Reclaiming the Fourth Amendment through an Originalist Interpretation

by

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Amendment 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.”

The Fourth Amendment has been mangled into something radically different than what its text, purpose, or history would lend itself to. By discarding an originalist reading the Supreme Court has found elements and tests that do not exist. The warrant requirement, probable cause requirement, and exclusionary rule are the end result of a misguided attempt to expand the Amendment’s protection and restrain government power. However, by doing this the Supreme Court has undermined the core of the Amendment, its objective and the standard of reasonableness it is supposed to hinge on.

In practice this reinterpretation has had the opposite effect. It is clear that an “originalist” understanding, interpretation, and application of the Fourth Amendment is the best way to faithfully adhere to the text and spirit of the Amendment while providing greater protection against Constitutional violations.

The Amendment’s current incarnation can be traced back to a judicial philosophy championed by Chief Justice Earl Warren. It would be an overstatement to blame everything on the Warren Court but it is fair to say that his belief that the Court had the positive responsibility to intervene where social injustice was evident, while admirable if misguided, is at least partially
responsible. The Warren Court, and Burger Court that followed, took this philosophy and reshaped the function and role of the Court in the American political process. When the Supreme Court focused on righting the wrongs of society the resulting opinions tended to be the direct product of picking a desired outcome first and then manufacturing a ruling. The role of judicial precedent, American history and legal tradition, or even the basic text of the Constitution was only as important as its rhetorical utility to the opinion.

Warrants

The Supreme Court has said on numerous occasions that there is a warrant requirement in the Fourth Amendment. While the Amendment does address warrants, the Supreme Court’s mistake has been in defining why the Amendment addresses warrants at all. The history and the text aim to limit and restrain warrants rather than explicitly or implicitly requiring, encouraging, or even preferring them. The warrant requirement as articulated by the Supreme Court fails by its own intended logic and history.

The Amendment is made up of two parts: that all searches and seizures by reasonable and that warrants must meet a certain criteria (probable cause, oath or affirmation, and particular description). The argument in support of the warrant requirement is that both parts are bound by an implicit third that no searches and seizures may occur except pursuant to a warrant. The expectant consequence being that the government should not trespass or intrude on someone without judicial authorization and that said judicial authorization should be in the form of a warrant. This line of reasoning, while initially plausible, is not consistent with the Amendment’s history or real world application.
It could be argued that just because the text does not explicitly call for a warrant requirement does not mean it is not there. That perhaps the framers and voters understood that the warrant requirement was so much at the Amendment’s core that it did not need to be expressly stated. If this were the case much of what the Supreme Court has done in recent decades could be justified and in keeping with the document. An example of this reasoning can be found in the First Amendment. Among the freedoms protected in the First Amendment is free speech and protecting political speech especially. The First Amendment’s relationship to protecting political speech is something common among various theories of Constitutional interpretation. This is an important distinction between originalism (both intention and textualism) and strict constructionism, the latter being what many critics of originalism are actually arguing against. A strict constructionist would look to see if something is specifically mentioned; an originalist does this as well but does not end his analysis there. Rather the next step would be to examine what public meaning was at the time or what the framers intended (depending on the brand of originalism). While many states had constitutions with Fourth Amendment like language, none had a textual warrant requirement. Also, many state Supreme Court’s rejected any implied warrant requirement as did common law, treatises, and Constitutional Convention debates.  

There are a number of examples in common law and contemporary actions of the era that cast doubt on the existence of any implied warrant requirement.  

In common law, arrests may be made without warrants in a variety of circumstances. An arrest is a seizure by any measure but to say that an arrest is per se unreasonable if warrantless would be so cumbersome that it would necessarily lead to a complete inability to effect arrests or total disregard of Fourth Amendment protection. In an attempt to preserve the warrant
requirement and an ability to make an arrest, the Supreme Court had to create an “arrest exception” in 1976.³

Related to arrests without warrants are searches of an arrestee and his surroundings. This practice is supported both by common law and common sense; a strict warrant requirement would be impossible and irrational. Strict adherence to the warrant requirement would prevent the police from frisking a detained and potentially dangerous suspect; threatening an officer’s safety while they waited for a warrant before checking a person for a weapon. The Supreme Court recognized this in 1969 by finding an “incident to arrest exception” to the warrant requirement.⁴ This of course raises a logical conundrum of requiring warrants in less intrusive circumstances but not incident to an arrest.

Common law holds that officers can search arrestees for “mere evidence” even though many other searches for “mere evidence” were not allowed.⁵ Additionally, the warrants referred to in the Fourth Amendment’s Warrant Clause were solely for stolen goods; early American statutes later extended warrants to smuggled, dangerous goods, contraband, and criminal instrumentalities.⁶ They were not extended to “mere evidence” because of the potential issues associated with the probable cause requirement. Akhil Reed Amar has argued that removing the warrant clause from traditional uses unleashes probable cause by turning it into a blank check for the government because the argument can be made that the government could “probably” find something if allowed to search for “mere evidence” (especially after factoring in the high-tech forensic techniques currently available to the police).⁷ This is the exact set of circumstances early American lawmakers and voters sought to avoid.

Yet another historical example of the government lacking the need for a warrant requirement is success. Meaning that ex post success, like finding contraband, was a defense
against an allegation of a search being unreasonable. Variations of this defense were successfully used in a number of major pre-Fourth Amendment cases and early American Supreme Court landmark cases (Justice Story and Gelston v. Hoyt for example). This should not be misinterpreted to suggest that officials could act reckless without consequences, quite the opposite. A government official acting without a warrant acted at his own peril and was liable for his actions, and even if he did find something that success would not protect him if his search had violated the rights of any other person besides the target of the successful search. However, a more detailed examination of how damages function as a deterrent against government abuses will be addressed later in this document.

There are other historical examples that refute the existence of an embedded or implied warrant requirement. A proponent of the warrant requirement could still argue that simply because early American lawmakers failed to follow the warrant requirement does not mean it did not exist, rather that it was ignored, and its true purpose was betrayed. There are historical parallels to draw from: the Sedition Act clearly violated the First Amendment’s protection of political free speech and Thomas Jefferson unquestionably went beyond his executive authority as defined by the Constitution when he orchestrated the Louisiana Purchase without Congressional authorization or approval. The only problem with this argument lacks historical and textual support. There are no examples of objections being made against the government for betraying the Fourth Amendment by not first obtaining a warrant made in the decades preceding or following the ratifying of the Fourth Amendment. There is also no portion of the Amendment that clearly calls for a warrant requirement. Most importantly common sense dictates that a strict warrant requirement is functionally not viable.
Similar to “arrests without warrants” there are numerous scenarios in which requiring officials to obtain a warrant would be imprudent. In 1967, the Supreme Court had to once again concoct a new exception in order to rescue the warrant requirement from collapsing under its own flawed logic with the so-called “exigent circumstances exceptions” for fast breaking situations like hot pursuit.\textsuperscript{10}

Another obstacle to the possibility of a strict warrant requirement is consent searches. It is difficult to imagine why the government should be required to obtain a warrant when a person to be searched had consented to be searched. Conversely if the warrant requirement is a right guaranteed by the Fourth Amendment it does not follow that it is a right that someone may waive on someone else’s behalf. The Supreme Court has repeatedly held that searches could be Constitutional when given consent by a wife against her husband\textsuperscript{11} and when authorities reasonably believed that consent had been given by the property’s rightful owner.\textsuperscript{12} With the exception of parental right over a minor and durable power of attorney, the courts do not recognize an individual’s ability to waive the Constitutional rights and protections of another.

Plain view searches also pose a problem for those who believe that any search conducted without a warrant is per se unreasonable. If an individual is out in public with a backpack that contains five pounds of cocaine and a police officer notices this when said individual opens the bag in a restaurant to retrieve a book from the bag. A strict adherent to the warrant requirement might contend that the police officer is constitutionally obligated to seek out a judge and obtain a search warrant. It reeks of absurdity to expect a police officer to not act on such information as soon as the officer sees it. Change this hypothetical so the individual is carrying a bomb instead of cocaine or that the officer saw the cocaine with an x-ray machine instead of his naked eye.
No matter how the facts are altered, to an originalist, the search has been conducted by the officer. The only difference or issue is whether the search was reasonable. To a warrant requirement advocate the issue hinges on whether the officer obtained a warrant. Note that one of definitions of “search” at the time of America’s founding and today is to “look scrutinizing at.” An originalist armed with the reasonableness test would have no problem squaring the hypothetical with definition of “search.” The Supreme Court, on the other hand, has had considerable difficulty with plain view searches and has further confused the matter by playing word games; ruling that naked eye searches were not really searches but use of high-tech binoculars may be. The Supreme Court determined that merely looking at a turntable was not a search; neither was trespassing on a property, scaling fences, and peering through barn windows nor hovering over an enclosed yard with a helicopter.

If a warrant requirement exists, and it is strict, it creates more problems than its proponents hope it fixes. It forces the Supreme Court to make exceptions to it or worse yet redefine what a search and seizure is. By no longer calling certain actions searches and/or seizures the Supreme Court constrains the Fourth Amendment’s protections and guarantees instead of expanding it.

There are a litany of other real world examples of government searches that do not require that a government officer first obtain a warrant. Security checkpoints at Courthouses and airports, IRS audits, EPA emissions test, a municipal health inspector, any corporate regulations, or investigations carried out by administration agencies. All of these examples are searches and/or seizures that are and were meant to be covered by the Fourth Amendment.

A critic might point out that the examples listed in the previous paragraph apply in many incidents to civil law actions. This is one of the unfortunate beliefs that have come out of the
Supreme Court’s treatment of the Fourth Amendment. It is a common misconception that the Fourth Amendment applies only to criminal law. This has been perpetuated by law schools that cover the Fourth Amendment not in a Constitutional Law courses but rather in Criminal Procedure or Evidence courses. There is nothing in the text or history of the Fourth Amendment to suggest that only applies to criminal law. The English and early American cases that had greatest impact on the creation of the Fourth Amendment involved customs enforcement, which could arguably by considered a criminal or a civil action. Also that if two searches are equally intrusive it does not logically follow that a criminal target be more restricted than civil searches, especially if the target is not a suspect but rather a mere innocent possessor of evidence.

All of this is why modern warrant requirement advocates have recognized the necessity of some exceptions and instead claim that warrantless search and seizures are per se unreasonable save for a limited number of well-defined historical and commonsensical exceptions. This view abandons any connection to the text. It makes little sense to claim the warrant requirement by citing an implicit third part of the Fourth Amendment and then to accept that there are historical exceptions and supplementary exceptions that common sense calls for.

This argument merely seems to follow a number of different paths just to hinge on reasonableness, in the form of the common sense exceptions, the very aspect of the Fourth Amendment textual opponents sought to move away from. In a word, the modified approach is ultimately non-textual and still largely shaped by reasonableness. There are theories of constitutional interpretation that would not be at all discouraged if the view it expounds is unsupported by the text or history. This certainly did not stop the Warren Court in copious opinions, but it is unnecessary to do that to the Fourth Amendment, which is stronger if left to its text.
At this point it may be helpful to evaluate warrants in an historical context and examine why the eighteenth and nineteenth century founders, framers, lawmakers, voters, and citizens viewed warrants with such hostility, animus, and suspicion. The Fourth Amendment sought to limit and discourage warrants, not buttress and encourage them. That is why warrants had to meet certain criteria like probable cause, oath, and particular description. If a warrant lacked any one of these elements it was per se unreasonable.

Many were made uneasy by warrants because of a process involved in issuing one. Warrants were issued ex parte, without giving the accused person to be searched notice and opportunity to be heard. Except for the person accusing a target who was not there, all of the parties involved in the process and execution were government officials. This bothered people of that time because judges were often paid by the central government and therefore seen as government agents no different than law enforcement.

Many supporters argue that “warrants provide a neutral and detached decision maker.” William J. Stuntz, an advocate of both the warrant requirement and the exclusionary rule dismisses this rationale by pointing out that every police action is subject to a certain level of judicial scrutiny. While it could be argued that the police and judges are detached (since one is executive and one is judicial), ignoring the fact that the judges are often magistrates who also perform law enforcement duties, it can also be argued that since they are both government agents that they are not significantly detached. Founding era Americans understood this and was merely another reason they looked upon warrants with distrust.

Warrants were also not subject to the same after-the-fact judicial review warrantless searches were. This was probably the biggest objection people had with warrants. Warrants gave the government immunity from civil action if the search was unreasonable. In fact, that is the
whole reason government officials sought warrants in the first place, to shield themselves from liability. As a result a warrant protects the searcher, not the searched. People trusted juries; not judges and warrants. The Supreme Court has tried to protect the target but a warrant does the opposite. In effect, the Supreme Court chose the worse possible tool to achieve its goals.20

*Probable Cause*

The Supreme Court, in tackling an assortment of exceptions to the warrant requirement has contended that even warrantless searches must be backed with probable cause. Just like the warrant requirement, this view ignores the text of the Fourth Amendment. Following the text, warrantless searches do not require probable cause any more than they require oath, description, or anything else the Fourth Amendment attaches to warrants. Probable cause got applied to warrantless searches because without it the Supreme Court thought that it would discourage and the government from getting the warrant.21 What the Supreme Court got wrong was that discouraging and limiting warrants was part of what the Fourth Amendment was meant to do.

While it is true that certain common law searches and seizures needed probable cause, like arrests, it must be noted that the same ex post success discussed above applied here too and there were many warrantless actions that did not require a warrant.22

Clearly the universal probable cause requirement lacks textual or historical support; it also fails to hold up against the basic scrutiny of common sense. If probable cause is a good probability of discovering something like contraband, it is unable to provide the standard for all warrantless search and seizures.23 If probable cause is required for all warrantless searches immediate complications arise. It is difficult to establish probable cause for airport security, plain
view searches, like a cop scanning a street corner through a car window, administrative agency regulations, code compliance, and does nothing to answer if prior probable cause would be necessary to conduct a search that has been consented to.

Such dilemmas have led to the Supreme Court to engage in similar word games and concessions it faced with the “warrant requirement” in an attempt to preserve the probable cause requirement and avoid absurdity. One tactic is to redefine and water down the meaning of search and seizure. The other is to play games with what constitutes probable cause. An airport metal detector may rely on a .001% probability of finding a bomb or weapon. Most would agree that .001% is appropriate in airports for bombs but not in someone’s house for Cuban cigars. Perhaps a 50.001% probability of finding of finding drugs in a person’s car is enough for probable cause. Taking it further, a teacher may assert with a 100% probability of a student having swallowed banded chewing gum. Upon considering these three different percentages it becomes more apparent that while setting a fixed percentile is desirable, it is incapable of producing an amount that would not offend common sense. What makes .001% acceptable at an airport and for unacceptable contraband chewing gum is the imminence of potential harm that may come into play, but this scheme replaces probable cause with reasonableness. Once again the court is attempting to create new doctrine that fails to achieve its goal as well as an originalist interpretation would.

The Exclusionary Rule

The third unfortunate byproduct of the Supreme Court’s misinterpretation of the Fourth Amendment is the wholly inadequate “remedy” known as the exclusionary rule, which seeks to
exclude improperly obtained evidence from criminal proceedings. Like the warrant requirement and probable cause requirement, the exclusionary rule is something that the eighteenth and nineteenth century framers, legal scholars, and voters had no concept of and certainly did not intend or believe to be contained within the Fourth Amendment. The exclusionary rule provides criminal defendants a disproportional benefit and advantage compared to the alleged violation. Despite the prospective windfall it conferred, excluding evidence was rarely sought by criminal defendants in the nineteenth century most likely because it either did not exist as an option or that it seemed so absurd to courts at that time since nothing like the exclusionary rule existed in common law.24 In 1822, Justice Joseph Story addressed the issue directly by stating “in the ordinary administration of municipal law the right of using evidence does not depend, nor, as far as I have any recollection, has ever been supposed to depend upon the lawfulness or unlawfulness of the mode, by which it is obtained.”25

The exclusionary rule was the result of a Fourth-Fifth Amendment fusion in 1886 the Supreme Court case Boyd v. United States.26 Where the Supreme Court excluded various papers the government sought to use. The Fourth Amendment Reasonableness Clause and the Fifth Amendment’s Incrimination Clause “run almost into each other” and “throw great light on each other” the Court ruled. This fusion occurred during the Lochner era which essentially reasoned that people have the right to their property and it is unreasonable to use it against him.27

Akhil Reed Amar comments that the exclusion was not designed to remedy the antecedent violation, but prevent a new one from occurring in the courtroom itself, a violation rooted in Fifth Amendment self-incrimination concerns.28 This is why the exclusionary rule more closely adheres to Fifth Amendment principles than Fourth Amendment principles: such as applying the rule to criminal cases but not civil cases and being able to use illegally-obtained
evidence against any defendant other than the searchee. Like much of the *Lochner* era’s philosophy and precedent, the modern Supreme Court has rejected *Boyd* explicitly but has kept the exclusionary rule.

As a result of this repudiation, the exclusionary rule is supported by three modern reasons/arguments: judicial integrity and fairness, the non-profit principle, and deterrence.

The first argument is that the exclusionary rule protects judicial integrity and fairness. It is safe to assume that judicial integrity and fairness are important principles and goals that any sensible person would argue with. The pertinent issue is whether the exclusionary rule furthers that aim or frustrates it. It is difficult to fathom how the court’s integrity or fairness is best protected by a rule that prevents evidence from being introduced. If the court is charged with any degree of truth seeking responsibility, burying its head in the sand seems to be a peculiar way to go about it. Critics may counter that the integrity of the court is best served by barring evidence that may be false or planted. This is a legitimate concern, but not one solved exclusion. The legitimacy of evidence is largely for a jury to determine but modern exclusionary rule decisions are made by a judge. The constitutionality of a given search does not influence the inherent truthfulness or falsehood of a particular piece of evidence. Indeed, it can be argued that inclusion of the evidence for a jury’s consideration may benefit a defendant, because if a defendant can prove or convince a jury that a particular piece of evidence was planted or fabricated by corrupt officials it would boast any defense by establishing reasonable doubt.

The judicial integrity and fairness argument also invariably implies that courts that fail to exercise the exclusionary rule lack judicial integrity and fairness. Canada did not have the exclusionary rule until the 1980’s, England still does not, antebellum United States courts did not, and present day civil courts do not. This line of reasoning suggests that all of these courts
and their subsequent proceedings do or did lack the judicial integrity and fairness. If the exclusionary rule truly represented the Fourth Amendment’s tool of judicial integrity and fairness it would apply equally to criminal and civil cases just like the Amendment itself.

The second argument is the “non-profit principle” which means that the government should not profit from its own wrongdoing, and that is the price of the Fourth Amendment. This argument assumes a “but for” casual link. That “but for” the government’s illegal search the government would not have been able to use the obtained evidence against that defendant. It assumes that the government is always better off because of its actions. Suppose that evidence is obtained, the police could have gotten a warrant but did not because they reasonably believed that they were within one of the recognized exceptions. Here a defendant gains a great advantage. One could argue that the government could still get the evidence in through the doctrine of inevitable discovery, which is truer in theory than in practice because the burden of proof threshold for the government to prove is incredibly high.\(^{29}\) The non-profit principle is particularly strange because in theory it is supposed to merely level the playing field by excluding evidence the government is should not have in the first place. But this explanation exposes the disproportionate nature of a remedy. The defendant is better off because damning evidence against him has been permanently excluded. Therefore the more damning the evidence and more guilty the defendant, the more reward he gets for the government’s violation.

Another disproportionate aspect of the “but for” reasoning is that merely because something is a clear but for cause of a search does not mean it was legally foreseeable. It is the violation of the Fourth Amendment that should matter, not the aftereffects. Akhil Reed Amar explains this by giving an example of two identical men living side by side in identical houses. The police illegally search both houses and find nothing in one and evidence of a murder in the
other. The murderer is tried and convicted. They both sue the government. They should receive the same amount of damages because both men suffered the same Constitutional violation. The murderer’s trial and conviction was not legally cognizable.\textsuperscript{30} Applying the same set of facts to the current system, under the exclusionary rule and the non-profit principle, the murderer gets to suppress evidence while the innocent man gets nothing despite suffering the same degree of infringement. This is precisely what is meant by the exclusionary rule benefitting the guilty.

The non-profit principle argument becomes especially odd when one considers that the government in fact often literally does profit from the “but for” consequences of unconstitutional searches. For instance, if an unconstitutional search leads to the discovery and confiscation of contraband or illegal goods, like drugs, the government does not return the items to the thief or smuggler from whom it confiscated it from. The government regularly sells drugs it does not destroy to research facilities. The government also frequently seizes assets like property and vehicles through asset foreclosure when said items were used in connection with illegal activity. In the vast majority of circumstances the seizing agency is able to sell the impounded items, use them, or sell them and have the proceeds added to their operating budget.\textsuperscript{31} It would be unreasonable to expect the government to return confiscated goods to a smuggler if the government obtained the goods illegally, although scholars who advocate the exclusionary and cite the non-profit principle as a reason fail to argue that the government should return stolen property to a robber or that the government should be unable to sell confiscated narcotics to an approved university for scientific research.

The third modern argument is that the exclusionary rule acts as a deterrent because excluding evidence will send the government a message that a particular behavior is not acceptable thereby deterring future abuses. If a major ambition of the exclusionary rule really is
to deter the government from violating search and seizure rights of the people, the practice of excluding evidence from criminal proceedings is probably the least effective method imaginable in order to accomplish that goal. The framers and early American voters understood that, and that is why they had punitive damages and civil tort suits to deter the government from conducting unreasonable search and seizures, because it focused on the scope of the violation rather than the resultant evidence gathered.

Perhaps the greatest flaw of the exclusionary rule as a deterrent is that it can, by definition, only function as a deterrent when obtaining a criminal conviction is the ultimate goal of an unreasonable search and seizure. It does nothing to protect an innocent civilian from government harassment.

The exclusionary rule provides no relief and does not deter a government agent from purposely harassing a person because gender, race, sexual orientation, or any other personal reason said agent may have, and because securing a conviction is not the reason for the actions the agent will never have to justify his actions to a judge or jury. It may be pointed out that a victim of such actions by a government agent has other options available, like filing a compliant with the agency. However the effectiveness of these methods is negligible and at best mixed and it also does nothing to counter the assertion that the exclusionary rule is unable to deter violating the search and seizure rights of innocent parties.

Furthermore, the use of the exclusionary rule as a remedy to absolve Fourth Amendment violations will predictably lead to a pervasive sense of estrangement and disillusionment between the law enforcement establishment and the public it seeks to protect. It is obvious that the exclusionary rule provides no relief for the unfortunate citizen who has his possessions unreasonably searched when an official’s goal is harassment rather than criminal conviction.
A less often discussed or considered unintended consequence of the exclusionary rule as a remedial scheme is the costs it imposes on victims of crime, who are forced to watch the criminal justice system fail them by letting go a person who preyed on them simply because a police officer may have reasonably believed that his actions were within the parameters carved out by the Supreme Court regarding searches. That victim will be less likely to depend on law enforcement in the future which will invariability undermine their respect for and faith in the legal system fostering a misdirected hostility away from the offender and instead towards the system and doctrine that freed him. This in turn will only add to the frustration of efforts to prevent crime and exact a high toll in human injury; it should be mentioned that this is the end product the Supreme Court was fearful of through a rigid application of the exclusionary rule. The frustration of efforts to prevent crime could derive from law enforcement officers being unsure about when they may act or whether their efforts might be held hostage by the availability of a judge; it would also likely come to fruition because when the people’s faith in law enforcement erodes they are less likely to cooperate with it. Effectively the police become seen as nothing more than a nuisance whose purpose is to assess fines through traffic violations and, as an organization, incapable of reducing crime and protecting the citizenry.

One may criticize this line of reasoning as overly alarmist and that if it does happen, it only occurs in individually isolated circumstances. Admittedly, this effect may be difficult to empirically verify, however it is not such an outlandish possibility.

Consider the fundamentals of advertising and marketing. It is widely accepted that a person (customer) who has a negative interaction and/or experience is exponentially more likely to tell other people about it than if they were satisfied. This is relevant here because, in this sense, people’s opinion of the criminal justice system are affected by the negative experiences
they endure, perceive, or observe in the same way their opinion of a company, product, or service may. It is therefore foreseeable that the spread pessimistic sentiment would move through the public at an incredibly faster pace, especially in tight knit communities. Since it is widely recognized that law enforcement skill is always dependant on community support and collaboration to some degree or another it becomes increasingly apparent why the Supreme Court in *Terry v. Ohio* conceded the flaws in the exclusionary rule.

Conceivably the most egregious defect in the argument that the exclusionary rule is an effective remedy is the doctrine’s absolute futility in dealing with the problem of police brutality. Even if one were to assume that excluding evidence from criminal proceedings was a valid and effective remedy to cure an unlawful search, the fact that the other half of the Fourth Amendment, seizures, is left unaffected. Whenever the government or an agent thereof detains a person, be it momentarily or indefinitely, a seizure of that person’s time, mobility, and attention has occurred. Unless such a seizure leads to a search that yields evidence that may be excluded later on, the subject of that seizure, it determined to be unlawful, will not receive any remedy under the exclusionary rule for a Fourth Amendment violation. Police brutality is, among other things, a seizure. When a police officer acts in such a manner that officer is violating the victim’s Fourth Amendment rights and while the officer may face criminal and/or administrative actions it does not follow that the victim should receive no protection from the very Amendment that prohibits it.

Oftentimes police brutality, either real or alleged, involves race, which only further inflames public sentiment. The public is understandably frustrated with internal administrative procedures that arise in response to allegations, and as a result there is most likely a percentage of police abuse that goes unreported because people view complaining as futile. Consequently
police brutality also greatly contributes to the frustration of efforts to prevent crime and foster public cooperation.

“Exclusion requires no judgment about how much harm a defendant has suffered.”

William J. Stuntz, an advocate of both the warrant requirement and the exclusionary rule, sees this as a benefit because the valuation difficulty disappears. In actuality, this is a major detriment because not all violations are equally egregious and therefore does not call for the same remedy.

Another problem is, as stated above, the guiltier someone is the more they have to gain from the exclusionary rule. As a consequence the Four Amendment relies heavily on most likely guilty criminal defendants to enforce it. The exclusionary rule also reinforces the erroneous placement of the Fourth Amendment in the spheres of criminal procedure and evidence law instead of its proper place in constitutional law.

The final outcome of the exclusionary rule is that people will be prone to draw conclusions that a criminal defendant’s Fourth Amendment rights were not violated instead of having to concede that an accused person’s rights were violated and risk having to face dismissing charges against an obviously guilty person. This sentiment is a natural and expected reaction. No one wants to free a violent and/or predatory criminal because a well meaning but inexperienced police officer might have gotten too close to the sometimes obscured line between a “well-delineated” exception to the warrant requirement and a violation of someone’s Fourth Amendment rights. Similarly, it is perfectly feasible that a constitutionally sound search may be declared a violation because of the popularity or status of accused or even a judge’s personal objection to a particular statute or public policy. The public may casually ignore certain actions and be outraged by others simply based on its usage and effect despite the fact that the Fourth Amendment does not. This expansion and growth (and possible contraction) will eventually lead
to contradictions. Akhil Reed Amar describes this outcome as a short term deterrence causing a long term instability because it will erode the public’s respect for and value of the Fourth Amendment.\textsuperscript{35}

\textit{The Reasonableness Standard}

If at the heart of the Fourth Amendment is the command that all searches and seizures be reasonable, the question then becomes deciding what is and is not reasonable under the Amendment. The process for determining reasonableness is made up of a combination of common sense (tort) reasonableness and constitutional reasonableness.

Common sense (tort) reasonableness is something that could be defined by juries, judges, and legislatures. Common sense dictates that over time the sheer number of cases would lead to the creation of a bright line that can be adjusted as circumstances require. If people who have had their rights violated or at least claimed it would have an opportunity to be heard, a jury would be able to look beyond warrants and probable cause to the importance, intrusiveness, identity, and other relevant factors relating to the search and/or seizure at issue. Obviously more serious crimes and more serious needs can justify more serious searches and seizures. This method of defining and ascertaining reasonableness is particularly preferable to the current confusion of what does or does not constitute a reasonable search and/or seizure. A jury is also best suited to determine what is and is not reasonable in given set of circumstances, which is not uncommon in American legal tradition. A jury is a much more preferable and the most equitable way to determine if a person’s rights were violated. Under the current regime the exclusionary rule
leaves this determination squarely with the judge, clearly a jury would be better connected to what is considered reasonable as defined by common sense than a judge.

An originalist interpretation would also better be able to respond to changes in technology and investigatory techniques. The Supreme Court would no longer have to “find” or carve out exceptions to the implied warrant requirement and probable cause requirement while trying to preserve them. For example, consider the use of electronic surveillance and the court’s ability to issue warrants. By its very nature electronic surveillance, like “bugs” and wire taps, is incapable of meeting the explicit criteria necessary to authorize a warrant, because it is not possible for the government to specifically describe the particular conversations that have not occurred as of the time of issuing the warrant. Moreover, a warrant is traditionally served at the time it is issued, which does not happen with electronic surveillance because its target is conversations that do not yet exist. The secrecy involved with the ex parte proceedings is not the problem, because under an originalist application of the Fourth Amendment the only question would be the reasonableness of the search and seizure not the existence of a warrant. It is clear that the Amendment is relevant and capable of applying to new circumstances. While the current Fourth Amendment, as mangled by the Supreme Court, would be ineffective until the Supreme Court craved out another exception. An originalist exercising the principle of reasonableness could logically declare that greater intrusiveness requires greater reasonableness and need not transform itself as a result of every twist and turn along the course of human progress. This principle could be used with equal effectiveness in 1808, 1908, and 2008.

Running parallel with common sense (tort) reasonableness is the concept of Constitutional Reasonableness. Meaning simply that the Fourth Amendment does not exist in
isolation and that in certain instances Fourth Amendment protections relate to and may work in concert with other sections and doctrines.

The following examples are meant to illustrate how Constitutional Reasonableness could work and to demonstrate the relationship between various sections of the Constitution, Bill of Rights, and philosophy that imbues each. They are not meant to be a declaration of how it must turn out.

Privileged communication. If the government were to intercept privileged communication between an attorney and his client in the course of a legitimate investigation with electronic surveillance, the government would be unable to use said information due to its status. Even if the underlying search itself was perfectly reasonable from a common sense point of view allowing the government the opportunity or ability to use the particular information conveyed in a privileged communication would be constitutionally unreasonable. Here the Fourth Amendment would be functioning in concert with a person’s right to counsel and right to keep that communication privileged. While it could be pointed out that the privileged attorney-client communication in this example would be protected with or without constitutional reasonableness, the fact remains that the constitutional reasonableness is at the very least able to provide an additional level of protection. Because not only was the communication protected, it was also protected from the government unreasonably seizing it.

Due Process. If, as part of the remedial scheme, a special court or jurisdiction were appointed or established to address potential Fourth Amendment violations, it would stand to reason that the principles that guide procedural and substantive due process would also serve to aid the courts by ensuring people had access to any available remedies.
Equal Protection. Even if racially disparate impact alone does not violate the Constitution, the constitutional principles that underlie equal protection should be considered if a certain group bears a heavier burden on search and seizure actions and procedures. And whether or not whether said procedures and disparate impact are reasonable are an issue that can only be dealt with if reasonableness is raised and the principles of equal protection is considered.36

The Fifth Amendment’s Takings Clause. The Takings Clause to technically limited to property, although the underlying principle is that no innocent individual should be singled out to bear a special burden for the benefit of the entire community. With this principle in mind consider the actions of a malicious prosecutor getting a grand jury to subpoena a person of modest means, who must pay for counsel and travel at their own expense, repeatedly and dragging the process out for weeks if not months. The summonses to appear before a grand jury is a seizure covered by the Fourth Amendment, and while no tangible property is involved the underlying principle of the Takings Clause could be viewed to enlighten the circumstances.37

**Remedies and Practical Effects**

By abandoning the false belief that the exclusionary rule is an appropriate or even effective remedy, the Fourth Amendment may return to, and in a way, rediscover the civil enforcement process which was used to remedy infringements and violations for over a hundred years before the exclusionary rule was made up.

Civil torts and trespass suits would be the most obvious remedy available. This would allow a person to bring an action into open court and have the reasonableness of the action determined by a civil jury. If the jury found that the government’s actions were unreasonable it
would have the opportunity to assess punitive damages to both remedy the violation and also to send the government a message that its actions were unacceptable. This is preferable to the current regime wherein that determination and message is sent by a solitary judge.

Because civil trials are public the civil tort model would also help cultivate greater governmental transparency and public awareness of the behavior of its police force. As opposed to the current system discussed above, that more often than not frustrates the efforts to prevent crime by putting the community and its law enforcement in adversarial positions.

One benefit of the assessment of punitive damages would be that, unlike the exclusionary rule, the public and government would be able to more precisely gauge the cost of police abuse and misconduct in quantifiable specific terms. Unlike the existing structure that simply excludes evidence, which certainly affects the governments’, and therefore the people’s, position the true extent of the damage is vague and difficult to put into practical terms.

The civil tort model should also be inline with the evolution of modern American tort law. This means permitting class action suits for when a large number of people have been violated by the same action. For instance, if the government were to illegally and unreasonably monitor everyone’s phone calls. Another change that should be adopted is vicarious liability. This would entail suing the government agency instead of, or in addition to, the government agent who personally violated someone’s rights.

Finally, it is conceivable that the Congress and state legislatures would enact laws that define was is and is not reasonable in certain circumstances. This would provide the dual advantage of letting government entities know exactly where the line between reasonable and unreasonable is and, since legislative bodies represent the will of the electorate, that line may be altered as necessary to keep up with new circumstances and technology.
Conclusion

No one expects this return to the text and purpose of the Fourth Amendment to happen over night, but perhaps the most important step towards this goal is for the Supreme Court to continue to have to contend with the problems the warrant “requirement”, probable cause “requirement”, and the exclusionary rule repeatedly cause. Each time the Supreme Court is faced with Fourth Amendment issues arising of the Court’s misinterpretation in recent decades, it is forced to pick between continuing and often furthering an absurdity or slowly returning to reasonableness the Amendment was meant to hinge on. Indeed, the very act of questioning whether a search and/or seizure was or is reasonable strengthens the Fourth Amendment and therefore the Constitutional protections of the people as a whole. This is why, in this instance, an originalist’s approach is the best.
Endnotes

6 Id.
7 Amar, *FOURTH AMENDMENT FIRST PRINCIPLES*, at 761.
8 Id. at 766.
9 Id. at 765.
13 Amar, *FOURTH AMENDMENT FIRST PRINCIPLES*, at 762.
17 Amar, *FOURTH AMENDMENT FIRST PRINCIPLES*, at 757.
18 Id. at 763.
20 Amar, *FOURTH AMENDMENT FIRST PRINCIPLES*, at 765.
23 Id. at 768.
24 Id. at 770.
27 Amar, *FOURTH AMENDMENT FIRST PRINCIPLES*, at 770.
28 Id. at 771.
29 Id. at 773.
30 Id. at 773-74.
32 Terry v. Ohio, 392 U.S. 1, 19 (1968).
34 Stuntz, *Warrants and Fourth Amendment Remedies*, at 883.
35 Amar, *FOURTH AMENDMENT FIRST PRINCIPLES*, at 776.
36 Id. at 780.
37 Id. at 779-780.
Reclaiming this meaning is essential for understanding the scope of the original Fourth Amendment and for ensuring a doctrine that reflects fidelity to the founding principles. Discover the world's research. 17+ million members. The Fourth Amendment today is an embarrassment. Much of what the Supreme Court has said in the last half century - that the Amendment generally calls for warrants and probable cause for all searches and seizures, and exclusion of illegally obtained evidence - is initially plausible but ultimately misguided. Through an analysis of the debates of the Mexican Congress of 1823–1824 this article explores both the knowledge and understanding that the Mexican [Show full abstract] representatives had of the US Constitution and the use they made of it. The Fourth Amendment (Amendment IV) to the United States Constitution is part of the Bill of Rights. It prohibits unreasonable searches and seizures. In addition, it sets requirements for issuing warrants: warrants must be issued by a judge or magistrate, justified by probable cause, supported by oath or affirmation, and must particularly describe the place to be searched and the persons or things to be seized. The Fourth Amendment: Text, Origins, and Meaning. Protection From Unreasonable Search and Seizure. Share. Through Writs of Assistance, officials were free to search virtually any home they liked, at any time they liked, for any reason they liked or for no reason at all. Since some of the founding fathers had been smugglers in England, this was an especially unpopular concept in the colonies. Clearly, the framers of the Bill of Rights considered such colonial-era searches to be unreasonable. What Are ‘Unreasonable’ Searches Today?