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A NEW REPORT OF *ENTICK V. CARRINGTON* (1765)

T.T. Arvind and Christian R. Burset[*]

The Supreme Court has described *Entick v. Carrington* (1765) as "the true and ultimate expression of constitutional law" for the Founding generation. For more than 250 years, judges and commentators have read that case for guidance about the rule of law, executive authority, and the original meaning of the Fourth and Fifth Amendments. But we have been reading a flawed version. This Article publishes, for the first time, a previously unknown manuscript report of *Entick v. Carrington*. We explain why this version is more reliable than other reports of the case, and how this new discovery challenges prevailing assumptions about *Entick*'s legal and historical meaning. Although we leave a full reevaluation of *Entick* for future scholarship, we show that any future judicial or academic discussion of the case must take this new report into account.

INTRODUCTION

Entick v. Carrington (1765) is a landmark by any measure.[2] The Supreme Court has described it as "the true and ultimate expression of constitutional law" for the Founding generation,[3] a case that not only illuminates the Fourth Amendment but helped to inspire it.[4] The case has shaped criminal procedure and constitutional thinking across the common-law world,[5] and it is widely seen as helping to define the rule of law.[6] It has also been discussed as an important precedent about

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3 *See* Timothy Endicott, *Was* Entick v Carrington *a Landmark?*, *in* ENTICK V CARRINGTON: 250 YEARS OF THE RULE OF LAW 109, 109 (Adam Tomkins & Paul Scott eds., 2015) [hereinafter ENTICK V CARRINGTON].

4 Boyd v. United States, 116 U.S. 616, 626–27 (1886); *accord* Florida v. Jardines, 569 U.S. 1, 7–8 (2013); United States v. Jones, 565 U.S. 400, 405 (2012).

See Carpenter v. United States 138 S. Ct. 2206, 2264 (2018) (Gorsuch, J., dissenting); Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 SUFFOLK U. L. REV. 53, 64–65 (1996); William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1838 (2016); Jeffrey Bellin, *Fourth Amendment Textualism*, 118 MICH. L. REV. 233, 255–56 (2019); Laura K. Donohue, *The Original Four5th Amendment*, 83 U. CHI. L. REV. 1181, 1196 (2016); William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 396–404 (1995).

See, e.g., *Coco v The Queen* (1994) 179 CLR 427, 454 (Toohey, J.) (Austl.); *Smethurst v Comm'r of Police* [2020] HCA 14 [124] (Gageler, J.) (Austl.); R (Miller) v. Prime Minister [2019] UKSC 41, ¶ 32. ; R (Miller) v. Prime Minister [2019] UKSC 41, [32]. *Entick* has also been important for state constitutional law. *See* JEFFREY S. SUTT6ON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 49 (2018); *infra* notes 85–87 and accompanying text.

E.g., Adam Tomkins & Paul Scott, *Introduction*, *in* ENTICK V CARRINGTON, *supra* note 2, at 1, 1; *see* A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 114 (Liberty Fund 1982) (1915); *cf.* 6 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 265 (1924) (describing the limits placed on government since the Revolution).

precedent.[7] It is unfortunate, then, that we have been citing a flawed report of the decision.

The outlines of the case are clear enough. In 1755, the Rev. John Entick, a former schoolmaster and textbook-writer, put his talents at the service of *The Monitor or British Freeholder*, a weekly periodical that specialized in attacking the government.[8] In 1762, the Bute Ministry decided that several of the *Monitor*'s essays were seditious libels, that Entick had written them, and that their publication should cease.[9] Lord Halifax, one of the secretaries of state, issued a warrant authorizing Nathan Carrington and three other royal agents to enter Entick's house and seize his papers.[10] Entick objected to their actions as unlawful, and he successfully sued them for trespass.[11] His success depended on a powerful opinion by Lord Camden, the chief justice of the Court of Common Pleas.[12]

It is less clear what Camden's opinion said.[13] There were no official law reports at the time,[14] and what we know of the case depends on two published reports of what Camden declared from the bench: a short report published by George Wilson SL in 1770,[15] and a longer one published by Francis Hargrave in 1781.[16] The two reports have important differences, and scholars have spilled much ink in debating which to cite.[17] But there are reasons to doubt the accuracy of both.[18] Wilson's version is so short as to be obviously incomplete,[19] and he has generally had an uneven reputation as a reporter.[20] Scholars today pay attention to his report of *Entick*

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[7] *See, e.g.*, Ronald K.L. Collins & David M. Skover, *Paratexts*, 44 STAN. L. REV. 509, 529 (1992). The case has also been cited to illuminate Article III's case-or-controversy requirement. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1551 (2016) (Thomas, J., concurring).

[8] Jennett Humphreys & Penelope Wilson, *Entick, John*, OXFORD DICTIONARY OF NAT'L BIOGRAPHY (Sept. 23, 2004), https://doi.org/10.1093/ref:odnb/8824 [https://perma.cc/W556-B8AM].

[9] *See* David Stiles, *Arresting John Entick: The* Monitor *Controversy and the Imagined British Conquests of the Spanish Empire*, 53 J. BRIT. STUD. 934, 935 (2014).

[10] *Id.*

[11] *Id.* at 942, 955.

[12] *Id.* at 955.

[13] Tomkins & Scott, *supra* note 6, at 1.

[14] *See* JOHN P. DAWSON, THE ORACLES OF THE LAW 80 (1968).

[15] Entick v. Carrington (1765) 95 Eng. Rep. 807; 2 Wils. K.B. 275 (C.P.).

[16] Entick v. Carrington (1765) 19 Howell's State Trials 1029 (C.P.). For the publication dates see Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 565 n.25 (1999). There were also some newspaper reports of the case, but they rarely included anything besides the names of the parties, the verdict, and the holding. *See id.* at 564 n.22.

[17] *See infra* Part I. This is a frequent problem with prominent eighteenth-century cases. For instance, there are several substantial reports of Lord Mansfield's opinion in *Somerstt v. Stewart* (1772), an important case about slavery. *Compare* James Oldham, *New Light on Mansfield and Slavery*, 27 J. BRIT. STUD. 45, 54–59 (1988) (concluding that Serjeant Hill's manuscript report "is the most dependable"), *with* George Van Cleve, Somerset's Case *and Its Antecedents in Imperial Perspective*, 24 LAW & HIST. REV. 601, 632–33 (2006) (concluding that a "contemporaneous newspaper report," not Hill's, "is probably the most accurate account").

[18] *See* Tom Hickman, *Revisiting* Entick v Carrington*: Seditious Libel and State Security Laws in Eighteenth-Century England*, *in* ENTICK V CARRINGTON, *supra* note 2, at 43, 79. As we discuss below, Hickman is correct in his assessment that the State Trials report is defective.

[19] Newspapers reported that Lord Camden took about two and a half hours to announce his opinion. Davies, *supra* note 16, at 564 n.22. In Wilson's report, Camden's opinion runs to about 2,500 words, which would have taken a fraction of that time to read aloud.

[20] *See, e.g.*, Ackworth v. Kempe (1778) 99 Eng. Rep. 30, 31; 1 Dougl. 41, 43 (K.B.) (Mansfield CJ) ("[Wilson's] printed account of the case shews the danger of inaccurate reports."); Doe *ex dem.* Bayntun v. Watton (1774) 98 Eng.

mostly because of its comparatively early publication date.[21] Hargrave's reporting has usually been considered more reliable,[22] but his version of *Entick* seems to have been an exception. He was deliberately vague about the provenance of the report,[23] and its internal inconsistencies have led some scholars to speculate that it might be defective.[24]

That might not matter if *Entick* were merely a symbol, often cited but rarely read, of eighteenth-century ideals. But the case *is* read, sometimes quite carefully, as a source of principles and doctrines that remain relevant today. In particular, courts and commentators have closely analyzed a famous passage in Camden's opinion about property rights.[25]

This Article offers a new chance to see whether that and other passages will bear the weight. Our primary purpose is to publish, for the first time, a new version of Camden's opinion, taken from a recently discovered manuscript report in the British Library. Unlike Hargrave's version, the provenance of this report is clear: it was prepared for Attorney General Charles Yorke based on notes taken in court by the barrister Edward Moore. As we explain in Part I, both the provenance of the report and the identity of the reporter suggest that this version is more reliable than previously published reports. Its superiority is further corroborated by the existence of a second hitherto unpublished manuscript report, recently discovered in the collections of Lincoln's Inn Library, which presents a substantially similar text.

There are several textual differences between Moore's version of *Entick* and the published version, which have important implications for what the case means. In Hargrave's version, Camden makes two famous statements that have been crucial to the modern understanding of the case. The first puts property rights at the center of constitutional law: "The great end, for which men entered into society, was to secure

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Rep. 1037, 1038; 1 Cowp. 189, 192 (K.B.) (Mansfield CJ) (agreeing with counsel's statement that a case reported by Wilson "must be a mistake"); Emily Kadens, *Justice Blackstone's Common Law Orthodoxy*, 103 NW. U. L. REV. 1553, 1601 n.276 (2009) ("Blackstone's opinion [in *Scott v. Shepherd*] is badly botched by Wilson."). *But see* 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 551 (Boston, Little, Brown & Co. 10th ed. 1860) (praising the accuracy of Wilson's reports).

[21] *See infra* notes 71–74 and accompanying text.

[22] In *Butt v. Conant*, the court confronted conflicting reports by Wilson and Hargrave of *Rex v. Wilkes*. Butt v. Conant (1820) 129 Eng. Rep. 834, 848; 1 Brod. & B. 548, 583–84 (C.P.). The judges took Hargrave's to be more reliable. *Id.* at 848; 1 Brod. & B. at 583–84 (opinion of Park, J.); *id.* at 851; 1 Brod. & B. at 593–94 (opinion of Burrough, J.); *id.* at 855; 1 Brod. & B. at 602 (opinion of Richardson, J.). *But see infra* note 88 (noting a later lawyer's concern about Hargrave's use of a manuscript case report).

[23] *See infra* Part I(A).

[24] Scholars who support the authenticity of Hargrave's report typically do so on the basis of his connection with individuals involved in the case and his reputation as a manuscript collector, rather than on internal textual evidence. *See, e.g.*, David Feldman, *The Politics and People of* Entick v Carrington, *in* ENTICK V CARRINGTON, *supra* note 2, at 5, 33–34. As other scholars have pointed out, however, the text of the report contains contradictions that raise questions as to whether it is wholly accurate. *See, e.g.*, Hickman, *supra* note 18, at 79 ("There is no doubt that some of Lord Camden's recorded reasons are difficult to reconcile with his clearly expressed view that the King's Bench authorities were good law. One possibility is that the report is not entirely accurate, and it is notable that Wilson's report of the case does not record Lord Camden denying *Kendall & Row* to be law if extended beyond treason.").

[25] *E.g.*, United States v. Jones, 565 U.S. 400, 405 (2012); Donohue, *supra* note 4, at 1197–98; Richard A. Epstein, Entick v Carrington *and* Boyd v United States*: Keeping the Fourth and Fifth Amendments on Track*, 82 U. CHI. L. REV. 27, 29 (2015); Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67, 75.

their property."[26] The phrase matters, among other reasons, because courts quote it to justify a "connection between an individual's property interests and his standing to challenge a search or seizure."[27] The second key passage in Hargrave's version concerns the nature of legal authority: "If it is law, it will be found in our books. If it is not to be found there, it is not law."[28] Judges have read this passage as suggesting that *Entick* embodies a negative view of authority, in which the government has only those powers that the law expressly gives it.[29] Moore's report contains neither of those statements. Instead, on both points it proceeds on the basis of a different and considerably more nuanced set of constitutional principles. These differences suggest that there is a need to revisit the received understanding of *Entick* and its significance for modern law.

The rest of this Article proceeds as follows. Part I offers some guidance on how to use this report. It explains why Moore's version of *Entick* is more reliable than previously published reports, and why it is worthy of citation, including for scholars interested in the original meaning of the Fourth and Fifth Amendments. Part II offers some context for *Entick*, including new information about the role of the defendants that might be relevant to how we relate the case to modern law. Part III highlights some key differences between the Moore report and other versions of *Entick*. Two of the most frequently quoted passages from Hargrave's report—one that emphasizes the importance of property rights, and another that discusses the nature of legal authority—are absent from Moore's version of the case. Although we don' attempt to offer a comprehensive reinterpretation of *Entick* or of eighteenth-century constitutional law, we highlight four topics where this new report has broader implications: the relevance of property rights to the Fourth Amendment; the common law's conception of state power; the protection against self-incrimination; and emergence of *stare decisis*. We also show how a passage present in Moore but absent in other reports resolves an otherwise puzzling internal inconsistency in Camden's opinion. The Appendix provides a transcription of the Moore report, including some notes on the text.

I. How to Use this Report

This Part makes the case for citing the Moore report of *Entick*. Section A argues that it is at least as reliable, and probably more so, than other versions of the case. But reliability is not the only consideration in deciding which report to use. For lawyers interested in *Entick* primarily as a guide to constitutional meaning, there is also the question of which version would have been most important to the Founding generation. Section B suggests that Moore's report of *Entick* might have been known

[26] *Entick*, 19 Howell's State Trials at 1066.

[27] *E.g.* United States v. Beaudion, 979 F.3d 1092, 1096 (5th Cir. 2020); *see also* Baude & Stern, *supra* note 4, at 1839 (describing this passage as having "contributed to a longstanding conventional wisdom that until the mid-twentieth century, trespass was the central test for a Fourth Amendment search").

[28] *Entick*, 19 Howell's State Trials at 1066.

[29] *See, e.g.*, United States v. Carloss, 818 F.3d 988, 1006 n.2 (10th Cir. 2016) (Gorsuch, J., dissenting); *see also* Davies, *supra* note 16, at 646 n.273 ("[C]ommon-law sources tended to define lawful authority positively . . . as a general matter, the absence of an affirmative statement of authority was understood to mean there was no authority.").

to Founding-era lawyers. Section C argues that, even if the Moore report itself was not well known in the eighteenth century, it would still matter for our understanding of Founding-era law.

A. Which Version is Most Reliable?

The Appendix reproduces a manuscript report found in the Hardwicke Papers, which are part of the collections of the British Library. The cover of the report states that it was prepared by Edward Moore. Internal evidence and a comparison of the handwriting enables the reporter to be identified as Edward Moore of Surrey (1735–92), a barrister and the brother of Peter Moore MP.[30]

Two sets of considerations suggest that Moore's report contains a better account of *Entick* than what Hargrave printed in the State Trials. The first arises from the contrast between Moore's reliability as a reporter on the one hand, and the uncertain provenance of Hargrave's report on the other. The second is textual and arises from the relationship of Moore's report to other documents.

i. Relative Reliability: Moore vs. Hargrave's Anonymous Friend

Although Hargrave is usually considered to be a reliable reporter[31]—at least by contemporary standards[32]—his report of *Entick* was unusual. The State Trials are usually scrupulous in giving details of sources.[33] For *Entick*, however, Hargrave tells us only that his report was "a copy of [the] Judgment" obtained by an unidentified friend.[34] That in itself was not unusual; eighteenth-century law reporters sometimes printed opinions "from unidentified sources that were considered by the reporters to be trustworthy."[35] But lawyers did not always trust anonymous reports,[36] and here the original reporter's anonymity raises the question of why Hargrave could boast

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[30] For more information on Moore, see Margaret Escott, *Moore, Peter (1753–1828), of Edward Street, Mdx.*, THE HIST. OF PARLIAMENT, https://www.historyofparliamentonline.org/volume/1820-1832/member/moore-peter-1753-1828 [https://perma.cc/936B-E8L5].

[31] *See supra* note 22 and accompanying text.

[32] Blackstone, writing in the year *Entick* was decided, described law reporters as "private and contemporary hands; who sometimes through haste and inaccuracy, sometimes through mistake and want of skill, have published very crude and imperfect (perhaps contradictory) accounts of one and the same determination." 1 WILLIAM BLACKSTONE, COMMENTARIES *72.

[33] *See, e.g.*, Campbell v. Hall (1774) 20 Howell's State Trials 239, 239 (K.B.) (noting that the report was "compiled from the Reports of Mr. Lofft and Mr. Henry Cowper, together with the short-hand writer's report of the Arguments of Mr. Macdonald . . . and Mr. Hargrave. Both those learned persons have assented to the publication of this Manuscript, which was imparted to me by Mr. Hargrave, with his accustomed kindness of assistance in the improvement of this Work."); Trials on the Informations against Smith & Hollis (1776) 20 Howell's State Trials 1226, 1226 (Exch.) (noting that the report had been "[t]aken in Short-hand by Joseph Gurney").

[34] *Entick*, 19 Howell's State Trials at 1029.

[35] James Oldham, *The Indispensability of Manuscript Case Notes to Eighteenth-Century Barristers and Judges*, *in* MAKING LEGAL HISTORY 30, 37 (Anthony Musson & Chantal Stebbings eds., 2012).

[36] For example, Chief Justice John Vaughan discounted a case cited from Sir Francis Moore's Reports because the "case is not reported by … Moore, but reported to him, non constat in what manner, nor by whom." Bole v. Horton (1673) 124 Eng. Rep. 1113, 1124; Vaughan 360, 382 (C.P.).

such confidence in its accuracy. He said he had "reason to believe" that Lord Camden had destroyed the original copy of his opinion, which Hargrave does not claim to have ever seen.[37] (This was a significant omission, because some of Hargrave's other reports purported to be taken directly from Camden's notes.)[38] Nor does Hargrave claim that he or his friend had been present when Camden announced his opinion in court. Although he assures us that "a first reading" of the document left him "without a doubt" as to its authenticity, he also noted "some trifling inaccuracies," which he attributed to "careless transcribing."[39] Hargrave did not explain whether he attempted to correct those errors, or how, fifteen years after Camden delivered his opinion, Hargrave could so quickly recognize an authentic record of what it had said.[40] At best, Hargrave has offered an admittedly imperfect record of Camden's words.

The sixteen-year gap between the decision and the publication of Hargrave's report should reinforce our skepticism. It is possible that Hargrave or his unnamed friend took advantage of the delay to make their report say, in 1781, what they wish Camden had said in 1765. That kind of embellishment was common in the eighteenth century.[41] We know, for example, that James Madison repeatedly revised his notes of the Constitutional Convention in response to changing political circumstances.[42] Judges were not above "polishing and supplementing" the opinions they read in court before giving them to the printer.[43] And Hargrave himself admitted massaging the historical record when he published an account of his argument in *Somerset's Case*.[44]

We shouldn't assume that contemporary readers would have noticed any such changes. By the time Hargrave published his report, Entick and Carrington were dead, as were several of the lawyers involved in the case, including Yorke and John Glynn. Camden was nearing 70, and he might have become less interested in legal work.[45] (Hargrave's preface also makes it clear that Camden hadn't seen the report before its publication.)[46] And even if readers had noticed that Hargrave's report was off, they might have preferred his version to the original.

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[37] *Entick*, 19 Howell's State Trials at 1029.

[38] 2 FRANCIS HARGRAVE, JURISCONSULT EXERCITATIONS 100 (London, W. Clarke & Sons 1811).

[39] *Entick*, 19 Howell's State Trials at 1029.

[40] Despite the strong reputation as a legal antiquarian that Hargrave enjoys today, his ability to assess the accuracy of manuscript reports was not universally accepted in the nineteenth century. *See* Schauber v. Jackson *ex dem.* Bogert, 2 Wend. 13, 26–27 (N.Y. 1828) (argument of counsel) (arguing that a commentary by Francis Hargrave and Charles Butler had made an erroneous legal claim due to "an incorrect manuscript note of the case cited to support it").

[41] Mark Leeming, *Lawyers' Uses of History, from* Entick v Carrington *to* Smethurst v Commissioner of Police, 49 AUSTL. BAR REV. 199, 219 (2020).

[42] *See* MARY SARAH BILDER, MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION 154 (2015).

[43] *See* Kadens, *supra* note 20, at 1579.

[44] In the prominent case of *Somerset v. Stewart*, *see supra* note 17, Hargrave's report reproduced his own argument as counsel. As he candidly admitted, the argument he inserted into his report was not "actually delivered" in court, but was "entirely a written composition" made for publication. Sommersett v. Stewart (1772) 20 Howell's State Trials 1, 23 n.* (K.B.). What he did not mention was that his printed account largely reflected what two other barristers, William Davy and John Glynn, had actually said in court, and that Hargrave "sometimes followed Davy almost verbatim." DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION 1770–1823 472 n.5 (Oxford Univ. Press 1999) (1975).

[45] In 1782, he declined to return to the position of Lord Chancellor when offered the post. Peter D.G. Thomas, *Pratt, Charles, first Earl Camden*, OXFORD DICTIONARY OF NAT'L BIOGRAPHY (2008), https://doi.org/10.1093/ref:odnb/22699 [https://perma.cc/W4EH-CE7S].

[46] *See Entick*, 19 Howell's State Trials at 1029–30.

In addition to these concerns with Hargrave's report, there are several reasons to look favorably on Moore's. The first is the reputation of the reporter himself. In May 1765, a few months before *Entick* was decided,[47] the House of Commons had commissioned Moore to help compile the first index of its journals.[48] His appointment came on the recommendation of Attorney General Yorke, and it was partly a matter of patronage.[49] But it also seems to have reflected confidence in his proficiency as a lawyer, as suggested by the fact that Moore's patrons also hired him for their personal business.[50]

The results of Moore's work as indexer, delivered some thirteen years later, justified this faith in his abilities. He and his employers conceived of the index as a species of legal literature, meant to serve as a guide to parliamentary precedents as well as a summary of the journals' contents.[51] Because of this dual mission, his work required him not only to master the journals' contents but also to assess their completeness and accuracy.[52] He worked with three other indexers, each of whom covered a different period of parliamentary history. Although the other indices were deemed to be "messy" and "unsatisfactory," Moore's work was seen as more successful;[53] and when the U.S. Congress sought to index its own proceedings a century later, it looked to Moore's efforts as a model.[54] There seems to be good reason, then, to trust that Moore took great care in preparing his report of *Entick*.

A further reason to trust Moore's report is its association with Charles Yorke, who had clear personal and professional motivations to obtain an accurate record of what the case said. In addition to his personal investment as counsel for the defendants in *Entick*, his position as attorney general would have given him a strong

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[47] Lord Camden delivered his judgment on November 27, 1765. Hickman, *supra* note 18, at 72.

[48] HC J. (May 13, 1776) (35) p. 786, https://babel.hathitrust.org/cgi/pt?id=chi.78147329&view=1up&seq=11&skin=2021 [https://perma.cc/54G2-CGSU].

[49] *See* Letter from Edward Moore to Charles Yorke (1766), Add MS 35637, f. 327 (on file with the British Library). Moore was an expert in finding his way into minor but lucrative offices. He was close to Henry Fox, Lord Holland, and his son, Charles James Fox, and served as joint guardian to Henry Vassall-Fox, 3rd Baron Holland. (The Foxes, like Charles Yorke, were prominent members of the Whig establishment.) Under their patronage, Moore held several minor offices, including Receiver and Register of the Hackney Coach Office and Deputy Paymaster of the Widows' Pensions. L. S. Sutherland & J. Binney, *Henry Fox as Paymaster General of the Forces*, 70 ENG. HIST. REV. 229, 242 & n.2 (1955); Escott, *supra* note 30; HC Jour. (2 July 1783) (39) p. 538; 2 SIR BERNARD BURKE, A GENEALOGICAL AND HERALDIC HISTORY OF THE LANDED GENTRY OF GREAT BRITAIN & IRELAND 1119 (London, Harrison 6th ed. 1882). These offices may not have been especially prestigious, but they helped make Moore wealthy enough to commission a portrait by Sir Joshua Reynolds. *See The Property of a Deceased Estate: Sir Joshua Reynolds P.R.A. 1723–1792*, SOTHEBYS (June 6, 2007, 10:30 AM), http://www.sothebys.com/en/auctions/ecatalogue/2007/important-british-paintings-l07122/lot.43.html [https://perma.cc/JZK9-7PPN].

[50] For instance, Lord Holland hired Moore privately to research parliamentary precedents. Sutherland & Binney, *supra* note 49, at 242 n.2.

[51] *See* Paul Seaward, *Parliamentary Law in the Eighteenth Century: From Commonplace to Treatise*, *in* ESSAYS ON THE HISTORY OF PARLIAMENTARY PROCEDURE 97, 105–06 (Paul Evans ed., 2017); EDWARD MOORE, A GENERAL INDEX TO, OR DIGEST OF, SEVENTEEN VOLUMES OF THE JOURNALS OF THE HONOURABLE HOUSE OF COMMONS, at v (reprinted by order of the House of Commons 1805).

[52] *See, e.g.*, MOORE, *supra* note 51, at xxiii–xxiv (summarizing a speech by Lord North, but emphasizing that this summary came from Moore's own recollection, rather than from "an authentic Copy" of North's text).

[53] Seaward, *supra* note 51, at 106–07.

[54] H.R. REP. No. 52, at 6 (1879) (criticizing three eighteenth-century indices to parliamentary proceedings as "faulty in their methods and not uniform in arrangement," but praising Moore's index as "a work of very considerable merit" and adopting his approach for indexing the journals of Congress).

interest in being able to cite the case accurately as an advisor and advocate. The issues that *Entick* addressed were crucial for guiding the government's practices of law-enforcement and intelligence-gathering.

ii. Textual Corroboration

Even if we set aside the evidence presented in Section one, there are two textual reasons to treat Moore's report as a more accurate record of what Camden actually said. First, there is evidence that Moore's report, unlike Hargrave's was in circulation almost immediately after *Entick* came down. For instance, an anonymous pamphlet published in 1766 took as its epigraph the following passage from *Entick*:

> I know of no distinction between *State Necessities* and others; our books do not make any such distinction; and we find in 3º Car. 1mi. Mr. Serjeant Ashley was committed to the Tower, for saying in one of his arguments at the bar, there was a *State Power*, or law of the state, as well as of the country. And the Judges, with respect to ship-money, were committed for saying, there was a state necessity for it.[55]

That text appears verbatim (with minor typographical differences) in the Moore report.[56] But it is completely absent from Wilson's report, and the phrasing differs considerably from Hargrave's text.[57] This suggests that the anonymous author had access either to Moore's version of the case or to a version that was in substantial agreement with it—and that this version was seen as accurate by contemporaries who were closely engaged with the political issues to which *Entick* related. The close relationship between Moore's report and the contemporary pamphlet literature gives considerable credence to its account of the case, especially when contrasted with the lack of any prior attestation of Hargrave's report .[58]

Second, and most significantly, Moore's version is corroborated by a second manuscript report of *Entick*, now housed in the Lincoln's Inn Library.[59] This second manuscript largely tracks Moore's report. The two manuscripts are far more similar to each other than to either published version of the case. The only differences between them relate to minor matters of phrasing, and the Lincoln's Inn report is in agreement with Moore's report on every matter where Moore's report differs from Hargrave's. Nevertheless, the nature and frequency of the variations between them

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[55] STATE NECESSITY CONSIDERED AS A QUESTION OF LAW (London, S. Bladon 1766) [hereinafter STATE NECESSITY]. The same text appears, with minor typographical differences, in [RALPH HEATHCOTE], SYLVA; OR, THE WOOD 230, 232 (London, T. Payne & Son 1786). The author may have been quoting from STATE NECESSITY, since both books refer to the opinion's author by his old title of Lord Chief Justice Pratt, rather than the correct title of Lord Camden.

[56] *Infra* p. 77.

[57] *Compare* STATE NECESSITY, *supra* note 55, *and Of Reason of State, or State Necessity?*, *supra* note 55, at 232, *with* Entick v. Carrington, (1765) 19 Howell's State Trials 1029, 1073 (C.P.).

[58] *See infra* Part I(A).

[59] *Entick v. Carrington* (1765) (Lincoln's Inn Manuscript), Misc 562 (on file with Lincoln's Inn Library). The provenance of the Lincoln's Inn version is unknown. Email from Dunstan Speight, Libr. of Lincoln's Inn Libr., to Christian R. Burset, Assoc. Professor of L., Notre Dame L. Sch. (Mar. 15, 2019, 06:00 CDT) (on file with author).

suggest that the two documents were prepared independently by different reporters present when Camden read his opinion. The high degree of agreement between Moore's report and the (apparently wholly independent) Lincoln's Inn report makes it very likely that they present a more accurate account of Camden's actual words in court than do the published reports.

To be sure, there are other possibilities for explaining the relationship between the manuscripts, but none seems especially plausible. First, one manuscript might be an imperfect copy of the other. But the nature of the variations makes this unlikely. Both documents were fair copies, suggesting a degree of care in their preparation; but the frequency of minor differences between them would imply a deeply careless copyist. Moreover, the Lincoln's Inn version does not say anything about its being derived from the notes of Edward Moore. Since the authority of a law report depended on the reliability of its reporter, this would have been a surprising detail for a copyist to omit. That makes it unlikely that the Lincoln's Inn manuscript was a copy of the British Library version.

It is also unlikely that both manuscripts were prepared from a common source, such as original shorthand notes taken by Moore or someone else in court. If that had been so, variations might have arisen when different copyists made different judgments about how to expand Moore's shorthand. But this does not fit with what historians have learned about eighteenth-century shorthand practices, in which shorthand reporters read from their notes to transcribers who took down the dictation in longhand.[60] In addition, the British Library and Lincoln's Inn manuscripts often differ in the order of words and phrases within a sentence. That, too, makes it unlikely that they were prepared from a common source. The shorthand systems of the day were literal, making it unlikely that a single shorthand version could give rise to systematic differences of this type. But two reporters making independent notes would produce precisely such differences, as each reporter would have made different decisions about simplification, or different minor mistakes, in transcribing the judge's words.[61] Moreover, it was common for multiple reporters to be present in court, at least during trials,[62] and it seems plausible that more than one reporter would have taken down an important opinion like *Entick*.

Together, these factors—Moore's reliability; Yorke's involvement; evidence of the report's contemporary circulation; its corroboration by a second report; and the uncertain origins of Hargrave's version—suggest that the manuscript report published here offers the best evidence of what the case actually said.

B. Which Report Should We Cite?

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[60] *See, e.g.*, Simon Devereaux, *The City and the Sessions Paper: "Public Justice" in London, 1770–1800*, 35 J. BRIT. STUD. 466, 476–77 (1996) (describing a shorthand reporter's practice, in 1787, of reading "from his shorthand notes to two transcribers who both took down what he dictated to them").

[61] *See* Magnus Huber, *The* Old Bailey Proceedings*, 1674–1834: Evaluating and annotating a corpus of 18th- and 19th-century spoken English*, VARIENG, https://varieng.helsinki.fi/series/volumes/01/huber/ [https://perma.cc/QUP9-L3ME] (Nov. 14, 2016).

[62] *See* Devereaux, *supra* note 60, at 489 n.82 (noting that at trials in London, "[i]t was conventional in important cases for counsel on each side to employ their own shorthand writers for their own uses").

Reliability is not the only consideration in deciding whether to use a newly discovered report. There is also the question of which versions were available to contemporaries. In particular, some scholars have argued that insofar as *Entick* is a guide to the original meaning of the Fourth Amendment,[63] we should focus on whatever version of the case was most widely available to the people who ratified it.[64] If that's right, then it would seem that Moore's report—which has never before made it into print—might be of interest to historians but of little use to constitutional lawyers. (We focus here on implications for U.S. constitutional law, but the issue also arises in other contexts.)[65]

We present two arguments against that view. The first, discussed in this Section, is that Moore's report of *Entick* may well have been known to Founding-era lawyers. The second, discussed in Section C, is that a hidebound focus on the text of particular reports misses their real significance for understanding eighteenth-century law.

Let's begin by assuming that a particular report of *Entick* is relevant only insofar as the Founding generation actually read it before drafting and ratifying the Bill of Rights. (We'll challenge this assumption below.) For example, Justice Thomas has suggested *Entick* matters because it "inspired the Fourth Amendment,"[66] so that the case's interest depends on how it "influenced" the Founders.[67] As Professor Epstein puts it, the Fourth Amendment was "clearly an effort to mimic in the Bill of Rights the protection that Lord Camden offered in *Entick*."[68] Because one can only mimic what one can see, we need to know what version of *Entick* the Founders were reading.[69] Copies of the Wilson and Hargrave reports were circulating in the United States by the 1780s, but the Moore report was not in print anywhere.[70] Nonetheless, there are still reasons to think that Moore's account of the case might have influenced some members of the Founding generation.

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[63] Maureen E. Brady, *The Lost "Effects" of the Fourth Amendment: Giving Personal Property Due Protection*, 125 YALE L.J. 946, 980–81 (2016); *see also* Note, *The Border Search Muddle*, 132 HARV. L. REV. 2278, 2287–88 & n.84 (2019) (noting that judges, lawyers, and commentators disagree about the role of history in interpreting the Fourth Amendment, but nearly everyone agrees that Founding-era understandings merit at least some weight).

[64] *See* Thomas Y. Davies, *Can You Handle the Truth? The Framers Preserved Common-Law Criminal Arrest and Search Rules in "Due Process of Law"—"Fourth Amendment Reasonableness" is Only a Modern, Destructive, Judicial Myth*, 43 TEX. TECH L. REV. 51, 117–18 & n.350 (2010); *see also* Donald A. Dripps, *"Dearest Property": Digital Evidence and the History of Private "Papers" as Special Objects of Search and Seizure*, 103 J. CRIM. L. & CRIMINOLOGY 49, 65–66 (2013) (discussing what reports would have been available to the American founders); Roger Roots, *The Framers' Fourth Amendment Exclusionary Rule: The Mounting Evidence*, 15 NEV. L.J. 42, 52–59 (2014) (tracing the history of multiple copies of the *State Trials*); Orin Kerr, *Identifying the Most Important Version of* Entick v. Carrington, VOLOKH CONSPIRACY (Sept. 25, 2012, 12:52 AM), http://volokh.com/2012/09/25/legal-history-bleg-identifying-the-most-important-version-of-entick-v-carrington/ [https://perma.cc/25LQ-D95S] (discussing the relative prevalence of the Hargrave and Wilson reports in the founding era).

[65] For example, consider the statement that "[t]he principles of constitutional liberty and security carried forward from *Entick v Carrington* are part of our common law inheritance." *Smethurst v Comm'r of Police* (2020) 376 ALR 575, 606 (Austl.) (opinion of Gageler, J.). How can a principle be carried forward from the eighteenth century if it remained unknown?

[66] Carpenter v. United States, 138 S. Ct. 2206, 2239 (2018) (Thomas, J., dissenting).

[67] City of West Covina v. Perkins, 525 U.S. 234, 247 (1999) (Thomas, J., concurring).

[68] Epstein, *supra* note 25, at 32 (stating this about the Fourth and Fifth Amendments); *cf.* People v. Chiagles, 142 N.E. 583, 583 (N.Y. 1923) (Cardozo, J.) ("[T]he statutes of New York express the principle that English law received as the outcome of the prosecutions of Wilkes and Entick.").

[69] *See* Davies, *supra* note 16, at 635.

[70] *See* Dripps, *supra* note 64, at 65–66 & n.82.

As Section A explained, there is evidence that the Moore report, or something quite similar to it, was circulating in manuscript by 1766.[71] It was common at the time for law students and practitioners to seek out manuscript reports of cases; Sir James Burrow said he published his *Reports* in 1772 partly to fend off "continual interruption and even persecution, by incessant applications for searches into my notes."[72] It would be a mistake, then, to place too much weight on a report's unavailability in print.[73] Between *Entick*'s decision in 1765 and the publication of Wilson's report in 1770, members of the bar and students at the Inns of Court would have been just as likely to come across a copy of the Moore manuscript as any other version of the case. Even after Wilson published his report, practitioners who had heard of Moore's version would have been inclined to treat it as more complete in light of its much greater length.[74] Thus, at least until the publication of Hargrave's version in 1781, manuscript accounts of *Entick* would have played a particularly crucial role in shaping contemporary understandings of the case.

During that time, dozens of American colonists were studying law in London,[75] and it seems likely that they would have sought out information about an opinion of such great legal and political importance.[76] These colonial law students often took their manuscript notes of cases home, where they continued to shape American understandings of English law.[77] Although we have no direct evidence that a copy of Moore's report made it to North America, it may well have been the first version of *Entick* that some members of the Founding generation read or discussed.

C. Manuscript Reports as Evidence of the Law

The last Section made a circumstantial argument that the Moore report was available to lawyers of the Founding generation. But even if that argument fails—if it turns out that the report had been locked in a cabinet between 1765 and 2019,

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[71] *See supra* Part I(A)(2). We do not claim that the report was universally known, only that it was available to at least some contemporaries. *Cf.* ANOTHER LETTER TO MR. ALMON, IN MATTER OF LIBEL: WITH A POSTSCRIPT UPON CONTEMPT OF COURT AND ATTACHMENT 147 (London, J. Almon 2d ed. 1771) [hereinafter ANOTHER LETTER TO MR. ALMON] ("There have been several judgments given of late days, which I have wished to come at, but never could. There was one in particular in the Common Pleas about the seizure of papers, which ought to have been published, and of which I could never get even a note.").

[72] 1 JAMES BURROW, REPORTS OF CASES ADJUDGED IN THE COURT OF KING'S BENCH DURING THE TIME OF LORD MANSFIELD'S PRESIDING IN THAT COURT, at iii (Philadelphia, Hopkins & Bayard 1808) (1772); *see also* Oldham, *supra* note 35, at 42 (noting that practitioners' case notes were widely "borrowed, copied, and cited").

[73] This is true not only for *Entick*, but also for related cases that arose in the 1760s out of the government's attempt to crack down on the opposition press. Joseph Sayer, for example, quotes at length from manuscript reports of three such cases—*Huckle v. Money*, *Beardmore v. Carrington*, and *Beardmore v. Halifax*—in his 1770 treatise on the law of damages. JOSEPH SAYER, THE LAW OF DAMAGES 218–30 (London, W. Strahan & M. Woodfall 1770). The manuscripts on which Sayer relied differed from the reports that were subsequently printed—especially for *Huckle*. *Compare* SAYER, *supra*, at 218–21, *with* Huckle v. Money (1763) 95 Eng. Rep. 768; 2 Wils. K.B. 205 (K.B.).

[74] *See* Oldham, *supra* note 35, at 42–43 (noting one eighteenth-century lawyer who treated a report as incomplete because his own notes of the case were substantially longer).

[75] *See* E. ALFRED JONES, AMERICAN MEMBERS OF THE INNS OF COURT, at v (1924).

[76] *See, e.g.*, Kerr, *supra* note 25, at 75 ("[Camden's] decision was a controversial and widely noted political statement as much as it was a legal opinion.").

[77] Anton-Hermann Chroust, *The Legal Profession in Colonial America*, 33 NOTRE DAME LAW. 51, 63 (1957).

unremembered and unread—the report might still matter for our understanding of the Bill of Rights. To the extent that one's theory of constitutional interpretation cares about how Founding-era lawyers would have approached *Entick*,[78] even a hidden manuscript might matter. This Section explains why.

When *Entick* was decided, common lawyers generally believed that judicial decisions did not make new law. Instead, judges merely declared what the law was.[79] Legal historians disagree about when this understanding of precedent began to fade in the United States, but it certainly had currency well into the nineteenth century.[80] For example, in *Swift v. Tyson*, Justice Story famously wrote that "the decisions of Courts . . . are, at most, only evidence of what the laws are; and are not of themselves laws."[81] Legal historians have offered competing theories about the source of this preexisting law, which is variously said to have emerged from natural law, communal customs, or the shared understanding of bench and bar.[82] For present purposes, the important thing is that lawyers at the time agreed that the law preexisted judges' articulation of it.

Under this declaratory theory of law, individual cases like *Entick* might be important for symbolic or political reasons, but not because they were thought to transform the law in any important way. As a result, when Founding-era lawyers celebrated *Entick*, they would have done so not because it said something unique, but because it captured broader understandings of the law.[83] To the extent the Founders were trying to mimic *Entick* when they drafted and ratified the Fourth Amendment, what they would have wanted to copy was not the case itself but the common law that it embodied. In other words, they looked to *Entick* because they

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[78] *Cf.* William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 LAW & HIST. REV. 809, 810 (2019) (describing originalist constitutional interpretation as "applying the law of the past"); John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 751 (2009) (arguing that "the Constitution should be interpreted using the interpretive methods that the constitutional enactors would have deemed applicable to it"). Not all self-described originalists subscribe to this approach. *See, e.g.*, Jack M. Balkin, *The Construction of Original Public Meaning*, 31 CONST. COMMENT. 71, 72, 78 (2016).

[79] Neil Duxbury, *Custom as Law in English Law*, 76 CAMBRIDGE L.J. 337, 341–42 (2017); Gerald J. Postema, *Classical Common Law Jurisprudence (Part II)*, 3 OXFORD U. COMMONWEALTH L.J. 1, 12 (2003).

[80] *See* Charles J. Reid, Jr., *Judicial Precedent in the Late Eighteenth and Early Nineteenth Centuries: A Commentary on Chancellor Kent's* Commentaries, 5 AVE MARIA L. REV. 47, 57 (2007); Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 666–67 (1999).

[81] Swift v. Tyson, 16 U.S. 1, 18 (1842).

[82] *See, e.g.*, William R. Casto, *The Early Supreme Court Justices' Most Significant Opinion*, 29 OHIO N.U. L. REV. 173, 204–05 (2002); William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1517 (1984); Caleb Nelson, *A Critical Guide to* Erie Railroad Co. v. Tompkins, 54 WM. & MARY L. REV. 921, 931–35 (2013); Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527, 532–34 (2019); A.W.B. Simpson, *The Common Law and Legal Theory*, *in* OXFORD ESSAYS IN JURISPRUDENCE (2D SERIES) 77, 94 (A.W.B. Simpson ed., 1973).

[83] *See* Carpenter v. United States, 138 S. Ct. 2206, 2239 (2018) (Thomas, J., dissenting) (describing *Entick* as embodying the "English legal tradition"); Note, *Seizure of Incriminating Evidence at Time of Prisoner's Arrest*, 24 HARV. L. REV. 661, 661–62 (1911) ("[T]he Fourth Amendment is properly nothing more than a constitutional pronouncement of a common law rule, well recognized in England before the adoption of the Amendment . . . ."). *But cf.* David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1784–93 (2000) (analyzing and critiquing the view that the Fourth Amendment codified common-law principles).

judged it to be orthodox. There's a reason we don't hitch our constitutional law to the celebrated opinions of Lord Jeffreys and Chief Justice Scroggs.[84]

Antebellum citations to *Entick* reflected this understanding. In 1841, for example, the Supreme Judicial Court of Massachusetts cited the case for the proposition that "the right to search for and seize private papers is unknown to the common law."[85] Although the court quoted at length from Hargrave's report, it did so to demonstrate the "principles upon which the important decision in *Entick v. Carrington* was founded."[86] It was "those principles"—not *Entick* per se—that were "warmly cherished" by the "enlightened statesmen" of the eighteenth century.[87]

Just as *Entick* was merely evidence of the common law, published reports would have been seen as merely evidence of *Entick*. Eighteenth- and nineteenth-century lawyers understood that printed reports were often incorrect or incomplete,[88] and one of their tasks in researching precedents was to consider whether manuscript or even oral sources might offer better evidence of prior cases.[89] It was not particularly important whether a report happened to exist in printed or manuscript form, or—more importantly for our purposes—whether it had previously been known. One nineteenth-century treatise summarized this mentality as follows:

> A manuscript note of a case is authority. It may be more full, or accurate, than a printed report of the same case. The existence of such manuscript may be little known. When cited by a party in a cause, . . . the opposite party, or the Court, may never have heard of it before; it may then come as a great surprise upon both.[90]

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[84] *See* Timbs v. Indiana, 139 S. Ct. 682, 694–95 (2019) (Thomas, J., concurring) (arguing that the 1689 English Bill of Rights was partly a reaction against fines imposed by "the infamous Chief Justice Jeffreys"); Harmelin v. Michigan, 501 U.S. 957, 967 (1991) ("Most historians agree that the 'cruell and unusuall Punishments' provision of the English Declaration of Rights was prompted by the abuses attributed to the infamous Lord Chief Justice Jeffreys of the King's Bench during the Stuart reign of James II."); Boyd v. United States, 116 U.S. 616, 629–30 (1886).

[85] Commonwealth v. Dana, 43 Mass. (2 Met.) 329, 334 (1841).

[86] *Id.* at 335.

[87] *Id.* at 335–36. *Dana* was decided before the Fourth Amendment was incorporated against the states. But as with Fourth Amendment cases, the court in *Dana* was concerned with the alleged unreasonableness of a search. *Id.* at 334. Moreover, the state constitutional provision at issue in that case, which had been drafted by John Adams, has been used to illuminate the original meaning of the Fourth Amendment. *E.g.*, *Carpenter*, 138 S. Ct. at 2240 (Thomas, J., dissenting); Donohue, *supra* note 4, at 1269.

[88] *See, e.g.*, Attorney General *ex rel.* Univ. of Cambridge v. Lady Downing (1769) 27 Eng. Rep. 368, 370; Amb. 571, 574 (Ch.) (Camden LC) ("I am of opinion, that either the report is mistaken, or that it is not law.").

[89] *See* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 192–93 (5th ed. 2019); James Oldham, *Detecting Non-Fiction: Sleuthing Among Manuscript Case Reports for What Was* Really *Said*, *in* LAW REPORTING IN BRITAIN 133, 133 (Chantal Stebbings ed., 1995); Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 589–91 (2008); Ian Williams, *"He Creditted More the Printed Booke": Common Lawyers' Receptivity to Print, c. 1550–1640*, 28 LAW & HIST. REV. 39, 39–40 (2010). For examples of American courts continuing this practice into the nineteenth century, see Columbian Ins. Co. v. Catlett, 25 U.S. 383, 402 (1827) (Johnson, J., concurring in part), and Johnson v. Morris, 7 N.J.L. 6, 12–13 (N.J. 1822).

[90] JAMES RAM, THE SCIENCE OF LEGAL JUDGMENT 5 (Philadelphia, John S. Littell 1835) (footnotes omitted); *see also* Reid, *supra* note 80, at 56 (describing Ram's treatise). This approach endured much longer in England. *See, e.g.*, FREDERICK POLLOCK, *Judicial Records*, *in* ESSAYS IN THE LAW 222, 233 (1922) (stating that law reports in England lacked "any authentic or even official character, and can always be contradicted by a more accurate report or even by the clear recollection of the Court or counsel, though this does not often happen"); *see also* Peter M.

The possibility of being surprised by old reports followed naturally from the declaratory theory of law.[91] If judicial precedents were evidence of a preexisting law, better evidence might always be found.[92]

We can see this approach to undiscovered sources in early cases applying the common law in Pennsylvania. Like many states, Pennsylvania enacted a statute in 1777 to "receive" England's common law.[93] As a result, Pennsylvania courts had to determine the content of the law their state had received. In doing so, they didn't assume that the legislature had enacted whatever common-law rules that had been thought to exist at the time. Instead, they asked what English law had actually been—even if that law had been unknown to the legislators of 1777. In *Clayton v. Clayton*, for example, counsel for the plaintiff in error cited a published report of Lord Mansfield's opinion in *Wigfall v. Brydon* (1766).[94] Opposing counsel replied that that case had to be a mistake, as it relied on "not very good reasons."[95] Instead, the defendant in error argued, Mansfield's true position was revealed by "a manuscript note of [a later] case taken by Mr. *Edward Tilghman* in the King's Bench in *June* 1773," when Tilghman had been a student at the Middle Temple.[96] The court accepted Tilghman's manuscript note as more reliable than the printed report of *Wigfall*, in part because the manuscript made Mansfield's position easier to "reconcile . . . with other decisions of good authority."[97] Presumably, the Pennsylvania legislature had been unaware of Tilghman's report when it had adopted English common law in 1777. But this was unproblematic for the Pennsylvania Supreme Court: what mattered, in the end, was what English law had actually been.

As this discussion suggests, it is risky to attribute too much weight to any one case—much less any particular report of that case—when reconstructing eighteenth-

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Tiersma, *The Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187, 1197 (2007) ("Even today, an unreported case can function as precedent in England, as long as a barrister vouches for its authenticity.").

[91] As William Baude and Stephen Sachs have observed, surprises are inherent in any legal system that includes a system of "secondary rules"—i.e., "rules *about* rules, which set out how we recognize certain rules, change their contents, or authoritatively identify violations." William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1465–68 (2019).

[92] *See, e.g.*, Wadham v. Marlow (1784) 99 Eng. Rep. 764, 773–74; 4 Dougl. 54, 70–72 (K.B.); Millar v. Taylor (1769) 98 Eng. Rep. 201, 254–55; 4 Burr. 2303, 2402 (K.B.); Welles v. Trahern (1740) 125 Eng. Rep. 1147, 1151; Willes 233, 239 (C.P.); *see also* ANOTHER LETTER TO MR. ALMON, *supra* note 71, at 147 ("At present, I am always uncertain whether what is printed be a faithful report or not; it comes with no authority, but from some private hand; and therefore I think myself at liberty to treat it like any other publication . . . .").

[93] An Act to Revive and Put in Force Such and so Much of the Late Laws of the Province of Pennsylvania as is Judges Necessary to be in Force in this Commonwealth and [to] Revive and Establish the Courts of Justice and for Other Purposes therein Mentioned, ch. 737, *reprinted in* 9 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 29, 29–30 (James T. Mitchell & Henry Flanders eds., 1903).

[94] Clayton v. Clayton, 3 Binn. 476, 479 (Pa. 1811) (citing Wigfall v. Brydon (1766) 97 Eng. Rep. 1156; 3 Burr. 1895 (K.B.)).

[95] *Id.* at 482.

[96] *Id.* (emphasis added). Incidentally, the printed report of the case cited by counsel, *Goodright v. Patch* (1773) 98 Eng. Rep. 620; Lofft 221 (K.B.), went unmentioned.

[97] *Clayton*, 3 Binn. at 484. It presumably helped that the reporter was the cousin of Chief Justice William Tilghman. But Chief Justice Tilghman seems to have had a habit of consulting unpublished legal material. *See, e.g.*, Colhoun v. Snider, 6 Binn. 134, 137 (Pa. 1813) (Tilghman, C.J.) (discussing, as potential evidence of the common law of Pennsylvania, the manuscript notes of other judges and "a conversation which I once had with Judge Smith").

century law.[98] Lawyers at the time understood that reporters could err; and even if a lawyer was convinced that a particular report accurately captured what a judge had said, the judge's opinion was only one piece of evidence about what the law itself actually said.[99] Eighteenth-century *law* depended much less on the precise text of judicial opinions than American caselaw today, although a judge's language still mattered, both legally and politically.[100] As we have noted above, *Entick v. Carrington* was considered a leading case not because it was radical but because it was orthodox, and it was considered orthodox because it upheld a widely held view that issuing warrants for seizing papers was "dangerous and unconstitutional," at least in prosecutions of seditious libel.[101] The search for *Entick*'s legal meaning is a search for the constitutional ideas upon which that view of warrants was based. Moore's report of *Entick* should be treated as a contribution to that search for legal meaning.[102]

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[98] We assume for present purposes that the Fourth Amendment "received" the common law as it actually stood in 1791, just as Pennsylvania received the common law in the example discussed above. *Cf.* Carpenter v. United States, 138 S. Ct. 2206, 2264, 2268 (2018) (Gorsuch, J., dissenting) (suggesting that Fourth Amendment rights should be determined by "[t]he common law at 1791, extended by analogy to modern times"). In other words, the Fourth Amendment "invokes the common law itself," rather than "the static content" that happened to be attributed to the common law at any one point in time. Richard M. Re, *Fourth Amendment Fairness*, 116 MICH. L. REV. 1409, 1416–17 (2018) (quoting Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 732 (1988) (Scalia, J.)); *see also id.* at 1411 ("In . . . referring to the ever-evolving common law notion of reasonableness, the Fourth Amendment established a broad principle, rather than codifying any fixed set or version of eighteenth-century doctrines."). This is the same approach that courts have taken with the Seventh Amendment. *See, e.g.,* Dimick v. Schiedt, 293 U.S. 474, 482 (1935); United States v. Wonson, 28 F.Cas. 745, 750 (C.C.D. Mass. 1812) (Story, J.) ("[T]he common law here alluded to is not the common law of any individual state . . . but it is the common law of England, the grand reservoir of all our jurisprudence.").

It is possible, however, that the Fourth Amendment was understood to *codify* the understanding of the common law that prevailed in 1791, rather than to receive it. *See* Sklansky, *supra* note 83, at 1801 (summarizing and critiquing the view "that the Warrant Clause of the Fourth Amendment merely codified protections well established at common law"). On that view, it would not matter what the true content of the common law was in 1791; all that would matter is what the Founding generation thought it was codifying. If that is correct, then it might be thought that lawyers today would have little reason to care about any version of *Entick* that was unknown to the Founders. *Cf.* Davies, *supra* note 64, at 117–19 (arguing that interpreters of the Fourth Amendment should rely on Wilson's report because Hargrave's later report was unlikely to have been read by the Founders).

But that argument fails to account for the second, and broader, point we make in this Section: that printed reports were far from the only source for Founding-era understandings of the common law. *See, e.g.*, *supra* note 17; *infra* note 102. This is particularly true of *Entick* itself, which grew out of and contributed to a contentious political debate. Accordingly, the Founding generation's understanding of the common law in general and of *Entick* in particular would also have been shaped by the positions espoused in that broader debate. As a result, the Moore report would still be relevant to the extent it sheds further light on what the terms of that debate were, even if it was unlikely to have been read by members of the Founding generation.

[99] *See* Tiersma, *supra* note 90, at 1192.

[100] *See id.* at 1202–03.

[101] 2 THOMAS ERSKINE MAY, THE CONSTITUTIONAL HISTORY OF ENGLAND SINCE THE ACCESSION OF GEORGE THE THIRD 129 (Francis Holland ed., 1912) (1863).

[102] The problem of potentially unreliable law reports is well known to legal historians. *See, e.g.*, Henry Horwitz & James Oldham, *John Locke, Lord Mansfield, and Arbitration During the Eighteenth Century*, 36 HIST. J. 137, 146 (1993). And much Fourth Amendment scholarship already seems to recognize the need to look beyond the text of individual cases. *See, e.g.*, Baude & Stern, *supra* note 4, at 1838–39 (using *Entick* and other cases to construct "a positive law baseline for the Fourth Amendment"); Kerr, *supra* note 25, at 74–75 (noting *Entick*'s political context). Nonetheless, some scholars still expend great energy arguing that it would be wrong to cite reports of a case that might have been unknown to some or all of the Founders. *See, e.g.*, Davies, *supra* note 64, at 117–18; Thomas Y.

We don't claim that the Moore report renders other versions totally obsolete. That Moore's report is comparatively reliable doesn't mean that it's perfect. For one thing, Moore reproduces only Camden's opinion, while Wilson's report also tells us about the arguments of counsel. And even if Hargrave's report is embellished, it still reveals something about how the case was historically understood.[103] Nonetheless, the clear provenance of the Moore report and its close agreement with other contemporary sources strongly suggest that Wilson's and Hargrave's reports of the case should no longer be our first port of call as a source of what *Entick* said. As we have argued above, the Moore Report is the closest we are likely to get to an accurate account of Camden's words. For the purposes of constitutional jurisprudence and legal history, that makes it at least as worthy of citation as Hargrave's report, and its existence challenges some of the ways in which printed reports of *Entick* have been used.

I. THE CONTEXT OF THE CASE

To read *Entick* correctly, it's helpful to know how and why it arose. This Part briefly summarizes the background of the case. This Part is meant especially to correct two widespread misunderstandings about *Entick* and its circumstances. First, courts often describe *Entick* as a case about "general warrants," a phrase that has caused some confusion.[104] That term usually refers to unparticularized warrants that fail to name the person to be arrested, the place to be searched, or the property to be seized.[105] But lack of specificity wasn't the problem with the warrant in *Entick*, which actually named its target.[106] The problem, rather, was that the warrant unnecessarily authorized the search of private papers.[107] Second, this Part offers new information about the role of royal messengers—the government agents who were defendants in the case—and the extent to which they are analogous to modern police.[108]

A. *The Political Context*

Entick and several related cases emerged in response to the government's attempt to silence its critics. In 1755, the Rev. John Entick started contributing to *The Monitor or British Freeholder*, a weekly periodical that frequently criticized the government led by the Earl of Bute.[109] In 1762, the Bute Ministry tried to end the *Monitor*'s attacks. George Montagu-Dunk, the second Earl of Halifax and the

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Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in* Crawford v. Washington, 71 BROOK. L. REV. 105, 116 n.34 (2005).

[103] As Justice Leeming has pointed out, even an inaccurate account of a judge's words might influence the later development of the law. Leeming, *supra* note 41, at 220.

[104] For various definitions of "general warrant," see Davies, *supra* note 16, at 558 n.12.

[105] *E.g.*, *General Warrant*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[106] *See* Note, *supra* note 63, at 2295–96.

[107] *See id.*

[108] *Cf.* Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1921 (2014) ("[T]here were no police in [*Entick*]. Instead, the search was conducted by royal 'messengers.'").

[109] Humphreys & Wilson, *supra* note 8.

Secretary of State for the Northern Department, issued a warrant authorizing Nathan Carrington and three other King's Messengers[110] to enter Entick's house and seize his papers.[111]

When Carrington and his colleagues executed the search, they did not find any seditious writings, but they detained Entick and seized several of his books and papers.[112] Arthur Beardmore, a lawyer who was also involved with the *Monitor*, was the target of a similar warrant.[113] He was arrested and detained at Carrington's house for six days along with his clerk, David Meredith, after which both were released on recognizance.[114] Other printers and booksellers were also caught up in the arrests, searches, and seizures.[115] Entick, Beardmore, and others brought several actions against the Messengers for trespass, on the basis that their actions were without lawful authority and thus a wrongful invasion of the plaintiffs' rights; and against the Messengers and Lord Halifax for false imprisonment.[116]

A second set of cases arose out of action taken the following year against another publication critical of the government, *The North Briton*. Once again, Halifax issued a warrant for the paper's producers. This time, however, the warrant did not name its targets, but simply authorized the arrest of "the authors, printers and publishers" of *The North Briton*'s forty-fifth issue, which had attacked George III and his ministers for making an overly conciliatory peace with France.[117] Pursuant to that warrant, the Messengers arrested the printer Dryden Leach—who had not in fact been involved with publishing the *North Briton* no. 45.[118] (He had printed an earlier issue.)[119] His arrest was the result of erroneous information received by the Messengers, and he sued them for false imprisonment.[120]

General warrants of the kind at issue in *Leach v. Money* had been used for many years, but in the 1760s they became much more controversial.[121] This was largely due to the intensely partisan nature of the *Monitor* and *North Briton* cases, which

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[110] The messengers were James Watson, Thomas Ardran, & Robert Blackmore. Warrant Authorizing Search of Entick's House and Seizing of Papers (Nov. 6, 1762), Add MS 22131, f. 29 (on file with the British Library).

[111] Humphreys & Wilson, *supra* note 8. The warrant directed the messengers

> to make strict and diligent search for John Entick, the author, or one concerned in writing of several weekly very seditious papers, intitled the Monitor, or British Freeholder, No. 357, 358, 360, 373, 376, 378, 379, and 380, printed for J. Wilson and J. Fell in Pater Noster Row, which contains gross and scandalous reflections and invectives upon His Majesty's Government, and upon both Houses of Parliament; and him, having found, you are to seize and apprehend, and to bring, together with his books and papers.

Warrant Authorizing Search of Entick's House and Seizing of Papers (Nov. 6, 1762), Add MS 22131, f. 29 (on file with the British Library). The warrant is also quoted in Wilson's report of *Entick*, 95 Eng. Rep. at 810; 2 Wils. K.B. at 278–79.

[112] Hickman, *supra* note 18, at 57–58.

[113] *Id.*

[114] *Id.* at 58.

[115] *Id.*

[116] *Id.* at 68–69, 69 n.85, 71.

[117] A copy of the warrant is filed in TS 11/923, and is reproduced in the report of *Leach v. Money* (1765) 19 Howell's State Trials 1002, 1004 (K.B.). *See also* Hickman, *supra* note 18, at 60–61 (discussing the contents of *The North Briton*'s forty-fifth issue).

[118] *Leach*, 19 Howell's State Trials at 1005.

[119] *Id.* at 1022.

[120] *Id.* at 1006.

[121] *See* Stiles, *supra* note 9, at 953–54.

emerged from a dispute about the Bute government's foreign policy at the end of the Seven Years' War.[122] Politics at the time were febrile and bitterly contested.[123] As it became increasingly clear that Britain was going to win the war, Entick and like-minded authors urged Britain to strike a decisive blow against its Bourbon foes, which would ensure that France and Spain would never again threaten its security or resist the expansion of its commerce.[124] When Bute instead took a more conciliatory approach, Entick and other "Patriot" authors accused him of squandering Britain's military successes—and, more broadly, of threatening English liberty and betraying the achievements of the Glorious Revolution.[125] In this context, the raids on the *Monitor* and *North Briton* were seen not only as attacks on particular writers, but as an attempt to suppress an alternative vision of the British Empire.[126] General warrants, which were one of the Bute ministry's key tools in those raids, became in 1764 the subject of a bitter public debate, which focused on the dangers they posed to liberty.[127]

B. The Role of Royal Messengers

The Messengers of the Crown were primarily responsible for executing those warrants. Their title doesn't adequately convey the nature of their work, which extended well beyond acting as couriers. One eighteenth-century publication described them as not only delivering "Dispatches Foreign and Domestick," but also executing warrants "to take up Persons for High Treasons, or other Offences against the State, which do not so properly fall under the Cognizance of the common Law; and are, perhaps, not proper to be divulg'd in the ordinary Course of Justice."[128] In keeping with that description, Carrington played a significant role in gathering intelligence on matters of state security, including through surveillance, investigation, and interrogation.[129] The affidavit he filed in connection with the trial of John Wilkes demonstrates the extensive scope of his work as an investigator.[130] After a different prosecution for seditious libel, Carrington helped relocate a Crown

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[122] *See id.* at 953.

[123] *See* JOHN BREWER, PARTY IDEOLOGY AND POPULAR POLITICS AT THE ACCESSION OF GEORGE III 9 (1976); STEVE PINCUS, THE HEART OF THE DECLARATION: THE FOUNDERS' CASE FOR AN ACTIVIST GOVERNMENT 15–16 (2016).

[124] Stiles, *supra* note 9, at 953; Jacob Rowbottom, Entick and Carrington*, the Propaganda Wars and Liberty of the Press*, *in* ENTICK V CARRINGTON, *supra* note 2, at 85, 87. For a fuller account of the political controversy that surrounded Bute's foreign policy, see BRENDAN SIMMS, THREE VICTORIES AND A DEFEAT: THE RISE AND FALL OF THE FIRST BRITISH EMPIRE, 1714–1783, at 487–93 (2007); and JAMES M. VAUGHN, THE POLITICS OF EMPIRE AT THE ACCESSION OF GEORGE III 66–69 (2019). For Entick's views on the Seven Years' War, see 1 JOHN ENTICK, THE GENERAL HISTORY OF THE LATE WAR (London, Edward & Charles Dilly 3d ed. 1775).

[125] LINDA COLLEY, BRITONS: FORGING THE NATION 1707–1837, at 110 (1992).

[126] Stiles, *supra* note 9, at 935.

[127] *See infra* Part III(B).

[128] THE PRESENT STATE OF THE BRITISH COURT 39–40 (London, A. Bell & F. Osborn 1720).

[129] *See, e.g.*, Report of Nathan Carrington to the Duke of Newcastle on surveillance of Madam Chambrayer (May 28, 1753), Add MS 32731, f. 512 (on file with the British Library) (describing surveillance of persons suspected of spying); Letter from Nathan Carrington to Hugh Valance Jones (May 11, 1753), Add MS 35423, f. 151 (on file with the British Library) (describing the arrest and interrogation of suspected Jacobite sympathizers).

[130] 2 JAMES OLDHAM, THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY 819–20 (Thomas A. Green ed., 1992).

witness who feared retaliation.[131] His work could also take on a diplomatic character, as when he hosted the Cherokee chiefs who visited Britain to meet George III in 1762.[132]

As this range of assignments suggests, Messengers were often entrusted with delicate tasks that demanded discretion. They sometimes reported directly to the secretaries of state, who would have developed a keen sense of each messenger's abilities.[133] It is worth emphasizing that the warrants in *Entick* and related cases were all directed to specific messengers, who were unlikely to have been selected at random. When Carrington searched Entick's house, he had been a messenger for nearly thirty-five years,[134] and he seems to have developed a reputation among Britain's political class; Horace Walpole described him as an "old man, the cleverest of all ministerial terriers."[135] All but one of the other messengers named in the warrants had at least a decade of experience in that role.[136] Such enduring service for Britain's most senior politicians had its perks. It is unknown whether Carrington had any political connections before his appointment, but his role as messenger allowed him to procure a minor sinecure for his son-in-law, George Garrick, and to partially pay for at least one of his grandsons to attend Eton.[137] This level of political access helps to make sense of the broad discretion given them by general warrants. Messengers were not the equivalent of ordinary police officers. Their duties also required them to be political operatives, civil servants, and detectives.

Messengers' work could be dangerous. When Carrington executed a warrant on the *London Evening Post*, he had to break open a locked door with "a Chizel and an Iron Barr," at which point the owner called his workers and "ordered them to oppose [Carrington] force for force."[138] And, like other royal officials, Messengers' duties

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[131] Statement of Nathan Carrington in support of Thomas Falkner's petition (Feb. 22, 1766), TNA T 1/455 (on file with the UK National Archives) (documenting the assistance Carrington gave Thomas Falkner who was forced to leave Staffordshire after giving evidence that led to the conviction of an Anglican clergyman for writing a seditious libel).

[132] *See* KATE FULLAGAR, THE WARRIOR, THE VOYAGER, AND THE ARTIST: THREE LIVES IN AN AGE OF EMPIRE 82–83 (2020). The Cherokees' British escort apparently referred to Carrington as "Mr. N——Caccanthropos," combining the Greek words for "evil" and "man," suggesting that his unpopularity extended beyond radical printers. *Id.*

[133] *See, e.g.*, Letter from Nathan Carrington to Lord Newcastle (Apr. 9, 1755), Add MS 32854, f. 89 (on file with the British Library) (showing that Carrington's acquaintance with Lord Newcastle was sufficiently personal that he could write directly to him requesting a personal favor).

[134] *See Guard Chamber: Messengers 1660–1837*, *in* 11 OFFICE-HOLDERS IN MODERN BRITAIN 91–111 (R.O. Bucholz ed., 2006), https://www.british-history.ac.uk/office-holders/vol11/pp91-111 [https://perma.cc/KL6K-K83J].

[135] Letter from Horace Walpole to Lord Hertford (Feb. 15, 1764), *in* 38 THE YALE EDITION OF HORACE WALPOLE'S CORRESPONDENCE 315, 317 (W.S. Lewis ed., 1974). For a list of messengers and their dates of service, see *Guard Chamber: Messengers 1660–1837*, *supra* note 134.

[136] *Guard Chamber: Messengers 1660–1837*, *supra* note 134 (showing that John Money had been a messenger since 1731, James Watson since 1745, and Robert Blackmore since 1752. The most junior messenger named in the warrants, Thomas Adran (or Ardran), had six years' experience).

[137] 6 PHILIP H. HIGHFILL, JR., KALMAN A. BURNIM & EDWARD A. LANGHANS, A BIOGRAPHICAL DICTIONARY OF ACTORS, ACTRESSES, MUSICIANS, DANCERS, MANAGERS & OTHER STAGE PERSONNEL IN LONDON, 1660–1800, at 113 (1978).

[138] Carrington's Account of the Execution of a Warrant on the London Evening Post (1754?), T 1/357 (on file with The National Archives).

exposed them to personal legal liability.[139] The Treasury typically reimbursed messengers for their legal expenses,[140] but this could not always be assumed in advance.[141] Reimbursement was discretionary,[142] and there could be awkward delays while the messengers waited for their money.[143]

Carrington's expenses were not limited to legal costs. In a petition submitted to the Treasury in July 1770, he described himself as having been "constantly employed" between 1763 and 1769 in gathering witnesses and evidence for the litigation in *Entick* and related suits.[144] Carrington received £200 from the Treasury in response to this petition, but he nevertheless appears to have been left with sizeable debts. A late codicil attached to his will records that he had been required to dispose of large sums of money, and still had debts outstanding, to the extent that his estate was no longer sufficient to meet the legacies he had initially left.[145]

This background is central to understanding what contemporaries thought was at stake in *Entick*—and, thus, the significance of the differences between Moore's report of the case and the two printed reports.

III. A NEW VIEW OF *ENTICK*

The Moore report differs significantly from the text printed by Hargrave. Indeed, it is hard to find two successive sentences that don't differ. A full discussion of those differences and their implications will require more than one article. Here, we highlight a few divergences which we believe to be particularly important for how *Entick* is read today, focusing especially on the role of property rights, the nature of

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[139] *See, e.g.*, JAMES E. PFANDER, CONSTITUTIONAL TORTS AND THE WAR ON TERROR 3–4 (2017) (demonstrating that tort suits against individual government agents were the ordinary means of challenging state action in the eighteenth century).

[140] *See* Addenda to the Cases of Wilkes and Canning, 19 Howell's State Trials 1382, 1415–16 (reproducing an entry of May 31, 1765, in the Treasury minute-book, indicating that messengers and other officials would be reimbursed for expenses incurred in pursuing seditious libels); ARTHUR H. CASH, JOHN WILKES: THE SCANDALOUS FATHER OF CIVIL LIBERTY 133 (2006) ("The messengers did not have to pay this money out of their own pockets: it was paid by the Crown out of public funds.").

[141] In one case, a group of fourteen victorious plaintiffs agreed to accept a reduced payment from Carrington and another messenger, and to pay their own costs, rather than insist on receiving the full measure of costs and damages they had been awarded. *June 21, 1764*, *in* 7 THE ANNUAL REGISTER OR A VIEW OF THE HISTORY, POLITICKS, AND LITERATURE, FOR THE YEAR 1764, at 80, 81 (London, J. Dodsley 1765). The most likely explanation for this posttrial settlement is that the plaintiffs settled in exchange for the defendants' declining to pursue a bill of exceptions in King's Bench. *See* Hickman, *supra* note 18, at 65 & n.71. But there might also have been some doubt about who would ultimately pay. When the *North Briton* looked back on the settlement a few years later, it asked whether "the sums deducted from the printers [sic] damages" were "saved to the Treasury, or only to the messengers." *Annals of the Reign of King George III*, 121 N. BRITON, Aug. 19, 1769, at 137. If the parties thought that the messengers themselves were on the hook, then there might have been some question about how quickly, or how fully, they would be able to pay—hence the compromise.

[142] *See, e.g.*, Thomas Nuthall, Treasury Solicitor, Report on the Petition of Nathan Carrington for his Expences and Services in the Actions brought by Wilkes and the printers against the Messengers &c. (July 26, 1770), T 1/479 (on file with The National Archives).

[143] *See* V. WHEELER-HOLOHAN, THE HISTORY OF THE KING'S MESSENGERS 160–61 (1935).

[144] Petition of Nathan Carrington for his Expences and Services in the Actions brought by Wilkes and the printers against the Messengers &c. (July 25, 1770), T 1/479 (on file with The National Archives).

[145] Will of Nathan Carrington of Saint James, Middlesex, PROB 11/1035/349 (on file with The National Archives).

executive power, the protection against self-incrimination, and Camden's view of precedent.

A. Property and Privacy

One of the two most famous passages in *Entick* is the "great end" statement, proclaiming in Lockean terms the sanctity of property rights: "The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole."[146] The other is Camden's theory of how the exercise of executive power must be justified by legal sources: "If it is law, it will be found in our books. If it is not to be found there, it is not law."[147] Neither of these passages is present in Moore's report, and their absence has significant consequences for how we read *Entick*.

Let's start with the "great end" statement. Conventional readings of *Entick* have relied on this passage to put property rights at the center of constitutional protections against unlawful searches and seizures. One's papers, in this reading, merit protection not because of any free-floating concern for privacy but because they are "the owner's goods and chattels"; that they contain private information is just "an aggravation of the trespass."[148] This view has been adopted by courts in Australia[149] and the United States,[150] and as well as by academic commentators.[151] Not everyone who has endorsed this reading sees it as something to admire. Justice Edelman of the High Court of Australia, for example, has argued that *Entick*, despite its "highfalutin language," simply reflected "an eighteenth century elevation of the right to property above other rights, which are at least as fundamental, such as bodily integrity or liberty."[152] But even according to its critics, this property-centric interpretation is the orthodox modern reading of *Entick*.[153]

Nonetheless, some scholars (and dissenting judges) have challenged it.[154] Professor Stuntz described "the privacy interest in homes and papers" as "the main

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[146] *Entick*, 19 Howell's State Trials at 1066; *cf.* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 355 (Peter Laslett ed., 1988) ("The great end of Mens entring into Society, being the enjoyment of their Properties in Peace and Safety . . . .").

[147] *Entick*, 19 Howell's State Trials at 1066.

[148] *Id.*

[149] *See, e.g.*, *Smethurst v Comm'r of Police* (2020) 376 ALR 575, 606 (Austl.) (opinion of Gageler, J.) ("*Entick v. Carrington* cemented the position at common law that the holder of a public office cannot invade private property for the purpose of investigating criminal activity without the authority of positive law. Lord Camden . . . recognised a link between protection of personal property and protection of freedom of thought and political expression." (footnotes omitted)).

[150] *See, e.g.*, Florida v. Jardines, 569 U.S. 1, 8 (2013); Carpenter v. United States, 138 S. Ct. 2206, 2240 (2018) (Thomas, J., dissenting) ("[T]he founding generation understood that, by securing their property, the Fourth Amendment would often protect their privacy as well.").

[151] *E.g.*, THOMAS K. CLANCY, THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION 105–06 (3d ed. 2017); K. D. EWING & C. A. GEARTY, THE STRUGGLE FOR CIVIL LIBERTIES 30 (2000); Epstein, *supra* note 25, at 35.

[152] *Smethurst* (2020) 376 ALR at 637 (opinion of Edelman, J.).

[153] *See id.*

[154] *See, e.g.*, United States v. Seljan, 547 F.3d 993, 1017–18 (9th Cir. 2008) (Kozinski, C.J., dissenting).

focus of Camden's opinion,"[155] and Professor Amar reads *Entick* as representing "a proto-privacy principle."[156] Most strikingly, Professor Baranger has recently suggested that "the legal reasoning in Camden's opinion would work perfectly well, or maybe even better, without" its most celebrated passage.[157] The problem, of course, is that the "great end" passage is there nonetheless.

Moore's report removes that difficulty. Instead of a ringing endorsement of property rights, the equivalent passage in Moore's report begins by acknowledging the need to *limit* such rights in a political community: the common law, Camden argued, required "every Man . . . to give up his Right for the sake of Justice & the general good."[158] Following from that, a very different relationship between property and privacy emerges. Like Hargrave, Moore has Camden describing papers as a man's "dearest property."[159] But "property," in the Moore report, is more closely related to privacy: "Private Papers are the only way of concealing a man's most valuable Secrets either in his Profession or any other Way, & are his dearest property. Where private Papers are carried away, the Secrets contained in them may be discovered."[160] The law protects private papers not merely because they are chattels but more fundamentally because of the secrets they contain.[161] Privacy is the end; property is merely the means.

Two other textual differences reinforce this reading. First, Hargrave's *Entick* states that "the eye cannot by the laws of England be guilty of a trespass,"[162] a passage that Australian and U.S. courts have taken to suggest that visual surveillance without physical trespass was necessarily lawful.[163] Moore's version lacks that statement. This is not to claim that Camden would have allowed a mere glance to support an action in trespass. But the passage's absence suggests a less mechanical insistence on physical intrusion than has sometimes been attributed to him.[164] (We discuss the second difference, a citation to *R. v. Cornelius*, in Section C.)

This is not to say that property rights were irrelevant for Camden (or for the Fourth Amendment). *Entick* was, after all, an action in trespass, the very nature of

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[155] Stuntz, *supra* note 4, at 399.

[156] AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION 128 n.* (2012).

[157] Denis Baranger, *Law, Liberty and* Entick v Carrington, *in* ENTICK V CARRINGTON, *supra* note 2, at 185, 186.

[158] *See infra* p. 68.

[159] *Entick*,19 Howell's State Trials at 1066 ("Papers are the owner's goods and chattels: they are his dearest property . . . .").

[160] *Infra* p. 68.

[161] Privacy" and "secrecy" have distinct meanings today, but they were often used interchangeably in the eighteenth century. Johnson's famous dictionary, for example, defined "privacy" as "State of being secret; secrecy," and "secrecy" as "privacy." 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, J. Knapton et al. 1756). When Entick published his own dictionary (in the same year he won his big case), he made a similar conflation. JOHN ENTICK, A NEW ENGLISH-LATIN DICTIONARY 189, 224 (London, Charles Dilly new ed. 1783).

[162] *Entick*, 19 Howell's State Trials at 1066.

[163] *E.g.*, Kyllo v. United States, 533 U.S. 27, 31–32 (2001); *see also* Boyd v. United States, 116 U.S. 616, 628 (1886); *Smethurst v Comm'r of Police* (2020) 376 ALR 575, 606 (Austl.) (opinion of Gageler, J.).

[164] Other areas of the common law acknowledged the possibility of harm to secrecy interests without physical invasion. *See* 4 BLACKSTONE, *supra* note 32, at *168 (*"Eaves-droppers*, or such as listen under walls or windows or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nusance [sic] and presentable at the court-leet, or are indictable at the sessions"); *id.* at *223 (adding that "the animadversion of the law upon eaves-droppers" was rooted in the same concerns that protected homes from "forcible invasion").

which required some kind of invasion of property. And there is abundant evidence beyond *Entick* that eighteenth-century Britons (and Americans) were deeply concerned about securing property from unwanted governmental intrusion.[165] With this context in mind, Moore's *Entick* suggests a middle ground between a narrowly property-focused approach, on one hand, and a freestanding concern for "privacy," on the other.[166]

The political backdrop to *Entick* gives us a better sense of Camden's concerns. As discussed above, the warrants with which the case was concerned had been issued to suppress criticism of the government. For authors who opposed those warrants, the key danger was not the brief trespass they enabled but the more enduring damage they might inflict by exposing the secrets of the government's critics. As one widely reprinted pamphlet put it, private papers contained "secrets (of which there are many) that tho' they can neither affect life nor liberty, yet some men would rather die than have discovered."[167]

According to this pamphlet—often attributed to Wilkes's supporter Richard Grenville, second Earl Temple[168]—papers were not merely chattels. They were "the depositories of our fortune; the trustees of our credit, character, and reputation; the secretaries of our pleasures. They are our closest confidents; the most intimate companions of our bosom; and, next to the recess of our own breasts, they are the most hidden repository we can have."[169] Other writers also suggested that papers mattered more than other kinds of chattel. The journalist John Almon described papers not only as property themselves, but as containing information "of the utmost consequence to private property," whose security might be undermined by the state's disclosure or destruction of business documents.[170] For these writers, as for Camden,

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[165] *See, e.g.*, Brady, *supra* note 63, at 980–96.

[166] For the latter extreme, see *Griswold v. Connecticut*, 381 U.S. 479, 484, 484 n.* (1965) (citing *Entick* as evidence that the Constitution protects a right to privacy that includes the right of married couples to use contraceptives). *Compare* Nita A. Farahany, *Searching Secrets*, 160 U. PA. L. REV. 1239, 1271–72 (2012) (suggesting that "Fourth Amendment privacy concerns include a secrecy interest"), *with* Mihailis E. Diamantis, *Privileging Privacy: Confidentiality as a Source of Fourth Amendment Protection*, 21 U. PA. J. CONST. L. 485, 489 (2018) (critiquing what the author describes as the Supreme Court's "conception of privacy as a kind of secrecy").

[167] [LORD TEMPLE?], A LETTER TO THE RIGHT HONOURABLE THE EARLS OF EGREMONT AND HALIFAX, ON THE SEIZURE OF PAPERS 9 (London, J. Williams 1763) [hereinafter LETTER TO EGREMONT AND HALIFAX]. The pamphlet was reprinted in a number of popular publications. *See, e.g.*, *A letter to the Earls of Egremont and Halifax, on the Seizure of Papers*, SCOTS MAG., July 1763, at 396, 400; *A Letter to the Right Hon. The Earls of Egremont and Halifax, on the Seizure of Papers*, UNIVERSAL MAG., June 1763, at 316, 321. The pamphlet was also cited favorably in *A Letter to the Right Honourable the Earls of Egremont and Halifax, His Majesty's Principal Secretaries of State, on the Seizure of Papers*, 15 CRITICAL REV. 409, 487 (1763); and *A Letter to the Right Hon. the Earls of Egremont and Halifax, His Majesty's Principal Secretaries of State, on the Seizure of Papers*, 28 MONTHLY REV. 490, 490 (1763).

[168] *See* ENGLISH SHORT TITLE CATALOGUE, no. T871, http://estc.bl.uk/T871 (accessed Mar. 9, 2022) (giving the pamphlet's authorship); *see* Earl of Hardwicke to Duke of Newcastle (Apr. 30, 1763), *in* 3 THE LIFE AND CORRESPONDENCE OF PHILIP YORKE, EARL OF HARDWICKE, LORD HIGH CHANCELLOR OF GREAT BRITAIN 487, 487–88 (1913) (reporting that Temple was present when Carrington came to arrest Wilkes, and that Temple was also present in court during some of Wilkes's subsequent court proceedings).

[169] LETTER TO EGREMONT AND HALIFAX, *supra* note 167, at 8–9.

[170] [JOHN ALMON], A LETTER CONCERNING LIBELS, WARRANTS, AND THE SEIZURE OF PAPERS 44 (London, J. Almon 2 ed. 1764); *see also* LETTER TO EGREMONT AND HALIFAX, *supra* note 167, at 7–8 ("Papers relate to the affairs of business and property; the advantages, title, and security of which depend upon them . . . .").

the importance of papers springs from their role as repositories of information. Unlike Hargrave's report, therefore, Camden's reasoning in Moore's report responds squarely to what contemporaries believed to be the problem with the approach the government took to dealing with the *Monitor* and the *North Briton*.[171] Property rights are a means of protecting privacy, and they might even be relevant for defining privacy's limits (whether for the Fourth Amendment or in other contexts). But to focus solely on technical questions of trespass or ownership is to miss the forest for the trees.[172]

B. Secrecy and State Power

The special significance of papers had legal consequences. It has long been recognized that seizing papers might inflict a greater injury than seizing other kinds of property. In Hargrave's report, Camden observes that "the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages."[173] In Moore's report, however, Camden addresses the distinctiveness of papers not by treating it as an aggravating factor relevant to the remedy but by demanding a heightened justification for their disclosure.[174]

This becomes clear when we consider the second major difference between the Moore and Hargrave reports. In Hargrave's version, Camden makes a striking statement about the nature of legal authority: "If it is law, it will be found in our books. If it is not to be found there, it is not law."[175] The statement—made in the course of Camden's discussion of the Secretary of State's power to issue the warrant in question—is necessarily transsubstantive, suggesting a general rule about how to prove the content of law. Moreover, the rule is binary: either something is law (and in the books) or not. That stands in some tension with the immediately preceding claim, which suggests more of a spectrum: "the law to warrant [a claim of power] should be clear in proportion as the power is exorbitant."[176]

Moore's report cures this difficulty. It omits the first, binary rule about legal authority and focuses only on the relationship between the *extensiveness* of the power claimed by the Secretary of State and the need for clear legal authority: "As this Jurisdiction of the Secretary of State is so extensive; therefore the Power ought to be as clear as it is extensive. It does not appear in our Law Books at all, that he has this Power."[177]As the government claims more extensive authority, its burden of proving the lawfulness of that authority rises. On one hand, this idea explains why Camden

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[171] *See infra* p. 66–67.

[172] *Cf.* United States v. Jones, 565 U.S. 400, 424–25 (2012) (Alito, J., concurring in the judgment) (arguing that an excessive focus on property rights "disregards what is really important … and instead attaches great significance to something that most would view as relatively minor," i.e., "a technical trespass").

[173] *Entick*, 19 Howell's State Trials at 1066. Some later commentators have gone even further, reading *Entick* to suggest that some private papers cannot be seized even with a valid warrant. *E.g.*, Eric Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 VA. L. REV. 869, 880–84 (1985).

[174] *See infra* pp. 72–73.

[175] *Entick*, 19 Howell's State Trials at 1066.

[176] *Id.*

[177] *Infra* p. 68; *cf. Entick*, 19 Howell's State Trials at 1065–66 ("Such is the power, and therefore one should naturally expect that the law to warrant it should be clear in proportion as the power is exorbitant.").

was so skeptical of the asserted power to search and seize property on suspicion of seditious libel. On the other hand, it suggests that Camden was not propounding what has been described as a "'negative conception' of public powers," according to which the government has only those powers specifically conferred by law.[178] In Moore's report, Camden says nothing that might preclude the government from having some sort of implicit power—as long as it was more modest than the "extensive" power claimed in *Entick* itself.[179]

Other judges seem to have shared this framework for assessing claims of governmental authority. Consider Lord Mansfield's opinion in *Leach v. Money*.[180] (Although Camden and Mansfield were legal and political rivals, *Entick* praised *Leach* as "very [r]ight.")[181] Although *Leach* is often cited as a case about the validity of general warrants,[182] that issue never came up when the case was argued for the second (and final) time. Instead, Attorney General Yorke simply conceded that the defendants had not acted within the terms of the warrant they had cited in their defense.[183]

Commentators have long surmised that Yorke made that concession in order to "keep the issue of general warrants alive" by denying the court an opportunity to give a clear judgment against them.[184] But a careful reading of the record reveals that Yorke had already lost on that point. All four judges present—Lord Chief Justice Mansfield and Justices Wilmot, Yates, and Aston—agreed that general warrants were void.[185]

Their rationale tracks Camden's framework in *Entick*. In defending general warrants, secretaries of state claimed an exceptionally broad discretion, which was much greater than that enjoyed by other magistrates.[186] Such a grant of power required a clear grounding in legal authority and could not be grounded in practice alone. Justice Yates presented the strongest version of this claim: "an Usage from the 1st year of Rome would not give [general warrants] any Sanction at all," he insisted, "for no Usage or Custom whatever, can ever establish anything that is in its first Principles illegal."[187] Mansfield, characteristically, put it in less absolute terms.

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[178] Endicott, *supra* note 2, at 122–25 (summarizing and critiquing this view). For a defense of the negative conception, see Adam Tomkins, *The Authority of* Entick v Carrington, *in* ENTICK V CARRINGTON, *supra* note 2, at 161, 161–84.

[179] *See infra* p. 68.

[180] Money v. Leach (June 18, 1765), TS 11/923 (on file with The National Archives) [hereinafter TS Report of *Money*]. A different version of the case was published in William Blackstone's reports, (1765) 96 Eng. Rep. 320 ; 1 Black. W. 555 (K.B.). We rely on the version found in the files of the Treasury Solicitor, because Blackstone's reports have a mixed reputation for accuracy. *See, e.g.*, Kadens, *supra* note 20, at 1578–82; Tiersma, *supra* note 90, at 1201.

[181] *Infra* p. 70. That praise is not surprising: the decision affirmed a verdict over which Camden had presided.

[182] *E.g.*, Davies, *supra* note 16, at 579.

[183] TS Report of *Money*, *supra* note 180.

[184] Hickman, *supra* note 18, at 67–68. Hargrave similarly "conjectured, that [Yorke] despaired of being able to support" the legality of general warrants. Leach v. Money (1765) 19 Howell's State Trials 1001, 1028 (K.B.).

[185] TS Report of *Money*, *supra* note 180; *see also* 1 OLDHAM, *supra* note 130, at 204 (quoting and discussing the manuscript report).

[186] TS Report of *Money*, *supra* note 180 ("[T]he Sollr General has admitted, that such a warrant from a Justice of Peace would be bad.").

[187] *Id.*

He began by declaring that "usage against clear principles and Authorities of Law, never weighs."[188] He then qualified this statement by suggesting that a practice might nonetheless be allowed to continue if "the Public" would experience "great inconvenience from changing the Usage."[189] But this exception was a high bar; the precedent that Mansfield cited to support it involved a case in which "the Inconvenience would have been ten Times more in overturning what had been done there, than in letting it remain as it was."[190] That was manifestly not the situation in *Leach*.

This was a nuanced and pragmatic approach to state power, but it was more liable to abuse than the binary rule suggested in Hargrave's version of *Entick*. Camden seems to have recognized this danger in an earlier case, *Huckle v. Money*, in which he focused on the need for courts to police the government's attempts to expand its power.[191] In *Huckle*, a journeyman printer sued a royal messenger, John Money, for arresting and confining him on suspicion of having printed the *North Briton* no. 45.[192] After the jury awarded the printer £300, Money moved for a new trial on the ground that the damages were excessive.[193] The plaintiff had only been in custody for about six hours, during which time Money had "used him very civilly by treating him with beef-steaks and beer."[194] Therefore, Money argued, the plaintiff had suffered little or no actual harm.[195]

Camden denied the motion.[196] In explaining his decision, he relied partly on the need for judges to defer to juries.[197] But he also made the affirmative argument that juries "*ought* to assess exemplary Damages" in cases involving "an Injury … done under the Colour of Authority."[198] Camden made it clear that he was troubled not merely by the government's abuse of its power in issuing and executing the warrant, but also by its attempt to cloak that abuse in law after the fact. In evaluating the appropriateness of damages, he considered it an aggravating factor that the government's lawyers had attempted at trial "to maintain the Legality of the Warrant."[199] It was the Crown's unjustified attempt to expand its authority in court, not only the abuse of power in the field, that demanded exemplary damages.[200]

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[188] *Id.*

[189] *Id.*

[190] *Id.*

[191] Huckle v. Money (1763) 95 Eng. Rep. 768, 769; 2 Wils. K.B. 205, 207 (K.B.).

[192] *Id.* at 768; 2 Wils. K.B. at 206.

[193] *Id.*

[194] *Id.*

[195] *Id.*

[196] *Id.* at 769; 2 Wils. K.B. at 207. He was then known as Chief Justice Pratt, but we use his later title for the sake of simplicity.

[197] *See Huckle*, 95 Eng. Rep. at 768–69; 2 Wils. K.B. at 206–07.

[198] JOSEPH SAYER, THE LAW OF DAMAGES 220–21 (London, W. Strahan & M. Woodfall for P. Uriel & T. Cadell 1770) (emphasis added) (quoting an unpublished manuscript report of *Huckle*).

[199] *Id.* at 220.

[200] *Id.* at 220–21; *accord Huckle*, 95 Eng. Rep. at 769; 2 Wils. K.B. at 207 ("[Jurors] saw a magistrate . . . attempting to destroy the liberty of the kingdom, by insisting upon the legality of this general warrant before them; they heard the King's Counsel, and saw the solicitor of the Treasury endeavouring to support and maintain the legality of the warrant in a tyrannical and severe manner.").

This sense of horror at the abuse of lawful authority puts *Entick* in a new and distinctive light. Camden's concern was neither simply the protection of property, as Hargrave's report suggests, nor the protection of privacy, as a more maximalist reading might wish. It was, rather, controlling governmental authority in order to check its ability to adversely affect an individual's ability to keep secrets. We might summarize Camden's reasoning as follows: papers are more valuable to their owners than ordinary chattels because of the secrets they might contain; searching or seizing papers thus involves the exercise of greater power than the search or seizure of other kinds of property; therefore, the exercise of such power requires an especially clear grounding in legal authority.[201] Property rights mattered—especially since they were foundational for an action in trespass—but the heart of the decision was its concern for the ability to safeguard one's private thoughts and secrets. The manuscript report thus exonerates *Entick* from Justice Edelman's accusation that *Entick* elevated property rights over "bodily integrity or liberty."[202] Liberty was precisely what *Entick* sought to protect.

C. Self-Incrimination

Camden's focus on protecting secrets against the executive also helps to explain his approach to self-incrimination. Courts continue to debate whether the Fifth Amendment's protection against self-incrimination is merely a trial right, or whether it also bars certain pretrial uses of compelled statements.[203] The present debate can be traced to the Court's fusion of the Fourth Amendment's Reasonableness Clause and the Fifth Amendment's Incrimination Clause in *Boyd v. United States*, which described them as "run[ning] almost into each other."[204] In *Boyd*'s telling, *Entick* inspired not only the Fourth Amendment but also the Fifth.[205] And the fact that *Entick* was concerned not only with the use of illegally seized evidence but with the illegality of the seizure itself suggested that the Incrimination Clause might extend beyond criminal trials.[206] Later judges and scholars rejected *Boyd*'s conflation of the two amendments, suggesting a narrower scope for the Self-Incrimination Clause.[207]

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[201] *Cf.* William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1749–50 (2013) (arguing that in the eighteenth century, some powers were deemed so "great" that they had to be expressly authorized, while other, lesser powers could be implied); Aziz Z. Huq, *How the Fourth Amendment and the Separation of Powers Rise (and Fall) Together*, 83 U. CHI. L. REV. 139, 145–47 (2016) (describing *Entick* as concerned with political dissent and the limitation of executive power).

[202] *Smethurst v Comm'r of Police* (2020) 376 ALR 575, 637 (Austl.) (opinion of Edelman, J.).

[203] *See* Vogt v. City of Hays, 844 F.3d 1235, 1240 (10th Cir. 2017) ("The Third, Fourth, and Fifth Circuits have stated that the Fifth Amendment is only a trial right. . . . In contrast, the Second, Seventh, and Ninth Circuits have held that certain pretrial uses of compelled statements violate the Fifth Amendment." (footnotes omitted) (citations omitted)). In *Vogt*, the Tenth Circuit held that the Fifth Amendment right against self-incrimination applies to a probable cause hearing. *Id.* at 1246. The Supreme Court granted certiorari to review that decision but then dismissed the writ as improvidently granted. City of Hays v. Vogt, 138 S. Ct. 1683, 1684 (2018) (per curiam).

[204] Boyd v. United States, 116 U.S. 616, 630 (1886).

[205] *Id.*

[206] *See id.*

[207] *See, e.g.*, Carpenter v. United States, 138 S. Ct. 2206, 2253 (2018) (Alito, J., dissenting); Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 916

But at least some Justices, although wary of a full-fledged revival of *Boyd*, remain interested in at least partially resurrecting its more expansive approach.[208]

The Moore report supports such a partial rehabilitation of *Boyd*. As in the Hargrave report, Moore presents Camden as rooting the protection against lawful searches in the right of criminal suspects not to condemn themselves.[209] In addition, the Moore report has Camden summarizing a precedent, *R v. Cornelius*,[210] that illustrates the scope of this right.[211] *Cornelius* involved an information filed against a justice of the peace for extorting money when licensing alehouses.[212] When the prosecutor sought "a Rule to inspect the Books of the Corporation," the judges denied it, partly on the ground that "it was in effect obliging a Defendant . . . to furnish Evidence against Himself."[213]

Cornelius and *Boyd* had similar facts. Although *Cornelius* involved a criminal prosecution, and *Boyd* was a civil forfeiture proceeding, both concerned the state's authority to inspect documents created by the defendants in the ordinary course of business.[214] But Camden's opinion departed from *Boyd* in two respects. First, his citation to *Cornelius* undermines *Boyd*'s tight connection between self-incrimination and property rights.[215] The defendants in *Cornelius* did not own the requested records; the Corporation of Ipswich did.[216] But that was irrelevant to the defendant's interest in not being condemned by the records he had created.

Second, Camden's approach was less absolute than *Boyd* suggested. Later commentators have read *Entick* as declaring an early version of the "mere evidence" rule—the now-rejected doctrine that a search warrant could not authorize the seizure of items which were "merely" evidence against a criminal defendant (as opposed to items to which the government might claim title, such as the instrumentalities or fruits of a crime).[217] But the Moore report offers an important caveat. Although it presents Camden as deeply suspicious of searches for mere evidence, he does not foreclose them entirely. Instead, he leaves unresolved the question of whether

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(1995); Michael S. Pardo, *Disentangling the Fourth Amendment and the Self-Incrimination Clause*, 90 IOWA L. REV. 1857, 1858–59 (2005).

[208] *See, e.g.*, *Carpenter*, 138 S. Ct. at 2271 (Gorsuch, J., dissenting) (citing Richard A. Nagareda, *Compulsion "To Be a Witness" and the Resurrection of* Boyd, 74 N.Y.U. L. REV. 1575, 1619 & n.172 (1999)); United States v. Hubbell, 530 U.S. 27, 50–51, 55–56 (2000) (Thomas, J., concurring) (also citing Nagareda).

[209] *Infra* p. 77. ("I shou'd be glad to know, whether the Law obliges a Man in any Case to produce Evidence against himself?—No . . . it is certain, the Law compels no man to condemn himself.").

[210] R v. Cornelius (1744) 93 Eng. Rep. 1133; 2 Strange 1210 (K.B.). There is a substantial summary of the case in *The King v. Purnell* (1748) 96 Eng. Rep. 20, 23; 1 Black. W. 37, 45 (K.B.); *R v. Purnell* (1748) 95 Eng. Rep. 595, 596–97; 1 Wils. K.B. 239, 241–42 (K.B.).

[211] *Infra* p. #.

[212] *Cornelius*, 93 Eng. Rep. at 1133–34; 2 Strange at 1210–11.

[213] *See infra* p. 77.

[214] Although *Boyd* itself did not cite *Cornelius*, some later judges noticed the affinity between the two cases. *E.g.*, Blum v. State, 51 A. 26, 29–30 (Md. 1902); Samuel A. Alito, Jr., *Documents and the Privilege Against Self-Incrimination*, 48 U. PITT. L. REV. 27, 35 n.37 (1986). The "corporation" in *Cornelius* was the Borough of Ipswich; the defendants were justices of the peace.

[215] *See* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 788 (1994); Stuntz, *supra* note 4, at 427–28.

[216] *See Cornelius*, 93 Eng. Rep. at 1133; 2 Strange at 1210–11.

[217] 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.6(d), at 604 (3rd ed. 1996).

"necessity" might authorize such searches in "secret Cases"—i.e., those in which detection of the crime is especially difficult.[218] He didn't need to resolve that question in *Entick*, because seditious libels were the antithesis of secret cases; indeed, they were public by their very nature. Once again, Camden's reasoning was less concerned with absolute rights—whether to property or privacy—than with extracting clear and appropriately demanding justifications for government actions.

D. The Role of Precedent

Finally, Moore's report sheds new light on Camden's approach to judicial precedent. The later eighteenth century was a pivotal time in the development of *stare decisis*. Although there was a general consensus that the duty of judges was to declare the content of preexisting law, not to make law,[219] there was disagreement about the extent to which judges were bound by earlier decisions.[220] Did declaring the "law" mean rigidly following past precedents? Or were judges instead to pursue the common law's deeper principles even at the cost of bypassing earlier decisions?[221] Hargrave's report portrays Camden as doing both—much to the consternation of later scholars, who have struggled to reconcile his apparent inconsistencies.[222] Moore's report, in contrast, suggests a more consistent—and more rigorous—approach to judicial precedent.

One of the questions presented in *Entick* was whether a secretary of state—and, by extension, the defendants who had acted under the secretary's orders—should be considered a conservator of the peace.[223] If he was, then the defendants might have been able to claim the benefit of the Constables Protection Act 1750, which insulated justices of the peace from "vexatious" litigation.[224] In the course of addressing the statute's applicability, Camden considered whether a secretary of state might be a conservator of the peace by virtue of being a privy counsellor.[225] That, in turn, required Camden to determine the power of privy counsellors to arrest and commit suspects to prison, for offenses other than high treason.[226] Three prior cases—*R v. Kendal & Row* (1700),[227] *R v. Derby* (1711),[228] and *R v. Earbury* (1733)[229]—had suggested that privy counsellors possessed such a power. But Camden, reluctant to concede the lawfulness of that position, proceeded to investigate the foundations of

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[218] *See infra* p. 76.

[219] *See supra* notes 79–82 and accompanying text.

[220] *See* DAVID LIEBERMAN, THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN 86–87 (1989).

[221] *See* Kadens, *supra* note 20, at 1598–1601.

[222] For a review and summary, see Hickman, *supra* note 18, at 71–80.

[223] *Infra* p. 46.

[224] *Infra* p. 63; Constables Protection Act (1750) 24 Geo. 2 c. 44, § 6.

[225] *Infra* p. 46.

[226] *Infra* p. 61.

[227] There are four reports of the case: 91 Eng. Rep. 304, 1 Salk. 348; 91 Eng. Rep. 939, 1 Ld. Raym. 65; 88 Eng. Rep. 1178, 12 Mod. 82; and 90 Eng. Rep. 517; Comb. 343.

[228] 92 Eng. Rep. 794, Fort. 140.

[229] 94 Eng. Rep. 509; 2 Barn. K.B. 293; 94 Eng. Rep. 544; 2 Barn. K.B. 346.

those cases, and particularly of Lord Chief Justice Holt's opinion in *Kendal & Row*, which the other two cases had followed.

This is where modern scholars get confused. In Hargrave's report, Camden's research leads him to conclude that Holt's opinion was so erroneous as to lack validity: "In consequence of all this reasoning, I am forced to deny the opinion of my lord chief justice Holt to be law, if it shall be taken to extend beyond the case of high treason."[230] This approach was consistent with a contemporary legal orthodoxy that treated erroneous precedents as "not law."[231] Despite this statement, however, Hargrave's report also records Camden as repeatedly professing to follow Holt's ostensibly unlawful decision.[232] In particular, Hargrave's Camden states that he and his brother judges were "bound to adhere to" *Derby* and *Earbury*, and that he had "no right to overturn" them, even if they were "erroneous."[233] The difficulty of reconciling Camden's rejection of *Kendal & Row* with his acquiescence in *Darby* and *Earbury* has led Professor Hickman to surmise that Hargrave's report might have been inaccurate.[234] The Moore report confirms that suspicion.

The Moore report offers two complementary solutions to the problem of Camden's attitude toward precedent. First, Moore, like Hargrave, reports Camden as "denying" the authority of Holt's opinion in *Kendal & Row*. Importantly, however, Moore does not have Camden *denying Holt's opinion to be law*. Instead, Camden simply denies it, meaning that he records his disagreement without expressly rejecting its authoritative status:

> I am therefore obliged to deny the Opinion of my Lord Holt, where he says, that any one of the Council, or the Secretary of State might commit; for I cannot construe the Power to extend further than High Treason; nor is it fair to give the words a larger Construction, as the Cases there relied on, are all confined to High Treason.[235]

Camden then goes on to elucidate his reasons for disagreeing with Holt and subsequent cases, before explaining his ultimate decision to acquiesce in them:

> But I wou'd have it understood . . . that the Law of this Country is never so safe, as where Courts of Justice hold themselves to be concluded by the Authorities of their Predecessors; for if Judges did not regard former Determinations, & were to think themselves at Liberty not to adhere to the Precedents of those who had gone before them; but on Principles and Opinions of their own, wou'd overturn former Determinations & settled Cases, they wou'd by that means, invest themselves with little less than Legislative Power, & no Certainty of Law cou'd be had.[236]

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[230] *Entick*, 19 Howell's State Trials at 1058.

[231] *E.g.*, 1 BLACKSTONE, *supra* note 32, at *70 ("For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law* . . . .").

[232] Hickman, *supra* note 18, at 76–78.

[233] *Entick*, 19 Howell's State Trials at 1058–59.

[234] Hickman, *supra* note 18, at 77 n.114, 79.

[235] *See infra* p. 61.

[236] *See infra* p. 62.

This paragraph has no counterpart in Hargrave's report, but it fits with what we know of Camden's judicial philosophy. A decade later, in a parliamentary debate related to a famous copyright case, Camden denied that common law judges had any right to decide cases based on "moral fitness and equitable right."[237] Instead, Camden insisted, judges ought to decide cases based on "the old black letter of our law . . . preserved in their books or in judicial records."[238] Precedent, not principle, had to guide the law.

Camden's target in making that statement was Lord Mansfield. Although the two judges had reached similar outcomes in the general-warrants cases, Camden was suspicious of what he described as Mansfield's tendency to ignore inconvenient precedents.[239] *Entick* provided Camden with an excellent opportunity not only to constrain the executive but also to make the case for his broader jurisprudential principles. By describing *Kendal & Row* as flawed but nonetheless binding, Camden flaunted his fidelity to judicial precedent—but in a way that was costless, since his discussion of *Kendal* was dictum[240] and did nothing to stop him from reaching his preferred outcome in *Entick*.

The history of precedent remains a much-debated topic, and we don't claim that Camden's statement in *Entick* resolves any of the many open questions about how or when the doctrine of precedent came to assume its modern form. But it does reinforce the idea that the nature of precedent was contested in the later eighteenth century—to such an extent that judges might spar over it even in a case where the underlying theory made no different to the outcome.

CONCLUSION

Entick v. Carrington remains a crucial precedent across the common-law world. Our principal goal has been to offer new evidence about *Entick*—especially a new report of the case itself—that will allow future scholars to reach their own conclusions about what the case means. At the same time, we've suggested four areas in which this new report of *Entick* challenges widely shared orthodoxies. Compared to prevailing views of the case, *Entick* turns out to be less focused on property rights and more pragmatic about rights in general. It is less committed to a negative view of state power but more concerned about the impact of exaggerated assertions of power—particularly when it comes to governmental intrusion on private secrets. And it is more rigidly committed to *stare decisis*. As we've warned, it would be unwise to put too much weight on any one case, much less a single report of a case. But the interpretations we've offered here at least suggest a need to revisit some of the frameworks that courts and commentators have built around inaccurate reports of *Entick*.

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[237] Proceedings in the Lords on the Question of Literary Property (Feb. 22, 1774), *in* 17 THE PARLIAMENTARY HISTORY OF ENGLAND, FROM THE EARLIEST PERIOD TO THE YEAR 1803, at 953, 998 (London, T.C. Hansard for Longman et al. 1813).

[238] *Id.* at 999.

[239] *See* JAMES OLDHAM, ENGLISH COMMON LAW IN THE AGE OF MANSFIELD 359–60 (2004).

[240] Hickman, *supra* note 18, at 75.

APPENDIX: *ENTICK V. CARRINGTON*, AS REPORTED BY EDWARD MOORE

The text that follows is a verbatim transcript of Edward Moore's report, based on the original manuscript in Moore's own hand in the British Library's collections (BL Add MS 36206). Variant readings from the Lincoln's Inn manuscript are noted in footnotes to the text. (We have ignored differences that merely relate to punctuation, sentence or paragraph breaks, abbreviations, and spelling.) In preparing the text for publication, we have followed the following conventions:

- We have expanded some abbreviations that in the eighteenth century were commonly used in handwriting but not in print (e.g., "agst" is transcribed as "against"). All other abbreviations or contractions are printed as they were. For example, "Ch. J.", "tho'" and "cou'd" are transcribed verbatim, rather than as "Chief Justice", "though", and "could."
- In common with other manuscripts of the period, the first word of a page is frequently repeated at the bottom of the preceding page. These repetitions are omitted in the transcript.
- Marginal notes in the manuscript are transcribed within {curly braces}. Superscripts are transcribed in curly braces with the prefix {super: }
- In the manuscript, each page is numbered in two different ways: a page number in ink contemporaneous with the transcript; and a folio number in pencil, added at the time the Moore report was bound and catalogued as part of the Hardwicke papers. We have followed the original numbers, which are indicated in [square brackets]. The exception is the title page, which does not have an original page number in the MS and is therefore numbered with its folio reference.

* * *

In the Common Pleas

Entinck[241] and Carrington & others } Case

Notes of Lord Chief Justice Camden's Opinion on this Case, as delivered by his Lordship in Mich[s] Term 6th G 3rd Wednesday the 27th of November 1765.

Taken by
Edward Moore **[24r]**

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[241] Authors' note: Entick sometimes published under the name "Entinck," so someone taking down the case as declared orally might have used either spelling. Although "Entick" is the more common spelling, later commentators have continued to use "Entinck." *See, e.g.*, MAY, *supra* note 101, at 128.

In the Common Pleas

Entinck & Carrington & others } Case

Mich[s] Term 6th G 3rd Wednesday 27th November 1765

Notes of the Opinion of the Court on this Case, as it was delivered by Lord Ch. J. Camden.

Lord Camden,

This Case is an Action of Trespass brought by the Plaintiff against the Defendants for entering his Dwelling House and seizing and carrying away his Papers. And the Plaintiff declares that on the 11th day of November 1762 the Defendants broke and entered the Plaintiff's House & seized & carried away his Books & Papers.[242] To this Declaration the Defendants have pleaded that they are not Guilty, upon which Issue is joined. And in the next Place the Defendants plead, that before the Day & Year[243] in the Declaration mentioned, the Right Hon[ble] the Earl of Hallifax one of His Majesty's Privy Council & Secretary[244] of State, who by virtue of his Office used to sign & issue Warrants, in due manner made his Warrant in Writing. And they further say, that the said Earl on the 6th Day of November 1762 made his Warrant under his Hand & Seal & directed it to the Defendants four of his Majesty's Messengers, by which Warrant they were commanded, to seize the Plaintiff & his Books & Papers; and for that purpose, to make strict & diligent Search for the author printer & Publisher of a certain Paper, called the Monitor or British Freeholder & to take the Author Printer and Publisher thereof; which said Warrant sets forth that the said Paper contains gross & scandalous Reflections & Invectives on his Majesty's Government & both Houses of Parliament, of which said Paper the Plaintiff was the Supposed Author. And further the **[1]** said Warrant commands that they the said Messengers Him the said Entinck having found, should bring him before the said Earl of Hallifax to be examined & dealt with according to Law. And in the due execution of the said Warrant all Magistrates, Mayors, Bailiffs Constables & other Peace Officers[245] are commanded[246] to be aiding & assisting to them the said Messengers. They further say, that they upon the said Day & Year in the Declaration mentioned, about 11 o'clock in the Forenoon, entered the Plaintiff's Dwelling House the Doors being open & not locked, in order to search for & bring him the said Entinck & his Books & Papers[247] before the said Earl of Hallifax. And they accordingly searched for & found[248] the said Plaintiff, his Books & Papers,[249] & did

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[242] Variation in Lincoln's Inn Manuscript: [carryed away his papers &c.].
[243] Variation in Lincoln's Inn Manuscript: [time].
[244] Variation in Lincoln's Inn Manuscript: [Secretarys]
[245] Variation in Lincoln's Inn Manuscript: [Constables &c].
[246] Variation in Lincoln's Inn Manuscript: [are Ordered & Commanded].
[247] Variation in Lincoln's Inn Manuscript: [the said Entick his books and papers].
[248] Variation in Lincoln's Inn Manuscript: [And that they accordingly searched for found & seized].
[249] Variation in Lincoln's Inn Manuscript: [the said Plaintiff his Papers].

carry him & them to the said Earl of Hallifax's Office & delivered them to Lovell Stanhope Esq. the then Law Clerk. And they further say, that on the 17th [250] November following the Plaintiff was discharged out of custody and they say, that they did not deliver the said Entinck to the[251] Earl of Hallifax, because He was not then in the way.[252]

They then plead another Justification which is pretty much the same as the first, except instead of averring, that they carried the Books & Papers to Lovel Stanhope,[253] they shew, that they carried them to the Earl of Hallifax. And upon a general Replication to those Pleas, the Issues are joined between the Parties. And this Case came on to be tried at Westminster Hall before a special Jury & the Jury then found a Special Verdict, which was pretty much in Substance this.

They first find as to the Trespass, that the Defendants are not Guilty. And with respect to all **[2]** that Part of the Trespass, & the Damage done in pursuance of the Warrant granted by the Earl of Hallifax, one of the Privy Council[254] & a Secretary of State, They find, that on the 17th October 1762, one Scott came before the said Lovel Stanhope[255] the Law Clerk, & gave an Information against the Plaintiff, as the Supposed Author of the Monitor or British Freeholder; & then Scott's information is set forth. The Jury further find, that upon the 6th day of November in the said year,[256] the said Information was produced & shown to the Earl of Hallifax,[257] whereupon He the said Earl made & issued his Warrant and directed it to the Defendants for apprehending the Plaintiff and Seizing his Papers; and then the Warrant is set forth. And the Verdict proceeds to find, that the said Earl of Hallifax caused the said Warrant[258] to be delivered to the Defendants four of his Majesty's Messengers, & that they on the said 11th of November[259] without any Constable, entered into the Plaintiff's Dwelling House,[260] the Door being open, & seized Him said Plaintiff[261] & his Papers, and that they the said Messengers in executing said Warrant[262] broke open one Bureau, one Drawer &c & the Deeds, private Papers[263] & several other things, of him the said Entinck, did inspect in searching for & in order to find[264] the said Paper called the Monitor or British Freeholder. And the Verdict further States, that after having done this, they took his Papers so seized & gave

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[250] Variation in Lincoln's Inn Manuscript: [17th day of November].

[251] Variation in Lincoln's Inn Manuscript: [custody & that they did not deliver him to the said].

[252] Variation in Lincoln's Inn Manuscript: [he was not then to be found].

[253] Variation In Lincoln's Inn Manuscript: [that they carried them to the Earl of Halifax's office to Lovel Stanhope as in the former plea].

[254] Variation in Lincoln's Inn Manuscript: [one of His Majestys privy Council].

[255] Variation in Lincoln's Inn Manuscript: [came before Edwd Weston Esq.].

[256] Variation in Lincoln's Inn Manuscript: [in the year 1762].

[257] Variation in Lincoln's Inn Manuscript: [produced to the said Earl of Halifax].

[258] Variation in Lincoln's Inn Manuscript: [the Warrant].

[259] Variation in Lincoln's Inn Manuscript: [the 11th of November].

[260] Variation in Lincoln's Inn Manuscript: [entered in the Plaintiff's House].

[261] Variation in Lincoln's Inn Manuscript: [seized him].

[262] Variation in Lincoln's Inn Manuscript: [the said Warrant].

[263] Variation in Lincoln's Inn Manuscript: [the Deeds & Papers].

[264] Variation in Lincoln's Inn Manuscript: [and several other things did inspect in executing the said Warrant in order to Search for and find].

notice to Lovel Stanhope Esq. the then Law Clerk[265] who was then an assistant to the said Earl of Hallifax in the Execution of his Office; & that He did Assist in the Examination of all Books & Papers as Law Clerk.[266] And they also[267] find that He the said L. Stanhope is likewise a Justice of the Peace for the liberty of Westminster; And that they the said Messengers[268] gave him notice of the Books & Papers[269] so seized, and at the Instance & request of the said L. Stanhope the said Messengers,[270] delivered the Books & Papers so seized to him. And the Verdict **[3]** further states, that in the 1st year of his present Majesty he granted the Office of Law Clerk to the said L. Stanhope, in order to examine & take the Depositions of those persons, whom it might be necessary to examine relative to public affairs.[271] And then the said Letters Patent are set forth. And it is further said, that the said L. Stanhope in the said 1st year of his present Majesty,[272] accepted the said Letters Patent, & that he the said L. Stanhope has enjoyed the said Office ever since, & that during all that Time, the Examination of all Persons Books & Papers[273] relative to the public affairs, have been committed to him, by the Secretary of State as his particular Part of the Business to examine the same.[274] The Jury further find, that down from the Time of the Revolution, the like Warrants had been frequently granted, as that is[275] in the present Case. And then the Verdict states the Oath of the Messengers, by which[276] they swear to be true to his Majesty & that they will serve his Majesty as Messengers, & be Obedient to his[277] Commands, & to all the Lords of his Majesty's Privy Council, & to the Secretaries of State.[278] And the Verdict further finds, that no Demand was ever made by the Plaintiff of the said Warrant, or of any Copy thereof, or of the Defendants Authority,[279] nor did He the said Plaintiff, bring his Action for the said Trespass, till within 6 months afterwards.[280]

The Verdict[281] then states the Whole Matter to the Court, & says, that if the Court is of Opinion, that the Justification is good in Point of Law, then they find a Verdict

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[265] Variation in Lincoln's Inn Manuscript: [seized & took his Papers & of the Papers so seized gave notice to Lovel Stanhope Esq.].

[266] Variation in Lincoln's Inn Manuscript: [examination of all persons Books & Papers brought to the said Earl of Halifax's Office as Law Clerk].

[267] Variation in Lincoln's Inn Manuscript: [they further].

[268] Variation in Lincoln's Inn Manuscript: [and that said Messengers].

[269] Variation in Lincoln's Inn Manuscript: [notice of the said person Books & Papers].

[270] Variation in Lincoln's Inn Manuscript: [and that the said Defendants at the Instance & request of the said Lovel Stanhope].

[271] Variation in Lincoln's Inn Manuscript: [publick affairs &c].

[272] Variation in Lincoln's Inn Manuscript: omits [Majesty].

[273] Variation in Lincoln's Inn Manuscript: [Books & things].

[274] Variation in Lincoln's Inn Manuscript: [State for the purpose of examining the same as his particular part of the Business].

[275] Variation in Lincoln's Inn Manuscript: [with that].

[276] Variation in Lincoln's Inn Manuscript: [wherein].

[277] Variation in Lincoln's Inn Manuscript: [would serve his Majesty as Messengers & be Obedient to His Majesty's].

[278] Variation in Lincoln's Inn Manuscript: [the Privy Council & Secretarys of State &c].

[279] Variation in Lincoln's Inn Manuscript: [Warrant or of the Defendants Authority, or of any Copy of the said Warrant].

[280] Variation in Lincoln's Inn Manuscript: [within Six months after the Time when it was committed].

[281] Variation in Lincoln's Inn Manuscript: adds the superscript: [Jury].

for the Defendants, but if not,[282] then they find a verdict for the Plaintiff. & £300 Damages.

With respect to these two Justifications the Jury proceed to find the 1st, that it is verbatim as in the Defendants' plea. With regard to the 2d Justification they find for the Plaintiff. **[4]**

This is the whole Record now before the Court for their Opinion. And this Record has set up two Defences to the Action, upon both of which the Defendants relied.[283]

The 1st arises from the Facts found in the Special Verdict, whereby they put themselves upon the footing of officers acting under the Warrant of a Magistrate, and therefore say, they are within[284] the Protection of the Act of 24th G. 2d and[285] they are justified under that Act of Parliament.

The 2d is[286] upon the Legallity of the Warrant; for this being a Justification at Common Law, the Officer will be answerable if the Magistrate is not justified, in granting the Warrant.

Under the 1st of these Defences, it is incumbent upon[287] the Defendants to shew, that they are Officers under this[288] Act of Parliament. And

Under the 2d, that they are Officers acting under the Warrant of a Person properly authorized[289] to grant it; & that they have acted in Obedience to the Warrant, so granted. This then brings it to the Question, whether they have shewn that in Evidence? And this Question naturally involves another, & that is, whether the Secretary of State can be taken to be within the Equity of the 24 G. 2?[290] And from the words of this Act of Parliament 'tis observable,[291] that both the Officers & Justices are mentioned together, and therefore the Justification must be good for both, or both must be excluded.

This therefore leads me to consider, the Authority of that Minister, who granted this Warrant, in both the Capacities of Secretary of State & Privy Councellor, to see,[292] whether he can be intended to be within the Equity of that Act. If He has any Authority to commit, it is clear he holds it under no Statute or Act of Parliament; therefore whatever power of this sort now exists in Him, must be given by the Common Law. **[5]**

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[282] Variation in Lincoln's Inn Manuscript: [they then find for the Defendants generally, but if the Court should be of opinion the Justification is not sufficient in Law].

[283] Variation in Lincoln's Inn Manuscript: [upon both which they relied].

[284] Variation in Lincoln's Inn Manuscript: [and therefore within].

[285] Variation in Lincoln's Inn Manuscript: [and they say,].

[286] Variation in Lincoln's Inn Manuscript: [second Justification is].

[287] Variation in Lincoln's Inn Manuscript: [on].

[288] Variation in Lincoln's Inn Manuscript: [the].

[289] Variation in Lincoln's Inn Manuscript: [Person Authorized].

[290] Variation in Lincoln's Inn Manuscript: [taken as a Justice of the Peace & taken to be within the Equity of that Act of Parliament of 24th G. 2d ca 44].

[291] Variation in Lincoln's Inn Manuscript: [from the words of this Act it is Observable].

[292] Variation in Lincoln's Inn Manuscript: [and see].

Now in order to shew this Power as derived from the Common Law, the Secretary of State[293] has been considered as a Conservator of the Peace, by Virtue of his being[294] a Secretary of State or privy Councellor.

From hence then arises this matter, Whether in either of these Characters he can be considered as a Conservator of the Peace.

1st then, He has not the Power of a Conservator of the Peace, in either of the Capacities of Secretary of State or Privy Councellor under any Act of Parliament.

But 2d, admitting him to be so, and to have such Power; then

The 1st Question will be, Whether he is within the Equity of the 24. G. 2, made for the Protection of Justices of the Peace & their Officers from vexatious Prosecutions?

The next is,[295] Whether the Defendants acted in Obedience to, & duly executed the Warrant? And then,

The next is,[296] Whether the seizing the Papers was lawful or not?

As to the 1st Question. The power of the Minister[297] in the way it is exercised is pretty singular & extraordinary. If he is considered in the Light of a Privy Councellor, he cannot have any such Power, no such power is given to them. If he has it as a Privy Councellor,[298] all privy Councellors must have it; Yet Secretaries of State alone exercise it. If they say they ever had that power as Privy Councellors;[299] yet was there no other Proof; the circumstance of their not using the Power, & that they never practiced it for so many years back (till the late Instance) is almost sufficient to shew, the Power never existed.

The Authority of a Privy Councellor is in some Instances greater, in others less, than that of a Conservator. His power as a Privy Councellor **[6]** extends throughout the whole Kingdom, yet the Authority does not extend to him as a Privy Councellor merely,[300] as it did to Conservators of the Peace. A Privy Councellor can commit in some Cases, where the Conservators had not any Jurisdiction whatever.[301] His Warrants are chiefly against larger Offences,[302] which no Conservators ever pretended to. On his warrants what is done? Why, the Person is apprehended for Treason, and brought up into these Courts by a Habeas Corpus, is sent back in the first Instance, and that is more than any other can do.[303] And yet tho' he does all this, it seems admitted he has no Power[304] to administer an Oath, or to take Bail.

This Jurisdiction, so extraordinary in it's nature, is so very Dark & intricate, that the Councel who were to support it, were not able to form any Opinion from whence

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[293] Variation in Lincoln's Inn Manuscript: Manuscript omits these opening words, and carries on from the previous sentence with [he has been considered].

[294] Variation in Lincoln's Inn Manuscript: [by his being].

[295] Variation in Lincoln's Inn Manuscript: [and then the next will be].

[296] Variation in Lincoln's Inn Manuscript: [& the third & next is].

[297] Variation in Lincoln's Inn Manuscript: [Magistrate].

[298] Variation in Lincoln's Inn Manuscript: [to them as privy Counsellors; & if he has, then].

[299] Variation in Lincoln's Inn Manuscript: omits [as Privy Councellors].

[300] Variation in Lincoln's Inn Manuscript: [extend to him merely as a Privy Councellor].

[301] Variation in Lincoln's Inn Manuscript: [Conservator had not any Jurisdiction whatsoever].

[302] Variation in Lincoln's Inn Manuscript: [Libellers & larger Offences].

[303] Variation in Lincoln's Inn Manuscript: Manuscript omits this sentence and the immediately preceding one.

[304] Variation in Lincoln's Inn Manuscript: [not the power].

it came; and being at a Loss to account for it, Sometimes they affix it to the Office of a Secretary of State; and[305] Sometimes to the Privy Councellor, & at others pretend[306] his own Authority by Custom will justify Him;[307] and in the last Argument, they endeavour'd to derive his Power[308] from the King's Command, & say, it was originally per Mandatum Domini Regis, & by a gradual Transfer of the King's Authority to the Secretary[309] of State. (Whatever his true Authority was, it must be admitted he is in the full Possession of his Power at this Day.) And to support[310] this Power, They attempt to shew it, from the constant Usage & Practice of granting these Warrants down from the Revolution, & that the Secretary of State[311] has been in the Practice of it, & that Practice recognized since that Time, in many Cases; particularly the Cases of the King & Darby and the King & Earberry,[312] to say Nothing of the Case of Kendal & Roe, upon which the other two Cases were built. There is no Occasion to shake these Authorities to know, whether He is within the Equity of the Statute of 24 G. 2.[313] **[7]**

And tho' the Origin of this Power of Commitment is so very dark[314] & obscure, yet it is necessary to know from whence it sprung; & tho' this is not of the least Consequence to the public Safety, I will endeavour to trace this Power back to its origin, in order to determine whether this Person is within the Act of the 24. G. 2. or not; for before I can say,[315] whether he is,[316] or is not, I must trace him back to his Origin. This is rather the Office of an Antiquarian than of a Judge.[317] But here[318] let me observe, that tho' a great deal has been said about the Liberty of the Subject, the Liberty[319] of the Subject is not in the least affected or concerned, in this Determination, let it turn out as it will;[320] for, so long as the Proceedings under these Warrants are regulated by Law; the Public are but little interested or concerned,[321] in the Choice of that Person, by whom they are granted.

To proceed then; A Secretary of State, as such, is a mere private Secretary & no more;[322] by Articuli super Chartas he is described; & by my Lord Coke's Reading upon it, this Officer is the keeper of the Signet of the King, or rather of the King's

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305 Variation in Lincoln's Inn Manuscript: omits [and].

306 Variation in Lincoln's Inn Manuscript: [sometimes they pretend].

307 Variation in Lincoln's Inn Manuscript: [will justify].

308 Variation in Lincoln's Inn Manuscript: [and on the last Argument, they endeavored to derive this power].

309 Variation in Lincoln's Inn Manuscript: [Secretarys]

310 Variation in Lincoln's Inn Manuscript: [in Order to support].

311 Variation in Lincoln's Inn Manuscript: [& that he].

312 Variation in Lincoln's Inn Manuscript: [particularly the King & Darby & the King & Earbury].

313 Variation in Lincoln's Inn Manuscript: [the equity of the Statute.].

314 Variation in Lincoln's Inn Manuscript: [is very dark].

315 Variation in Lincoln's Inn Manuscript: [for before I can take upon me to Say].

316 Variation in Lincoln's Inn Manuscript: [Whether it is].

317 Variation in Lincoln's Inn Manuscript: [than a Judge; & a Search which will rather gratify Curiosity, than Satisfaction.].

318 Variation in Lincoln's Inn Manuscript: [And here].

319 Variation in Lincoln's Inn Manuscript: [yet the liberty].

320 Variation in Lincoln's Inn Manuscript: omits the words [let it turn out as it will].

321 Variation in Lincoln's Inn Manuscript: [but little concerned].

322 Variation in Lincoln's Inn Manuscript: Manuscript omits the opening words of this paragraph and begins [By Articuli super Chartas…].

Privy Signet[323] to Sign the King's private Letters. This Seal is taken notice of in several Books. My Lord Coke in his Comment on the above Statute pa. 556,[324] tells you the Reason why this Seal is in the Secretary's Custody. If at the Time my Lord Coke[325] wrote this Institute he had been acquainted with the Authority now ascribed to him, he would most certainly have mentioned it in this Place; and therefore his Silence is a strong Argument, that no such Power existed at that Time.

The Secretarys of State are likewise mentioned in the Statute of 27. Hen. 8, and in the 8 Report in the Prince's Case, & Lord Coke's[326] Institutes &c. And in **[8]** all these Places, the King's Secretary, or as he is called the King's Chief Secretary, is mentioned without that Addition,[327] that He is an Officer of great Consequence. None of the Passages in these Authors, give him the Title, or ascribe to Him the Power of a Magistrate, and I do not find[328] that He is even a Privy Councellor.

In the Times of King James & Charles 1st, according to my Lord Clarendon's Account, He is not an Officer of such Magnitude as is now contended for;[329] being then only employed to make up Dispatches relative to State Affairs; to write the King's Letters &c, & not to sit at the Council Board to decide, but only to pen the Resolutions of the Council.

It will not be difficult[330] to account for this Officer's growing so Great, as he has since done. It seems, his Authority grew by the Custom in Europe of having resident Ambassadors, & then all the Dispatches from foreign courts[331] went through his Hands, & He became a Person of Consequence from that Time, & it was then necessary, to invest him with more Authority & Splendor.

This being the true Description of his Employment, I see no Cause why he should be reckoned or called a Magistrate; or that he should have the Power of a Conservator of the Peace. The Custody of the Signet implies no such Power to commit; if it did, it is most likely the Warrant wou'd be stampt with that Seal. Besides all this, 'tis[332] not consistent with the Prudence and Wisdom of the Common Law of this Kingdom, to give that Person a Power to commit, without a Power to examine upon Oath, which it is evident, they do not now exercise, or pretend to have.

Mr. Justice Rokeby, in the Case of Kendal & Roe, says, that one of these Powers is incident to the other. And I own I entirely agree with Mr. J. Rokeby; for no Magistrate can commit, without the Power of administering an Oath.[333] How can he commit, if He **[9]** cannot examine upon Oath?[334] The Practice of the Cases in the House of Commons does not justify this; for these are Precedents for no other Cases. The Rights of that House are above those of all other Courts & paramount to Error

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[323] Variation in Lincoln's Inn Manuscript: [or rather the Kings privy Signet].
[324] Variation in Lincoln's Inn Manuscript: [in his 2d Inst: 556].
[325] Variation in Lincoln's Inn Manuscript: [my L. Cooke].
[326] Variation in Lincoln's Inn Manuscript: [Lord Cook's].
[327] Variation in Lincoln's Inn Manuscript: [without that Addition, which has been contended for;].
[328] Variation in Lincoln's Inn Manuscript: [and I don't find by them,].
[329] Variation in Lincoln's Inn Manuscript: [as is now contended].
[330] Variation in Lincoln's Inn Manuscript: [be very difficult].
[331] Variation in Lincoln's Inn Manuscript: omits [from foreign courts].
[332] Variation in Lincoln's Inn Manuscript: [it is].
[333] Variation in Lincoln's Inn Manuscript: [of examining upon Oath.].
[334] Variation in Lincoln's Inn Manuscript: omits this sentence.

and above our Injunction. And notwithstanding [335] in that particular Case of[336] Kendal & Roe, Mr. J. Rokeby & Myself agree in the Principle; yet our conclusions are drawn in a very different manner. He from the assumed Power of committing, infers the Power of administering an Oath. I am of the contrary Opinion, that without the Power of administering an Oath,[337] they cannot commit. If Secretaries of State are Common Law Magistrates, one would expect to find some account of them in our Books; but except in two or three Places, his Name is not known. The Silence of the Books therefore is the Strongest Reason[338] to say, that he is not an Object of the Common Law, especially when we consider the many unsuccessful attempts, that have been made by the Council in support of this Power,[339] to transform the Secretary of State into a Conservator of the Peace. For this purpose Fitzherbert,[340] Dalton, Stamford, Coke,[341] Hale, Hawkins, Lambert, Pulton & others have all been searched and examined in order to see, if such a Person cou'd be found in any of them.[342] The King in all these Books is mentioned always, as the first & great Conservator of the Kingdom, & then follows[343] the Chancellor, the Treasurer,[344] the Master of the Roles, the Chief Justices,[345] and the other inferior Conservators;[346] some of whom it is said, hold this Power by some particular Tenure, some by Prescription, & others by the Common Law; but no Secretary of State or privy Councellor is to be found in any of these[347] **[10]** Books. And I do affirm it, that no Record has ever called this Person a Conservator, till the Case of Kendal & Roe, which has been cited in support of this Power.[348]

The next Cases that are cited by the Defendants Council[349] are in Leonard's Reports—1 Leon 70 or 71, 29 & 30 Eliz: There the Party appears to have been committed[350] by a Secretary of State & Privy Councellor, and the[351] Objection in this Case was, that the Cause of Commitment was not mentioned in the Return; and therefore a Day was given to emend it,[352] and then they return'd the Commitment to be, By the whole Council Board.

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[335] Variation in Lincoln's Inn Manuscript: [above our Injunction or Prohibition notwithstanding].

[336] Variation in Lincoln's Inn Manuscript: [in].

[337] Variation in Lincoln's Inn Manuscript: [administering of an Oath].

[338] Variation in Lincoln's Inn Manuscript: [Strongest Evidence].

[339] Variation in Lincoln's Inn Manuscript: [in support of this Case].

[340] Variation in Lincoln's Inn Manuscript: [Fisher].

[341] Variation in Lincoln's Inn Manuscript: [Cook].

[342] Variation in Lincoln's Inn Manuscript: [could be found amongst the Old Conservators of the peace; but these authors mention all those who had that power, He could not be found in any of them].

[343] Variation in Lincoln's Inn Manuscript: [follow].

[344] Variation in Lincoln's Inn Manuscript: adds [the Chamberlain,].

[345] Variation in Lincoln's Inn Manuscript: [the chief Justices &c].

[346] Variation in Lincoln's Inn Manuscript: omits [and the other inferior Conservators].

[347] Variation in Lincoln's Inn Manuscript: [all these].

[348] Variation in Lincoln's Inn Manuscript: ends sentence at [Kendal & Roe.].

[349] Variation in Lincoln's Inn Manuscript: [Cited in support of this power].

[350] Variation in Lincoln's Inn Manuscript: [in that Case the party was committed].

[351] Variation in Lincoln's Inn Manuscript: [Councellors the].

[352] Variation in Lincoln's Inn Manuscript: [mend the return].

There is a like Case in 2. Leonard 175. of a Commitment by a Secretary of State, & there the same Objection[353] was taken, & the Return ordered to be amended; but in that Case it does not appear what was done, nor whether any other Return was made.[354]

These Authorities shew, that the Judges of those Days, knew of no such committing Magistrates as Secretaries of State. They pay no regard to that Office, but they always treat the Commitments by Secretary of State & Privy Councellors, as the Act of the Council Board[355] only; and to Shew further, that the Privy Council Board was the only acting Magistrate at that Time, we need only look into that Question,[356] upon which the 12 Judges were to give their Opinion, as to the Commitments by the King, & the Commitments by the Privy Council Board.[357] And on that occasion, when the Question was put, all the 12 Judges were obliged to remonstrate against their Authority; but they take[358] no notice at all, of the power of Secretaries of State, or of single Privy Councellors; which they certainly wou'd have done, if they had had the least suspicion of them[359] having this Power.

In the 3[d] year of Charles 1st, when the House of **[11]** Commons made the Enquiry[360] concerning the Commitments[361] by the King or Council, 'tis natural to expect the Secretary of State's Warrant[362] wou'd have been mentioned; but there is not throughout that long Debate[363] in the House of Commons, any notice taken of Him, and his name is not mentioned.

The Petition of Right too is equally Silent on that Subject. And in the 16th Car. 1. when the Habeas Corpuss were granted upon all State Commitments, & when all those who had that[364] Power of Committing, were ex abundanti Cautela enumerated,[365] & every sort of Commitment mentioned, yet this sort of Commitment by a privy Councellor or Secretary of State, is not amongst that[366] number. If then he had a Power of his own to commit, this famous Act of Parliament may be considered as waste Paper; a Supposition almost incredible; for who can conceive that these Persons, so jealous of any Infringement on the Rights & Liberties of the Subjects, as the Judges & Commons of those Times were, that they should even bind the King himself by name, & leave the Secretary of State at large, to exercise the Power of committing at Pleasure, where Majesty itself was restrained. Whoever attends to this, will say, the Secretary of State never exercised the Power of committing in his own

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353 Variation in Lincoln's Inn Manuscript: [objections].

354 Variation in Lincoln's Inn Manuscript: ends sentence at [ordered to be amended.].

355 Variation in Lincoln's Inn Manuscript: [Act of the Council].

356 Variation in Lincoln's Inn Manuscript: [look into the Case & Consider that Question].

357 Variation in Lincoln's Inn Manuscript: [King & commitments by the Privy Council].

358 Variation in Lincoln's Inn Manuscript: [took].

359 Variation in Lincoln's Inn Manuscript: [their].

360 Variation in Lincoln's Inn Manuscript: [Inquiry].

361 Variation in Lincoln's Inn Manuscript: [concerning State Commitments].

362 Variation in Lincoln's Inn Manuscript: ['tis natural to expect the Secretaries Warrant].

363 Variation in Lincoln's Inn Manuscript: [Argument].

364 Variation in Lincoln's Inn Manuscript: [a].

365 Variation in Lincoln's Inn Manuscript: [ex abundanti Cautela were enumerated].

366 Variation in Lincoln's Inn Manuscript: [the].

Right; I say in his own Right; because when He did commit, the Commitment was[367] considered as the Act[368] of the King.

If we look into the Ephemeris Parliamentarica pa 62 (or 152),[369] this Passage will throw great light into the present[370] Enquiry; & from what it says, it appears the Powers of Secretarys of State was[371] from a[372] Delegation by the King to the Secretary, of the King's[373] Royal Prerogative to Commit, in his own person; **[12]** & from him devolved to the Secretary of State & not as a delegated Power. The passage I allude to, is a Speech of Secretary Coke's,[374] where he says, He is to make no Return to any Court or Power whatever, but to the King. This was spoke on[375] the famous Dispute on the Question, whether the King cou'd commit, or whether his Council or his Secretary[376] cou'd without shewing the Cause. The Statute of Westminster the 1st was the Ground of the Crown's Pretensions. On this occasion Mr. Secretary Coke[377] said, He daily committed without shewing the Cause. And when he says, he daily committed, He must mean, those Commitments that were under the Warrants which[378] were of[379] speciale Mandatum Domini Regis. This shews how the supposed Delegations arose. It was only in the Transaction of State Affairs, & only employing the King's Messengers of the Chamber, requiring civil Officers to assist &c,[380] which shews the Nature of the Secretary of State's Power. Mr. Secretary Coke's Speech is as follows,[381] –

{vide Epherm: Parliam. pa 62 (or 152) – or, the 8. Vol. of the Parliamentary History pa. 95 or 96, from whence Mr. Serjt. Nares quoted it in his Argument}[382]

To understand the meaning of this Speech I must inform you, of the noble Struggle between the **[13]** Crown & the Parliament, about the Commitments by the King & by the Council, and whether in those Warrants granted by[383] the King & by the Council, the Cause of the Commitment ought to be set forth in the Warrant.

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[367] Variation in Lincoln's Inn Manuscript: [Commitments were].

[368] Variation in Lincoln's Inn Manuscript: [Acts].

[369] Variation in Lincoln's Inn Manuscript: [Ephemeris Parliamentori pa. 152 or 62].

[370] Variation in Lincoln's Inn Manuscript: [into this].

[371] Variation in Lincoln's Inn Manuscript: [were].

[372] Variation in Lincoln's Inn Manuscript: [the].

[373] Variation in Lincoln's Inn Manuscript: [His].

[374] Variation in Lincoln's Inn Manuscript: [Mr. Secretary Cookes to the House].

[375] Variation in Lincoln's Inn Manuscript: [upon].

[376] Variation in Lincoln's Inn Manuscript: [his Council or Secretary].

[377] Variation in Lincoln's Inn Manuscript: [Cooke].

[378] Variation in Lincoln's Inn Manuscript: [that].

[379] Variation in Lincoln's Inn Manuscript: [per].

[380] Variation in Lincoln's Inn Manuscript: [& requiring civil Officers to assist].

[381] Variation in Lincoln's Inn Manuscript: [Mr. Sec. Cooke's Speech is this].

[382] Variation in Lincoln's Inn Manuscript: omits this citation and provides the following quote: "Do not think by Cases of Law & Debate we can make that not to be Law, which in experience we find every day necessary; make what Law you will, If I do discharge the place I bear, I must Commit Men, & must not discover the Cause to any Goaler or Judge: If I by this power commit one without just Cause, the burden falls heavy on me, by his Majesty's displeasure and he will remove me from my place. [Sed vide the page in the Ephem Parliam] Government is a solid thing & must be supported."

[383] Variation in Lincoln's Inn Manuscript: [Warrants by].

The point that occasioned this Struggle, was on this[384] Question, whether the Persons committed by the King's Command, or the Privy Council Board, the Fact for which they were committed ought to have been set forth in the warrant, & whether such Persons, so committed, were bailable. It was contended at that Time, that the King had a Power to commit; 1st by his own name & 2d by his Privy Council. The matter then in Dispute between the King & the Parliament was confined to these two Commitments, that is, Commitments by the King Himself,[385] and Commitments by the Privy Council; both claiming the Power of Committing, without shewing the Cause. These Commitments seem to be provided for in the Statute of Westminster 1st and the Cases that I have cited in Leonard, shew, that single Counsellor's commitments were not intitled to it, for no other Commitments then, were deemed to be within that Act of Parliament. The Precedents produced in support of this Power, speak of no other Commitments but these. It is very remarkable too, that the House of Lords in that Struggle, whether out of Compliment to the Crown, or from[386] what other motive does not appear, they[387] resolved that either the King or his Council cou'd commit provided they shewed good Cause.

And it is observable **[14]** that tho'[388] Mr. Secretary Cooke had told them in his Speech, that He had made a daily Practice of Committing without shewing Cause; yet they took no notice of a Secretary of States Warrant at all.[389] What then were these Commitments by the Secretaries? They were only such, & esteemed only such, as were per speciale Mandatum Dom. Regis; for no other Warrants claim'd that extraordinary Privilege of concealing the Cause, but those.[390] This Observation explains what he means, when He says, the Power of Committing was committed to him; this meant the Power of the King, not the Power qua Secretary; but per special Mand: Dom. Regis.

Upon this Ground it will be very easy[391] to explain the singularity of this Magistrate's Proceedings,[392] from a few observations; such as his meddling only with[393] a few State Offences; his Commiting tho' no Power to administer an Oath &c[394] all which Particularities are congruous enough to the Idea of the King's Warrant, but not to the Warrant of his Subject. If it shou'd be understood, that he cou'd commit by his own Power, then the Power must naturally have been taken Notice of on this Dispute; but it was never mentioned by the Parliament, nor by the 16th of[395] Charles 1st. The Council Board's[396] Warrants were only provided for.

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[384] Variation in Lincoln's Inn Manuscript: [the].
[385] Variation in Lincoln's Inn Manuscript: [Commitments by the King].
[386] Variation in Lincoln's Inn Manuscript: omits [from].
[387] Variation in Lincoln's Inn Manuscript: omits [they].
[388] Variation in Lincoln's Inn Manuscript: [And though].
[389] Variation in Lincoln's Inn Manuscript: [yet they took no notice at all, of a Secretary of States Warrant].
[390] Variation in Lincoln's Inn Manuscript: [no other Warrants, but those, claim'd that extraordinary priviledge of concealing the Cause].

[392] Variation in Lincoln's Inn Manuscript: [Magistrate's [above: "Ministers"] proceeding].
[393] Variation in Lincoln's Inn Manuscript: [such as meddling only with].
[394] Variation in Lincoln's Inn Manuscript: [no power to Administer an Oath;].
[395] Variation in Lincoln's Inn Manuscript: omits [of].
[396] Variation in Lincoln's Inn Manuscript: [The Council Board Warrants].

It was thought[397] in Queen Elizabeth's Reign, that the Secretary of State was the fitest Hand to issue these Warrants, for then the Council became too numerous to be informed of every matter, & it was very natural to put the supposed Power of examining & committing to one; & therefore you find him so employ'd[398] under that Queen. **[15]** But when the Judges on the Question put to them, by the Queen [above: King] & Parliament,[399] declared they wou'd remand none of his Prisoners, without shewing the Cause of their Commitment;[400] then it was, the King's mandate was produced.[401] Thus He was in that King's Reign, & so[402] he continued down to the Restoration.

I have then but little to add upon this Head, till the Case of Kendal & Roe, when it was said, a Secretary of State cou'd commit.

It is not improbable, but that he claimed this Power from the Licensing Act 13th & 14th Car. 2d. That Act of Parliament gave him the 1st Right to issue Warrants in his own name; not to commit Persons, but to search for Papers &c.[403] Now will arise a Question; Whether by this Power given by that Act of Parliament He had any new Power to commit in his own Name? 'Tis remarkable that during that Interval he never offered to commit in his own Name.

The Cases since the Revolution, such as the King & Darby, the King & Earberry, Kendal & Roe & the King & Darby[404] afford no light into the present Enquiry, that Secretaries of State have the power to commit; tho' Strong Cases to confirm the contrary; but I mean to except the Case of Kendal & Roe, because there my Ld C.J. Holt[405] seems to collect his Opinion from the Authorities, & there says, Privy Councellors can commit, & that Secretaries of State are Privy Councellors;[406] but with respect to all the rest, they are totally silent. **[16]**

Before, therefore I can conclude, that the Secretary of State's power was deriv'd from the King, I must enquire into the Power[407] of Secretaries of State to commit, as privy Councellors. I will then freely state, what I have discovered of this matter, on searching & enquiring into it.

And in the 1st place, it is proper to observe, that the Privy Councellor cannot derive his authority from the Statute of Westminster 1st; for he is not mentioned in that Statute. The first word we hear of the Power of this Officer to commit by the King's Command,[408] is in Stamford, who is the first Commentator, that mentions him; & he says; as to the Commandment of the King, it is to be understood, as the Commandment of his own Mouth. And Lambert in his Chapter of Bailment, gives

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[397] Variation in Lincoln's Inn Manuscript: [Afterwards it was thought].
[398] Variation in Lincoln's Inn Manuscript: [And so we [above: "you"] find the Secretary of State employed].
[399] Variation in Lincoln's Inn Manuscript: [by the King and Parliament].
[400] Variation in Lincoln's Inn Manuscript: [without her shewing the Cause of the Commitment].
[401] Variation in Lincoln's Inn Manuscript: [that the King's mandate was produced].
[402] Variation in Lincoln's Inn Manuscript: [such].
[403] Variation in Lincoln's Inn Manuscript: omits [&c].
[404] Variation in Lincoln's Inn Manuscript: [the King & Derby, The King & Earbury, & The King & Windham].
[405] Variation in Lincoln's Inn Manuscript: omits [my].
[406] Variation in Lincoln's Inn Manuscript: omits [& that Secretaries of State are Privy Councellors].
[407] Variation in Lincoln's Inn Manuscript: [powers].
[408] Variation in Lincoln's Inn Manuscript: omits [by the King's Command].

this[409] Construction & says; All the Commitments by the Council, have been by the King. And the Commitments by the Council of those Times were never attempted to be carried further, than to State Affairs and Commitments per Mandatum Domini Regis, & could not extend to a Single Councellor.[410] Thus far & no further, did the Council in the Time of Charles 1st endeavour to extend that Law. And by the Cases in Queen Elizabeth's Time, it is plain the Judges were of the same Opinion, & so Leonard confirms it. If then, He is not intitled by this Statute, he must be impowered, if at all, by the Common Law, They who say He is, wou'd do well to shew, some Authorities for this Opinion.[411] It is[412] clear he is not mentioned as a Conservator of the Peace[413] in any of the Books. The first Place where this Officer[414] is mentioned as a Magistrate is in the Year Book 33d Hen. 6. ca. 8, where there is an equivocal Reading as to the word[415] Duos or Dominos; for there the Word Dominos[416] is abbreviated in such a manner, that it may as well **[17]** stand for the word Duos as Dominos[417] —& it is observable that the Parliament take Notice of that Case, & this Ambiguity as to the Word Duos or Dominos. The next time you meet with Him, in the light of a Magistrate, is in the 1st Ed: 6. ca 12: Where in some new Treasons, that Act of Parliament directs Accusations for the offences there enumerated, to be made & declared to one of the King's Council, or to one of the King's Justices of Assize or else to one of the King's Justices[418] of the Peace. And the like Power is given by the 5 & 6th of the same King ca. 11. Sec. 10. And in Kelyng fo. 19. they find, that[419] a Confession upon Examination before a Privy Councellor, is a Confession within the meaning of that Act of Parliament (& tho' rather as the Lord Bridgman said, because Justices of the Peace were not enabled to take Examination before the Statute 1st & 2d. Wm. & Mary ca 13.)

That Act in the 12 Sec. had provided, that no Person shou'd be attainted of High Treason, but by the Testimony of two Persons, unless the said Party arraigned shall willingly & without violence confess the same.

It seems to me, that the Ground upon which the Judges proceeded, was the Clause whereby they were appointed to take the Declarations of the Persons, who gave Information of the Treason.[420]

In the Books & in Kelyng they do not give us the Reason upon which the Judges went, only, that it should be, before a Person authorized to take it. Whether the Reason was, that Privy Councellors being mentioned with Justices of the Peace & **[18]** Justices of Assize in the new Treason,[421] they should likewise be considered as

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409 Variation in Lincoln's Inn Manuscript: [the].
410 Variation in Lincoln's Inn Manuscript: [Single Councellors Commitments].
411 Variation in Lincoln's Inn Manuscript: [some Opinions & Authorities to support their Argument.].
412 Variation in Lincoln's Inn Manuscript: [Tis].
413 Variation in Lincoln's Inn Manuscript: omits [of the Peace].
414 Variation in Lincoln's Inn Manuscript: [he].
415 Variation in Lincoln's Inn Manuscript: [either as to the word].
416 Variation in Lincoln's Inn Manuscript: [The the [sic] Word Dominos].
417 Variation in Lincoln's Inn Manuscript: [will read as well duos as Dominos].
418 Variation in Lincoln's Inn Manuscript: [Justice].
419 Variation in Lincoln's Inn Manuscript: omits [that].
420 Variation in Lincoln's Inn Manuscript: [Treasons].
421 Variation in Lincoln's Inn Manuscript: [Treasons].

having Power to take Confessions in other Cases of Treason, does not appear. The Case of High Treason, however, is the only Case to which these Authorities refer. If this does give them that Power, it is confined to Treason only, & that more by Conjecture than positive Construction; & if the Authority stood no better than upon these Books, it is no more, than a Conjectural Authority.

The next Cases in support of this Authority,[422] are the Cases in Leonard; and those prove no more, than that the Judges admit[423] a Power to commit without saying in what Cases. And there they call upon the Secretary of State for a better Return, & 'tis[424] observable, that Sir Francis Walsingham the then Secretary of State and a good Lawyer, in the Case in Leon., deserted[425] his single Power & returned the Warrant to be per the whole Council Board.[426]

The next Authority that is produced, is in Queen Elizabeth's Time, in Anderson 297. There is no occasion to remind you how arbitrary the Prerogative grew, & how much it encreased in the End of this Queen's Reign. It seems to me, that the Power deriv'd from the King of issuing these Warrants, had been adopted to every Privy Councellor. These Warrants were so oppressive, that the Courts of Justice were obliged to interpose, & so they did, for the Judges of that Time had Courage to resist the novel Proceedings of the separate Members of the Council Board. Upon that Occasion a Question being put[427] to the Judges, in what Cases Persons committed might be remanded? They then remonstrated against the Warrants granted by the Privy Council,[428] & desired that some new Order might be taken, that her Highnesses Subjects might not be committed.

And[429] at that time the **[19]** Question to the Judges being this — In what Cases Persons commited by the Queen or by the Council may be remanded? The Answer is this — We think that if any Person be commited by her Majesty's Commandment from her own Person, or by Order from the Council Board, or if any one or two of her Council commit one for High Treason, in either of those Cases, such Person so commited may not be delivered by any of the Courts, until due Trial had by Law, and Judgment of Acquittal had; but nevertheless, the Judges may award the Queen's Writt, to bring the Persons before them; and if upon the Return thereof, the Cause of their Commitment be certified to the Judges, as it ought to be, then the Judges in the Case before, ought not to deliver Him, but to remand Him[430] to the place from whence He came.

There is a studied Obscurity in this Opinion, which shews how cautious the Judges were obliged to be in those dangerous times; for whether[431] they meant to

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[422] Variation in Lincoln's Inn Manuscript: [Power].

[423] Variation in Lincoln's Inn Manuscript: omits [admit].

[424] Variation in Lincoln's Inn Manuscript: [it is].

[425] Variation in Lincoln's Inn Manuscript: adds the marginal note [renounced].

[426]Variation in Lincoln's Inn Manuscript: [Returns the Warrant to be per mandatum Dom Regis the whole Council].

[427] Variation in Lincoln's Inn Manuscript: [was put].

[428] Variation in Lincoln's Inn Manuscript: adds the marginal note: [q. counsellor].

[429] Variation in Lincoln's Inn Manuscript: [Now].

[430] Variation in Lincoln's Inn Manuscript: [the Prisoner].

[431] Variation in Lincoln's Inn Manuscript: [(by this Opinion)].

admit a special Power of Commiting to the King, or whether this was to refer to the[432] Commitments, tho' no Cause set forth,[433] or whether if one or more of the Council commited, they wou'd remand or discharge the Persons[434] absolutely, is altogether ambiguous.[435] And the only Proposition laid down here, is, that they wou'd never remand the Person, if commited in the Case of High Treason.

Thus much is necessary to resolve in this remarkable Opinion; because it is upon this Opinion, that my Lord Ch. Justice Holt relies, in the Case of Kendal & Roe where he says; In Anderson it was the Opinion of all the Judges **[20]** that the Privy Council or any one of them might commit, & certainly the Secretary of State is one of them, & in Anderson it is plainly resolved, & so it is in Leonard.

Now at that[436] Time, it is apparent all the Privy Councellors exercised the Right whatever it was; from whence 'tis[437] natural to suppose, if the Power had been equally founded, the Practice wou'd have been continued in the same way down to this Time. Instead of this, it does not appear, that Privy Councellors from that Era have ever asserted this Right in Point of Fact since. And now when the Secretary of State has exercised that Power, no other Person has follow'd his Example, nor does the Privy Councellor know to this Moment he has this Power to commit. Hence we may venture to infer, the Power of Commiting in Privy Councellors, ceased from this Period; & therefore the Crown is obliged to interfere, and they are to resort to the Declarations of the King or the Board Warrants.

In the great Debate in the 3rd year of Charles 1st no Privy Councellor's Warrant does once occur; but then you find the Secretary of State dealing forth these Warrants under the King's Mandate. No Notice is taken in that Argument of the Secretary of State's Power to commit. And the King's royal mandate, or the Board Warrant, was the only one, that seemed to be at all warranted.

And in the Statute of Westminster 1st the Power of commiting is largely discussed, yet no mention at all of Secretaries of State.[438]

'Tis observable, that these Warrants[439] were disused & wou'd never have been acknowledged again, if the Bill that gave the Hab. Corpus Act, & that which abolished the Star Chamber, had not again introduced them.

Where this Form of Commitment **[21]** appears, it is both legal & illegal, & therefore no Argument from any pretended Recognition, can make the present supposed Authority of Secretaries of State[440] valid; because in these Arguments, it was necessary to mention every Mode of Commitment in which these Warrants were granted.

If there cou'd be any Doubt as to this, it seems cleared up by a Passage in the Journals of the House of Commons relative to the Bill concerning the Star Chamber

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[432] Variation in Lincoln's Inn Manuscript: [all].
[433] Variation in Lincoln's Inn Manuscript: [tho' no Cause was set forth].
[434] Variation in Lincoln's Inn Manuscript: [Person].
[435] Variation in Lincoln's Inn Manuscript: [does not appear, & is altogether Ambiguous].
[436] Variation in Lincoln's Inn Manuscript: [this].
[437] Variation in Lincoln's Inn Manuscript: [it is].
[438] Variation in Lincoln's Inn Manuscript: [yet no mention of a Secretary of States Power at all].
[439] Variation in Lincoln's Inn Manuscript: [these two Warrants].
[440] Variation in Lincoln's Inn Manuscript: [a Secretary of State].

in the 17. Car. 1.[441] {(Vol. 2. pa. 195.)} While this Bill was passing, the House put a Question,[442] Whether the House shou'd consent to the[443] puting of the Word Liberties, out of the Bill, because the Commons have a larger Power to provide for them, & that the Crown or Council Board had no Authority but what was given by the Statutes of the Realm.[444] And[445] when you come to look into the Preamble of that Act of Parliament you find the word Liberty; & the Body of that Act, recites the Usurpation upon which that Act was made; from whence I collect, that the word Liberty stood in the Clause. The Passage in the Journals is as follows; "Whether the House shou'd consent to the puting out of the word Liberties out of the Bill. The House was divided upon this Question, & it was carried in the Affirmative, and upon that the House came to this Resolution; Resolved upon the Question, that the House doth Assent to the puting the word Liberties out of the Bill concerning the Star Chamber & the Council Board[446]—And this is the Reason given for it—Because the House has appointed a Bill to be drawn, to provide for **[22]** the Liberty of the Subjects in a larger Manner.

Mr. Serjeant Wilde & Mr. Whitlock are appointed to draw a Bill to that Purpose, upon the several Points that have been here[447] this Day debated.

Resolved upon the Question, That neither the Body of the Lords of the Council, nor any of them in particular as a Privy Councellor, has any Power to imprison any Freeborn Subject, except in such Cases as they are warranted by the Statutes of the Realm."

To explain that Passage in a few Words; only reflect back, that the only Ground upon which the King's Authority stood, was the Statute of Westminster 1st. Now Coke[448] & Selden on this Occasion & at this Time did contend,[449] that the Crown Lawyers had not construed that Act of Parliament according to Law, & that the Mandatum Domini Regis, must be Confined to the Courts of Justice; and they argued, that the King had no authority by his own Person to commit, & consequently not by the Council Board. This Passage is material to prove, & I do it to demonstrate, that the mention made of a Privy Councellor in that Act of Parliament, is no Recognition of his Power.

What follows next, is the Observation on the Trial of the Seven Bishops, who were commited by Thirteen Privy Councellors[450] by name, who signed the Warrant for their Commitment; but the Warrant did not appear to be signed by them in Council. Now if any Man in Westminster Hall at that Time had understood, that one or more Privy Councellors had a Right to commit[451] in any Case of a Misdemeanour,

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441 Variation in Lincoln's Inn Manuscript: [in the 16/17th Car. 1].
442 Variation in Lincoln's Inn Manuscript: adds [which was this].
443 Variation in Lincoln's Inn Manuscript: omits [the].
444 Variation in Lincoln's Inn Manuscript: adds the marginal note [Habeas Corpus Act].
445 Variation in Lincoln's Inn Manuscript: omits [And].
446 Variation in Lincoln's Inn Manuscript: ends quote here, and starts a new quote at [Because the House].
447 Variation in Lincoln's Inn Manuscript: omits [here].
448 Variation in Lincoln's Inn Manuscript: [Cook].
449 Variation in Lincoln's Inn Manuscript: omits [& at this Time].
450 Variation in Lincoln's Inn Manuscript: [committed by 13 of the Privy Councellors].
451 Variation in Lincoln's Inn Manuscript: [could commit].

or the Case of a Libel[452] (for that was the Case of a Libel) that would have been a flat Answer to the Objection. But they were so far from insisting upon this, that all the Council did **[23]** admit, that the Warrant if by one Privy Councellor only, wou'd have been void. And in that Case the Soll. General cites the very words of the 16. Car. 1. & it is remarkable, that He[453] produced the Act[454] itself, which shews,[455] that He had not any Idea of the Power to commit by one Privy Councellor; so little did he dream of a single Councellor's Warrant being good.

Mr. Pollexfen in the Course of that Argument says, We do all pretty well agree (for ought I can perceive) in these two Things; We do not deny but the Council Board has a Power to commit, they on the other Side do not affirm, that the Lords of the Council can commit out of Council.

Then The Attorney General answers and says,—Yes they may as Justices of the Peace.—Which Mr. Pollexfen replies to & says; this is not pretended to be so here.—Then the Chief Justice takes it up & says—No, no, that is not the Case.—Then the Court got rid of the Question by presuming the Commitment, as it was signed by so many, to be signed by them at the Privy Council Board.

There cannot be a stronger Authority than this, to shew, that a single Privy Councellor had no Power to commit. And it is evident the whole Body of the Law, were then as ignorant of the Power of Privy Councellors singly to commit, now contended for,[456] as the Privy Councellors of those Days themselves were. And yet they very[457] able Lawyers who were concerned in this Argument, & they had all been concerned in all the State Cases in the Time of Car. 1st. And to suppose that all these Persons could be ignorant of this extraordinary Power, & at the same Time, that the Power existed,[458] is a Supposition not to be maintained **[24]** by any Arguments.

This is the whole of what I have been able to collect, as to the Power of Privy Councellors to commit. So all the Arguments for the Defendants on this Occasion depends upon the two Cases in Leonard, which do suppose some Power in Privy Councellors to commit without saying what. The Statute of Edw. 6th[459] gives them a Right to commit in Cases of Treason. And the Case[460] in Anderson does recognize such a Power to commit in the Case of High Treason;[461] but I do not find any such Power claimed in any other Case. I am therefore obliged to deny the Opinion of my Lord Holt,[462] where he says, that any one of the Council,[463] or the Secretary of State might commit; for I cannot construe the Power to extend further than High Treason; nor is it fair to give the words a larger Construction, as the Cases there relied on, are all confined to High Treason. And the Judges in those Cases were under no

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452 Variation in Lincoln's Inn Manuscript: [Misdemeanor or Libel].
453 Variation in Lincoln's Inn Manuscript: [the Sollr. Genl.].
454 Variation in Lincoln's Inn Manuscript: [the very Act].
455 Variation in Lincoln's Inn Manuscript: [plainly shews].
456 Variation in Lincoln's Inn Manuscript: omits [now contended for].
457 Variation in Lincoln's Inn Manuscript: [they were very].
458 Variation in Lincoln's Inn Manuscript: omits [& at the same Time, that the Power existed].
459 Variation in Lincoln's Inn Manuscript: adds [too].
460 Variation in Lincoln's Inn Manuscript: [Cases].
461 Variation in Lincoln's Inn Manuscript: [in Cases of High Treason].
462 Variation in Lincoln's Inn Manuscript: [my Ld. C. J. Holt].
463 Variation in Lincoln's Inn Manuscript: [any of the Council].

Necessity, to lay down the Construction to relate to other Cases, not there[464] before them.

Now it has been argued, that were you to admit a Power of committing in Cases of High Treason, a fortiori, that Power must be allowed in other Cases of an inferior Nature. I take this to be otherwise; for where I see a Special Power in one particular Case has been committed to particular Persons, & confined to one single Case & no other, I have no Power of enlarging the[465] Authority, & to say others were intended.

Consider how strange it wou'd sound, from those late Instances to say, that every Privy Councellor is invested with a Power to commit in[466] Cases of High Treason & all other Cases whatever; & at the same Time, it is clear He is not a Conservator of the Peace. Nobody calls him a Conservator. Mr. Justice Rokeby[467] said—He [468]thought **[25]** Him in the Nature of a Conservator, yet He himself hardly calls him a Conservator;[469] and how this cou'd be he does not shew. That is the only Authority on which they wou'd shew Him to be a Conservator. I wish he wou'd have explained what He meant by saying, He was in the nature of a Conservator, & not being a Conservator.[470]

I have now finished all that I have to say on this Head, & I am satisfied the Secretarys of State have assumed this Power as a transfer from the King (for they have no legal Power) but I confess I do not know how and I am clear[471] the Law knows no such Magistrate. My Brothers[472] agree with me in this Opinion, and[473] that we must abide by the Resolutions in the Cases of[474] the King and Darby[475] & the King & Earberry,[476] & we think ourselves bound to adhere to them. And tho' I abide by them as settled Grounds and Cases, yet I do not like them.

But I wou'd have it understood (tho' that is my Opinion),[477] that the Law of this Country is never so safe, as where Courts of Justice hold themselves to be concluded by the Authorities of their Predecessors; for if Judges[478] did not regard former Determinations, & were[479] to think themselves at Liberty not to adhere to the Precedents of those who had gone before them; but on Principles and Opinions[480] of their own, wou'd overturn former Determinations & settled Cases, they wou'd by

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[464] Variation in Lincoln's Inn Manuscript: [then].
[465] Variation in Lincoln's Inn Manuscript: [that].
[466] Variation in Lincoln's Inn Manuscript: [all].
[467] Variation in Lincoln's Inn Manuscript: [Rokely].
[468] Variation in Lincoln's Inn Manuscript: omits [said—He].
[469] Variation in Lincoln's Inn Manuscript: [hardly calls him so].
[470] Variation in Lincoln's Inn Manuscript: [& not a Conservater].
[471] Variation in Lincoln's Inn Manuscript: adds the interlinear note [for].
[472] Variation in Lincoln's Inn Manuscript: [And my Brothers].
[473] Variation in Lincoln's Inn Manuscript: [{Qu: if not But}].
[474] Variation in Lincoln's Inn Manuscript: [abide by the Cases of].
[475] Variation in Lincoln's Inn Manuscript: [Darley].
[476] Variation in Lincoln's Inn Manuscript: [Earbury].
[477] Variation in Lincoln's Inn Manuscript: omits [(tho' that is my Opinion)].
[478] Variation in Lincoln's Inn Manuscript: [we].
[479] Variation in Lincoln's Inn Manuscript: [& Judges were].
[480] Variation in Lincoln's Inn Manuscript: omits [and Opinions].

that means, invest themselves with little less than Legislative[481] Power, & no Certainty of Law cou'd be had.

The Secretary of State then[482] having been considered in these two Lights of a Secretary of State and Privy Councellor,[483] He is not within the **[26]** Act of the 24. G. 2. and consequently He must be within it, if at all, in some other Capacity. In the first Light[484] he is not considered as a Conservator of the Peace; and in the 2d He is not; but if he was, yet no such Person could be held to be a Justice of the Peace within the meaning of 24 G. 2. [485] But I will admit him for a while, to be a Conservator, to see whether he can be within that Act or not.[486] For as to the 7 Jas. 1st I think it is[487] clear the Defendants under that Act, cannot plead[488] the Genl. Issue & give the Special Matter in Evidence. And here I will consider the 6. Heu. 7. As that Act compelled Justices to Act, on which Account the 24 G. 2. was made stronger for their Protection, than perhaps than it otherwise would have been.[489]

This Act of 24 G. 2 is called, An Act for rendering Justices of the Peace more safe in the Execution of their Office, & for indemnifying Constables[490] Acting in Obedience to their Warrants. And in the Preamble of that Act 'tis said, Whereas Justices of the Peace are discouraged in the Execution of their Office[491] by vexatious Actions brought against them for or by Reason of their Proceedings &c.[492]—Now here the only Grantor of the Warrant is the Justice of the Peace. The Officers described as acting under the Justice of Peace's Warrant are Constables. [493]

Now the Officers acting under the Justices of the Peace by this Act of Parliament, upon the Production of the Warrant, if demanded,[494] are protected, if they are prosecuted for what they have done in Obedience to it.[495]

Now say the Council in this Case, the Officers are justified, because the Secretary of State is a Conservator of the Peace.—I say no. He is not a Conservator; because Secretaries of State are clearly not within[496] the Letter or Meaning of that Act of Parliament; for **[27]** Justice of the Peace, & Conservator of the Peace are not convertible Terms. A Justice of the Peace may be a Conservator, but a Conservator cannot be a Justice of the Peace.

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481 Variation in Lincoln's Inn Manuscript: [lesligative <sic>].
482 Variation in Lincoln's Inn Manuscript: [Now then the Sec. of State].
483 Variation in Lincoln's Inn Manuscript: [& a privy Counsellor].
484 Variation in Lincoln's Inn Manuscript: omits [Light].
485 Variation in Lincoln's Inn Manuscript: [within that Act of 24 G. 2].
486 Variation in Lincoln's Inn Manuscript: [within the Equity of that Act.].
487 Variation in Lincoln's Inn Manuscript: ['tis].
488 Variation in Lincoln's Inn Manuscript: [cannot under that Act, plead].
489 Variation in Lincoln's Inn Manuscript: [And here I will consider the 6 H. 7 on which Account the 24 G. 2 was made Stronger perhaps than it otherwise wou'd have been as that Act compelld Justices of the Peace to Act].
490 Variation in Lincoln's Inn Manuscript: [Constables & others].
491 Variation in Lincoln's Inn Manuscript: [Offices].
492 Variation in Lincoln's Inn Manuscript: omits [&c.].
493 Variation in Lincoln's Inn Manuscript: [Constables & others].
494 Variation in Lincoln's Inn Manuscript: [if it is demanded].
495 Variation in Lincoln's Inn Manuscript: [to the Warrant.].
496 Variation in Lincoln's Inn Manuscript: [are not clearly within].

In Order to shew the Secretary of State to be within the Equity of the Act,[497] the Defendant's Council have argued upon two Rules of Construction of all Acts of Parliament.

1st That wherever in a genl. Act of Parliament a particular person is put by way of Example, all others shall be comprized in pari materia.[498]

The 2d Rule of Construction is in Plowden 127,[499] where an enacting Statute enacts a Thing, it includes all Things in ejusdem Generis.

And Instances of this kind are produced,[500] where the Bishop of Norwich mentioned in an Act,[501] shall mean all Bishops; Warden of the Fleet shall mean all Gaolers; Justices of the Peace for One County shall mean all Justices of the Peace.

Now as to the 1st Rule it is right,[502] where the Person expressed, is clearly put by way of Example, the Judges ought to construe all others that fall within the same Reason; but then we ought to be sure the Person is put by way of Example.

Wherever the Rule is general, the Act must be particular, & mention but one by way of Example; Such as the Warden of the Fleet, by which all Gaolers are included; & it must not mention more than One; for if it said the Warden of the Fleet & the Gaoler of A & B, it wou'd not fall within that[503] Rule. But where the Act is general, this way of arguing can be maintained within either of the Rules; that is; that where **[28]** it mentions Tenant for years, Tenant for Half a year shall be intended.

Now in all other Cases, there must be a perfect Resemblance between the Persons expressed, & those intended to be included, as for Instance;[504] Administrators are clearly within the express meaning of Executors & so of all others. In all these Cases the Persons are to answer in all Respects the Objects of the Law, as acting under the same Reason, as those who are mentioned in the Act by way of Example. Does not every Body see then, that you must first examine the Law itself, before you can apply the Construction? And the fundamental Rule of Construction is that in Plowden 53. where he says, The Rule must be adapted to the Law, & not the Law to the Rule. And again in fo. 205 & 231 his Words are; The Construction is to be collected out of the words & the true intent & meaning of the Act.

Let us now[505] by this Rule try the present Case. And 1st let the Justice of Peace in this Act stand as a magistrate at large, capable of receiving as large Powers as other known legal magistrates. The Justice of Peace as a magistrate is introduced by the Act, as intrusted with many Law Businesses and actually troubled with vexatious Suits, in consequence of the Execution of the[506] Office. He is besides mentioned as a Magistrate acting by a Warrant directed to a Constable, who is obliged to execute

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[497] Variation in Lincoln's Inn Manuscript: [within the Act].
[498] Variation in Lincoln's Inn Manuscript: [that are in pari materia].
[499] Variation in Lincoln's Inn Manuscript: [And the 2d Rule of Construction, is, that in Plowden 127].
[500] Variation in Lincoln's Inn Manuscript: omits [produced].
[501] Variation in Lincoln's Inn Manuscript: omits [mentioned in an Act].
[502] Variation in Lincoln's Inn Manuscript: [Now the 1st Rule is right].
[503] Variation in Lincoln's Inn Manuscript: [the].
[504] Variation in Lincoln's Inn Manuscript: [Now, as for Instance].
[505] Variation in Lincoln's Inn Manuscript: [then].
[506] Variation in Lincoln's Inn Manuscript: [his].

it as a Common Law Officer, & not the same as Messengers, for they are[507] not obliged to execute the Warrant of a Justice of the Peace.

Now take a Conservator & see whether he is intrusted with the like Powers as a Justice of the Peace; & you will find he is intrusted[508] with no Law Matters at all. The **[29]** Justice of the Peace is spoken of, as a Magistrate executing many Law Matters; & a Conservator, as far as I am able to guess, has nothing to do, but with the Common Law; & it is remarkable, if you look into Crumpton, that the Justices of the Peace had a particular Clause to enable them to act in those old Statutes, such as the Statute of Northampton &c; for the general Conservatorship cou'd not give him[509] such Power; & it was afterwards the Form,[510] to add the Acts of Parliament Statute by Statute in the Justice of Peace's Commission,[511] till the Time of Elizabeth speak[512] of this in order to shew, that a Conservator cou'd not be looked upon as a Person intrusted with the Execution of the Law in that Sense.

In the next Place, he is not liable to those vexatious Suits[513] as Justices of the Peace were; because he never acts. No man ever heard of an Action brought against a Conservator, as such, unless you call Constables Conservators; & they would hardly be considered as such as those. Then how does it appear he can issue such a Warrant & command a Constable to execute it? The Books say nothing of that; tho' all the Books say, Constables are Conservators. Constables & Ch. Justices are equally Conservators & have equal Power. This Power therefore of Secretaries of State is very doubtful, & tho' I cannot directly say, they cannot command a Constable, yet I think I may take it for granted, that he cou'd not as a Conservator, command a Messenger to execute his Warrant. Then did the[514] Act of Parliament refer to acting Magistrates, or Persons only known **[30]** by historical Tradition? It is a maxim in Law, ad ea qua frequentius accidunt qua quae Jura adaptantur, not[515] to Persons who never felt the Inconvenience which the Statute meant to remedy.

From these observations, it may be said of Conservators, that none of them are the objects of this Statute by name, and I find no Acts[516] of theirs, as Conservators, are within the Provision of that Act of Parliament made for the Protection of Justices of the Peace. Then let the Secretaries of State be incorporated & classed either with the higher or the lower Conservators, they are not within this Act. Will they rank with his Majesty, the Chancellor, the Chief Justices[517] or with the other inferiour

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[507] Variation in Lincoln's Inn Manuscript: [a Messenger, for he is].

[508] Variation in Lincoln's Inn Manuscript: adds the interlinear note [invested].

[509] Variation in Lincoln's Inn Manuscript: [them].

[510] Variation in Lincoln's Inn Manuscript: [the form afterwards].

[511] Variation in Lincoln's Inn Manuscript: [to add the Acts of Parliament in the Justices of the Peace Commission, Stat. by Stat.].

[512] Variation in Lincoln's Inn Manuscript: [I speak].

[513] Variation in Lincoln's Inn Manuscript: is missing several words at the end of the previous paragraph and the start of this, reading [a Conservator could not be looked upon as a Person intrusted with the vexatious Suits].

[514] Variation in Lincoln's Inn Manuscript: [this].

[515] Variation in Lincoln's Inn Manuscript: [& not].

[516] Variation in Lincoln's Inn Manuscript: [Act].

[517] Variation in Lincoln's Inn Manuscript: adds [&c.].

Conservators, Constables &c.? If with the higher, He is too much above the Protection, & if within[518] the lower Class, he is beneath it.

If there wanted Argument to support this Construction, the number of those protected are enumerated in the 7th Jas. 1st ca. 5. which is a Case of the like kind.[519] This[520] Act is to enable Justices of the Peace, Mayors, or Bailiffs of Cities or Towns corporate, Headboroughs, Portreeves, Constables, Collectors of Subsidies,[521] & Fifteenths who were molested in the Execution of their Offices &c (vide the Act). Now under this[522] Act of Parliament it has been clearly held & determined,[523] that neither Churchwardens nor Overseers are within it. And[524] it was said by my Lord Coke, that, that[525] Act of Parliament must be taken strictly, & that Opinion was founded on another[526] that went before it. Why was the Law so Construed? Because those Acts of Parliament which were made to restrain the Course of the Common Law, cou'd not be extended by Equity. **[31]**

It is impossible that two Acts of Parliament could be more nearly allied, than the two I have mentioned.[527] The Objects of both & the Causes of both were the same, & the Remedies of a similar Nature in both. The one in Truth is the 2d Part of the other. The first not being an adequate Remedy, the 2d is added to compleat the work. If by any Construction any Person shou'd be admitted within the 2d who is not within the first, that Person would not be compleatly protected for want of the Benefit of the Provisions of the former Act; without which the 2d Act is as imperfect a Protection as the 1st wou'd be[528] without the Second.

Upon the whole, we are all of Opinion, that neither the Secretary of State nor the Privy Councellor[529], nor the Messengers are within the meaning of this Act of Parliament; if so, the Defendants are not intitled under the General Issue to give the Special Matter in Evidence.

But if they were within that Act, then the Question would be, whether the Messengers had acted properly? And it would have behoved them to have shewed, that they acted in obedience to the Warrant for upon that Condition only, they are justified by that Act. When the Legislature held out that measure of Humanity & Compassion, & excused the Officer from judging of the Legallity of the Warrant, they at the same time obliged Him to shew, He had acted in Obedience to it. This

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[518] Variation in Lincoln's Inn Manuscript: [with].

[519] Variation in Lincoln's Inn Manuscript: [If there wanted Argument to Support this Construction, the Construction on the 7th Jas. 1st ca. 5. might be applied to this. There, in that Act the no. of those protected are enumerated & that is a Case of the like nature].

[520] Variation in Lincoln's Inn Manuscript: [that].

[521] Variation in Lincoln's Inn Manuscript: [Tythingmen, Collectors of Subsidies].

[522] Variation in Lincoln's Inn Manuscript: [Offices. And under that].

[523] Variation in Lincoln's Inn Manuscript: [clearly determined].

[524] Variation in Lincoln's Inn Manuscript: [thus] with the marginal note [Qu. If not And].

[525] Variation in Lincoln's Inn Manuscript: [by my Lord Coke, this].

[526] Variation in Lincoln's Inn Manuscript: [upon another].

[527] Variation in Lincoln's Inn Manuscript: [two Acts I have mentioned].

[528] Variation in Lincoln's Inn Manuscript: [was].

[529] Variation in Lincoln's Inn Manuscript: [councellors].

was relied upon in the Debates in[530] the House of Commons, and in the late Decission of[531] the King's Bench on General Warrants.[532] **[32]**

The Defendants in the present Case, did not take with them a Constable, which is a flat Objection. They had no Right to dispute the Direction of the Warrant. They can have no other Plea under this Act,[533] but Ignorance; and Ignorance is no Plea; & the Justifications are not good, because they did not act in obedience to the Warrant.

And in the 2d Place; They did not bring the Books and Papers to my Lord Hallifax,[534] the Grantor of the Warrant; but carried them to L. Stanhope[535] the Law Clerk; nor is it any Excuse to say, that L. Stanhope[536] was an assistant to my Lord Hallifax and used to examine the Persons, Books & Papers, &c.[537]

I shall state more upon this Head of Justification; but before I do, cannot first help observing, that the Secretary of State has already eased himself of every Part of his Authority, except the signing & sealing of the warrant;[538] everything else[539] is left to the Law Clerk, who acts as he pleases. This is not Right; and I cou'd wish for the future, the Secretary of State wou'd discharge this Part of his Office in his own Person.

The Question then upon the Special Verdict being dispatched, I come now to the last Point upon the Justification, for the Defendants having failed under the 24 G. 2. they are now to justify the Warrant, and to shew, the Secretary of State had a Jurisdiction to issue this Warrant;[540] for if the Superiour had no Authority,[541] the Defendants are Guilty of the Trespass.

The Doctrine on this Head is laid down in the Case of Shergold & Holloway Hill 8 G. 2 B. R. This, tho' not the most difficult, yet it is the most interesting Question; because if it[542] shou'd be determined in favour **[33]** of the Jurisdiction, then the Closets, Trunks, Chests, Drawers & private Cabinets of every Person, suspected of being the Author of a Libel, even tho' that Suspicion only rested in the private Breast of the Secretary of State, wou'd be thrown open to the Messengers, whenever the Messenger[543] suspected a Person to be the Author, Printer or Publisher of a Libel; & whenever that was the Case, the most private Repositories[544] of the Person suspected wou'd be broke open & unlocked[545] & all his Books, Papers, Deeds, private family

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[530] Variation in Lincoln's Inn Manuscript: [relied on in the Debates of].
[531] Variation in Lincoln's Inn Manuscript: [in].
[532] Variation in Lincoln's Inn Manuscript: [on the General Warrants.].
[533] Variation in Lincoln's Inn Manuscript: [Act of Parliament].
[534] Variation in Lincoln's Inn Manuscript: omits words at the end of the previous paragraph, reading: [the Justifications are not good; because they did not bring the Books & Papers to my Lord Halifax . . .].
[535] Variation in Lincoln's Inn Manuscript: [Lovel Stanhope Esq.].
[536] Variation in Lincoln's Inn Manuscript: [Lovel Stanhope].
[537] Variation in Lincoln's Inn Manuscript: [the Persons, Papers, &c.].
[538] Variation in Lincoln's Inn Manuscript: [except signing & sealing of the Warrants].
[539] Variation in Lincoln's Inn Manuscript: [every Thing].
[540] Variation in Lincoln's Inn Manuscript: [to grant it].
[541] Variation in Lincoln's Inn Manuscript: [Power or Authority].
[542] Variation in Lincoln's Inn Manuscript: [this].
[543] Variation in Lincoln's Inn Manuscript: [Secretary].
[544] Variation in Lincoln's Inn Manuscript: [Boxes Chests &c.].
[545] Variation in Lincoln's Inn Manuscript: omits [& unlocked].

Writings,[546] Accounts & every Thing taken & carried away, if the Warrant is executed; for here Nothing is left either to the Discretion or Humanity of the Messenger, but he is ordered to take all. And even this extraordinary Power is assumed by the Secretary of State, before the Paper searched for is found to be criminal; nay, before the Person has been heard or examined; nay, even before the Papers themselves are examined or the Contents known, or the Person is prov'd to be either the writer or publisher.[547] This Power is not supported by any Book or Authority whatever, the great executive Hand of Justice, Mr. Justice Scroggs, always excepted.

The Arguments urged by the Defendants' Council in support of this Power, are of this kind—That such Warrants had been issued frequently since the Revolution. And they say further, that they bear a great Resemblance[548] to Warrants granted in Cases of Searches for Stolen Goods, & that they have been frequently executed upon Printers & never complain'd of. And that they have often been [549] returned to Habeas Corpus's into these Courts, & that they have never been denied to be good. And further, they say, this Power is necessary for the sake of the public peace & Safety[550] **[34]** of the State.

The late Determination of the King's Bench[551] on General Warrants was very right, & on this Ground I will answer the Arguments on the Practice since[552] the Revolution.

Before I state the Question on these Warrants, it will be necessary to state the Power described in them.[553] 'Tis a Power to seize the Man's Books & Papers—the Books &c and Papers of the Man, who is supposed to be the author of the Paper, which is imagined to be a Libel. And the Warrant[554] is ordered to be executed by a Messenger, with or without a Constable; therefore that assistance cou'd not[555] be necessary in Point of Law, & they need neither take a Constable or any Body else with 'em to execute the Warrant, but go[556] by themselves, at any Time, either when the Person was at Home, or take the Opportunity of his Absence & Act under no Inspection; so that when the Man's Papers are gone, as the only Witnesses in this Case are the Trespassers themselves, the Party injured is without Redress. And here, if the Officer was so disposed, he might carry off Bank Bills, if they fell in his way, & he[557] could do it with Impunity, because there is no Person with him, & consequently nobody to inform against Him.

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[546] Variation in Lincoln's Inn Manuscript: [Family Writings &].
[547] Variation in Lincoln's Inn Manuscript: [is proved either the Author Printer or Publisher.].
[548] Variation in Lincoln's Inn Manuscript: [bear great Resemblance].
[549] Variation in Lincoln's Inn Manuscript: omits [executed upon Printers & never complain'd of. And that they have often been].
[550] Variation in Lincoln's Inn Manuscript: [& the Safety].
[551] Variation in Lincoln's Inn Manuscript: [of B.R.].
[552] Variation in Lincoln's Inn Manuscript: [the argument of the Practice from].
[553] Variation in Lincoln's Inn Manuscript: [in these Warrants].
[554] Variation in Lincoln's Inn Manuscript: [it].
[555] Variation in Lincoln's Inn Manuscript: [never].
[556] Variation in Lincoln's Inn Manuscript: [may go].
[557] Variation in Lincoln's Inn Manuscript: [they].

And here it must be observed, that no Subject whatever is excepted, because both Houses of Parliament have lately resolved, there is no Privilege in the Case of a seditious Libel, & therefore their Books & Papers may be seized in the same way.[558] And I am able to affirm, that this sort of Warrant,[559] upon a late Occasion has been executed in its utmost Latitude; for in the Case of Wilkes & Wood, when the Messengers were executing that Warrant, they boggled when they came to his private Desks & Bureau,[560] & they sent to the Secretary of State to know what they should do, and whether they must take **[35]** all the Papers & Writings? And the Secretary of State[561] sent word—All must be taken. And they then took all they cou'd find, & swept the whole, & Mr. Wilkes's private Pocket Book filled up the mouth of the Sack. And I have since been told by the ablest & most experienced Messenger, & who is best acquainted with the Practice,[562] that he was obliged to do every Thing commanded in the Warrant, by virtue of his Oath, or otherwise he perjured himself, & that on these Occasions he[563] generally swept all. As this Jurisdiction of the Secretary of State is so extensive, therefore the Power ought to be as clear as it is extensive. It does not appear in our Law Books at all, that he has this Power.[564]

For the Sake of the Security of the Subjects in general in Cases of Execution & Seizures &c[565] at Common Law, every Man by the Common Law, is oblig'd to give up his Right for the sake of Justice & the general Good, but then that is only for a Time till the Demands for which they are seized are satisfied. But by the Law of England every Invasion of a Man's private property is a Trespass, & subject to an Action; tho' not a Farthing Damage done; for no Man can set his Foot upon my Land & even tread my Grass, without commiting a Trespass, & being liable to an Action for it. This is proved by every Declaration in Trespass, &[566] is every Day's Experience; and in that Case, the Defendant if he admits the Fact, He is then obliged to shew some positive Law, or some unavoidable Necessity has excused Him. The Jury have nothing to do with more than the Fact, & if the Defendant shews a Justification in Point of Law, the Judges are to look into their Books, to see if the **[36]** Defendant is justified either by the Statute or the Common Law; & if upon looking, nothing is found, & the Books are silent on that Head, the Silence of the Books is[567] conclusive Evidence against the Defendant, that He is not right in his Justification.

According to this way of Reasoning, it is incumbent on the Defendants to shew, by what Law this Trespass is warranted. Private Papers are the only way of concealing a man's most valuable Secrets either in his Profession or any other Way, & are his dearest property. Where private Papers are carried away, the Secrets

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[558] Variation in Lincoln's Inn Manuscript: omits [& therefore their Books & Papers may be seized in the same way].

[559] Variation in Lincoln's Inn Manuscript: [this Warrant].

[560] Variation in Lincoln's Inn Manuscript: [Bureaus].

[561] Variation in Lincoln's Inn Manuscript: [The Secretary of State].

[562] Variation in Lincoln's Inn Manuscript: omits [& who is best acquainted with the Practice].

[563] Variation in Lincoln's Inn Manuscript: [they].

[564] Variation in Lincoln's Inn Manuscript: [this such Power].

[565] Variation in Lincoln's Inn Manuscript: omits [&c].

[566] Variation in Lincoln's Inn Manuscript: [which].

[567] Variation in Lincoln's Inn Manuscript: [are].

contained in them may be discovered. Whence then does the Secretary of State derive this Power? Is there any Law that gives him[568] such a Power as this? I cannot satisfy myself that there is, for I see none. Then 'tis[569] too much for me to justify that[570] Practice.

But, it has been said by the Council for the Defendants, that tho' this cannot be applied to a Direct Law; yet it bears a Resemblance to the Seizure of Goods in Cases of Felony.

Now in the Case of Stolen Goods, I may seize my own particular Goods in the Officer's Hands, in Case the Thief is convicted, I have a Right to my Goods again;[571] but here, tho' the Party is Innocent, he cannot have his Goods again. So I may search for stolen Goods and they must remain in the Proper Custody till[572] Trial & Conviction had. No Description of Goods or Papers is here given as in the other Case. So these are not similar Cases. Besides here the Goods are allowed to be the Plaintiff's.

This Case of searching for stolen Goods crept into the Law by imperceptible Practice. My Lord Coke, did deny it's Perfectness. But in this Case only observe the great Caution[573] with which the Law proceeds, in this single Instance. There must be a full Knowledge upon Oath of a Theft commited, &[574] the Person robed must describe his Goods, & **[37]** that he suspects the Person against whom the Warrant is granted; & he must attend upon the Execution & see if the Goods found answer the Description; & lastly upon the Officer's Search, if they are not found, he must answer for the Consequence: and in this Case the Officer will be always a witness against Him. On the Contrary, in the present case, there is no Person to prove[575] there was not the Papers in his Custody; no Person[576] ready to see, whether they were or were not there,[577] nor what He takes; tho' to say the Truth the Officer cannot pilfer, because he cannot take more than what he is commanded to do by the Warrant, which commands him to take all. If in this Case he shou'd call up all the Servants in the House, to see what he did, & give an Inventory of every Thing he takes,[578] yet that wou'd not do, because this is not originally Right, and I say, if this had been originally Right, the Law wou'd have shewed this long since by mentioning a Thing of this Consequence in the Books; and in this Case the Silence of the Books proves[579] the Contrary.

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[568] Variation in Lincoln's Inn Manuscript: [this Magistrate].

[569] Variation in Lincoln's Inn Manuscript: [it is].

[570] Variation in Lincoln's Inn Manuscript: [the].

[571] Variation in Lincoln's Inn Manuscript: [my own particular Goods wherever I find 'em in the Hands of the Officer & in Case the Thief is convicted I have my Goods again].

[572] Variation in Lincoln's Inn Manuscript: [till a].

[573] Variation in Lincoln's Inn Manuscript: omits [great].

[574] Variation in Lincoln's Inn Manuscript: omits [&].

[575] Variation in Lincoln's Inn Manuscript: [On the Contrary, here is no Person to prove].

[576] Variation in Lincoln's Inn Manuscript: [because no Person].

[577] Variation in Lincoln's Inn Manuscript: [were there or not].

[578] Variation in Lincoln's Inn Manuscript: [all the Goods taken].

[579]Variation in Lincoln's Inn Manuscript: [is Conclusive Evidence of].

I come now to the Practice since the Revolution, which has been strongly urged and insisted on with this[580] most emphatical Stress, that an Usage from that Era[581] must have a particular Weight in this Case.

If the Practice from the Revolution is insisted upon, & that it begun then, it was too late to be Law now; if it is more antient, the Revolution is not to answer for it. And I wou'd have it understood, that the Revolution is not to be considered as the Era from whence we date our Constitution. The Revolution only restored this Constitution to it's first Principles. It did nothing more. It did not **[38]** enlarge the Liberty of the Subject, but only gave it a better Security than it had before. It repair'd the Fabrick & might support or aid it by way of Buttress to it, but it did not rebuild it. It neither widened nor contracted the Constitution.

With Regard then, to the Practice since[582] the Revolution, it is too short a Time to give it a prescriptive Right; if it goes no higher than the Revolution, it is much too modern to be Evidence of the Common Law. It was wrong at the Revolution and since, if not right before that Period. If it was right, the Books & Record must shew it. Even if[583] beyond memory we cou'd hardly establish such Practice independent of Book Authorities. It wou'd then be a Practice contrary to Law. It requires[584] some stronger Proof than the Practice since the Revolution,[585] to establish these Warrants on principles of the Common Law.

The Court of King's Bench did lately declare in the Case of General Warrants, that they were illegal, & tho' they had been long & frequently issued, & that matter passed sub silentio, it gave no weight to them. The Determination of B. R. was very Right, & I do most heartily[586] concur in the same Opinion.

The Names & Rights of public Magistrates to grant Warrants has been long since known, and out of the abundance of Warrants that have been granted, no such warrant as this to seize all Papers[587] was ever granted, & if it was, it is not to be found in any of the Books of Record.

The Submissions to the Number of Returns on Habeas Corpus[588] in Cases of this Sort, are no Proofs at all. They are only so many Proofs of Guilt & Fear, Poverty & Distress, stooping & submitting[589] to Power & Greatness, Opulence & Tyranny.

But whoever receiv'd a Notion, that Part of the Law of this Land, laid buried in a particular Person, to search, seize & carry away the Papers of particular Persons, from Time whereof the memory of man is not to the Contrary, **[39]** and yet that it shou'd never be mentioned? It is not to be supposed—and if that had been the Case, I cou'd not now support it.

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[580] Variation in Lincoln's Inn Manuscript: [the].

[581] Variation in Lincoln's Inn Manuscript: [such an Era].

[582] Variation in Lincoln's Inn Manuscript: [With Regard to the Practice then since].

[583] Variation in Lincoln's Inn Manuscript: omits [if].

[584] Variation in Lincoln's Inn Manuscript: [And therefore it requires].

[585] Variation in Lincoln's Inn Manuscript: [some stronger proof than this].

[586] Variation in Lincoln's Inn Manuscript: omits [most].

[587] Variation in Lincoln's Inn Manuscript: omits [to seize all Papers].

[588] Variation in Lincoln's Inn Manuscript: [The Submissions to the great number of Returns to Habeas Corpus into these Courts].

[589] Variation in Lincoln's Inn Manuscript: omits [stooping &].

The Defendants upon this Occasion have[590] stoped at the Revolution, & have gone[591] no further back for Precedents, &[592] they were in the Right of it; because[593] they cou'd not have found more than two or three Warrants beyond that Time to answer their Purpose. But I will look further & see what Warrants of this sort can be found amongst[594] the antient[595] Records of Hab. Corpus's. I find none but a few in the Reign of Car. 2^d^. There did not[596] exist such a Warrant before the Time of abolishing the Star Chamber. The 3^d^ Vol. of Rushworth's Collections speaks of the Power of Searching; and by his Description of it, the Messenger had a Power to search[597] in all Places to see if the Printers had Licences; & upon those Searches if they found any Books which they suspected were Libels, they carried them before the magistrate of the Star Chamber. The Star Chamber at that Time took upon them the Business of these Libels, & before the Restoration no Libels were returned into B. R.[598] not because the B. R. had not Power to enquire into them, but because the Star Chamber had that Jurisdiction, & the Attorney General chose to carry them there. They enacted the Search Warrant & soon after the Star Chamber assumed all Power[599] over the Press, and they had a Licencer,[600] & dignified one of their Officers with the Title of, The Messenger of the Press; an Officer well known in those Times. That Court was afterwards abolished in the 16. Car. 1. Perhaps it was against these Persons[601] that Milton wrote his Ariopagitica.[602]

The Licensing Act, which was the 13th & 14th of Car. 2 was the first Time that Secretaries of State are mentioned as Magistrates; & that Act[603] gave them the Power to issue such Warrants. But those Warrants were not against the Persons of Printers, but only to search their Papers to see if they had Licences. **[40]** Therefore it was not like the present search Warrant,[604] and I will add further, neither so inconvenient nor so oppressive. The Right of enquiring into the Licence, was the Reason of the Search.

This Act expired in the 32d Year of the same King's Reign, & it was afterwards revived in Jac. 2d's Time, & continued till the Time of William & Mary & then dropt. I do suspect this Warrant took its Rise from that, the Difference[605] being this; In the 1st the Seizure of the Person was to follow the Seizure of the Papers—Here, the Seizure of the Papers is to follow the Apprehension of the Person; and with this

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[590]Variation in Lincoln's Inn Manuscript: [has].
[591] Variation in Lincoln's Inn Manuscript: [has been very judicious in going].
[592] Variation in Lincoln's Inn Manusript: omits [&].
[593] Variation in Lincoln's Inn Manuscript: [for].
[594] Variation in Lincoln's Inn Manuscript: [in].
[595] Variation in Lincoln's Inn Manuscript: [Ancient].
[596] Variation in Lincoln's Inn Manuscript: [There did not then].
[597] Variation in Lincoln's Inn Manuscript: [of Searching].
[598] Variation in Lincoln's Inn Manuscript: [the B.R.].
[599] Variation in Lincoln's Inn Manuscript: [all the Power].
[600] Variation in Lincoln's Inn Manuscript: [Licencer of the Press].
[601] Variation in Lincoln's Inn Manuscript: [this Sett of men].
[602] Variation in Lincoln's Inn Manuscript: [Ariopagiticea].
[603] Variation in Lincoln's Inn Manuscript: [are mentioned & that].
[604] Variation in Lincoln's Inn Manuscript: omits [search].
[605] Variation in Lincoln's Inn Manuscript: [the Difference between the 2 Warrants].

further Difference too,[606] that Search Warrant was only to seize particular Papers; this is to seize all Papers without Distinction or Exception.

When the Licensing Act expired in the End of Charles 1st's[607] Reign, if the Secretary of State had had the Power to grant these Warrants before this[608] Act, why was he mentioned in the Licensing Act? If that had been so, I hardly see any Reason for it.

About the Time the Licensing Act expired, it was a Question, Whether the Law itself was not a sufficient Correction[609] of the Press? At Common Law publishing false news either with or without a License of the King, or[610] even tho' the news were true was punishable; and all Libels were held criminal if published. Upon this Question the Judges met, & the Court resolved; That it is Criminal to write a seditious Paper & false News; nay, that it was criminal to write any news at all without a Licence.

In the 2 Vol. of the State Trials, pa. 1038 Ch: Justice Scroggs speaks concerning the Question of publishing Matters concerning Public Affairs, without the King's Licence. But[611] it seems the Chief Justice was a little incorrect in his Report here,[612] for from it, it seems as if he only meant to punish the Writers of false news; but he is more accurate in the 3 Vol. pa 58. on Jeffery's[613] Argument **[41]** on which he says, without a Licence they can publish no News at all. Then Ch. J. Scroggs[614] in a further Part of the Trial takes up the Case & says, (the words as I remember are) When by the Kings Command we ventured to give an Opinion as to the Regulation. {vide the State Trials, sed 2v. the Edition}

This is the Opinion of all the 12 Judges of England. Can the 12 Judges extrajudicially make a Law to bind the Kingdom? I say no. There must be antecedent Authorities from which an extrajudicial opinion can be collected. Resolutions of all the Judges, tho' a great & revered authority, ought not to bind the Public.[615] It is a matter of Impeachment to subscribe to such Resolutions.

Out of this Doctrine in[616] the Opinion of the 12 Judges,[617] springs that noted search warrant, that was condemned by the House of Commons. And it is not unreasonable to suppose, from the Observations that occur on comparing the Warrant & the Opinion, that it was the 12 Judges that found'd[618] this Warrant. The Warrant is a sort of Comment upon the Opinion; for if you can seize a Libel, a Warrant to search for it is legal.

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[606] Variation in Lincoln's Inn Manuscript: omits [too].
[607] Variation in Lincoln's Inn Manuscript: [Charles II's].
[608] Variation in Lincoln's Inn Manuscript: [that].
[609] Variation in Lincoln's Inn Manuscript: has [Conection], and adds the marginal note [Qu: if not correction].
[610] Variation in Lincoln's Inn Manuscript: [&].
[611] Variation in Lincoln's Inn Manuscript: [But there].
[612] Variation in Lincoln's Inn Manuscript: has [Repeal] with the marginal note: [Qu:].
[613] Variation in Lincoln's Inn Manuscript: [Mr. Jeffery's].
[614] Variation in Lincoln's Inn Manuscript: [the Ch. J.].
[615] Variation in Lincoln's Inn Manuscript: [the Kingdom].
[616] Variation in Lincoln's Inn Manuscript: [on].
[617] Variation in Lincoln's Inn Manuscript: adds [that Libels might be seized].
[618] Variation in Lincoln's Inn Manuscript: [formed].

It is necessary for me to ask, Whether there is any Authority, besides the Opinion of these 12 Men to say, Libels shall be seized? If they may, I am afraid all the Inconvenience of general Seizures will follow upon the Right of seizing Part. And if the particular power is allow'd, every Man's House may fall a victim to the merciless Search of a Messenger, & be ransacked from Top to Bottom, whenever he[619] is suspected of **[42]** being either the Author,[620] Printer or Publisher of a Libel.

My Lord Coke[621] in the King & Bare has resolved, that writing[622] a Libel with an intent to publish it, & having it in Custody for that Purpose, is criminal. And in his[623] 5 Rep. 125[b]. He says,[624] that it is not material whether the Libel be true, or whether the Party by whom[625] it is made be of good or ill Fame, for in a settled State of Government the Party griev'd ought to complain of every Injury done him in an ordinary Course of Law, & not by any means to revenge himself, either by the odious Course of libeling or otherwise.

And Hobart in the Case of Lake & Hatton says, Libels,[626] whether the Contents are true or not, are[627] not to be justified.

1 Ventris 31.[628] says, the[629] having a Libel & not delivering it to a magistrate, was only punishable in the Star Chamber, unless the Party maliciously publish'd it.[630] But the Court corrected the Doctrine in[631] The King & Bare, & said, that he might design to keep it silent, yet[632] it might fall into other Hands after a man's Death, & be published.

And in Carthew 409[633] 'tis said, that the transcribing & collecting of this libellous matter[634] was highly criminal without publishing it, & that it was of dangerous Consequence to the Government; for though the Writer or Collector never published these Libels, yet his having them in Readiness for that Purpose, if any Occasion should happen, is highly criminal, & tho' he might design to keep them private, yet after his Death they might fall into such Hands as might be injurious to Government,[635] therefore[636] Men ought not to be allowed to have such evil Instruments in their keeping.

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[619] Variation in Lincoln's Inn Manuscript: [a man].
[620] Variation in Lincoln's Inn Manuscript: [being the Author].
[621] Variation in Lincoln's Inn Manuscript: [My Lord Ch. J. Holt].
[622] Variation in Lincoln's Inn Manuscript: [a Writing].
[623] Variation in Lincoln's Inn Manuscript: [And my Lord Coke in his].
[624] Variation in Lincoln's Inn Manuscript: omits [He].
[625] Variation in Lincoln's Inn Manuscript: [on whom].
[626] Variation in Lincoln's Inn Manuscript: [a Libel].
[627] Variation in Lincoln's Inn Manuscript: [is].
[628] Variation in Lincoln's Inn Manuscript: [And 1st Ventris 31].
[629] Variation in Lincoln's Inn Manuscript: omits [the].
[630] Variation in Lincoln's Inn Manuscript: omits [it].
[631] Variation in Lincoln's Inn Manuscript: [in the Case of].
[632] Variation in Lincoln's Inn Manuscript: [& yet].
[633] Variation in Lincoln's Inn Manuscript: [In Carth. 409.].
[634] Variation in Lincoln's Inn Manuscript: [collecting this libellous matter].
[635] Variation in Lincoln's Inn Manuscript: [to the Government].
[636] Variation in Lincoln's Inn Manuscript: [& therefore].

If this be Law; & I cannot deny it;[637] why then upon a Publication of a Libel, so many Thousands would have it, almost every Body would know of it, & might buy or borrow it to read, & have[638] it in their Custody; & in that Case **[43]** the whole Kingdom wou'd be criminal, & it would be very difficult[639] to find an innocent Jury to try it. And therefore if the having a Libel in Custody is[640] criminal; if they have a Power to seize it; then[641] He that has a Libel, or that has had a Libel in his Custody, or that copied a Libel, or that had had a Libel[642] lent him to read, might[643] in any of these Cases[644] become the Object of a Search Warrant. If Libels are to be seized, it must be laid down with great Precission—Where, when, by whom, how, in what Cases & by what Magistrates.[645] All these particulars must be explain'd to be Law, before the Person can become the Object of a Search Warrant.

Tho' Ch: J: Scroggs, you see, says, in the first Instance you may seize the Author of a Libel and send him to Prison. That is the only Instance I can find of such an Opinion, & I shall be excused, I hope, if I lay the Authority of that Judge aside. And as I cannot find any other[646] to warrant that Power, I cannot be satisfied that such a Power can be supported.

I have given an Answer to the Authorities that have been cited & relied on from the Revolution. And I now come[647] to the last Part of the Argument with respect to state necessity. And here 'tis[648] said, it is better to prevent than punish Libels. Let the Legislature declare how that is to be done?

But, however State necessity is greatly relied on. I know of no Distinction between State necessities & others. Our Books do not make[649] any such Distinction. We[650] find that[651] in the 3d Car. 1st Time, Mr. Serjeant Ashley[652] was committed to the Tower for saying in one of his Arguments at the Bar, there was a State Power, or Law of the State, as well as the Country.[653] And the Judges with respect to the Ship Money **[44]** were committed for saying, there was a State necessity for it.

Lastly it is[654] argued, that such a Search is apt to discover offenders, by discovering Evidence of their offences, that would otherwise have been hid.

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[637] Variation in Lincoln's Inn Manuscript: adds [(& say it is not)].
[638] Variation in Lincoln's Inn Manuscript: [to have].
[639] Variation in Lincoln's Inn Manuscript: omits [very].
[640] Variation in Lincoln's Inn Manuscript: [be].
[641] Variation in Lincoln's Inn Manuscript: omits [then].
[642] Variation in Lincoln's Inn Manuscript: [that had a Libel].
[643] Variation in Lincoln's Inn Manuscript : [read &c].
[644] Variation in Lincoln's Inn Manuscript: [in any of these Cases he might].
[645] Variation in Lincoln's Inn Manuscript: [by what magistrate, in what Cases &c].
[646] Variation in Lincoln's Inn Manuscript: [any other Opinion].
[647] Variation in Lincoln's Inn Manuscript: [now I come].
[648] Variation in Lincoln's Inn Manuscript: [it is].
[649] Variation in Lincoln's Inn Manuscript: [take].
[650] Variation in Lincoln's Inn Manuscript: [And we].
[651] Variation in Lincoln's Inn Manuscript: omits [that].
[652] Variation in Lincoln's Inn Manuscript: [Askeers].
[653] Variation in Lincoln's Inn Manuscript: [of the Country.].
[654] Variation in Lincoln's Inn Manuscript: [was].

In answer to this,[655] I shou'd be glad to know, whether the Law obliges a Man in any Case to produce Evidence against himself?—No; so strong is the Law from taking Evidence from a Person, that there is no way to get it back again when taken away[656] from him, but by an Action at Common Law. In criminal Actions never such a Thing was hear'd of, neither in Treason, Murder, Felony, Rape &c. And there seems more necessity for it in those, than in any other Cases whatever, from the very great Difficulty there is[657] in these Cases to prove the Guilt of the Offenders.

In 2. Strange 1210. there was an Information against the Defendant for granting Licenses to Ale House People for money. The Prosecutor applied for a Rule to inspect the Books of the Corporation, alledging the Defendants were only Justices as they were Bailiffs. But the Judges (absent the Ch: Justice) upon Consideration refused to grant it, their Right to be Bailiffs or Justices not being in Question, and said, it was in effect obliging a Defendant indicted for a misdemeanor to furnish Evidence against Himself.

This Case was one of those, where this kind of Evidence was supposed to be allowed;[658] but no such Argument is warranted by that Opinion. In Criminal nor Civil Cases can it be done. Now whether this proceeds from the Gentleness of the Law towards Criminals, or from a Consideration, that such a Power wou'd be more pernicious than useful to the Public, does not appear from the Books. It is certain, however, that the Law compels no man to condemn himself. If the Law should suffer Evidence **[45]** to be sought for against the Guilty, it cou'd not be done but the Innocent wou'd be injured.[659] The strongest Evidence before Trial, being only ex parte, is only presumptive &[660] a suspicion at large. Was a Presumption, especially in this Case of Libels allowed, who wou'd be safe? Here the strongest Evidence shou'd be required, & may be had, for this Crime is always commited in open Day light & in the face of the Sun, & every Act of Publication makes new Proof. If necessity requires the Powers[661] contended for, it only can do it in secret Cases. Here every Thing is open & every Man may be a Witness, &[662] the Sollicitor of the Treasury, may if he pleases,[663] be a Witness[664] Himself. Now if the Evidence of the Government requires the Production of the Author & applies to the Printer, He generally produces him; & suppose He should not, the[665] Publication is stoped & the Inconvenience remedied.

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[655] Variation in Lincoln's Inn Manuscript: omits [In answer to this].

[656] Variation in Lincoln's Inn Manuscript: [when once taken away], and adds the marginal note: [Qu: if].

[657] Variation in Lincoln's Inn Manuscript: [there generally is].

[658] Variation in Lincoln's Inn Manuscript: [This Case was supposed to be one of those, where this kind of Evidence was allowed].

[659] Variation in Lincoln's Inn Manuscript: [without Injuring the Innocent].

[660] Variation in Lincoln's Inn Manuscript: adds the marginal note [if].

[661] Variation in Lincoln's Inn Manuscript: [Power].

[662] Variation in Lincoln's Inn Manuscript: omits [&].

[663] Variation in Lincoln's Inn Manuscript: [chooses it].

[664] Variation in Lincoln's Inn Manuscript: [be an Evidence].

[665] Variation in Lincoln's Inn Manuscript: [yet the].

We all agree in our Opinion & I will conclude with saying, that these Papers {super: Warrants}[666] to seize and carry away the Party's Papers in the Case of a seditious Libel[667] are illegal & void.

Before I conclude, I will just say one Word for myself, and I do desire not to be understood to be an Advocate for Libels. All seditious Libels should ever be discountenanced. And I will always endeavour to punish Calumny, for that enervates Government by sowing Sedition in the minds of the People, & often produces the worst Consequences, by provoking the People against their Ruler, & the Ruler against the People. I will always set my Face against scandalous & seditious[668] Libels, & will strongly recommend it to the Jury always to convict, where the Proof is clear. For if Libels **[46]** are suffered it may become desirable that the Liberty of the Press might be restrained,[669] which by frequent Abuse & the neglect or obstinacy of Juries might become intollerable, & then there would be a necessity for entirely abolishing this valuable Privilege. The Press ought to be restrained, least by it's being too free, it bring an Odium upon itself by exceeding the Bounds of Truth.[670] In all civilized Countries this is practiced, to correct the Press. No one enjoys the Liberty more fully than Ours. But by suffering the Press to be too open,[671] the People may overturn the Liberty to their own Ruin, & therefore this is necessary; for when Licentiousness is tolerated, Liberty is in the utmost Danger; and Government must be supported for fear of Anarchy; for the worst of Governments, even Tyranny, is better than no Government at all.

Judgment for the Plaintiff **[47]**

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[666] Variation in Lincoln's Inn Manuscript: [Powers].
[667] Variation in Lincoln's Inn Manuscript: [in the Case of Seditious Libels].
[668] Variation in Lincoln's Inn Manuscript: [malicious].
[669] Variation in Lincoln's Inn Manuscript: [entirely restrained].
[670] Variation in Lincoln's Inn Manuscript: omits [by exceeding the Bounds of Truth.].
[671] Variation in Lincoln's Inn Manuscript: [by suffering it to be open].