

Reconstructing the Fourth Amendment

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A History of Search and Seizure, 1789–1868

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Preface

As a teenager and even as a preteen, I remember being appalled by the large number of black faces I saw on TV whenever there was a crime story on the news or in pulp fiction. It seemed odd to me, a white kid growing up in the Bronx, that there were so few white faces, just as a matter of sheer probabilities. I grew up in a working-class neighborhood in which many kids, white or black, were at least involved in minor crime, from drug use to graffiti to vandalism and even minor arson (torching outdoor garbage cans to see the fire trucks come). Yet I knew not a single white kid arrested for these behaviors. I am sure there must have been some, but not within my circles.

These thoughts might seem odd for a twelve- or thirteen-year-old boy, but I was a bookish kid who read widely and was always sensitive to unfairness. I was close to my dad, and he labored ten to twelve hours each day, six days a week, to feed his family, still barely making enough money to do so. It seemed to me that something was wrong with a world in which a good man who labored so hard could receive so little in return. His plight made me attentive to unfair inequalities in the world. When I found them, I tried to understand them, usually failing in that endeavor.

The need to understand never left me, and, as I aged, my quest made the world seem more, not less, complex and confusing. I promised neither to suffer my dad's fate nor to forget it. My way out was education. I studied hard, seeing the legal profession as a means for making a decent living while doing some good. I somehow never bought into the jokes about greedy lawyers or even my own granddad's pointed insistence on pronouncing the word "lawyer" like "liar." My journey paid off when I started working in my twenties at the Philadelphia, Pennsylvania, district attorney's office.

That work did not, however, bring me the clarity that I sought. On my very first day in court, I was struck, once again, with the sea of black faces. The face of almost every defendant hauled into court was black, but this was equally true for most of the victims. Offenders and accusers alike shared one primary characteristic: poverty. For all whites' fear of crime, and too many did suffer its sting, it was the African American community in that city that bore the brunt of both the problem of criminality and the criminal "justice" solution.

Later in life, I became a law professor, teaching and writing about criminal justice. In that capacity, I became involved in the innocence movement as it became clear that too many of those in our jails and prisons did not belong there. Some significant portion of those injustices stemmed from police mistakes, even perfectly well-meaning officers focusing too early on one theory of

who did the crime—perhaps because of subconscious stereotyping about likely suspects—while ignoring contradicting evidence. I also heard increasingly more stories of whites suffering insults and abuse at the hands of the police, particularly during traffic stops. Meanwhile, the war on drugs was taking its toll on Hispanic communities, the war on terror on Muslim ones. The range of permissible warrantless, suspicionless searches and seizures expanded rapidly, with few political obstacles standing in the way of the crime and terror warriors.

My growing concerns did not stem from any soft-heartedness toward criminality. To the contrary, I became a prosecutor because of my sympathy for victims and my keen appreciation of the virtues of retribution. That appreciation was born of the fear of crime in the neighborhoods of my youth, my dad's having been mugged three times at gunpoint, and my own experiences of being mugged and assaulted. My zest for retribution has dimmed as time has tempered my own sense of infallibility in such matters and taught me the complexity of the human heart. But my zeal for public safety, both from street predators and governmental ones, remains strong. Yet the current system seemed to be failing on both counts, bringing neither security nor freedom.

Still worse, the current state of affairs seemed radically inconsistent with both my high school civics lessons about the nature of American democracy and my own understanding of American history. High school civics taught me that our constitutional culture was one of respect and equality for all citizens. History taught me that security and freedom were complementary, not contradictory.

My attention began to focus on the start of most criminal cases—the arrests, stops, frisks, wiretaps, and other searches and seizures that identify suspects and bring them into the criminal process. Something seemed amiss at this entry point. The Fourth Amendment to the U.S. Constitution, prohibiting “unreasonable” searches and seizures, governs that entry point. What particularly worried me was the public image of the constitutional law of search and seizure as just a way to free the guilty on a “technicality.” As I recalled the history of the Fourth Amendment, it was a tale of struggle against the oppressions of the British Crown, which saw searching and seizing as a means of suppressing political dissent, weakening the opposition, and sowing discord among its members. In short, it was as much about the political rights of the “People” as of any individual suspect, and, indeed, the Fourth Amendment speaks of the “right of the People,” something done in only a very few other constitutional provisions. Yet even this history seemed incomplete to me, for the original Fourth Amendment, as ratified in 1791—indeed the entire original Bill of Rights—applied only to the federal government, not to the states. It was one of the functions of the Fourteenth Amendment, ratified in 1868, to apply or “incorporate” the Bill of Rights, including the Fourth Amendment, against the

states. This 1868 constitutional amendment was one of three—the Thirteenth and Fifteenth Amendments being the other two—designed to end the vestiges of slavery. The understandings of search and seizure practices during slavery and Reconstruction thus seemed particularly relevant to understanding the mutated or reconstructed Fourth Amendment of 1868. Then, as now, knowing the African American experience was central to knowing the meaning of America.

So, in a search for the complete story, I dug further into the history of both the original and the mutated Fourth Amendments. What I found did not always match my preconceptions, but it did confirm my sense that we were on the wrong path. This book looks to the past to shine light on where we once were headed in the hope that we might thereby correct our future course. The circuitous path that brought me here began with exposure to crime on the streets and, as will soon be told, it is in that same place—on the streets—that the Fourth Amendment was born and raised.

Acknowledgments

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I have been pondering the ideas in this book for several years, and early versions of some of the ideas here, especially those in chapters 1, 6, and 12, were explored in portions of *Racial Auditors and the Fourth Amendment: Data with the Power to Inspire Political Action*, 66 L. & CONTEMP. PROBS. 221 (2003); *Respect and the Fourth Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 15 (2003); *Stories of Fourth Amendment Disrespect: From Elian to the Internment*, 70 FORDHAM L. REV. 2257 (2002); and *Hate Crimes, Free Speech, and the Contract of Mutual Indifference*, 80 B.U. L. REV. 1283 (2000). The vast majority of this book, however, appears here for the first time in print. Thanks as well to those too numerous to name whose feedback on my earlier work helped in my efforts to make this book worthwhile.

A Stylistic Note: I hope that the text of this book will be of interest to anyone with a love of American history, specialist or not. Specialists, however, who may wish to explore a particular issue in further detail should be aware that many of the notes contain more than mere citations.