The Fourth Amendment, 1789–1868: A Strange History

Bruce P. Smith[*]

ANDREW E. TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789–1868 (New York University Press 2006)

In recent years, scholars have shed considerable light on the eighteenth-century origins of the Fourth Amendment.[1] Andrew Taslitz's *Reconstructing the Fourth Amendment*, which examines developments in the law of search and seizure from the Framers' Era through the ratification of the Reconstruction Amendments, addresses a period in the Amendment's history that has long remained obscure. By directing attention to the middle decades of the nineteenth century, Taslitz places himself in a position to illuminate the history of search and seizure during the period that witnessed the emergence of professional police forces, the principal governmental actors regulated by the modern-day Fourth Amendment.[2] By examining the history of search and seizure through the lens of race relations, Taslitz offers to contribute to our growing understanding of the relationship between the nation's troubled racial history and the development of constitutional criminal procedure.[3] And by addressing the impact of the adoption of the Fourteenth Amendment on the scope and meaning of the Fourth, Taslitz promises to build upon a sophisticated and growing body of legal-historical scholarship that examines the degree to which the Reconstruction Amendments refashioned the original Amendments to the Bill of Rights.[4]

---

[*] Professor of Law and Co-Director, Illinois Legal History Program, University of Illinois College of Law. I am grateful to the journal's editors for soliciting me to write this review.

[1] *See, e.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999); Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925 (1997); William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393 (1995); and William J. Cuddihy, The Fourth Amendment: Origins and Original Meaning (1990) (unpublished Ph.D. dissertation, Claremont Graduate School) (on file with Claremont Graduate School).

[2] "The Fourth Amendment applies to all government actors, but it is almost always enforced against police officers." RONALD JAY ALLEN ET AL., COMPREHENSIVE CRIMINAL PROCEDURE 323 (2001).

[3] *See* Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000).

[4] Leading studies include 2 BRUCE ACKERMAN, WE THE PEOPLE, TRANSFORMATIONS (1998), and AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998).

Echoing themes advanced in a series of earlier scholarly articles,[5] the book's argument boils down to this. The "original" Fourth Amendment, ratified in 1791, sought to protect "the People" against political "violence." During the antebellum period, amidst concerns about the southern states' use of search-and-seizure powers to regulate the mobility, property, and privacy of slaves, free blacks, and abolitionists, the meaning of the Fourth Amendment "mutated." The Fourteenth Amendment incorporated this "mutated" Fourth Amendment against the states, requiring, among other things, that modern-day governmental actors "respect" individual citizens and groups, act upon "individualized" suspicion, deliberate with citizens about "search-and-seizure policy," and adopt the "least restrictive means" of achieving investigative goals.

This is a work of both history and theory. Indeed, the author self-consciously uses history as a means of supporting his normative vision of the Fourth Amendment—an Amendment whose jurisprudence he deems to be deeply flawed. Ultimately, however, the historical foundation laid by the author fails to support the theoretical apparatus he seeks to place upon it. Despite the author's bold claim to offer a "revisionist" view of the "original" Fourth Amendment, his claims about the eighteenth century depart little from those advanced by previous scholars. Despite the author's pioneering effort to situate the law of search-and-seizure within the context of antebellum slavery, his study ignores the workings of day-to-day criminal justice administration. And despite the author's confident assertion that he offers a theory of the Fourth Amendment that is both more principled and more historically grounded than those articulated by others, the "lessons" he draws from history are, too frequently, vague or impractical. All in all, while this book searches zealously, it seizes disappointingly little.

This review proceeds in three parts. Part I examines the book's historical claims, focusing on three periods: the eighteenthcentury; the antebellum era; and the mid-1860s, when the Reconstruction Amendments were framed, debated, and ratified. Part II distills and assesses five of the leading "lessons" that the author draws from the history he chronicles. Part III addresses a pair of subjects left unexplored in the book: the activities of the newly emergent professional police in the middle decades of the nineteenth century and the history of the Fourth Amendment's ultimate incorporation against the states.

I. HISTORY

Part I of this review takes up the historical claims set forth in *Reconstructing the Fourth Amendment*, focusing on three eras: the eighteenth century, when the

---

[5] *See, e.g.*, Andrew E. Taslitz, *Criminal Law: Respect and the Fourth Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 15 (2003); Andrew E. Taslitz, *Stories of Fourth Amendment Disrespect: From Elian to the Internment*, 70 FORDHAM L. REV. 2257 (2002); and Andrew E. Taslitz, *Slaves No More!: The Implications of the Informed Citizen Ideal for Discovery Before Fourth Amendment Suppression Hearings*, 15 GA. ST. U. L. REV. 709 (1999).

"original" Fourth Amendment was adopted; the antebellum period, when the author claims that the Fourth Amendment's meaning was fundamentally transformed; and the mid-1860s, when the Fourteenth Amendment was drafted, debated, and ratified.

A. *The Eighteenth Century*

Taslitz purports to offer a "revisionist" history of the "original" Fourth Amendment (p. 55), a "reinterpretation" of the Amendment different from that offered by any other scholar. (P. 89.) Given the extent to which the eighteenth-century landscape has been traversed, these are significant claims. Do they stand up?

Like other scholars, Taslitz focuses on the three canonical cases that formed the intellectual backdrop to the Fourth Amendment: in America, the *Writ of Assistance Case* (1761);[6] and, in England, *Wilkes v. Wood* (1763)[7] and *Entick v. Carrington* (1765).[8] Like others before him, Taslitz stresses the political dimension of these disputes, involving (in America) matters of imperial taxation and (in England) criticism of the Crown's ministers.[9] Like his predecessors, the author emphasizes the two principal differences between the eighteenth-century regime of search-and-seizure law and that of our contemporary age: the absence of professional police forces[10] and the lack of an exclusionary rule as a remedy to illegality.[11] In short, there is much that is familiar here.

Perhaps the author's claim to "revisionism" is grounded in his view that the original Fourth Amendment is "best understood as serving to tame everyday political violence" (p. 2), an issue, according to the author, that "no one has yet explored." (P. 279 n.4.) It is hard to know what to make of this claim. As noted above, numerous scholars have stressed the *political* context of the eighteenth-century controversies over searches and seizures.[12] In turn, a host of scholars have

---

[6] Paxton's Case of the Writ of Assistance, *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, at 51 (1865) (discussed in Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 SUFFOLK U. L. REV. 53 (1996)).

[7] 19 Howell's State Trials 1153, 98 Eng. Rep. 489 (C.P.D. 1763).

[8] 19 Howell's State Trials 1029, 95 Eng. Rep. 809 (K.B. 1765).

[9] "Notice that none of the three cases involved a typical instance of criminal law enforcement: These were not investigations of murders or rapes or drug deals." ALLEN ET AL., *supra* note 2, at 325. For further reflections on the political nature of the cases, see Stuntz, *supra* note 1.

[10] *See* Thomas Y. Davies, *An Account of* Mapp v. Ohio *That Misses the Larger Exclusionary Rule Story*, 4 OHIO ST. J. CRIM. L. 619 (2007) (reviewing CAROLYN N. LONG, *MAPP V. OHIO*: GUARDING AGAINST UNREASONABLE SEARCHES AND SEIZURES (2006)) [hereinafter Davies, *Account*].

[11] *See, e.g.*, Stuntz, *supra* note 1.

[12] *See supra* text accompanying note 9.

stressed the Fourth Amendment's role in taming *violence*.[13] And the author himself quotes an extract from the most extensive study of the Fourth Amendment's origins that refers to the importance of "violence" and "politics" in catalyzing eighteenth-century resistance to illegal searches and seizures. (P. 39.)[14] And while it may well be the case that no scholar has stressed the ubiquity of "political violence" to the same degree as has the author, his definition of "political violence" is so vague and so expansive that those eschewing his path have seemingly taken the more defensible approach.[15]

At times, Taslitz suggests that he is striking out in a new direction by placing distinctive emphasis on the degree to which the original Fourth Amendment "create[d] rights serving *public*, *political* functions in addition to preserving spheres of private, individual autonomy." (P. 57; emphasis added.) But the notion that the original Fourth Amendment served both "public" and "political" functions is not new; to the contrary, it is arguably the dominant theme in Akhil Amar's extensive and sophisticated body of scholarship on the Fourth Amendment, a point that Taslitz himself concedes.[16] And if Taslitz is claiming that constitutional understandings, over time, have been forged not only by courts but by people in "the street," he has ample scholarly company here as well.[17]

This is not to suggest that Taslitz simply parrots the views of other scholars. To the contrary, he routinely quibbles with the work of others in his extensive (and frequently digressive) footnotes. For example, in a multiple-column footnote dedicated to the legal-historical scholarship of Thomas Davies, Taslitz contends that Davies improperly concludes that ships and commercial premises were excluded from the scope of the original Fourth Amendment. Yet having belabored

---

[13] *See, e.g.*, Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment "Reasonableness,"* 98 COLUM. L. REV. 1642, 1668 (1998) (noting that "potential *violence* is unquestionably a significant Fourth Amendment concern") (emphasis added); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780 (2006) (criticizing the failure of the Fourth Amendment to regulate "the manner of searches and seizures—how *violent* and humiliating they are") (emphasis added).

[14] "Americans began to reject the general warrant in the 1760s for the same reasons that Englishmen of earlier centuries had abnegated methods of search and seizure: *violence*, *politics*, and a sudden increase in the accustomed types of search [and] seizure." 2 Cuddihy, *supra* note 1, at 1171. (emphasis added) (cited in Taslitz, p. 39.)

[15] According to Taslitz, "[a]bsent a citizen's voluntary consent, all police activity involves violence or its threat." (P. 2.) According to this virtually limitless definition, a police officer who rescues a cat from a tree when its owner is away or who walks a beat to see if any store windows have been broken has engaged in "violence" or threatened "violence." If other scholars have rejected such a broad definition of "violence," it is to their credit.

[16] As Amar notes, "[p]rivate 'persons' would remain the core rights-holders, but 'the people' on civil juries would retain a vital role in shaping the boundaries of the right." AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 326 (2005).

[17] For similar themes, see LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); Gary S. Rowe, *Constitutionalism in the Streets*, 78 S. CAL. L. REV. 401 (2005).

this point, Taslitz admits that the fundamental difference between the two scholars is one of "emphasis in interpretive attitude"—meaning, apparently, that "Davies relies more heavily . . . on official and elite statements about the law" than does Taslitz. (P. 297 n.92.)

While it is true that Davies (and Amar, for that matter) wrestles with elite sources—among them, the Fourth Amendment's text and contemporary Congressional legislation—it is to their credit, not their detriment. And while Taslitz claims that his resort to non-elite sources provides a better interpretive guide to the Fourth Amendment's original contours, he does not make clear how interpretation of such evidence—such as instances involving the tarring-and-feathering of revenue officers—offers a better mode of constitutional interpretation than the meticulous examination of text and history undertaken by others.

B. *The Antebellum Period*

Taslitz is at his most compelling in describing the extent to which southern slave owners used their extensive powers of search and seizure to regulate slaves, free persons of color, and abolitionists.

As the author observes, slaves in the South suffered various types of intrusive, frightening, and humiliating treatment. Slave owners engaged in or encouraged "searches of black homes followed by seizure of black firearms, [and] unjustified arrests"; southerners "mandated passes for blacks away from plantations"; and slaves suffered "beatings by state officials," as well as "legally authorized whippings." (P. 94.) Incorporating the important work of Sally Hadden, Taslitz notes that slave patrols had the authority to "search slave cabins, disperse slave gatherings (including religious services), safeguard areas around and within plantations and towns, interrogate and detain suspected violators, . . . examine slave passes or tickets," and even engage in "stakeout[s]."[18] (P. 109.)

As Taslitz notes, the activities of southern slave owners were not confined to the South. Searches and seizures conducted pursuant to the Fugitive Slave Acts engendered bitter controversies in localities across the North, including Boston, Syracuse, and Washington, D.C.[19] Free persons of color also suffered from the southern states' aggressive use of search and seizure. The Negro Seaman's Acts, first adopted in the 1820s in the wake of the Denmark Vesey insurrection, permitted free black sailors to be jailed while their ships were anchored in southern ports and allowed such sailors to be sold into slavery if their captains refused to pay requisite fees. (P. 246.)

---

[18] *See* SALLY E. HADDEN, SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS (2001).

[19] *See* Paul Finkelman, *Legal Ethics and Fugitive Slaves: The Anthony Burns Case, Judge Loring, and Abolitionist Attorneys*, 17 CARDOZO L. REV. 1793 (1996) (discussing the rendition of a fugitive slave in Boston in 1854); and Paul Finkelman, *Fugitive Slaves, Midwestern Racial Tolerance, and the Value of "Justice Delayed,"* 78 IOWA L. REV. 89 (1992) (discussing application of fugitive slave law in Iowa).

Whites, for their part, also faced the risk that their property and persons would be seized. Southern legislatures criminalized the "delivery of subversive antislavery literature from the local post office to the intended recipients." (P. 227.) Even white political elites saw themselves subjected to physical violence and expulsion upon traveling into the South. Such was the fate of the Massachusetts lawyer Samuel Hoar, who was expelled from South Carolina in 1844 after arriving in Charleston at the behest of the Commonwealth of Massachusetts.[20] (P. 246.)

Despite the extreme nature of such actions, efforts to declare them illegal under the Fourth Amendment fared poorly in the antebellum period. In *Commonwealth v. Griffith* (1823),[21] the Massachusetts Supreme Judicial Court declined to afford constitutional rights to the black petitioner. (P. 162.) Even when bolstered with claims derived from the Fifth Amendment's Due Process Clause and the Seventh Amendment's Civil Jury Clause, attacks on the constitutionality of the Fugitive Slave Act premised on the Fourth Amendment proved unavailing. As late as 1858, in the *Yazoo City Post Office Case* (1858),[22] Attorney General Caleb Cushing permitted detention of abolitionist literature. (P. 227.) When courts proved willing to restrain southern exercises of search-and-seizure power, they generally did not invoke the Fourth Amendment. For example, when a federal court, in *Elkison v. Deliesseline* (1823), struck down the South Carolina Negro Seaman's Act as unconstitutional, the court did so on the grounds that the Act "clash[ed] with the general powers of the United States to regulate commerce" and would "impl[y] a direct attack upon the sovereignty of the United States."[23]

C. *The Era of the Reconstruction Amendments*

A central proposition of *Reconstructing the Fourth Amendment* is that "[t]he Framers of the nineteenth century matter . . . as much as those of the eighteenth." (P. 12.) According to Taslitz, the Fourteenth Amendment, adopted in 1868, refined the meaning of the Fourth Amendment "to embrace [the] lessons that the nation painfully learned from its struggles" with the "Slave Power."[24] (P. 89.)

---

[20] Regarding Hoar, see WILLIAM WIECEK, THE SOURCES OF ANTI-SLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1868 (1977).

[21] 19 Mass. 11, 2 Pickering 11, 14, 15 (1823).

[22] 8 Op. Att'y Gen. 489, 494 (1858).

[23] As the court observed, the Acts evinced "utter incompatibility with the power delegated to [C]ongress to regulate commerce with foreign nations and our sister states." 8 F. Cas. 493 (C.C.D.S.C. 1823) (No. 4366). The court also stressed the Act's "express violation" of the existing "commercial convention with Great Britain." *Id.*

[24] Michael Kent Curtis, *John A. Bingham and the Story of American Liberty: The Lost Cause Meets the "Lost Clause,"* 36 AKRON L. REV. 617 (2003); Garrett Epps, *The Antebellum Political Background of the Fourteenth Amendment*, 67 LAW & CONTEMP. PROBS. 175 (2004).

Indeed, the author claims that "[m]uch of the history of, and debate over" the Fourteenth Amendment "focused on unreasonable searches and seizures." (P. 94.)

The evidence that Taslitz assembles concerning the drafting and ratification of the Fourteenth Amendment is certainly suggestive of the importance of search-and-seizure law, though it is hardly compelling. Consider the author's assessment of the motivations of the principal drafter of Section 1 of the Fourteenth Amendment, John Bingham. Noting that Bingham referred to the Hoar incident on the floor of the Congress in 1866, Taslitz speculates that this "suggests at least an *implicit* recognition that search and seizure protections were at the core of the 'privileges and immunities' of U.S. citizens." (P. 248; emphasis added.) But, of course, Bingham might well have invoked the Hoar incident for other reasons: to emphasize the failure of the southern states to abide by the Comity Clause; to emphasize the danger of mob violence; or to remind his listeners of the dangers of attainder and banishment, the mechanisms by which Hoar had been expelled. Put bluntly, the fact that Bingham alluded to a noteworthy incident involving South Carolina in a speech on the floor of Congress is not the same as claiming that protections against illegal "search and seizure" constituted the "core" of the Fourteenth Amendment. Given the centrality of Taslitz's claim that the law of search and seizure was a critical preoccupation of the Framers of the Fourteenth Amendment, it is regrettable that the author chose to develop the argument so late (and so briefly) in the book.[25]

II. LESSONS

Like other legal scholars, Taslitz is troubled both by the Supreme Court's Fourth Amendment jurisprudence and by the ways that history has been invoked by the Court to defend that jurisprudence.[26] In his book's concluding chapter, the author draws multiple historical "lessons" that he believes should guide modern-day courts, legislators, and police officers.[27] Part II of this review takes up five of these "lessons": (1) the need for a "respectful" Fourth Amendment jurisprudence that protects individuals and groups from "humiliation"; (2) the requirements that law enforcement officials pursue "individualized justice" and eschew "unduly

---

[25] Taslitz's treatment of "Reconstruction and the Mutated Fourth Amendment" occupies only fifteen pages (out of 277), and appears in the book's penultimate chapter. (Pp. 242–57.)

[26] For criticisms of the Supreme Court's interpretation of eighteenth-century history in the Fourth Amendment context, 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 (2002) (criticizing the court's interpretation of the eighteenth-century historical record); and David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739 (2000) (contending that the Supreme Court's effort to interpret the Fourth Amendment through the lens of the eighteenth-century common law "has little to recommend it").

[27] The final chapter offers ten such "lessons," which "restate" and "expand" upon seven earlier lessons that the author draws from the eighteenth-century history.

group-based suspicions"; (3) the importance of furnishing more robust Fourth Amendment protection to zones and interests outside the home; (4) the desirability of "direct citizen involvement" in "crafting and monitoring" search-and-seizure policy; and (5) the application of a "least restrictive alternatives principle," by which the state must seek to "ensure a politically acceptable level of public safety in the ways that will do least damage to . . . Fourth Amendment interests." (Pp. 258–62.)

A. *"Respectful" Policing*

Taslitz repeatedly asserts that his theory of the Fourth Amendment is "one rooted in the substantive value of respect." (P. 11.) According to the author, a Fourth Amendment jurisprudence informed by "respect" is best capable of checking "the state's abuse of violence," including "sending degrading messages about human worth, insulting individuals or groups, undermining rather than reinforcing desirable republican norms, . . . suppressing dissenting voices," and "treating persons on the basis of stereotype or surmise rather than as unique" individuals. (P. 4; internal quotation omitted.)

But what would a "respectful" Fourth Amendment look like in practice? The author claims that an "excellent start toward a jurisprudence of respect" can be found in the first of two opinions issued by Judge Harold Baer, Jr., in *United States v. Bayless* (1996).[28] In *Bayless*, a middle-aged African-American woman was arrested by plain-clothes officers at roughly 5:00 a.m. in the Washington Heights section of Manhattan—an area claimed by the police to be "a hub for the drug trade." After observing Bayless's out-of-state rental car "moving slowly" along 176th Street and, later, double-parked, the officers witnessed four males approach the car, two of whom placed "large black duffel bag[s] into the trunk." After spotting the officers, the men "moved in different directions at a rapid gait." When the officers later pulled over Bayless and searched her trunk, they discovered thirty-four kilograms of cocaine and two kilograms of heroin. Bayless later admitted that she had driven from Michigan to New York with a friend named "Terry" in order "to get some drugs," that the drugs had a street value of $1 million, but that she thought the packages merely contained cocaine, not heroin.[29]

Applying the "totality of the circumstances" test, Judge Baer initially granted Bayless's motion to suppress the physical evidence and her post-arrest statements, reasoning that the police officers lacked "reasonable, articulable suspicion that any criminal activity was afoot."[30] Noting, among other findings, that the arresting officer had testified that Bayless (not "Terry") was driving and that the Government had offered no corroborating evidence that the area in which the arrest

---

[28] 913 F. Supp. 232 (S.D.N.Y. 1996) (Baer, J.) [*Bayless I*], *vacated*, 921 F. Supp. 211 (S.D.N.Y. 1996) (Baer, J.) [*Bayless II*].

[29] *Bayless I*, at 235–36.

[30] *Id.* at 239.

had occurred was a "known hub for the drug trade," Baer deemed the testifying officer's statements to be "incredible." Roughly four months later, after considerable political and public outcry, and after receiving additional evidence that the portion of Washington Heights in which the arrest occurred was "a significant center of narcotics trafficking," Judge Baer vacated his previous order.[31]

Taslitz characterizes Judge Baer's decision in *Bayless I* as a "noble effort," presumably because it recognizes that police officers occasionally lie on the stand and that suspects (especially minority suspects) might well have sensible reasons for evading the police. In a similar vein, Taslitz also praises a dissent by Justice Stevens in *Illinois v. Wardlow* (2000),[32] a 5-4 decision upholding the conviction of a defendant who was apprehended and frisked after fleeing from officers. The dissent adduced empirical data suggesting that flight might be a perfectly reasonable (and innocent) response for members of minority groups living in high-crime areas.

In reminding us that even the innocent may wish to avoid interactions with the police, Taslitz performs a useful service. But how is the principle of "respect" supposed to guide a judge or police officer in the many other situations that arise in modern-day investigations? How would "respectful" investigators seek to search the computer of a suspected child pornographer?[33] How would "respectful" dogs go about sniffing cars for drugs?[34] How can "respectful" judges assess the constitutionality of installing a biometric surveillance system to observe attendees at the Super Bowl?[35] Much like premising constitutional criminal procedure on an overarching commitment to "due process," a Fourth Amendment jurisprudence premised on "respect" is likely to be either hopelessly vague, ad hoc, or toothless.

B. *"Individualized" Suspicion*

Taslitz seeks to refine his definition of a "respectful" Fourth Amendment by taking the position that searches and seizures should be "individualized"—that is, predicated on suspicion of an individual's wrongdoing rather than his or her affiliation with a group. In reminding his readers of the disproportionate impact of

---

[31] *Bayless II*, at 240 n.12.

[32] 528 U.S. 119 (2000).

[33] Here, the courts already face considerable jurisprudential challenges. *See* Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 HARV. L. REV. 532 (2005).

[34] Illinois v. Caballes, 543 U.S. 405 (2005).

[35] *See* John D. Woodward, Jr., *Super Bowl Surveillance: Facing Up to Biometrics*, RAND ARROYO CENTER, May 2001, *available at* http://www.rand.org/pubs/issue_papers/IP209/ (discussing biometric facial recognition system employed at Super Bowl XXXV).

policing on members of minority groups, Taslitz sensibly concurs with themes struck in the writings of David Harris, David Cole, and others.[36]

Of course, as Christopher Slobogin has observed, "the individualized suspicion requirement" is already part of our Fourth Amendment jurisprudence—at least rhetorically.[37] Thus, while Taslitz (like others) finds fault with the flimsiness of the protection that this particular requirement affords, it is not clear that simply asserting the importance of "individualization" will have any impact on those jurists who already claim to be committed to the goal.

At any rate, what exactly would a requirement of "individualized" justice mean? As Slobogin incisively observes, a commitment to individualized suspicion simply "cannot be honored when large groups of people are subjected to searches or seizures, like those that occur in connection with roadblocks, drug testing, public camera surveillance and data mining"—in short, where "an individualized suspicion requirement would stop the government's investigation dead in its tracks."[38] Although we might imagine a world in which "group searches" could simply be prohibited, the reality is that "even liberal justices recognize" that "[g]roup searches are an important means of keeping us safe."[39] Here, too, Taslitz's plea is impassioned but unrealistic.

C. *Expanded Scope*

Taslitz is also concerned with the scope of the Fourth Amendment—particularly, the tendency of modern-day jurisprudence to focus on the sanctity of the home at the expense of ignoring other domains and interests. According to the author, the "notion of privacy" evinced in the Supreme Court's Fourth Amendment jurisprudence "eviscerate[s] any philosophical, sociological, or commonsense notion of privacy outside homes, offices, and related structures." (P. 270.)

Taslitz makes a provocative point in arguing that the Court's focus on private homes means that persons sitting on porch stoops or living in apartments with common hallways will have "less privacy than the rich." (P. 273.) But Taslitz's solution to the problem is not convincing. His remedy is for the Court to "reconceptualize" its jurisprudence in a manner "true to the lessons of [slaves'] experience." (P. 271.)

---

[36] *See*, *e.g.*, David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002); David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265 (1999).

[37] Christopher Slobogin, *The Liberal Assault on the Fourth Amendment*, 4 OHIO ST. J. CRIM. L. 603, 611 (2007) ("Hand in glove with the Court's probable cause doctrine is the individualized suspicion requirement. As the Court has stated, 'A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing.'") (citing City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000)).

[38] *Id.* at 611–12.

[39] *Id.* at 612.

But how so? The history that Taslitz recounts provides a confusing guide. Because "[s]lave cabins were ramshackle affairs," many of the slaves' "intimate actions had to take place outside," and "[t]he law's failure to recognize these privacy interests was part of what marked the slaves as outsiders to the polity." (P. 271.) To be sure, generations of social-historical scholarship have demonstrated how slaves sought to carve out lives, build and preserve ties, and exercise agency outside the narrow confines created for them.[40] Taslitz quotes such efforts in superabundance.[41] But how these facts informed the views of the Fourteenth Amendment's Framers, or how they should affect the contours of the modern-day Fourth Amendment, remain extremely elusive.

D. *Citizen Involvement*

Befitting his populist leanings, Taslitz also believes that "the People should have a more direct role in deliberative governance concerning search and seizure policy." (P. 67.) The claim seems consistent with modern efforts to involve the citizenry in policing, whether through citizen review boards, joint police-citizen task forces, buy-back programs, or community policing initiatives.

Here, Taslitz offers some intriguing examples. He praises the efforts, in Cincinnati, of the Black United Front and the American Civil Liberties Union, which entered into a "Collaborative Agreement" with the city council and police union requiring regular meetings between the parties, annual reporting, and periodic surveys of satisfaction. (P. 60.) He highlights the St. Louis Firearm Suppression Program, which involved police officers asking parents to open their homes voluntarily to permit searches for weapons potentially held by their children, upon condition of non-prosecution.[42]

But the long-term outcomes of such citizen-police collaborations remain highly mixed. The ability of citizen review boards to "reform" police practices continues to be questioned.[43] For its part, the St. Louis Firearm Suppression Program was scrapped in 1999 in the wake of the appointment of a new police

---

[40] The classic study is, of course, EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE (1974).

[41] For example, it is not clear why the author feels it necessary to inform his readers that "slave healers" treated "menstrual cramps with tea made from gum-tree bark, and colic with syrup made from a boiled rat's veins" (p. 197), that slaves played at "picking berries" and "raiding potato and watermelon patches" (p. 193), or that slaves engaged in "fishing, dancing, fiddling, racing, telling tales, playing marbles, and strumming banjos" in their leisure time. (P. 196.)

[42] *See* Jeffrey Fagan, *Policing Guns and Youth Violence*, 12 CHILDREN, YOUTH & GUN VIOLENCE 144 (2002), *available at* http://www.futureofchildren.org/pubs-info2825/pubs-info_show.htm?doc_id=154414.

[43] *See* Barbara Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453 (2004) (discussing failure of citizen review boards to effect "systemic" reforms in police practices).

chief, suggesting that citizen-police collaborations can be short-lived.[44] In the national security context, deliberation between citizens and law enforcement agencies is often unrealistic given the stakes and timing at issue. All in all, Taslitz's efforts to generate a Fourth Amendment jurisprudence premised on "popular constitutionalism" are more provocative than pragmatic.

E. *Less-Restrictive Alternatives*

Taslitz also argues that "less-restrictive alternatives" should be pursued before governmental actors resort to searches and seizures. According to Taslitz, "[t]here are numerous alternatives to mass humiliation and privacy invasion, whether our goal is to lower crime or to strengthen order." (P. 272.)

One possibility offered by the author is "target-hardening"—for example, "designing subway turnstiles that cannot be jumped to prevent minor offenses such as 'fare-beating.'" (P. 272.) But, are such measures necessarily desirable, even when feasible? In 1991, the New York City Transit Authority instituted a series of changes at the subway station at 110th Street and Lexington Avenue, which had been identified as a "problem station" prone to fare avoidance.[45] At this station, "clerk-controlled high wheel (floor-to-ceiling) turnstiles [were] installed, which made most forms of fare evasion impossible" at that station.[46] Post-installation studies revealed, not surprisingly, that arrests and summons for fare evasion shot up at two nearby stations.[47] Moreover, critics of the "hardened" station argued that the measures reflected a "brutalist" approach to security.[48] Others expressed concern that the floor-to-ceiling barriers would be difficult to cross should persons need to exit the station in an emergency.[49]

Given his faith in constitutional deliberation, Taslitz is also a strong believer in *consensual* searches and seizures as a less restrictive alternative to police-initiated searches and seizures. The suggestion is intriguing: By most accounts, police in St. Louis achieved considerable success in convincing parents to open their homes to search for guns held by their potentially wayward teenagers, upon condition that prosecutions would not ensue should weapons be found. (P. 272.) Of course, it is difficult to see how such programs (or, for that matter, other forms of consensual activities, such as gun "give-back" or "buy-back" programs) are

---

[44] *See* U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, REDUCING GUN VIOLENCE: THE ST. LOUIS CONSENT-TO-SEARCH PROGRAM 2 (2004).

[45] *See* Robert R. Weidner, *Target Hardening at a New York City Subway Station: Decreased Fare Evasion—at What Price?*, in PREVENTING MASS TRANSIT CRIME 117 (Ronald V. Clarke ed., 1996), *available at* http://www.popcenter.org/Library/CrimePrevention/Volume%2006/index.htm.

[46] *Id.* at 121.

[47] *Id.* It was not clear whether this reflected displacement of crime or enhanced policing activities at the other stations.

[48] *Id.*

[49] *Id.*

likely to deter hardened criminals or even youths who choose to conceal guns outside their homes. Consent, in short, is a promising but limited tool.

Taslitz's most wildly idealistic means of avoiding searches and seizures is the recommendation that cities launch "[p]ublic-works programs for the homeless." (P. 272.) To be sure, employing people is less restrictive than arresting them. But if the claim is that police should not be permitted to engage in searches of homeless persons until such social welfare measures have been adopted, the position is wildly unrealistic.[50] Put differently, although petty crime would no doubt decline if governmental entities expanded social welfare programs, the fact that such programs could *always* be expanded given sufficient political will would mean that there would always exist a less-restrictive alternative than arrest. A constitutional standard of this nature that would eviscerate the ability of law enforcement officials to engage in searches and seizures is no standard at all.

III. UNEXPLORED THEMES

In the final portion of this review, I wish to address two subjects that the author does not discuss: the rise of professional policing in the middle decades of the nineteenth century; and the period between 1868 and the incorporation of the Fourth Amendment against the states.

A. *The Rise of Professional Policing*

In a book that pays so much attention to the antebellum era, it is curious that the author makes no effort to address the most important institutional development of this period from the perspective of modern-day Fourth Amendment jurisprudence: the rise of professional police forces.

As existing studies indicate, professional policing developed in the United States in the middle decades of the nineteenth century in response to urban riots, occasionally prompted by the types of racialized mob actions with which Taslitz is so familiar.[51] The first such force developed in New York (1845), and later in New Orleans (1852), Boston (1855), Chicago (1855), Philadelphia (1855), Baltimore (1857), and Providence (1864).[52] Even the most comprehensive histories of the nineteenth-century police pay virtually no attention to search and

[50] After all, police in New Haven, Connecticut, continued to dislodge homeless persons even after Connecticut's vagrancy law had been deemed unconstitutional. *See* Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165 (1996).

[51] *See* STANLEY H. PALMER, POLICE AND PROTEST IN ENGLAND AND IRELAND, 1780–1850 (1988).

[52] *See generally* DAVID R. JOHNSON, AMERICAN LAW ENFORCEMENT: A HISTORY (1981); ROGER LANE, POLICING THE CITY: BOSTON, 1822–1885 (1967); WILBUR R. MILLER, COPS AND BOBBIES: POLICE AUTHORITY IN NEW YORK AND LONDON, 1830–1870 (2d ed. 1999).

seizure, and we thus continue to know little about the activities of police officers during the antebellum, Civil War, and Reconstruction eras.[53]

But rather than addressing the gaps in our existing knowledge, Taslitz seeks to elide the history of search-and-seizure law in the context of slavery with its application in the context of day-to-day policing of crime. Unfortunately, the analogy between policing of slaves and policing of criminals is overly simplistic; as the leading recent study of the history of Anglo-American criminal procedure has revealed, the policing, prosecution, and punishment of "political" offenses typically differs considerably from the administration of "ordinary" criminal offenses.[54] Similarly, criminal procedure in cases involving slavery—the most salient political issue of the age—differed considerably from procedure in day-to-day criminal cases, routinely, for example, involving testimonial disqualifications and summary (i.e., non-jury) trial.[55] Although intriguing, the question of whether controversies over searches and seizures in the context of slavery had any discernible impact on practice in ordinary criminal cases remains unexplored and unanswered.

B. *Reconstruction and the Road to Incorporation*

Like other scholars and jurists, Taslitz assumes that the Fourteenth Amendment incorporated the Fourth Amendment—though he evinces no particular interest in the theory, timing, or impact of the claimed incorporation. Instead, Taslitz simply sidesteps this debate, blithely stating that he has no interest in examining the complex web of arguments surrounding the "incorporation debate."

Even if one sidesteps this debate, one still confronts a vexing question: If the Fourteenth Amendment adopted a fundamentally transformed understanding of the Fourth Amendment, did the law of search and seizure change in any noticeable respect in the post-1868 period? Although further research is undoubtedly warranted, considerable evidence suggests that no such transformation occurred, at least not in the immediate post-1868 period.

In the South, as Taslitz knows, a series of labor regulations designed to control African-American mobility arose shortly after the Reconstruction Amendments had been ratified. Such controls included anti-vagrancy legislation, convict leasing, and laws criminalizing the "enticement" of workers under contract.[56] Northern states, for their part, also showed little respect for personal "mobility." By 1896, forty out of forty-four states had passed stringent laws

---

[53] For a preliminary assessment of the role of nineteenth-century police officers in interrogation, see Wesley Oliver, *Magistrate's Examinations, Police Interrogations, and Miranda-Like Rules in Nineteenth-Century New York*, 81 TUL. L. REV. 777 (2007).

[54] *See* JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL (2001).

[55] *See, e.g.*, THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619–1860 (1996).

[56] *See* DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN-AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL (2003).

against "tramping," essentially criminalizing the practice of traveling from place to place to seek work.[57] If the Fourteenth Amendment signaled a trend towards enhanced respect for personal "mobility," that weighty lesson appears to have been lost on virtually every state legislature in the postbellum period, on the police who actively enforced such laws, and on the courts who routinely upheld such laws and enforcement actions against challenge.[58]

Did the Supreme Court by chance exhibit a more enlightened perspective? Here too, the Fourteenth Amendment does not appear to have brought about any immediate sea change in the meaning of the Fourth Amendment. In *Boyd v. United States* (1886),[59] which deemed unconstitutional a provision of an 1874 statute requiring persons suspected of violating the revenue laws to produce "any business book, invoice, or paper," the Court cited a host of evils associated with such governmental action. In doing so, however, it cited the standard shop-worn citations: the *Writ of Assistance Case*[60] and the ringing declarations of Lord Camden in *Entick v. Carrington*.[61] Seizures of fugitive slaves, harassment of free black sailors, interference with abolitionist newspapers, or any of the hosts of other wrongs associated with the "Slave Power" featured nowhere in the decision.

Nor did the Supreme Court work quickly when it came to incorporating the Fourth Amendment against the states. To the contrary, as Thomas Davies has shrewdly observed, the Supreme Court waited a good long time before incorporating such protections.[62] And they did so well after the application of the federal constitution to juries, mob-dominated proceedings, and torture, and well after the chilling expose on police misconduct published in the Wickersham Report.[63] Although further research on the post-1868 era is warranted, one straightforward possibility suggests itself: The Fourteenth Amendment accomplished a far less significant reworking of the Fourth, at least in the short term, than Taslitz's portrait would suggest.

---

[57] For details, see DAVID MONTGOMERY, CITIZEN WORKER: THE EXPERIENCE OF WORKERS IN THE UNITED STATES WITH DEMOCRACY AND THE FREE MARKET DURING THE NINETEENTH CENTURY 87 (1993).

[58] Between 1891 and 1897, police in Buffalo, New York, arrested "more than two thousand people each year . . ., including [the author] Jack London, who had ridden the rails to see Niagara Falls." *Id.* (citing Sidney L. Harring, *Class Conflict and the Suppression of Tramps in Buffalo, 1892–1894*, 11 LAW & SOC'Y REV. 873 (1977)).

[59] 116 U.S. 616 (1886).

[60] *See* QUINCY, JR., *supra* note 6.

[61] 19 Howell's State Trials 1029 (C.P.D. 1765).

[62] *See* Davies, *Account*, *supra* note 10.

[63] *See* Klarman, *supra* note 3.

IV. CONCLUSION

In 1955, C. Vann Woodward famously entitled his pioneering history of Reconstruction Era race relations *The Strange Career of Jim Crow*.[64] The historical developments that Woodward recounted were "strange" not only because they had long remained obscure, but because Woodward demonstrated that the origins of the *de facto* regime of Jim Crow arose not in the immediate aftermath of the Civil War, but in the 1890s, after decades of fluid and highly contingent developments.[65]

In addressing themes in the history of criminal procedure that have long escaped attention, Taslitz also tells a strange history. Yet the history that Taslitz recounts is strange in other, less positive senses. This is an ambitious, provocative, empathetic, and prodigiously researched book. But it is also a difficult, elusive, and, at times, irritating one.[66] The author's coverage is extremely selective. The approach to the work of other scholars is oddly combative. The policy prescriptions are vague and often only loosely moored to the underlying history. And the voice is unpredictable, shifting from historical narrative to normative theory, and veering from exegesis of popular films to the author's personal experiences with race relations. Taslitz's book is surely *a* history of search and seizure. But *the* history of search and seizure during the nineteenth century still remains to be written.

---

[64] *See* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (1955).

[65] For a sensitive assessment of the Woodward Thesis and its critics, see Michael J. Pfeifer, *Review of C. Vann Woodward,* The Strange Career of Jim Crow: A Commerorative Edition, H-SOUTH, H-NET REVIEWS, May 2003, http://www.h-net.org/reviews/showpdf.cgi?path=244101057184600 (book review).

[66] Although Taslitz cites extensively from both primary documents and respected secondary sources, he also sees fit to stock his footnotes with citations to episodes from *The Sopranos* (p. 280 n.19) and lyrics from THE ROLLING STONES (p. 285 n.3). Even for an aficionado of these aspects of contemporary popular culture, such allusions do very little to clarify the author's often elusive arguments.