ACTIONS FOR TRESPASS & *HUNTER V. SOUTHAM*

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INTRODUCTION

In *Hunter v. Southam* (1984), the Supreme Court held that s. 8 of the *Charter*[1] ordinarily requires law enforcement officers to obtain a warrant, where "feasible", before conducting a search.[2] The absence of a warrant or common law power, the Court held, gives rise to a presumption that the search is unreasonable and, therefore, contrary to s. 8.[3] The Court, in *Hunter*, gave no indication that the rule it created was merely one possible means of fulfilling the requirements of s. 8 rather than a mechanism specifically required by the *Charter*. That may go some way towards explaining why Parliament has, since then, given little or no thought to replacing the search warrant regime with other means of deterring unreasonable searches and seizures. In particular, the viability of constitutional torts as an alternative means of protecting s. 8 rights has not been adequately explored. Those interested in deterring abuses of state power by holding public authorities liable in tort, therefore, ought to be concerned by the way *Hunter* was decided.

This paper argues that s. 8 does not *per se* require the legislature to adopt a search warrant regime over other possible means of deterring unreasonable searches; that Parliament was, and perhaps still is, entitled to rely on actions for trespass over search warrants as the preferred means of protecting s. 8 values. In making this argument, this paper does not suggest that the rule created in *Hunter* is a bad rule, or that we should exchange a search warrant regime for a tort-based deterrent. It claims only that a tort-based regime should be considered a live alternative to the *Hunter* rule – one open for debate in the House of Commons, not foreclosed by the *Constitution*.[4] Once we see that rules like that created in *Hunter* are optional, rather than constitutionally mandated, we see opportunities all around us for public authority liability to assume a greater role.

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1 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

2 *Hunter v. Southam*, [1984] 2 S.C.R. 145 at para. 30 [*Hunter*]. There is, of course, an exception where, under the circumstances, there exists a common law power to carry out a search. Don Stuart notes that this qualification of the warrant requirement seems to permit an "exigent circumstances" exception: see Don Stuart, *Charter Justice in Canadian Criminal Law*, 3d. ed. (Toronto: Carswell, 2001) at 233-34.

3 *Hunter*, *ibid.* at para. 31.

4 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 and *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Constitution*].

Before Hunter: The Genesis of Search Warrants

Before the release of *Hunter*, it was far from inevitable that the Court would take the bold position that s. 8 demands a search warrant regime. In 1983, the Law Reform Commission of Canada pointed out that, unlike the Fourth Amendment of the American Constitution, s. 8 makes no specific allusion to warrants.[5] This "raise[d] the possibility that as a constitutional matter, Canadian courts [would] not show the preference for warrants that has characterized American law."[6] The LRC was careful to note that "a similar policy of preference for the warrant could be accepted by Canadian courts" but did so with the caveat that "this policy would have to be advanced in the absence of supportive wording in section 8 of the *Charter*."[7] The Ontario Court of Appeal in *R. v. Rao* decided that the *Charter* did not require the police to acquire a warrant to effect a valid search; that although the failure to obtain a warrant might weigh heavily in favour of a finding that a search was unreasonable (particularly where premises were the object of the search), it was not a reason in itself to make that finding.[8]

It seems even less inevitable that the Court would take the road it has taken when we consider both the debatable legal foundation for the American Supreme Court's approach to unreasonable searches and seizures, and the history of the search warrant itself. Akhil Reed Amar has proposed a reading of the Fourth Amendment differing from that traditionally given by the American Supreme Court.[9] The Fourth Amendment, like s. 8 of the Charter, bars the government from conducting unreasonable searches and seizures. It is distinct insofar as it explicitly mentions warrants: "no warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[10] The U.S. Supreme Court has long supposed that, according to the text of the Fourth Amendment, a warrantless search is presumptively unreasonable.[11] But Amar has observed that warrants were once considered, if anything, presumptively *un*reasonable – that the Fourth Amendment regards warrants as a *lesser* vehicle for protecting the right to be free from unreasonable searches and seizures. His reasoning draws heavily on the availability, when the Fourth Amendment was drafted, of actions for trespass.

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[5] Law Reform Commission of Canada, Working Paper 30: Police Powers – Search and Seizure in Criminal Law Enforcement (Ottawa: 1983) at 44 [LRC]. See U.S. Const., Bill of Rights, amend. IV [Fourth Amendment].

[6] *Ibid.* LRC.

[7] *Ibid.*

[8] See *R. v. Rao* (1984), 46 O.R. (2d) 80 (C.A.). For analysis of the case, see Stuart, *supra* note 2 at 227-29.

[9] See Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven: Yale University Press, 1998) at ch. 4 [Amar, *Bill of Rights*]. See also Akhil Reed Amar, "Fourth Amendment First Principles" (1997) 107 Harv. L. Rev. 757.

[10] Fourth Amendment, *supra* note 5.

[11] See *e.g. United States v. United States District Court*, 407 U.S. 297 (1972).

Amar notes that government officials, when the Fourth Amendment was drafted, would have preferred to seek out a judicial warrant in advance of a search, rather than face the possibility of heavy damages in the event of a successful trespass claim.[12] The warrant, issued by a judge perhaps sympathetic to the officials seeking authorization, would ensure that those executing the search would not have to explain themselves before a jury eager to deter incursions on their civil liberties.[13] An official seeking to justify the reasonableness of a search would almost certainly prefer to do so *ex parte* and *in camera*, rather than before a jury in a public trial where his reasons would undergo substantially greater scrutiny.[14] Indeed, Amar suggests that the standard of probable cause was intended to be a much higher evidentiary threshold than one of mere "reasonableness". Since an official would need to be extraordinarily convinced of a search's reasonableness before taking the chance of a costly suit, the *de facto* threshold of proof for warrantless searches was probable cause. By prescribing a test of probable cause for judicially authorized searches, Amar claims, the Fourth Amendment aimed to make authorized searches at least as practically unlikely as warrantless searches. The Fourth Amendment, according to Amar, did not envision searches taking place where the person conducting the search lacked a high degree of confidence in its reasonableness.[15] The probable cause requirement in the warrant clause reflects the fact that a search conducted under conditions where that level of confidence does not exist is constitutionally unsatisfactory.

The problems with warrants – that they are issued after *ex parte*, *in camera* arguments – stem from the circumstances under which they developed. The search warrant today is regarded as an essential condition for individual freedom, an exemplar of a society committed to civil liberties. It was not envisaged in that way when it was devised. The search warrant emerged as a means of empowering, not restraining, law enforcement officers; a mechanism by which the justice of the peace could delegate to someone else the authority to conduct a search.[16] The justice of the peace granting the warrant acted as an administrator rather than an adjudicator.[17]

This might seem counter-intuitive, given that justices of the peace have long been unable to grant a search warrant on a whim. We need, though, to see the limits

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[12] Amar, *Bill of Rights*, *supra* note 9 at 69.

[13] *Ibid.* at 69-70.

[14] *Ibid.*

[15] This reasoning closely resembles that underpinning Jeremy Bentham's nineteenth-century model of the panopticon, a prison in which prisoners cannot tell whether they are being watched and are, for that reason, disinclined to misbehave. As Foucault later showed, this reasoning underlay many criminal justice strategies. See Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. by Alan Sheridan (New York: Vintage Books, 1995) at 195-228.

[16] See LRC, *supra* note 5 at 29-30.

[17] *Ibid.* at 30-31.

on their authority to grant search warrants for what they were: instances of (at the time) radical judicial interference with ministerial power. The search warrant as it was initially conceived was perfectly consistent with a conception of the justice of the peace as someone who could search any person's home for any reason or no reason; the warrant was simply a means by which the justice could conduct searches without having to conduct them personally. The common law requirements that the justice of the peace act "judicially" in deciding whether to issue a search warrant, and that the warrant be particular rather than general, were regarded as limits upon the justice of the peace in his use of the search warrant, not as features inherent to the idea of the warrant.[18] There was, in fact, a line of authority stemming from the Star Chamber that general warrants were acceptable.[19] The precedential value of those decisions was disputed by Hale, and by various judges in a series of cases – including the seminal English decision *Entick v. Carrington*.[20] We should, though, not take that dispute as a sign that the courts disagreed about the nature of the search warrant. The decision to "rudely dismiss" the authority of Star Chamber decisions in common law courts was grounded not in legal interpretation but in political morality.[21]

Once we understand the search warrant as something designed to extend rather than limit power, debates over whether warrants should be required as a precondition to searches get re-cast. Eighteenth-century judges deciding whether search warrants should exist were not trying to find ways of protecting the privacy of citizens, but rather were trying to find new ways to *invade* the privacy of citizens. Originally, the applicant for a search warrant was not a police officer investigating a criminal offence, but a private citizen wanting to recover stolen goods.[22] Search warrants were justified on the basis that, without them, the owner of stolen goods could never recover them.[23] Applications for search warrants were allowed to be made *ex parte* and *in camera* because, if they were not, the thief would have time to place the goods beyond the reach of the true owner, causing irreparable prejudice. The aspects of search warrant procedure most prejudicial to the civil liberties of citizens are precisely those aspects most in keeping with its essential nature, its reason for being.

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[18] *Ibid.* at 31.

[19] See Sir Matthew Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown*, 1st Am. ed., vol. 1 (Philadelphia: R.H. Small, 1847) at 586-87; *Leach v. Money* (1765), 19 How.St.Tr. 1001 at 1027 [*Leach*].

[20] See *Entick v. Carrington* (1765), 19 How.St.Tr. 1029 at 1071; *Ibid. Leach*; *Ibid.* Hale; Jacob W. Landynski, *Search and Seizure and the Supreme Court: A Study in Constitutional Interpretation* (Baltimore: John Hopkins Press, 1966) at 19-30.

[21] *Ibid.* Landynski at 29.

[22] *Ibid.*

[23] See Amar, *Bill of Rights*, *supra* note 9 at 72-73.

This is not a rant against search warrants. Whatever their origins, they have come to represent limited government. We should not, though, let historical revisionism blind us to a basic truth: the warrant is used as a tool for protecting civil liberties because the government had *already* created it for an altogether different purpose. Had eighteenth-century legislators, executive actors and courts been trying to find ways to protect civil liberties, they might well have found a different way. Indeed, as we have seen from Amar's analysis, they might have thought they had a different and better way *already*: the action for trespass.

With these considerations in mind, we can approach the Supreme Court's ruling in *Hunter* with fresh eyes. If the Court could have recognized strategies for preventing unreasonable searches and seizures, other than a search warrant regime, why did it not do so? In posing this question, we are not asking whether the search warrant requirement adequately prevents unreasonable searches, or whether actions for trespass represent such effective deterrents that a search warrant regime would be unnecessary. Those are empirical questions we cannot answer here. For our purposes, the relevant question is this: did the *Hunter* Court have a good reason for thinking a search warrant regime the *only possible* means of preventing unreasonable searches and seizures, such that some other strategy – for instance, a strategy relying on the availability of constitutional tort actions – *could not* replace that regime?

On the Need for a Search Warrant Regime (and the Absence of Need for Anything Else)

The Court, in *Hunter*, acknowledged that actions for trespass have, in the past, been used to remedy and deter unreasonable searches and seizures. It sought, however, to detach s. 8 from the action for trespass on the basis that the latter is bound up with the idea that a right to privacy protects nothing more than an interest in property. Section 8, the Court held, protects a much wider sphere of interests:

> In my view the interests protected by s. 8 are of a wider ambit than those enunciated in *Entick v. Carrington*. Section 8 is an entrenched constitutional provision. It is not therefore vulnerable to encroachment by legislative enactments in the same way as common law protections. There is, further, nothing in the language of the section to restrict it to the protection of property or to associate it with the law of trespass. It guarantees a broad and general right to be secure from unreasonable search and seizure.[24]

If, by "associate it with", the Court meant "tether it to", we can find no fault with the remark: there is indeed no reason to think that s. 8 requires actions for trespass, or precludes the state from using other strategies to ensure that searches and seizures are "not unreasonable". But if the statement amounts only to the observation that s. 8 does not expressly require the government to rely on actions for

[24] *Hunter*, *supra* note 2 at para. 22.

trespass as opposed to a warrant regime, we might well ask "so what?" That the *Charter* permits the deterrence of unreasonable searches through strategies that do not rely on tort actions, hardly suggests that tort actions ought to be dismissed as possible strategies. Furthermore, the Court gains no traction by pointing out that the common law of trespass could be subject to legislative encroachments. That only means the legislature could, in principle, decide to use some method for preventing unreasonable searches other than one based on the availability of an action for trespass. It does not mean the legislature is or should be compelled to draw on other means.

Let us, then, consider why the Court in *Hunter* preferred a search warrant regime over other methods of preventing unreasonable searches, like actions for trespass. The Court reasoned that, because s. 8 forbids only unreasonable searches, it implicitly requires an assessment of the reasonableness of searches.[25] The question is whether that assessment must occur prior to the search, or if an *ex post facto* assessment is constitutionally permissible. The *Hunter* Court decided that s. 8 requires a strategy for preventing unreasonable searches, not merely for identifying and remedying them after the fact. The Court stated:

> [A] post facto analysis would, however, be seriously at odds with the purpose of s. 8. That purpose is, as I have said, to protect individuals from unjustified state intrusions upon their privacy. That purpose requires a means of preventing unjustified searches before they happen, not simply of determining, after the fact, whether they ought to have occurred in the first place. This, in my view, can only be accomplished by a system of prior authorization, not one of subsequent validation.[26]

That may be right. It is, however, question-begging on a number of levels. Let us accept as read that s. 8 requires the state to devise some strategy for preventing unreasonable searches. It certainly does not follow that the judiciary should have the final say as to which strategy it should adopt. The judiciary is, first and foremost, responsible for interpreting the *Constitution*. Its primary duty is to apply the law, not make it.[27] To say that the state has a constitutional responsibility to create and maintain, for all time, a search warrant regime, the Court would need to be able to say – since the *Charter* itself says nothing whatsoever about search warrants – that only a search warrant regime could do what the *Constitution* requires: deter officers from conducting unreasonable searches.

That is a tricky argument to make, and the Court never takes the steps to make it. The *Hunter* Court does nothing to show that constitutional actions for trespass –

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[25] *Ibid.* at para. 25.

[26] *Ibid.* at para. 27 [emphasis added].

[27] Obviously, that distinction is not hard-and-fast as a practical matter. In principle, though, we can surely agree that the legislature, and not the judiciary, is responsible for making new law. See, on this point, Stephen Guest, *Ronald Dworkin* (Stanford: Stanford University Press, 1992) at 68.

or any other legal device – would not have the requisite deterrent effect. Maybe it chose not to make that case because it would have seemed absurd to suppose that, given the prohibitively high cost of litigation and the uncertainty surrounding the kind of damages that might be awarded for unreasonable searches, the deterrent effect of actions for trespass would be low (or, anyway, not high enough to satisfy the demands of s. 8). *Hunter*, though, did more than just say that actions for trespass were not, *at that time*, adequate substitute deterrents for a warrant regime. By treating the matter as unworthy of analysis, the Court implies that *only* a warrant regime could deter to the extent required by s. 8. Perhaps, in 1984 (or, for that matter, 2006), actions for trespass would have failed as an adequate deterrent, but there is little reason to assume that actions for trespass could not, under any circumstances, have the deterrent effect of a warrant regime; that they could never serve as a constitutionally acceptable substitute.

The Exclusionary Rule

In making this point, we need to bear in mind that actions for trespass would not need to do all the work of deterring unreasonable searches by themselves. Had the *Hunter* Court recognized neither a search warrant requirement nor any other method of preventing unreasonable searches, we would yet have had at least one safeguard in place: the exclusionary rule contained in s. 24(2).[28] The bulk of Fourth Amendment case law, since *Boyd v. United States*,[29] has grounded a Fourth Amendment exclusionary rule in deterrence arguments;[30] that is, in the claim that the exclusionary rule is an expedient means of ensuring compliance with the Fourth Amendment rather than a rule required by the *Constitution* itself.[31] The Supreme

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[28] The Supreme Court of Canada has also suggested in recent years that there is a power to exclude improperly obtained evidence at common law. See *R. v. Buhay*, [2003] 1 S.C.R. 631 at para. 40, 10 C.R. (6th) 205; *R. v. Harrer*, [1995] 3 S.C.R. 562 at paras. 21-24. For criticism of this suggestion, see Plaxton, "Who Needs Section 24(2)? Or: Common-Law Sleight-of-Hand" (2003) 10 C.R. (6th) 236.

[29] *Boyd v. United States*, 116 U.S. 616 (1885) [*Boyd*]. The Fifth Amendment explicitly requires courts to exclude certain kinds of evidence, but the Fourth does not. The Fourth Amendment merely states that the government shall not conduct unreasonable searches and seizures; it does not say that the proceeds of such searches should or must be excluded at trial. The Supreme Court in *Boyd* held that a Fourth Amendment violation is necessarily a violation of the Fifth Amendment; that an unreasonable search invariably amounts to a constructive infringement of the searchee's right not to incriminate herself under the Fifth Amendment. To give effect to the intention of the Framers of the Fifth Amendment, an exclusionary rule must, the *Boyd* Court claimed, be read into the Fourth. *Boyd* is discussed and criticized in Landynski, *supra* note 20 at 57-61; Polyvios G. Polyviou, *Search and Seizure: Constitional and Common Law* (London: Duckworth, 1982) c. 1.

[30] See *United States v. Janis*, 428 U.S. 433 at 446 (1976).

[31] Hence, in *Wolf v. Colorado*, 338 U.S. 25 (1949) [*Wolf*], a majority found that the exclusionary rule applied only in federal criminal cases. The Court, it found, could not exclude evidence obtained through unreasonable seizures under the Fourteenth Amendment, since the exclusionary rule was merely one possible means of enforcing the requirements of the Fourth. The Court later narrowly overruled *Wolf* in *Mapp v. Ohio*, 367 U.S. 643 (1961) again on the basis of expedience. The decision has been criticized as unprincipled. See Polyviou, *supra* note 29 at 345-8. In *United States v. Calandra*, 414 U.S. 338 (1974), the Court used the deterrence-based rationale to explain why it was

Court of Canada has likewise justified the exclusionary rule in s. 24(2) largely, though not exclusively, on deterrence grounds.[32] So the *Hunter* Court could not plausibly claim that a constitutional tort would need to do all the work of deterring unreasonable searches.

One might object that a search warrant requirement was necessary if the exclusionary rule was to have any teeth. Presently, an accused person bears the burden of proving a s. 8 violation. That is feasible because, unless some common law power to search exists, the accused need only point to the absence of a search warrant if she wants to say that the search was unreasonable. An accused would have a far more difficult time proving that probable cause did *not* exist, even with the Crown's duty of disclosure.[33] This would diminish the likelihood of unreasonable searches being discovered, and so dilute the deterrent effect of s. 24(2). Viewed in conjunction with actions for trespass, s. 24(2) might nonetheless provide a constitutionally sufficient deterrence. If we have doubts about the deterrent effect of actions for trespass, though, we may wonder if *two* flimsy deterrent regimes could truly offer a constitutionally acceptable substitute for a warrant regime.

To be sure, courts might not think it appropriate to determine the admissibility of evidence seized pursuant to a search in the same manner they do now. But we can be creative. After all, by establishing the warrant requirement in *Hunter*, the Supreme Court essentially put the burden of proof on the Crown to establish probable cause – the burden simply lies on the Crown at the pre-trial stage of proceedings.[34] As the *Hunter* Court noted: "[A search-warrant] requirement puts the onus on the state to demonstrate the superiority of its interest to that of the individual. As such it accords with the apparent intention of the *Charter* to prefer,

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not constitutionally necessary to exclude evidence in grand jury proceedings. For a general overview of the debate over the exclusionary rule's constitutional status in Fourth Amendment jurisprudence, see Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* (St. Paul: West Publishing Co., 1987) vol. 1, § 1.1.

[32] For the argument that among the possible justifications for the exclusionary rule, the only plausible one is that of deterrence, see Steven Penney, "Taking Deterrence Seriously: Excluding Unconstitutionally Obtained Evidence Under Section 24(2) of the *Charter*" (2003) 49 McGill L.J. 105 at 110-13.

[33] To some extent, we can and should test this claim in light of current legal practice, since the prevalence of warrants means that the constitutionality of a search often hinges on whether there were sufficient grounds to support the issuance of the warrant. This raises a further observation about the possible benefits of search warrants: it puts the Crown in a position where it must state, on the record, the facts on which it relies in claiming that probable cause exists. The fact that a paper trail is out there, in turn, may increase the likelihood of a successful challenge to the constitutionality of a search. On the need for open-ness in applications for search warrants, it is useful to see *R. v. Araujo*, [2000] 2 S.C.R. 992 at para. 59, 149 C.C.C. (3d) 449 (S.C.C.), where the Court observed that "amplification evidence" should be accepted in only narrow circumstances. See also *R. v. Jarvis*, [2002] 3 S.C.R. 757 at para. 44; *R. v. Sutherland* (2000), 150 C.C.C. (3d) 231 at para. 12 (Ont. C.A.).

[34] The Crown must likewise prove that an accused's confession to a person in authority is voluntary before such a statement is admissible against the accused in a criminal trial. The Supreme Court in *R. v. Oickle*, [2000] 2 S.C.R. 3, though, observed that this is a common-law rule going beyond the requirements of s. 7 of the *Charter*.

where feasible, the right of the individual to be free from state interference to the interests of the state in advancing its purposes through such interference."[35] Now, one might object that the Crown's burden at trial would be in the course of s. 8 litigation, whereas the pre-trial burden is not. The Supreme Court has frequently insisted, for example in cases like *R. v. Mills*, that the claimant bears the burden of proving that a violation has occurred.[36] Such an objection, however, seems something of a dodge. The warrant ensures that the proceeds of the search are established as reasonable and, therefore, admissible in civil or criminal proceedings; that a s. 8 challenge to its admissibility will fail. It rebuts a presumption that the search is unreasonable, its proceeds inadmissible. Once we say that s. 8 requires advance judicial authorization, we seem committed to saying that, at the moment an application for a warrant is made, s. 8 is in play. If we are prepared to say that the Crown must prove probable cause before it can obtain a warrant, we can just as easily say that the Crown must prove probable cause before the proceeds of a search can be admitted in a criminal trial. If it failed to discharge that burden, it would need to establish under s. 24(2) that exclusion of the seized evidence would bring the administration of justice into disrepute.

Even supposing that the exclusionary rule's deterrent force depends upon the *sub silentio* onus-shifting that occurs with the search warrant regime, we are not committed to thinking that the deterrent effect of that pairing is itself constitutionally adequate; *i.e.*, we might wonder if something like actions for trespass are required to "top up" the level of deterrence offered by the search warrant-exclusionary rule combo. It is worth noting that long after the U.S. Supreme Court recognized both the search warrant requirement and the exclusionary rule, it held in *Bivens v. Six Unknown Named Agents* that the Fourth Amendment also mandates a cause of action against federal agents[37] who conduct unreasonable searches and seizures.[38] The Court rejected the claim that the Fourth Amendment merely confines the kind of defence available to federal agents subjected to an action for trespass. If that were true, the Court reasoned, it would follow that a state which altogether abolished the tort of trespass, or declared that such actions could not be launched against federal agents, could effectively prevent citizens from obtaining any civil remedy for unreasonable searches whatsoever.[39] That would be an unacceptable outcome, the Court continued, insofar as "damages have been regarded as the ordinary remedy for invasions of personal interests in liberty."[40]

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[35] *Hunter*, *supra* note 2 at 29.

[36] See *R. v. Mills*, [1999] 3 S.C.R. 668.

[37] The Court did not need to decide whether the Fourteenth Amendment likewise requires the individual states to recognize constitutional torts for unreasonable searches, since federal statute already created such a cause of action. See 42 U.S.C.A. § 1983 (West 1994); *Monroe v. Pape*, 365 U.S. 167 (1961).

[38] See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) [*Bivens*].

[39] *Ibid.* at 395.

[40] *Ibid.* at 395.

There remains no firm evidence, one way or the other, that exclusionary rules actually deter law enforcement officers from conducting unreasonable searches. To some extent we can give them the benefit of the doubt.[41] We need not, though, think exclusionary rules so effective that they need no back-up deterrent measures. Why might we think that any kind of exclusionary rule, by itself, lacks sufficient deterrent value? For starters, the rule creates no disincentive to engage in unreasonable searches. The exclusionary rule makes unreasonable searches less attractive by taking away an advantage of conducting them.[42] It does not actually punish people who conduct them.[43] Just as a person who attempts to devise a will without following the conditions laid down in the applicable legislation is not punished when her "will" is treated as a legal nullity,[44] a person who wants to obtain evidence for a criminal prosecution is not punished when the evidence she unconstitutionally obtains is excluded as evidence.[45]

There is a second reason, related to the first. Because an exclusionary rule has deterrent value only insofar as it removes an advantage of conducting unreasonable searches, it has no deterrent value whatsoever in circumstances where investigating officers are either indifferent to the possibility of using the proceeds of a search in a criminal prosecution,[46] or where the prospect of obtaining evidence through legal means is faint. A police officer who thinks that, in the absence of a search, the criminal will go free anyway, or who thinks (however unreasonably) that the court will, for whatever reason, admit the evidence despite the unconstitutionality of the search, will not find s. 24(2) especially vexing.

Moreover, the law of standing means that the exclusionary rule does not prevent the proceeds of all unreasonable searches from being admitted as evidence. If the police seize evidence of criminal wrongdoing in the course of a search, the accused has the standing to challenge the constitutionality of the search only if she had a reasonable expectation of privacy in the place searched.[47] If she does not have standing, the evidence will be admitted whether or not it was obtained as a result of an unconstitutional search. Now, the Supreme Court has suggested that a lack of

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[41] See Oaks, "Studying the Exclusionary Rule in Search and Seizure" (1970) 37 U. Chicago L. Rev. 665 at 709; Polyviou, *supra* note 29 at 356.

[42] See *Elkins v. United States*, 364 U.S. 206 at 217 (1960), cited with approval in *Mapp v. Ohio*, 367 U.S. 656 (1961); Anthony G. Amsterdam, "Perspectives on the Fourth Amendment" (1974) 58 Minn. L. Rev. 349 at 431-32. See also Roger J. Traynor, "Mapp *v.* Ohio at Large in the Fifty States" [1962] Duke L.J. 319 at 335.

[43] See Burger C.J.'s dissent in *Bivens*, *supra* note 38 at 413.

[44] I leave aside the question of whether criminal sanctions would serve as an effective deterrent.

[45] See H.L.A. Hart, *The Concept of Law*, 2d. ed. (Oxford: Clarendon Press, 1997) at 28.

[46] See *Hudson v. Michigan*, 126 S. Ct. 2159 at 2161 (2006) (per Scalia J.): "[T]he value of deterrence depends upon the strength of the incentive to commit the forbidden act."

[47] See *R. v. Edwards*, [1996] 1 S.C.R. 128; *R. v. Belnavis*, [1997] 3 S.C.R. 341. For discussion of the s. 8 standing cases, see Don Stuart, "The Unfortunate Dilution of Section 8 Protection: Some Teeth Remain" (1999) 25 Queens L. J. 65; Stuart, *supra* note 2 at 218-23.

standing under s. 8 will not necessarily prevent a court from excluding improperly obtained evidence at common law.[48] That common law power, however, is largely untested. As yet, the deterrent effect of such a common law exclusionary rule can only be minimal (though that may change in time). As matters stand, the exclusionary rule strips away the advantages of conducting only some searches, not all.

Finally, and lest we forget, the exclusionary rule might not be the method we want to chiefly use for deterring unreasonable searches even *if* we (a) buttress it with the search warrant requirement; (b) are content with merely muting any positive incentive for carrying out unreasonable searches; and (c) manage to putty over the holes left by the standing issues. It is hardly uncontroversial to allow guilty people to go free because someone else has acted illegally. A criminal trial, first and foremost, is about discovering the truth. The exclusion of probative evidence to some extent undercuts its credibility. This is why all Anglo-American countries have traditionally recognized no common law exclusionary rule for improperly obtained evidence as such.[49] In England, where s. 78 of the *Police and Criminal Evidence Act* 1984 specifically grants courts the discretion to exclude improperly obtained evidence, courts are as edgy about exercising such a power as they were reticent to acknowledge it at common law.[50] Even in the United States, famous for its exclusionary rule, it has not been universally accepted. There was no clear common law exclusionary rule for evidence seized contrary to the Fourth Amendment until the Court's 1961 decision in *Mapp v. Ohio*, and there remains much doubt – notwithstanding the Court's early decision in *Boyd*[51] – that the U.S. *Constitution* itself mandates exclusion of such evidence.[52] Only recently, a majority of the American Supreme Court held that, given the availability of police professional sanctions and civil actions, the exclusionary rule should not be used to deter violations of the knock-and-announce rule.[53] In doing so, the majority cast serious doubt on the extent to which the exclusionary rule would represent the Court's preferred approach to deterring unreasonable searches at all.

We might suppose that this is one instance where foreign jurisprudence can tell us very little. In Canada, unlike other countries, there is a constitutionally enshrined power on the part of courts to exclude the proceeds of unreasonable searches as evidence at trial. But, following the English example and the lead of American

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[48] See the cases cited *supra* note 28.

[49] See, *e.g. R. v. Leatham* (1861), 8 Cox C.C. 498 at 501; *Quebec (A.G.) v. Begin*, [1955] S.C.R. 593.

[50] *Police and Criminal Evidence Act*, 1984 (U.K.), c. 60. See Andrew Ashworth and Mike Redmayne, *The Criminal Process*, 3d. ed. (Oxford, 2005) at 320-25.

[51] *Boyd*, supra note 29.

[52] *Boyd* is discussed and criticized in Landynski, *supra* note 20 at 57-61; Polyvios G. Polyviou, *Search and Seizure: Constitutional and Common Law* (London: Duckworth, 1982) at c. 1.

[53] *Hudson*, *supra* note 46.

critics of the exclusionary rule, our courts could have concluded that the exclusion of probative evidence would almost always bring the administration of justice into disrepute. Section 24(2) gives courts the power to exclude evidence, but it gives little guidance as to how that power should be exercised.

The exclusionary rule is not necessarily the most effective deterrent imaginable and, if it were, we might still think it too blunt an instrument to be worth wielding very often. And once we knock the legs out from under the claim that exclusionary rules should be or are our primary weapon in deterring unreasonable searches, we likewise find the argument that search warrants are necessary to maintain the exclusionary rule's deterrent value less forceful. This is not an argument against the exclusionary rule as interpreted by the Supreme Court of Canada, any more than it is an argument against search warrants. Both may be splendid means of protecting s. 8 values. But are they the only means available under the *Charter*? If not, the rule laid down in *Hunter* should be given a second look in legislative chambers. There might be good reasons for preferring actions for trespass or constitutional torts over a search warrant regime.

Actions for Trespass

The extent to which actions for trespass (dressed-up as constitutional tort actions) could have a meaningful deterrent effect is a matter of some debate. A successful tort action can make a statement that a mere declaration of unconstitutionality cannot, simply because the public will more insistently demand that the government do something about its policies (or its rogue agents) when a finding of unconstitutionality is accompanied by a large damages award to be paid out of tax dollars. As Ken Cooper-Stephenson has remarked, "Governments are badly discredited when they are forced to use large portions of tax money to compensate individuals or a discrete section of the population. They may well prefer to spend money putting their house in order."[54]

We can imagine other advantages as well. Presently, a person whose home was illegally searched, but who has not been criminally charged, can find no remedy in s. 24(2). She may, however, launch a civil suit to recover damages. The deterrent effect of the action for trespass does not depend on whether the police officer intends to find evidence for use in a criminal trial, whether evidence is seized against someone with a reasonable expectation of privacy in the location rather than someone who does not, or whether the Crown ultimately decides to prosecute in the first place. In principle, there could be a disincentive, rather than the mere absence of incentive, to conduct any unreasonable searches, not only some.

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[54] Ken Cooper-Stephenson, "The Emergence of Constitutional Torts Worldwide" (Paper presented at Comparative Constitutionalism and Rights: A Global Perspective, Durban, South Africa, December 2005) [unpublished] at 20. See also Jerome Hall, "The Law of Arrest in Relation to Contemporary Social Problems" (1936) 3 U. Chicago L. Rev. 345 at 373. But see LaFave, *supra* note 31 at 32-34.

On the other hand, it is precisely because tax dollars are at stake in constitutional tort claims that judges might hesitate to order the government to pay a large amount in exemplary or punitive damages. Many, perhaps most, unreasonable searches will cause little physical harm to the person or property, or psychological harm. The harm they cause will often be moral. If constitutional tort actions are to have a meaningful deterrent effect, the damages awarded must go beyond the merely compensatory; otherwise, the tort action threatens to become nothing more than a tariff for unconstitutional conduct. Constitutional tort actions will work as effective deterrents only if judges and juries show the moxie to award large punitive damages.

We will recall, from Amar's analysis, that there was no "good faith" defence to common law actions for trespass when officers conducted unreasonable searches. The *de facto* standard of proof, before a search would be conducted, was one of probable cause, since no officer would subject himself to the risk of a tort action unless he was very sure that there were good reasons to conduct the search. Had officers been able to avail themselves of a "good faith" defence, such as that recognized by the U.S. Supreme Court in *Harlow v. Fitzgerald*,[55] they might well have been emboldened to conduct unreasonable searches in the hope that their actions could be explained away later. It may not, in other words, be enough to simply recognize the availability of actions for trespass as a remedy for unconstitutional searches. It may be that actions for trespass will have sufficiently high deterrent value only if the scope of the tort is defined in certain ways.

There are other reasons to be skeptical of the deterrent value of constitutional torts. Police officers might well think they have nothing to fear if a matter goes to civil trial. They make sympathetic defendants, and the people who are most likely to be subjected to unreasonable searches do not necessarily make the most sympathetic plaintiffs. Prospective claimants will not necessarily be so well-heeled that they can afford legal representation. Furthermore, the seminal eighteenth-century trespass cases, like *Wilkes* and *Entick v. Carrington*, were decided by juries who were deeply and understandably concerned about abuses of state power.[56] Today, fewer civil matters are decided by juries; judges are more likely to resolve them. That might make no difference to the constitutional action's effectiveness as a deterrent. It might make all the difference in the world.

Before one could decide that constitutional torts, not search warrants and exclusionary rules, should be the primary means of deterring unconstitutional searches, a great many things would need to be considered. We have elected legislators to engage in that very consideration. Maybe the best way of deterring unconstitutional searches is through the use of a search warrant regime and a robust exclusionary rule. Maybe it would be best to use constitutional torts in conjunction with the exclusionary rule. The point, which I have made on several occasions now,

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[55] *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

[56] See Landynski, *supra* note 20 at c. 1.

is not that any or all of these strategies are good or bad. The point is that they are all, in theory, valid as strategies. Each plan of attack has its strengths and its weaknesses. The Court, in *Hunter*, had the authority to say how much deterrence a given plan of attack had to provide if it was to survive constitutional scrutiny, and even the authority to provide an interim measure to ensure that Canadians were not unconstitutionally insecure against unreasonable searches while Parliament settled on the strategy it wanted. It did not, though, have the authority to foreclose, for all time, the debate on which strategy to employ. Parliament, not the courts, had the authority to decide how s. 8 values should be defended.

Search Warrants and Parliamentary Inertia

Towards the end of its analysis, the Court in *Hunter* observed that "[a] requirement of prior authorization, usually in the form of a valid warrant, has been a consistent prerequisite for a valid search and seizure both at common law and under most statutes."[57] Certainly, as the LRC noted in its Report, criminal legislation was, as of 1982, cluttered with provisions for search warrants, though there was some evidence that police officers did not actually use warrants as often as they could.[58] This raises an interesting issue, since the very fact that a particular strategy is well-established can give rise to the presumption that it is the only strategy available to the legislature. The law is a web (even if the seams often show), and we cannot remove certain rules (particularly well-established and prominent rules) without diminishing the effectiveness of many others, perhaps without causing wholesale confusion. For all intents and purposes, rules can become "constitutionalized".

This is not the venue to explore whether the search warrant rule created in *Hunter* is a principle of fundamental justice. It may be that, even if a requirement of judicial authorization was not a principle of fundamental justice before *Hunter*, it has become one in the 22 years since. Once the Court recognized a search warrant requirement, the need for law enforcement in the short-term meant that an elaborate framework had to be adopted, perhaps committing the government to the *Hunter* strategy – perhaps, practically speaking, for all time. This only underscores the importance of distinguishing between rules required by the *Constitution* and rules that represent merely one possible means of protecting constitutional values. Had the Court more openly identified the constitutional status of the search warrant rule, Parliament may well have felt more inclined to consider alternative deterrent tactics, like actions for trespass. That the action for trespass presently does not have a more prominent role to play in the defence of s. 8 values may serve as an object lesson in the dangers of judicial over-reaching.

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[57] *Hunter*, *supra* note 2 at 160 [emphasis added].

[58] See LRC, *supra* note 5 at 81-83.

CONCLUSION

Hunter v. Southam is a landmark decision. It has influenced constitutional interpretation and criminal procedure as much as any judgment released in the *Charter* era. It is also deeply flawed. By failing to say what kind of rule *Hunter* created, the Court has given the search warrant an exalted status it might not deserve. At the same time, the potential constitutional significance of tort actions has been artificially stifled. Whether or not we want constitutional torts to usurp the role of search warrants in the protection of s. 8 values, we ought to be concerned that the question has been, for more than 20 years, taken off the table. Those interested in deterring abuses of state power by holding public authorities liable in tort could do worse than start by tackling *Hunter* head-on.