ARTICLE

POLICING AS GENERAL WARRANTS

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The drafters of the Bill of Rights and its proponents envisioned a document constitutionalizing protections against some of the worst abuses they had experienced under English rule. Prominent businessmen—many of them engaged in smuggling—found their homes ransacked in search of contraband on flimsy evidence and without any reason given for the disruption of their business and consequent enrichment of government agents. The Fourth Amendment addressed the use of general warrants and writs of assistance to allow government agents to conduct broad searches with limited scrutiny. In the early years of the Constitution, this had little practical effect, because public safety and criminal investigations were largely left to the states. State responses to criminal behavior were the province of institutions with limited powers,

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† Supervising Attorney, Community Legal Services, Inc. J.D., Washington and Lee University School of Law. The authors would like to acknowledge that this Article relies heavily on citations to white, male authors. Some of this is a consequence of the types of sources a work exploring historical understandings of the Constitution requires. When possible, it is our preference to include the experiences of historically excluded people in our understanding of history. Despite the short shrift the available sources give those voices, the shoulders upon which we stand support a vision of a more just and inclusive society. We thank Hon. Daryl Funk, Daniel Harawa, Alex Klein, Robert White, and Matthew Wyatt for their invaluable insight, guidance, and feedback during the preparation of this Article. Special thanks to Professor Hasbrouck's research assistant, Tom Boss, for his assistance with research into historical and humanities sources. We extend our love to the amazing editors at the *University of Pennsylvania Law Review*—specifically Scott Aravena, Christina Bartzokis, Max Bresticker, Matthew M. Chagares, Shivani Chelliah, Devin DiSabatino, David Hahn, Ryan Homer, Sarah Jaklitsch, Nathalie Rincon, Henry Schlick, Jake Shepherd and Christopher Tarakji—for superb editing and thoughtful comments that significantly advanced this piece. Finally, I would like to personally thank my wife, Mandy Liesch, whose support during the drafting and editing of this piece has been invaluable.

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such as sheriffs and watches, though slave patrols in the southern states exercised broader search and seizure powers. These state institutions rarely provoked challenges under state constitutional protections, leaving the limits of both state and federal constitutional protections untested.

While the Fourth Amendment's protections were not initially read to apply against the states, the Fourteenth Amendment aimed to extend the full range of constitutional rights to all citizens, including newly free Black Americans. In practice, the novel institution of professional policing emerged in the decades before the Civil War as a response to perceived disorder and criminal behavior. Police became more proactive in cities to suppress labor unrest and organized crime, conducting investigations on their own initiative long before any evidence was presented to a judicial officer. Anti-union policing saw government agents and their business allies develop undercover tactics and engage in mass violence in the name of law and order. Few targets of professional policing's broader search and seizure powers challenged their arrests, convictions, or assaults under the Reconstruction Amendments in the Nineteenth Century. By the time courts effectively applied the Fourth Amendment against the states, police forces had essentially assumed the powers of the slave patrols against all free people.

The modern practice of policing by means of roving, armed government agents conducting frequent, warrantless searches replicates the abuses of general warrants and writs of assistance. The application of those powers to undermine democratic remedies for economic injustices replicates the abuses of the slave patrols. This Article takes up the novel argument that in doing so, modern policing violates the Fourth and Fourteenth Amendments. While constitutional rights are necessarily open to interpretation by the courts, they should never be construed to provide less protection than they did when instituted. This Article advances the abolition constitutionalist proposition that the tools necessary to enact many of police abolition's goals already exist within the Constitution. Reversing constitutional law's historical errors to restore the common-law protections embodied in the Fourth Amendment would strip police of their slave patrol powers.

INTRODUCTION

In that instrument I hold there is neither warrant, license, nor sanction of the hateful thing; but interpreted, as it ought to be interpreted, the Constitution is a glorious liberty document.[1]

— *Frederick Douglass*

Colonial Massachusetts customs officers knew Daniel Malcom as a smuggler who dealt in untaxed liquor.[2] A paid informant told them that Malcom kept such liquor in his house.[3] Relying upon the vast search powers granted to them by a writ of assistance and an ordinary warrant from a justice of the peace, they approached his house, intent on searching it for the contraband they suspected he stored there.[4] Malcom, relying on the advice of his attorney, James Otis, refused the customs officers entry into his cellar in the absence of his real accuser.[5] Bystanders refused to assist the customs officers, and a crowd gathered in Malcom's defense.[6] As night approached, the customs officers withdrew, and Malcom's home remained unsearched.[7]

Over two hundred years later, Maine State Trooper Pappas obtained a tip from an informant that Derrick Favreau had a hidden compartment in his car

1 FREDERICK DOUGLASS, THE MEANING OF JULY FOURTH FOR THE NEGRO 16 (1852), https://masshumanities.org/wp-content/uploads/2019/10/speech_complete.pdf [perma.cc/GTH8-WEWF].

2 Laurent Sacharoff, *The Broken Fourth Amendment Oath*, 74 STAN. L. REV. 603, 655 (2022).

3 *Id.* at 656.

4 *See* Sina Kian, *The Path of the Constitution: The Original System of Remedies, How It Changed, and How the Court Responded*, 87 N.Y.U. L. REV. 132, 133 (2012) ("After presumably brief pleasantries, the officials revealed their writ of assistance-a general warrant issued by a customs official.").

5 Sacharoff, *supra* note 2, at 655-56.

6 *See* Hannah Bloch-Wehba, *Exposing Secret Searches: A First Amendment Right of Access to Electronic Surveillance Orders*, 93 WASH. L. REV. 145, 173 (2018) ("[The customs officers] attracted scrutiny and resistance from passersby who refused to help.").

7 Sacharoff, *supra* note 2, at 656.

for secretly transporting illegal drugs.[8] Pappas chose to place Favreau under surveillance, following him from his home to a store and then away from the store.[9] Favreau became aware of the surveillance, making an unsignaled turn to confound the trooper.[10] Pappas used this turn as a pretext to stop Favreau's vehicle, extending the necessary duration of the stop to allow for the arrival of a drug detection dog.[11] The dog indicated the presence of drugs, and a subsequent search of the vehicle revealed a hidden compartment containing cocaine.[12] Favreau was arrested and convicted, and the First Circuit Court of Appeals upheld his conviction in an opinion penned by Associate Justice David Souter.[13]

Daniel Malcom was likely as involved in criminalized behavior as Derrick Favreau was. The law enforcement agents who came to search his home, concerned about challenges to their authority under writs of assistance, took the precaution of also obtaining a specific warrant.[14] Yet the Boston mob saw this warrant, based upon the word of a paid informant who was not present, as no more legitimate than the writs of assistance and general warrants fueling their calls for independence.[15] Their grievances with general warrants and their ilk formed the foundations of the Fourth Amendment, yet modern constitutional law permits modern police with similarly supported suspicions to conduct *warrantless* searches despite that very protection.[16] These warrantless searches exceed the scope the Fourth Amendment was intended to allow for even searches pursuant to a warrant. The Supreme Court's search and seizure jurisprudence has effectively handed American police a general

8 *See* United States v. Favreau, 886 F.3d 27, 29 (1st Cir. 2018) ("[H]e had received an informant's tip that Favreau possessed a vehicle that contained a 'trap,' a secret compartment in which drugs could be hidden and transported.").

9 *See id.* at 29-30.

10 *See id.* at 30.

11 *See id.*

12 *See id.*

13 *See id.* at 31 ("The probable cause to search was therefore not the product of any unconstitutionally lengthy detention prior to the search that could be said to taint the validity of the search itself.").

14 *See* Sacharoff, *supra* note 2, at 656. ("Even an ordinary search warrant the officers had obtained from a JP—based upon a thirdhand account—was not valid without the real accuser, the crowd maintained.").

15 *See id.* ("The crowd that assembled outside Malcom's home to help him resist similarly declared to the officers that the writ was unlawful.").

16 *Compare* Stanford v. Texas, 379 U.S. 476, 481 (1965) ("Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists. The hated writs of assistance had given customs officials blanket authority to search where they pleased . . . ."), *with* Terry v. Ohio, 392 U.S. 1, 30 (1968) ("[W]here a police officer [concludes] that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous . . . he is entitled . . . to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons . . . .").

warrant. This Article explores how constitutional law lost the plot on general warrants.

The Constitution's protections against searches and seizures were designed to remedy specific historical abuses by law enforcement. The Fourth Amendment, as originally conceived, encompassed broad protections against warrantless searches and seizures from the common law while also constitutionalizing common-law standards for obtaining a warrant.[17] The inclusion of the Fourth Amendment was motivated in part by the English government's abuses of general warrants and writs of assistance.[18] Prominent cases of the day found those practices in conflict with the common-law standards for searches and seizures.[19] These common-law foundations of the Fourth Amendment persisted into the nineteenth century but were eroding by the time of the Civil War.[20]

The Reconstruction Amendments formally ended slavery and served as a legal basis for exorcising its badges and incidents.[21] Racialized policing—a practice necessary for preserving slavery and potentially fostering its return—was among those badges and incidents and therefore contrary to the Thirteenth Amendment.[22] Where security against unreasonable searches and

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17 *See* Kiel Brennan-Marquez, *Extremely Broad Laws*, 61 ARIZ. L. REV. 641, 653-54 (2019) ("In fact, the Fourth Amendment was ratified explicitly in response to the 'Crown's practice of using general warrants and writs of assistance,' royal decrees that gave British soldiers and other agents of the Crown boundless authority to perform searches across entire townships.").

18 *See* Maryland v. King, 569 U.S. 435, 466 (2013) (Scalia, J., dissenting) ("At the time of the founding, Americans despised the British use of so-called 'general warrants'—warrants not grounded upon a sworn oath of a specific infraction by a particular individual, and thus not limited in scope and application."); *cf.* DAVID GRAY, THE FOURTH AMENDMENT IN AN AGE OF SURVEILLANCE 70 (2017) ("[While] general warrants were under scrutiny in England, [colonial] citizens . . . were complaining about writs of assistance, . . . a special form of general warrant. Although writs of assistance would have been illegal under English common law, colonial authorities claimed that the Townshend Acts of 1767 denied those common-law protections to the colonists.").

19 *See, e.g.*, Entick v. Carrington, (1765) 95 Eng. Rep. 807, 817 (KB) ("The defendants have no right to avail themselves of the usage of these warrants since the Revolution . . . ."); Wilkes v. Wood, (1763) 98 Eng. Rep. 489, 498 (KB) ("If they should be found to be legal, they are certainly of the most dangerous consequences; if not legal, must aggravate damages."); Paxton's Case (Mass. 1761), *in* JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY, BETWEEN 1761 AND 1772, 51, 56-57 (Samuel M. Quincy ed., 1865) ("This is properly a Writ of Assistants, not Assistance; not to give the Officers a greater Power, but as a Check upon them.").

20 *See* Thomas Y. Davies, *Correcting Search-and-Seizure History: Now-Forgotten Common-Law Warrantless Arrest Standards and the Original Understanding of "Due Process of Law"*, 77 MISS. L.J. 1, 173-75 (2007) (tracing the persistence and erosion of common-law arrest standards between the drafting of the Bill of Rights and the Civil War).

21 *See* Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 67 UCLA L. REV. 1108, 1112-13 (2020) (discussing the application of the Thirteenth Amendment to the badges and incidents of slavery).

22 *See id.* at 1121 ("Just as Jim Crow policing served a policy of controlling Black labor, mass incarceration continues its tradition.").

seizures is the right of free people, fear of them was an essential incident of slavery.[23] Racialized policing of free Black people after the Civil War was a significant concern of the Reconstruction Congress and a major factor in the adoption of the Fourteenth Amendment.[24] The Reconstruction Congress used its powers under these new amendments to pass legislation forbidding racialized policing and granting legal remedies to its victims.[25] At both the First and Second Foundings,[26] Congress amended the Constitution to redress law enforcement abuses: overly broad search and seizure powers with the Fourth Amendment and racialized policing with the Reconstruction Amendments.

Modern policing bears little resemblance to its antecedents in the First Founding era, having largely developed over the course of the nineteenth century. Policing in the Founding era consisted of few officials with limited powers against free people.[27] Slave patrols operated under considerably looser standards, having general power to search and seize enslaved people and even those suspected of being enslaved.[28] The development of policing shifted over the course of the nineteenth century, resulting in large, professional police forces with broad investigatory mandates.[29] Professional policing, at least of white people, began in major northern cities in the decades leading up to the

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23 *See* Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 PA. J. CONST. L. 561, 571 (2012) (elaborating on the inherent vulnerability to seizure as an incident of slavery).

24 *See* David H. Gans, *"We Do Not Want to Be Hunted": The Right to Be Secure and Our Constitutional History of Race and Policing*, 11 COLUM. J. RACE & L. 239, 269 (2021) ("The Fourteenth Amendment was added to the Constitution against the backdrop of a host of systematic violations of fundamental rights by state governments, including by the police.").

25 *See*, *e.g.*, Green v. Thomas, 734 F. Supp. 3d 532, 543 (S.D. Miss. 2024) (order denying qualified immunity) (describing Congress's passage of the Ku Klux Klan Act of 1871 in reaction to widespread abuses of Black people by Klansmen and their allies in law enforcement and government), *aff'd in part & rev'd in part*, 129 F.4th 877, 889-90 (5th Cir. 2025).

26 *See* Burt Neuborne, *Federalism and the "Second Founding:" Constitutional Structure as a "Double Security" for "Discrete and Insular" Minorities*, 77 N.Y.U. ANN. SURV. AM. L. 59, 70 (2022) (distinguishing the radical changes of the Reconstruction Amendments from other Constitutional amendments to the extent that they constitute a Second Founding akin to the adoption of the Constitution and Bill of Rights).

27 *See* Seth W. Stoughton, *The Blurred Blue Line: Reform in an Era of Public & Private Policing*, 44 AM. J. CRIM. L. 117, 122-24 (2017) (discussing the many officials responsible for some aspect of public safety or law enforcement in Colonial America and their limited law enforcement powers); Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1238-40 (2016) ("[B]y the time of the US Founding, [legal authorities] and the general public [understood] that, outside of pursuit of a known felon, a warrant must issue prior to search or seizure within the home. They rejected general warrants and required certain particulars even for specific warrants to be valid.").

28 *See* Gans, *supra* note 24, at 262-63 ("Slave patrols that had essentially unfettered power to search and seize—and to terrorize Black people—were a basic feature of slavery that predated the Constitution and continued long after its ratification.").

29 *See* Stoughton, *supra* note 27, at 125-27 (tracing the development of professional police forces and the evolution of their powers and duties during the nineteenth century).

Civil War.[30] These early professional police were largely organized on the Peelian model, dependent upon the police being seen as part of the community and exercising their authority with the consent of the populace.[31] Yet this community consent was illusory, as professional police largely served to maintain social and economic order.[32] Professional policing spread after the Civil War, with more focus on investigating crimes in response to public perception of increased crime.[33]

Modern policing by armed government agents with broad investigative powers who largely focus their efforts on communities of color clearly violates the original intent of both the Fourth Amendment and the Reconstruction Amendments. The broad search powers of modern police replicate general warrants and writs of assistance in that they give police unfettered authority.[34] Modern policing involves roving investigators who have the power to engage in stops and searches with little suspicion and who seldom seek warrants to justify their activities.[35] Police today employ arrest standards that, even if

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30 *See id.*

31 *See* David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 479 n.30 (2016) (discussing the role of the Peelian Principles in the importation of professional policing in northern U.S. cities).

32 *See* Ahmed A. White, *Capitalism, Social Marginality, and the Rule of Law's Uncertain Fate in Modern Society*, 37 ARIZ. STATE L.J. 759, 799 (2005) ("According to most authorities, the police evolved from the very outset not as arbiters of crime control and public safety, but as agents in the construction and maintenance of social order under capitalism."); Steve Herbert, Katherine Beckett & Forrest Stuart, *Policing Social Marginality: Contrasting Approaches*, 43 L. & SOC. INQUIRY 1491, 1495-96 (2018) ("After emancipation, as modern capitalism took shape, the police turned their coercive attention to the new industrial working class that presented new challenges to the economic order. By the late nineteenth century, the police regularly mobilized to defeat workers' strike efforts and unionization attempts." (citation omitted)).

33 *See* Stoughton, *supra* note 27, at 125 ("The first 'modern' municipal police departments began to appear . . . largely in response to rioting and civil unrest . . . . As American policing became more formalized, police agencies somewhat reluctantly added detective bureaus.").

34 *See* Thomas Y. Davies, *Can You Handle the Truth? The Framers Preserved Common-Law Criminal Arrest and Search Rules in "Due Process of Law"—"Fourth Amendment Reasonableness" Is Only a Modern, Destructive, Judicial Myth*, 43 TEX. TECH L. REV. 51, 133 (2010) ("[T]oday's police badge confers the sort of discretionary authority that only a general warrant could have conferred in 1789.").

35 *See* Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in* Atwater v. Lago Vista, 37 WAKE FOREST L. REV. 239, 421 (2002) ("Contemporary police-phase criminal procedure confers substantial discretionary authority on officers and allows (and expects) them to act on their own initiative. Thus, contemporary doctrine rarely requires police to obtain warrants before making arrests or searches."); *see also* PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 1-7 (2017) (describing the frequent and disparate application of police superpowers to communities of color); SARAH A. SEO, POLICING THE OPEN ROAD: HOW CARS TRANSFORMED AMERICAN FREEDOM 12 (2019) (describing the use of cars as "the most policed aspect of everyday life"). As to how roving, armed government agents implicate the Fourth Amendment, Justice Scalia summarized it best: "To constitute an arrest, however—the quintessential 'seizure of the person' under our Fourth Amendment jurisprudence—the mere grasping or *application of physical force* with lawful authority,

they used warrants, would vastly outstrip the common-law arrest rules of the Founding era.[36]

The racialized patterns of modern policing replicate the abuses of the slave patrols and early Reconstruction policing. Black and other marginalized communities bear the brunt of these abuses.[37] Self-fulfilling prophecies like "high crime neighborhoods," "furtive gestures," and "suspiciously evading police" allow modern police to justify their racialized patterns of enforcement.[38] Pretextual stops justify the same sort of racial targeting as the flurry of vagrancy laws and Black Codes did in the aftermath of the Civil War.[39] The through line of the law enforcement abuses that inspired the Fourth and Fourteenth Amendments and law enforcement in the mass incarceration era is the use of overbroad search and seizure power to economically interfere[40] with politically disfavored groups.[41] The Equal

whether or not it succeeded in subduing the arrestee, was sufficient." California v. Hodari D., 499 U.S. 621, 624 (1991) (emphasis added).

36 *See* Davies, *supra* note 20, at 90 ("[T]he Framers drafted declarations of rights under a different and more restrictive conception of the boundary of government action than that used in modern constitutional theory.").

37 *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012) (arguing that the modern criminal justice system targets Black communities and functions as a system of racial control).

38 *See* PETER VERNIERO & PAUL H. ZOUBEK, N.J. OFF. OF ATT'Y GEN., INTERIM REPORT OF THE STATE POLICE REVIEW TEAM REGARDING ALLEGATIONS OF RACIAL PROFILING 67-68 (1999), https://www.nj.gov/lps/intm_419.pdf [https://www.perma.cc/FP5X-4JSA] ("[Arrest statistics disproportionately representing minorities] have been used to grease the wheels of a vicious cycle—a self-fulfilling prophecy where law enforcement agencies rely on arrest data that they themselves generated as a result of the discretionary allocation of resources and targeted drug enforcement efforts.").

39 *See* Richard S. Frase, *What Were They Thinking? Fourth Amendment Unreasonableness in* Atwater v. City of Lago Vista, 71 FORDHAM L. REV. 329, 333 (2002) ("Of course, the police will not follow, arrest, and search every driver they see, given the potentially staggering costs . . . . Instead, the extremely broad arrest and search powers now enjoyed by the police will be applied in a highly selective manner . . . .").

40 We use this broad term because law enforcement abuses in different eras have taken vastly different forms, particularly in how they disrupt the economic lives of politically disfavored groups. Seizing and appropriating the property of businessmen involved in smuggling—or even just international trade—prior to the Revolution, suppression of organized labor, convict leasing, excessive fines and fees, and civil asset forfeiture represent just some of the forms of economic interference that law enforcement has used in American history. The unifying theme, though, is the government's pairing of criminal law enforcement with the disruption of the economic lives of politically disfavored groups.

41 *Compare* Mike Petridis, *In General Public Use: An Unnecessary Test in Fourth Amendment Searches Using Advanced Sensing Technology*, 36 TOURO L. REV. 577, 580-81 (2020) (discussing how the broad power of the British to search and seize colonial ships in the buildup to the Revolution inspired the Fourth Amendment), *and* Gans, *supra* note 24, at 270 ("The Fourteenth Amendment's revolutionary mandates were added to the Constitution against the backdrop of the Black Codes, the South's effort to reimpose slavery, strip Black people of their fundamental rights, and keep them in a subordinate status."), *with* Brandon Hasbrouck, *The Just Prosecutor*, 99 WASH. U. L. REV. 627, 653-54 (2021) (exploring the racist origins of the war on drugs and resulting mass incarceration).

Protection Clause should have prevented such abuses, but its perversion in constitutional law aided in the recreation of the law enforcement powers whose abuses inspired the Fourth, Thirteenth, and Fourteenth Amendments.[42] This Article posits that instead of receiving the generalized protections the Constitution laid out for free people, we have all become subject to police as powerful as the slave patrol.

The restoration of the common-law standards baked into the Fourth Amendment in 1789 would require the end of discretionary, proactive police investigations. Constitutional rights should never be interpreted to provide *less* protection than they did when drafted.[43] While some modern Fourth Amendment decisions provide protections not envisioned at the Framing,[44] the restoration of common-law warrant and warrantless-arrest standards does not require rescinding those protections.[45] We should reverse the errors of the late nineteenth century and restore the common-law standards implicit in the Fourth Amendment while stripping police of their slave patrol powers.[46]

While plenty of scholars have used originalist methods to argue for broader search and seizure protections under the Fourth Amendment,[47] this

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42 *Cf.* Brandon Hasbrouck, *The Antiracist Constitution*, 102 B.U. L. REV. 87, 113-15 (2022) (discussing the corruption of the Equal Protection Clause to serve colorblind constitutionalism).

43 *See* Donohue, *supra* note 27, at 1195 ("[W]hile living constitutionalism may embrace a meaning of 'unreasonable' beyond that adopted at the Founding, it is on shakier ground when it may look to read the rights that existed at the time the Constitution was drafted out of existence."); United States v. Carloss, 818 F.3d 988, 1006 (10th Cir. 2016) (Gorsuch, J., dissenting) ("[T]he Fourth Amendment, at a minimum, protects . . . against searches of . . . persons, houses, papers, and effects to the same degree the common law protected . . . against such things at the time of the founding, for in prohibiting 'unreasonable' searches the Amendment incorporated existing common law restrictions on the state's investigative authority."); Riley v. California, 573 U.S. 373, 403 (2014) (reviewing the origins of the Fourth Amendment as a response to general warrants and writs of assistance and stating that "the fact that technology now allows an individual to carry around [private] information in his hand does not make the information any less worthy of the protection for which the Founders fought.").

44 *See, e.g.*, Weeks v. United States, 232 U.S. 383, 398 (1914) (introducing an exclusionary rule for evidence seized in violation of the Fourth Amendment).

45 *See* United States v. Jones, 565 U.S. 400, 411 (2012) ("What we apply is an 18th-century guarantee against unreasonable searches, which we believe must provide *at a minimum* the degree of protection it afforded when it was adopted."). *See also* GRAY, *supra*, note 18, at 171 ("[The Fourth Amendment] demands that the political branches commit to policies of restraint. Where they fail to do so, [it] requires that courts . . . impose prospective remedial measures sufficient to effectively guarantee the security of the people against threats of unreasonable searches and seizures.").

46 *Cf.* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 400 (1974) ("[T]he authors of the Bill of Rights had known oppressive government. . . . [T]he guarantee against unreasonable 'searches and seizures' . . . should be read to assure that any and every form of such interference is at least regulated by fundamental law so that it may be 'restrained within proper bounds.'").

47 *See, e.g.*, Michael J. Zydney Mannheimer, *The Contingent Fourth Amendment*, 64 EMORY L.J. 1229, 1232-34 (2015) (arguing that the reasonableness requirement would have originally been

Article engages in an excavation of history with an eye to police abolition. We cannot merely ask the Court to consider broader applications of the Fourth Amendment to bring it in line with historical law enforcement. We must instead begin by realizing what our rights were under the Constitution and how those rights were taken away.[48] It is not sufficient to say merely what the law ought to be without examining why the law became misshapen. The Supreme Court has certainly played a role in the loss of our rights from the Warren Court to the present.[49] But this Article also traces how economic and political forces across eras influenced the development of both the Constitution and constitutional law, proposes an abolition constitutionalist approach to the inequity of constitutional law, and challenges modern policing. In our resistance to injustices in constitutional law, we must not conflate those inequities with the Constitution itself. The Constitution contains the tools to restore the common-law protections of the Fourth Amendment and abolish the slave patrol practices of modern police.

This Article proceeds in three parts. Part I explores the police practices of Colonial America and traces the development of modern policing during the nineteenth century. Part II demonstrates how the Fourth Amendment and Reconstruction Amendments incorporated objections to law enforcement abuses into their civil rights protections. Part III compares the modern

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understood to apply state law search-and-seizure protections to federal agents); Junichi Semitsu, *From Facebook to Mug Shot: How the Dearth of Social Networking Privacy Rights Revolutionized Online Government Surveillance*, 31 PACE. L. REV. 291, 381 (2011) (arguing that the Framers would have objected to government surveillance of private citizens on social networks); Lisa Lucile Owens, *Concentrated Surveillance Without Constitutional Privacy: Law, Inequality, and Public Housing*, 34 STAN. L. & POL'Y REV. 131, 160-61 (2023) (discussing the originalist problems with the Supreme Court's distinction between conventional and new surveillance technologies in Fourth Amendment analysis).

48 The story of how those rights were lost could be quite an extensive article by itself. *Terry v. Ohio*, 392 U.S. 1 (1968), would merit its own part in such an article, and this Article engages only somewhat with the literature on *Terry* and its progeny. The problem this Article tackles, though, is significantly broader than *Terry*, a decision which does not even claim to be grounded in the original understanding of the Fourth Amendment. *See id.* at 10-11 (focusing on the practical arguments in front of the Court rather than the original meaning of the Fourth Amendment).

49 *See* Tracey Maclin, Terry *and Race:* Terry v. Ohio*'s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271, 1320 (1998) ("Police safety would be served by allowing officers to frisk suspicious individuals without probable cause, however, the creation of a police safety exception [in *Terry*] meant the loss of Fourth Amendment rights."); Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 129 (2017) ("Over the past four decades, the Supreme Court has interpreted the Fourth Amendment to enable and sometimes expressly legalize racial profiling."). Further harmful developments loom that the Supreme Court has yet to scrutinize. *See, e.g.*, Mary Mara, *A Look at the Fourth Amendment Implications of Drone Surveillance by Law Enforcement Today*, 9 AKRON J. CONST. L. & POL'Y 1, 21 (2017) ("[T]he use of [drone] technology to surveil traditionally private spaces, although expedient, comes with an unacceptable price tag: a loss of Fourth Amendment privacy rights for criminals and law-abiding citizens alike.").

practice of policing with the historical abuses of general warrants, writs of assistance, and the slave patrols and other racialized policing of the south. Finally, the Conclusion unifies these historical explorations to support, for the first time, the claim that modern policing by armed, roving government agents with broad search and arrest powers violates the original public meaning of the Fourth, Thirteenth, and Fourteenth Amendments by exposing the general population to the very abuses those amendments were drafted to remedy.

I. THE DEVELOPMENT OF POLICING IN AMERICA

Free labor's the cornerstone of US economics . . . .[50]
—Killer Mike

American law enforcement did not reach its modern form within the country's first hundred years. The drafters of the Bill of Rights and the Reconstruction Amendments understood law enforcement in fundamentally different forms from what we see today. Understanding those public safety regimes is necessary to any examination of the original public meaning of constitutional rights meant to protect Americans from law enforcement abuses.

In the early Republic, law enforcement duties were divided between several traditional local officers—sheriffs, constables, watchmen, justices of the peace, etc.—with limited powers under the common law.[51] States that practiced slavery usually added a slave patrol to that regime, whose powers to police enslaved people were far greater than any of the traditional officers.[52] By the Civil War, American cities were beginning to adopt professional police forces based on the Peelian model of London's Metropolitan Police Service.[53] These police, while more powerful than their predecessors, were initially still

50 KILLER MIKE, *Reagan*, *on* R.A.P. MUSIC (Williams Street 2012).

51 *See* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 620-24 (1999) (describing the limited powers and interactions of constables and justices of the peace in Colonial America). Federal law enforcement was significantly less robust than even this limited state regime. *See* Gautham Rao, *The Federal Posse Comitatus Doctrine: Slavery, Compulsion, and Statecraft in Mid-Nineteenth Century America*, 26 L. & HIST. REV. 1, 4-5 (2008) (discussing the lack of any practical federal power to enforce the Fugitive Slave Act).

52 *See* Samuel Walker, *Governing the American Police: Wrestling With the Problems of Democracy*, 2016 U. CHI. LEGAL F. 615, 624 (2016) ("Because of the salience of the issue of controlling the slave population, modern-style policing emerged in the southeast before it did in the cities outside the south. . . . [P]olicing in the southeast prior to the mid-1960s reinforces the . . . argument . . . that the police have traditionally served . . . the dominant white majority.").

53 *See id.* ("Policing outside of the southeast, although modeled after the highly centralized London Metropolitan Police, adopted a decentralized structure of political control.").

constrained by the common-law principles undergirding the Bill of Rights.[54] This Part explores the history of American policing in two sections. The first details the law enforcement regimes of the early Republic, while the second tracks the creation and evolution of professional police forces in the nineteenth century.

A. *Law Enforcement in the Age of the First Founding*

Colonial public safety officers largely mirrored their English counterparts, with their attendant limitations under the common law.[55] Search, arrest, investigation, and patrol duties were spread across numerous offices, rather than concentrated in a unified, professional police force.[56] Typical public safety officers included justices of the peace, sheriffs, constables, and watchmen.[57] Those actively moving about the community in the course of their duties—constables and watchmen—served preventative and reactive purposes rather than investigative ones.[58] While all of these officials had the power to arrest without a warrant under certain circumstances, those exceptions were narrow and limited by both the scope of their duties and the penalties for unlawful arrests.[59]

The powers of those traditional English public safety officers were quite limited at common law. The sheriff was a democratically elected official with judicial powers in minor civil cases and the duties of overseeing elections, keeping the peace, serving judicial process, and attending to the King's interests in the county.[60] Sheriffs were able to appoint subordinate officers—

54 *See* Davies, *supra* note 20, at 188-89 ("[I]t appears that the first American reported decisions to endorse the bare probable cause standard for warrantless arrests by officers were the 1844 Pennsylvania decision *Russell v. Shuster* and the 1850 Massachusetts decision *Rohan v. Sawin*.").

55 *See* David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1205 (1999) ("Early American law enforcement for the most part resembled English law enforcement."); George C. Thomas III, *Stumbling Toward History: The Framers' Search and Seizure World*, 43 TEX. TECH L. REV. 199, 209 (2010) ("[T]he extremely narrow scope of [framing-era] federal law enforcement meant that the regulation of almost all search and seizure activity was left to the common law . . . .").

56 *See* Thomas, *supra* note 55, at 200-01 (noting the many differences between eighteenth-century law enforcement and "today's para-military investigative operation").

57 *See id.* (discussing the duties of sheriffs and constables); David Gray, *Fourth Amendment Remedies as Rights: The Warrant Requirement*, 96 B.U. L. REV. 425, 467-68 (2016) (discussing the division of duties between constables, watchmen, sheriffs, and magistrates).

58 *See* Slanksy, *supra* note 55, at 1198 ("[T]he constabulary and watch were not relied upon for the arrest of most criminals. The core function of the watch was preventive: keeping an eye out for trouble, raising an alarm when it was spotted, and perhaps deterring some of it by mere presence.").

59 *See* Donohue, *supra* note 27, at 1222-31, 1238-39 (detailing the standards for English common-law officials to arrest wrongdoers and noting that, at the time of the U.S. Founding, "pursuit of a known felon" was the only exception to the warrant requirement for searches or seizures within the home).

60 *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *328-33 (explaining the role of the sheriff).

an under-sheriff, bailiffs, and gaolers—to carry out parts of their duties,[61] and to require all men in the county to assist them in keeping the peace or arresting felons.[62] Sheriffs, under-sheriffs, and bailiffs had the authority to arrest known felons without a warrant and to carry out arrests pursuant to a warrant.[63] Coroners likewise were democratically elected officers with a combination of ministerial and judicial powers.[64] In their judicial role, coroners investigated the causes of deaths and the circumstances of shipwrecks and treasure troves.[65] Their ministerial role was largely confined to substituting for the sheriff to avoid conflicts of interest, but a coroner could also arrest a known felon without a warrant.[66] Justices of the peace, meanwhile, were primarily judicial officers, appointed by commissions and tasked with county recordkeeping and with keeping the peace, as well as various duties under statutes.[67] Justices of the peace were responsible for suppressing riots and fights, for issuing special warrants, and for arresting those who committed felonies or breaches of the peace in their presence.[68] Constables were purely ministerial in their role as keepers of the peace.[69] They were also tasked with overseeing guards and watchmen.[70] Constables could arrest and promptly bring before a justice of the peace anyone who

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61 *See id.* at *333-35 (describing the sheriff's subordinates).

62 *See id.* at *332 (describing the *posse comitatus*, or "power of the county").

63 *See id.* at *332-34 (describing the arrest powers and duties of these officers); 4 WILLIAM BLACKSTONE, COMMENTARIES *287-89 (explaining warrants and noting that the sheriff, among other officers, could make arrests without a warrant). Felony arrests were subject to significant restrictions to ensure the arresting officer's confidence that the person to be arrested was, in fact, a felon. *See* Donohue, *supra* note 27, at 1223 ("[T]he agent needed a high level of confidence that the individual had actually engaged in the illegal activity—specifically, that the officer, or the person approaching the officer to demand the arrest, had witnessed the person commit the crime.").

64 *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *335-37 ("The office and power of a coroner are also, like those of a sheriff, either judicial or ministerial; but principally judicial."); *see also* RADLEY BALKO & TUCKER CARRINGTON, THE CADAVER KING AND THE COUNTRY DENTIST: A TRUE STORY OF INJUSTICE IN THE AMERICAN SOUTH, 37-40 (2018) (describing the origins and breadth of the responsibilities of coroners under the common law).

65 *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *337 ("Concerning treasure trove, he is also to enquire who were the finders, and where it is, and whether any one be suspected of having found and concealed a treasure . . . .").

66 *See id.* ("The ministerial office of the coroner is only as the sheriff's substitute."); 4 WILLIAM BLACKSTONE, COMMENTARIES *289 ("The coroner, may apprehend any felon within the county without warrant.").

67 *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *338-41 (describing the various duties of justices of the peace, who were appointed by the King's special commission).

68 *See id.* at *342 (explaining that justices of the peace had "all the power of the ancient conservators" to suppress riots and arrest felons); 4 WILLIAM BLACKSTONE, COMMENTARIES *287-89 (noting that justices of the peace had a limited ability to issue warrants and could apprehend felons).

69 *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *344-45 (noting that the primary responsibility of the constable was to preserve the king's peace in their districts).

70 *See id.* at *345 ("The constable may appoint watchmen at his discretion . . . .").

broke the peace or, upon probable cause, someone suspected of a felony or a wounding likely to become one.[71] Watchmen could similarly make warrantless arrests for any offense—even so little as being a suspicious passerby—but only at night, and only until morning.[72] In considering the breadth of these arrest powers, it is worth noting that felonies at common law were only the most serious of offenses,[73] and common law judges took pains to limit the statutory expansion of the category.[74]

But that system contained another component for Black Americans: the slave patrol.[75] The structure of these patrols developed before the foundation of the United States and remained largely intact until the Civil War.[76] "Patrols obeyed orders from and were appointed by district commissioners and were given elaborate search and seizure powers as well as the right to administer up to twenty lashes."[77] Slave patrols served to protect the ruling class and their property interests, particularly their interest in owning human beings.[78] The enslavers feared both the potential escape and potential vengeance of enslaved people.[79] As Professor Philip Reichel notes, the slave

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71 *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *289 ("[The constable] may, without warrant, arrest any one for a breach of the peace, and carry him before a justice of the peace. And, in case of felony actually committed, or a dangerous wounding whereby felony is like to ensue, he may upon probable suspicion arrest the felon . . . .").

72 *See id.* (noting that watchmen could "arrest all offenders, and particularly nightwalkers, and commit them to custody till the morning . . . .").

73 *See* John R. Cosgrove, *Four New Arguments Against the Constitutionality of Felony Disenfranchisement*, 26 T. JEFFERSON L. REV. 157, 173 (2004) ("Felonies at common law were offenses formerly punishable by death, or by forfeiture of lands or goods, or both. Such crimes included larceny, robbery, burglary, rape, arson, and murder but certainly not drug, tax, and other offenses created by statute without prior common law recognition.").

74 *See* Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 939 (2005) ("The English courts created the rule of lenity to ameliorate . . . the 'legislative blood lust of eighteenth-century England.' At that time, almost all felonies were capital offenses, and . . . judges lacked discretion to sentence persons convicted of such felonies to any penalty other than death . . . ." (footnote omitted)).

75 *See* Ben Brucato, *Policing Race and Racing Police: The Origin of US Police in Slave Patrols*, 47 SOC. JUST. nos. 3-4, 2020, at 115, 126 ("Most slave codes in British colonial America founded police that conscripted all whites to brutally control enslaved Africans and to subject all Blacks to intensive surveillance, harassment, and violence.").

76 *See id.* at 128 (describing the enduring structure of slave patrols between 1740 and the beginning of the Civil War).

77 Philip L. Reichel, *Southern Slave Patrols as Transitional Police Type*, 7 AM. J. POLICE, no. 2, 1988, at 60.

78 *See id.* at 51, 61 ("The patrols were to seek out potential runaways, weapons, ammunition, or stolen goods.").

79 *See* Brucato, *supra* note 75, at 129-30 ("[P]lanters and colonial administrators were cognizant and fearful of demographic disparities, as enslaved Africans outnumbered them. Their fears of insurrection were likely exaggerated by this disparity. . . . These capacities were seen as a primary threat to security, which the slave patrols were designed to prevent.").

patrols held search and seizure powers that white Americans would scarcely have tolerated if applied to themselves:

> In an ironic sense the resistance by slaves should have been completely understandable to American patriots. Patrols were allowed search powers that the colonists later found so objectionable in the hands of British authorities. Add to that the accompanying lack of freedoms to move, assemble, and bear arms, and the slave resistance seems perfectly appropriate.[80]

Despite its obvious injustices, this system existed alongside the more limited sheriffs, constables, watchmen, and the like.

Parliament sometimes used statutory authority to expand on common law search and seizure principles.[81] The practice of using general warrants to pursue publishers for seditious libels originated in statute but continued in the absence of any statutory authority.[82] The writs of assistance used by Crown customs agents to search the homes of American businessmen similarly originated in statutory law.[83] However, these statutory expansions were viewed as anathema by the American revolutionaries, who strongly voiced their objections thereto.[84] The trials challenging the writs of assistance were so formative that, recounting James Otis's arguments against the practice in Boston, John Adams observed, "[t]hen and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born."[85] Otis's cases were both a formative experience for Adams and a major influence on early American criminal procedure.[86] Law enforcement and public safety officers in the era immediately preceding the enactment of the Fourth Amendment possessed

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80 Reichel, *supra* note 77, at 63 (citation omitted).

81 *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *342 ("The power, office, and duty of a justice of the peace depend on his commission, and on the federal statutes, which have created objects of his jurisdiction.").

82 *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *288 n.i ("When those acts [allowing for the issuance of warrants] expired in 1694, the same practice was inadvertently continued . . . .").

83 *See* Robert M. Pitler, *Independent State Search and Seizure Constitutionalism: The New York State Court of Appeals' Quest for Principled Decisionmaking*, 62 BROOK. L. REV. 1, 23 (1996) ("Thus, it seems that a writ of assistance was really not a warrant, and that it provided a customs agent no more authority to search than that already provided by the agent's commission and the statute under which it was issued." (citations omitted)).

84 *See* Thomas K. Clancy, *The Framers' Intent: John Adams, His Era, and the Fourth Amendment*, 86 IND. L.J. 979, 991-92 (2011) (discussing the broad statutory expansions of search-and-seizure authority to which James Otis and his contemporaries objected).

85 Letter from John Adams to William Tudor (Mar. 29, 1817) *in* 10 THE WORKS OF JOHN ADAMS 248 (Charles Francis Adams ed., 1856), *quoted in* Boyd v. United States, 116 U.S. 616, 625 (1886)).

86 *See Boyd*, 116 U.S. at 625 (quoting from Otis).

only limited search-and-seizure powers absent a judicial finding of probable cause and the issuance of a warrant.[87]

B. *The Emergence of Professional and Investigative Policing in the Nineteenth Century*

The orthodox history of modern professional policing begins with Robert Peel and the London Metropolitan Police Force.[88] In both England and America, popular opinion in the eighteenth century cut hard against the idea of omnipresent law enforcement.[89] Urbanization and structural changes to the economy during the Industrial Revolution led to new anxieties, which capitalists used to raise support for the creation of public security forces to protect their investments.[90] Whether crime actually increased or not, public perception of criminal behavior drove calls for the establishment of police departments.[91] As Professor Gary Potter explained, "[t]he modern police force not only provided an organized, centralized body of men . . . legally authorized to use force to maintain order, it also provided the illusion that this order was being maintained under the rule of law, not at the whim of

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87 *See* Pitler, *supra* note 83, at 22 ("During colonial times, New York's search (for stolen property) and arrest warrants apparently complied to some degree with the English common law requirements of oath, probable cause and particularity." (citation omitted)).

88 *See* David G. Barrie, *Anglicization and Autonomy: Scottish Policing, Governance and the State, 1833 to 1885*, 30 L. & HIST. REV. 449, 450 (2012) ("In older and institutional police histories, this has been accredited to the pervasive influence of the Metropolitan Police. Established in London in 1829, this institution became a template for other countries to follow." (citation omitted)).

89 *See* Cynthia A. Brown, Utah v. Strieff*: Sound the Hue and Cry*, 45 S.U. L. REV. 1, 12-13 (2017) ("The fears and concerns of an organized police force expressed by Sir Robert Peel's countrymen were not novel and were equally observable in the colonies . . . . [C]olonists, similar to their countrymen, found the idea of an organized force perpetually in the streets too great a threat to their peace and independence.").

90 *See* Douglas W. Allen & Yoram Barzel, *The Evolution of Criminal Law and Police During the Pre-Modern Era*, 27 J. L., ECON. ORG. 540, 563-64 (2011) ("[T]he enormous transition from artisan to standardized goods led to increases in theft opportunities and . . . our modern institutions are the response to this reality."); Robert Liebman & Michael Polen, *Perspectives on Policing in Nineteenth-Century America*, 2 SOC. SCI. HIST. 346, 356-57 (1978) ("Groups carrying out policing actions on behalf of particular economic interests claim legitimacy by identifying the protection of property with the maintenance of public order. Whether we consider labor conflict, licensing, or vice, these claims reflect concerns of production, distribution, and consumption.").

91 *See* Michael M. O'Hear, *(The History of) Criminal Justice as a Morality Play*, 161 U. PA. L. REV. ONLINE 132, 141 (2013) (book review) ("By the 1850s, nearly half of Chicago's population was foreign born. The flood of new arrivals was accompanied by perceptions of a crime wave in the city and calls for the creation of a police force."); Steven D. Stark, *Perry Mason Meets Sonny Crockett: The History of Lawyers and the Police as Television Heroes*, 42 U. MIA. L. REV. 229, 237 (1987) ("What first brought a wave of stories about crime to the public in the mid-nineteenth century was a new literary form, the detective story.").

those with economic power."[92] Rapid economic change ushered in rapid institutional changes in public safety in the form of full-time police forces.[93]

These new police forces accrued power under relaxed legal standards.[94] The shift from traditional models of public safety to policing required expanded investigatory duties and with them, surveillance.[95] The shift in focus from the apprehension of people who had already broken the law or the peace to the prevention of crime and the control of the "dangerous classes" came with a shift in the authorized use of force.[96] While force—even deadly force—had always been the province of public safety officials attempting to arrest felons,[97] the new police routinely used force simply to maintain order.[98] This force was frequently turned against organized labor—a novel threat to the established economic order—even when workers demonstrated peacefully.[99] The common law did not permit the use of deadly force to arrest misdemeanants and even treated it as murder.[100] Yet police were quickly

92 Gary Potter, *The History of Policing in the United States, Part 2*, EKU ONLINE (July 2, 2013), https://www.academia.edu/30504361/The_History_of_Policing_in_the_United_States [perma.cc/5Q9K-CP67].

93 *Id.* ("These [emerging] mercantile interests also wanted to divest themselves of the cost of protecting their own enterprises, transferring those costs from the private sector to the state.").

94 *See* Thomas Y. Davies, *How the Post-Framing Adoption of the Bare Probable Cause Standard Drastically Expanded Government Arrest and Search Power*, 73 L. & CONTEMP. PROBS., Summer 2020, at 1 ("[T]he notion that bare probable cause that a crime might have been committed suffices to justify a warrantless arrest, or issuance of an arrest warrant, dates back only to roughly the middle of the nineteenth century.").

95 *See* Barry Friedman, *Secret Policing*, 2016 U. CHI. LEGAL F. 99, 99 (2016) (discussing surveillance as one of the distinguishing traits of modern policing).

96 Potter, *supra* note 92 ("Centralized and bureaucratic police departments, focusing on the alleged crime-producing qualities of the 'dangerous classes' began to emphasize preventative crime control. The presence of police, authorized to use force, could stop crime before it started by subjecting everyone to surveillance and observation.").

97 *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *289 ("And, in case of felony actually committed, or a dangerous wounding whereby felony is like to ensue, [the constable] may upon probable suspicion arrest the felon; and for that purpose is authorized . . . even to kill the felon if he cannot otherwise be taken . . . ."); *cf.* Brief for Appellee-Respondent at 45, Tennessee v. Garner, 471 U.S. 1 (1985) (Nos. 83-1035, 83-1070) ("As long as many felonies were capital, authorizing deadly force to stop fleeing felony suspects was not without its logic. For a suspect fleeing a death penalty could be assumed to be a desperate person, motivated to resist arrest by all possible means.").

98 *See* Wesley MacNeil Oliver, *The Modern History of Probable Cause*, 78 TENN. L. REV. 377, 424 (2011) ("Police efforts to contain labor demonstrations in the latter half of the nineteenth century frequently resulted in violence. Clubs were often used to break up strikes and protests.").

99 *See, e.g.*, Jim Hawkins, *Papers, Petitions, and Parades: Free Expression's Pivotal Function in the Early Labor Movement*, 28 BERKELEY J. EMP. & LAB. L. 63, 96 (2007) (describing New York police violently suppressing labor protests in 1836 and 1850).

100 *See* Davies, *supra* note 35, at 325 ("For example, although deadly force could lawfully be used to effect the arrest of a felon, it was unlawful (and murder) if used in an attempt to arrest a misdemeanant.").

authorized to use extreme force.[101] Professor Carol S. Steiker noted that, "[i]n place of the bell with which the colonial constable had rung the hours of the night watch, the new police officers began to receive uniforms, horses, and eventually guns."[102] The shift from public safety to law-and-order enforcement brought with it an antagonistic stance to large swaths of the public.[103]

Public order was not constrained merely to maintaining the peace, or even securing property interests; American law frequently took on a puritanical moralism in regulating personal behavior.[104] This tendency played into the hands of both northern industrialists and the former enslavers of the south, as they sought to portray free Black Americans and immigrant laborers as lazy and dangerous.[105] During Reconstruction, reactionary state legislatures criminalized behaviors that had formerly been permissible—such as hunting, fishing, or grazing livestock on common land—or the province of tort law, such as trespass, in order to control Black labor.[106] Police were responsible for enforcing this social order between capital and labor.[107]

The role of criminal law as a tool for social control required law enforcement officers with broad power to investigate crimes where evidence wasn't always readily available.[108] They made use of torture and street

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101 *See* Wesley M. Oliver, *Prohibition's Lingering Shadow: Under-Regulation of Official Uses of Force*, 80 MO. L. REV. 1037, 1043-44 (2015) ("[I]n New York City, special 'strong-arm squads' were established in the early years of the police force to respond to gangs who attacked officers . . . . [T]hey were given locust clubs . . . and dispatched to the city's toughest neighborhoods with orders to 'beat senseless' known gang members.").

102 Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 833 (1994) (citations omitted).

103 *See* Gary Potter, *The History of Policing in the United States, Part 3*, EKU ONLINE (July 9, 2013), https://www.academia.edu/30504361/The_History_of_Policing_in_the_United_States [perma.cc/5Q9K-CP67] ("The presence of a paramilitary force, occupying the streets, was regarded as essential because such 'organizations intervened between the propertied elites and propertyless masses who were regarded as politically dangerous as a class'").

104 *See* William G. Carleton, *Cultural Roots of American Law Enforcement*, CURRENT HIST., July 1967, at 5 ("There were legal restrictions on selling intoxicating beverages, on gambling, on prostitution and other sexual behavior, and not infrequently even on dancing, card playing, theaters and other amusements.").

105 *See* Phal Sok, *Broken Systems: Function by Design*, 68 UCLA L. REV. DISCOURSE 14, 24 (2021) ("Public drunkenness, crime, violence, protests, and worker unrest were all seen as coming from an inferior, morally corrupt, and unskilled underclass—primarily of the poor, immigrants other than white Western Europeans, and free Black people. This made it easy to isolate them as a socially dangerous group, making them easily visible and easy to target.").

106 *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877 at 203-04 (1988) (describing the use of criminal law to compel labor relations in the southern states).

107 *See* Carleton, *supra* note 104, at 7 (describing local law enforcement "operat[ing] as a virtual constabulary for management" in labor disputes).

108 *See* Wesley MacNeil Oliver, *The Neglected History of Criminal Procedure, 1850-1940*, 62 RUTGERS L. REV. 447, 460 (2010) ("By the end of the nineteenth century, juries alone determined whether the confessions presented to them were voluntarily extracted. Rare tort suits and highly

violence, often with public support.[109] The New York Police Department engaged in wiretapping with impunity.[110] Despite the pressure to wear uniforms on patrol, police began to conduct investigations through subterfuge, first by engaging private detectives to work undercover, and then by assuming that role themselves.[111] Law enforcement investigations ceased to be so much the evaluation of evidence presented by witnesses and victims but instead became a form of domestic espionage.[112]

Despite their vast powers and comfortable pay, early American police forces were hardly professional and largely subject to machine politics rather than bureaucratic control.[113] Under machine politics, police departments were largely staffed by the beneficiaries of political patronage.[114] In practice, such police were corrupt, inefficient, brutal, and racist.[115] American police obtained

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political internal disciplinary proceedings were the only mechanisms limiting arrests and physical searches.").

109 *See id.* ("In the early years of the Progressive Era, officers were given a very public mandate to torture suspects in interrogation rooms and inflict unnecessary violence upon suspected criminals on the streets."); Jeffrey S. Adler, *"The Greatest Thrill I Get Is When I Hear a Criminal Say, 'Yes, I Did It'": Race and the Third Degree in New Orleans, 1920-1945*, 34 L. & HIST. REV. 1, 12 (2016) ("By the late 1920s, nearly all big-city police departments relied on third-degree interrogations.").

110 *See* Oliver, *supra* note 108, at 461 ("[I]n the early twentieth century, when the department's wiretapping practices were revealed, the Commissioner of Police successfully asserted that he required no authorization to eavesdrop so long as the intrusion was conducted with the good faith intent to investigate crime.").

111 *See* Rebecca Roiphe, *The Serpent Beguiled Me: A History of the Entrapment Defense*, 33 SETON HALL L. REV. 257, 262-63 (2003) ("Hired initially by private businesses, the Pinkertons often ended up working with local police and federal officials in staging undercover operations."); Jacqueline E. Ross, *The Surveillance State and the Surveillance Private Sector: Pathways to Undercover Policing in France and the United States*, 40 L. & HIST. REV. 261, 284 (2022) ("Following the war, Prohibition marked both the high point of the private sector's agenda setting power, and the low point of its operational importance, as the state developed its own surveillance infrastructure."); *see also* TIM WEINER, ENEMIES: A HISTORY OF THE FBI 61 (2012) ("In . . . 1924, the Bureau maintained a spy on the ACLU's executive board, purloined the minutes of its meetings in Los Angeles, and kept tabs on its donor lists . . . . Hoover was receiving . . . reports on the ACLU board's legal strategies. His files grew to include dossiers on the group's leaders and prominent supporters . . . .").

112 *See also* Roiphe, *supra* note 111, at 269 (describing the expansion of power and investigative techniques in federal law enforcement during the early twentieth century).

113 *See* Liebman & Polen, *supra* note 90, at 357 ("In the case of public policing, the electoral accountability of municipal forces made local policing the object of contention among competing political parties."); Walker, *supra* note 52, at 637 ("The nineteenth century police commissions were generally created by state legislatures as a means of wresting control of a police department from city political machines, which were controlled by the legislature's rival political party.").

114 *See* Nirej S. Sekhon, *Redistributive Policing*, 101 J. CRIM. L. & CRIMINOLOGY 1171, 1191 (2011) ("Well into the twentieth century, urban police departments were cogs in urban machine politics. Police departments were prime sources of patronage jobs. The beat cop was as much a sub-local functionary for the political machine as he was a watchman ensuring some measure of order on his beat.").

115 *See, e.g.*, Carolyn B. Ramsey, *Intimate Homicide: Gender and Crime Control, 1880-1920*, 77 U. COLO. L. REV. 101, 169 (2006) ("Law enforcement in the age of machine politics was infamously corrupt and inefficient."); Wesley MacNeil Oliver, *supra* note 108, at 475 ("[Charles] Parkhurst and

the authority from their uniforms, firearms, and vast discretion to search, seize, and use force in investigations undertaken on their own initiative well before they became subject to professional standards. Professionalism grew in response to public pressure for increased oversight in the late nineteenth and early twentieth centuries.[116] Judicial oversight was a similarly late development,[117] and legislative oversight is still badly lacking.[118] This long development without significant oversight allowed police departments to develop a culture of institutional disregard for the rights of the public.[119] Part II explores the law enforcement abuses that gave rise to constitutional rights under the Fourth and Fourteenth Amendments.

[Frank] Moss alleged that the poor quality of police recruits, and the lenient treatment these officers received when faced with complaints of brutality, itself demonstrated the corrupt influence of machine politics."); Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 309, 336 n.146 (1998) ("[C]orruption was not isolated, but existed in an elaborate system connecting the police, district attorneys, and the courts with organized crime and big-city political machines. The tolerance of third degree tactics by courts tied to machine politics was an aspect of this broader web of corruption."); Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191, 223 n.108 (1998) ("Police contained red-light districts in African-American neighborhoods, where [machine politics effectively disenfranchised Black citizens]. Because African Americans could not hold police accountable, they suffered from the proliferation of unchecked vice, which often was engaged in by many who came from outside of the community.").

116 *See* Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995, 2003-04 (2017) ("Among the police, however, the twentieth century featured a particularly persistent movement toward professional status. That movement took its roots in the late nineteenth century, when Progressive reformers appalled by the influence of political machines over urban police departments lobbied for greater oversight."); April Walker, *Racial Profiling—Separate and Unequal Keeping the Minorities in Line—The Role of Law Enforcement in America*, 23 ST. THOMAS L. REV. 576, 579 (2011) (describing the resulting Professional Era, beginning around 1920, during which police were supposed to be removed from the influence of local politics).

117 Many of these broad powers were not subjected to serious judicial review until the middle of the twentieth century. *See, e.g.*, Jonathan Hafetz, *Torture, Judicial Review, and the Regulation of Custodial Interrogations*, 62 N.Y.U. ANN. SURV. AM. L. 433, 442 (2007) ("Yet, if *Brown* [*v. Mississippi*] illustrated the prevalence of torture, it also helped prompt federal judicial oversight of police interrogations by prohibiting the use of coerced confessions to obtain convictions."); Wesley M. Oliver, *Prohibition's Anachronistic Exclusionary Rule*, 67 DEPAUL L. REV. 473, 476 (2018) ("The need for a mechanism for judicial oversight of police was clear, but the need to prevent illegal searches was far from compelling. Borrowing a century-old scheme, the Supreme Court in *Mapp* [*v. Ohio*] addressed the fears of the 1960s with a remedy for the abuses of the 1920s.").

118 *See* Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1844 (2015) (describing the relatively sparse content of police agency-enabling legislation); *id.* at 1836 ("Popular control of the police—via urban machine politics—left a trail of corruption and incompetence that has caused us to grant the police enormous autonomy.").

119 *Cf. id.* at 1835 ("Policing agencies are authorized by breathtakingly broad delegations of power, and there is virtually no process that ensures democratic input into the means by which they go about their tasks."); David H. Gans, *Repairing Our System of Constitutional Accountability: Reflections on the 150th Anniversary of Section 1983*, 2022 CARDOZO L. REV. 90, 108 (2022) ("Because so many constitutional violations are due to organizational conditions that permit official violence and the violation of fundamental rights to flourish, holding the governmental entity liable . . . . creates an incentive for the government to . . . eliminate conditions that lead to a culture of disregard for constitutional rights and other systemic drivers of harm.").

II. CONSTITUTIONAL PROTECTIONS AS RESPONSES TO LAW ENFORCEMENT ABUSES

I take the words as they were promulgated to the people of the United States, and what is the fairly understood meaning of those words.[120]

— *Antonin Scalia*

Many of our constitutional protections can be easily traced to specific historical problems. In the case of the Fourth Amendment and Reconstruction Amendments, these protections were widely understood to redress common law enforcement abuses. The abuses of general warrants and writs of assistance were well-known in the aftermath of the Revolution, inspiring constitutional protections in the new state constitutions and the Bill of Rights alike.[121] The Fourteenth Amendment arose in the context of new state legal regimes after emancipation that turned law enforcement to the task of replicating the conditions of slavery for newly freed Black Americans.[122] These aims were hardly secret, and the First and Reconstruction Congresses used widely-understood language to accomplish their ends.[123] These aims, though, define not the limits of the respective amendments, but instead their cores; the amendments "must be capable of wider application than the mischief which gave [them] birth."[124] This Part discusses the abuses the drafters of the Fourth and Fourteenth Amendments sought to remedy and the language they chose to convey that remedy to the public. It does so in two sections: the first addresses the Fourth Amendment, while the second turns to the Fourteenth Amendment.

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120 Antonin Scalia, Assoc. J., Sup. Ct. Judicial Adherence to the Text of Our Basic Law: A Theory of Constitutional Interpretation (Oct. 18, 1996) (transcript available at https://www.proconservative.net/PCVol5Is225ScaliaTheoryConstlInterpretation.shtml [perma.cc/ZN8T-QBPY]).

121 *See* Davies, *supra* note 20, at 87-172 (exploring the development of search and seizure protections in the early state and federal constitutions).

122 *See* John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1388 (1992) ("In 1866, when people discussed abridgments of the privileges or immunities of citizens, they mainly were talking about . . . Black Codes. The Codes . . . restricted freed slaves' [civil] rights . . . . Some included vagrancy laws that effected a virtual return to slavery . . . .").

123 *See* Davies, *supra* note 20, at 90 ("The State Framers did not undertake to impose novel limits on the state legislatures; rather, they undertook to preserve existing rights against legislative usurpation. Indeed, that is why they initially crafted 'declarations' of rights."); *id.* at 127 ("[T]he framing of the Federal Bill of Rights was largely a replay of the framing of the state declarations and drew upon the same understanding of common-law rights as the state declarations had."); Hasbrouck, *supra* note 42, at 130-33 (discussing the abolitionist use of the terminology of the Reconstruction Amendments in the decades before their enactment).

124 Weems v. United States, 217 U.S. 349, 373 (1910).

A. *General Warrants, Writs of Assistance, and the Fourth Amendment*

The Framers of the Fourth Amendment—especially John Adams—were intimately familiar with the prominent search-and-seizure cases of their day.[125] James Otis's arguments against writs of assistance in *Paxton's Case*,[126] John Wilkes's and John Entick's opposition to general warrants, and common-law notions of liberty and security were all familiar rallying cries as revolutionary fervor spread.[127] Each of these concepts contributed to the development of the Fourth Amendment's text. This Section examines the revolutionaries' search-and-seizure theory in its context as a lens to understanding the meaning of the Fourth Amendment.

The genesis of the Fourth Amendment began with James Otis's opposition to writs of assistance in *Paxton's Case*.[128] According to Professor Thomas K. Clancy, "Otis proposed a framework of search and seizure principles designed to protect individual security."[129] These principles inspired the next decade and a half of resistance to the arbitrary abuses of British rule and shaped the concepts that became the Fourth Amendment.[130] The writs of assistance granted customs agents nearly unfettered search powers to combat smuggling.[131] Customs agents were motivated to vigorously enforce the writs by the promise of keeping a portion of any condemned goods they recovered for themselves.[132] This vigorous enforcement enabled

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125 *See also* Clancy, *supra* note 84, at 979 ("Upon examination, Adams stands out in that era as having profound opportunities to examine search and seizure practices and as having the most important role in formulating the language and structure of the Fourth Amendment.").

126 Paxton's Case (Mass. 1761), in JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY, BETWEEN 1761 AND 1772 (Samuel M. Quincy ed., 1865).

127 *See* Thomas K. Clancy, *The James Otis Lecture: The Importance of James Otis*, 82 MISS. L.J. 487, 496 (2013) ("Adams and other contemporaries repeatedly used the concept of 'security' to describe the quality of the right protected as to each person's life, liberty, and property."); Luke M. Milligan, *The Right "to Be Secure":* Los Angeles v. Patel, 2014-2015 CATO SUP. CT. REV. 251, 275-76 (2015) (describing "Founding-era discourse about the harms caused by the *potentiality* of unreasonable searches and seizures"); Luke M. Milligan, *The Forgotten Right to Be Secure*, 65 HASTINGS L.J. 713, 746-47 (2014) (same).

128 *See* Davis v. United States, 328 U.S. 582, 604 (1946) (citing Otis's speech in *Paxton's Case* as the event that set the American Revolution inevitably in motion).

129 Clancy, *supra* note 127, at 488.

130 *See id.* (emphasizing the importance of Otis' "inspirational role for those seeking to find the proper accommodation between individual security and governmental needs").

131 *See id.* at 493; *see also* C.L. "Butch" Otter & Elizabeth Barker Brandt, *Reserving the Foundation of Liberty*, 19 NOTRE DAME J. L. ETHICS & PUB. POL'Y 261, 264 (2005) ("The writs were general, universal, perpetual, and transferable search warrants used to enforce smuggling laws so the cash-strapped British crown could wring revenue from the colonies to satisfy the crushing debt of a worldwide empire.").

132 *See* Clancy, *supra* note 84, at 992 ("The successful informer would receive a portion of the goods condemned, making the informer the 'beneficiary of a mode of law enforcement that was commonly resorted to' at a time when no regular police organizations existed.").

customs officers to more frequently uncover smuggling operations, but exposed even law-abiding merchants to inspection and increased pressure not to trade with non-English industries.[133] Otis's opposition to the writs persisted beyond the initial case, inspiring other advocates and activists in Boston and around the colonies.[134] Otis's advocacy was critical as a source of the Fourth Amendment's strong protection of the home and defined standards for the issuance of warrants.[135]

In England, opposition to unchecked search authority crystalized around political publishing.[136] There, general warrants authorizing a broad search to uncover the authors of seditious publications allowed the King's Messengers to engage in a spree of house searches, arrests, and seizures of private papers.[137] John Wilkes, John Entick, and their colleagues responded with trespass suits against the messengers, winning large awards based mostly on the impropriety of using a general warrant to break into a house.[138] These cases drew considerable attention among the American colonists.[139] In

133 *See* Timothy Lynch, *In Defense of the Exclusionary Rule*, 23 HARV. J.L. & PUB. POL'Y 711, 720-21 (2000) (tracing the use of writs of assistance in the American colonies from attempts to control trade in the 1730s to Boston merchants' engagement of James Otis as their champion in 1761).

134 *See* David E. Steinberg, *The Uses and Misuses of Fourth Amendment History*, 10 U. PA. J. CONST. L. 581, 603 (2008) ("Otis's argument was a major event in the American movement for independence from England."); Michael W. Price, *Rethinking Privacy: Fourth Amendment "Papers" and the Third-Party Doctrine*, 8 J. NAT'L SEC. L. & POL'Y 247, 256-57 (2016) (describing John Adams and the Sons of Liberty organizing against the Stamp Act's revival of writs of assistance in the English colonies).

135 *See* Steinberg, *supra* note 134, at 603 (discussing Otis's focus on the home as deserving of special protection under the law); Otter & Brandt, *supra* note 131, at 265-66 ("Otis's argument in the Writs of Assistance case hinged on several major points, one of which was the invocation of the ancient notion regarding the sanctity of the home."); Thomas K. Clancy, *The Purpose of the Fourth Amendment and Crafting Rules to Implement That Purpose*, 48 U. RICH. L. REV. 479, 502 (2014) ("The writs of assistance were also viewed as deficient because, inter alia, they existed for an unlimited length of time, they were not returnable, no oath was required for one to issue, and no grounds were needed to justify the request.").

136 *See* Price, *supra* note 134, at 252-55 (describing the prosecutions, trespass suits, and political advocacy of publishers John Wilkes and John Entick in their opposition to the general warrants used against them). An earlier wave of opposition to general warrants produced precedents for the eighteenth-century movement to invoke in its effort to constitutionalize search and seizure standards. *See* NELSON B. LASSON, HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 34–43 (1937) (discussing the development of English constitutional search and seizure protections leading up to the 1760s).

137 *See* Steinberg, *supra* note 134, at 601 ("Based on a general warrant issued by the Tory Secretary of State, English officers searched at least five houses and arrested at least forty-nine people pursuant to this single general warrant.").

138 *See generally* Entick v. Carrington, (1765) 95 Eng. Rep. 807 (KB); Wilkes v. Wood, (1763) 98 Eng. Rep. 489 (KB).

139 *See* Price, *supra* note 134, at 254 ("Indeed, it is an understatement to say that the *Entick* and *Wilkes* cases generated significant interest in the nascent American states."); Clancy, *supra* note 135, at 500 ("Another famous champion of liberty, well known to the colonists, was John Wilkes."); *see generally* (1765) 95 Eng. Rep. 807 (KB).

addition to affirming the security of the home and the standards for warrants, the seditious libel cases likely provided the inspiration for Adams's inclusion of papers among the enumerated items protected under the Fourth Amendment's precursor, Article 14 of the Massachusetts Declaration of Rights.[140]

The Fourth Amendment does not explicitly address when warrantless searches and seizures might be reasonable, likely as a consequence of two factors. First, the common law allowed for only extremely limited types of warrantless searches and seizures.[141] Second, and perhaps more importantly, these warrantless searches and seizures—unlike general warrants and writs of assistance—were seldom abused in the framers' time.[142] The common law permitted warrantless searches pursuant to an arrest,[143] and warrantless arrests only when the person making the arrest witnessed a felony or breach of the peace, or the person to be arrested was a known felon.[144] While the text of the Fourth Amendment does not explicitly address warrantless searches and seizures, its context indicates a desire to constitutionalize the search-and-seizure principles accepted by the American revolutionaries, including their common-law limitations, as part of the reasonableness requirement.

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140 *See* Price, *supra* note 134, at 256-57 (discussing Adams's familiarity with Wilkes and his inclusion of papers in Article 14); MASS. CONST., art. XIV ("Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions.").

141 *See* Donald L. Beci, *Fidelity to the Warrant Clause: Using Magistrates, Incentives, and Telecommunications Technology to Reinvigorate Fourth Amendment Jurisprudence*, 73 DENV. U. L. REV. 293, 302 (1996) ("At the time the Framers created the Fourth Amendment, the common law permitted two types of warrantless searches and seizures: an official could conduct a search incident to arrest without a warrant, and certain arrests could be made without a warrant."); 1 WILLIAM BLACKSTONE, COMMENTARIES *130-31 ("Here again the language of the great charter is, that no freeman shall be taken or imprisoned but by the lawful judgment of his equals, or by the law of the land. And many subsequent old statutes expressly direct, that no man shall be taken or imprisoned . . . . or detained without cause shewn, to which he may make answer according to law."). This limitation does not apply to the slave patrols, which were statutory rather than common-law entities, and to which the revolutionaries, concerned with their own rights as free men, mostly did not object. *But see* Daryl Austin, *Anti-Slavery Revolutionaries Who Practiced What They Preached*, THE HILL: CHANGING AMERICA (July 10, 2020), https://thehill.com/changing-america/opinion/506782-anti-slavery-revolutionaries-who-practiced-what-they-preached/ [https://perma.cc/T4K4-Y43Q] (describing public objections to the slave trade from a number of revolutionaries including Washington, Jefferson, and Madison, despite the personal participation in the practice).

142 *But see* Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 219-20 (1993) ("Customs officials claimed that their authority for these warrantless searches derived from their commissions or deputations. This claim not only lacked legal support, but many people in Massachusetts also strongly and violently contested it."). Warrantless searches under the common law drew little condemnation, but warrantless searches ex officio did.

143 *See id.* at 214 ("The framers undoubtedly feared general warrants, and eighteenth-century litigants apparently harbored no particular objection to searches incident to arrest.").

144 *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *289 (discussing the authority of various government officials to make warrantless arrests).

The Fourth Amendment's text does, however, provide further clues to the bounds of reasonableness: "The right of the people to be *secure* . . . ."[145] Professor Richard McAdams noted the importance of this phrase:

> Manifestly concerned with the repose of the people, the framers of the fourth amendment did not merely create a right of individuals to be free from unreasonable searches and seizures, but a societal right to be free from the fear such searches create. When the police ransack a house in the middle of the night, a neighbor is still free from searches but not secure against them.[146]

The Fourth Amendment protects against general warrants and their ilk because of their potential to produce a chilling effect detrimental to the foundations of a free society.[147] By requiring a judicial officer's review of a warrant prior to all but the most urgent warrantless searches and seizures, the framers ensured that the particularized suspicion requirement would be enforceable.[148] That guarantee serves to enforce a collective right necessary to a functional democratic republic.[149] A search violates the basic rights enshrined in the Fourth Amendment when it tends to erode the public's faith that they can be secure against interference in the lawful conduct of their personal lives.

The revolutionaries objected not just to overbroad warrants but also to the statutory and executive usurpation of the judicial role in common-law

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145 U.S. CONST. amend. IV (emphasis added).

146 Richard H. McAdams, *Tying Privacy in Knotts: Beeper Monitoring and Collective Fourth Amendment Rights*, 71 VIRGINIA L. REV. 297, 318–19 (1985). *Accord* Milligan, *The Forgotten Right to Be Secure*, *supra* note 127, at 745 ("Because the issuance of a general warrant necessarily violates the right to be secure, and because such warrants do not always subject persons to unreasonable searches or seizures, logic demands that the right to be secure was meant to safeguard something beyond the mere right to be "spared" an unreasonable search or seizure."); Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 102, 131 (2008) ("Plainly, no single search or seizure, by itself, can destroy the people's security. It is rather the generalization of the power underlying a particular search or seizure that has the potential to do so."); GRAY, *supra* note 18 at 157 ("Our forebears' interest in preserving this state of security and tranquility reflects their preoccupation with the threat to collective security posed by general warrants and writs of assistance."); Robert M. White, *Encryption Backdoors and the Fourth Amendment*, 108 MARQUETTE L. REV. (2025) (forthcoming) ("A person's right to be secure against a type of conduct proscribes as to others not only the type of conduct but also a nearby range that would threaten insecurity from it; otherwise, the right would be only to not suffer the conduct, not to be secure against it.").

147 *See* Rubenfeld, *supra* note 146, at 127 ("Freedom requires that people be able to live their personal lives without a pervasive, cringing fear of the state. A fear produced by the justified apprehension that their personal lives are subject at any moment to be violated and indeed taken from them if they become suspicious in the eyes of governmental authorities.").

148 *See id.* at 125 ("But it is the probable cause requirement that prevents 'general' searches and seizures. Without that requirement, the Fourth Amendment's demand for particular descriptions would be feckless.").

149 *Cf.* GRAY, *supra* note 18, at 165 ("Threats to the security of the people arise instead from the possibility that anyone could be subjected to an unreasonable search or seizure at any time.").

search-and-seizure practices. James Otis railed against writs of assistance as void under the English constitution.[150] The writs of assistance were creatures of statutory law rather than the traditional warrants of the common law.[151] John Adams, the principal architect of the Fourth Amendment, credited Otis's opposition to writs of assistance as the opening act of the movement for American independence.[152] The general warrants used to persecute John Wilkes and John Entick allegedly originated in the inherent authority of the Crown,[153] but were anathema to those same common law principles.[154] The Anti-Federalist push for a Bill of Rights focused not merely on warrant requirements but the threat of federal agents with broad powers of search and seizure.[155] Indeed, presented with the choice between state constitutional models addressing only general warrants and state constitutional models with broader guarantees of protection from search and seizure, Congress chose the latter.[156] All of these examples demonstrate that the prominent legal and political minds involved in the Fourth Amendment's inspiration and development concerned themselves broadly with seeking a backstop against legislative and executive overreach in searches and seizures.

That concern must inform judicial standards for evaluating government search and seizure powers. No legislature has the power to invest government officials with general search or seizure authority free from judicial oversight

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150 *See John Adams' Reconstruction of Otis's Speech in the Writs of Assistance Case*, *in* THE COLLECTED POLITICAL WRITINGS OF JAMES OTIS 13-14 (Richard A. Samuelson ed., 2015) ("No Acts of Parliament can establish such a writ; though it should be made in the very words of the petition, it would be void. An act against the constitution is void.").

151 *See* Clancy, *supra* note 84, at 991 ("Legislation enabling customs searches and seizures was adopted in 1662, authorizing searches without suspicion anywhere the searcher desired to look. Pursuant to the statute, writs of assistance were issued.").

152 *See* Stanford v. Texas, 379 U.S. 476, 481-82 (1965) ("'Then and there,' said John Adams . . . . 'the child Independence was born.'").

153 *See* Entick v. Carrington, (1765) 95 Eng. Rep. 807, 816-17 (KB) ("It was argued that if a Secretary of State hath power to commit in high treason, he hath it in cases of lessor crimes: but this we deny, for if it appears that he hath power to commit in one case only, how can we then without authority say he has that power in other cases?").

154 *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *288 n.i (discussing the use of general warrants against publishers and the determination of the King's Bench that such warrants were void).

155 *See* Patrick Henry, Debates, The Virginia Convention (June 16, 1788), *in* 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1331-32 (John P. Kaminski & Gaspare J. Saladino eds., 1993) ("The officers of Congress may come upon you, fortified with all the terrors of paramount federal authority . . . . They may, unless . . . restrained by a Bill of Rights, or some similar restriction, . . . search, ransack and measure, every thing you eat, drink and wear. They ought to be restrained within proper bounds.").

156 *See* Clancy, *supra* note 84, at 982 ("During the crucial period of 1787 to 1789, those two models remained the options to choose from in drafting a search and seizure provision. The states that urged adoption of a search and seizure amendment all advocated the Adams model and Congress ultimately utilized that model.").

and beyond the scope of the common law protections embodied in the Fourth Amendment. Nor can any officer, by the inherent power of their office, conduct lawful searches or seizures exceeding what a judicially issued warrant could authorize. Originalist inquiries into permissible searches and seizures often look for those limits in the statutes of the early republic.[157] But those statutes never faced serious constitutional review. Despite John Marshall's declaration that "[i]t is emphatically the province and duty of the judicial department to say what the law is,"[158] the Supreme Court seldom reviewed statutes for their conformity with constitutional rights prior to Reconstruction.[159] Statutes, being the product of legislatures, should be treated with skepticism when they conflict with earlier historical evidence of principles and practices.[160] While the precise contours of reasonableness and probable cause might shift with time—provided they do so to provide greater protection than at common law—any suspicion sufficient to support a search or seizure must be strong enough to survive the scrutiny of a judicial officer and to support a solemn oath or affirmation.

B. *Racialized Law Enforcement and the Reconstruction Amendments*

White supremacist law enforcement from the Antebellum through early Reconstruction similarly informed the structure of the Thirteenth and Fourteenth Amendments. Slave patrols in the south and slave catchers in the north offended abolitionist ideals of civil rights.[161] By the time of the Civil War, Americans understood government's public safety role to include

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157 *See, e.g.*, Virginia v. Moore, 553 U.S. 164, 168 (2008) ("We look to the statutes and common law of the founding era to determine the norms that the Fourth Amendment was meant to preserve."); Carroll v. United States, 267 U.S. 132, 151 (1925) (examining statutes of the first four Congresses to establish the permissibility of warrantless searches of vehicles).

158 Marbury v. Madison, 5 U.S. 137, 177 (1803).

159 *See* Sophia Z. Lee, *The Reconciliation Roots of Fourth Amendment Privacy*, 91 U. CHI. L. REV. 2139, 2153 (2024) ("Courts reviewing legislatures for conformance with state and federal constitutions focused on the scope of legislatures' affirmative lawmaking powers; individual rights were the incidental by-product of that review.").

160 Ironically, this sort of examination places Fourth Amendment privacy protections on better footing than warrantless search exceptions rooted in the customs statutes of the early republic. *Cf. id.* at 2160-61, 2176-84 (discussing the development of privacy as a popular concept and its adoption in a Fourth Amendment context by the Reconstruction Congress as a limitation on customs searches, potentially supporting privacy rights under the Fourteenth Amendment).

161 *See* Brandon Hasbrouck, *Reimagining Public Safety*, 117 NW. U. L. REV. 685, 696 (2022) ("[Slave patrols] functioned to surveil and control enslaved Black people in order to keep the system of white supremacy safe for slaveowners."); Rebecca E. Zietlow, *Freedom Seekers: The Transgressive Constitutionalism of Fugitives from Slavery*, 97 NOTRE DAME L. REV. 1375, 1397 (2022) ("The 1850 Fugitive Slave Act created the first federal police force, 'a massive slavecatching infrastructure for all of the United States.'") (quoting CHRISTOPHER JAMES BONNER, REMAKING THE REPUBLIC: BLACK POLITICS AND THE CREATION OF AMERICAN CITIZENSHIP 116-17 (2020)).

protecting the lives, liberty, and property of the people.[162] Yet southern legislatures responded to Reconstruction with aggressive Black Codes designed to turn law enforcement to the task of ensnaring newly freed Black Americans in a regime replicating slavery.[163] Law enforcement did little to protect Black citizens from private violence, sometimes even encouraging or joining in it to enforce the white supremacist social order.[164] While the Reconstruction Congress saw the Thirteenth Amendment as providing it with power to remedy these abuses, the Fourteenth Amendment was proposed to strengthen Congress's claim to such constitutional powers over state and local law enforcement.[165]

Antebellum slave patrols and slave catchers terrorized Black people, regardless of whether they were actually enslaved.[166] In the south, slave patrols formed the earliest professional police forces.[167] The patrols had no

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162 *See* Steven J. Heyman, *The First Duty of Government: Protection, Liberty, and the Fourteenth Amendment*, 41 DUKE L.J. 507, 547 (1991) ("[T]he right to protection was recognized even by the Democrats and conservative Republicans who opposed the Civil Rights Act and the Fourteenth Amendment.").

163 *See* Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, 3 J. LEGAL ANALYSIS 165, 253 (2011) ("Black Codes arose to subordinate the freedmen.").

164 *See, e.g.*, FERGUS M. BORDEWICH, KLAN WAR: ULYSSES S. GRANT AND THE BATTLE TO SAVE RECONSTRUCTION 55 (2024) (describing police indifference to the murder of a scalawag political candidate); *id.* at 88 ("[T]hree men led by a local judge thrashed Bentley in front of the young Black children he taught at a freedmen's school."); *id.* at 132 ("[Alamance County] hosted no fewer than ten loosely independent 'camps' of the White Brotherhood, . . . including . . . the county sheriff and eleven of his deputies . . . ."); *id.* at 238 ("[W]hen U.S. marshals handed over fifteen suspected raiders to the local sheriff, himself a clandestine Klansman it was later learned, he freed them immediately."); *see also* Heyman, *supra* note 162, at 548 ("During the latter half of 1865, the nation also began to receive reports from the South of widespread violence against blacks as well as white Unionists and Northerners.").

165 *See* CONG. GLOBE, 39th Cong., 1st Sess. 1759 (1866) (statement of Sen. Trumbull) ("I think we have the authority to confer that jurisdiction under the second clause of the [Thirteenth Amendment], which . . . . authorizes us to do whatever is necessary to protect the freedman in his liberty."); James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U. L. REV. 1465, 1491 (2019) ("Two Republican representatives did urge passage of the Fourteenth Amendment partly to end convict leasing, but not—it appears—because of any deficiency in the Thirteenth, but rather because President Johnson and the cunning rebels had misread it to permit the practice.").

166 *See* Gans, *supra* note 24, at 262-63 ("Slave patrols that had essentially unfettered power to search and seize—and to terrorize Black people—were a basic feature of slavery that predated the Constitution and continued long after its ratification."); Zietlow, *supra* note 161, at 1398 ("Because of the [Fugitive Slave] Act's weak evidentiary standard and the far-reaching nature of federal enforcement, free [B]lack people now lived in constant danger of being kidnapped and sold into slavery.").

167 *See* Hasbrouck, *supra* note 21, at 1114 ("Formal policing in the South developed in the 1700s as slave patrols.").

need for warrants to search and seize Black people.[168] They detained, questioned, isolated, and brutalized Black people in a reign of terroristic control.[169] The slave patrols bred dogs to hunt down Black people and return them to slavery.[170] As Professor Michele Goodwin noted, "[S]lave patrol police enforced social order."[171] The slave catchers stretched that social order's reach to the north under the Fugitive Slave Acts.[172] Prior to the Reconstruction Amendments, to be Black in America was to be subject to the whims of law enforcement without recourse.[173]

By the middle of the nineteenth century, though, American views on the role of government were shifting. Abolitionist activists cited the law's duty to protect all those subject to it in their claims against slavery.[174] James Birney claimed that the government's duty of protection was so fundamental as to be necessary for its exercise of authority over the individual.[175] Lysander Spooner viewed the government's duty of protection to encompass both persons and their liberty as a necessary condition of the social contract.[176] Even moderate politicians recognized the government's duty to protect the

168 *See* ANDREW E. TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURES, 1789–1868, at 109 (2006) ("For all practical purposes, patrols had nearly unlimited authority to search, seize, and exercise violence.")

169 *See* Gans, *supra* note 24, at 262-63 (describing the indiscriminate violence and tactics used by slave patrols).

170 *See* P. Khalil Saucier, *Traces of the Slave Patrol: Notes on Breed-Specific Legislation*, 10 DREXEL L. REV. 673, 680 (2018) ("[D]ogs were specifically bred for the systematic use of putting down slave rebellions, canine warfare, colonial enterprising, and torture. Dogs played a significant role in the repressive machinery of bondage and captivity—admired by slave catchers and feared by slaves.").

171 Michele Goodwin, *Law and Anti-Blackness*, 26 MICH. J. RACE & L. 261, 321 (2021).

172 *See* Craig B. Mousin, *A Clear View from the Prairie: Harold Washington and the People of Illinois Respond to Federal Encroachment of Human Rights*, 29 S. ILL. U. L.J. 285, 302 (2005) ("The [Fugitive Slave] Act provided scant safeguard for judicial review against the claims of the slave catchers. Free blacks remained in jeopardy under the earlier act, but after 1850 the Act provided them with no defense nor a right to a jury trial.").

173 Even in their aftermath, that recourse was often limited. *See* Melvin J. Kelley IV, *Testing One, Two, Three: Detecting and Proving Intersectional Discrimination in Housing Transactions*, 42 HARV. J.L. & GENDER 301, 353 (2019) ("Following the Civil War, many Southern legislatures opted to [prevent free Black people from fully participating in society by] fashioning their own Black Codes. In response, Congress wielded its Thirteenth Amendment power to enforce . . . abolition . . . with the passage of the Civil Rights Act of 1866.").

174 *See* Barnett, *supra* note 163, at 182 (discussing Theodore Dwight Weld's advancement of the idea that "the equal protection of the laws is, first and foremost, about rendering *protection*"); *id.* at 230 (quoting Joel Tiffany's writings on the meaning of equal protection to mean that "protection, in the enjoyment of their natural, and *inalienable* rights, was the great paramount object of the institution of the National Government[]" and that the "term *citizen*, under our constitution . . . carries with it . . . the right of protection on the part of the citizen").

175 *See id.* at 220-21 (describing Birney's claim that the denial of government protection to enslaved persons implied their lack of duty to obey the law, thus undermining the entire authority of the government).

176 *See id.* at 209 (describing Spooner's views on the right of equal citizens before the law to the law's protection).

people. Representative James Hughes argued in favor of professionalizing Washington, D.C.'s police force because "[the object of government] is to protect the people in their personal liberty, their personal security, and their rights of private property."[177] While Hughes employed the argument in the interest of free, white citizens, his focus on the government's duty of protection demonstrates that the concept was hardly limited to radical activism.[178] To the mid-nineteenth century American public conscience, the government had a duty to extend protection to all its citizens.

Emancipation—with the attendant duty of extending the law's protection to the south's suddenly free Black citizens—was scarcely reality before southern states began their attempts to legislate around it. In the immediate aftermath of emancipation, newly passed Black Codes attempted to so thoroughly regulate the activities of Black Americans as to effectively return them to slavery.[179] Black people's freedom of movement was severely restricted under the Black Codes.[180] As Professor Jennifer Mason McAward described them:

> [T]he codes required the freedmen to make annual written contracts for their labor and provided that they would be subject to arrest and forfeiture of the entirety of their annual wages if they left before the contract's term. Vagrancy laws were strengthened in an effort to ensure that freedmen agreed to such contractual provisions; those who lacked a "home and support" were subject to arrest and enforced service to pay their debts. By the end of 1866, all southern states had enacted such codes.[181]

The policing accompanying the Black Codes was aggressive even over trivial offenses.[182] As Professor David H. Gans noted, "Police, militia, and armed

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177 CONG. GLOBE, 35th Cong., 1st Sess. 1592 (1858) (statement of Rep. James Hughes).

178 *See* Heyman, *supra* note 162, at 544-45 (discussing similar arguments of Hughes's allies in Congress that it was the basic obligation of the legislature to provide adequate protection against crime and violence to preserve the peace and security of their community).

179 *See* Ryan C. Williams, *Originalism and the Other Desegregation Decision*, 99 VA. L. REV. 493, 528 (2013) ("The Black Codes threatened to undermine the recently adopted Thirteenth Amendment by maintaining the free black populations of the southern states in a permanently subordinate condition and reducing substantial portions of the [B]lack population to slavery-like conditions.").

180 *See* Robert J. Kaczorowski, *Congress's Power to Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted*, 42 HARV. J. ON LEGIS. 187, 242 (2005) ("Black codes authorized employers and landowners, as well as ordinary whites organized into patrols, to enforce an informal, customary system of controls that restricted [B]lacks' freedom to move from place to place.").

181 Jennifer Mason McAward, *The Scope of Congress's Thirteenth Amendment Enforcement Power After* City of Boerne v. Flores, 88 WASH. U. L. REV. 77, 108 (2010) (citations omitted).

182 *See* Gans, *supra* note 24, at 273 ("Across the South, white police officers and others seized and arrested Black people en masse for vagrancy and other trivial offenses, often for pretextual reasons.").

vigilantes ransacked the homes of Black people and violated their most basic personal security to steal their arms, rob them, and leave them defenseless."[183] Law enforcement officers acting under the Black Codes routinely engaged in warrantless home searches and arrests to ensure the continuing subjugation of Black Americans after the formal end of slavery.

Southern police, however, were not content merely to harass, rob, and arrest Black people. Congress commissioned a Joint Committee on Reconstruction to investigate conditions in the south, which reported dismal progress. Police forces across the south were complicit in violent revanchism.[184] In Wilmington, North Carolina, "[the beatings were] generally in the night-time. The police [were] not uniformed, or only [wore] a star. A [C]olored man sometimes [did] not know who attack[ed] him, or why. The statement of the policeman [was] enough [to avoid discipline] . . . . [U]sually the offence charged was slight . . . ."[185] In New Orleans, "one of the police officers of the city, in front of the [Freedmen's Bureau headquarters], went up and down the street knocking in the head every [N]egro man, woman, and child that he met, tumbling some of them into the gutter, and knocking others upon the sidewalks."[186] In Magnolia, Mississippi, militia were "particularly adapted to hunting, flogging, and killing [C]olored people . . . ."[187] The Fourteenth Amendment was debated, passed, and ratified as police brutality and murder ran rampant in the south.[188]

Abolitionists in the Reconstruction Congress considered the Emancipation Proclamation and the Thirteenth Amendment to not only have ended slavery, but also to have elevated free Black Americans to equal citizenship with their white counterparts. The Reconstruction Congress meant to ensure that full economic and civil freedom was to be extended

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183 *Id.* at 277.

184 *See, e.g.*, BORDEWICH, *supra* note 164, at 144-47 (recounting the murder of John W. Stephens, a North Carolina scalawag politician, likely at the hands of the local sheriff and his accomplices inside the county courthouse).

185 REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, H.R. REP. NO. 30, pt. II, at 271-72 (1866).

186 *Id.*, pt. IV, at 80.

187 *Id.*, pt. III, at 185.

188 *See* Gans, *supra* note 24, at 281 ("These tragic events served as a reminder that state governments would not respect the fundamental rights of Black Americans and that racial violence and discriminatory policing would continue unchecked without new constitutional protections."); *see also* CONG. GLOBE, 39th Cong., 1st Sess. 127-28 (1866) (statement of Sen. Charles Sumner) (describing the violence to person and property facing free Black people in Alabama following emancipation); CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Lyman Trumbull) (describing the statutory barriers and criminal penalties that free Black people in Mississippi and South Carolina faced to the exercise of their rights to freedom of religion, to bear arms, to travel freely, and to freedom of assembly).

along with emancipation.[189] When realities in the southern states did not even approach such a situation, Congress responded with the Civil Rights Act of 1866. The Civil Rights Act provided that:

> [A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property . . . .[190]

The language of the Civil Rights Act recalls the interests in liberty, security, and property that informed the Fourth Amendment. The Act also criminalized discriminatory law enforcement and disparate criminal punishments.[191] Support for the Civil Rights Act was broad enough to override President Johnson's veto.[192] To overcome lingering doubts of the Act's constitutionality, Congress drafted and passed the Fourteenth Amendment, constitutionalizing many of the Civil Rights Act's protections and guaranteeing their authority to legislate on the subject.[193] Congress aimed the Fourteenth Amendment not just at equality but at protecting the people from discriminatory courts and police violence.[194] In applying the Reconstruction Amendments, courts should account for the law enforcement abuses they were drafted to remedy and apply a more robust concept of the protection of the laws. Part III explores how our constitutional law fails to extend the protections of the Constitution when policing runs contrary to the people's rights.

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189 *See* CONG. GLOBE, 39th Cong., 1st Sess. 343 (1866) (statement of Sen. Charles Wilson) ("[W]e have advocated the rights of the [B]lack man because the [B]lack man was the most oppressed type of the toiling men of this country . . . . [Those influences that] keep down and crush down the rights of the poor [B]lack man bear down and oppress the poor white laboring man.").

190 Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1868).

191 *See id.* § 2.

192 *See* Mark A. Graber, *The Second Freedmen's Bureau Bill's Constitution*, 94 TEX. L. REV. 1361, 1367 (2016) ("The next week, on April 6, the Senate, by a 33-15 margin, voted to override that veto. The House voted to override three days later by 122-41.").

193 *See* Heyman, *supra* note 162, at 553-54 (describing the impetus for drafting the Fourteenth Amendment).

194 *See id.*; Gans, *supra* note 24, at 290 ("Just as important, the Fourteenth Amendment was centrally concerned, in a way the original Fourth Amendment was not, with police violence. The Fourteenth Amendment struck at centuries of history that permitted Black bodies to be violated indiscriminately, and instead promised personal security to all.").

III. THE CONFLICT BETWEEN MODERN POLICING AND CONSTITUTIONAL RIGHTS AS ORIGINALLY UNDERSTOOD

[W]hile living constitutionalism may embrace a meaning of "unreasonable" beyond that adopted at the Founding, it is on shakier ground when it may look to read the rights that existed at the time the Constitution was drafted out of existence.[195]
—Laura K. Donohue

The conflict between the ideal of constitutional rights and the reality of police practices can largely be explained by clarifying its economic dimension. Where law enforcement in the Colonial Era had threatened the business elite, they enshrined strong rights protections against law enforcement abuses into the Constitution.[196] Those protections persist to this day, though their interpretation is inconsistent.[197] Modern professional policing developed as a response to perceived problems of crime and disorder.[198] Labor power—whether in the form of union organizing or Black Americans no longer willing to accept the conditions of slavery—threatened entrenched economic interests. Police gained new enforcement powers to suppress labor power while new criminal laws directed them to enforce social policies to control workers.[199] A brief interest convergence between formerly enslaved people, northern industrialists who wished to employ them, and abolitionists led to a

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195 Donohue, *supra* note 27, at 1195.

196 *See* Clancy, *supra* note 84, at 992-1006 (describing the role of merchant opposition to general warrants and writs of assistance in forming John Adams's influential views on search and seizure); Lynch, *supra* note 133, at 720 ("During the 1730s, the British government sought to prevent the American colonies from conducting business with non-English industries. To enforce the trading restrictions, Parliament authorized the issuance of general search warrants called 'writs of assistance.'").

197 *See* THOMAS K. CLANCY, THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION § 11.1, at 468 (2008) ("There are at least five principal models that the Court currently chooses from to measure reasonableness: the warrant preference model; the individualized suspicion model; the totality of the circumstances test; the balancing test; and a hybrid model giving dispositive weight to the common law."); Carbado, *supra* note 49, at 131 ("Fourth Amendment doctrine expressly authorizes or facilitates the very social practice it ought to prevent: racial profiling. This authorization and facilitation exposes African Americans not only to the violence of frequent police contact but also to the violence of police killings and physical abuse.").

198 *See* Gary Potter, *The History of Policing in the United States*, EKU ONLINE (June 25, 2013), https://www.academia.edu/30504361/The_History_of_Policing_in_the_United_States [https://perma.cc/EXC7-G4TU] ("The emerging commercial elites needed a mechanism to insure a stable and orderly work force, a stable and orderly environment for the conduct of business, and the maintenance of what they referred to as the 'collective good.'").

199 *See, e.g.*, Ross, *supra* note 111, at 266 ("From the late nineteenth century onwards, private detectives infused the public sphere with their undercover tactics when they took on leadership roles in municipal police departments and federal agencies."); Brian Sawers, *Property Law as Labor Control in the Postbellum South*, 33 LAW & HIST. REV. 351, 351 (2015) ("In the former Confederacy, fresh elections were held in 1865, and legislatures moved quickly to criminalize trespass, restrict hunting and fishing, and close the range.").

new infusion of constitutional rights in the midst of the police power's expansion.[200] When those interests diverged, capital's control over law resumed, and the new rights amounted to very little in the way of protection against law enforcement officers.[201]

Modern police replicate the abuses that our constitutional rights were drafted to prevent. They search people and property with nearly the same authority as a customs officer with a writ of assistance.[202] They maintain a racial and economic underclass in much the same way as the slave patrols.[203] Rather than the "equal protection of the law" granting all citizens the full benefit of freedom from unreasonable searches and seizures,[204] a perverse notion of "equal" treatment has subjected us all to the power of the slave patrols. This Part addresses the failure of constitutional law to preserve our rights against law enforcement abuses in three sections. The first discusses the replication of general warrants and writs of assistance in the broad, discretionary searches and seizures allowed to police as an inherent power of their office. The second traces the continuation and expansion of slave patrol policing in Jim Crow, union busting, and mass incarceration. The third condemns these failures as symptomatic of the perversion of the Equal Protection Clause from its origins in abolitionist concepts of protection to the endorsement of any indignities—so long as they be equally applied.

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200 *See* W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 1860–1880, at 185-87 (Free Press 1998)(1935) (discussing the forging and unravelling of the alliance between Black Americans, abolitionists, and northern industrialists during Reconstruction); C. VANN WOODWARD, THE BURDEN OF SOUTHERN HISTORY 95-97 (3d ed. 2008)(1960) (explaining the partisan economic policies that motivated business interests to back Radical Reconstruction).

201 *See* DU BOIS, *supra* note 200, at 185-87 (discussing the top prioritization of capitalistic interests); Harrison, *supra* note 122, at 1387 ("Judging by the Supreme Court's case law, one would think that Johnson's motion [to delete the Privileges or Immunities Clause] had passed. No important line of decision rests on the clause; every student of constitutional law quickly learns that it was virtually read out of the document by the *Slaughter-House Cases*."); William G. Ross, *The Constitutional Significance of the Scottsboro Cases*, 28 CUMB. L. REV. 591, 593-94 (1997/1998) ("[T]he Equal Protection clause, also intended for the benefit of African Americans, became almost a dead letter with the advent of the so-called 'separate but equal' doctrine . . . . [T]he Court turned a blind eye to the plight of the racial minorities that the Fourteenth Amendment was written to protect.").

202 *See* Davies, *supra* note 34, at 133 ("Rather, today's police badge confers the sort of discretionary authority that only a general warrant could have conferred in 1789.").

203 *See* Hasbrouck, *supra* note 21, at 1114-16 (comparing the powers of the slave patrols to modern police abuses against Black people).

204 *See* Hasbrouck, *supra* note 42, at 109, 132 ("To the abolitionists, then, equal protection meant not just that the government had a duty to apply the law equally, but that the law *must* protect those subject to it.").

A. *The Broad Search Powers of Modern Police as De Facto General Warrants and Writs of Assistance*

Modern police hold the power to make arrests and conduct a broad range of searches by virtue of their office. While common-law standards required an arrest warrant for anyone who did not witness a felony—or respond to the hue and cry—to seize a person, modern police can make arrests whenever they have probable cause that a person committed a felony.[205] And while entering a home required a warrant outside of the hot pursuit of a felon, even the most protected spaces in our search-and-seizure regime are subject to a litany of exceptions.[206] Outside of searches incident to an arrest, colonial law enforcement officers simply did not conduct warrantless searches outside of homes,[207] yet those have become a fact of life in modern policing.[208] The claim that modern policing replicates the powers of general warrants is not new; Professor Thomas Y. Davies exhaustively contrasted the practices of the two eras and came to that conclusion.[209] Yet Davies stopped short of reaching a prescriptive conclusion for modern constitutional interpretation.[210] This

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205 *Compare supra* notes 59–73 and accompanying text (discussing the limited powers of traditional English public safety officers at common law), *and* David Gray, *The Fourth Amendment State Agency Requirement: Some Doubts*, 109 IOWA L. REV. 1487, 1501-02 (2024) (discussing the process of raising the hue and cry to pursue a felon under the common law), *with* Davies, *supra* note 94 at 6 ("By the end of the nineteenth century most American jurisdictions accepted bare probable cause—circumstances indicating that a felony might have been committed—as the standard for warrantless felony arrests.").

206 *Compare* Steinberg, *supra* note 134, at 597 n.93 ("[T]he lack of debate about warrantless house searches likely occurred because in early America, 'the common law apparently provided no justification for a search of a house beyond the ministerial execution of a valid search warrant.' In other words, everyone agreed that warrantless house searches were impermissible." (citation omitted)), *with* George Dery, *Expedient Knocks and Cowering Citizens: The Supreme Court Enables Police to Manufacture Emergencies by Pounding on Doors at Will in* Kentucky v. King, 17 BERKELEY J. CRIM. L. 225, 239-40 (2012) ("The Court declared exigent circumstances to be a 'well established' and 'well-recognized' warrant exception that covered several emergency situations, including emergency aid, hot pursuit, and prevention of evidence destruction." (citations omitted)).

207 *See* United States v. Chadwick, 433 U.S. 1, 8 (1977) ("The absence of a contemporary outcry against warrantless searches in public places was because, aside from searches incident to arrest, such warrantless searches were not a large issue in colonial America.").

208 *See* Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 533 (1995) ("The list of permissible suspicionless invasions continues to grow, and the level of intrusiveness of those suspicionless governmental actions has continually intensified.").

209 *See generally* Davies, *supra* note 51 (detailing the powers and limitations of early American law enforcement and how these influenced the understanding of the Fourth Amendment); Davies, *supra* note 20 (detailing both the original common law limitations on search and seizure and how these protections eroded as modern policing developed).

210 *See* Davies, *supra* note 51, at 747 ("[T]he central issue in . . . Fourth Amendment doctrine is the degree to which [we can or should] constrain discretionary police authority by a regime of rules . . . . That issue must be addressed with a realistic understanding that the law enforcement institutions of the framing era were not adequate to meet [modern] needs . . . ."); *cf. generally* Roger

Article's examination of the conflict between modern police practices and the Fourth Amendment concludes that the conflict must be resolved in favor of the Fourth Amendment.

The Supreme Court's Fourth Amendment jurisprudence since the Warren Court has served to progressively limit the scope of the constitutional right to be secure against unreasonable searches and seizures.[211] As this right eroded, professional police's power filled the void. Too often, exceptions have swallowed the Fourth Amendment. Look to a daily aspect of American life: travel in automobiles.[212] A traffic stop is a quintessential common law arrest: the police make a show of authority by engaging their lights and siren, and the driver submits by pulling over.[213] American cities and suburbs have been increasingly built with an assumption that individuals will own and travel in cars.[214] While the numbers are difficult to track, tens of thousands of Americans even live in their cars.[215] Yet the sheer mobility of automobiles has led the Supreme Court to justify their warrantless search even when no exigency exists.[216] Police, by virtue of their office, have the power to compel the driver of a vehicle to pull over to the side of the road and submit to questioning.[217] They then have authority to search and impound automobiles

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Roots, *Are Cops Constitutional?*, 11 SETON HALL CONST. L.J. 685 (2001) (arguing against the constitutionality of modern policing, but leaving unsaid the connection of general warrants, the slave patrols, and the Fourteenth Amendment).

211 *See* Clancy, *supra* note 208, at 533 (1994).

212 *See* George M. Dery III, *Missing the Big Picture: The Supreme Court's Willful Blindness to Fourth Amendment Fundamentals in* Florida v. White, 28 FLA. ST. U. L. REV. 571, 572 (2001) ("Thus, *White* elevated the automobile exception to such high status that it outranks the Fourth Amendment mainstays of the timeliness of probable cause and the Warrant Clause itself.").

213 *See* California v. Hodari D., 499 U.S. 621, 626 (1991) ("An arrest requires *either* physical force . . . *or*, where that is absent, *submission* to the assertion of authority.").

214 *See* Muizz Akhtar, *Too Many Americans Live in Places Built for Cars—Not For Human Connection*, VOX (Aug. 25, 2022, 6:54 AM), https://www.vox.com/features/23191527/urban-planning-friendship-houston-cars-loneliness [https://perma.cc/VR73-4B3T] ("Car-centric development was given preference over everything else, and in the decades after World War II, highways and parking lots would come to dominate the urban American landscape. This came at the expense of public transportation, walkability, and the ability of most Americans to carry on their lives without a car.").

215 *See* JoAnn Ryan, *Why Are So Many Americans Living in Their Cars?*, MEDIUM (Sept. 13, 2022), https://medium.com/the-midnight-garden/why-are-so-many-americans-living-in-their-cars-861438cba3f1 [https://perma.cc/Z9RS-JGXG] ("In 2019, the Census Bureau reported that these numbers had been steadily increasing, and put the estimate at 140,000. Since then, the numbers have continued to skyrocket . . . .").

216 *See* Dery, *supra* note 212, at 583-84 (detailing the Court's rulings in several cases that eliminated any semblance of an exigency requirement for warrantless automobile searches).

217 *See* David A. Harris, *The Use of Traffic Stops Against African Americans: What Can Be Done?*, 1 J.L. SOC'Y 91, 92 (1999) ("[A]ny time a police officer sees a traffic offense, the officer may stop the driver, even if the officer has absolutely no interest in traffic enforcement and in fact is interested in the driver for other reasons which themselves would not be legally adequate for a stop."); PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 24-25 (2009) (recounting a police officer's demonstration that any car can be pulled over for a traffic violation within a few blocks).

as soon as they have probable cause to suspect a crime has been committed, and the power to stop them for even minor violations.[218] Police can also set up checkpoints to stop all drivers along a road and subject them to brief questioning—as long as they can point to some reason other than general crime control.[219] Combined with the abilities to look through windows (which are often forbidden from being darkened to prevent this),[220] question stopped drivers,[221] and summon drug detection dogs,[222] probable cause often represents a low barrier to conducting a search during a traffic stop.[223] On American roads, police can search a car almost whenever they want without any need to obtain a warrant. This sweeping search power easily recalls the

These stops, at common law, would constitute an arrest. *Cf. Hodari D.*, 499 U.S. at 626-28 (explaining that stopping a person through a show of authority and submission to that authority form the basis of an arrest analyzed as a seizure under the Fourth Amendment).

218 *See* David A. Harris, *Car Wars: The Fourth Amendment's Death on the Highway*, 66 GEO. WASH. L. REV. 556, 574 (1998) ("[T]he Court's view of traffic codes in *Whren* free Trooper Washington and every other police officer to do exactly what is otherwise forbidden: act on nothing more than a hunch. And these cases 'stand up in court.'").

219 *See* Russell L. Weaver, *Investigation and Discretion: The* Terry *Revolution at Forty (Almost)*, 109 PENN. ST. L. REV. 1205, 1215 (2005) ("Police can act if the public interest is great enough and if the intrusion on the individual's rights is not too great. As a result, motorists can be stopped at traffic checkpoints simply to further the governmental interest in eradicating drunk driving." (citations omitted)); Brent E. Newton, *The Real-World Fourth Amendment*, 43 HASTINGS CONST. L.Q. 759, 794 (2016) ("The Court also upheld a suspicionless roadblock aimed at locating witnesses to a hit-and-run accident . . . . [and] suspicionless checkpoints located relatively near the international border so long as they are brief and only if a 'question or two' are posed to the driver and passengers concerning their immigration status." (citations omitted)).

220 *See Window Tint Laws By State: 2024 Legal Window Tint Percentages*, RAYNO, https://www.raynofilm.com/blog/automotive-window-tint-laws-by-state [https://perma.cc/FA9C-PH9B] (last visited June 16, 2024) ("Extremely dark tint can be obstructive to investigations, and dangerous during traffic stops and other incidents. Every state has window tint laws to dictate how much tinting is allowed on each window of your vehicle."). Even drivers with tinted windows cannot rely upon them to protect against an officer armed with an iPhone. *See* United States v. Poller, 682 F. Supp. 3d 226, 232 (D. Conn. 2023) ("Accordingly, the detectives did not violate Poller's reasonable expectation of privacy by using an iPhone to see through the tint of the windows on his car.") , *aff'd*, 129 F.4th 169 (2d Cir. 2025).

221 *See* Jeannine Bell, *The Violence of Nosy Questions*, 100 B.U. L. REV. 935, 937 (2020) ("Though it is normally most people's impetus to resist or deflect such lines of inquiry, the Supreme Court has empowered one group of individuals to demand responses to nosy questions—police officers.").

222 *See* Ricardo J. Bascuas, *Property and Probable Cause: The Fourth Amendment's Principled Protection of Privacy*, 60 RUTGERS L. REV. 575, 608 (2008) ("Justice Scalia joined Justice Stevens's majority opinion in *Illinois v. Caballes*, which held that police could have a drug dog sniff a car during a traffic stop so long as the sniffing did not prolong the stop." (citation omitted)).

223 *See* David E. Steinberg, *The Drive Toward Warrantless Auto Searches: Suggestions from a Back Seat Driver*, 80 B.U. L. REV. 545, 557 (2000) ("Once police lawfully have stopped a car, evidence discovered in plain view often furnishes probable cause that allows police to conduct a wide-ranging search of the auto.").

authority of customs agents under writs of assistance, despite originating by analogy to statutes passed by Congress during the early republic.[224]

Even outside of cars, police have significant power to interfere with "persons, houses, papers, and effects."[225] Using a deliberately ambiguous standard of reasonable suspicion,[226] police may initiate a *Terry* stop on little more than a hunch. While such a stop is not considered an arrest by modern reckoning, police may engage in questioning and a pat-down search, even employing handcuffs and drawn weapons.[227] Blackstone's formulation of the common law conflicts with this practice:

> NEXT to personal security, the law of England regards, asserts, and preserves the personal liberty of individuals. This personal liberty consists in the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law.[228]

Such stops overwhelmingly target communities of color, resulting in a high number of arrests, despite the overall low frequency of converting a stop to an arrest.[229] Furthermore, the Supreme Court authorizes a wide range of warrantless searches of homes. In addition to classic exceptions like consent,

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224 *See* Carroll v. United States, 267 U.S. 132, 150-53 (1925) (generalizing a warrantless search exception from statutes involving cargo ships at sea to cover all vehicles in any location). The decision is deeply flawed due to its reliance on the statutes of an era in which criminal defendants simply did not challenge the constitutionality of searches in court. *See* Lee, *supra* note 159, at 2153-54 (discussing the limited concept of civil liberties operant prior to Reconstruction). Furthermore, *Carroll* fails to engage meaningfully with the question of whether a person's belongings transported in their automobile were effects entitled to Fourth Amendment search protections.

225 U.S. CONST. amend. IV.

226 *See* Aliza Hochman Bloom, *When Too Many People Can Be Stopped: The Erosion of Reasonable Suspicion Required for a* Terry *Stop*, 9 ALA. C.R. & C.L. L. REV. 257, 260, 264 (2018) (enumerating the general statements of the reasonable suspicion standard for initiating a non-custodial stop in public and arguing that law enforcement are given "substantial deference" in decisions to initiate a stop).

227 *See* Mark A. Godsey, *When* Terry *Met* Miranda*: Two Constitutional Doctrines Collide*, 63 FORDHAM L. REV. 715, 716 (1994) ("Thus, it is no longer uncommon for police officers executing *Terry* stops to employ highly intrusive, 'arrest-like' measures of force such as handcuffs or drawn weapons."). *But see* Hodari D., 499 U.S. at 624 ("To constitute an arrest, however[,] . . . the mere grasping or application of physical force with lawful authority, whether or not it succeeded in subduing the arrestee, was sufficient.").

228 1 WILLIAM BLACKSTONE, COMMENTARIES *130.

229 *See* David A. Harris, *Across the Hudson: Taking the Stop and Frisk Debate Beyond New York City*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 853, 866 (2013) (providing statistics on racial disparities, arrest rates, and overall uses of New York City's stop and frisk policies). These harms further fall disproportionally on segments of those communities further marginalized by income, gender, and sexual orientation. *See* Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 CALIF. L. REV. 1637, 1658 (2021) ("Negatively racialized groups, trans and queer communities of color, and low-to no-income communities of color in particular have faced the harms of over-policing due to stereotypes that inform social perceptions of criminality and disorder.").

the hot pursuit of a felon, and a search incident to arrest, the Court has authorized searches when police suspect a danger to the public, police, or property, or the potential destruction of evidence.[230]

While exceptions for imminent danger extend the logic of the hot pursuit exception, the destruction of evidence exception is entirely modern. Even when the police themselves create the risk of lost evidence, their conduct may be excused by such an exigency unless their initial conduct was itself unconstitutional.[231] In cases involving contraband, this exception nearly swallows the rule, despite contraband being the very thing Crown officers sought with their detestable writs of assistance.[232] *Kentucky v. King* established that, by virtue of their office, police may approach a home they suspect contains contraband to seek consent to search for it and, if that consent is not freely given, claim exigent circumstances and simply search anyway. [233] Such powers over persons and homes replicate—and exceed—the breadth of general warrants and writs of assistance, respectively. The citizens of Boston would have been outraged if customs agents had arrived at Daniel Malcom's home, been unable to secure his consent to a search, decided that he might be destroying evidence, and broken down his door.

The unreasonable invasion of persons and their property through searches was not the only aspect of writs of assistance that the Framers found objectionable. They also detested the use of such writs to enrich the officials enforcing them.[234] Modern policing often uses a variety of tactics to enrich

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230 *See* Di Jia, Kallee Spooner & Rolando V. Del Carmen, *An Analysis and Categorization of U.S. Supreme Court Cases Under the Exigent Circumstances Exception to the Warrant Requirement*, 27 GEO. MASON U. C.R. L.J. 37, 49-55 (2016) (discussing categories of permissible warrantless searches of homes).

231 Kentucky v. King, 563 U.S. 452, 455 (2011); *see also* Case Comment, *Exigent Circumstances Exception*: Kentucky v. King, 125 HARV. L. REV. 211, 214 (2011) ("Citizens have no obligation to open their doors to law enforcement officers without a warrant, and therefore they have 'only themselves to blame' if they instead invite a warrantless search by destroying evidence.").

232 *Compare King*, 563 U.S. at 471-72 (finding that police banging loudly upon a residential door, announcing themselves, and then—believing the destruction of evidence to be imminent—breaking down the door did not violate the Fourth Amendment), *with* Sacharoff, *supra* note 2, at 655-56 (relating the story of the Malcom Affair), *and supra* notes 125–135 and accompanying text (discussing the role of writs of assistance in inspiring the Fourth Amendment).

233 *King*, 563 U.S. at 472 ("Because the officers in this case did not violate or threaten to violate the Fourth Amendment prior to the exigency, we hold that the exigency justified the warrantless search of the apartment.").

234 *See* Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 75-76 (1998) ("Writs of assistance authorized customs officers to seize suspected contraband and to retain a share of the proceeds . . . [,] an outrage that brought with it corrupt officials, lawless seizures, selective enforcement, fabricated evidence, extortionary agreements from subjects with no effective legal recourse, [and extrajudicial killings]." (footnotes omitted)).

police departments directly,[235] indirectly through municipal budgets,[236] and through benefits to individual officers.[237] Two of the most prominent—policing-for-profit through fines and fees and asset forfeiture—persist despite recent widespread condemnation.[238] Some of the most prominent recent uprisings against police abuses stem from widespread mistreatment aimed at extracting wealth from Black communities.[239] Fines and fees extract a terrible burden—Americans owe billions of dollars in court fines and fees.[240] Asset forfeiture extracts even greater sums from Americans.[241] Sharon Brett, Legal

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235 *See id.* at 40 ("Congress conferred these financial benefits to . . . law enforcement both directly, through block grants earmarked for drug law enforcement, and indirectly, through forfeiture provisions authorizing law enforcement agencies to seize 'drug-related' assets, such as a house in which marijuana plants have been grown, and use the proceeds for their budgetary needs.").

236 *See* Sinduja Rangarajan, Hannah Levintova & Laura Thompson, *The Blue Budget: What Cities Spend on Police*, MOTHER JONES, Sept.-Oct. 2020, https://www.motherjones.com/criminal-justice/2020/08/the-blue-budget-what-major-cities-spend-on-police [https://perma.cc/6BS9-8BRU] ("While there's wide variation in how much cities spend on police, most dedicate between 25 percent to 40 percent of their budgets to policing.").

237 *See* Sharon Brett, *Reforming Monetary Sanctions, Reducing Police Violence*, 4 UCLA CRIM. JUST. L. REV. 17, 28 (2020) ("Individual officers may also be motivated to arrest more people on low level charges because doing so allows them to work more hours processing and booking those arrests, which results in overtime pay. And . . . 'high-performing' departments and units may receive ancillary benefits, such as higher performance-based budgeting awards.").

238 *See, e.g.*, Roger Pilon & Trevor Burrus, *Civil Forfeiture Reform*, *in* CATO HANDBOOK FOR POLICYMAKERS 163, 164 (9th ed. 2022), https://www.cato.org/sites/cato.org/files/2023-03/cato-handbook-9th-edition.pdf [https://perma.cc/EPY2-BBXV] ("[T]he property is seized for forfeiture to the government, not because the owner has been found guilty of a crime but because the property is said to 'facilitate' a crime, whether or not a crime was ever proved or a prosecution even begun."); S. POVERTY L. CTR., CIVIL ASSET FORFEITURE: UNFAIR, UNDEMOCRATIC, AND UN-AMERICAN 1 (2017), https://www.splcenter.org/wp-content/uploads/files/com_policybrief_civil_asset_forfeiture_web.pdf [https://perma.cc/MZ9J-7TCS] ("Instead, [asset forfeiture] perverts the incentives of law enforcement, encouraging agencies to pursue strategies that maximize profit rather than ensure public safety."); Andrew Wimer, *Policing Should Not Be About Generating Profit*, FORBES (June 12, 2020, 10:19 AM), https://www.forbes.com/sites/instituteforjustice/2020/06/12/policing-should-not-be-about-generating-profit [https://perma.cc/SXW3-LZWH] ("By handing out citations that carry heavy fines and fees, or by taking and keeping property through civil forfeiture, policing has become increasingly about profit rather than public safety.").

239 *See* Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 420-21 (2018) (discussing the role of policing-for-profit as a means of extracting a disproportionate share of the municipal budget from Black communities in the uprisings in Ferguson and Baltimore).

240 *See* BRIANA HAMMONS, TIP OF THE ICEBERG: HOW MUCH CRIMINAL JUSTICE DEBT DOES THE U.S. REALLY HAVE? 4 (2021), https://finesandfeesjusticecenter.org/content/uploads/2021/04/Tip-of-the-Iceberg_Criminal_Justice_Debt_BH1.pdf [https://perma.cc/C5K8-QNCS] ("[W]e can document that at least $27.6 billion of fines and fees is owed across the nation. This figure grossly understates the amount of court debt that people living in the U.S. cannot afford to pay because only 25 states provided data, and the information that many provided was incomplete.").

241 *See* LISA KNEPPER, JENNIFER MCDONALD, KATHY SANCHEZ & ELYSE SMITH POHL, POLI¢ING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 5 (3d ed. 2020), https://ij.org/wp-content/uploads/2020/12/policing-for-profit-3-web.pdf [https://perma.cc/2E9E-

Director at the ACLU of Kansas, summarized the violence inherent in the focus on fines and fees:

> Police officers make a variety of choices when carrying out their law enforcement obligations, both in general and specifically with regard to collecting fines and fees. The strategies they choose, including where to target enforcement efforts (geographic decisions), the personnel to use (deployment and staffing decisions), and the specific tactics for enforcement (e.g., stop and frisk, the use of specialized units for warrant enforcement, sweeps, or vehicle checkpoints), are all possible touchpoints for unnecessarily punitive contact between law enforcement and members of the community. Some of these tactics are inherently violent. But even when encounters begin as "routine" (and in some communities, "routine" means openly hostile or antagonistic), they can quickly become physically aggressive or even dangerous, especially when they [are] deployed with regular frequency in Black, [B]rown, and poor communities.[242]

The Supreme Court unanimously ruled that the Eighth Amendment's prohibition of excessive fines applies to state governments.[243] Yet the Eighth Amendment analysis examines only proportionality, bypassing the corruption and abuse inherent to even small extractions that made profiteering such an objectional part of writs of assistance. For lower-income people, even proportional extractions can be devastating, and they all too often lack the resources to resist such tactics.[244] Modern police departments all too often embrace such profiteering, reviving some of the very abuses the Framers sought to outlaw.

Much of the abuse inherent in policing derives from the Supreme Court's dubious—but potent—interpretation of consent and the legal fiction that many stops and searches are consensual.[245] The perverse Fourth Amendment

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7PQ5] ("Since 2000, states and the federal government forfeited a combined total of at least $68.8 billion. And because not all states provided full data, this figure drastically underestimates forfeiture's true scope.").

242 Brett, *supra* note 237, at 33.

243 *See* Timbs v. Indiana, 139 S. Ct. 682, 689 (2019) ("Protection against excessive punitive economic sanctions secured by the Clause is, to repeat, both 'fundamental to our scheme of ordered liberty' and 'deeply rooted in this Nation's history and tradition.'" (quoting McDonald v. City of Chicago, 561 U.S. 742, 767 (2010))).

244 *Cf.* Brandon L. Garrett, Sara S. Greene & Marin K. Levy, *Foreword: Fees, Fines, Bail, and the Destitution Pipeline*, 69 DUKE L.J. 1463, 1471 (2020) ("[P]overty channels marginalized people into systems of both civil and criminal punishment, even when the law itself appears class neutral.").

245 *See* Geoffrey S. Corn, *"Light Him Up": Addressing the Dangerous Intersection of Traffic Stops and Consent*, 20 GEO. J.L. & PUB. POL'Y 617, 627-28 (2022) ("It is the objectively reasonable traffic stop that offers the police officer the opportunity to request consent; and it is the ease of satisfying

jurisprudence in *Kentucky v. King*, for instance, relied upon the conceit that officers knocking and announcing themselves at a home are not demanding entry, but asking consent for a search.[246] But as Professor Peter Meijes Tiersma put it:

> Following the orders of a uniformed and armed officer ("Pull over" or "Place your hands on the car") is never truly voluntary.
>
> Whether a question like "Does the trunk open?" or "May I look in the trunk?" is merely a request that can be refused or a command that must be obeyed depends not so much on the language used, but on the power relationship between the speaker and addressee. If an ordinary citizen, taking a tour of the White House, asks a guard standing in front of the door to the Oval Office, "May I enter this room?" it is simply a request. If the President asks, he is ordering the guard to step aside. Likewise, suppose that a police officer pulls over a car and asks the driver, "May I see your license?" "No" is simply not an appropriate response. We know that the officer has the right to see our license, has the power to enforce this right, and that refusing to show our license would only get us into worse trouble, or at least greatly inconvenience us. The officer's polite request is really nothing less than a command.[247]

Police officers serve as a compelling reminder of the state's monopoly on violence.[248] Violence has so long been used to entrench social and economic control that the Court's fiction of freely-given compliance with armed officers out of a sense of safety shows itself as the fantasy of the naively comfortable.[249] The power disparity between officers and the people they police ensures that the consent supposedly undergirding so many searches is tenuous at best. Police will find a way to search your car, your home, or your person by either cowing you into submission or invoking an exception. They

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the voluntariness test for consent that allows the officer to expand the traffic stop to a general search.").

246 *See* Kentucky v. King, 563 U.S. 452, 472 (2011) ("There is no evidence of a 'demand' of any sort, much less a demand that amounts to a threat to violate the Fourth Amendment.").

247 Peter Meijes Tiersma, *The Judge as Linguist*, 27 LOY. L.A. L. REV. 269, 281-82 (1993) (footnotes omitted).

248 *See* Sok, *supra* note 105, at 22 ("Police surveil, suppress, and act as an arm of violence for the government. Police are a public institution of social control and coercion along with jails and prisons. Police criminalize and remove those that do not obediently comply.").

249 *Compare* Reva B. Siegel, *The History of History and Tradition: The Roots of* Dobbs*'s Method (and Originalism) in the Defense of Segregation*, 133 YALE L.J. F. 99, 147-48 (2023) ("What if those in power entrench state authority—including its monopoly on violence—to dominate and subordinate the disfranchised, arrogating to itself control over property and speech?"), *with* United States v. Drayton, 536 U.S. 194, 205 (2002) ("And of more importance, bus passengers answer officers' questions and otherwise cooperate not because of coercion but because the passengers know that their participation enhances their own safety and the safety of those around them.").

will arrest you whenever they like if they can use their vast powers of search and interrogation to meet a nebulous standard of probable cause. They have an authority, by virtue of their office and its legitimized violence, that restores and expands the powers of the general warrant and the writ of assistance. That authority obliterates any notion that the people are secure against such unreasonable searches and seizures. Because that authority encompasses the ills the Fourth Amendment was created to remedy, the Constitution cannot abide it. We must bring constitutional law in line with the Constitution and eliminate the general warrant authority from the ex officio powers of modern police.

B. *Modern Racialized Policing as the New Slave Patrols*

Modern policing disproportionately targets communities of color.[250] Some of that targeting is the result of racial biases baked into our society that unconsciously shape the actions of individual officers.[251] But too much of it is baked into the core of policing as an institution, although the distinction matters little to people facing a long history of racially discriminatory policing.[252] American professional policing originates not from a need to protect the community from violence or prosecute its perpetrators but from a desire for control, particularly control of Black people.[253] Indeed, rather

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250 *See* Robin G. Steinberg, *Police Power and the Scaring of America: A Personal Journey*, 34 YALE L. & POL'Y REV. 131, 132 (2015) ("This nation's policing strategy targets low-income communities, particularly low-income communities of color, by arresting millions of people for low-level disorder crimes that occur in all communities, but are only policed in some.").

251 *See* L. Song Richardson, *Implicit Racial Bias and Racial Anxiety: Implications for Stops and Frisks*, 15 OHIO ST. J. CRIM. L. 73, 81 (2017) ("In the context of policing, implicit racial bias and racial anxiety can result in officers stopping, frisking, and using force more often against Black civilians than White civilians. This can occur even when officers are not consciously racist and Blacks are not engaged in criminal activity.").

252 *See* W. Kerrel Murray, *Discriminatory Taint*, 135 HARV. L. REV. 1190, 1194 (2022) ("[W]rongdoers should not be able to continue acting with unreconstructed unconstitutional aims. But policy change over time can cloak precisely that behavior, especially when we often must infer a policy's illegitimacy from a context that bad faith actors can manipulate. We can thus gain much from better understanding temporal pretext.").

253 *See* Jerron R. Wheeler, *Defunding C.O.P.S.: Conditioning Federal Funding to State and Local Law Enforcement Agencies Upon the Implementation of a Program That Screens Its Current and Future Officers for White Supremacist Affiliations*, 23 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 1, 4 (2023) ("Policing in the early American South was built on the belief that the white race is inherently superior to other races and white people should have control over people of color, particularly Black people."); Arusha Gordon, *The First Amendment, Policing, and White Supremacy in America*, 28 TEX. J. ON C.L. & C.R. 33, 34-35 (2022) ("[E]ven before the nation's founding, and before official state and local police agencies were created, white supremacy played a role in policing: slave patrols, which were first created in the 1700s to catch runaway slaves, were the forbearers of our current day police system.").

than protect communities of color from violence, police perpetuate violence against such communities to maintain white supremacy's control.[254]

Racialized patterns of enforcement rely upon racially coded descriptions of individuals and communities that have evolved into self-fulfilling prophecies.[255] Defense attorneys face a high degree of credulity from judges for police officers' pretextual justifications of stops and searches.[256] The stops and searches win judicial sanction despite their underlying racism.[257] This further reinforces the prejudicial assumptions underlying police resource allocation creating the fiction of a race-neutral justification.[258] With such broad stop and search powers and little oversight for discriminatory patterns of policing, police are effectively turned loose to enforce social and economic control over Black and other marginalized communities.

Pretextual stops replicate the racial targeting of the flurry of vagrancy laws and Black Codes in southern states after the Civil War.[259] These new laws were often enforced by organizations and individuals who had acted as slave patrols before emancipation to ensure that emancipation did as little as

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254 *See* Jelani Jefferson Exum, *Presumed Punishable: Sentencing on the Streets and the Need to Protect Black Lives Through a Reinvigoration of the Presumption of Innocence*, 64 HOW. L.J. 301, 307 (2021) ("This systemic racism that runs over four centuries deep has fostered and cultivated the presumption that Black people must be controlled through force and violence—by police and lay persons alike." (citations omitted)); *see also* Jamison v. McClendon, 476 F. Supp. 3d 386, 390-91 (S.D. Miss. 2020) (listing a litany of relatively innocuous activities for which Black people have been subjected to police violence).

255 *See generally* Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479 (2016) (discussing the drivers of repeated police interactions with Black communities).

256 *See* Kenneth Graham & Leon Letwin, *The Preliminary Hearing in Los Angeles: Some Field Findings and Legal-Policy Observations*, 18 UCLA L. REV. 635, 718 (1971) ("Many magistrates seem unduly credulous about the stories advanced to justify probable cause for these searches [of Black, Latinx, and counterculture youths].").

257 *See, e.g.*, Whren v. United States, 517 U.S. 806, 813 (1996) ("[T]he Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

258 *See* David Harris, *Law Enforcement's Stake in Coming to Grips With Racial Profiling*, 3 RUTGERS RACE & L. REV. 9, 16 (2001) ("Because police will target [B]lack drivers for drug crimes, they will find [drugs] disproportionately among [B]lack drivers. This means that more [B]lacks will be arrested, prosecuted, convicted, and jailed, which of course will reinforce the idea that [B]lacks are disproportionately involved in drug crimes, resulting in a continuing motive and justification for stopping more [B]lack drivers as a rational way of using resources to catch the most criminals.").

259 *See* Ion Meyn, *White-on-Black Crime: Revisiting the Convict Leasing Narrative*, 2024 WIS. L. REV. 533, 554 (2024) ("Black persons were disproportionately arrested, convicted, and sent to forced labor under the 'duly convicted' exception of the Thirteenth Amendment. The broad discretion granted by underlying laws like Black Codes and vagrancy statutes facilitated this use of direct state violence against Black persons.").

possible to upset the racial order.[260] Their evolution into modern pretextual stops was effected by a Supreme Court indifferent to the reality that its purportedly race-neutral standards would be disproportionately visited upon Black communities.[261] The Brennan Center summarized the effects of the resulting mass incarceration on communities of color:

> Mass incarceration exacerbates poverty and inequality, holding back millions of men and women. People who have interacted with the justice system—a disproportionate number of whom are racial and ethnic minorities—face discrimination in the hiring process, earn lower wages, have weaker social networks, and experience less upward economic mobility than those who are never incarcerated. And they aren't the only ones to shoulder these burdens: Their families and communities suffer as well, and the effect reverberates across generations.[262]

The legislative and executive initiatives underlying the War on Drugs and its attendant police superpowers came from politicians' hostility towards Black communities.[263] Modern racialized policing developed by a direct through-line from the slave patrols and their practices.

The connection is not merely one of historical development though. The powers and practices of modern police forces enable them to act in nearly every manner that the slave patrols did apart from directly handing Black people over to private owners. Modern police can disrupt public

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260 *See* Potter, *supra* note 92 ("Following the Civil War, these vigilante-style organizations evolved in[to] modern Southern police departments primarily as a means of controlling freed slaves who were now laborers working in an agricultural caste system, and enforcing 'Jim Crow' segregation laws . . . .").

261 *See* Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1449 (2016) ("The dynamic in *Terry*—in which the Court is warned that African-Americans will bear the burden of its expansion of police powers, the Court either ignores or discounts the concern, and then, in fact, African-American men do bear the burden of the police practice—is commonplace.").

262 *Social and Economic Harm*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/issues/end-mass-incarceration/social-economic-harm [https://perma.cc/MN4L-FWEE] (last visited Jan. 6, 2025).

263 *See* Dylan Tureff, *Securing White Votes by Incarcerating Black Bodies: The Criminalization of Blackness and the Perpetuation of a National Moral Panic in the American Carceral State*, 25 GEO. PUB. POL'Y REV. 42, 59 (2020) ("Recognizing the electoral power of tough on crime language and policies, ambitious Republican and Democratic politicians alike employed similar tactics to exploit the nation's moral panic of crime, specifically Black drug-related crime.").

gatherings.[264] They can harass people who seem out of place.[265] They can interrogate people they find suspicious.[266] They can demand entry into houses and force their way inside if the occupants refuse.[267] They can kill anyone who even *appears* to be defending themselves.[268] They enjoy special protections from lawsuits for abusing their power.[269] These slave patrol

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264 *Compare* Wadie E. Said, *The Politicization of Criminal Prosecutions*, 75 S.C. L. REV. 55, 61 (2023) ("Activists and advocates among the protesters were adamant that the police engaged in mass arrest campaigns across the spectrum of American cities with the purpose of harassing and disrupting the [Black Lives Matter] protesters; after all, the protests were geared at halting excessive police violence and impunity against minority communities."), *with* An Act to Establish a Patrol in Saint Mary's, Anne-Arundel, Prince George's, and Charles Counties, Ch. CC § 1, 625 Md. Laws 162 (1821), available at https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000625/html/am625—162.html [https://perma.cc/BJ9G-T3PG] ("[The slave patrol] shall proceed to make diligent search through the said neighbourhood or district, as prescribed in the authority, for a period of not less than four hours, nor more, than eight hours, and to disperse, all unlawful and riotous assemblages of coloured persons . . . .").

265 *Compare* Erika L. Johnson, *"A Menace to Society:" The Use of Criminal Profiles and Its Effect on Black Males*, 38 HOW. L.J. 629, 656-57 (1995) ("By allowing the use of race in investigatory stops, or failing to condemn such a practice, many courts have accepted the out-of-place doctrine as an important predictive device. In many investigatory stops, courts seem unwilling to carefully scrutinize police officers' judgments."), *with* Act of Feb. 16, 1821, ch. CC § 1, 625 Md. Laws 162 ("[The slave patrol shall] apprehend and seize all negroes and slaves, or persons of colour, whom they may have reason to suspect have unlawfully absented themselves from home, or have illegally emigrated from another state, or are in any manner violating the laws of this state.").

266 *Compare* Terry v. Ohio, 392 U.S. 1, 30 (1968) (sanctioning investigative stops of individuals "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot" and pat-down searches if an officer suspects a weapon may be present), *with* Act of Feb. 16, 1821, ch. CC § 2, 625 Md. Laws 162 ("[I]t shall be the duty of the said patrol, or as many of them as is necessary, as soon as convenient, to take all persons whom they may apprehend as aforesaid, before some justice of the peace for the county for examination . . . .").

267 *Compare* Kentucky v. King, 563 U.S. 452, 473 (2011) (Ginsburg, J., dissenting) ("The Court today arms the police with a way routinely to dishonor the Fourth Amendment's warrant requirement in drug cases. In lieu of presenting their evidence to a neutral magistrate, police officers may now knock, listen, then break the door down, never mind that they had ample time to obtain a warrant."), *with* Act of Feb. 16, 1821, ch. CC § 3, 625 Md. Laws 162 ("[I]f said patrol have reason to suspect that [runaway slaves are hidden in the home] of any coloured person . . . [they shall] demand . . . to be admitted [to search] . . . and if the owner or occupant shall refuse to suffer such entry and search . . . to use all necessary force to effect the same . . . .").

268 *Compare* Ciji Dodds, *The Rule of Black Capture & the Ahmaud Arbery Case*, 14 GEO. J.L. & MOD. CRITICAL RACE PERSP. 31, 54 (2023) ("Police departments have adopted the Court's lexicon and now, ambiguous terms like 'immediate threat,' 'totality of the circumstances,' 'reasonable officer,' and 'active resistance' function as magic words that departments use to create ornamental use of force policies, justify police brutality in paperwork, and mount legal defenses."), *with* S.C. Slave Code of 1740, No. 670, § V, S.C. Acts 397, 399 ("[A]nd if [a slave found somewhere other than their home plantation or place of employment] shall assault and strike [a] white person [attempting to capture them], such slave may be lawfully killed.").

269 *Compare* Leah M. Litman, *Antiracist Remedial Approaches in Judge Gregory's Jurisprudence*, 78 WASH. & LEE L. REV. 1051, 1068 (2021) ("[T]he defense of qualified immunity . . . shields officers against damages liability except in cases where the officer violates a clearly established constitutional

powers are precisely the sort of police authority that Otis found so objectionable in the writs of assistance.[270] And, of course, all of these powers are wielded disproportionately against Black people.[271] If a modern government attempted to establish an organization called the "slave patrol" to harass Black people and force them into labor in chattel slavery, no serious judge would consider that organization to stand up to constitutional scrutiny. Yet aside from police forces' desire for legitimacy and chattel slavery itself, there is little distinction between modern police and the slave patrols. Giving full meaning to the Fourteenth Amendment's vision of protection and citizenship requires the end of modern slave patrol policing.

C. *"Equal Protection" That Subjects Us All to Slave Patrol Policing Is No Protection at All and Does Nothing to Foster Equality*

Modern police act with the vast authority of the slave patrols rather than under the common-law restrictions applicable to searches and seizures of free people in the Founding era. The Supreme Court's nominally colorblind jurisprudence has built a system of racial subordination through selective application of generally applicable rules that disregards the often disparate experiences of white and non-white individuals.[272] Yet that very veneer of colorblindness requires that police do more than just use their vast powers to overtly sustain racial subjugation. The slave patrol powers—with their attendant writs of assistance and general warrants—are also applied when police find themselves called upon to regulate any outsider[273] regardless of race. The rise of mass incarceration has vastly expanded the reach of police, and the search and seizure jurisprudence and criminal codes driving mass incarceration leave everyone overpoliced, if unequally so.

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right."), *with* Act of Feb. 16, 1821, ch. CC § 3, 625 Md. Laws 162 ("[I]n any action of trespass, or other suit brought by any owner or occupant for any entry made in virtue of this act, the defendant shall, on the general issue plea, have liberty to give the special matter in evidence.").

270 *See* OTIS, *supra* note 150, at 12 ("Every one with this writ may be a tyrant if this commission be legal, a tyrant in a legal manner, also may control, imprison, or murder any one within the realm.").

271 *See* Butler, *supra* note 261, at 1448 tbl. 1 (breaking down the disproportionate application of stop-and-frisk policies by race in several American cities).

272 *Cf.* Daniel Harawa, *Coloring in the Fourth Amendment*, 137 HARV. L. REV. 1533, 1538 (2024) ("The Fourth Amendment as conceived by the Court is hardly race-neutral. Rather, Fourth Amendment doctrines generally incorporate a racial perspective based on the experiences of white people.").

273 We use this term broadly to refer to marginalized communities, whether racial minorities, immigrants, unhoused people, LGBTQ+ people, religious minorities, or others outside of the dominant cultural mainstream.

The spread of such police abuses violates the Fourteenth Amendment's guarantee of "equal protection of the laws."[274] This is trivially true in the sense that racist policing means that the protection of law is administered unequally. But it also cuts to the deeper, abolitionist meaning of the Fourteenth Amendment: The Constitution is meant to guarantee that the law will provide the people with its protection.[275] Subjecting them to frequent stops, searches, arrests, and brutality is the antithesis of that protection.[276] The Reconstruction Congress envisioned a new separation-of-powers regime whereby the executive branch would provide protection, the legislature would craft laws to guide that protection, and the courts would ensure that those laws were justly applied.[277] Instead, the courts have turned the guarantee of equal protection against remedial legislative action through colorblind jurisprudence.[278] With this as equal protection's supposed purpose, the Court has little use for the Equal Protection Clause as a tool for reviewing discriminatory policing.[279]

The need to apply slave patrol policing to non-Black people to avoid transparently violating the hollowed-out Fourteenth Amendment provides policing with an opportunity rather than a challenge. Expanding oppression rather than universalizing rights protections enables more generalized economic control through the criminalization of poverty.[280] Professor Peter B. Edelman described the mesh of systems criminalizing poverty:

> For far too long America's poor have been criminalized by intersecting systems that impact low-income individuals at all levels, including the school-to-prison pipeline, chronic nuisance orders, public housing shortages, anti-

274 U.S. CONST. amend XIV, § 1.

275 *See* Hasbrouck, *supra* note 42, at 132 ("The concept of equal protection, meanwhile, arose from the notion that the duty of loyalty that citizens owed their country conferred upon the government a corresponding duty to protect the life, liberty, and property of those citizens.").

276 *Cf.* LASSON, *supra* note 136, at 39 (discussing the seventeenth century English parliament's assertion that subjecting a person's home to warrantless search is a "badge of slavery").

277 *See id.* at 161 ("Congress drafted the enabling clauses with a deliberate eye to the *McCulloch* standard—the lax standard applied to such powers as Congress's ability to levy taxes and spend for the general welfare.").

278 *See* Randall Kennedy, *Colorblind Constitutionalism*, 82 FORDHAM L. REV. 1, 5-6 (2013) (discussing the rise of colorblind constitutionalism in Supreme Court opinions weakening affirmative action).

279 *Cf.* Evan D. Bernick, *Equal Protection Against Policing*, 25 U. PA. J. CONST. L. 1154, 1229 (2023) ("All disparate-impact-based discrimination claims are a long shot under current equal-protection doctrine.").

280 *See* Monica Bell, Stephanie Garlock & Alexander Nabavi-Noori, *Toward a Demosprudence of Poverty*, 69 DUKE L.J. 1473, 1480 (2020) ("Choices of what to criminalize and how to enforce criminal provisions often result in the punishment of the poor because of their poverty . . . . these laws . . . sanction[] those who engage in otherwise ordinary acts but do so while poor . . . . [and] penalize those who rely on public benefits to gain [necessary] resources . . . .").

> homelessness ordinances, claims of welfare fraud, and inadequate mental health systems. The punishing fines and fees that often result from a low-income individual's interaction with these systems have exacerbated the cycle of poverty.[281]

This allows modern policing to unify the economic roots of its northern and southern predecessors,[282] better enabling the suppression of economic democracy.[283] Although the northern police of the nineteenth century did not enjoy the latitude of their slave patrol counterparts, their allies in the private sector acted with great impunity.[284] Professional policing has always aimed to control labor, and modern policing has largely embraced the tactics of the private detective agencies.[285] The criminalization of poverty in the twenty-first Century is every bit as much about maintaining capital's access to a politically weak labor force as the criminalization of vagrancy was during Reconstruction. To that end, purportedly colorblind policing drives both racial and economic inequality by subjecting Americans to the abuses that the Fourth and Fourteenth Amendments aimed to remedy.

Abolition constitutionalism provides a path forward.[286] While both originalist and living constitution scholars have called for broader

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281 Peter B. Edelman, *Criminalization of Poverty: Much More to Do*, 69 DUKE L.J. ONLINE 114, 117 (2020).

282 *See also* Sok, *supra* note 105, at 23-24 (tracing American policing's origins through both the southern slave patrols and northern efforts to suppress organized labor).

283 *Cf.* Nikolas Bowie, *Antidemocracy*, 135 HARV. L. REV. 160, 160-61 (2021) (discussing how antidemocratic forces have consistently used American law to prevent democratic control of the economy).

284 *See* Stoughton, *supra* note 27, at 126 ("[W]ithout a strong federal police presence, private organizations stepped in to fill the gap. In 1850, as localities across the country continued to establish their own police agencies, Allan Pinkerton formed the Pinkerton National Detective Agency. Pinkerton agents engaged in sting operations, solved crimes, and hunted down criminals . . . ." (citations omitted)); Ross, *supra* note 111, at 276 ("Instead of . . . *replacing* the state . . . private detectives sometimes *bypassed* the public sector altogether, as when businesses used undercover tactics to break unions, recoup losses, recapture stolen property, fire dishonest employees, or decide whether it was worth [pursuing] criminal sanctions. Infiltrating labor unions likewise allowed management to bypass the state." (citations omitted)).

285 *See* Ross, *supra* note 111, at 302 ("With the advent of [legislation] culminating in the enactment of the Prohibition Amendment and the Volstead Act, American law enforcement agencies came to adopt and channel the undercover methods and ever-shifting moral panics of the private sector, whether these coalesced around prostitution, narcotics, liquor, or radical politics and suspected subversion.").

286 *See* Dorothy Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 120 (2019) ("Abolitionists always have their eyes set on a future they are in the process of creating. At the very same time they are deconstructing structures inherited from the past, they are constructing new ones to support the future society they envision."); *see also* Hasbrouck, *supra* note 42, at 165 ("So, I invite you—all of you—to exercise your imaginations as to what this world and this time can become. Envision a better world, because if we do not begin there, we will never succeed in making it a reality.").

interpretations of the Fourth Amendment's search and seizure protections,[287] they seldom acknowledge the racial dimension of our constitutional law.[288] The Supreme Court made this mess and has the power to fix it, but recent years give little reason for short-term optimism on that front.[289] Yet the abolitionist struggles of the nineteenth century provide a model for organizing for constitutional change. Some abolitionists, like Lysander Spooner and Frederick Douglass, advocated for the Constitution as a vehicle for ending slavery even when constitutional law embraced the status quo.[290] During the Antebellum years, such abolitionist theories could not win majorities in Congress or the Supreme Court but still contributed to the development of law through powerful dissents such as Justice Curtis's in *Dred Scott v. Sandford*.[291] And the abolitionists' constitutional interpretations won

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287 *See, e.g.*, Michael J. Zydney Mannheimer, *Decentralizing Fourth Amendment Search Doctrine*, 107 KY. L.J. 169, 210 (2018) ("Pursuant to this approach, violation by government officials of positive law in their quest for information is sufficient but not necessary to make out a Fourth Amendment violation. It is sufficient because a violation of positive law could have formed the basis for a common-law tort suit in 1791."); Justin F. Marceau, *The Fourth Amendment at a Three-Way Stop*, 62 ALA. L. REV. 687, 696 (2011) ("Technology in support of government investigations is rapidly advancing, but the willingness of law enforcement to employ previously available technologies in a more intrusive manner also cries out for Fourth Amendment scrutiny."); Andrew E. Taslitz, *Fortune-Telling and the Fourth Amendment: Of Terrorism, Slippery Slopes, and Predicting the Future*, 58 RUTGERS L. REV. 195, 238 (2005) ("The sheer pace of change indeed prods courts inevitably toward the model of the living constitution, . . . to cope with computer surveillance, thermal imaging, international crime, and mass terror, among other challenges that the Framers could not have contemplated.").

288 *See* Devon W. Carbado, *(E)Racing the Fourth Amendment*, 100 MICH. L. REV. 946, 965 (2002) ("Put another way, the race and Fourth Amendment scholarship fails to examine the nexus between the development of Fourth Amendment doctrine on the one hand, and ideological notions about what race is and should be on the other.").

289 *See also* Roberts, *supra* note 286, at 10 ("The tension between recognizing the relentless antiblack violence of constitutional doctrine, on one hand, and demanding the legal recognition of black people's freedom and equal citizenship, on the other, animates . . . abolitionist debates on the U.S. Constitution.").

290 *Compare* Helen J. Knowles, *Securing the "Blessings of Liberty" for All: Lysander Spooner's Originalism*, 5 N.Y.U. J. L. & LIBERTY 34, 39-40 (2010) ("More radical theories of constitutional interpretation took hold during the 1840s, but only Spooner's could claim a methodologically rigorous, absolutist commitment to the position that slavery was unconstitutional. Into the 1850s, Spooner's arguments were beginning to attract some prominent abolitionists, including Frederick Douglass."), *with* Prigg v. Pennsylvania, 41 U.S. 539, 622 (1842) ("[T]he right to seize and retake fugitive slaves, and the duty to deliver them up, in whatever state . . . they may be found, and of course the corresponding power in Congress to use the appropriate means to enforce the right and duty, derive . . . from the Constitution of the United States . . . .").

291 *See* 60 U.S. (19 How.) 393, 572-73 (1857) (Curtis, J., dissenting) ("At the time of the . . . Articles of Confederation, all free native-born inhabitants of [five states], though descended from [enslaved Black people], were not only citizens of those States, but such of them as had the other necessary qualifications possessed the franchise of electors, on equal terms with other citizens."); *see also* Andrew T. Hyman, *The Due Process Plank*, 43 SETON HALL L. REV. 229, 244-45 (2013) (locating Justice Curtis's *Dred Scott* dissent within the abolitionist movement); *cf.* Paul Brickner, *Reassessing Long-Accepted Truths About Justice John McLean: His Secret of Success*, 38 OHIO N.U. L. REV. 193, 239-40 (2011) (discussing Justice McLean's theories of citizenship in his *Dred Scott*

out during the Reconstruction Congress resulting in the passage of the Thirteenth and Fourteenth Amendments and powerful legislation to support them.[292] Abolition can win again, if we work for it. The first step to restoring the Constitution's protections against abusive searches and seizures is envisioning a better constitutional law and demanding its realization.

CONCLUSION: RESTORING OUR CONSTITUTIONAL RIGHTS

The requirement of probable cause has roots that are deep in our history. The general warrant, in which the name of the person to be arrested was left blank, and the writs of assistance, against which James Otis inveighed, both perpetuated the oppressive practice of allowing the police to arrest and search on suspicion. Police control took the place of judicial control, since no showing of "probable cause" before a magistrate was required.[293]

— *William O. Douglas*

Occupants who choose not to stand on their constitutional rights but instead elect to attempt to destroy evidence have only themselves to blame for the warrantless exigent circumstances search that may ensue.[294]

— *Samuel Alito*

There are over 700,000 active writs of assistance in the United States today.[295] Any police officer in America, suspecting a home contains readily-destroyable contraband, may approach the front door, knock,[296] and force an entry if they believe the evidence may be damaged if they delay.[297] Just as Crown customs agents could enter any house they chose to search for contraband, so too may police officers in the age of the War on Drugs.

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dissent as influences on the eventual theories of citizenship underlying the Thirteenth and Fourteenth Amendments).

292 *See* Barnett, *supra* note 163, at 257 ("[E]ven if the Taney Court . . . was right and these constitutional abolitionists were wrong about the original meaning of the Constitution, congressional Republicans drafted the Thirteenth and Fourteenth Amendments to reverse the Court's rulings. To appreciate fully the public meaning of these Amendments, therefore, we need to know whence they came.").

293 Henry v. United States, 361 U.S. 98, 100 (1959).

294 Kentucky v. King, 563 U.S. 452, 470 (2011).

295 *See* Press Release, U.S. Census Bureau, National Police Week: May 14-20, 2023 (May 14, 2023), https://www.census.gov/newsroom/stories/police-week.html [https://perma.cc/S66C-YJNM] (claiming that 712,112 full-time police officers had the power of arrest in 2021).

296 *See* Florida v. Jardines, 569 U.S. 1, 8 (2013) ("Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do.'" (citations omitted)).

297 *See King*, 563 U.S. at 470.

Current police officers are also armed with general warrants. They may stop whomever they like, arrest on their own initiative, and often find their actions shielded by false confessions.[298] Indeed, police officers may infringe on Americans' rights in the age of *Terry* stops similar to how the King's Messengers arrested the publishers of *The North Briton* and *The Monitor* without judicial oversight.[299]

Everyone in America is subject at any time to the very abuses that inspired the Fourth Amendment. The Framers did not envision such a regime; the public safety officers of their time held much more limited powers subject to judicial oversight.[300] The lone exception to that oversight lay in the slave patrol.[301] Where the Constitution aimed to ensure the security of law-abiding citizens, enslaved people were not permitted such security; their enslavement required instead a constant condition of fear. Yet the slave patrol should have ended with the Thirteenth Amendment. The rights of formerly enslaved Americans should have been brought into line with their fellow citizens through the equal protection demanded by the Fourteenth Amendment.

Instead, the United States has built a different kind of equality. Americans were made equal before law enforcement but not by lifting up the formerly enslaved.[302] Rather, capitalism's demand for compliant and subjugated labor drove the universalization of slave patrol police powers through the new professional police forces.[303] That is not to say that such powers are evenly

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298 *See* Brian Cutler, Keith A. Findley & Danielle Loney, *Expert Testimony on Interrogation and False Confession*, 82 UMKC L. REV. 589, 590 (2014) ("The DNA exonerations of the past few decades and the study of false confessions have demonstrated both that error in criminal cases is real and more common than ever believed and that false confessions are one of the leading contributors to wrongful conviction."); *Illegal Arrests Yield False Confessions*, CHI. TRIB. (Dec. 17, 2001, 1:00 AM), https://www.chicagotribune.com/2001/12/17/illegal-arrests-yield-false-confessions/ ("The gateway to a false confession is, in many cases, an illegal arrest-taking a person into custody on little or no evidence and subjecting him to high-pressure interrogation."); *see, e.g.*, Yusef Salaam, Kevin Richardson & Raymond Santana, *We Are the 'Exonerated 5.' What Happened to Us Isn't Past, It's Present.*, N.Y. TIMES (Jan. 4, 2021), https://www.nytimes.com/2021/01/04/opinion/exonerated-five-false-confessions.html [https://perma.cc/FM46-5H3Y] ("With these tactics of deception and intimidation, detectives sought to exhaust, disorient and confuse us. They hoped to make us so fearful of never seeing our loved ones again that we'd say anything to protect ourselves and our families. Ultimately, that's what nearly all of us did.").

299 *See* T.T. Arvind & Christian Burset, *A New Report of* Entick v. Carrington *(1765)*, 110 KY. L.J. 265, 281-83 (2022) (contextualizing cases involving the Crown's abuses of critical publishers).

300 *See supra* Section I.A (discussing colonial law enforcement structures).

301 *See id*. (addressing slave patrols).

302 *See* Pope, *supra* note 165, at 1503 ("[W]hite Southerners proved unexpectedly willing to sacrifice members of their own race in order to sustain the supply of unfree labor. Even as Congress debated the Act, state legislators were already beginning to legislate in race-neutral language, leaving discrimination to the discretion of individual law enforcement officers and judges.").

303 *See* Alexis Hoag, *Abolition as the Solution: Redress for Victims of Excessive Police Force*, 48 FORDHAM URB. L.J. 721, 735 (2021) (addressing the failure of the Civil Rights Act of 1866 to deliver justice to victims of police violence because of the structural racism inherent in America's social

applied; white supremacy needs to foster an underclass to ensure the support of ordinary white Americans.[304] Still, even wealthy, white professionals can quickly find themselves on the wrong end of police violence.[305]

Perpetuating an unjust racial and economic regime requires a large enforcement arm with vast search and seizure powers and the authorization to use these powers on officers' own initiative.[306] Our Constitution demands that such abuses must not exist, but these demands have effectively been read out of constitutional law.[307] We can end these abuses by demanding a system of constitutional law aligned with abolition constitutionalism.[308] The restoration and universalization of our Fourth Amendment rights does not require that we eliminate law enforcement agencies entirely, but it does demand a radical reimagination of their role and powers. The remainder of this Article explores what organizations operating at the limits set in our Constitution might look like, rather than our ideal of what public safety *should* be.[309] A full examination of the desirability of all the possible structures available under the Fourth, Thirteenth, and Fourteenth Amendments is beyond the scope of this Article.

The Fourth Amendment is inconsistent with a large, agenda-setting force of roving, armed government agents tasked with investigating and punishing

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order); William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1111, 1123 (1989) (describing the suppression of the labor movement's socialist demands through "[g]overnment bludgeoning").

304 When economic solidarity has grown across racial lines in America, capitalism strikes back with every dirty trick available. *See* C. VANN WOODWARD, THE BURDEN OF SOUTHERN HISTORY 150-151 (3d ed. 2008) (discussing the similarities of white supremacist responses to Reconstruction and to the Populist movement of the 1890s); DU BOIS, *supra* note 200, at 597 ("To be sure the [native-born, white] skilled labor guilds and capital had bitter disputes and even open fighting, but they fought to share profit from labor and not to eliminate profit.").

305 *See, e.g.*, JOANNA SCHWARTZ, SHIELDED: HOW THE POLICE BECAME UNTOUCHABLE 44-46 (2023) (detailing the events leading to the death of Tony Timpa at the hands of Dallas police).

306 *See* V. Noah Gimbel & Craig Muhammad, *Are Police Obsolete? Breaking Cycles of Violence Through Abolition Democracy*, 40 CARDOZO L. REV. 1453, 1526 (2019) ("Whatever their ancillary public safety functions, police and the criminal legal system they serve are tools of social control responsible for enforcing the racialized caste system that keeps the capitalist order running smoothly.").

307 *Cf.* Jonathan Feingold, *The Problem is the Court, Not the Constitution*, JOTWELL (Apr. 27, 2023), https://conlaw.jotwell.com/the-problem-is-the-court-not-the-constitution/ [https://perma.cc/TA3T-SNW5] ("Of course, 'constitutional law' is not some independent and self-executing thing. It is little more than what five Supreme Court Justices say the Constitution means. We might, accordingly, reframe the opening question and instead ask: Has the Supreme Court been faithful to the Constitution?").

308 *See also* Fred O. Smith, Jr., *The Other Ordinary Persons*, 78 WASH. & LEE L. REV. 1071, 1085 (2021) ("As a democracy with an anti-democratic past, it is incumbent on us to explore ways not to reproduce past exclusion. As a nation whose egalitarian ethics have evolved, it is important that we take active steps not to become complicit in horrors that are incompatible with those ethics.").

309 For a more prescriptive discussion of public safety, see Hasbrouck, *supra* note 161, at 710-30 (2022).

social-order crimes.[310] To end the scourge of search and arrest powers with such broad reach as to encompass everyone, we must embrace a vision of public safety that looks very little like modern policing.[311] While we may wish to retain a professional organization with public safety responsibility, arming that organization's rank and file and tasking them with general criminal investigations is incompatible with the Fourth Amendment.

Restoring the full force of the Fourth Amendment requires embracing a public safety regime with judicial oversight of investigations. That oversight would embrace the Fourth Amendment's guarantees of equal protection. Investigations would be targeted to specific crimes rather than suspicion of criminality,[312] responding to the expressed needs of the community without distinction of race or class. When a poor, Black American's car window is broken and the shoes they need for work are stolen, the resulting investigation would be as earnest as if a painting were taken from a white CEO's home. But either would be a higher priority for criminal investigation than a general notion that someone somewhere might be misbehaving. The focus of criminal law and its attendant investigations would be on interpersonal harms we collectively deem more serious than those which can be resolved by compensation alone. To be effective in investigating these interpersonal harms, an organization developed for this purpose would need to be fundamentally different from modern police, who are ill-suited for that

310 *See* Katz v. United States, 389 U.S. 347, 356-57(1967) (citation omitted) ("It is apparent that the agents in this case acted with restraint. Yet . . . . [s]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."); Brinegar v. United States, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting) ("We must remember that the extent of any [warrant exception] which we sustain, the officers interpret and apply themselves and will push to the limit. We must remember, too, that freedom from unreasonable search . . . [cannot be invoked in advance by] the innocent citizen . . . ."). *Cf.* Friedman & Ponomarenko, *supra* note 118, at 1877 (calling for police agencies to be governed by "clearer legislative authorization on the front end, rules adopted by police departments themselves through a transparent process that allows for public participation, or some other method of obtaining community input into policing policy").

311 *See* Michal Buchhandler-Raphael, *Mapping Alternative First Responder Models to Domestic Violence*, 30 VA. J. SOC. POL'Y & L. 15, 20 (2023) (citations omitted) ("[Non-reformists] call for abolition: complete transformation . . . of existing social structures by replacing police . . . with new institutions that redefine the notion of public safety. [They] challenge the legitimacy of policing . . . and call for empowering Black and other minority communities by giving them democratic control over the institutions that govern them.").

312 *Cf.* Kesha S. Moore, Ryan Tom & Jackie O'Neil, *The Truth Behind Crime Statistics: Avoiding Distortions and Improving Public Safety* 2, LDF THURGOOD MARSHALL INST. (2022) https://www.naacpldf.org/wp-content/uploads/2022-08-03-TMI-Truth-in-Crime-Statistics-Report-FINAL-2.pdf [https://perma.cc/D75J-KT3Z?type=image] ("Like in previous eras, current politicized discussions of crime ignore or distort crime data to intensify public fear, heighten racial tension, and undermine criminal justice reforms that promote long-term, sustainable public safety.").

purpose.[313] Criminal law would necessarily need to abandon its focus on social policy.[314] These changes would follow from the restoration of the warrant requirement for nearly all searches and seizures.

This constitutional reevaluation would also provide the opportunity to reconsider the wisdom of the large, vague role we currently give police.[315] Police have been assigned public order, public safety, and investigative roles that are too often conflated.[316] The conflation of these roles drives much of the conflict between police practice and constitutional law.[317] Reducing the scope of any individual law enforcement or public safety official's role could relieve this tension. The investigative role could be separated from that of protecting the public from interpersonal violence. A professional organization with a comparable role to the Colonial watches could fulfill the public safety role under such a division, even with the limited arrest powers afforded to their predecessors. Ordinary watch officers would be unarmed, to reduce their coercive effect, while they might have the ability to summon

313 *See* Shima Baradaran Baughman, *Crime and the Mythology of Police*, 99 WASH. U. L. REV. 65, 76-77 (2021) (citations omitted) ("Police have never successfully solved crimes with any regularity, as arrest and clearance rates are consistently low throughout history. Indeed, while the public overwhelmingly assumes that police are solving crimes, police have never solved the majority of serious crimes.").

314 *Cf.* Bruce Green, *Urban Policing and Public Policy—The Prosecutor's Role*, 51 GA. L. REV. 1179, 1198-99 (2017) (citation omitted) ("Historically, criminal law has been abused and misused for social policy ends, including, no doubt, by prosecutors who are not self-conscious about their role.").

315 *See* Barry Friedman, *Are Police the Key to Public Safety?: The Case of the Unhoused*, 59 AM. CRIM. L. REV. 1597, 1605 (2022) ("We need to start regulating the front end of policing, establishing statutes and enforcing department policies that govern the use of force, stops, surveillance, and much else.").

316 *See* Shawn E. Fields, *The Fourth Amendment Without Police*, 90 U. CHI. L. REV. 1023, 1036 (2023) ("[Alex S.] Vitale references the 'big myth' that police officers 'chase the bank robbers . . . [and] find the serial killers.' In reality, police spend most of their time 'responding to noise complaints, issuing parking and traffic citations, and dealing with other noncriminal issues.'" (citation omitted)); Mariame Kaba, *Yes, We Literally Mean Abolish the Police*, N.Y. TIMES (June 12, 2020).

317 *See, e.g.*, Matthew Specht, *Quarrelling About Public Safety: How a Reverse* Miranda *Warning Would Protect the Public and the Constitution*, 45 STETSON L. REV. 177, 187 (2016) ("The expanded [public safety] exception [to *Miranda* warning requirements] has turned nearly every criminal investigation into a public safety crisis. Under the current doctrine, the mere possibility of a weapon's presence is sufficient to justify a failure to Mirandize a suspect."); Nicolas Duque Franco, *Suspicious to Whom? Reforming the Suspicious Activity Reporting Program to Better Protect Privacy and Prevent Discrimination*, 43 N.Y.U. REV. L. & SOC. CHANGE 611, 631-32 (2019) (comparing police department policies requiring reporting of suspicious activity, even when that activity enjoys First Amendment protections); *cf.* Rachel A. Harmon & Andrew Manns, *Proactive Policing and the Legacy of* Terry, 15 OHIO ST. J. CRIM. L. 49, 53 (2017) ("On patrol, the paradigmatic police officer engages in traffic stops, . . . addresses incidents they stumble over, and answers calls, many of which involve no allegations of criminal activity . . . . By contrast, 'criminal investigation plays a relatively small role in . . .' public safety, given that few crimes are solved [by] investigators.").

armed response units for sufficiently dangerous situations.[318] The typical member of a modern watch would be more akin to a violence interrupter than a police officer.[319] A watch model, grounded in common-law structures familiar to and accepted by the Founders, would almost certainly pass Fourth Amendment muster. To ensure conformity with the Fourteenth Amendment, though, a modern watch would need to be subject to oversight to ensure it did not replicate the discriminatory patterns of current policing.

The restoration of the Fourth Amendment and the Reconstruction Amendments would effectively abolish policing as we know it. Yet it would not require abandoning the idea of professional public safety and criminal investigations nor would it require the abolition of criminal law.[320] The Constitution embraced those concepts and imposed safeguards on them. Those safeguards remain in the Constitution's text and should be read back into constitutional law as they originally existed.

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318 *See, e.g.*, *Authorised Firearms Officer*, METRO. POLICE (last visited Jan. 11, 2025), https://www.met.police.uk/police-forces/metropolitan-police/areas/c/careers/police-officer-roles/police-constable/overview/roles-and-opportunities/authorised-firearms-officer/ [https://perma.cc/8Z49-T8E9] ("Even though our armed officers attend thousands of incidents every year, their advanced levels of training in conflict resolution and de-escalation means that it is incredibly rare for an officer to have to discharge their firearm in order to achieve their policing aim.").

319 *See* Christopher Slobogin, *The Minimalist Alternative to Abolition: Focusing on the Non-Dangerous Many*, 77 VAND. L. REV. 531, 542 (2024) ("Another crime control innovation that does not involve the police at all is the development of violence interrupter programs, which rely on people who were once incarcerated to roam neighborhoods and snuff out gang and other community tensions before they develop into open hostilities."). Police abolition would also require reevaluation of the thresholds for Fourth Amendment scrutiny. *See* Fields, *supra* note 316, at 1024-25 ("The U.S. Supreme Court has emphasized that the 'primary purpose' of the Fourth Amendment is to restrain criminal investigations by law enforcement. Outside that context, courts are reluctant to grant protections from government searches or seizures, and they are even more reluctant to require probable cause or a warrant . . . ." (citation omitted)).

320 *See supra* Section I.A. (describing the systems of public safety and criminal investigations prior to professional policing); Mary Zerkel, *Reimagining Community Safety*, AM. FRIENDS SERV. COMM. (May 20, 2021), https://afsc.org/news/reimagining-community-safety [https://perma.cc/ZD5Z-5ZD6] (cataloging modern, non-police emergency response proposals); Jerry Iannelli & Joshua Vaughn, *What Public Safety Without Police Looks Like*, APPEAL (Jan. 8, 2021), https://theappeal.org/what-public-safety-without-police-looks-like [https://perma.cc/4W7S-HBSQ] (discussing the need to both move crisis response away from police and address the underlying social and material conditions that lead to crises); Brandon Hasbrouck, *Unshielded: How the Police Can Become Touchable*, 137 HARV. L. REV. 895, 919–31 (2024) (book review) (discussing potential abolitionist changes to modern policing).