We the People

Article I

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The Constitution and Criminal Procedure

First Principles

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Preface

This book is a collection of essays, but it is, I hope, much more than that. Taken as a whole, these interlocking essays aim to fundamentally reorient the field now known as constitutional criminal procedure.

Constitutional criminal procedure—the very label tugs in different directions. Not all of our Constitution is about criminal procedure, and not all criminal procedure should be constitutionalized. This logical gap between the Constitution and criminal procedure is matched by a sociological gap in today's law schools: constitutional law and criminal procedure are typically taught as separate courses, by separate groups of scholars. Very few of our most prominent constitutional law scholars have devoted extensive analysis to the Fourth, Fifth, and Sixth Amendments, individually or as a group. Conversely, very few of America's leading academic voices in criminal procedure are broad-gauged students of the Constitution.

One obvious explanation, of course, is that prior to the Warren Court, remarkably little criminal procedure had been constitutionalized. Most criminal cases are rooted in state law and tried in state courts; and before the 1960s, the Fourth Amendment exclusionary rule, the Fifth Amendment self-incrimination clause and double jeopardy clause, and all the protections of the Sixth Amendment applied only to federal cases. And so, for the generation of legal scholars coming of age before 1960, criminal procedure and (federal) constitutional law were rather distinct fields.

Today, however, constitutional law pervades criminal procedure casebooks, courses, and scholarship. Yet the kind of constitutional law discourse and scholarship that now dominates criminal procedure is

generally, in a word, *bad* constitutional law—constitutional law insouciant about constitutional text, ignorant of constitutional history, and inattentive to constitutional structure. Or, at least, so I shall argue in the pages that follow.

Good constitutional criminal procedure must be, first and foremost, good constitutional law—developed with respect for things like text, history, and structure. In this book I attempt to analyze the Fourth, Fifth, and Sixth Amendments from these perspectives, to lay bare their first principles.

Good constitutional law must of course also pay heed to precedent, but Supreme Court case law in this field is remarkably complex, sometimes perverse, and often contradictory. Part of the problem is that the Burger and Rehnquist Courts have not always shared the Warren Court's vision but have regularly chosen to distinguish away disfavored cases without overruling them. After twenty-five years of this strategy, *U.S. Reports* bristles with language poking out in opposite directions at every level of abstraction. But this intergenerational tension is only part of the problem. The deeper problem is that at no time has the Supreme Court had a coherent and clearly developed vision of constitutional criminal procedure. The Warren Court contradicted itself, and so has the post-Warren Court. Cases come to the Court one by one, under different clauses and amendments; and the Justices have failed to see how these clauses fit together into a coherent whole.

And that is the aim of this book—to show how the Fourth, Fifth, and Sixth Amendments fit together. To ease exposition, I have organized each of the first three chapters around a particular amendment or clause. Each chapter can thus stand alone and be read profitably by a lawyer or judge who needs to understand a particular clause or amendment to deal with the case at hand. But each chapter is also designed to interlock with the others; and in a brief concluding chapter, I try to pull the camera back and identify broader themes connecting the different parts of my project. In this concluding chapter, as in the ones that precede it, I stress the need to construe the Constitution in ways that protect the innocent without needlessly advantaging the guilty. Taken as a whole, this book seeks to provide both scholars and general readers with a coherent, integrated vision of the entire field now known as constitutional criminal procedure.

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Contents

1 Fourth Amendment First Principles

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

The Fourth Amendment today is an embarrassment. Much of what the Supreme Court has said in the last half-century—that the amendment generally calls for warrants and probable cause for all searches and seizures, and exclusion of illegally obtained evidence—is initially plausible but ultimately misguided. As a matter of text, history, and plain old common sense, these three pillars of modern Fourth Amendment case law[1] are hard to support; in fact, today's Supreme Court does not really support them. Except when it does. Warrants are not required—unless they are. All searches and seizures must be grounded in probable cause—but not on Tuesdays. And unlawfully seized evidence must be excluded whenever five votes say so. Meanwhile, sensible rules that the amendment clearly does lay down or presuppose—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—are ignored by the Justices. Sometimes. The result is a vast jumble of judicial pronouncements that is not merely complex and contradictory, but often perverse. Criminals go free while honest citizens are intruded upon in outrageous ways with little or no real remedy. If there are good reasons for these and countless other odd results, the Court has not provided them.

Nor has the academy. Indeed, law professors have often been part of the problem, rather than the solution. Begin in the classroom. The Fourth Amendment is part of the Constitution yet is rarely taught as part of constitutional law. Rather, it unfolds as a course unto itself, or is crammed into criminal procedure. The criminal procedure placement is especially pernicious. For unlike the Fifth, Sixth, and Eighth Amend-

ments, which specially apply in criminal contexts,[2] the Fourth Amendment applies equally to civil and criminal law enforcement. Its text speaks to all government searches and seizures, for whatever reason. Its history is not uniquely bound up with criminal law. And the amendment presupposes a civil damage remedy, not exclusion of evidence in criminal trials; its global command that all government searches and seizures be reasonable sounds not in criminal law, but in constitutional tort law.[3]

Placing the Fourth Amendment in criminal procedure thus distorts, causing us to see things that are not there. It also obscures, leading us to miss things that are there—as does teaching the amendment in a stand-alone course. What we miss is how the Fourth Amendment connects up with the rest of the Constitution, procedurally and substantively. From a legal-process perspective, we fail to focus clearly on basic constitutional questions like: Who should decide whether a search or seizure is reasonable? Legislatures? Administrators? Judges? Juries? Some combination? Who should be allowed to issue warrants, and how should their decisions be reviewed? From a substantive perspective, we give short shrift to questions like: How should searches and seizures outside the criminal context be constitutionally regulated? What makes a search or seizure substantively unreasonable? How should other constitutional principles—protecting speech, privacy, property, due process, equality, democratic participation, and the like—inform the reasonableness determination?

When we move from law school classrooms to law reviews and legal treatises, things do not improve. Leading scholars ponder every nuance of the latest Supreme Court case but seem unconcerned about the amendment's text, unaware of its history, and at times oblivious or hostile to the common sense of common people. Like the Justices, leading scholars seem to think the amendment requires warrants, probable cause, and exclusion but then often abandon all this to avoid absurdity. Fourth Amendment case law is a sinking ocean liner—rudderless and badly off course—yet most scholarship contents itself with rearranging the deck chairs.

There is a better way to think about the Fourth Amendment—by returning to its first principles. We need to read the amendment's words and take them seriously: they do not require warrants, probable cause, or exclusion of evidence, but they do require that all searches and seizures be reasonable. While keeping our eyes fixed on reasonableness, we must remember the historic role played by civil juries and civil damage actions in which government officials were held liable for unreasonable intrusions against person, property, and privacy. We need to recover the lost linkages between

the Fourth and Seventh Amendments—linkages obscured by teaching the Fourth in criminal procedure and the Seventh in civil procedure. We must self-consciously consult principles embodied in other parts of the Constitution to flesh out the concrete meaning of *constitutional* reasonableness. Finally, we must use twentieth-century legal weaponry like *Bivens* actions, class actions, structural injunctions, entity liability, attorney's fees, administrative regulation, and administrative remedies, to combat twentieth-century legal threats—technology and bureaucracy—to the venerable values protected by the Fourth Amendment.

In what follows, I shall first critique the current doctrinal mess and then attempt to sketch out a better way—a package that, taken as a whole, strikes me as far superior to the status quo along any number of dimensions. It is more faithful to constitutional text and history. It is more coherent and sensible. It is less destructive of the basic trial value of truth seeking—sorting the innocent from the guilty. It is more conducive to the basic appellate value of truth speaking; it will help courts to think straight and write true, openly identifying criteria of reasonableness rather than mouthing unreasonable principles that are blindly followed, and then blandly betrayed.[4] Finally, my package, taken as a whole,[5] can be understood by, and draws on the participation and wisdom of, ordinary citizens—We the People, who in the end must truly comprehend and respect the constitutional rights enforced in Our name.

Make no mistake: I come to praise the Fourth Amendment, not to gut it. It is a priceless constitutional inheritance, but we have not maintained it well. Refurbished, it is a beauty to behold, for it was once—and can once again be—one of our truly great amendments.

The Mess: A Critique

The words of the Fourth Amendment really do mean what they say. They do not require warrants, even presumptively, for searches and seizures. They do not require probable cause for all searches and seizures without warrants. They do not require—or even invite—exclusions of evidence, contraband, or stolen goods. All this is relatively obvious if only we read the amendment's words carefully and take them seriously.

Warrant Requirement?

The modern Supreme Court has claimed on countless occasions that there is a warrant requirement in the Fourth Amendment.[6] There are two variants of the warrant requirement argument—a strict (per se)

variant that insists that searches and seizures always require warrants, and a looser (modified) variant that concedes the need to craft various common-sense exceptions to a strict warrant rule. Both variants fail.

The Per Se Approach. The first (per se) variant interpolates but nevertheless purports to stay true to the text. The amendment contains two discrete commands—first, all searches and seizures must be reasonable; second, warrants authorizing various searches and seizures must be limited (by probable cause, particular description, and so on). What is the relation between these two commands? The per se approach reasons as follows: Obviously, the first and second commands are yoked by an implicit third that no search or seizure may take place except pursuant to a warrant.[7] Although not expressing the point in so many words, the amendment plainly presumes that warrantless searches and seizures are per se unreasonable. Surely executive officials should not be allowed to intrude on citizens in a judicially unauthorized manner. And the mode of proper judicial authorization is the warrant. Why else would the warrant clause exist?

Standing alone, this line of argument is initially plausible. But when all the evidence is in, we shall see that it is plainly wrong. Begin by noting that the per se interpolation is only one of several possible ways of understanding the relationship between the amendment's two commands. Perhaps, for example, there is no logical relation between the two: the first speaks globally to all searches and seizures, whereas the second addresses the narrower issue of warrants. Or, if this reading seems insufficiently holistic, the same result obtains under a more aesthetic reformulation: warrants are not required, but any warrant that does issue is per se unreasonable if not supported by probable cause, particular description, and the rest. As we shall see, this reading ultimately squares more snugly with the amendment's specific words, harmonizes better with its historic context, and makes considerably more common sense.[8]

If a warrant requirement was intended but not spelled out—if it simply went without saying—we might expect to find at least some early state constitutions making clear what the federal Fourth Amendment left to inference. Yet although many states featured language akin to the Fourth Amendment, none had a textual warrant requirement.[9] Of course, it could be argued that here, too, a warrant requirement was generally presumed—it went without saying. But in leading antebellum cases, the state supreme courts of Pennsylvania, New Hampshire, and Massachusetts briskly dismissed claims of implied warrant require-

ments under state constitutional provisions that were predecessors of, and textually quite similar to, the federal Fourth Amendment.[10] And these cases harmonize with nineteenth-century opinions from many other states.[11] Supporters of the warrant requirement have yet to locate any antebellum cases contra.

Nor have proponents of a warrant requirement uncovered even a handful of clear statements of the "requirement" in common law treatises, in the debates over the Constitution from 1787 to 1789, or in the First Congress, which proposed the Fourth Amendment. On the contrary, when we consult these and other sources, we see a number of clear examples that disprove any implicit warrant requirement.

Arrests without warrants. At common law, arrests—seizures of persons—could take place without warrants in a variety of circumstances. So said the major founding-era commentators.[12] In 1792—one year after ratification of the Fourth Amendment—the Second Congress explicitly conferred this common law arrest power on federal marshals.[13] Relying on this and other broad historical evidence, the modern Supreme Court in *United States v. Watson* carved out an "arrest exception" to its so-called "warrant requirement."[14] But all this raises an obvious logical problem with the "requirement" itself. If an arrest—one of the most intrusive kinds of seizures imaginable—does not require a warrant, why do less intrusive searches and seizures?[15]

Searches pursuant to arrests. In his brilliant study of the Fourth Amendment, Professor Telford Taylor reminds us that, since at least the seventeenth century, the common law has recognized broad authority to search an arrestee and his immediate surroundings without a search warrant, and even when the arrest itself was warrantless:

> Whether the chase was in hot pursuit, by hue and cry, or by a constable armed with an arrest warrant, the object was the person of the felon, and the weapon he had used or the goods he had stolen. A seventeenth-century work on the function of constables gives a broad description of the power of search incident to arrest. . . .
>
> Neither in the reported cases nor the legal literature is there any indication that search of the person of an arrestee, or the premises in which he was taken, was ever challenged in England until the end of the nineteenth century. When the power was belatedly contested, . . . the English courts gave the point short shrift. That the practice had the full approval of bench and bar, in the time of George III when Camden and Mansfield wrote, and when our Constitution was adopted, seems entirely clear.[16]

Indeed, Taylor goes on to remark that, even at a time when other searches for "mere evidence" were disallowed by American courts, officers without warrants could search an arrestee for "mere evidence."[17]

On the basis of this and other data, the modern Supreme Court has carved out an "incident to arrest exception" to its so-called "warrant requirement" for all searches.[18] But once again, this exception seems to *dis*prove the rule: why should various less intrusive, nonarrest searches be subject to requirements that arrest searches are not?

Not only were warrants unnecessary for "mere evidence" arrest searches; but also warrants could not, historically speaking, support a search for certain types of "mere evidence." The common law search warrants referred to in the warrant clause were solely for stolen goods;[19] various early American statutes extended warrants to searches for smuggled or dangerous goods (gunpowder, diseased and infected items, and the like), contraband, and criminal instrumentalities.[20] If there was probable cause to believe that a place contained these items, an ex parte warrant could issue, without notice to the owner of the place, lest he be tipped off and spirit away the goods, or lest the items cause imminent harm. Even if ultimately innocent, mere possession of these items was suspicious or dangerous enough to justify summary process, and the standard for this process was probable cause. But once searches for mere evidence are allowed, wholly innocent and unthreatening citizens are much more likely to be implicated.[21] With modern forensic techniques, virtually any place could yield "evidence" of some offense, civil or criminal—fingerprints of a next-door neighbor suspected of a traffic offense, carpet fibers relevant to products liability issues, and so on. Under these circumstances, the summary and ex parte procedures underlying warrants become quite problematic on due process grounds. Strictly read, the warrant clause applies only to search warrants akin to traditional search warrants—warrants for contraband, stolen goods, and the like.[22] Once uprooted from this soil, the amendment's "probable cause" formulation becomes awkward and oppressive. (There is always probable cause to believe the government will find *something* in a house—walls, for example—yet surely *that* kind of probable cause cannot always suffice to support an ex parte warrant.) The upshot is not that government may never conduct reasonable searches for "mere evidence" like a murderer's bloodstained shirt, believed to be stashed in the car of an unsuspecting neighbor—that would be silly[23]—but that the *warrant clause* cannot always be stretched to reach these searches.[24] And this straightforward result is yet another signal that many of the most important searches and seizures can and must take place without warrants.

Searches of ships and storehouses. In a statute passed during the same session at which it adopted the Fourth Amendment, the First Congress pointedly authorized federal naval inspectors to enter ships without warrants and, again without warrants, to search for and to seize any goods that they suspected violated customs laws.[25] Similar provisions were contained in congressional acts passed in 1790, 1793, and 1799.[26] Other provisions of the 1789 act authorized, but did not require, warrants to search houses, stores, and buildings; the statute did not say that no search or seizure could occur without a warrant, but only that, under certain conditions, naval officers and customs collectors would "be entitled to a warrant."[27] In yet another early statute, the First Congress authorized warrantless entry into and inspection of all "houses, store-houses, ware-houses, buildings and places" that had been registered (as required by law) as liquor storerooms or distilleries.[28]

If any members of the early Congresses objected to or even questioned these warrantless searches and seizures on Fourth Amendment grounds, supporters of the so-called warrant requirement have yet to identify them.

Successful searches and seizures. At common law, it seems that nothing succeeded like success. Even if a constable had no warrant and only weak or subjective grounds for believing someone to be a felon or some item to be contraband or stolen goods, the constable could seize the suspected person or thing. The constable acted at his peril. If wrong, he could be held liable in a damage action. But if he merely played a hunch and proved right—if the suspect *was* a felon, or the goods *were* stolen or contraband—this ex post success apparently was a complete defense.[29] Variants of the ex post success defense appeared prominently in several landmark English cases that inspired the Fourth Amendment[30] and in the 1818 Supreme Court case of *Gelston v. Hoyt,* authored by Justice Story.[31] We shall return to this point later, but for now it is yet another historical example casting doubt on the so-called warrant requirement.

Other historical examples exist,[32] but the four we have already considered suffice to make clear that, if a warrant requirement truly did go without saying, leading eighteenth- and nineteenth-century authorities did not think so.

Of course, this hardly ends the matter. Perhaps early judges and lawmakers simply misunderstood the true spirit of the principles the Constitution embodied. For example, less than a dozen years after the adoption of the Constitution and the ratification of the Bill of Rights, Congress passed and federal judges upheld the now-infamous Sedition

Act. Surely this act was unconstitutional in any number of ways. And surely the self-serving actions of early Congresses and judges do not end the matter. Is it possible that in the Fourth Amendment, too, the early implementation betrayed the underlying principle?

No. The problem with the so-called warrant requirement is not simply that it is not in the text and that it is contradicted by history. The problem is also that, if taken seriously, a warrant requirement makes no sense. Consider just a few common-sense counterexamples to the notion that all searches and seizures must be made pursuant to warrants.

Exigent circumstances. In a wide range of fast-breaking situations—hot pursuits, crimes in progress, and the like—a warrant requirement would be foolish. Recognizing this, the modern Supreme Court has carved out an "exigent circumstances exception" to its so-called warrant requirement.[33]

Consent searches. If government officials obtain the uncoerced authorization of the owner or apparent owner, surely they should be allowed to search a place, even without a warrant. And the modern Supreme Court has so held. It is tempting to claim that this is no exception to a warrant requirement but merely a "waiver" of Fourth Amendment rights by the target of a search. However, the waiver argument surely cannot justify *A*'s "waiving" *B*'s Fourth Amendment rights, and yet the Court has allowed searches when a wife consented to a search of her husband's property.[34] It has also upheld searches when the consenting party did not really have authority to permit the police to search—because, say, someone else was the true owner—but the police reasonably thought the consenter was the owner.[35] The explicit logic here has been that, even though the police had neither a true warrant nor a true waiver, they acted *reasonably*.[36] But this is a recognition that reasonableness—not a warrant—is the ultimate touchstone for all searches and seizures.

Plain view searches. When a Secret Service agent at a presidential event stands next to her boss, wearing sunglasses and scanning the crowd in search of any small sign that something might be amiss, she is searching without a warrant. Yet surely this must be constitutional, and the Supreme Court has so suggested. At times, however, the Court has played word games, insisting that sunglass or naked-eye searches are not really searches.[37] But if high-tech binoculars or X-ray glasses are used, then maybe . . .[38]

These word games are unconvincing and unworthy. A search is a search, whether with Raybans or X rays.[39] The difference between these two searches is that one may be much more reasonable than

another. In our initial hypothetical, the search is public—the agent is out in the open for all to see; nondiscriminatory—everyone is scanned, not just, say, blacks; unintrusive—no X-ray glasses or binoculars here; consented to—when one ventures out in public, one does assume a certain risk of being seen; and justified—the President's life is on the line. But change these facts, and the outcome changes—not because a nonsearch suddenly becomes a search, but because a search at some point becomes *unreasonable*. (Imagine, for example, a government policy allowing government officials, as a perk of power, to stand unobservably under bleachers and take snapshots of women's panties.)[40]

Because it creates an unreasonable mandate for all searches, the warrant requirement leads judges to artificially constrain the scope of the amendment itself by narrowly defining *search* and *seizure*. If a "search" or a "seizure" requires only reasonableness rather than a warrant, however, judges will be more likely to define these terms generously.[41] (Interestingly, in the landmark *Katz* case, the Court, perhaps unconsciously, smuggled reasonableness into the very definition of the amendment's trigger: the amendment comes into play whenever government action implicates a "reasonable expectation of privacy.")[42]

Real life. Finally, consider the vast number of real-life, unintrusive, nondiscriminatory searches and seizures to which modern-day Americans are routinely subjected: metal detectors at airports, annual auto emissions tests, inspections of closely regulated industries, public school regimens, border searches, and on and on. All of these occur without warrants. Are they all unconstitutional? Surely not, the Supreme Court has told us, in a variety of cases.[43] What the Court has not clearly explained, however, is how all these warrantless searches are consistent with its so-called warrant requirement.

It is no answer to point out that most of these searches are designed to enforce not "criminal" but "civil" laws—safety codes, pollution laws, and the like. The text of the amendment applies equally to both civil and criminal law.[44] The unsupported idea that the "core" of the amendment is somehow uniquely or specially concerned with criminal law is simply an unfortunate artifact of the equally unsupported exclusionary rule. If two searches are equally unintrusive to the target, why should the criminal search be more severely restricted than the civil search?[45] In any event, aren't metal detectors there to detect and deter crimes like attempted hijacking? And what about warrantless weapons frisks conducted by police officials as a routine part of their criminal enforcement policy?[46]

We have now seen at least eight historical and commonsensical exceptions to the so-called warrant requirement. There are many

others[47]—but I am a lover of mercy. And by now I hope the point is clear: it makes no sense to say that all warrantless searches and seizures are per se unreasonable.

The Modified Per Se Approach. At this point, a supporter of the so-called warrant requirement is probably tempted to concede some exceptions and modify the per se claim: warrantless searches and seizures are per se unreasonable, save for a limited number of well-defined historical and commonsensical exceptions.

This modification is clever, but the concessions give up the game. The per se argument is no longer the textual argument it claimed to be; it no longer merely specifies an implicit logical relation between the reasonableness command and the warrant clause. To read in a warrant requirement that is not in the text—and then to read in various non-textual exceptions to that so-called requirement—is not to read the Fourth Amendment at all. It is to rewrite it. What's more, in conceding that, above and beyond historical exceptions, common sense dictates various additional exceptions to the so-called warrant requirement, the modification seems to concede that the ultimate touchstone of the amendment is not the warrant but reasonableness.[48]

According to the modified approach, the Framers did not say what they meant, and what they meant—warrants, always—cannot quite be taken seriously, so today we must make reasonable exceptions. On my reading, the Framers did say what they meant, and what they said makes eminent good sense: all searches and seizures must be reasonable. Precisely because these searches and seizures can occur in all shapes and sizes under a wide variety of circumstances, the Framers chose a suitably general command.

The Per Se Unreasonableness of Broad Warrants. If all this is so, why has the Court continued to pay lip service to the so-called warrant requirement? What *is* the purpose of the warrant clause, and how does it relate to the more general command of reasonableness? And what is wrong with the logic that drives the warrant requirement—namely, that executive officials should be prohibited from searching and seizing without judicial approval, and that the warrant clause specifies the proper mode of this approval?

To anticipate my answers to these related questions: Perhaps the Justices have been slow to see the light because they do not understand that juries, as well as judges, are the heroes of the Founders' Fourth Amendment story. Indeed, at times, the Founders viewed judges and