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ARE COPS CONSTITUTIONAL?

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ABSTRACT

Police work is often lionized by jurists and scholars who claim to employ "textualist" and "originalist" methods of constitutional interpretation. Yet professional police were unknown to the United States in 1789, and first appeared in America almost a half-century *after* the Constitution's ratification. The Framers contemplated law enforcement as the duty of mostly private citizens, along with a few constables and sheriffs who could be called upon when necessary. This article marshals extensive historical and legal evidence to show that modern policing is in many ways inconsistent with the original intent of America's founding documents. The author argues that the growth of modern policing has substantially empowered the state in a way the Framers would regard as abhorrent to their foremost principles.

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PART I

PART II

PART I

INTRODUCTION

Uniformed police officers are the most visible element of America's criminal justice system. Their numbers have grown exponentially over the past century and now stand at hundreds of thousands nationwide.1 Police expenses account for the largest segment of most municipal budgets and generally dwarf expenses for fire, trash, and sewer services.[2] Neither casual observers nor learned authorities regard the sight of hundreds of armed, uniformed state agents on America's roads and street corners as anything peculiar -- let alone invalid or unconstitutional.

Yet the dissident English colonists who framed the United States Constitution would have seen this modern 'police state' as alien to their foremost principles. Under the criminal justice model known to the Framers, professional police officers were unknown.3 The general public had broad law enforcement powers and only the executive functions of the law (e.g., the execution of writs, warrants and orders) were performed by constables or sheriffs (who might call upon members of the community for assistance).4 Initiation and investigation of criminal cases was the nearly exclusive province of private persons.

At the time of the Constitution's ratification, the office of sheriff was an appointed position, and constables were either elected or drafted from the community to serve without pay.5 Most of their duties involved civil executions rather than criminal law enforcement. The courts of that period were venues for private litigation -- whether civil or criminal -- and the state was rarely a party. Professional police as we know them today originated in American cities during the second quarter of the nineteenth century, when municipal governments drafted citizens to maintain order.6 The role of these "nightly watch" officers gradually grew to encompass the catching of criminals, which had formerly been the responsibility of individual citizens.7

While this historical disconnect is widely known by criminal justice historians, rarely has it been juxtaposed against the Constitution and the Constitution's imposed scheme of criminal justice.[8] "Originalist" scholars of the Constitution have tended to be supportive, rather than critical of modern policing.[9] This article will show, however, that modern policing violates the Framers' most firmly held conceptions of criminal justice.

The modern police-driven model of law enforcement helps sustain a playing field that is fundamentally uneven for different players upon it. Modern police act as an army of assistants for state prosecutors and gather evidence solely with an eye toward the state's interests. Police seal off crime scenes from the purview of defense investigators, act as witnesses of convenience for the state in courts of law, and instigate a substantial amount of criminal activity under the guise of crime fighting. Additionally, police enforce social class norms and act as

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[1] As of June, 1996, there were more than 700,000 full- and part-time professional state-sworn police in the United States. *See* BUREAU OF JUSTICE STATISTICS, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 1996 (1998). Figures for earlier decades and centuries are difficult to obtain, but a few indicators suggest that the ratio of police per citizen has grown by at least four thousand percent. In 1816, the British Parliament reported that there was at that time one constable for every 18,187 persons in Great Britain. *See* Jerome Hall, *Legal and Social Aspects of Arrest Without a Warrant*, 49 HARVARD L. REV. 566, 582 (1936). Conventional wisdom would suggest that American ratios were, if anything, lower. Today there is approximately one officer for every 386 Americans.

[2] The City of Los Angeles, for example, spends almost half (49.1%) of its annual discretionary budget on police but only 17.7% on fire and 14.8% on public works. *See City of Los Angeles 1999-2000 Budget Summary* (visited Dec. 2000). The City of Chicago spends over forty percent of its annual budget on police. *See Chicago Budget 1999* (visited Dec. 2000). Seattle spends more than $150 million, or 41 percent of its annual budget, on police and police pensions. *See* City of Seattle 2000 Proposed Budget (visited Dec. 2000). The City of New York is one exception, due primarily to New York State's unique system for funding education. Police and the administration of justice constitute the third largest segment, or twelve percent, of the City's budget, after education and human resources. *See* THE CITY OF NEW YORK, EXECUTIVE BUDGET, FISCAL YEAR 2000 1 (2000) (pie chart).

3 See Carol S. Steiker, Second Thoughts About First Principles, 107 HARV. L. REV. 820, 830 (1994) (saying twentieth century police and "our contemporary sense of 'policing' would be utterly foreign to our colonial forebears").

[4] See id.

[5] *See id*. at 831 (saying the sole monetary reward for such officers was occasional compensation by private individuals for returning stolen property).

[6] *See* CHARLES SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 314 (1978). The City of Boston, for example, enacted an ordinance requiring drafted citizens to walk the streets "to prevent any danger by fire, and to see that good order is kept." *Id*.

[7] *C.f. id*. (mentioning that cops' role of maintaining order predates their role of crime control).

[8] *But see, e.g*., Steiker, *supra* note 3, at 824 (saying the "invention ... of armed quasi-military, professional police forces, whose form, function, and daily presence differ dramatically from that of the colonial constabulary, requires that modern-day judges and scholars rethink" Fourth Amendment remedies).

[9] *See, e.g*., ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 104 (1996) (criticizing Supreme Court rulings that have "steadily expanded" the rights of criminals and placed limitations upon police conduct).

tools of empowerment for favored interest groups to the disadvantage of others.[10] Police are also a political force that constantly lobbies for increased state power and decreased constitutional liberty for American citizens.

THE CONSTITUTIONAL TEXT

The Constitution contains no explicit provisions for criminal law enforcement.[11] Nor did the constitutions of any of the several states contain such provisions at the time of the Founding.[12] Early constitutions enunciated the intention that law enforcement was a universal duty that each person owed to the community, rather than a power of the government.[13] Founding-era constitutions addressed law enforcement from the standpoint of individual liberties and placed explicit barriers upon the state.[14]

PRIVATE PROSECUTORS

For decades before and after the Revolution, the adjudication of criminals in America was governed primarily by the rule of private prosecution: (1) victims of serious crimes approached a community grand jury, (2) the grand jury investigated the matter and issued an indictment only if it concluded that a crime should be charged, and (3) the victim himself or his representative (generally an attorney but sometimes a state attorney general) prosecuted the defendant before a petit jury of twelve men.[15] Criminal actions were only a step away from civil actions -- the only material difference being that criminal claims ostensibly involved an interest of the public at large as well as the victim.[16] Private prosecutors acted under authority of the people and in the name of the state -- but for their own vindication.[17] The very term "prosecutor" meant criminal plaintiff and implied a private person.[18] A *government* prosecutor was referred to as an attorney general and was a rare phenomenon in criminal cases at the time of the nation's founding.[19] When a private individual prosecuted an action in the name

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[10] *Cf*. E.X. BOOZHIE, THE OUTLAW'S BIBLE 15 (1988) (stating the true mission of police is to protect the status quo for the benefit of the ruling class).

[11] As a textual matter, the Constitution grants authority to the federal government to define and punish criminal activity in only five instances. Article I grants Congress power (1) "[t]o provide for the Punishment of counterfeiting the Securities and current Coin of the United States," art. I, § 8, cl. 6; (2) "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations," *id*, cl. 10; (3) "[t]o make Rules for the Government and Regulation of the land and naval Forces," *id*. at cl. 14; (4) "[t]o exercise exclusive Legislation in all Cases whatsoever, over" the District of Columbia and federal reservations. *id*. at cl. 17; *see also* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 426 (1821) ("Congress has a right to punish murder in a fort, or other place within its exclusive jurisdiction; but no general right to punish murder committed within any of the states"). Likewise, (5) Article III defines the crime of "Treason against the United States" and grants to Congress the "Power to declare [its] Punishment...." U.S. CONST. art. III, § 3.

[12] Several early constitutions expressed a right of citizens "to be protected in the enjoyment of life, liberty and property," and therefore purported to bind citizens to contribute their proportion toward expenses of such protection. *See* DELAWARE DEC. OF RIGHTS of Sept. 11, 1776, § 10; PA. CONST. of Sept. 28, 1776, Dec. of Rights, § VIII; VT. CONST. of July 8, 1777, Chap. 1, § IX. Other typical provisions required that the powers of government be exercised only by the consent of the people, *see, e.g*., N.C. CONST. of Dec. 18, 1776, § V, and that all persons invested with government power be accountable for their conduct. *See* MD. CONST. of Nov. 11, 1776, § IV.

[13] The constitutions of several early states expressed the intent that citizens were obligated to carry out law enforcement duties. *See, e.g*., DELAWARE DEC. OF RIGHTS of Sept. 11, 1776, § 10 (providing every citizen shall yield his personal service when necessary, or an equivalent); N.H. CONST. of June 2, 1784, Part I, art. I, § XII (providing that every member of the community is bound to "yield his personal service when necessary, or an equivalent"); VT. CONST. of July 8, 1777, Chap. 1, § IX (providing every member of society is bound to contribute his proportion towards the expenses of his protection, "and to yield his personal service, when necessary").

[14] *C.f*. JAMES BOVARD, LOST RIGHTS: THE DESTRUCTION OF AMERICAN LIBERTY 51 (1st ed. 1994) (discussing Revolution-era perception that the law was a means to restrain government and to secure rights of citizens).

[15] Originally, all criminal procedure fell under the rule of private vengeance. A victim or aggrieved party made a direct appeal to county authorities to force a defendant to face him.

See ARTHUR TRAIN, THE PRISONER AT THE BAR 120 n. (1926). From these very early times, "grand" or "accusing" juries were formed to examine the accusations of private individuals. *Id*. at 121 n. Although the accusing jury frequently acted as a trial jury as well, it eventually evolved into a separate body that took on the role of accuser on behalf of aggrieved parties. It deliberated secretly, acting on its members' own personal information and upon the application of injured parties. *Id*. at 124 n.

[16] In the early decades of American criminal justice, criminal cases were hardly different from civil actions, and could easily be confused for one another if "the public not being joined in it." Clark v. Turner, 1 Root 200 (Conn. 1790) (holding action for assault and battery was no more than a civil case because the public was not joined). It was apparently not unusual for trial judges themselves to be confused about whether a case was criminal or civil, and to make judicial errors regarding procedural differences between the two types of cases. *See* Meacham v. Austin, 5 Day 233 (Conn. 1811) (upholding lower court's dismissal of criminal verdict because the case's process had been consistent with civil procedure rather than criminal procedure).

[17] *See* Respublica v. Griffiths, 2 Dall. 112 (Pa. 1790) (involving action by private individual seeking public sanction for his prosecution).

[18] *See, e.g*., Smith v. State, 7 Tenn. 43 (1846) (using the term prosecutor to describe a private person); Plumer v. Smith, 5 N.H. 553 (1832) (same); Commonwealth v. Harkness, 4 Binn. 193 (Pa. 1811) (same).

[19] *See* Harold J. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons From History*, 38 AM. U. L. REV. 275, 281-90 (1989) (saying that any claim that criminal law enforcement is a 'core' or exclusive executive power is historically inaccurate and therefore the Attorney General need not be vested with authority to oversee or trigger investigations by the independent counsel).

of the state, the attorney general was required to allow the prosecutor to use his name -- even if the attorney general himself did not approve of the action.[20]

Private prosecution meant that criminal cases were for the most part limited by the need of crime victims for vindication.[21] Crime victims held the keys to a potential defendant's fate and often negotiated the settlement of criminal cases.[22] After a case was initiated in the name of the people, however, private prosecutors were prohibited from withdrawing the action pursuant to private agreement with the defendant.[23] Court intervention was occasionally required to compel injured crime victims to appear against offenders in court and "not to make bargains to allow [defendants] to escape conviction, if they ... repair the injury."[24]

Grand jurors often acted as the detectives of the period. They conducted their investigations in the manner of neighborhood sleuths, dispersing throughout the community to question people about their knowledge of crimes.[25] They could act on the testimony of one of their own members, or even on information known to grand jurors before the grand jury convened.[26] They might never have contact with a government prosecutor or any other officer of the executive branch.[27]

Colonial grand juries also occasionally served an important law enforcement need by account of their sheer numbers. In the early 1700s, grand jurors were sometimes called upon to make arrests in cases where suspects were armed and in large numbers.[28] A lone sheriff or deputy had reason to fear even approaching a large group "without danger of his life or having his bones broken."[29] When a sheriff was unable to execute a warrant or perform an execution, he could call upon a *posse* of citizens to assist him.[30] The availability of the *posse comitatus* meant that a sheriffs resources were essentially unlimited.[31]

LAW ENFORCEMENT AS A UNIVERSAL DUTY

Law enforcement in the Founders' time was a *duty* of every citizen.[32] Citizens were expected to be armed and equipped to chase suspects on foot, on horse, or with wagon whenever summoned. And when called upon to enforce the laws of the state, citizens were to respond "not faintly and with lagging steps, but honestly and bravely and with whatever implements and facilities [were] convenient and at hand."[33] Any person could act in the capacity of a constable without being one,[34] and when summoned by a law enforcement officer, a private person became a temporary member of the police department.[35] The law also presumed that any person acting in his public capacity as an officer was rightfully appointed.[36]

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[20] *See* Respublica v. Griffiths, 2 Dall. 112 (Pa. 1790) (holding the Attorney General must allow his name to be used by the prosecutor).

[21] Private prosecutors generally had to pay the costs of their prosecutions, even though the state also had an interest. *See* Dickinson v. Potter, 4 Day 340 (Conn. 1810). Government attorneys general took over the prosecutions of only especially worthy cases and pursued such cases at public expense. *See* Waldron v. Turtle, 4 N.H. 149, 151 (1827) (stating if a prosecution is not adopted and pursued by the attorney general, "it will not be pursued at the public expense, although in the name of the state").

[22] *See* State v. Bruce, 24 Me. 71, 73 (1844) (stating a threat by crime victim to prosecute a supposed thief is proper but extortion for pecuniary advantage is criminal).

[23] *See* Plumer v. Smith, 5 N.H. 553 (1832) (holding promissory note invalid when tendered by a criminal defendant to his private prosecutor in exchange for promise not to prosecute).

[24] Shaw v. Reed, 30 Me. 105, 109 (1849).

[25] *See* In re April 1956 Term Grand Jury, 239 F.2d 263 (7th Cir. 1956).

[26] *See* Goodman v. United States, 108 F.2d 516 (9th Cir. 1939).

[27] *See* Krent, *supra* note 19, at 293

[28] *C.f.* Ellen D. Larned, 1 History of Windham County, Connecticut 272-73 (1874) (recounting attempts by Windham County authorities in 1730 to arrest a large group of rioters who broke open the Hartford Jail and released a prisoner).

[29] *Id.* at 273

[30] *See* Buckminster v. Applebee, 8 N.H. 546 (1837) (stating the sheriff has a duty to raise the posse to aid him when necessary).

[31] *See* Waterbury v. Lockwood, 4 Day 257, 259-60 (Conn. 1810) (citing English cases).

[32] See Jerome Hall, Legal and Social Aspects of Arrest Without A Warrant, 49 HARV. L. REV. 566, 579 (1936).

[33] Barrington v. Yellow Taxi Corp., 164 N.E. 726, 727 (N.Y. 1928).

[34] *See* Eustis v. Kidder, 26 Me. 97, 99 (1846).

[35] By the early 1900s, courts held that civilians called into posse service who were killed in the line of duty were entitled to full death benefits. *See* Monterey County v. Rader, 248 P. 912 (Cal. 1926); Village of West Salem v. Industrial Commission, 155 N.W. 929 (Wis. 1916).

[36] United States v. Rice, 27 Fed. Cas. 795 (W.D.N.C. 1875).

Laws in virtually every state still require citizens to aid in capturing escaped prisoners, arresting criminal suspects, and executing legal process. The duty of citizens to enforce the law was and is a constitutional one. Many early state constitutions purported to bind citizens into a universal obligation to perform law enforcement functions, yet evinced no mention of any state power to carry out those same functions.[37] But the law enforcement duties of the citizenry are now a long-forgotten remnant of the Framers' era. By the 1960s, only twelve percent of the public claimed to have ever personally acted to combat crime.[38]

The Founders could not have envisioned 'police' officers as we know them today. The term "police" had a slightly different meaning at the time of the Founding.[39] It was generally used as a verb and meant to watch over or monitor the public health and safety.[40] In Louisiana, "police juries" were local governing bodies similar to county boards in other states.[41] Only in the mid-nineteenth century did the term 'police' begin to take on the persona of a uniformed state law enforcer.[42] The term first crept into Supreme Court jurisprudence even later.[43]

Prior to the 1850s, rugged individualism and self-reliance were the touchstones of American law, culture, and industry. Although a puritan cultural and legal ethic pervaded their society, Americans had great toleration for victimless misconduct.[44] Traffic disputes were resolved through personal negotiation and common law tort principles, rather than driver licenses and armed police patrol.[45] Agents of the state did not exist for the protection of the individual citizen. The night watch of early American cities concerned itself primarily with the danger of fire, and watchmen were often afraid to enter some of the most notorious neighborhoods of cities like Boston.[46]

At the time of Tocqueville's observations (in the 1830s), "the means available to the authorities for the discovery of crimes and arrest of criminals [were] few,"[47] yet Tocqueville doubted "whether in any other country crime so seldom escapes punishment."[48] Citizens handled most crimes informally, forming committees to catch criminals and hand them over to the courts.[49] Private mobs in early America dealt with larger threats to public safety and

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[37] The Constitution is not without provisions for criminal procedure. Indeed, much of the Bill of Rights is an outline of basic criminal procedure. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 118 (2d ed. 1985). But these provisions represent enshrinements of individual liberties rather than government power. The only constitutional provisions with regard to criminal justice represent *barriers* to governmental power, rather than provisions for that power. Indeed, the Founders' intent to protect individual liberties was made clear by the language of the Ninth Amendment and its equivalent in state constitutions of the founding era. The Ninth Amendment, which declares that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people," provides a clear indication that the Framers assumed that persons may do whatever is not justly prohibited by the Constitution rather than that the government may do whatever is not justly prohibited to it. *See* Randy E. Barnett, *Introduction: James Madison's Ninth Amendment, in* THE RIGHTS RETAINED BY THE PEOPLE 43 (Randy E. Barnett ed., 1989).

[38] *See* JAMES S. CAMPBELL ET AL., LAW AND ORDER RECONSIDERED: REPORT OF THE TASK FORCE ON LAW AND LAW ENFORCEMENT TO THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE 450 (1970) (discussing survey by the President's Commission on Law Enforcement and Administration of Justice).

[39] The term "policing" originally meant promoting the public good or the community life rather than preserving security. *See* Rogan Kersh et al., *"More a Distinction of Words than Things": The Evolution of Separated Powers in the American States*, 4 ROGER WILLIAMS U. L. REV. 5, 21 (1998).

[40] *See, e.g.*, N.C. CONST. of Dec. 18, 1776, Dec. of Rights, § II (providing that people of the state have a right to regulate the internal government and "police thereof); PA. CONST. of Sept. 28, 1776, Dec. of Rights, art. III (stating that the people have a right of "governing and regulating the internal police of [the people]").

[41] *See* Police Jury v. Britton, 82 U.S. (15 Wall.) 566 (1872). The purpose of such juries was 1) to police slaves and runaways, (2) to repair roads, bridges, and other infrastructure, and (3) to lay taxes as necessary for such acts. *Id*. at 568. *See also* BLACK'S LAW DICTIONARY 801 (abridged 6th ed. 1991).

[42] When Blackstone wrote of offenses against "the public police and economy" in 1769, he meant offenses against the "due regulation and domestic order of the kingdom" such as clandestine marriage, bigamy, rendering bridges inconvenient to pass, vagrancy, and operating gambling houses. 4 WILLIAM BLACKSTONE, COMMENTARIES 924-27 (George Chase ed., Baker, Voorhis& Co. 1938) (1769).

[43] *See, e.g.*, Wolf v. Colorado, 338 U.S. 25,27-28 (1948) (proclaiming that "security of one's privacy against arbitrary intrusion by the police" is at the core of the Fourth Amendment (clearly a slight misstatement of the Founders' original perception)).

[44] *See* Roger Lane, *Urbanization and Criminal Violence in the 19th Century: Massachusetts as a Test Case, in* NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE, VIOLENCE IN AMERICA: HISTORICAL AND COMPARATIVE PERSPECTIVES 445, 451 (Graham & Gurr dir., 1969) (saying citizens were traditionally supposed to take care of themselves, with help of family, friends, or servants "when available").

[45] *See, e.g.*, Kennard v. Burton, 25 Me. 39 (1845) (involving collision between two wagons).

[46] Lane, *supra* note 44, at 451.

[47] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 96 (J.P. Mayer ed., Harper Perennial Books 1988) (1848).

[48] *Id*.

[49] *See id*. at 96.

welfare, such as houses of ill fame.[50] Nothing struck a European traveler in America, wrote Tocqueville, more than the absence of government in the streets.[51]

Formal criminal justice institutions dealt only with the most severe crimes. Misdemeanor offenses had to be dealt with by the private citizen on the private citizen's own terms. "The farther back the [crime rate] figures go," according to historian Roger Lane, "the higher is the relative proportion of serious crimes."[52] In other words, before the advent of professional policing, fewer crimes -- and only the most serious crimes -- were brought to the attention of the courts.

After the 1850s, cities in the northeastern United States gradually acquired more uniformed patrol officers. The criminal justice model of the Framers' era grew less recognizable. The growth of police units reflected a "change in attitude" more than worsening crime rates.[53] Americans became less tolerant of violence in their streets and demanded higher standards of conduct.[54] Offenses which had formerly earned two-year sentences were now punished by three to four years or more in a state penitentiary.[55]

POLICE AS SOCIAL WORKERS

Few of the duties of Founding-era sheriffs involved criminal law enforcement. Instead, *civil* executions, attachments and confinements dominated their work.[56] When professional police units first arrived on the American scene, they functioned primarily as protectors of public safety, health and welfare. This role followed the "bobbie" model developed in England in the 1830s by the father of professional policing, Sir Robert Peel.[57]

Early police agencies provided a vast array of municipal services, including keeping traffic thoroughfares clear. Boston police made 30,681 arrests during one fiscal year in the 1880s, but in the same year reported 1,472 accidents, secured 2,461 buildings found open, reported thousands of dangerous and defective streets, sidewalks, chimneys, drains, sewers and hydrants, tended to 169 corpses, assisted 148 intoxicated persons, located 1,572 lost children, reported 228 missing (but only 151 found) persons, rescued seven persons from drowning, assisted nearly 2,000 sick, injured, and insane persons, found 311 stray horse teams, and removed more *than fifty thousand* street obstructions.[58]

Police were a "kind of catchall or residual welfare agency,"[59] a lawful extension of actual state 'police powers.'[60] In the Old West, police were a sanitation and repair workforce more than a corps of crime-fighting gun-slingers. Sheriff Wyatt Earp of OK Corral fame, for example, repaired boardwalks as part of his duties.[61]

THE WAR ON CRIME

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[50] See Pauline Maier, Popular Uprisings and Civil Authority in Eighteenth-Century America, 27 WM. & MARY Q. 3-35 (1970).

[51] DE TOCQUEVILLE, *supra* note 47, at 72.

[52] Lane, *supra* note 44, at 450.

[53] See id.

[54] *Id*.

[55] *See id*. at 451.

[56] *See, e.g*., Lamb v. Day, 8 Vt. 407 (1836) (involving suit against constable for improper execution of civil writ); Tomlinson v. Wheeler, 1 Aik. 194 (Vt. 1826) (involving sheriff's neglect to execute civil judgment); Stoyel v. Edwards, 3 Day 1 (1807) (involving sheriffs execution of civil judgment).

[57] If the modern police profession has a father, it is Sir Robert Peel, who founded the Metropolitan Police of London in 1829. *See* SUE TITUS REID, CRIMINAL JUSTICE: BLUEPRINTS 58 (5th ed. 1999) (attributing the founding of the first modern police force to Peel). Peel's uniformed officers -- nicknamed 'Bobbies' after the first name of their founder -- operated under the direction of a central headquarters (Scotland Yard, named for the site once used by the Kings of Scotland as a residence), walking beats on a full-time basis to prevent crime. *See id*. Less than three decades later, Parliament enacted a statute requiring every borough and county to have a London-type police force. *See id*.

The 'Bobbie' model of policing caught on more slowly in the United States, but by the 1880s most major American cities had adopted some type of full-time paid police force. *See id*. at 59 (noting that the county sheriff system continued in rural areas).

[58] *See* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 151-52 (1993) (citation omitted).

[59] *Id*. at 151.

[60] *See id*. at 152 (describing early police use of station houses as homeless shelters for the poor). This same type of public problem-solving still remains a large part of police work. Police are called upon to settle landlord-tenant disputes, deliver emergency care, manage traffic, regulate parking, and even to respond to alleged haunted houses. *See id*. at 151 (recounting 1894 alleged ghost incident in Oakland, California). Police continue to provide essential services to communities, especially at night and on weekends when they are the only social service agency. *See* SILBERMAN, *supra* note 6, at 321.

[61] *See* GARRY WILLS, A NECESSARY EVIL: A HISTORY OF AMERICAN DISTRUST OF GOVERNMENT 248 (1999) (citation omitted).

Toward the end of the nineteenth century, police forces took on a brave new role: crime-fighting. The goal of maintaining public order became secondary to chasing lawbreakers. The police cultivated a perception that they were public heroes who "fought crime" in the general, rather than individual sense.

The 1920s saw the rise of the profession's second father -- or perhaps its wicked stepfather -- J. Edgar Hoover.[62] Hoover's Federal Bureau of Investigation (FBI) came to epitomize the police profession in its sleuth and intelligence-gathering role. FBI agents infiltrated mobster organizations, intercepted communications between suspected criminals, and gathered intelligence for both law enforcement and political purposes.

This new view of police as soldiers locked in combat against crime caught on quickly.[63] The FBI led local police to develop integrated repositories of fingerprint, criminal, and fraudulent check records. The FBI also took over the gathering of crime statistics (theretofore gathered by a private association),[64] and went to war against "Public Enemy Number One" and others on their "Ten Most Wanted" list.[65] Popular culture began to see police as a "thin blue line," that "serves and protects" civilized society from chaos and lawlessness.[66]

THE ABSENCE OF CONSTITUTIONAL CRIME-FIGHTING POWER

But the constitutions of the Founding Era gave no hint of any thin blue line. Nothing in their texts enunciated any governmental power to "fight crime" at all. "Crime-fighting" was intended as the domain of individuals touched by crime. The original design under the American legal order was to restore a semblance of *private* justice. The courts were a mere forum, or avenue, for private persons to attain justice from a malfeasor.[67] The slow alteration of the criminal courts into a venue only for the *government's* claims against private persons turned the very spirit of the Founders' model on its head.

To suggest that modern policing is extraconstitutional is not to imply that every aspect of police work is constitutionally improper.[68] Rather, it is to say that the totality and effect of modern policing negates the meaning and purpose of certain constitutional protections the Framers intended to protect and carry forward to future generations. Modern-style policing leaves many fundamental constitutional interests utterly unenforced.

Americans today, for example, are far more vulnerable to invasive searches and seizures by the state than were the Americans of 1791.[69] The Framers lived in an era in which much less of the world was in "plain view" of the government and a "stop and frisk" would have been rare indeed.[70] The totality of modern policing also places pedestrian and vehicle travel at the mercy of the state, a development the Framers would have almost certainly never sanctioned. These infringements result not from a single aspect of modern policing, but from the whole of modern policing's control over large domains of private life that were once "policed" by private citizens.

THE DEVELOPMENT OF DISTINCTIONS

The treatment of law enforcement in the courts shows that the law of crime control has changed monumentally over the past two centuries. Under the common law, there was no difference whatsoever between the privileges, immunities, and powers of constables and those of private citizens. Constables were literally and figuratively

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[62] *See* REID, *supra* note 57, 65 (5th ed. 1999).

[63] *See* JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 129 (1993).

[64] See id.

[65] *See id*. at 130

[66] *See* E.X. BOOZHIE, THE OUTLAW'S BIBLE 15 (1988).

[67] Private prosecution was not without costs to taxpayers. The availability of free courtrooms to air grievances tended to promote litigation. In 1804, the Pennsylvania legislature acted to allow juries to make private prosecutors pay the costs of prosecution in especially trifling cases. Act of Dec. 8, 1804 PL3, 4 Sm L 204 (repealed 1860). Private persons were thereafter liable for court costs if they omitted material exculpatory information from a grand jury, thereby causing a grand jury to indict without knowledge of potential defenses. *See* Commonwealth v. Harkness, 4 Binn. 194 (Pa. 1811). This protection, like many others, was lost when police and public prosecutors took over the criminal justice system in the twentieth century. *See* United States v. Williams, 504 U.S. 36 (1992) (holding prosecutor has no duty to present exculpatory evidence to grand jury).

[68] In the American constitutional scheme, the states have 'general jurisdiction,' meaning they may regulate for public health and welfare and enact whatever means to enforce such regulation as is necessary and constitutionally proper. *See, e.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985), National League of Cities v. Usery, 426 U.S. 833 (1976) (both standing for the general proposition that states have constitutional power to provide for protection, health, safety, and quality of life for their citizens). *See also* Lawrence Tribe, American Constitutional Law, §§ 6-3, 7-3 (2d ed. 1988). State and municipal police forces can therefore be viewed as constitutional to the extent they actually carry out the lawful enactments of the state.

[69] *See infra* notes 285-398 and their accompanying text.

[70] *See* Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 347 (1984).

clothed in the same garments as everyone else and faced the same liabilities -- civil and criminal -- as everyone else under identical circumstances. Two centuries of jurisprudence, however, have recast the power relationships of these two roles dramatically.

Perhaps the first distinction between the rights of citizen and constabulary came in the form of increased power to arrest. Early in the history of policing, courts held that an officer could arrest if he had "reasonable belief both in the commission of a felony and in the guilt of the arrestee.[71] This represented a marginal yet important distinction from the rights of a "private person," who could arrest only if a felony had *actually* been committed.[72] It remains somewhat of a mystery, however, where this distinction was first drawn.[73] Scrutiny of the distinction suggests it arose in England in 1827 for more than a generation after ratification of the Bill of Rights in the United States.[74]

Moreover, the distinction was illegitimate from its birth, being a bastardization of an earlier rule allowing constables to arrest upon transmission of reasonably reliable information from a third person.[75] The earlier rule made perfect sense when many arrests were executed by private persons. "Authority" was a narrow defense available only to those who met the highest standard of accuracy.[76] But when Americans began to delegate their law enforcement duties to professionals, the law relaxed to allow police to execute warrantless felony arrests upon information received from third parties. For obvious reasons, constables could not be required to be "right" all of the time, so the rule of strict liability for false arrest was lost.[77]

The tradeoff has had the effect of depriving Americans of certainty in the executions of warrantless arrests. Judges now consider only the question of whether there was reasonable ground to suspect an arrestee, rather than whether the arrestee was guilty of any crime. This loss of certainty, when combined with greater deference to the state in most law enforcement matters, has essentially reversed the original intent and purpose of American law enforcement that the state act against stern limitations and at its own peril. Because arrest has become the near exclusive province of professional police, Americans have fewer assurances that they are free from unreasonable arrests.

Distinctions between the privileges of citizens and police officers grew more rapidly in the twentieth century. State and federal lawmakers enshrined police officers with expansive immunities from firearm laws[78] and from laws regulating the use of equipment such as radio scanners, body armor, and infrared scopes.[79] Legislatures also exempted police from toll road charges,[80] granted police confidential telephone numbers and auto registration,[81] and even exempted police from fireworks regulations.[82] Police are also protected by other statutory immunities and protections, such as mandatory death sentences for defendants who murder them,[83] reimbursement of moving expenses when officers receive threats to their lives,[84] and even special protections

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[71] See Jerome Hall, Legal and Social Aspects of Arrest Without A Warrant, 49 HARV. L. REV. 566, 567 (1936).

[72] See id.

[73] *See id*. at 567-71 (discussing earliest scholarly references to the distinction). A 1936 Harvard Law Review article suggested the distinction is a false one owed to improper marshalling of scholarship. *See id*. (writing of "the general misinterpretation" resulting from a 1780 case in England).

[74] *See id*. at 575 n.44 (citing the case of *Beckwith v. Philby*, 6 B. & C. 635 (K. B. 1827)).

[75] *See id*. at 571-72. Although official right was apparently considered somewhat greater than that of private citizens during much of the 1700s, the case law enunciates no support for any such distinction until *Rohan* v. *Sawin*, 59 Mass. (5 Cush.) 281 (1850). It was apparently already the common practice of English constables to arrest upon information from the public in the 1780's. *See id*. at 572. The "earlier requirement of a charge of a felony had already been entirely forgotten" in England by the early nineteenth century. *Id*. at 573. According to Hall, the only real distinction in practice in the early nineteenth century was that officers were privileged to draw their suspicions from statements of others, whereas private arrestors had to base their cause for arrest on *their own* reasonable beliefs. *See id*. at 569.

[76] *See* Rohan v. Sawin, 59 Mass. (5 Cush.) 281, 285 (1850).

[77] See id.

[78] *See* 18 U.S.C. § 925 (a)(l) (2000) (exempting government officers from federal firearm disabilities).

[79] *See, e.g.*, CAL. PENAL CODE § 468 (West 1985) (releasing police from liability for possession of sniper scopes and infrared scopes).

[80] *See, e.g.*, FLA. STAT. CH. 338. 155 (1990).

[81] *See, e.g.*, FLA. STAT. CH. 320.025 (1990) (allowing confidential auto registration for police).

[82] *See* ARK. CODE ANN. § 20-22-703 (Michie 2000).

[83] *See* 18 U.S.C. § 1114 (amended 1994) (providing whoever murders a federal officer in first degree shall suffer death).

[84] *See* CAL. PENAL CODE § 832.9 (West 1995).

from assailants infected with the AIDS virus.[85] Officers who illegally eavesdrop, wiretap, or intrude upon privacy are protected by a *statutory* (as well as case law) "good faith" defense,[86] *while* private citizens who do so face up to five years in prison.[87] The tendency of legislatures to equip police with ever-expanding rights, privileges and powers has, if anything, been strengthened rather than limited by the courts.[88]

But this growing power differential contravenes the principles of equal citizenship that dominated America's founding. The great principle of the American Revolution was, after all, the doctrine of limited government.[89] Advocates of the Bill of Rights saw the chief danger of government as the inherently aristocratic and disparate power of government authority.[90] Founding-era constitutions enunciated the principle that all men are "equally free" and that all government is derived from the people.[91]

RESISTING ARREST

Nothing illustrates the modern disparity between the rights and powers of police and citizen as much as the modern law of resisting arrest. At the time of the nation's founding, any citizen *was privileged* to resist arrest if, for example, probable cause for arrest did not exist or the arresting person could not produce a valid arrest warrant where one was needed.[92] As recently as one hundred years ago, but with a tone that seems as if from some other, more distant age, the United States Supreme Court held that it was permissible (or at least defensible) to shoot an officer who displays a gun with intent to commit a warrantless arrest based on insufficient cause.[93] Officers who executed an arrest without proper warrant were themselves considered trespassers, and any trespassee had a right to violently resist (or even assault and batter) an officer to evade such arrest.[94]

Well into the twentieth century, violent resistance was considered a lawful remedy for Fourth Amendment violations.[95] Even third-party intermeddlers were privileged to forcibly liberate wrongly arrested persons from unlawful custody.[96] The doctrine of non-resistance against unlawful government action was harshly condemned at the constitutional conventions of the 1780s, and both the Maryland and New Hampshire constitutions contained provisions denouncing nonresistance as "absurd, slavish, and destructive of the good and happiness of mankind."[97]

By the 1980s, however, many if not most states had (1) eliminated the common law right of resistance,[98] (2) *criminalized the* resistance of any officer acting in his official capacity,[99] (3) eliminated the requirement that an

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[85] *See, e.g.*, CAL. HEALTH & SAFETY CODE §§ 199.95-199.99 (West 1990) (mandating HIV testing for persons charged with interfering with police officers whenever officers request).

[86] *See* Electronic Communications Privacy Act, 18 U.S.C. 2511 (2000); United States v. Leon, 104 S. Ct. 3405 (1984).

[87] *See* Williams v. Poulos, 11 F.3d 271 (l[st] Cir. 1993).

[88] *See, e.g.*, People v. Curtis, 450 P.2d 33, 35 (Cal. 1969) (speaking of the "[g]eneral acceptance" by courts of the elimination of the right to resist unlawful arrest).

[89] *See* HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR: THE POLITICAL THOUGHT OF THE OPPONENTS OF THE CONSTITUTION 53 (1981). The statements of James Madison when introducing the proposed amendments to the Constitution before the House of Representatives, June 8, 1789, also support such a reading of the Bill of Rights. House of Representatives, June 8, 1789 Debates, *reprinted in* THE ORIGIN OF THE SECOND AMENDMENT: A DOCUMENTARY HISTORY OF THE BILL OF RIGHTS 1787-1792 647, 657 (David E. Young, ed.) (2d ed. 1995) (stating "the great object in view is to limit and qualify the powers of Government").

[90] *See* STORING, *supra* note 89, at 48.

[91] *See, e.g.*, MD. CONST. of 1776, art. I (declaring that "all government of right originates from the people, is founded in compact only, and instituted solely for the good of the whole"); MASS. CONST. of 1780, art. I ("All men are born free and equal, and have certain natural, essential, and unalienable rights"); N.H. CONST. of 1784, art. I ("All men are born equally free and independent").

[92] *See* Coyle v. Hurtin, 10 Johns. 85 (N.Y. 1813).

[93] *See* Bad Elk v. United States, 177 U.S. 529 (1900).

[94] *See* Rex v. Gay, Quincy Mass. Rep. 1761-1772 91 (Mass. 1763) (acquitting assault defendant who beat a sheriff when sheriff attempted to arrest him pursuant to invalid warrant).

[95] See Wolf v. Colorado, 338 U.S. 25, 30 n. 1, 31 n. 2 (1948) (citing cases upholding right to resist unlawful search and seizure).

[96] *See* Adams v. State, 48 S.E. 910 (Ga. 1904).

[97] *See* MD. CONST. of 1776, art. IV; N.H. Const. of 1784, art. X.

[98] *See, e.g.*, State v. Kutchara, 350 N.W.2d 924, 927 (Minn. 1984) (saying Minnesota law does not recognize right to resist unlawful arrest or search); People v. Curtis, 450 P.2d 33, 36 (Cal. 1969) (holding California law prohibits forceful resistance to unlawful arrest).

arresting officer present his warrant at the scene,[100] and (4) drastically decreased the number and types of arrests for which a warrant is required.[101] Although some state courts have balked at this march toward efficiency in favor of the state,[102] none require the level of protection known to the Framers.[103]

But the right to resist unlawful arrest can be considered a *constitutional* one. It stems from the right of every person to his bodily integrity and liberty of movement, among the most fundamental of all rights.[104] Substantive due process principles require that the government interfere with such a right only to further a compelling state interest[105] -- and the power to arrest the citizenry unlawfully can hardly be characterized as a compelling state interest.[106] Thus, the advent of professional policing has endangered important rights of the American people.

The changing balance of power between police and private citizens is illustrated by the power of modern police to use violence against the population.[107]

As professional policing became more prevalent in the twentieth century, police use of deadly force went largely without clearly delineated guidelines (outside of general tort law).[108] Until the 1970s, police officers shot and killed fleeing suspects (both armed and unarmed) at their own discretion or according to very general department oral policies.[109] Officers in some jurisdictions made it their regular practice to shoot at speeding motorists who refused orders to halt.[110] More than one officer tried for murder in such cases -- along with fellow police who urged dismissals -- argued that such killings were in the discharge of official duties.[111] Departments that adopted written guidelines invariably did so in response to outcries following questionable shootings.[112]

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[99] *See, e.g.*, CAL. PENAL CODE § 243 (criminalizing the resistance, delay or obstruction of an officer in the discharge of "any duty of his office"). CAL. PENAL CODE § 834(a) (1957) ("If a person has knowledge ... that he is being arrested by a peace officer, it is the duty of such person to refrain from using force or any weapon to resist such arrest").

[100] *See, e.g.*, United States v. Charles, 883 F.2d 355 (5th Cir. 1989) (excusing as harmless error the failure of officers executing warrant to have the warrant in hand during raid); United States v. Cafero, 473 F.2d 489, 499 (3d Cir. 1973) (holding failure to deliver copy of warrant to the party being searched or seized does not invalidate search or seizure in the absence of prejudice); Willeford v. State, 625 S.W.2d 88, 90 (Tex. App. 1981) (upholding validity of search and seizure before arrival of warrant). Not only has the requirement that officers show their warrant before executing it been eliminated, but the requirement that officers announce their authority and purpose before executing search warrants has been all but eliminated. *See* Richards v. Wisconsin, 570 U.S. 385 (1997) (eliminating requirement that officers be refused admittance before using force to enter the place to be searched in many cases).

[101] *See* William A. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment*, 58 MO. L. REV. 771 (1993) (discussing the erosion of requirements for arrest warrants in many jurisdictions).

[102] *See, e.g.*, Polk v. State, 142 So. 480, 481 (Miss. 1932) (striking down statute allowing warrantless arrest for misdemeanors committed outside an officer's presence); Ex Parte Rhodes, 79 So. 462, 462-63 (Ala. 1918) (holding statute unconstitutional which allowed for warrantless arrest for out-of-presence misdemeanors).

[103] *See* Schroeder, *supra* note 101, at 793.

[104] *See* Thor v. Superior Court, 855 P.2d 375, 380 (Cal. 1993) (saying the developing consensus "uniformly recognizes" a patient's right to control his own body, stemming from the "long-standing importance in our Anglo-American legal tradition of personal autonomy and the right of self-determination.") (citations omitted). "For self-determination to have any meaning, it cannot be subject to the scrutiny of anyone else's conscience or sensibilities." *Id.* at 385.

[105] *See* Michael v. Hertzler, 900 P.2d 1144, 1145 (Wyo. 1995) (stating if a statute reaches a fundamental interest, courts are to employ strict scrutiny in making determination as to whether enactment is essential to achieve compelling state interest).

[106] "[Only] the gravest abuses, endangering paramount interests, give occasion for permissible limitation." Thomas v. Collins, 323 U.S. 516, 530 (1945). A "compelling state interest" is defined as "[o]ne which the state is forced or obliged to protect." BLACK'S LAW DICTIONARY 282 (6th ed. 1990) (citing Coleman v. Coleman, 291 N.E.2d 530, 534 (1972)).

[107] The American constitutional order grants to every individual a privilege to stand his ground in the face of a violent challenger and meet violence with violence. A "duty to retreat" evolved in some jurisdictions, however, where a defender contemplates the use of *deadly force*. *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW 461 (2d ed. 1986). But with police, the courts have never imposed a duty to retreat. *See id.* This, combined with the recurring police claim that an attacker might get close enough to grasp the officer's sidearm, has meant, in practical terms, that an officer may repel even a minor physical threat with deadly force.

The effect of this exception for law enforcement officers has been to grant an almost absurd advantage to police in 'self-defense' incidents. Not only do cops have no duty to retreat, but they seem privileged to kill whenever a plausible threat of any injury manifests itself. *See infra*, notes 115-147, and accompanying text. Cops -- unlike the general public -- appear excused whenever they open fire on an individual who threatens *any* harm -- even utterly nonlethal -- against them, such as a verbal threat to punch the officer combined with a step forward. *See infra*, notes 123-147, and accompanying text.

[108] *See* James J. Fyfe, *Police Use of Deadly Force: Research and Reform, in* THE CRIMINAL JUSTICE SYSTEM: POLITICS AND POLICIES 134-40 (George F. Cole & Mare G. Gertz eds., 7th ed. 1998).

[109] *Id.* at 135 (quoting Chapman and Crocket).

[110] *See* People v. Klein, 137 N.E. 145, 149 (Ill. 1922) (reporting that "numerous" peace officers testified that shooting was the customary method of arresting speeders during trial of peace officer accused of murder).

[111] *See id.*; Miller v. People, 74 N.E. 743 (Ill. 1905) (involving village marshal who shot and killed speeding carriage driver).

[112] *See* Fyfe, *supra* note 108, at 137.

Prior to 1985, police were given near total discretion to fire on the public wherever officers suspected that a fleeing person had committed a felony.[113] More than 200 people were shot and killed by police in Philadelphia alone between 1970 and 1983.[114]

In 1985, the United States Supreme Court purported to stop this carnage by invalidating the use of deadly force to apprehend unarmed, nonviolent suspects.[115] *Tennessee v. Garner*[116] involved the police killing of an unarmed juvenile burglary suspect who, if apprehended alive, would likely have been sentenced to probation.[117] The Court limited police use of deadly force to cases of self defense or defense of others.[118]

As a practical matter, however, the *Garner* rule is much less stringent. Because federal civil rights actions inevitably turn not on a strict constitutional rule (such as the *Garner* rule), but on the perception of a defendant officer, officers enjoy a litigation advantage over all other parties.[119] In no reported case has a judge or jury held an officer liable who used deadly force where a mere "reasonable" belief that human life was in imminent danger existed.[120] Some lower courts have interpreted *Garner* to permit deadly force even where suspects pose no immediate and direct threat of death or serious injury to others.[121] The U.S. Ninth Circuit Court of Appeals recently denied the criminal liability of an agent who shot and killed an innocent person to prevent another person from retreating to "take up a defensive position," drawing criticism from Judge Kozinski that the court had adopted the "007 standard" for police shootings.[122]

Untold dozens, if not hundreds, of Americans have been shot in the back while fleeing police, even after the *Garner* decision. Police have shot and killed suspects who did nothing more than make a move,[123] reach for their identification too quickly,[124] reach into a jacket or pocket,[125] "make a motion" of going for a gun,[126] turn either toward or away from officers,[127] 'pull away' from an officer as an officer opened a car door,[128] rub their eyes and stumble forward after a mace attack,[129] or allegedly lunge with a knife,[130] a hatchet,[131]or a ballpoint

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[113] See id. at 140.

[114] *See id*. at 141 (table showing fatal shootings per 1,000 police officers, Philadelphia). A study of Philadelphia P.D. firearm discharges from 1970 through 1978 found only two cases that resulted in departmental discipline against officers on duty. *See id*. at 147 n.2. One case involved an officer firing unnecessary shots into the air; the other involved an officer who shot and killed his wife in a police station during an argument over his paycheck. *See id*.

[115] See Tennessee v. Garner, 471 U.S. 1 (1985).

[116] 471 U.S. 1 (1985).

[117] *See* Fyfe, *supra* 108, at 136.

[118] The *Garner* decision has been interpreted in different ways by different courts and law-making bodies. *See* Michael R. Smith, *Police Use of Deadly Force: How Courts and Policy-Makers Have Misapplied Tennessee v. Garner*, 1 KAN. J. L. & PUB. POL'Y, 100, 100-01 (1998). Smith argues that many of these interpretations stem from inaccurate readings of *Garner* and that lower courts have failed to hold police officers liable according to the standard required by the Supreme Court. *See id*.

[119] On behalf of modern police, courts have adopted a qualified immunity defense to police misconduct claims. Essentially, where cops can justify by plausible explanation that their conduct was within the bounds of their occupational duties, there is a "good faith" defense. *See* Harlow v. Fitzgerald, 457 U.S. 800 (1982); Procunier v. Navarette, 434 U.S. 555 (1978); Imbler v. Pachtman, 424 U.S. 409 (1976); Wood v. Strickland, 420 U.S. 308 (1975). But as David Rudovsky points out, the "good faith" defense is an artificial ingredient to normal tort liability. "The standard rule," notes Rudovsky, "is that a violation of another's rights or the failure to adhere to prescribed standards of conduct constitutes grounds for liability." David Rudovsky, *The Criminal Justice System and the Role of the Police*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE, 242, 248 (David Kairys ed., 1982). The "good faith" defense for police is thus an artificial layer of tort immunity protection not normally available to other types of litigants. Under the standard rules of tort law, after all, a defendant's good faith, intent, or knowledge of the law are irrelevant. *See id*. at 248.

[120] *See* Smith, *supra* note 118, at 117.

[121] *See id*. at 106.

[122] Idaho v. Horiuchi, 215 F.3d 986 (9th Cir. 2000) (Kozinski, J., dissenting).

[123] OCTOBER 22 COALITION TO STOP POLICE BRUTALITY ET AL., STOLEN LIVES: KILLED BY LAW ENFORCEMENT 307 (2d. ed. 1999) (hereinafter "STOLEN LIVES") (saying officer shot and killed victim after victim 'made a move' following a foot chase).

[124] *See id*. at 207 (listing a 1993 Michigan case).

[125] *See id*. at 262 (reporting 1990 Brooklyn case in which cop had shot unarmed teenage suspect in back of head for allegedly reaching into jacket).

[126] *See id*. at 250 (reporting 1996 New York case in which man was shot 24 times by police while sitting in car with his hands in the air); *id*. at 252 (reporting shooting of alleged car thief after motion as if they were going for a gun').

[127] *See id*. at 262 (reporting 1990 Bronx shooting precipitated by the decedent turning toward an officer as officer opened door of decedent's cab).

[128] *See id*. at 263 (reporting 1988 New York case initiated when a driver made illegal turn and ending with police pumping 16 bullets into her).

[129] *See id*. at 262 (reporting 1990 Brooklyn case in which decedent was shot nine times while standing and twice in back while lying on ground).

[130] *See id*. at 240 (reporting a 1998 New York case).

[131] *See id*. at 232 (reporting 1991 New Mexico case).

pen.[132] Cops have also been known to open fire on and kill persons who brandished or refused to drop virtually any hand-held object -- a Jack Daniel's whiskey bottle,[133] a metal rod,[134] a wooden stick,[135] a kitchen knife (even while eating dinner),[136] a screwdriver,[137] a rake[138] -- or even refused an order to raise their hands.[139]

Cops who shoot an individual holding a shiny object that can be said to resemble a gun -- such as a cash box,[140] a shiny silver pen,[141] a TV remote control,[142] or even a can opener[143] -- are especially likely to avoid liability. In line with this defense, police officers nationwide have been caught planting weapons on their victims in order to make shootings look like self defense.[144] In one of the more egregious examples ever proven in court, Houston police were found during the 1980s to have utilized an unofficial *policy* of planting guns on victims of police violence.[145] Seventy-five to eighty percent of all Houston officers apparently carried "throw-down" weapons for such purposes.[146] Only the dogged persistence of aggrieved relatives and the firsthand testimony of intrepid witnesses unraveled the police cover-up of the policy.[147]

Resisting arrest, defending oneself, or fleeing may also place an American in danger of being killed by police.[148] Although the law clearly classifies such killings as unlawful, police are rarely made to account for such conduct in court.[149] Only where the claimed imminent threat seems too contrived -- such as where an officer opened fire to defend himself from a pair of fingernail clippers[150] -- or where abundant evidence of a police cover-up exists, will courts uphold damage awards against police officers who shoot civilians.[151]

As Professor Peter L. Davis points out, there is no good reason why police should not be liable *criminally* for their violations of the criminal code, just as other Americans would expect to be (and, indeed, as the constables of the Founding Era often were).[152] Yet in modern criminal courts, police tend to be more bulletproof than the

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[132] *See id*. at 220 (reporting 1998 Nevada case).

[133] *See id*. at 29.

[134] *Id*. at 44.

[135] *Id*. at 46. The possession of a wooden stick has cost more than one person his life at the hands of police. *See also id*. at 68.

[136] *Id*. at 53.

[137] *Id*. at 53.

[138] See Detroit Police Kill Mentally Ill Deaf Man, BOSTON GLOBE, Aug. 31, 2000 at A8.

[139] *See* STOLEN LIVES, *supra* note 123, at 57. [140] *See id*. at 60.

[140] *See id*. at 62.

[141] *See id*. at 206 (listing a 1993 Michigan case). In another Michigan case, a cop shot someone who merely had a VCR remote control in his pocket, claiming he mistook it for a gun. *See id*. at 205.

[142] *See id*. at 206 (listing a 1993 Michigan case). In another Michigan case, a cop shot someone who merely had a VCR remote control in his pocket, claiming he mistook it for a gun. *See id*. at 205.

[143] *See id*. at 305 (saying Houston police surrounded truck and fired 59 times at victim as he sat in truck holding can opener). No civilian witnesses saw the "shiny object" (can opener) police claimed they saw. *See id*.

[144] Police use of throwdown guns has been alleged across the country. Guns which are introduced without a suspect's fingerprints when they should have fingerprints, and guns that are found by police officers after an initial, supposedly complete, search of a crime scene by other detectives, can be said to raise questions about police use of throw-down guns. *C.f*. Joe Cantlupe & David Hasemyer, *Pursuit of Justice: How San Diego Police Officers Handled the Killing of One of Their Own. It Is a Case Flawed by Erratic Testimony and Questionable Conduct*, SAN DIEGO UNION-TRIBUNE, Sept. 11, 1994, at A1 (raising the issue in a San Diego case).

[145] *See* Webster v. City of Houston, 689 F.2d 1220, 1227 (5th Cir. 1982).

[146] *Id*. at 1222.

[147] *See id*. at 1221-23 (describing "damning" evidence of official cover-up and police vindication as a matter of policy).

[148] *See* STOLEN LIVES, *supra* note 123, at 72. In one 1987 Los Angeles case, a man was shot four times and killed when he picked up a discarded pushbroom to deflect police baton blows. *See id*. 72.

[149] *See id*. at iv. In one particularly egregious case, a police killing was upheld as beyond liability where officers shot a speeding trucker who refused to stop. *See* Cole v. Bone, 993 F.2d 1328 (8th Cir. 1993). *But see, e.g*., Gutierrez-Rodriquez v. Cartagena, 882 F.2d 553 (1st Cir. 1989) (affirming verdict against plainclothes officers who shot driver who drove away); Sherrod v. Berry, 827 F.2d 195 (7th Cir. 1987) (affirming verdict against officers who shot driver as driver reached into jacket pocket during questioning); Moody v. Ferguson, 732 F. Supp. 176 (D.S.L. 1989) (rendering judgment against officers who shot driver fleeing in vehicle from traffic stop).

[150] *See* Zuchel v. City and County of Denver, Colorado, 997 F.2d 730 (10th Cir. 1993).

[151] *See* Alison L. Patton, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Deterring Police Brutality*, 44 HASTINGS L. J. 753, 754 (1993) (saying plaintiffs rarely win absent independent witnesses or physical evidence).

152 See Peter L. Davis, Rodney King and the Decriminalization of Police Brutality in America, 53 MD. L. REV. 271, 288 (1994). Prior to the 1900s, it was not uncommon for law enforcers who killed suspects during confrontations to be placed on trial for their lives even when they reacted to violent resisters. See United States v. Rice, 27 F. Cas. 795 (C.C.N.C. 1875) (No. 16,153) (involving deputy United States Marshall on trial for murder of tax

Kevlar vests they wear on the job. Remember that the district attorneys responsible for prosecuting police for their crimes are the same district attorneys who must defend those officers in civil cases involving the same facts.[153] Under the Framers' common law, this conflict of interest did not arise at all because a citizen grand jury -- independent from the state attorney general -- brought charges against a criminal officer, and the officer's victim prosecuted the matter before a petit jury.[154] But the modern model of law enforcement provides no real remedy, and no ready outlet for the law to work effectively against police criminals. Indeed, modern policing acts as an obstruction of justice with regard to police criminality.

The bloodstained record of shootings, beatings, tortures and mayhem by American police against the populace is too voluminous to be recounted in a single article.[155] At least 2,000 Americans have been killed at the hands of law enforcement since 1990.[156] Some one-fourth of these killings -- about fifty per year -- are alleged by some authorities to be in the nature of murders.[157] Yet only a handful have led to indictment, conviction and incarceration.[158] This is true even though most police killings involve victims who were unarmed or committed no crime.[159]

Killings by police seem as likely as killings by death-row murderers to demonstrate extreme brutality or depravity. Police often fire a dozen or more bullets at a victim where one or two would stop the individual.[160] Such indicia of viciousness and ferocity would qualify as aggravating factors justifying the death penalty for a civilian murderer under the criminal laws of most states.[161]

From the earliest arrival of professional policing upon America's shores, police severely taxed both the largess and the liberties of the citizenry.[162] In early municipal police departments, cops tortured, harassed and arrested thousands of Americans for vagrancy, loitering, and similar "crimes," or detained them on mere "suspicion."[163] Where evidence was insufficient to close a case, police tortured suspects into confessing to crimes they did not commit.[164] In the name of law enforcement, police became professional lawbreakers, "constantly breaking in upon common law and ... statute law."[165] In 1903 a former New York City police commissioner remarked that

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evasion suspect); State v. Brown, 5 Del. (5 Harr.) 505 (Ct. Gen. Sess. 1853) (fining peace officers for assault and false imprisonment); Conner v. Commonwealth, 3 Bin. 38 (Pa. 1810) (involving a constable indicted for refusing to execute arrest warrant). Even justices of the peace could be criminally indicted for dereliction of duties. See Respublica v. Montgomery, Dall. 419 (1795) (upholding validity of a criminal charge against a justice of the peace who failed to suppress a riot).

[153] *See* Davis, *supra* note 152, at 290 (noting the hopeless conflict of interest in handling police violence complaints).

[154] For an overview of the powers of early grand juries to accuse government officials, see Roger Roots, *If It's Not a Runaway, It's Not a Real Grand Jury*, 33 CREIGHTON L. REV. 821 (2000).

[155] *See* Steiker, *supra* note 3, at 836 (saying police excesses such as beatings, torture, false arrests and the third degree arc well documented).

[156] *See* STOLEN LIVES, *supra* note 123, at vii.

[157] See International Secretariat of Amnesty International, News Release, From Alabama to Wyoming: 50 Counts of Double Standards -- The Missing Entries in the US Report on Human Rights, Feb. 25, 1999.

[158] *See* STOLEN LIVES, *supra* note 123, at iv.

[159] *See id*. at v.

[160] Certain examples demonstrate. FBI agents in Elizabeth, New Jersey shot 38 times inside an apartment to kill an unarmed man who they first tried to say had fired first. *See id*. at 226. In February 1999, Bronx police fired 41 bullets at an unarmed African immigrant in his apartment doorway. *See id*. at 234. After this unlawful killing, cops unlawfully searched the decedent's apartment to justify shooting, failing to find any evidence of drugs. *See id*. In August 1999, Manhattan cops fired a total of 35 shots at alleged robber (who probably did not fire), injuring bystander and sending crowds fleeing. *See id*.

[161] Most states that allow the death penalty require that aggravating factors exist before imposition of capital punishment. *See, e.g.*, IDAHO CODE § 19-2515 (1997) (allowing death penalty for crimes involving "especially heinous, atrocious or cruel, [or] manifesting exceptional depravity" or showing "utter disregard for human life"); TEX. CRIM. P. ANN. § 37.071 (West 1981) (listing factors such as whether the crime was "unreasonable in response to the provocation"); WYO. STAT. ANN. § 6-2-102 (Michie 1999) (allowing death penalty only upon a finding of aggravating factors such as a creation of great risk of death to two or more persons or for "especially atrocious or cruel" conduct).

[162] The earliest attempts at professionalization of constables failed in the United States due to insufficiency of public funds. *See* Steiker, *supra* note 3, at 831. Some of the earliest U.S. Supreme Court decisions regarding police forces involve disputes over municipal police spending. *See, e.g.*, Louisiana ex rel. Hubert v. New Orleans, 215 U.S. 170 (1909) (resolving dispute over debts run up by municipal police district); New Orleans v. Benjamin, 153 U.S. 411 (1894) (involving dispute over unbudgeted debts run up by New Orleans police board); District of Columbia v. Hutton, 143 U.S. 18 (1891) (dealing with salary dispute involving District of Columbia police force).

[163] *See* FRIEDMAN, *supra* note 58, at 362 (1993). Dallas police, for example, arrested 8,526 people in 1929 "on suspicion" but charged less than five percent of them with a crime. *See id*.

[164] The infamous case of *Brown v. Mississippi*, 297 U.S. 278 (1936), provides a grim reminder of the torture techniques that have been employed upon suspects during the past century. In *Brown*, officers placed nooses around the necks of suspects, temporarily hanged them, and cut their backs to pieces with a leather strap to gain confessions. *Id*. at 281-82.

[165] FRIEDMAN, *supra* note 58, at 151 n.20 (quoting George S. McWatters, who studied New York detectives in the 1870s).

he had seen "a dreary procession of citizens with broken heads and bruised bodies against few of whom was violence needed to affect an arrest.... The police are practically above the law."[166]

THE SAFETY OF THE POLICE PROFESSION

Defenders of police violence often cite the dangerous nature of police work, claiming the police occupation is filled with risks to life and health. Police training itself -- especially elite SWAT-type or paramilitary training that many officers crave -- reinforces the "dangerousness" of police work in the officers' own minds.[167] There is some truth to this perception, in that around one hundred officers are feloniously killed in the line of duty each year in the United States.[168]

But police work's billing as a dangerous profession plummets in credibility when viewed from a broader perspective. Homicide, after all, is the second leading cause of death on the job for *all* American workers.[169] The taxicab industry suffers homicide rates almost *six times* higher than the police and detective industry.[170] A police officer's death on the job is almost as likely to be from an accident as from homicide.[171] When overall rates of injury and death on the job are examined, policing barely ranks at all. The highest rates of fatal workplace injuries occur in the mining and construction industries, with transportation, manufacturing and agriculture following close behind.[172] Fully 98 percent of all fatal workplace injuries occur in the civilian labor force.[173]

Moreover, police work is generously rewarded in terms of financial, pension and other benefits, not to mention prestige. Police salaries may exceed $100,000 annually plus generous health insurance and pension plans -- placing police in the very highest percentiles of American workers in terms of compensation.[174] The founding generation would have been utterly astonished by such a transfer of wealth to professional law enforcers.[175] This reality of police safety, security and comfort is one of the best-kept secrets in American labor.

In all, it is questionable whether modern policing actually decreases the level of bloodshed on American streets. Police often bring mayhem, confusion and violence wherever they are called.[176] Approximately one-third of the people killed in high-speed police car chases (which are often unnecessarily escalated by police) are innocent bystanders.[177] Cops occasionally prevent rather than execute rescues.[178] "Police practices" ranked as the number one *cause* of violent urban riots of the 1960s.[179] Indeed, police actively participated in or even initiated some of the nation's worst riots.[180] During the infamous Chicago Police Riot during the Democratic National Convention

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[166] *See* TITUS REID, supra note 57, at 122 (citations omitted).

[167] See Peter B. Kraska & Victor E. Kappeler, Militarizing American Police: The Rise and Normalization of Paramilitary Units, 44 SOC. PROBS. 1, 11 (1997).

[168] One-hundred-seventeen federal, state, and local officers were killed feloniously in 1996 -- the lowest number since 1960. *See* Sue TITUS REID, *supra* note 57, at 123.

[169] *See* National Institute for Occupational Safety and Health, *Violence in the Work Place*, June 1997.

[170] See id.

[171] Approximately 40 percent of police deaths are due to accidents. *See* TITUS REID, *supra* note 57, at 123.

[172] See National Institute for Occupational Safety and Health, Fatal Injuries to Workers in the United States, 1980-1989: A Decade of Surveillance 14 (April 15, 1999); Robert Rockwell, Police Brutality: More than Just a Few Bad Apples, REFUSE & RESIST, Aug. 14, 1997 (describing the "cultivation of the myth of policing as the most dangerous occupation").

[173] *See id*. at 13.

[174] *See* SKOLNICK & FYFE, *supra* note 63, at 93.

[175] *See* Hall, *supra* note 71, at 582-83 (describing early constables as "[a]bominably paid").

[176] *C.f*. STOLEN LIVES, *supra* note 123, at v (saying when police arrive on the scene, they often escalate the situation rather than defuse it).

[177] *See* STOLEN LIVES, *supra* note 123, at vi.

[178] *See, e.g*., Brandon v. City of Providence, 708 A.2d 893 (R.I. 1998) (finding municipality immune from liability when cops prevented relatives of injured shooting victim from taking victim to the hospital before victim died). *See also* Stolen Lives, *supra* note 157, at 305 (saying Tennessee police prevented fire fighters from saving victim of fire in 1997 case). Other notorious examples can be cited, including the 1993 Waco fire (in which fire trucks were held back by federal agents) and the 1985 MOVE debacle in Philadelphia in which police dropped a bomb on a building occupied by women and children and then held back fire fighters from rescuing bum victims. *See* WILLIE L. WILLIAMS, TAKING BACK OUR STREETS: FIGHTING CRIME IN AMERICA 16 (1996) (saying investigative hearings revealed cops had held back rescuers as a 'tactical decision').

[179] *See* SKOLNICK & FYFE, *supra* note 63, at 75 (citing U.S. Civil Disorder Commission study).

[180] *See* SKOLNICK & FYFE, *supra* note 63, at 83 (describing police riots at Columbia University and Los Angeles).

in 1968, police physically attacked 63 newsmen and indiscriminately beat and clubbed numerous innocent bystanders.[181]

PROFESSIONALISM?

If the modern model of cop-driven criminal justice has any defense at all, it is its "professionalism." Private law enforcement of the type intended by the Framers was supposedly more inclined toward lax and arbitrary enforcement than professional officers who are sworn to uphold the law.[182] Upon scrutiny, however, the claim that professional police are more reliable, less arbitrary, and more capable of objective law enforcement than private law enforcers is drastically undermined.

The constitutional model of law enforcement (investigation by a citizen grand jury, arrest by private individuals, constables or citizens watch, and private prosecution) became seen as inefficient and ineffective as America entered its industrial age.[183] Yet the grand jury in its natural and unhobbled state is *more*, rather than less, able to pursue investigations when compared to professional police. Grand jurors are not constrained by the Fourth, Fifth or Sixth amendments -- or at least the "exclusionary rule" fashioned by the courts to enforce those amendments.[184]

In the absence of police troops to enforce the law, the early criminal justice system was hardly as hobbled and impotent as conventional wisdom suggests. Private watch groups and broad-based advocacy groups existed to enforce laws and track criminals among jurisdictions. Thousands of local anti horse thief associations and countless 'detecting societies' sprang up to answer the call of crime victims in the nineteenth century.[185] In Maine, the "Penobscot Temperance League" hired detectives to investigate and initiate criminal cases against illegal liquor traffickers.[186] In the 1870s a private group called the Society for the Suppression of Vice became so zealous in garnering prosecutions of the immoral that it was accused in 1878 of coercing a defendant into mailing birth control information in violation of federal statutes,[187] one of the earliest known instances of conduct that later became defined as entrapment.[188] Although some of these private crime-fighting groups were invested with limited state law enforcement powers,[189] they were not police officers in the modern sense and received no remuneration.

Such volunteer nonprofessionals continue to aid law enforcement as auxiliary officers in many American communities.[190] Additionally, private organizations affiliated with regional chambers of commerce, neighborhood watch and other citizens' groups continue to play a substantial -- though underappreciated -- role in fighting crime.[191] America also has a long history of outright vigilante justice, although such vigilantism has been exaggerated both in its sordidness[192] and in its scope.[193]

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[181] *See* RIGHTS IN CONFLICT: THE OFFICIAL REPORT TO THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE xxiii, xxvi (1968).

[182] *See* John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511 (1994) (attacking private prosecution as unfair, arbitrary, and not in the public interest).

[183] *See* Hall, *supra* note 71, at 580-85 (detailing inadequacies of private law enforcement).

184 See United States v. Wong, 431 U.S. 174 (1977) (holding Miranda requirements do not apply to a witness testifying before a grand jury); United States v. Calandra, 414 U.S. 338 (1974) (holding grand jury witness may not refuse to answer questions on ground that they are based on evidence obtained from unlawful search); United States v. Dionisio, 410 U.S. 1 (1973) (holding seizure of a person by subpoena for grand jury appearance is generally not within Fourth Amendment's protection).

[185] *See* Richard M. Brown, *Historical Patterns of Violence in America, in* NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE, VIOLENCE IN AMERICA: HISTORICAL AND COMPARATIVE PERSPECTIVES 57 (Graham & Gurr, ed. 1969).

[186] *See* State v. Walker, 32 Me. 195 (1850) (upholding actions of the private group).

[187] See United States v. Whittier, 28 F. Cas. 591 (C.C.E.D. Mo. 1878).

[188] *See supra* notes 438-445 and accompanying text for a discussion of the evolution of entrapment as a law enforcement practice.

[189] *See* Richard Maxwell Brown, *The American Vigilante Tradition, in* NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE, VIOLENCE IN AMERICA: HISTORICAL AND COMPARATIVE PERSPECTIVES 57 (Graham & Gurr, dir. 1969).

[190] *See* JAMES S. CAMPBELL, ET AL., LAW AND ORDER RECONSIDERED: REPORT OF THE TASK FORCE ON LAW AND LAW ENFORCEMENT 441 (1970) (discussing successes of citizen auxiliary units in Queens, New York and other areas).

[191] *See id*. 437-54 (1970) (discussing successes of citizen involvement in law enforcement).

[192] American frontier vigilantism generally targeted serious criminals such as murderers, coach robbers and rapists as well as horse thieves, counterfeiters, outlaws, and 'bad men.' *See* NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE, VIOLENCE IN AMERICA: HISTORICAL AND COMPARATIVE PERSPECTIVES 97 (Graham & Gurr, dir. 1969). Arguably, such offenders qualified as felons and would have

Moreover, government-operated policing is hardly a monopoly even today, neither in maintaining order nor over matters of expertise and intelligence-gathering.[194] There are three times more private security guards than public police officers and even activities such as guarding government buildings (including police stations) and forensic analysis are now done by private security personnel.[195]

The chief selling point for professional policing seems to be the idea that sworn government agents are more competent crime solvers than grand juries, private prosecutors, and unpaid volunteers. But this claim disintegrates when the realities of police personnel are considered. In 1998, for example, forty percent of graduating recruits of the Washington, D.C. police academy failed the comprehensive exam required for employment on the force and were described as "practically illiterate" and "borderline-retarded."[196] As a practical matter, police are more dependent upon the public than the public is dependent upon police.[197]

Cops rely on the public for a very high percentage of their investigation clearances. As the rate of crimes committed by strangers increases, the rate of clearance by the police invariably declines.[198] Roughly two-thirds of major robbery and burglary arrests occur solely because a witness can identify the offender, the offender is caught at or near the crime scene, or the offender leaves evidence at the scene.[199] In contrast, where a suspect cannot be identified in such ways, odds are high that the crime will go unsolved.[200]

Studies show that as government policing has taken over criminal investigations, the rates of clearance for murder investigations have actually gone down. For more than three decades -- while police units have expanded greatly in size, power and jurisdiction -- the gap between the number of homicides in the United States and the number of cases solved has widened by almost twenty percent.[201] Today, almost three in ten homicides go unsolved.[202]

DNA EVIDENCE ILLUSTRATES FALLIBILITY OF POLICE

Moreover, a surprisingly high number of police conclusions are simply wrong. Since 1963, at least 381 *murder* convictions have been reversed because of police or prosecutorial misconduct.[203] In the 25-year period following

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faced the death penalty under the common law even if more conventional court processes were followed. That such vigilante movements often followed rudimentary due process of law is attested by historians such as Richard Maxwell Brown, who recounts that "vigilantes' attention to the spirit of law and order caused them to provide, by their lights, a fair but speedy trial." Richard Maxwell Brown, *supra* note 189, at 164. The northern Illinois Regulator movement of 1841, for example, provided accused horse thieves and murderers with a lawyer, an opportunity to challenge jurors, and an arraignment. *See id*. at 163. At least one accused murderer was *acquitted* by a vigilante court on the Wyoming frontier. *See* Joe B. Frantz, *The Frontier Tradition: An Invitation to Violence, in* NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE, VIOLENCE IN AMERICA: HISTORICAL AND COMPARATIVE PERSPECTIVES 129-30 (Graham & Gurr, dir. 1969). Many accused were let off with whipping and expulsion rather than execution in the early decades of vigilante justice. *See* Brown, *supra* note 189, at 164. Less than half of all vigilante groups ever killed anyone. *See id*. Ironically, the move by vigilante groups toward killing convicted suspects began in the 1850s, -- corresponding closely with the meteoric rise of professional policing. *See id*.

Vigilante movements occasionally developed to *rescue* the law from corrupt public officials who were violating the law. The case of the vigilantes who arrested and hanged Sheriff Henry Plummer of Virginia City, Montana in 1864 is such an example. *See* LEW L. CALLAWAY, MONTANA'S RIGHTEOUS HANGMEN (1997) (arguing the vigilantes had no choice but to take the law into their own hands).

[193] "[T]he Western frontier developed too swiftly for the courts of justice to keep up with the progression of the people." Joe B. Frantz, *supra* note 192, at 128. Vigilante movements did little more than play catch-up to what can only be described as rampant frontier lawlessness. Five-thousand wanted men roamed Texas in 1877. *See id*. at 128. Major crimes often went totally unprosecuted and countless offenders whose crimes were well known lived openly without fear of arrest on the western frontier. *See id*. Vigilantes filled in only the most gaping holes in court jurisdiction, generally (but not always) intervening to arrest only the perpetrators of serious crimes. *See id*. and at 130 (saying "improvised group action" was the only resort for many on the far frontier).

[194] David H. Bayley & Clifford D. Shearing, *The Future of Policing, in* THE CRIMINAL JUSTICE SYSTEM: POLITICS AND POLICIES 150, 150 (George F. Cole & Marc G. Gertz, eds., 7th ed. 1998).

[195] *See id*. at 151, 154.

[196] Tucker Carlson, *Washington's Inept Police Force,* WALL ST. J., Nov. 3, 1993, at A19

[197] *See* SILBERMAN, *supra* note 6, at 297. Silberman points out that New York City police solved only two percent of robbery cases in which a witness could not identify an offender or the offender was not captured at the scene. *See id*.

[198] *See id*. at 296 (saying clearance rate dropped precipitously between 1960 and 1976 as proportion of crimes committed by strangers increased).

[199] *See id*. (citing figures registered between 1960 and 1976).

[200] *See id*. at 296.

[201] See Laura Parker & Gary Fields, Unsolved Killings on Rise: Percent of Cases Closed Drops From 86% to 69%, USA TODAY, Feb. 22, 2000, at A1.

[202] See id.

[203] *See* BARRY SCHECK, ET AL., ACTUAL INNOCENCE 175 (2000).

the Supreme Court's ruling in *Gregg v. Georgia*[204] reaffirming the use of capital punishment, one innocent person has been freed from death row for every seven who have been executed.[205] In Illinois, Thirteen men have been freed from death row since 1977 after proving their innocence -- more than the twelve who were actually put to death over the same period. Governor George Ryan finally ordered a moratorium on executions until the death penalty system could be revamped,[206] referring to the death penalty system as "fraught with error."[207]

Yet death penalty cases are afforded far more due process and scrutiny of evidence than noncapital cases. If anything, the error rate of police in noncapital cases is likely substantially higher. Governor Ryan's words would seem to apply doubly to the entire system of police-driven investigation.

The advent of DNA analysis in the courtrooms of the 1990s greatly accelerated the rate at which police errors have been proven in court, even while avenues for defendants' appeals have been systematically cut off by Congress and state legislatures.[208] DNA testing before trial has exonerated at least 5000 *prime suspects* who would likely have otherwise been tried on other police evidence.[209] Often, exculpatory DNA revelations have come in cases where other police-generated evidence was irreconcilable, suggesting falsification of evidence or other police misconduct.[210] The sheer number of wrongly accused persons freed by DNA evidence makes it beyond dispute that police investigations are far less trustworthy than the public would like to believe.[211]

Even more unjustified is the notion that a justice system powered by professional police possesses higher levels of integrity, trustworthiness and credibility than the criminal justice model intended by the Framers. Within the criminal justice system, cops are regarded as little more than professional witnesses of convenience, if not professional perjurers, for the prosecution.[212] Almost no authority credits police with high levels of honesty. Indeed, the daily work of cops requires strategic lying as part of the job description.[213] Cops lie about the strength of their evidence in order to obtain confessions,[214] about giving *Miranda* warnings to arrestees when on the witness stand,[215] and even about substantive evidence when criminal cases need more support. Cops throughout the United States have been caught fabricating, planting and manipulating evidence to obtain convictions where cases would otherwise be very weak.[216] Some authorities regard police perjury as so rampant that it can be considered a "subcultural norm rather than an individual aberration" of police officers.[217] Large-scale investigations of police units in virtually every major American city have documented massive evidence tampering, abuse of the arresting power, and discriminatory enforcement of laws according to race, ethnicity, gender, and socioeconomic status. Recent allegations in Los Angeles charge that dozens of officers abused their authority by opening fire on unarmed suspects, planting evidence, dealing illegal drugs, or framing some 200

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[204] 428 U.S. 153 (1976) (finding death penalty constitutional so long as adequate procedures are provided to a defendant).

[205] *See* SCHECK, *supra* note 203, at 218.

[206] See Illinois Governor Orders Execution Moratorium, USA TODAY, Feb. 1, 2000, at 3A.

[207] See id.

[208] *See* SCHECK, *supra* note 203, at 218 (noting an average of 4.6 condemned people per year have been set free after 1996, while only 2.5 death row inmates per year were freed between 1973 and 1993).

[209] *See id*. at xv (noting these 5,000 exonerations came from only the first 18 thousand results of DNA testing at crime laboratories -- a rate of almost 30% exonerated).

[210] *C.f. id*. at 180 (detailing indictment of four officers for perjury and obstruction of justice in the wake of one DNA exoneration).

[211] DNA testing has proven that at least 67 people were sent to prison or death row for crimes they did not commit. *See id*. at xiv. This number grows each month. *See id*.

[212] *C.f*. Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L. J. 1311, 1311 (1994) (saying "[p]olice perjury is the dirty little secret of our criminal justice system").

[213] *See* BURTON S. KATZ, JUSTICE OVERRULED: UNMASKING THE CRIMINAL JUSTICE SYSTEM 77-86 (1999).

[214] *See* SILBERMAN, *supra* note 6, at 308 (describing interrogation techniques of police as "an art form in its own right."). Lying or bluffing can often persuade a suspect to admit crimes to the police which would not otherwise be proven. *See id.*

[215] *C.f. id*. (recounting that an officer under observation would simply lie on the stand if challenged in court about whether Miranda warnings were given before questioning a suspect).

[216] See Joe Cantlupe & David Hasemyer, Pursuit of Justice: How San Diego Police Officers Handled the Killing of One of Their Own. It Is a Case Flawed by Erratic Testimony and Questionable Conduct, SAN DIEGO UNION-TRIBUNE, Sept. 11, 1994, at A1 (exposing that some officers gave false testimony in case of suspected cop-killers).

[217] Andrew Horwitz, Taking the Cop Out of Copping a Plea: Eradicating Police Prosecution of Criminal Cases, 40 ARIZ. L. REV. 1305, 1321 (1998) (quoting Jerome H. Skolnick).

innocent people.[218] More than a hundred prosecutions had to be dismissed in Chicago in 1997 due to similar police misconduct.[219] During the infamous "French connection" case of the 1970s, New York City narcotics detectives were caught diverting 188 pounds of heroin and 31 pounds of cocaine for their own use, making the City's Special Investigating Unit the largest heroin and cocaine dealer in the city.[220]

Police criminality was so acute in New Orleans during the 1980s and 1990s that people were afraid to report crimes for fear that corrupt officers would retaliate or tip off organized crime figures. One New Orleans officer was convicted of ordering the execution of a witness who reported him to the internal affairs unit for allegedly pistol-whipping a teenager.[221] Thirty-six Washington, D.C. officers were indicted on charges such as drug dealing, sexual assault, murder, sodomy and kidnapping in 1992.[222]

In Detroit, repeated corruption allegations have seen a number of low- and high-ranking officers go to prison for drug trafficking, hiring hit men, providing drug protection, and looting informant funds.[223] Police burglary rings have been uncovered in several cities.[224]

Patterns of police abuse tend to repeat themselves in major American cities despite endless attempts at reform.[225] New York City police, for example, have been the subject of dozens of wide-ranging corruption probes over the past hundred years[226] yet continue to generate corruption allegations.[227] Police exhibit unique levels of occupational solidarity.[228] Review boards and internal affairs commissions inevitably fail to penetrate police loyalty and find resistance from every rank.[229] Cops inevitably form an isolated authoritarian subculture that is both cynical toward the rule of law and disrespectful of the rights of fellow citizens.[230] The code of internal favoritism that holds police together may more aptly be described as syndicalism rather than professionalism. Historically, urban police "collected" from local businesses.[231] Today, a more subtle brand of racketeering prevails, whereby police assist those businesses which provide support for police and undermine businesses which are perceived as antagonistic to police interests. This same shakedown also applies to newspaper editors and politicians.[232]

Even at the federal level, where national investigators presume to police corruption and oversee local departments, favoritism toward the police role is rampant. In 1992, for example, the federal government filed criminal charges in only 27 cases of police criminality.[233] A federal statute criminalizing violations of the Fourth Amendment has never been enforced even a single time, although it has been a part of the U.S. Code since

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[218] *See* Daniel B. Wood, *One precinct stirs a criminal-justice crisis*, CHRISTIAN SCIENCE MONITOR, Feb. 18, 2000, at 1.

[219] *See* TITUS REID, *supra* note 57, at 120.

[220] *See* SILBERMAN, *supra* note 6, at 231.

[221] *See* Gary Fields, *New Orleans' Crime Fight Started With Police*, USA TODAY, Feb. 1, 2000, at 6A.

[222] *See* Tucker Carlson, *Washington's Inept Police Force*, WALL ST. J., Nov. 3, 1993, at A19.

[223] *See Abuse of Power*, DETROIT NEWS, May 3, 1996.

[224] *See* Lawrence W. Sherman, *Becoming Bent: Moral Careers of Corrupt Policemen, IN* "ORDER UNDER LAW": READINGS IN CRIMINAL JUSTICE 96, 104-06 (1981) (discussing police burglary scandals of the 1960s).

[225] *See* Wood, *supra* note 218, at 5 (citing critics).

[226] *See* FRIEDMAN, *supra* note 58, at 154. The Lexow Committee of 1894 was perhaps the first to probe police misconduct in New York City. The Committee found that the police had formed a "separate and highly privileged class, armed with the authority and the machinery of oppression." *See id.*. Witnesses before the Committee testified to brutal beatings, extortion and perjury by New York police. *See id*. at 154-55.

[227] In April 1994, for example, thirty-three New York officers were indicted and ultimately convicted of perjury, drug dealing and robbery. *See* James Lardner, *Better Cops. Fewer Robbers*, N.Y. TIMES MAG., Feb. 9, 1997, pp. 44-52. The following year, sixteen Bronx police officers were indicted for robbing drug dealers, beating people, and abusing the public. *See id*.

[228] *See* Jerome H. Skolnick, *A Sketch of the Policeman's "Working Personality," in* THE CRIMINAL JUSTICE SYSTEM: POLITICS AND POLICIES 116, 123 (George F. Cole & Marc G. Gertz 7th ed. 1998).

[229] *See* Wood, *supra* note 218, at 5 (quoting critics).

[230] *C.f*. TITUS REID, *supra* note 57, at 117-119 (describing police subculture).

[231] *See* FRIEDMAN, *supra* note 58, at 154 (saying New York police of the 1890s engaged in routine extortion of businesses, collecting kickbacks from push-cart vendors, corner groceries, and businessmen whose flag poles extended too far into the street). In Chicago, police historically sought "contributions" from saloonkeepers. *See id.* at 155.

[232] *See, e.g.*, PATRICK J. BUCHANAN, RIGHT FROM THE BEGINNING 283-84 (1990) (detailing police favoritism toward one St. Louis newspaper and antagonism toward its competitor); Jonathan D. Rockoff, *Comment Costs Kennedy Police Backing*, PROVIDENCE J., April 21, 2000, at 1B (describing police unions' threats to drop their support for Rep. Kennedy due to Kennedy's public remarks).

[233] *See* Davis, *supra* note 152, at 355.

1921.[234] Throughout the 1980s and '90s, the FBI Crime Laboratory actively abetted the misconduct of local police departments by misrepresenting forensic evidence to bolster police cases against defendants.[235]

COPS NOT COST-EFFECTIVE DETERRENT

In terms of pure economic returns, police are a surprisingly poor public investment. Typical urban police work is very expensive because police see a primary part of their role as intervention for its own sake -- poking, prodding and questioning the public in hope of turning up evidence of wrongdoing. Toward this end, police spin quick U-turns, drive slowly and menacingly down alleyways, reverse direction to track suspected scofflaws, and conduct sidewalk pat-down searches of potential criminals absent clear indicia of potential criminality.[236] Studies indicate, however, that such tactics are essentially worthless in the war on crime. One experiment found that when police do not 'cruise' but simply respond to dispatched calls, crime rates are completely unaffected.[237]

Thus the very aspect of modern policing that the public view as most effective -- the creation of a 'police presence' -- is in fact a monstrous waste of public resources.[238] Similarly, the history of America's expenditures in the war on drugs provides little support for the proposition that money spent on policing yields positive returns.[239] University of Chicago professor John Lott has found that while hiring police can reduce crime rates, the net benefit of hiring an additional officer is about a quarter of the benefit from arming the public with an equivalent dollar amount of concealed handguns.[240]

There is no doubt that modern police are a creation of lawful representative legislatures and are very popular with the general public.[241] But the rights of Americans depend upon freedom *from* government as much as freedom *of* government.[242] Constitutions must provide a countermajoritarian edifice to the threat posed by the will of the masses, and courts must at times pronounce even the most popular programs invalid when they contravene the fundamental liberties of a minority -- or even the whole people at times when they inappropriately devalue their liberties.[243]

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[234] *See* Wasserstrom, *supra* note 70, at 293-94 n.188 (1984) (stating no one has ever been convicted under the statute, 18 U.S.C. § 2236).

[235] *See* U.S. Dep't of Justice, Office of Inspector General, *The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases* (April 1997) (detailing Justice Department's findings of impropriety at the FBI Crime Lab).

[236] *Cf*. SlLBERMAN, *supra* note 6, at 211-14 (observing the behavior of cops on patrol).

[237] *See id*. at 215-16 (citing study conducted in Kansas City in the 1970s).

[238] *C.f. id*. at 215 (pointing to mounting criticism of traditional approach). Studies of police pull-overs and sidewalk stops invariably demonstrate patterns of economic, racial, and social discrimination as well. *See, e.g*., Bruce Landis, *State Police Records Support Charges of Bias in Traffic Stops*, PROVIDENCE J., Sept. 5, 1999 at 1A (reporting Rhode Island traffic stop statistics demonstrate racial bias by state police).

[239] The United States' 'war on drugs' is a perfect illustration of the difficulties of implementing broad-ranging social policy through police enforcement mechanisms. "Not since Vietnam ha[s] a national mission failed so miserably." JIM MCGEE & BRIAN DUFFY, MAIN JUSTICE: THE MEN AND WOMEN WHO ENFORCE THE NATION'S CRIMINAL LAWS AND GUARD ITS LIBERTIES 43 (1996). The federal drug control budget increased from $4.3 billion in 1988 to $11.9 billion in 1992, yet national drug supply increased greatly and prices dropped during the same period. *See id*. at 42. The costs of enforcement in 1994 ranged from $79,376 per arrestee by the DEA to $260,000 per arrestee by the FBI, with no progress made at all toward decreasing the drug trade. *See id*.

[240] *See* JOHN R. LOTT, JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS 213 n.3 (1998) (citing forthcoming paper).

[241] Some two-thirds of the public say they have a great deal of respect for the police. See SHMUEL LOCK, CRIME, PUBLIC OPINION, AND CIVIL LIBERTIES: THE TOLERANT PUBLIC 69 (1999). Interestingly, however, lawyers are more than 20 percentage points lower in their general assessment of police. *See id*.

[242] Public opinion polls repeatedly show that a majority of the public favor decreasing constitutional protections. *See, e.g., id*. at 6. It must be noted, however, that the general public is *more* inclined than lawyers and the Supreme Court to favor protecting some civil liberties. For example, 49 percent of the public disapproves of police searching private property by air without warrant, while only 37 percent of lawyers disapprove and the Supreme Court upheld the practice in *United States v. Dunn*, 480 U.S. 294 (1987). *See id*. at 39. A majority of the public (51%) would prohibit police from searching one's garbage without a warrant, while only 36 percent of lawyers disapprove and the Supreme Court upheld the practice in *California v. Greenwood*, 486 U.S. 35 (1988). *See id*. The public is also less inclined than lawyers to approve of using illegally obtained evidence to impeach a witness. *See id*. at 45.

[243] *C.f*. Illinois v. Krull, 480 U.S. 340, 365 (1987) (O'Connor, J., dissenting) (stating Fourth Amendment rights have at times proved unpopular and the Framers drafted the Fourth Amendment in fear that future majorities might compromise Fourth Amendment values).

PART II

POLICE AS A STANDING ARMY

It is largely forgotten that the war for American independence was initiated in large part by the British Crown's practice of using troops to police civilians in Boston and other cities.[1] Professional soldiers used in the same ways as modern police were among the primary grievances enunciated by Jefferson in the Declaration of Independence. ("[George III] has kept among us standing armies"; "He has affected to render the military independent of and superior to the civil power"; "protecting them, by a mock trial...."). [2] The duties of such troops were in no way military but involved the keeping of order and the suppression of crime (especially customs and tax violations).

Constitutional arguments quite similar to the thesis of this article were made by America's Founders while fomenting the overthrow of their government. Thomas Jefferson proclaimed that although Parliament was supreme in its jurisdiction to make laws, "his majesty has no right to land a single armed man on our shores" to enforce unpopular laws.[3] James Warren said that the troops in Boston were there on an unconstitutional mission because their role was not military but rather to enforce "obedience to Acts which, upon fair examination, appeared to be unjust and unconstitutional."[4] Colonial pamphleteer Nicholas Ray charged that Americans did not have "an Enemy worth Notice within 3000 Miles of them."[5] "[T]he troops of George the III have cross'd the wide atlantick, not to engage an enemy," charged John Hancock, but to assist constitutional traitors "in trampling on the rights and liberties of [the King's] most loyal subjects ..."[6]

The use of soldiers to enforce law had a long and sullied history in England and by the mid-1700s were considered a violation of the fundamental rights of Englishmen.[7] The Crown's response to London's Gordon Riots of 1780 -- roughly contemporary to the cultural backdrop of America's Revolution -- brought on an immense popular backlash at the use of guards to maintain public order.[8] "[D]eep, uncompromising opposition to the maintenance of a semimilitary professional force in civilian life" remained integral to Anglo-Saxon legal culture for another half century.[9]

Englishmen of the Founding era, both in England and its colonies, regarded professional police as an "alien, continental device for maintaining a tyrannical form of Government."[10] Professor John Phillip Reid has pointed out that few of the rights of Englishmen "were better known to the general public than the right to be free of standing armies."[11] "Standing armies," according to one New Hampshire correspondent, "have ever proved destructive to the Liberties of a People, and where they are suffered, neither Life nor Property are secure."[12]

If pressed, modern police defenders would have difficulty demonstrating a single material difference between the standing armies the Founders saw as so abhorrent and America's modern police forces. Indeed, even the

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[1] *See* JOHN PHILLIP REID, IN DEFIANCE OF THE LAW: THE STANDING-ARMY CONTROVERSY, THE Two CONSTITUTIONS, AND THE COMING OF THE AMERICAN REVOLUTION (1981) (recounting the history and constitutional background of the standing-army controversy that preceded the Revolution).

[2] THE DECLARATION OF INDEPENDENCE paras. 12, 13, 14 (U.S. 1776).

[3] *See* JOHN P. REID, *supra* note 244, at 79.

[4] *See id*. at 79.

[5] *See id*. at 50 (citation omitted).

[6] *See id*. at 29 (quoting the orations of Hancock).

[7] In Edinburgh in 1736, a unit of town guards maintaining order during the execution of a convicted smuggler was pelted with stones and mud until some soldiers began firing weapons at the populace. *See* JOHN P. REID, *supra* note 244, at 114-15 (recounting the history and constitutional background of the standing-army controversy which preceded the Revolution). After nine citizens were found dead, the captain of the guard was tried for murder, convicted, and himself condemned to be hanged. *See id*.

When officers of the crown indicated a willingness to pardon the captain, a mob of civilians "rescued" the captain from prison and hanged him. *See id*.

[8] *See* Hall, *supra* note 71, at 587-88.

[9] *Id*. at 587.

[10] Ben C. Roberts, *On the Origins and Resolution of English Working-Class Protest, in* NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE, VIOLENCE IN AMERICA: HISTORICAL AND COMPARATIVE PERSPECTIVES 238, 252 (Graham & Gurr, dir. 1969).

[11] JOHN P. REID, *supra* note 244, at 80.

[12] *See id*. at 95 (quoting from a 1770 issue of the *New Hampshire Gazette)*.

distinctions between modern police and actual military troops have blurred in the wake of America's modern crime war.[13] Ninety percent of American cities now have active special weapons and tactics (SWAT) teams, using such commando-style forces to do "high risk warrant work" and even routine police duties.[14] Such units are often instructed by active and retired United States military personnel.[15]

In Fresno, California, a SWAT unit equipped with battering rams, chemical agents, fully automatic submachine guns, and 'flashbang' grenades roams full-time on routine patrol.[16] According to criminologist Peter Kraska, such military policing has never been seen on such a scale in American history, "where SWAT teams routinely break through a door, subdue all the occupants, and search the premises for drugs, cash and weapons."[17] In high-crime or problem areas, police paramilitary units may militarily engage an entire neighborhood, stopping "anything that moves" or surrounding suspicious homes with machine guns openly displayed.[18]

Much of the importance of the standing-army debates at the ratification conventions has been overlooked or misinterpreted by modern scholars. Opponents of the right to bear arms, for example, have occasionally cited the standing-army debates to support the proposition that the Framers intended the Second Amendment to protect the power of states to form militias.[19] Although this argument has been greatly discredited,[20] it has helped illuminate the intense distrust that the Framers manifested toward occupational standing armies. The standing army the Framers most feared was a soldiery conducting law enforcement operations in the manner of King George's occupation troops -- like the armies of police officers that now patrol the American landscape.

THE SECOND AMENDMENT

The actual intent of the Second Amendment -- that it protect a right of people to maintain the means of violently checking the power of government -- has been all but lost in modern American society.[21] Modern policing's increasing monopoly on firepower tends to undermine the Framers' intent that the whole people be armed, equipped, and empowered to resist the state. Many police organizations lobby incessantly for gun control, even though the criminological literature yields scant empirical support for general gun control as a crime-prevention measure.[22]

Nor is there much legitimacy to the claim that professional police are more accurate or responsible with firearms than the armed citizenry intended by the Framers. To this day, civilians shoot and kill at least twice as many criminals as police do every year,[23] and their 'error rate' is several times lower.[24] In a government study of handgun battles that lead to officer injuries, it was found that police who fired upon their killers were less than half as accurate as their civilian, nonprofessional, assailants.[25]

Moreover, police seem hardly less likely to misuse firearms than the general public.[26] In New York City, where private possession of handguns has been virtually eliminated for most civilians, problems with off-duty police

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[13] *See* Kraska & Kappeler, *supra* note 167, at 2-3 (citing National Institute of Justice report detailing "partnership" between Defense and Justice Departments in equipping personnel to "engage the crime war").

[14] *See* William Booth, *The Militarization of 'Mayberry,'* WASH. POST, June 17, 1997, at A1.

[15] See id.

[16] See id.

[17] *See id*. (quoting Kraska).

[18] *See* Kraska & Kappeler, *supra* note 167, at 10.

[19] See Roger Roots, The Approaching Death of the Collective Right Theory of the Second Amendment, 39 DUQUESNE L. REV. 71 (2000).

[20] See id.

[21] C.f. id.

[22] *See* JOHN R. LOTT, JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS (1998) (supporting a proposition consistent with the title); GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA (1991).

[23] KLECK, *supra* note 265, at 111-116, 148.

[24] *See* George F. Will, *Are We a Nation of Cowards?*, NEWSWEEK, Nov. 15, 1993, at 93. The error rate is defined as the rate of shootings involving an innocent person mistakenly identified as a criminal. See id.

[25] *See* ANTHONY J. PINIZZOTTO, ET AL., U.S. DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE, IN THE LINE OF FIRE: A STUDY OF SELECTED FELONIOUS ASSAULTS ON LAW ENFORCEMENT OFFICERS 8 (1997) (table showing 41 percent accuracy by police as opposed to 91 percent accuracy by their assailants with handguns).

[26] *See, e.g.*, Morgan v. California, 743 F.2d 728 (9th Cir. 1984) (involving drunk officers who backed their car into innocent civilian couple and then brandished guns to threaten them).

misusing firearms have repeatedly surfaced.[27] Los Angeles police have been found to fire their weapons inappropriately in seventy-five percent of cases.[28] Between early 1989 and late 1992, more than one out of every seven shots fired by Washington, D.C. police officers was fired accidentally.[29]

THE THIRD AMENDMENT

Although standing armies were not specifically barred by the final version of the Constitution's text, some authorities have pointed to the Third Amendment[30] as a likely fount for such a conceptual proposition.[31] Additionally, the Amendment's proscription of quartering troops in homes might well have been interpreted as a general anti-search and seizure principle if the Fourth Amendment had never been enacted.[32] The Third Amendment was inspired by sentiments quite similar to those that led to passage of the Second and Fourth Amendments, rather than fear of military operations. Writing in the 1830s, Justice Story regarded the Third Amendment as a security that "a man's house shall be his own castle, privileged against all *civil* and military intrusion."[33]

The criminal procedure concerns that dominated the minds of the Framers of the Bill of Rights were created not only before the Revolution but also after it. In the five years following British surrender, the independent states vied against each other for commercial advantage, debt relief, and land claims. Conflict was especially fierce between the rival settlers of Pennsylvania and Connecticut on lands in the west claimed simultaneously by both states.[34] Both states sent partisan magistrates and troops into the region, and each faction claimed authority to remove claimants of the rival state.[35] Magistrates occasionally ordered arrest without warrant, turned people out of their homes, and even ordered submission to the quartering of troops in homes.[36] In 1784, a Pennsylvania grand jury indicted one such magistrate and forty others for abuse of their authority.[37] Many agents had to be arrested before the troubles finally ended in 1788 -- the very moment when the Constitution was undergoing its ratification debates.[38] These troubles, and not memories of life under the Crown, were fresh in the minds of the Framers who proposed and ratified the Bill of Rights.

The Third Amendment's proscription of soldiers quartered in private homes addressed a very real *domestic* concern about the abuse of state authority in 1791. This same fear of an omnipresent and all-controlling government is hardly unfounded in modern America. Indeed, the very evils the Framers sought to remedy with the entire Bill of Rights -- the lack of security from governmental growth, control and power -- have come back to haunt modem Americans like never before.[39]

THE RIGHT TO BE LEFT ALONE

The 'police state' known by modern Americans would be seen as quite tyrannical to the Framers who ratified the Constitution. If, as Justice Brandeis suggested, the right to be left alone is the most important underlying

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[27] *See* Shapiro v. New York City Police Dept., 595 N.Y.S.2d 864 (N.Y. Sup. Ct. 1993) (upholding revocation of pistol license of cop who threatened drivers with gun during two traffic disputes); Matter of Beninson v. Police Dept., 574 N.Y.S.2d 307 (N.Y. Sup. Ct. 1991) (involving revocation of pistol permit of cop based on two displays of firearms in traffic situations).

[28] *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 255 n. 34 (2d ed. 1995) (citing review of nearly 700 shootings).

[29] *See* Tucker Carlson, *Washington's Inept Police Force*, WALL ST. J., Nov. 3, 1993, at A19.

[30] U.S. CONST. amend. III ("No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law").

[31] *See* Morton J. Horwitz, *Is the Third Amendment Obsolete?*, 26 VALPARAISO U. L. REV. 209, 214 (1991) (stating the Third Amendment might have produced a constitutional bar to standing armies in peacetime if public antipathy toward standing armies had remained intense over time).

[32] See id.

[33] 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 747-48 (1833) (emphasis added).

[34] For a well-written local history of this conflict, see HENRY BLACKMAN PLUMB, HISTORY OF HANOVER TOWNSHIP 121-140 (1885).

[35] See id.

[36] *See id*. at 125-26.

[37] *See id*. at 130.

[38] *See id*. at 138 (adding that those convicted "were allowed easily to escape, and no fines were ever attempted to be collected").

[39] *See, e.g*., JAMES BOVARD, FREEDOM IN CHAINS: THE RISE OF THE STATE AND THE DEMISE OF THE CITIZEN (1999) (presenting a thesis in line with the title); JAMES BOVARD, LOST RIGHTS: THE DESTRUCTION OF AMERICAN LIBERTY (1994) (detailing America's loss of freedom).

principle of the Constitution,[40] the cop-driven model of criminal justice is anathemic to American constitutional principles. Today a vast and omnipotent army of insurgents patrols the American landscape in place of grand juries, private prosecutors, and the occasional constable. This immense soldiery is forever at the beck and call of whatever social forces rule the day, or even the afternoon.[41]

THE FOURTH AMENDMENT

Now to the Fourth Amendment. The Amendment reads: "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."[42] This protection was clearly regarded as one of the more important provisions of the Bill of Rights during debates in and out of Congress prior to ratification.[43] To this day, the Amendment is probably the most cited constitutional provision in challenges to police action.

The cold, hard reality, however, is that the interest protected by the amendment -- security from certain types of searches and seizures -- has been drastically scaled back since 1791. In saying this, I am mindful that there are those among the highest echelons of the bench and academy who claim that current Fourth Amendment law is *more protective* than the Framers intended.[44] Indeed, there are those claiming the mantles of textualism and originalism who would decrease Fourth Amendment rights even further.[45] The ever-influential Akhil Amar, for example, has argued that the Fourth Amendment's text does not really *require* warrants but merely lays out the evidentiary foundation required to *obtain* warrants.[46] Amar joins other "originalist" scholars who emphasize that the only requirement of the Fourth Amendment's first clause ("The right of the people to be secure in their persons, papers, and effects from unreasonable searches and seizures shall not be violated") is that all searches and seizures be "reasonable."[47] The warrant requirement pronounced in many Supreme Court opinions, according to Amar, places an unnecessary burden upon law enforcement and should be abandoned for a rule Amar considers more workable -- namely civil damages for unreasonable searches after the fact as determined by juries.

This type of "originalism" has appealed to more than one U.S. Supreme Court justice,[48] at least one state high court,[49] and various legal commentators.[50] Indeed, it has brought a perceivable shift to the Supreme Court's

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[40] *See* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (saying the right to be let alone is "the most comprehensive of rights and the right most valued by civilized man.").

[41] *C.f.* Stephen D. Mastrofski, et al., *The Helping Hand of the Law: Police Control of Citizens on Request*, 38 CRIMINOLOGY 307 (2000) (detailing study finding officers are likely to use their power to control citizens at mere request of other citizens).

[42] U.S. CONST. amend. IV.

[43] *See, e.g.*, Maryland Minority, *Address to the People of Maryland*, Maryland Gazette, May 6, 1788, *reprinted in* THE ORIGIN OF THE SECOND AMENDMENT, *supra* note 89, at 356, 358 (stating that an amendment protecting people from unreasonable search and seizure was considered indispensable by many who opposed the Constitution).

44 See, e.g., AKHIL R. AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 1-45 (1997). Amar argues that the Amendment lays down only a few "first principles" -- namely "that all searches and seizures must be reasonable, that warrants (and only warrants) always require probable cause, and that the officialdom should be held liable for unreasonable searches and seizures." *Id*. at 1

[45] *See, e.g.*, Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49 (arguing that the Fourth Amendment should not provide a guilty criminal with any right to avoid punishment).

[46] *See* AMAR, *supra* note 287, at 3-17 (arguing the Framers intended no warrant requirement).

[47] See id.

[48] *See* California v. Acevedo, 500 U.S. 565, 581 (1991) (Scalia, J., concurring) (referencing Amar's claims for support). Ten years earlier, in *Robbins v. California*, 453 U.S. 420 (1981), Justice Rehnquist cited a 1969 book by Professor Telfred Taylor -- Amar's predecessor in the argument that the Fourth Amendment's text requires only an ad hoc test of reasonableness -- for the same proposition. *Id*. at 437 (Rehnquist, J., dissenting).

[49] *See, e.g.*, Hulit v. State, 982 S.W.2d 431, 436 (Tex. Crim. App. 1998) (citing Amar for proposition that Fourth Amendment requires no warrants).

[50] *See, e.g.*, Max Boot, Out of Order: Arrogance, Corruption, and Incompetence on the Bench 66 (1998) (reciting the Amar/Taylor thesis without reservation).

Fourth Amendment jurisprudence.[51] Even the U.S. Justice Department has adopted this argument as its own in briefs filed in the U.S. Supreme Court arguing for elimination of the warrant requirement.[52]

The problem with this line of interpretation is that it does not square with the original view of the Framers. Even the most cursory examination of history reveals that law enforcers of the Founding Era, whether private persons, sheriffs or constables, were obligated to procure warrants in many circumstances that modern courts do not require warrants.[53] The general rule that warrants were required for all searches and seizures except those involving circumstances of the utmost urgency seems so well settled at the time of ratification that it is difficult to imagine a scholar arguing otherwise.[54] But Professor Amar does. "Supporters of the warrant requirement," the professor writes, "have yet to find any cases" enunciating the warrant requirement before the Civil War.[55]

Perhaps Amar has overlooked the 1814 case of *Grumon v. Raymond*, in which the Connecticut Supreme Court held both a constable, who executed an improper search warrant, and a justice of the peace who issued the warrant, civilly liable for trespass.[56] The court in *Grumon* clearly stated that the invalidity of the search warrant left the search's legality "on no better ground than it would be if [the search had been pursuant to] no process."[57] Or maybe Amar is unfamiliar with the 1807 case of *Stoyel v. Lawrence*, holding a sheriff liable for executing a civil arrest warrant after the warrant's due date and declaring that the warrant "gave the officer no authority whatever, and, consequently, formed no defence";[58] or the 1763 Massachusetts case of *Rex v. Gay*, acquitting an arrestee for assaulting and beating a sheriff who arrested him pursuant to a facially invalid warrant;[59] or *Batchelder v. Whitcher*, holding an officer liable for ordering the seizure of hay by an unsealed warrant in 1838;[60] or *Conner v. Commonwealth*, in which the Pennsylvania Supreme Court concluded in 1810 that if the requirement of warrants based on probable cause could be waived merely to allow constables to more easily arrest criminals, "the constitution is a dead letter."[61]

Even the cases Amar cites for the proposition that search warrants were not required under antebellum Fourth Amendment jurisprudence do not squarely support such a proposition.[62] Most of them merely repeat the

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[51] Since the addition of Justice Rehnquist to the Supreme Court, the Court has traveled far down the road toward ejecting the warrant requirement. *See generally* Wasserstrom, *supra* note 70. The Court has increasingly tended to adopt a mere balancing test, pitting the citizen's "Fourth Amendment interests" (rather than his "rights") against "legitimate governmental interests." *See, e.g.*, Delaware v. Prouse, 440 U.S. 648, 654 (1979).

[52] In United States v. Chadwick, 433 U.S. 1, 6 (1977), the United States Justice Department mounted a "frontal attack" on the warrant requirement and argued that the warrant clause of the Fourth Amendment protected only "interests traditionally identified with the home." Accordingly, the Justice Department would have eliminated warrants in every other setting.

[53] *Compare* Howard v. Lyon, 1 Root 107 (Conn. 1787) (involving constable who obtained "escape warrant" to recapture an escaped prisoner and even had the warrant "renewed" in Rhode Island where prisoner fled), *and* Bromley v. Hutchins, 8 Vt. 68 (1836) (upholding damages against a deputy sheriff who arrested an escapee without warrant outside the deputy's jurisdiction), *with* United States v. Watson, 423 U.S. 411 (1976) (allowing warrantless arrest of most suspects in public so long as probable cause exists).

[54] *See* Morgan Cloud, *Searching through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1713 (1996) (citing the exhaustive research of William Cuddihy for the proposition that specific warrants were required at Founding).

[55] AMAR, *supra* note 287, at 5.

[56] 1 Conn. 40 (1814).

[57] *See id*. at 44.

[58] 3 Day 1, 3 (Conn. 1807).

[59] 1761-1772 Quincy Mass. Reports (1763). Perhaps Amar's statement can be read as a commentary on the dearth of originalist scholarship among those who support strong protections for criminal suspects and defendants. "Originalism" as a means of constitutional interpretation is not always definable in a single way, and "originalists" may often contradict each other as to their interpretation of given cases. *See* Richard S. Kay, *"Originalist" Values and Constitutional Interpretation*, 19 HARV. J.L. & PUB. POL'Y 335 (1995). Professor Kay has identified four distinct interpretive methods as being "originalist" -- any two of which might produce differing conclusions: 1) original text, 2) original intentions, 3) original understanding, and 4) original values. *See id*. at 336. This being conceded, originalism has generally been the domain of "conservative" jurists for the past generation, fueled by reactions to the methods of adjudication employed by the Warren Court. *See id*. at 335.

[60] 9 N.H. 239 (1838).

[61] 3 Bin. 38, 43 (Pa. 1810).

[62] Admittedly, two of Amar's cited cases present troubling statements of the law. The rule of Amar's first case, *Jones v. Root*, 72 Mass. 435 (1856), is somewhat difficult to discern. Although the case may be read as a total rejection of required warrants (as Amar contends, *supra* note 287, at 4-5 n.10), it may also be read as an adoption of the "in the presence" exception to the warrant requirement known to the common law. The court's opinion is no more than a paragraph long and merely upholds the instruction of a lower court that a statute allowing warrantless seizure of liquors was constitutional. *Jones*, 72 Mass. at 439. The opinion also upheld the use of an illustration by the trial judge that suggested the seizure was similar to a seizure of stolen goods observed *in the presence* of an officer. *See id*. at 437.

A second case may also be read to mean that the government may search and seize without warrant, but might also be read as enunciating the "breach of peace" exception to the warrant requirement. *Mayo v. Wilson*, 1 N.H. 53 (1817) involved a town tythingman who seized a wagon and horses of an apparent teamster engaged in commercial delivery on the Sabbath, in violation of a New Hampshire statute. Amar quotes *Mayo's* pronouncement that the

"warrant requirement" of the common law and find that their given facts fit within a common law exception.[63] Similarly, the cases Amar cites that interpret various Fourth-Amendment equivalents of state constitutions by no means indicate that Founding-era law enforcers could freely search and seize without warrant wherever it was "reasonable" to do so. [64]

WARRANTS A FLOOR, NOT A CEILING

Under Founding-era common law, warrants were often considered as much a constitutional floor as a ceiling. Warrants did provide a defense for constables in most trespass suits, but were *not good enough* to immunize officials from liability for *some* unreasonable searches or seizures.[65] The most often-cited English case known to the Framers who drafted the Fourth Amendment involved English constabulary who had acted pursuant to a search warrant but were nonetheless found civilly liable for stiff (punitive, actually) damages.[66]

For more than 150 years, it was considered *per se* unconstitutional for law enforcers to search and seize certain categories of objects, such as personal diaries or private papers, *even with perfectly valid warrants*.[67] Additionally, Fourth Amendment jurisprudence prohibited the government from seizing as evidence any personal property which was not directly involved in crime, *even with a valid warrant*.[68] The rationale for this "mere evidence" rule was that the interests of property owners were superior to those of the state and could not be overridden by mere indirect evidentiary justifications.[69] This rule, like many other obstacles to police search

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New Hampshire Fourth-Amendment equivalent "does not seem intended to restrain the legislature ..." But elsewhere in the opinion, the New Hampshire Supreme Court stated that an arrest *required* a "warrant in law" -- either a magistrate's warrant, or excusal by the commission of a felony or breach of peace. *Mayo*, 1 N.H. at 56. "[B]ut if the affray be over, there *must be an express warrant." Id*. (emphasis added). Not much support for Amar's thesis there.

Mayo was decided only fourteen years after the dawn of judicial review in *Marbury v. Madison*, *5* U.S. 137 (1803), during an era when the constitutional interpretations of legislatures were thought to have equal weight to the interpretations of the judiciary. *Cf*. HENRY J. ABRAHAM, THE JUDICIAL PROCESS 335-40 (7th ed. 1998) (describing the slow advent of the concept of judicial review). Indeed, the first act of a state legislature to be declared unconstitutional came only seven years earlier, *see* Fletcher v. Peck, 10 U.S. 87 (1810), and the first state court decision invalidated by the Supreme Court had come only one year earlier. *See* Martin v. Hunter's Lessee, 14 U.S. 304 (1816). The very heart of the *Mayo* decision that Amar relies on (the proposition that state legislatures have concurrent power of constitutional review with the judiciary) was so thoroughly discredited soon afterward that Amar's extrapolation that Founding era courts did not require warrants seems exceedingly far-fetched.

As judicial review gathered sanction, the doctrine apparently enunciated in *Mayo* became increasingly discredited. *See* Ex Parte Rhodes, 79 So. 462 (Ala. 1918) (saying "[t]here is not to be found a single authority, decision, or textbook, in the library of this court, that sanctions the doctrine that the legislature, a municipality, or Congress can determine what is a 'reasonable' arrest").

[63] Amar cites six cases (all referred to in *United States v. Watson*, 423 U.S. 411 (1976)), as standing for the proposition that state Fourth Amendment equivalents did not presume a warrant requirement. AMAR, *supra* note 287, at 5 n. l1. The first case, *State v. Brown*, 5 Del. (5 Harr.) 505 (Ct. Gen. Sess. 1853), is difficult to reconcile with Amar's thesis that antebellum courts recognized no warrant requirement. *Brown* upheld a *criminal* verdict against a night watchman who entered a residence in pursuit of a fleeing chicken thief and instead falsely arrested -- without warrant -- the proprietor. The second case cited by Amar, Johnson v. State, 30 Ga. 426 (1860), simply upheld a guilty verdict against a man who shot a policeman during a warrantless arrest for being an accomplice to a felony. The Georgia Supreme Court repeated the common law exception allowing that an officer may arrest felons without warrant. The third case, Baltimore & O. R.R. Co. v. Cain, 81 Md. 87, 31 A. 801 (1895), merely reversed a civil jury verdict for an arrestee on grounds that the appellant railroad company was entitled to a jury instruction allowing for a breach-of-peace exception to the warrant requirement. The fourth case, *Reuck v. McGregor*, 32 N.J.L. 70 (Sup. Ct. 1866), reversed a civil verdict on grounds of excessive damages -- while *upholding civil liability* for causing warrantless arrest of an apparently wrongly-accused thief. *Holley v. Mix*, 3 Wend. 350 (N.Y. Sup. Ct. 1829), Amar's fifth case, offers little support for Amar's thesis. *Holley* upheld a civil judgment against a private person and an officer who arrested a suspect pursuant to an invalid warrant. Finally, *Wade v. Chaffee*, 8 R.I. 224 (1865), simply held that a constable was not bound to procure a warrant where he had probable cause to believe an arrestee was guilty of a felony, even though no fear of escape was present.

[64] Amar cites four cases as standing for the proposition that state courts interpreted their state constitutional predecessors of the Fourth Amendment's text as requiring no warrants for searches or seizures. AMAR, supra note 287, at 5 n.10. *Jones v. Root*, 72 Mass. (6 Gray) 435 (1856), upheld a Massachusetts "no-warrant" statute in a one-paragraph opinion explained *supra* note 306. In *Rohan v. Sawin*, 59 Mass. (5 Cush.) 281 (1850), Massachusetts' highest court found that a warrantless arrest qualified under the "felon" exception to the warrant requirement. *Mayo v. Wilson*, 1 N.H. 53 (1817), is described *supra* note 306.

Finally, the 1814 Pennsylvania case of *Wakely v. Hart*, *6* Binn. 316 (Pa. 1814), resolved a civil suit brought by an accused thief (Wakely) against his arresters upon grounds that the arrest had been warrantless and Wakely had been guilty only of a misdemeanor. The Pennsylvania Supreme Court upheld a jury's verdict for the arresters, upon the rather-fudged finding that Wakely had fled from the charges against him and had been guilty of at least "an offence which approaches very near to a felony," if not an actual felony. *Wakely*, 6 Binn. at 319-20.

[65] *See* Eric Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 VA. L. REV. 869, 874 (1985) (saying the search and seizure clause of the Fourth Amendment "embodies requirements independent of the warrant clause" but which were more strict at Founding than warrant requirement).

[66] *See* Wilkes v. Wood, 19 Howell's State Trials 1153, 1167 (c.p. 1763) (stating "a jury have it in their power to give damages for more than the injury received").

[67] *See* Schnapper, *supra* note 308, at 917 (referring to *Boyd v. United States*, 116 U.S. 616 (1886)). *Boyd's* proposition was slowly watered down and distinguished until the case of *Andresen v. Maryland* finished it off. Andresen v. Maryland, 427 U.S. 463 (1976) (holding that business documents evidencing fraudulent real estate dealings could be constitutionally seized by warrant).

[68] *See* Gouled v. United States, 255 U.S. 298 (1921) (pronouncing "mere evidence" rule, which stood for more than 45 years).

[69] *See* Schnapper, *supra* note 308, at 923-29.

and seizure power, was discarded in the second half of the twentieth century by a Supreme Court much less respectful of property rights than its predecessors.[70]

PRIVATE PERSONS AND THE FOURTH AMENDMENT

Under the Founders' Model, a private person like Josiah Butler, who lost twenty pounds of good pork under suspicious circumstances in 1787, could approach a justice of the peace and obtain a warrant to search the property of the suspected thief for the lost meat.[71] Private individuals applied for many or most of the warrants in the Founders' era and even conducted many of the arrests.[72] Even where sworn constables executed warrants, private persons often assisted them.[73] To avoid liability, however, searchers needed to secure a warrant before acting.[74] False arrest was subject to strict liability.[75]

The Founders contemplated the enforcement of the common law to be a duty of private law enforcement, and assumed that private law enforcers would represent their interests with private means. However, the Founders viewed private individuals executing law enforcement duties as "public authority" and thus intended for the Fourth and Fifth Amendments to apply to such individuals when acting in their law enforcement capacities.[76] Consequently, the Supreme Court's 1921 decision in *Burdeau v. McDowell*[77] -- often cited for the proposition that the Fourth Amendment applies only to government agents -- was almost certainly either wrongly decided or wrongly interpreted by later courts.[78]

Some of the earliest English interpretations of the freedom from search and seizure held the protection applicable to private citizens as much as or more so than government agents.[79] Massachusetts and Vermont were apparently the first states to require that search and arrest warrants be executed by sworn officers.[80] New Hampshire adopted the same rule in 1826, more than a generation after the Bill of Rights was ratified.[81] It is likely that some states allowed private persons to execute search warrants well into the nineteenth century.

Because many Founding-era arrests and searches were executed by private persons, and early constables *needed* the assistance of private persons to do their jobs, the Fourth Amendment was almost certainly intended for application to private individuals. *Burdeau* cited no previous authority for its proposition in 1921, and early American cases demonstrate an original intent that the Fourth Amendment apply to every searcher acting under

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[70] *See* Warden v. Hayden, 387 U.S. 294 (1967) (holding that police can obtain even indirect evidence by use of search warrants). *Hayden* overturned at least five previous Supreme Court decisions by declaring that "privacy" rather than property was the "principle object of the Fourth Amendment." *Id*. at 296 n.l, 304

[71] *See* Frisbie v. Butler, 1 Kirby 213 (Conn. 1787).

[72] *See, e.g*., Stevens v. Fassett, 27 Me. 266 (1847) (involving defendant who had obtained two arrest warrants against plaintiff without officer assistance); State v. McAllister, 25 Me. 490 (1845) (involving crime victim who swore out warrant affidavit against alleged assailant); State v. J.H., 1 Tyl. 444 (Vt. 1802) (quashing criminal charge gained by unsworn complaint of private individual).

[73] *See* Humes v. Taber, 1 RI. 464 (1850) (involving search by sheriff accompanied by private persons).

[74] *See* Kimball v. Munson, 2 Kirby (Conn.) 3 (1786) (upholding civil damages against two men who arrested suspect without warrant to obtain reward).

[75] *See* Wasserstrom, *supra* note 70, at 289.

[76] The Framers regarded private persons acting under color of "public authority" to be subject to constitutional constraints like the proscription against double jeopardy..*See* Stevens v. Fassett, 27 Me. 266 (1847) (holding private prosecutors were prohibited from twice putting a defendant in jeopardy for the same offense).

[77] 256 U.S. 465 (1921).

[78] *Burdeau v. McDowell* involved a corporate official (McDowell) who was fired by his employer for financial malfeasance at work. After McDowell's termination, company representatives raided his office, opened his safe, and rifled through his papers. *See id*. at 473. Upon finding incriminating evidence against McDowell, company representatives alerted the United States Justice Department and turned over certain papers to the government. A district judge ordered the stolen papers returned to McDowell before they could be seen by a grand jury. The Supreme Court reversed, stating the Fourth Amendment "was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies." *Id*. at 475.

[79] *See* Cloud, *supra* note 297, at 1716 (discussing transition during early 1700s from concept that 'a man's house is his castle (except against the government)' to the legal adage that 'a man's house is his castle (especially against the government)').

[80] Massachusetts and Vermont apparently required that only public officers execute search warrants in the early nineteenth century. *See* Commonwealth v. Foster, 1 Mass. 488 (1805) (holding justice of peace had no authority to issue a warrant to a private person to arrest a criminal suspect); State v. J.H., 1 Tyl. 444 (Vt. 1802).

[81] *See* Bissell v. Bissell, 3 N.H. 520 (1826).

color of law.[82] On the open seas, most enforcement of prize and piracy laws was done by "privateers" acting for their own gain but who were held accountable in court for their misconduct.[83]

Later courts have taken this holding to mean that "a wrongful search or seizure conducted by a private party does not violate the Fourth Amendment." Walter v. U.S. 447 U.S. 649, 656 (1979). *See also* United States v. Jacobsen, 466 U.S. 109, 113 (1984) (saying "This Court has also consistently construed this protection as proscribing only governmental action; it is wholly inapplicable to a private individual not acting as an agent of the Government or with the participation or knowledge of any government official.").

As explained in Part I, early constables had powers no greater than those of other individuals, so they needed warrants before engaging in law enforcement activities beyond any citizen's authority. Like you or I, a constable would be thought outside the bounds of good etiquette (and well outside the law) were he to conduct an unconsented search of another's person, property or effects, and should -- very reasonably -- expect to be jailed, physically repulsed, or sued for such conduct.

A private person's only defense was the absolute correctness of his allegations. A person was liable if, for example, his complaint was too vague as to the address to be searched,[84] he misspelled the name of the accused in his complaint,[85] or he sought the execution of a warrant naming a "John Doe" as a target.[86]

This was the constitutional model secured to America by the Framers. The idea of police having special powers was only a seedling, alien to the scheme of ordered liberty and limited government created by the Constitution. Eventually, police interceded between private individuals and magistrates altogether, and today it is virtually unheard of for a private person to seek a search warrant from a magistrate.

Freedom from search and seizure has been retracting in favor of police ever since the ink was dry on the Bill of Rights. The Framers lived under a common law rule that required warrantless arrests be made only for felonies where no warrant could be immediately obtained.[87] By the early to mid-1800s, the rule had changed to allow warrantless arrests for all felonies regardless of whether a warrant could be obtained.[88] Early American courts also apparently allowed warrantless arrests for misdemeanor breaches of peace committed in the arrestor's presence. Toward the end of the nineteenth century, most state courts had changed to allow warrantless arrest for *all crimes* of any kind committed in an officer's presence, as well as for all felonies committed either within or without an officer's presence regardless of whether a warrant can be obtained.[89]

By the mid-1900s, arrest had become the almost-exclusive province of paid police, and their power to arrest opened even wider. A trend toward allowing police to arrest without warrant for all crimes committed even *outside* their presence has recently developed,[90] with little foreseeable court-imposed impediment.[91] Almost

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82 See Kimball v. Munson, which upheld civil damages against two men who arrested an alleged horse thief without warrant in response to a constable's reward offer. 2 Kirby 3 (Conn. 1786). Kimball suggested the two private persons would have been protected from liability had they secured a warrant soon after their arrest of the suspect. *See also* Frisbie v. Butler, 1 Kirby 213 (Conn. 1787) (applying specificity requirement to search warrant issued to private person).

83 *See* Del Col v. Arnold, 3 U.S. (3 Dall.) 333 (1796) (holding that "privateers" on the open seas who capture illegal vessels under the auspices of government authority act at their own peril and may be held liable for all damages to the captured vessels -- even where the captured vessels are engaged in crimes on the high seas).

84 *See* Humes v. Taber, 1 R.I. 464 (1850)

85 *See* Melvin v. Fisher, 8 N.H. 406, 407 (1836) (saying "he who causes another to be arrested by a wrong name is a trespasser, even if the process was intended to be against the person actually arrested).

86 *See* Holley v. Mix, 3 Wend. 350 (N.Y. 1829).

87 *See* Kimball v. Munson, 2 Kirby 3 (Conn. 1786) (faulting two arrestors for failing to obtain a proper warrant immediately after their warrantless arrest of a suspected felon); Knot v. Gay, 1 Root 66, 67 (Conn. 1774) (stating warrantless arrest is permitted "where an highhanded offense had been committed, and an immediate arrest became necessary, to prevent an escape").

88 *See* Wade v. Chaffee, 8 R.I. 224 (R.I. 1865) (holding a constable is not bound to procure a warrant before arresting a felon even though there may be no reason to fear the escape of the felon).

89 *See, e.g.*, Oleson v. Pincock, 251 P. 23, 25 (Utah 1926); Burroughs v. Eastman, 59 N.W. 817 (Mich. 1894); Minnesota v. Cantieny, 24 N.W. 458 (Minn. 1885); William A. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment*, 58 Mo. L. REV. 790-91 (1993).

90 *See* Schroeder, *supra* note 101, at 784 n.14-16 (listing eight jurisdictions allowing such arrests).

91 *But see id*. at 791 n.39 (listing four cases that have held warrantless arrests for crimes committed outside an officer's presence unconstitutional).

every American jurisdiction has legislated for the erosion of common law limitations with regard to domestic violence arrests and arrests for other high profile misdemeanors.[92]

Despite the Fourth Amendment, the Supreme Court has imposed almost no limits on warrantless arrest at all. Only forcibly entering a residence without warrant to arrest someone inside has been found to violate the Fourth Amendment.[93] Outside the home, modern police have been essentially licensed by the Court to arrest almost anyone at any time so long as probable cause exists.[94] The Supreme Court effectively buried the original purpose of warrantless arrest entirely in 1985, declaring that "[r]estraining police action until after probable cause is obtained... might... enable the suspect to flee in the interim."[95]

Long forgotten is the fact that common law allowance for warrantless arrest was precipitated solely on an *emergency* rationale and allowed only to protect the public from immediate danger.[96]

The rationale for the felon exception to the warrant requirement in 1791, for example, was that a felony was any crime punishable by death, generally thought to be limited to only a handful of serious crimes.[97] Felons were considered "outlaws at war with society,"[98] and their apprehension without warrant qualified as one of the "exceptions justified by absolute necessity."[99] By the late twentieth century, however, many crimes the Framers would have considered misdemeanors or no crime at all had been declared felonies and the rationale for immediate community action to apprehend "felons" had changed greatly.[100] The courts, however, have been slow to react to this far-reaching change.[101] In any case, the vast majority of arrests (seventy to eighty percent) are for misdemeanors,[102] which would have been proscribed without warrant under the Framers' law.

ORIGINALISTS CALL FOR CIVIL DAMAGES

The writings of most modern "originalist" scholars promote civil suits against police departments, instead of exclusion of evidence, as a remedy for police misconduct. Professor Amar, for example, champions a return to civil litigation, but with, somehow, a better return than such actions currently bring.[103] He invents a fantastically implausible cause of action where "government should generally not prevail."[104] He bases this idea on actual cases from the nineteenth century where people prevailed against constables and sheriffs in relatively routine circumstances, often with heavy damage awards.[105]

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[92] *See id*. at 779-81 n.13 (providing two pages of statutory provisions allowing warrantless arrest for domestic violence and other specific misdemeanors).

[93] *See* Welsh v. Wisconsin, 466 U.S. 740 (1984) (requiring warrant to forcibly enter a home to arrest someone inside for a misdemeanor traffic offense); Payton v. New York, 445 U.S. 573, 589 (1980) (requiring warrant to forcibly enter a home to arrest a suspected felon unless exigent circumstances prevail).

[94] *See* United States v. Watson, 423 U.S. 411, 412 (1976). *Watson* represents one of the starkest redrawings of search and seizure law ever pronounced by the Supreme Court. Essentially, the Court declared that officers may arrest without warrant wherever they have probable cause. Justice Thurgood Marshall released a blistering dissent accusing the majority of betraying the "the only clear lesson of history" that the common law "considered the arrest warrant far more important than today's decision leaves it." *Id*. at 442 (Marshall, J., dissenting).

[95] United States v. Hensley, 469 U.S. 221, 229 (1985).

[96] *See* Conner v. Commonwealth, 3 Bin. 38, 42-43 (Pa. 1810) (insisting that public safety alone justifies exceptions to the warrant requirement).

[97] *See* Tennessee v. Garner, 471 U.S. 1, 14 (1985). The number of crimes considered felonies varied greatly according to location and period. Plymouth Colony knew only seven in 1636: treason, willful murder, willful arson, conversing with the devil, rape, adultery, and sodomy. *See* Julius Goebel, Jr., *King's Law and Local Custom in Seventeenth Century New England*, 31 COLUM. L. REV. 416, n.43 (1931). In general, the American colonists considered far fewer crimes to be felonies than did the people of England. *C.f*. Thorp L. Wolford, *The Laws and Liberties of 1648, reprinted in* ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW 147, 182 (David H. Flaherty, ed. 1969) (saying there were far more felonies in English than in Massachusetts law).

[98] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 253 (2d ed. 1995).

[99] United States v. Rabinowitz, 339 U.S. 56, 70 (1950) (Frankfurter, J. dissenting).

[100] *See* United States v. Watson, 423 U.S. 411, 439-440 (1976).

[101] *But see id*. at 438 (Marshall, J., dissenting) ("[T]he fact is that a felony at common law and a felony today bear only slight resemblance, with the result that the relevance of the common-law rule of arrest to the modern interpretation of our Constitution is minimal").

[102] *See* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 20 (2d ed. 1992).

[103] *See* AMAR, *supra* note 287, at 44. The remedial suggestions proposed by Amar (strict liability tort remedies, class actions, attorneys' fees, statutorily-generated punitive damages, and injunctive relief) are, if anything, less loyal to originalist ideals than the warrant requirement he criticizes. *See* Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 828 (1994) (suggesting Amar's departures from the Framer's intent regarding remedies belie his proclaimed adherence to the Framers' "vision" regarding warrants, probable cause and the exclusionary rule).

[104] *See* AMAR, *supra* note 287, at 44 n. 226 (saying the "government should generally not prevail" in Amar's type of ideal tort actions).

[105] *See* AMAR *supra* note 287, at 12.

These cases actually occurred -- but in an age before police took over American law enforcement. Civil damages really were a better remedy when many or most searches were sought -- and sometimes conducted -- by private persons who stood strictly liable in court if their allegations proved false or their conduct proved overzealous.[106] American law provided recovery for every false arrest. If it was not the constable who executed the warrant, the private person, who lodged the original insufficient complaint, was liable.[107]

Under Founding-era common law, liability for officers was in many respects *higher* than for private persons. Sheriffs and deputies could be held liable for failing to arrest debtors for collection of debts[108] or to serve other process,[109] for allowing an imprisoned debtor to escape,[110] for failing to keep entrusted goods secure[111] or to deliver goods in custody at a proper time,[112] or for failing to keep faithful accounting and custody of property.[113] Sheriffs were also obligated to return writs within a specific time period, at pain of civil damages.[114] They were liable to debtors whose property was sold at sheriffs sales if proper advertisement procedures were not followed[115] and for negligently allowing other creditors to obtain priority interests on attached property.[116]

Law enforcers were liable for false imprisonment, even where they acted with court permission, if procedures were improper.[117] A deputy was liable for damages to an arrestee whom he arrested outside his jurisdiction.[118] Sheriffs were even liable if their deputies executed civil process in a rude and insolent manner.[119] When executing writs, sheriffs were liable for any unnecessary violence against innocent third persons who obstructed them.[120]

The Founders' law knew no "good faith" defense for law enforcers. Sheriffs and justices who executed arrests pursuant to invalid warrants were considered trespassers (as were any judges who granted invalid warrants). Any person was justified in resisting, or even battering, such officers.[121] Justices of the peace could be held liable for ordering imprisonment without taking proper steps.[122]

Any party who sued out or issued process did so at his peril and was civilly responsible for unlawful writs (even if the executing officer acted in good faith).[123]

Nor did state authority provide the umbrella of indemnification that now protects public officers. Sheriffs of the nineteenth century often sought protection from liability by obtaining bonds from private sureties.[124] Their bonds were used to satisfy civil judgments against them while in office.[125] If the amount of their bonds was

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[106] *See* Wasserstrom, *supra* note 70, at 289 (saying false arrest was subject to strict liability in colonial times).

[107] *See* Holley v. Mix, 3 Wend. 350, 354 (N.Y. 1829) (stating if any person charge another with felony, the charge will justify an officer taking the suspect in custody, but the person making the charge will be liable for false arrest if no felony was committed).

[108] *See* Clarke v. Little, 1 Smith 100, 101 (N.H. 1805) (addressing liabilities of deputy to debtor's creditors).

[109] Hall v. Brooks 8 Vt. 485 (1836) (holding constable liable for refusing to serve court process).

[110] *See* Shewel v. Fell, 3 Yeates 17, 22 (Pa. 1800) (holding sheriff liable to prisoner's creditor for entire debt of prison escapee).

[111] *See* Chapman v. Bellows, 1 Smith 127 (N.H. 1805).

[112] *See* Morse v. Betton, 2 N.H. 184, 185 (1820).

[113] *See* Lamb v. Day, 8 Vt. 407 (1836) (holding constable liable for allowing mare in his custody to be used); Bissell v. Huntington, 2 N.H. 142. 146-47 (1819).

[114] *See* Webster v. Quimby, 8 N.H. 382, 386 (1836).

[115] *See* Administrator of Janes v. Martin, 7 Vt. 92 (Vt. 1835).

[116] *See* Kittredge v. Bellows, 7 N.H. 399 (1835).

[117] *See* Herrick v. Manly, 1 Cai. R. 253 (N.Y. Sup. Ct. 1803).

[118] *See* Bromley v. Hutchins, 8 Vt. 194, 196 (Vt. 1836).

[119] *See* Hazard v. Israel, 1 Binn. 240 (Pa. 1808).

[120] *See* Fullerton v. Mack, 2 Aik. 415 (1828).

[121] *See* Rex v. Gay, Quincy, Mass. Rep. 1761-1772 (1763) (acquitting defendant who battered sheriff when sheriff attempted arrest with warrant irregular on its face).

[122] *See* Percival v. Jones, 2 Johns. Cas. 49, 51 (N.Y. 1800) (holding justice of peace liable for issuing arrest execution against person privileged from imprisonment).

[123] See id.

[124] *See* Preston v. Yates, 24 N.Y. 534 (1881) (involving sheriff who obtained indemnity bond from private party).

[125] *See* Grinnell v. Phillips, 1 Mass. 530, 537 (1805) (involving Massachusetts statute requiring officers to be bonded).

insufficient to satisfy judgments, sheriffs were liable personally.[126] It was not uncommon for a sheriff to find himself in jail as a debtor for failing to satisfy judgments against him.[127] Even punitive damages against officers -- long disfavored by modern courts with regard to municipal liability -- were deemed proper and normal under the law of the Framers.[128]

Unlike the early constables, uniformed police officers were generally introduced upon the American landscape by their oaths alone and without bonds. Their municipal employers (hence, the taxpayers) were on the hook for their civil liabilities. Although courts tended to treat police identically to bonded officials,[129] their susceptibility to civil redress was much lower. This change in the law of policing had the effect of depriving Americans of remedies for Fourth Amendment (and other) violations.[130] The evil that now pervades criminal justice -- swarms of officers unaccountable in court either criminally or civilly -- was the very evil that the Founders sought to remedy in the late eighteenth century.[131]

DEVELOPMENT OF IMMUNITIES

But immunities follow duties, and duties placed upon police by lawmakers have exploded since 1791.[132] Immunities grew slowly, beginning with a slight deference to officer conduct so long as there was no bad faith, corruption, malice or "misbehavior,"[133] and ending with broad qualified immunity.[134] When the practice of professional policing arrived from England upon American shores (for the second time, actually, if we consider modern police to be akin to the "standing armies" of the Founders' generation), cases began to enunciate a general deference to police conduct, permitting that the actions of officers in carrying out their duties "not to be harshly judged."[135] Appellate courts began to reverse jury verdicts against officers upon new rules of law granting privileges unknown to private individuals.[136]

THE LOSS OF PROBABLE CAUSE, AND THE ONSET OF PROBABLE SUSPICION

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[126] *See* Tilley v. Cottrell, 43 A. 369 (R.I. 1899) (holding constable liable for damages against him for which his indemnity bond did not cover).

[127] *C.f.* White v. French, 81 Mass. 339 (1860) (involving officer arrested when his obligor failed to pay for officer's liability); Treasurer of the State v. Holmes, 2 Aik. 48 (Vt. 1826) (involving sheriff jailed for debt in Franklin County, Vermont).

[128] At the time of Founding, juries remedied improper searches and seizures by levying heavy damages from officers who conducted them. *See* AMAR, *supra* note 287, at 12. The ratification debates made it clear that no method of curbing "the insolence of office" worked as well as juries giving "ruinous damages whenever an officer has deviated from the rigid letter of the law, or been guilty of any unnecessary act of insolence or oppression." Maryland Farmer, *Essays by a Farmer* (1), *reprinted in* THE COMPLETE ANTI-FEDERALIST 5, 14 (Herbert J. Storing ed., 1981). Punitive damages were apparently common in search and seizure trespass cases, and provided "an invaluable maxim" for securing proper and reasonable conduct by public officers. Today, however, municipalities never have to pay out punitive damages. *See* Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981).

[129] *See* Johnson v. Georgia, 30 Ga. 426 (1860) (holding that a policeman is as much under protection of the law as any public officer).

[130] Many Founding-Era constitutions contained statements declaring a right of remedy for every person. *See, e.g.*, DEL. CONST. of 1776, § 12 (providing that "every freeman for every injury done him in his goods, lands or person, by any other person, ought to have remedy by the course of the law of the land"); MASS. CONST. of 1780, art. I, § XI (providing "Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs"); N.H. CONST. of 1784, part I, § XIV (stating "Every subject of this state is entitled to a certain remedy"). Some early proposals for the national Bill of Rights also included such remedy provisions. *See, e.g.*, Proposed Amended Federal Constitution, April 30, 1788, *reprinted in* THE ORIGIN OF THE SECOND AMENDMENT: A DOCUMENTARY HISTORY OF THE BILL OF RIGHTS 1787-1792 790, 791 (David E. Young, ed.) (2d ed. 1995) (providing that "every individual... ought to find a certain remedy against all injuries, or wrongs").

[131] *C.f.* THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776) ("He has erected a multitude of New Offices, and sent hither swarms of Officers to harass our people, and eat out their substance").

[132] A small history lesson regarding the early development of officer immunity is provided in *Seaman v. Patten*, 2 Cai. R. 312 (N.Y. Sup. Ct. 1805). Early tax and custom enforcement agents were unsworn volunteers, having "generally received a portion of the spoil." *Id.* at 315. Corresponding to this system, such agents acted at their own peril and were civilly liable for their every impropriety. This "hard rule" of high officer liability was still in force a generation after the Constitution was ratified, although courts began to hold officers less accountable for their mistakes when officers became sworn to perform certain ever-more-difficult duties. *See id.*

[133] *See Seaman*, 2 Cai. R. at 317; Bissell v. Huntington, 2 N.H. 142, 147 (1819) (declaring that sheriffs good faith acts should receive "most favourable construction."). "[N]either the court, the bar, nor the public should favor prosecutions against them for petty mistakes." *Id.* at 147.

[134] *See* Diana Hassel, *Living a Lie; The Cost of Qualified Immunity*, 64 Mo. L. REV. 123, 151 n. 122.

[135] State v. Dunning, 98 S.E. 530, 531 (N.C. 1919).

[136] *See, e.g.*, Stinnett v. Commonwealth, 55 F.2d 644, 647 (4th Cir. 1932) (reversing jury verdict against officer on grounds that "courts should not lay down rules which will make it so dangerous for officers to perform their duties that they will shrink and hesitate from action"); State v. Dunning, 98 S.E. 530 (N.C. 1919) (reversing criminal verdict against officer who shot approaching man on grounds that the officer enjoyed a privilege to use deadly force instead of retreating).

Probable cause for the issuance of warrants has also become less strict.[137] The Supreme Court regarded hearsay evidence as insufficient to constitute probable cause for seventeen years in the first half of the twentieth century,[138] but has since given police free reign to construct probable cause in whatever way they deem proper. Instead of *probability* that a crime has been committed, the courts now require only some possibility, a relaxed standard that "robs [probable cause] of virtually all operative significance."[139] This watered-down "probable cause" for the issuance of ex parte warrants would have shocked the Founders.[140]

At common law, one could sue and recover damages from a private person who swore out a false or misleading search warrant affidavit.[141] In contrast, few modern officers will ever have to account for lies on warrant applications so long as they couch their "probable cause" in unprovables. "Anonymous citizen informants,"[142] material omissions and misrepresentations,[143] irrelevant or prejudicial information,[144] and even outright falsities are now common fixtures of police-written search warrant applications.[145] For years, Boston police simply made up imaginary informants to justify searches and seizures.[146] Police themselves refer to the phenomenon as "testilying" -- an aspect of normal police work regarded as "an open secret" among principle players of the criminal justice system.[147]

POLICE AND THE "AUTOMOBILE EXCEPTION"

The courts have been particularly unkind to Fourth Amendment protections in the context of motor vehicle travel. Since the 1920s, Fourth Amendment jurisprudence has allowed for a gaping and ever-widening exception to the warrant requirement with regard to the nation's roadways.[148] Today, police force untold millions of

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[137] The Supreme Court's recent jurisprudence has offered a more relaxed definition of "probable cause" as a "fluid concept" of "suspicion" rather than a fixed standard of probability. *See* Wasserstrom, *supra* note 70, at 337 (analyzing Justice Rehnquist's opinion in *Illinois v. Gates).*

[138] *See* Grau v. United States, 287 U.S. 124, 128 (1932), *overturned by* Brinegar v. United States, 338 U.S. 160 (1949).

[139] Wasserstrom, *supra* note 70, at 274.

[140] *See* AMAR, *supra* note 287, at 20. Judges of the Founding era appear to have been somewhat more reluctant than modern judges to issue search and seizure warrants. For an early example of judicial scrutiny of warrant applications, see *United States v. Lawrence*, 3 U.S. 42 (1795) (upholding refusal of district judge to issue warrant for arrest of French deserter in the face of what government claimed was probable cause). Today, search warrant applications are rarely denied. The "secret wiretap court" established by Congress to process wiretap applications in 1978, has rejected only one wiretap request in its 22-year life. *See* Richard Willing, *Wiretaps sought in record numbers*, USA TODAY, June 5, 2000, at A1 (saying the court approved 13,600 wiretap requests in the same period).

[141] Private persons were liable if, for example, their complaint was too vague as to the address to be searched, *see* Humes v. Taber, 1 R.I. 464 (1850); misspelled the name of the accused, *see* Melvin v. Fisher, 8 N.H. 406, 407 (1836) (saying "he who causes another to be arrested by a wrong name is a trespasser, even if the process was intended to be against the person actually arrested); or called for the execution of a warrant naming a "John Doe" as a target, *see* Holley v. Mix, 3 Wend. 350 (N.Y. 1829).

[142] *See* Hervey v. Estes, 65 F.3d 784 (9th Cir. 1995) (involving challenge to search warrant wrongfully obtained through false references to anonymous sources).

[143] *See* Hummel-Jones v. Strope, 25 F.3d 647 (8th Cir. 1994) (involving police officer's failure to disclose to judge that an undercover deputy sheriff was the "confidential informant" referred to in a search warrant application).

[144] *See* David B. Kopel & Paul H. Blackman, *The Unwarranted Warrant: The Waco Search Warrant and the Decline of the Fourth Amendment*, 18 HAMLINE J. PUB. L & POL'Y 1, 13 (saying Waco warrant was filled with statements irrelevant to Koresh's alleged firearm violations).

[145] *See id*. at 21 (noting ATF agent's false claims that various spare parts were machine gun conversion kits).

[146] *See* ALAN M. DERSHOWITZ, THE ABUSE EXCUSE AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY 235 (1994).

[147] *Id*. at 233.

[148] The 1920's saw an explosion of police privilege to oversee two separate -- but often interrelated -- elements of American life: Prohibition and the automobile. *See* FRIEDMAN, *supra* note58, at 300 (saying search and seizure became a particularly salient issue during Prohibition). In 1925, the Supreme Court, by split decision, released an opinion that would grow within the next 75 years into an immense expansion of police prerogatives while at the same time representing an enormous loss of personal security for American automobile travelers. *Carroll v. United States* upheld a warrantless search of an automobile for liquor as valid under the infamous Volstad Act, enacted to breathe life into the Eighteenth Amendment. 267 U.S. 137 (1925). The Carroll opinion led lower courts to more than one interpretation, *see* Francis H. Bohlen & Harry Shulman, *Arrest With and Without a Warrant*, 75 U. Pa. L. Rev. 485, 488-89 (1927) , but slowly became recognized as a pronouncement of an "automobile exception" to the warrant requirement. *See* United States v. Ross, 456 U.S. 798, 822 (1982).

Two decades after *Carroll*, Justice Robert H. Jackson tried in earnest to force the genie back into the bottle by narrowing the automobile exception to cases of serious crimes, but a 7-2 majority outnumbered him. *See* Brinegar v. United States, 338 U.S. 160, 180-81 (1949) (Jackson, J., dissenting). Since *Brinegar*, the "automobile exception" has been a fixture of Fourth Amendment jurisprudence, and has greatly expanded. The automobile exception now accounts for the broadest umbrella of warrant exceptions. *See, e.g.*, California v. Acevedo, 500 U.S. 565 (1991) (allowing warrantless search of containers in automobiles even without probable cause to search the vehicle as a whole). Indeed, the automobile exception has expanded so far that it has made a mockery of Fourth Amendment doctrine. As Justice Scalia pointed out in his *Acevedo* concurrence, an anomaly now exists protecting a briefcase carried on the sidewalk from warrantless search but allowing the same briefcase to be searched without warrant if taken into a car. *Acevedo* at 581 (Scalia, J., concurring).

motorists off the roads each year to be searched or scrutinized without judicial warrant of any kind.[149] Any police officer can generally find some pretext to justify a stop of any automobile.[150] In effect, road travel itself is subject to a near total level of police control,[151] a phenomenon that would have confounded the Framers, who treated seizures of wagons, horses and buggies as subject to the same constraints as seizures of other property.[152]

The courts have laid down such a malleable latticework of exceptions in favor of modern police that virtually any cop worth his mettle can adjust his explanations for a search to qualify under one exception or another. When no exception applies, police simply lie about the facts.[153] "Judges regularly choose to accept even blatantly unbelievable police testimony."[154] The practice on the streets has long been for police to follow their hunches, seek entrance at every door, and then attempt to justify searches after the fact.[155] Justice Robert Jackson observed in 1949 that many unlawful searches of homes and automobiles are never revealed to the courts or the public because the searches turn up nothing.[156]

ONE EXCEPTION: THE EXCLUSIONARY RULE?

Conventional wisdom suggests there is one important exception to the long decline of Fourth Amendment protections: the exclusionary rule. Since 1914, the Supreme Court has required the exclusion of evidence seized in violation of the Fourth Amendment from being used against a defendant in federal court.[157] In 1961, this rule was applied to the states in *Mapp v. Ohio*.[158] Shortly thereafter, the Supreme Court expanded the exclusionary rule to other protections such as the Fifth and Sixth Amendments in cases such as *Miranda v. Arizona*.[159]

Textualists and originalists have lobbed a steady stream of vitriol against the exclusionary rule for decades. No enunciation of such a rule, say these critics, can be found in the writings or statements of the Framers.[160] Moreover, say such critics, the rule places a heavy burden on the efficiency of police (but simultaneously, somehow, fails to deter them in any way), and unfairly frees a small but not insignificant percentage of "guilty" offenders.[161] So-called "conservative" legal scholars remember the Warren Court's imposition of the exclusionary rule upon the states in the 1960s as a bare-knuckled act of judicial activism[162] and argue that the Court "[took] it upon itself, *without constitutional authorization*, to police the police."[163]

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[149] Police surveillance of American roadways has brought the bar of justice far closer to most Americans than ever before. Few accounts of the sheer scale of traffic stops are available, but anecdotal evidence suggests traffic encounters with police number in the hundreds of millions annually. In North Carolina alone, more than 1.2 million traffic infractions were recorded in a single year. *See* FRIEDMAN, *supra* note 58, at 279. Of actual traffic stops, no reliable estimate can be made.

[150] *See* SKOLNICK & FYFE, *supra* note 63, at 99.

[151] In *Delaware v. Prouse*, 440 U.S. 648 (1979), the Supreme Court actually considered, but stopped short of, allowing cops to randomly stop any traveler without any particularized reason -- with one justice (Rehnquist) arguing that cops may do so. *Prouse*, 440 U.S. at 664 (Rehnquist, J., dissenting).

[152] *See* Flanders v. Herbert, 1 Smith (N.H.) 205 (1808) (finding constable who stopped a driver and horse team pursuant to an invalid writ of attachment liable for trespass). Private tort principles rather than state licensing programs governed highway travel at the time of the Framers. *See* Kennard v. Burton, 25 Me. 39 (1845).

[153] *See* David Rudovsky, *The Criminal Justice System and the Role of the Police, in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE, 242, 247 (David Kairys, ed. 1982).

[154] *Id*.

[155] Prior to the imposition of the exclusionary rule in *Mapp v. Ohio*, 367 U.S. 643 (1961), the Cincinnati police force rarely applied for search warrants. In 1958, the police obtained three warrants. In 1959 the police obtained none. *See* Bradley C. Canon, *Is the Exclusionary Rule in Failing Health?: Some New Data and a Plea Against a Precipitous Conclusion, 62* KENTUCKY L. J. 681, 709 (1974). Similarly, the use of search warrants by the New York City Police Department prior to *Mapp* was negligible, but afterward, over 5000 warrants were issued. *See* Wasserstrom, *supra* note 70, at 297 n. 203.

[156] Brinegar v. United States, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting) (expressing belief that many unlawful searches are never revealed because no evidence is recovered).

[157] *See* Weeks v. United States, 232 U.S. 383 (1914).

[158] 367 U.S. 643 (1961).

[159] 384 U.S. 436 (1966).

[160] *See* AMAR, *supra* note 287, at 21 (claiming "[s]upporters of the exclusionary rule cannot point to a single major statement from the Founding -- or even the antebellum or Reconstruction eras -- supporting Fourth Amendment exclusion of evidence in a criminal trial").

[161] *See* BURTON S. KATZ, JUSTICE OVERRULED: UNMASKING THE CRIMINAL JUSTICE SYSTEM 43 (1997) (saying in two consecutive sentences that "[t]he exclusionary rule has failed in its only goal" but that "[t]he cost... is almost unbelievably high").

[162] *See, e.g., id*. at 43 (saying *Mapp* was the "culmination of an activist judicial trend").

[163] Fred E. Inbau, *Public Safety v. Individual Civil Liberties: The Prosecutor's Stand*, 53 J. CRIM. L., CRIMINOLOGY & P. S. 85 (1962), *reprinted in* 89 J. CRIM. L. & CRIMINOLOGY 1413, 1413 (1999) (emphasis added).

The *Miranda* and *Mapp* decisions provoked an onslaught of hostility by police organizations and their sympathizers that has not subsided decades later. High-ranking authorities (not the least of which were Justices Harlan and White, who dissented in *Miranda)* wrote that such decisions put society at risk from criminals.[164] The *Miranda* rule, according to Justice White, would force "those who rely on the public authority for protection" to "engage in violent self-help with guns, knives and the help of their neighbors similarly inclined."[165] Even more outraged was the chief of police of Garland, Texas, who responded, "We might as well close up shop."[166]

Yet the dire predictions that followed the *Miranda* and *Mapp* decisions were ultimately proved false.[167] Rather than returning to what Justice White decried as "violent self-help" (as the Constitution's framers truly intended), America continued its slide into increased dependence upon police for the most mundane aspects of law enforcement. If anything, reliance upon police for personal protection has increased since the 1960s.

I propose an altogether different interpretation of *Mapp*, *Miranda*, and some of the Warren Court's other criminal procedure decisions. While I concede that this jurisprudence grossly violated certain constitutional principles (most importantly, principles of federalism), I submit that such rulings were attempts to bring constitutional law into accord with the alien threat posed by modern policing. Professional policing's arrival upon the American scene required that the Court's Bill of Rights jurisprudence splinter a dozen ways to accommodate it. Thus, *Mapp* and *Miranda* were an application of brakes to a foreign element (modern policing) that is itself *without constitutional authorization*.

In many ways, the Warren Court was the first U.S. Supreme Court to face criminal procedural questions squarely in light of the advent of professional policing. The *Miranda* and *Mapp* decisions, according to noted criminal law expert David Rudovsky, "at least implicitly acknowledged widespread police and prosecutorial abuse,"[168] a phenomenon that would have bedeviled the Framers. *Mapp's* holding was brought on more by the need to make the criminal justice system work fairly than by any other consideration.[169] The same realities gave way to the rule of *Bivens v. Six Narcotics Agents*, in 1971, in which the Court conceded that an agent acting illegally in the name of the government possesses a far greater capacity for harm than any individual trespasser exercising his own authority (as prevailed as the common form of law enforcement in 1791).[170]

Furthermore, the notion that exclusion cannot be justified under an originalist approach is not nearly as well-founded as its harshest critics suggest.[171] Critics of the rule point to the 1914 case of *Weeks v. United States*[172] as the rule's debut in Supreme Court jurisprudence.[173] However, the rule actually debuted in dicta in the 1886 case of *Boyd v. United States*.[174] Even this seemingly late date of the rule's debut can be attributed to the Court's lack of criminal appellate jurisdiction until the end of the nineteenth century.[175] The reality is that *Boyd*, the Court's

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[164] Miranda v. State of Arizona, 384 U.S. 436, 516 (1966) (Harlan, J., dissenting) (saying "the Court is taking a real risk with society's welfare in imposing its new regime on the country. The social costs of crime are too great to call the new rules anything but a hazardous experimentation.").

[165] *Id*. at 542 (White, J., dissenting).

[166] *See* J. Richard Johnston, *Plea Bargaining in Exchange for Testimony: Has* Singleton *Really Resolved the Issues?*, CRIMINAL JUSTICE, Fall 1999, at 32 (quoting from Ed Cray's biography of Earl Warren, *Chief Justice*).

[167] See id.

[168] David Rudovsky, *The Criminal Justice System and the Role of the Police, in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 246 (David Kairys, ed. 1982).

[169] Six years prior to the *Mapp* decision, the influential California Supreme Court justice Roger Traynor concluded that exclusion was necessary to level the playing field between state and citizen. "It is morally incongruous," wrote Traynor, "for the state to flout constitutional rights and at the same time demand that its citizens observe the law." People v. Cahan, 282 P.2d 905, 911 (Cal. 1955).

[170] *See* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 392 (1971).

[171] *See* Illinois v. Krull, 480 U.S. 340, 362 (1987) (O'Connor, J., dissenting) (saying the exclusionary rule is much more soundly based in history than is popularly thought).

[172] 232 U.S. 383 (1914).

[173] *See, e.g*., Katz, *supra* note 214, at 43 (saying there was no exclusionary rule for 123 years and "[t]here is a good reason for that.").

[174] 116 U.S. 616 (1886).

[175] *See* AMAR, *supra* note 287, at 146 (explaining that the Supreme Court reported very few criminal cases of any kind until the end of the 1800's).

first suggestion of the rule, represents, for practical purposes, the *very first Fourth Amendment case* decided by the Supreme Court. The exclusionary rule thus has a better pedigree than it is credited with.[176]

THE FIFTH AMENDMENT

In a previous article, I described the limitation of common law grand jury powers by Rule 6 of the Federal Rules of Criminal Procedure as an unconstitutional infringement of the Fifth Amendment Grand Jury Clause.[177] The fact that most criminal charges are now initiated not by crime victims but by armed state agents who serve the state's interests represents a drastic alteration of Founding-era criminal procedure.[178] The suppression of grand jurors' lawful powers belies the intent of the Constitution that law enforcement officials be subject to stringent oversight by the citizenry through grand juries. Modern policing, in effect, acts as a middleman between the people and the judicial branch of government that was never contemplated by the Framers.

The Fifth Amendment also prohibits the compulsion of self-incriminating testimony.[179] Various competing interpretations ebbed and flowed from this provision until 1966, when the Supreme Court held that police are required to actually tell suspects about the Fifth and Sixth Amendments' protections before interrogating them.[180] The sheer volume of criticism by police organizations of the *Miranda* ruling over the next three decades indicates the strong state interest in keeping the Constitution's protections concealed from the American public.

Modem police interrogation could scarcely have been imagined by the Framers who met in Philadelphia in the late eighteenth century. Police tactics such as falsifying physical evidence, faking identification lineups, administering fake lie detector tests and falsifying laboratory reports to obtain confessions are methods developed by the *professionals* of the twentieth century.[181] Against such methods a modern suspect stands little chance of keeping his tongue. Like the exclusionary rule and the entrapment defense, the *Miranda* rule operates as an awkward leveling device between the rights of American citizens and their now-leviathanic government.

In 2000, the Supreme Court upheld (indeed, "constitutionalized") the *Miranda* rule in the face of widespread predictions that the police-favoring Rehnquist majority would abandon the rule.[182] The Court delivered an opinion recognizing that "the routine practices of [police] interrogation [is] itself a relatively new development."[183] The *Miranda* requirement, according to Justice Rehnquist, was therefore justified as an extension of *due process* -- a far more sustainable course than one extending from the wording of the Fifth and Sixth Amendments.[184]

The *Dickerson* decision illustrates the increasingly awkward peace between the Bill of Rights and the phenomenon of modern policing. Because the Framers did not contemplate wide-scale execution of government power through paid, full-time agents, modern jurisprudence reconciling the Bill of Rights with today's police practices seems increasingly farfetched. Justices Scalia and Thomas dissented from the *Dickerson* majority with well-founded textualist objections, arguing that the majority was writing a "prophylactic, extraconstitutional Constitution" to protect the public from police.[185] Yet in light of the extraconstitutional nature of modern police, the *Dickerson* majority opinion is no less consistent with the Framers' constitutional intent.

DUE PROCESS

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[177] See Roger Roots, If It's Not a Runaway, It's Not a Real Grand Jury, 33 CREIGHTON L. REV. 821 (2000).

[178] See id.

[179] *See* U.S. CONST. amend. V (providing no person "shall be compelled in any criminal case to be a witness against himself).

[180] *See* Miranda v. Arizona, 384 U.S. 436 (1966).

[181] *See* SKOLNICK & FYFE, *supra* note 63, at 61.

[182] *See* Dickerson v. United States, 530 U.S. 428 (2000).

[183] *Id*. at 435 n. l.

[184] *See id*. at 435.

[185] *Id*. at 434 (Scalia, J., dissenting).

Due process of law depends upon assurances that a level playing field exists between rival adversaries pitted against each other.[186] The constitutional design pitted a citizen defendant against his citizen accuser before a jury of his (the defendant's) peers. The state provided only the venue, the process, and assurances that the rule of law would govern the outcome. By comparison, a modern defendant is hardly pitted in a fair fight, facing the vast treasury and human resources of the state. While the criminal justice system of the Founding era was victim-driven, and thus self-limiting, today's system is fueled by a professional army of police who measure their success in numbers of arrests and convictions.[187]

Police themselves often ignore standard concepts of fairness, official regulations, and statutes in their war on crime.[188] Police agencies have even been known to develop institutional means to circumvent court attempts to equalize the playing field.[189] In the face of unwanted publicity or controversy surrounding police brutality cases, police departments have been known to release arrest records to the media to vilify victims of police misconduct.[190]

The police model of law enforcement tilts the entire system of criminal justice in favor of the state. The police, though supposedly neutral investigators, are in reality an arm of the prosecutor's office.[191] Where police secure a crime scene for investigation, they in fact secure it *for the prosecution* alone and deny access to anyone other than the prosecution. A suspect or his defense attorneys often must obtain court permission to view the scene or search for evidence. Only such exculpatory evidence as by accident falls into the hands of the prosecution need be revealed to the suspect or defendant.[192] In cases where police misconduct is an issue, police use their monopoly over the crime scene to prepare the evidence to suit their version of events.[193]

Mapp, *Miranda* and *Dickerson* notwithstanding, the tendency of modern courts to work around police practices, rather than nullify or restrain them, poses the very threat to due process of law the Framers saw as most dangerous to liberty. Instead of viewing the system as a true adversarial contest with neutral rules, judges and lawmakers have decided that catching (nonpolice) lawbreakers is more important than maintaining a code of integrity.[194] The "sporting theory of criminal justice," wrote Justice Warren Burger, "has been experiencing a decline in our jurisprudence."[195] In its place is a system where the government views the nonpolice lawbreaker as a threat to its authority and places top priority on defeating him in court.[196]

ENTRAPMENT

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[186] *C.f*. Hayes v. Missouri, 120 U.S. 68, 70 (1887) (recognizing that impartiality in criminal cases requires that "[b]etween [the accused] and the state the scales are to be evenly held"); Unites States v. Singleton, 165 F.3d 1297, 1314 (10th Cir. 1999) (Kelly, J., dissenting) (speaking of "the policy of ensuring a level playing field between the government and defendant in a criminal case").

[187] *See* BOOZHIE, *supra* note 10, at 238.

[188] See id.

[189] G. Gordon Liddy points out in his 1980 autobiography *Will* that when the courts began requiring that the FBI provide defense attorneys with FBI reports on defendants, the FBI circumvented such orders by recording investigation notes on unofficial attachments which were never provided to the defense. *See* G. GORDON LIDDY, WILL 354 (1980).

[190] *See, e.g., id*. at 216 (reporting 1996 St. Louis case in which police released arrest record of dead person whom police had killed to damage his reputation); *id*. at 238 (reporting 1998 New York case in which police released rap sheet of their victim but withheld identity of involved officers); *id*. at 240 (reporting case in which police revealed dead suspect was on parole and used his case to call for abolishing parole).

[191] Perhaps the most extreme example of lopsided investigative resources occurred in the Oklahoma City bombing case in 1995. Defense attorneys complained that "the resources of every federal, state, and local agency in the United States" were at the government's disposal -- including a 24-hour FBI command center with 400 telephones to coordinate evidence-gathering for the prosecution. *See* Petition For Writ of Mandamus of Petitioner-Defendant, Timothy James McVeigh at 13, McVeigh v. Matsch (No. 96-CR-68-M) (10th Cir. Mar. 25, 1997). In contrast, the defense complained that "without subpoena power, without the right to take depositions, and without access to national intelligence information, the McVeigh defense can go no further." *Id*. at 4.

[192] *See* Brady v. Maryland, 373 U.S. 83 (1963) (finding that suppression of evidence favorable to defense violates due process). Prosecutors are required by the *Brady* doctrine to reveal exculpatory evidence in their possession or in the possession of the investigating agency. *See* United States v. Zuno-Arce, 44 F3d 1420 (9th Cir. 1995). Only one federal court of appeals has held that prosecutors are imputed to hold knowledge of information "readily available" to them and require such knowledge to be transferred to the defense. *See* Williams v. Whitley, 940 F2d 132 (5th Cir. 1991). However, nothing in the law mandates that police look for exculpatory evidence.

[193] *See, e.g.*, STOLEN LIVES, *supra* note 123, at 248 (reporting 1997 New York City case in which officers closed off scene of shooting by police for a half an hour after the shooting). Upon being allowed to enter the shooting scene, observers noticed that police had moved large kitchen table to the side of room to make police claim that victim (who had apparently been on other side of the table from officers) had lunged at them more plausible. *See id*.

[194] *See* BOOZHIE, *supra* note 10, at 238.

[195] Brewer v. Williams, 430 U.S. 387, 417 (1977) (Burger, J., dissenting).

[196] BOOZHIE, *supra* note 10, at 238.

Abandonment of victim-driven, mostly private prosecution has led to consequences the Framers could never have predicted and would likely never have sanctioned. Even in the most horrific examples of colonial criminal justice (and there were many), defendants were rarely if ever entrapped into criminal activity. The development of modern policing as an omnipotent power of the state, however, has necessitated the simultaneous development of complicated doctrines such as entrapment and "outrageous government conduct" as counterweights.

It was not until the late nineteenth century that any English or American case dealt with entrapment as a true defense to a criminal charge.[197] (The case law until then had been virtually devoid of police conduct issues altogether).[198] Beginning in 1880, English case law slowly became involved with phenomena such as state agents inducing suspects to sell without proper certificates,[199] persuading defendants to supply drugs to terminate pregnancy,[200] and enticing people to commit other victimless crimes. Dicta in some English cases expressed outrage that police might someday "be told to commit an offense themselves for the purpose of getting evidence against someone."[201] Police who commit such offenses, said one English court, "ought also to be convicted and punished, for the order of their superior would afford no defense."[202]

Entrapment did not arise as a defense in the United States until 1915, when the conduct of government officers for the first time brought the issue before the federal courts. In *Woo Wai v. United States*, the Ninth Circuit overturned a conviction of a defendant for illegally bringing Chinese persons into the United States upon evidence that government officers had induced the crime.[203] Growth in police numbers and "anti-crime" warfare was so rapid that in 1993, the Wyoming Supreme Court wrote that entrapment had "probably replaced ineffectiveness of defense counsel and challenged conduct of prosecutors as the most prevalent issues in current appeals."[204]

The growth of the use of entrapment by the state raises troubling questions about the nature and purposes of American government. Rather than "serving and protecting" the public, modern police often serve and protect the interests of the state against the liberties and interests of the people. A significant amount of police brutality, for example, seems aimed at mere philosophical, rather than physical, opposition. Police dominance over the civilian (rather than service to or protection of him) is the "only truly iron and inflexible rule" followed by police officers.[205] Thus, any person who defies police faces virtually certain negative repercussions, whether a ticket, a legal summons, an arrest, or a bullet.[206] One study found nearly half of all illegal force by police occurred in response to mere defiance of an officer rather than a physical threat.[207]

In the political sphere, police serve the interests of those in power *against* the rights of the public. New York police of the late nineteenth century were found by the New York legislature to have committed "almost every conceivable crime against the elective franchise," including arresting and brutalizing opposition-party voters, stuffing ballot boxes, and using "oppression, fraud, trickery [and] crime" to ensure the dominant party held the city.[208] In the twentieth century, J. Edgar Hoover's FBI agents burglarized hundreds of offices of law-abiding, left-wing political parties and organizations, "often with the active cooperation or tacit consent of local

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[197] *See* PAUL MARCUS, THE ENTRAPMENT DEFENSE 3 (2d ed. 1995).

[198] *See id*. at 3-4.

[199] *See* Blaikie v. Linton, 18 Scot. Law Rep. 583 (1880).

[200] *See* Regina v. Bickley, 2 Crim. App. R. 53, 73 J.P.R. 239 (C.A. 1909).

[201] Brannan v. Peek, 2 All E.R. 572, 574 (Q.B. 1947).

[202] *Id*.

[203] 223 F. 412 (9th Cir. 1915).

[204] Rivera v. State, 846 P.2d 1, 11 (Wyo. 1993).

[205] SKOLNICK & FYFE, *supra* note 63, at 102 (quoting Paul Chevigny).

[206] *See id. See also* STOLEN LIVES, *supra* note 123, at 302. Kevin McCoullough, who was suing the City of Chattanooga for unjust imprisonment, was shot dead by police at his workplace after he allegedly threw or ran at police with a metal object. McCoullough had predicted his own murder by police in statements to co-workers. *See id*.

[207] *See id*. (citing President's Commission on Law Enforcement and Administration of Justice study).

[208] *See* FRIEDMAN, *supra* note 58, at 154 (citations omitted).

police."[209] The FBI has also spent thousands of man-hours surveiling and investigating writers, playwrights, directors and artists whose political views were deemed a threat to the interests of the ruling political establishment.[210]

Police today are a constant agent on behalf of governmental power. Both in the halls of legislatures and before the courts, police act as lobbyists against individual liberties.[211] Police organizations, funded by monies funneled directly from police wages, lobby incessantly against legislative constraints on police conduct.[212] Police organizations also file *amicus curie* briefs in virtually every police procedure case that goes before the Supreme Court, often predicting dire consequences if the Court rules against them. In 2000, for example, the police lobby filed *amicus* briefs in favor of allowing police to stop and frisk persons upon anonymous tips, warning that if the Court ruled against them, "the consequence for law enforcement and the public could be increased assaults and perhaps even murders."[213]

CONCLUSION

The United States of America was founded without professional police. Its earliest traditions and founding documents evidenced no contemplation that the power of the state would be implemented by omnipresent police forces. On the contrary, America's constitutional Framers expressed hostility and contempt for the standing armies of the late eighteenth century, which functioned as law enforcement units in American cities. The advent of modern policing has greatly altered the balance of power between the citizen and the state in a way that would have been seen as constitutionally invalid by the Framers. The implications of this altered balance of power are far-reaching, and should invite consideration by judges and legislators who concern themselves with constitutional questions.

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[209] JEFFREY REIMAN, THE RICH GET RICHER AND THE POOR GET PRISON: IDEOLOGY, CLASS, AND CRIMINAL JUSTICE 166 (5th ed. 1997).

[210] *See* HERBERT MITGANG, DANGEROUS DOSSIERS (1988). The FBI kept a 207-page file on cartoonist Bill Mauldin, a 153-page file on book publisher Alfred A. Knopf, and a 23-page file on Lincoln biographer Carl Sandburg, for example. *See id*. at 249, 195, and 81.

[211] The Fraternal Order of Police (FOP), the largest police organization in the United States, has over 270,000 members and has been named one of the most powerful lobbying groups in Washington. *See* National Fraternal Order of Police, *Press Release*, Sept. 17, 1997.

[212] An example of the police lobby's power is its ability to scuttle asset forfeiture reform. The International Association of Chiefs of Police (IACP) managed to keep congressional leaders from attaching forfeiture reform to budget legislation in 1999. *See* IACP, *End of Session Report for the 1st Session of 106th Congress: FY 2000 Funding Issues*, Jan. 17, 2000. *See also* Peter L. Davis, *Rodney King and the Decriminalization of Police Brutality in America*, 53 MD. L. REV. 271, 281 n.40 (1994). Police unions in many jurisdictions successfully thwart efforts to establish civilian review boards. *See id*. at 282.

[213] *See* Richard Willing, *High Court Restricts Police Power to Frisk*, USA TODAY, Mar. 29, 2000, 4A.