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Restoring The Fourth Amendment: The Original Understanding Revisited

by DAVID E. STEINBERG

I. Introduction

Today, Fourth Amendment doctrine is a mess. Supreme Court decisions are arbitrary, unpredictable, and often border on incoherent.

Fourth Amendment scholars compete to develop catchy phrases that describe this quagmire. Professor Craig Bradley writes: "The fourth amendment is the Supreme Court's tarbaby; a mass of contradictions and obscurities that has ensnared the 'Brethren' in such a way that every effort to extract themselves only finds them more profoundly stuck." According to Professor Erik Luna, each new Fourth Amendment case "is more duct tape on the Amendment's frame and a step closer to the junkyard." Professor Akhil Amar simply writes: "The Fourth Amendment today is an embarrassment."

This incoherence has resulted from attempts to apply the Fourth Amendment in situations where the amendment never was intended.
to apply. The framers intended that the Fourth Amendment only would regulate searches of residences. The Fourth Amendment prohibited house searches pursuant to a general warrant, as well as warrantless house searches.

If one asked the framers what the amendment provided with respect to other types of government searches or seizures, the answer would be: "Nothing at all."

Part II of this article reviews three areas of modern Fourth Amendment law—container searches, random drug tests, and auto checkpoints. The law in these areas is arbitrary and unpredictable. As a result, police officers may violate the Fourth Amendment simply because they cannot understand Fourth Amendment law. When courts exclude evidence obtained in violation of the Fourth Amendment, this doctrinal unpredictability results in high social costs.

Part III of this essay reviews historical evidence on the original understanding of the Fourth Amendment. To a remarkable degree, framing era discussions of unreasonable searches and seizures all focused on a single, discrete problem—unlawful searches of residences. The modern assumption that the Fourth Amendment applies outside of house searches receives little if any historical support.

Part IV of this essay discusses why Fourth Amendment history matters. Given the lack of any modern consensus defining the term "unreasonable searches and seizures," a non-originalist Fourth Amendment interpretation ultimately will be arbitrary and subjective.
as illustrated by modern Fourth Amendment doctrine. Part IV demonstrates this subjectivity by examining results of the modern "reasonable expectation of privacy test," used to determine if the Fourth Amendment warrant requirement applies. Originalist evidence on the meaning of the Fourth Amendment is relevant, precisely because there is no coherent alternative.

Part V of this essay briefly examines possible restraints on police officers in a world without a Fourth Amendment. Such restraints could include police department rule-making, statutory regulations, and tort suits seeking civil damages. Critics may contend that these alternatives will not impose adequate restraints on police officers. But relying on the Fourth Amendment as a general regulation of police searches and seizures simply is unworkable. The Fourth Amendment never was intended to serve this role.

II. The Doctrinal Morass

The following section examines Supreme Court doctrine that governs three areas of Fourth Amendment law—container searches, random drug tests, and auto checkpoints. This review is sobering. These Fourth Amendment decisions seem both arbitrary and unpredictable.

The section concludes by noting the high social costs that occur when this doctrinal incoherence is combined with the exclusionary rule. Police officers violate the Fourth Amendment because the officers can't understand the law. As a result of these violations, evidence is excluded and guilty criminals go free.

A. Container Searches.

A container "denotes any object capable of holding another object." Common examples of containers include luggage, purses, and brown paper bags.  

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8. See, e.g., United States v. Chadwick, 433 U.S. 1, 6-16 (1977) (a warrantless search of a footlocker violated the Fourth Amendment).


10. See, e.g., California v. Acevedo, 500 U.S. 565, 569-81 (1991) (where police officers found a brown paper bag in a car, a warrantless search of the bag did not violate the Fourth Amendment); United States v. Ross, 456 U.S. 798, 804-25 (1982) (where a police officer had probable cause to believe that an automobile contained narcotics, the officer could open a paper bag in the trunk of the car without first obtaining a warrant).
The general Fourth Amendment rule that applies to containers is stated in *United States v. Chadwick*. The Chadwick Court concluded that individuals have a reasonable expectation of privacy in closed containers. Chief Justice Warren Burger wrote that like a person "who locks the doors of his home against intruders," a person who places his possessions in a locked footlocker "is due the protection of the Fourth Amendment Warrant Clause." The Chadwick decision thus announced the following rule: police officers may seize a container with probable cause, but the officers cannot open the container until they obtain a warrant.

However, police officers do not need a warrant to search one type of large, common container – the automobile. The Supreme Court has justified warrantless searches of automobiles for three reasons: 1) cars are inherently mobile, 2) there is extensive regulation of motor vehicles and traffic, and 3) people possess a limited expectation of privacy in an auto that "travels public thoroughfares where both its occupants and its contents are in plain view."

Cases where police officers have found containers inside of cars have posed special problems. In *Arkansas v. Sanders*, the Supreme Court initially held that police officers violated the Fourth

12. Id. at 11.
13. Id. at 13-16.
14. See, e.g., California v. Carney, 471 U.S. 386, 390-95 (1985) (holding that a warrantless search of a parked motor home did not violate the Fourth Amendment); Chambers v. Maroney, 399 U.S. 42, 51 (1970) (holding that police officers who possess probable may conduct a warrantless search of an auto stopped on a highway, because "the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained").
15. See, e.g., Chambers, 399 U.S. at 48-54 (upholding the warrantless search of an automobile); Carroll v. United States, 267 U.S. 132, 153 (1925) (same).
16. Cady v. Dombrowski, 413 U.S. 433, 441 (1973) (observing that extensive regulation leads to greater "police-citizen contact involving automobiles" than "police-citizen contact in a home or office").
Amendment, where the officers opened a suitcase in a taxicab trunk without first obtaining a warrant. However, *Sanders* ultimately was reversed by *California v. Acevedo.* In *Acevedo,* Justice Harry Blackmun wrote for the majority: "We conclude that it is better to adopt one clear-cut rule to govern automobile searches and eliminate the warrant requirement for closed containers set forth in *Sanders.*" 

However, the Court has not adopted one clear-cut rule for containers found in cars. Where police officers have probable cause to believe that incriminating evidence is located somewhere in a car, but the officers are unsure of where the evidence is concealed, the officers may conduct a warrantless search of "every part of the vehicle and its contents that may conceal the object of the search." This rule "applies equally to all containers" found in a car, as well as to the car itself.

On the other hand, police officers may have probable cause to believe that evidence of crime is located in a particular container, which happens to be stored in an auto. If so, police officers may conduct a search of the suspicious container, but "a search of the entire vehicle" would be "without probable cause" under the Fourth Amendment—and thus unlawful.

In short, the Court has endorsed a distinction with respect to containers in cars. Where police officers have probable cause to believe that evidence is located somewhere in the car, the officers may search the entire car and open any containers. However, where police officers have probable cause to believe that a particular container in a car holds the evidence, police officers may open that container, but cannot search the rest of the car. The fine distinction between "probable-cause-with-respect-to-the-car" and "probable-cause-with-respect-to-a-container-in-the-car" is sure to invite litigation, unintentional Fourth Amendment violations, and exclusion.

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20. *Id.* at 763 ("[T]he State has failed to carry its burden of demonstrating the need for warrantless searches of luggage properly taken from automobiles.").
22. *Id.*
24. *Id.* at 822.
26. *Id.* at 580.
of probative evidence.

The different treatment of containers-inside-of-cars and containers-outside-of-cars raises even more serious Fourth Amendment anomalies. Consider the following hypothetical, based on Justice Blackmun's dissent in *Chadwick*. Police officers have probable cause to believe that a train is carrying a footlocker, loaded with marijuana. The defendants claim the footlocker at a Boston train station, and sit down on top of the footlocker. The defendants then leave the footlocker on the floor of the station, while they look for an attendant to help move the heavy footlocker. The defendants eventually find an attendant, who loads the footlocker into a co-defendant's automobile.

If federal agents arrested the defendants while they were sitting on the footlocker, the agents could conduct a warrantless search of the footlocker. Under the search incident to arrest doctrine, law enforcement officers who lawfully arrest a suspect may conduct a warrantless search of any containers within the suspect's immediate control. Because the footlocker was within the suspects' immediate control while they were sitting on it, a lawful arrest at this time would have permitted the federal agents to conduct a warrantless search of the footlocker.

Alternatively, federal agents might have waited until the footlocker was stored in the auto. If the agents seized the footlocker after it came to rest in the automobile, the automobile exception would authorize a warrantless search of this container.

But now assume that federal agents seized the footlocker after the suspects had left to look for help, but before the footlocker was loaded into the car. Assume further that the agents searched the footlocker without a warrant. According to *Chadwick*, this

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30. *Id.* at 4.
31. *Id.*
32. *Id.*
33. *See* Chimel v. California, 395 U.S. 752, 763 (1969) (holding that a warrantless search was unlawful, where police officers searched areas of an arrested suspect's house that were not within the suspect's immediate control).
34. *See, e.g.*, United States v. Robinson, 414 U.S. 218, 224-37 (1973) (when a police officer arrested a suspect, the officer may open a cigarette package in the suspect's coat without obtaining a warrant).
35. *See* Acevedo, 500 U.S. at 572-81 (where police officers had probable cause to believe that a brown paper in the trunk of an automobile contained marijuana, the officers could open the paper bag).
warrantless search of the footlocker would violate the Fourth Amendment.\textsuperscript{36}

As Justice Blackmun described these results in his \textit{Chadwick} dissent: "The approach taken by the Court has the perverse result of allowing fortuitous circumstances to control the outcome of the present case."\textsuperscript{37} In other words, to make the lawfulness of a search turn on such trivial timing issues is absurd.

Dissenting in \textit{Acevedo},\textsuperscript{38} Justice John Paul Stevens identifies a similar Fourth Amendment "paradox."\textsuperscript{39} A suspect is carrying a heavy briefcase. Police officers have probable cause to believe that the briefcase is filled with marijuana. Indeed, the briefcase does contain this illicit drug. However, the police officers have not obtained a search warrant for the briefcase. The suspect hails a cab. The cab driver agrees to load the briefcase in the trunk. The suspect then enters the cab, leaving the briefcase on the sidewalk. The cab driver puts the briefcase in the trunk of the cab, shuts the trunk, and drives away.

Assume that the police officers seize the briefcase while it sits on the sidewalk. If the officers search the briefcase without a warrant, the \textit{Chadwick} rule governing container searches applies. The warrantless search of the briefcase is unlawful, and any evidence found inside almost certainly will be excluded at a criminal trial.\textsuperscript{40}

However, what if the officers wait until the briefcase is in the

\textsuperscript{36} \textit{Chadwick}, 433 U.S. at 11-16. In \textit{Chadwick}, federal agents actually seized the footlocker just after the defendants had loaded the container into the trunk of Chadwick's car. \textit{Id.} at 4. However, the \textit{Chadwick} Court concluded that the automobile search doctrine did not apply, because the footlocker had only a "brief contact with Chadwick's car." \textit{Id.} at 11.

I never have understood why the automobile search doctrine did not apply in \textit{Chadwick}. Most automobile search cases do not consider how long a container has rested in an automobile. Instead, courts often have upheld warrantless automobile searches after a container has spent just a few minutes inside of a car. See, \textit{e.g.}, \textit{Acevedo}, 500 U.S. at 572-81 (a warrantless search of a brown paper bag was lawful, when the defendant had placed the paper bag in the trunk of his car just a few moments before police officers stopped the car, opened the trunk, and searched the paper bag). Based on the reasoning that appears in decisions such as \textit{Acevedo}, the \textit{Chadwick} Court should have treated the search of the footlocker as an automobile search case.

\textsuperscript{37} \textit{Chadwick}, 433 U.S. at 22 (Blackmun, J., dissenting).

\textsuperscript{38} \textit{Acevedo}, 500 U.S. at 585 (Stevens, J., dissenting).

\textsuperscript{39} \textit{Id.} at 598.

\textsuperscript{40} \textit{Chadwick}, 433 U.S. at 11-16. If the suspect were carrying the briefcase, police officers could arrest the suspect and then search the briefcase without a warrant. Under the search incident to arrest doctrine, police officers may conduct a warrantless search of any container within a suspect's immediate control, at the time when the suspect is lawfully arrested. See, \textit{e.g.}, United States v. Robinson, 414 U.S. 218, 224-37 (1973) (upholding a warrantless search of a cigarette package in a suspect's coat, which occurred during a lawful arrest).
trunk of the taxi? Now that the auto search doctrine applies, the warrantless search is permissible.\textsuperscript{41} Justice Stevens had the following reaction to these results: "[S]urely it is anomalous to prohibit a search of a briefcase while the owner is carrying it exposed on a public street yet to permit a search once the owner has placed the briefcase in the locked trunk of his car."\textsuperscript{42}

These bizarre results are the work of the nation's best and brightest legal talent. Supreme Court Justices are carefully selected, and subjected to a rigorous confirmation process.\textsuperscript{43} The Court's jurisdiction is almost entirely discretionary, with the Justices handling a relatively limited docket.\textsuperscript{44} Each Justice has the assistance of several law clerks, whom the Justices choose from the best and brightest law school graduates.\textsuperscript{45} As is the case with the doctrines discussed below, the bizarre results in the container search cases suggest that something is terribly wrong with the way that we currently think about the Fourth Amendment.

\textbf{B. Random Drug Tests}

Since 1989,\textsuperscript{46} the Supreme Court has reviewed six random drug test cases. The Court has upheld four random drug test programs, while concluding that two other programs violated the Fourth

\textsuperscript{41} See, e.g., Wyoming v. Houghton, 526 U.S. 295, 299-307 (1999) (where a highway patrol officer found a passenger's purse in an auto, the officer could search the purse without a warrant); \textit{Acevedo}, 500 U.S. at 572-81 (police officers did not violate the Fourth Amendment, where the officers conducted a warrantless search of a brown paper bag located in the trunk of an automobile).

\textsuperscript{42} \textit{Acevedo}, 500 U.S. at 598 (Stevens, J., dissenting).


\textsuperscript{44} See, e.g., \textit{LISA A. KLOPPENBERG, PLAYING IT SAFE: HOW THE SUPREME COURT SIDESTEPS HARD CASES AND STUNTS THE DEVELOPMENT OF LAW} (New York: New York University Press, 2001) (reporting that the Supreme Court agrees to review only about one percent of the cases that reach the Court through a petition for certiorari).

\textsuperscript{45} See, e.g., Mark R. Brown, \textit{Gender Discrimination in the Supreme Court's Clerkship Selection Process}, 75 OR. L. REV. 359, 362 (1996) (former Supreme Court clerks "practice in the nation's best law firms, teach in its best law schools, hold the plum public-sector appointments, and on occasion rise again to the Supreme Court").

Amendment.\textsuperscript{47}

In distinguishing between permissible and impermissible random drug test programs, the Court has emphasized two factors. First, the Justices often have upheld random drug tests only after the government has demonstrated that the tests serve "special needs."\textsuperscript{48} Second, the Justices have not permitted the use of random drug test results in criminal prosecutions.\textsuperscript{49}

As in most areas of Fourth Amendment law, the Court’s random drug tests decisions seem unpredictable and difficult to reconcile. In \textit{Chandler v. Miller},\textsuperscript{50} the Justices struck down a Georgia statute, which required that candidates for designated state offices must take a urinalysis drug test prior to their nomination or election. However, in \textit{Board of Education v. Earls},\textsuperscript{51} the Justices upheld a random urinalysis test policy for high school students who participated in competitive extracurricular activities.\textsuperscript{52}

The holdings in \textit{Earls} and \textit{Chandler} are difficult to reconcile. In \textit{Chandler}, the Court emphasized that the state had not produced any "concrete danger" of widespread illicit drug use among candidates for public office.\textsuperscript{53} But such evidence also was lacking with respect to the particular students tested in \textit{Earls}.\textsuperscript{54}


\textsuperscript{48}\textit{Skinner}, 489 U.S. at 620.

\textsuperscript{49}See \textit{Ferguson}, 532 U.S. at 80 (a random drug testing program for women receiving prenatal care violated the Fourth Amendment, where law enforcement authorities could receive positive drug test results).

\textsuperscript{50}520 U.S. 305 (1997).

\textsuperscript{51}536 U.S. 822 (2002).

\textsuperscript{52}Id. at 826.

\textsuperscript{53}\textit{Chandler}, 520 U.S. at 318-19.

\textsuperscript{54}\textit{Earls}, 536 U.S. at 835 (the state school board failed to demonstrate any "particularized or pervasive drug problem" among Tecumseh High School students involved in extracurricular activities. \textit{See also id.} at 853 (Ginsburg, J., dissenting) ("Nationwide, students who participate in extracurricular activities are significantly less likely to develop substance abuse problems than are
In fact, random drug testing of candidates for public office would seem to serve a more compelling interest than testing high school students who participate in extracurricular activities, other than athletic competitions. If certain members of the school orchestra or chess club were under the influence of illicit drugs, those students presumably would not pose a danger to anyone but themselves. Conversely, if high-ranking state officials were under the influence of illegal drugs, the officials could make decisions resulting in considerable harm to the public. In short, the Court's random drug test decisions in Chandler and Earls are difficult to reconcile.

C. Automobile Checkpoints

In three relatively recent decisions, the Supreme Court has applied the Fourth Amendment to automobile checkpoints where police officers stop each driver. As is the case in the container search cases and the random drug test cases, these checkpoint decisions seem arbitrary and unpredictable. The Supreme Court issued these auto checkpoint decisions in the last 15 years. The incoherence of this relatively new branch of Fourth Amendment law is particularly troubling.

In Michigan Department of State Police v. Sitz, the Supreme Court upheld a Michigan sobriety checkpoint. Michigan state law enforcement officers stopped every vehicle that passed through a fixed checkpoint. At the checkpoint, the officers checked each driver for obvious signs of intoxication.

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55. See Vemonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995). The Supreme Court upheld a random drug testing program for high school students who participated in interscholastic athletics. Id. at 665. The Acton majority observed that when student athletes use illegal drugs, "the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high." Id. at 662.

56. Earls, 536 U.S. at 852 (Ginsburg, J., dissenting) ("[T]he great majority of students that the School District seeks to test in truth are engaged in activities that are not safety sensitive to an unusual degree.").

57. But cf Chandler, 520 U.S. at 321-22 (state officials "typically do not perform high-risk, safety sensitive tasks").


60. On average, each checkpoint stop lasted for about 25 seconds. Id. at 448. See also
The *Sitz* Court held that the Michigan sobriety checkpoint program did not violate the Fourth Amendment. Chief Justice William H. Rehnquist balanced "the magnitude of the drunken driving problem," and the state's "interest in eradicating it" against the minimal intrusion on motorists' privacy.

In *City of Indianapolis v. Edmond*, the Court reviewed a narcotics checkpoint program with many similarities to the checkpoint program upheld in *Sitz*. In *Edmond*, police officers stopped a predetermined number of vehicles at each checkpoint location. While checking each driver for signs of impairment, the police officers led a drug-detecting dog around the outside of each stopped vehicle.

The checkpoint in *Edmond* seemed identical to the *Sitz* sobriety checkpoint, except that a drug-detecting dog sniffed the cars in *Edmond*. But in *United States v. Place*, the Court had held that the use of a drug-detecting dog was not a search, and was not covered by the Fourth Amendment. So the *Edmond* checkpoint would seem to satisfy the Fourth Amendment.

But it didn't. The *Edmond* Court held that the Indianapolis narcotics checkpoints resulted out of an improper "primary purpose." According to Justice Sandra Day O'Connor, the *Sitz* checkpoint was designed primarily in response to "the necessity of ensuring roadway safety." However, in *Edmond*, "the Indianapolis checkpoint program unquestionably has the primary purpose of interdicting illegal narcotics." The use of a checkpoint designed primarily to serve criminal law enforcement interests was improper.

If *Sitz* and *Edmond* were not confusing enough, the Court further muddied the checkpoint waters in *Illinois v. Lidster*. Shortly

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United States v. Martinez-Fuerte, 428 U.S. 543, 554-67 (1976) (where the Border Patrol stopped cars briefly at a fixed checkpoint to search for illegal aliens, the checkpoint did not violate the Fourth Amendment).

62. *Id.* ("the intrusion on motorists stopped briefly at a sobriety checkpoint ... is slight").
64. *Id.* at 34-35.
66. *Id.* at 707.
68. *Id.* at 43.
69. *Id.* at 40.
70. *Id.* at 44.
after a bicyclist was killed in a hit-and-run accident on an Illinois highway, police officers erected a highway checkpoint “at about the same time of night and at about the same place” as the location where the accident had occurred.\textsuperscript{72} During a brief stop, police officers asked the occupants of each auto if they possessed any information about the fatal hit-and-run accident.\textsuperscript{73}

Robert Lidster was driving his minivan erratically as he approached the checkpoint. Lidster was arrested, and eventually convicted of driving under the influence of alcohol.\textsuperscript{74}

The \textit{Lidster} checkpoint was “designed primarily to serve the general interest in crime control.”\textsuperscript{75} Consequently, if one were to adopt the reasoning in \textit{Edmond}, this checkpoint would be unlawful.

Wrong again! The \textit{Lidster} Court upheld the crime scene checkpoint. Although the \textit{Lidster} checkpoint furthered the state’s “general interest in crime control,”\textsuperscript{76} the checkpoint merely involved an “information-seeking kind of stop.”\textsuperscript{77} Writing for the \textit{Lidster} majority, Justice Stephen Breyer observed: “The stop’s primary law enforcement purpose was \textit{not} to determine whether a vehicle’s occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others.”\textsuperscript{78}

The Court’s attempts to distinguish the constitutional checkpoints in \textit{Sitz} and \textit{Lidster} from the unconstitutional checkpoint in \textit{Edmond} are unconvincing. All three checkpoints were designed to serve a “law enforcement purpose.”\textsuperscript{79} After all, each checkpoint case came to the Supreme Court as a result of a criminal prosecution and a conviction.

The argument that the police officers in \textit{Lidster} were involved only in an information-gathering foray is disingenuous. Had these police officers stopped the hit-and-run driver at the Illinois checkpoint, the officers unquestionably would have detained the driver. Indeed, after Lidster was stopped, the state prosecuted him for drunk driving.

\begin{footnotes}
\item[72.] \textit{Id.} at 422.
\item[73.] \textit{Id.}
\item[74.] \textit{Id.}
\item[75.] \textit{Edmond,} 531 U.S. at 42.
\item[76.] \textit{Lidster,} 540 U.S. at 424.
\item[77.] \textit{Id.}
\item[78.] \textit{Id.} at 423.
\item[79.] \textit{Edmond,} 531 U.S. at 42.
\end{footnotes}
At least in *Lidster*, the Justices candidly admitted that the Court would assess each checkpoint's "reasonableness, hence its constitutionality, on the basis of the individual circumstances." The vagueness of this non-standard provides virtually no guidance to police departments on lawful and unlawful checkpoints. Future checkpoints seem certain to result in constitutional violations by conscientious police departments, exclusion of probative evidence, and questions about the legitimacy of the Supreme Court's Fourth Amendment interpretations.

D. Why It Matters: The Exclusionary Rule

A perfectly reasonable response to this doctrinal jumble is: "So what?" The complexities of Fourth Amendment doctrine provide me with a Criminal Procedure course to teach each year. And the Fourth Amendment also is an endless source for bar examination questions.

But such Fourth Amendment doctrinal incoherence imposes high social costs because of the exclusionary rule. Under this rule, physical evidence obtained in violation of the Fourth Amendment usually is inadmissible at trial. Because such physical evidence is frequently highly probative, application of the exclusionary rule often means that the state cannot successfully prosecute guilty defendants, who go free.

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80. *Lidster*, 540 U.S. at 426. The Court's distinction between the valid sobriety checkpoint in *Sitz* and the invalid narcotics checkpoint in *Edmond* suggests a highly questionable balancing of private and public interests. In *Sitz*, during a sobriety checkpoint established for 75 minutes, police officers arrested about 1.6 percent of the drivers they stopped. *Sitz*, 496 U.S. at 448. In *Edmond*, during six narcotics checkpoints, about 9 percent of the auto stops resulted in arrests. *Edmond*, 531 U.S. at 34-35. The higher success rate suggests that the invalid *Edmond* checkpoint served more compelling state interests than the valid *Sitz* checkpoint.


The Supreme Court has held that the exclusionary rule does not apply in some circumstances, even where police officers have obtained evidence in violation of the Fourth Amendment. The Supreme Court has held that courts should not exclude evidence, "when an officer acting with objective good faith" relies on a valid search warrant. See, e.g., *United States v. Leon*, 468 U.S. 897, 920 (1984); *United States v. Havens*, 446 U.S. 620, 627-28 (1980) (illegally obtained evidence could be used to impeach a defendant's credibility on cross-examination, where the questions had been suggested by the direct examination).

82. See, e.g., *Illinois v. Gates*, 462 U.S. 213, 254-55 (1983) (noting that because of "the inherent trustworthiness of seized tangible evidence and the resulting social costs from its loss through suppression, application of the exclusionary rule has been restricted"); *Amar, Fourth Amendment First Principles, supra* note 4, at 799 (as a result of the exclusionary rule, the Fourth Amendment "has lost its luster and become associated with grinning criminals getting off on crummy technicalities").
The arbitrariness, unpredictability, and at times, incoherence of Fourth Amendment law virtually ensure that police officers will violate the Fourth Amendment, and evidence will be excluded. Consider the facts of *Kyllo v. United States.* While sitting in a car parked in a public street, federal agents used a thermal imaging unit to measure the temperature inside of Danny Kyllo's garage. The agents did not obtain a search warrant prior to using this unit.

The thermal imaging unit showed that Kyllo's garage was unusually warm. This finding supported the agents' suspicions that Kyllo was using his garage as a marijuana greenhouse.

The agents' suspicions were justified. A subsequent search of Kyllo's residence revealed more than 100 marijuana plants. Kyllo predictably sought to suppress the evidence about the marijuana plants, arguing that the warrantless use of the thermal imaging unit had violated the Fourth Amendment.

Assume that prior to the decision in *Kyllo,* the federal agents had asked me whether the warrantless use of the thermal imaging unit was constitutional. I would have speculated that the agents probably could use the unit without first obtaining a warrant. In *California v. Ciraolo,* the Supreme Court already had held that police officers need not obtain a warrant before using an airplane to peer into a suspect's backyard. Both the aerial surveillance and the use of the thermal imaging unit had occurred without any physical trespass into the suspect's home. Before the *Kyllo* decision, I

84. Id. at 29-30.
85. See id. at 30 ("The scan showed that the roof over the garage and a side wall of petitioner's home were relatively hot compared to the rest of the home and substantially warmer than neighboring homes in the triplex.").
86. Id. at 30.
87. Id. at 30-31.
88. Id.
89. Given the unpredictable quality of Fourth Amendment decisions, I strongly would have encouraged the agents to obtain a warrant, if possible. Under the Fourth Amendment, police officers may obtain a warrant only if the officers have established probable cause. U.S. CONST. amend. IV.
90. 476 U.S. 207 (1986).
91. Id. at 211-15.
92. Kyllo's argument that warrantless use of the thermal imaging unit violated the Fourth Amendment received the strongest support from *United States v. Karo,* 468 U.S. 705 (1984). *Karo* held that warrantless monitoring of a beeper violated the Fourth Amendment, where the beeper had entered a residence. Id. at 716-18. However, unlike the thermal imaging unit in *Kyllo,* the beeper in *Karo* actually was present within the four walls of the residence.
reasoned that if warrantless aerial surveillance of a residential backyard was constitutional, then warrantless use of the thermal imaging unit outside of a residence also must be constitutional.

I was wrong. By a slim 5-4 majority, the Kyllo Court held that the warrantless use of the thermal imaging unit violated the Fourth Amendment. Writing for the majority, Justice Antonin Scalia worried that a thermal imaging unit could provide law enforcement officers with intimate details of a homeowner’s activities.93

As a result of the Fourth Amendment violation, the trial court excluded evidence of the marijuana plants found in Kyllo’s garage. Without this physical evidence, the government typically could not convict a marijuana farmer such as Kyllo.

Some commentators have lauded the Kyllo decision as a victory for individual liberty and freedom.94 But for anyone who cares about justice and equal treatment, Kyllo is an embarrassment. Danny Kyllo was a marijuana farmer, just as culpable as any other marijuana farmer with 100 plants. Yet while most marijuana farmers go to jail, Kyllo might never serve jail time because police officers violated the Fourth Amendment.

Whatever the propriety of suppressing evidence when law enforcement officers act in bad faith, it is hard to think of Kyllo as a case of bad faith by federal agents.95 I’ve been writing about the Fourth Amendment since 1989,96 and I didn’t think that the agents in Kyllo needed a warrant. If I don’t understand when the Fourth Amendment requires a warrant, I’m not certain how federal agents and police officers are supposed to get it right.

This is the ultimate problem with an unpredictable and arbitrary body of Fourth Amendment law, where violations of the amendment are enforced through an exclusionary rule remedy. Inevitably, police

93. Kyllo, 533 U.S. at 38 (asserting that a thermal imaging unit “might disclose, for example, at what hour each night the lady of the house takes her daily sauna and bath”).

94. See, e.g., David Cole, Scalia’s Kind of Privacy, THE NATION, July 23, 2001, at 6 (the Kyllo decision involved “a rare instance of an alliance between liberals and libertarians, united here in support of the sanctity of the home”); Jeffrey W. Childers, Comment, Kyllo v. United States, A Temporary Reprieve From Technology-Enhanced Surveillance of the Home, 81 N.C. L. REV. 728, 757 (2003) (“Kyllo has been hailed as a landmark case that will stand along with the Warren Court’s decision in Katz.”).

95. The Supreme Court has held that courts should not exclude evidence, “when an officer acting with objective good faith” relies on an invalid search warrant. United States v. Leon, 468 U.S. 897, 920 (1984). The good faith exception currently applies only to searches conducted pursuant to an invalid warrant. The Court has not developed a similar good faith exception for warrantless searches.

96. See Steinberg, Making Sense of Sense-Enhanced Searches, supra note 6.
officers will misinterpret unpredictable Fourth Amendment doctrine, courts will exclude evidence, and guilty criminals will go free. In the end, society pays a high price for the Supreme Court’s Fourth Amendment incoherence.

III. The Original Understanding of the Fourth Amendment

A. House Searches and the Fourth Amendment: The Historical Record

As Thomas Davies accurately observes, framing era discussions "were almost exclusively about the need to ban house searches under general warrants." After a careful review of history, the emphasis on house searches becomes apparent. In short, the framers enacted the Fourth Amendment only to proscribe house searches pursuant to a general warrant, or no warrant at all. When they enacted the Fourth Amendment, the framers did not intend to regulate other types of searches and seizures.

As William Cuddihy observes, the doctrine of unreasonable searches and seizures originated as early as seventh-century England. The early English codes "penalized severely those who invaded a neighbor’s premises or provoked a disturbance within it." These English housebreaking laws "sought to control violence by private persons toward each other, not official searches by the government."

With the increased frequency of government house searches after 1485, English thought began to postulate that certain types of house searches by government agents were unreasonable and unlawful. As Cuddihy summarizes this movement: "Elizabethan Englishmen began to insist that their houses were castles for the paradoxical reason that the castle-like security that those houses had afforded from intrusion was vanishing. As the violence and frequency of searches escalated, the perception that some types of search and seizure were unreasonable appeared." From the beginning, the doctrine of unreasonable searches and seizures focused on house searches, and not other types of government conduct.

99. Id.
100. Id. at 36.
101. Id. at 128.
The focus on unlawful house searches was reflected in framing era controversies, which ultimately resulted in the Fourth Amendment. Commentators have observed that discussion of unreasonable searches in the late eighteenth century primarily focused on three controversies – the John Wilkes cases in England, Paxton’s case in Boston, and American reactions to the Townshend Act. In all three controversies, criticisms of the English government focused almost exclusively on physical searches of houses pursuant to general warrants.

In the eighteenth century, the most well-known examples of unreasonable searches arose out of an English seditious libel prosecution, brought against opposition politician John Wilkes and his supporters. In April 1763, an anonymous letter printed in an opposition periodical described the British Tory administration as “wretched” puppets, and “the tools of corruption and despotism.” Based on a single general warrant issued by the Tory Secretary of State, English officers searched at least five houses and arrested at least 49 people. Wilkes and his supporters responded with at least thirty different trespass and false imprisonment suits.

In a series of decisions issued between 1763 and 1769, English courts concluded that the house searches in the John Wilkes cases violated English common law principles. The officers who conducted these house searches were liable for trespass and false imprisonment.

The decisions in the John Wilkes cases heavily emphasized the impropriety of house searches pursuant to the general warrant. For

102. See, e.g., NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT 43-48 (1937) (discussing the John Wilkes cases); id. at 57-63 (discussing Paxton’s case); id. at 69-76 (discussing the Townshend Act). See also Davies, supra note 97, at 561-67 (discussing these three controversies and noting agreement among commentators that these controversies represent the most important events leading to the adoption of the Fourth Amendment).

103. For a detailed account of the John Wilkes cases, see Cuddihy, supra note 98, at 886-927.

104. Id. at 886.

105. Id. at 893.

106. Id. at 894.


108. See LASSON, supra note 102, at 44-45 (describing the verdicts in the John Wilkes cases, and noting that the English government’s expenses in these cases “were said to total £100,000”).
example, in *Huckle v. Money*, Chief Justice Pratt refused to set aside a damages verdict won by a printer, whose house had been searched pursuant to the general warrant. Chief Justice Pratt's opinion harshly criticized house searches pursuant to general warrants. For example, Chief Justice Pratt wrote: "To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law with which no Englishman would wish to live an hour; it was a most daring public attack made upon the liberty of the subject." Other opinions issued in the John Wilkes cases included similar criticisms of unlawful house searches.

On the other side of the Atlantic, American discussions of unreasonable searches and seizures also focused on the need to regulate house searches. In 1761, customs officer Charles Paxton sought to renew a writ of assistance that Paxton had received from the Superior Court in Boston. The writ of assistance was the American equivalent of the English general warrant. In January 1761, an association of Massachusetts merchants challenged the lawfulness of Paxton's writ of assistance before the superior court. James Otis, a prominent Boston attorney, argued the case on behalf of the merchants.

Otis argued that the writs of assistance operated as general warrants, in violation of common law principles. Otis initially asserted that "the freedom of one's house" was among "the most essential branches of English liberty." Otis then complained that with a writ of assistance, customs officials "may enter our houses

110. Id. at 769.

111. See, e.g., Entick v. Carrington, 95 Eng. Rep. 807, 818 (C.P. 1765) ("to enter a man's house, search for and take away all his books and papers" violated common law principles); Wilkes v. Wood, 98 Eng. Rep. 489, 498 (C.P. 1763) (where the defendants claimed a right "to force persons houses, break open escrutores, seize their papers, etc. upon a general warrant," these actions were "totally subversive [to] the liberty of the subject").

112. Cuddihy, supra note 98, at 760-61.

113. Colonial authorities used the writs of assistance to search for customs violations. The writ authorized customs officers to search any places where the officers suspected that smuggled goods were hidden. Customs officers believed that these writs empowered them to enter and inspect all houses in Massachusetts. See id. at 759.

The writ was named a "writ of assistance" because the writ compelled all peace officers and other persons present to assist the customs officers in the performance of the search. See Davies, supra note 97, at 561 n.18.

114. See Cuddihy, supra note 98, at 765.

when they please . . . . may break locks, bars and every thing in their way – and whether they break through malice or revenge, no man, no court can inquire . . . .”\textsuperscript{116}

It is significant that Otis argued only against house searches. As Thomas Davies has noted, Otis’s clients were “merchants who also owned ships and warehouses.”\textsuperscript{117} But Otis did not challenge the searches of warehouses or the seizure of ships – only physical intrusions into residences.\textsuperscript{118}

In discussing unreasonable searches and seizures, early commentators also focused on house searches. In 1644, Sir Edward Coke described unreasonable searches in the following terms: “One or more justice or justices of peace cannot make a warrant upon a bare surmise to break any man’s house to search for a felon, or for stolen goods . . . .”\textsuperscript{119} Coke observed that “for justices of peace to make warrants upon surmises, for breaking the houses of any subjects to search for felons, or stolen goods, is against [the] Magna Carta.”\textsuperscript{120}

Early American legal commentators seemed to agree that the Fourth Amendment merely incorporated the English common law prohibition on unlawful physical searches of houses. In describing the Fourth Amendment, Thomas Cooley wrote: “The maxim that ‘every man’s house is his castle’ is made a part of our constitutional law in the clause prohibiting unreasonable searches and seizures.”\textsuperscript{121} When Samuel Adams attacked the writs of assistance in 1772, Adams asserted: “Our homes and even our bedchambers are exposed to be ransacked, our boxes and chests and trunks broke open and plundered by wretches . . . whenever they are pleased to say that they suspect there are in the house wares etc. for which dutys have not

\textsuperscript{116} Id.
\textsuperscript{117} Davies, supra note 97, at 602.
\textsuperscript{118} Id. at 601-02.
\textsuperscript{119} EDWARD COKE, FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 176 (1817). Coke’s treatise originally was published in 1644. See Davies, supra note 97, at 578-79 n.74.
\textsuperscript{120} COKE, supra note 119, at 176. William Blackstone also emphasized the illegality of general warrants. Blackstone wrote: “A general warrant to apprehend all persons suspected, without naming or particularly describing any person in special, is illegal and void for its uncertainty . . . .” 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 288 (1769) (emphasis in the original).
\textsuperscript{121} THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 299-300 (1868).
been paid . . . "122 Adams continued that customs officers "may break into the sacred rights of domicil, [and] ransack their houses . . . ."123

The Continental Congress provides one of the best sources of information on the intent of the Fourth Amendment's framers. In their complaint against oppressive British action, the Congress focused on house searches, and not other law enforcement activity. As William Cuddihy reports, the Continental Congress, in a 1774 address to the American people, protested against the power of customs officers "to break open and enter houses without the authority of any civil magistrate founded on legal information."124 In a 1774 letter to the inhabitants of Quebec, the Congress warned that British customs officers would break into "houses, the scenes of domestic peace and comfort and called the castles of the English subjects in the books of their law."125

Framing era sources demonstrated a remarkable uniformity about what constituted unreasonable searches and seizures. Early commentators emphasized the need to proscribe unlawful house searches.

B. Searches Outside of the Home

Without question, framing era discussions of unreasonable searches and seizures focused on house searches. Nonetheless, the modern Supreme Court has assumed that the Fourth Amendment applies to virtually all searches and seizures.126

Did the framers intend that the Fourth Amendment would apply to searches and seizures, other than house searches? The historical record suggests that the amendment was not intended to apply beyond house searches.

First, there is a striking dearth of eighteenth-century and early


123. Id. Like James Otis, Adams made his argument in the seaport of Boston. Many members of Adams' audience undoubtedly were merchants, who owned shops, warehouses, and vessels. Nonetheless, Adams only discussed house searches.

124. Cuddihy, supra note 98, at 1116.

125. Id. at 1117.

126. See Steinberg, Akhil Amar and Fourth Amendment History, supra note 5, at 228 (the Supreme Court "has presumed that the Fourth Amendment imposes a global reasonableness requirement on all searches and seizures"). See also id. at 234-35 (discussing the modern reasonableness requirement).
nineteenth-century cases discussing constitutional challenges to searches and seizures. Prior to the 1886 Supreme Court decision in *Boyd v. United States*, federal and state constitutional search and seizure provisions probably were discussed in fewer than 50 court opinions. In the rare cases where attorneys argued that law enforcement activities ran afoul of a federal or a state constitutional provision, courts typically concluded that the search and seizure provision had not been violated.

With respect to searches and seizures that took place outside of the home, Americans seemed to assume that the Fourth Amendment did not apply to such controversies. Consider ship seizures. In two particularly notorious colonial cases, British agents seized ships owned by prominent merchants Henry Laurens of South Carolina and John Hancock of Massachusetts. Nelson Lasson observes that in Boston during 1768, "a riot resulted when John Hancock's sloop 'Liberty' was seized." But when the American federal government later seized ships in the early nineteenth century, the ship seizures were not attacked on Fourth Amendment grounds. In early nineteenth century ship seizure cases that reached the United States Supreme Court, the Fourth Amendment was not even mentioned.

127. 116 U.S. 616 (1886).
128. See Davies, supra note 97, at 611-19.
129. See, e.g., Banks v. Farwell, 38 Mass. (21 Pick.) 156, 159-60 (1838) (a warrantless search of a shop did not violate the Massachusetts constitution, which prohibited unreasonable searches and seizures); Mayo v. Wilson, 1 N.H. 53, 59-60 (1817) (a warrantless arrest did not violate the New Hampshire Constitution, which prohibited unreasonable searches and seizures); Wakely v. Hart, 6 Binn. 316, 318 (Pa. 1814) (a warrantless arrest did not violate the Pennsylvania constitution, which regulated searches and seizures).

But cf. Sanford v. Nichols, 13 Mass. (13 Tyng) 286, 289-90 (1816) (a house search conducted pursuant to an invalid warrant probably violated a Massachusetts constitutional provision, which prohibited unreasonable searches and seizures).

130. See Cuddihy, supra note 98, at 1205-14.
131. LASSON, supra note 102, at 72. Some authors have cited these ship seizure cases as indicating that the framers intended to extend the Fourth Amendment beyond house searches. See Tracey Maclin, *The Complexity of the Fourth Amendment*, 77 B.U. L. REV. 925, 962 (1997) [hereinafter Maclin, *The Complexity of the Fourth Amendment*] (the ship seizure controversies "helped to focus colonial thinking on the principle of probable cause"). But cf. Davies, supra note 97, at 604. Davies contends that the ship seizure controversies did not dispute "general search authority," but instead involved challenges focused on "customs racketeering' in the form of hypertechnical applications of customs rules or forfeiture proceedings based on the perjured testimony from informers." *Id.*

132. See, e.g., *The Appollon*, 22 U.S. 362, 371 (1824) (concluding that a ship seizure was not authorized by a federal statute, without mentioning the Fourth Amendment); Little v. Barreme, 6 U.S. 170, 179 (1804) (same).
This does not mean that Americans had lost interest in ship seizures. In the 1789 Collections Act, Congress approved the warrantless search of vessels for customs violations.\textsuperscript{133} Americans apparently believed that regulation of ship seizures would occur through federal statutes, and not through application of the Fourth Amendment.

Finally, advocates of a broad Fourth Amendment note that a few states sometimes required warrants for non-residential searches and seizures. For example, a 1786 Rhode Island statute required that federal tax agents obtain a specific warrant before the agents could search a "Dwelling-House, Store, Ware-house, or other Building."\textsuperscript{134} In a 1786 act, Delaware required that government agents obtain specific warrants before the agents could search buildings for cargo pilfered from shipwrecked vessels.\textsuperscript{135}

But in early America, state laws that required a warrant for non-residential searches clearly were the exception, not the rule. With respect to searches and seizures in early America, Gerard Bradley accurately observes: "Warrantless searches, then as now, were the rule rather than the exception, and each of the thirteen colonies, and then states, as a common practice, authorized them."\textsuperscript{136} As support for this proposition, Bradley cites a long list of colonial, state, and federal laws that indeed authorized warrantless searches and seizures.\textsuperscript{137}

C. Summary

We never will be able to determine the intent of the framers of the Fourth Amendment with absolute certainty. Nonetheless, the historical record strongly suggests that the Fourth Amendment was enacted solely to regulate house searches. The amendment was enacted to proscribe house searches pursuant to a general warrant, as

\textsuperscript{133} Collections Act of 1789, ch. 5, § 24, 1 Stat. 29, 44-45 (1789). Based on this provision, Chief Justice William Howard Taft concluded that the Fourth Amendment was intended to apply to ship searches.\textsuperscript{See} Carroll v. United States, 267 U.S. 132, 150-51 (1925).

However, if the Framers intended that the Fourth Amendment would govern ship searches, it is unclear why Congress would pass a statute that simply restated the law imposed by the amendment. If anything, the Collections Act suggests that Congress needed to enact a law regulating searches of vessels, because the Fourth Amendment did not apply to such searches.

\textsuperscript{134} Cuddihy, \textit{supra} note 98, at 1292.

\textsuperscript{135} \textit{Id.} at 1293.


\textsuperscript{137} \textit{Id.} at 1041-45, nn. 64-65.
well as warrantless house searches. The amendment was not intended to regulate other types of searches.

138. Thomas Davies has advanced a reading of Fourth Amendment history that is very similar to the interpretation presented in this article. Davies appropriately emphasizes that the historical concerns resulting in the Fourth Amendment “were almost exclusively about the need to ban house searches under general warrants.” Davies, supra note 97, at 551. See also id. at 642-50 (emphasizing the sanctity of the home in eighteenth-century America).

However, I disagree with Davies on at least two points. Davies concludes that the sole purpose of the Fourth Amendment was “banning Congress from authorizing the use of general warrants.” Id. at 650. “In other words, the Framers did not address warrantless intrusions at all in the Fourth Amendment or in the earlier state provisions.” Id. at 551.

In concluding that the Fourth Amendment did not address warrantless searches, Davies notes the absence of eighteenth-century protests about warrantless searches. Id. at 603. However, the lack of debate about warrantless house searches likely occurred because in early America, “the common law apparently provided no justification for a search of a house beyond the ministerial execution of a valid search warrant.” Id. at 649. In other words, everyone agreed that warrantless house searches were impermissible.

According to Davies’ reading of the Framers’ intent, a search of a house pursuant to a general warrant would be an “unreasonable search,” as that term is used in the Fourth Amendment. However, Davies asserts that a warrantless house search would not be an unreasonable search, at least for Fourth Amendment purposes. Given the profound common law tradition that proscribed unauthorized entries into houses, I cannot agree with Davies’ conclusion that the Fourth Amendment permitted warrantless house searches.

Davies and I also disagree on the implications of the Framers’ original intent for current Fourth Amendment doctrine. Davies believes that a return to the original understanding of the Fourth Amendment would subvert the purpose the Framers had in mind when they adopted the text. Id. at 741. Davies largely accepts the Supreme Court’s rewriting of the Fourth Amendment, because today law enforcement officers exercise “a level of discretionary authority that the Framers would not have expected a warrantless officer could exercise unless general warrants had been made legal.” Id.

I agree with Davies’ concerns about unrestrained police discretion. However, judicial activism is not the only potential source for police restraint. As noted in Part V of this article, police discretion could be limited by police department rule-making, statutory regulations, or damage awards in civil tort suits. See infra text accompanying notes 158-203.

In short, having nine appointed Supreme Court Justices reinvent the Fourth Amendment based on their personal views about “unreasonable searches and seizures” is not the most sensible way to regulate police discretion. In my opinion, Fourth Amendment doctrine is such a mess because well-intentioned judges have invoked the amendment in situations where it never was intended to apply. See supra text accompanying notes 7-80 (discussing Fourth Amendment decisions that seem arbitrary and incoherent).

139. Akhil Amar advocates an interpretation of Fourth Amendment history that is quite different from the account presented in this article. See, e.g., Akhil Reed Amar, The Fourth Amendment, Boston, and the Writs of Assistance, 30 SUFFOLK U. L. REV. 53 (1996); Amar, Fourth Amendment First Principles, supra note 4; Akhil Reed Amar, The Bill of Rights as a Constitution, 100 YALE L.J. 1131, 1775-81 (1991). Amar’s historical argument rests on two critical propositions. First, like the current Supreme Court, Amar asserts that the framers intended that the Fourth Amendment would impose a global reasonableness requirement on almost all government evidence gathering activities. Amar, Fourth Amendment First Principles, supra note 4, at 801-04.

Second, Amar asserts that the framers actually believed all warrants were dangerous —
IV. The Continuing Importance of the Original Understanding

Why should our Fourth Amendment interpretation be controlled by the framers' understanding in the eighteenth century? Because no modern consensus exists about the meaning of the term "unreasonable searches and seizures." If courts do not rely on the original intent of the framers, Fourth Amendment decisions will be purely subjective, based on a particular judge's beliefs about what is reasonable and unreasonable.

Times certainly have changed since the late eighteenth century, particularly with respect to law enforcement. In contrast with today's omnipresent law enforcement departments, crimes and law enforcement officers were few and far between in early America.\(^{140}\)

Unlike members of today's transient society, early Americans were tied to their residences. Travel was slow, difficult, and often including specific warrants. \textit{Id.} at 771-80. According to Amar, the framers did not view the warrant process as protecting against unreasonable searches. Instead, civil trespass suits offered the primary protection from such searches. \textit{Id.} at 774. Amar contends that the Framers viewed warrants as dangerous, because a warrant would provide "an absolute defense in any subsequent trespass suit." \textit{Id.} Amar concludes: "Judges and warrants are the heavies, not the heroes, of our story." Amar, \textit{The Bill of Rights as a Constitution}, 100 YALE L.J. 1131, 1179 (1991). \textit{See also} TELFORD TAYLOR, \textit{Two Studies in Constitutional Interpretation: Seizure and Surveillance and Fair Trial and Free Press} 41 (1967) (also arguing that the Framers viewed all warrants as "an enemy").

Although Amar's account is creative and engaging, his contentions often seem at odds with the historical record. To take just one example, when early American legislatures passed statutes regulating searches and seizures, those statutes sometimes included a warrant requirement. \textit{See, e.g.}, Excise Act of 1791, 1 Stat. at 207 (1791) (requiring that federal customs officers must obtain a warrant, before the officers searched certain types of buildings for spirits that were concealed "with intent to evade the duties thereby imposed upon them"); Davies, supra note 97, at 681-83 (noting that in 1780 and 1785, the Pennsylvania legislature enacted statutes that required specific warrants for house searches). Although Amar contends that the framers viewed all warrants as dangerous, these early American statutes requiring warrants contradict Amar's contention.

A number of Fourth Amendment scholars disagree with Amar's reading of Fourth Amendment history. For articles reviewing and criticizing Amar's historical arguments, see Morgan Cloud, \textit{Searching Through History: Searching for History}, 63 U. CHI. L. REV. 1707, 1739 (1996) (Amar "selectively deploys incomplete fragments of the historical record to advance a partisan thesis"); Davies, supra note 97, at 663 ("Amar is an engaging writer, but his treatment of text and history is often loose and uninformed."); Maclin, \textit{The Complexity of the Fourth Amendment}, supra note 131, at 929. ("Amar provides an incomplete account of the [Fourth Amendment's history].").

For a detailed critique of Amar's Fourth Amendment historical analysis, see Steinberg, \textit{Akhil Amar and Fourth Amendment History}, supra note 5.

140. \textit{See, e.g.}, Davies, supra note 97, at 620 ("There were no police departments in the colonies or early states. In fact, there were no professional law enforcement officers."); Sara Sun Beale, \textit{Federalizing Crime: Assessing the Impact on the Federal Courts}, 40 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 40 (1996) (noting that federal criminal law initially had a very limited scope, and specified only 17 offenses).
dangerous. An obsession with the sanctity of the home made sense in early America, when most Americans simply couldn’t stray too far from their residences.

In addition, the types of law enforcement controversies also have changed. Today, search and seizure controversies sometimes involve assertions that law enforcement officers regularly discriminate against racial minorities. In contrast, early American governments sometimes used their search and seizure powers to protect slave holders’ ownership over their African-American slaves.

Given all of these differences, one might argue that the original understanding of the Fourth Amendment has little relevance today. Unfortunately, no modern consensus exists about the meaning of the Fourth Amendment term “unreasonable searches and seizures.”

Given this lack of consensus, courts cannot develop a coherent alternative to the original understanding.

Consider perhaps the most familiar modern Fourth Amendment test – the “reasonable expectation of privacy” test. Since the 1967 decision in *Katz v. United States*, the Supreme Court has endorsed this two-part test for determining when police officers must obtain a warrant. The *Katz* test provides: “[F]irst that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”

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142. See David A. Harris, The Stories, The Statistics, and the Law: Why “Driving While Black” Matters, 84 MINN. L. REV. 265, 279 (1999) (describing a study conducted on the New Jersey turnpike, which showed “that 73.2 % of those stopped and arrested were black, while only 13.5 % of the cars on the road had a black driver or passenger”); Anthony C. Thompson, Stopping the Usual Suspects: Race and the Fourth Amendment, 74 N.Y.U. L. REV. 956, 957-58 (1999) (“Between January 1995 and September 1996, of the 823 citizens detained for drug searches on one stretch of Interstate 95, over seventy percent were African American.”). See also Devon W. Carbado, (E)racing the Fourth Amendment, 100 MICH. L. REV. 946, 1030 (2002) (empirical evidence suggests that police officers “are more likely to stop blacks and Latinas/os than whites”).

143. As of 1787, five American states preserved the general warrant as a device for capturing runaway slaves. See Cuddihy, supra note 98, at 1277-82. See also Cloud, supra note 139, at 1727-28.

144. U.S. CONST. amend. IV.


146. *Id.* at 361 (Harlan, J., concurring). The “reasonable expectation of privacy test” is not
Supreme Court decisions indicate considerable uncertainty about when a person has an expectation of privacy “that society is prepared to recognize as ‘reasonable.’” In California v. Greenwood, the Supreme Court considered whether a homeowner possessed a reasonable expectation of privacy in opaque, plastic garbage bags, which the homeowner had left on the front curb for the trash collector. The Greenwood majority concluded that the homeowner did not have a reasonable expectation of privacy, with respect to the contents of the garbage bags. In his majority opinion, Justice Byron White wrote: “It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoopers, and other members of the public.”

In his dissenting opinion, Justice William Brennan disagreed about whether a homeowner may expect privacy in their curbside trash bags. Justice Brennan wrote: “Like rifling through desk drawers or intercepting phone calls, rummaging through trash can divulge the target’s financial and professional status, political affiliations and inclinations, private thoughts, personal relationships, and romantic interests.”

In California v. Ciraolo, the Justices considered whether a homeowner possessed a reasonable expectation of privacy, with respect to police surveillance of the homeowner’s backyard from an airborne plane. A majority of the Justices concluded that Dante Ciraolo did not have a reasonable expectation of privacy, with respect to aerial overflights. Writing for the majority, Chief Justice Warren Burger asserted: “Any member of the public flying in this airspace who glanced down could have seen everything that these officers

completely ahistorical. The framers were concerned with protected privacy in homes. For example, in response to the British Townshend Act that authorized writs of assistance, Judge William Henry Drayton of Charleston complained in 1774 that “a petty officer has power to cause the doors and locks of any man to be broke open, to enter his most private cabinet and thence to take and carry away, whatever he shall in his pleasure deem uncustomed goods.” WILLIAM HENRY DRAYTON, A Letter From Freeman, in 1 DOCUMENTARY HISTORY OF THE AMERICAN REVOLUTION 15 (R.W. Gibbes ed. 1855) (emphasis added). However, as discussed above, the framers intended to protect privacy only by preventing unlawful physical trespasses into homes. See supra text accompanying notes 97 – 139.

149. Id. at 37-38.
150. Id. at 40.
151. Id. at 50.
152. 476 U.S. 207 (1986).
153. Id. at 209-10.
observed.”

In his dissent, Justice Lewis Powell argued that Ciraolo indeed possessed a reasonable expectation of privacy with respect to the aerial surveillance by law enforcement officers. Justice Powell observed: “Travelers on commercial flights, as well as private planes used for business or personal reasons, normally obtain at most a fleeting, anonymous, and nondiscriminating glimpse of the landscape and buildings over which they pass.” But in the Ciraolo case, “police conducted an overflight at low altitude solely for the purpose of discovering evidence of crime within a private enclave into which they were constitutionally forbidden to intrude at ground level without a warrant.”

So who got it right? Do residents possess a reasonable expectation of privacy in their curbside trash containers? Do homeowners possess a reasonable expectation of privacy, with respect to aerial surveillance of their backyards?

As illustrated by the divisions among the Supreme Court Justices, there simply are no right or wrong answers to these questions. Instead, the conclusions will depend on the background beliefs of the person answering the question – including their beliefs on the value of the warrant process, the importance of catching and convicting criminals, the importance of limiting police investigations, and the proper role of the courts in the law enforcement process. The divisions in Supreme Court cases such as Greenwood and Ciraolo demonstrate that a broad consensus on such issues is lacking.

Ultimately, attempts to apply the “reasonable expectation of privacy” test boil down to a judge’s subjective assessment about whether a particular warrantless search seemed appropriate. The arbitrary and unpredictable nature of Fourth Amendment decisions is not simply the result of sloppy work by Supreme Court Justices. Given the lack of consensus on basic assumptions regarding police searches and seizures, vague standards such as the “reasonable

154. Id. at 213.
155. Id. at 223.
156. Id. at 224-25.
157. For criticisms that the Katz test is vague, and subject to result-oriented manipulation, see Melvin Gutterman, A Formulation of the Value and Means Models in the Age of Technologically Enhanced Surveillance, 39 SYRACUSE L. REV. 647, 665-77 (1988) (criticizing the Katz test as vague and manipulable); George C. Thomas, Time Travel, Hovercrafts, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment, 80 NOTRE DAME L. REV. 1451, 1500 (2005) (agreeing with other scholars that “[t]he ‘expectation of privacy’ notion is flawed to the core”).
expectation of privacy" test inevitably will lead to subjective and arbitrary decisions.

And so we return to the original understanding of the Fourth Amendment, which limited the amendment to unlawful house searches. The original understanding matters, but not because eighteenth century views on law enforcement are particularly relevant today. Instead, the original understanding of the Fourth Amendment is critically important because we lack coherent, principled alternatives.

V. Police Restraint in a World Without a Fourth Amendment

Assume that the Supreme Court returned to the original understanding of the Fourth Amendment, and applied the amendment only to house searches. In such a regime, cases involving the amendment rarely would arise. Other means of restraining police discretion would deserve attention.

If the scope of the Fourth Amendment were more limited, at least three other approaches for restraining police discretion would be plausible. Those alternative sources include internal police department rule-making, statutory regulations, and civil damage suits based on the tort of trespass.

A. Police Department Rule-Making

In a landmark 1974 article, Anthony Amsterdam recommended that police departments promulgate regulations, which would limit police discretion with respect to searches and seizures. Amsterdam asserted that police rule-making would "tend to tame the welter of police practices that now come before the courts for fourth amendment adjudication by preventing some of those practices from being used in the first place."

In the abstract, Amsterdam's proposal has won wide-ranging support and praise. The United States Supreme Court has written that police department rules "governing the conduct of criminal investigations are generally considered desirable," and that such rules "may well provide more valuable protection to the public at large than the deterrence flowing from the occasional exclusion of items of

159. Id. at 421.
evidence in criminal trials.” A broad array of scholars also have praised Amsterdam’s proposal.

Yet despite the almost universal praise, actual implementation of Amsterdam’s police rulemaking proposal largely has not taken place. As David Sklanksy writes: “Progress toward guidelines for the exercise of police discretion has been sporadic, crisis-driven, and limited.”

The lack of police department rule-making probably results from many factors. But police departments may have declined to develop search and seizure rules because courts already occupy the field. As discussed above, the Supreme Court has interpreted the Fourth Amendment as a license for writing detailed codes that regulate police conduct. With courts having undertaken the task of regulating searches and seizures, police departments may see little reason to get involved.

In fact, under the current regime, police departments have considerable incentives not to undertake rulemaking. As noted above, Fourth Amendment doctrine is complicated, unpredictable, and pervasive. A police department easily could write a rule, which a court ultimately would determine had violated the Fourth Amendment. After a court identified the error, the police department would face considerable embarrassment and almost certain liability. In the current regime, police departments have every reason not to get involved.

If the Supreme Court limited the Fourth Amendment to house


161. See, e.g., Debra Livingston, Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing, 97 Colum. L. Rev. 551, 658-59 (1997) (advocating “broad policy statements developed within the police department that seek to instruct the officer in how to employ his discretion in addressing specific public order problems”); Erik Luna, Transparent Policing, 85 Iowa L. Rev. 1107, 1142-43 (2000) (“The last few years have seen a revived academic interest in controlling discretion within the criminal justice system, with particular emphasis placed on the visibility and accountability of discretionary judgments.”).

162. David A. Sklansky, Quasi-Affirmative Rights in Constitutional Criminal Procedure, 88 Va. L. Rev. 1229, 1273 (2002). See also id. at 1274-75 (explaining that lower courts have written that whether to require police department rule-making is a matter for the Supreme Court, and the Supreme Court “has shown no interest in requiring it”); Samuel Walker, Controlling the Cops: A Legislative Approach to Police Rulemaking, 63 U. Det. L. Rev. 361, 368 (1986) (describing how police manuals typically “overemphasize trivial matters of internal discipline,” while ignoring “most of the critical issues related to the exercise of police authority”).

163. See supra text accompanying notes 7-80. See also Steinberg, Akhil Amar and Fourth Amendment History, supra note 5, at 234 (stating that the Supreme Court has assumed that the Fourth Amendment applies to almost all searches and seizures).

164. See supra text accompanying notes 7-80.
searches, would police rule-making fill the void? Police critics no doubt would express skepticism. In support of warrants, the Supreme Court has contrasted the neutral magistrate considering a warrant application with police officers "engaged in the often competitive enterprise of ferreting out crime."\(^{165}\) This statement implies that police officers are concerned only with the end result of catching criminals, and not with the intrusiveness of their investigations.

Such statements carry unnecessarily cynical implications. Police officers typically live in the neighborhoods that they police. Like any other citizens, police officers value security and privacy for themselves and their families. If the Supreme Court returned to the original understanding of the Fourth Amendment, police departments would have a real incentive to regulate the conduct of their officers. If police departments did not implement the necessary regulations, citizens could turn to the elected officials who regulated those officers.

**B. Statutory Regulations**

Statutes adopted by elected legislators provide another possible source of police restraint. As was the case for police departments, the Supreme Court’s development of detailed Fourth Amendment police codes leaves legislatures with little incentive to regulate searches and seizures. Any police regulations proposed by a legislature would face criticism as either too restrictive or not restrictive enough.\(^{166}\) It is easier simply to do nothing.

Nonetheless, legislatures sometimes have proven quite willing to impose restrictions on law enforcement officers, when particular search techniques generated real public concern. In the 1967 *United States v. Katz*\(^{167}\) decision, the Supreme Court concluded that a warrantless wiretap violated the Fourth Amendment to the United States Constitution.\(^{168}\) But for practical purposes, the most important restrictions on wiretapping appear in a federal statute enacted by Congress – Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III").\(^{169}\) Title III requires that the government

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166. *See* Livingston, *supra* note 161, at 662 ("Politicians, afraid of being viewed as ‘anti-police,’ may be reluctant to require that police promulgate guidelines for the enforcement of public order laws."); Walker, *supra* note 162, at 385 ("Legislative bodies have been particularly reluctant to become involved in the details of police operations.").
168. *Id.* at 349-59.
must obtain a court order prior to installing a wiretap. Title III specifies the requirements for a wiretap application, and the standards that a judge must use in determining whether to grant the application. Title III makes unauthorized wiretapping a felony.

To date, the significant restrictions on the interception of internet communications have derived from federal statutes, rather than from the Fourth Amendment. With respect to internet transmissions, the most applicable statute probably is the Electronic Communications Privacy Act of 1986 (ECPA). Among other things, the ECPA governs the use of a “trap and trace” device – a device which “captures the incoming electronic or other impulses which identify the originating number of an instrument or device from which a wire or electronic communication was transmitted.”

Like the Title III restriction on wiretaps, the ECPA permits the use of a trap and trace device only after the government has obtained a court order. The ECPA specifies the contents of an application for a trap and trace device, and the circumstances where a court should permit the use of such a device. Accordingly, in cases where citizens feel the most profound concerns about intrusive searches, Congress has passed statutes that constrain police activity.

Regulation of police searches by statutes is an attractive alternative, when compared to regulation of such searches by the Supreme Court. If a statutory regulation does not work well in practice, it is easy to amend or repeal the statute. Reversing a problematic Supreme Court interpretation typically involves a much slower and more uncertain process.

Further, statutory regulations permit a much more flexible approach with respect to remedies for violations. Exclusion of evidence from a criminal trial might occur only after the most egregious police violations, if at all. Other remedies could include

170. Id. § 2516(3).
171. Id. § 2518(1).
172. Id. § 2518(3).
173. Id. § 2511.
174. Id. §§ 3121-3127.
176. Id. § 3121(a).
177. Id. § 3122(b)(2).
fines, money compensation for victims of unlawful searches, or employment citations that could affect a police officer's salary or chances of promotion. In short, statutory regulation suggests greater substantive and remedial flexibility than the current Fourth Amendment regime.

C. Tort Suits And Civil Damages

The origins of the prohibition on unreasonable searches and seizures developed in civil trespass suits. As noted above, in the influential John Wilkes cases from 1763 to 1769, English courts imposed trespass liability on the British government for house searches conducted pursuant to an invalid general warrant. According to Nelson Lasson, the English government's expenses in the John Wilkes cases totaled 100,000 pounds.

Today, plaintiffs do not often sue police officers for damages in trespass actions. The dearth of such tort suits has occurred for many reasons. Attorneys tend to think of intrusive police searches and seizures as Fourth Amendment violations, rather than as common law trespass suits. As a result, damage actions arising out of unlawful searches and/or seizures typically are brought as Fourth Amendment suits, rather than under the tort doctrine of trespass. A prevailing plaintiff may shift their attorney's fees to the defendant in a Fourth Amendment suit, but not in a trespass tort suit. State statutes sometimes immunize law enforcement officers from tort liability.

179. See Christopher Slobogin, Why Liberals Should Chuck the Exclusionary Rule, 1999 U. ILL. L. REV. 363, 405-406 (1999) (advocating a civil damages alternative to the exclusionary rule, which could include monetary liability for police officers, class actions, and injunctive relief).


181. LASSON, supra note 102, at 44-45.


183. See id. § 1988 (in a §1983 damages suit, a court “may allow the prevailing party” to recover “a reasonable attorney’s fee as part of the costs”).

184. See, e.g., ALA. CODE § 6-5-338 (1975) (any peace officer “shall have immunity from tort liability arising out of his or her conduct in performance of any discretionary function within the line and scope of his or her law enforcement duties”); MICH. COMP. LAWS § 691.1407(2) (a police officer is “immune from tort liability,” unless the officer’s conduct amounts to gross negligence); Bushong v. Williamson, 790 N.E.2d 467, 471-72 (Ind. 2003) (an Indiana statute bars
And when the state has brought criminal charges against an individual, a defense attorney may be more focused on excluding evidence at a criminal trial, as opposed to seeking damages in a civil suit.

Nonetheless, a few trespass suits against police officers still occur. In *Montes v. Gallegos*, Police Chief Danny Pacheco entered the home of Juan Montes and Marian Montes. Pacheco then arrested Juan Montes. The trial court ultimately concluded that Pacheco's entry and arrest were based on a facially invalid warrant.

Maria Montes brought a trespass action against Pacheco. In ruling on the plaintiff's motion for summary judgment, District Judge James A. Parker wrote that Chief Pacheco had engaged in "an unauthorized entry upon the land of another." As a result, Judge Parker granted Montes' motion for summary judgment on her trespass action.

In *Yeager v. Hurt*, Sheriff H.F. Yeager of the Alabama Department of Public Safety seized plaintiff James Hurt's motorcycle. Yeager incorrectly believed that the motorcycle was stolen. Although the motorcycle was not stolen, the Alabama Department of Public Safety retained possession of the motorcycle for more than two years. While in the department's custody, this vehicle was damaged.

A jury awarded Hurt $20,000 damages, based on a Fourth Amendment violation, a law enforcement defendant may defeat the suit by establishing qualified immunity. A law enforcement officer will succeed on a qualified immunity argument, unless a reasonable officer would have understood that their conduct had violated the Fourth Amendment. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). *See also* *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (an executive branch officer or employee sued for a constitutional violation may establish qualified immunity, unless the officer or employee has violated "clearly established law").

186. *Id.* at 1169.
187. *Id*.
188. *Id.* at 1170.
189. *Id*.
190. *Id*.
192. *Id.* at 1179.
193. *Id.* at 1178-79.
194. *Id.* at 1182.
195. *Id*.
Amendment claim that Sheriff Yeager had engaged in an unreasonable search and seizure with respect to Hurt's motorcycle.\textsuperscript{196} However, the jury also awarded Hurt an additional $2,000 damages on a variety of state tort claims, including a trespass action.\textsuperscript{197} The Alabama Supreme Court ultimately upheld the damage awards entered against Sheriff Yeager.\textsuperscript{198}

If police searches and seizures were regulated primarily by trespass law, this court-created body of law might develop the same unpredictability and arbitrary results as current Fourth Amendment law. However, state legislators could correct any particularly troublesome trespass ruling.\textsuperscript{199} Such input from elected officials is not possible in Fourth Amendment cases, where the United States Supreme Court's constitutional interpretations are the supreme law of the land.

A tort damages remedy also might serve deterrence and fairness goals more effectively than the Fourth Amendment exclusionary rule. Whether the exclusion of evidence actually deters police misconduct is uncertain.\textsuperscript{200} The prospect of police officers or police departments facing money judgments would provide a clear incentive to avoid improper searches and seizures.

In addition, trespass judgments would not affect results at criminal trials. A trespass judgment simply would require that a law enforcement officer must pay money damages. Conversely, where a court finds a Fourth Amendment violation, highly probative physical evidence typically is excluded from a criminal trial.\textsuperscript{201}

\textsuperscript{196} Id. at 1179.

\textsuperscript{197} Id.

\textsuperscript{198} Id. at 1179-82. See also Brooks v. Harrisburg, 10 Pa. D. & C.3d 1, 2-4 (1979) (refusing to dismiss a trespass action, where police officers allegedly entered the plaintiffs' house and arrested an innocent man).

\textsuperscript{199} In addition, each state develops its own body of trespass law. A quirky trespass interpretation would affect only one state, and could be repudiated by other jurisdictions. Conversely, Supreme Court interpretations of the Fourth Amendment bind the entire United States.

\textsuperscript{200} For an introduction to the debate on the effectiveness of the exclusionary rule, compare Slobogin, \textit{supra} note 179, at 378-94 (questioning whether the exclusionary rule will deter abuses of police power), with Carol S. Steiker, \textit{Second Thoughts About First Principles}, 107 HARV. L. REV. 820, 851 (1994) ("Like it or not, the exclusionary rule, with all of its limitations, is in very real terms 'the only game in town.'").

\textsuperscript{201} See, e.g., James v. Illinois, 493 U.S. 307, 311 (1990) ("[T]he occasional suppression of illegally obtained yet probative evidence has long been considered a necessary cost of preserving overriding constitutional values."); United States v. Calandra, 414 U.S. 338, 348 (1974) (the exclusionary rule is "a judicially created remedy designed to safeguard Fourth Amendment rights generally"); Mapp v. Ohio, 367 U.S. 643, 646-60 (1961) (the exclusionary rule applies to the
A search and seizure regime based on trespass law would not be problem free. Damage suits against police officers may face a number of obstacles, including the reluctance of attorneys to sue the law enforcement officers who protect them. Nonetheless, regulating searches and seizures through trespass actions, together with police department rules and statutory regulations, present a viable alternative to arbitrary and unpredictable regulation of law enforcement officers through the Fourth Amendment.

VI. Conclusion

The framers of the Constitution never intended that the Fourth Amendment would govern all police investigations. Instead, the framers intended that the Fourth Amendment only would prohibit unlawful physical searches of houses, pursuant to a general warrant, or no warrant at all. And outside of the need to regulate such house searches, no modern consensus has emerged on the appropriate interpretation of the Fourth Amendment.

Fourth Amendment decisions appear arbitrary and subjective because these decisions are arbitrary and subjective. Police officers acting in good faith violate the Fourth Amendment, because the officers cannot understand Fourth Amendment law. Evidence is then excluded and as a result, guilty criminals go free.

states, and the trial court should have excluded obscene material obtained in violation of the Fourth Amendment).

202. Some of the problems that might accompany a reliance on damage suits to deter improper searches and seizures include: 1) A victim may be unaware that they possess a civil action; 2) Even if the victim is aware of their right to sue for damages, the victim may fear police reprisals and decline to bring suit; 3) The victim may be unable to retain an attorney to prosecute the action; 4) Police officers may be able to defeat the action by asserting a good faith belief in the legality of their actions as a defense; 5) Police officers are likely to appear as more credible witnesses before a trier of fact than a victim of an improper search, particularly if this victim can be linked to criminal activity; and 6) The victim of an improper search may be unable to prove that they suffered any compensable damages as a result of an improper search. See William A. Schroeder, Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule, 69 GEO. L.J. 1361, 1386-90 (1981). See also Amsterdam, supra note 157, at 360 (asserting that Fourth Amendment civil actions are "seldom maintained, nor are they, as a practical matter, maintainable").

203. A number of commentators have advocated civil damage suits as an alternative to the exclusionary rule. See, e.g., Amar, Fourth Amendment First Principles, supra note 4, at 811-16 (suggesting a variety of civil enforcement alternatives to the exclusionary rule, including civil damage suits); Randy E. Barnett, Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice, 32 EMORY L.J. 937, 969-90 (1983) (proposing restitution to victims of police injustice as a preferable alternative to the exclusionary rule); Slobogin, supra note 179, at 405-23 (arguing that the exclusionary rule should be replaced by a hybrid damages system, based on both tort law and administrative law).
The final section of this article contains alternatives to the current regime, where the Supreme Court has used the Fourth Amendment to develop police codes that govern searches and seizures. Such alternatives include police department rule-making, statutory regulations, and tort suits seeking civil damages. Each of these alternatives has advantages and disadvantages.

Regardless of the viability of the proposed alternatives, the Court should reconsider its current approach to the Fourth Amendment. Fourth Amendment doctrine is such a mess because judges are attempting to apply the amendment in situations where it was never intended to apply.