

“BETTER THE MOB AND THE KU-KLUX”: A HISTORY OF THE LAW OF SEARCH AND SEIZURE IN FLORIDA

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I. INTRODUCTION

As late as 1930, and on several occasions prior to that date, Harvard Law Professor Felix Frankfurter could offer, as an example of something that the Supreme Court would almost never be called upon to decide, “whether the [Fourth Amendment] protection against ‘unreasonable searches and seizures’ is violated.”¹ In 1939 Professor Frankfurter was appointed to the High Court, where he would serve for 23 years; and where, as Justice Frankfurter, he would participate in a great many notable opinions having to do with whether the Fourth Amendment protection against unreasonable searches and seizures had been violated.²

That Professor Frankfurter made a bad guess doesn’t make him a bad guesser. From the adoption of the Fourth Amendment in 1791³ until the decision in *Weeks v. United States*⁴ in 1914, the Supreme Court had almost nothing to say about the meaning of the Fourth Amendment’s protection against unreasonable searches and seizures, for the very good reason that nobody asked.⁵ A constitutional provision that engendered jurisprudence

* Judge, 11th Judicial Circuit of Florida. The author is grateful to his more learned colleagues Hon. Nushin Sayfie, Hon. Miguel de la O, Hon. Michael Hanzman, and Hon. Robert Luck, for reviewing drafts of this article. The views expressed herein, however, are those of the author only. Thanks, too, to law clerk Brett J. Novick.

1. Felix Frankfurter, *The Supreme Court and the Public*, THE FORUM, June 1930, at 329, 332; see also Felix Frankfurter, *Twenty Years of Mr. Justice Holmes’s Constitutional Opinions*, 36 HARV. L. REV. 909, 912 (1923).

2. See, e.g., *Steanelli v. Minard*, 342 U.S. 117, 119 (1951); *Brinegar v. United States*, 338 U.S. 160, 180–88 (1949); *Harris v. United States*, 331 U.S. 145, 155–74 (1947) (Frankfurter, J., dissenting); *Davis v. United States*, 328 U.S. 582, 594–616 (1946) (Frankfurter, J., dissenting); *Zap v. United States*, 328 U.S. 624, 630–33 (1946) (Frankfurter, J., dissenting).

3. The U.S. Nat’l Archives & Records Admin., *The Bill of Rights Transcript Text*, THE CHARTERS OF FREEDOM, http://archives.gov/exhibits/charters/bill_of_rights_transcript.html (last visited Nov. 13, 2014).

4. *Weeks v. United States*, 232 U.S. 383 (1914).

5. See Theodore B. Lacey, *The Supreme Court’s Fluctuating Reaction to National Prohibition in Fourth Amendment Decisions from 1920–1933*, at 61 (April 4, 2005) (unpublished B.A. thesis, Princeton University), available at http://web.princeton.edu/sites/jmadison/awards/2005-Lacey_Thesis.pdf (“Until the onset of the twentieth century, the Supreme Court decided virtually no search and seizure cases and no penalties were prescribed for the violation of the [Fourth] Amendment.”). But see, e.g., *Boyd v. United States*, 116 U.S. 616,

about once every 123 years was unlikely to engender much jurisprudence.

Fremont Weeks was the man who got around to asking the Supreme Court what the Fourth Amendment meant. While Weeks was being arrested at the train station in Kansas City, Missouri, police officers entered his home without a warrant; searched; and seized various papers and other evidentiary artifacts.⁶ After turning the fruits of this search over to the U.S. marshal, the police and the marshal returned to Weeks's home and searched again, seizing still more documents.⁷ None of this searching and seizing was done pursuant to warrant.⁸

Charged with various federal crimes relating to the conduct of a lottery, Weeks moved for the return of his unlawfully-seized property.⁹ The motion was denied upon the representation of the prosecution that the property in question was evidence, and would be employed as such at trial.¹⁰ Weeks renewed his objection at the time the demised papers were offered in evidence against him.¹¹ His objection was overruled.

It was undoubtedly the case that, at common law, evidence was not subject to suppression because it had been unlawfully obtained.

In the ordinary administration of municipal law the right of using evidence does not depend, nor, as far as I have any recollection, has ever been supposed to depend upon the lawfulness or unlawfulness of the mode, by which it is obtained. If it is competent or pertinent evidence, . . . the evidence is admissible on charges for the highest crimes, even though it may have been obtained by a trespass upon the

621–634 (1886). *Boyd* analyzed the Fourth Amendment, and featured some stirring and oft-quoted language: “[i]t is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property” *Boyd*, 116 U.S. at 630. But the Fourth Amendment analysis employed in *Boyd* was *sui generis*; according to *Boyd*, the Fourth and Fifth Amendments run almost into each other, because “any forcible and compulsory extortion of a man’s . . . private papers to be used as evidence to convict him of crime, or to forfeit his goods . . . is violative of the former as violative of the latter. *Id.* at 630.

[The two amendments]

throw great light on each other. For the “unreasonable searches and seizures” condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man “in a criminal case to be a witness against himself,” which is condemned in the Fifth Amendment, throws light on the question as to what is an “unreasonable search and seizure” within the meaning of the Fourth Amendment.

Id. at 633. Whatever the merits of this approach to the Fourth Amendment, it has not survived. *Id.* at 638.

6. *Weeks*, 232 U.S. at 386.

7. *Id.*

8. *Id.*

9. *Id.* at 387.

10. *Id.* at 388.

11. *Id.*

person, or by any other forcible and illegal means [O]n trials for crimes, evidence is often obtained from the possession of the offender by force or by contrivances, which one could not easily reconcile to a delicate sense of propriety, or support upon the foundations of municipal law. Yet I am not aware, that such evidence has upon that [ground] ever been dismissed for incompetency.¹²

But *Weeks* did not call upon the Court to construe the common law. It called upon the Court to construe the Fourth Amendment.¹³

By its plain terms, the Fourth Amendment picks up where the common law left off. The Fourth Amendment does not purport to create any rights. It does not provide, for example, that, “There is hereby created a right to be free from unreasonable search and seizure.” That right the Fourth Amendment takes as given. The Fourth Amendment exists to protect that right—to protect from violation a right antecedent in time and source to the Amendment itself. The very words with which the Fourth Amendment begins reflect as much. The right of the people to be secure in their persons, houses, papers and effects—that already-existing right—is, by operation of the Fourth Amendment, to be shielded, to be made secure, to be given effect.

And how could this right, this right to be free from unreasonable governmental invasion of home and self and effects, be violated by government? Certainly it could be violated by the executive branch, whose officers might force their way into the privacy of the home and distraint personal property. Certainly, too, it could be violated by the judicial branch if it received the fruits of such pillage and plunder in evidence, permitting them to be used in courts of law as the basis for judgments in

12. *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 843–44 (Ct. C. D. Mass. 1822).

13. *See Weeks*, 232 U.S. at 398; *see also State v. Sheridan*, 96 N.W. 730, 731 (Iowa 1903). This obvious distinction, and its perhaps less obvious consequence, was recognized a decade before *Weeks* in *State v. Sheridan*:

It is said . . . that the court will not inquire how the offered evidence has been procured, and, even if obtained by a search warrant in violation of the defendant’s constitutional or legal rights, it will still be admitted, if otherwise competent; and that defendant’s only redress is an action for damages against the officer or person committing the trespass. It is true there are cases giving seeming support to this doctrine, but most of them, when examined, will be found to be instances in which the incriminating evidence has been discovered by persons acting without color of authority, or by officers as the incidental result of the service of a warrant of arrest or other writ or process legally issued. None can be found, we think, where the state has been permitted to obtain a search warrant in confessed violation of law, and thereby take papers or property from the home of the man suspected of the crime, and use the matter thus procured in securing his conviction. To so hold is to emasculate the constitutional guaranty, and deprive it of all beneficial force or effect in preventing unreasonable searches and seizures. We think the evidence should have been excluded.

Sheridan, 96 N.W. at 731.

law. In both instances—that involving conduct by executive officers and that involving conduct by judicial officers—the right which the Fourth Amendment existed to preserve from violation would be violated.

That, in any event, was the understanding of the *Weeks* court.

The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects, against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all intrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.¹⁴

Clearly the limitations imposed by the Fourth Amendment are directed to the judicial as well as to the executive branch. They are directed to “the courts of the United States *and* Federal officials,” and “the duty of giving . . . [those limitations] force and effect is obligatory upon *all* intrusted under our Federal system with the enforcement of the laws.”¹⁵ It is, after all, “the courts[] which are charged at all times with the support of the Constitution.”¹⁶ Just as clearly, the Fourth Amendment is, by its terms, an exclusionary rule. For

[i]f letters and private documents can . . . be seized and held *and used in evidence* against a citizen accused of an offense, the protection of the [Fourth] Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.¹⁷

Justice Day’s opinion in *Weeks* is written for a unanimous Court. The tone of that opinion is almost nonplused: Of course courts must refuse to receive evidence obtained in violation of the Fourth Amendment. We’re surprised you had to ask. We would have told you so if you had asked sooner.

In three ensuing cases—*Silverthorne Lumber Company v. United States*,¹⁸ *Gouled v. United States*,¹⁹ and *Amos v. United States*²⁰—the

14. *Weeks*, 232 U.S. at 391–92.

15. *Id.* at 392 (emphasis added).

16. *Id.*

17. *Id.* at 393 (emphasis added).

18. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920).

Supreme Court completed the laying out of the metes and bounds of the Fourth Amendment's exclusionary purpose and function.²¹ The historical arc formed by these jurisprudential points intersected with a very different sort of historical arc. In 1920 Prohibition became the law.²² Prohibition begat bootlegging, and bootlegging begat search and seizure issues. Prior to Prohibition, and certainly prior to *Weeks*, state statutes regulating search and seizure, and reported opinions construing state-law congeners to the Fourth Amendment, were few and far between. When the change of law brought about by the *Weeks* line of cases and the changes of the facts of social life brought about by Prohibition were stirred together, a florescence of law-making—both judicial and legislative—resulted. It resulted in Florida, and it resulted elsewhere.²³ Part II of this article considers those changes in Florida law.

For the better part of the following half-a-dozen decades, Florida courts provided strong protection from unlawful search and seizure, adopting the doctrine from *Weeks* and progeny that the Fourth Amendment is itself an exclusionary rule. Although Florida cases cited to federal authorities, it is clear that Florida law was the principal source of that protection.

That changed dramatically in 1982. Article I, section 12 of the Florida constitution had long provided, in language all but identical to that of the Fourth Amendment, that:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the

19. *Gouled v. United States*, 255 U.S. 298, 306 (1921).

20. *Amos v. United States*, 255 U.S. 313, 317 (1921).

21. See discussion *infra* notes 30–32, 115–16 and accompanying text. See generally *Amos*, 255 U.S. at 315–16; *Gouled*, 255 U.S. at 312–13; *Silverthorne*, 251 U.S. at 392; *Weeks*, 232 U.S. at 392. Today's jurisprudence teaches that the exclusionary rule, far from being the core and purpose of the Fourth Amendment, is a judicial excrescence awkwardly and unnecessarily grafted onto the Fourth Amendment. See discussion *infra* notes 115–16. Whether the present jurisprudential view is a better or a worse one than that taken a century ago, the historical record is clear: the *Weeks/Silverthorne/Gouled/Amos* Court saw the Fourth Amendment as an exclusionary rule. See *Amos*, 255 U.S. at 315–16; *Gouled*, 255 U.S. at 312–13; *Silverthorne*, 251 U.S. at 392; *Weeks*, 232 U.S. at 392.

22. U.S. CONST. amend XVIII, *repealed by* U.S. CONST. amend XXI.

23. See, e.g., Lacey, *supra* note 5, at 7 (“the modern conception of the Fourth Amendment . . . is owed largely to [the 18th] Amendment[,] repealed . . . [almost] a century ago. Upon the previously blank canvas of Fourth Amendment law, the Supreme Court painted an elaborate and colorful vision that remains with us today.”).

In large part because of its timing and in large part because the character of the law caused the judicial system to be inundated with cases hinging on the legitimacy of police enforcement practices, Prohibition . . . compelled the Supreme Court of the 1920's and early 1930's to lay the foundation of the modern Fourth Amendment.

Id. at 13.

unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained.²⁴

In 1982, however, this article was amended, effective the following year, to conclude with the following language:

This right shall be construed in conformity with the [Fourth] Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the [Fourth] Amendment to the United States Constitution.²⁵

The effect of the amendment is to render article I, section 12 a dependent, rather than an independent, guarantee of Floridians' protection from unreasonable search and seizure. In truth the effect of the amendment is to render article I, section 12 a nullity.²⁶ Floridians, like all Americans, have such protection from unreasonable search and seizure as is afforded by the Fourth Amendment; Floridians, unlike most Americans, have no additional protection from unreasonable search and seizure afforded to them by their state constitution. In recent years, the United States Supreme Court has adumbrated the drastic curtailment, perhaps even the outright elimination, of the Fourth Amendment exclusionary rule.²⁷ Part III of this article begins with a discussion of the effect that the 1982 amendment has had, and will have, on constitutionally-based remedies for unlawful searches and seizures in Florida.

At the time of the 1982 amendment, there existed a number of Florida statutes that provided, or could reasonably be interpreted to provide, for the suppression of unlawfully-obtained evidence in criminal cases. Many of these statutes had been on the books since the bootlegger days of the 1920's. Curiously, the legislature in 1982 did not amend these statutes to bring them into conformity with the change to article I, section 12. More curiously still, no subsequent legislature in the ensuing three decades has

24. FLA. CONST. art. I, § 12.

25. *Id.*

26. See Christopher Slobogin, *State Adoption of Federal Law: Exploring the Limits of Florida's "Forced Linkage" Amendment*, 39 U. FLA. L. REV. 653, 673 (1987) ("[T]he 1983 amendment to article I, section 12 of the Florida Constitution has re-oriented search and seizure law in Florida. It establishes that Florida courts may not provide any less or any more protection than is afforded under the fourth amendment as the United States Supreme Court construes it.").

27. See discussion *infra* Part III.

amended these statutes to bring them into conformity with the 1982 change to article I, section 12. Their power to promote justice by the exclusion from Florida trials of evidence obtained in violation of Floridians' rights lies untapped.²⁸ Greater reliance should have been placed on them in years past. Greater reliance will have to be placed on them in years to come, as the constitutional exclusionary rule withers and, perhaps, dies. That, in any event, is the thesis of this article, and the subject of the balance of Part III.

II. FLORIDA'S SEARCH AND SEIZURE LAW: ITS LIFE AND TIMES

A. FLORIDA'S ROARING '20'S

To the Supreme Court of Oliver Wendell Holmes and Louis Brandeis, evidence obtained in violation of the Fourth Amendment was to be excluded in obedience to the simple command that the privacy and sanctity of the home, the integrity and autonomy of the self, "shall not be violated."²⁹ It was to be excluded "in order to protect the Government. To protect it from illegal conduct of its officers. To preserve the purity of its courts."³⁰ It was to be excluded because failure to exclude renders the promise of the Fourth Amendment either an empty aspiration or a shabby specimen of bait-and-switch. It was to be excluded as living proof that in a government of laws, the ends can never justify the means. It was to be excluded because its receipt is, in a word, wrong.

Florida courts seemed, in the wake of the *Weeks* line of cases, just as impassioned about this principle, deriving it not from the Fourth Amendment but from Florida's constitutional congener, at that time section 22 (now section 12) of the Declaration of Rights of the Florida Constitution.³¹ *Tillman v. State*,³² although it did not involve the

28. Slobogin, *supra* note 26, at 716. As stated by Slobogin:

Despite the 1983 amendment to section 12, courts must follow a statute that provides more protection than the Supreme Court's fourth amendment decisions require. Section 12 only requires linkage between Florida's *constitutional* search and seizure provision and Supreme Court opinions. It does not authorize repeal of duly enacted statutes that place more restrictions on police practices than those opinions.

Id.

29. U.S. CONST. amend. IV.

30. *Casey v. United States*, 276 U.S. 413, 425 (1928) (Brandeis, J., dissenting). *Casey* is not a Fourth Amendment case. Justice Brandeis made it clear in his *Casey* dissent, however, that evidence, obtained in violation of the Fourth Amendment, was, in his view, inadmissible. *Id.* "I am aware that courts—mistaking relative social values and forgetting that a desirable end cannot justify foul means—have, in their zeal to punish [criminal defendants], sanctioned the use of evidence obtained through criminal violation of property and personal rights" by law-enforcement officers. *Id.* at 423.

31. See FLA. CONST. of 1838, art. I, § 7; FLA. CONST. of 1861, art. I, § 7; FLA. CONST. of 1865, art. I, § 7; FLA. CONST. of 1868, Declaration of Rights § 19; FLA. CONST. of 1885,

suppression of physical evidence, is the precursor to those cases that did. In *Tillman*,

a deputy sheriff, while proceeding at night in his car along the public road met a negro man walking with something under his arm; he stopped his car in the road, and when he did so the negro also stopped and the deputy sheriff seeing he had a package under his arm jumped out of the car and without a warrant and without knowing what the package contained . . . attempted to take the package from him. The man resisted the attempt to take his property, and drew his pistol and [the deputy sheriff] grabbed it. A scuffle ensued, and the pistol was discharged . . .³³

Although no one was injured, *Tillman*—the “negro” referred to in the captioned paragraph—was charged with and convicted of assault with intent to murder.³⁴ Perhaps it was not entirely necessary for the Florida Supreme Court to consider the constitutionality of the officer’s seizure of Mr. *Tillman*’s person to conclude that the evidence of assault was insufficient to support Mr. *Tillman*’s conviction. But the court took it upon itself to consider whether, “an officer, without a search warrant or warrant of arrest, [has] the right to stop any one on the public highway, particularly in the nighttime, and demand that he surrender what he has in his possession, or take it from him without his consent.”³⁵ And in resolving that question, the court quoted the applicable Florida constitutional provision in its entirety not once but twice, coupling the quotes with emphatic assurances that courts would not tolerate an officer’s “seizing property in violation of the [Florida] Constitution”³⁶—even when the citizen thus victimized was a “negro.”

The *Weeks* line of cases, and the principle for which those cases stand, was expressly adopted in Florida’s jurisprudence in *Atz v. Andrews*³⁷ in 1922. In *Atz*, two police officers “entered a restaurant where the defendant boarded.”³⁸ One officer simply walked in through the open front door; the other knocked on the back door and was let in by Mr. *Atz*.³⁹ They claimed that, once inside, they asked *Atz* if he had any “shine”⁴⁰ (*i.e.*,

Declaration of Rights § 22; FLA. CONST. art. I, § 12 (amended 1968); FLA. CONST. art. I, § 12 (1983). Every iteration of the Florida constitution has had a provision protecting against unreasonable search and seizure.

32. *Tillman v. State*, 88 So. 377 (Fla. 1921).

33. *Id.* at 379.

34. *Id.* at 378.

35. *Id.* at 379.

36. *Id.*

37. *Atz v. Andrews*, 94 So. 329, 331 (Fla. 1922).

38. *Id.* at 330.

39. *Id.*

40. *Id.*

moonshine, home-made whiskey). They further claimed that Atz obligingly admitted that he did, and even went so far as to give it to the officers—who of course arrested him for its unlawful possession.⁴¹

Nowadays this course of conduct would be considered as raising no Fourth Amendment (or article I, section 12) issue, or at least none worth much discussion. Mr. Atz would be found to have authority to consent to the entry of the premises; and to have consented both to the entry by the officers and to the production of the contraband liquor. But the Florida opinions of the *Atz* era—the post-*Weeks* era—were full of altiloquent expressions of concern for the rights of the people, and for the transgressions of those rights by the police.⁴² In the words of the *Atz* court,

[T]he fact that the defendant opened the door to the knock of the deputy sheriff and told him to come in would not be construed as an invitation to enter for the purpose of making a search, or authority for searching after he had so obtained entrance. It is an act of ordinary courtesy to a person who knocks at the door of one's home to invite him to enter, and such an act of courtesy will not be construed as a waiver of the [householder's rights to be free from unreasonable search and seizure]. . . .⁴³

There then follows an extended discussion of *Gouled*, and an impassioned rejection of the notion that the common-law rule—the rule that courts will not inquire into the provenance of evidence placed before them—survived the enactment of the Florida Declaration of Rights and the Fourth Amendment.⁴⁴

41. *Id.*

42. *See, e.g., Ruiz v. State*, 50 So. 3d 1229, 1231–32 (Fla. 4th DCA 2011) (Gross, C. J.). This is not to say that Florida opinions of the present era are bereft of expressions of the same concerns:

Over time, the concept of “consent” to a search has become divorced from its common meaning. In the Fourth Amendment context, “consent” has come to mean that set of circumstances that the law will tolerate as an exception to the probable cause or warrant requirement. What passes for “consent” today would not have survived a motion to suppress 25 years ago. Now, even aggressive conduct by the police will not necessarily vitiate “consent” when viewed as part of the “totality of the circumstances”

The “totality of the circumstances” approach has expanded the concept of “consent” in a way that has had a significant effect on the administration of criminal justice. It allows a trial court to rely on other factors that swallow aggressive police conduct and contract the limits of Fourth Amendment protection.

In many cases, the police rely upon a defendant's voluntary consent to justify a search or a stop. One possibility is that citizens, especially those involved in crimes, have a desire to cooperate with the police to avoid making waves. Another possibility, far more sinister, is that the police have to recognize that “consent” is the catch-all exception to the Fourth Amendment, so they tailor their testimony accordingly.

Id.

43. *Atz*, 94 So. at 330–31.

44. *Id.* at 331–32. The court routinely cites to both the Florida and the federal Constitutions.

To permit an officer of the state to *acquire evidence illegally* and in violation of sacred constitutional guarantees, and to use the *illegally acquired* evidence in the prosecution of the person who [possessed the contraband thus seized] strikes at the very foundation of the administration of justice, and where such practices prevail make law enforcement a mockery.⁴⁵

Although the *Atz* court cites extensively to *Gouled* and *Amos*, it makes clear that the exclusion from Florida trials of evidence obtained in violation of Florida constitutional law is compelled as a matter of Florida, and not merely federal, law. The court cites with profound disapproval a suggestion made in Wharton's *Criminal Evidence*⁴⁶ that federal law, and federal courts, stand alone in rejecting the notion that evidence unconstitutionally obtained can be constitutionally received: "Whatever other state courts may do, the Supreme Court of Florida will guard and protect the constitutional rights, privileges, and immunities of the people, as sacredly as the federal courts."⁴⁷

Throughout the 1920's the Florida Supreme Court, as it had in *Atz*, insisted that constitutional principles governing search and seizure contemplated exclusion of evidence wrongfully obtained; and, as it had in *Atz*, relied on the Florida as well as the federal constitution as the source for that position. *Jackson v. State*⁴⁸ involved an appeal from a conviction for what today would be defined as resisting an officer with violence.⁴⁹ Mrs. Jackson's argument on appeal was that the search warrant presented to her by the officer in question was defective; and that these defects entitled her to resist his search "by biting him on the arm and taking hold of his person in a rude, angry, and threatening manner."⁵⁰ It is, and was, settled law that a Floridian confronted with an unlawful or wrongful police order may offer non-violent, but not violent, resistance.⁵¹ If police officers searched Mrs.

See id. at 331.

45. *Id.* at 332.

46. 2 FRANCIS WHARTON, A TREATISE ON THE LAW OF EVIDENCE IN CRIMINAL ISSUES 1076-77 (The Lawyers Coop. Publ'g Co. 10th ed. 1912).

47. *Atz*, 94 So. at 332.

48. *Jackson v. State*, 99 So. 548 (Fla. 1924).

49. *Id.*; *see also* FLA. STAT. § 843.01 (2014).

Whoever knowingly and willfully resists, obstructs, or opposes any officer . . . or other person legally authorized to execute process in the execution of legal process or in the lawful execution of any legal duty, by offering or doing violence to the person of such officer or legally authorized person, is guilty of a felony of the third degree . . .

§ 843.01. Mrs. Jackson appears to have been convicted of just such conduct. *Jackson*, 99 So. at 549.

50. *Jackson*, 99 So. at 549.

51. *See, e.g., Dean v. State*, 466 So. 2d 1216, 1217 (Fla. 4th DCA 1985) ("in Florida, the common law rule remains in effect that one may resist an unlawful arrest so long as he does so

Jackson's house in reliance upon a warrant later determined to be inadequately drafted,⁵² her remedy was to be sought by litigation, not by mastication.

But the Florida Supreme Court reversed Jackson's conviction. As it had in *Tillman* and *Atz*, it began with a heartfelt defense of those rights of liberty which the constitutional provisions regarding search and seizure serve to protect:

[T]here is no process known to the law, the execution of which is more distressing to the citizen or that actuates such intense feeling of resentment on account of its humiliating and degrading consequences [than the search of the home]. As thus enunciated the law is in line with . . . [that] spirit of liberty which holds every man's house or dwelling as his castle, and which declares that it must not be invaded or subjected to an uninvited search, except by a duly qualified officer, and then only in pursuance of a valid writ commanding it.⁵³

And as it had in *Tillman* and *Atz*, the court placed principal emphasis on the relevant Florida constitutional provision as the source of this protection; while noting in passing that the "Fourth Amendment to the federal Constitution is almost identical"⁵⁴ in its terms.

Atz and *Jackson* notwithstanding, the opinion of the Florida Supreme Court in *Gildrie v. State*⁵⁵ is generally cited as establishing what is today referred to as the "exclusionary rule" as part of the law of Florida.⁵⁶ The *Gildrie* defendants were charged with, *inter alia*, possession of stolen property.⁵⁷ Evidentiary artifacts obtained during a search of their home, which search was conducted pursuant to warrant, were offered in evidence.⁵⁸ But "neither the affidavit nor the search warrant sufficiently complie[d] with the provisions of" what today would be article I, section 12 of the Florida Constitution "in that no description of the things to be seized

without violence.").

52. See *Jackson*, 99 So. at 550.

53. *Id.* at 549; see also *Hart v. State*, 103 So. 633 (Fla. 1925). In another search and seizure case involving bootleg whiskey, the court quoted the excerpted language from *Jackson* "because of its excellence." *Id.* at 634. Following the pattern of *Tillman*, *Atz*, and *Jackson*, the *Hart* case, while citing to leading federal authorities such as *Gouled*, *Amos*, and *Weeks*, made clear that it was relying on Florida legal principles. *Id.* at 634–35. The court again cited with disapprobation any suggestion in Wharton's *Criminal Evidence* "that State courts are less mindful of constitutional guarantees than the Federal courts, . . . [a] severe criticism of state tribunals of justice, but [one which] with respect to the decisions of this court . . . is unwarranted." *Id.* at 635.

54. *Jackson*, 99 So. at 549.

55. *Gildrie v. State*, 113 So. 704 (Fla. 1927).

56. See, e.g., *Brown v. State*, 124 So. 467, 467 (Fla. 1929); *Pell v. State*, 122 So. 110, 115 (Fla. 1929); *Robertson v. State*, 114 So. 534, 537 (Fla. 1927).

57. *Gildrie*, 113 So. at 704.

58. *Id.* at 704.

is found either in the affidavit or in the warrant.”⁵⁹ Thus the question before the court was “whether . . . evidence, obtained by the searching of a dwelling house . . . without a valid search warrant . . . is admissible to prove the commission of the criminal act” with which the defendants were charged.⁶⁰

Largely ignoring Florida law, the *Gildrie* court cited almost exclusively to federal authorities. Placing particular reliance on the *Weeks* quaternion and on *Agnello v. United States*,⁶¹ *Gildrie* concludes that, “the highest judicial authority holds that evidence obtained by the unlawful search of a dwelling house is not admissible to prove the occupant of such dwelling house guilty of a criminal offense.”⁶² And because the U. S. Supreme Court, construing the federal constitution, has reached this conclusion, “[i]t therefore follows that evidence so obtained in this state [must] be excluded.”⁶³

In this respect *Gildrie* is a bit of an outlier in Florida’s search and seizure jurisprudence of the 1920’s. As discussed *supra*, most Florida case law from that decade features a respectful tip of the cap to federal constitutional law, but places firm reliance on Florida constitutional law. As discussed *infra*, that approach will continue to be followed for more than half a century in Florida. Even *Gildrie* returns to the fold in its penultimate paragraph:

It may be that when the judgment in this case is reversed two men who have participated in a gross violation of a criminal law of this state will probably go free of further punishment, but this result should not deter this court from enforcing the provisions of the *Constitution of the state of Florida* and the provisions of the *statutes of this state* which were made and have stood through the ages as a protection against the invasion of the dwelling house of every man.⁶⁴

The explosive growth of search and seizure law prompted by the Prohibition era was not restricted to the judicial department of Florida government. On June 7, 1923, the Florida legislature passed, as effective

59. *Id.* at 705.

60. *Id.* at 705.

61. *Agnello v. United States*, 269 U.S. 20, 33–34 (1925).

62. *See Gildrie*, 113 So. at 706; *Boyd v. United States*, 116 U.S. 616 (1886); *see also Atz*, 94 So. 329 (1922); *Jackson*, 99 So. 548 (1924). It is a criticism of *Gildrie* that, like the U. S. Supreme Court it treats the issue of suppression of wrongfully-obtained physical evidence as one sounding in the jurisprudence of the Fifth, rather than the Fourth Amendment. *See Boyd*, 116 US at 639. *Gildrie*’s predecessors, such as *Atz* and *Jackson*, rely principally on Florida law; but when they do look to federal constitutional authority, recognize that it is the Fourth and not the Fifth Amendment that is instructive. *See Atz*, 94 So. at 331; *Jackson*, 99 So. at 549.

63. *See Gildrie*, 113 So. at 706.

64. *Id.* at 706 (emphasis added).

July 1, Ch. 9321, “An Act Relating to the Issue of Search Warrants and to the Execution of Same, and Providing Penalties for the Violation of the Provisions of This Act”⁶⁵ (hereinafter “the Act”). The Act created the modern statutory search and seizure law of Florida. Its provisions, in only slightly modified form, are still on the books.⁶⁶ The comprehensive provisions of the Act make clear the intent of the legislature to regulate search and seizure as a matter of Florida, rather than federal, law. Those provisions also make clear the desire of the legislature to afford Floridians broad and far-reaching protections from invasive search and seizure.

After an introductory section,⁶⁷ section 2, codified at Florida Statutes section 933.04 (and curiously entitled “Affidavits”), provides:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches shall not be violated and no search warrant shall be issued except upon probable cause, supported by oath or affirmation particularly describing the place or places to be searched and the persons or persons and thing or things to be seized.⁶⁸

The language is, of course, all but identical to that of the Fourth Amendment and of article I, section 12 of the Florida Constitution (and has nothing to say about “Affidavits”). It provides statutory emphasis and affirmance of those constitutional provisions, and an independent statutory guarantee of rights.⁶⁹ Sections 5⁷⁰ and 6⁷¹ repeat and underscore the requirement of probable cause supported by sworn testimony.

Sections 11⁷² and 13⁷³ of the Act provide that the householder is entitled to a copy of the warrant pursuant to which his home is searched, and a copy of the inventory of items seized. Section 14⁷⁴ provides a mechanism for the return of non-contraband property to its lawful owner. Special limitations are prescribed when the premises to be searched is a

65. Act of July 1, 1923, ch. 9321, 1923 Fla. Laws 387 (“An Act Relating to the Issue of Search Warrants and to the Execution of Same, and Providing Penalties for the Violation of the Provisions of This Act”).

66. See FLA. STAT. § 933.01 *et seq.* (2012); discussion *infra* Part III.

67. See Act of July 1, 1923, ch. 9321, §1, 1923 Fla. Laws 387. Section one of The Act provides an effective date for the act, and announces that from and after that date, “the issuance and execution and return of search warrants shall be in accordance” with the Act. *Id.*

68. FLA. STAT. § 933.04 (2014).

69. See *infra* pp. 34–35.

70. See FLA. STAT. § 933.05 (1927).

71. See FLA. STAT. § 933.06 (1927).

72. See FLA. STAT. § 933.11 (1927).

73. See FLA. STAT. § 933.13 (1941).

74. See FLA. STAT. § 933.14 (1941); see also FLA. STAT. § 705.105 (1990) (discussing the return of seized property not used in evidence); see generally FLA. STAT. § 790.08 (1997) (discussing the return of weapons).

home.⁷⁵ And sections 16 and 17, codified at Florida Statutes sections 933.16 and section 933.17, actually provide criminal penalties for “[a]ny person who maliciously and without probable cause procures a search warrant to be issued and executed” and for “[a]ny officer who in executing a search warrant willfully exceeds his authority or exercises it with unnecessary severity.”⁷⁶

When the Florida legislature of the 20’s did want to rely upon federal law, it knew how to say so. Chapter 12257 (No. 452), enacted in 1927, was captioned:

An Act to Adopt the Provisions of the Opinion of the Supreme Court of the United States in the Case of George Carroll versus the United States, Reported in 267 U.S. Reports, Beginning at Page 132, as Being the Law of the State of Florida Relative to Searches and Seizures of Vehicles for Carrying Contraband or Illegal Intoxicating Liquors or Merchandise, and to Declare Points of Law Decided in That Case to Be Hereafter Taken, Accepted as Held to Be the Law of the State of Florida on the Subject Covered Thereby.⁷⁷

This particular legislative enactment, codified (and still on the statute books) as Florida Statutes section 933.19, simply cites to *Carroll v. United States*⁷⁸ and says, in effect: That’s for me!⁷⁹

75. See Act of July 1, 1923, ch. 9321, 1923 Fla. Laws 387, 389; FLA. STAT. § 933.09 (1941). Section 9 of the Act sets forth the common-law “knock and announce” rule, viz., that an officer armed with a warrant who knocks and announces his purpose and authority, and is refused entry, may use force to enter and serve the warrant. FLA. STAT. § 933.09. Section 9 originally provided, however, that an officer so situated could not use force to enter a dwelling house at night. *Id.* That limitation is not carried forward to present-day. *Id.*

76. FLA. STAT. § 933.16 (1971); FLA. STAT. § 933.17 (1971). At present, section 933.16 makes the malicious procuring of a search warrant a first-degree misdemeanor, punishable by up to one year in jail. FLA. STAT. § 933.16. Section 933.17 makes a law-enforcement officer’s abuse of his warrant authority a second-degree misdemeanor, punishable by up to sixty days in jail. FLA. STAT. § 933.17.

77. Act of June 3, 1927, ch. 12257, 1927 Fla. Laws 1138–39.

78. *Carroll v. United States*, 267 U.S. 132 (1925).

79. See FLA. STAT. § 933.19 (2014).

(1) The provisions of the opinion rendered by the Supreme Court of the United States on March 2, 1925, in that certain cause wherein George Carroll and John Kiro were plaintiffs in error and the United States was defendant in error, reported in 267 United States Reports, beginning at page 132, relative to searches and seizures of vehicles carrying contraband or illegal intoxicating liquors or merchandise, and construing the Fourth Amendment to the Constitution of the United States, are adopted as the statute law of the state applicable to searches and seizures under s. 12, Art. I of the State Constitution, when searches and seizures shall be made by any duly authorized and constituted bonded officer of this state exercising police authority in the enforcement of any law of the state relative to the unlawful transportation or hauling of intoxicating liquors or other contraband or illegal drugs or merchandise prohibited or made unlawful or contraband by the laws of the state.

(2) The same rules as to admissibility of evidence and liability of officers for illegal or unreasonable searches and seizures as were laid down in said case by the Supreme Court of the United States shall apply to and govern the rights, duties and liabilities of

Apart from its unconventional approach to legislative lawmaking—the statute cites a reported opinion and announces its adoption of that opinion in all its particulars⁸⁰—section 933.19 departs from the general tenor of ‘20’s-era Florida search and seizure law by restricting, rather than expanding or preserving, the rights of Floridians.

The *Carroll* defendants were suspected bootleggers in the Grand Rapids, Michigan, area.⁸¹ They were observed driving to Grand Rapids from Detroit, a source city for contraband whiskey from Canada, in the company of other known or suspected bootleggers.⁸² They were stopped, and their car searched, without a warrant; and were subsequently prosecuted for possession of the liquor found in the search.⁸³ At issue was whether the fruits of such a search—a search conducted on the basis of probable cause⁸⁴ but in the absence of a warrant—were admissible on charges of possession of those fruits.

Early on in his lengthy opinion for the Court, Chief Justice Taft excerpted language from the legislative history of one of the Prohibition statutes: “It is impossible to get a warrant to stop an automobile. Before a warrant could be secured the automobile would be beyond the reach of the officer with its load of illegal liquor disposed of.”⁸⁵ This practical problem, in the Court’s view, explained, “[t]he intent of Congress to make a distinction between the necessity for a search warrant in the searching of private dwellings and in that of automobiles.”⁸⁶ Fast cars, the rum-runners

officers and citizens in the state under the like provisions of the Florida Constitution relating to searches and seizures.

(3) All points of law decided in the aforesaid case relating to the construction or interpretation of the provisions of the Constitution of the United States relative to searches and seizures of vehicles carrying contraband or illegal intoxicating liquors or merchandise shall be taken to be the law of the state enacted by the Legislature to govern and control such subject.

Id.

80. *Chacon v. State*, 102 So. 2d 578, 589 (Fla. 1958) (“[B]y Section 933.19 . . . our Legislature has made a part of the statute law of Florida the decision of the Supreme Court of the United States in *Carroll v. United States*.”); see also *Thurman v. State*, 156 So. 484, 488 (Fla. 1934) (“[O]ur Legislature has by statute adopted the opinion in *Carroll v. United States* . . . as the law of this state.”).

81. *Carroll*, 267 U.S. at 160.

82. *Id.*

83. *Id.* at 163 (McReynolds, J., dissenting).

84. *Id.* at 160. To the modern reader, the showing of probable cause here seems exiguous at best: a car, driven lawfully along a well-trafficked roadway from Detroit to Grand Rapids, was occupied by shady characters known or suspected to be bootleggers. *Id.* But according to the *Carroll* Court, “That the officers, when they saw the defendants, believed that they were carrying liquor, we can have no doubt, and we think it is equally clear that they had reasonable cause for thinking so.” *Id.*

85. *Id.* at 146.

86. *Id.* at 147.

who drove them, and the moonshine whiskey they carried, had changed America; and the Fourth Amendment would have to be accommodating:

It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. . . . [T]hose lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search *unless there is known to a competent official . . . probable cause for believing that their vehicles are carrying contraband or illegal merchandise.*⁸⁷

Undoubtedly *Carroll*, and Florida Statutes section 933.19 codifying *Carroll*, would result in a great many more warrantless searches and seizures than could have been made before *Carroll*.⁸⁸ In this respect, the Florida Legislature's decision to import *Carroll*, bag and baggage, into the statute law of Florida is at odds with the pattern of judicial and legislative lawmaking in Florida in the '20's, which generally expanded or at least maintained the procedural protections of Floridians from unreasonable search and seizure. In this respect; but only in this respect. The practicalities to which the Supreme Court gave way in *Carroll* could scarcely be avoided, and it was perfectly reasonable for the Florida legislature to give way to them as well.⁸⁹ But there has been no forgetting that it would be preferable, even if it is no longer possible, to live in a pre-*Carroll* Florida. On those infrequent occasions when Florida courts cite *Carroll* or section 933.19 or both, it is almost always with a reminder such as, "This court is committed to the doctrine that an officer without a search warrant or warrant of arrest has no right to stop one on the public highway, particularly in the nighttime, and demand that he surrender what he has in

87. *Carroll*, 267 U.S. at 153–54 (emphasis added).

88. Lacey, *supra* note 5, at 110.

[T]he enforcement powers of Prohibition agents was increased dramatically as a result of Chief Justice Taft's words [in *Carroll*]. For the first time in any case, it was held that police and other government officials did not need a warrant to search an automobile . . . the Court has consistently affirmed this ruling through the present day. The immense impact of *Carroll*, therefore, cannot be overstated considering that automobiles are . . . involved in over 75% of the crimes committed in the United States today. The dramatic effect of Taft's words can also not be downplayed during the Prohibition era. The character of the illicit liquor business inherently involved the transportation of the contraband from the location in which it was manufactured to a location where it could either be consumed or sold. Thus, the *Carroll* decision and the freedom in [sic] gave [to] Prohibition agents to pursue enforcement objectives was also somehow involved in nearly every violation of the Eighteenth Amendment.

Id.

89. See generally discussion *infra* Part III at pp. 32–33. Perhaps ironically, the survival of the *Carroll* doctrine through its embodiment in § 933.19 has, as a result of intervening changes in Supreme Court jurisprudence, become a source of expanded rather than diminished protection of the rights of Floridians against unreasonable search and seizure. *Id.*

his possession.”⁹⁰

B. THE NEXT HALF-CENTURY

With the repeal of Prohibition,⁹¹ the feverish production of search and seizure law, judicial and legislative, came to an end in Florida.⁹² In the decade that had followed the completion of the *Weeks* line of cases and the enactment of Prohibition, Florida had put in place both the statutory and the decisional authority that would stand for the succeeding half-century. During that half-century the pace at which judicial opinions on the law of search and seizure were engendered was much slower than in the ‘20’s, and such opinions as were published announced little if anything new. The principal legislative enactments of the ‘20’s discussed *supra* remained on the statute books as, to a substantial extent, they do to this day.

Florida courts continued to rely chiefly on Florida constitutional law, and only secondarily on federal constitutional law, in resolving search and seizure issues.⁹³ “Evidence obtained in violation of article I, section 12 is inadmissible in Florida courts . . . regardless of whether the evidence in question was obtained in violation of the Fourth Amendment, and regardless of the scope of the Fourth Amendment exclusionary rule.”⁹⁴ “[E]ven if the federal exclusionary rule is changed, this in no way affects the fifty year old rule in Florida that evidence seized in violation of article I, section 12 of the Florida Constitution is inadmissible in evidence.”⁹⁵ Florida courts continued to employ eloquent, even perfervid, language to express their determination to defend the rights embodied in article I section 12.⁹⁶ And the precedents set by *Atz, supra*, and *Jackson, supra*,

90. *Kersey v. State*, 58 So. 2d 155, 156 (Fla. 1952) (after citing to *Carroll*); *see also* *Byrd v. State*, 80 So. 2d 694, 696 (Fla. 1955) (quoting the excerpted language from *Kersey* after citing to *Carroll* and Fla. Stat. § 933.19).

91. U.S. CONST. amend. XXI, § 1.

92. *See generally* *Lacey, supra* note 5, at 6 (“[M]ore than two-thirds of the prosecutions in federal courts during the [Eighteenth] Amendment’s thirteen year reign stemmed from its violation.”)

93. *Slobogin, supra* note 26, at 668 (“From the first decision construing [Florida’s constitutional search and seizure provision] . . . to . . . *Mapp v. Ohio*, 367 U.S. 643 (1961)], 88 percent of the [Florida court] decisions addressing search and seizure issues relied on state law alone or combined with federal precedent.”).

94. *Odom v. State*, 403 So. 2d 936, 940 (Fla. 1981) (citing *Sing v. Wainwright*, 148 So. 2d 19, 20 (Fla. 1962) and *Taylor v. State*, 355 So. 2d 180, 182 (Fla. 3d DCA 1978)); *see also* *Gildrie v. State*, 113 So. 704, 706 (Fla. 1927); *Mixon v. State*, 54 So. 2d 190, 191–92 (Fla. 1951); *State ex rel. Wilson v. Quigg*, 17 So. 2d 697, 701 (Fla. 1944); *Thurman v. State*, 156 So. 484, 486–87 (Fla. 1934); *Norman v. State*, 388 So. 2d 613, 614 (Fla. 3d DCA 1980); *Hesselrode v. State*, 369 So. 2d 348, 350 (Fla. 2d DCA 1979);

95. *Taylor*, 355 So. 2d at 184 (citing *Gildrie*, 113 So. at 706); *see also* *Sing*, 148 So. 2d at 20.

96. *See, e.g., De Lancy v. City of Miami*, 43 So. 2d 856, 857 (Fla. 1950) (“We are not

notwithstanding, Florida courts continued to cite *Gildrie* as having established the “exclusionary rule” as part of the law of the state.⁹⁷

The Florida Constitution was revised in 1968. To the existing language of article I, section 12, the Fourth Amendment congener, was added the statement, “Articles or information obtained in violation of this right shall not be admissible in evidence.” The new language put to rest any debate as to whether article I, section 12 was itself an exclusionary rule, or whether the exclusionary rule was a judicially-imposed filigree upon the constitutional law. If it had somehow been unclear prior to 1968, from and after that time there could be no dispute but that the “exclusionary rule was specifically articulated in . . . [Florida’s] [C]onstitution and hence part of [Florida’s] organic law.”⁹⁸

And then everything changed.

III. THE 1982 AMENDMENT

Although Florida’s jurisprudence of search and seizure was, nominally at least, based upon interpretation of the state and not the Federal Constitution, there were few if any respects in which Florida law differed from the federal mainstream. In 1979, and again in 1982, Florida courts held that the exclusionary rule applied in probation revocation hearings.⁹⁹ And in 1981, the Florida Supreme Court held that an undercover officer’s use of a “body bug” was in some circumstances a search.¹⁰⁰ These cases, of no great practical or jurisprudential consequence,¹⁰¹ were arguably at odds with U. S. Supreme Court teachings.¹⁰² In other respects—certainly in all

unaware that guilty persons may go free where convincing evidence against them is held inadmissible because obtained by defective search warrants. But our paramount concern is for the guaranty in the organic law against unreasonable searches.”); *see also* *Mathis v. State*, 15 So. 2d 762, 762 (Fla. 1943) (“The same degree of sanctity and protection which is accorded the palace, likewise applies in the hovel.”); *Cooper v. State*, 143 So. 217, 217 (Fla. 1932) (“Section 22 [now section 12] of the Declaration of Rights . . . was not placed in the organic law of this state as an idle gesture.”).

97. *Dickens v. State*, 59 So. 2d 775, 776 (Fla. 1952); *Warwick v. State*, 140 So. 219, 219 (Fla. 1932); *Betancourt v. State*, 224 So. 2d 378, 381 (Fla. 3d DCA 1969).

98. *State v. Lavazzoli*, 434 So. 2d 321, 323 (Fla. 1983).

99. *See State v. Dodd*, 419 So. 2d 333, 335 (Fla. 1982); *Grubbs v. State*, 373 So. 2d 905, 910 (Fla. 1979).

100. *State v. Sarmiento*, 397 So. 2d 643, 644–45 (Fla. 1981).

101. *See, e.g., Padgett v. State*, 404 So. 2d 151, 152 (Fla. 1st DCA 1981); *Pittman v. State*, 397 So. 2d 1205, 1206 (Fla. 1st DCA. 1981); *Hurst v. State*, 409 So. 2d 1059, 1060 (Fla. 1st DCA 1982); *Ruiz v. State*, 416 So. 2d 32, 34 (Fla. 5th DCA 1982). Florida decisions following *Sarmiento* narrowed that case almost out of existence. *See Padgett*, 404 So. 2d at 152; *Pittman*, 397 So. 2d at 1206; *Hurst*, 409 So. 2d at 1060; *Ruiz*, 416 So. 2d at 34.

102. *United States v. White*, 401 U.S. 745, 751 (1971) (holding that an undercover agent’s use of a body bug was not a search); *United States v. Frederickson*, 581 F.2d 711, 713 (8th Cir. 1978) (collecting cases).

important respects—the jurisprudence of article I, section 12 proceeded hand in glove with the jurisprudence of the Fourth Amendment.

Yet these trivial distinctions between Florida and federal law

clearly triggered the push for the [1982 constitutional] amendment [to article I, section 12]. Law enforcement groups and legislators were particularly angered by the *Sarmiento* decision and saw the amendment as a way to overrule it. Florida Governor Bob Graham asked the legislature to adopt the proposed amendment and place it before the electorate on the ground that Florida “should extend no more rights to those who would break our laws than the U.S. Constitution would require.”¹⁰³

Professor Slobogin quotes a memorandum that the Florida attorney general’s office submitted to the state legislature in support of the proposed amendment as follows:

Florida courts have construed Florida’s prohibition against unreasonable searches and seizures and have applied Florida’s constitutionally based exclusionary rule in a very broad fashion. Thus, Florida is one of the most restrictive states in the nation, if not the most, in terms of admissibility of evidence in criminal proceedings. These restrictive evidentiary standards mean it is much more difficult to convict criminals in Florida than in other states and our federal system.¹⁰⁴

Professor Slobogin charitably characterizes the statements appearing in the foregoing paragraph as “exaggerated.”¹⁰⁵ “Nonsensical” and “baseless” would be, if less charitable, more accurate characterizations. Florida’s search and seizure law differed from U.S. Supreme Court search

103. Slobogin, *supra* note 26, at 671–72 n. 110 (citing Lipman, *Revisions on Crime Win Easily*, ORLANDO SENTINEL, Nov. 3, 1982, at 1C, col. 1 (stating that “Governor Graham, Attorney General Jim Smith, and a coalition of law enforcement groups leg supporters of amendment, the immediate effect of which was to overturn *Sarmiento*”); Anderson, *Amendment 2 Passes Justices’ Review*, FLA. TIMES-UNION, Nov. 2, 1982, at 1B, col. 2 (“The primary motive behind the amendment is a desire by the Legislature to overrule a 1981 Florida Supreme Court decision that prohibits police who do not have search warrants from using body bugs to monitor conversations inside private homes”); Pudlow, *Law Enforcement Proposals Stir Lively Debate*, TALLAHASSEE DEMOCRAT, Nov. 1, 1982, at 1B, col. 1 (explaining “that law-enforcement officials frustrated that recordings of conversations electronically intercepted by an officer wearing a body bug are admissible evidence in federal court, but not in state court”); Jenne, *Should Voters OK Amendment #2: Yes: State Presently Is Losing Vital Evidence in Drug War*, FT. LAUDERDALE SUN-SENTINEL, Oct. 24, 1982, at H1, col. 1 (“arguing that *Sarmiento* has been ‘detrimental because [it has] thrown the criminal justice system into turmoil on the issue of warrantless interceptions’”).

104. Slobogin, *supra* note 26, at 672 (quoting OFFICE OF THE ATT’Y GEN., REVISED MEMORANDUM., PROPOSED CONSTITUTIONAL AMENDMENT REGARDING SEARCHES & SEIZURES & THE EXCLUSIONARY RULE, at 1 (1982) (on file with Fla. State Archives, Dep’t of State, Tallahassee, Fla.).

105. Slobogin, *supra* note 26, at 672.

and seizure law, and mainstream American search and seizure law, in particulars so minute and inconsequential as to be next to non-existent. The notion that Florida was, somehow, among the “most restrictive states in the nation, if not the most, in terms of admissibility of evidence in criminal proceedings” was wildly inaccurate and entirely unsupportable.

But this kind of sloganeering made itself felt. On November 2, 1982, Florida voters adopted legislatively-proposed changes to article I, section 12 of the Florida Constitution, the changes to take effect on January 4, 1983. Pursuant to the amendment, the constitutional provision was altered to conclude as follows:

This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.¹⁰⁶

A moment’s reflection is required to bring home how remarkable this seemingly innocuous language really is. All Floridians, like all other Americans, are beneficiaries of the Fourth Amendment and of the U.S. Supreme Court’s interpretations of the Fourth Amendment. If the Florida Constitution had no article I, section 12, and no other provision purporting to safeguard Floridians from unreasonable searches and seizures by government, Floridians would still be entitled to the protections of the Fourth Amendment and Florida judges would still be obliged to apply those protections. Had the 1982 amendment removed article I, section 12 from the Florida Constitution entirely, the result would have been the same as was brought about by the amendment as worded. Either way, article I, section 12 is rendered a nullity. It is not an independent guarantee of Floridians’ rights. It is a dependent guarantee of Floridians’ rights—dependent on U.S. Supreme Court interpretations of the Fourth Amendment, the benefit of which Floridians already enjoy anyway. It guarantees nothing not already guaranteed.

It is a fair question why the legislature, instead of proposing the amending language actually employed, did not simply propose the elimination of article I, section 12 from the Florida Constitution. Perhaps it was nothing more than a question of politics: Perhaps it was thought to be easier to get Floridians to raise their hands in response to the question, “Who wants to follow the U.S. Supreme Court when it comes to the law of search and seizure?” than to get Floridians to raise their hands in response

106. FLA. CONST. art. I, §12.

to the question, “Who wants to eliminate Florida’s long-standing constitutional protection against unreasonable search and seizure?” But the effect is precisely the same. In the words of one distinguished Florida jurist:

I write . . . to express my sincere regret at the passage of the recent amendments to Article I, Section 12 of the Florida Constitution, inasmuch as they amount, in effect, to a virtual repeal of the entire state constitutional right. By these amendments, Florida no longer has a separately protected constitutional right on search and seizure; it is now inexorably linked to the Fourth Amendment and has no independent existence apart from the Fourth Amendment. I doubt whether the voters realized that they were, in effect, repealing Article I, Section 12 of the Florida Constitution when they overwhelmingly approved the recent amendments in the November 1982 elections, but that is exactly what they did. Perhaps, with the passage of time, we will learn what a mistake that decision was and will act to restore Article I, Section 12 to its rightful place in the Florida Constitution. Until then, I think it clear that Article I, Section 12 of the Florida Constitution is a dead letter.¹⁰⁷

As a jurisprudential matter, Judge Hubbard’s dire predictions were, and are, unimpeachable: article I, section 12 is indeed rendered a dead letter by operation of the 1982 amendments. As a practical matter, however, the amendments made little difference at the time of their enactment. Florida search and seizure law and federal search and seizure law were so nearly identical that trading the former for the latter mattered little in most Florida cases most of the time. That changed radically, however—and Judge Hubbard’s chickens came home to roost—when in a trilogy of cases beginning in 2006, the U.S. Supreme Court signaled its desire to bring an end to the Fourth Amendment exclusionary rule.

The police in *Hudson v. Michigan*¹⁰⁸ had a warrant to search Mr. Hudson’s house.¹⁰⁹ It was conceded, however, that in executing the warrant the police disregarded the “knock and announce” requirement of *Wilson v. Arkansas*.¹¹⁰ The question before the Court was “whether violation of the ‘knock-and-announce’ rule requires the suppression of all evidence found in the search.”¹¹¹

The matter was easily resolved. Justice Scalia identified various interests protected by the knock-and-announce rule that diverged from those interests protected by the warrant requirement.

107. *State v. Ridenour*, 453 So. 2d 193, 194 (Fla. 3d DCA 1984) (Hubbart, J., concurring).

108. 547 U.S. 586 (2006).

109. *Id.* at 588.

110. *Id.* at 588–90 (citing *Wilson v. Arkansas*, 514 U.S. 927 (1995)).

111. *Hudson*, 547 U.S. at 588.

What the knock-and-announce rule has never protected, however, is one's interest in preventing the government from seeing or taking evidence described in a warrant. Since the interests that *were* violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable.¹¹²

And there the matter could have rested. No Supreme Court precedent stood for the principle that violation of the common-law knock-and-announce rule must be remedied by suppression of evidence. Justice Scalia offered reasons, which reasons the reader of *Hudson* was free to accept or reject, why violation of the common-law knock-and-announce rule should not be remedied by suppression of evidence.

But Justice Scalia's opinion ranged far beyond that narrow issue, offering a lengthy critique of the Fourth Amendment exclusionary rule itself. The notion that the exclusion of unconstitutionally-obtained evidence is compelled by the very operation of the Fourth Amendment—bedrock doctrine to the Supreme Court of the *Weeks* era, and of the *Mapp* era—Justice Scalia denigrates as “[e]xpansive *dicta*.”¹¹³ According to Justice Scalia, the Fourth Amendment exclusionary rule is separate and apart from the Fourth Amendment itself; is justified to the extent, and only to the extent, that it deters Fourth Amendment violations; and even then must be applied sparingly and only when its deterrence value outweighs its attendant social costs (the social costs being the inability of government successfully to prosecute the citizen through the use of ill-gotten evidence that the government, according to its most cherished and fundamental law, should never have come to possess in the first place).¹¹⁴

In *Herring v. United States*¹¹⁵ the Court went beyond the mere denigration of the exclusionary rule and actually reduced substantially the scope and ambit of the rule. In *Herring*, police made an arrest, and conducted a search incident to that arrest, based upon a warrant which, it later developed, had been recalled some months earlier.¹¹⁶ It was uncontested “that there was a Fourth Amendment violation.”¹¹⁷ But it was likewise uncontested that the violation was not willful on the part of the

112. *Id.* at 594.

113. *Id.* at 590–91. Justice Scalia specifically tars with the brush of “[e]xpansive *dicta*” the following passage from *Mapp*: “[A]ll evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.” *Id.* at 608 (quoting *Mapp v. Ohio*, 367 U.S. 643, 655 (1961)). To characterize this language as expansive *dicta* requires an expansive notion of *dicta*. It could with as good a grace be identified as a core part of the holding of *Mapp*.

114. *Hudson*, 547 U.S. at 591–92, 594.

115. *Herring v. United States*, 555 U.S. 135 (2009).

116. *Id.* at 137–38.

117. *Id.* at 138–39.

police.

Building upon Justice Scalia's position in *Hudson*, Chief Justice Roberts emphasizes repeatedly in *Herring* that exclusion is justified not as a right but as a remedy; and only to the extent of its deterrence value,¹¹⁸ and then only when countervailing "social costs" are minimal.¹¹⁹ But the Chief Justice goes further: Although the *Weeks* Court made clear that the constitutional wrong done when unlawfully-obtained evidence is received in a court of law is as great as, perhaps greater than, the constitutional wrong done when unlawfully-obtained evidence is seized in the first place,¹²⁰ *Herring* states flatly that, "The exclusionary rule was crafted to curb police rather than judicial misconduct."¹²¹ And most importantly, *Herring* contracts the exclusionary rule to apply solely to evidence the fruits of "deliberate, reckless, or grossly negligent conduct" violative of Fourth Amendment rights.¹²² Evidence obtained by transgressions of the Fourth Amendment that are committed insouciantly, or thoughtlessly, or negligently (but not grossly so) will henceforth not be remedied by the exclusion of the evidence resulting from those transgressions.

Although *Davis v. United States*¹²³ announced no new diminution of the exclusionary rule, it made clear the slight regard that the Court has for the use of the rule and left open an invitation to future diminution. The rule was deprecated as a mere "prudential doctrine,"¹²⁴ even as a "bitter pill" to be swallowed only as a "last resort."¹²⁵ Its application is justified not by the mere violation of the Fourth Amendment, but only when the violation is flagrant.¹²⁶

Two points form a line. *Hudson*, *Herring*, and *Davis* are three points, and the line they form is not difficult to follow. The Fourth Amendment exclusionary rule has one foot in the grave and one on a wet bar of soap. The Supreme Court as presently constituted sees the circumstances to which the exclusionary rule should be applicable as so rare as to make the appearance of Halley's Comet a commonplace by comparison.

As goes the Fourth Amendment, so goes article I, section 12 of the Florida Constitution. If the Supreme Court renders exclusion a non-existent or all-but-non-existent remedy under the Fourth Amendment, it

118. *Id.* at 141.

119. *Id.* at 144.

120. *See supra* notes 15–18 and accompanying text.

121. *Herring*, 555 U.S. at 142 (citing *Arizona v. Evans*, 514 U.S. 1, 15 (1995)).

122. *Herring*, 555 U.S. at 144.

123. *Davis v. United States*, 131 S. Ct. 2419 (2011).

124. *Id.* at 2426 (citations omitted).

125. *Id.* at 2427 (quoting *Hudson*, 547 U.S. at 591).

126. *See id.*

becomes, by operation of the 1982 conforming amendment, just as non-existent or all-but-non-existent under article I, section 12. Unlike other states, Florida has rendered itself incapable of providing its citizenry with any higher level of constitutional protection of their rights to be free from unreasonable searches and seizures than is provided to all Americans by operation of the Fourth Amendment.

Florida has rendered itself incapable of providing its citizenry with any higher level of *constitutional* protection; it has not rendered itself incapable of providing its citizenry with any higher level of protection. The conforming amendment of article I, section 12 extends to article I, section 12 only. It does not limit the protection afforded to Floridians by Florida statutes.¹²⁷ In the years that lie ahead, Floridians will be obliged to rely increasingly on statutes and statutory remedies to redress violations of their freedom from unreasonable search and seizure.

Perhaps this is, in one sense at least, a good thing. As noted *supra*, the basic statutory framework for the regulation of search and seizure in Florida has been on the books since the 1920's. One would expect to find these venerable statutes frequently cited and well developed in the case law. They are not. Most Florida cases addressing search and seizure issues resolve those issues as matters of constitutional law, Florida or federal. But it has been the law since at least the time of Justice Brandeis's oft-cited concurring opinion in *Ashwander v. Tennessee Valley Authority et al.*¹²⁸ that courts should

not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction, [courts should resolve the case on the statutory basis].¹²⁹

127. See *Oregon v. Hass*, 420 U.S. 714, 719 (1975) (citing *Cooper v. California*, 386 U.S. 58, 62 (1967) (noting it is settled constitutional doctrine that, "a State is free *as a matter of its own law* to impose greater restrictions [on] police activity than those the United States Supreme] Court holds to be necessary upon federal constitutional standards") (emphasis added); see also *Arkansas v. Sullivan*, 532 U.S. 769, 772 (2001); *Lego v. Twomey*, 404 U.S. 477, 489 (1972); *Sibron v. New York*, 392 U.S. 40 (1968); *State v. Kaluna*, 520 P.2d 51, 58 (Haw. 1974); *State v. Slaney*, 653 So. 2d 422, 425 (Fla. 3d DCA 1995).

[T]he states are privileged under their state law to adopt higher, but not lower, standards for police conduct than those required by the Fourth Amendment. In Florida, these higher standards may not, as a matter of state law, be imposed under the state constitutional guarantee against unreasonable searches and seizures, but may be imposed by other provisions of Florida law, including a state statute. *Slaney*, 653 So. 2d at 425 (internal citations omitted).

128. *Ashwander et al. v. Tenn. Valley Auth. et al.*, 297 U.S. 288, 341 (1936).

129. *Id.* at 347; see also *In re Holder*, 945 So. 2d 1130, 1133 (Fla. 2006) (noting that, "we have long subscribed to a principle of judicial restraint by which we avoid considering a

Generations of Florida lawyers should have been citing, at least in the first instance, Florida statutes as the basis for relief from unreasonable search and seizure; and generations of Florida judges should have been adjudicating claims for relief on the basis of those statutes. The elimination or near-elimination of a constitutional exclusionary rule will oblige Florida lawyers and judges to do what they should have been doing for decades.

Consider, for example, Florida Statutes section 933.19, discussed *supra*. It cites to the opinion of the Supreme Court in *Carroll* and adopts that opinion as the statute law of Florida. At the time that it was propounded, *Carroll* was viewed as creating a novel and far-reaching exception to the traditional warrant requirement, the “automobile” or “evanescent evidence” exception: because cars, and the contraband they may carry, are rapidly mobile, law enforcement can stop and search those cars for that contraband based upon mere probable cause and without a warrant. By operation of Florida Statutes section 933.19, that was and remains the statutory law of Florida.

It was, but no longer remains, the constitutional law of the United States. In 1968 the Supreme Court, in *Terry v. Ohio*,¹³⁰ created for the first time the less-than-probable-cause standard of “articulable reasonable suspicion;”¹³¹ and in 1981, in *Michigan v. Long*,¹³² the Court applied that standard to the stop and search of an automobile. Because the 1982 conformity amendment to article I, section 12 of the Florida Constitution requires Florida’s constitutional search and seizure law to follow that of the U.S. Supreme Court, “articulable reasonable suspicion” is a sufficient basis, as a matter of both Florida and federal constitutional law, to justify a car stop.

As a matter of constitutional law—but *not* as a matter of statute law. Like a specimen of a long-extinct insect species perfectly preserved in amber or malachite, the *Carroll* doctrine is preserved in the law of Florida by section 933.19. Section 933.19 has not been amended or altered in any way by the 1982 constitutional amendment. As a matter of constitutional law, a police officer in Florida can stop a passing motorist based upon mere “articulable reasonable suspicion” that the motorist has committed or is committing a crime. But as a matter of statute law, a police officer in Florida cannot stop a passing motorist unless the officer has probable cause to believe that the motorist has committed or is committing a crime. Section 933.19, intended to aid law enforcement at the time it was enacted,

constitutional question when the case can be decided on nonconstitutional grounds”).

130. *Terry v. Ohio*, 392 U.S. 1 (1968).

131. *See id.* at 27, 31.

132. *Michigan v. Long*, 463 U.S. 1032 (1981).

now affords Floridians a heightened protection from law enforcement.

Not part of the 1920's flurry of search-and-seizure law-making is Florida Statute section 901.151.¹³³ In the wake of the U.S. Supreme Court's path-breaking creation of the "stop and frisk" doctrine in *Terry v. Ohio*,¹³⁴ the Florida legislature enacted section 901.151. The statute faithfully codifies *Terry*. Subsections (2), (3), and (4) deal with permissible stops.¹³⁵ Subsection (5) deals with the "frisk."¹³⁶ But subsection (6) creates a statutory exclusionary rule that exists independently of the Fourth Amendment and independently of Florida's article I, section 12. If the U.S. Supreme Court were to eliminate the Fourth Amendment exclusionary rule tomorrow, subsection (6) of 901.151 would remain unchanged.

Subsection (6) provides:

No evidence seized by a law enforcement officer in any search under this section shall be admissible *against any person* in any court of this state or political subdivision thereof unless the search which disclosed its existence was authorized by and conducted in compliance with the provisions of subsections (2)–(5).¹³⁷

133. See FLA. STAT. § 901.151 (1997).

134. See generally *Terry*, 392 U.S. at 1.

135. FLA. STAT. § 901.151 (1997). Specifically, the language of section 901.151 includes:

(2) Whenever any law enforcement officer of this state encounters any person under circumstances which reasonably indicate that such person has committed, is committing, or is about to commit a violation of the criminal laws of this state or the criminal ordinances of any municipality or county, the officer may temporarily detain such person for the purpose of ascertaining the identity of the person temporarily detained and the circumstances surrounding the person's presence abroad which led the officer to believe that the person had committed, was committing, or was about to commit a criminal offense.

(3) No person shall be temporarily detained under the provisions of subsection (2) longer than is reasonably necessary to effect the purposes of that subsection. Such temporary detention shall not extend beyond the place where it was first effected or the immediate vicinity thereof.

(4) If at any time after the onset of the temporary detention authorized by subsection (2), probable cause for arrest of person shall appear, the person shall be arrested. If, after an inquiry into the circumstances which prompted the temporary detention, no probable cause for the arrest of the person shall appear, the person shall be released.

Id.

136. *Id.* Section (5) specifically discusses the "frisk":

(5) Whenever any law enforcement officer authorized to detain temporarily any person under the provisions of subsection (2) has probable cause to believe that any person whom the officer has temporarily detained, or is about to detain temporarily, is armed with a dangerous weapon and therefore offers a threat to the safety of the officer or any other person, the officer may search such person so temporarily detained only to the extent necessary to disclose, and for the purpose of disclosing, the presence of such weapon. If such a search discloses such a weapon or any evidence of a criminal offense it may be seized.

Id.

137. FLA. STAT. § 901.151 (1997) (emphasis added).

On the face of it, this remarkable statutory language revives the long-forgotten doctrine of “automatic standing.”¹³⁸ It provides that wrongfully-seized evidence is not admissible against *any person*. It purports to vest with standing anyone against whom wrongfully-seized evidence will be offered. Assume, for example, that Smith is walking down the street and a police officer, acting without cause of any kind, stops and searches him and finds contraband. Assume further that the contraband is in a plastic baggie upon which is written, “this contraband is the property of Jones.” Under established Fourth Amendment and article I, section 12 jurisprudence, Smith has standing to move to suppress, but Jones does not.¹³⁹ The search and seizure in question were not visited upon Jones. Under Florida Statutes section 901.151(6), however, Jones has standing to move to suppress simply because the contraband will be offered in evidence against him.

Section 2 of the 1923 Act, codified then as now at Florida Statutes section 933.04 and captioned, “Affidavits,” provides:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches shall not be violated and no search warrant shall be issued except upon probable cause, supported by oath or affirmation particularly describing the place or places to be searched and the persons or persons and thing or things to be seized.¹⁴⁰

This statutory language being all but identical to the Fourth Amendment and article I, section 12, the question that naturally presents itself is: When the legislature proposed and brought about the 1982 Amendment to the Florida Constitution, why did it not amend this statute to require conformity with United States Supreme Court jurisprudence as well? And in the intervening three decades, why have no subsequent legislatures done so? After all, amending the Constitution is a difficult and politically laborious task.¹⁴¹ In comparison, amending a statute is a simple business. Why did the legislature choose to do the one and not the other?

There are two possible explanations, one of which can be dismissed out of hand. Jokes denigrating politicians are a ubiquitous and reliable source of amusement. In that spirit, one possible explanation for the legislature’s failure to bring section 933.04 into conformity with the Fourth Amendment and post-1982 article I, section 12 is that Florida legislators were, and remain, blithely unaware of the provisions of their own statute law; or, being aware of those provisions, failed, and continue to fail, to see

138. *See, e.g., Jones v. United States*, 362 U.S. 257, 267 (1960).

139. *See, e.g., Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980); *United States v. Salvucci*, 448 U.S. 83, 91–92 (1980); *Rakas v. Illinois*, 439 U.S. 128, 148 (1978).

140. FLA. STAT. § 933.04 (2014).

141. *See* FLA. CONST. art. XI, § 5 cl. (amended 1968).

the inconsistency in amending a provision of the state constitution but not amending an identical provision of the state statutes. It is an explanation; but it is not an explanation to be taken seriously.

There is an alternative, and much more likely, explanation. In the taxonomy of laws, constitutional law is intended to be the most stable. By tying article I, section 12 to the Fourth Amendment, the legislature made certain that the organic law of search and seizure would be pronounced with but one voice, and that the voice would be that of the highest judicial authority in the land. Constitutional doctrine would be as fixed, certain, knowable, and unchanging as law can be.

By contrast, it is desirable that statute law be flexible, even protean. Faced with changing factual circumstances, lawyers and judges must interpret and re-interpret statutory law. In some sense, the legislature is the court of last resort where statutory law is concerned: if courts err in their interpretation of a statute, the legislature can amend the statute to rectify the error.

Viewed in this fashion, the legislature's decision, made three decades ago and adhered to ever since, to bring about the conformity amendment of article I, section 12, but not to amend section 933.04 in the same way, makes perfect sense. In effect, the legislature has said to Florida's lawyers and judges: With respect to the constitutional law of search and seizure, we want little experimentation and little change. Only one court, the highest in the land, will decide this law. But with respect to the statute law of search and seizure, you lawyers and judges should cultivate an independent jurisprudence, a Florida jurisprudence, a jurisprudence based upon "logic, and [Florida legal] history, and [Florida] custom, and utility, and the accepted standards of right conduct" in Florida.¹⁴² If you err in cultivating this statute- and Florida-precedent-based jurisprudence, we, the people's directly-elected representatives, will amend the statute law to correct your error.

Thus understood, the legislature's continued declination to amend section 933.04—its declination to amend it, for example, after *Hudson*, after *Herring*, after *Davis*—speaks volumes. As discussed in detail *supra*, Florida has a long, emphatic, and independent tradition of excluding from use at trial evidence that is the product of a violation of the right of the people to be secure in their persons, houses, papers, and effects. Section 933.04 will continue to give effect to that tradition. It is to that tradition that Florida lawyers and judges should look first in litigating and

142. BENJAMIN NATHAN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 112-13 (Yale University Press 1921).

adjudicating search and seizure cases. Only when such adjudication cannot be achieved at the sub-constitutional level are courts to look for constitutional answers.

The foregoing is not mere theorizing. It is a doctrinal approach that has been embraced by the Florida Supreme Court in the important recent case of *State v. Cable*.¹⁴³

The facts of *Cable* were identical in all material respects to those of *Hudson v. Michigan*. Citing the conformity language of article I, section 12, the prosecution argued that the result in *Hudson* must obtain in *Cable*, *i.e.*, that a failure of the police to “knock and announce” is not to be remedied by suppression of evidence.

The knock-and-announce rule has long been part of Florida law, and for many years has been codified as Florida Statutes sections 901.19¹⁴⁴ and 933.09.¹⁴⁵ In *Benefield v. State*,¹⁴⁶ a case that has been relied upon and frequently cited since its propounding in 1964,¹⁴⁷ the Florida Supreme Court “held that a violation of Florida’s knock-and-announce statute . . . required the suppression of the evidence obtained.”¹⁴⁸ These statutes, and the interpretive law giving effect to them, are undisturbed by *Hudson*. And because they are dispositive of the question raised in *Cable*, there was no reason for Florida courts to attempt to resolve that case on constitutional grounds. Indeed Florida courts would have been wrong to attempt to do so. The Florida Supreme Court in *Cable* quoted with approval the following language from the decision of the intermediate appellate court below:

The issue in the instant case . . . is not—as it was in *Hudson*—whether the evidence is subject to suppression under the Fourth Amendment. Instead, the issue is whether suppression of the evidence is a remedy

143. *State v. Cable*, 51 So. 3d 434 (Fla. 2010).

144. FLA. STAT. § 901.19. Subsection (1) provides:

If a peace officer fails to gain admittance after she or he has announced her or his authority and purpose in order to make an arrest either by a warrant or when authorized to make an arrest for a felony without a warrant, the officer may use all necessary and reasonable force to enter any building or property where the person to be arrested is or is reasonably believed to be.

Id.

145. FLA. STAT. § 933.09. The statute provides: “The officer may break open any outer door, inner door or window of a house, or any part of a house or anything therein, to execute the warrant, if after due notice of the officer’s authority and purpose he or she is refused admittance to said house or access to anything therein.” *Id.*

146. *Benefield v. State*, 160 So. 2d 706 (Fla. 1964).

147. *Cable*, 51 So. 3d at 439 (citing *Guerrie v. State*, 691 So. 2d 1132 (Fla. 4th DCA 1997); *Kistner v. State*, 379 So. 2d 128 (Fla. 1st DCA1979); *Moreno v. State*, 277 So. 2d 81 (Fla. 3d DCA 1973)). Computer research indicates that *Benefield* has been cited in 149 Florida cases. *See, e.g., Cable*, 51 So. 3d at 439; *Guerrie*, 691 So. 2d at 1133; *Kistner*, 379 So. 2d at 128; *Moreno*, 277 So. 2d at 83.

148. *Cable*, 51 So. 3d at 435.

that must be applied for the violation of the statutory knock-and-announce provision [C]ase law does not support the conclusion that the statute has no force independent of the requirement of the Fourth Amendment Indeed, *Benefield* applied the exclusionary rule for violations of the knock-and-announce statute long before the United States Supreme Court decided . . . *Wilson v. Arkansas*.¹⁴⁹

Dissenting for himself and Justice Labarga, Justice Polston pointed out that, “Because the majority’s decision is premised on common law principles, the Florida Legislature may choose to eliminate the majority’s exclusionary rule for knock-and-announce violations.”¹⁵⁰ And of course in this observation Justice Polston is entirely correct. The Florida legislature encourages Florida courts to cultivate an independent, Florida-law-based subconstitutional jurisprudence of search and seizure. The Florida legislature retains a revisory power over that jurisprudence, in the sense noted by Justice Polston: the legislature may alter statutes to alter statutory interpretation. To date, the legislature has not done so with respect to the holding in *Cable*. As time passes, the legislature’s continued inaction will constitute ever-greater evidence of its approval of that holding.¹⁵¹

IV. CONCLUSION

Although the Fourth Amendment was made a part of the Constitution in 1791, last year—2014—marked its true centennial. The Fourth Amendment was an all-but-inert form of words until 1914, when the Supreme Court gave life and meaning to it. Whether that living, meaningful Fourth Amendment will celebrate a bicentennial in 2114, is a nice question. Increasingly bereft of its core purpose—the exclusion from democratic legal proceedings of evidence obtained by antidemocratic and illegal means—the Fourth Amendment is in the process of being rendered merely hortatory. If it does not shield the people’s courts from the receipt of evidence obtained by transgression of the people’s rights, then it expresses not a command, merely a vague wish, that the people be protected from unreasonable and overreaching governmental search and seizure.

By operation of the 1982 conformity amendment to the Florida constitution, the reduction of the Fourth Amendment from a bang to a

149. *Id.* at 441.

150. *Id.* at 444 (Polston, J., dissenting).

151. *See* *Zommer v. State*, 31 So. 3d 733, 754 (Fla. 2010) (“the Legislature is presumed to have adopted prior judicial constructions of a law unless a contrary intention is expressed.”) (quoting *Fla. Dep’t of Children & Families v. F.L.*, 880 So. 2d 602, 609 (Fla. 2004)); *see also* *Fla. Dep’t of Envtl. Prot. v. ContractPoint Fla. Parks*, 986 So. 2d 1260, 1269–70 (Fla. 2008); *Fla. Dep’t of Rev. v. City of Gainesville*, 918 So. 2d 250, 264 (Fla. 2005).

whimper must result in the identical reduction of article I, section 12. Florida's longstanding legal tradition of vigorous protection of the constitutional rights of its citizens from abusive search and seizure will be diluted out of existence, or nearly out of existence.

Whether Florida lawyers and judges will develop a fully-formed subconstitutional jurisprudence of search and seizure is also a nice question. To date, they have chosen not to do so; in the future they may have no choice but to do so. But prophesy is an uncertain business at best, the more so in light of the wandering path that search and seizure law has taken in this state.

In some sense, that wandering path began on June 30, 1922, with *Atz v. Andrews*.¹⁵² Chief Justice Browne's very thorough opinion for the Court included this language, upon which present-day Florida courts would be hard-pressed to improve, and which present-day Florida judges and lawyers would be well-advised to remember:

In this era, when earnest-thinking men and women are ardently trying to arouse public sentiment on the subject of strict law enforcement, it would seem most meet and proper for the courts to set the example, and not sanction law-breaking and constitutional violation in order to obtain [evidence] against another law-breaker. Better the mob and the Ku-Klux, than a conviction obtained in a temple of justice by [evidence] illegally acquired by agents of the government and officers of the law. The distinction between illegally acquired [evidence] and perjured testimony is not in kind, but in degree, and a conviction obtained by the use of either or both of these methods condemns the administration of justice at the same time that it condemns the prisoner.¹⁵³

152. *Atz*, *supra* note 44.

153. *Id.* at 332.