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**SPEAKERS**

Anthony Sanders, Daniel Epps

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A **Anthony Sanders** 00:24

Hello, and welcome to Short Circuit, your podcast on the federal courts of appeals. I'm your host, Anthony Sanders, director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on Monday, September 18, 2023, although you won't be listening to it for a little while. But that's okay because this is not a late-breaking podcast about the latest from the federal courts of appeals, as we usually have here on Short Circuit. But this is a bit of a more timeless area of law where we're going to be talking about something very near and dear to our hearts here at IJ, and that is the Fourth Amendment. But also something a little bit more nebulous and mysterious, but something that I take a great interest in, and that is the general law. And so, to that end, today, we have a special episode with a special guest who is co-author on, conveniently enough, a piece called The Fourth Amendment and General Law, published earlier this year in the Yale Law Journal. That's a pretty good place to land a publication. Now, he published this along with his colleague, Danielle D'Onfro, who is also a professor at Washington University at St. Louis School of Law. And so I'm very pleased to introduce you to Professor Daniel Epps. Now, Dan is the Treiman professor of law at Wash U. He also has numerous accolades: has been published in all kinds of wonderful places (in addition to the Yale Law Journal), he also clerked for Justice Anthony Kennedy, and has been a longtime podcaster. And you will know him from the currently going podcast, Divided Argument, which is an unscheduled, unrehearsed (much to my chagrin, as someone who has a scheduled podcast) podcast about the Supreme Court that he puts on with his co-host, former IJ clerk, Will Baude. Will is now known for a few bigger and better things than being a clerk at IJ, including the stuff about Section 3 of the 14th Amendment that people have been buzzing around the last few weeks, but we're not going to get into that today. Instead, it's all about the Fourth Amendment and general law with Professor Daniel Epps. So Dan, welcome to Short Circuit.

D **Daniel Epps** 02:58

Thanks for having me, Anthony. And I'm pleased to know that my work, recent work, is already considered timeless.

A Anthony Sanders 03:05

That's right. That's right. It'll never change because I think it set the authoritative statement on the Fourth Amendment and general law. Now, be that as it may, the Fourth Amendment very much has been in flux at the Supreme Court the last few years. It seemed to be ever since Justice Scalia (in my view) and a very good decision in 2012 (I think it was) with this case called *Jones* kind of set everything anew on what's possible with the Fourth Amendment. And since then, people have been trying to figure out, including the Justices on the Supreme Court, how the Fourth Amendment relates to our stuff (for lack of a better word). And so you are kind of part of this ongoing conversation about how to think about the Fourth Amendment in this new phase of its history. So give us a bit of an overview as to, you know, what that history is, what the debate has been, and where you see yourself in it. And we can go from there.

D Daniel Epps 04:15

Sure. So in terms of the history, you kind of have to go back quite a ways. And, you know, there's a little bit of disagreement about what the history of the Fourth Amendment looks like, but I think we can go back a couple hundred years and say the main way, you know, you have this provision in the Constitution that protects against unreasonable searches and seizures ... There's a lot of disagreement about what exactly that means, but in terms of how these things once worked, normally, you would go (if you were, you know, the victim of an unreasonable search and seizure), and you would sue somebody in, say, state court. You would just bring a kind of trespass action and say, hey, you trespassed, and if it was unreasonable, the constable or whomever couldn't maintain a defense. And in theory, the Fourth Amendment kind of continues to allow those kinds of suits to happen in that backdrop. But fast forward, you know, more than a hundred years into the 20th century and Fourth Amendment protections look very different, right? They're now enforced primarily as motions to exclude evidence in criminal cases. So evidence has been found (and culpatory evidence), and so I'm going to say, yeah, this evidence looks bad, but it was taken in some way that was unreasonable ... violated, you know ... There was no warrant. It doesn't, you know, for various reasons. And so, for that reason, it should be excluded at my trial. And so that develops, and then around the middle of the 20th century, the Court says, well, we need kind of a test to figure out, you know, what actually counts as a forbidden search and seizure. Prior to that point—and again, this is where there's some kind of disagreement or incurs kind of pushback on this, but the conventional view is the Court kind of looks to property rights—sort of said did the police, you know, intrude on your property rights? Did they commit a trespass in conducting the search and seizure? And if they didn't, it's not necessarily a violation. But then, in the middle of the 20th century, the Court starts saying what matters is whether what the police did intruded, violated a reasonable expectation of privacy. So you have to have an expectation of privacy that society is prepared to treat as reasonable, and that's kind of the test for whether—formally, that's actually the test—there is a search or seizure at all, which is kind of ... doesn't make a lot of sense conceptually, but, you know, put that to the side. But basically, that's the test for figuring out whether the police action at least implicates the Fourth Amendment and possibly violates your rights. The Court has continued to adhere to this over the decades. It is pretty widely criticized, and one of the main criticisms is it's totally malleable. It's not really rooted in anything. It's kind of circular because the kinds of privacy rights we treat as reasonable are kind of the ones the Court has told us are reasonable. And there has been a kind of struggle to figure out if there's something better. And you teed up what I would say by referencing Justice Scalia in *Jones*, and in some follow on opinions to that sort of later in his career, he had been kind of a critic of *Katz* but hadn't quite fully developed an alternative.

A **Anthony Sanders** 07:46

That's been the reasonable expectation of privacy case. That it ... kind of ...

D **Daniel Epps** 07:51

Yeah, sorry, sorry. I should have said that earlier. *Katz* is the case that lays out that test. It's a case about basically putting recording, surreptitious recording, of a conversation on the phone.

A **Anthony Sanders** 08:02

For the listeners' benefit, it's "K—a—t—z." Unfortunately, it has nothing to do with felines, but that was the fellow's name in the case.

D **Daniel Epps** 08:08

Although Orin, you know, Orin Kerr, you know (probably the leading scholar of the Fourth Amendment these days), has chronicled the number of bad puns in student law review notes about *Katz*. So he's got a list somewhere published in all the conspiracy blogs, so Google that. They're pretty good.

A **Anthony Sanders** 08:28

We'll put a link up to that in the show notes. I think our listeners would enjoy that.

D **Daniel Epps** 08:31

Oh great. Okay, that's all the better. And so he starts saying this reasonable expectation of privacy test, aka the *Katz* test, you know, just doesn't make a ton of sense. It's kind of just made up. All we're really doing is just saying, you know, you have Fourth Amendment protection and stuff that the Justices like, right? Basically, we're not actually looking at what society thinks is reasonable. It's just an inquiry into, you know, what the Justices like and what we think is reasonable. It's not rooted in anything. And so he started saying that, but he doesn't clearly say what we should be doing instead. He starts to flesh that out a little bit more, and he starts saying, well, we need to look at kind of ... Sorry, we need to look at kind of traditional property protections. And he does that in some cases. I'd say he doesn't give us at any point a really full theory, right? It's about are you looking just at the, you know, the specific law of trespass that's codified by statute in Maryland and the District of Columbia, if the search occurred, the GPS tracking (which was at issue in the *Jones* case), if it occurred in those states, are you doing something else? Are you looking at the positive law, the property law that would have existed in the U.S. and England in the late 18th century? It's unclear, you know, and I think that's the kind of thing that he would have continued to develop had he been on the Court another decade or so. But he kind of plants that seed, and a lot of people find that intriguing.

And different people have gone with that in different directions. One approach that our paper engages with a lot is one by, you know, my podcast co-host, Will Baude, and a good friend of mine, James Stern, called the positive law model. It sounds like you've already talked about that on the show possibly a little bit.

A **Anthony Sanders** 10:22

Here and there, yeah.

D **Daniel Epps** 10:22

At least alluded to it ... The idea being that whether police action implicates the Fourth Amendment turns entirely on what the positive law of the jurisdiction where the action occurs says is this something that a private party couldn't do?

A **Anthony Sanders** 10:40

And then by positive law, you mean like it could be the common law, it could be statutes, but of like whatever the actual law is for that jurisdiction? That's the law?

D **Daniel Epps** 10:51

Yes, the actual law of that jurisdiction. You have to go say, what does Maryland say about this? You have to look at Maryland courts and the Maryland code and maybe like the Baltimore city code or, you know, the stuff that actually is legally operative in that jurisdiction. And it's a really good article that they wrote in the Harvard Law Review: The Positive Law Model of the Fourth Amendment. I think it's one of the best Fourth Amendment articles in a really long time. It's really provocative, really interesting, creative; it really changes the way you think about this stuff. But it also, you know, creates some real ... a bunch of practical problems. You know, do the rules change the instant you drive over the border between a different city? There are all sorts of complexities that I think they don't fully work out and don't have fully satisfactory answers to. And I think as clever a theory as it is, it strikes me, and I think it strikes a lot of other people, as something the Court is never going to fully adopt. But more interestingly, it's something that I think is not what Justice Scalia was aiming at. And it's not something that the Court today, that sort of the Court historically, has ever really done. And so what our paper tries to do is kind of, you know, ride the wind from Justice Scalia's criticism and some more recent work by Justice Gorsuch in a case called *Carpenter*, which is about tracking location using cell site locations. So basically, looking at information about, you know, where someone's cell phone moves and when it's connecting to cellular radio towers. And we say, you know, the general idea that Justice Scalia had—that you look to kind of property law protections—that's the right idea. But you don't go pull out the Baltimore city code and the Maryland code and things like that. You can look at those things. Instead, you do something a little different. What you do is you look to general law. And here, we're relying on a lot of really interesting work by some, you know, sort of originalist-minded scholars, historical scholars like Caleb Nelson. Will actually has written about the general law in other places. But what is general law? General law is basically the kind of common law that kind of exists, but is not under the formal power of any

one jurisdiction. You kind of are ... It's exactly kind of, if you were trying as a court to kind of just figure out what is the right common law answer to a question, and, you know, we're not bound by a particular statute, how would you do that? How would courts do that? How have courts done that historically? They look at a bunch of different sources, they look at the practices of different states, they look at customs, and so forth. And they try to come up with the best answer. Now, we are not doing ... It's not really an originalist paper. As such, we kind of make some arguments for why this is actually much more consistent with the way the Fourth Amendment would originally have worked. You would go into court, and you would bring a common law trespass action, as I said, and the way that those typically would have been understood 200 years ago would be not as this sort of purely positivist, "What does this exact jurisdiction say?", but as an inquiry into the general law. What is the general law of property, trespass, and so forth? It's a little bit more complicated than that. There's a lot of wrinkles there that I don't want to get into right this minute, but we think that this is the right approach. That when confronted with a question of uncertainty about the scope of the Fourth Amendment, you know, does this thing that the police did, is this something that the Fourth Amendment says something about, maybe requires a warrant for? How do we figure that out? We say, you know, you gauge not in this kind of fuzzy privacy analysis. You look to whether this is something that, you know, the kind of action that would, you know, (at least prima facie) implicate the general law, violate someone's rights under the general law. So the general law of property, this thing that the police took possession of, would this be something under the general law that would have been treated and that would continue to be treated under the best reading of those principles as a bailment? Would this be a trespass under general law? And I think one thing that's quite compelling about our approach is that it's actually much more consistent with what the Court has done and with what Justice Scalia was doing in the cases where he, you know, kind of defended a property-based approach. In those cases, he was not looking at the specific rules applying in any different jurisdiction. He was sort of asking, you know, is this a trespass under general principles? Is there an implied license for police to bring a drug dog to someone's front door to kind of sniff? And he, again, he doesn't look at sort of jurisdiction-specific rules. He asks this more general question about the kind of customs and habits of the country in the case where we talked about that, in this case called *Florida v. Jardines*. And we think this is a better approach for a lot of reasons. We think it has better justification in history. We think it's much better justified by precedent of the cases that do moves like this. And we think it's much easier to apply than something like the positive law model, which causes protections to kind of radically change depending on, you know, specific rules as you cross over city boundaries and so forth. This would produce, we think, national rules because courts with Fourth Amendment cases would say, look, you know, I can look at what the property law of Maryland says, but ultimately, this is a question of, you know, federal constitutional meaning. And we think that the scope of the protection shouldn't be, you know, totally controlled by what this particular jurisdiction has done. Instead, we think the scope would always have been understood to be kind of a question of general law. And we're going to do that. We're going to do the traditional tools of the common law, which is looking at these kind of broad concepts that come from the original common law. But it also can include creating new and recognizing new kind of common law rules. So it has a fair amount of flexibility, but it's a little bit more tied to kind of law at least, we think, as a formal matter than the kind of free-wheeling *Katz* reasonable expectation of privacy test.

A Anthony Sanders 17:54

Law that's tied the law has a certain ring to it.

D Daniel Epps 17:59

Yeah. But yeah, I would just say that a lot of people, you know, have this aversion—right—to this idea that you can have law that isn't something a legislature said.

A Anthony Sanders 18:10

Right.

D Daniel Epps 18:10

Right? They have this view, kind of post Justice Oliver Wendell Holmes, that there is no such thing as a brooding omnipresence in the sky. There's only the kind of positive commands of any given sovereign. And I think that some of the work that we're really leaning on in recent years has said no, that doesn't have to be true. There are things that we can kind of treat and recognize as law, you know, without necessarily saying that the specific rule has to have been written down by a sovereign. Instead, it can be perfectly consistent with law to sort of say what is supposed to happen here is courts are supposed to look at kind of general practices and sort of try to recognize what the rule is that comes out of, you know, social custom and tradition and, you know, insights that have been recognized by their courts.

A Anthony Sanders 18:58

Well, I want to get to very much the idea of law without a sovereign in a moment. But, for listeners' benefit, what's a couple of examples of like how this might play out in the real world beyond the, you know, couple of cases that Justice Scalia was involved with: the dog sniff case and the GPS on a car case? But what are a couple other examples where, you know, you have to look to property law for what the heck, you know, the boundaries are, what private people could do, or what the government could do? And then how would that affect a court looking at the Fourth Amendment?

D Daniel Epps 19:38

Sure. And so, you know, I think one selling point of our theory is that this is not like a radical change in terms of results. Actually, you know, if you look at probably a good number of the *Katz* cases, of the reasonable expectation of privacy cases from the last, you know, 60 years or so, are kind of asking the kinds of questions that a general law court would ask. They're just using the kind of wrong vocabulary, the wrong tools, and they can sometimes be led into error that way. So we don't say like, here's this completely radical change. But so, you know, just to sort of take one small example—a couple small examples—here are courts that have said that, you know, if you kind of like leave your apartment and, you know, it's clear that you don't plan on coming back (you've kind of fled), that you have abandoned your privacy expectation.

A Anthony Sanders 20:38

Even if you still have a lease, right?

D Daniel Epps 20:41

Yes, even if you still have a lease. And as we talk about, it's just not consistent with traditional property understandings that you maintain property rights and in that location while you have some valid property interests: a lease, you're the owner, and so forth. And so, you know, privacy isn't really the answer to the question. You know, maybe you do expect someone to break into your apartment. I don't know. But that's not the right question. The question is, do you have, you know, an expectation ... You know, does property law give you a grounding and a right to kind of object to when the government busts into your place? Likewise, there are various cases, you know, that involve kind of movable, tangible property. And we talk about how bailments, the law of bailments—Danielle has actually written separately about kind of reviving the law of bailments, this traditional common law rule governing movable, tangible property—that there's a lot of rich content there that could provide some guidance, both in cases involving physical property because we show that a lot of lower courts have kind of approached questions about movable, physical property using a kind of ill-fitting *Katz* approach: Do you have a real expectation of privacy in your jacket or something like that? And we say no. The rules ... There are some pretty firm, well-established rules there that govern, you know, what are third party's rights vis-à-vis a particular ... in their, you know, piece of property that you've left somewhere? How much do you as the owner still retain your rights? And there's this rich law there that actually looks different and provides, in some ways, more protection than this property approach. And ... But we also talked about, you know, you can ... These concepts can be extended to other forms of property. There are ways you can think about, you know, information that you have given to Dropbox as a bailment. Yes, they are the physical holder of your files. But the right way to think about that, from a general law perspective, is they are just a bailee, you are the bailor. You retain your property interest in the files, they're holding them for you, they have certain obligations, and so forth. As a matter of, you know, civil lawsuits, maybe you've had to sign various waivers or so forth, arbitration clauses—who knows—but as a matter of general law, that's the kind of property relationship that we think would have prevailed and we think provides, you know, a fair bit of guidance and flexibility and kind of the right conceptual toolkit for dealing with not just traditional situations, but these new situations that the Fourth Amendment—and I think the *Katz* test—is really struggling with these days.

A Anthony Sanders 23:29

Yeah. So let's get into that, the bailment, and maybe the contract aspect of that because I see that as kind of the most ... might be the biggest change from current doctrine. And I think it's a change that a lot of critics of the Court have wanted—you know, your podcasting co-host included—that currently, under Supreme Court doctrine (what's called third-party doctrine), if someone else has your stuff, you don't have—is in possession your stuff—much standing, as they call it, to object to the government getting that stuff. Maybe that third person does. Maybe the third person, of course, doesn't have as much of an interest. But maybe you've signed a contract, like whether it's your bank or a safe deposit box (like a case we have at IJ right now) or something else where you have a contract with that person who said yeah, I will look after your stuff. I will object to searches for your stuff. And then the police come in, and you can't enforce those rights. So with that in mind, we have this *Carpenter* case from a few years ago. That ... the one with the ... about the cell phones that you talked about, and Justice Gorsuch has, it's technically a dissent, but it's kind of a concurrence in the case where he's like, hey, I like this new idea about property rights, but guys, I don't know what to do. And like should we look at contract? Should we look like ... And he's basically inviting, you know, lawyers to come up with arguments to try to convince him. So your ... What intrigued me about your idea is it takes those contractual

rights seriously, but it's like it doesn't really exactly depend on, you know, having to look at the fine print of every single contract when the Court is looking at the Fourth Amendment. Do I have that right?

D Daniel Epps 25:23

That's absolutely right. And we think, you know, that that would be kind of just administratively, you know, deeply impractical. And so, you know, just more generally, one thing that I have long believed, and I've sort of—I've said this to Will—I was like, this is a great theory (the positive law model); it's just never going to happen. The Justices aren't going to like it. They want to be able to make national rules; courts want to be able to make rules that apply. And so our approach lets you make those kind of more general rules, but your description of Justice Gorsuch's, you know, "dissent" is exactly right. And we sort of framed the introduction to the paper as, you know, kind of an answer to his question because he sort of said—you know, like you said, it's phrased as a question—like do we do this; do we do that? And we say, you know, look, Justice Gorsuch says do we look at the positive law today? Do we look at what the law was in 1791? And our answer is neither, right? You do something different, but something that's actually very compatible with what he's trying to do, what he seems inclined to do. And so, you know, the paper, we think, is not just a kind of brief address to him, but he provides a really nice articulation, crystallization of the question going forward that justice is drawn to his approach or asking. And we think it provides like very satisfying answers to those questions.

A Anthony Sanders 26:46

So I haven't read all of the back and forth from your paper and your critics and those you discuss, but I have seen that there's ... one quibble has been that you talk ... you have this idea about the general law, you know, would quote ... Put quotes around general law because we get into how that might be different than what most people think about the general law in legal scholarship and what it is today. And then there is an argument though that the Fourth Amendment as it was understood, or would have been understood, and when it was adopted in 1791 is that unreasonable meant like not according to the common law, whatever the common law was back then. So I could see how if you're looking at, you know, computer hacking or something like that, that's not going to help you at all. But if it's something more clear, say the ... you know, what the common law was in 1791, and everyone says yes, well, Blackstone said that's the law. And everyone believed it was the law. And yet, it's changed to the period, you know, we have today. Does that provide some, you know, breaks on how you would look at interpreting the Fourth Amendment because, at that point, it seems like you're kind of rejecting the common law that the Fourth Amendment itself was referring to, or is there not a problem there?

D Daniel Epps 28:18

Well, I think, you know, that presupposes the answer to the question of what the Fourth Amendment was trying to do. It is one of the options on the table to just say the Fourth Amendment was meant to take the common law rules that existed at that time and just kind of ... Those are the rules, right? Those are the rules we're stuck with. We criticize that approach because we say that's not the way, you know, the generation that drafted, ratified, you know, believed in,

endorsed the Fourth Amendment would have understood the kind of protections of the common law: that they weren't just this fixed body of rules that were never going to change for all time; that if, you know, the kinds of ways in which these cases were brought and enforced, you would have, you know ... Courts would have looked to the general law, but also, at the same time, the understanding would not have been the general law is whatever a court says it is, right? That's what we think today, right? We think the common law is just ... This is just a delegation to courts to make up the rules. And that's not the way it would have been understood either. It would have been understood as, you know, there are answers out there, and there's ... You look to various things, and the common law can change in the sense—and this is something, you know, Blackstone would have believed—that we can ... A court can recognize it got something wrong, right? That there was an earlier answer to a question about common law, general law that then changes, but it's not necessarily because the law changes. It's maybe because that answer was always correct, and it wasn't fully recognized courts can make mistakes. But we also don't think ... We think it doesn't make sense to say that by, you know, drafting, ratifying, and so forth the Fourth Amendment, the idea was to completely, you know, to not provide any protection for kind of other kinds of situations that would arise in the future, right? That basically it only governs, you know, the kinds of physical intrusions that would have been considered trespasses under property law a couple hundred years ago, and I think that's a ... You know, there's a real problem with that, if you take that view. And this is something that Justice Gorsuch sort of alludes to—although he's talking more about *Katz*—but in a world where we just care about things like that, there's not going to be much left of the Fourth Amendment because all of our privacy is, you know, the stuff that we care about ... You know, all that information basically just resides on computer servers. And the government can potentially get basically every detail it wants to about our lives without ever setting foot in our houses, without ever laying a hand on us. And maybe you could take the position that it really just is about those kinds of traditional, physical trespasses. We certainly think that wouldn't be consistent with the spirit of the Fourth Amendment, with Fourth Amendment values. And we also don't think that would have been consistent with the way that generation would have understood the law—that this idea that, you know, the common law is just the set of rules that courts have come up with. And does that create the possibility that, you know, the specific rules might look different today, depending on how courts approach the question? Sure. That also is a problem with the prevailing *Katz* test. It's also a problem with the positive law model because the legislature can go change the positive law rules tomorrow. And so ... And we also, at the same time, I think we say, you know, we would approach things with a fairly strong presumption that, you know, what counted as a physical trespass 200 years ago is not super likely to change, right? Even if our approach sort of says look to the general law today, you know, we don't necessarily think of, see great arguments that that's going to be radically different today. And so, in practice, I'm not sure it's going to be that much less protective, if at all, than a kind of approach that we sort of call "on the paper," that freezes the rules in amber, you know, 1791 amber. That's exactly what the common law rules are, and they can never change, even though they had kind of, you know, evolved and developed and been extended, you know, by courts up until that point.

A Anthony Sanders 32:26

Well, let's get more into that common law and then the general law. So one reason that I really enjoyed your article and the discussion of common law by you and Danielle is that, you know, you ... I haven't read Danielle's other scholarship. I haven't read much of yours either, but you

guys don't strike me as like Friedrich Hayek, uber libertarian. Like anarchist types, right? Which is people more like myself, who often get into the whole idea of spontaneous order and the creation of law and law without a lawmaker and all that. And that—some of our listeners may be familiar with those arguments—you take seriously the idea of law. That it's just kind of, you know, generally the law of the land, even if it's not made by legislatures and statutes, but you use it in a very practical way that is different than most of the literature in this area. So with that kind of, you know, practical background, tell us a little bit more about what you mean by the law, you know, kind of as a general common law, majority rule common law—you might call it—and how that's different than or maybe it's, to some extent, the same thing as what we, usually, in legal circles called the general law, which is this idea that we had, I think, about a hundred years where federal courts made this kind of common law that was different than state common law. And sometimes, they contradicted each other, and it was okay. And yet, it was in some sense just kind of, you know, the same thing we had in state courts but at a national scale.

Daniel Epps 34:20

D

Yes, that's it. That's exactly right. And I'll just say, in terms of background, in terms of where we're coming from, Danielle has written a lot about the kind of common law, and I think sees that as a kind of regulatory system that worked really well and still has a lot of applicability today, a lot of insights, a lot of wisdom over the centuries. And that, you know, we've kind of lost sight of that.

Anthony Sanders 34:40

A

Which is generally Hayek's view at a, you know, 30,000 foot level as well. It's the utility of the ...

Daniel Epps 34:46

D

Yeah, maybe. I mean, it sort of depends on exactly where you think, you know, where exactly you think the rules are coming from, but in, I think, in theory, it really is the same thing as the kind of ... the general federal common law that courts were engaged in pre-*Erie*, you know, a hundred years ago or so when they would have commercial cases, and they would reach conclusions about cases arising out of the similar facts and similar jurisdictions that were different from state courts. But we think it's important to understand what those courts could have jurists provincially think they were doing and were aiming to do, even if, you know, look, in practice, they're making different rules. Sure. But we think that, at the time, both, you know, state courts and federal courts were tasked with the same question, which was, again, answering the kind of general common law question about a particular situation about a particular transaction. And the idea being not that there's this separately authorized, sovereign lawmaking power, but instead that sometimes, you know, courts disagree with each other about what the right legal answer is. And because you think of the general law as not just the positive law that's under the control of Pennsylvania, but instead is a kind of more general thing that you have to look to a broader set of sources for guidance. The Pennsylvania Supreme Court

could get it wrong—they could get the common law wrong—and in which case, there's no reason why a federal court asking the same question should feel any obligation to defer, in the same way that there's no obligation for the federal court to defer to the Pennsylvania Supreme Court's interpretation of, say, federal constitutional law that it reaches for a case involving their jurisdiction because this is not ... The Pennsylvania Supreme Court is not the lawmaker, right? The law comes from, emanates from, a different source. And courts can disagree, and that's, you know, just a necessary function of having a federal system with, you know, overlapping judicial hierarchies. But, you know, post-*Erie*, post the criticisms by Justice Holmes, we have this kind of positivist view, which is just that, oh sure, you know, courts were saying that they were looking for the rules that are out there, but they're just the lawmakers. And we think that that's not ... That's not the right way to understand what the law as kind of a formal matter was doing and what it was aiming to do. Steve Sachs at Harvard, who's a friend, has written some really interesting stuff about this—about unwritten law about common law that isn't under the control of one lawmaker. His metaphor that he uses a lot is rules of grammar and maybe rules of fashion, which are, you know, there are rules that are out there. But there's not one person who has the sovereign authority just to command them. Instead, you have to kind of identify them by looking at various practices and, you know, weighing different sources differently to try to identify them. That doesn't mean that there are no rules whatsoever. It just means it's a little bit harder and more complicated to try to identify what they are.

A

Anthony Sanders 38:02

And does it also ... I mean, I find in thinking about this area, does it also help to reconceptualize how we usually think about stare decisis these days, where now we have this view of what courts say, especially apex courts—state supreme court or the U.S. Supreme Court—that what they say is kind of like a statute, and then that's law. And that, you know, it's like they amended the statute when they, you know, distinguish a past case or what have you. Whereas the old common law idea was, look, a court could say this, but it would be ... Maybe it was just kind of a little off. And then if courts keep saying that for a long time, then yes, that is the common law changing over time. But you have to kind of look at the whole matrix before you get what the common law rule is.

D

Daniel Epps 38:53

Yeah. And I think you don't just say the rule is exactly ... The rule is the same thing as what the Court says, right? What the Court says is evidence of the rule. What the Court is doing is its own good faith effort to try to identify the rule, but they can screw it up. And the fact that the Court said the rule is "x" doesn't conclusively settle the question. Now, as a matter of stare decisis, vertical and horizontal stare decisis, you know, the lower court might have to defer to that and follow that as a matter of vertical stare decisis. And a court itself might feel some obligation to stick with the rule, even if it thinks it was erroneous as a matter of horizontal stare decisis. But as a matter of kind of formalism, I think it is important to understand, and it provides a little bit of judicial humility to say that we don't make up the rules. We just try to discern the rules, and we can get it wrong. And then, if we think we've gotten it wrong, there's a further question about, you know, how do we address that and whether we change course. But we are not lawmakers; we are law finders.

A Anthony Sanders 40:01

So one rule, you know—some people might be wondering right now—of the common law is that statute, whether it's by Parliament or state legislature, can displace the common law (at least if they're clear about doing that). And so we, of course, live in an age today where there's umpteen statutes, there's still the common law, and they kind of interplay with each other and feed off each other in some ways. So any area, especially in some of these new techie areas, like drones—that's an example where there's like regulations, there's state, there's common law. It's really a mess, of course, where your property ends and the drones' right begins. So how does your model deal with the statutes, regulations in the same mix as the common law because then, you're not just looking at cases, you're looking at ... I mean, you said, it's not like the positive law model where you actually look at the statute for jurisdiction. But still, there's a lot of statutes out there that are the law, so how do you go about that?

D Daniel Epps 41:12

Yeah. So that's ... It's complicated. So you're absolutely right that Parliament could, you know, override the common law by passing a statute, and courts would have to follow that. Because of principles of parliamentary supremacy, that doesn't necessarily change the common law. It actually just overturns the common law, sort of supplants the common law, in that jurisdiction. Here, in the Fourth Amendment, it's different because it's a constitutional rule, right? And it's a constitutional rule—the Fourth Amendment protections—that a legislature can't just eradicate. They can't just say tomorrow, we've passed a new statute that says warrantless searches are fine whenever. And so we think that the task would remain for the Court to discern the common law, general law, scope of protection. And a statute is going to be relevant to that. It's going to reflect society's expectations. It's going to reflect all sorts of things that are relevant, but not dispositive. If it turns out that all 50 states have passed statutes sort of saying you have no interest in this—that's recognizable law at all—gosh, it becomes a little harder for a court to say. The right answer, under the general law today, is that there's still this really robust privacy protection. It just means that no one jurisdiction can just automatically, you know, by sheer force of will supplant the protection. And we think that's an important thing. We don't ... We think that, you know, that's a real drawback of the boat and stern, positive law approach, which is it just gives this power to legislatures to tweak positive law in a way, you know, to make it the kind of tail wagging the dog to actually really watered down or to eliminate Fourth Amendment protections in different contexts.

A Anthony Sanders 42:54

So one case that this might remind a lot of people of, although it's a different context, is a last term Supreme Court case about the lady who had her equity stolen from her, right? Something like that?

D Daniel Epps 43:14

*Tyler v. Hennepin County*.

A Anthony Sanders 43:15

Right. So this took place not far from where I live. Hennepin County takes this woman's home. It seems like she didn't have much of an argument that it was improperly taken for not paying property tax, but then, they sell it. And they keep the excess of the sale, which was quite a bit of excess. And there's many other cases where there's much bigger points of excess, amounts of excess. And so the argument that the government had is that this is just the property law of the state, and so it's not a taking. And the Supreme Court, in relying on some precedent said, actually, you could make that technical argument about the state of the law in Minnesota or whatever state you're talking about, but that can't override the Takings Clause because there's this just general understanding of property law. So, of course, having explained it that way, it sounds a lot like general law property that you might have for the Fourth Amendment. Do you see differences there? Is it kind of in the same space? How would you characterize, you know, what you would ... your argument versus this takings kind of conception?

D Daniel Epps 44:36

We liked that a lot, you know. It came out after our article was to the printer and everything, so we don't really get to rely on it.

A Anthony Sanders 44:45

But it allows you a follow-up article.

D Daniel Epps 44:47

Yeah. So then maybe that's ... We should put that in the pipeline. But we thought that case was great, and it's really doing a similar kind of move, right? Where there's this provision in the Constitution, and we think it, you know, provides protection to property. The Fourth Amendment is very property focused, right? It enumerates ...

A Anthony Sanders 45:09

Yeah, all kinds of property.

D Daniel Epps 45:10

Some, you know, yeah ... houses, papers, effects—things that are property interests. And if you just say the scope and the protection are just totally creatures of state law, it really can make the protections of the Fourth Amendment a nullity. And the Court has made a kind of something that looks like a general law move both in Fourth Amendment cases and in Fifth Amendment cases, and it really does so in the *Tyler* case, which we really liked. The Court says, look, if we just make it—"the scope"—totally dependent on state law, on any one state law, states can just eliminate the protection of the Takings Clause by saying, you know, you have a right to this property, except to the extent that the government has the right to take it

whenever it wants. So the Court says we look to not just the positive law of that jurisdiction but to traditional property law principles, plus historical practice and this Court's precedents. We think that is exactly what courts should be doing in Fourth Amendment cases, which is, you know, sure, you look at the jurisdiction's laws. And those are really important data points; those are not nothing. But you kind of would look to these kind of historical, big picture concepts of property law because we don't want to give any jurisdiction this power to just completely render a federal constitutional protection a nullity.

A Anthony Sanders 46:38

So maybe we can close on an area that I like to bore our listeners about, and that's state constitutions. So your argument, of course, is about the federal constitution—which we live in a federal system, the 50 States. Since the Fourteenth Amendment, or at least should have been since the Fourteenth Amendment, applied to the states in a general way, but just about every state has a version of the Fourth Amendment in their own constitution. A handful, actually, before the Fourth Amendment was drafted.

D Daniel Epps 47:14

Yeah.

A Anthony Sanders 47:14

So would this model work at the state constitutional level? Or is it just, there, it would align with the positive law model? Like, what do you think? Do you think it is translatable to that level? Or do you think, at that point, you know, it's not as useful?

D Daniel Epps 47:37

I think it could totally work just fine. And it's going to be a matter of, you know, how that state's constitution works. I mean, so one thing to note is there are a number of states where the courts have said, our, you know, state version of the Fourth Amendment is just coterminous with federal constitutional search and seizure jurisprudence. So they look the same, and, you know, ours doesn't provide more or less protection. And so we'll just piggyback on that. And in those states, presumably, the analysis would look exactly the same. You just answer the Fourth Amendment question. But, in other states, I think it's really going to be a question of like what exactly that state constitutional provision is understood as doing. But there certainly would be nothing wrong with the state saying we have the state constitutional protection; we think the scope of it should be determined by general law principles. States can tell courts to do general law; that's totally fine. And because it's a state constitutional provision, our own state's scope of statutory private property rights can't, you know, override the state constitutional protection. Now, a state could do it differently. You could say that, you know, the way to interpret this is you look at, you know, does this violate Minnesota property law? That would be okay too because I think states, you know, can make whatever constitutional provisions they want, as long as they don't go below the federal constitutional floor. But I don't think the fact that law is being adjudicated by a state court means that that state court can't be doing general law. And

so some of the scholarship that we rely on is talking about how there are still actually some states where, if you kind of read their law formally, they seem to still be just—in general—giving, instructing their courts to go out and find general law and not to just make the common law of that particular jurisdiction. That the formal thing those courts, those state courts, are supposed to be doing is a general law type analysis.

A **Anthony Sanders** 49:40

So it could, I mean ... Your argument, it seems like it could be true to the state constitutional provision to look to general law, even though, say the state itself might have a very minority view of, you know, some property rights wrinkle or whatever it has because, there, the state constitution is kind of calling for a different source of law than the state's own positive law. I'm tempted to make a joke about studies of 50 different state constitutions and how it takes a long time, considering my own experience, but I'll skip that. I have actually a final question that we can just use about which is it seems like the Supreme Court has gotten a little shy of the Fourth Amendment the last couple of years. Either this issue or any issue, maybe that'll change for the coming term, which may have ... will have started, I think, by the time people hear this podcast, but what's your take on why this has happened? Is it like new justices, new alignments, they're trying to figure each other out? And what do you think that portends on this whole issue of the, you know, post-*Katz* interpretation of the Fourth Amendment?

D **Daniel Epps** 50:09

Yeah. Yeah. And it's, you know, perfectly consistent with positivism to say this sovereign has told you to go look at some other source of law, right? A state constitutional provision could even say, you know, the scope of Louisiana's protection against search and seizure shall be defined by reference to Mississippi's, right? I mean, it would be weird. You can't really imagine why they would want to do that. But there's nothing, you know, illegitimate about doing that if the state of Louisiana itself has made the sovereign decision to incorporate it. Now, that said, if you're in a state that has consistently said we read the common law as not providing this protection, and then you're saying, well, in Fourth Amendment cases, could you also look to common law? Those state courts are probably likely to say we also think the general law doesn't provide that protection because we don't think that's the right answer into the general law—the other thing. And so, you know, there may end up ... be some, you know, contraction there. But I think that you wouldn't just say, well, this state statute abrogated common law principles. Therefore, that automatically answers the general law question for purposes of a state constitution. That doesn't have to be the case. It could be, again. And that's just ... and we don't ... That's a great question. It's one that we, I think, don't touch at all in the paper just because there's ... We'd have to do kind of the work to look at 50 different states's provisions, their content, their original understanding, you know, their larger context, all sorts of things. And so all I'd say is that there's nothing stopping a state and a state court from recognizing this approach. And it may be the best answer for many, many states. But it's also, you know ... I certainly wouldn't take the position that the Fourth Amendment requires states to adjudicate their own constitutional provisions the same way. It could be totally different. I think that's just a question of constitutional meaning in those jurisdictions. Yeah, I really don't know. I mean, it could just be that there are, you know ... It's kind of random that, in any given year, the Court doesn't grant that many cases. And so if the right cases that pique their interest don't come up, they don't grant them, and then maybe next year, there are four. It could be that some of the

hardest Fourth Amendment questions are ones where we still need kind of what they call a percolation in the lower courts. That they're hard, and that we want more lower courts to weigh in before the Court really answers them conclusively. There's hard questions we talk about a little bit in the paper—about pole cameras, right? If the, you know ... It's on public property; the court just sets up a camera on the lightpost and/or something, and it's not trespassing, but it's kind of recording everybody that's coming and going is not a Fourth Amendment violation. That's hard. It's hard under our approach. It's hard under *Katz*. And maybe you want to wait and see how those cases come out. Maybe the Court has been so good about resolving all these little, minutia questions that there's fewer and fewer kind of more traditional questions under *Katz* that courts need to resolve. I don't know. I think Orin Kerr is somebody who might be able to tell us, you know, whether there are fewer circuit splits than there once were on Fourth Amendment questions. I don't have an intuition on that. But I think that the length of time is short enough that we shouldn't make any firm conclusion that the Court has ... is not interested. If it goes on for another year in which we've got a really extended period when there's not new Fourth Amendment law being made when, you know, normally you'd expect two or three cases a year, then I think that's where we really need to sit down and say what is going on? Or maybe they're just too divided about how to, you know ... the larger approach in these cases, and they want to kind of wait and think about it. And maybe some of the newer justices just don't care about the issue compared to other stuff; they have a different agenda. That could be. I think it's just a little too soon to say and so I'm—certainly as someone who teaches Criminal Procedure Investigation, you know—very much hoping there's some new cases because I like teaching them. And I like, you know, keeping my students up to date and saying, hey, there's this case that's going to come down in the next few months. Keep an eye out for it. It's going to be really interesting. I also like predicting what they're going to say, and I'm usually able to kind of figure out what they're likely to say in those cases. But, you know, I guess it makes it easier for me to teach. I don't have to adjust my syllabus at all year to year.

A Anthony Sanders 55:29

Well, that's a good point. Well, we'll keep a look on the calendar, and if a year from now we don't have more cases, maybe we'll have you back and you say more about what's going on?

D Daniel Epps 55:43

Yeah, we can solve the mystery.

A Anthony Sanders 55:44

I think I'd like to hope that we're going to get some more Fourth Amendment at the Supreme Court soon, but that remains to be seen. But Dan, thank you so much for joining us today on Short Circuit. This has been a fascinating conversation about two of my favorite peas in the pod: the Fourth Amendment and general law. So best of luck on your next endeavor in this area and very much appreciate it.

D Daniel Epps 56:10

Alright. Thanks, Anthony. It was a great discussion.

A Anthony Sanders 56:12

And for everyone else, we'll see you next time. But, in the meantime, I want everyone to get engaged.