NOTE

A CASE OF MISTAKEN AUTHORITY: RECONCILING *ILLINOIS v. RODRIGUEZ*, ORIGINALISM, AND THE COMMON LAW

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In the last few decades, the Supreme Court has largely turned to a history-based, originalist approach to the Fourth Amendment. Many scholars have been quick to laud the change, criticize the methodology, or argue their views of the historical record. But few have taken the time to catalogue what historical sources and evidence the Supreme Court has found persuasive in its originalist cases. This Note does so. It takes the Court's originalist methodology as a given and recognizes that historical analysis has become a key part of the Court's Fourth Amendment jurisprudence. So, this Note analyzes various originalist opinions of the Court to compile a set of tools that litigants should be using when arguing Fourth Amendment issues.

This Note then undertakes to apply these tools in an area where the Court has not. In Illinois v. Rodriguez*, the Court established its doctrine of apparent-authority consent. But the case was decided under a non-originalist framework. Using the Court's preferred historical sources, this Note argues that* Rodriguez*'s approach to apparent-authority consent was unknown to the common law of trespass, searches, and seizures. And if apparent authority would not have excused a trespass at common law, it should not excuse a government search now. Thus, doctrine and methodology conflict regarding apparent-authority consent. In response, this Note advances a few possible ways to harmonize that inconsistency.*

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INTRODUCTION

In its recent Fourth Amendment cases, the Supreme Court has increasingly turned toward a theory of Fourth Amendment originalism to determine the meaning of the constitutional protection against unreasonable searches and seizures.[1] Championed by Justice Antonin Scalia,[2] Fourth Amendment originalism is based upon one fundamental principle: "The Amendment 'must provide *at a minimum* the degree of protection it afforded when it was adopted.'"[3]

To figure out what that minimum degree of protection is, the Court has frequently undertaken historical surveys of the Founding-era common law of trespass, searches, and seizures.[4] Of course, the Court has recognized that common law rules are not always clear.[5] However, in the cases where the Court has found that the common law definitively declared that a certain type of search or seizure was or was not reasonable, that determination has been all but dispositive.[6] In those cases, litigants can win game, set, and match by convincing the Court of their understanding of the historical legal record.

While Fourth Amendment originalism had a distinguished pedigree in the Court's early search and seizure jurisprudence, it was largely discounted during the Warren and Burger Courts.[7] As such, many cases decided during the mid- to late-twentieth century were litigated on a jurisprudential rubric that differs substantially from much of the Court's current approach to deciding Fourth Amendment questions.

This leads to a few natural questions. What tools should litigants use to argue Fourth Amendment search and seizure cases under the now-ascendant originalist framework? And how do many of the Court's older precedents stack up in light of this revived history-based approach? Does the Founding-era common law support those decisions? Further, how should people react when it seems that current cases do not ensure that

[1] David A. Sklansky, The Fourth Amendment and Common Law, 100 Colum. L. Rev. 1739, 1743 (2000).

[2] Id.

[3] Lange v. California, 141 S. Ct. 2011, 2022 (2021) (quoting United States v. Jones, 565 U.S. 400, 411 (2012)).

[4] See, e.g., id. at 2022–24; Wilson v. Arkansas, 514 U.S. 927, 931–36 (1995); Atwater v. City of Lago Vista, 532 U.S. 318, 326–45 (2001).

[5] *Lange*, 141 S. Ct. at 2022.

[6] See *Atwater*, 532 U.S. at 345 n.14.

[7] Sklansky, supra note 1, at 1740–41.

the Fourth Amendment provides "the degree of protection it afforded when it was adopted"?[8]

This Note undertakes to answer these questions. While much recent originalist scholarship is quick to provide historical evidence it argues the Court should find persuasive, this Note inverts the analysis, first cataloguing the various types of sources the Court has regularly used to determine the content of the common law and then presenting them to litigants as primary tools to be used in making history-based legal arguments. Then, as a case study, this Note takes those tools and applies them to *Illinois v. Rodriguez*,[9] a case decided just before the Court began to shift its focus toward a history-based approach. In *Rodriguez*, which established the Court's current doctrine regarding apparent-authority-consent searches, the Court held that police may constitutionally search a person's home pursuant to consent obtained from someone who the officers reasonably, but mistakenly, believed had the requisite authority to consent.[10] However, using a mixture of well-known and rarely or never-before cited historical evidence, including early American and British case law, this Note argues that *Rodriguez*'s holding does not fit comfortably within the Founding-era common law of searches and seizures. But it proposes a few ways to reach a sort of harmony.

Thus, this Note proceeds in five Parts. Part I introduces the doctrine of consent and apparent authority. Part II examines how the Court has increasingly looked to history and the common law to determine whether a search is reasonable or not under the Fourth Amendment. Part III catalogues the common tools and methods that the Court has used to determine what the content of the Founding-era common law of searches and seizures actually was. Part IV uses those tools to argue that apparent authority would not have excused an officer's trespass onto someone's land, making that trespass an unreasonable search at common law. Finally, Part V discusses the possible implications that this research may have for apparent-authority-consent-search doctrine.

[8] *Lange*, 141 S. Ct. at 2022 (quoting *Jones*, 565 U.S. at 411).
[9] 497 U.S. 177 (1990).
[10] Id. at 188–89.

I. BACKGROUND ON APPARENT-AUTHORITY-CONSENT SEARCHES

A. Consent and Third-Party Consent Searches

Consent searches, or searches "conducted after a person with the authority to do so voluntarily waives Fourth Amendment rights,"[11] are an integral part of modern policing. Police officers conduct millions of consent searches every year, amounting to over ninety percent of all warrantless searches.[12] And the Supreme Court has upheld this practice, recognizing that consent is a "well settled" exception to both the probable cause and warrant requirements of the Fourth Amendment.[13]

The exception extends even to cases where the person giving consent is not the ultimate target of the police's investigation.[14] Under the doctrine of third-party consent, "the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared."[15] In other words, the police may search a person's property without their consent as long as they have the consent of some other person with sufficient "joint access or control" of that same property.[16]

B. Illinois v. Rodriguez *and Apparent-Authority-Consent Searches*

The Court's third-party consent cases lead to the inevitable question: What happens when the police conduct a search pursuant to the consent of a third party who does not actually have sufficient "joint access or control"? In *Illinois v. Rodriguez*, the Court addressed the question head-on, holding that the Constitution permits searches made pursuant to an

[11] Search, Black's Law Dictionary (11th ed. 2019).

[12] Eva Lilienfeld & Kimberly Veklerov, Note, Permission to Destroy: How a Historical Understanding of Property Rights Can Rein in Consent Searches, 108 Va. L. Rev 1055, 1060 & n.19 (2022).

[13] Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973). The Fourth Amendment states that "[t]he 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] Sharon E. Abrams, Comment, Third-Party Consent Searches, the Supreme Court, and the Fourth Amendment, 75 J. Crim. L. & Criminology 963, 964 (1984). For example, if Bert and Ernie jointly own a house, the third-party consent doctrine would state that Bert can give consent to search that house, even if the police are ultimately investigating Ernie.

[15] United States v. Matlock, 415 U.S. 164, 170 (1974).

[16] Id. at 171 n.7.

objectively reasonable belief that the consenting party had sufficient authority to give consent.[17]

Because *Rodriguez* forms the foundation for this Note, a brief recounting of its facts and justifications is warranted. On July 26, 1985, Edward Rodriguez awoke to police in his bedroom.[18] They were there without a warrant and were accompanied by Gail Fischer, who had moved out of Rodriguez's apartment several weeks prior.[19] Fischer had called the police earlier that night, alleging that Rodriguez had assaulted her.[20] She showed clear signs of abuse and told the police that Rodriguez was asleep at "our" apartment, to which she had a key.[21] The police then obtained her consent to go to the apartment and arrest Rodriguez.[22] After they arrived at the apartment and Fischer let them in, however, the police discovered a large amount of drug paraphernalia and cocaine.[23] So they arrested Rodriguez and charged him with drug trafficking.[24]

Rodriguez moved to suppress all the evidence found in his apartment.[25] He argued that Fischer had moved out of the apartment and, as such, had no authority to grant the police consent to enter.[26] The trial court, suppressing the evidence, agreed.[27] The trial court also rejected the State's claim that the officer's reasonable belief that Fischer had authority over the apartment made the search reasonable under the Fourth Amendment.[28] While the Supreme Court found that the state court's actual-authority determination was "obviously correct,"[29] it reversed the lower court on apparent authority, holding that a search would be valid as long as "the

[17] 497 U.S. 177, 188–89 (1990). This would eventually adopt the moniker "apparent authority." See United States v. Terry, 915 F.3d 1141, 1145 (7th Cir. 2019). Yet, as will be discussed in more depth below, this moniker might be particularly inapt, as apparent authority, understood through the law of agency, was not traditionally a defense to unlicensed entry upon another's land. See Restatement (First) of Agency § 311 cmt. b (Am. L. Inst. 1933).

[18] *Rodriguez*, 497 U.S. at 179–80.

[19] Id. at 179.

[20] Id.

[21] Id.

[22] Id.

[23] Id. at 180.

[24] Id.

[25] Id.

[26] Id. Fischer neither owned nor leased the apartment; she did not pay rent; she was not permitted to bring guests to the apartment; she was not even allowed to access the property alone. Id.

[27] Id.

[28] Id.

[29] Id. at 182.

facts available to the officer at the moment . . . [would] warrant a man of reasonable caution in the belief that the consenting party had authority over the premises."[30]

In its analysis, the Court focused on the concept of reasonableness.[31] The Court noted that the Fourth Amendment does not bar the government from ever searching someone's home without the consent of the owner; instead, all it does is protect individuals from "unreasonable" searches.[32] And reasonableness can come from a variety of sources, like from a warrant or from consent.[33] However, the Court also pointed out that factual mistakes do not strip otherwise reasonable searches of their reasonableness. For this reason, a search pursuant to a warrant supported by probable cause is reasonable, even if it later turns out that the property searched has no relation to the crime being investigated.[34] Similarly, a search incident to arrest is reasonable even if the searched person is actually an innocent third party whom the officers reasonably but erroneously believe is their suspect.[35] In short, the Court concluded that its precedents establish a rule that police officers need only be reasonable in their factual determinations. As long as that condition is met, a search will be reasonable if it would have been reasonable were the facts actually as the officers believed them to be.[36] As such, if an officer reasonably believes that a party has authority to consent to a search, whether they actually have that authority is largely irrelevant.[37]

II. REASONABLENESS AND THE FOURTH AMENDMENT

In many ways, *Rodriguez*'s reasonableness analysis reflects an intermediary step in the evolution of the Fourth Amendment jurisprudence both of the Court and of the opinion's author, Justice Scalia. I call it an "intermediary" step because *Rodriguez* demonstrates how the

[30] Id. at 188–89 (internal quotation marks omitted) (quoting Terry v. Ohio, 392 U.S. 1, 22 (1968)).

[31] "[W]hat is at issue when a claim of apparent consent is raised is not whether the right to be free of searches has been *waived*, but whether the right to be free of *unreasonable* searches has been *violated*." Id. at 187.

[32] Id. at 183 (quoting U.S. Const. amend. IV).

[33] Id. at 183–84; see also Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (noting consent as an exception to the rule that a warrantless search is unreasonable).

[34] *Rodriguez*, 497 U.S. at 184 (citing Illinois v. Gates, 462 U.S. 213, 232 (1983)).

[35] Id. at 184–85 (citing Hill v. California, 401 U.S. 797, 803–04 (1971)).

[36] Id. at 185–86.

[37] Id. at 186.

Court began to depart from the warrant-preference view of the Fourth Amendment.[38] However, the analysis also fails to incorporate even the slightest hint of the originalism that would later become foundational to Justice Scalia's personal Fourth Amendment jurisprudence and largely influential on the jurisprudence of the Court as a whole.[39] Instead, the opinion relies upon the much more open-ended "balancing test of general reasonableness" that gained prominence on the Court in the 1980s.[40]

A. The Warrant-Preference View of the Fourth Amendment

A review of the Court's "reasonableness" jurisprudence will be helpful in understanding the Court's turn toward what some scholars have called Fourth Amendment originalism.[41] For much of the twentieth century, the Court was guided by the Warren Court's "warrant preference" view of the Fourth Amendment.[42] Under this framework, the "Unreasonableness Clause" and the "Warrant Clause"[43] of the Fourth Amendment were interconnected, with the requirements of the Warrant Clause essentially defining unreasonableness under the first.[44] This created a sort of per se rule establishing that warrantless searches were presumptively unreasonable.[45] And as a parallel, when government officers did obtain a valid warrant, searches would essentially be insulated from any Fourth Amendment challenge.[46]

This was well summarized by the Court in *Katz v. United States*, where it stated that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the

[38] See Sklansky, supra note 1, at 1751; see also Silas J. Wasserstrom, The Court's Turn Toward a General Reasonableness Interpretation of the Fourth Amendment, 27 Am. Crim. L. Rev. 119, 129 (1989) (tracking the Court's turn from strict adherence to the requirements of the Warrant Clause toward a more open-ended "balancing test of general reasonableness").

[39] Sklansky, supra note 1, at 1743, 1751. Professor Sklansky notes that this was typical of Justice Scalia's early Fourth Amendment opinions. Id. at 1750.

[40] Wasserstrom, supra note 38, at 129.

[41] See, e.g., Sklansky, supra note 1, at 1744.

[42] Cynthia Lee, Reasonableness with Teeth: The Future of Fourth Amendment Reasonableness Analysis, 81 Miss. L.J. 1133, 1138 (2012); Wasserstrom, supra note 38, at 119; Thomas Y. Davies, Recovering the Original Fourth Amendment, 98 Mich. L. Rev. 547, 559 (1999).

[43] Lee, supra note 42, at 1137 (quoting Groh v. Ramirez, 540 U.S. 551, 571–72 (2004) (Thomas, J., dissenting)).

[44] Wasserstrom, supra note 38, at 129.

[45] Lee, supra note 42, at 1135.

[46] Id.

Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."[47] Of course, the second part of this phrase points out the inconsistency in this early conception of the Fourth Amendment, since it is somewhat hard to square the concept of a per se rule with a regime of exceptions.[48]

This inconsistency grew during the Burger Court, where the Court cut back on much of the Warren Court's Fourth Amendment jurisprudence.[49] It did this not by overruling prior cases, however, but instead by using the framework left by the Warren Court and modifying the doctrine to restrict the Amendment's scope.[50] Still, the cases during this period acknowledged the primacy of the warrant requirement, even if the Court's language began to downplay its importance.[51]

B. The General-Reasonableness View of the Fourth Amendment

Over the course of the 1980s, this began to change. In a series of cases, the Court began to divorce the idea of reasonableness from the warrant requirement, leading to what some have called a "general reasonableness" approach to the Fourth Amendment.[52] This took a balancing approach, where the Court considered precedent and weighed the interests of the government and compared them to the interests of the individual.[53] Occasionally, this lowered the constitutional threshold for searches and permitted the government to intrude upon the privacy of individuals without warrants, probable cause, or even individualized suspicion.[54] But it also expanded protections for individuals in other respects, finding that

[47] Katz v. United States, 389 U.S. 347, 357 (1967).

[48] See Akhil Reed Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757, 762–71 (1994).

[49] Wasserstrom, supra note 38, at 121.

[50] Id. at 121–23.

[51] Id. at 119 n.5 (noting how earlier cases regarded warrant exceptions as "jealously and carefully drawn," while Burger Court cases were more likely to characterize them as "specifically established" (first quoting United States v. Jones, 357 U.S. 493, 499 (1958); and then quoting United States v. Ross, 456 U.S. 798, 825 (1982))).

[52] Id. at 128–30. This approach has also been called a "generalized-reasonableness" approach or the "separate clauses" view. See Davies, supra note 42, at 559; Lee, supra note 42, at 1139.

[53] Lee, supra note 42, at 1135–36.

[54] Wasserstrom, supra note 38, at 129 (first discussing Griffin v. Wisconsin, 483 U.S. 868 (1987); and then discussing Skinner v. Ry. Lab. Execs.' Ass'n, 489 U.S. 602 (1989)).

even warrant-based searches might still be unreasonable in some circumstances.[55]

This is primarily the approach we see in *Rodriguez*. While the analysis begins with a perfunctory statement that "[t]he Fourth Amendment generally prohibits the warrantless entry of a person's home, whether to make an arrest or to search for specific objects," [56] this statement is not central to the Court's analysis at all. Instead, the crux of Justice Scalia's opinion is "that no such search will occur that is 'unreasonable,'" and "[t]he ordinary requirement of a warrant is sometimes supplanted by other elements that render the unconsented search 'reasonable.'"[57] Indeed, in rejecting Justice Marshall's dissenting position that relied upon a much stronger version of the warrant requirement, Justice Scalia reemphasized that "'unreasonable[ness]' . . . is all that the Constitution forbids" and that "[t]he essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials."[58]

This open-ended reasonableness approach led to its own share of criticisms. Chief among these concerns was that the Court, in relying upon case-by-case determinations of reasonableness, had offered very little guidance and granted overly broad discretion to lower courts on how to deal with Fourth Amendment cases.[59] And this concern extends beyond the courts since an ad hoc reasonableness approach similarly gives less guidance to "public officials[] and citizens than does a categorical approach."[60] This lack of guidance then segues into a more generalized concern that courts and officials will be empowered, not prohibited, to act with the "official arbitrariness" that the Fourth Amendment and its attendant rules were meant to check.[61]

[55] Id. at 130 (first discussing Welsh v. Wisconsin, 466 U.S. 740 (1984); then discussing Winston v. Lee, 470 U.S. 753 (1985); and then discussing Tennessee v. Garner, 471 U.S. 1 (1985)).

[56] Illinois v. Rodriguez, 497 U.S. 177, 181 (1990).

[57] Id. at 185.

[58] Id. at 186 n.* (quoting Delaware v. Prouse, 440 U.S. 648, 653–54 (1979)).

[59] Sklansky, supra note 1, at 1807; Lee, supra note 42, at 1135.

[60] Alan Z. Rozenshtein, Fourth Amendment Reasonableness After *Carpenter*, 128 Yale L.J.F. 943, 958–59 (2019) (quoting Jamal Greene, The Supreme Court, 2017 Term—Foreword: Rights as Trumps?, 132 Harv. L. Rev. 28, 94 (2018)). For a discussion of the disparate tests that the circuit courts have adopted in the face of *Rodriguez*'s general-reasonableness approach, consider *infra* notes 209–12 and accompanying text.

[61] Rozenshtein, supra note 60, at 959 (quoting Carol S. Steiker, Second Thoughts About First Principles, 107 Harv. L. Rev. 820, 855 (1994)); see *Prouse*, 440 U.S. at 653–54 (noting

C. Fourth Amendment Originalism

This was not lost upon Justice Scalia. Though his initial Fourth Amendment opinions implemented the prevailing Fourth Amendment doctrine of the 1980s, those early opinions held "seeds" that would eventually bloom into his well-known jurisprudence of Fourth Amendment originalism.[62] We can see the first fruits of those blooms in the opinions he wrote at the beginning of the 1990s. For example, consider *County of Riverside v. McLaughlin*.[63] In that case, the majority, relying upon the balancing method of generalized reasonableness, held that delays to holding probable cause hearings are presumptively reasonable as long as the hearing occurs within forty-eight hours of an arrest.[64] In dissent, Justice Scalia acknowledged that there is "room for such an approach in resolving novel questions of search and seizure under the 'reasonableness' standard that the Fourth Amendment sets forth."[65] But he indicated that, in his view, that approach had an important limitation: when the common law presented a "clear answer" on whether a practice was permitted or not, "the 'balance' has already been struck, the 'practical compromise' reached—and it is the function of the Bill of Rights to preserve that judgment."[66] Under this framework, references to history are crucial since the Fourth Amendment is meant to preserve an

how the Fourth Amendment was intended to impose standards "upon the exercise of discretion by government officials").

[62] Sklansky, supra note 1, at 1751. While much of the vitality of Fourth Amendment originalism today is due to the influence of Justice Scalia, reliance upon history and the common law has a distinguished pedigree in Fourth Amendment jurisprudence. As Professor Sklansky recounts, many "venerated" Fourth Amendment cases from the late-nineteenth and early-twentieth centuries relied heavily upon the perspective of the Framers and the Amendment's history. Id. at 1740. For example, "*Boyd v. United States*, [116 U.S. 616 (1886),] the Court's first major interpretation of the Fourth Amendment, drew broad lessons from the eighteenth-century controversies in England and America to which the Amendment responded." Id. However, "by the early 1970s the history of the Fourth Amendment seemed increasingly beside the point." Id. at 1741. As such, while originalism in the Fourth Amendment context cannot be solely attributed to Justice Scalia, its resurgence in the Supreme Court's modern jurisprudence is largely a product of Justice Scalia's making. Id. at 1743.

[63] 500 U.S. 44 (1991).

[64] Sklansky, supra note 1, at 1754–55; *McLaughlin*, 500 U.S. at 56 (resting its decision on a balancing of "competing interests").

[65] *McLaughlin*, 500 U.S. at 60 (Scalia, J., dissenting).

[66] Id. (emphasis omitted) (quoting Gerstein v. Pugh, 420 U.S. 103, 113 (1975)).

individual's common law rights.[67] This concept became the foundation of Fourth Amendment originalism.[68]

While Justice Scalia was writing only for himself in *McLaughlin*, his position gained increasing prominence in the Court over the next three decades. For example, in *Wilson v. Arkansas*, Justice Thomas, writing for a unanimous Court, stated that the meaning of the term "reasonable" is "guided by the meaning ascribed to it by the Framers of the Amendment."[69] And in *Wyoming v. Houghton*, the Court explicitly endorsed a two-step Fourth Amendment analysis, where "traditional standards of reasonableness" are only considered if, after a historical inquiry, the Court determines that the challenged act would not have been "regarded as an unlawful search or seizure under the common law when the Amendment was framed."[70]

In undertaking this analysis, the Court has largely turned to the common law of trespass. In a way, this was a return to tradition; much of the Court's Fourth Amendment jurisprudence prior to the mid-twentieth century was founded upon trespass principles.[71] And in doing so, the Court has settled upon a relatively simple rule that "keeps easy cases easy."[72] First, the Court asks if the government has obtained information by physically intruding on a constitutionally protected area, of which "the home is first among equals."[73] If so, then a search has occurred. Second, the Court asks if the investigation "was accomplished through an unlicensed physical intrusion."[74] This legally unauthorized intrusion, in the Court's view, is what makes that search unreasonable.

This pattern has continued into the twenty-first century. Indeed, Justices from across the ideological spectrum have both acknowledged

[67] Id.

[68] Sklansky, supra note 1, at 1744.

[69] 514 U.S. 927, 931 (1995).

[70] 526 U.S. 295, 299–300 (1999).

[71] United States v. Jones, 565 U.S. 400, 405 (2012); Kyllo v. United States, 533 U.S. 27, 31 (2001); see also Olmstead v. United States, 277 U.S. 438, 466 (1928) (noting that the Fourth Amendment is not violated absent an arrest or "actual physical invasion of [a person's] house 'or curtilage' "), *overruled by* Katz v. United States, 389 U.S. 347 (1967); Boyd v. United States, 116 U.S. 616, 630 (1886) (noting that "the very essence of constitutional liberty and security" created by the Fourth Amendment "appl[ies] to all invasions on the part of the government and its employés [sic] of the sanctity of a man's home").

[72] Florida v. Jardines, 569 U.S. 1, 11 (2013).

[73] Id. at 5, 6. Alternatively, the police need only commit some act that would be akin to a physical intrusion or gather information that could only have been gathered by way of a physical intrusion at the time of the Founding. *Kyllo*, 533 U.S. at 40.

[74] *Jardines*, 569 U.S. at 7.

and used Fourth Amendment originalism in their opinions.[75] *Lange v. California* is a recent example.[76] Justice Kagan, writing for the Court, recognized that the common law is "instructive in determining what sorts of searches the Framers of the Fourth Amendment regarded as reasonable."[77] And while she acknowledged that the common law may be "hard to figure out," she still reaffirmed the position that, since the Framers would have relied upon the common law in determining whether a certain police practice was reasonable (and, therefore, constitutional), "the Framers' view provides a baseline for our own day: The Amendment 'must provide *at a minimum* the degree of protection it afforded when it was adopted.'"[78]

III. THE SUPREME COURT'S METHODS FOR DETERMINING THE CONTENT OF THE COMMON LAW

Since the common law has become, in many ways, the measure of the Fourth Amendment, finding the content of the common law has become critically important. In both historical and recent originalist Fourth Amendment cases, the Supreme Court has routinely looked to a few standard sources to understand what rights actually were protected by the common law.

A. Entick v. Carrington

One common source is the famous case of *Entick v. Carrington*.[79] Often, the Court will use the circumstances surrounding *Entick* and the principles underlying that case to draw broader conclusions about the content of the common law and the meaning of the Fourth Amendment. Indeed, from the very beginning of the Court's Fourth Amendment jurisprudence, the Court has recognized the special place that *Entick*

[75] See Lawrence Rosenthal, An Empirical Inquiry into the Use of Originalism: Fourth Amendment Jurisprudence During the Career of Justice Scalia, 70 Hastings L.J. 75, 100 (2018). In this empirical study of the voting habits of the different Justices throughout Justice Scalia's tenure on the Court, Professor Rosenthal notes that *every* Justice, even those who are not avowed originalists, either authored or joined opinions that either expressly relied on an originalist methodology or considered the original meaning and common law practices surrounding the Fourth Amendment. Id.

[76] 141 S. Ct. 2011 (2021).

[77] Id. at 2022 (quoting Steagald v. United States, 451 U.S. 204, 217 (1981)).

[78] Id. (quoting United States v. Jones, 565 U.S. 400, 411 (2012)).

[79] 19 How. St. Tr. 1029 (C.P. 1765).

occupied in the imaginations of the Founders and in their understanding of searches and seizures. As such, the Supreme Court has stated that Lord Camden's opinion in that case "express[ed] the true doctrine on the subject of searches and seizures, . . . furnishing the true *criteria* of the reasonable and 'unreasonable' character of such seizures."[80] And further, "[t]he principles laid down in [*Entick*] affect the very essence of constitutional liberty and security," serving as "the true and ultimate expression of constitutional law."[81]

With this in mind, it is important to understand the circumstances underlying *Entick* and the "principles" that actually were "laid down" in that case. In 1762, the Earl of Halifax signed a warrant aimed at John Entick for publishing papers satirizing the British government, which the defendant, Nathan Carrington, executed by forcing his way into Entick's home and searching indiscriminately for four hours.[82] Entick then sued Carrington for trespass, but Carrington argued that his actions were justified and that he was protected by the warrant.[83] Lord Camden, however, found that the general warrant authorizing the search, in which "nothing had been described, nor the target of the search distinguished," was invalid under the laws of England and thus offered Carrington no defense or justification for his trespass.[84]

In explaining his decision, Lord Camden stated that the right to be secure in one's property is "sacred and incommunicable," except where the law abridges that right "for the good of the whole."[85] As such, anyone who "set[s] his foot upon my ground without my licence . . . is liable to an action" in trespass; even those who merely "bruis[e] the grass" are liable unless they can show, "by way of justification, that some positive law has empowered or excused him. . . . If no such excuse can be found or produced . . . the plaintiff must have judgment."[86] Furthermore, the fact that the trespasser was an officer attempting to "detect[] offenders by discovering evidence" similarly provided the officer with no defense, for even "the king himself has no power to declare when the law ought to be

[80] Boyd v. United States, 116 U.S. 616, 630 (1886) (emphasis added) (quoting U.S. Const. amend. IV).

[81] Id. at 626, 630.

[82] Laura K. Donohue, The Original Fourth Amendment, 83 U. Chi. L. Rev. 1181, 1196–97 (2016).

[83] *Entick*, 19 How. St. Tr. at 1030–31.

[84] Donohue, supra note 82, at 1197–98.

[85] *Entick*, 19 How. St. Tr. at 1066.

[86] Id.

violated for reason of state."[87] Indeed, it was the official nature of Carrington's trespass that made the trespass a governmental search and seizure in the first place.[88]

Entick, therefore, established a two-part inquiry for determining if a search or seizure is actionable in trespass and would have been unreasonable under the Fourth Amendment. First, the plaintiff needed to establish, or the defendant needed to admit, that the entry onto the plaintiff's property was unlicensed. Then, the burden shifted to the defendant, who needed to prove that his or her actions were justified under the law. And the entry needed to be *actually and legally* justified—merely the fact that the officer thought the entry was justified, as Carrington surely did by relying upon a general warrant of the type that had been routinely utilized during the eighty years between the Glorious Revolution and 1765,[89] was insufficient.

We can see the plain influence of *Entick* from the fact that its own search and seizure analysis was clearly a model for the trespass- and property-based test utilized by the Court in many of its recent Fourth Amendment cases.[90] Indeed, many of those cases themselves explicitly reference *Entick* while explaining the principles underlying the property-based view of the Amendment and in applying that test.[91]

However, while *Entick* has been influential in establishing many of the baseline rules and principles regarding trespass and justification, its discussion lacks specifics regarding what would count as a justification. As such, the Court has often had to branch beyond *Entick* to fill in many of the gaps regarding the more specific content of the common law. And it has done this generally by referring to two primary sources: commentators and case law.[92]

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[87] Id. at 1073.

[88] See United States v. Jones, 565 U.S. 400, 406 n.3 (2012) ("Where, as here, the Government obtains information by physically intruding on a constitutionally protected area, such a search has undoubtedly occurred.").

[89] *Entick*, 19 How. St. Tr. at 1035. As Professor Donohue further documents, the English Crown's use of general warrants extended even to the sixteenth century. Donohue, supra note 82, at 1208–09.

[90] See supra note 74 and accompanying text.

[91] See, e.g., *Jones*, 565 U.S. at 405 ("[N]o man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law." (quoting Entick v. Carrington, 95 Eng. Rep. 807, 817 (1765))); Florida v. Jardines, 569 U.S. 1, 7–8 (2013).

[92] This is not an exhaustive list, and the Court has often turned to other sources, such as statutory law. See, e.g., Wilson v. Arkansas, 514 U.S. 927, 933 (1995).

B. Commentators and Early American and English Case Law

Often, the Court has looked to see if well-known common law commentators have specifically weighed in on the question presented before the Court. For example, the Court leaned heavily on Sir William Blackstone's *Commentaries on the Laws of England* in the formulation of its modern curtilage and open-fields doctrines.[93] Similarly, the Court in *Lange v. California* looked at various common law treatises to conclude that the hot-pursuit exception only applied to felonies. In so doing, the Court concluded that "commentators thus differed on the scope of the felony exception to the warrant requirement. But they agreed on one thing: It was indeed a *felony* exception."[94] This uniformity was influential (if not dispositive) in refuting any claim that a hot-pursuit exception should apply categorically to all crimes, including misdemeanors.

The Court has also routinely taken the path traditional to all common law courts and has determined the content of the common law by analyzing case law.[95] As such, it has often based its understanding of the common law of searches and seizures by looking at English and early American search and seizure cases.

Those cases occasionally provide express answers to the question presented before the Court. For example, in *Wilson v. Arkansas*, the Court interpreted the Fourth Amendment to require that officers ordinarily need to knock, announce their presence, and give homeowners a chance to respond to them before they can forcibly enter a home to execute a warrant.[96] It did so largely because "[t]he common-law knock and announce principle was woven quickly into the fabric of early American law."[97] Specifically, the Court noted that many states had expressly codified that common law requirement through statutory law and that,

[93] See, e.g., Oliver v. United States, 466 U.S. 170, 180 (1984) (citing 4 William Blackstone, Commentaries *225); United States v. Dunn, 480 U.S. 294, 300 & n.3 (1987) (citing Blackstone, supra, at *223, *225–26).

[94] Lange v. California, 141 S. Ct. 2011, 2023 (2021).

[95] See, e.g., United States v. Watson, 423 U.S. 411, 420 (1976) (citing "early cases" relying upon the common law rule that officers could, upon probable cause, arrest suspected felons in public without a warrant); *Wilson*, 514 U.S. at 933 (noting how "[e]arly American courts" acknowledged that officers needed to knock and announce their presence before they could forcibly enter a home under a search warrant).

[96] 514 U.S. at 929.

[97] Id. at 933.

even when a state had not done so, "[e]arly American courts similarly embraced the common-law knock and announce principle."[98]

Likewise, in *Atwater v. City of Lago Vista*, the Court addressed whether a "breach of the peace" was a constitutional prerequisite to an officer's ability to arrest a misdemeanant without a warrant.[99] In reviewing the historical record, the Court ultimately rejected this position and held that, because the common law had no unanimous (or well-settled, near-unanimous) rule to the contrary, an officer has the constitutional authority to arrest anyone who "has committed even a very minor criminal offense in his presence."[100]

Interestingly, the Court's analysis in *Atwater* largely proceeds in the negative sense. Instead of showing that the common law *recognized* an officer's power to arrest misdemeanants without a warrant, the Court based its conclusion on the fact that American and English cases were *inconsistent* on this point. As such, the Court acknowledged that Atwater's argument for the "breach of the peace" requirement did have some historical support from commentators and case law.[101] But the Court then marched through its own historical evidence showing that there was no such requirement and that warrantless arrests of misdemeanants were utterly unproblematic. Among this evidence were "the numerous early- and mid-19th-century decisions expressly sustaining (often against constitutional challenge) state and local laws authorizing peace officers to make warrantless arrests for misdemeanors not involving any breach of the peace."[102] In the Court's view, this doomed any attempt to incorporate that requirement into the Fourth Amendment; if there is a deeply rooted and long-standing practice of permitting these arrests, then it is hard to argue that the common law or the Framers would have seen them as inherently unreasonable or unlawful. Absent the sort of consistency seen in *Wilson*,[103] the Court was not willing to recognize that arrests made without adhering to a "breach of the peace" rule were unconstitutional. On the contrary, the presence of ample cases and commentators affirmatively showing that officers *could* at least

[98] Id.

[99] 532 U.S. 318, 327 (2001).

[100] Id. at 354.

[101] Id. at 329–30.

[102] Id. at 342–43.

[103] Id. at 341 ("[I]n contrast with *Wilson*, it is not the case here that '[e]arly American courts . . . embraced' an accepted common-law rule with anything approaching unanimity." (alteration in original) (quoting Wilson v. Arkansas, 514 U.S. 927, 933 (1995))).

occasionally arrest mere misdemeanants counseled in favor of a constitutional interpretation that similarly permitted that.

IV. THE COMMON LAW OF TRESPASS AND INVALID/MISTAKEN AUTHORITY

With this understanding of *Entick*'s (and the current Supreme Court's) analysis of the common law of searches and seizures, the issue now shifts to applying those principles to the circumstances surrounding *Rodriguez*. Namely, we must ask whether the officers' entry into Rodriguez's home was a trespass and whether that trespass was justified or excused by their reasonable mistake regarding Fischer's authority to grant consent.

A. Trespass Quare Clausum Fregit

In a case like *Rodriguez*, where the officers entered the defendant's house without permission, the most relevant form of trespass would be trespass *quare clausum fregit* (Latin: "why he broke the close"). This form of trespass, also known as trespass to land or trespass to real property, was the specific common law action available to those seeking redress for another's unlicensed entry upon their own land or property.[104]

Common law commentators understood trespass to land as relatively simple. According to Sir William Blackstone, trespass to land "signifies no more than an entry on another man's ground without a lawful authority, and doing some damage, however inconsiderable, to his real property."[105] As such, every unlicensed entry was actionable because "every such entry or breach of a man's close carries necessarily along with it some damage or other . . . *viz.* the treading down and bruising his herbage."[106]

Most early American courts understood trespass *quare clausum fregit* similarly: "Every unauthorized entry upon the land of another is a *trespass*

[104] Trespass, Black's Law Dictionary (11th ed. 2019). Trespass *vi et armis* (Latin: "with force and arms") was a similarly available action, since the "force" required for that action was "implied by the 'breaking' of the close (that is, an enclosed area), even if no real force is used"; but, for simplicity and to ease confusion, this Note will focus on trespass *quare clausum fregit*. Id.; see also Forcible, Black's Law Dictionary (11th ed. 2019) (defining the term "forcible" with reference to the law of trespass).

[105] 3 Blackstone, supra note 93, at *209.

[106] Id. at *209–10; 2 Isaac Espinasse, A Digest of the Law of Actions at Nisi Prius 56–57 (Phila., J. Cruckshank & W. Young 1791).

for which an action lies, though the damages be merely *nominal*."[107] The law created a rule of strict liability,[108] focused purely on whether the defendant had actually entered upon the plaintiff's land (i.e., broke the close) and whether that entry was authorized or licensed.[109] As such, questions of apparent authority and the defendant's intent were irrelevant. As the Supreme Court of the District of Columbia said,

> A trespass is simply an unauthorized entry by one person upon the land of another, and it can make no manner of difference whether the person making the unauthorized entry knew it was the land of the plaintiff or supposed it to be the land of a third person or supposed that it was his own land. The question is not what he knew or supposed in reference to the ownership of the land; but was it in fact the land of another, and not his own and did he go upon it without authority or license from the lawful proprietor? If he did he committed a trespass, although it might be but a technical trespass entitling the owner to merely nominal damages.[110]

[107] Dixon v. Clow, 24 Wend. 188, 188 (N.Y. Sup. Ct. 1840); see also Brown v. Perkins, 83 Mass. (1 Allen) 89, 89 (1861) ("An entry into the building of another without license express or implied is a trespass, and entitles the owner to nominal damages."); Adams v. Freeman, 12 Johns. 408, 409 (N.Y. Sup. Ct. 1815) ("To enter a dwelling house without license, is, in law, a trespass."); Hatch v. Donnell, 74 Me. 163, 163 (1882) (finding trespass where "[t]he defendant had no right of entry on the plaintiff's land . . . [because] [p]ermission was not asked nor license given"). Recall also that this largely mirrors Lord Camden's understanding of trespass. Entick v. Carrington, 19 How. St. Tr. 1029, 1066 (C.P. 1765) ("No man can set his foot upon my ground without my licence, but he is liable to an action; though the damage be nothing . . . .").

[108] Leigh M. Clark, Trespass Quare Clausum Fregit—Strict Liability or Not, 12 Ala. L. Rev. 301, 301 (1960); John C.P. Goldberg & Benjamin C. Zipursky, The Strict Liability in Fault and the Fault in Strict Liability, 85 Fordham L. Rev. 743, 748 (2016); Restatement (First) of Agency § 311 cmt. b (Am. L. Inst. 1933) ("A person is not protected if he voluntarily meddles with another's property by the fact that he is mistaken as to his rights in such things. If a third person enters upon or takes possession of land or chattels of the principal, he is a trespasser or converter if the agent has no power to give the principal's consent, although such person reasonably believes the agent to be the owner or to be authorized to give consent.").

[109] Restatement (Second) of Torts § 166 cmt. b (Am. L. Inst. 1965) ("The early English common law seems to have imposed liability upon one whose act directly brought about an invasion of land in the possession of another, irrespective of whether the invasion was intended, was the result of reckless or negligent conduct, or occurred in the course of an abnormally dangerous activity, or was a pure accident, and irrespective of whether harm of any sort resulted to any interest of the possessor. All that seems to have been required was that the actor should have done an act which in fact caused the entry.").

[110] Cahill v. Harris, 6 D.C. 214, 215 (1867).

Under this understanding of trespass, it was no defense that the trespasser believed that he or she was authorized[111] to enter upon the plaintiff's property. Indeed, "[t]respass *quare clausum fregit* lies, though the act were not intentional,"[112] and a trespasser would be held liable even though the trespass came from an honest mistake.[113]

1. A Trespasser's Mistake Regarding the Scope of Their Own Authority Was Not Excused Where the Mistake Was Induced by the Property's Owner

The rule that all unauthorized entry was actionable was occasionally harsh, but early courts rarely bucked the rule. For example, various courts held that a defendant was liable in trespass, even when the defendant's mistake about their own authority was directly caused by the plaintiff. Consider the case of *Pearson v. Inlow*.[114] In that case, the plaintiff, John Pearson, sold part of his land to the defendant, Abraham Inlow, which Inlow planned to use for logging.[115] When the two men went to ascertain the new boundary line between their two lots, Pearson incorrectly indicated where Inlow's new property ended.[116] Inlow eventually logged

[111] This Section largely proceeds using the terms "authorization" and "license" interchangeably. Of course, this is not always true, as authorization could come from another source. In South Carolina, for example, early cases held that there could be no action for trespass *quare clausum fregit* when defendants entered onto a plaintiff's "unenclosed and uncultivated lands" for hunting purposes since that was "a right which the law gives," albeit a right that admittedly *departed* from the stricter rules of the English common law. McConico v. Singleton, 9 S.C.L. (2 Mill.) 244, 244–46 (1818); Broughton v. Singleton, 11 S.C.L. (2 Nott & McC.) 338, 340 (1820); see also Rowland Jay Browne, A Practical Treatise on Actions at Law 421 (London, Henry Butterworth 1843) (defining "close"). Since positive law authorized the entry and the plaintiff could not divest the defendant of that right, his consent (or express lack of it) was irrelevant. However, it is entirely plausible to see authorizations granted by law as justifications that excuse an unlicensed entry, making it a question more appropriate in the second step of the trespass analysis. See 2 Espinasse, supra note 106, at 56–57 (defining "trespass" as "[e]very entry upon the land of another . . . if done without the owner's consent," but then noting that the law gives certain individuals a right to enter another's land without a license such that they will not be trespassers).

[112] Browne, supra note 111, at 420.

[113] Clarke Butler Whittier, Mistake in the Law of Torts, 15 Harv. L. Rev. 335, 347 (1902). The one possible exception to this principle is where the act that led to the entry was itself unintentional (e.g., where the defendant only entered the property at all because of some involuntary accident, such as tripping over a plank and crossing a boundary line), but even that exception was not absolute. Id. at 347 n.8 (comparing *The Nitro-Glycerine Case*, 82 U.S. (15 Wall.) 524 (1872), with *Newsome v. Anderson*, 24 N.C. (2 Ired.) 42 (1841)).

[114] 20 Mo. 322 (1855).

[115] Id. at 322.

[116] Id.

up to the line indicated by Pearson, not knowing that he had actually cut beyond his property line and entered into Pearson's lot.[117] After Pearson sued Inlow in trespass, the Supreme Court of Missouri upheld Inlow's liability; according to that court, the fact that Pearson was the cause of the mistake was irrelevant since his statements did not vest Inlow with any property interest over the land or the trees.[118]

In a similar case, *Maye v. Yappen*, the Supreme Court of California also held that the defendant's mistake caused by the plaintiff's error was not an excuse for the defendant's subsequent trespass.[119] The fact that the defendant's mining operations extended into the plaintiff's lot was sufficient to trigger trespass liability because the plaintiff's mistaken assertion that the defendant had not crossed over into the plaintiff's property could not be construed as a license to enter that property.[120]

Of course, these cases differ somewhat from the scenario presented in *Rodriguez*. These two cases concern situations where the defendants were mistaken about the scope of *their own* authority over the land in question. They believed that they were working on their own land, and they undoubtedly would have had authority to mine or log the land if they had in fact owned it. *Rodriguez*, however, dealt with a case of third-party consent—the officers needed some other person to authorize their entrance into Rodriguez's apartments because they had no right to enter on their own. In that case, therefore, the officers were mistaken about the scope of *a third party's* authority over the property, which in turn affected their own.

2. A Trespasser's Mistake Regarding the Scope of Their Own Authority Was Not Excused Where the Mistake Was Induced by Third Parties

Early American cases address this scenario, too. And they indicate that the result is the exact same: a mistake about a third party's authority to consent to or authorize entrance onto a property does not excuse a trespass. In *Baring v. Pierce*, for example, the plaintiff brought an action of trespass *quare clausum fregit* against the defendant, who had logged the plaintiff's land.[121] In defense, the defendant argued that he was permitted to enter the property pursuant to a contract he had made with

[117] Id.
[118] Id. at 323.
[119] 23 Cal. 306, 306 (1863).
[120] Id. at 308.
[121] 5 Watts & Serg. 548, 548 (Pa. 1843).

the owner's agent.[122] The Supreme Court of Pennsylvania, however, found that the agent had acted in excess of his actual authority.[123] And *ultra vires* agreements alone "will furnish no defence to an action of trespass *quare clausum fregit*."[124] The fact that the court made no further inquiry into apparent authority or the defendant's good faith or reasonable belief as to the agent's power to permit him to enter the property proves that lack of actual authority alone was sufficient to impose liability.[125]

We see a similar situation in *Essington v. Neill*.[126] There, a defendant who had carried away lumber from the plaintiff's land sought to justify his actions by claiming that he had been ordered to do so by the wife of a third party who also had claim to the land.[127] The court found, however, that even if the third party had color of title to the land, that provided no defense to the defendant because he had been ordered onto the property by the *wife* who, under Illinois law, was not the agent of her husband.[128] And since the wife had no actual authority over the land, her direction (consent) to enter upon the land and seize the lumber actually owned by the plaintiff was not exculpatory. Again, actual authority was the beginning and end of the inquiry—the reasonableness of the defendant's belief was not even relevant enough to be mentioned.[129]

Likewise, early American courts concluded that a license given by a third party who was a *prior* owner of a property creates no defense to a trespass suit instituted by the land's current owner. As the Supreme Court explained, "by the conveyance of the lands to the plaintiff the license from the original owner was necessarily terminated."[130] And courts reached the same result where the defendant received consent to enter the land from a prior owner who had passed away, noting that a mere license based on consent has no duration beyond the prior owner's interest in the

[122] Id. at 550–51.
[123] Id. at 551.
[124] Id. at 548.
[125] See id. at 551–52.
[126] 21 Ill. 139 (1859).
[127] Id. at 139–40.
[128] Id. at 142–43.
[129] Id.
[130] N. Pac. R.R. Co. v. Paine, 119 U.S. 561, 566 (1887); see also Harris v. Gillingham, 6 N.H. 9, 11 (1832) ("[W]hen Ames conveyed the land . . . the license to occupy the house, upon the land, which the [trespasser] may have derived, by implication, from the license to erect it, expired.").

property.[131] Importantly, these courts never discussed as a possible defense whether the defendants knew that the person who granted them the license no longer owned the property, nor whether it was reasonable to continue to believe that their licenses remained valid.[132] And thus, a license granted by a third party, even one who had the power to grant the license when he or she did, would not protect a defendant from an action in trespass if that license had evaporated by the time of the trespass.

3. Application to Illinois v. Rodriguez

These cases, and those like it,[133] all point in the same direction: trespass *quare clausum fregit* was a strict liability tort in which the defendant's knowledge and beliefs, even those arrived at in good faith, were completely irrelevant. The only thing that really mattered was whether the defendant entered upon the possessor's property without a license. If she did, she would be liable, regardless of why she broke the plaintiff's close.

This conclusion cuts largely against the reasoning in *Rodriguez*. Recall that in *Rodriguez*, the Court determined that a search pursuant to apparent authority was constitutionally reasonable if "the facts available to the officer at the moment . . . 'warrant a man of reasonable caution in the belief' that the consenting party had authority over the premises."[134] In other words, a search would be permissible if the officers reasonably, though mistakenly, believed that the person giving them consent was actually authorized to do so.

[131] Putney v. Day, 6 N.H. 430, 432 (1833); cf. Hunt v. Ennis, 12 F. Cas. 913, 914–15 (Story, Circuit Justice, C.C.R.I. 1821) (No. 6889) (noting that a power or authority created by individuals expires upon their death, provided there is no legal interest attached to the power).

[132] See *Paine*, 119 U.S. 561; *Putney*, 6 N.H. at 431–32.

[133] See also, e.g., Allison v. Little, 5 So. 221, 224 (Ala. 1889) ("It was no defense to this action that the defendant had cut the trees by the instructions of certain persons, who had no lawful right to confer on him the authority to do so, although he believed they had such authority. He was the victim of his own credulity, and must be the sufferer by his negligence in not inquiring, rather than that the loss should be visited on another who is innocent."); Huling v. Henderson, 29 A. 276, 278 (Pa. 1894) ("If [an apparent agent] had in fact no authority, permission from him did not excuse the trespass, no matter what defendant thought."); Oswalt v. Smith, 12 So. 604, 605 (Ala. 1893) (noting that trespass may lie against a servant who cut down trees on another's property, even where the servant was told by an agent of the master that the trees were on the master's property); cf. Tourne v. Lee, 8 Mart. (n.s.) 548, 549 (La. 1830) ("Trespassers, or those accused of trespassing on the rights of others, cannot relieve themselves from responsibility, by pleading, in defence, the authority of third persons.").

[134] Illinois v. Rodriguez, 497 U.S. 177, 188 (1990) (quoting Terry v. Ohio, 392 U.S. 1, 21–22 (1968)).

But these early American cases would seem to counsel the Court to reach exactly the opposite conclusion. Early American cases indicated that *all* unauthorized entry into another's home was an actionable trespass. And the key inquiry was not whether the action would have been authorized *if the facts were as the trespasser (reasonably) believed them to be* but whether the action was authorized upon the facts *as they actually existed*. This is why a trespasser would be liable even if he reasonably believed he was on his own property or if she reasonably believed that she was permitted to enter onto another's property. Whether or not the entry would have been a trespass had the facts been as the trespasser believed them to be might have influenced damages but certainly not liability.[135]

This demonstrates the central disconnect between the common law and the Court's analysis in *Rodriguez*. Justice Scalia saw this as a question premised on facts: Was the officer behaving "reasonably" in relation to his or her factual conclusions, in a way that comports with the leeway built into the probable cause standard? But the common law focused more on the *legal* question of authority: Did the law or the third party actually authorize the entry into the property? And the legal question of whether or not the defendant had the requisite authority (granted by law, the plaintiff, or an authorized third party) brooked no mistake.

But of course, this only addresses the first step of *Entick*'s two-part search and seizure analysis. While any unauthorized entry onto another's property, even one premised on reasonable belief or apparent authority, would have been a trespass, we still must consider whether an officer's reasonable mistake about the scope of his own authority to enter onto another's property in furtherance of his official duties would have provided a legal excuse justifying the trespass.

[135] Simpson v. McCaffrey, 13 Ohio 508, 522 (1844) (en banc) ("The evidence [that an officer's trespass was reasonable and bona fide] in no sense constituted a justification of the trespass complained of. But it was competent in mitigation of damages."); Theodore Sedgwick, A Treatise on the Measure of Damages 488–92 (N.Y., John S. Voorhies 1847) (collecting English and American cases applying exemplary damages for willful trespass).

B. Invalid/Mistaken Authority Provided No Defense for Actions Taken in Excess of Actual Authority

1. An Officer's Belief That He Was Authorized or Required to Act Was No Defense

Let us begin with the famous case of *Little v. Barreme*.[136] This case took place during the Quasi-War, a period of "undeclared naval war" between the United States and France.[137] On December 2, 1799, United States ships under the command of Captain George Little captured a Danish brigantine, the *Flying Fish*, under suspicion that the ship had violated the nonintercourse law that Congress had passed earlier that year.[138] That law had prohibited American residents from engaging in any naval commerce with France or its dependencies,[139] and it further authorized the President to order the U.S. Navy to examine and seize any American ships that appeared to be sailing *toward* French ports with the intention of "engag[ing] in such illicit commerce."[140] However, in response to this law, the President issued orders sweeping more broadly than that which was authorized by the express terms of the law, commanding Captain Little to "prevent all intercourse" between American and French ports by ensuring that all American ships, including those "bound to, *or from*, French ports, do not escape."[141] Pursuant to these orders, Captain Little seized the *Flying Fish* as it was *departing* from the French port of Jeremie.[142]

The Court found that this seizure was not authorized by Congress's statute and was therefore illegal.[143] The fact that Captain Little was just following orders was irrelevant because "the instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass."[144] And while this case has long been a staple of national security law, the actual holding of the case states that Captain Little, despite his good faith belief that he was

[136] 6 U.S. (2 Cranch) 170 (1804).
[137] Michael J. Glennon, Two Views of Presidential Foreign Affairs Power: *Little v. Barreme* or *Curtiss-Wright*?, 13 Yale J. Int'l L. 5, 6 (1988).
[138] *Little*, 6 U.S. (2 Cranch) at 170, 175.
[139] Id. at 170 (quoting Act of Feb. 9, 1799, ch. 2, § 1, 1 Stat. 613, 613–14).
[140] Id. at 171 (quoting § 5, 1 Stat. at 615).
[141] Id. (emphasis omitted).
[142] Id. at 176.
[143] Id. at 179.
[144] Id.

authorized to seize the *Flying Fish* and his general duty to follow all the orders of his superiors, must be liable for his trespass in an ordinary tort suit.[145] In effect, the officer's mistaken assumptions—that his orders were valid and that he was authorized to seize the ship—were no defense.[146]

This conclusion was not isolated to *Little v. Barreme*. In *Tracy v. Swartwout*, for example, the Court rejected a lower court's ruling that a governmental officer could not be held liable for compensatory damages when the officer was "pursuing what he believed to be his duty."[147] That case involved a dispute over the amount of duties to be paid on imported cane syrup.[148] The law required that the importers pay a fifteen-percent *ad valorem* tax on the goods, an amount that the plaintiffs attempted multiple times to pay.[149] The defendant, however, refused to permit the plaintiffs to import the syrup into the country at that rate.[150] Instead, he told the plaintiffs that they would have to pay a tax of three cents per pound.[151] The plaintiffs refused to pay this tax, leaving the syrup to sit in a government warehouse until the government "changed its views of the law" and delivered the goods under the prescribed fifteen-percent *ad valorem* tax.[152] By this time, unfortunately, the syrup had lost substantial value.[153]

The plaintiffs sued to recover damages.[154] However, the jury only awarded them a judgment of six cents.[155] Why? Because the trial court instructed the jury that it could impose no more than "nominal damages" upon the officer since he, in good faith, had been following the orders of his superiors instructing him "not to permit the entry at less than three cents per pound."[156]

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[145] Id. ("Captain *Little* then must be answerable in damages to the owner of this neutral vessel . . . .").

[146] Compare this to *Rodriguez*, where the officer's mistake about the validity of Fischer's consent, and his authorization to search the house, *was* a defense to the constitutionality of the search. Illinois v. Rodriguez, 497 U.S. 177, 188–89 (1990).

[147] 35 U.S. (10 Pet.) 80, 83, 97 (1836).

[148] Id. at 81.

[149] Id. at 81–82; see Act of July 14, 1832, ch. 227, § 17, 4 Stat. 583, 593 ("That syrup imported in casks . . . shall pay fifteen per centum ad valorem.").

[150] *Swartwout*, 35 U.S. (10 Pet.) at 82.

[151] Id. This was at least 6.67 times greater than the tax actually imposed by the law.

[152] Id.

[153] Id. at 83.

[154] Id. at 93.

[155] Id. at 94.

[156] Id. at 82, 83. Even this award of six cents, however, recognizes that officers are not immunized from suit simply due to a mistake in their authority or duty. Nominal damages

The Supreme Court disagreed, rejecting the proposition that good faith immunized officers from paying damages caused by their own unlawful acts.[157] On the contrary, the Court held that "[i]t would be a most dangerous principle to establish, that the acts of a ministerial officer, when done in good faith, however injurious to private rights, and unsupported by law, should afford no ground for legal redress."[158] While such an officer should *not* be liable for exemplary or punitive damages, the Court was clear that officers "can claim no further exception."[159] It did not matter that Swartwout believed he was both authorized and duty-bound to seize and hold the syrup: the fact that he actually exceeded the scope of his lawful authority made his conduct tortious.[160] This case, therefore, reaffirms the principle that an officer's mistake about the scope of his own authority was no defense to liability, emphasizing the idea that the common law afforded individuals protections in the face of officers who, even acting in complete good faith, exceeded their authority during the course of their duties.

Finally, compare this principle to the rule of law recognized by the Court in the case of *Amy v. The Supervisors*.[161] While this case involves an executive officer's omission to act, rather than a tortious commission,[162] the Court reaffirmed the rule that it clearly established in *Little* and *Tracy*: "A mistake as to his duty and honest intentions will not excuse the offender."[163] Indeed, the Court considered this principle to be so foundational and well-established that it provided no citation for the

were an important remedy at common law designed to recognize any violation of a legal right. Uzuegbunam v. Preczewski, 141 S. Ct. 792, 799 (2021).

[157] *Swartwout*, 35 U.S. (10 Pet.) at 95.

[158] Id.

[159] Id.

[160] Id. ("The collector has a right to hold possession of imported goods until the duties are paid or secured to be paid, as the law requires. But, if he shall retain possession of the goods, and refuse to deliver them after the duties shall be paid, or bond given, or tendered, for the proper rate of duties, he is liable for the damages which may be sustained by this refusal.").

[161] 78 U.S. (11 Wall.) 136 (1870).

[162] As a brief recounting of the facts of this case, Amy "obtained a judgment for money against Desmoines County, Iowa." Id. at 136. The Court then issued a mandamus to the county supervisors to levy a tax so that the county could pay that judgment. Id. The supervisors disobeyed the mandamus and were consequently sued in their individual capacities for recovery of the judgment. Id. The lower court dismissed the case, but the Supreme Court reversed and remanded. Id. at 139.

[163] Id. at 138.

proposition; instead, it merely stated that "[t]here is an unbroken current of authorities to this effect."[164]

These cases support the proposition that officers acting outside their authority were treated like all others who violated the private, common law rights of individuals.[165] The fact that they believed that their actions were authorized (or not, in the case of *Amy*) was no defense. And the fact that the Court ultimately imposed liability is no surprise in light of the traditional common law principle that "reasonable, good-faith belief was no defense to absolute liability for trespass."[166]

2. Invalid Warrants Provided No Defense to Trespassing Officers

These Supreme Court opinions reflect similar principles established in other common law cases. Consider, for example, the variety of cases holding that facially invalid warrants provide no defense or justification to a trespassing officer. Indeed, this was exactly the case in *Entick v. Carrington*.[167] There, Carrington intruded upon Entick's home pursuant to the authority of the general warrant. But since the warrant was itself fundamentally flawed, it was as though it never existed, depriving Carrington of any defense it might have provided.[168]

As Professor Donohue explains, *Entick* was not the only English case from this time that rejected an officer's claim to authority coming from an invalid warrant. Instead, it was just one part of a pattern of cases that "laid the groundwork" for the Founder's views of the Fourth Amendment.[169] For example, two other cases, *Wilkes v. Wood*[170] and *Leach v. Money*,[171] rested upon the exact same principles laid down by Lord Camden in *Entick*: when a warrant itself fails to comply with the law, that warrant does not justify an officer's otherwise tortious actions.

[164] Id.

[165] See Amar, supra note 48, at 774 ("[A]ny official who searched or seized could be sued by the citizen target in an ordinary trespass suit . . . .").

[166] California v. Acevedo, 500 U.S. 565, 583 (1991) (Scalia, J., concurring). Indeed, Justice Scalia even cited to *Little* in support of this principle. Id. (citing Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804)).

[167] 19 How. St. Tr. 1029 (C.P. 1765).

[168] See supra Section III.A.

[169] Donohue, supra note 82, at 1196.

[170] 19 How. St. Tr. 1153 (C.P. 1763).

[171] 19 How. St. Tr. 1001 (K.B. 1765).

In *Wilkes*, a member of Parliament was arrested, and his papers were seized, under a general warrant.[172] Lord Camden presided over this case as well, and he found the arrest and the search and seizure of Wilkes's papers unlawful: the arrest was invalid since Wilkes was protected by Parliamentary privilege, and the search and seizure was unlawful since the warrant was too general to be valid.[173] As such, Wilkes was entitled to damages, and the jury awarded him a staggering judgment of £1,000.[174] And in *Leach*, a case factually similar to *Wilkes*, Lord Mansfield agreed with Lord Camden that general warrants violated the common law.[175] According to him, all of the common law commentators had held "such an uncertain warrant void," meaning that a defendant officer could find in them no refuge.[176]

Following independence, American courts reached the same conclusion that reliance upon facially invalid warrants provided no justification to trespassing officers. In *Grumon v. Raymond*, for example, the Supreme Court of Errors of Connecticut rejected the authority conferred by a warrant purporting to allow a sheriff and his constables to search any "suspected places, houses, stores, or barns" in the town of Wilton and to search any suspected persons for two stolen bags.[177] Relying largely upon *Entick*, the court held that any warrant so vague and expansive upon its face would be illegal.[178] And since every officer is "bound to know the law," the execution of that invalid warrant made the officer liable in trespass.[179]

Similarly, in *Reed v. Rice*, the Court of Appeals of Kentucky—the state's highest court at the time—held that an officer could be held liable in an action for trespass *quare clausum fregit* for executing a warrant that did not sufficiently describe the place to be searched.[180] That court clarified that when an individual or officer "officiously [undertakes to execute the law, as he conscientiously believed at the time,] then he puts his conduct upon his own judgment, and if that deceives, he is

[172] Donohue, supra note 82, at 1201–02.
[173] Id. at 1203–04.
[174] Id. at 1204.
[175] Id. at 1205.
[176] Id. at 1207 (quoting *Leach*, 19 How. St. Tr. at 1027).
[177] 1 Conn. 40, 41, 44 (1814).
[178] Id. at 43–45.
[179] Id. at 48.
[180] 25 Ky. (2 J.J. Marsh) 44, 46, 48 (1829).

responsible."[181] And likewise, the Supreme Court of Ohio held that evidence that an officer mistakenly believed he was legally justified in executing a warrantless search was inadmissible, since "[a] trespass may be committed from a mistaken notion of power, and from an honest motive to accomplish some good end. But the law tolerates no such abuse of power, nor excuses such act."[182]

As such, it is clear that early American courts found that an officer's mistaken belief in their authority under a warrant was no excuse where the warrant, on its face, was invalid. The rule became more complicated, however, where the warrant was facially valid but where some procedural quirk made it irregular. Often, the key question turned on whether the issuing court had subject matter jurisdiction over the action and filed the warrant with the required elements, such as the oath and description of the place to be searched. For example, consider *Savacool v. Boughton*.[183] There, the Supreme Court of Judicature of New York found that a process protected an officer even though the issuing court did not have *personal* jurisdiction over the subject of that process.[184] Since the face of the warrant indicated that the issuing court had *subject matter* jurisdiction over the case, and since there would be no way for the officer to know that the court had no jurisdiction over the person affected by the process, the officer was not liable for an action in trespass.[185]

In so holding, the court emphasized a few fundamental considerations. As a general rule, "[w]here the court issuing the process has general jurisdiction, and the process is regular on its face . . . the officer has a protection by reason of his regular writ."[186] However, when the process issues from a court of limited jurisdiction, and the process exceeds the jurisdiction of the issuer, then the process is void and offers no

[181] Id. at 47.

[182] Simpson v. McCaffrey, 13 Ohio 508, 509, 522 (1844) (en banc); see also, e.g., Sandford v. Nichols, 13 Mass. 286, 289 (1816) (noting that a defective warrant cannot provide an officer lawful authority to trespass); Reed v. Lucas, 42 Tex. 529, 532–33 (1875) (noting that a refusal to allow those executing a search warrant to justify a trespass due to an invalid warrant, even where they "denied all malice [and] claimed that they acted, as they believed, in obedience to law," was not objectionable since it reflects "the law on that subject"); Halsted v. Brice, 13 Mo. 171, 174–75 (1850) (finding it "oppressively apparent" that a warrant that is "insufficient and absolutely illegal upon its very face" is "utterly inadmissible for any purpose, whether in justification, excuse or mitigation").

[183] 5 Wend. 170 (N.Y. Sup. Ct. 1830).

[184] Id. at 181.

[185] Id.

[186] Id. at 172 (emphasis omitted).

protection.[187] Of course, it is important to note that the *Savacool* court noted that the rules it articulated were not uniform rules, and that many courts had found that officers would be liable even in the first set of circumstances.[188] But the mere fact that a rule was not universally followed does not mean that it was not decisively settled,[189] and based on the extent of previously discussed authorities attacking immunities for officers acting in excess of authority, there is at least some reason to pause in the face of this supposed justification.

Still, conceding the validity of this justification does nothing to affect the analysis thus far presented, because it is an exception premised upon a warrant issued by a court of competent subject matter jurisdiction. Warrants were traditionally seen as a safeguard against officer liability; that was their primary purpose.[190] Consent does not come freighted with that same pedigree. But even assuming it does, apparent-authority consent, such as we see in *Rodriguez*, does not fit comfortably under this exception. Before a court would even think to apply it, a trespassing officer would have to show that the body issuing the process or warrant had good subject matter jurisdiction over the action.[191] That is, the court must determine if the warrant-issuing magistrate had "power to exercise authority" and "rule on the conduct of persons or the status of things" based on the "nature of the case and the type of relief sought."[192] When we consider these questions in the context of consent to enter onto a

[187] Id.; see also Champaign Cnty. Bank v. Smith, 7 Ohio St. 42, 51 (1857) (same). Further, officers are "presumed to know the law," which includes whether the process was being issued by a body of competent subject matter jurisdiction. Noles v. State, 24 Ala. 672, 695 (1854). As such, where a warrant issues from a magistrate for an offense that the magistrate has no authority over, the warrant is void and offers no justification, regardless of what the officer thought. Id. (citing 2 William Hawkins, A Treatise of the Pleas of the Crown 81 (London, Eliz. Nutt & R. Gosling 1721)).

[188] *Savacool*, 5 Wend. at 175–80; see also *Champaign Cnty. Bank*, 7 Ohio St. at 50 ("The authorities are not uniform, as to the circumstances under which a ministerial officer can justify, in trespass, by showing that the alleged tortious acts were done by virtue of process."); *Noles*, 24 Ala. at 695 ("[T]here is much uncertainty and contrariety of opinion in the books, as to when an executive officer shall be protected by virtue of process placed in their hands . . . .").

[189] See Uzuegbunam v. Preczewski, 141 S. Ct. 792, 799 (2021) (explaining that the rule allowing nominal damages for a violation of any legal right was decisively settled, despite not being universally followed).

[190] See Amar, supra note 48, at 778 ("Whereas the modern Court has described how a warrant reassures a search target, earlier judges understood how it barred a target from suing after the fact." (footnote omitted)).

[191] *Noles*, 24 Ala. at 695.

[192] Jurisdiction, Black's Law Dictionary (11th ed. 2019).

property, the Court normally says that a person cannot exercise this kind of authority unless they have sufficient "access or control for most purposes."[193] As such, in drawing an analogy, a third party lacking actual authority over a property does not have sufficient "jurisdiction" over the property to consent to granting officers entry. And this inherent lack of authority by the warrant-granting body was fatal to any immunity that could possibly have been claimed under this exception.[194] Moreover, it was the officer's duty to know the jurisdiction and power of each authority-granting body.[195] By extension, it then becomes the officer's duty to determine whether a third party is actually empowered to consent to a search of a property. And since it was no excuse that the officer made a mistake in the first scenario, it should be no excuse in the second.

3. Application to Illinois v. Rodriguez

With these considerations in mind, it becomes clear that the officers in *Rodriguez* would not have been able to justify their trespass at common law. As Lord Camden discussed in *Entick*, it fell upon the trespassing officer to justify his actions by demonstrating that "some positive law has empowered or excused him."[196] But this the officers cannot do. An officer's mistake about the scope of her own authority does not excuse an action in excess of that authority, for "[a] trespass may be committed from a mistaken notion of power, and from an honest motive to accomplish some good end. But the law tolerates no such abuse of power, nor excuses such act."[197] Regardless of whether the officer claims authority from the President,[198] the Secretary of the Treasury,[199] or a judicial warrant,[200] the fact that the authority is ultimately invalid prevents the officer from claiming any justification or defense from that authority. As the Supreme Court has said, *ultra vires* authorization cannot legalize or excuse an otherwise illegal act.[201] Yet Gail Fischer's granting of consent to the police to enter into Edward Rodriguez's apartment was the definition of

[193] United States v. Matlock, 415 U.S. 164, 171 n.7 (1974).
[194] *Noles*, 24 Ala. at 696–97.
[195] See id. at 695; see also Grumon v. Raymond, 1 Conn. 40, 48 (1814).
[196] Entick v. Carrington, 19 How. St. Tr. 1029, 1066 (C.P. 1765).
[197] Simpson v. McCaffrey, 13 Ohio 508, 522 (1844).
[198] See, e.g., Little v. Barreme, 6 U.S. (2 Cranch) 170, 171 (1804).
[199] Tracy v. Swartwout, 35 U.S. (10 Pet.) 80, 93 (1836).
[200] *Entick*, 19 How. St. Tr. at 1031.
[201] *Little*, 6 U.S. (2 Cranch) at 179.

an *ultra vires* act,[202] making her consent irrelevant to whether or not the officers' entry was justified.

V. IMPLICATIONS OF THE FACT THAT *ILLINOIS V. RODRIGUEZ* SEEMS AT ODDS WITH THE COMMON LAW

Having shown the inconsistency between the common law of searches and seizures and the Court's current apparent-authority-consent-search doctrine, the question then becomes: What to do with this information? Of course, the impact of this research will largely depend on the audience of this Note. Still, it might have three potential implications for the future of the Fourth Amendment and the law of apparent-authority-consent searches.

First, and somewhat drastically, this research perhaps shows that the Court was wrong, start to finish, with *Rodriguez*. While the Court did not consult the common law, it should have. And the common law principles demonstrate emphatically that a search pursuant only to "apparent authority" consent would have been an unreasonable search and seizure at the time the Fourth Amendment was drafted and ratified. The officers' entry into Rodriguez's apartment without his license, express or implied, was a plain trespass. And their mistake about the scope of their own authority (namely, their authority to enter the apartment pursuant to consent from someone who had no authority to give such consent) could not "legalize an act which without [that consent] would have been a plain trespass."[203] Since the Fourth Amendment must be interpreted to provide the protections afforded by the common law,[204] the tortious search of Rodriguez's apartment should be seen as constitutionally unreasonable. And therefore, the only way to rectify the Court's mistake in *Rodriguez* would be to overrule the decision.

Second, and even more drastic, the inconsistency between current doctrine and historical doctrine could call into question the wisdom of the Court's recent shift toward Fourth Amendment originalism. Scholars and jurists have criticized an overreliance on history in Fourth Amendment doctrine for a variety of reasons.[205] Some, for example, argue that the

[202] Illinois v. Rodriguez, 497 U.S. 177, 182 (1990).

[203] *Little*, 6 U.S. (2 Cranch) at 179.

[204] Lange v. California, 141 S. Ct. 2011, 2022 (2021); California v. Acevedo, 500 U.S. 565, 583 (1991) (Scalia, J., concurring).

[205] See, e.g., Steiker, supra note 61, at 856–57; Sklansky, supra note 1, at 1813–14; Rosenthal, supra note 75, at 79.

common law of search and seizure is an inapt parallel to present search and seizure law because crime and policing have fundamentally changed between 1791 and today.[206] In addition, or potentially as a corollary to this, others argue that the Fourth Amendment is best understood not as incorporating substantive common law rules but rather as incorporating the common law methodology, permitting "reasoned elaboration" to allow the Court to eschew "time-bound rules of search and seizure" in favor of an updated and updateable view of what is reasonable.[207] Regardless of these objections, there is no doubt that the Court's recent turn toward history is a departure from the practice of the mid-twentieth century.[208] And one could argue that the mere uncertainty that the change in methodology brings to Fourth Amendment jurisprudence, as evidenced by the questions that led to this Note, might counsel against the Court's more recent approach.

But for those of us who agree with the Court's originalist methodology yet recognize the improbability of the Court reconsidering *Rodriguez*, neither option is particularly satisfying. A third option, however, might provide a way to square the lessons from this common law research and *Rodriguez*'s holding. Lower courts still frequently hear apparent-authority-consent cases, and this research could influence how those courts apply *Rodriguez*. This is especially true in light of the fact that the various circuits have somewhat split over the proper standards to use when determining if the officer's belief regarding a person's authority was reasonable or not.

For example, the U.S. Court of Appeals for the Seventh Circuit has held that, in some circumstances, a police officer will not be entitled to assume a person has authority based simply on the inferences they make regarding the facts they know.[209] Instead, police officers may be under a duty to "inquire further" regarding a person's authority to consent.[210] When there are many "equally plausible possibilities" that would explain the facts, and some would mean that the third party does not have authority to consent, inferring that the third party does have authority

[206] See, e.g., Steiker, supra note 61, at 856–57 (citing Steagald v. United States, 451 U.S. 204, 217 n.10 (1981)).

[207] Sklansky, supra note 1, at 1813–14.

[208] Id. at 1813.

[209] United States v. Terry, 915 F.3d 1141, 1145 (7th Cir. 2019).

[210] Id. (quoting United States v. Goins, 437 F.3d 644, 648 (7th Cir. 2006)).

would be unreasonable.[211] In contrast, the Eleventh Circuit follows a less stringent test. In its view, a search pursuant to apparent authority will be reasonable if the facts as the officer knew them "could" lead to an inference that the third party had authority to consent.[212] This seems a far cry from the Seventh Circuit's standard, which implies that a search will be reasonable only if the *sole* reasonable inference is that the third party has authority.

The Seventh Circuit's standard seems intuitively more in line with the common law understanding of unreasonable searches and seizures. Recall, for example, that officers executing a warrant were "bound to know the law," which included knowing whether any particular court was authorized to issue the warrant the officer was to execute.[213] In the face of this requirement, no reasonable officer would execute a warrant without first asking if the warrant was indeed from a court of competent jurisdiction. They could not just rely on inferences; instead, they had a duty to inquire whether a particular court was permitted to issue a warrant. The Seventh Circuit's standard seems to reflect this understanding.

CONCLUSION

Under *Entick v. Carrington*, an officer would be liable in tort if they trespassed upon the property of another without any justification or excuse granted by positive law. That test has been formative in the Supreme Court's Fourth Amendment jurisprudence, especially with the recent resurgence of property and trespass principles in its search and seizure cases. Therefore, under an originalist view of the Fourth Amendment, the government commits an unreasonable search or seizure where officers trespass upon one's property for the purpose of obtaining information absent legal justification. And in determining whether a trespass has occurred or whether the entry was justified, the Court has often looked to the common law of property and trespass to find answers.

In *Illinois v. Rodriguez*, the Court failed to take this approach. As such, it would seem to stand as an anachronism in Fourth Amendment jurisprudence. Its loose, ad hoc reasonableness inquiry leads to division in the lower courts, with different courts applying disparate tests to reach inconsistent outcomes. "In my view, the path out of this confusion should

[211] Id.
[212] United States v. Barber, 777 F.3d 1303, 1306 (11th Cir. 2015).
[213] Grumon v. Raymond, 1 Conn. 40, 48 (1814).

be sought by returning to the first principle that the 'reasonableness' requirement of the Fourth Amendment affords the protection that the common law afforded."[214] And the protections afforded by the common law are clear. A warrantless, unauthorized entry onto a person's property was a trespass. Good faith and reasonableness provided no defense for this trespass. As such, the officers in *Rodriguez* were trespassers and tortfeasors, and the common law would have protected Rodriguez from their actions. There is no room for additional balancing, because "the 'balance' has already been struck, the 'practical compromise' reached—and it is the function of the Bill of Rights to preserve that judgment."[215] The Fourth Amendment, therefore, should have been interpreted to offer Rodriguez those same protections.

[214] California v. Acevedo, 500 U.S. 565, 583 (1991) (Scalia, J., concurring).

[215] County of Riverside v. McLaughlin, 500 U.S. 44, 60 (1991) (Scalia, J., dissenting) (emphasis omitted).