *Entick* opinion plainly suggested the exclusionary rule that was recognized in *Boyd v. United States*: "[O]ur law has provided no paper search in these cases *to help forward the convictions*."<sup>291</sup>

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284. WILLIAM A. ALDERSON, A PRACTICAL TREATISE UPON THE LAW OF JUDICIAL WRITS AND PROCESS IN CIVIL AND CRIMINAL CASES 611 (New York, Baker, Voorhis & Co., 1895); Galloway, *supra* note 61, at 335 (quoting *Commonwealth v. Dana*, 2 Mass. (2 Met.) 329, 334 (1841)).

285. See Galloway, *supra* note 61, at 411-13 (describing the view that papers are essentially extensions of a person and his private thoughts).

286. Amar IV, *supra* note 5, at 465.

287. *Id.*

288. See *infra* notes 311-335 and accompanying text.

289. See Galloway, *supra* note 61, at 367. Professor Russell W. Galloway, Jr. published a fascinating article on this topic in 1982 that should be read by every Fourth Amendment scholar.

290. *Id.* at 418 ("There can be little doubt that the framers of the fourth amendment intended the amendment's first clause to ban all searches of private papers.")

291. *Entick v. Carrington*, 19 How. St. Tr. 1029, 1073 (emphasis added).

### XIII. PRIVILEGES AND EXCLUSION OF WITNESSES IN EARLY AMERICAN CRIMINAL TRIALS

All evidentiary privileges that keep information from the eyes of a trier of facts can be characterized as truth-suppressing devices.<sup>292</sup> Privileges such as the attorney-client, doctor-patient and spousal privilege, and—first and foremost—the privilege of silence in the face of government demands, are unquestionably mechanisms that impede “truth-seeking and punishing the guilty.”<sup>293</sup> But if anything, such privileges were more numerous at the time of the Founding than they are now.<sup>294</sup> This alone casts doubt upon depictions of Founding-era evidence law promoted by modern anti-exclusionists.

In the late eighteenth and early nineteenth centuries, people were free from arrest while going to and coming from church,<sup>295</sup> while attending court,<sup>296</sup> and while going to and returning from election places.<sup>297</sup> Defendants arrested while holding such

292. See MCCORMICK ON EVIDENCE § 72(a), at 130 (Kenneth S. Broun ed., 6th ed. 2006) (“[R]ules of privilege...are not designed or intended to facilitate the fact-finding process or to safeguard its integrity. Their effect instead is clearly inhibitive; rather than facilitating the illumination of truth, they shut out the light.”); see also *id.* § 87, at 151 (“[N]one can deny the [attorney-client] privilege’s unfortunate tendency to suppress the truth....”). Wigmore famously said of the attorney-client privilege that “[i]ts benefits are all indirect and speculative; its obstruction is plain and concrete.” *Id.* (quoting 8 WIGMORE ON EVIDENCE § 2291, at 554 (McNaughton rev. 1961)).

293. See, e.g., Pitler, *supra* note 27, at 466 (claiming the “doctrine of nonexclusion developed from the common law courts’ paramount concern with truth-seeking and punishing the guilty”).

294. See MCCORMICK, *supra* note 292, § 71, at 126 (suggesting that evidentiary privileges and disqualifications have waned over time); *id.* § 78, at 142 (indicating that the “older branches” of the “ancient tree” of spousal privilege were more protective of secrecy than the privilege’s “late offshoot”).

295. See, e.g., JOHN F. ARCHBOLD, THE PRACTICE OF COUNTRY ATTORNIES AND THEIR AGENTS, IN THE COURTS OF LAW AT WESTMINSTER 102 (1838) (saying clergymen were privileged from arrest while going to and coming from church for religious duties); 1 THOMAS COVENTRY & SAMUEL HUGHES, AN ANALYTICAL DIGESTED INDEX TO THE COMMON LAW REPORTS: FROM THE TIME OF HENRY III TO THE COMMENCEMENT OF THE REIGN OF GEORGE III 97 (Philadelphia, R.H. Small, 1832) (collecting English cases privileging certain persons from arrest while attending and traveling to and from court); JAMES F. OSWALD, CONTEMPT OF COURT, COMMITMENT, AND ATTACHMENT AND ARREST UPON CIVIL PROCESS, IN THE SUPREME COURT OF JUDICATURE (London, W. Clowes and Sones 1895) (discussing the long history of various privileges from arrest while going to and coming from English courts).

296. See *Richards v. Goodson*, 4 Va. (2 Va. Cas.) 381 (1823) (discharging prisoner because he was privileged from arrest while attending court in his own case); *Ex parte M’Neil*, 6 Mass. (4 Tyng) 245 (1810) (releasing debtor who was arrested while attending court); see also HURD, *supra* note 121, at 270 (discussing privilege from arrest on Sunday, while under civil process, etc.).

297. OHIO REV. CODE ANN. § 2331.11(A)(2) (LexisNexis 2005) (Stating that “[e]lectors, while going to, returning from, or in attendance at elections” are privileged from arrest); see also *Hargis v. Vaughan*, 1 Del. Cas. 241, 241 (1799) (ordering discharge of a man arrested while returning from the general election on grounds he was privileged to go to and return from an election polling

privileges were discharged upon a mere showing that their arrests occurred while they held them.<sup>298</sup> John Wilkes, the most famous victim of an illegal search and seizure known to the Founding Fathers, was released instantly from the Tower of London upon showing that he was privileged from arrest because he was a member of Parliament.<sup>299</sup>

The Speech and Debate Clause of the United States Constitution describes a privilege from arrest for Congressmen while making law and coming from or going to their legislative chambers.<sup>300</sup> Congress passed a statute in 1802 prohibiting the arrest of an active soldier for debt.<sup>301</sup> Such privileges differed from state to state, and sunsetted at different times in different locations. (And some, of course, still exist today.) But their very prevalence at the time of the Fourth Amendment's ratification mocks and defies the claims of modern anti-crime scholars who suggest that the Founders sanctioned the interception of any person or property at any time upon a showing of public necessity.

The same goes for the many testimonial privileges, which prevailed in court practice during the Founding period. Various evidentiary privileges, such as the spousal privilege, the attorney-client privilege and the priest-penitent privilege, have protected defendants from conviction for centuries.<sup>302</sup> These privileges operated because the law known to the Framers recognized values that were *higher* than the state's interest in "truth-seeking and punishing the guilty."<sup>303</sup> They were, in some respects, more powerful obstacles to the state than a defendant's right against compelled self-incrimination because that right can be lifted simply by granting immunity from prosecution to the speaker and issuing him a subpoena.<sup>304</sup> Relationship privileges, on the other hand, rest on privacy barriers that cannot be breached no matter how compelling the state's desire for evidence.

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station).

298. See *Hargis*, 1 Del. Cas. at 241; *Swift v. Chamberlain*, 3 Conn. 537, 538-39 (1821) (upholding discharge of arrestee who had been seized while awaiting election returns and allowing an additional civil action for malicious prosecution).

299. As a member of Parliament, John Wilkes was "privileged from arrests in all cases except treason, felony, and ACTUAL breach of the peace...." *King v. Wilkes*, (1763) 95 Eng. Rep. 737, 740 (K.B.) (argument of Wilkes' counsel). Wilkes was ordered discharged from the Tower. *Id.*

300. See U.S. CONST. art. I, § 6, cl. 1.

301. See *Commonwealth v. Keeper of the Jail of Philadelphia*, 4 Serg. & Rawle 505, 506 (Pa. 1818) (construing the 1802 statute).

302. The spousal privilege alone has existed since at least 1628, when Lord Coke wrote that "A wife [for they are two souls in one flesh], and it might be a cause of implacable discord and dissention betweene the husband and the wife, and a meane of great inconvenience." 1 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; OR, A COMMENTARY UPON LITTLETON: NOT THE NAME OF THE AUTHOR ONLY, BUT OF THE LAW ITSELF xcii (16th ed., rev., corr. 1809) (Latin translation in brackets)).

303. Pitler, *supra* note 27, at 466.

304. See *Amar II*, *supra* note 5, at 66.

Trial practices of the nineteenth century often disqualified witnesses from testifying no matter how truthful their testimony might be. Blacks, Indians and other nonwhites were all excluded as witnesses in early American court practice.<sup>305</sup> Spouses of parties were also disqualified as witnesses.<sup>306</sup> The testimony of both criminal defendants and their accusers was excluded from early trials. “Conviction of crime, want of religious belief, and other marks of ill fame were held sufficient” during the Founding period to exclude witness testimony.<sup>307</sup> “Indeed,” wrote Justice Sutherland, “the theory of the common law was to admit to the witness stand only those presumably honest, appreciating the sanctity of an oath, unaffected as a party by the result, and free from any of the temptations of interest.”<sup>308</sup> Congress and the courts were busy eliminating these “competency” exclusionary rules throughout the late nineteenth and early twentieth centuries.<sup>309</sup> But as late as 1878 a defendant could not testify in his own defense in a criminal case,<sup>310</sup> and the Supreme Court was still dealing with whether defendants could call their own spouses to testify in their defense as recently as 1933.<sup>311</sup>

These lines of cases further rebut the claims of anti-exclusion scholars that “[u]nder the common law, a strict nonexclusionary rule required a court to admit all competent and probative evidence regardless of its source.”<sup>312</sup> To the contrary, the evidentiary practices of the common law were riddled with seemingly nonsensical exclusionary rules regarding the competency of witnesses. While it is true that some of these rules were aimed at “truth-seeking”<sup>313</sup> (e.g., the bar on convicted criminal or atheist testimony), others were extensions of patrician or discriminatory interests.<sup>314</sup>

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305. See, e.g., Thomas D. Morris, *Slaves and the Rules of Evidence in Criminal Trials*, 68 CHI.-KENT L. REV. 1209 (1993) (discussing the trend toward allowing Blacks and Indians to provide testimony in American courts of the nineteenth century); Jonathan L. Entin, *Symposium: The Ohio Constitution—Then and Now: An Examination of the Law and History of the Ohio Constitution on the Occasion of its Bicentennial: An Ohio Dilemma: Race, Equal Protection, and the Unfulfilled Promise of a State Bill of Rights*, 51 CLEV. ST. L. REV. 395 (2004) (discussing the history of Ohio’s rules prohibiting Blacks from testifying against Whites in Ohio courts).

306. See *Davis v. Dinwoody*, (1792) 100 Eng. Rep. 1241, 1241 (K.B.).

307. *Funk v. United States*, 290 U.S. 371, 376 (1933).

308. *Id.* at 376.

309. See *id.* (“But the last fifty years have wrought a great change in these respects, and today the tendency is to enlarge the domain of competency....”) (quoting *Benson v. United States* 146 U.S. 325, 336 (1892)).

310. See Mason Ladd, *Credibility Tests—Current Trends*, 89 U. PA. L. REV. 166, 174-76 (1940) (discussing the common law rule that a criminal defendant could not testify in his own defense because his motive to lie was so strong).

311. Brief for the Petitioner at 7, *Hawkins v. United States*, 358 U.S. 74 (1958) (No. 20).

312. Pitler, *supra* note 27, at 466.

313. *Id.*

314. See Stephen A. Siegel, *The Federal Government's Power to Enact Color-*

But more importantly, these archaic rules of witness competency allowed an immense realm of factual knowledge to evade exposure in criminal trials. All the powers of the state, even in the government's unceasing quest to "punish the guilty," could not pierce such rules. The all-seeing eye of the state is a modern invention, without sanction in the criminal justice practices of early America.

#### XIV. DID THE FOURTH AMENDMENT'S FRAMERS INTEND TO PROTECT ONLY THE INNOCENT?

What of the recurring claim that the Framers of the Bill of Rights intended that the Fourth Amendment apply only to "innocent" people?<sup>315</sup> According to this argument, justice "is, or should be, a truth-seeking process" and "the guilty" should never claim to be wrongly arrested or convicted.<sup>316</sup>

It is upon this set of assertions where anti-exclusion scholars are on their weakest footing.<sup>317</sup> Recall that most Founding-era search cases turned on a property rationale.<sup>318</sup> The Founders generally viewed property rights as stemming from values that trump the power of the state to know all or punish all offenses against it.<sup>319</sup> It was only in 1967, in *Warden v. Hayden*, that the Supreme Court announced for the first time that the "principle object of the Fourth Amendment is the protection of privacy rather than property,"<sup>320</sup> overturning at least five prior Supreme Court decisions<sup>321</sup> and discarding search and seizure limitations that had existed for two centuries.<sup>322</sup>

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*Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477, 479 (1998) (discussing the long history of legal impediments to blacks and other minorities imposed by early legal systems).

315. See, e.g., Amar II, *supra* note 5, at 154 (describing the "commonsensical point" that "the essence of our Constitution's rules about criminal procedure" is that they "seek[] to protect the innocent" and "[l]awbreaking, as such, is entitled to no legitimate expectation of privacy"); Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 49 (1982) (stating the premise that the Fourth Amendment does not protect the interest of a criminal in avoiding punishment for his crime).

316. Wilkey, *supra* note 196, at 267.

317. Cf. *Ex parte Richardson*, 16 S.C.L. (Harp.) 308, 308 (S.C. 1824) (granting motion for prohibition against lower court's convening without proper procedure, prohibiting trial court from retrying defendant because of gross procedural errors in initiation of the prosecution); *The Superior Court Diary of William Samuel Johnson 1772-1773*, reprinted in 4 AMERICAN LEGAL RECORDS 98 (John T. Farrell ed., 1942) (discussing a "guilty" thief who sued his arrestor over the manner of his arrest).

318. See Roots, *supra* note 16, at 734 (citing the Founding-era "mere evidence" rule).

319. See *id.*

320. *Warden v. Hayden*, 387 U.S. 294, 304 (1967).

321. See *id.* at 296 n.1.

322. The fact that the Framers relied directly on property right values in drafting the Fourth Amendment was disregarded. See Roots, *supra* note 16, at 734.

When the Supreme Court imposed the exclusionary rule on all federal courts in *Weeks v. United States*, it did so because the evidence in question—certain papers relating to an illegal lottery—was owned by Weeks and not by the government.<sup>323</sup> Upon consideration of a motion by Weeks for the return of his illegally seized (stolen, actually) property, the Supreme Court recognized that exclusion was the only rule consistent with constitutional property rights.<sup>324</sup> Yet modern-day *faux* originalists claim the government has a constitutional power to retain such property in its quest to “punish the guilty.”<sup>325</sup>

Given the Framers’ interest in protecting property rights, it seems hardly revolutionary that they would have looked favorably upon search and seizure remedies that require investigators to immediately return illegally seized property to its rightful owners. As several scholars have pointed out, exclusion simply “restores the *status quo ante*,” placing “both the State and the accused in the positions they would have been in had the Constitution not been violated—neither better nor worse.”<sup>326</sup>

Judges have occasionally applied exclusionary remedies with just such simplicity. Consider the ruling of the Kentucky Supreme Court in *Youman v. Commonwealth* in 1920 where the Court reversed an order of the trial judge demanding that the sheriff pour the contraband whiskey into a sewer and ordered that the whiskey—contraband though it appeared to be—be returned to its owner.<sup>327</sup>

In this light, the position of anti-exclusion scholars—that the Framers would have sanctioned a criminal justice system allowing state actors to search for and take property from its owners without warrant or valid process and then retain it merely because the state asserts an evidentiary value in such property—seems quite dubious. The Founders’ well-established distrust of the state exposes this assertion as highly unrealistic.<sup>328</sup>

Remember also that the most famous search and seizure case known to the Framers who enacted the Bill of Rights involved an unquestionably “guilty”

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323. See *Weeks v. United States*, 232 U.S. 383, 393, 398 (1914).

324. See *id.* at 389, 398.

325. See Pitler, *supra* note 27, at 466.

326. See, e.g., Norton, *supra* note 4, at 262 (justifying the exclusionary rule on restitution grounds); accord Heffernan, *supra* note 18, at 1217.

327. *Id.* at 861, 867. The opinion is somewhat confusing on the question of whether the liquor was contraband, indicating that the “liquor was purchased by Youman or his wife at a time when and a place where it was lawful to sell and buy intoxicating liquor, but it was unlawful to have it in possession for purposes of sale, as charged in the warrant.” *Id.* at 861.

328. “The people of the States, during the existence of the confederation, suffered from the violation of private property by their governments. In reconstituting their political system . . . they protected property from unreasonable searches and seizures, and the title from detriment, except in the due course of legal proceeding.” *Dodge v. Woolsey*, 59 U.S. (18 How.) 331, 378 (1855) (Campbell, J., dissenting).

offender,<sup>329</sup> John Wilkes of Parliament, who had authored anti-monarch pamphlets but nonetheless recovered damages from his illegal searchers and seizers.<sup>330</sup> Courts of the Founding and antebellum periods were not the voices for communitarian control or law and order that we know today. “[E]ven guilty persons are entitled to the benefit of the laws and constitution,” wrote Justice Spencer Roane of Virginia in 1814.<sup>331</sup> “It can never be the true understanding of those [constitutional] principles, that a general warrant[] is *void* where the party arrested is innocent, and valid if he be guilty.”<sup>332</sup>

In all, the notion that the Framers viewed the Fourth Amendment as a protection only for the innocent seems remarkably foolish.<sup>333</sup> Those who debated the various

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329. The recurring use of quotation marks around the terms *innocent* and *guilty* stems from the author’s cynicism toward the notion that any government authority is capable of determining criminal guilt independent of a jury in each given case. Of course, the Framers generally believed in the theory that every individual possesses natural rights, which are presumed superior to the rights of the state and the power of positive law. *See, e.g.*, ANDREW P. NAPOLITANO, *A NATION OF SHEEP* 1-9 (2007) (describing the gradual movement of American legal philosophy from natural-rights orientations toward more instrumentalist principles); Robert P. George, *Natural Law, the Constitution, and the Theory and Practice of Judicial Review*, in *VITAL REMNANTS: AMERICA’S FOUNDING AND THE WESTERN TRADITION* 151, 152 (Gary L. Gregg II ed., 1999) (“Most modern commentators agree that the American founders were firm believers in natural law” and viewed the state’s role as presumptively inferior by comparison). Under the Framers’ construction of criminal procedure, determination of criminal liability was the sole province of juries, who could pronounce a defendant innocent even if the state proved him to be unquestionably “guilty” in fact. *See, e.g.*, William E. Nelson, *The Eighteenth-Century Background of John Marshall’s Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 904 (1979) (“[J]uries rather than judges spoke the last word on law enforcement in nearly all, if not all, of the eighteenth-century American colonies.”).

330. *See Wilkes v. Wood*, (1763) 98 Eng. Rep. 489, 493-94, 497-99 (K.B.).

331. *Wells v. Jackson*, 17 Va. (3 Munf.) 458, 468 (1814) (Roane, J., concurring).

332. *Id.* at 468.

333. Two curious cases illustrate this point. *Long v. State* involved a buggy-wheel thief who was apprehended in 1850 by private persons purporting to act under the authority of law. 12 Ga. 293 (1852). The thief begged for release and promised to pay his arrestors a slave, some blacksmith tools, a wagon and some other goods (in addition to the stolen buggy wheels) in exchange for release from prosecution. *See id.* at 295-98. Later, the thief lodged a complaint against his arrestors for robbery, and a Georgia grand jury indicted five men for criminal theft of the goods in excess of the buggy wheels. *See id.* at 295-96. The Georgia Supreme Court upheld robbery convictions of the vigilantes, stating that, although the buggy-wheel thief was plainly guilty of stealing the wheels, his guilt was immaterial. *See id.* at 326, 328, 332. What mattered was that the non-deputized law enforcers had failed to secure a proper warrant or take the thief to a magistrate. *See id.* at 326.

The 1837 North Carolina case of *Mead v. Young*, 19 N.C. (2 Dev. & Bat.) 521 (1837), is another bona fide example of a guilty man taking advantage of constitutional protections from unreasonable search and seizure. *Mead* involved a complainant (Young) who obtained a warrant from a magistrate for the arrest of Mead for beating and wounding one of Young’s slaves. *Id.* at 521-22. The warrant commanded a man named Boyd (who was not a public officer) “to apprehend the said company, and them safely keep.” *Id.* at 522. Boyd gathered a posse and went searching for Mead. *Id.* Seeing the posse, Mead surrendered. *Id.* Subsequent conversations between Mead and

provisions of the Bill of Rights regarded the state not as a benevolent protector, but with suspicion and disdain.<sup>334</sup> Constitutional criminal procedure was designed to thwart the state at strategic points, sometimes in circumstances where agents of the state most desire evidence and information. Presumption of innocence, speedy trial provisions, requirements of strict and explicit charging, and double jeopardy clauses in early constitutions acted as bars to prosecutions even where the state's view of "guilt" was unchallenged. Trial by jury originally functioned not only as a mere fact-finding device but also as a fundamental check on the power of government and a means to obstruct unwarranted government prosecutions of "guilty" offenders.<sup>335</sup>

Most of the procedural protections enunciated in the Bill of Rights are lineal descendants of protections that arose during the Inquisition era when the Catholic Church pursued alleged heretics with savage zeal.<sup>336</sup> Silence rights—and the exclusionary rules that developed to protect those rights at trials and other

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Young resulted in a payment by Mead to Young of \$150, possibly to compensate for injuries to the slave but also likely intended as satisfaction of an impending criminal prosecution (which never commenced). *See id.* Mead later sued both Young and Boyd for trespass and false imprisonment. *Id.*

The North Carolina Supreme Court held that the warrant afforded no protection for Young and Boyd because it failed to identify Mead by name, stating that "[b]y the best established principles of the common law—principles deemed so important, as to be embodied in our Constitution, and placed beyond the reach even of legislation—certainty of the person so to be seized, is 'an essential matter required,' in every warrant to apprehend a man for an imputed crime." *Id.* at 526; *see also* *Flanders v. Herbert*, 1 Smith 205, 210-11 (N.H. 1808) (upholding jury's award of damages to plaintiff who was a "wrong-doer" but who suffered an illegal seizure by constables).

334. *See, e.g.*, Patrick Henry, Speech at the Virginia Ratifying Convention (June 5, 1788), reprinted in *THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES* 199, 201 (Ralph Ketcham ed., 1986) (urging Americans to "suspect every one who approaches that jewel [of liberty]" by dint of government authority); Alexander White, *To the Citizens of Virginia*, WINCHESTER VA. GAZETTE, Feb. 29, 1788, reprinted in *THE ORIGIN OF THE SECOND AMENDMENT: A DOCUMENTARY HISTORY OF THE BILL OF RIGHTS 1787-1792*, at 288 (David E. Young ed., 2d ed. 1995) ("In America it is the governors not the governed that must produce their Bills of Right: unless they can shew the charters under which they act, the people will not yield obedience . . ."); *see also* Thomas Tredwell, Debates Before the New York Convention (July 2, 1788), reprinted in *THE ORIGIN OF THE SECOND AMENDMENT: A DOCUMENTARY HISTORY OF THE BILL OF RIGHTS*, 464, 467 (David Young ed., 2nd ed. 1995) (arguing that Federalist pleas to have faith that political leaders will not violate the rights of citizens were alarming and that "it is proved by all experience,—[that suspicion of those in power] is essentially necessary for the preservation of freedom.").

335. *See* LYSANDER SPOONER, AN ESSAY ON THE TRIAL BY JURY 1, 6 (Boston, Bela Marsh 1852). The constitutional purpose behind the grand jury process was likewise for the "protect[ion] of the guilty." Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U.L. REV. 1, 48 (2002).

336. LEVY, *supra* note 53, at 4-20. The Inquisitions "left a trail of mangled bodies, shattered minds, and smoking flesh" in the early thirteenth century until canon law developed procedures for dissidents—"guilty" of doctrinal disagreement—to challenge them. *See id.* at 19-21

proceedings—were established as shields to protect “the guilty” from government and the Church.<sup>337</sup>

#### XV. WIGMORE’S CONSTRUCTION OF A “COMMON LAW DOCTRINE OF NONEXCLUSION”

What about those nineteenth-century cases, which are often cited by anti-exclusion originalists, that admitted illegally seized evidence? These holdings should be assessed for what they are: isolated statements of the law that hardly represented the “universal law against exclusion,” which Professor Amar and others have suggested prevailed across the United States in the mid-1800s.<sup>338</sup> Scrutiny of such citations reveals that *only two jurisdictions*, Massachusetts and New Hampshire, had adopted clear rules of nonexclusion by the time the Supreme Court decided *Boyd* in 1886.<sup>339</sup> These two jurisdictions were greatly outnumbered by jurisdictions with few

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337. See Michael S. Green, *The Privilege’s Last Stand: The Privilege Against Self-Incrimination and the Right to Rebel Against the State*, 65 BROOK. L. REV. 627 (1999).

338. E.g., Amar II, *supra* note 5, at 25.

339. (Need citation to Mass and New Hampshire Case here). The strong constitutional foundations of the exclusionary rule also seem to be supported by legal developments in other countries whose court systems evolved from English common law. It was once common for anti-exclusion scholars to state that the United States was alone in the world in its adoption of exclusion. Chief Justice Burger, for example, claimed so in his famous dissent in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting) (“This evidentiary rule is unique to American jurisprudence.”). Of course, the unique nature of American constitutional sovereignty—being held by the individual rather than the state—makes comparisons between America’s constitutional order and that of other countries somewhat inappropriate. Even so, it is evident that Burger’s argument has been undermined in recent decades. English, Scottish, Canadian and Australian courts have all independently applied versions of the exclusionary rule in the past 30 years, although not consistently. See Stribopoulos, *supra* note 32, at 87, 89-92, 118-19 (describing Britain’s tortured application and prohibition of the rule). At present, England, Scotland, Canada and Australia all use exclusion at the discretion of judges in various circumstances. See *id.* Scotland has adopted something of a rule of discretionary exclusion, generally admitting inadvertently seized evidence and excluding evidence seized with deliberate illegality. *Id.* at 89-90. These foreign systems have adopted exclusion—by court discretion in specific circumstances rather than by rule—upon general principles of fundamental fairness. See *id.* at 87, 89, 120 (describing the justification for a discretionary exclusion rule in England, Scotland, and Canada).

The law of Great Britain never did have a fully settled common law rule of nonexclusion as anti-exclusion scholars sometimes allege. Telford Taylor pointed out in 1969 that “English case law in this field is sparse, but in both of the only two important post-*Entick* decisions, seizures of purely evidentiary documents were sustained.” TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION: SEARCH, SEIZURE, AND SURVEILLANCE AND FREE TRIAL AND FAIR PRESS* 61 (1969). Going back in time yields English cases of habeas corpus discharge for search and seizure violations similar to early decisions in the United States. See 3 THE LEGAL GUIDE 122-23 (London, Richards & Co. 1840) (reporting a case in which inmates arrested unlawfully were discharged from custody and granted damages); *The King v. White*, 20 How. St. Tr. 1376, 1380-81 (1771) (ordering inmate discharged on grounds that he had no other remedy under the impressment [statute]).

or no criminal cases on their books regarding searches or seizures—*except cases excluding illegally seized persons* from custody, as already discussed.<sup>340</sup>

To understand the actual fabric of search and seizure jurisprudence during the nineteenth century, one must don the hat of a historiographer. Historiography is the study of history by means of scrutinizing the writings of historians rather than their underlying facts.<sup>341</sup> In the case of the exclusionary rule, a historiographical analysis invariably and inevitably directs and redirects scrutiny upon the writings of a single individual: the dean of evidence law, John Henry Wigmore.

Wigmore was the Akhil Amar of his day. He invested decades of effort into a personal war against the exclusionary rule. Wigmore's writings on the exclusionary rule began before the end of the nineteenth century and continued well into the twentieth. As dean of the Northwestern University School of Law and the author of America's foremost treatise on the law of evidence—which continues in print long after his death<sup>342</sup>—Wigmore was able to promote and foster a revisionist view of early American search and seizure law that greatly impacted the way future legal historians would think about the Fourth Amendment exclusionary rule.<sup>343</sup>

In Wigmore's narrative, the 1841 Massachusetts case of *Commonwealth v. Dana*, 43 Mass. (2 Met.) 329 (1841), was said to be representative of a vast jurisprudence, which sustained the admissibility of illegally seized evidence in state criminal trials.<sup>344</sup> But neither *Dana* nor any other precedent in any American jurisdiction at the time admitted illegally-seized evidence in criminal litigation.<sup>345</sup> The *Dana* court

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340. For a detailed discussion of apposite state cases immediately preceding the *Boyd* decision, see Donald E. Wilkes, Jr., *A Critique of Two Arguments Against the Exclusionary Rule: The Historical Error and the Comparative Myth*, 32 WASH. & LEE L. REV. 881, 891-92 (1975).

341. See MICHAEL BENTLEY, *MODERN HISTORIOGRAPHY: AN INTRODUCTION* ix (1999).

342. See generally ARTHUR BEST, *WIGMORE ON EVIDENCE* (4th ed. 1995).

343. See Wilkes, *supra* note 346, at 896-97.

344. Wigmore, *supra* note 74, at 479 (claiming “it has long been established that the admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence”).

345. Anti-exclusion scholars occasionally cite dicta in an 1822 federal circuit case, *United States v. La Jeune Eugenie*, 26 F. Cas. 832 (C.C.D. Mass. 1822) (No. 15,551), as supporting the proposition that a common law rule of nonexclusion prevailed in the early Republic. See, e.g., O’Laughlin, *supra* note 6, at 708 (footnote omitted) (claiming “*La Jeune Eugenie* is illustrative of the state of the exclusionary rule in the antebellum era.”). *La Jeune Eugenie* was an admiralty case involving the capture of a French slave ship (*La Jeune Eugenie*) by an American-flagged vessel on the high seas. 26 F. Cas. at 833. The case had ramifications in many areas of law, including admiralty law, international law and the law of the slave trade, and it ultimately led to a ruling by the Supreme Court, in 1825, that the United States government had no authority to intervene in slave shipments under the flags of other nations. See *The Antelope*, 23 U.S. (10 Wheat.) 66, 101-02 (1825).

The opinion in *La Jeune Eugenie* states that “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.” 26 F. Cas. at 843. While this language does appear to support the alleged “doctrine of nonexclusion,” it hardly illustrates “the state of the

found that its search and seizure of lottery tickets and other evidence was legal and reasonable because “the warrant in [that] case [was] in conformity with all the requisites of the statute and the [Massachusetts] declaration of rights,” and, thus, there was no need to consider the question of constitutional remedies.<sup>346</sup> However, the court offered the dicta that an illegal search was not “good reason for excluding the papers seized as evidence.”<sup>347</sup>

In 1858 the New Hampshire Supreme Court decided *State v. Flynn*,<sup>348</sup> upholding the admission of testimony by an officer who had properly executed a valid search warrant and uncovered evidence of illegal liquor sales.<sup>349</sup> The Flynn Court cited *Commonwealth v. Dana* as support for the proposition that “evidence . . . will not be rejected because it has been either illegally or improperly obtained.”<sup>350</sup> The Flynn decision ultimately grew into New Hampshire’s general rule that “[t]he

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exclusionary rule in the antebellum era.” *Compare La Jeune Eugenie*, 26 F. Cas. at 833 with O’Laughlin, *supra* note 6, at 708. For one thing, the court in *La Jeune Eugenie* addressed the law of tort in admiralty jurisdictions rather than making pronouncements about the scope of the Fourth Amendment. *See Davies, supra* note 15, at 664 n.320 (discussing the “widespread misperception that Justice Story addressed and rejected exclusion under the Fourth Amendment in dicta in his 1822 circuit court opinion” in *La Jeune Eugenie*). In Davies’s words, “[a]ll Story’s dictum stands for is the unexceptional proposition that exclusion is not appropriate when evidence has been obtained through an unlawful *private* arrest and search — a view which has never been seriously challenged.” *Id.* at 665 n.320.

346. *Dana*, 43 Mass. (2 Met.) at 336.

347. *Id.* at 337. There is contradictory language in the *Dana* opinion. On one hand, the decision held that the warrant and seizure in the case were lawful. *See id.* On the other hand, there is language in the opinion, “[a]dmitting that the lottery tickets and materials were illegally seized. . . .” *Id.* This author reads this language as offering the hypothetical scenario that an illegal search and seizure occurred for purposes of speculating as to the admissibility of evidence. Wigmore apparently interpreted the same language as a holding and consequently construed *Dana* as establishing an exclusionary ruling. *See Wigmore, supra* note 74, at 479 & n.1. Professor Donald Wilkes has suggested that the *Dana* Court meant “assuming” rather than “admitting.” *See Wilkes, supra* note 341, at 894. Readers are urged to consult the opinion and form their own conclusions.

348. *State v. Flynn*, 36 N.H. 64 (1858).

349. *Id.* at 68-69. The facts in *Flynn* are described without much detail, and, apparently, the officer saw liquor or evidence of liquor but did not seize it. *Id.* at 68 (counsel for the State said “there was no seizure”). Moreover, the court apparently sustained the legality of the search and seizure (if any), meaning *Flynn* (like the *Dana* case in Massachusetts) offered mere dicta in favor of nonexclusion: “The objection made in this case . . . is, rather, that information obtained by means of a search-warrant . . . is not competent to be given in evidence, because it has been obtained by compulsion . . . .” *Id.* at 70. While the court apparently did not rule on whether there had been any search and seizure violation (or held that any search or seizure was lawful), it held that the objection was unsustainable. *See id.*

350. *Id.* at 72. *Flynn* also cited a previous New Hampshire case, *State v. McGlynn*, 34 N.H. 422 (1857), for support. *Id.* at 66-67. In *McGlynn*, the court found “upon general principles” that a constable who assisted in an arrest and search of a suspect and a search of his premises need not swear before testifying in court that the “proceedings had been legal and regular.” *McGlynn*, 34 N.H. at 425, 424.

method by which” evidence is “obtained and produced before the court, even if illegal, d[oes] not affect [its] value as evidence.”<sup>351</sup>

But it was not until 31 years after the *Dana* decision that the dicta published in *Dana* became law with regard to physical evidence anywhere in the United States. In *Commonwealth v. Welsh*, an 1872 Massachusetts decision, the court upheld the admission into evidence of seized liquor in a criminal trial on grounds that “If the officer was guilty of any misconduct in his mode of serving the warrant, he may perhaps have rendered himself liable to an action, or indictment; but the fact that intoxicating liquors were found in the safe would not thereby be rendered incompetent as evidence.”<sup>352</sup>

Here we have what appears to be the first sighting of a “rule of nonexclusion” in any American jurisdiction, authored some four generations after ratification of the Bill of Rights. But such is the nature of *stare decisis* that a string of citations, built upon a weak foundation and following a particular doctrine in a single jurisdiction, can be seen as a bounty of authority within a few decades.<sup>353</sup>

In 1886, however, when the U.S. Supreme Court delivered the *Boyd* decision (holding that compulsory production of private papers to establish a criminal charge is barred by the Fourth Amendment), there were probably only two decisions in the country—both from Massachusetts—that conflicted with the ruling.<sup>354</sup> In 1897, the

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351. *State v. Agalos*, 107 A. 314 (N.H. 1919) (citing *Flynn*, 36 N.H. 64).

352. 110 Mass. 359, 360 (1872) (citing a civil forfeiture case, *Commonwealth v. Intoxicating Liquors*, 4 Allen 593 (1862)).

353. *See Commonwealth v. Tibbetts*, 32 N.E. 910, 911 (Mass. 1893) (citing *Dana*, *Certain Lottery Tickets*, *Certain Intoxicating Liquors*, and *Taylor* for proposition that “[e]vidence which is pertinent to the issue is admissible, although it may have been procured in an irregular or even illegal manner”); *Commonwealth v. Henderson*, 5 N.E. 832, 833 (Mass. 1885) (upholding admission of evidence obtained by officer pursuant to search and stating “[i]t is immaterial whether the proceedings of the officer in serving the search warrant were regular and lawful or not”); *Commonwealth v. Taylor*, 132 Mass. 261, 262-63 (1882) (stating that testimony of medical examiner who performed autopsy without authority admissible); *Commonwealth v. Welsh*, 110 Mass. 359, 360 (1872) (citing *Certain Intoxicating Liquors* for proposition that evidence found under erroneous warrant “would not thereby be rendered incompetent as evidence”); *Commonwealth v. Certain Intoxicating Liquors*, 86 Mass. (4 Allen) 593, 597-600 (1862) (citing *Dana* and upholding civil forfeiture of liquor seized pursuant to flawed and fabricated paperwork); *Certain Lottery Tickets*, 59 Mass. (5 Cush.) 369, 374 (1850); *Commonwealth v. Dana*, 43 Mass. (2 Met.) 329, 337 (1841).

354. After much searching, the author has identified only two pre-*Boyd* decisions that plainly upheld the admission of illegally seized physical evidence (or at least officer testimony that such evidence had been found) in criminal prosecutions over objections based on constitutional search and seizure protections. *See Commonwealth v. Welsh*, 110 Mass. 359, 360 (1872) (upholding the admission into evidence of seized liquor in a criminal trial and citing *Intoxicating Liquors* for the proposition that any defects in the search would not render the evidence inadmissible); *Commonwealth v. Henderson*, 5 N.E. 832, 833 (Mass. 1885) (upholding conviction and stating “[i]t is immaterial whether the proceedings of the officer in serving the search-warrant were regular and lawful or not”). The other pre-1886 cases cited by Wigmore and mentioned in this discussion either were not criminal cases (e.g., *Certain Lottery Tickets*, *supra* note 353), involved only questions of

Georgia Supreme Court cited the Dana/Welsh citation string for the proposition that a rule of inclusion was “consistently adhered to” in Massachusetts.<sup>355</sup> By 1909, the South Dakota Supreme Court was able to cite the same string (along with Georgia’s ruling) as standing for the proposition that “the great weight of authority seems to be in favor of [inclusion of evidence], without regard to the manner in which it was obtained.”<sup>356</sup>

There were cases in other jurisdictions that went the other way on the same questions.<sup>357</sup> But by the time of the first edition of Wigmore’s *A Treatise on the System of Evidence in Trials at Common Law*, in 1904, Wigmore was able to rope together a formidable citation string, which he presented as evidence that *Boyd* represented an “unsatisfactory opinion”<sup>358</sup> and a “dangerous heresy”<sup>359</sup> against settled common law. Wigmore also began mixing the Massachusetts and New Hampshire citations with precedents that were barely on point and packing all of them into an ever-expanding footnote in his many books and essays.<sup>360</sup> By the time of Wigmore’s famed 1922 anti-exclusion article in the *ABA Journal*, his footnote had grown to cover parts of five pages and contained citations to more than 100 cases.<sup>361</sup> Such a formidable wall of precedents supposedly showing *Boyd* to be “thoroughly incorrect in its historical assertions”<sup>362</sup> ensured that all but *Boyd*’s most intrepid defenders would be dissuaded from checking Wigmore’s citations, lest a week be lost in a law library.

But the devil is always in the details, and Wigmore’s footnote contained much slimmer support for his claims than its length suggested. A large number of the cases cited by Wigmore, for example, merely distinguished the Supreme Court’s *Boyd* or *Weeks* rules from their given facts and, thus, followed the rule of exclusion

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testimony as opposed to physical evidence (e.g., *McGlynn*, *supra* note 350, and *Flynn*, *supra* p. 56-57), or offered mere dicta as opposed to actual holdings (e.g., *Dana*, *supra* p. 106-07). Even *Welsh* did not state that its seizure had been illegal, but assumed hypothetically that it was. *See Welsh*, 110 Mass. at 360.

355. *Williams v. State*, 28 S.E. 624, 625 (Ga. 1897).

356. *State v. Madison*, 122 N.W. 647, 650-51 (S.D. 1909).

357. *See, e.g.*, *State v. Sheridan*, 96 N.W. 730, 731 (Iowa 1903) (excluding goods unlawfully taken); *Blum v. State*, 51 A. 26, 28-30 (Md. 1902) (holding illegally seized evidence inadmissible); *People ex rel. Ferguson v. Reardon*, 90 N.E. 829, 833 (N.Y. 1910) (closely following *Boyd* and upholding habeas corpus discharge of a businessman arrested for refusing to show his stock transfer record books upon demand); *State v. Slamon*, 50 A. 1097, 1098-99 (Vt. 1901) (following *Boyd*).

358. JOHN H. WIGMORE, *A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* § 2183, at 2956-57 n.1 (1905).

359. *Id.* § 2264, at 3125-26.

360. *Id.* § 2264, at 3124-25 n.2.

361. Wigmore, *supra* note 74, at 479-83 n.1.

362. John H. Wigmore, *Using Evidence Obtained by Illegal Search and Seizure*, 7 MASS. L.Q., Aug. 1922, at 33, 36 (reprinting essentially the same citations).

implicitly.<sup>363</sup> Some of the cases announced exceptions to the exclusionary rule, such as the search-incident-to-arrest<sup>364</sup> or consent exceptions,<sup>365</sup> thus upholding exclusion by implication. One of Wigmore's cited cases involved a lawyer who expressed regret over voluntarily surrendering deed papers to a party in civil litigation without asserting a work-product privilege or other defense.<sup>366</sup> Another case upheld the admission of a book of tax records over objections that the book did not state exact dates or precisely match an indictment.<sup>367</sup> One involved litigation over a coroner making an unauthorized autopsy.<sup>368</sup> Others were civil cases in which one party objected unsuccessfully to discovery violations.<sup>369</sup> Many were simply cases where defendants unsuccessfully asserted a privilege or unsuccessfully objected to the admission of evidence on non-Fourth-Amendment grounds.<sup>370</sup> Still others *supported exclusion*, and Wigmore cited to them as a concession.<sup>371</sup>

Like an appellate brief written by a shrewd litigator, Wigmore's impressive-looking footnote concealed as much as it illuminated.<sup>372</sup> In 1922, even after twenty years of researching the question, Wigmore could identify no law on the subject in more than one-quarter of the states.<sup>373</sup> Wigmore misstated, deliberately it would

363. See, e.g., *Chastang v. State*, 3 So. 304, 304 (Ala. 1887) (allowing admission of a gun seized during a search-incident-to-arrest by warrant—and explicitly distinguishing its holding from *Boyd* while agreeing with *Boyd's* analysis).

364. See *id.*; *State v. Laundry*, 204 P. 958, 974-76 (Ore. 1922); *State v. Mausert*, 95 A. 991, 992-93 (N.J. 1915); *Younger v. State*, 114 N.W. 170, 172 (Neb. 1907).

365. See *Faulk v. State*, 90 So. 481, 481 (Miss. 1922); *State v. Fuller*, 85 P. 369, 370-71 (Mont. 1906) (holding that defendant had consented to a comparison of his shoes with shoe prints found at the crime scene and had thus waived his objection); *State v. Fowler*, 90 S.E. 408, 410-11 (N.C. 1916).

366. See *Wood v. McGuire*, 21 Ga. 576, 582 (1857).

367. See *State v. Gorham*, 65 Me. 270, 271-73 (1876) (erroneously cited in Wigmore, *supra* note 74, at 481 n.1).

368. See *Commonwealth v. Taylor*, 132 Mass. 261, 262-3 (1882).

369. See *Faunce v. Gray*, 38 Mass. (21 Pick.) 243, 245-46 (1838).

370. See, e.g., *Stevison v. Earnest*, 80 Ill. 513, 516-17 (1875) (upholding the admission of loose papers over a party's objection); *State v. Sawtelle*, 32 A. 831, 833 (N.H. 1891) (involving a telegram, claimed by a company to be privileged, which was ordered to be produced).

371. See *People v. Margelis*, 186 N.W. 488, 489 (Mich. 1922) (excluding a pint of whiskey which fell out of a suspect's pocket during an illegal arrest).

372. Wigmore collected his set of precedents in a traveling footnote that was published in various publications, including several editions of his evidence treatise and a 1922 *ABA Journal* article, *Using Evidence Obtained by Illegal Search and Seizure*. Wigmore, *supra* note 74, 479-83 n.1. This citation string first appeared in Wigmore's 1904 treatise and remained essentially unchanged, except for the addition of new cases as they developed. WIGMORE, *supra* note 368, § 2183, at 295-57 n.1.

373. Even some fairly populous states with well-developed case law, such as Florida, Ohio, Virginia and Wisconsin, had no published cases on the question. See Wigmore, *supra* note 74, at 479 n.1.

seem, the holdings in some of the cases he cited.<sup>374</sup> Some states cited by Wigmore (e.g., Maryland<sup>375</sup> and Michigan<sup>376</sup>) switched from recognizing an exclusionary rule

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374. For example, Wigmore cited Utah as one jurisdiction supportive of a rule of nonexclusion. *See* Wigmore, *supra* note 74, at 483 n.1 (“search without a warrant, held admissible; the offense being committed in [the officers’] presence”). Yet, the Supreme Court of Utah actually declined to rule on the issue at all and suggested that exclusion would be the appropriate remedy if the question were presented. *See* *Salt Lake City v. Wight*, 205 P. 900, 903 (Utah 1922). The Court stated that:

It may well be that under some circumstances, in a proper case, the trial court would be justified in making an order suppressing evidence . . . so as to preclude its being used as evidence against one who is criminally accused, but no such case is presented upon this record for our consideration and determination.

*Id.*

Wigmore’s footnote omitted one jurisdiction with an exclusionary rule, Wyoming, even though he must have come across references to its cases in *Wight*, which he cited. *See* *State v. Peterson*, 194 P. 342, 344, 350, 354 (Wyo. 1920) (imposing the rule of exclusion for search and seizure violations); *Wight*, 205 P. at 903; Wigmore, *supra* note 74, at 483 n.1.

375. *Compare* *Blum v. State*, 51 A. 26, 28-30 (Md. 1902), with *Lawrence v. State*, 63 A. 96, 102-03 (Md. 1906). *Blum* reversed a trial court’s admission of books and papers on grounds that the introduction of such evidence violated Maryland’s Fourth and Fifth Amendment corollaries. *Blum*, 51 A. at 28-30. The *Lawrence* decision (upholding admission of illegally seized evidence) overturned earlier precedents on Maryland’s books (e.g., *Blum*), which had recognized an exclusionary rule. *Lawrence*, 63 A. at 102-03. Wigmore cited the *Lawrence* case in his search and seizure footnote but did not mention *Blum*. Wigmore, *supra* note 74, at 481 n.1.

376. In his notes on Michigan cases alone, Wigmore failed to list several cases supporting exclusion, which were referenced in cases he did cite. *See, e.g.,* *People v. Halveksz*, 183 N.W. 752, 753 (Mich. 1921) (excluding evidence and discharging defendant on grounds that “[n]o power exists at common law to make a search and seizure without a warrant”); *People v. Le Vasseur*, 182 N.W. 60, 61 (Mich. 1921) (excluding evidence and discharging defendant); *People v. Vander Veen*, 182 N.W. 61, 62 (Mich. 1921) (upholding exclusion); *People v. Woodward*, 183 N.W. 901, 901-02 (Mich. 1921) (upholding exclusion).

Wigmore’s Michigan citations make it appear that Michigan had started with a strict nonexclusionary rule and then moved toward an exclusionary rule in the wake of the unsound reasoning of *Boyd* and *Weeks*. *See* Wigmore, *supra* note 74, at 481 n.1 (citing *Cluett v. Rosenthal*, 100 Mich. 193, 197 (1894) as Michigan’s first case validating the admission of testimony regarding the contents of an illegally seized book). In fact, Michigan courts had been discharging illegally seized persons for generations. *See, e.g., In re May*, 1 N.W. 1021, 1021-24 (Mich. 1879) (ordering release of improperly arrested vagrant and stating it is irrelevant whether she is guilty); *People v. Crocker*, 57 Mich. 31 (1869) (ordering discharge of suspect who was arrested by an unsigned warrant).

Moreover, the court in *Rosenthal v. Muskegon Circuit Judge*, which preceded the *Cluett* ruling and was not cited by Wigmore, ordered civil plaintiffs in possession of illegally seized books and papers to surrender them immediately to their owners (the defendants) and not to “us[e] such original books and papers, or us[e] or disclos[e] the contents of such copies, in any manner whatsoever...” 57 N.W. 112, 115 (Mich. 1893) (quoting *Hergman v. Dettlebach*, 11 How. Pr. 46, 48 (N.Y. 1855)). Wigmore also failed to mention another early Michigan exclusion case, *Newberry v. Carpenter*, 65 N.W. 530, 531-32 (Mich. 1895) (holding that government agents may not seize an

to admitting illegally seized evidence in the wake of Wigmore's initial writings<sup>377</sup>—contrary to Wigmore's assertion that “the heretical influence” of *Boyd* and *Weeks* was spreading “a contagion of sentimentality in some of the State Courts, inducing them to break loose from long-settled fundamentals.”<sup>378</sup> Significantly, some jurisdictions that switched from an exclusionary rule to an inclusionary rule even cited Wigmore's assertions among their *grounds* for doing so.<sup>379</sup>

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entire building with a search warrant solely for purposes of seeking evidence against a criminal defendant, and releasing the building to its owner and recognizing the mere evidence rule of *Hibbard v. People*, 4 Mich. 125 (1856)).

Michigan's true exclusion-rule history is almost precisely the opposite of the history told by Wigmore and later described in *Wolf v. Colorado*'s famous tables of state cases. *See* 338 U.S. 25, 33-34, 36 (1949) (listing Michigan as a state that “opposed the *Weeks* doctrine before the *Weeks* case had been decided,” and which, after *Weeks*, “overruled or distinguished prior contrary decisions”). In reality, Michigan can be viewed as a jurisdiction that originally recognized exclusion but moved toward nonexclusion in the wake of Wigmore's “research” and then flip-flopped to follow *Weeks*, perhaps after Michigan judges scrutinized Wigmore's citations. *See infra* notes 388-389 and accompanying text.

377. *Compare* *State v. Strait*, 102 N.W. 913, 913-15 (Minn. 1905) (holding that parties have no right of exclusion *before grand juries*, thus distinguishing its facts from those of *Boyd* while implicitly following it), *with* *State v. Hoyle*, 107 N.W. 1130, 1130 (Minn. 1906) (upholding admission of evidence from a warrantless search).

Other state courts also flip-flopped on the issue. *Compare* *State v. Harley*, 92 S.E. 1034, 1035 (S.C. 1917) (admitting illegally seized articles on grounds that illegality was immaterial), *and* *State v. Atkinson*, 18 S.E. 1021, 1024-25 (S.C. 1894) (stating papers were admissible regardless of how they were found so long as the defendant was not made to produce them), *with* *Blacksburg v. Beam*, 88 S.E. 441, 441 (S.C. 1916) (excluding liquor obtained illegally).

378. Wigmore, *supra* note 74, at 480.

379. *Compare* *Blum*, 51 A. at 30 (following *Boyd* and excluding evidence of an inspection of business records), *with* *Lawrence*, 63 A. at 102-03 (citing “the recent and valuable work on Evidence of Professor Wigmore” and its “exhaustive and discriminating review of the authorities” and stating that evidence will be admitted regardless of the legality of its seizure). The “valuable work on Evidence of Professor Wigmore” language continues to justify Maryland's nonexclusionary “rule” (which is actually an abandonment of Maryland's original exclusionary rule described in *Blum*) to this day. *See* *Ford v. State*, 967 A.2d 210, 230 (Md. Ct. Spec. App. 2009) (citing the language as support for the proposition that Maryland recognizes no exclusionary rule); *Marshall v. State*, 35 A.2d 115, 117 (Md. 1943) (citing Wigmore's “valuable work” to show that illegally taken evidence may be admitted); *Meisinger v. State*, 141 A. 536, 537-38 (Md. 1928) (citing Wigmore's “valuable work” for the proposition that “[w]hen evidence offered in a criminal trial is otherwise admissible, it will not be rejected because of the manner of its obtention”); *Archer v. State*, 125 A. 744, 749-50 (Md. 1924) (citing Wigmore's “valuable work”); *see also* *Cohn v. State*, 109 S.W. 1149, 1150-51 (Tenn. 1908) (citing 4 WIGMORE ON EVIDENCE §§ 2183, 2264 and a dozen of Wigmore's inclusionary cases for the proposition that although evidence was produced by illegal spying, “it would not be rejected by the court as relevant to the issue”). *Cf.* *State v. Anderson*, 174 P. 124 (Idaho 1918) (split decision with majority upholding admission of liquor seized without warrant). Wigmore cited *Anderson* with the claim that it “flatly approv[ed] the orthodox principle, and [did not take] the trouble to notice *Weeks v. U.S.*” Wigmore, *supra* note 74, at 480-81 n.1. Yet, Wigmore failed to report that the *Anderson* decision was so close that three justices on the Idaho Supreme Court each

More significantly, only a small handful of Wigmore's cases were rendered prior to the 1886 *Boyd* decision, which anti-exclusionists claim defied the "universal law" of the nineteenth century.<sup>380</sup> Even Massachusetts and New Hampshire had adopted their rules of nonexclusion fairly recently at the time of the *Boyd* decision and rather tepidly at first.<sup>381</sup> Initially, their courts merely distinguished then-prevailing legal standards (e.g., those laid out in 1765 in *Entick v. Carrington*)<sup>382</sup> or cited their own dicta or English cases that were not on-point.<sup>383</sup> The law in the other states was unsettled, and in a state which Wilson Huhn describes as pre-decided.<sup>384</sup>

Yet for generations after the first publication of Wigmore's writings, scholars have cited them for the proposition that some vast body of jurisprudence of the nineteenth century recognized an *inclusionary* rule. Professor Amar, building on

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held separate positions, and that the case was originally decided in favor of exclusion. *Anderson*, 174 P. at 126. A lengthy dissent by Justice Morgan revealed the conflict among the panelists:

Some time ago I was assigned the task of preparing the opinion of the court in this case. A draft of an opinion was prepared, but my utmost efforts have not convinced the other justices of the soundness of my logic, nor of the wisdom of the decisions of the Supreme Court of the United States, ably expressed, in similar cases.

*See id.* (Morgan, J., dissenting). Wigmore's exaggerated claims may have played a role in altering the outcome of the decision during its drafting stage. *See id.* at 125 (the majority citing Wigmore as support for the false claim that the "doctrine [of nonexclusion] has received the approval of the courts of a majority of the states").

Morgan's dissent also questioned the notion that the nonexclusion cases cited by Wigmore were not merely procedural. Morgan pointed out that some of the holdings, presented as being on the merits of exclusion, were in fact rulings on the appropriate procedure for challenging illegally seized evidence. *See id.* at 126 (Morgan, J., dissenting) ("Some of the decisions above cited," wrote Morgan, "announce the rule that a court will not pause in the trial of a criminal case to frame and try a collateral issue to determine the means by which evidence against the defendant was obtained."). According to Morgan, even *Adams v. New York*, 192 U.S. 585 (1904), can be read as merely holding that a suppression motion should not be made during a criminal trial, but should be a pretrial motion. *See Anderson*, 174 P. at 128.

380. Amar II, *supra* note 5, at 25 (speaking of a "universal law against exclusion" that allegedly prevailed in the nineteenth century).

381. *See supra* notes 345-356 and accompanying text.

382. *See supra* notes 345-356 and accompanying text.

383. Professor Davies observes that neither of the two English cases cited by the *Dana* Court, *Legatt v. Tollervey*, (1811) 104 Eng. Rep. 617 (K.B.), and *Jordan v. Lewis*, (1740) 104 Eng. Rep. 618 (K.B.), "were germane to an alleged violation of a constitutional standard[]" because "they each involved an attempt by a defendant officer to prevent a plaintiff-victim in a false prosecution case from admitting unofficially obtained court records as evidence of the false prosecution — the reverse of the setting involved in the constitutional argument for exclusion." *See Davies, supra* note 15, at 664 n.318.

384. *See Wilson Huhn, The Stages of Legal Reasoning: Formalism, Analogy, and Realism*, 48 VILL. L. REV. 305, 305 (2003) (suggesting that *stare decisis* develops chronologically through the stages of formalism, analogy, and realism, especially in resolving difficult questions of law, and roughly corresponding to the stages of cognitive and moral development).

Wigmore's arguments, alleged the existence of a "universal law against exclusion," which supposedly prevailed in the mid-1800s.<sup>385</sup> Yet Wigmore conceded that prior to the twentieth century, criminal defendants who "had occasion to invoke the Fourth Amendment" as a bar to seizure and admission of physical evidence were "limited in number."<sup>386</sup> It was only with Prohibition and the government's drive to convict people of victimless crimes such as selling liquor that the Fourth Amendment "suddenly c[a]me into wide and frequent" application.<sup>387</sup>

It must be recognized that with the exception of John Wigmore's writings, anti-exclusion scholarship was fairly sparse until the second half of the twentieth century.<sup>388</sup> Most legal scholars of the late 1800s and early 1900s were far less likely than Wigmore to express the opinion that the exclusionary rule represented a radical revolution in criminal justice practices. Although today's anti-exclusionists regard Wigmore's assertions as representative of the scholarship of his day, Wigmore's bold proclamations were in fact criticized at the time.<sup>389</sup> Someone on the Michigan Supreme Court must have spent a few hours checking Wigmore's citations in preparation for a 1919 opinion. The Court, in *People v. Marxhausen*, cast a doubtful eye upon his assertions:

There has been some criticism of the Boyd Case by courts and writers, who have regarded it as not in accord with a long line of cases in state courts [citing Wigmore's principle cases]. . . .

We are impressed, however, that a careful consideration of the Boyd Case, in connection with the Adams Case and the decisions of the state courts, some of which are cited above, but many of which are not, taken in the light of what was said by the court in the Weeks Case, demonstrate that in the main the United States Supreme Court and the courts of last resort of the various states are in accord, and that the Boyd Case does not conflict, as its critics claim, with the holdings of the many state courts.<sup>390</sup>

Consider also Osmond K. Fraenkel's 1921 critique: "the connection between the privilege against self-incrimination and the right to be free from unreasonable

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385. Amar II, *supra* note 5, at 25 (speaking of a "universal law against exclusion" that allegedly prevailed in the nineteenth century).

386. Wigmore, *supra* note 74, at 479.

387. *See id.*

388. *See* Wilkes, *supra* note 346, at 884 (saying defenders of the exclusionary rule were caught unprepared in the 1970s by Chief Justice Burger's claim that the exclusionary rule was without constitutional support).

389. *See* Osmond K. Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361, 367 & n.35 (1921) (criticizing Wigmore's assertions).

390. *People v. Marxhausen*, 171 N.W. 557, 560-1 (Mich. 1919) (emphasis added) (citations omitted).

searches is much closer than the critics of the [*Boyd*] opinion [meaning Wigmore] concede.<sup>391</sup> Fraenkel pointed out that the connection between the two principles was prominent in the pamphlets that accompanied the *Wilkes* and *Entick* cases, with which the Amendment's drafters and ratifiers were familiar.<sup>392</sup> Wigmore's contention that the Fourth Amendment was not intended to aid "the guilty"—now the stock-in-trade of all anti-exclusion scholarship—was also discredited by Wigmore's contemporaries.<sup>393</sup>

As Justice Potter Stewart observed in a 1983 speech, none of the Supreme Court decisions credited with creating the exclusionary rule included much discussion about *whether* the exclusionary rule should exist.<sup>394</sup> They *assumed* it should.<sup>395</sup> Nor were there dissents in any of those cases in which any justice scolded his colleagues for abandoning a long-settled "common law rule of nonexclusion."<sup>396</sup> It was until the 1970s before any member of the Supreme Court wrote that the exclusionary rule represented a novel abandonment of long-standing nineteenth-century black-letter law.<sup>397</sup>

What the cases cited by Wigmore illustrate is not that exclusion was a radical departure from the settled law of the late nineteenth century, but that the law governing illegally seized physical evidence was unsettled and developing during the period. The sparse record of regional trial practices in the early republic yields scant basis to make *any* categorical statements about early evidentiary practices. And

391. Fraenkel, *supra* note 399, at 367.

392. *Id.* at 367 n.35.

393. See Note, *Evidence Obtained by Illegal Search and Seizure*, 14 COLUM. L. REV. 338, 338 (1914) (stating "it seems clear that the Fourth Amendment was intended" to "impede prosecutions irrespective of the guilt or innocence of the accused").

394. Stewart, *supra* note 26, at 1372.

395. See *id.*

396. Pitler, *supra* note 27, at 479; cf. Donald A. Dripps, *Justice Harlan on Criminal Procedure: Two Cheers for the Legal Process School*, 3 OHIO ST. J. CRIM. L. 125, 136 (2005) ("Justice Harlan's dissent in *Mapp* is as noteworthy for what it did not say as for what it did say. Harlan did not invoke the original understanding of either the Fourth Amendment or the Fourteenth."). A caveat is merited here because the Supreme Court's opinion in *Adams v. New York* did state that a vast majority of cases on the issue went against exclusion. See 192 U.S. 585, 598 (1904) ("But the English and nearly all of the American cases have declined to extend this doctrine to the extent of excluding testimony which has been obtained by such means, if it is otherwise competent"). Yet, *Adams* stopped short of claiming that nonexclusion was a settled rule, as many anti-exclusionists claim today.

397. See, e.g., *California v. Minjares*, 443 U.S. 916, 920 (1979) (Rehnquist, J., dissenting from denial of stay) (criticizing the *Weeks* Court for its "almost casual[ ]" holding that exclusion was required by the Fourth Amendment); *Stone v. Powell*, 428 U.S. 465, 497 (1976) (Burger, C.J., concurring) (in which Chief Justice Burger referred to the Court's exclusionary rule regime as a "remarkable situation—one unknown to the common-law tradition"); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 415-16 (1971) (Burger, C.J., dissenting) (criticizing the application of the exclusionary rule).

because appellate courts rarely ruled on criminal trial evidence decisions during the 1800s, there were no rules at all in many jurisdictions, other than the exclusion-implicating rules mandated by the law of pretrial habeas corpus and the mere evidence doctrine. It was only after 1914 that some state appellate courts began ruling one way or the other on the specific question of whether to exclude wrongfully seized *physical* evidence, either following *Weeks* or declining to follow it. Many state jurisdictions had only a few binding search and seizure interpretations before *Mapp* closed off all nonexclusionary options in 1961.<sup>398</sup>

## XVI. CONCLUSION

Early American criminal evidentiary remedies went for the most part unrecorded and unreviewed. What we do know of such remedies supports, rather than undermines, the notion that early American judges applied exclusion where evidence was taken illegally by state actors. *The very first* U.S. Supreme Court decisions to consider the meaning of the Fourth Amendment ordered criminal defendants discharged before trial on Fourth Amendment grounds.<sup>399</sup> The earliest Supreme Court decision to construe the Fourth Amendment's applicability to physical evidence *applied an exclusionary rule*.<sup>400</sup> Pre-Founding statements by judges and commentators indicating that illegal seizure of evidence merited exclusion, or the vitiation of subsequent criminal prosecutions, brought no recorded challenge.<sup>401</sup> By contrast, there was no known opposition to this position during the Founding period.

All of this means that exclusionary remedies were unquestionably among the originally intended remedies of the Fourth Amendment. Although modern-day anti-exclusion scholars claim that the Constitution's Founders lived in a world where exclusion of evidence on search or seizure grounds was unknown, or even that a *rule of nonexclusion* prevailed during the Founding and antebellum periods, the exact opposite is true. Late eighteenth- and early nineteenth-century courts routinely discharged victims of search and seizure violations from custody.<sup>402</sup> The proposition that search and seizure protections were closely allied with silence rights (and hence exclusionary principles) is supported by a number of sources in the political and legal discourse of the Founding period.<sup>403</sup> In contrast, court holdings that explicitly rejected the notion of Fourth Amendment (or state corollary) exclusion were rare

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398. See, e.g., WESLEY W. HORTON, *THE CONNECTICUT STATE CONSTITUTION: A REFERENCE GUIDE* 50 (1993) (stating that Connecticut search and seizure law is still "mostly virgin territory" except for a handful of decisions).

399. See *Ex parte* Burford, 7 U.S. (3 Cranch) 448, 451 (1806); *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 110-11 (1807).

400. See *Boyd v. United States*, 116 U.S. 616, 638 (1886).

401. See *Frisbie v. Butler*, 1 Kirby 213, 215 (Conn. 1787).

402. See *supra* notes 118-90 and accompanying text.

403. See *supra* notes 239-276 and accompanying text.

phenomena in the American states prior to the U.S. Supreme Court's exclusion ruling in *Boyd v. United States* in 1886. Such holdings arose in only two state court systems, during a 40-year period from the 1850s to the 1890s. Moreover, the legal-historical record strongly supports the proposition that these two regional lines of pre-*Boyd* nonexclusion cases represented *departures* from the common law known to the Founding generation and their understandings of search and seizure provisions in the federal Constitution and early state constitutions.