NOTE

SEARCHING FOR A MEANING: THE ENIGMATIC INTERPRETATION OF VIRGINIA'S STATUTORY BAN ON WARRANTLESS SEARCHES

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The modern U.S. Supreme Court tells us that the touchstone of the Fourth Amendment is reasonableness. That proposition flows logically enough from the Amendment's text and helps explain why there are so many situations in which law enforcement does not need to obtain a warrant before conducting a Fourth Amendment search. Individuals in Virginia, however, are protected not only by the Fourth Amendment but also under state law. And Section 19.2-59 of the Code of Virginia contains a ban on searches without a warrant, subject only to exceptions in the enforcement of game and marine fisheries laws—rather, that is what Section 19.2-59 seems to say *it contains. In practice, the Supreme Court of Virginia has for decades interpreted the statute to provide the same protections as the Fourth Amendment, despite the stark differences between the two texts.*

This Note's first contribution is to explore that discrepancy. It documents how Section 19.2-59 was first passed during the Prohibition Era as part of a backlash to overly intrusive searches by law enforcement agents. It reveals that the Supreme Court of Virginia was originally willing to credit the statute's plain meaning and interpret it as offering broader protections against unreasonable searches than the common law. In the middle of the twentieth century, however, the court began to misread those early cases, leading to the current understanding of the law that is divorced from its plain meaning. The

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history of Section 19.2-59 thus raises difficult questions of statutory interpretation. This Note's second contribution is to identify those questions and begin articulating what the contemporary meaning of Section 19.2-59 should be.

INTRODUCTION

"Because we can only administer the law as it is written, the interpretative principle that precedes all others is that 'courts must presume that a legislature says in a statute what it means and means in a statute what it says . . . .'."[1]

Kenneth Wilson was pulled over as he drove through Chesterfield County, Virginia, on the evening of March 29, 2019.[2] The officer who commenced the stop did not initially give any reason for doing so. But after running Wilson's license and registration, he ordered Wilson to step out of his car.[3] Wilson responded by asking why he had been pulled over. The officer told Wilson that his headlight was out and opened the driver-side door. Wilson remained seated. The officer quickly repeated the order three more times, but Wilson did not budge. Then, without warning, the officer punched Wilson in the face and yanked him out of the car.[4]

Once Wilson was restrained, the officer informed him that he had ordered Wilson to exit the vehicle due to the smell of marijuana.[5] Wilson was patted down and escorted away. The officer then searched his car and found marijuana. In subsequent criminal proceedings, the Chesterfield County General District Court ordered that the drugs be suppressed.[6]

Wilson sued the officer under both federal and state law seeking half a million dollars in compensatory and punitive damages. In considering the officer's motion to dismiss, the U.S. District Court for the Eastern District of Virginia noted that one of the state law claims was for "unlawful search in violation of Virginia Code § 19.2-59."[7] The court did not take long to resolve the claim, simply noting that it "rel[ies] on the absence of probable cause" and citing to a 1968 Supreme Court of Virginia case in support of the proposition.[8] In Wilson's case, the court reasoned, the smell of

[1] Appalachian Power Co. v. State Corp. Comm'n, 876 S.E.2d 349, 358 (Va. 2022) (internal quotation marks omitted) (first quoting Coalter v. Bargamin, 37 S.E. 779, 781 (Va. 1901); and then quoting Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 296 (2006)).

[2] Wilson v. Painter, No. 3:20cv645, 2020 WL 7497801, at *1 (E.D. Va. Dec. 21, 2020).

[3] Id. at *2.

[4] Id.

[5] Id.

[6] Id.

[7] Id.

[8] Id. at *8 (citing Carter v. Commonwealth, 163 S.E.2d 589, 592 (Va. 1968)).

marijuana gave the officer probable cause that there was contraband in the vehicle. The Section 19.2-59 claim was accordingly dismissed.[9]

At first glance, the decision appears unremarkable. Yet it is notable for what the court did *not* do: consider the text of Section 19.2-59 of the Code of Virginia. If it had, the court would have needed to concede that the provision says nothing about probable cause. Instead, Section 19.2-59 seems to plainly prohibit the type of warrantless search that Wilson's car was subject to. The statute starts with a simple command:

> No officer of the law or any other person shall search any place, thing or person, except by virtue of and under a warrant issued by a proper officer.[10]

That general prohibition is subject to an exception allowing for the warrantless searches of vehicles—but only when such searches are carried out in the enforcement of Virginia's game or marine fisheries laws.[11] The limited exception seems to further Wilson's case, giving rise to a negative inference that warrantless automobile searches in all other contexts are prohibited.[12]

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[9] Id. at *8–9. Wilson did not challenge the court's dismissal of the § 19.2-59 claim on appeal. Wilson v. Painter, No. 21-1083, 2021 WL 5851070, at *1 n.1 (4th Cir. Dec. 9, 2021) (per curiam).

[10] Va. Code Ann. § 19.2-59 (2022). The rest of the statute reads:

> Any officer or other person searching any place, thing or person otherwise than by virtue of and under a search warrant, shall be guilty of malfeasance in office. Any officer or person violating the provisions of this section shall be liable to any person aggrieved thereby in both compensatory and punitive damages. Any officer found guilty of a second offense under this section shall, upon conviction thereof, immediately forfeit his office, and such finding shall be deemed to create a vacancy in such office to be filled according to law.
>
> Provided, however, that any officer empowered to enforce the game laws or marine fisheries laws as set forth in Title 28.2 may without a search warrant enter for the purpose of enforcing such laws, any freight yard or room, passenger depot, baggage room or warehouse, storage room or warehouse, train, baggage car, passenger car, express car, Pullman car or freight car of any common carrier, or any boat, automobile or other vehicle; but nothing in this proviso contained shall be construed to permit a search of any occupied berth or compartment on any passenger car or boat or any baggage, bag, trunk, box or other closed container without a search warrant.

Id.

[11] Id.

[12] See Miller & Rhoads Bldg., L.L.C. v. City of Richmond, 790 S.E.2d 484, 487 (Va. 2016) ("In interpreting statutory language, we have consistently applied the time-honored principle *expressio unius est exclusio alterius* . . . . Under this maxim, when a legislative enactment limits the manner in which something may be done, the enactment also evinces the intent that it shall not be done another way." (internal quotation marks and citations omitted)).

The perfunctory treatment Section 19.2-59 received in Kenneth Wilson's case is not unusual. In fact, Section 19.2-59 and its seemingly near-total ban on warrantless searches have gone almost entirely overlooked both in practice and in the literature. In practice, the statute is interpreted to offer the same protections as the Fourth Amendment,[13] despite the fact that the Amendment allows for a large portion of law enforcement searches to occur without a warrant.[14] Section 19.2-59 is also understood to create a cause of action against law enforcement officers akin to that found in 42 U.S.C. § 1983.[15] In the literature, the statute's origins, development, and interpretation by courts have never been explored.[16]

This Note seeks to change that. Part I summarizes the current state of the law on illegal searches in Virginia under the Fourth Amendment, Section 10 of the Virginia Declaration of Rights,[17] and Section 19.2-59.

[13] The Fourth Amendment to the U.S. Constitution reads:

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

U.S. Const. amend. IV.

[14] See 2 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 4.1(b) (6th ed. 2020) (providing an overview of the instances in which police are permitted to conduct a search without a warrant under the Fourth Amendment, including the exigent circumstances exception, the automobile exception, consent searches, inventory searches, and searches incident to arrest); Ronald Jay Allen, Joseph L. Hoffmann, Debra A. Livingston, Andrew D. Leipold & Tracey L. Meares, Criminal Procedure: Investigation and Right to Counsel 435, 467 (4th ed. 2020) ("Taken individually, these exceptions may seem narrow enough. Cumulatively, the exceptions may be the rule—and warrants the real exception.").

[15] See infra Subsection I.B.2.

[16] A review of the secondary sources citing § 19.2-59 on Westlaw and Lexis+ reveals a smattering of treatises and journal articles that mention the statute. That literature has given only cursory consideration to the law. See, e.g., Robert S. Claiborne, Jr., Comment, Commonwealth and Constitution, 48 U. Rich. L. Rev. 415, 423, 423 n.38 (2013) (calling it "troubling" that § 19.2-59 "does not plainly impose the same Fourth Amendment requirements, but Virginia courts have construed [it] to do so"); John L. Costello, Virginia Criminal Law and Procedure § 35.6 (4th ed. 2008) ("This statute was enacted in response to public outcry during the Prohibition Era and has been consistently held to be coextensive with the Fourth Amendment . . . .").

[17] Section 10 of the Virginia Declaration of Rights is the search-and-seizure provision in the Virginia Constitution. It reads:

> That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.

Va. Const. art. I, § 10.

Part II explores the history of Section 19.2-59.[18] It reveals the statute was originally enacted in 1920 as part of a larger bill meant to rein in the searches of state prohibition officers. Although the statute has been amended several times since, much of its substance remains the same as it was in 1920. Part III first analyzes how the Supreme Court of Virginia[19] interpreted Section 19.2-59 in the years immediately following its enactment. It then documents how, in the latter half of the century, the court misread those earlier cases, leading to the current application of the statute that departs not only from its text, but also from how it was originally understood by courts. Finally, Part IV makes a preliminary attempt at answering several questions raised by the analysis in Parts II and III.

I. CONTEMPORARY UNDERSTANDINGS OF VIRGINIA LAW

The modern understanding of Virginia courts is that individuals enjoy co-extensive protection from illegal searches under federal and state law. A criminal defendant is free to challenge a search under any combination of the Fourth Amendment, Section 10 of the Virginia Declaration of Rights, and Section 19.2-59 of the Code of Virginia. But there is no universe of cases where a court will find an illegal search has occurred under one of those sources of law but not the others. Similarly, the primary remedies available—the exclusion of evidence in a criminal case and damages in a civil one—are also generally understood to be the same under federal and state law.

A. Rights Protected

The rights guaranteed by Section 10 of the Virginia Declaration of Rights and the Fourth Amendment are one and the same under the Supreme Court of Virginia's current jurisprudence.[20] Similarly, modern

[18] Although § 19.2-59 did not obtain its current place in the Code of Virginia until 1975, see Act of Mar. 22, 1975, ch. 495, 1975 Va. Acts 846, 856–57, this Note refers to earlier versions of the provision as "Section 19.2-59" for clarity.

[19] The modern-day Supreme Court of Virginia was known as the "Supreme Court of Appeals" until 1970. 2 A.E. Dick Howard, Commentaries on the Constitution of Virginia 704 (1974). For clarity, this Note refers to the court by its current name when referencing decisions of the pre-1970 court.

[20] See Sidney v. Commonwealth, 702 S.E.2d 124, 126 n.* (Va. 2010) ("The rights [defendant] asserts under the Fourth Amendment are co-extensive with those rights afforded under Article 1, Section 10 of the Constitution of Virginia."); see also LaKeith Faulkner &

Virginia courts consider the rights protected by Section 19.2-59 the same as those protected by the Fourth Amendment—despite the former containing a seemingly near-*complete* ban on warrantless searches whereas the text of the latter guarantees freedom only from *unreasonable* searches. This interpretation of Section 19.2-59 was most recently articulated by the Supreme Court of Virginia in *Cromartie v. Billings*.[21] For individuals in Virginia, this means that the rights protected by the Fourth Amendment, Section 10, and Section 19.2-59 collapse into one another. And in adjudicating individual cases, Virginia courts will take their cues from the U.S. Supreme Court's Fourth Amendment jurisprudence.[22] In practice, therefore, the state rights protected under Section 10 and Section 19.2-59 are entirely dependent on the U.S. Supreme Court.[23]

B. Remedies Provided

The remedies available to someone aggrieved by an illegal search are also essentially identical under federal and state law in Virginia.

1. The Exclusionary Rule

The exclusionary rule has long offered criminal defendants a remedy for violations of their Fourth Amendment rights at the federal level.[24] Distilled to its simplest form, the exclusionary rule bars the use of

Christopher R. Green, State-Constitutional Departures from the Supreme Court: The Fourth Amendment, 89 Miss. L.J. 197, 212 (2020) (noting Virginia is one of, at most, thirteen states that have never elected to depart from the U.S. Supreme Court's Fourth Amendment jurisprudence under its state constitution).

[21] 837 S.E.2d 247, 254 (Va. 2020) ("§ 19.2-59 has been consistently held to provide only the same protection as that afforded by the Fourth Amendment." (internal quotation marks omitted)).

[22] See, e.g., id. at 254–55 (surveying only U.S. Supreme Court cases about the Fourth Amendment in determining whether defendant should be liable under plaintiff's § 19.2-59 claim); *Sidney*, 702 S.E.2d at 126 n.* ("For purposes of this opinion we include [the defendant]'s state constitutional rights in our discussion of his federal constitutional rights.").

[23] It is worth briefly noting the existence of 18 U.S.C. § 2236, which bans certain warrantless searches by federal officials. Despite sharing some features, 18 U.S.C. § 2236 and § 19.2-59 are in fact quite different. Namely, the former applies only to searches of "any private dwelling used and occupied as such dwelling" and contains exceptions for exigent circumstances and consent searches. 18 U.S.C. § 2236. Section 19.2-59, on the other hand, applies to searches of "any place, thing or person" and contains exceptions only for certain searches in enforcement of Virginia's game and marine fisheries laws. Va. Code Ann. § 19.2-59 (2022).

[24] See Weeks v. United States, 232 U.S. 383, 398 (1914).

evidence at trial that was obtained by an unconstitutional search or seizure.[25] The U.S. Supreme Court applied the exclusionary rule against the states in the seminal case of *Mapp v. Ohio*.[26] Since then, defendants in Virginia state courts have been able to seek the suppression of evidence obtained in violation of their Fourth Amendment rights.

Although the rights protected by Section 10 of the Virginia Declaration of Rights and Section 19.2-59 collapse into the Fourth Amendment, the Supreme Court of Virginia has never recognized the exclusionary rule as a remedy for a violation of those state law rights. Prior to *Mapp*, all relevant evidence—regardless of whether it was obtained through an illegal search or seizure—was admissible in criminal prosecutions in Virginia.[27] Since *Mapp*, Virginia courts have been obliged to suppress evidence obtained through unconstitutional searches or seizures as a matter of federal law, but the Supreme Court of Virginia has never grounded such a decision in Section 10 or Section 19.2-59.[28]

2. Damages

Individuals who are subject to an unconstitutional search or seizure also have the potential remedy of seeking damages. 42 U.S.C § 1983 provides plaintiffs a cause of action against anyone who violates their federal constitutional rights under color of *state* law, and in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, the U.S. Supreme Court established that *federal* officials can also be sued by individuals for violating their Fourth Amendment rights.[29] The availability of damages under Section 1983 or *Bivens* is severely curtailed, however, by the doctrine of qualified immunity: even when an individual officer has violated a plaintiff's federal constitutional rights, they will only be held liable if they have violated legal rules that were "clearly established" at the time the action was taken.[30] In practice, this

[25] 1 LaFave, supra note 14, § 1.6, at 249.

[26] 367 U.S. 643, 655–57 (1961).

[27] See Hall v. Commonwealth, 121 S.E. 154, 156–57 (Va. 1924). See infra Section III.A for further discussion of *Hall*.

[28] See Troncoso v. Commonwealth, 407 S.E.2d 349, 350 (Va. Ct. App. 1991); see also Hart v. Commonwealth, 269 S.E.2d 806, 809 (Va. 1980) ("Our own philosophical misgivings [about the federal exclusionary rule] are irrelevant, and we will of course continue to apply the rule as construed from time to time by the Supreme Court.").

[29] 403 U.S. 388, 397 (1971).

[30] Anderson v. Creighton, 483 U.S. 635, 638–39 (1987).

means Section 1983 and *Bivens* offer a remedy only when the offending officer acts with something akin to gross negligence.[31]

Section 19.2-59 also creates a cause of action.[32] And like a plaintiff under Section 1983 or *Bivens*, a plaintiff under Section 19.2-59 must overcome an immunity hurdle to hold an officer responsible. Similar to *qualified* immunity at the federal level, Virginia courts have adopted the doctrine of *sovereign* immunity to offer some protection for officials who are sued under state law for actions they took in carrying out their governmental duties.[33] Yet despite the Supreme Court of Virginia's insistence on keeping qualified immunity separate from sovereign immunity,[34] one is hard-pressed to find any practical difference between the two when reviewing suits brought under Section 19.2-59.[35] That is because, similar to qualified immunity, sovereign immunity "does not protect one who 'acts wantonly, or in a culpable or grossly negligent manner.'"[36]

Thus, despite the nominal differences between qualified immunity and sovereign immunity, it seems impossible to imagine a case where a defendant would be entitled to immunity under one of Section 1983 or Section 19.2-59 but not the other. Combined with the fact that modern

[31] Allen et al., supra note 14, at 332.

[32] Va. Code Ann. § 19.2-59 (2022) ("Any officer or person violating the provisions of this section shall be liable to any person aggrieved thereby in both compensatory and punitive damages."); see also Cromartie v. Billings, 837 S.E.2d 247, 254 (Va. 2020) ("The statute creates a cause of action against law enforcement officers and other government agents.").

[33] See Messina v. Burden, 321 S.E.2d 657, 660 (Va. 1984).

[34] See, e.g., *Cromartie*, 837 S.E.2d at 254 ("Despite the statute's similarity to 42 U.S.C. § 1983, the immunity defense that applies to Code § 19.2-59 is sovereign immunity, not qualified immunity." (citation omitted)).

[35] See, e.g., Burnham v. West (*Burnham I*), 681 F. Supp. 1160, 1168–69 (E.D. Va. 1987); Burnham v. West (*Burnham II*), 681 F. Supp. 1169, 1171–72 (E.D. Va. 1988). Both *Burnham* decisions, which were based on the same facts, involved claims of illegal search under federal and state law. The court initially found that, although some of the searches violated the plaintiffs' constitutional rights, the defendants had not violated clearly established law and thus were entitled to *qualified* immunity. *Burnham I*, 681 F. Supp. at 1168–69. On plaintiffs' motion to reconsider, the court acknowledged that it should have applied *sovereign* immunity to the state law claims. *Burnham II*, 681 F. Supp. at 1171–72. Nevertheless, the court determined that sovereign immunity protected the defendants from liability under § 19.2-59 for the same reason that qualified immunity had protected them under § 1983 (because the defendants had not known that their searches would violate the plaintiffs' constitutional rights). Id. at 1173; see also *Burnham I*, 681 F. Supp. at 1168 (dismissing the state law claims under *qualified* immunity). In its most recent § 19.2-59 case, the Supreme Court of Virginia cited *Burnham II* repeatedly in laying out the doctrine of sovereign immunity. See *Cromartie*, 837 S.E.2d at 254.

[36] *Cromartie*, 837 S.E.2d at 254 (quoting James v. Jane, 282 S.E.2d 864, 869 (Va. 1980)).

Virginia courts have interpreted Section 19.2-59 to protect the same rights as the Fourth Amendment, this means that the statute provides an identical civil damages remedy as Section 1983.

II. STATUTORY HISTORY OF SECTION 19.2-59

This Part provides—for the first time—an overview of the history of what is now Section 19.2-59 of the Code of Virginia. Section II.A documents its original enactment as part of a larger bill to rein in illegal searches in 1920. Section II.B details how the statute has been amended in the years since while always maintaining its seemingly near-complete ban on warrantless searches. Tracing this history is an important component of understanding Section 19.2-59 and how it should be interpreted today.[37]

A. The 1920 Act

The General Assembly has long sought to regulate searches. The 1919 Code of Virginia contained a chapter dedicated to the subject of search warrants.[38] That chapter, which was originally enacted in 1848,[39] authorized judges to issue search warrants upon a finding of "reasonable cause."[40] It enumerated four types of contraband, in addition to stolen goods, that warrants could be issued to search for and provided that stolen property be returned to its lawful owner as quickly as possible.[41]

In 1920, the chapter was significantly expanded. On March 19 of that year, the General Assembly approved Senate Bill 63, entitled, "An ACT

[37] There is agreement among textualists and non-textualists alike that earlier versions of a statute can be valuable sources to draw upon when determining its meaning. See Anita S. Krishnakumar, Statutory History, 108 Va. L. Rev. 263, 265–66 (2022).

[38] See Va. Code. Ann. tit. 41, ch. 191 (1919).

[39] See Act of Mar. 14, 1848, ch. 120, 1847–1848 Va. Acts 93, 160.

Prior to 1848, search warrants were handled in a piecemeal fashion by the General Assembly. The Code of 1819—the first official consolidation of all laws that had previously been approved in Virginia—contained only a few regulations regarding searches. See 1 The Revised Code of the Laws of Virginia, at iii–v (Richmond, Thomas Ritchie 1819) (preface); 2 The Revised Code of the Laws of Virginia, at tit. 19, ch. 220, § 80 (Richmond, Thomas Ritchie 1819) (authorizing justices of the peace to issue warrants upon a finding of "good cause" to search for illegal tobacco shipments). And in 1824 and 1834, the General Assembly passed laws that authorized the issuance of warrants to search for runaway enslaved persons. Act of Feb. 25, 1824, ch. 35, § 3, 1823–1826 Va. Acts 37, 38; Act of Mar. 11, 1834, ch. 68, § 5, 1833–1834 Va. Acts 77, 79.

[40] Va. Code. Ann. tit. 41, ch. 191, § 4819 (1919).

[41] Id.

to regulate search warrants and to prohibit searches without search warrants."[42] The legislative history of the Act is relatively sparse, but we can still piece together a fair understanding of the statute by examining its text, drafting history, and the context in which it was passed.

Start with the text. Divided into six sections, the Act covered both familiar ground and new territory when it came to the issuance of search warrants. The first section laid out requirements for an affidavit to issue a search warrant. These requirements were more verbose than the law on the books and used the term "probable cause" instead of "reasonable cause"—but they ultimately appeared to offer substantively the same protections as the 1919 Code.[43] Other sections were clearly designed to offer greater protections. For instance, whereas existing law spoke of search warrants to search a "house" or "place," the 1920 Act contemplated search warrants to search a "house, place, vehicle or baggage."[44] The Act also prescribed that any magistrate who willfully and knowingly issued a "general search warrant, or a search warrant without [an] affidavit . . . shall be deemed guilty of a misfeasance."[45]

Most significantly, the Act, as its title indicated, contained a prohibition on searches without warrants. Consider the original version of the modern-day Section 19.2-59:

> It shall be unlawful for any officer of the law or any other person to search any house, place, vehicle, baggage or thing except by virtue of and under a warrant issued by the proper officer.[46]

It detailed punishments—including the possibility of imprisonment—for those who violated the prohibition.[47] It created a remedy for those

[42] Act of Mar. 19, 1920, ch. 345, 1920 Va. Acts 516.

[43] See id. § 1; Va. Code. Ann. tit. 41, ch. 191, § 4819 (1919).

[44] Act of Mar. 19, 1920, ch. 345, § 1, 1920 Va. Acts 516, 516; Va. Code. Ann. tit. 41, ch. 191, § 4819 (1919).

[45] Act of Mar. 19, 1920, ch. 345, § 5, 1920 Va. Acts 516, 518.

[46] Id. § 4.

[47] Id. ("Any officer or other persons searching any house, place, vehicle, or baggage otherwise than by virtue of and under a search warrant, shall be deemed guilty of a misdemeanor and be fined not less than fifty dollars nor more than five hundred dollars or be confined in jail not less than one month nor more than six months, or both, in the discretion of the justice, jury or court trying the same. . . . Any officer found guilty of a second offense under this section shall, upon conviction thereof, in addition to the penalty hereinbefore provided, immediately forfeit his office, and such conviction shall be deemed to create a vacancy in such office to be filled according to law.").

aggrieved by warrantless searches.[48] And it contained an exception for limited searches in the enforcement of game and prohibition laws.[49]

Stepping back from the text of the 1920 Act, it is clear that the legislation was part of a widespread backlash to the enforcement of the state's prohibition laws. State-level prohibition in Virginia had gone into effect in late 1916.[50] The State Department of Prohibition, initially led by Commissioner J. Sidney Peters, was tasked with enforcement.[51] Peters was a polarizing figure whose tactics were almost immediately subject to criticism: "Peters's Agents Attack Passenger with Pistols" blared the headline to a 1918 newspaper article describing the actions of Prohibition Department officials aboard trains travelling through Virginia.[52] A 1919 editorial by the *Richmond Times-Dispatch* noted a "wave of indignation . . . sweeping Virginia because of the illegal and extra-legal activities of agents of the Prohibition Department."[53] The editorial lamented that "every day on the high-roads, on the trains, at the depots, wherever travelers go, there are violations of the law on the part of the officers. Necessity of warrants is ignored, personal rights infringed, baggage torn open and rummaged, and innocent persons subjected to inconveniences, indignities and embarrassment."[54]

Unsurprisingly, the issue became a political one. On the campaign trail, a Norfolk candidate for state senate in 1919 declared that "[i]t is of

[48] Id. ("Any officer or person violating the provisions of this section shalt be liable to any person aggrieved thereby in both compensatory and punitive damages.").

[49] Id. ("[A]ny officer empowered to enforce the game laws and the laws with reference to intoxicating liquors may without a search warrant enter for the purposes of police inspection any freight yard or room, passenger depot, baggage room or warehouse, storage room or warehouse, train, baggage car, passenger car, express car, Pullman car, freight car, boat or other vehicle of any common carrier, boat, automobile or other vehicle; but nothing in this proviso contained shall be construed to permit a search of any occupied berth or compartment on any passenger car or boat or of any baggage, bag, trunk, box or other closed container without a search warrant.").

[50] Hugh Harrington Fraser, J. Sidney Peters and Virginia Prohibition, 1916–1920, at 13 (1971) (Master's thesis, University of Richmond), https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1327&context=masters-theses [https://perma.cc/TK3K-KN2Y].

[51] Id. at 24–27.

[52] Richmond Times-Dispatch, June 15, 1918, at 10.

[53] Editorial, Law Observance in Law Enforcement, Richmond Times-Dispatch, Apr. 2, 1919, at 6.

[54] Id.; see also Durham Bros. & Co. v. Woodson, 154 S.E. 485, 487 (Va. 1930) ("It is a matter of common knowledge that for some years prior to the year 1920 there were complaints that many citizens were being harassed and humiliated by having their houses, vehicles and baggage searched, upon mere suspicion, by officers and other persons seeking to discover infractions of certain laws.").

supreme importance that every citizen should be protected against illegal search and seizure," and called for the abolishment of the Prohibition Department.[55] That candidate—J.T. Deal—would go on to win his race and co-author Senate Bill 63 the following year.[56]

The drafting history of the 1920 Act makes clear that the statute was intended to be a forceful rebuke to the actions of state prohibition agents. As originally introduced, Senate Bill 63 contained no exception for the enforcement of game or prohibition laws.[57] It also required any officer convicted under the law to be removed from office. A second conviction would result in a *felony* and potentially up to *five years* in the "penitentiary."[58] Supporters of prohibition—commonly referred to as "drys"—were aghast. The bill was "one of the most drastic ever presented," claimed State Senator G. Walter Mapp, and would make the enforcement of prohibition laws almost impossible.[59] For its supporters, the bill appeared to be a priority. Reports surmised that it would "probably be among the first to be considered on the floor of the [Senate]."[60]

The Act was amended as it made its way through the legislative process. The Senate Committee on Courts of Justice reduced the penalties called for by the bill, eliminating the possibility of a felony conviction, reducing the maximum term of imprisonment for offenders from five years to six months, and making removal from office punishment for a *second* offense.[61] The drys still were not satisfied and moved to postpone consideration of the bill indefinitely. That move was unsuccessful, and the bill moved to the floor of the Senate for debate.[62]

[55] Richmond Times-Dispatch, May 18, 1919, at 4.

[56] S.B. 63, 1920 Gen. Assemb. (Va. 1920) (as introduced) (on file with the Virginia Division of Legislative Services).

[57] Id.

[58] Id. § 4.

[59] Details Must Be Given in Affidavit, Richmond Times-Dispatch, Jan. 22, 1920, at 1; see also Fraser, supra note 50, at 13, 61 (labeling the 1916 Act that led to prohibition in Virginia as the "Mapp Law" and noting that Senator Mapp was one of Commissioner Peters's top allies in the 1920 General Assembly).

[60] Details Must Be Given in Affidavit, supra note 59.

[61] S.B. 63, 1920 Gen. Assemb. § 4 (Va. 1920) (as reported from the Committee on Courts of Justice) (on file with the Virginia Division of Legislative Services); see also Senate Journal and Documents 216 (Va. 1920) (noting the bill was reported from the Committee on Courts of Justice with a committee substitute on February 12).

[62] See "Drys" Attempt to Block Search-and-Seizure Bill, Richmond Times-Dispatch, Feb. 28, 1920, at 2; see also Senate Journal and Documents, supra note 61, at 435 (documenting the drys' movement to postpone); id. at 491 (documenting the bill advancing to the Senate floor).

The limited exception for the enforcement of game and prohibition laws was added on the Senate floor.[63] It is not readily apparent whether that exception was intended to strengthen or weaken the bill as a whole. On one hand, it authorized prohibition officers to enter trains to conduct inspections without a warrant[64]—one of the practices that had given rise to the 1920 Act in the first place. On the other hand, the Act made it clear that officers still needed to obtain a warrant to search any baggage during such inspections. Additionally, the exception did not authorize prohibition agents to conduct warrantless searches of *homes*. Perhaps tellingly, the amendment creating the exception was supported by Senator Deal and his co-author and opposed by Senator Mapp, the leader of the drys.[65]

The Senate ultimately passed Senate Bill 63 by a thirty-two to seven margin,[66] and the House approved the bill without amendment by a forty-five to thirty-eight vote.[67] Virginia now had a law that seemingly prohibited warrantless searches in all but a few instances.

One apparently high-profile case demonstrates that the new statute was immediately put to use. In December 1920, a farmer in Chesterfield County—the same locale where Kenneth Wilson would be pulled over ninety-nine years later—charged that a state prohibition inspector and others had searched his house without a warrant.[68] The inspector was arrested just days later.[69] The story grew into a larger scandal when it was charged that the prohibition agents had in fact kept most of the liquor they had found at the farm to sell for their own profits.[70] Although the charges were eventually dropped, the inspector was fined fifty dollars for having entered the home without a warrant, just as the 1920 Act prescribed.[71]

[63] Senate Journal and Documents, supra note 61, at 491.

[64] Id.

[65] Id.

[66] Id. at 505–06.

[67] House Journal and Documents 800 (Va. 1920).

[68] Warrant is Issued for Arrest of H.D. Brown, Richmond Times-Dispatch, Dec. 23, 1920, at 14.

[69] Brown Under Arrest, Richmond Times-Dispatch, Dec. 25, 1920, at 12.

[70] Hobson Prepares Four Indictments in Liquor Scandal, Richmond Times-Dispatch, Feb. 18, 1921, at 1.

[71] Id. (noting the fifty dollar fine imposed for "entering and searching the home of [the farmer] without a search warrant"). The case appears to have fallen apart after the prosecution's star witness was himself charged with violating the state's prohibition laws. See Brown and Sweet Will Not Have to Face Jury, Richmond Times-Dispatch, Oct. 7, 1921, at 3. The news surely came as a relief to the prohibition inspector, who was shot while conducting another raid about a week before the announcement was made. See State Prohibition Agent

B. Developments Since the 1920 Act

Apart from some modernization in its language, the basic prohibition on almost all warrantless searches that first appeared in the 1920 Act remains unchanged in Section 19.2-59 today. However, other aspects of Section 19.2-59 have changed over the past century, arguably in ways that should be relevant to a contemporary understanding of the statute. This Section explores those changes.

1. Searches for Which Warrants Are Required

The 1920 Act required warrants for the search of "any house, place, vehicle, baggage or thing."[72] Section 19.2-59 currently requires—at least on its face—warrants for the search of "any place, thing or person."[73] The words "house," "vehicle," and "baggage" have been replaced with the word "person." This revision occurred in 1975 as part of the reenactment of Virginia's criminal procedure laws into the newly created Title 19.2.[74]

Notably, the insertion of the word "person" in the 1975 revision was accompanied by the insertion of an exception allowing for searches incident to arrest.[75] It is not readily apparent what the General Assembly intended by adding this exception. The Virginia Code Commission was responsible for drafting the revision of Title 19.2 in 1975 and did not appear to view itself as acting with a mandate for novel, substantive change. In the report it submitted to the Governor and General Assembly, the Commission wrote "[M]inor changes have been made in the language of many [chapters] to eliminate uncertainty, needless repetition and excess verbiage. Recent decisions of the Supreme Court of the United States have necessitated some redrafting to eliminate unconstitutional

H.D. Brown is Wounded in Raid, Richmond Times-Dispatch, Sept. 30, 1921, at 1. He appears to have made a full recovery. See Dry Officers Capture Record-Breaking Still, Richmond Times-Dispatch, July 27, 1922, at 3 (detailing the inspector's participation in a raid the following year).

[72] Act of Mar. 19, 1920, ch. 345, § 4, 1920 Va. Acts 516, 517.

[73] Va. Code Ann. § 19.2-59 (2022).

[74] Act of Mar. 22, 1975, ch. 495, 1975 Va. Acts 846, 856.

[75] Id. at 857 ("Provided further, however, that as an incident to a lawful arrest, an officer or other person, without a search warrant, may search the person arrested and any vehicle which he may be occupying at the time or furniture or receptacles within his easy grasping distance, for weapons and for objects related to the offense for which he is being arrested which could be readily destroyed or disposed of. Provided further, that proof that the officer acted with reasonable cause to believe that he was acting within any authority of this section shall be a defense to any action under this section either criminal or civil.").

provisions in several of the present statutes."[76] The Committee reiterated a similar point with respect to the search warrant chapter, specifically.[77] Thus, perhaps the creation of the search incident to arrest exception should be viewed as the General Assembly's attempt to codify the U.S. Supreme Court's decisions in *Chimel v. California*[78] and *United States v. Robinson*[79] into state law. Regardless of the reason why the General Assembly decided to insert a search incident to arrest exception to Section 19.2-59 in 1975, it went on to eliminate it the very next year.[80]

2. Criminal Penalties

The 1920 Act provided that anyone who violated its prohibition on warrantless searches would be guilty of a misdemeanor and punished with one to six months in jail, as well as a fine between fifty and five hundred dollars.[81] Today, Section 19.2-59 says only that someone who violates its provisions "shall be guilty of malfeasance in office."[82]

This change happened in two parts. First, the language concerning jail time and fines was deleted in 1960 as part of the revision of Virginia's criminal procedure laws and replaced with the phrase "shall be guilty of a misdemeanor."[83] The Virginia Code Commission was tasked with drafting the reenactment—as it later was again in 1975—and stated that the change was meant to make the offense "punishable under the general

[76] See Va. Code Comm'n, Revision of Title 19.1 of the Code of Virginia, H. Doc. No. 20, at 4 (1975).

[77] See id. at 5 ("Chapter 5 of Title 19.1, which deals with the issuance of search warrants, has been revised to bring it in conformity with recent decisions and the Rules of Court. The revision is found in Chapter 5 of Title 19.2." (citations omitted)).

[78] 395 U.S. 752, 762–63 (1969) (holding that the search incident to arrest principle justifies a search of the arrestee and "the area into which an arrestee might reach" for weapons or evidence of the crime committed).

[79] 414 U.S. 218, 235 (1973) (clarifying the scope of the search incident to arrest of a person); see also Twentieth Annual Survey of Developments in Virginia Law: 1974–1975—Criminal Procedure, 61 Va. L. Rev. 1713, 1724–26 (1975) (advancing alternative possible explanations for the addition of the search incident to arrest exception to § 19.2-59).

[80] See Act of Mar. 29, 1976, ch. 293, 1976 Va. Acts 326–27. The deletion of the search incident to arrest exception appears to have been uncontroversial. It passed the Senate by a vote of thirty-five to three, 1 Senate Journal 570 (Va. 1976), and the House by a vote of eighty-seven to eight, 1 House Journal 1182 (Va. 1976).

[81] Act of Mar. 19, 1920, ch. 345, § 4, 1920 Va. Acts 516, 517.

[82] Va. Code Ann. § 19.2-59 (2022).

[83] Act of Mar. 30, 1960, ch. 366, 1960 Va. Acts 497, 512–14.

misdemeanor statute."[84] At the time, misdemeanors for which no specific punishment was prescribed were punishable by up to a year in jail, as well as a fine of up to five hundred dollars.[85] Thus, the 1960 revision resulted in stricter penalties—i.e., up to a year in jail—for a violation of Section 19.2-59.

Second, the term "misdemeanor" was replaced in 1978 with the phrase "malfeasance in office."[86] This change appears to have been intended to weaken the consequences for violating Section 19.2-59.[87] While Virginia law contemplates prosecutions for malfeasance in office cases,[88] the category of offense does not have a default set of punishments attached to it like misdemeanors do. As of 1978, therefore, it appears that jail time is no longer a possible punishment for violating Section 19.2-59.

3. Exceptions

The 1920 Act provided that "any officer empowered to enforce the game laws and the laws with reference to intoxicating liquors" could "without a search warrant enter" certain types of locations "for the purposes of police inspection."[89] Section 19.2-59 currently contains similar language, albeit without the reference to prohibition and with an added exception for those "empowered to enforce the . . . marine fisheries laws."[90]

Although the Prohibition Era in Virginia ended in 1933,[91] the mention of "laws with reference to intoxicating liquors" was not removed from

[84] Va. Code Comm'n, Revision of Titles 18 and 19 of the Code of Virginia, H. Doc. No. 7, at 157 (1959).

[85] See Act of Mar. 30, 1960, ch. 358, 1960 Va. Acts 417, 418.

[86] See Act of Apr. 8, 1978, ch. 721, 1978 Va. Acts 1177, 1177.

[87] As introduced, the bill would have also eliminated the cause of action created by § 19.2-59; however, it was amended as it moved through the legislative process. See H.B. 937, 1978 Gen. Assemb. (Va. 1978) (as introduced) (on file with the Virginia Division of Legislative Services) (eliminating the cause of action); Act of Apr. 8, 1978, ch. 721, 1978 Va. Acts 1177, 1177 (retaining the cause of action).

[88] See Act of Mar. 4, 1977, ch. 108, 1977 Va. Acts 131, 131 (codified at Va. Code Ann. § 19.2-8 (2022)) (establishing a statute of limitations for "[p]rosecutions of non-felonious offenses which constitute malfeasance in office").

[89] Act of Mar. 19, 1920, ch. 345, § 4, 1920 Va. Acts 516, 517.

[90] Va. Code Ann. § 19.2-59 (2022). See supra Subsection II.B.1 for a discussion of the search incident to arrest exception that was inserted to and then deleted from § 19.2-59 in the 1970s.

[91] Lorraine Eaton, Virginia's Prohibition History, Virginian-Pilot (Nov. 30, 2008), https://www.pilotonline.com/news/article_20b31552-ad56-5547-aacb-f3524f731ae1.html [https://perma.cc/X5A5-M8MM].

Section 19.2-59 until the enactment of the 1950 Code of Virginia.[92] The marine fisheries exception was added in 1997.[93] That is the last time that Section 19.2-59 was amended and reenacted. Thus, it is the legislative act from which the statute currently draws its force.[94]

* * *

Some of the details of Section 19.2-59 may have been amended since it was first approved in 1920, but the statute's core command has remained the same. The Supreme Court of Virginia, however, has not been as consistent in its interpretation of the law, as the next Part will show.

III. SUPREME COURT OF VIRGINIA CASE LAW

The Supreme Court of Virginia's jurisprudence on illegal searches was in its infancy when the General Assembly passed the 1920 Act. The official 1919 Annotated Code of Virginia cited only one case involving the legality of searches, a nearly century-old common law decision.[95] Section 10 of the Virginia Declaration of Rights had not once been construed by the Supreme Court of Virginia.[96]

[92] See Va. Code § 19-33 (Michie 1950); see also Va. Code Ann. tit. 41, ch. 191, § 4822d (Michie 1942) (featuring the exception).

[93] Act of Mar. 6, 1997, ch. 147, 1997 Va. Acts 196.

[94] The 1997 Act's legislative history is barren. The bill summary provided by Virginia's Legislative Information System stated only that the Act "[a]uthorizes marine patrol officers to enter property or facilities in the process of carrying out their law-enforcement responsibilities without having to obtain a search warrant. Currently, game wardens have such authority." Bill Summaries, 1997 Session, HB 2096 Search Warrants by Marine Patrol Officers, Va.'s Legis. Info. Sys., https://lis.virginia.gov/cgi-bin/legp604.exe?971+sum+HB2096S [https://perma.cc/8QM9-GSM8] (last visited Sept. 13, 2022).

[95] See Va. Code. Ann. tit. 41, ch. 191, § 4819 (1919). The annotation noted that the case, *Faulkner v. Alderson*, 21 Va. (Gilmer) 221 (1821), stood for the proposition that "[t]he landlord of a tenant at will may peacefully enter the premises, but an illegal search for stolen goods makes him a trespasser ab initio."

Two years prior to the passage of the 1920 Act, the Supreme Court of Virginia had considered an allegedly illegal search under the Commonwealth's prohibition laws for the first time in *Lucchesi v. Commonwealth*, 94 S.E. 925 (Va. 1918). The *Lucchesi* court rejected the defendant's argument that the U.S. Supreme Court's endorsement of an exclusionary rule in *Weeks v. United States* compelled the court to suppress liquor that was found in his suitcase as he disembarked a train in Richmond. Id. at 926–27. The decision appears to have been grounded in the common law, making no reference to § 10 of the Virginia Declaration of Rights or any statute.

[96] See Zimmerman v. Town of Bedford, 115 S.E. 362, 365 (Va. 1922) ("[T]here is no decision of this court, to which we have been cited or of which we are aware, construing the language of the Virginia Constitution under consideration [(i.e., § 10)].").

However, in the decade following the passage of the 1920 Act, the Supreme Court of Virginia confronted a flurry of cases—most related to the enforcement of prohibition laws—where individuals claimed to have been aggrieved by illegal searches. These cases forced the court to construe the meaning of the 1920 Act and Section 10. They are critically important in determining how Section 19.2-59 was originally understood, yet they have never been considered as a whole.[97] Section III.A does just that. And in Sections III.B and III.C, this Part demonstrates that, since the 1960s, these Prohibition Era cases have consistently been misunderstood and misapplied by the Supreme Court of Virginia.

A. Prohibition Era Cases

The first occasion for the Supreme Court of Virginia to construe the 1920 Act arose in *Zimmerman v. Town of Bedford*.[98] Zimmerman had been convicted of violating a local prohibition law after "ardent spirits stored for sale" were found in his house.[99] On appeal, he challenged the sufficiency of the warrant that authorized the search. The search warrant had been issued after a man attested, "I have watched [Zimmerman's] place and from the nature of the people going in and out of his premises, I am satisfied he has liquor there."[100] Zimmerman argued that this man was a "stranger in town," having only been present for two days, and his affidavit was therefore insufficient to establish "probable cause" under the 1920 Act.[101] To wit, Zimmerman alleged the warrant that had been issued was a general warrant, prohibited by Section 10 of the Virginia Declaration of Rights.[102]

The Supreme Court of Virginia rejected Zimmerman's challenge. The court conceded that it had never before construed Section 10 but surmised that the provision "may" have "le[ft] it to the Legislature" to determine "what character of evidence is requisite" to the issuance of a search warrant.[103] The 1920 Act had done this, the court reasoned, by requiring

[97] The cases were all included in annotated versions of the Code of Virginia published by the Michie Company of Charlottesville throughout the middle of the twentieth century. See, e.g., Va. Code § 19-33 (Michie 1950). But there appears to be no secondary source that has ever considered them together before.

[98] 115 S.E. 362 (Va. 1922).

[99] Id. at 362.

[100] Id.

[101] Id. at 366.

[102] Id. at 365.

[103] Id. at 365–66.

an affidavit alleging briefly the facts constituting probable cause—"the same requirement as that, in substance, contained in the Fourth Amendment."[104] The court then determined that the affidavit in Zimmerman's case had been sufficient to establish probable cause, reasoning that the fact the affiant was a stranger in town "merely partially affected the weight to be given to, and did not entirely destroy this evidence."[105] In short, there was probable cause to search Zimmerman's house; therefore, the warrant was not a general warrant.

It is worth stressing the limitation of the Supreme Court of Virginia's holding in *Zimmerman*. Crucially, the court did not hold that the *entirety* of the 1920 Act was equivalent to the Fourth Amendment. Instead, it merely noted that the 1920 Act's requirement that an affidavit contain "the material facts constituting the probable cause" for issuing a search warrant was identical to the Fourth Amendment's requirement of probable cause.[106] This provision was far from the 1920 Act's most notable. In fact, a similar requirement—one for "good cause"—dated all the way back to the tobacco inspection warrants detailed in the 1819 Code of Virginia.[107] Nevertheless, *Zimmerman* continues to be mistakenly cited for the proposition that *all* of the 1920 Act—including Section 19.2-59's prohibition on warrantless searches—was meant to be equivalent to the Fourth Amendment.[108] This despite the fact that Section 19.2-59's prohibition was not at issue in the case because no warrantless search had been conducted.

It was not until the following year that the Supreme Court of Virginia had its first occasion to consider a warrantless search under Section 19.2-59 in *Quivers v. Commonwealth*.[109] Quivers and a compatriot had been convicted of violating state prohibition laws in York County. Out for a drive one night, the two men failed to stop their "cart or jumper" upon command by the sheriff, who subsequently overtook them and found "a quart bottle of corn liquor in a sack" lying between them.[110] On appeal,

[104] Id. at 366.
[105] Id.
[106] Id.
[107] See supra note 39 and accompanying citations.
[108] See infra Section III.B; Buonocore v. Chesapeake & Potomac Tel. Co., 492 S.E.2d 439, 441 (Va. 1997) ("This construction also comports with the body of case law holding that Code § 19.2-59 affords only the same substantive protection as that provided by the Fourth Amendment." (citing *Zimmerman*, 115 S.E. at 366)).
[109] 115 S.E. 564 (Va. 1923).
[110] Id. at 564.

Quivers argued that any testimony regarding the liquor should have been struck from the record because the sheriff had no authority to conduct a warrantless search under the 1920 Act.[111]

The Supreme Court of Virginia did not agree. Pointing to the exception in Section 19.2-59 that allowed those enforcing prohibition laws to enter any "vehicle" without a warrant, the court reasoned that the sheriff "acted under and not against the authority of the statute upon which the defendant relies."[112] Despite its ruling, the court noted that Quivers's attorney may have missed an argument. The exception in Section 19.2-59 specified that "nothing in this proviso contained shall be construed to permit a search of . . . any baggage, bag, trunk, box or other closed container without a search warrant."[113] Although this language would conceivably apply to the "sack" in which Quivers's liquor was found, the court merely noted that such an argument was "not contended, or even intimated."[114]

Two months after *Quivers*, the Supreme Court of Virginia considered a warrantless search under considerably different circumstances in *McClannan v. Chaplain*.[115] The case was a civil suit brought by a farmer from Princess Anne County. The plaintiff alleged that defendants, special police officers acting to enforce the state's prohibition laws, had searched his farm without a search warrant in a disorderly fashion, violating Section 10 of the Virginia Declaration of Rights and Section 19.2-59.[116] The facts of the case were uncontested. The defendants had received a tip that the plaintiff was operating an illegal still and, without a warrant, entered the "thicket, woods, and swamp" on his land to search for it.[117] The defendants did not find the still, became separated in the swamp, and eventually fired several pistol shots into the air to locate each other. Throughout the search of the plaintiff's property, none of the defendants came within 200 yards of his house.[118] At trial, the jury had found for the defendants.[119]

[111] Id. at 564–65.
[112] Id. at 565.
[113] Act of Mar. 19, 1920, ch. 345, § 4, 1920 Va. Acts 516, 517–18.
[114] *Quivers*, 115 S.E. at 565.
[115] 116 S.E. 495 (Va. 1923).
[116] Id. at 495, 498.
[117] Id. at 496.
[118] Id.
[119] Id. at 495.

The Supreme Court of Virginia held that the search was legal under the common law, Section 10, and Section 19.2-59. The court began by noting the differences between Section 10 and the Fourth Amendment. It reasoned that, while the Fourth Amendment is declaratory of the common law's prohibition on "unreasonable" searches or seizures, "[i]n Virginia we have no constitutional provision on this subject, except Section 10, which merely forbids searches and seizures under 'general warrants,' not searches and seizures without any warrant."[120] The court wrote that a search under a general warrant would be "unreasonable," and thus Section 10 "merely adopts and makes unchangeable by the Legislature the common law on the subject to that extent, but no further."[121] Since the search in *McClannan* occurred under no warrant—rather than under a general warrant—"[S]ection 10 of the Virginia Constitution has no direct application to the case. It has an indirect application, however, in its enunciation in part of the common rule on the subject."[122]

The court went on to determine that the search was not "unreasonable" under the common law. This was primarily because the common law was concerned with protecting "the privacy of . . . home and . . . papers," not general property rights.[123] Because the warrantless search of the plaintiff's property in the case occurred "remote from [plaintiff's] home and curtilage, and not even in his personal presence" it "was not an 'unreasonable' search, and hence was not forbidden by the common law."[124]

Finally, the court concluded that the defendants' search did not violate Section 19.2-59. The court began its consideration by conceding, "It is plain, when the whole statute is read, that . . . it has a wider scope than the common-law rule on the subject."[125] Nevertheless, the court insisted that the statute be construed in light of both the state's prohibition laws—which it reasoned allowed the seizure of illegal stills without a warrant—

[120] Id. at 498.
[121] Id.
[122] Id.
[123] Id. at 499.
[124] Id. The court did also favorably cite language that seemed to indicate a search for contraband could *never* be unreasonable. Id. (quoting Haywood v. United States, 268 F. 795, 803 (7th Cir. 1920)). However, the fact that the warrantless search occurred far away from the plaintiff's house and curtilage appeared to be the primary reason the court found the search to be reasonable under the common law.
[125] Id. at 500.

and the common law.[126] The court therefore adopted a narrow understanding of the words "house," "place," and "thing" in Section 19.2-59 to mean only those within "the immediate personal custody of some one."[127] A warrantless search outside of the plaintiff's house and its curtilage was therefore not prohibited by the statute.

The year following *McClannan*, the Supreme Court of Virginia considered whether to adopt the exclusionary rule as a matter of state law in the case of *Hall v. Commonwealth*.[128] Hall was a widow from Halifax County who was convicted under the state prohibition laws after a search of her home authorized under a warrant that the Commonwealth conceded was "illegal and void."[129] The court firmly rejected the notion that either the Virginia Declaration of Rights or Section 19.2-59 mandated adoption of the exclusionary rule.[130]

The *Hall* court offered a variety of justifications for its conclusion. It reasoned the exclusionary rule would be inefficient, requiring criminal trials to take time to investigate the legality of the searches that had produced their underlying evidence—an "outside issue" that would "tend to confuse the issues and create unnecessary delay."[131] Any officer carrying out an illegal search, the court also reasoned, was no longer "a representative of the state, but a trespasser."[132] "[The police officer] alone is responsible for his illegal acts," the court wrote.[133] The violation of an individual's right to be free from illegal search was "complete when the search is made . . . the subsequent use of the articles taken as evidence is no part of such violation."[134]

[126] Id. at 499–500. It is worth noting that the prohibition law cited by the court did not *explicitly* state that stills could be seized without a warrant. See id. at 497 (quoting Act of Mar. 10, 1918, ch. 388, § 21 1/2, 1918 Va. Acts 578, 594–95). But see Virginia Section, Intoxicating Liquors—Constitutionality of Provision in Act of 1922 for Search Without Warrant, 9 Va. L. Rev. 146, 155–56, 158–59 (1922) (analyzing the validity of a 1922 state law permitting prohibition agents to conduct certain types of warrantless searches and surmising that the law violated § 10 of the Virginia Declaration of Rights).

[127] *McClannan*, 116 S.E. at 500.

[128] 121 S.E. 154 (Va. 1924). The court presented the question as one of "first impression in this court," id. at 155, even though it had given some consideration to the issue six years earlier in *Lucchesi v. Commonwealth*, 94 S.E. 925 (Va. 1918); see also supra note 95 (discussing *Lucchesi*).

[129] *Hall*, 121 S.E. at 155.

[130] Id. at 155–56.

[131] Id. at 155.

[132] Id. at 156.

[133] Id. at 155.

[134] Id. at 156.

After laying out these reasons, the court proceeded to consider the 1920 Act, which it wrote "was manifestly passed to protect and enforce the rights of the citizens guaranteed to them by section 10 of the Virginia Bill of Rights."[135] The court noted that the Act included punishment—including the possibility of jail time—for any person who conducted a warrantless search and offered compensatory and punitive damages for any person aggrieved by such a search. The 1920 Act provided all of the remedies available for Hall, the court reasoned. It would be improper for the judiciary to layer on the exclusion of evidence as an additional consequence:

> Had the Legislature deemed further penalties necessary for the protection of the citizens against illegal searches and seizures, it would doubtless have prescribed them. Having failed to do so, the duty does not rest upon the courts to inflict additional penalties . . . .[136]

Hall would continue to govern in Virginia courts until the decision of the U.S. Supreme Court to apply the exclusionary rule against the states in 1961.[137] That may explain why Virginia's search jurisprudence almost entirely dried up in the time between *Hall* and the 1960s. Without the availability of the exclusionary rule, questions of illegal searches were often not litigated: seemingly no prosecutions were brought under the 1920 Act, and plaintiffs usually did not bring lawsuits against those who allegedly violated their statutory right to be free from warrantless searches.[138] Nevertheless, what appears to be the lone case litigated under the 1920 Act during this time period provides important insight to the Supreme Court of Virginia's early understanding of Section 19.2-59.

[135] Id. This dicta is the only portion of the Supreme Court of Virginia's Prohibition Era cases that provides support for the notion that § 19.2-59 was originally understood to protect the same rights as § 10 of the Virginia Declaration of Rights (and perhaps, by extension, the Fourth Amendment). Citing *Hall* for that proposition is disingenuous, however, in that it avoids dealing with *McClannan*, where the court kept its § 10 and § 19.2-59 analyses separate, see supra notes 120–27 and accompanying text, and *Durham Brothers & Co. v. Woodson*, where the court allowed recovery in a civil suit for the violation of rights which would not have been protected under § 10, see infra notes 139–46 and accompanying text.

[136] *Hall*, 121 S.E. at 156. The Supreme Court of Virginia decided a case on the same day as *Hall* that briefly affirmed the court's decision to not adopt the exclusionary rule. See Casey v. Commonwealth, 121 S.E. 513, 513 (Va. 1924).

[137] See Mapp v. Ohio, 367 U.S. 643, 655–57 (1961).

[138] See Stephen A. Saltzburg, American Criminal Procedure: Cases and Commentary 353 (1980) (noting no criminal prosecutions have arisen under the 1920 Act).

Unlike every other illegal search case of its era, *Durham Brothers & Co. v. Woodson*[139] did not have any connection to enforcement of prohibition laws. Instead, the case was a civil suit brought by a seventy-five-year-old plaintiff, Sarah Woodson, against a grocery store in Roanoke whose employee, she alleged, had illegally searched her handbag in violation of Section 19.2-59.[140] There was some dispute around what exactly had transpired. Woodson claimed that, after shopping with her grown son at the grocery store on a Saturday morning, she was accosted by an employee who accused her of stealing a loaf of bread. The employee, Woodson alleged, had the attitude "of one speaking to a hound dog" and "looked into [her] bag" before being assured by the owner of the store that she had, in fact, paid for all of her goods.[141] The grocery store denied that any search had occurred and maintained that, even if one had, Section 19.2-59 only applied to searches that were conducted "with a view of the possibility of a criminal prosecution."[142] At trial, the jury found for Woodson and awarded her $400.[143]

The Supreme Court of Virginia upheld the award on appeal. The court began by acknowledging that the search was likely legal under the common law, but then noted "we are not called upon in the instant case to consider . . . the rule at common law . . . but to construe an independent act of the General Assembly passed in the year 1920."[144] Of Section 19.2-59, the court spoke in stark terms, rejecting the store's argument that it was not meant to enlarge the definition of an unlawful search:

> That the language employed is perhaps too broad in its scope may be conceded. But this fault, if fault it be, is not to be corrected by the court, as correction lies within the exclusive province of the law-making branch of the government. That it was the intention of the Legislature not to confine the right of search to houses or places, but to extend the same to vehicles, baggage, and things is manifest from the language employed. . . . This provision is found for the first time in the Acts of 1920 and clearly indicates the intention of the legislature to depart from the general rule at common law and also to enlarge the right of search

[139] 154 S.E. 485 (Va. 1930).
[140] Id. at 486. She did not assert any other cause of action. Id.
[141] Id. (internal quotation marks omitted).
[142] Id. at 486–87.
[143] Id. at 485.
[144] Id. at 487.

> conferred by the Code, as well as to impose upon one who violates its provisions both a penal and a civil liability.[145]

That the grocery store employee was not a law enforcement agent was also irrelevant. Section 19.2-59 prohibited any officer *or other person* from conducting a search without a warrant.[146] The employee had searched Sarah Woodson's bag without a warrant, so he was liable to her under the statute.

* * *

This survey of the Supreme Court of Virginia's early cases construing the 1920 Act and Section 10 of the Virginia Declaration of Rights carries several takeaways regarding the court's original understanding of Section 19.2-59.

First, the statute was understood to do more than merely codify the common law's prohibition against unreasonable searches. The *Durham Brothers* court applied this principle to a concrete case by allowing Section 19.2-59 to facilitate recovery of damages for a search that would not have been illegal under common law. The Supreme Court of Virginia, in other words, was willing to give effect to the plain text of the statute.

Second, Section 19.2-59 was not going to render *every* warrantless search illegal. Specifically, the Supreme Court of Virginia was both willing to give effect to the statute's exception for limited searches in the enforcement of prohibition laws (as in *Quivers*) as well as read it against the general backdrop of common law allowing for warrantless searches outside the curtilage of a person's house (as in *McClannan*).[147] Still, it is worth emphasizing that the Supreme Court of Virginia's willingness to read Section 19.2-59 against at least some background common law

[145] Id.; see also supra note 54 (quoting the *Durham Brothers* court's articulation of the motivations behind the 1920 Act).

[146] In 1997, however, the Supreme Court of Virginia held that amendments to § 19.2-59 since *Durham Brothers* meant that the cause of action created by the statute could no longer be used against private individuals not affiliated with law enforcement. Buonocore v. Chesapeake & Potomac Tel. Co., 492 S.E.2d 439, 440–41 (Va. 1997).

[147] The *Quivers* court also seemed to suggest that § 19.2-59 should not be read as displacing the common law principle of allowing warrantless searches incident to arrest. See 115 S.E. 564, 565 (Va. 1923) (quoting Weeks v. United States, 232 U.S. 383, 392 (1914)). However, the case was not decided on that point.

principles in these early cases did not mean the court understood the statute as merely codifying the common law in its entirety.[148]

Third, the Supreme Court of Virginia understood Section 10 of the Virginia Declaration of Rights to offer relatively little protection to individuals. Because Section 10 did not contain a prohibition on warrantless searches, the court reasoned it had "no direct application" to searches conducted without a warrant.[149] Instead, Section 10 enshrined in the Virginia Constitution the idea that searches under general warrants were illegal—i.e., it "merely adopt[ed] and ma[de] unchangeable by the Legislature the common law on the subject to that extent, but no further."[150]

In short, the Supreme Court of Virginia believed that the Virginia Constitution largely left the issue of how to regulate searches to the General Assembly, which in turn had exercised its authority in Section 19.2-59 to offer individuals greater protections than those offered by the common law.

B. Mid-Century Missteps

Beginning with a string of cases in the 1960s, the Supreme Court of Virginia departed both from the plain text of Section 19.2-59 and its original understanding of the 1920 Act. The court's decisions during this time period are responsible for the current understanding of Section 19.2-59 as providing no greater protections than the Fourth Amendment.

The missteps began in the 1962 case, *Tri-Pharmacy, Inc. v. United States*.[151] The case involved a forfeiture proceeding commenced by the Commonwealth after property was seized following the execution of a search warrant on a property suspected of operating an illegal lottery in Arlington. Tri-Pharmacy and several individuals filed petitions claiming ownership of the property on the basis that the search warrant was invalid because the affidavit supporting it did not establish probable cause.[152]

The court rejected their claim. It began by laying out what it saw as the relevant law of the case: Section I of the 1920 Act requiring that search

[148] See McClannan v. Chaplain, 116 S.E. 495, 500 (Va. 1923) (acknowledging, despite applying background common law principles, "It is plain, when the whole statute is read, that . . . it has a wider scope than the common-law rule").

[149] See id. at 498.

[150] Id.

[151] 127 S.E.2d 89 (Va. 1962).

[152] Id. at 90–92.

warrants be supported by probable cause, Section II of the 1848 Act listing "materials unlawfully made . . . for drawing a lottery" as one of the permissible targets of a search warrant, and Section IV of the 1920 Act, prohibiting warrantless searches.[153] It is not at all apparent why the court felt Section 19.2-59's prohibition on warrantless searches was relevant to the case, as the property at issue had been seized pursuant to a search warrant. Nevertheless, the court went on to cite two of its early cases on the 1920 Act:

> In *Hall v. Commonwealth*, we expressed the view that the purpose of these statutes (then embodied in Acts 1920, ch. 345, p. 516) was to protect and enforce the rights of the citizens guaranteed to them by Article I, § 10 of the Virginia Constitution; and in *Zimmerman v. Town of Bedford*, we said that their requirements were the same in substance as those contained in the Fourth Amendment to the Federal Constitution.[154]

This was an inaccurate assertion. *Zimmerman* had not held that the *entirety* of the 1920 Act was the same in substance as the Fourth Amendment—it had held the "probable cause" standard in the 1920 Act was substantively the same as the "probable cause" standard in the Fourth Amendment.[155] *Zimmerman* had nothing to say about Section 19.2-59's prohibition on warrantless searches because—like *Tri-Pharmacy*—the case did not concern a warrantless search.

Tri-Pharmacy was not the last case to confuse the court's holding in *Zimmerman*. In *One 1963 Chevrolet Pickup Truck v. Commonwealth*, the Supreme Court of Virginia did so again, this time in a case that *did* involve a warrantless search.[156] Like *Tri-Pharmacy*, *Chevrolet Pickup Truck* involved a forfeiture proceeding. The Commonwealth was seeking to sell a truck after it had been seized and its owner arrested by an Alcoholic Beverage Control agent for illegally transporting whiskey. The agent had observed alcohol in the truck after pulling it over and subsequently conducted a warrantless search of the vehicle.[157] The case came to the Supreme Court of Virginia after the owner of the truck challenged the legality of the search.

[153] Id. at 92.
[154] Id. (footnotes and citations omitted).
[155] Zimmerman v. Town of Bedford, 115 S.E. 362, 365–66 (Va. 1922).
[156] 158 S.E.2d 755 (Va. 1968).
[157] Id. at 756–57.

The case primarily turned on a state law that required those enforcing the state's liquor laws to obtain a search warrant before searching a vehicle.[158] However, in response to the owner's alternative argument that the search was illegal under Section 19.2-59, the court once again misconstrued *Zimmerman*, reasoning that the case had said "of our statutes providing for the issuance of search warrants and forbidding search without a warrant that their requirements are the same in substance as those contained in the Fourth Amendment."[159] The court went on to conclude that the agent's warrantless search complied with Section 19.2-59 since it was reasonable under the Fourth Amendment.[160]

The court's mistake in *Chevrolet Pickup Truck* appears to have gone unnoticed at the time,[161] but in retrospect, it was the origin of the court's modern reading of Section 19.2-59. Nine months later, the Supreme Court of Virginia relied on the decision in *Carter v. Commonwealth*, a criminal case (later cited by the Eastern District of Virginia in Kenneth Wilson's lawsuit),[162] for the proposition that "[Section 19.2-59] affords in substance only the same protections as that afforded by the Fourth Amendment."[163] The court repeated the move in another criminal case the following year, *Kirby v. Commonwealth*.[164]

We can see the consequences of the court's mistake play out in contemporaneous editions of *Defending Criminal Cases in Virginia*, a handbook published by the Virginia State Bar and Virginia State Bar Association. The first edition appeared in 1966—two years prior to

[158] Id. at 757.

[159] Id. (citation omitted).

[160] Id. at 758–59.

[161] A commentary on the case published in the *Virginia Law Review* was critical of the court's reading of the state liquor law and Fourth Amendment jurisprudence but did not mention § 19.2-59. See The Annual Survey of Virginia Law—Criminal Law and Procedure, 54. Va. L. Rev. 1579, 1597–98, 1598 n.105 (1968).

[162] Wilson v. Painter, No. 3:20cv645, 2020 WL 7497801, at *8 (E.D. Va. Dec. 21, 2020).

[163] 163 S.E.2d 589, 592 (Va. 1968).

[164] See 167 S.E.2d 411, 412 (Va. 1969) (citing *Chevrolet Pickup Truck*, 158 S.E.2d at 755) (contemplating "Virginia statutes . . . forbidding searches without a warrant" though not explicitly citing to the contemporary version of § 19.2-59). Like *Chevrolet Pickup Truck*, *Carter* and *Kirby* were both criticized by the *Virginia Law Review* at the time, whose editors felt the Supreme Court of Virginia had erred in applying the U.S. Supreme Court's search incident to arrest jurisprudence. See The Annual Survey of Virginia Law—Criminal Law and Procedure, 55 Va. L. Rev. 1581, 1599–602 (1969). The editors noted § 19.2-59 in a footnote, acknowledging the provision was worded in "absolute terms" but then—in a now-familiar move—cited *Chevrolet Pickup Truck* for the proposition that the statute only prohibited unreasonable searches. See id. at 1600 n.119.

Chevrolet Pickup Truck. It noted Section 19.2-59 and asserted, "A strict, literal interpretation of this statute would make illegal practically any search and seizure not based upon a legal search warrant."[165] The handbook felt the law was unsettled on whether evidence obtained in violation of Section 19.2-59 was admissible, but in light of the statute, encouraged defense attorneys to file motions to suppress "any evidence seized without a legally issued search warrant."[166]

The handbook's optimism had disappeared by 1971. An updated edition once again noted the broad language of Section 19.2-59 but acknowledged that

> the recent case of *Carter v. Commonwealth* construed [Section 19.2-59] as affording only the same protection as that provided by the Fourth Amendment. In light of *Mapp* and *Carter* . . . Virginia's search and seizure statutes, as written, appear to be obsolete and out of line with the law as applied.[167]

C. Into the Modern Era

The last notable amendments to Section 19.2-59 occurred in the mid-1970s.[168] The Supreme Court of Virginia has considered the statute on only a few occasions since then, entirely sticking to its understanding that the law confers no protections beyond those contained in the Fourth Amendment.

The 1977 case of *Thims v. Commonwealth* is demonstrative. Like *Carter* and *Kirby*, *Thims* was a criminal case where the defendant moved to suppress evidence under the Fourth Amendment and Section 19.2-59.[169] The search at issue had occurred the day after Thims was arrested when police used keys that were taken from him during that arrest to unlock a car in his driveway without a warrant.[170] The Supreme Court of Virginia held that the search was proper under the Fourth Amendment in

[165] Joint Comm. on Continuing Legal Educ., Va. State Bar & Va. State Bar Ass'n, Defending Criminal Cases in Virginia 39 (1966).

[166] Id. at 40.

[167] Joint Comm. on Continuing Legal Educ., Va. State Bar & Va. State Bar Ass'n, Defending Criminal Cases in Virginia 60 (1971).

[168] See supra Section II.B.

[169] 235 S.E.2d 443, 444 (Va. 1977); Carter v. Commonwealth, 163 S.E.2d 589, 592 (Va. 1968); Kirby v. Commonwealth, 167 S.E.2d 411, 412 (Va. 1969).

[170] *Thims*, 235 S.E.2d at 444–45.

part because the officer had probable cause to believe the car contained evidence of a crime.[171] It then turned its attention to Section 19.2-59.

The court was considering the statute the year after the General Assembly removed the search incident to arrest exception, which had only been added the year prior to that.[172] Although the removal of the exception was not directly relevant to the case, the court nonetheless felt compelled to explain it. The court reasoned that the exception had been added in 1975 to "br[ing] the statute in line" with its decisions in *Carter* and *Kirby* (which had involved searches incident to arrest).[173] The decision to remove the exception a year later was made out of a belief "that the statute should be broadly worded to avoid the necessity for frequent amendments."[174] The court offered no textual hook or legislative history to support this interpretation of the General Assembly's see-sawing amendments to Section 19.2-59. Instead, the court concluded that it "perceive[d] no legislative intent that the statute in 1975 should provide any greater restrictions on warrantless searches than required under the Fourth Amendment, and we so hold."[175] Never mind Section 19.2-59's plain text or the court's original understanding of it, the statute would be read as a mere recitation of the Fourth Amendment.

IV. CONSEQUENCES FOR CONTEMPORARY UNDERSTANDINGS OF VIRGINIA LAW

This Note has thus far argued that Virginia courts have strayed from the plain text and their original understanding of Section 19.2-59 of the Code of Virginia over the past several decades. The analysis presented raises several questions of statutory interpretation for additional research and consideration. This Part enumerates those questions and take some initial steps towards formulating their answers.

A. What Rights Should Be Protected by Section 19.2-59?

Over the past sixty years, the Supreme Court of Virginia has held that Section 19.2-59 protects no rights that are not protected by the Fourth Amendment. The modern U.S. Supreme Court tells us that the touchstone

[171] Id. at 447.
[172] See supra Subsection II.B.1.
[173] *Thims*, 235 S.E.2d at 448.
[174] Id.
[175] Id.

of the Fourth Amendment is "reasonableness."[176] The touchstone of Section 19.2-59, however, is unquestionably "warrants." The text plainly prescribes that any search of a "place, thing, or person" without one is unlawful, aside from the exceptions it provides for limited searches in enforcement of game and marine fisheries laws.[177] The Supreme Court of Virginia cases from the Prohibition Era reviewed by this Note provide no support for the notion that Section 19.2-59 was originally understood to merely codify the protections of the Fourth Amendment. Instead, the court repeatedly said, the statute provided greater protection than the common law.[178]

But where does that leave us? If the answer is to strictly follow the text of Section 19.2-59, a host of issues emerge. Take, for instance, consent searches. It is widely accepted that law enforcement does not need a warrant to conduct a search if the proper person has voluntarily consented to it.[179] However, a literal reading of Section 19.2-59 would render consent searches illegal. Similarly, police are understood to be able to properly enter a home without a warrant if they have probable cause coupled with an exigent circumstance, such as shots being fired.[180] But according to the plain text of Section 19.2-59, police officers should seemingly have to take the time to stop and get a search warrant, even if they witness a home invader enter a residence and subsequently hear shots being fired from inside.

In a vacuum, the proper approach to interpreting Section 19.2-59 would seem to fall somewhere in between parroting the U.S. Supreme Court's Fourth Amendment jurisprudence and reading the statute as an absolute prohibition on warrantless searches, subject only to its enumerated exceptions. Indeed, it is a common principle of statutory interpretation that generally worded laws can be read to implicitly incorporate background principles of common law.[181] And this Note's analysis shows the Supreme Court of Virginia originally understood Section 19.2-59 to codify protections greater than those in the common law while, at the

[176] See, e.g., Lange v. California, 141 S.Ct. 2011, 2017 (2021).

[177] Va. Code Ann. § 19.2-59 (2022).

[178] See supra Section III.A.

[179] See Schneckloth v. Bustamonte, 412 U.S. 218, 248–49 (1973); Brooks v. Commonwealth, 712 S.E.2d 464, 466–67 (Va. 2011).

[180] See, e.g., Mincey v. Arizona, 437 U.S. 385, 392 (1978); Commonwealth v. Campbell, 807 S.E.2d 735, 738–40 (Va. 2017).

[181] See Caleb Nelson, Statutory Interpretation 20–21, 629 (2011); Anita S. Krishnakumar, The Common Law as Statutory Backdrop, 136 Harv. L. Rev 608, 614–17 (2022).

same time, not entirely displacing it.[182] The question therefore becomes to what extent Section 19.2-59 should be understood as displacing the common law.

Additionally, consideration must be given to the effects—if any—of the General Assembly reenacting Section 19.2-59 after the Supreme Court of Virginia began interpreting it to protect only the same rights as the Fourth Amendment. It has been said that a legislature "is presumed to be aware of a[] . . . judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."[183] On the other hand, "[w]here the law is plain, subsequent reenactment does not constitute an adoption of a previous . . . construction."[184] Indeed, some of the reenactments of Section 19.2-59 since 1920 were made as part of revisions of larger sections of the code, which indicates they may not have been intended to implicitly codify the gloss that the Supreme Court of Virginia had put on the statute. And this Note's review uncovered no legislative history to suggest that the General Assembly ever understood itself to be doing so.[185]

Further analysis beyond this Note will be necessary to flesh out the details of the rights protected by Section 19.2-59. For now, it is sufficient to say that the plain text of the statute can be given effect—in a way the Supreme Court of Virginia has refused to do over the past several decades—to offer broader protections than the common law while, at the same time, not being read as literally as it first appears.

B. Should Section 19.2-59 Be Understood to Incorporate the Defense of Sovereign Immunity?

In the most recent Supreme Court of Virginia case concerning Section 19.2-59, *Cromartie v. Billings*, the plaintiff's counsel raised an ambitious argument in their brief: the statute should not be understood to incorporate

[182] See McClannan v. Chaplain, 116 S.E. 495, 499–500 (Va. 1923) (construing § 19.2-59 in light of the common law principle allowing for warrantless searches outside the curtilage of an individual's house).

[183] Lorillard v. Pons, 434 U.S. 575, 580 (1978).

[184] Demarest v. Manspeaker, 498 U.S. 184, 190 (1991).

[185] See generally Nelson, supra note 181, at 478–83 (providing an overview of the arguments for and against interpreting subsequent reenactment of a statute as codifying previously applied judicial glosses).

any defense of sovereign immunity.[186] Although the court ignored the argument in its opinion, it is worth considering at least briefly here.

The plaintiff's argument in *Cromartie* was a textual one: Section 19.2-59 expressly waives sovereign immunity. Section 19.2-59 makes no mention of any sort of immunity but rather plainly states that any person who violates the statute "shall be liable to any person aggrieved thereby."[187] Plaintiff's counsel pointed out that the phrase "shall be liable" mirrors the Virginia Tort Claims Act—"the quintessential waiver of sovereign immunity"—and Section 36-96.17(E)(3) of the Code of Virginia, which the Supreme Court of Virginia has said contains an express waiver of sovereign immunity.[188]

The comparison of the language in Section 19.2-59 with what the Supreme Court of Virginia has, in other statutes, held to be an express waiver of sovereign immunity is an attractive argument, but it can perhaps be rebutted. As a starting point, it bears remembering that the same language can have different meaning in different contexts. The words, "I am starving" for instance, have a different meaning when uttered by a grumpy teenager on a long car ride than they do when proclaimed by an explorer lost for weeks on end in the desert. So too, it could be argued, the words "shall be liable" should be understood to have a different meaning in the context of the Virginia Tort Claims Act—a statute enacted specifically for the purpose of waiving some sovereign immunity—than in the context of Section 19.2-59. Likewise, although the Supreme Court of Virginia has referred to the phrase "shall be liable" in Section 36-96.17(E)(3) as an "explicit waiver of sovereign immunity," it did so in an instance where it was comparing the statute to a closely situated statutory provision that *did not* contain the language.[189] There is no similar companion to Section 19.2-59 which resembles the provision in many ways but does not contain the phrase "shall be liable."

Furthermore, it should be noted that the language in Section 19.2-59 closely mirrors the language in 42 U.S.C. § 1983, which also contains no

[186] Brief of Appellant at 17–19, Cromartie v. Billings, 837 S.E.2d 247 (Va. 2020) (No. 180851).

[187] Va. Code Ann. § 19.2-59 (2022).

[188] Brief of Appellant, supra note 186, at 17–19; see also Virginia Tort Claims Act, Va. Code Ann. § 8.01-195.3 (2022) ("Subject to the provisions of this article, the Commonwealth *shall be liable* . . . ." (emphasis added)); Commonwealth ex rel. Fair Hous. Bd. v. Windsor Plaza Condo. Ass'n, 768 S.E.2d 79, 89–90 (Va. 2014) (describing "shall be liable" in Va. Code Ann. § 36-96.17(E)(3) as an "explicit waiver of sovereign immunity").

[189] See *Windsor Plaza*, 768 S.E.2d at 89–90.

mention of immunity but is nonetheless read to incorporate the defense of qualified immunity. Qualified immunity is, of course, "one of the most debated civil rights litigation issues of our time."[190] In particular, recent scholarship has advanced alternative views on the scope of immunity defenses that were available to government officials at the time Section 1983 was originally enacted.[191] That debate is relevant to Section 1983 because the U.S. Supreme Court has held the legitimacy of state-officer immunities depends on the common law as it existed when Congress passed the statute in 1871.[192] Unlike Section 1983, however, Section 19.2-59 does not draw its force from a nineteenth-century enactment.[193] Instead, it gets its force from the 1997 Act that added the exception for limited searches in the enforcement of marine fisheries laws.[194] And it is undeniable that the doctrine of sovereign immunity was well-established in Virginia by that time.[195] Thus, the debate over whether Section 1983 should be read to allow for the defense of qualified immunity may have little bearing on the debate over whether Section 19.2-59 should be read to allow for the defense of sovereign immunity.

Ultimately, this question deserves further research and consideration. For now, it seems fair to merely remark that Section 19.2-59 can likely—although not certainly—be understood to allow for the defense of sovereign immunity.

[190] Scott A. Keller, Qualified and Absolute Immunity at Common Law, 73 Stan. L. Rev. 1337, 1340 (2021) (quoting Ventura v. Rutledge, 398 F. Supp. 3d 682, 697 n.6 (E.D. Cal. 2019)).

[191] See William Baude, Is Qualified Immunity Unlawful?, 106 Calif. L. Rev. 45, 51 (2018) (asserting that the argument that qualified immunity derives from the common law that existed when § 1983 was passed "does not withstand historical scrutiny"); Keller, supra note 190, at 1344 (arguing "the common law around 1871 did recognize a freestanding qualified immunity protecting all government officers' discretionary duties—like qualified immunity today."); William Baude, Is Quasi-Judicial Immunity Qualified Immunity?, 74 Stan. L. Rev. Online 115, 115 (2022) (responding to Keller's argument).

[192] Keller, supra note 190, at 1341 (quoting Filarsky v. Delia, 566 U.S. 377, 384 (2012)).

[193] Section 1983 gets its current force from the Revised Statutes of 1874. Nelson, supra note 181, at 785–87, 786 n.41.

[194] Act of Mar. 6, 1997, ch. 147, 1997 Va. Acts 196.

[195] See, e.g., Messina v. Burden, 321 S.E.2d 657, 660 (Va. 1984) ("[T]he doctrine of sovereign immunity is alive and well in Virginia." (internal quotation marks omitted)).

C. Does Section 19.2-59 Provide for the Suppression of Evidence Obtained in Violation of It?

The traditional articulation is that Virginia does not require suppression of evidence obtained in violation of state law.[196] When Section 19.2-59 is understood merely as protecting the same rights as the Fourth Amendment, this principle is irrelevant to its interpretation: if evidence is obtained in violation of Section 19.2-59, it is also obtained in violation of the Fourth Amendment, and therefore may be subject to suppression. However, if Section 19.2-59 is understood as protecting rights beyond those within the ambit of the Fourth Amendment, then defendants would benefit if evidence obtained in violation of the statute was understood to be inadmissible. Alternatively, the U.S. Supreme Court has severely curtailed the exclusionary rule in recent decades, and some commentators have even suggested that it could be eliminated entirely.[197] If such a development were to occur, whether to suppress evidence obtained in an illegal search would become strictly a question of state law.

There is an at-least plausible argument that evidence obtained in violation of Section 19.2-59 should be subject to the exclusionary rule in Virginia courts. The argument follows from reading Section 19.2-59 in conjunction with Section 19.2-60, which provides that "[a] person aggrieved by an allegedly unlawful search or seizure may move the court to return any seized property and to suppress it for use as evidence."[198] Notably, Section 19.2-60 contemplates the suppression of evidence obtained as the result of any "unlawful" search. Searches in violation of Section 19.2-59 are, by definition, "unlawful" and should therefore perhaps lead to the exclusion of evidence under Section 19.2-60.

This argument is not without its flaws. As an initial matter, Section 19.2-60 does not explicitly mandate the exclusion of evidence obtained as the result of an unlawful search; it merely permits an aggrieved party to move for suppression and guides that "[t]he court shall receive

[196] See Virginia v. Moore, 553 U.S. 164, 167–68 (2008) (citing Moore v. Commonwealth, 609 S.E.2d 74, 82 (Va. Ct. App. 2005) (Annunziata, J., dissenting)).

[197] See, e.g., Adam Liptak, Justices Step Closer to Repeal of Evidence Ruling, N.Y. Times (Jan. 30, 2009), https://www.nytimes.com/2009/01/31/washington/31scotus.html [https://web.archive.org/web/20221226152831/https://www.nytimes.com/2009/01/31/washington/31scotus.html]; see also Collins v. Virginia, 138 S. Ct. 1663, 1675 (2018) (Thomas, J., concurring) ("I have serious doubts about this Court's authority to impose [the exclusionary] rule on the States.").

[198] Va. Code Ann. § 19.2-60 (2022).

evidence on any issue of fact necessary to the decision of the motion."[199] Additionally, the Virginia statute governing pretrial appeals in felony cases provides that the Commonwealth may only appeal a suppression order that was issued "on the grounds such evidence was obtained in violation of the provisions of the Fourth, Fifth or Sixth Amendments to the Constitution of the United States or Article I, Section 8, 10 or 11 of the Constitution of Virginia."[200] There is no mention of Section 19.2-59 or Section 19.2-60. Allowing evidence obtained in violation of Section 19.2-59 to be suppressed under Section 19.2-60 would therefore lead to the incongruous result of the Commonwealth not being able to appeal such an order. Indeed, such a result has occurred on at least one occasion in the past, leading the Virginia Court of Appeals to later declare that Section 19.2-60 can be used to suppress evidence obtained only in violation of the U.S. or Virginia Constitution or a statute which expressly provides suppression as a remedy.[201] The Supreme Court of Virginia has never weighed in on the question.

* * *

This Part has just begun to scratch the surface of determining the proper meaning of Section 19.2-59. But two final points bear emphasizing. First, the fact that Section 19.2-59 has been reenacted by different General Assemblies over the past century who may or may not have had different expectations about how it would be applied should not ultimately drive the interpretation of the statute. Legislators' expected applications, while sometimes relevant to a statute's interpretation, should not be equated with a statute's meaning.[202] Instead, it is important to give meaning to the words the General Assembly chose to enact. In the case of Section 19.2-59, the General Assembly has repeatedly approved of language that purports to prohibit all warrantless searches with exceptions only for limited searches in the enforcement of certain types of laws. On each of

[199] Id.

[200] Va. Code Ann. § 19.2-398(A)(2) (2022).

[201] See Troncoso v. Commonwealth, 407 S.E.2d 349, 350 (Va. Ct. App. 1991); see also Commonwealth v. Ragland, 374 S.E.2d 183, 183 (Va. Ct. App. 1988) (finding the Commonwealth could not appeal an order suppressing evidence on the grounds it was obtained in violation of § 19.2-59).

[202] See Bostock v. Clayton County, 140 S. Ct. 1731, 1749 (2020) ("[T]he fact that [a statute] has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity; instead, it simply demonstrates [the] breadth of a legislative command. And it is ultimately the provisions of those legislative commands rather than the principal concerns of our legislators by which we are governed." (citations and internal quotation marks omitted) (alterations in original)).

these occasions, the General Assembly could have simply amended the statute to read, "No officer of the law or any other person shall conduct a search of any place, thing or person in violation of the Fourth Amendment." Yet it has never chosen to do so.[203]

Second, statutes in Virginia play an especially critical role in protecting individuals from unlawful searches and seizures because of the seemingly limited protections embodied in Section 10 of the Virginia Declaration of Rights. This point has perhaps been overlooked by modern courts that, whenever Section 10 is raised, simply note that the provision is "co-extensive" with the Fourth Amendment. Such an articulation fails to account for the fact that Section 10 contains only a prohibition on general warrants, not a prohibition on unreasonable searches like the Fourth Amendment does.[204] This distinction was noted by the Supreme Court of Virginia in its early cases considering the 1920 Act[205] and is seen by some commentators as important to understanding the original meaning of the Fourth Amendment.[206]

Of course, so long as the Fourth Amendment is applicable to the states, the U.S. Constitution establishes a floor of protection for individuals in Virginia. However, if Virginians wish to go beyond that floor—as many other states have done—the text of Section 10 makes it hard to see how the Virginia Constitution, absent amendment, could serve as the source of additional protections. Virginians seeking guarantees against government searches and seizures beyond those offered by the Fourth Amendment must therefore establish them through statute. In essence, that is what the 1920 General Assembly did when it enacted the original version of Section 19.2-59. The Supreme Court of Virginia should respect that instruction unless and until the General Assembly decides to change it.

[203] Indeed, on the two most recent occasions the General Assembly reenacted § 19.2-59, it did so not only with the text's general prohibition, but also with the section's header reading "*Search without warrant prohibited*; when search without warrant lawful." Act of Apr. 8, 1978, ch. 721, 1978 Va. Acts 1177, 1177 (emphasis added); Act of Mar. 6, 1997, ch. 147, 1997 Va. Acts 196, 196 (emphasis added).

[204] See Claiborne, supra note 16, at 420–24 (making a similar argument); Virginia Section, Intoxicating Liquors—Constitutionality of Provision in Act of 1922 for Search Without Warrant, supra note 126, at 157 (same).

[205] See supra Section III.A.

[206] See Thomas K. Clancy, The Framers' Intent: John Adams, His Era, and the Fourth Amendment, 86 Ind. L.J. 979, 1027–29, 1035–41, 1044–51 (2011).

CONCLUSION

The Code of Virginia contains a provision—Section 19.2-59—that purports to prohibit almost all warrantless searches. For many decades, the Supreme Court of Virginia has interpreted it to protect the same rights as the Fourth Amendment without ever offering an explanation for how it derives the same meaning from two demonstrably different texts. This Note establishes that discrepancy and, for the first time, explores the history of Section 19.2-59. It demonstrates that it was originally understood by courts to offer greater protections than the common law and that those early cases have since been misread by Virginia courts. Finally, this Note proposes several questions that should guide the search for a proper understanding of Section 19.2-59.