

THE RELATIONAL NATURE OF PRIVACY

by
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The hard Fourth Amendment cases, especially those involving surveillance, ask whether the police investigative tactic at issue counts as a “search”; if not, the Fourth Amendment does not apply at all. Under the Court’s main test, at least for surveillance without a trespass, the police conduct a “search” if they invade a person’s reasonable expectation of privacy.

But when the Court assesses Fourth Amendment privacy, it treats it as an all-or-nothing concept without regard to the relation between the person searched and the person searching. For example, the Court has held that when the police rummage through a person’s garbage left curbside, this conduct does not amount to a search. The Court reasoned that a person does not expect privacy in his garbage in relation to animals, scavengers, or children, and therefore has no privacy in his garbage with respect to anyone, including the police.

This Article argues that in assessing the Fourth Amendment, the Court should take into account the relational nature of privacy, and acknowledge that we have a greater expectation of privacy as against the government than we do as against our neighbors and friends. In fact, we desire and expect the highest level of privacy when the government pursues a criminal investigation, and it is here the Fourth Amendment should play its greatest role. This follows based upon the relational nature of privacy, certain lines of Supreme Court precedent, such as the inventory and administrative search cases, and the history of the Fourth Amendment, rooted especially in the seminal John Wilkes cases, which were initiated as a criminal case.

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INTRODUCTION

Privacy both reflects and governs our relations with the world. On the simplest descriptive level, we rank privacy in widening circles.¹ Within the inner circle lies our family. A person exposes far more private and secret information and access to a spouse or partner than to friends, more to friends than to acquaintances, and more to them than to strangers. Usually the government lies on the outer circle. Our relationship to the government differs from our relationship to others, whether our neighbors or even institutions.

But this simple description misses the full complexity of privacy. When we think of privacy as secrecy, we think of it as a static state or condition:² a person alone on a desert island enjoys perfect privacy, for example.³ But privacy also refers to the right to privacy and measures the harm from an invasion or violation of that right.⁴ When we talk about privacy we must look at the manner and purpose of any intrusion. If a doctor looks in someone's wallet to find an emergency contact, that is far less an intrusion than if a jealous spouse looks there for evidence of infidelity—in these contexts purpose drives the inquiry.

¹ See Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919, 919 (2005).

² W. A. Parent, *Privacy, Morality, and the Law*, 12 PHIL. & PUB. AFF. 269, 269–75 (1983).

³ Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 428 (1980).

⁴ *Id.* at 424–25.

Privacy not only underlies and defines our relationships but also defines many of our Fourth Amendment rights. In fact, the Fourth Amendment only applies if the police conduct counts as a “search,” which under Supreme Court doctrine means conduct that intrudes upon our reasonable expectation of privacy⁵ or amounts to a physical intrusion akin to trespass.⁶ Since the police may often obtain information without a physical intrusion by using technology and surveillance,⁷ privacy remains an important measure of Fourth Amendment applicability.⁸

But the Supreme Court, in assessing Fourth Amendment privacy, often ignores the relational nature of privacy as well as the manner and purpose of the intrusion.⁹ It treats privacy as an all-or-nothing concept; if a person has waived or ceded privacy to one person she has ceded it to all. As a result, the Court treats the government as just another member of the public,¹⁰ or sometimes even a friend,¹¹ and does not recognize that we have special reasons for desiring privacy from the government in particular.

For example, the Court has held the police may rummage through a person’s garbage left curbside without warrant or probable cause. That person has no reasonable expectation of privacy in his garbage, according to the Court, because a scavenger or an animal might do the same.¹² True, we have little expectation of privacy as against scavengers or animals, since we expect they might go through our garbage. But aside from the mess, we do not care if a scavenger searches our garbage for bottles and cans. We do care if our neighbor goes through our garbage looking for something embarrassing, and we care even more if the government searches our garbage for evidence of crimes.¹³ Privacy is not an all-or-nothing concept; rather, we have an expectation of privacy

⁵ *E.g.*, *Smith v. Maryland*, 442 U.S. 735, 739–40 (1979) (citing *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

⁶ *United States v. Jones*, 132 S. Ct. 945, 950–52 (2012).

⁷ *Kyllo v. United States*, 533 U.S. 27, 29–30 (2001) (police use of a thermal imaging device directed at the outside of home to determine if a person was growing marijuana inside).

⁸ *Jones*, 132 S. Ct. at 955 (Sotomayor, J., concurring) (expectation of privacy test remains important for “cases of electronic or other novel modes of surveillance that do not depend upon a physical invasion on property”).

⁹ *See, e.g.*, *California v. Greenwood*, 486 U.S. 35, 40–41 (1988) (a person who puts his garbage curbside has exposed it to the public, thereby losing any expectation of privacy vis-à-vis the police).

¹⁰ *See id.* at 41.

¹¹ *See, e.g.*, *Hoffa v. United States*, 385 U.S. 293, 302 (1966) (government informant posing as a friend in the defendant’s hotel room does not count as a search).

¹² *Greenwood*, 486 U.S. at 40.

¹³ *See State v. Hemeple*, 576 A.2d 793, 805 (N.J. 1990) (disagreeing with the *Greenwood* rationale and noting: “There is a difference between a homeless person scavenging for food and clothes, and an officer of the State scrutinizing the contents of a garbage bag for incriminating materials.”).

against the government but not against scavengers because our relationships to each and the nature and purpose of the searches differ vastly.

This Article argues that in assessing whether police conduct amounts to a “search” under the Fourth Amendment, the Court should measure a person’s privacy as against the government and not simply as against the public, a scavenger, or a friend. The government plays a special role in our lives, and our privacy vis-à-vis the government reflects that role. The government has powers of coercion, the power to criminally prosecute,¹⁴ and at certain times and places in history a tendency to use such prosecutions to oppress.¹⁵ Thus, even if we have no expectation of privacy as against a scavenger or child rooting through our garbage, we do as against the police; even if we would tell a secret to a friend, that disclosure does not make the secret fair game for the police.

This Article focuses on privacy because the Court uses that concept to establish whether the Fourth Amendment applies. But this Article also evaluates the purpose of the Fourth Amendment more generally to answer the same question—should the Fourth Amendment apply? It concludes that the Fourth Amendment plays a special role in regulating criminal investigations, based upon its history and other lines of Supreme Court precedent, as well as upon ordinary and scholarly views of privacy. This purpose should make us more inclined to find that the Fourth Amendment applies when the police conduct a criminal investigation compared to some other type of government inquiry.

This Article takes a novel approach because it decouples the question of whether the Fourth Amendment plays a special role in criminal prosecutions from the question of whether we should remedy violations of the Fourth Amendment with the exclusionary rule. Past discussions of the role of the Fourth Amendment have become distorted by partisan debates over the exclusionary rule; we can decide the purpose of the Fourth Amendment as an initial matter independent of remedy and gain a clearer and less partisan picture of its purpose. This approach makes particular sense in this context: we seek the purpose of the Fourth Amendment in order to determine whether it applies—what counts as a search—and not how to handle violations.

¹⁴ *United States v. Morrison*, 529 U.S. 598, 617–18 (2000) (states enjoy plenary police power, including the suppression of violent crime).

¹⁵ *E.g.*, ROBERT CONQUEST, *THE GREAT TERROR: A REASSESSMENT* 256–64 (1990) (describing Stalin’s use of criminal arrest and prosecution to accomplish his purge of political enemies); LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION* (1968) (cataloging the Crown’s use of criminal prosecution to oppress, especially in the Star Chamber and High Commission, to stamp out religious heresy); GEORGE NOBBE, *THE NORTH BRITON: A STUDY IN POLITICAL PROPAGANDA* (1939) (showing how the King used criminal prosecution to persecute political dissident John Wilkes, whose cases in large part led to the Fourth Amendment).

This Article proceeds in three main parts to establish the main purpose of the Fourth Amendment and what counts as a search. Part I shows that more than any other precedent, the founding generation premised the Fourth Amendment upon the famous travails of John Wilkes.¹⁶ Scholars often focus on the trespass aspect of these cases,¹⁷ which of course led directly to Fourth Amendment protections,¹⁸ but forget that the entire John Wilkes affair started¹⁹ and ended²⁰ as a criminal prosecution. That is, the unreasonable searches and seizures in the seminal English cases arose in the context of the Crown using criminal prosecution to stifle dissent.²¹ In the colonies, the concepts of dignity and respect permeate the historical record leading up to the Fourth Amendment, and the founding generation's complaints about searches often emphasized the indignity of government-authorized searches.²²

Part II surveys key Fourth Amendment scholarship as relevant here.

Part III discusses the leading philosophical approaches to privacy and how these demonstrate the importance of relations to privacy. Privacy is more than simply individual secrecy, and important relationships including love and friendship depend upon our ability to selectively disclose private information, as do other important activities including political deliberation and free speech. Part III also shows how our expectations of privacy as against the government and particularly law enforcement differ from and are often greater than our expectations as against our friends or neighbors.

Part IV discusses several lines of Supreme Court cases in which the Court has recognized that the Fourth Amendment applies particularly to criminal searches, in part because the invasion of privacy is greater, and

¹⁶ Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 772 (1994) (“*Wilkes* . . . was the paradigm search and seizure case for Americans.”); David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1799 (2000) (“[N]o statute, practice manual, or commentator . . . shaped the thinking of late-eighteenth-century Americans on the subject of search and seizure as powerfully as the judicial invalidation in the 1760s of broad warrants executed in London against John Wilkes . . .”). *But see* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 567 (1999) (arguing that the reauthorization of the general writ in the Townshend Act had more influence than the *Wilkes* case).

¹⁷ *See, e.g.*, Amar, *supra* note 16, at 775–76 (“All the major English cases that inspired the Fourth Amendment were civil jury actions . . .”); Davies, *supra* note 16, at 562–65 (focusing on the trespass actions); *see also* *Wilkes v. Wood*, (1763) 98 Eng. Rep. 489 (K.B.).

¹⁸ WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING* 602–1791, at 443–44 (2009).

¹⁹ *King v. Wilkes (Wilkes I)*, (1763) 95 Eng. Rep. 737 (K.B.); 1 JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 428 (London, Macmillan & Co. 1883) (referring to Wilkes as an example of a criminal case).

²⁰ *R v. Wilkes (Wilkes III)*, (1770) 98 Eng. Rep. 327 (K.B.).

²¹ *See* NOBBE, *supra* note 15.

²² *See infra* Part I.B.

in part, apparently, because the Fourth Amendment plays a special role in such investigations. Early on, the Court afforded far less Fourth Amendment protection to inventory searches attendant to an arrest²³ and to administrative searches²⁴ than to the very same search when undertaken to find evidence of a crime. As the police sought to justify criminal searches as inventory or administrative, the Court pushed back; if the primary purpose of the search was to seek evidence of a crime against the person searched, the Court provided full, and therefore greater, Fourth Amendment protection.²⁵

Part V applies the claim to foundational cases such as *California v. Greenwood*²⁶ (the garbage case), police deception cases such as *Hoffa v. United States*,²⁷ and third-party doctrine cases such as *United States v. Miller*²⁸ and *Smith v. Maryland*²⁹ to show why these cases were wrongly decided. At least one Supreme Court justice seems ready to revisit some of the concepts underlying those wrongly decided cases,³⁰ in particular the notion that ceding privacy to one person waives it as to the world—including law enforcement.

In the end, more lies at stake than garbage. When the Court ignores the relational nature of privacy and treats the government as simply a friendly neighbor, it opens a vast territory to unregulated government searches. For example, a police officer may pose as a UPS delivery person and through deception gain entrance to a person's home without warrant or probable cause; anything he sees once inside he can use as evidence against the person.³¹ This same mistaken principle leads to what we might call the *Kyllo*-effect:³² the Court has hinted the police may use any surveillance technology to spy without Fourth Amendment regulation as long as that technology enjoys general public use. As surveillance drones become cheaper and more widespread—already a person can buy a drone for about \$300, control it with his iPhone, and use it to take photos and videos³³—the police will be able to use that same

²³ *E.g.*, *South Dakota v. Opperman*, 428 U.S. 364 (1976).

²⁴ *E.g.*, *Camara v. Mun. Court*, 387 U.S. 523 (1967).

²⁵ *See City of Indianapolis v. Edmond*, 531 U.S. 32, 48 (2000) (primary purpose of police traffic checkpoint was to discover evidence of crimes, and it therefore violated the Fourth Amendment).

²⁶ 486 U.S. 35 (1988).

²⁷ 385 U.S. 293 (1966).

²⁸ 425 U.S. 435 (1976).

²⁹ 442 U.S. 735 (1979).

³⁰ *United States v. Jones*, 132 S. Ct. 945, 957 (2012) (Sotomayor, J., concurring) (“[I]t may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties.”).

³¹ *United States v. Miglietta*, 507 F. Supp. 353, 355–56 (M.D. Fla. 1980).

³² *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

³³ Emily Price, *Parrot's Updated A.R. Drone Adds a 720p Video Camera*, GIZMAG (Jan. 9, 2012), <http://www.gizmag.com/parrots-updated-ar-drone-720p-video-camera/21033/>.

technology to spy on backyards and even upstairs bedrooms without any Fourth Amendment regulation. But a proper understanding of the relational nature of privacy would avoid these outcomes; even if our neighbor can deploy a drone to spy on us, the police cannot unless they satisfy Fourth Amendment standards.

I. HISTORY

In assessing the general purpose of the Fourth Amendment, especially based upon its history, this Article considers two main views. Under the first view, the Fourth Amendment has no special connection to searches in aid of criminal investigations.³⁴ Rather, it protects against the same type of harm whether your neighbor conducts the search or the government. Under this view, the fact that the government conducts the search adds no extra harm. It protects against property damage or destruction and only protects against invasion of privacy to the extent that an invasion by anyone would—mostly protecting against embarrassment caused by the type of information or activity revealed.

On the other hand, as this Article argues, even though the Fourth Amendment does protect against those harms, it also protects against government oppression, against the kind of harms that only a government search can produce. When the police search for evidence of crimes, they implicitly (or explicitly) accuse the person of a crime and subject the person to domination, coercion, and force, as well as to embarrassment and humiliation. An officer who searches a home without warrant or suspicion engenders indignation at the dissonance between acting under the color of law and law.

Even aside from the Fourth Amendment, the framers' great concern was oppression and in rhetoric they were obsessed with the concept of power. To them, power meant "the dominion of some men over others."³⁵ Power always tended to "expand itself beyond legitimate boundaries" and was most commonly analogized to trespass in the general sense.³⁶ They saw general searches and seizures as tools of such power and oppression and the Fourth Amendment as a bulwark against government oppression generally.³⁷ And as we can also see below, the context of at least the Wilkes cases in England—widely followed in the colonies—raised concerns not only about government oppression generally but about searches in aid of criminal prosecution in particular.

³⁴ See, e.g., Amar, *supra* note 16, at 758; Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49.

³⁵ BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 56 (enlarged ed. 1992).

³⁶ *Id.*

³⁷ See CUDDIHY, *supra* note 18, at 670; ANDREW E. TASLITZ, *RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789–1868*, at 4–5 (2006).

The history leading to the Fourth Amendment represents the development of a right against the government. In England and the colonies the protections against searches developed over centuries, and reflected political and social evolution particularly from as early as 1290 to 1791.³⁸ Initially a person's right to exclude, and his right to treat his home as his castle, mostly meant he could exclude his neighbor, not the government.³⁹ In 1604, for example, Lord Coke reported that in all cases in which the King is a party, the Sheriff may break into a person's home to arrest him or execute the King's process, but they must seek permission to enter before they may force their way in.⁴⁰ But by 1700 this view began to change. The adage and concept that a man's house is his castle evolved largely into a right against the government, and people began to view government searches "as more onerous than undesired visits by private persons."⁴¹ William J. Cuddihy describes the development thus: "Between 1700 and 1760, 'A man's house is his castle (*except* against the government)' yielded to 'A man's house is his castle (*especially* against the government).'"⁴²

A. The King v. Wilkes

Despite the long history leading up to the Fourth Amendment, and the social, political, and philosophical evolution that made it possible, scholars largely agree that the framers premised the Fourth Amendment in large part in reaction to a handful of historical precedents, first and most notably, the case of John Wilkes⁴³ and related cases in England, and second, the argument of James Otis in Boston against the writs of assistance.⁴⁴

³⁸ CUDDIHY, *supra* note 18, at lxvi–lxvii.

³⁹ *Id.* at lxiii ("Most Englishmen of 1600 understood their houses to be castles only against their fellow subjects and conceded almost absolute powers of search, arrest, and confiscation to the government.").

⁴⁰ Semayne's Case, (1604) 77 Eng. Rep. 194 (K.B.) 195.

⁴¹ CUDDIHY, *supra* note 18, at lxiv.

⁴² *Id.*

⁴³ *Id.* at ch. 19; *id.* at 443 ("The *Wilkes Cases* (1763–69) represented a major but incomplete step toward the specific warrant clause of the Fourth Amendment."); see also TELFORD TAYLOR, *Search, Seizure, and Surveillance, in TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 19, 19 (1969) ("Thanks especially to . . . John Wilkes . . . we know a good deal about the 'original understanding' of those who framed the constitutional safeguards against unreasonable searches and seizures . . ."); Amar, *supra* note 16, at 772 ("*Wilkes* . . . was the paradigm search and seizure case for Americans."); Davies, *supra* note 16, at 563 ("The accounts of the trials exclaimed the importance of the issue for English liberty and the sanctity of the house . . .").

⁴⁴ Letter from John Adams to William Tudor (March 29, 1817), in 10 THE WORKS OF JOHN ADAMS: SECOND PRESIDENT OF THE UNITED STATES 244, 247–48 (Boston, Little, Brown & Co. 1856) (describing how, because of Otis's arguments against the writs of assistance, "[t]hen and there the child Independence was born"); John Adams, Petition of Lechemere, in 2 LEGAL PAPERS OF JOHN ADAMS 106, 107 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965); TAYLOR, *supra* note 43, at 19, 38.

When Fourth Amendment scholars discuss the case of John Wilkes, they naturally focus on the unreasonable search part of his story, and on the lawsuits that established that general warrants are unlawful. But John Wilkes was a dissident polemicist and member of parliament who was persecuted and criminally prosecuted for his writings against the government.⁴⁵ The English and colonists glorified him not only for establishing the sanctity of a man's home as his castle but also for his fearless political speech in the face of criminal prosecution.⁴⁶ After all, the John Wilkes cases started⁴⁷ and ended⁴⁸ as criminal prosecutions.⁴⁹

On April 23, 1763, No. 45 of *The North Briton* appeared.⁵⁰ It criticized the recent peace treaty between England and France and the King's Speech discussing that treaty. The authorities considered it a seditious libel and the King himself commanded action.⁵¹ The Attorney General and Solicitor General both considered the No. 45 "a fit subject for prosecution."⁵² They suspected Wilkes as the author, but before bringing charges they determined to seek more evidence.

The Secretary of State issued a general warrant authorizing searches and arrests in order to find the authors, printers and publishers of No. 45—general because it named no persons to arrest nor identified places to search.⁵³ It left complete discretion to the messengers, who arrested 48 people during two days.⁵⁴ When information pointed to John Wilkes,

⁴⁵ In his most controversial writing, No. 45 of *The North Briton*, Wilkes criticized the Crown's ministers while he purported to praise the King himself). John Wilkes, No. XLV, in 2 THE WORKS OF THE CELEBRATED JOHN WILKES, ESQ. 227, 236–39 (London, J. Williams n.d.).

⁴⁶ See ARTHUR H. CASH, JOHN WILKES: THE SCANDALOUS FATHER OF CIVIL LIBERTY 113 (2006); Amar, *supra* note 16, at 772 n.54. The general population lionized him but many in the elite who approved of his principles thought his writing often went too far. See, e.g., FATHER OF CANDOR, A LETTER CONCERNING LIBELS, WARRANTS, THE SEIZURE OF PAPERS, AND SURETIES FOR THE PEACE OR BEHAVIOUR 63 (London, J. Almon 2d ed. 1764); JUNIUS, LETTER XXXV: TO THE PRINTER OF THE PUBLIC ADVERTISER (Dec. 19, 1769), reprinted in THE LETTERS OF JUNIUS 198, 204–05 (Boston, N.H. Whitaker 1829).

⁴⁷ King v. Wilkes (*Wilkes I*), (1763) 95 Eng. Rep. 737 (K.B.). This case is criminal because the Crown's lawyers argued that Wilkes was validly arrested and held for a crime—seditious libel—and the Court accepted the premise of that argument—though releasing him based up on parliamentary privilege. *Id.* at 741–42. On the other hand, the posture was more complicated, since Wilkes came to court on a habeas petition. *Id.* at 739.

⁴⁸ R v. Wilkes (*Wilkes III*), (1770) 98 Eng. Rep. 327 (K.B.) (sentencing Wilkes for a subsequent printing of *The North Briton* as well as an unpublished libelous poem).

⁴⁹ NOBBE, *supra* note 15, at 218–24; STEPHEN, *supra* note 19, at 428 (using Wilkes as an example of a criminal trial from the 1760s).

⁵⁰ *Wilkes I*, 95 Eng. Rep. at 737.

⁵¹ NOBBE, *supra* note 15, at 212 ("George Grenville has recorded that they acted expressly on the King's commands.").

⁵² *Id.*

⁵³ *Id.* at 214–15.

⁵⁴ *Id.* at 215.

Secretary of State Halifax verbally authorized his arrest as well as a search of his premises via the same three-day-old warrant used to search or arrest the others; naturally, the warrant failed to identify Wilkes by name, his premises or the items to be seized other than “Their Papers.”⁵⁵

A constable and government messengers arrested Wilkes and subjected his home to an exhaustive search, opening or breaking every lock and drawer, closet and bureau, examining or seizing nearly every paper. They broke more than 20 doors, hundreds of locks, rummaged through scores of trunks, and scattered thousands of books on the floors for later collection⁵⁶—“plunder on a scale that neither the Huns, the Gestapo, nor the N.K.V.D. could have exceeded.”⁵⁷

Within a few days, Wilkes appeared before Lord Justice Pratt in the court of common pleas seeking release on a habeas petition. On the second day of the proceedings he made a brief speech that focused not upon the unjustified search of his home or even his arrest but rather upon the government’s “persecution” of him for his political views.⁵⁸ His counsel, on the other hand, argued that the arrest had been unlawful and he should be released. The court recessed to consider the arguments and spectators cheered him as he went back to the Tower of London, and again crowds cheered him as he returned to court later in the week.⁵⁹

On May 6, Lord Chief Justice Pratt ordered Wilkes released without bail. He held that Wilkes was protected by parliamentary privilege since the case against him was a misdemeanor rather than treason or felony and did not threaten an actual breach of the peace.⁶⁰

Wilkes sued nearly everyone involved in the search of his home in 16 separate trespass actions, including one against Secretary of State Halifax, recovering thousands of pounds. Dozens of printers, journeymen, and apprentices who had been searched or arrested also won large judgments in trespass and false imprisonment. These cases established that general warrants for arrest, search, or seizure were unlawful—ultimately leading to the specific warrant requirement of the Fourth Amendment.⁶¹

But even before Wilkes’ trespass case came to judgment, the government continued its persecution of Wilkes. The Attorney General had initially brought a seditious libel prosecution against Wilkes by way of an information⁶² but dropped it in the hopes that Wilkes would drop his

⁵⁵ *Id.* at 214, 218.

⁵⁶ CUDDIHY, *supra* note 18, at 442–43.

⁵⁷ *Id.* at 442.

⁵⁸ King v. Wilkes (*Wilkes I*), (1763) 95 Eng. Rep. 737, 740–41.

⁵⁹ CASH, *supra* note 46, at 113, 115.

⁶⁰ *Wilkes I*, 95 Eng. Rep. at 742.

⁶¹ CUDDIHY, *supra* note 18, at 443–44.

⁶² CASH, *supra* note 46, at 122. Crown prosecutors could initiate misdemeanors *ex officio* by filing a charging document called an “information” rather than securing a grand jury indictment. *See id.* Many jurisdictions today retain this form of accusation for misdemeanors and, in some states, for felonies.

civil law suits. (He didn't). The government then sought another criminal case to bring while at the same time orchestrating votes in the House of Commons and the House of Lords that the privilege does not extend to seditious libel.⁶³ The government hoped the parliament, over which the Crown had greater control,⁶⁴ would remove the privilege, declare him a libeler, and poison the juries that would soon hear his trespass case. This plan backfired, the public stood behind Wilkes, and the jury in his trespass case against Wood awarded him 1,000 pounds.⁶⁵

The dissenters in the House of Lords argued that the privilege, to mean anything, must extend to all misdemeanors including libel cases to protect the freedom of parliament against the crown's power of criminal prosecution.⁶⁶

The Attorney General later filed a new criminal information based upon Wilkes' republication of the entirety of *The North Briton*, including No. 45. It also charged him with a private criminal libel for writing, though not publishing, an obscene poem and falsely attributing its footnotes to a prominent bishop.⁶⁷ To gain evidence on the second charge, the government threatened witnesses with their own criminal prosecution.⁶⁸ One scholar has argued, from "inference," that the prosecution also obtained incriminating evidence from Wilkes' own trial counsel—a copy of the very obscene poem itself.⁶⁹ Since Wilkes had fled to France after a duel, he was tried and convicted in absentia.⁷⁰

Other cases arising from the Wilkes searches, and analogous searches of other publications, led to opinions that drew an even closer connection between unreasonable searches and seizures and criminal prosecution. In *Huckle v. Money*, the Court wrote: "To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition . . ." ⁷¹ In *Entick v. Carrington*, another case the founding generation relied upon, the Court noted how governments regularly use unreasonable search and seizure as well as

⁶³ NOBBE, *supra* note 15, at 239–40, 245; CARL WITTKER, *THE HISTORY OF ENGLISH PARLIAMENTARY PRIVILEGE* 117–18 (Da Capo Press 1970) (1921).

⁶⁴ George III brought to a peak bribery of Parliament to support his policies, in particular in the Wilkes case. Note, *The Bribed Congressman's Immunity from Prosecution*, 75 *YALE L.J.* 335, 337 n.10 (1965).

⁶⁵ *Wilkes v. Wood (Wilkes II)*, (1763) 98 Eng. Rep. 489 (K.B.) 499.

⁶⁶ 29 Nov. 1763, 30 *H.L. JOUR.* 426, 429 (Eng.) ("[W]hen our ancestors considered, that the law had lodged the great powers of Arrest, Indictment, and Information, in the crown, they saw the Parliament would be undone, if, during the Time of Privilege, the Royal Process should be admitted in any Misdemeanor whatsoever.").

⁶⁷ CASH, *supra* note 46, at 144, 152. The title page of Wilkes' essay contained an erect penis next to a 10-inch scale. *Id.* at 152.

⁶⁸ *See id.* at 144.

⁶⁹ *Id.* at 172 & 421 n.21.

⁷⁰ *R v. Wilkes (Wilkes III)*, (1770) 98 Eng. Rep. 327 (K.B.) 328.

⁷¹ *Huckle v. Money*, (1763) 95 Eng. Rep. 768 (K.B.) 769.

compelled self-incrimination as improper tools to further criminal investigations.⁷²

The Wilkes trespass cases that led to the specific warrant requirement of the Fourth Amendment thus arose in the context of a Crown bound to destroy Wilkes through criminal prosecution as well as through other legal and political mechanisms, and we should allow the Fourth Amendment to flourish most when linked to criminal investigations today. As another influential but anonymous writer Junius wrote, the Wilkes cases were more than simply the right against unreasonable searches but stood as an example of the Crown's determination to persecute one man: "the destruction of one man has been now, for many years, the sole object of your government"⁷³

The Wilkes cases also played a direct or indirect role in the development of several Constitutional provisions in addition to establishing the right against unreasonable search and seizure and in particular the abolition of general warrants that permit searches without suspicion or particularity.⁷⁴ First, the Wilkes cases played a role in the development of the right to freedom of speech, especially as against criminal prosecutions for seditious libel.⁷⁵ Second, the Wilkes cases played a role in the development of the privilege of members of Congress against arrest and the speech and debate clause,⁷⁶ and even their qualifications in relation to expulsion.⁷⁷ Third, they have at least an indirect connection to the Grand Jury Clause, for it again highlights the dangers of initiating cases by information rather than through a grand jury.⁷⁸

At this remove we can separate these issues, but at the time they worked together as a whole. One influential pamphlet from 1764 analyzing the case expressly linked the problem of seditious libel,

⁷² Entick v. Carrington, (1765) 95 Eng. Rep. 807 (K.B.) 812.

⁷³ JUNIUS, *supra* note 46, at 205.

⁷⁴ CUDDIHY, *supra* note 18, ch. 21.

⁷⁵ ZECHARIAH CHAFFEE JR., FREE SPEECH IN THE UNITED STATES 21 (1941) ("The First Amendment was written by men to whom Wilkes and Junius were household words, who intended to wipe out the common law of sedition"). *But see* LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 220 (1985) (questioning how committed the framers were to abolishing seditious libel).

⁷⁶ Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista*, 37 WAKE FOREST L. REV. 239, 292-300 (2002); Note, *supra* note 64, at 337 n.10.

⁷⁷ See Powell v. McCormack, 395 U.S. 486, 527-31 (1969) ("Wilkes' struggle and his ultimate victory had a significant impact in the American colonies," including upon the constitutional qualification of members of Congress.).

⁷⁸ One influential pamphlet highlights the potential for abuse in allowing the Crown to proceed by information in seditious libel cases in particular, as also happened in the Zenger case. See FATHER OF CANDOR, *supra* note 46, at 7. Of course, the Grand Jury Clause did not alter this regime since it applies, roughly speaking, only to felonies, usually defined as punishable by more than a year in prison. FED. R. CRIM. P. 7(a); Mackin v. United States, 117 U.S. 348 (1886).

overzealous prosecution, and the problem with general warrants and searches. Authored anonymously by “Father of Candor,”⁷⁹ its title was *A Letter Concerning Libels, Warrants, and the Seizure of Papers, Etc.* He begins discussing seditious libels and how the Crown may abuse its criminal powers by bringing such cases by information rather than through a grand jury, and links this odious practice to the Star Chamber.⁸⁰ Indeed, the Attorney General would use such criminal prosecutions to harass the Crown’s enemies and stifle dissent.⁸¹ He argues truth should be a defense and the facts be decided by juries. He likewise criticized parliament’s abdication of the parliamentary privilege against such prosecutions.⁸²

Father of Candor links seditious libel to warrants when he ridicules the government’s argument in the Wilkes cases that seditious libel is different, and more dangerous, and therefore justifies general warrants which in other cases might not be justified.⁸³ He then repeats what was by then the common wisdom established by *Wilkes v. Wood*, that neither custom nor the common law supported general warrants.⁸⁴ The discussion of warrants, in short, came in the context of criminal prosecutions and the Crown’s ability or power to take extraordinary measures in the face of seditious libel and treason.⁸⁵

In the colonies, oppressive criminal libel based upon informations rather than grand jury indictments would instantly remind the colonists of the famous Peter Zenger case, which itself plays such an important role in the development of both the Free Speech Clause and the Grand Jury Clause.⁸⁶ In 1734, the Crown twice tried to indict Peter Zenger for seditious libel based upon his newspaper writings, and twice the people of New York refused to indict.⁸⁷ The prosecution then side-stepped the grand jury and brought the case by means of an information—but to no avail.⁸⁸ Zenger argued truth as a defense, and even though the law

⁷⁹ Davies, *supra* note 16, at 565 n.23 (Father of Candor may have been Lord Chief Justice Pratt).

⁸⁰ FATHER OF CANDOR, *supra* note 46, at 7–8 (“But, by some fatality, the Attorney General’s information, an offspring of the Star-chamber, was overlooked and suffered still to remain . . .”).

⁸¹ *Id.* at 8 (“[T]he Attorney General can file an information for what he pleases . . . to harass the peace of any man in the realm . . . [A]n Attorney General can easily undo any man of middling circumstances [and most] Bookfellers and Printers know this very well . . .”).

⁸² *Id.* at 10–11, 15–18.

⁸³ *Id.* at 37.

⁸⁴ CUDDIHY, *supra* note 18, at 448. Cuddihy has pointed out that general warrants enjoyed far greater custom and statutory sanction than Justice Pratt acknowledged.

⁸⁵ FATHER OF CANDOR, *supra* note 46, at 37–41. But in another context, Leonard W. Levy asserts that the colonists paid no attention to Father of Candor. Leonard W. Levy, *On the Origins of the Free Press Clause*, 32 UCLA L. REV. 177, 215–17 (1984).

⁸⁶ See generally Eben Moglen, *Considering Zenger: Partisan Politics and the Legal Profession in Provincial New York*, 94 COLUM. L. REV. 1495 (1994).

⁸⁷ *Id.* at 1513.

⁸⁸ *Id.* at 1514.

recognized no such defense, the jury acquitted in one of the great monuments to liberty.⁸⁹

The Wilkes cases thus link the Fourth Amendment not only to the First Amendment and free speech but also to the goals underlying the Grand Jury Clause. The initial Wilkes case was a criminal prosecution by means of unjust process—*ex officio* search and commitment warrant by the Secretary of State—and unjust means—unreasonable search and seizure. The Grand Jury Clause stands as a barrier between the people and the potentially oppressive power of the government’s use of criminal prosecution by requiring probable cause, determined not by the prosecutor but by the people. The Fourth Amendment likewise requires a finding of probable cause by a neutral magistrate and not simply the prosecutor, and requires specific warrants, and it does so in large part in reaction to the Wilkes cases—which were criminal prosecutions. Indeed, the Secretary’s messengers engaged in the very dragnet search for criminal evidence that we worry about today—searching and arresting dozens of printers, journeymen, and apprentices in search of evidence against Wilkes.

B. *James Otis and the Boston Smugglers*

The other paradigm widely thought to form a basis for the Fourth Amendment came from Boston—especially since the text of the Fourth Amendment so closely parallels that of the Massachusetts constitution.⁹⁰ But nearly 20 years before that constitution, James Otis argued to a Boston court that the writs of assistance, which authorized customs officers to search wherever they pleased for uncustomed goods, were unauthorized by law. As with the Wilkes case, scholars focus on his argument that such searches violated the privacy and sanctity of a man’s home, and indeed Otis did make such a case.⁹¹

But even here lies a quasi-criminal context. After all, the Boston merchants who hired Otis to argue against the writs were smugglers who sought to continue their huge profits by avoiding taxes and other inconveniences of the customs laws. In addition, forfeiture itself is quasi-criminal; indeed courts apply the exclusionary rule to forfeiture cases on precisely that basis.⁹²

But more important, the question of searches hinged on the underlying law they were in aid of. The searches were unjust because the

⁸⁹ *Id.* at 1497.

⁹⁰ Thomas K. Clancy, *The Framers’ Intent: John Adams, His Era, and the Fourth Amendment*, 86 IND. L.J. 979, 1001–02 (2011).

⁹¹ *See, e.g.*, Davies, *supra* note 16, at 601–02.

⁹² One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 700 (1965) (“[A] forfeiture proceeding is quasi-criminal in character.”) (citing *Boyd v. United States*, 116 U.S. 616, 633–34 (1886)). *But see* *United States v. Marrocco*, 578 F.3d 627, 642 (7th Cir. 2009) (Easterbrook, C.J., concurring) (arguing that the exclusionary rule applies only to forfeitures intended to be criminal punishment).

tax laws were unjust. The tax laws were unjust because they were passed in England without representation in the colonies.⁹³ In other words, the searches were bad not simply because they intruded upon privacy in some general sense but because they intruded upon privacy for a particular purpose: to aid an oppressive government in enforcing unjust laws. John Adams made this link between Otis's argument against general searches and the underlying oppressive tax laws when he later wrote that in 1761, at Otis's argument, "[t]hen and there the child Independence was born."⁹⁴

Even though the context involved smuggling, the thrust of the rhetoric involved dignity. Again and again, as Adams reported it, Otis excoriated the writs as subjecting the merchant class to arbitrary searches by their social inferiors, investing individuals with tyrannical power they lord over others. When he vividly portrays officers of lower status invading every part of a home, he captures the outraged and injured pride in saying, "even THEIR MENIAL SERVANTS ARE ALLOWED TO LORD IT OVER US" making us "the servant of servants."⁹⁵ Today we do not find persuasive the precise particulars of Otis's injured dignity arising from colonial notions of class, but we recognize at a more general level that the Fourth Amendment protects against the same type of incursion upon dignity when police officers abuse their power to conduct unwarranted searches.

C. *Subsequent Interpretations*

The Court has periodically noted that a chief purpose of the Fourth Amendment was to protect against oppressive government and in particular criminal prosecution. In *Frank v. Maryland*, Justice Frankfurter surveyed the history of the Fourth Amendment, including the *Entick v. Carrington*⁹⁶ case and the Boston situation.⁹⁷ From the Boston situation he gleaned a concern with government oppression through the mechanism of forfeiture,⁹⁸ which he grouped with criminal law as the government's use of coercive force to reach its ends. From *Entick* he gleaned a concern with government oppression via criminal prosecution, since the *Entick* search furthered a criminal prosecution against a dissident writer. He focused on the language in *Entick* that grouped the right against searches

⁹³ See generally TASILTZ, *supra* note 37, at 23–32.

⁹⁴ Letter from John Adams to William Tudor, *supra* note 44, at 248; see also Clancy, *supra* note 90, at 1005.

⁹⁵ Adams, *supra* note 44, at 142.

⁹⁶ (1765) 95 Eng. Rep. 807 (K.B.).

⁹⁷ *Frank v. Maryland*, 359 U.S. 360, 363–65 (1959), *overruled by* *Camara v. Municipal Court*, 387 U.S. 523 (1967). See *infra* note 100.

⁹⁸ *Frank*, 359 U.S. at 364 ("James Otis attacked the Writ of Assistance because its use placed 'the liberty of every man in the hands of every petty officer.'" (quoting WILLIAM TUDOR, *THE LIFE OF JAMES OTIS OF MASSACHUSETTS* 66 (Boston, Wells & Lilly 1823))).

with the right against self-incrimination: both stood against a government seeking evidence of crimes through illegitimate means.⁹⁹ He concluded that “it was on the issue of the right to be secure from searches for evidence to be used in criminal prosecutions or for forfeitures that the great battle for fundamental liberty was fought.”¹⁰⁰

In *Wolf v. Colorado* the Court again via Justice Frankfurter found that the Fourth Amendment was “basic to a free society” and “implicit in ‘the concept of ordered liberty.’”¹⁰¹ This suggests the amendment does more than merely protect general privacy; it governs our relationship to the government. In *Wolf*, Justice Frankfurter, writing in 1949, alluded to the oppressive tactics of contemporary repressive regimes, perhaps Germany or the Soviet Union, in saying:

The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples.¹⁰²

Just this year in *Messerschmidt v. Millender*, Justice Sotomayor echoed Justice Frankfurter, noting the special place criminal prosecutions played in the development of the Fourth Amendment: “The Fourth Amendment was adopted specifically in response to the Crown’s practice of using general warrants and writs of assistance to search ‘suspected places’ for evidence of smuggling, libel, or other crimes.”¹⁰³

⁹⁹ See *id.* at 365 (“[E]vidence of criminal action may not [save certain exceptions] be seized without a . . . warrant. It is this aspect of the constitutional protection to which the quoted passages from *Entick v. Carrington* and *Boyd v. United States* refer.”).

¹⁰⁰ *Id.* Frank was subsequently overruled by *Camara v. Municipal Court*, 387 U.S. 523 (1967). The *Camara* decision does not undermine Frankfurter’s general view of the Fourth Amendment; rather, it simply holds that the Fourth still has *some* application in non-criminal cases. But it and later special needs cases essentially support Frankfurter’s observation that the Fourth Amendment plays a special role in criminal cases.

¹⁰¹ *Wolf v. Colorado*, 338 U.S. 25, 27 (1949).

¹⁰² *Id.* at 28. The description of a nighttime arrest parallels events in Arthur Koestler’s *Darkness at Noon* describing Stalin’s purges through the Moscow show trials. See Arthur Koestler, *Darkness at Noon* 5–9 (Daphne Hardy trans., 1969). Frankfurter met Koestler in 1948, a year before *Wolf*, ARTHUR M. SCHLESINGER, JR., *A LIFE IN THE TWENTIETH CENTURY: INNOCENT BEGINNINGS, 1917–1950*, at 461 (2000), though of course he did not need to have met Koestler to be aware of the trials in Moscow or the Gestapo arrests in Germany.

¹⁰³ *Messerschmidt v. Millender* 132 S. Ct. 1235, 1252–53 (2012) (Sotomayor, J., dissenting) (citing *Boyd v. United States*, 116 U.S. 616, 625–26 (1886)).

II. FOURTH AMENDMENT BACKGROUND

A. *Coverage, Protection, and the Exclusionary Rule*

Suppose we agree the Fourth Amendment at least in part targets criminal investigations. How do we apply that principle? In theory we can apply it in any of three stages of analysis. First, we can use this principle to help determine whether the Fourth Amendment applies at all—that is, whether certain police conduct counts as a search. Some scholars think of this as a question of whether the Fourth Amendment *covers* the practice at all,¹⁰⁴ and coverage is the main issue addressed by this Article.

Second, if the Court finds certain conduct to be a “search,” the Court must determine how much Fourth Amendment protection to provide. Homes usually require a warrant and probable cause, but if the search is administrative, less protection applies.¹⁰⁵ Cars on the open road also get less protection—the police do not need a warrant if they have probable cause to search.¹⁰⁶ The police may detain a person on the street without a warrant and based upon reasonable suspicion¹⁰⁷—a standard less than probable cause—and the same for a search of school children.¹⁰⁸ In all these cases the Court assumes or finds there has been a search or seizure but then must decide what level of protection to apply.¹⁰⁹

Third, once the Fourth Amendment applies and the police have violated it, we must determine remedy. The most vigorous debates center on the exclusionary rule, of course, and numerous scholars such as Amar and Posner, as well as Justices such as Cardozo, have argued the Fourth Amendment has no special role to play in criminal cases, and therefore we should not have an exclusionary rule. The trespass remedy, if restored to its full power, can suffice, some scholars argue.

Of the three stages, this Article focuses on the first, whether certain conduct counts as a search. But most of the debates about the purposes of the Fourth Amendment have been pulled into the gravitational field of the third question, whether we should use an exclusionary rule.¹¹⁰ This article resists that temptation.

¹⁰⁴ E.g., Marc Jonathan Blitz, *Video Surveillance and the Constitution of Public Space: Fitting the Fourth Amendment to a World that Tracks Image and Identity*, 82 TEX. L. REV. 1349, 1406 (2004); Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 616 (1996).

¹⁰⁵ See *Camara v. Mun. Court*, 387 U.S. 523, 534–39 (1967).

¹⁰⁶ *Carroll v. United States*, 267 U.S. 132 (1924).

¹⁰⁷ *Terry v. Ohio*, 392 U.S. 1 (1968).

¹⁰⁸ *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2639 (2009).

¹⁰⁹ See Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 388–93 (1974). Frederick Schauer established a similar two-step analysis for the Free Speech Clause: coverage asks whether the clause applies at all, and protection asks whether in this case the clause should protect the speech against government incursion. FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* (1982).

¹¹⁰ See TAYLOR, *supra* note 43, at 20.

B. *Amar, Posner, and Taylor*

Akhil Amar, Richard Posner, and to some extent Telford Taylor have rejected any special connection between the Fourth Amendment and criminal investigations. They have argued that the Fourth Amendment basically removes a defense from government officials and puts them on the same footing as a private individual who conducts a similar unconsented-to search.

This view that the Fourth Amendment merely puts government officials on the same footing as private individuals when its requirements are not met had one of its best proponents in then-Judge Cardozo. In addressing New York's search and seizure provision, he wrote that it contained nothing "whereby official trespasses and private are differentiated in respect of the legal consequences to follow them. All that statute does is to place the two on an equality."¹¹¹ Judge Cardozo made this pronouncement in the context of rejecting the exclusionary rule for New York; if the exclusionary rule were not an issue, he might have expressed less hostility to the notion that the Fourth Amendment has some special application in criminal investigations.

Akhil Amar has likewise argued that the Fourth Amendment provides no special protection against criminal prosecutions either in language or history. As for text, the Fifth, Sixth, and Eighth Amendments, he says, apply specially to criminal contexts; by contrast, "the Fourth Amendment applies equally to civil and criminal law enforcement."¹¹² As for history, he writes: "Its history is not uniquely bound up with criminal law."¹¹³ He therefore argued we should not group the Fourth Amendment with the criminal procedure provisions of the Fifth and Sixth Amendments and enforce the Fourth Amendment with an exclusionary rule. Rather, he argued that the chief remedy for a Fourth Amendment violation by a government official was a trespass lawsuit.¹¹⁴

His arguments fit into his larger mission to show that the chief operative clause of the Fourth Amendment is the first one, banning unreasonable searches and seizures.¹¹⁵ The warrant clause, according to Amar, was not a requirement but a *limit*. In his view, warrants of any type were excoriated by the founding generation. If a government officer searched without a warrant, the homeowner could sue and a jury would decide if the intrusion was "reasonable." But if the officer searched pursuant to a warrant, that stood as a *per se* defense, taking away from the jury the judgment of reasonableness. Amar argued the founding

¹¹¹ *People v. Defore*, 150 N.E. 585, 588 (N.Y. 1926), *abrogated by* *Mapp v. Ohio*, 367 U.S. 643 (1961).

¹¹² Amar, *supra* note 16, at 758.

¹¹³ *Id.*

¹¹⁴ *Id.* at 774. Amar ignored the other main remedy—a person could use force to prevent an official from entering unlawfully, the very essence of trespass law.

¹¹⁵ *Id.* at 801.

generation far preferred a jury to decide the reasonableness of a search over a judge beforehand and therefore preferred warrantless searches to warrant searches. The Fourth Amendment therefore merely removes a potential defense when the intruding government official lacks a warrant and commits an unreasonable search or seizure; that is, the Fourth Amendment puts government officials on the same footing as others.¹¹⁶

The bottom line for Amar: we should eliminate the exclusionary rule. He says the jury is the main protector against unreasonable search and seizure, and points to the English cases as precedent: “All the major English cases that inspired the Fourth Amendment were civil jury actions, in which defendant officials unsuccessfully tried to use warrants as shields against liability.”¹¹⁷

Like Amar, Richard Posner has argued that the Fourth Amendment merely removed a defense so that a person could sue the officer in tort.¹¹⁸ Consequently, the Fourth Amendment protects those interests protected by trespass, battery, and false imprisonment: property interests, bodily integrity, and freedom of movement. He grants that it might protect informational privacy, but not “the criminal’s interest in avoiding punishment.”¹¹⁹ Also like Amar, Posner argues that the Fourth Amendment does not apply specially to criminal cases in part by arguing that the English cases that inspired the Fourth Amendment “were not criminal cases.”¹²⁰

Both Amar and Posner rely to some extent upon Telford Taylor, who also argued that the framers’ concern in writing the Fourth Amendment was not to prefer warrants as a protection but to limit them since they were the chief tool of abuse.¹²¹ He argues that the founders, as well as the English at the time, viewed with favor the restrictions the common law had imposed on the warrant a private person could secure to search for stolen goods.¹²² The framers, in essence, sought to confine the power of officials to the same power a private individual had in searching to recover stolen goods, including swearing an oath and particularity.¹²³ Thus, Taylor also seems to believe that in writing the Fourth Amendment, the framers saw no special harm in government searches as compared to similar private searches.

These arguments, particularly those made by Amar and Posner, ignore the thrust of history and in particular the *Wilkes* and *Entick* cases.

¹¹⁶ *Id.* at 774.

¹¹⁷ *Id.* at 775.

¹¹⁸ Posner, *supra* note 34, at 61.

¹¹⁹ *Id.* at 51.

¹²⁰ *Id.* at 52.

¹²¹ TAYLOR, *supra* note 43, at 41 (“Far from looking at the warrant as protection against unreasonable searches, they saw it as an authority for unreasonable and oppressive searches . . .”).

¹²² *Id.* at 39–41.

¹²³ *Id.* at 24–25, 39–41.

True, Wilkes, Entick, and the others sought relief in civil trespass actions, and the stirring denouncements of general warrants came in those civil actions. But to say as Posner does that the English cases that inspired the Fourth Amendment “were not criminal cases” is simply wrong. As amply demonstrated in Part I, the Wilkes cases *began* (and ended) as criminal cases. The entire series of searches and seizures that led to the civil cases arose in aid of criminal cases in which the Crown sought to stifle dissent.

Moreover, Wilkes did not have to raise the illegality of the search in his criminal case because the Attorney General dropped the case before he needed to. Had the Attorney General pursued this first criminal case against Wilkes based upon the illegally obtained evidence, one suspects the Court, given the context, might have fashioned an exclusionary rule despite some much older authority to the contrary.¹²⁴ After all, many have noted that Lord Camden invented many of the legal theories he used to find general warrants unprecedented.

In 1764 the Attorney General did pursue criminal charges against Wilkes to trial, but the government developed evidence without resort to searching Wilkes’ home. Indeed, the Attorney General made sure it did not rely upon evidence based upon illegal searches. In addition, in this second criminal case it tried Wilkes *in absentia*.¹²⁵ Thus, Posner and Amar are simply wrong to assert the Wilkes cases were not criminal.

But even when we look at the civil trespass cases arising out of the Wilkes criminal investigation, we see that the judges and juries treated them far differently from ordinary trespass cases, again contradicting the narrow view Amar and Posner take. As noted above, Posner argues that the only remedy for a police violation of the Fourth Amendment should be the same remedy against a private trespass intrusion: recovery for property damage, essentially, and the type of invasion of privacy that a private search incurs. But the Wilkes cases show that juries and judges awarded more—precisely because the defendants were government agents rather than private citizens.

For example, before the messengers arrested Wilkes, they arrested William Huckle on (wrongful) suspicion of having printed No. 45. Huckle was a journeyman printer who made only a guinea (roughly a pound) a week. He sued for trespass, assault, and imprisonment, and the jury awarded him £300—nearly a year’s salary. The defendant sought a new trial on the grounds that the award far exceeded the actual harm. Money had held him for only six hours, fed him beer and beef-steaks, and otherwise treated him “very civilly.”¹²⁶

The Court rejected the motion. It conceded that the “personal injury done him was very small” and that a jury would normally award about

¹²⁴ See CUDDIHY, *supra* note 18, at 776.

¹²⁵ See *supra* notes 67–70 and accompanying text.

¹²⁶ Huckle v. Money, (1763) 95 Eng. Rep. 768 (K.B.) 768.

£20.¹²⁷ But the Court held the exemplary damages were appropriate based upon the Crown's invasion of Huckle's fundamental liberty. Lord Chief Justice Pratt did not know what the jury had thought, but recounted what they likely did think:¹²⁸ that this was a "great point touching the liberty of the subject," that they saw a magistrate exercise arbitrary power, "violating Magna Charta, and attempting to destroy the liberty of the kingdom."¹²⁹ This arrest of Huckle, in his home, Justice Pratt concluded, "was a most daring public attack made upon the liberty of the subject."¹³⁰ These were no ordinary trespass cases and juries and judge alike treated them as part of the larger picture of criminal prosecution and persecution.

Finally, one small point: Amar argues that the Fourth Amendment plays no special role in criminal cases because it applies equally in civil cases.¹³¹ This statement is also untrue. As shown in Part IV, the Court initially held that the Fourth Amendment does not apply *at all* in certain civil cases such as administrative search cases, and even today it recognizes that the Fourth Amendment applies with greater force in criminal as opposed to administrative search cases.¹³²

III. PRIVACY VIS-À-VIS THE GOVERNMENT

The Court assesses whether police conduct constitutes a search by determining whether that conduct invades a reasonable expectation of privacy.¹³³ True, it has also recently held that a trespass alone (when the police are looking for something) counts as a search, but the privacy test will remain important for those cases that do not involve trespass.¹³⁴ This section takes that test seriously and shows why, first, privacy is a relational concept and depends upon who the other person is and, in particular, upon their purpose in gaining information or access. Second, this section then shows why privacy vis-à-vis the government is special, particularly when law enforcement conducts a search for evidence of crimes.

¹²⁷ *Id.*

¹²⁸ *Id.* at 769 ("[T]he small injury done to plaintiff, or the inconsiderableness of his station and rank in life did not appear to the jury in that striking light in which the great point of law touching the liberty of the subject appeared to them at the trial . . .").

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ See Amar, *supra* note 16, at 775.

¹³² See *infra* Part IV. See also, e.g., Frank v. Maryland, 359 U.S. 360, 366 (1959), *overruled by* Camara v. Mun. Court, 387 U.S. 523 (1967).

¹³³ Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

¹³⁴ United States v. Jones, 132 S. Ct. 945, 950–52 (2012).

A. *Privacy as Secrecy*

In order to see how privacy is relational, it is helpful to distinguish a subset of privacy that is not relational, which we can think of as really just secrecy (from everyone). Some facts or some activities we wish to keep secret or hidden from all people at almost all times. Most people close the bathroom door to urinate, defecate, or vomit, and see no purpose, generally, in letting others watch—though even with these activities people sometimes do perform them with others present for various reasons. In addition to activities, many have secrets, usually very embarrassing facts of criminal, immoral, or simply stupendously stupid behavior that they keep secret from everyone. Finally, there are times when everyone, no matter how devoted to family or friends, simply wants some time alone, in order to read, think, or relax.

Under this total secrecy view of privacy, if a person discloses the information or activity to even one other person, the information is no longer completely secret and therefore no longer private.¹³⁵ Few scholars accept this view,¹³⁶ but the Court on many occasions has. In cases such as *California v. Greenwood*,¹³⁷ discussed in the introduction, and *Florida v. Riley*,¹³⁸ if *anyone* could see what the person had deliberately hid, then it was no longer private.

Justice Marshall captured the problem with this view in his dissent in *Smith v. Maryland*, noting that “privacy is not a discrete commodity, possessed absolutely or not at all.”¹³⁹ Rather, as detailed below, we have different levels of secrecy and privacy with different people or classes of people.

B. *Privacy Is Relational*

In contrast to a notion of privacy simply as total secrecy, common sense tells us we treat privacy differently with different people and different classes of people. What we disclose to a spouse or partner we might not wish to disclose to the public or even a friend. In some of the closest relationships, people expect far less physical privacy; for example, when people have sex they usually take their clothes off, but they still expect to keep their nakedness private from everyone else. Friendships too can involve disclosures meant to be kept private; a person might confess, for example, to having racist thoughts to a very close friend but to no one else.

¹³⁵ Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087, 1105–09 (2002).

¹³⁶ *Id.* at 1108. (“A number of theorists have claimed that understanding privacy as secrecy conceptualizes privacy too narrowly.”).

¹³⁷ 486 U.S. 35, 40 (1988).

¹³⁸ 488 U.S. 445, 451 (1989).

¹³⁹ *Smith v. Maryland*, 442 U.S. 735, 749 (1979) (Marshall, J., dissenting).

Usually we rank our expectation of privacy in widening circles, expecting the least privacy with respect to those to whom we are closest. But of course there are exceptions: we might feel comfortable disclosing personal information such as financial information to anonymous institutions and the government that we would keep secret from even our closest friends. We accept that an insurance company, and some of its employees, will know very personal medical information about us because those employees do not really know us—we are anonymous to them and vice versa.

Courts in some contexts recognize that privacy is not simply secrecy, waived if the information is disclosed even to one person.¹⁴⁰ In *United States Department of Justice v. Reporters Committee for Freedom of the Press*, the Court recognized that privacy depends upon the “degree of dissemination” and does not disappear simply because it has ever been disclosed.¹⁴¹ Privacy statutes likewise recognize that when a person discloses information to one institution or government agency, it remains private vis-à-vis other persons, institutions, or government agencies. The Privacy Act of 1974, for example, prohibits an agency that has collected information for one purpose from disclosing it to other agencies for another purpose.¹⁴² Similarly, the Internal Revenue Code limits when the IRS can disclose tax return information to law enforcement.¹⁴³

1. *Scholarship*

Scholars do not agree on a definition of privacy, its scope, or even its purposes, but a great many acknowledge that privacy does not equal secrecy in the sense that disclosure to one person completely eliminates any expectation of privacy; rather, they largely agree that privacy depends upon and fosters relationships, and that privacy promotes important interests, from love and friendship to freedom, independence, and free speech. Below I will review some leading theories of privacy to show how they address relational privacy.

Several scholars including Alan Westin and Charles Fried view privacy as a question of control of information, but this control theory recognizes the importance of relationships and group privacy. Westin defines privacy thus: “Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.”¹⁴⁴ This definition treats privacy as relational: a person can choose to disclose certain information to some and not others, and that information will remain private vis-à-vis the others; in addition, he can control how the

¹⁴⁰ Strahilevitz, *supra* note 1, at 923.

¹⁴¹ U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 763–64 (1989).

¹⁴² 5 U.S.C. § 552a(b) (2006).

¹⁴³ I.R.C. § 7213(a) (2006).

¹⁴⁴ ALAN F. WESTIN, *PRIVACY AND FREEDOM* 7 (1967).

information is used, meaning he has some control over further disclosures, again helping to keep the information private from further classes of people.

Charles Fried expressly makes control of information serve the function of promoting relationships based on love, friendship, and trust. He argues that privacy gives each person secret, personal information that amounts to a kind of capital he can share with others to foster relationships.¹⁴⁵ Of course, this regime will only work if the newly shared information will still remain private among the smaller group. Robert Gerstein argues personal relationships would be impossible without privacy.¹⁴⁶ William Heffernan notes that small groups, married couples or circles of friends, can “seek[] privacy from the world” and that this group does and should have privacy as an individual would.¹⁴⁷ Ferdinand Schoeman agrees,¹⁴⁸ and Daniel Solove recognizes that one purpose of privacy is to foster intimate relationships.¹⁴⁹

Privacy can only promote these relationships if it allows its members to keep private any information or activities from further disclosure. Of course, this does not mean—as the Court has sometimes said—that such secrecy is guaranteed. Friends gossip, and what we tell our closest friends in confidence may trickle out. But usually we expect the secret to remain within one tier of a hierarchy of concentric circles of intimacy. One friend might tell another, but likely not the police—assuming of course the person is really a friend.¹⁵⁰

Even those who focus on privacy as protecting individuals recognize that it plays an important role in fostering relationships, and that privacy extends to groups as well as individuals. Edward Bloustein, for example, argues that privacy at its core protects individual dignity, but also sees it as protecting a person’s freedom to form relationships free from outside prying.¹⁵¹ Likewise Amitai Etzioni treats secrecy as the definition of privacy but allows selective secrecy that includes groups.¹⁵²

¹⁴⁵ CHARLES FRIED, *AN ANATOMY OF VALUES: PROBLEMS OF PERSONAL AND SOCIAL CHOICE* 142 (1970).

¹⁴⁶ Robert S. Gerstein, *Intimacy and Privacy*, in *PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY* 265 (Ferdinand David Schoeman ed., 1984).

¹⁴⁷ William C. Heffernan, *Fourth Amendment Privacy Interests*, 92 J. CRIM. L. & CRIMINOLOGY 1, 54 (2001).

¹⁴⁸ Ferdinand Schoeman, *Privacy and Intimate Information*, in *PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY* 403, 404 (Ferdinand David Schoeman ed., 1984) (“[P]rivacy marks out something morally significant about what it is to be a person and about what it is to have a close relationship with another.”).

¹⁴⁹ Solove, *supra* note 135, at 1121.

¹⁵⁰ I don’t mean to set up a tautology that anyone who tells the police about a friend’s criminal activity isn’t really a friend; rather, I mean that real friends rarely will tell the police unless the crime is serious.

¹⁵¹ See Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, in *PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY* 156, 187–88 (Ferdinand David Schoeman ed., 1984).

¹⁵² See AMITAI ETZIONI, *THE LIMITS OF PRIVACY* 207–08 (1999).

Confidential relationships capture this relational nature of privacy quite well. Though U.S. law generally does not consider breach of confidence to be an invasion of privacy, some such as Neil Richards and Daniel Solove have argued it should.¹⁵³ They point to England, which developed a notion of privacy that focuses on confidentiality and on “relationships rather than individuals.”¹⁵⁴ Unlike the total secrecy model some courts apply, “[c]onfidentiality is more nuanced, as it involves the sharing of information with others and the norms by which people within relationships handle each other’s personal information.”¹⁵⁵ Since confidentiality seems to fall comfortably within the concept of privacy, even if the law does not treat it that way, we may view such protections as illuminating the relational nature of this type of privacy.

Thus, though under a concept different from privacy, the law does protect confidential information, which is relational. Tort law provides for a breach of fiduciary duty or confidentiality as, for example, when a doctor discloses confidential medical information.¹⁵⁶ Federal law likewise keeps certain health information private¹⁵⁷ and protects digital information,¹⁵⁸ though spottily. Aside from damages remedy, testimonial privileges exclude from testimony secrets divulged on the basis of a confidential relationship such as marriage,¹⁵⁹ attorney–client,¹⁶⁰ doctor–client,¹⁶¹ source–reporter,¹⁶² and confessor–clergy.¹⁶³

Recent work in privacy and social science shows that as a descriptive matter we generally disclose private information to certain classes of people or institutions with the expectation that it will likely remain within a certain circle. Lior Strahilevitz, for example, has examined the social science research and concluded that people disclose private information after making an intuitive prediction that it will remain within a certain

¹⁵³ Neil M. Richards & Daniel J. Solove, *Privacy’s Other Path: Recovering the Law of Confidentiality*, 96 GEO. L.J. 123 (2007).

¹⁵⁴ *Id.* at 174.

¹⁵⁵ *Id.*

¹⁵⁶ *E.g.*, RESTATEMENT (SECOND) OF TORTS § 874 (1979); *Horne v. Patton*, 287 So. 2d 824, 829–30 (Ala. 1973).

¹⁵⁷ *See, e.g.*, Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936.

¹⁵⁸ Stored Communications Act, 18 U.S.C. § 2701–2012 (2006). This act is sometimes called the Electronic Communications Privacy Act after the larger public law of which it is a part. The Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848; *see also* Orin S. Kerr, *A User’s Guide to the Stored Communications Act, and a Legislator’s Guide to Amending It*, 72 GEO. WASH. L. REV. 1208, 1208 n.1 (2004).

¹⁵⁹ MCCORMICK ON EVIDENCE §§ 78–86 (Kenneth S. Broun et al. eds., 6th ed. 2006).

¹⁶⁰ *Id.* at §§ 87–97.

¹⁶¹ *Id.* at §§ 98–105.

¹⁶² *Id.* at § 76.2(b).

¹⁶³ *Id.*

social network and not “migrate” to another one.¹⁶⁴ One network or circle might be our friends; another might be internet advertisers; yet a third might be the government; and even within the government, the FBI would differ from the IRS or some more benign regulatory agency.

When scholars discuss privacy, they generally discuss its rationale or justification and therefore why it is valuable, but of course privacy can be abused. Richard Posner argues it often is, enabling people to hide negative information for their own gain.¹⁶⁵ Men have used the right of privacy in the home for centuries to beat their wives with too little consequence.¹⁶⁶ The Ku Klux Klan used anonymity to further their racist violence and intimidation. And criminal conspirators rely upon the privacy of telephone conversations, email, texts, and other forms of communication to facilitate often wide ranging criminal enterprises.

The abuse of privacy makes Fourth Amendment law hard, since the same privacy we grant to everyone to prosper, others use to shield criminal enterprises. Indeed, in 1928 when the Court in *Olmstead v. United States* addressed wiretapping without a warrant or probable cause, it faced an indictment of nearly 100 people for conspiracy to violate the National Prohibition Act by smuggling and distributing liquor in a vast scheme earning about \$2 million a year.¹⁶⁷ The conspirators communicated by telephone, and federal agents wiretapped months of telephone calls to break the ring.¹⁶⁸ It is no wonder on these facts that the Court held wiretapping was not a search under the Fourth Amendment and therefore required no warrant or probable cause.¹⁶⁹

Nevertheless, the Fourth Amendment must balance these needs because privacy is so important for everyone else to pursue fundamental human activities, important both personally and as part of a deliberative democracy. Privacy depends upon the relationship and the purpose of the person seeking to invade it, and the next section discusses how this relates to law enforcement intrusions.

C. *Privacy Vis-à-vis the Government*

When it comes to privacy, the government is different. It looms as a social institution and network different from other social networks, certainly different from friends and neighbors but also different from private institutions—its criminal enforcement arm so much the greater. No one likes to be pulled over or questioned by the police, even if

¹⁶⁴ See Strahilevitz, *supra* note 1, at 936, 984–85.

¹⁶⁵ See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 40 (6th ed. 2003).

¹⁶⁶ JUDITH WAGNER DECEW, *IN PURSUIT OF PRIVACY: LAW, ETHICS, AND THE RISE OF TECHNOLOGY* 81–86 (1997) (summarizing the feminist critique of the “darker side of privacy”).

¹⁶⁷ *Olmstead v. United States*, 277 U.S. 438 (1928).

¹⁶⁸ *Id.* at 455–56.

¹⁶⁹ *Id.* at 464.

completely innocent, much less have their homes or persons searched. Such stops or searches—again, imagine an innocent person—exact a mental, emotional, and dignitary toll all captured by the concept of invasion of privacy, though equally well captured by the very term used in the Fourth Amendment—“secure.”¹⁷⁰

Below, I focus on the privacy harms from a police search and divide them into those that arise directly from the intrusion itself and those that might arise later as downstream harms, usually as a result of specific facts the person conducting the search has learned. Of course they overlap, and a person might feel anguish during the search because of what he fears will result from the search. It nevertheless seems helpful to divide the harms. After identifying the harms in each of the two cases, I then show how those harms usually are different from and often greater than the harms from an equivalent search by a private individual.

1. *Intrusion Harms*

The intrusion itself, the actual police search, exacts direct contemporaneous harms such as property damage, loss of time, fear, humiliation, anger, and a feeling of oppression. The chief cause of these harms likely arises from what a police search implies: the subject of the search has committed a crime. A search almost always equals an accusation.¹⁷¹ *Jardines v. State*¹⁷² presents a perfect example. In that case, both federal and state governments deployed teams of law enforcement personnel along the street on which Jardines lived, conducting hours of surveillance of his home with several officers going onto his porch. One of those officers brought a drug-sniffing dog, which alerted, leading to a warrant and a full-blown search of the home.¹⁷³

The Florida Supreme Court held that the entire procedure constituted a search in large part because of the extensive and public deployment of officers along the street and directly in front of Jardines’ home invaded a reasonable expectation of privacy.¹⁷⁴ In examining why, the court identified the direct harms of the intrusion itself, including humiliation and embarrassment.¹⁷⁵ The search robbed the resident of his “anonymity,” an important type of privacy identified by Ruth Gavison.¹⁷⁶ The harm arose, the court said, because the conduct would be viewed by neighbors as an “official accusation of crime.”¹⁷⁷ This accusation, if

¹⁷⁰ U.S. CONST. amend. IV.

¹⁷¹ There are rare exceptions when the police search one person’s home or car to find evidence against someone else, such as *Zurcher v. Stanford Daily*, 436 U.S. 547, 551 (1978), but usually in such a case the government will proceed by subpoena or some less intrusive method than search.

¹⁷² 73 So. 3d 34 (Fla. 2011), *cert. granted*, 132 S. Ct. 995 (2012).

¹⁷³ *Id.* at 46–48.

¹⁷⁴ *Id.* at 48.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 36; Gavison, *supra* note 3, at 433.

¹⁷⁷ *Jardines*, 73 So. 3d at 48.

Jardines were aware of it, would contribute to any humiliation he might feel; even if not, it would certainly damage his reputation and count that way as a direct harm, one identified by Prosser as protected by the right to privacy.¹⁷⁸

The accusation of a crime implicit in a search also violates a person's dignity, not as a feeling, but as a description of how one is treated; "dignity" becomes shorthand for our notion of the proper relationship between the government and its treatment of the people. Bloustein most prominently described privacy as chiefly concerned with protecting individual dignity,¹⁷⁹ and numerous scholars have argued the Fourth Amendment patrols the relationship between the government and the people.¹⁸⁰ Without a Fourth Amendment or other restraining law, the police could in theory, and might often in practice, search homes without any suspicion, creating what everyone would agree would be an oppressive police state. Individual dignity and freedom do not demand *total* dignity and freedom but reasonable limits on government intrusion to protect *reasonable* dignity and freedom. The Fourth Amendment does not prohibit searches, but requires some individualized suspicion, often probable cause, and in homes, a warrant, to ensure the appropriate balance.

This type of harm to dignity protected against by a right to privacy and the Fourth Amendment differs from a mental or emotional injury. Prosser bloodlessly reduced invasion of privacy and intrusion upon seclusion into tort-like mental injuries such as anguish, and if he recognized "dignity" at all, it was as a describable and empirical state of mental well-being.¹⁸¹ Bloustein and others, by contrast, insist upon an understanding of "dignity" that captures a person's freedom and autonomy from others and, in the Fourth Amendment context, from the government.¹⁸²

A police search also exacts contemporaneous harms of humiliation and loss of dignity simply by the government's assertion or show of authority. When the police stop a person on the street or in her car and search either, or when they enter and search a home by virtue of at least the color of authority, they say, essentially, "I have power over you." To physically dominate another with government authority must present the starkest case of subjugation when done outside the protections of the

¹⁷⁸ Prosser divides the right to privacy into four categories, including the right against public disclosure of private facts, and it is this category which in his view protects reputation. William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960). One could easily characterize this more as a downstream harm that arises not directly from the intrusion upon the person's seclusion but as a result of that intrusion becoming public.

¹⁷⁹ Bloustein, *supra* note 151, at 187–88.

¹⁸⁰ See, e.g., Amsterdam, *supra* note 109, at 377; Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1083, 1088 (2002).

¹⁸¹ See Prosser, *supra* note 178, at 392, 398.

¹⁸² See Bloustein, *supra* note 151, at 187–88.

Fourth Amendment. Such action illegally invades privacy by demeaning the person subject to this power. The recent focus on stop-and-frisk policies in New York City and elsewhere highlights this notion of dignity and respect. Those stopped and searched, whether legally or not, describe feeling humiliated but also complain about what the treatment says about them as minorities: that as minorities they are afforded less respect.¹⁸³

The history of the Fourth Amendment amply supports the notion that it protects against the humiliation and loss of dignity wrought by unreasonable government searches and seizures. As noted in Part I, James Otis, in arguing against renewal of the writs of assistance in Boston, which he considered to authorize unreasonable searches, repeatedly discussed the incongruity of a lowly government official subjecting a higher-class merchant to his power. He focused repeatedly upon the indignity of the intrusion, saying “even THEIR MENIAL SERVANTS ARE ALLOWED TO LORD IT OVER US” which would make the colonists, or at least the merchant class, “the servant[s] of servants.”¹⁸⁴ He told the story of an apparently lowly Mr. Ware who had breached the Sabbath Day Acts. When the Judge sought to punish him, Ware turned the tables and used a writ to search the judge’s house “from the garret to the cellar.”¹⁸⁵ Dignity permeates Otis’s argument.

William Stuntz argued that the Fourth Amendment protects against these harms, but that we should describe them not as privacy invasions but more directly as instances of police coercion.¹⁸⁶ In his view, privacy, at least as understood by the Court, did not or could not embrace the ordinary and common problems of police coercion during criminal investigations, and that we should simply shift our view of the Fourth Amendment to adapt to the realities of modern policing.¹⁸⁷ He may be right, but it seems that a concept of privacy can address the same types of invasion by the police, especially those raised by modern surveillance techniques that rarely involve coercion such as thermal imagers, drug sniffing dogs, or even wiretaps.

Above, I simply identify the harms from a police search and how those harms contribute to our notion that the police have invaded a person’s privacy; identifying such harms can help to determine whether certain conduct should count as a search and therefore enjoy Fourth Amendment protection. But those harms alone do not tell us whether a

¹⁸³ Wendy Ruderman, *Rude or Polite, City’s Officers Leave Raw Feelings in Stops*, N.Y. TIMES, June 27, 2012, at A1 (“In interviews with 100 people who said they had been stopped by the New York police in neighborhoods where the practice is most common, many said the experience left them feeling intruded upon and humiliated.”).

¹⁸⁴ Adams, *supra* note 44, at 142.

¹⁸⁵ *Id.* at 143.

¹⁸⁶ William J. Stuntz, *Privacy’s Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1020 (1995).

¹⁸⁷ *See id.* at 1019.

search is reasonable under the Fourth Amendment. Obviously, if the police have a warrant and probable cause the interest of the person, whether innocent or guilty, in avoiding such harms as humiliation and denial of respect must give way to society's desire that the police solve crimes.

But more important, what the foregoing tells us is that our privacy in relation to the government differs from a similar invasion by anyone else. True, when a neighbor snoops or a burglar invades our home against our will, they subject us to some degree of dominion and humiliation, but nothing like the harm imposed by a government invasion based on the color of law but in violation of it. Most will knuckle under when faced with a show of authority, even those who would resist the same imposition from some private person; moreover, the law draws a distinction: in most jurisdictions residents cannot resist even illegal police entries or seizures.

2. *Downstream Harms*

The harm that results from an invasion of privacy also includes downstream harms such as embarrassment and damage to reputation. If someone breaks into your computer, learns you are bankrupt or have HIV, and posts that information on the Internet, the harm lies not in the intrusion itself but in the subsequent harm caused by the release of the information learned from the intrusion.

Scholars, particularly those who emphasize that privacy protects personal information, similarly recognize that privacy protects against the downstream harm caused by disclosure of such information. William Prosser vigorously urged that privacy could be reduced to tort-like harms such as mental distress or damaged reputation, and the disclosure-of-private-facts tort protected precisely against those harms.¹⁸⁸ Daniel Solove in his taxonomy of privacy discusses how the subsequent use of information will affect how our privacy has been invaded—though he does not identify the special harm to privacy that accrues when the government searches in aid of criminal prosecution.¹⁸⁹ He notes that “[p]eople want to protect information that makes them vulnerable or that can be used by others to harm them physically, emotionally, financially, and reputationally.”¹⁹⁰ He points to women who want to keep their addresses secret to avoid stalking or domestic abuse, police officers who fear retaliation from criminals, abortion doctors desiring to protect their families' safety, and celebrities avoiding the paparazzi.¹⁹¹

Others focused on how the immediate downstream harms such as embarrassment, scrutiny, hostility, loss of reputation or mental distress can lead to further harms by deterring people from carrying out

¹⁸⁸ Prosser, *supra* note 178, at 389.

¹⁸⁹ Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 525–52 (2006).

¹⁹⁰ *Id.* at 532.

¹⁹¹ *Id.*

fundamental activities. DeCew, for example, argues that an invasion of privacy can have a chilling effect on our behavior and thus contract our freedom; even the threat of scrutiny reduces the “control over who knows what about their lives. Such control must be understood as a basic part of the right to shape the ‘self’ that one presents to the world.”¹⁹²

Ruth Gavison likewise discusses how privacy protects the multifaceted activities that require some level of privacy: “They include a healthy, liberal, democratic, and pluralistic society; individual autonomy; mental health; creativity; and the capacity to form and maintain meaningful relations with others.”¹⁹³ These can all be threatened by the “hostile reaction” of others, including punishment from the government, if the private becomes involuntarily disclosed.¹⁹⁴ Thus, beyond the immediate downstream harms Prosser sees—such as mental anguish—lie the larger values of freedom and self-identification that the more immediate harms threaten, much as an assault not only hurts physically but reduces our freedom of movement through fear of such pain.

Case law likewise recognizes that downstream harm justifies privacy. For example, in *Whalen v. Roe*, a state statute required doctors to provide the state with the names and addresses of every patient receiving a prescription for certain potentially dangerous drugs such as opium, cocaine, methadone, and amphetamines.¹⁹⁵ The Court apparently assumed a person has some constitutional right to informational privacy and weighed the potential harms to the patients.

The first harm was inadvertent disclosure from the state health department to the public. The Court apparently understood that this type of disclosure would be very harmful, but it held that this possibility was remote.¹⁹⁶ The second harm was the disclosure to state health officials, but the Court said the information would remain within a very small number of health department employees, and the harm from disclosing the information to a few health department employees was minimal.¹⁹⁷ After all, a patient already allows her medical information to be disclosed to doctors, hospital personnel, and insurance companies—state bureaucrats were no different. The Court thus assessed not only the harm, but the harm based upon who received the information—little harm arises from a few anonymous government employees, but great harm would accrue from disclosure to the public at large. Against these limited and remote harms the Court balanced the state’s strong interest

¹⁹² DECEW, *supra* note 166, at 63–64 (quoting LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-16, at 1389–90 (2d ed. 1988)).

¹⁹³ Gavison, *supra* note 3, at 442.

¹⁹⁴ *Id.* at 448, 451.

¹⁹⁵ *Whalen v. Roe*, 429 U.S. 589, 593 & n.8 (1977).

¹⁹⁶ *Id.* at 600.

¹⁹⁷ *Id.* at 602.

in reducing illegal use of hard drugs that start off with a valid prescription and found the statute constitutional.¹⁹⁸

Other courts reviewing the protection of medical information likewise assess the potential harm that would flow from disclosure based upon the type of information, the potential for harm, and the government interest, among others.¹⁹⁹

Viewing privacy based upon the relationship to the person receiving the information and the harms disclosure ultimately produces tracks our common sense. Most of us have little concern in revealing our financial information to the government in tax returns because for most of us the information will be stored electronically and probably never reviewed by a person. Likewise, we probably have little concern that Facebook or Google retains personal information about us. But in both cases, we do become concerned when that information might be disclosed to another person who may use the information to harm us. The IRS cannot routinely disclose tax return information to the Department of Justice for prosecution, but rather can only do so upon a referral.

Empirical studies of how Americans measure privacy intrusions parallel these observations. People feel their privacy more invaded when the government conducts a search as part of a criminal investigation than when it does so for administrative reasons, such as to find housing code violations.²⁰⁰ People view the former as adversarial and the latter as merely paternalistic. In addition, people feel less put upon when they understand the objective of the search²⁰¹—and this captures the problem with arbitrary searches mentioned above.

3. *Conviction and Punishment*

In connection with a police search, the downstream harms potentially include arrest, prosecution, conviction, incarceration, and death. These harms lead drug dealers to keep their transactions private, and conspirators to form agreements in secret. They also may provide innocent people with a shield against criminal investigations that might lead to wrongful convictions. Drug dealers naturally *want* privacy for their transactions, but is such a desire legitimate, and does it *count* as a harm

¹⁹⁸ *Id.* at 603–04.

¹⁹⁹ *Fort Wayne Women's Health v. Bd. of Comm'rs*, 735 F. Supp. 2d 1045, 1060 (N.D. Ind. 2010) (adopting a balancing test “that includes: 1) ‘the type of record requested’; 2) ‘the information it does or might contain’; 3) ‘the potential for harm in any subsequent nonconsensual disclosure’; 4) ‘the injury from disclosure to the relationship in which the record was generated’; 5) ‘the adequacy of safeguards to prevent unauthorized disclosure’; 6) ‘the degree of need for access’; 7) ‘whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.’”) (quoting *Denius v. Dunlap*, 209 F.3d 944, 956 n.7 (7th Cir. 2000)).

²⁰⁰ CHRISTOPHER SLOBOGIN, *PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT* 34 & 228 nn.59–65 (2007).

²⁰¹ *Id.* at 36.

for assessing privacy? Does it matter whether the person is guilty or innocent?

If we believe along with those such as Alan Westin that privacy means control over who gets information and its use,²⁰² it seems that even criminals should enjoy some privacy rights and that the subsequent harm of criminal prosecution should count as a reason, a legitimate reason, to extend some right of privacy. On the other hand, if we view privacy largely as a tool to promote valuable activities such as love, friendship, and trust (as Fried does),²⁰³ or learning, democratic deliberation, and mental health (as Gavison does),²⁰⁴ the question becomes harder. For example, criminal conspirators develop a trusting relationship and so, if we value trust, perhaps privacy should provide some protection for such conspiracies. Use of some drugs such as marijuana, LSD, or peyote can promote learning and insight; perhaps use should also enjoy some privacy. Gavison touches on the question but largely avoids an answer, except to say that for crimes about which society is conflicted such as homosexual sex (at the time she wrote), perhaps there should be privacy since criminal sanctions would deter what at least some people consider valuable conduct.²⁰⁵

On the other hand, the legislature in defining crimes decides what activities are legitimate, and to say that punishment for a crime would deter people from committing those crimes seems precisely the point, and to premise a right to privacy on avoiding the deterrent effect of punishment seems eccentric.

The Supreme Court has generally required that the type of privacy protected by the Fourth Amendment be “legitimate,” and said at least in passing that a burglar’s desire to keep secret his activity is not legitimate.²⁰⁶ Under this view, echoed by Richard Posner, criminal conviction and punishment cannot count as the type of harm any reasonable right to privacy protects.²⁰⁷

Of course, the foregoing discussion assumes the person who seeks privacy is guilty, but what of the innocent? Does an innocent person have a reasonable expectation of privacy from a police search for fear it will turn up evidence that points, wrongly, to guilt, and will lead to arrest, prosecution, and possibly conviction? It seems the answer must be yes, at least in situations when a person reasonably fears such a mistake, and when that fear deters legitimate conduct and contracts his freedom.

To take one example, imagine a teacher, principal, or parent who has confiscated an illegal gun from a child. The person must put the gun somewhere before turning it into the police, and during that time surely

²⁰² See WESTIN, *supra* note 144, at 7.

²⁰³ FRIED, *supra* note 145, at 142.

²⁰⁴ Gavison, *supra* note 3, at 442.

²⁰⁵ *Id.* at 452–53.

²⁰⁶ *E.g.*, Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978).

²⁰⁷ Posner, *supra* note 34, at 52.

has a reasonable expectation of privacy in the area in which he has put it. If the person carries the gun to the police and a police officer stops him on the way, does he have a legitimate expectation of privacy in not being searched since he knows the search will (a) reveal a gun and (b) make him look guilty, since his explanation that he was simply taking it to the police station will sound incredible? “No, really,” one can hear the person protesting. It seems at least in this type of case, the prospect of mistaken arrest and possible prosecution do provide justification for a reasonable expectation of privacy.

Another example: the police may find evidence sufficient for an arrest even though the person is innocent. The police may arrest or at least detain someone who smells of alcohol only to discover later she is innocent. The question isn't whether the police should detain the person for further investigation; the question is whether that person has a *legitimate* interest in avoiding searches in the first place because they might lead to unnecessary detention or arrest, since the person is innocent.

In other words, an important aspect of privacy is to avoid others getting a distorted picture of us.²⁰⁸ We guard information from others not only because the information itself might accurately but negatively reflect us, but also because out of context it might lead to a negative but untrue picture. A familiar story is identity theft. Based upon faulty data, a credit agency will downgrade a person's credit because it has formed a false picture of the person based upon the spending habits of the identity thief. Thus we have a legitimate reason to keep data secret because it has such a powerful effect on our lives in the wrong hands and can distort or misrepresent.

To return to the garbage case, what the police find in a person's garbage will never be proof of guilt, merely evidence of it, and yet what appears in a person's trash, at least if she lives with others, could provide a misleading picture of that person. “[H]alf truths leading to rumor and gossip may readily flow from [an] attempt to ‘read’ contents of another's trash.”²⁰⁹ Without the barrier of probable cause, the police can develop a distorted view of a person from select pieces of information, and that person certainly has a legitimate interest in protecting the disclosure of information that would appear to incriminate an innocent person.

Above, I identified two ways in which a police search may invade privacy that differ in kind from a private search. The first, the intrusion and its attendant humiliation and denial of respect or dignity, seems to lie at the core of the Fourth Amendment as well as its history and therefore provides an appropriate and sufficient rationale for a legitimate expectation of privacy that is special in relation to the

²⁰⁸ Daniel Solove also discusses how the information disclosed will often distort our view of a person rather than enhancing it. Solove, *supra* note 189, at 533.

²⁰⁹ *State v. Morris*, 680 A.2d 90, 94 (Vt. 1996) (citing *People v. Edwards*, 458 P.2d 713, 718 (Cal. 1969)) (rejecting *Greenwood* under the Vermont Constitution).

government. The downstream harm of arrest, conviction, and punishment seem a harder case to justify, but in many of the administrative search cases the Court seems to implicitly rely at least in part on this rationale in holding that criminal searches invade privacy more than administrative ones—both searches are conducted by the government but the criminal one has far more serious potential consequences.

IV. CRIMINAL VERSUS NON-CRIMINAL SEARCHES

In the administrative search cases, everyone agrees the government agents have conducted a Fourth Amendment search, say of the home, for a housing code violation.²¹⁰ The Court must decide in these cases whether the administrative purpose means the Fourth Amendment does not apply or requires safeguards less than a warrant and probable cause, and of course it has chosen the latter path. The Fourth Amendment still applies to government searches even when administrative, but in weaker form.²¹¹

These cases present a few challenges. First, the Court struggles to distinguish searches for administrative reasons versus those for ordinary criminal law enforcement.²¹² But second, and most relevant here, the Court provides little express reason *why* the administrative searches receive less Fourth Amendment protection and, in the later cases, why the Court essentially provides more Fourth Amendment protection for criminal searches.²¹³ The Court does say that an administrative search invades privacy less than a criminal search, but it provides scant more analysis.

The big question these cases therefore present relates to the two types of privacy interest I identified in the above section: the harm from the intrusion, such as humiliation or the implicit accusation of a crime, and the downstream harm of arrest, prosecution, conviction, and punishment. In other lines of cases, the Court has essentially said these downstream harms cannot be legitimate justifications for privacy, that a desire of a criminal to avoid punishment obviously cannot strengthen any privacy claim.²¹⁴ But in the administrative search cases the Court seems at times to leave the possibility of punishment as the only distinguishing factor. That is, in many cases it is law enforcement that carries out the search in both instances, and the searches seem almost equal in the

²¹⁰ See, e.g., *Camara v. Mun. Court*, 387 U.S. 523, 534 (1967).

²¹¹ *Id.* at 538.

²¹² See, e.g., *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2081 (2011).

²¹³ See, e.g., *Camara*, 387 U.S. at 534–35 (focusing generally on government interest, but providing no specific factors for balancing interests); *Ferguson v. City of Charleston*, 532 U.S. 67, 82–84 (2001) (refusing to extend the “closely guarded category of ‘special needs’” to a hospital policy allowing for nonconsensual suspicionless drug testing since its primary purpose was to generate evidence “for law enforcement purposes”).

²¹⁴ *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978).

friction or oppressiveness they exact on the individual; the only difference seems to be the purpose of the search, to find evidence of a crime, and its likely outcome, criminal prosecution.

The inventory searches present the clearest expression of the Court's distinction between a criminal search and an administrative one, granting more protection for the former, and this section begins with those cases. It then turns to the administrative or special needs cases which are more complicated but end at the same place, with more Fourth Amendment protection for criminal investigative searches than administrative or special needs searches.

A. *Inventory Cases*

The Court has recognized that the Fourth Amendment plays a special role in searches for evidence of crimes in the inventory cases,²¹⁵ which allow police to search without a warrant or probable cause, but only if the purpose is other than criminal investigation. For example, when the police arrest someone and impound his car, they may conduct an inventory search of his car and any containers in his car without probable cause or any individualized suspicion.²¹⁶ The police conduct counts as a search and the Fourth Amendment therefore applies, but based upon the police purpose—cataloging an inventory—they need neither a warrant nor probable cause (or any suspicion). But the search must truly be for inventory purposes; the police must be conducting the search to protect the owner's property, to insure against future claims of loss, or to guard against danger to the police or others.²¹⁷ They may not do so if they are searching for evidence of a crime. In arriving at this conclusion, the Court not only said that these inventory searches are an exception, but also pointed out that the Fourth Amendment relates particularly to criminal investigations: "The standard of probable cause is peculiarly related to criminal investigations, not routine, noncriminal procedures. . . . The probable-cause approach is unhelpful when analysis centers upon the reasonableness of routine administrative caretaking functions, particularly when no claim is made that the protective procedures are a subterfuge for criminal investigations."²¹⁸

Or put another way, such inventory searches need no suspicion because they are "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."²¹⁹

²¹⁵ See, e.g., *Florida v. Wells*, 495 U.S. 1 (1990); *Colorado v. Bertine*, 479 U.S. 367 (1987); *Illinois v. Lafayette*, 462 U.S. 640 (1983); *South Dakota v. Opperman*, 428 U.S. 364 (1976).

²¹⁶ *Bertine*, 479 U.S. at 371-74.

²¹⁷ *Id.*

²¹⁸ *Id.* at 371 (omission in original) (quoting *Opperman*, 428 U.S. at 370 n.5).

²¹⁹ *Id.* at 381 (Marshall, J. dissenting) (quoting *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973)) (internal quotation marks omitted).

The Court has so carefully patrolled the divide between an acceptable search for inventory and an unacceptable search for evidence of crimes that it expresses surprising hostility when the police do use such a search for criminal investigation. For example, in *Florida v. Wells*, the Court said, “an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence.”²²⁰

On the surface the inventory search cases make sense: if the police are not looking for evidence but merely securing property, they could not possibly have probable cause to believe the vehicle has evidence. But the impossibility of probable cause could just as easily lead to the opposite conclusion: the police cannot do the search at all. And the ruse language from *Wells* suggests something else is afoot, that the Court believes special restraints are necessary when the police search for evidence and that it is the Fourth Amendment that provides those restraints.

But when we try to discover why a criminal search requires these restraints, where do we get? Consider the two ways in which a police search might invade privacy, the intrusion from the search itself and downstream harms such as prosecution. The level of intrusion seems very similar. Whether the police search an impounded car for inventory or for criminal investigation, in either case, the scope of the search and its physical intrusion will be nearly identical.²²¹ In either case the suspect likely does not even know about the search until afterward and may never learn of its purpose. Likewise, the government interest cannot explain the difference. After all, the government interest in protecting the suspect’s property or guarding against future claims of loss seems meager compared to the government interest in solving crimes.²²²

The downstream harms from each search may not be that different either, since even in an inventory search the police may prosecute based on what they find. Of course, if they are searching for evidence of crime, they may be more motivated to pursue any evidence they find, but perhaps not.

Rather, it seems the invasion of privacy arises not because of downstream harms of potential prosecution and not because of the proximate intrusiveness of harms of a search conducted while the person is present. Instead, it seems the Court restrains the criminal search simply because of its purpose. Certain purposes are invalid without satisfying the Fourth Amendment.

²²⁰ *Wells*, 495 U.S. at 4.

²²¹ True, when the police search cars for drugs they may sometimes completely dismantle the car. But in most cases the search for drugs will parallel an inventory search.

²²² I put officer safety aside since most inventory cases involving cars and other vehicles already impounded will not implicate officer safety.

B. Administrative, Special Needs, and Checkpoint Cases

Similarly, in what the Court sometimes calls the administrative or special needs cases, the Court also examines the government's purpose in conducting the search. For those searches furthering criminal prosecution, it requires either full Fourth Amendment protection or at least individualized suspicion; for searches furthering other goals, such as administrative regulation and safety, the Court relaxes the Fourth Amendment requirements, often eliminating any requirement of individualized suspicion.²²³

I use the term "administrative cases" broadly and generically.²²⁴ The Court has created three or possibly four types of administrative cases: (i) "administrative cases" in the narrow sense, such as a search of a home for housing code violations;²²⁵ (ii) "checkpoint cases" such as fixed traffic checkpoints for drunk drivers²²⁶ or aliens;²²⁷ (iii) "special needs" cases such as random drug tests of sensitive government employees²²⁸ or student athletes,²²⁹ and (iv) school cases, which may or may not be a subset of the special needs cases.²³⁰

But these cases all share a common trigger: before the Court will consider reducing or eliminating the warrant and probable cause requirements, the government must show that its primary purpose is other than to gather evidence of crimes for prosecution of the person

²²³ See, e.g., *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (police may establish sobriety checkpoint and briefly detain motorists without warrant or any individualized suspicion); *Camara v. Mun. Court*, 387 U.S. 523 (1967) (search of homes for housing code violations does not require individualized suspicion).

²²⁴ The term has been applied to a variety of different scenarios. See *City of Indianapolis v. Edmond*, 531 U.S. 32, 37–38 (2000) (categorizing the drug test cases as special needs, the home search cases as administrative, and the checkpoint cases as checkpoint cases); Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 255–56 (2011) (treating the cases generically as "administrative" but subdividing them into dragnet cases and special sub-population cases).

²²⁵ E.g., *Camara*, 387 U.S. 523.

²²⁶ E.g., *Sitz*, 496 U.S. 444. In dicta, the Court has recently classified the traffic checkpoint cases as separate from the special needs cases. See *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2081 (2011).

²²⁷ E.g., *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (fixed checkpoint for brief questioning without any suspicion to believe the vehicle contains illegal aliens and without warrant does not violate the Fourth Amendment).

²²⁸ E.g., *Nat'l Treasury Emps. Union v. von Raab*, 489 U.S. 656 (1989) (suspicionless and warrantless drug tests of sensitive government employees do not violate the Fourth Amendment).

²²⁹ E.g., *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (suspicionless and warrantless drug test of student athletes does not violate the Fourth Amendment).

²³⁰ Compare *id.* at 653 ("[W]e have found such 'special needs' to exist in the public school context."), with *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2369 (2009) (making no mention of "special needs" in discussing level of Fourth Amendment protection for search in school).

seized or searched.²³¹ That is, if the police simply stop cars to look for drugs, they need probable cause. But if they stop cars to get drunk drivers off the road—that is, chiefly for the purpose of promoting highway safety and not for criminal prosecution—they may stop motorists without probable cause or any suspicion. In practice the distinction may be a fine one; but the principle has become clear—the Court only allows weakened Fourth Amendment protection if the government’s purpose is “beyond the normal need for law enforcement.”²³²

Once the government establishes its purpose lies beyond ordinary criminal law enforcement, the Court will then conduct a balancing test to determine whether the search or seizure regime is reasonable.²³³ It will balance the government interest in the search (including how effective the program is) against the intrusion upon the person’s privacy. This balance will often obviate the need for a warrant or probable cause, and may reduce or eliminate individualized suspicion, as in drug-test cases and sobriety checkpoints.

Some have criticized this state of affairs. The Court itself remarked that “[i]t is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior”²³⁴—even though the Court has furthered that precise distinction. Christopher Slobogin has leveled a similar criticism: “In effect, such a conclusion means that the state must provide more protection against police abuse for those suspected of crime than for those who are not.”²³⁵ On the other hand, William Stuntz largely approved the distinction.²³⁶ Whether the Court provides enough protection in the administrative cases, I argue that it makes sense to provide some lesser degree of protection in administrative cases and, correspondingly, more in criminal cases.

Below, I sketch the development of the administrative cases to show why the Court provides stronger Fourth Amendment protection for criminal cases than for others.

²³¹ See, e.g., *Ferguson v. City of Charleston*, 532 U.S. 67, 82–83 (2001) (refusing to permit suspicionless drug testing because “the immediate objective of the searches was to generate evidence *for law enforcement purposes*”); *City of Indianapolis v. Edmond*, 531 U.S. 32, 41 (2000) (“We have never approved a checkpoint program whose primary purpose was to detect evidence of ordinary wrongdoing.”).

²³² *Edmond*, 531 U.S. 32 at 451 (quoting *Treasury Emps.*, 489 U.S. at 665) (internal quotation mark omitted).

²³³ *Id.* at 665–66. But sometimes the Court inexplicably jumps straight to balancing without a finding that the program serves special government needs beyond ordinary law enforcement. See *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 449–51 (1990).

²³⁴ *Camara v. Mun. Court*, 387 U.S. 523, 530 (1967).

²³⁵ Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 34 (1991).

²³⁶ Stuntz, *supra* note 186, at 1016–19.

1. *Origins*

This divide between criminal and administrative cases, with stronger Fourth Amendment protection for the former, begins with *Frank v. Maryland*.²³⁷ In *Frank*, the Court provided *no* Fourth Amendment protection to administrative searches of homes for code violations. An inspector could demand entry without a warrant or any individualized suspicion. In reaching this conclusion, the Court reasoned that the Fourth Amendment largely protected against investigations in aid of criminal prosecution, and an administrative search furthered health and safety, not criminal prosecution.²³⁸ Justice Frankfurter conceded the Fourth Amendment *also* protected privacy against intrusion, “the right to shut the door,” but administrative searches were justified when compared to this less formidable interest in privacy.²³⁹ He concluded that administrative searches were on the “periphery” of the Fourth Amendment at best.²⁴⁰

Frankfurter thus separated the Fourth Amendment into two main parts—one concerned with the general privacy to shut one’s door against anyone, and a second concerned with forming a defense against criminal prosecution. He gave substantial preference to the latter concern.

Eight years later the Court overruled *Frank*—sort of. In *Camara v. Municipal Court*, it held that the Fourth Amendment applied to administrative searches, including the warrant and probable cause requirements, but it watered these down so significantly that the divide between criminal and administrative cases remained.²⁴¹

In the eyes of *Camara*, the problem with administrative searches is the potential for arbitrary searches. As *Camara* described the problem, a housing inspector could demand entry into any home without a warrant and without any government oversight to ensure he did not abuse his authority.²⁴² He need merely show his credentials. The homeowner, in turn, had no way to know whether the municipal law authorized such a search, whether this inspector was acting pursuant to that law and therefore authorized, or what the goals and limits of the search should be. The problems, in view of the *Camara* Court, related as much to arbitrary government conduct as it did to privacy—and its solution reflected this view.²⁴³

Camara required a warrant, but the administrative agency in charge of searches could issue it.²⁴⁴ More significantly, the Court reinterpreted probable cause simply to mean that the agency had determined that the

²³⁷ 359 U.S. 360 (1959), *overruled by Camara*, 387 U.S. at 534.

²³⁸ *Id.* at 365–66.

²³⁹ *Id.*

²⁴⁰ *Id.* at 367.

²⁴¹ *Camara*, 387 U.S. at 534–38.

²⁴² *Id.* at 532.

²⁴³ *Id.* at 532–33.

²⁴⁴ *See id.* at 539–40.

area or neighborhood as a whole might have violations.²⁴⁵ That is, it eliminated any requirement of individualized suspicion, the very core of the concept of probable cause. It thus addressed one type of government abuse, arbitrary oppression, by requiring that inspectors be subject to guidelines, but it ignored the other type of abuse, searches without suspicion. But if the main abuse the Fourth Amendment guards against is criminal searches, then loosening the probable cause requirement becomes justified.

To those who opposed the *Frank* regime, *Camara* appeared at the time to be an advance, however, because at least the Court recognized and applied the Fourth Amendment to administrative searches, and provided some protection against arbitrary abuse. But when we look at what *Camara* produced in its wake, we see that it established the very same two-tiered Fourth Amendment as *Frank* had—a strong Fourth Amendment for traditional criminal cases and a far weaker one for administrative cases and the broad swath of “special needs cases” that have arisen since. As long as the government can show its primary purpose is not to collect evidence for criminal prosecution of the person searched or seized, it can potentially classify its search regime on the lower administrative search tier, with a watered down Fourth Amendment requirement.

Camara established weaker protections for administrative cases in part for practical reasons, but in part because, as it noted, a criminal investigation invaded a person’s privacy more than an administrative one. “[B]ecause the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen’s privacy.”²⁴⁶

Beyond this most significant distinction, the Court also noted that the public and courts had long accepted such administrative searches as reasonable.²⁴⁷ This acceptance might stem in turn from the first reason, that such searches are not criminal, and thus might simply be a restatement of that principal distinction, or it could represent a truly independent foundation.

The Court also noted that housing code violations such as faulty wiring cannot be discerned from without, making individualized suspicion impossible.²⁴⁸ Effective enforcement therefore requires area searches without the type of probable cause premised on individual suspicion. This practical consideration later drives many of the special need doctrine cases, but it is an odd argument. After all, possession of drugs, even in large quantities, whether in cars or homes, largely defies detection from without and yet this rationale cannot support any weakening of the probable cause requirement for drug searches. As a

²⁴⁵ *See id.* at 534–39.

²⁴⁶ *Id.* at 537.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

consequence, of the reasons *Camara* provides for watering down the Fourth Amendment in administrative search cases, the main one that remains is that they are not criminal cases.

Camara required that the case be non-criminal before it would loosen Fourth Amendment strictures, but subsequent cases did not always do so. In fact, the history of the special needs cases is a tug of war between factions on the Court—one faction sought to loosen the restriction even in criminal cases and another sought to carefully cabin any loosening to non-criminal cases. Most recently, the Court has said in dicta that it might loosen Fourth Amendment restrictions even in criminal cases but not eliminate entirely individualized suspicion.²⁴⁹

2. *Traffic Checkpoints*

The traffic checkpoint cases illustrate how the Court refined its doctrine to require that the government's primary purpose be other than to gather evidence of crimes of the person searched. In particular, we can see why the Court had to reach this result by comparing two cases, *Michigan Dept. of State Police v. Sitz*²⁵⁰ and *City of Indianapolis v. Edmond*,²⁵¹ which present an almost controlled experiment—every variable is the same except for the police purpose—administrative versus criminal.

In *Sitz*, the police department established a checkpoint based upon specific guidelines to check for drunk drivers.²⁵² The Court treated the conduct as a Fourth Amendment seizure. *Sitz* argued the police must have individualized suspicion before they can stop motorists to see if they are drunk. He also argued that the Court may depart from an individual probable cause standard only when the government's program goes beyond the needs of ordinary law enforcement. The defendant borrowed this requirement from the drug testing cases.²⁵³

The Court rejected the defendant's argument that the government must have a special need beyond ordinary law enforcement, at least in the context of traffic checkpoint cases, with no analysis and merely a cite to an earlier checkpoint case.²⁵⁴ Apparently it accepted the premise that

²⁴⁹ See *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2081 (2011) (noting that *Edmond* did not ban police checkpoints even for criminal searches but only that it banned them if there was no individualized suspicion).

²⁵⁰ 496 U.S. 444 (1990).

²⁵¹ 531 U.S. 32 (2000).

²⁵² *Sitz*, 496 U.S. at 447.

²⁵³ *Id.* at 449–50 (“[W]here a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual’s privacy expectations against the Government’s interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.” (alteration in original) (quoting *Nat’l Treasury Emps. Union v. von Raab*, 489 U.S. 656, 665–66 (1989)) (internal quotation marks omitted)).

²⁵⁴ *Id.*

sobriety checkpoints *do* seek to gather evidence in support of criminal convictions, though *Sitz* itself was a civil rather than criminal case.²⁵⁵

Thus, even though the purpose may have been ordinary law enforcement, indeed, seemingly regardless of the purpose, the Court simply launched into a reasonableness, balancing inquiry without requiring any trigger to escape the normal probable cause or at least individualized suspicion requirement.²⁵⁶ In weighing the balance, it ranked the government interest in reducing traffic deaths high and the intrusion into the motorist's privacy "slight."²⁵⁷ Even though only 1.6% of those stopped were drunk, the Court considered this sufficiently effective.²⁵⁸ The program was therefore constitutional.

When the Court in *Sitz* applied the reasonableness, balancing inquiry to cases that seemingly involved straightforward law enforcement by the police, it planted a ticking time bomb. After all, the premise would swallow the Fourth Amendment, since almost any criminal law enforcement goal will outweigh the intrusions into a motorist's privacy, and since the Court required a yield only as high as 1.6%, the police could erect checkpoints to stop motorists and search for any crime.

The Court apparently realized the magnitude of its error ten years later in *Edmond*. There, the police established a traffic checkpoint based on specific guidelines just as in *Sitz*—but this time to find drugs.²⁵⁹ When motorists were randomly stopped with no suspicion, the police directed a trained dog to sniff the car. If the dog alerted for drugs, the police (now with probable cause) would search the car and arrest those found with drugs. The plaintiffs brought a class action asserting the program violated the Fourth Amendment.²⁶⁰

The problem created by *Sitz* was now upon the Court. The police had established a checkpoint simply for criminal law enforcement without satisfying the Fourth Amendment warrant or probable cause requirements and without any individualized suspicion at all. But the logic of *Sitz* would uphold the stops: after all, drug distribution and use, along with the associated violence, represent a grave problem in the United States, and the intrusion upon the motorists was the same or even less than in *Sitz*. In *Sitz*, officers looked at drivers for signs of drunkenness and, if present, pulled them aside for further tests. Here, in *Edmond*, a

²⁵⁵ The plaintiffs had sued for declaratory relief and an injunction as Michigan drivers who regularly drove in that area. *Id.* at 448.

²⁵⁶ In his dissent, Justice Brennan hypothesized that the majority justified balancing based upon the minimal intrusion of the checkpoint, though he disagreed that this minimal intrusion justified abandoning any individualized suspicion requirement. *Id.* at 456–57 (Brennan, J., dissenting).

²⁵⁷ *Id.* at 451 (majority opinion).

²⁵⁸ *Id.* at 455.

²⁵⁹ *City of Indianapolis v. Edmond*, 531 U.S. 32, 35–36 (2000).

²⁶⁰ *Id.*

dog sniffed the outside of the car. Plus, the hit rate in *Edmond* was 9%,²⁶¹ far higher than the 1.6 % in *Sitz*, making the *Edmond* program far more effective.

But the Court in *Edmond* rejected the checkpoint because its primary purpose was ordinary criminal law enforcement.²⁶² It defused the ticking time bomb by pointing out the obvious—to allow the checkpoint in *Edmond* would be to allow the special needs doctrine to swallow the Fourth Amendment. The Court restored the presumption of individualized suspicion and required any departure to fall under an exception such as the special needs doctrine.²⁶³ “Special needs” is shorthand for needs beyond ordinary law enforcement—criminal law enforcement. The Court put the checkpoint cases into the framework of other special needs cases, including the administrative search cases such as *Camara* and the drug testing cases—all of which required that the government have some purpose other than law enforcement in the program, usually protecting future safety.

The Court had little trouble characterizing the checkpoint before it as ordinary law enforcement, since the police admitted they sought evidence for use in criminal prosecutions (rather than, say, simply to remove drugs from the streets and let the drivers go on their way).

Was *Edmond* therefore overruling *Sitz*? No—the Court essentially recharacterized *Sitz* as a special needs case retroactively, saying the government did not seek to arrest drunk drivers (a law enforcement motive) but rather sought to keep the highways safe by removing drunk drivers (a health and safety motive). This checkpoint program was clearly aimed at reducing the immediate hazard posed by the presence of drunk drivers on the highways, and there was an obvious connection between the imperative of highway safety and the law enforcement practice at issue.²⁶⁴

Perhaps this recharacterization involved some fine distinctions, but the Court had little choice but to erect a principled barrier to the *Sitz* principle. Its characterization of other earlier checkpoint cases similarly stretched the meaning of safety versus criminal enforcement, but again the Court had to work retroactively to retool cases whose principles could lead to the demise of the Fourth Amendment. Thus, it held that the checkpoint stops to check for driver’s licenses hypothetically approved in *Delaware v. Prouse*²⁶⁵ would be valid because they promoted highway safety rather than furthering general crime control.²⁶⁶ The *Edmond* Court now

²⁶¹ *Id.* at 34.

²⁶² *Id.* at 48.

²⁶³ *Id.* at 47. It did not necessarily restore the requirement of probable cause, however, even in ordinary law enforcement cases. See *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2081–83 (2011).

²⁶⁴ *Id.* at 43.

²⁶⁵ 440 U.S. 648, 663 (1979).

²⁶⁶ *Edmond*, 531 U.S. at 39–40.

justified the checkpoint to search for aliens in *Martinez-Fuerte* as based upon the need to protect the Nation's borders.²⁶⁷ The distinction between this goal and ordinary law enforcement seems thin, but the Court did not waver in asserting that the new rule does require that the government's "primary purpose" be something other than ordinary law enforcement.²⁶⁸

Edmond thus flatly superseded *Sitz*'s premise that the Court should start with a reasonableness inquiry in ordinary criminal cases, and restored the default requirement of individualized suspicion. Since the police stopped motorists with no suspicion, the checkpoint violated the Fourth Amendment.

3. Drug Testing

The drug testing cases followed an almost identical arc as the checkpoint cases. In the first round of cases, the Court endorsed alcohol or drug testing without individualized suspicion of sensitive Customs Service agents,²⁶⁹ railroad employees who have been in accidents,²⁷⁰ and high school student athletes.²⁷¹ In all these cases, the Court required a trigger before it would balance away the requirement of a warrant and probable cause, and in some, that trigger included the requirement that the government have a purpose other than criminal prosecution—what the Court came to dub "special needs."²⁷² For example, in the Customs Agent case, the government could not use the result of the drug testing in a criminal prosecution without the employee's consent.²⁷³ Likewise in the student athlete case, if the student tested positive the worst he faced was suspension from athletics, not criminal prosecution.²⁷⁴ In these cases, the government sought to deter drug use through measures other than criminal prosecution, and in all three the Court approved the program.

But as in the checkpoint cases, the government soon sought to use the special needs justification to escape the requirement of individualized suspicion even in an ordinary criminal law enforcement case. In *Ferguson v. City of Charleston*, a public hospital sought to address the problem of women using cocaine during their pregnancy and endangering their fetuses.²⁷⁵ At first it required drug testing of those suspected of using cocaine and referred positives for counseling and treatment. This remedy failed, and the hospital then teamed up with

²⁶⁷ *Id.* at 38.

²⁶⁸ *Edmond*, 531 U.S. at 40–42.

²⁶⁹ *Nat'l Treasury Emps. Union v. von Raab*, 489 U.S. 656 (1989) (drugs).

²⁷⁰ *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602 (1989) (alcohol).

²⁷¹ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (drugs).

²⁷² *E.g., id.* at 653; *Skinner*, 489 U.S. at 619–20; *Treasury Emps.*, 489 U.S. at 665–66 (1989).

²⁷³ *Treasury Emps.*, 489 U.S. at 663.

²⁷⁴ *Acton*, 515 U.S. at 651. It was unclear how much weight to Court put on this fact and how much it relied upon the special circumstances of students in school.

²⁷⁵ *Ferguson v. City of Charleston*, 532 U.S. 67, 70 (2001).

local prosecutors to establish a testing program that would require certain defined women who tested positive to be arrested immediately and prosecuted.²⁷⁶

The Court refused to categorize this as a special needs case and therefore would not engage in the balancing that might loosen or eliminate the warrant and individualized suspicion requirement.²⁷⁷ True, it said, the hospital sought to deter drug use as in the earlier drug testing cases, but the means it chose was criminal prosecution: “the immediate objective of the searches was to generate evidence *for law enforcement purposes*.”²⁷⁸ As in *Edmond*, the Court examined the procedure to determine whether the government’s “primary purpose” was to gather evidence for criminal prosecution.²⁷⁹ And as in *Edmond*, the Court had to push back against government conduct that sought to expand the special needs doctrine into ordinary law enforcement.

4. *Why Protect Criminals?*

As noted at the outset, the administrative cases provide more Fourth Amendment protection for criminals, or at least suspected criminals, than for those subject to non-criminal searches. I argue this dichotomy fits in line with at least an intuitive understanding that the Fourth Amendment does in fact play a special role when the government seeks evidence of crimes and when the government’s purpose is to prosecute. The Court in *Frank* flatly stated this, and the Court in *Camara* seemed to accept this basic premise.

As for more recent cases, the Court still seems to accept the premise that the Fourth Amendment must have its strongest protections at its core, criminal cases. True, the Court in *Edmond* did not say why it would impose different Fourth Amendment requirements for checkpoints with safety goals versus those with criminal enforcement goals. But by a process of elimination we can eliminate most factors that may have played a role in earlier cases. First, privacy cannot explain the difference because in both cases the intrusion upon privacy is nearly identical—a cop looking at the driver for signs of impairment versus a dog sniffing the outside of a car. Second, efficiency cannot explain the difference because the *Edmond* checkpoint was far *more* effective than the *Sitz* checkpoint—9% success versus only 1.2%.

The third basis to compare the *Sitz* and *Edmond* checkpoints is government interest, and here perhaps lies a possible explanation of the differences. In *Sitz*, the interest lies in the immediate need to remove drunk drivers from the highways to prevent the imminent harm if they continue driving. In *Edmond*, the interest in arresting those with drugs likely will not prevent any immediate harm. But this explanation runs

²⁷⁶ *Id.* at 70–72.

²⁷⁷ *Id.* at 81–84.

²⁷⁸ *Id.* at 82–83.

²⁷⁹ *Id.* at 81–83.

into a problem: the Court in *Edmond* nevertheless said that the government interest in interdicting narcotics is “of the first magnitude.”²⁸⁰ That interest, therefore, does not distinguish the *Edmond* checkpoint from the *Sitz* checkpoint as suggested above. In addition, in most special needs cases, the future harm is not imminent. The Court has found special needs for the random testing of student athletes and certain customs agents, and in neither case was there any suggestion of an imminent threat.²⁸¹

This leaves us with the final explanation: that the Fourth Amendment plays a special role in criminal law enforcement. The Court in *Edmond* seems to adopt this explanation, though not expressly. The *Edmond* Court says what matters is not only the degree of the government interest, but its nature, and concludes, “We are particularly reluctant to recognize exceptions to the general rule of individualized suspicion where governmental authorities primarily pursue their general crime control ends.”²⁸²

Finally, the *Edmond* test examines the *motives* of the police to determine their primary purpose.²⁸³ In many areas of Fourth Amendment law the Court has assiduously refused to consider police motive.²⁸⁴ That it should do so here suggests that harm to the motorist lies not only in the physical intrusion of the search or seizure itself but in the likely subsequent harms, as well as the government’s *role*. That is, if the government’s primary purpose is to seek evidence of crimes, that motive makes it more likely that a person will find himself subject to criminal prosecution as a result of the search. More important, when the government acts as prosecutor rather than merely regulator, the Fourth Amendment plays that special role in erecting a barrier against government oppression through such prosecution. The government is far less likely to oppress simply through regulation.

The most recent checkpoint case further refines the special needs doctrine by showing that the doctrine may apply even if the government pursues ordinary law enforcement goals as long as it does not pursue them against the person searched or seized. Thus, in *Illinois v. Lidster*, a person riding his bike home from a factory was hit and killed by a car.²⁸⁵ The police set up a checkpoint to stop drivers near the factory to give them a flier about the hit-and-run and to ask them if they saw anything

²⁸⁰ City of Indianapolis v. Edmond, 531 U.S. 32, 42 (2000).

²⁸¹ Vernonia Sch. Dist. 47J v. Action, 515 U.S. 646 (1995); Nat’l Treasury Emps. Union v. von Raab, 489 U.S. 656 (1989).

²⁸² *Edmond*, 531 U.S. at 43.

²⁸³ *Id.* at 47.

²⁸⁴ See, e.g., Whren v. United States, 517 U.S. 806, 809–13 (1996) (“Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”).

²⁸⁵ Illinois v. Lidster, 540 U.S. 419, 422 (2004).

that would help solve the crime. When the police stopped Lidster, they arrested him for drunk driving.²⁸⁶

Lidster argued that the checkpoint was invalid because it stopped motorists without any suspicion for the purposes of ordinary criminal law enforcement. The Court admitted that this was literally true, but that the *Edmond* formula did not apply when the target of the investigation was not the person stopped.²⁸⁷

Lidster furthers my argument that the Fourth Amendment erects a barrier against criminal investigation in aid of prosecution. After all, even if the police act to solve a crime, the Fourth Amendment provides less protection for the innocent motorist who might have information than it does for the potential target of a crime.

V. *GREENWOOD, HOFFA, ETC.*

Part II showed that privacy scholars almost all recognize, in one way or another, that privacy depends upon and furthers relationships, and that it is not an all-or-nothing concept but embraces degrees of disclosure. Our expectation of privacy, both descriptively and normatively, hinges on who wants to intrude and why. The Court also recognizes a greater invasion of privacy from criminal searches in its administrative search cases discussed in Part III.

But in several Fourth Amendment cases the Court has treated privacy as an all-or-nothing concept; this Part reviews some of those cases in detail and shows why a proper understanding of privacy would lead to a different conclusion. At least one Justice seems ready to make these changes. Justice Sotomayor wrote in concurrence this year that the Court may need to overrule *Smith* and *Miller* and treat privacy not as an all-or-nothing synonym for secrecy that is waived for the world if waived as to even one person: “I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disintegrated to Fourth Amendment protection.”²⁸⁸

A. *Garbage*

In *California v. Greenwood*, the police suspected the defendant of drug use and distribution.²⁸⁹ Without a warrant (and not relying on probable cause) the police asked the regular garbage collector to divert the defendant’s opaque garbage bags for them to search, once a week for two months. They found evidence of drug use that led to the defendant’s arrest and conviction.²⁹⁰

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 422–24.

²⁸⁸ *United States v. Jones*, 132 S. Ct. 945, 957 (2012) (Sotomayor, J., concurring).

²⁸⁹ *California v. Greenwood*, 486 U.S. 35, 37 (1988).

²⁹⁰ *Id.* at 37–38.

The Court agreed that the police must obtain a warrant based upon probable cause before searching most containers, but held that garbage bags were different—not because the homeowner had abandoned them but because society does not recognize any expectation of privacy in the contents of garbage as reasonable.²⁹¹ Members of the public, as well as the garbage collector, could inspect the garbage, and garbage left curbside is “readily accessible to animals, children, scavengers, snoops, and other members of the public.”²⁹² Since the defendant had no expectation of privacy in his garbage, the police conduct did not constitute a “search” under the Fourth Amendment.²⁹³

The Court, in other words, measured a search solely by expectation of privacy, and it measured expectation of privacy solely by the defendant’s privacy vis-à-vis the public at large. It did not address the possibility that a person’s privacy, and expectation of privacy, might be different in relation to the government than the public.

Critics of the decision largely argue that a person *does* have a reasonable expectation of privacy in their garbage as against the public at large.²⁹⁴ Justice Brennan in dissent stated the obvious—it is “contrary to commonly accepted notions of civilized behavior” to root through another’s garbage looking for private information.²⁹⁵ In fact, California law banned Greenwood’s neighbors from his garbage.²⁹⁶ These well-founded arguments would require *Greenwood* to be overruled on its own terms—though they do ignore the majority’s point that we lack an expectation of privacy as against scavengers, animals, and children.

In any event, I would analyze cases such as *Greenwood* differently. I would measure a person’s expectation of privacy not in relation to the public—or scavengers—but in relation to the government in particular. When a person gives his garbage over to the garbage collector, he does so with a certain understanding—namely, that the garbage collector will immediately mix that garbage with other garbage in a compactor and later dump it in an anonymous landfill. We do not so much abandon our garbage as dispose of it, and we dispose of it in a manner that maintains the privacy and secrecy of its contents. It is little different from sending sensitive documents to a company that shreds documents. In both cases, we relinquish our property right based on what the person who receives it will do with it. We concede privacy only to the garbage collector, and not even him since in the ordinary course the garbage will end up mixed with other garbage in a landfill.

²⁹¹ *Id.* at 41.

²⁹² *Id.* at 40 (footnotes omitted).

²⁹³ *Id.* at 39–42.

²⁹⁴ See, e.g., SLOBOGIN, *supra* note 200, at 31–34.

²⁹⁵ *Greenwood*, 486 U.S. at 45 (Brennan, J., dissenting).

²⁹⁶ See *People v. Krivda*, 5 Cal. 3d 357, 366 (1971) (discussing local ordinances forbidding tampering with trash containers).

Most states follow *Greenwood* even under their state constitutions,²⁹⁷ but several have recognized this distinction between a homeowner's garbage privacy vis-à-vis his neighbors and the police. For example, the Supreme Court of New Jersey found under its state constitution that a person has a reasonable expectation of privacy in her garbage.²⁹⁸ It sorted privacy based upon classes of people, distinguishing for example between children or parents looking for lost children and the police conducting dragnet searches of entire neighborhoods. "There is a difference between a homeless person scavenging for food and clothes, and an officer of the State scrutinizing the contents of a garbage bag for incriminating materials."²⁹⁹ Hawaii likewise reasoned that people "reasonably believe that police will not indiscriminately rummage through their trash bags."³⁰⁰

B. *The Kyllo-effect*

The principle that animates *Greenwood* is hard to dispute: "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."³⁰¹ If the statement merely means the police may scan faces in a crowd, or look through my living room from the street, perhaps we would have no reason for dispute, though even the latter example here seems to raise issues.

But the Court in *Kyllo v. United States* seemed to take the principle one step further to say that the police may not use enhanced technology "not in general public use" to spy on people in their homes.³⁰² Of course, the inverse, that the police may use enhanced technology that *is* in public use, does not follow as a matter of strict logic, but it could become a big loophole.³⁰³ That is, if and when people use thermal imaging widely, the police will be able to do the same. Again, the Court ignores the relational nature of privacy, measuring our privacy against the government by our privacy against some poorly identified subset of the public.

The principle naturally will apply to numerous types of technology. Parrot, a French company specializing in wireless devices for mobile phones, sells surveillance drones in the United States for about \$300 guided by an iPhone. They come with camera and video, and thermal

²⁹⁷ *Litchfield v. State*, 824 N.E.2d 356, 359 & n.1 (Ind. 2005) (collecting cases).

²⁹⁸ *State v. Hempele*, 576 A.2d 793 (N.J. 1990).

²⁹⁹ *Id.* at 805.

³⁰⁰ *State v. Tanaka*, 701 P.2d 1274, 1276 (Haw. 1985).

³⁰¹ *California v. Greenwood*, 486 U.S. 35, 41 (1988) (alteration in original) (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)) (internal quotation marks omitted).

³⁰² *Kyllo v. United States*, 533 U.S. 27, 40 (2001).

³⁰³ Christopher Slobogin has treated this possible loophole as a serious threat for Fourth Amendment protections against technological surveillance by the police. SLOBOGIN, *supra* note 200, at 51–53.

imaging (usually for agricultural use) is also becoming available.³⁰⁴ While not yet widespread, Parrot refers to the drone as one of its “Key Points” in future development.³⁰⁵ The increasing commercial use of drones has led the Congress to require the FAA to establish rules that would allow private drones under 4.4 pounds to fly below 400 feet.³⁰⁶

These inexpensive drones remain somewhat rudimentary and very loud—they are unlikely to sneak up on anyone.³⁰⁷ They operate best to shoot elaborate video of real estate for sale,³⁰⁸ to shoot feature movies, and to search for wildlife or game than they do to spy on neighbors. But the technology will improve, especially as drones developed for the Pentagon slowly seep into general commercial use. For example, the Pentagon has a prototype called the Hummingbird that is four inches long and weighs less than an ounce, and researchers say the size will only decrease.³⁰⁹ As the public generally begins to use these technologies as they become cheaper, the mistaken *Kyllo* principle will allow the police to use them for criminal investigations outside Fourth Amendment regulation.

C. Hoffa

In 1962 union leader Jimmy Hoffa faced trial for violating federal labor laws. A government informant posing as Hoffa’s friend joined him in his hotel room at night during the trial.³¹⁰ The government suspected Hoffa was bribing jurors in his trial, and asked the informant to be on the lookout. Hoffa did in fact make incriminating statements to the informant, who then testified to these remarks in a later trial in which Hoffa was convicted of jury tampering. Hoffa argued that the informant

³⁰⁴ Price, *supra* note 33; see also J. Bendig et al., *Introducing a Low-Cost Mini-UAV for Thermal- and Multispectral-Imaging*, 39-B1 INT’L ARCHIVES PHOTOGRAMMETRY, REMOTE SENSING & SPATIAL INFO. SCI. 345, 345 (2012), available at <http://www.int-arch-photogramm-remote-sens-spatial-inf-sci.net/XXXIX-B1/345/2012/isprsarchives-XXXIX-B1-345-2012.pdf>.

³⁰⁵ *Investor Presentation: 2011 First-Half Earnings*, PARROTCORP.COM, 7 (Sept. 2011), <http://parrotcorp.com/en/documents/q22011earningspresentation>.

³⁰⁶ FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 334, 126 Stat. 11, 76–77.

³⁰⁷ See Paul Goodhead, *Parrot AR.Drone Performance and Conclusion*, BIT-TECH.NET (July 18, 2010), <http://bit-tech.net/bits/2010/07/18/parrot-ar-drone-review/2>.

³⁰⁸ Nick Wingfield and Somini Sengupta, *Drones Set Sights on U.S. Skies*, N.Y. TIMES, Feb. 17, 2012, at A1.

³⁰⁹ Elisabeth Bumiller & Thom Shanker, *War Evolves with Drones, Some Tiny as Bugs*, N.Y. TIMES, June 19, 2011, at A1; *The Changing Shapes of Air Power*, N.Y. TIMES, June 19, 2011, at A10.

³¹⁰ *Hoffa v. United States*, 385 U.S. 293, 296 (1966) The lower court found that the informant had acted independently but the Court assumed the government had planted him for purposes of its decision. *Id.* at 298–99.

had gained entrance through deception and that the government had therefore violated the Fourth Amendment.³¹¹

The Court rejected the argument. The Court conceded that a person's hotel room is akin to his home and protected by the Fourth Amendment; it likewise held that the Fourth Amendment protects intangibles such as oral conversations.³¹² The Court did not address trespass head on, but rather said that the government conduct did not violate the *interests* trespass protects.³¹³ In phrasing that is hard to parse, the Court said Hoffa did not rely on the security of the room since he had let the informant in voluntarily and had openly told him his secrets. In the end, the Court concluded that Hoffa had merely misplaced his confidence in someone.³¹⁴

The Court reached this conclusion apparently through the following unstated logical links: if Hoffa had made incriminating statements to someone who was really a friend, and the police *later* asked that friend to relay those remarks, and the friend did, surely the police request would not count as a search. Otherwise, the police could never interview anyone in order to develop the information they would need for probable cause. Since that *could have* happened, what happened here is the same. Hoffa *thought* the informant was his friend as a fellow teamster; from Hoffa's point of view, that friend, like any friend, *could* tell the police what he said. Therefore, the two scenarios are the same.

The Court decided *Hoffa* one year before *Katz*. But even here the privacy regime has already begun to replace the trespass one. For there was likely a trespass here, and yet the Court essentially decided the case on privacy grounds. Hoffa in openly telling his supposed friend his secrets forfeited any expectation of privacy. Indeed, in subsequent cases the Court rebranded the rationale in *Hoffa* to be precisely this—he did not have a reasonable expectation of privacy³¹⁵ because he “assumed the risk” that the third party would tell others, such as the government.³¹⁶

When we view privacy as relational, we see that just because we cede privacy to a friend does not mean that we cede it vis-à-vis the government, even though the friend *could* tell the government. True, the government could ask a real friend to relay the conversation he had with Hoffa once he left the hotel room without constituting a search under the Fourth Amendment,³¹⁷ but that's not what happened in *Hoffa*. In *Hoffa*, the

³¹¹ Brief for Petitioner at 35, *Hoffa*, 385 U.S. 293 (Nos. 32–35).

³¹² *Hoffa*, 385 U.S. at 301.

³¹³ *See id.* at 302.

³¹⁴ *Id.* at 302–03.

³¹⁵ *Ferguson v. City of Charleston*, 532 U.S. 67, 94 (2001) (Scalia, J., dissenting); *Smith v. Maryland*, 442 U.S. 735, 743–44 (1979).

³¹⁶ *See Smith* at 744.

³¹⁷ *See William J. Stuntz, Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761, 793 (1989) (rationalizing *Hoffa* on the grounds that the lower courts had found that the government had not placed the informant into Hoffa's quarters but only received

Court assumed the government placed the informant in the hotel room posing as a friend. That makes all the difference, because now Hoffa's privacy relates not to a friend but to the government in the form of an informant.

D. *Smith and Miller*

This rationale from *Hoffa* and its ilk led the Court to the third-party doctrine—that any information we convey to a third party, even in confidence, loses any privacy vis-à-vis the government as well. In *United States v. Miller*, federal agents obtained by subpoena a customer's bank records from his bank.³¹⁸ The Court held the Fourth Amendment did not apply because the depositor had no reasonable expectation of privacy in the banking information; he had no privacy because he had voluntarily revealed the information to the bank. Even though he had assumed the bank would use the information for a limited purpose and treat it as confidential, he still “takes the risk” that the bank may betray that confidence.³¹⁹

The Court in *Smith v. Maryland* applied the same principle to phones: a person has no reasonable expectation of privacy in the phone numbers he dials since he voluntarily conveys this information to the phone company.³²⁰ The government therefore does not conduct a search when it obtains this information from the phone company.

Miller and *Smith* rely heavily on *Hoffa*'s principle that our friends may betray us; in the cases of *Miller* and *Smith*, even with respect to institutions that we may trust to treat our information confidentially, we take the “risk” that they may betray us. Since they *may* betray us, even if they do not and the government compels them to turn over information, as in *Miller*, we have ceded our privacy because we should have known they might have betrayed us.

A number of factors distinguish *Hoffa*, *Miller*, and *Smith*. In *Hoffa*, the friend was at the time of the communication really a government agent; the Court said that since a real friend *could have* betrayed Hoffa *after* the communication, Hoffa has no expectation of privacy even against someone who has already betrayed him and is really a government agent.³²¹ *Smith* is similar: the government there installed the pen register to obtain the phone numbers Smith dialed in real time.³²² The phone company was like a government agent, a false friend. But in *Miller*, the depositor placed his trust in a bank that was really a bank, acting in his

the information later when the informant volunteered it and suggesting it might be improper for the government to place an informant as a friend into a suspect's hotel room).

³¹⁸ *United States v. Miller*, 425 U.S. 435, 436 (1976).

³¹⁹ *Id.* at 440–43.

³²⁰ *Smith v. Maryland*, 442 U.S. 735, 745–46 (1979).

³²¹ *Hoffa v. United States*, 385 U.S. 293, 302–03 (1966).

³²² *Smith*, 442 U.S. at 737.

interest. Only later did the government compel the bank to disclose the information. But these distinctions seem not to matter greatly since the Court's principle remains the same in each: we cannot reasonably expect privacy from a friend or a bank since they could betray us at any time.

The Court's premise is correct: a friend could betray one after the fact, a bank could suddenly decide to disclose all its records to the government, but in the vast majority of cases they do not and our expectation that they will not is therefore reasonable. To make an analogy, when we draw our curtains in our homes, we create a reasonable expectation of privacy against the police using high-powered technology to look through the curtains. Now of course the cat or dog of the home might accidentally draw back the corner of the curtain, briefly revealing the interior of the home. And if that did happen the police may look in. But just because that might happen does not mean a person has lost his expectation of privacy against visual surveillance behind closed drapes. Privacy does not mean total secrecy, and the limited possibility of disclosure does not waive an otherwise reasonable expectation of privacy.

The third-party cases are troubling in themselves but also can lead to other even greater incursions. We disclose vast amounts of information to third parties that the government can possibly obtain wholesale without any Fourth Amendment regulation, though statutes do provide some spotty protection. For example, most of our routine activities now disclose to third parties the websites we visit, the identity of those we text, the email addresses of those with whom we correspond, and nearly everything we buy online such as books, music, movies, food, and medicine.³²³ These relatively early cases, *Hoffa*, *Smith*, and *Miller*, therefore will continue to dominate the regulation of technological surveillance under the Fourth Amendment.

CONCLUSION

In the past 50 years the Court has established a test for Fourth Amendment rights that will create havoc in an era of growing technological surveillance. It has put a person's reasonable expectation of privacy at the center of the Fourth Amendment, but it has ignored how privacy actually functions. It treats it as an all-or-nothing concept; if we have no expectation of or desire for privacy from a neighbor, or even a friend, then we have constructively ceded all privacy against anyone, including the government.

But privacy is relational. It varies in degree depending upon who seeks information about us and why. When the government seeks information about us for criminal prosecution, we desire and expect the most privacy.

³²³ *United States v. Jones*, 132 S. Ct. 945, 957 (2012) (Sotomayor, J., concurring).

This Article showed that the Fourth Amendment as best understood plays its greatest role in criminal investigations. It relied upon the nature of privacy, but also upon the history of the Fourth Amendment. One of the key precedents relied upon by the founding generation involved criminal cases that the King used to stifle dissent. His messengers used unreasonable searches based on general warrants with no persons or places identified to arrest and search scores of printers, journeymen, and apprentices for evidence of crimes—ultimately in persecution of one man, John Wilkes. Wilkes became a hero in the colonies, the chant “Wilkes and Liberty” ubiquitous, and the Fourth Amendment resulted. It governs searches and seizures, but we must not uproot it from the soil in which it first grew—a criminal case.

The relational nature of privacy should lead the Court to abandon its misplaced test for privacy, weighing a person’s privacy against the government by the lowest possible measure, such as a friend, or a neighbor, or worse, a scavenger or an animal. That means overruling or limiting *Greenwood*, *Hoffa*, *Miller*, and *Smith*, cases that if left standing will unleash vast government surveillance with no constitutional regulation. The concurring opinion this year in *United States v. Jones* provides hope that the Court may finally be willing to do so.