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## Book Reviews

### RECONSTRUCTION AND THE POLICE: TWO SHIPS PASSING IN THE NIGHT?

**RECONSTRUCTING THE FOURTH AMENDMENT:  
A HISTORY OF SEARCH AND SEIZURE, 1789–1868.**  
By Andrew E. Taslitz.<sup>1</sup> New York, New York University  
Press. 2006. Pp. xi +363. \$50.00.

*Donald A. Dripps*<sup>2</sup>.

Andy Taslitz is one of the most thoughtful and prolific members of the legal academy writing on issues in criminal justice. In this lively volume he links current issues in Fourth Amendment law to the Constitution's two great formative periods, the founding era of 1789–1791 and the reconstruction period that led to the adoption of the Fourteenth Amendment. Broadly speaking he believes that current doctrine slights such important values as community self-government, freedom of movement and freedom from public humiliation, and bolsters his critique of modern law with historical evidence suggesting the importance of these values to the Framers of the Fourth and Fourteenth amendments.

I have two basic criticisms. The first is that the book neglects the dynamic character of criminal justice throughout the nineteenth century. A central difficulty in fathoming the relationship between the Fourteenth Amendment and criminal justice is that the framing took place more or less in the middle of a radical transformation of the criminal justice process—a process I call the first criminal procedure revolution.

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Unlike the second revolution engineered by the Warren Court, legislatures rather than courts led the way. They took the system inherited from the English common law, a system based on private investigation and prosecution overseen by justices of the peace with a dominant role for the gallows in the penalty structure, and remade it utterly. Nineteenth century legislatures made fundamental institutional changes, by establishing paramilitary municipal police forces, public prosecutors with a functional monopoly on charging decisions, and a new system of punishment based on the penitentiary. They also made dramatic changes in legal doctrine and practice, bypassing the grand jury in favor of accusation by information, giving defendants the right to testify (and the risk that juries would convict them because they declined to do so), and made cross-examination rather than competence the central principle of evidence law. All of these changes were championed by the utilitarian reformer Jeremy Bentham, and while historians may quibble about just how much personal influence Bentham had, it remains fair to refer to these changes as Benthamite reforms.

Many of these changes, such as authorizing defense testimony and accusation by information in felony cases, were, and were understood as, direct attacks on the common law criminal justice system. The debate over these reforms was vigorous and prominent, and it went on before, during, and after the ratification of the Fourteenth Amendment. No history of the relationship between the Fourteenth Amendment and search-and-seizure should ignore, as Taslitz does, the evolving nature of the criminal justice system to which the new constitutional provision was to apply.

My second criticism requires far less exposition. I don't know how the law would change if the Justices of the Supreme Court read his book and unanimously agreed with it. I know that particular cases Taslitz discusses would have come out differently, but the vagueness of his interpretive premises and the generality of the principles he derives from his reading of history generate a normative framework that doesn't determine or even strongly imply a particular outcome on important issues. Most of the fault here lies with the Framers, who chose two clauses to regulate search-and-seizure, one far too general and the other far too rigid. It is still fair to say that distilling from history principles as broad and in as much tension with one another as liberty and community is not likely to alter how readers feel about stop-and-frisk or search-incident-to-arrest.

Part I of this review summarizes the book. Parts II and III develop more fully the two criticisms just introduced.

### I. AN OVERVIEW OF THE BOOK

*Reconstructing the Fourth Amendment* consists of 12 chapters, organized as an introduction and two parts. The first part, "Political Violence and the Original Fourth Amendment" argues that modern law's tolerance of broad police powers conflicts with founding-era values and with the amendment's textual commitment to a corporate "right of the people." Chapter 2, "Violence as Political Expression," makes Taslitz's central claims about founding-era history. Taslitz points out (pp. 18–23) that the Founders revered the rulings in *Entick v. Carrington* and *Wilkes v. Wood*<sup>3</sup>—cases in which the court ruled that executive-issued warrants to search for private papers furnished no defense to soldiers defending trespass suits. He also points to the Founders' approval of broad search powers when authorized by colonial legislature, as distinct from those authorized by the English Parliament in which America had no representation (pp. 23–36). Finally, he argues that one reason why the Founders detested general warrants was the insult or humiliation that accompanied their execution (pp. 36–44). State violence, according to Taslitz, has an expressive as well as a functional dimension. State violence against the individual absent individualized justification, he argues, treats the victim as a thing, not a person.

Chapter 3 builds on the premise that the Fourth Amendment requires "individualized justice" as a sign of official respect for the citizen. How much suspicion must state actors have before searching or seizing? Taslitz argues that the common law warrant process required rather stronger antecedent suspicion than current doctrine. The affiant had to have personal knowledge, and was accountable in tort if the suspected items were not found (p. 49). Moreover, according to Taslitz, the eighteenth century justice of the peace "was a man of stature expected independently to assess the adequacy of the grounds for probable cause." (p. 49, footnote omitted). The Fourth Amendment, therefore, "loosened common-law search and seizure standards" by dispensing with the requirement that the suspected stolen or contraband goods be both present at the place to be searched

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3. *Entick v. Carrington*, 19 Howell's St. Tr. 1029, 95 Eng. Rep. 807 (K.B. 1765); *Wilkes v. Wood*, 19 How. St. Tr. 1153, 98 Eng. Rep. 489 (1763).

and in fact stolen or contraband (p. 49). Nonetheless there was substantial continuity between the common law and the constitutional amendment: “What matters most, however, is that probable cause required specific, trustworthy information to make real the implicit aspiration toward individualized justice” (p. 49, footnote omitted).

Taslitz’s treatment of the origins of the Fourth Amendment is tantalizing; he mentions but does not cite anti-Federalist complaints about the pro-government features of the proposed amendment (p. 49). He does not discuss the founding era views on a related and arguably more interesting question, namely on whether mere evidence, including private papers, would be subject to search and seizure *even pursuant to a valid warrant*. *Entick v. Carrington* had held that at common law no warrant could be issued to seize private papers not stolen or otherwise contraband (*i.e.* “mere evidence,” private property useful to the government as proof, not the *corpus delicti*). If it should turn out that *Boyd v. United States*<sup>4</sup> correctly read the original understanding, originalist justices would be required to rethink a hugely important body of modern law—the one authorizing seizure or subpoena of business records, including computer records.

Chapter 3 also sets out one of the many methodological equivocations that run through the book. Taslitz, his emphasis on history notwithstanding, is not an originalist. “To see the Fourth Amendment as justifiably informed by the common law,” he writes, “is, therefore, to see the amendment as embodying a fundamental set of principles subject to evolution to fit individual fact situations and new social circumstances” (p. 53). In an earlier article, he wrote that:

Examining history can serve the same moral function as does studying current social practices in highlighting how we fall short of our moral ideals. History can also reveal repeating patterns, uncover intergenerational grievances and depths of feeling, and expose moral controversies whose resolution led to new law, thus informing moral sensibilities in a way that a concentration on current social practices alone cannot.

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4. *Boyd v. United States*, 116 U.S. 616 (1886) (statute presuming truth of forfeiture allegations upon failure of claimants to produce relevant business records violates Fourth and Fifth Amendments).

5. Andrew E. Taslitz, *Respect and the Fourth Amendment*, 94 J. CRIM. L. & CRIMIN. 15, 57 (2003) (footnote omitted).

History, then, informs but does not control. It provides modestly privileged reasons to prefer one result over another.

Chapters 4 and 5 are titled, respectively, "Modern Implications 1" and "Modern Implications 2." Chapter 4 concerns itself with institutional distributions of authority to resolve search-and-seizure disputes. Parting company with Thomas Davies, the author of the leading article, Taslitz sees special significance in the textual reference to "the right of the people" and the division of labor between the warrant clause and the reasonableness clause (p. 56). While legislatures usually speak for "the people" in our democratic system, Taslitz sees a role for both direct popular participation in Fourth Amendment law and a special role for the courts. Popular participation should take the form of jury decision in tort suits against the police (p. 60), and in the formulation of police policies in a more transparent and open administrative process (pp. 60–61).

Taslitz sees the dominant institutional player in Fourth Amendment disputes as the judiciary. History shows that the colonial judges resisted issuing general warrants. Judicial power to review executive branch search and seizure practices, however, should not be limited to passing on warrant applications. *Ex post* review of those practices, via the exclusionary rule, "return[s] the parties to the status quo ante as primarily a benefit to the People because it regulates the state's use of *political* violence" (p. 66) (emphasis in original). The exclusionary rule, moreover, provides the judiciary with a means of defending itself against interbranch poaching by the executive (p. 67). And whether speaking through suppression motions, damage actions, or suits for injunctive relief, the judges play the role of "robed teachers" (p. 53) looking over the shoulders of those in the political branches.

Having placed special responsibility in the courts in Chapter 4, in Chapter 5 Taslitz offers a general approach he believes courts ought to follow in Fourth Amendment cases. He distills seven lessons from history (p. 71). The list is too long to be reproduced, but it emphasizes the inherently expressive, and potentially insulting or humiliating, character of state violence; the linkage between security from search and arrest and freedom of expression; the emotional nature of the Fourth Amendment's origins; the importance of involving "the People" in shaping the amendment's application; and the importance of individualized justice, which Taslitz sees as largely compatible with efficient law enforcement. Taslitz then applies these principles to some con-

troversial Supreme Court cases. Illustratively, he approves of *Illinois v. Lidster*,<sup>6</sup> upholding a suspicionless roadblock to seek witnesses to a prior hit-and-run in the area, and disapproves of *Atwater v. City of Lago Vista*,<sup>7</sup> upholding the warrantless arrest of a motorist for the nonjailable misdemeanor offense of failing to wear a seat belt. In *Lidster* the expressive character of the state's violence was not stigmatizing or humiliating; in *Atwater* it was.

In Part II of the book, Taslitz links the Fourth Amendment to the Fourteenth. Chapters 6, 7, 8 and 9 discuss the incompatibility of the Fourth Amendment with the institutional apparatus of slavery—tolerance of private violence intended by whites to subordinate blacks as a class, the prohibition on unauthorized movement by slaves, and the slave patrols that enforced the prohibition with sweeping discretionary powers of search and seizure. Chapter 10 discusses antebellum attitudes held by slaves, slave-owners, and Northerners respecting privacy and property. Taslitz draws a sharp distinction between the Southern conception of rights that varied radically according to race and class, and a more universal and egalitarian conception held by at least some Northerners. Chapter 11 connects this discussion to constitutional law, by arguing that the Fourteenth Amendment secured the fruits of Northern victory in the civil war by writing a more universal and egalitarian vision of rights into our organic law.

Taslitz argues that the abuses against which the Fourteenth Amendment was aimed should inform modern readings of the Fourth Amendment (presumably including federal cases). He writes that:

The overwhelming weight of historians' opinions leaves little doubt that the framers, and probably the ratifiers, of the Fourteenth Amendment understood that it would apply the Fourth Amendment to the states, protection against unreasonable searches and seizures being among the "privileges and immunities" of U.S. citizens. Moreover, the vast majority of Black Code provisions and the many other acts of Southern counterrevolution involved searches and seizures. Everything from unjustified arrests, mandated passes to move about the countryside, beatings by state officials, legally authorized whippings, banishment, revived patrols, and invasions of homes encroached on fundamental rights to unimpeded lo-

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6. 540 U.S. 419 (2004).

7. 532 U.S. 318 (2001).

comotion, privacy and possession and use of property, absent adequate justification, such as because of probable cause or involvement in a crime. Furthermore, search and seizure issues frequently arose in the context of state seizure of freed people's firearms, firearms partly needed by the former bondsmen to protect themselves from white violation. (p. 248).

This passage, which includes no citations, is deceptively simple, because it ignores the different ways in which the Fourteenth Amendment might prohibit the kinds of arbitrary searches and seizures used to continue the subordination of the freed slaves during Reconstruction.

One way is indeed to read privileges-and-immunities as including the rights secured by the Fourth Amendment. It is also possible, however, to read the privileges-and-immunities clause as an equality provision analogous to Article IV's privileges-or-immunities clause, i.e., requiring the states to provide black and white citizens the same rights against searches and seizures.<sup>8</sup> Another possibility is to read due process as prohibiting extrajudicial punishment, of which arbitrary arrests, beatings and home invasions are examples.<sup>9</sup>

The theories seem similar, but they are not. On the straight-ahead incorporation theory apparently embraced by Taslitz, the warrant clause would operate against the states. On the equality reading states could set aside the warrant requirement whenever

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8. A thesis ably advanced by John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992). Harrison summarizes his argument as follows:

My main thesis rests on a distinction, central during Reconstruction and still familiar today, between substantive and equality-based constitutional limitations. A *substantive* protection either prescribes or forbids a certain content of state law. An *equality-based* protection, by contrast, says nothing about the substance of the state's law; it instead requires that the law, whatever it is, be the same for all citizens. I argue that the Privileges or Immunities Clause is, with respect to everyday rights of state law, the latter kind of protection. The main point of the clause is to require that every state give the same privileges and immunities of state citizenship—the same positive law rights of property, contract, and so forth—to all of its citizens.

*Id.* at 1387–88.

9. I defend this position in DONALD A. DRIPPS, *ABOUT GUILT AND INNOCENCE* 147 (2003):

Fourth Amendment analysis is now indistinguishable from an instrumental due process inquiry, except that the restrictive definitions of “searches and seizures” opens the door to unreasonable, yet constitutional, police investigations. Due process analysis could fill this unfortunate gap, while and “search” or “seizure” that is “reasonable” under the fourth Amendment should satisfy procedural due process standards as well (footnote omitted).



due process permitted them to do so, provided they did not require warrants for some classes of citizens but not others. And on the due process reading, what is “incorporated” would be the reasonableness clause alone, with warrants tagging along only when necessary to make especially intrusive searches and seizures reasonable.

It follows that Taslitz’s invocation of the “overwhelming weight” of informed opinion is somewhat misleading. Felix Frankfurter agreed that the Fourteenth Amendment incorporates the Fourth, but in a very different sense than Taslitz has in mind.<sup>10</sup> The incorporation controversy (and yes, there *is* a controversy)<sup>11</sup> turns out to have very little to do with the Fourth Amendment, because *some* limits on state search-and-seizure practice follow from due process, whatever meaning we give to the privileges-and-immunities clause. That probably helps Taslitz’s argument; if he were to take the total-incorporation position he would stand in favor of imposing the Seventh Amendment jury requirement on state systems of workers’ compensation, the Sixth Amendment jury requirement on state juvenile courts, and the grand jury requirement on that half of the states that authorize felony prosecutions by information.

10. See *Wolf v. Colorado*, 338 U.S. 25, 27–28 (1949) (Frankfurter, J.):

The security of one’s privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in ‘the concept of ordered liberty’ and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples.

Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment. But the ways of enforcing such a basic right raise questions of a different order. How such arbitrary conduct should be checked, what remedies against it should be afforded, the means by which the right should be made effective, are all questions that are not to be so dogmatically answered as to preclude the varying solutions which spring from an allowable range of judgment on issues not susceptible of quantitative solution.

11. See DRIPPS, *supra* note 9, at 27–36 (criticizing incorporation theory, largely relying on cases and treatises immediately following ratification); JAMES E. BOND, *NO EASY WALK TO FREEDOM* (1997) (reviewing ratification campaign in the South); STEPHEN B. PRESSER, *RECAPTURING THE CONSTITUTION* 161 (1994) (“The selective incorporation doctrine . . . is an invitation to unbridled judicial discretion, and must be ranked as one of the boldest and most astonishing acts of judicial usurpation in the history of the United States Supreme Court.”); George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers’ Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145 (2001) (criticizing incorporation theory, relying largely on proceedings in Congress). The critics of incorporation may be outnumbered temporarily, but we are rather far from being overwhelmed.

I am not sure, but I think Taslitz takes the position I consider the strongest version available to him. All theories of the Fourteenth Amendment converge on the proposition that the amendment secures rights against arbitrary violence by state officials, including (if not limited to) violence that would violate the Fourth Amendment when committed by federal agents. He then adds the attractive claim that we should read the limits on both federal and state authority with a special regard for the abuses that inspired the Fourteenth Amendment: violence intended to dominate a subordinate class defined by race, and, somewhat more particularly, limitations on personal mobility that were one feature of lower-caste status.

From this springboard, Chapter 12 criticizes current doctrine for giving insufficient weight to collective rights against group subordination and individual rights to freedom of movement, informational privacy, and against insult and humiliation. Taslitz is particularly critical of Supreme Court doctrine authorizing the stop-and-frisk of suspects based solely on (1) presence in a high crime neighborhood and (2) unexplained flight from the police (pp. 267–73). He also criticizes order-maintenance policing strategies as disproportionately oppressive, pointing to alternative police practices that might be less oppressive and more respectful of the citizen than mass searches and arrests of the dysfunctional for petty offenses (p. 272). Finally, he complains about the limited right to privacy against government use of electronic data and home visits by child protection agents (pp. 275–76). His treatment here is highly general, but seems to favor a reasonable-suspicion requirement for data acquisition and perhaps also for home visits to investigate child abuse.

I now pursue two lines of critique. First, as a matter of history, Taslitz's focus on Reconstruction yields an incomplete picture of the legal ecology upon which the Fourteenth Amendment was grafted. Second, as a matter of doctrine, his interpretive premises are both very vague and in tension with one another. They are so indeterminate that even if you adopted them, where you would come out on particular cases would still turn on basic and familiar choices about the relative value of freedom and security.

## II. THE FOURTEENTH AMENDMENT AND THE FIRST CRIMINAL PROCEDURE REVOLUTION

During the nineteenth century a reform movement, Benthamite in its content if not necessarily its pedigree,<sup>12</sup> established professional police to keep order and investigate offenses, and professional prosecutors to screen, charge, and try cases. The grand jury became irrelevant wherever it was not abolished. As defense lawyers became more common, they became standard, either as a matter of supply and demand or judicial appointment for indigent defendants in serious cases. The defendant gained the right to testify, and shouldered the risk that the jury would take it amiss if he didn't. Prison replaced execution as the standard punishment.

By 1868, the first municipal police departments in America had been founded,<sup>13</sup> and the first experiments with abolishing the defendant's incapacity to testify<sup>14</sup> and with abolishing the grand jury<sup>15</sup> were underway. Informed lawyers knew very well that the criminal justice system was changing, and they fully expected it to keep on changing.<sup>16</sup>

Until the 1960's the Supreme Court declined to read the Fourteenth amendment as incorporating the Fourth, Fifth and

12. As Leon Radzinowicz put it, "Impossible as this would have appeared to Bentham, most of his proposed improvements in the law and the machinery of justice have actually been introduced, although the fundamental tenets of his doctrine have by no means been universally adopted." LEON RADZINOWICZ, *A HISTORY OF ENGLISH CRIMINAL LAW: THE MOVEMENT FOR REFORM 1750-1833*, at 361 (1948) (footnote omitted). On Bentham's role in the movement for reform in America, see, e.g., *Ferguson v. Georgia*, 365 U.S. 570 (1961).

13. See, e.g., SAMUEL WALKER & CHARLES M. KATZ, *THE POLICE IN AMERICA* ch. 4 (5th ed. 2004) (American municipal police departments first established in the 1830s and 1840s).

14. See *Ferguson*, 365 U.S. at 577 ("The first statute was apparently that enacted by Maine in 1859 making defendants competent witnesses in prosecutions for a few crimes.").

15. See, e.g., Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. REV. 1, 18 (2002) (Michigan abolished requirement of grand jury indictment in 1859; "After the Civil War, reformers in nearly every state in the west and far west agitated for the abolition of the grand jury, and they ultimately succeeded in abolishing the grand jury requirement in four states" (footnote omitted)).

16. See, e.g., *Hurtado v. California*, 110 U.S. 516, 531 (1884):

There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age, and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms.

Sixth. Taslitz is probably right to say that for some time now the orthodox historical position is that the Fourteenth *was* meant to incorporate the Fourth, Fifth, and Sixth. The orthodox view, however, is seriously embarrassed by the history of criminal procedure. The flow of reform in the nineteenth century was understood as a direct attack on the common-law process, and that flow was not broken by reconstruction and the Fourteenth Amendment.

Informed lawyers knew that the Bill of Rights criminal provisions were under attack and they had no expectation whatever that the great struggle between Benthamism and the common law would be settled, constitutionally, by an amendment primarily designed to empower Congress to legislate on race relations in the states of the defeated Confederacy. The orthodox view of incorporation makes some sense with respect to the first and second amendments. Only by turning a blind eye to the history of criminal justice in the nineteenth century can the orthodox position be extended to the Fourth, Fifth and Sixth amendments (although in fairness it ought to be said that the history of criminal justice in the nineteenth century is only now emerging from the shadows of legal history).

I tend to agree with Taslitz that modern search-and-seizure law gives insufficient protection to freedom of movement and against public humiliation. The reason current law slights these values, however, is not that the craven settlement of 1876 repressed the memory of the Fourteenth Amendment's original progressive content. Benthamite reforms at odds with the Bill of Rights had their earliest successes in the North, not the South. Michigan authorized accusation by information in felony cases in 1859;<sup>17</sup> Maine gave the defendant the right to testify in 1864.<sup>18</sup> An important strand of progressive Northern opinion was hostile to the Fifth Amendment self-incrimination and grand-jury clauses.<sup>19</sup>

It was in the South, not the North, that the common-law process lasted the longest. Indeed some features of the old process vanished from the South only when the Warren Court de-

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17. See *supra* note 15.

18. See DAVID M. GOLD, *THE SHAPING OF NINETEENTH-CENTURY LAW: JOHN APPLETON AND RESPONSIBLE INDIVIDUALISM* 61 (1990). California was the next state, approving defense testimony in 1866. *Id.* at 62.

19. Opponents of permitting defense testimony argued, among other things, that it would compel the accused to testify against himself. Benthamites like Appleton rather frankly admitted their hostility to the privilege against self-incrimination. See *id.* at 64-65.

clared them unconstitutional. *Ferguson v. Georgia*<sup>20</sup> held the common-law rule making the accused incompetent to give sworn testimony a violation of due process. *Washington v. Texas*<sup>21</sup> struck down, on compulsory process and due process grounds, party-incompetence rules that had the effect of keeping defense witnesses off the stand. *Chambers v. Mississippi*<sup>22</sup> discarded, again on both Sixth Amendment and due process grounds, the common-law prohibition of impeaching a witnesses called by the impeaching party.

Benthamite attacks on the Bill of Rights reflected an attractive general theory separating substance from procedure and assigning procedure the limited role of accurate fact-finding. Conflict between this theory and the common law, which had over centuries evolved elaborate procedural obstacles to enforcing a sanguinary substantive law, was obvious. If the generation that framed and ratified the Fourteenth Amendment meant to leave resolution of the conflict between Benthamite reform and the common law criminal process to the political process—and the nationwide flow of reform successes through the turn of the century very strongly suggests this understanding—then the Fourteenth Amendment was not thought to impose the Fourth, Fifth and Sixth amendments, in terms, on the states.

Another, uglier, strand of nineteenth century history bears mentioning with respect to the Fourth Amendment. Before, during and after the ratification of the Fourteenth Amendment, lawless police brutality flourished in Northern cities that had never known slavery. This police violence, moreover, operated along class lines and was politically popular. In New York, “[c]omplaints of police violence date back to 1846, the NYPD’s first full year of operation, when twenty-nine people filed complaints with the city clerk charging that they had been assaulted by police officers.”<sup>23</sup> During the second half of the nineteenth century, “hundreds of press accounts of police violence . . . pre-

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20. 365 U.S. 570 (1961)

21. 388 U.S. 14 (1967). *See id.* at 19:

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant’s version of the facts as well as the prosecution’s to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution’s witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

22. 410 U.S. 284 (1973).

23. *See* MARILYNN S. JOHNSON, STREET JUSTICE: A HISTORY OF POLICE VIOLENCE IN NEW YORK CITY 15 (2003)

occupied New Yorkers."<sup>24</sup> Police violence became an enduring topic of political debate during the Civil War.<sup>25</sup>

Police brutality, with the approval of the majority, was not confined to New York. In Chicago, following the Haymarket bombing in 1886, State's Attorney Julius Grinnell advised the police to "[m]ake the raids first and look up the law afterward!"<sup>26</sup> The police followed this advice with enthusiasm:

Meeting halls, newspaper offices, and even private homes were invaded and ransacked for evidence. In two days more than fifty gathering places of anarchists and socialists were raided and persons under the slightest suspicion of radical affiliation arrested, in most cases without warrants and with no specific charge lodged against them . . . The next few weeks saw the detention of hundreds of men and women, most of them foreigners, who were put through the "third degree" to extract information and confessions.<sup>27</sup>

For example, police arrested one suspect and held him *incommunicado* for eight days; during interrogation he was kept in a cramped, lightless "sweat box" for hours.<sup>28</sup> In the 1930s the Wickersham Commission would document similar abuses throughout the country.<sup>29</sup> It is hard to believe that things had been better sixty years earlier.

By terminating his study in 1868, Taslitz avoids any treatment of post-ratification events. To the extent that the criminal justice system during Reconstruction was dynamic for independent causes, his choice is arbitrary and misleading. He relies on the views of the most enlightened of the Fourteenth Amendment's proponents, then ignores the repudiation of those views on the ground in the North. One particular instance is especially frustrating. Taslitz favors the exclusionary rule, but he misses a golden opportunity to explore its origins—which lie in the *Boyd*, *Sheridan* and *Weeks* decisions decades after 1868.<sup>30</sup>

24. *Id.* at 13.

25. *Id.*

26. PAUL AVRICH, *THE HAYMARKET TRAGEDY* 221 (1986); JAMES GREEN, *DEATH IN THE HAYMARKET* (2006).

27. AVRICH, *supra* note 26, at 221.

28. GREEN, *supra* note 26, at 206.

29. NATIONAL COMMITTEE ON LAW OBSERVANCE AND ENFORCEMENT, *REPORT ON LAWLESSNESS IN LAW ENFORCEMENT* (1931).

30. See *Boyd v. United States*, 116 U.S. 616 (1886) (statute presuming truth of forfeiture allegations upon failure of claimants to produce relevant business records violates Fourth and Fifth Amendments); *State v. Sheridan*, 96 N.W. 730 (Iowa 1903) (*Boyd* doctrine and state constitution require suppression of evidence obtained by execution of

The odious Southern slave apparatus deserves all the condemnation Taslitz (and anyone else) can heap upon it. The analogy between the slave system and brutal police practices might make good law, as analogies sometimes do. The analogy, however, is moral, not historical. The generation that ratified the Fourteenth Amendment distinguished what was taking place in the North from what was taking place in the occupied South. Northern legislatures were authorizing direct departures from the Bill of Rights, and Northern courts were upholding these innovations against constitutional challenge.<sup>31</sup> What these same legislatures did not do—impose meaningful restraints on the new police departments—is likewise suggestive of indifference or hostility toward individual rights against search and seizure.

As a matter of history, then, Taslitz focuses exclusively on race and Reconstruction. These are terribly important topics for understanding the history of search and seizure, but they are not the only important topics.

### III. A FOG OF REASONS

Current doctrine's successes—and failures—reflect the institutional realities impelling the Warren Court's criminal-procedure revolution. The modern police force and the modern public prosecutor gave the instruments of social control unprecedented powers, powers that were regularly abused and that legislatures had not seen fit to regulate. The judiciary stepped in to make law where none existed. To make the law of criminal procedure the Supreme Court had to issue constitutional rulings to govern millions of police-citizen encounters. The exclusionary rule gave the Court its only practical leverage over police conduct in the great majority of these cases, and so the law we have

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warrant for mere evidence); *Weeks v. United States*, 232 U.S. 383 (1914) (*Boyd* requires pretrial return of papers seized in warrantless home search by federal agent). Judge Cassel has noted that:

The first state decision suppressing evidence was *State v. Sheridan*, 96 N.W. 730 (Iowa 1903). In *Sheridan*, the Iowa court held that evidence obtained by a clear abuse of judicial process should be excluded under article I, § 8 of the Iowa Constitution. The Iowa Supreme Court overruled *Sheridan* in *State v. Tonn*, 191 N.W. 530 (Iowa 1923), on the ground that strict application of the exclusionary rule would thwart the proper administration of the criminal justice system.

Paul G. Cassell, *The Mysterious Creation of Search and Seizure Exclusionary Rules Under State Constitutions: The Utah Example*, 1993 UTAH L. REV. 751, 806 n.351.

31. See DRIPPS, *supra* note 9, at 31 (reviewing court decisions between 1866 and 1884 rejecting state defendants' Bill of Rights claims, whether grounded directly on the Fourth, Fifth and Sixth amendments, or via incorporation under the Fourteenth).

slights personal security and exalts privacy because the exclusionary rule does a much better job of protecting privacy than of protecting personal security.<sup>32</sup> The primacy of judge-made law in the criminal procedure field in turn gives the determinacy of that judge-made law an importance that Taslitz's focus on the lost wisdom of the Framers might occlude.

An ideal Fourth Amendment theory would satisfy three criteria. It would be legitimate, drawing fair support from text and history. It would also be reasonable, matching the results of most cases with widely-shared contemporary norms. And it would, finally, be determinate, giving police and lower courts the guidance they need to comply with the Constitution. The development of such an ideal theory has proved very difficult. Reasonable people could dispute whether Taslitz has succeeded in meeting the first two criteria. My point here is that he clearly fails the third criteria.

If one combines the seven "lessons of history" from the original Fourth Amendment (p. 71) with the ten "lessons of history" from the Fourteenth Amendment (pp. 258-62), one can construct as good an argument for one side as the other in most contested Fourth Amendment cases. Consider current stop-and-frisk law, which authorizes brief detention for investigation coupled with a protective frisk of suspects observed in unexplained flight from the police in "high crime neighborhoods."<sup>33</sup> Taslitz makes this practice the target of forceful criticism. Agreeing with a dissenting opinion by Justice Stevens, joined by three other Justices, he notes that experience of police abuse, especially among minority citizens, gives honest people good reason to flee (pp. 269-70). To the low probative value of flight, relied on by Stevens, Taslitz adds that prevailing doctrine's insensitivity to minority perspectives amounts to "silencing" that "crushes the human sense of self-worth, uniqueness, and autonomy" (p. 270). Finally, Taslitz criticizes prevailing doctrine for failing to recognize "the value of free movement and the seriousness of interference with it" (p. 270).

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32. On privacy's arbitrary primacy in the positive law, see William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016 (1995).

33. *Illinois v. Wardlow*, 528 U.S. 119 (2000). Technically speaking, it is possible that the stop might be justified but not a frisk, as when police suspect littering or a violation of the open container law. Given the "high crime neighborhood" premise, however, police with cause for the stop will typically also have cause for the frisk.



Yet Taslitz also acknowledges “the obligation of the state to protect its citizens from private violence and of the people to protect itself from state violence” (p. 261).

He notes the concern of the Reconstruction Congress with private violence against freed slaves and white unionists in the occupied South, commenting that “the challenge of protecting freedman from violence without eviscerating everyone’s civil rights preoccupied the Reconstruction Congress” (p. 261). He proposes a least-restrictive-alternative theory to adjudicate the old conflict between freedom and safety. Yet the stop-and-frisk cases seem to satisfy that criteria. It is hard to see what suspicious police can do to investigate a fleeing suspect without first stopping him.

Moreover, Taslitz’s concern for the expressive character of state violence applies also to the *failure* of the state to intervene. Randall Kennedy is only the most prominent voice to say that “blacks have suffered more from being left unprotected or under-protected by law enforcement authorities than from being mistreated as suspects or defendants.”<sup>34</sup> The image of police observing suspected gangsters jogging away unmolested would send a powerful message. Police abuse is only one source of the alienation from state authority so prevalent in many poor communities. Police indifference or impotence is also a factor.<sup>35</sup> Yet another factor is the quite rational prediction that police cannot keep secret the identity of those who inform against violent predators.<sup>36</sup> One advantage of stop-and-frisk is that when the frisk turns up drugs or weapons, police testimony is sufficient to convict.

Justice Thomas addressed the mobility point in his passionate dissent in *Chicago v. Morales*, in which the majority held the city’s anti-gang loitering law void for vagueness: “Gangs fill the daily lives of many of our poorest and most vulnerable citizens with a terror that the Court does not give sufficient consideration, often relegating them to the status of prisoners in their own

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34. RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (1998).

35. See, e.g., ELIJAH ANDERSON, *CODE OF THE STREET: DECENCY, VIOLENCE AND THE MORAL LIFE OF THE INNER CITY* 321 (1999). “Residents sometimes fail to call the police because they believe that the police are unlikely to come or, if they come, may even harass the very people who called them. This is an experience unfamiliar to most middle-class people.”

36. See *id.* (“With this attitude many people are afraid to report obvious drug dealing or other crimes to the police, for fear that the police might reveal their names and addresses to the criminals. It is thus better, many say, ‘to see but don’t see.’”).

homes."<sup>37</sup> I disagreed with Justice Thomas's assessment of the legal issue in *Morales*, but his descriptive point has the ring of truth. Private violence does more than police violence to curtail the freedom of movement in poorer communities, especially the freedom of women, children, and those who are no longer young.

So Taslitz has given us a lengthy list of lessons and principles, and given us how he would come out in some concrete cases. There does not, however, appear to be any determinate connection between the premises and the conclusions. †

### CONCLUSION

Professor Taslitz illuminates the important historical connection between search-and-seizure and racial oppression both before and after the Civil War. He shows that alternatives to today's decisions can be found in text and history. He has not, however, given us a complete history of search and seizure in the nineteenth century. Nor has he set out an interpretive program that can be expected to persuade the skeptical to abandon their own positions. More than thirty years ago, in his celebrated Holmes Lectures, Anthony Amsterdam bluntly declared that the Fourth Amendment's "language is no help and neither is its history."<sup>38</sup> That judgment, in my view, still stands.

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37. *Chicago v. Morales*, 527 U.S. 41, 99 (1999) (Thomas, J., dissenting).

38. Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 395 (1974).