

THE COHERENCE OF  
ORTHODOX FOURTH AMENDMENT JURISPRUDENCE

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INTRODUCTION

If there is any statement to which virtually all constitutional scholars would agree, it is that orthodox Fourth Amendment jurisprudence is a theoretical mess, full of doctrinal incoherence and inconsistency, revealing not much more than the constitutionally unmoored ideological predispositions of shifting majorities of Supreme Court justices. The perception of such a mess has led to myriad suggestions ranging from how the Court might reinterpret or abandon past decisions in this area in order to purchase the greatest amount of coherence at the least cost,<sup>1</sup> to excusing the Court's failure to achieve clarity and consistency on grounds that circumstances beyond its members'

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<sup>1</sup> Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994); Ronald J. Bacigal, *Putting the People Back into the Fourth Amendment*, 62 GEO. WASH. L. REV. 359 (1994); Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473 (1991); Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468 (1985); Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199 (1993); Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down That Wrong Road Again,"* 74 N.C. L. REV. 1559 (1996); Roger Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L. J. 329 (1973); Joseph D. Grano, *Rethinking the Fourth Amendment Warrant Requirement*, 19 AM. CRIM. L. REV. 603 (1982); Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197 (1993); Richard Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49; Brian J. Serr, *Great Expectations of Privacy: A New Model for Fourth Amendment Protection*, 73 MINN. L. REV. 583 (1989); Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1 (1991); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L. J. 1 (1997); Scott E. Sundby, *"Everyman"'s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751 (1994); TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* (1969); Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L. J. 19 (1988).

control make it extremely difficult for them to produce "a single coherent analytical framework" for its decisions.<sup>2</sup> In fact, even more extreme proposals exist, such as the suggestion that theoretical coherence is not an ideal worth striving for in the externally unconstrained enterprise of constitutional adjudication.<sup>3</sup> The main thesis of this paper is that the one proposition that has united the otherwise fragmented legal community on the subject of Fourth Amendment interpretation is, to put it bluntly, false. Far from criticizing, making excuses for, or throwing up one's hands at, the Supreme Court's orthodox interpretation of the Fourth Amendment, we should, despite occasional missteps (about which more will come later), praise it for the kind of coherence that even the Court's harshest critics have found it difficult to approximate.

The Fourth Amendment states, "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."<sup>4</sup> Orthodox Fourth Amendment jurisprudence is supported by four main pillars: (1) the definition of a "search" (DS) as an infringement of a subjective expectation of privacy that society is prepared to recognize as reasonable;<sup>5</sup> (2) the Warrant Requirement (WR), according to which warrantless searches and seizures are presumptively unreasonable and hence, outside of a few "limited,"<sup>6</sup> "specifically established, and well-delineated exceptions,"<sup>7</sup> are

<sup>2</sup> Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 350 (1974) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 483 (1971)).

<sup>3</sup> Ronald J. Allen & Ross M. Rosenberg, *The Fourth Amendment and the Limits of Theory: Local Versus General Theoretical Knowledge*, 72 ST. JOHN'S L. REV. 1149, 1151 (1998) (concluding that "the Fourth Amendment does not lend itself to general theoretical knowledge, that the imposition of any particular theoretical position would likely worsen rather than improve what is being modeled (although our conclusion here is tentative and sensitive to the difficulty of proving a negative), and that instead the production of local knowledge is to be encouraged and facilitated"); see Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1738 (1995) (arguing that "there are special advantages to incompletely theorized agreements in law (and elsewhere)").

<sup>4</sup> U.S. CONST. amend. IV.

<sup>5</sup> The "reasonable expectation of privacy" test derives from Justice Harlan's concurrence in *Katz v. United States*, 389 U.S. 347, 361 (1967), in which the test is characterized as "a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"

<sup>6</sup> *United States v. Ventresca*, 380 U.S. 102, 106-07 (1964).

<sup>7</sup> *Katz*, 389 U.S. at 357.

constitutionally proscribed;<sup>8</sup> (3) the Probable Cause Requirement (PCR), according to which the same thing may be said of searches and seizures conducted in the absence of probable cause;<sup>9</sup> and (4) the Exclusionary Rule (ER), which holds that (outside of a few limited exceptions) any evidence obtained in violation of a person's rights under the Fourth Amendment may be excluded from any criminal (or quasi-criminal) case against her.<sup>10</sup>

What befuddles the Court's critics is the seeming absence of a coherent analytical framework that justifies these four pillars, along with the veritable panoply of "limited" exceptions that the Court has carved out of the last three pillars. As one of the Court's more influential critics has rightly emphasized, the requisite explanation and justification should be true to the Amendment's text, history, and plain old common sense.<sup>11</sup> Now it must be admitted that the Court has not explicitly articulated the kind of justification desired by its critics. But, on further reflection, it becomes plain (or so I shall argue) that the Court's decisions have reached a state of doctrinal equilibrium characterized by the implicit acceptance of a single, simple, clear, coherent, and, above all, philosophically respectable, position based on well-known axiomatic principles of the theory of rights.

The framework of this article is as follows. Part I will lay out a normative, rights-based theory of the Fourth Amendment that provides the best reconstruction of the Court's orthodox opinions (including its decisions establishing WR, PCR, and ER) and explain how to extract it from the constitutional text.<sup>12</sup> This reconstruction will help

<sup>8</sup> See *Jones v. United States*, 357 U.S. 493, 497-98 (1958); *Johnson v. United States*, 333 U.S. 10, 13-14 (1948); *Chapman v. United States*, 365 U.S. 610, 613-15 (1961); *Terry v. Ohio*, 392 U.S. 1, 20 (1968); *Wong Sun v. United States*, 371 U.S. 471, 481-82 (1963); *Rios v. United States*, 364 U.S. 253, 261 (1960); *Stoner v. California*, 376 U.S. 483, 486-87 (1964); *United States v. Place*, 462 U.S. 696, 700-01 (1983).

<sup>9</sup> The second clause of the Fourth Amendment explicitly states that probable cause is required for *warranted* searches. The Court extended the requirement to *warrantless* searches generally in *Wong Sun*, 371 U.S. at 479-80.

<sup>10</sup> The Court first applied the ER to federal prosecutions in *Weeks v. United States*, 232 U.S. 383 (1914), and then extended the rule to state prosecutions in *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>11</sup> Amar, *supra* note 1, at 757.

<sup>12</sup> I will not consider whether the orthodox theory coheres with "history," a question that has been ably canvassed by others (Amar, *supra* note 1; William Cuddihy & B. Carmon Hardy, *A Man's House Was Not His Castle: Origins of the Fourth Amendment to the United States Constitution*, 37 WM. & MARY Q. 371 (1980); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999); JACOB W. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT* (John Hopkins University Press 1966); LEONARD W. LEVY, *ORIGINAL*

us identify the theoretical mistakes the Court has made on its way to crafting a coherent approach to Fourth Amendment cases. Part II, will consider the various "exceptions" to WR, PCR, and ER, explaining how most (though perhaps not all) may be justified in light of the theory outlined in Part I. Part III will answer some general objections (particularly those advanced by Wasserstrom & Seidman) to the sort of normative reconstruction presented in Parts I and II. The Article will then conclude by considering how this reconstruction of Fourth Amendment theory could and should bear on the Court's future decisions on Fourth Amendment issues, particularly in light of its rejection of the orthodox approach in the recently decided case of *Wyoming v. Houghton*.

# I. A NORMATIVE, RIGHTS-BASED THEORY OF THE FOURTH AMENDMENT

Among the fundamental interests protected by the Fourth Amendment the Court has listed privacy,<sup>13</sup> liberty,<sup>14</sup> property,<sup>15</sup> dignity,<sup>16</sup> and security.<sup>17</sup> Since the loss of dignity or security consequent upon a search or seizure conducted by a government agent is a direct function of loss of privacy, the Court, when applying the Fourth

INTENT AND THE FRAMERS' CONSTITUTION (Macmillan 1988); Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925 (1997); Taylor, *supra* note 1). Despite influential opposition, there appears to be increasing convergence among historians on the proposition that the orthodox theory is not clearly inconsistent with the semantic intentions of the Framers.

<sup>13</sup> *Katz v. United States*, 389 U.S. 347, 350 (1967) ("[the Fourth] Amendment protects individual privacy against certain kinds of governmental intrusion"); *United States v. Chadwick*, 433 U.S. 1, 7 (1977) ("[the Fourth Amendment] protects people from unreasonable government intrusions into their legitimate expectations of privacy").

<sup>14</sup> *United States v. Place*, 462 U.S. 696, 708 (1983) ("the police conduct intrudes on . . . the suspect's . . . liberty interest in proceeding with his itinerary"); *United States v. Ortiz*, 422 U.S. 891, 895 (1975) ("the central concern of the Fourth Amendment is to protect liberty and privacy from arbitrary and oppressive interference by government officials").

<sup>15</sup> *Place*, 462 U.S. at 708 ("the police conduct intrudes on . . . the suspect's possessory interest in his luggage").

<sup>16</sup> *Schmerber v. California*, 384 U.S. 757, 767 (1966) ("[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State"); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 613-614 (1989) ("[t]he [Fourth] Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government or those acting at their direction").

<sup>17</sup> *Camara v. Mun. Court*, 387 U.S. 523, 528 (1967) ("[t]he basic purpose of [the Fourth] Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials"); See *Skinner*, 489 U.S. at 613-14.

Amendment, has understandably focused its efforts on protecting privacy from unreasonable searches and protecting liberty and property from unreasonable seizures. Although the Court has traditionally described the features of persons protected by the Fourth Amendment as "interests" or "expectations," these terms, at least as commonly understood, do not adequately capture the objects of the amendment's concern. Consider first the concept of an "interest." An interest of mine is a rational desire for something that is objectively good for me. But I have an interest in many things that the state may (in a vast number of cases) legitimately keep from me or prevent me from obtaining in certain ways. For example, I have a strong interest in taking possession of your Ferrari (Ferraris are my life; you couldn't care less), but if I attempt to steal it, it would be permissible (required!) for the police to prevent me from doing so. Now consider the concept of an "expectation." An expectation is no more than a future-oriented belief. My expecting to steal your Ferrari is no more than my believing that I will be successful in stealing it. But surely this is the very kind of belief that it would be permissible for the police to render false. And the reason why it would be permissible for the police to deny me the object of my interest in this case (thereby frustrating my expectations in this regard) is that I have no right to the relevant object. If we distinguish carefully among "interests," "expectations," and "rights," it is plain (from the very language employed in the amendment's first clause) that the amendment protects, not mere interests or expectations, but rights.<sup>18</sup>

Let us then say that the interests protected by the Fourth Amendment are the right to privacy, the right to liberty, and the right to property. There are four important facts about rights that are well known to moral philosophers and that, as I will argue, the Court has recognized, even if only implicitly, in its Fourth Amendment decisions.

The first important fact is that rights are not absolute: there are occasions on which the failure to respect a right is fully justified. For example, as the owner of a precious rose garden, I have the (property) right that you not trample my rose bushes. But if the house next door

<sup>18</sup> I suspect that the reason for Justice Harlan's addition of "reasonable" to describe the "expectation of privacy" he held to be protected by the Fourth Amendment in *Katz* is largely, if only implicitly, motivated by the recognition that the relevant object of Fourth Amendment protection is the right to privacy. See discussion *infra*.

to mine goes up in flames and the only way for you to save the child trapped inside is to walk through my garden, then you would be fully justified in trampling my precious bushes. Rights-theorists put the point this way: in trampling my bushes, you *justifiably infringe* a right of mine. But if you were to trample my bushes out of mere malice, your infringement of my property right would be unjustified: it would count as a right *violation*. It is important to note that the justifiability of infringing a right depends on the *way* in which it is infringed. So, for example, if it is possible for you to reach the burning building by trampling only three bushes, but you gratuitously trample the rest of my precious garden, then your infringement of my property rights is not justified.<sup>19</sup>

The second important fact is that it is an inadequate justification for the infringement of a right that doing so will result in a better overall balance of good and bad than would be achieved by any other available means.<sup>20</sup> This point is sometimes made by saying that rights are trumps<sup>21</sup> or side-constraints.<sup>22</sup> Thus, for example, even if you don't much care about losing your Ferrari, the fact that it would give me great pleasure to possess it is insufficient to justify my stealing it from you.

The third important fact is that some pairs of rights are such that the amount of good required to be produced in order to justifiably infringe the one is greater than the amount of good required to be produced in order to justifiably infringe the other. In such a case, philosophers say that the first right is more *stringent* than the second. So, for example, the fact that you will successfully rescue the child from my neighbor's burning building is enough to justify trampling my rosebushes, but it is not enough to justify running me over with your car in order to reach the house in time to save her. Thus, philosophers say that my right to not be killed is more stringent than my right that you not trample my roses.<sup>23</sup>

<sup>19</sup> JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* 98, 112 (Harvard University Press 1990).

<sup>20</sup> See *id.* at ch. 6 generally.

<sup>21</sup> See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* ch. 7 (1977); Ronald Dworkin, *Rights as Trumps*, 1 OX. J. LEGAL STUD. 177 (1981).

<sup>22</sup> See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* ch. 3 (1974).

<sup>23</sup> See THOMSON, *supra* note 19, at 153.

The fourth important fact is that rights are retained unless they are either *waived* or *forfeited*.<sup>24</sup> A right is *waived* when the right holder voluntarily divests herself of the protections it affords by consenting to (or otherwise allowing) conduct that the right would otherwise proscribe. For example, I have a right that the police not walk into my house, but it is possible for me to waive this right by consenting to a home visit. It is important to note that consent can be granted either explicitly or tacitly. In Amsterdam, there are many houses with large living room windows into which passers-by may easily peer merely by turning their heads in the relevant direction if the curtains haven't been drawn. If an owner invites me into her house to look at the furniture in her living room, she *explicitly* consents to my doing so. But she may also *tacitly* (or *implicitly*) consent to my doing so by voluntarily failing to draw her living room curtains as she sees me walk by. A right is *forfeited* as a direct consequence of violating (or being about to violate, or having already violated) someone else's (usually stringent) rights. Thus, in the standard case, if I am about to kill you (in order to steal your Ferrari), you may justifiably protect yourself by killing me if that is the only way to prevent me from killing you. The reason for this is *not* that you justifiably infringe my right to not be killed by you, but rather that, in attempting to violate your (stringent) right to not be killed by me, my right to not be killed by you is something I have thereby lost (i.e., forfeited).

In the rights-theoretical framework constituted by these important facts, it is appropriate to say that none of the (non-waived, non-forfeited) rights protected by the Fourth Amendment is absolute, that the right to privacy and the right to liberty are more stringent than the right to property (though all three rights are trumps), and consequently that it is generally impermissible for government agents to infringe these rights unless doing so is needed to bring about considerably better results than would be brought about by not doing so.

Let us now see how this framework may be deployed to provide an interpretation of the text of the Fourth Amendment. Consider the first clause:

<sup>24</sup> See *id.* at 361, ch. 14 generally. In addition to being waived or forfeited, some rights may be lost by being transferred. This is true of property rights, but not of the rights to privacy and liberty, which are (in the famous words of the Declaration of Independence) inalienable (i.e., non-transferable). But the principle of right loss through right transfer is not relevant to fourth amendment cases, in which the actual holders of the relevant property rights have already been identified.

(C1)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.<sup>25</sup>

This clause itself is conjunctive in proposing that the state be subject to two requirements, one relevant to searches, the other to seizures:

(C1-search)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches shall not be violated.<sup>26</sup>

(C1-seizure)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures shall not be violated.<sup>27</sup>

And the second of these two requirements itself contains two requirements, one concerning seizures of persons, the other concerning seizures of things that are not persons (i.e., property):

(C1-seizure-person)

The right of the people to be secure in their persons against unreasonable seizures shall not be violated.<sup>28</sup>

(C1-seizure-property)

The right of the people to be secure in their property against unreasonable seizures shall not be violated.<sup>29</sup>

There are four main questions that need to be answered if we are to obtain a proper understanding of these two principles. The first is whether the rights in question are held individually or collectively. The second question is against whom the rights in question are held. The third question concerns the proper definition of "search" and "seizure." And the fourth concerns the proper definition of "unreasonable."

Concerning the first question, it should be plain that Fourth Amendment rights are held individually. For a collectively held right is a right possessed by a collective, and it is clear that the right to be secure in one's effects against unreasonable searches is not a right possessed by a group, but rather a right possessed by the (sole) owner of

the relevant effects.<sup>30</sup> And, concerning the second, it should be plain that Fourth Amendment rights are held against agents of the state acting in their capacity as agents of the state.<sup>31</sup> For it is not the business of a *constitution*, but rather the business of other areas of civil and criminal law, to establish or protect rights held against ordinary citizens qua citizens.

Concerning the third, it should be plain that a search is an attempt to find something (typically, in the relevant contexts, evidence of civil or criminal wrongdoing, or a person suspected of civil or criminal wrongdoing), that seizing a piece of property is taking possession of it (in such a way as to be in a position to deny its owner access to it, whether temporarily or permanently), and that seizing a person is coercively preventing her from going on her way.

Concerning the fourth, if one appeals to the rights-theoretic framework discussed above and one recognizes the rights to privacy, property, and liberty to be the fundamental interests protected by the Fourth Amendment, it is plausible to suppose that a *search* is unreasonable in so far as it unjustifiably infringes (i.e., violates) a person's right to *privacy*, that the *seizure of a piece of property* is unreasonable in so far as it unjustifiably infringes (i.e., violates) a person's right to *property*, and that the *seizure of a person* is unreasonable in so far as it unjustifiably infringes (i.e., violates) a person's right to *liberty*. Correspondingly, a search or seizure would be reasonable if it either did not infringe any fundamental Fourth Amendment right or did so justifiably.

On this reading of the first clause of the Fourth Amendment, (C1-search), (C1-seizure-person), and (C1-seizure-property) may be restated as follows:

<sup>30</sup> For a different view, see Amsterdam, *supra* note 2, at 539, 372 ("I am paying only lip service to the view that the fourth amendment is a collection of portable little spheres of interest . . . [r]ather, I am treating it as a general regulation of police behavior": "[my suggestions] would find a firmer footing in the alternative conception of the amendment as a general command to government to respect the collective security of the people in their persons, houses, papers and effects, against unreasonable searches and seizures").

<sup>31</sup> See *Boyd v. United States*, 116 U.S. 616, 630 (1886) ("[t]he principles laid down in this opinion . . . apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life"); *Weeks v. United States*, 232 U.S. 383, 391-92 (1914) ("The effect of the 4th Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law.").

<sup>25</sup> U.S. CONST. amend. IV.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

(C1-search)\*

The right of each person to be secure in her person or property against attempts by state agents, acting as such, to find wrongdoers or evidence of wrongdoing in ways that unjustifiably infringe her right to privacy shall not be violated.

(C1-seizure-person)\*

The right of each person to be secure in her person against coercion by state agents, acting as such, in ways that unjustifiably infringe her right to liberty shall not be violated.

(C1-seizure-property)\*

The right of each person to be secure in her property against dispossession by state agents, acting as such, in ways that unjustifiably infringe her right to property shall not be violated.

Moreover, to say that X's right to be secure against action A by person P "shall not be violated" is just to say that "P shall not perform action A." And this enables us to translate the relevant parts of C1 into the following simple rules:

(C1-search)\*

State agents, acting as such, shall not attempt to find wrongdoers or evidence of wrongdoing in ways that unjustifiably infringe a person's right to privacy.

(C1-seizure-person)\*

State agents, acting as such, shall not coerce a person in ways that unjustifiably infringe her right to liberty.

(C1-seizure-property)\*

State agents, acting as such, shall not dispossess a person in ways that unjustifiably infringe her right to property.

I believe that the Court accepts these principles, even if only implicitly, though it has found relatively clumsy ways of signaling its adherence to them. The clumsiness is most pronounced in the case of the proper interpretation of (C1-search). The Court, following Justice Harlan's concurrence in *Katz*, now defines a "search" for purposes of the Fourth Amendment as an infringement [by a state agent acting as such] of a subjective expectation of privacy that society is prepared to recognize as reasonable.<sup>32</sup> If we substitute definiens for definiendum in (C1-search), we obtain the following rule:

<sup>32</sup> See *Katz v. United States*, 389 U.S. 347, 361 (1967); *Maryland v. Garrison*, 480 U.S. 79, 91 (1987).

(C1-search-Harlan)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable infringements by state agents acting as such of subjective expectations of privacy that society is prepared to recognize as reasonable shall not be violated.

If we simplify this statement of the rule by making clear that the relevant rights are held individually, and by replacing "houses, papers, and effects" with "property" and "expectations of privacy that society is prepared to recognize as reasonable" with "reasonable expectations of privacy," then we obtain the following:

(C1-search-Harlan)

The right of each person to be secure in her person and property against unreasonable infringements by state agents acting as such of her reasonable expectations of privacy shall not be violated.

And if we say (as we did above) that "X's right to be secure against action A by person P shall not be violated" simply translates to "P shall not perform action A," we obtain the following restatement of Harlan's proscription:

(C1-search-Harlan)

State agents acting as such shall not unreasonably infringe a person's reasonable expectation of privacy.

Now compare this formulation of (C1-search) with the formulation I claim the Court has implicitly recognized:

(C1-search)\*

State agents acting as such shall not attempt to find wrongdoers or evidence of wrongdoing in ways that unjustifiably infringe a person's right to privacy.

The two formulations are very similar. There are three differences. First, (C1-search)\* makes clear, as (C1-search-Harlan) does not, that the activities proscribed by the relevant clause of the amendment are attempts to find wrongdoers or evidence of wrongdoing (that is, searches, as colloquially understood). Second, where (C1-search-Harlan) proscribes "unreasonable" infringements, (C1-search)\* proscribes "unjustified" infringements. And third, where (C1-search-Harlan) proscribes certain sorts of infringements of a "reasonable

expectation" of privacy, (C1-search)\* proscribes certain sorts of infringements of a "right" to privacy.

Of these differences, only the last is significant. For, first, although (C1-search)\* is more specific than (C1-search-Harlan) in view of being restricted to activities that count as "searches" in the colloquial sense, the Court has never applied (C1-search-Harlan) except to cases in which "searches" (as colloquially understood) occurred. Second, it is consistent with the Court's opinions to read "unreasonable" in "unreasonable infringement" to mean the same as "unjustified."<sup>33</sup> The significance of the third difference is that there are cases in which a person retains her right to privacy despite having no reasonable expectation thereof. Thus, for example, it might happen that, for reasons related to fighting the war on terrorism, reasons accepted by the vast majority of the voting population, the state declares that henceforth the police will routinely use highly sensitive thermal imaging equipment to trace the movements of people in their homes. In this sort of scenario, there is no expectation of privacy regarding where one is in one's home that society is prepared to recognize as reasonable, but the right to privacy, not having been waived or forfeited, remains.

So which of the two interpretations of (C1-search) should the Court accept? I would argue that (C1-search)\* is truer than is (C1-search-Harlan) to the amendment's text, and makes more sense overall. In the first place, (C1-search)\* fits more neatly with the "plain meaning" of "search" in (C1-search). In contrast to the colloquial definition of "search" encapsulated in (C1-search)\*, Harlan's definition bears little recognizable relation to the commonly understood meaning of the term. This is a serious deficiency in his analysis, if only because it paves the way for idiosyncratic, ideologically motivated, and thoroughly unprincipled "definitions" of constitutional terminology generally. Secondly, as we've seen, acceptance of (C1-search)\* would enable the Court to keep most of what Harlan's new definition captures. Thirdly, there is considerable evidence that the Court has relied on Harlan's definition in large part because it wished to use it as

<sup>33</sup> See *Schmerber v. California*, 384 U.S. 757, 768 (1966) ("the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner"); *United States v. Place*, 462 U.S. 696, 709 (1983) ("the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion").

means to justify its acceptance of a principle very like (C1-search)\*.<sup>34</sup> So if there were a textually faithful way to justify (C1-search)\* without relying on Harlan's definition, there is reason to believe that the Court would embrace it. And fourthly, the Court has indicated its acceptance of (C1-seizure-person)\* and (C1-seizure-property)\* in previous holdings, which principles cohere far better with (C1-search)\* than they do with (C1-search-Harlan).<sup>35</sup>

I conclude that (C1-search)\*, (C1-seizure-person)\*, and (C1-seizure-property)\* represent the most theoretically defensible and textually accurate way of reconstructing the principles underlying orthodox Fourth Amendment jurisprudence.<sup>36</sup> The reconstruction requires the abandonment of Harlan's definition of "search," but does not require the abandonment of the principle that Harlan was (somewhat clumsily) attempting to articulate.

Recall now that orthodox Fourth Amendment jurisprudence is supported by four pillars: Harlan's definition of "search," the warrant requirement (WR), the probable cause requirement (PCR), and the exclusionary rule (ER).<sup>37</sup> Having explained how the Court might use a rights-based framework to preserve the principles that Harlan's definition was designed to articulate without accepting the definition itself, it remains to be seen whether this framework can be used to make sense of WR, PCR, and ER.

The most obvious place to look for textual support for WR and PCR is in the second clause of the Fourth Amendment (call it "C2"):

(C2) No warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>38</sup>

<sup>34</sup> (C1-search)\* proscribes unjustifiable infringements (*i.e.*, violations) of the right to privacy by state agents (acting as such), and the Court has stated quite clearly that one of the functions of the fourth amendment is to protect the right to privacy (*supra* notes 13, 14, 16, 17).

<sup>35</sup> (C1-seizure-person)\* and (C1-seizure-property)\* proscribe unjustifiable infringements (*i.e.*, violations) of the right to liberty and the right to property by state agents (acting as such), and the Court has stated quite clearly that one of the functions of the fourth amendment is to protect the rights to liberty and property (*supra* notes 14-15).

<sup>36</sup> More needs to be said about how these principles themselves are best interpreted and applied, particularly with respect to the conditions under which the rights of privacy, liberty, and property are lost and the conditions under which these rights are *justifiably* infringed. See Part III.

<sup>37</sup> See cases cited *supra* notes 5-10 and accompanying text.

<sup>38</sup> U.S. CONST. amend. IV.

But as numerous commentators have noted C2 does *not* explicitly proscribe, nor does it even establish a presumption against, warrantless searches or searches that are not supported by probable cause; rather, the function of C2 is to proscribe general executive warrants.<sup>39</sup>

It might then be suggested in defense of WR and PCR that these requirements are to be extracted from an implied logical relationship that obtains between C1 and C2. The thought here is that the Framers would not have added C2 to C1 unless they had thought that the two clauses were related in some way, and the relation suggested by the circumstances of the amendment's composition is that of logical entailment.<sup>40</sup> Making the implication of entailment explicit requires no more than the addition of "so" immediately after the "and" that conjoins the clauses:

(4A§o)            The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and so no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

<sup>39</sup> See Amar, *supra* note 1, at 771-72. In this view Amar follows Taylor, *supra* note 1.

<sup>40</sup> It is highly significant that each of the Fourth Amendment's most important proximate antecedents, namely the tenth article of the Pennsylvania constitution (adopted in 1776) and the fourteenth article of the Massachusetts Declaration of Rights (adopted in 1780), has two clauses corresponding to the clauses of the Fourth Amendment explicitly connected by the word "therefore." The tenth article of the Pennsylvania constitution reads: "That the people have a right to hold themselves, their houses, papers, possessions free from search and seizure, and therefore warrants without oaths or affirmations first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, not particularly described, are contrary to that right, and ought not to be granted." PA. CONST. of 1776, art. X. And the fourteenth article of the Massachusetts Declaration of Rights reads: "Every subject has a right to be secure from all unreasonable searches, and seizures of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to the civil officer, to make search in suspected places, to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases and with the formalities, prescribed by the laws." MA. CONST. of 1780, art. XIV. For a useful discussion of the history of the Fourth Amendment's creation and adoption, see LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 150-79 (1999).

On this reading, the *reason* for proscribing general warrants is that searches and seizures authorized by such warrants are unreasonable, and therefore violate the fundamental personal rights that the amendment is designed to protect.

This is a persuasive argument. But it does not go far enough. For while (4A§o) supports PCR, it does not support WR. After all, (4A§o) suggests no more than that searches and seizures that are not supported by probable cause are unreasonable, and thus no more than that searches and seizures must be supported by probable cause if they are to pass constitutional muster. But it is perfectly consistent with the text of (4A§o) to claim that there is nothing wrong with a warrantless search or seizure *per se*.

Where, then, if not in C2 or in the implied logical relationship between C2 and C1 shall we find adequate justification for WR? The answer is obvious: nowhere but in C1 itself. I've already argued that the most theoretically and textually plausible reading of C1 entails that the clause serves a tripartite proscriptive function: it disallows activities by state agents (acting as such) that unjustifiably infringe (i.e., violate) a person's right to privacy, liberty, or property. Now the Court has rightly been concerned, not merely with what forms of state activity the Bill of Rights proscribes, but also with how these proscriptions are to be *judicially enforced*. For it has reasoned (in my view, quite rightly) that the Bill of Rights would have no teeth, and the fundamental rights established therein would remain unprotected, in the absence of a judicially imposed enforcement mechanism. The fundamental question, then, is how best to guarantee, or significantly increase the likelihood, that state agents, acting as such, will not in fact violate the privacy, liberty, and property-rights retained by the people. The Court's answer is that these rights are best protected by prophylactic measures, one of which requires state agents, and law enforcement officials in particular, to obtain authorization from a neutral and detached magistrate (i.e., a *judicial* warrant) on the basis of probable cause before undertaking searches or seizures that infringe these rights.<sup>41</sup> So the judicial warrant required by WR is a completely different form of authorization than the (executive) warrant mentioned in C2, and the source of its justification lies elsewhere than in C2 or in the presumed logical relationship between C2 and C1. It lies rather in

<sup>41</sup> For another prophylactic rule, see *Miranda v. Arizona*, 384 U.S. 436 (1966).



the fact that WR is the best means of preventing the rights-violations proscribed by the best reconstruction of C1.<sup>42</sup>

The Court has endorsed a similar justification for the exclusionary rule (ER). For it has reasoned that some way must be found to prevent violations of WR and PCR if the rights protected by these requirements are to be respected by the state, and that the most effective prophylactic measure is one that threatens the exclusion of any evidence obtained by law enforcement officials in ways that contravene WR or PCR from the prosecution's case-in-chief in a criminal (or quasi-criminal) case against any person who was searched or whose property was either searched or seized in those ways.<sup>43</sup> So ER, like WR and PCR, is a judicially mandated enforcement mechanism grounded, not in the "words" of C1 as such, but in the fact that it is needed to protect the rights that the words of C1 were designed to protect.<sup>44</sup>

It should be noted that the Court has fallen prey to confusion in its articulation of one particular aspect of ER: the rule of standing.<sup>45</sup> The standing rule says that "suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose

<sup>42</sup> See *Jones v. United States*, 357 U.S. 493, 498 (1958) ("[w]ere federal officers free to search without a warrant merely upon probable cause to believe that certain articles were within a home, the provisions of the Fourth Amendment would become empty phrases, and the protection it affords largely nullified"); *Johnson v. United States*, 333 U.S. 10, 14 (1948) ("[a]ny assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers"); *Terry v. Ohio*, 392 U.S. 1, 21 (1968) ("[t]he scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances").

<sup>43</sup> See *Stone v. Powell*, 428 U.S. 465, 482 (1976) ("[t]he exclusionary rule was a judicially created means of effectuating the rights secured by the Fourth Amendment").

<sup>44</sup> See *id.* at 486 ("The primary justification for the exclusionary rule then is the deterrence of police conduct that violates Fourth Amendment rights. Post-Mapp decisions have established that the rule is not a personal constitutional right. [Rather], 'the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect . . . .'" (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974))). The Court had previously appealed to the "imperative of judicial integrity"—the imperative that the administration of the law should not take advantage of the fruits of illegal activity—to justify ER. See *Elkins*, 364 U.S. at 222-23; *United States v. Peltier*, 422 U.S. 531, 536-37 (1975). The Court now treats this justification as secondary. See *Stone*, 428 U.S. at 485.

<sup>45</sup> See *Alderman v. United States*, 394 U.S. 165 (1969).

rights were violated by the search itself."<sup>46</sup> Thus the rule prevents a defendant in a criminal case from successfully objecting to the introduction of damaging evidence that was obtained by means of a search or seizure that violated the Fourth Amendment rights of someone else.<sup>47</sup> But if the function of ER is, as the Court has often said, to protect Fourth Amendment rights by deterring police misconduct (in the form of refusal to abide by the terms of WR and PCR), then the standing rule is straightforwardly counterproductive. For it makes it possible for the police to acquire evidence in complete disregard of the WR and PCR when they have no intention of using it in a criminal case against the person from whom it was acquired. Now one might reply, in defense of the rule, that "the victim [of an illegal search] can and very probably will object for himself when and if it becomes important for him to do so."<sup>48</sup> But there are many situations in which the victim does not, and will never, *know* that her right to property or privacy has been violated, and thus does not have, and will never have, any basis for the kind of objection envisaged by the *Alderman* majority. It might also be replied that there is no good reason to believe that "the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth."<sup>49</sup> But this is merely to say that there is no good reason to protect Fourth Amendment rights if there is a price to be paid in the form of significant "encroachment upon the public interest." This position merely denies what I have claimed to be part of the best reconstruction of the Court's opinions, namely that the interests protected by the amendment are *rights*, in the sense of functioning as "trumps" or "side-constraints" vis-à-vis the state's pursuit of the public good.<sup>50</sup>

What one should conclude from this discussion is that, leaving aside the Court's holding in *Alderman* and its companion standing cases, the Court's orthodox Fourth Amendment jurisprudence is best understood as grounded in an interpretation of the text that itself presupposes the normative, rights-based theory described at the start of

<sup>46</sup> See, e.g., *id.* at 171-72.

<sup>47</sup> See *id.* at 174.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 175.

<sup>50</sup> See DWORKIN, *supra* note 21; Nozick, *supra* note 22.

this section. This theory, applied to the "plain meaning" of the amendment's words, justifies the Court's adoption of WR, PCR, and ER without falling into theoretical or semantic incoherence. Rather than castigating the Justices for failing to respect the fundamental exegetical virtues to which they are beholden, we should be praising them for finding a way to act largely in accordance with these virtues in a complex and difficult area of constitutional law.

## II. RULES AND EXCEPTIONS

It may be that something other than theoretical incoherence bothers the critics of orthodox Fourth Amendment jurisprudence. As one commentator complains, the Court has issued "confusing" opinions presenting "incomprehensibly complex rules"<sup>51</sup> that, at least with respect to ER, fail "to inform the police how to behave and to inform the lower courts of the basis for the exclusionary decision,"<sup>52</sup> and that WR and PCR are "largely a sham"<sup>53</sup> because "there are over twenty exceptions to the probable cause or the warrant requirement or both."<sup>54</sup> As another wryly opines:

Warrants are not required—unless they are. All searches and seizures must be grounded in probable cause—but not on Tuesdays. And unlawfully seized evidence must be excluded whenever five votes say so . . . . The result is a vast jumble of judicial pronouncements that is not merely complex and contradictory, but often perverse. Criminals go free while honest citizens are intruded upon in outrageous ways with little or no real remedy.<sup>55</sup>

These complaints may be reduced to two criticisms: first, that the rules laid down by the Court for the police and lower courts to follow are excessively complex; and second, that there is no non-arbitrary, principled way to account for the Court's retention of WR, PCR, and ER in the face of the myriad exceptions to these principles for which the Court has found sufficient justification.

The first criticism may be dealt with briefly. For, as a recent pair of commentators points out: "Fourth Amendment law is close to a

<sup>51</sup> Bradley, *supra* note 1, at 1469.

<sup>52</sup> *Id.* at 1472.

<sup>53</sup> *Id.* at 1486.

<sup>54</sup> *Id.* at 1473.

<sup>55</sup> Amar, *supra* note 1, at 757.

model of clarity. Virtually every significant aspect of human interaction has already been provided for in a relatively clear set of rules."<sup>56</sup> For whether police officers have a mind to search or seize you or your property in your house, on the street, in your car, in an open field, in a police station (after arrest), in prison, at work, in school, in an airport, at the border, at a traffic stop, and so on, the Court has made it quite clear whether it is necessary for the officers to obtain a warrant or to possess probable cause in order to pursue their investigations in ways that have the potential to infringe Fourth Amendment rights. The Court's rules do force police officers to follow a wide variety of rules in a wide variety of different cases, but they are not confusing enough to prevent these officers from learning what is required of them in the different sorts of situations in which they have a desire to search or seize.

The second criticism is not as easily disposed of. The worry here is that the Court wants to have its cake and eat it too. On the one hand, it wishes to retain WR, PCR, and ER as means of protecting against the violation of Fourth Amendment rights by state agents acting as such. And on the other hand, the sheer number and variety of exceptions suggest that the Court no longer views these requirements as controlling its Fourth Amendment decisions. The requirements are there, not to be followed, but to be ignored. In accordance with this worry, commentators have seen in the Court's opinions two uneasily co-existing methods of adjudication in the area of Fourth Amendment law. The first consists in the application of formal rules deduced from *a priori* foundational principles (in this case, the rules encapsulated in WR, PCR, and ER), the second in the abandonment of formal rules in favor of a pragmatic methodology designed to achieve socially optimal results on the basis of a "balancing" of competing interests.<sup>57</sup> Those competing interests are namely, those of the person whose Fourth Amendment rights will be infringed by the proposed type of search or seizure, and those of society at large, whether in the form of law enforcement or some other compelling social prerogative, such as public safety or economic security.

This worry is ultimately misguided. In the first place, there is nothing inherently problematic about the existence of a large number of exceptions to a given principle. For there may be many different

<sup>56</sup> Allen & Rosenberg, *supra* note 3, at 1153. See also Dripps, *supra* note 1, at 1607-08.

<sup>57</sup> See, e.g., Bradley, *supra* note 1; Cloud, *supra* note 1.

situations in which the application of a requirement designed to achieve a particular purpose will, for reasons very particular to the type of situation in question, fail to reach its intended goal. This does not in any way take away from the status of the requirement *as a general requirement*, unless the exceptions to it are vaguely defined and poorly delineated. The question, then, ought not be whether the number of exceptions suggests that the Court has essentially abandoned WR, PCR, and ER, but rather whether the exceptions to these requirements are limited, well defined, and adequately justified.

The answer to this question is that there are good reasons to think that the Court's opinions have been more than adequate to the task. Consider first WR and PCR. To these requirements, the Court has found a number of exceptions, all but one of which it has classified under five main headings of its own devising: Exigent Circumstances, Special Needs, Diminished Interests, Consent, and History. A situation may fall within more than one of these general exception-making categories, but its falling under one of these categories is sufficient for it to count as an exception to the relevant requirement(s). Under Exigent Circumstances, we find the "hot pursuit" exception,<sup>58</sup> prison searches,<sup>59</sup> and searches of burning buildings.<sup>60</sup> Under Special Needs, we find "stop and frisk,"<sup>61</sup> housing inspections,<sup>62</sup> administrative searches of regulated businesses,<sup>63</sup> searches of probationers,<sup>64</sup> searches of students,<sup>65</sup> workplace searches of public employees,<sup>66</sup> drug testing of public employees,<sup>67</sup> sobriety checkpoints,<sup>68</sup> and highway safety checkpoints.<sup>69</sup> Under Diminished Interests, we find many of the cases already canvassed under the heading of Special Needs, but also the

<sup>58</sup> *Warden v. Hayden*, 387 U.S. 294 (1967).

<sup>59</sup> *Hudson v. Palmer*, 468 U.S. 517 (1984); *Bell v. Wolfish*, 441 U.S. 520 (1979).

<sup>60</sup> *Michigan v. Tyler*, 436 U.S. 499 (1978).

<sup>61</sup> *Terry v. Ohio*, 392 U.S. 1 (1968).

<sup>62</sup> *Camara v. Mun. Court*, 387 U.S. 523 (1967).

<sup>63</sup> *United States v. Biswell*, 406 U.S. 311, 316 (1972); *New York v. Burger*, 482 U.S. 691, 701 (1987).

<sup>64</sup> *Griffin v. Wisconsin*, 483 U.S. 868 (1987).

<sup>65</sup> *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002).

<sup>66</sup> *O'Connor v. Ortega*, 480 U.S. 709 (1987).

<sup>67</sup> *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602; *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

<sup>68</sup> *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990).

<sup>69</sup> *Delaware v. Prouse*, 440 U.S. 648 (1979).

"automobile" exception,<sup>70</sup> and the taking of blood samples.<sup>71</sup> Under Consent, we find consensual searches,<sup>72</sup> and finally, under History, we find three long standing and historical exceptions, namely the "arrest" exception,<sup>73</sup> the "search incident to lawful arrest" exception,<sup>74</sup> and border searches.<sup>75</sup> The last remaining exception, one that does not fall neatly into this classification, is the very special case of inventory searches, in which the predominant consideration is the safeguarding of the searchee's own property interests.<sup>76</sup>

The manner of exception-classification that the Court has devised is not above criticism. But there are certainly features of the categorization that are well justified, at least on the supposition that the Court has been working with the rights-based theory of Fourth Amendment law elucidated in the previous section. In particular, consider Exigent Circumstances, Diminished Interests, and Consent. In a situation falling under Exigent Circumstances, state agents find themselves contemplating a warrantless search or seizure without which it would be impossible to eliminate a very real (in some cases, imminent) threat of serious harm to themselves or other persons. The existence of such an exception-creating rationale is easily justified in a framework within which Fourth Amendment rights are non-absolute side-constraints. For, as we've seen, such a framework entails that state agents are permitted to infringe Fourth Amendment rights when such infringement is required to bring about considerably better results than would be brought about by not doing so. And the paradigmatic "considerably better result," as in the case in which you trample my rose-bushes in order to save the child trapped in the burning building next door, involves the prevention of serious harm. Cases in which the Court has found Fourth Amendment interests "diminished," "weakened," or simply "non-existent" are easily described as cases in which the relevant rights are either far from stringent or waived by implicit consent. If the rights are not stringent, as in the case of relatively routine or

<sup>70</sup> *California v. Acevedo*, 500 U.S. 565 (1991); *California v. Carney*, 471 U.S. 386 (1985); *United States v. Ross*, 456 U.S. 798 (1982); *Chambers v. Maroney*, 399 U.S. 42 (1970); *Carroll v. United States*, 267 U.S. 132 (1925).

<sup>71</sup> *Schmerber v. California*, 384 U.S. 757 (1966).

<sup>72</sup> *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973).

<sup>73</sup> *United States v. Watson*, 423 U.S. 411 (1976).

<sup>74</sup> *Chimel v. California*, 395 U.S. 752, 755 (1969) (analyzing evolution of the exception).

<sup>75</sup> *United States v. Ramsey*, 431 U.S. 606, 616 (1977) (analyzing evolution of the exception).

<sup>76</sup> *South Dakota v. Opperman*, 428 U.S. 364, 369 (1976); *Illinois v. Lafayette*, 462 U.S. 640, 646 (1983); *Colorado v. Bertine*, 479 U.S. 367, 372-73 (1987).

non-intrusive searches that produce a very limited amount of information of a non-revealing nature, such as blood sample extraction or urine testing, it is sufficient for justified infringement of the rights that such infringement is needed to bring about a not insignificant quantum of good.<sup>77</sup> If the rights are implicitly waived, as in those cases in which one leaves an item of property in one's car, knowing full well that any passer-by who happens to glance in the right direction will see it, then it is impossible to infringe them, and so there is no need to protect them against possible violation by state agents.<sup>78</sup> And the same applies to cases that fall under the Consent exception, in which permission to search or seize is *explicitly* granted.

Within the rights-based framework I have described, it is less easy to justify those exceptions that fall within the Special Needs or History categories. The Court finds a state interest "special" when it lies beyond the normal need for law enforcement and makes the relevant requirement (whether WR or PCR) impracticable.<sup>79</sup> Thus, in the school search cases, the Court has said that the state's (legitimate) interest is not in ordinary law enforcement, but (a) in the safety of students and school personnel and (b) in maintaining an environment conducive to learning (without which the school would not be able to

<sup>77</sup> Whether in the form of the correct identification of criminals or in the form of public safety.

<sup>78</sup> The consent rationale for the constitutional permissibility of a search appears in *Vernonia School District 47J v. Acton*, 515 U.S. 646, 657 (1995) ("[s]omewhat like adults who choose to participate in a 'closely regulated industry,' students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy"). What I understand the Court to be saying here is that, by agreeing to participate in school athletics with the full knowledge that regular intrusions upon one's privacy are incident to such participation, students are implicitly waiving their right to privacy (at least with respect to certain types of athletics-related intrusion). As the relevant quotation from *Vernonia* indicates, the Court's reason for thinking that the business owner's expectations of privacy are "diminished" in *New York v. Burger*, 482 U.S. 691 (1987), is that, by agreeing to become the owner of a business in an industry he knew to be closely regulated, he implicitly waived his right to privacy with respect to administrative inspections. Similar reasoning would appear to be in order in the case of *Wyman v. James*, 400 U.S. 309 (1971), in which the Court upheld a statute making the provision of benefits to a welfare applicant conditional on a "home visit" by a social worker. The Court reasoned that, if the state notifies the applicant of the home visit and the applicant allows the visiting social worker into her home for that purpose, then her privacy interests have not been violated. *Id.* at 317. The reason for this, we may presume, is that by allowing the social worker into her home, the applicant waives her right to privacy with respect to information relevant to her welfare eligibility.

<sup>79</sup> See, e.g., *Vernonia*, 515 U.S. at 653; *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987); *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

fulfill its basic pedagogical function).<sup>80</sup> Thus, requiring a warrant for the search of any student would make it impossible, or at least very difficult, for the state to maintain order and safety in the classroom.<sup>81</sup> However, it remains unclear why a need's being "special" (in the relevant sense) justifies the infringement of Fourth Amendment rights. In fact, the school search cases are best classified, not within some self-standing category of Special Needs, but within other exception-making categories. For, first, the state cannot effectively protect students and school personnel unless warrantless searches of students in the absence of probable cause are permitted when there is credible evidence of a threat of serious harm (Exigent Circumstances). Second, at least in the case of urinalysis, the non-stringent nature of the relevant privacy right (coupled with the compelling state interest in preventing drug use among schoolchildren) arguably justifies the particular form of privacy infringement at issue (Diminished Interests).<sup>82</sup> And third, at least in the case of student athletes, there is reason to believe that the relevant privacy rights have been waived, in that students' agreement to participate in school-sponsored athletic activities is predicated on the knowledge that they will thereby lose a significant measure of privacy (Implicit Consent).<sup>83</sup>

Similar remarks are appropriate with respect to the proper classification of other exceptions that the Court has classified under the rubric of Special Needs. In cases involving "stop and frisk," housing inspections, probationers, sobriety checkpoints, and the drug testing of railroad and firearm-carrying customs employees, the Court has explicitly referred to the avoidance of serious threats to public safety (whether in the form of violent resistance to being stopped by the police, collapsing buildings, recidivism, drunk driving, or railroad accidents, and so on) as a part of its rationale for making exceptions to WR or PCR (Exigent Circumstances).<sup>84</sup> In some of these cases, additional exception-making characteristics are present. Thus, for example, it is reasonable to think that probationers have *forfeited* their

<sup>80</sup> See *Vernonia*, 515 U.S. at 655-56.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 656-57.

<sup>83</sup> *Id.* at 657.

<sup>84</sup> See, e.g., *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 451 (1990); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 620 (1989); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 677 (1989); *Griffin v. Wisconsin*, 483 U.S. 868, 879 (1987); *Terry v. Ohio*, 392 U.S. 1, 30 (1968); *Camara v. Mun. Court*, 387 U.S. 523, 535 (1967).

Fourth Amendment rights until such time as they have provided sufficient evidence to believe that they are unlikely to commit future crimes. We can think of this as an additional, rights-based exception-making category, call it "Forfeiture," within which routine prison searches also fall. And it is clear that non-stringent rights (and hence, Diminished Interests) are at issue in "stop and frisk," sobriety checkpoint, and drug testing cases, in which the interaction of the person searched and/or seized with law enforcement personnel is brief and the infringement of rights non-intrusive.

As for the three long-standing exceptions classified under History (the "arrest" exception, the "search incident to lawful arrest" exception, and border searches), these are best classified under the rubric of Exigent Circumstances. In *Watson*, the Court held that police who possess probable cause to believe that a particular individual has committed, is in the process of committing, or will soon commit a crime may seize that individual in a public place without a warrant.<sup>85</sup> The best justification for this exception to WR is that the costs of imposing WR in such a case, in terms of lost opportunities to catch criminals or in terms of the danger to the possible or likely victim, are intolerably high, high enough to justify infringing the arrestee's right to liberty. In this way, *Watson* resembles all of the cases falling within the category of Exigent Circumstances. In *Chimel*, the Court held that police who seize a person lawfully may, in the absence of a warrant or probable cause, search the area under the arrestee's immediate control for weapons or (destructible or concealable) evidence.<sup>86</sup> Again, a justification that refers to the real potential threat to public safety or the real potential loss of incriminating evidence posed by the application of WR or PCR to the case at hand deserves to be classified under Exigent Circumstances. And finally, in *Ramsey*, the real potential threat to public safety posed by mailed packages that could only be opened in the presence of a warrant and/or probable cause suggests that this exception to WR and PCR should also qualify under the rubric of Exigent Circumstances.

The allowable types of exception to WR and PCR justified by means of the rights-based framework described in the previous section

<sup>85</sup> *United States v. Watson*, 423 U.S. 411, 422 n.12 (1976) (noting that Model Penal Code commentary recognizes that requiring a warrant for a street arrest would be an entirely novel approach to the warrant requirement).

<sup>86</sup> *Chimel v. California*, 395 U.S. 752, 762-63 (1969).

are therefore as follows: Exigent Circumstances, Diminished Interests (either in the form of Non-Stringent Rights or Implicit Consent), Explicit Consent, and Forfeiture. Apart from the unique case of "inventory" searches (justified as a means to protect one of the very rights protected by the Fourth Amendment itself), all of the exceptions to WR and PCR may be classified within these categories. So there is no reason to worry that the number and variety of exceptions to WR and PCR suggests that the Court no longer views these requirements as controlling its Fourth Amendment decisions.

The same is true of the myriad exceptions to ER that the Court has crafted over the years. Among these exceptions we find cases in which the police rely in "good faith" on facially valid warrants later found to be illegal<sup>87</sup> or on statutes later found to be unconstitutional;<sup>88</sup> cases in which illegally obtained evidence is brought to the attention of a judge in a civil, rather than a criminal or quasi-criminal, proceeding;<sup>89</sup> cases in which the relevant evidence is obtained by private persons<sup>90</sup> or by government employees with no connection to law enforcement;<sup>91</sup> cases in which the relevant evidence is introduced to prosecute an illegally arrested person;<sup>92</sup> cases in which the relevant evidence is introduced for purposes of impeachment at trial;<sup>93</sup> cases in which the relevant evidence is used as a basis for questioning a grand jury witness;<sup>94</sup> and finally "standing" cases in which the person seeking to exclude evidence is not the person who suffered the illegal search.<sup>95</sup> Recall now that the justification for ER is not that it captures one of the rights guaranteed by the Fourth Amendment, but that it deters law enforcement personnel from searching and seizing evidence in ways that contravene WR or PCR, ways that unjustifiably infringe

<sup>87</sup> *United States v. Leon*, 468 U.S. 897, 909 (1984).

<sup>88</sup> *Illinois v. Krull*, 480 U.S. 340, 349-50 (1987).

<sup>89</sup> *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 696 (1965); *United States v. Janis*, 428 U.S. 433, 458 (1976); *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1046 (1984); *Pa. Bd. of Probation & Parole v. Scott*, 524 U.S. 357, 363 (1998).

<sup>90</sup> *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921).

<sup>91</sup> *Arizona v. Evans*, 514 U.S. 1, 14-15 (1995).

<sup>92</sup> *United States v. Crews*, 445 U.S. 463 (1980) ("An illegal arrest, without more, has never been viewed as a bar to subsequent prosecution, nor as a defense to a valid conviction."); *Gersten v. Pugh*, 420 U.S. 103, 119 (1975) ("[I]llegal arrest or detention does not void a subsequent conviction."); *Frisbie v. Collins*, 342 U.S. 519 (1952); *Ker v. Illinois*, 119 U.S. 436 (1886).

<sup>93</sup> *Walder v. United States*, 347 U.S. 62 (1954); *United States v. Havens*, 446 U.S. 620 (1980).

<sup>94</sup> *United States v. Calandra*, 414 U.S. 338 (1974).

<sup>95</sup> *Rakas v. Illinois*, 439 U.S. 128 (1978); *Alderman v. United States*, 394 U.S. 165 (1969).

Fourth Amendment rights.<sup>96</sup> Apart from the last exception, which I've already criticized,<sup>97</sup> all of these cases are such that the deterrent value of ER is either insufficiently great to warrant exclusion, insignificant, or simply non-existent. So there is no call to criticize the Court for having no principled way of retaining the ER in the wake of its exception-making decisions.

How then shall we understand the Court's numerous references to the "balancing" of competing interests as a requirement of constitutional adjudication in the area of Fourth Amendment law? The critics see in the "balancing" (cost-benefit analysis) approach implicit abandonment of WR, PCR, and ER in favor of a pragmatic, case-by-case method of decision-making. Now it is true that there would be no room for "balancing" if the rights protected by the Fourth Amendment were absolute. But they are not. Moreover, "balancing" need not be conceived of as a form of consequentialist cost-benefit analysis applied to the infringement of Fourth Amendment rights. Rather, "balancing" may be understood as a way to determine whether the benefits of abandoning formal requirements are sufficiently great to justify infringement of rights of varying degrees of stringency. And much of what the Court has included in its "balancing" enquiries involves the further question of whether the Fourth Amendment rights at issue have been forfeited or tacitly or explicitly waived. Thought of in this way, "balancing" is consistent both with the retention of WR, PCR and ER and with the non-consequentialist rights-based theory outlined above. I conclude that critics who argue that the Court's methodology of adjudication is internally inconsistent have confused consequentialist cost-benefit analysis with non-consequentialist "balancing." Within the context of a rights-based theory of Fourth Amendment law, it is possible to provide a principled, non-arbitrary justification for almost all of the exceptions to the prophylactic rules the Court has imposed as a means to protect against the violation of Fourth Amendment rights.

### III. OBJECTIONS AND REPLIES

The rights-based approach I have been defending as the best reconstruction of the theoretical foundations on which the Court has built its orthodox Fourth Amendment jurisprudence takes its inspira-

tion explicitly from moral philosophy. According to some legal theorists, this is the wrong place to look for guidance in the enterprise of constitutional interpretation. Among these theorists, Silas J. Wasserstrom and Louis Michael Seidman take the argument one step further. They claim, not only that "there are serious obstacles to using moral philosophy to justify Fourth Amendment law"<sup>98</sup> and that "it . . . is doubtful that the writings of moral philosophers provide much that is useful to settle contemporary disputes about the meaning of the Fourth Amendment,"<sup>99</sup> but also that "a rights-based approach does not mesh very well with the structure of the Fourth Amendment."<sup>100</sup> In the rest of this section, I will explain why these criticisms of normative, rights-based approaches to Fourth Amendment interpretation are unwarranted, and hope thereby to clear up the most significant misunderstandings that stand in the way of widespread acceptance of such an approach.

#### *First Objection:*

"[A] growing number of philosophers have come to doubt that the techniques of moral philosophy can ever succeed in providing a neutral ground that will allow us to escape our own beliefs and desires or, indeed, that this is even a coherent goal."<sup>101</sup>

#### *Reply:*

The philosophers whom Wasserstrom and Seidman have in mind here are Thomas Nagel, Bernard Williams, and Michael Sandel.<sup>102</sup> These three scholars accept a version of perspectivalism, according to which it is impossible to attain an Archimedean point of view on one's own moral beliefs: In constructing a moral theory, we are (to use Otto Neurath's famous metaphor) "like sailors who must rebuild their ship on the open sea, never able to dismantle it in dry-dock and to reconstruct it there out of the best materials."<sup>103</sup> As Nagel, Williams, and

<sup>98</sup> Wasserstrom & Seidman, *supra* note 1, at 59.

<sup>99</sup> *Id.* at 60.

<sup>100</sup> *Id.* at 61.

<sup>101</sup> *Id.* at 59.

<sup>102</sup> *Id.* (citing Thomas Nagel, *THE VIEW FROM NOWHERE* (1986), Bernard Williams, *ETHICS AND THE LIMITS OF PHILOSOPHY* (1985), and Michael Sandel, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982)).

<sup>103</sup> Otto Neurath, *Protocol Sentences*, in *LOGICAL POSITIVISM* 201 (A.J. Ayer ed., Free Press, 1959).

<sup>96</sup> *Alderman*, 394 U.S. at 176-77.

<sup>97</sup> *Id.*; *Rakas v. Illinois*, 439 U.S. 128 (1978).

Sandel might put it, moral theorists cannot avoid starting from their own beliefs, whether about the rightness and wrongness of particular actions or about the intuitive acceptability of principles at different levels of generality.

But the version of perspectivalism that these three philosophers accept is both weak and uncontroversial. It is consistent with belief in the objective truth or falsity of moral claims and with belief in the possibility of moral knowledge. There is a stronger, and far more controversial, version of perspectivalism, according to which the lack of an Archimedean point of view on one's moral beliefs makes it impossible to justify revision of one's moral code. But the majority of working moral philosophers, including Nagel, Williams, and Sandel, reject strong perspectivalism, even if they differ as to proper moral methodology.<sup>104</sup>

### *Second Objection:*

[E]ven if philosophers themselves were more self-confident, judges still would have to decide which philosophers to listen to. Unfortunately, moral philosophers who have thought about privacy do not speak with one voice. On the contrary, they are hopelessly divided about what privacy is; about whether it is a value in itself, or whether it is only valuable because of its consequences; about whether respect for privacy is a facet of respect for personhood; about what claims the word 'privacy' encompasses; and even about whether it describes a coherent concept at all. A judge who is determined to make use of what moral philosophy has to offer would have to evaluate and choose between these conflicting positions. Moral philosophy may offer ways to think about the choice more clearly. But it does not offer a technique for making the choice 'objectively' or in a fashion uncontaminated by the view-point of the person doing the choosing.<sup>105</sup>

### *Second Reply:*

First, concerning the point that "judges would have to pick and choose between . . . conflicting positions,"<sup>106</sup> it should be noted that judges are inescapably in the unenviable position of being required to pick and choose among competing rationales in coming to their deci-

<sup>104</sup> On Rawls's and Thomson's rejection of strong perspectivalism, see *infra* notes 110-111.

<sup>105</sup> Wasserstrom & Seidman, *supra* note 1, at 59-60 (footnotes omitted).

<sup>106</sup> *Id.*

sions. This is what we pay judges to *do*. So there is nothing especially problematic about a judge having to choose among competing philosophical theories of the Fourth Amendment. Second, concerning the fact of widespread disagreement about the content and function of the right to privacy, it is, I think, significant that most philosophers find the concept of privacy coherent even if a *definition* (in terms of necessary and sufficient conditions) is hard to come by, just as most philosophers would accept that the concept of a game is coherent, even if a definition is hard, perhaps even impossible, to come by.<sup>107</sup> What matters is that it is possible to identify paradigm cases of justified and unjustified infringements of the right to privacy, on the basis of which it is possible to identify other violations and non-violations by analogy. The real divisions among moral philosophers in this area are over fine points of conceptual analysis and philosophical elucidation that judges need not worry too much about, at least until the fanciful hypothetical scenarios philosophers imagine in order to test our moral and semantic intuitions about the nature of privacy become real. And with respect to rights-based approaches, it is worth pointing out that there is much agreement on at least the general shape of a theory of rights,<sup>108</sup> agreement that is far more significant in the area of Fourth Amendment interpretation than are the relatively minor instances of philosophical hair-splitting mentioned by Wasserstrom & Seidman. Finally, the charge that moral philosophy "does not offer a technique for making . . . choice[s] 'objectively' or in a fashion uncontaminated by the viewpoint of the person doing the choosing"<sup>109</sup> is simply unfounded, at least if this means that judges must ultimately base their choices among competing philosophical positions on mere whim or political or ideological prejudices. Moral methodology has now reached a stage of impressive sophistication, whether in the form of a search for "reflective equilibrium"<sup>110</sup> or in the form of other more foundational (less coherentist) approaches.<sup>111</sup> Indeed, if objective moral truths are ever to be found, there appears to be no better way

<sup>107</sup> See W. A. Parent, *Recent Work on the Concept of Privacy*, 20 AM. PHIL. Q. 341-55 (1983). Parent considers dozens of attempts by philosophers and legal theorists, all of whom presuppose that the concept of privacy is coherent, to define "privacy."

<sup>108</sup> E.g., that rights are not absolute, that some are less stringent than others, that a theory of rights must make room for the waiving, forfeiting, and transferring of rights. See *supra* Part II.

<sup>109</sup> Wasserstrom & Seidman, *supra* note 1, at 60.

<sup>110</sup> See JOHN RAWLS, A THEORY OF JUSTICE 20 (1971).

<sup>111</sup> See THOMSON, *supra* note 19, at 1-33.

to discover them than by relying on the techniques of moral philosophy that Wasserstrom and Seidman so breezily dismiss.

*Third Objection:*

[I]t . . . is doubtful that the writings of moral philosophers provide much that is useful to settle contemporary disputes about the meaning of the fourth amendment. Most of these writings are on an extremely high level of generality. Philosophers have argued at length about what 'privacy' means, and about the justifications for treating it as a value or a right. In contemporary legal discourse, however, it is uncontroversial that *some* value should be attached to privacy. The important issue in most fourth amendment cases is the balance that should be struck between that value and competing concerns, such as interests in effective law enforcement and in decisionmaking based upon full information. Beyond the injunction to take privacy seriously, moral philosophers have little to say about this crucial question.<sup>112</sup>

*Third Reply:*

First, the charge that moral philosophy has little to say about the particular issues raised by the particular cases confronted by judges, such as those relevant to the proper "balancing" of Fourth Amendment interests, is, upon reflection, unfair. In recent years, moral philosophers in increasing numbers have contributed to the resolution of ground-level ethical issues, such as the conditions, if any, under which abortion, suicide, euthanasia, animal experimentation, gene therapy, and the killing of non-combatants in war are morally permissible. And there is no reason to believe that philosophers could not do the same, or better, in the way of discovering the precise conditions under which Fourth Amendment rights are justifiably infringed. Moreover, were philosophers to find themselves unable to contribute to a resolution of difficult ground-level moral issues, this might simply reflect the presence of incommensurable values that make it very difficult, and perhaps even impossible, to determine a unique correct answer. And that's no skin off the philosopher's nose. Second, even if it is incapable of providing clear guidance in particular cases, moral philosophy can still help judges establish a single coherent framework within

which all Fourth Amendment questions should be decided, enabling them to narrow disagreement to matters of crucial significance and avoid unnecessary theoretical confusion and conflict. Indeed, it is difficult to conceive of any other form of intellectual endeavor that would have the resources to provide judges with the relevant sort of assistance.

*Fourth Objection:*

[A] rights-based approach does not mesh very well with the structure of the fourth amendment. The amendment, as commonly understood, does not provide an absolute shield against even the most extreme invasions of privacy and liberty. It does not establish a right to privacy that trumps competing policy concerns. Instead, the fourth amendment prohibits searches only when the likelihood that the invasion will be productive fails to justify the cost. In its most general form, this translates into an insistence that the search be reasonable. When the Court attempts to give the requirement a somewhat more determinate content, it insists that the search be supported by 'probable cause' or 'reasonable suspicion.' In either case, however, the amendment requires no more than that the invasion be cost-justified in some sense.<sup>113</sup>

*Fourth Reply:*

First, as I have taken some pains to explain, it is simply false to suggest that rights-based approaches cannot accommodate the fact that "[t]he amendment . . . does not provide an absolute shield against even the most extreme invasions of privacy and liberty."<sup>114</sup> For it is an axiom of contemporary rights-based theories that not all rights are absolute. Except for Kant (perhaps), I know of *no* rights-theorists who would deny this axiom. It may be that Wasserstrom & Seidman intend to apply this objection only to "Kantian" approaches in particular.<sup>115</sup> But in that case, their objection simply ignores the non-Kantian (or non-absolutist variants of Kantian) approaches embraced by most contemporary rights-theorists. Second, it is simply false to say that the Fourth Amendment "does not establish a right to privacy that

<sup>112</sup> Wasserstrom & Seidman, *supra* note 1, at 60-61 (footnote omitted).

<sup>113</sup> *Id.* at 61-62.

<sup>114</sup> *Id.* at 61.

<sup>115</sup> *Id.*



trumps competing policy concerns.”<sup>116</sup> For, as we’ve seen, the pillars of orthodox Fourth Amendment doctrine (WR, PCR, and ER) are nothing other than the means of protecting Fourth Amendment rights in a large number of cases in which competing policy concerns dictate that the rights should give way. It may be that Wasserstrom & Seidman think that all “trumps” must be absolute. If so, then, as I’ve just argued, their criticism does not even apply to “non-absolutist” rights-theorists. Third, the claim that the Fourth Amendment “requires no more than that [invasions of privacy] be cost-justified in some sense”<sup>117</sup> is also false. For, as I have demonstrated, the best way of understanding the “balancing” of interests that the amendment has been read to require is partly as an attempt to specify the conditions under which the infringement of rights of varying degrees of stringency are justified, and partly as an attempt to determine the conditions under which rights are forfeited or either explicitly or implicitly waived.<sup>118</sup> Understood in this way, “balancing” is better seen as an application of a non-consequentialist rights-based approach than as the application of a consequentialist cost-benefit analysis.

#### *Fifth Objection:*

The difficulty in defending a normative theory of the fourth amendment also has had an impact on the reach of fourth amendment doctrine. We have seen already how the problem of justifying a normative theory has, on occasion, led the court into a circular definition of ‘searches.’ Reasonable expectations are defined by reference to a current reality that includes the very practices under attack, rather than by reference to the kinds of expectations people would have in a normatively attractive society. It is less commonly realized that the threshold requirement of state action also serves to entrench the status quo rather than to transform it in a fashion that would comport with the normative program advocated by philosophical defenders of privacy.<sup>119</sup>

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 62.

<sup>118</sup> *Id.* at 59-60.

<sup>119</sup> *Id.* at 63-64.

#### *Reply:*

First, concerning the circularity in the Court’s definition of “search,” we’ve already seen that it constitutes a clumsy and inadequate way to capture a legitimate and non-circular principle founded on axiomatic principles of contemporary rights-based theory. And it is a major advantage of the rights-based approach that it has the resources to justify the Court’s holdings in *Katz* and its progeny without relying on *ad hoc* and circular definitions. Second, the claim that the Court’s way of specifying the reach of the Fourth Amendment “serves to entrench the status quo” is justified only on the supposition that the scope of the protected privacy interest reaches no further than what is included under the rubric of “reasonable expectations.” But, as I’ve argued, the interests protected by the Fourth Amendment are not *expectations* (reasonable or otherwise), but *rights*. There is therefore no reason whatever to believe that the best reconstruction of the Court’s Fourth Amendment jurisprudence, one founded on the concept of “right,” rather than on the concept of “interest” or “expectation,” is inherently conservative.

#### *Sixth Objection:*

Current fourth amendment doctrine is inconsistent with [a] normative theory of privacy [that consists in a “program to protect the right to be let alone”] in two ways. First, the fourth amendment imposes no constitutional obligation on the government to intervene when privacy values are at risk. Victims of private violence would be laughed out of court if they suggested that the government’s failure to protect them stated a constitutional claim . . . . Second, even if the government voluntarily chooses to act in order to control private invasions, the fourth amendment may obstruct those efforts. By outlawing the most effective techniques for controlling burglars, rapists, and muggers, the amendment, in at least some situations, results in an overall reduction in personal privacy. All this suggests that an approach treating the fourth amendment as embodying a normative theory is fundamentally misconceived.<sup>120</sup>

<sup>120</sup> *Id.* at 66.

Reply:

It is indeed true that the principles underlying the Fourth Amendment do not constitute a program of privacy-maximization. And it may indeed be that putting these principles into effect results in the hamstringing of law enforcement, and consequently in "an overall reduction in personal privacy."<sup>121</sup> But the rights-based theory on which I have claimed that the Fourth Amendment is founded is not a privacy-maximization program: it is a set of principles proscribing violations of Fourth Amendment rights (including the right to privacy) by government agents acting as such. And there is no reason to expect that the implementation of such a program would reduce violations of Fourth Amendment rights overall. So I am ready to accept that current Fourth Amendment doctrine is inconsistent with a normative theory of privacy that consists in a program to protect the right to be let alone. But it does not follow from this, nor have Wasserstrom & Seidman given us any reason to accept, that current Fourth Amendment doctrine is inconsistent with any and all normative theories of privacy, or of the Amendment more generally.

#### WHITHER THE FOURTH AMENDMENT?

In recent years, the Court has begun to distance itself from orthodox Fourth Amendment jurisprudence. Drawing on a meager and shaky line of precedent,<sup>122</sup> Justice Scalia, writing for the majority in *Wyoming v. Houghton*, proposed an entirely new constitutional method of resolving Fourth Amendment disputes. As he put it:

In determining whether a particular governmental action violates [the fourth amendment], we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed . . . . Where that inquiry yields no answer, we must evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it

<sup>121</sup> *Id.*

<sup>122</sup> See generally *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995); *California v. Hodari D.*, 499 U.S. 621, 624 (1991); *United States v. Watson*, 423 U.S. 411, 418-20 (1976); *Carroll v. United States*, 267 U.S. 132, 149 (1925). See *Wyoming v. Houghton*, 526 U.S. 295, 311 n.3 (1999) (Stevens, J., dissenting) ("To my knowledge, we have never restricted ourselves to a two-step Fourth Amendment approach wherein the privacy and governmental interests at stake must be considered only if 18th-century common law 'yields no answer' . . . . Neither the precedent cited by the Court, nor the majority's opinion in this case, mandate that approach.").

intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.<sup>123</sup>

This method of Fourth Amendment adjudication promises to overturn decades of precedent by abandoning the Court's now traditional appeals to WR and PCR, except insofar as they are consistent with the new approach, in determining the constitutionality of a search or seizure that allegedly violates Fourth Amendment rights.

There is some reason to believe the continual intellectual pummeling that the Court has received from critics within the legal academy, across the ideological spectrum, charging that its orthodox Fourth Amendment decisions are theoretically inconsistent and incoherent has contributed to the increasing appeal of alternative methods of Fourth Amendment adjudication, including Scalia's "common-law originalism." Among the charges with which Scalia agrees is the claim that the orthodox definition of a "search" is totally without textual or other legitimate constitutional support. As Scalia put it in his concurring opinion in *Minnesota v. Carter*:

The dissent believes that "[o]ur obligation to produce coherent results" requires that we ignore [the] clear text and four-century-old tradition, and apply instead the notoriously unhelpful test adopted in a "benchmark" decision that is 31 years old [i.e., *Katz*]. In my view, the only thing the past three decades have established about the *Katz* test (which has come to mean the test enunciated by Justice Harlan's separate concurrence in *Katz* . . . ) is that, unsurprisingly, those "actual (subjective) expectation[s] of privacy" "that society is prepared to recognize as 'reasonable,'" . . . bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable. When that self-indulgent test is employed (as the dissent would employ it here) to determine whether a "search or seizure" within the meaning of the Constitution has occurred (as opposed to whether that "search or seizure" is an "unreasonable" one), it has no plausible foundation in the text of the Fourth Amendment.<sup>124</sup>

In addition, in his concurrence in *California v. Acevedo*, Scalia explicitly cited the Court's carving of exceptions to WR with the assistance

<sup>123</sup> *Houghton*, 526 U.S. at 299-300.

<sup>124</sup> *Minnesota v. Carter*, 525 U.S. 83, 97 (1998).

of Harlan's definition of a "search" as a *reason* to abandon the orthodox approach in favor of his own "common law originalism."

Even before today's decision, the "warrant requirement" had become so riddled with exceptions that it was basically unrecognizable . . . . Our intricate body of law regarding "reasonable expectation of privacy" has been developed largely as a means of creating these exceptions, enabling a search to be denominated not a Fourth Amendment "search" and therefore not subject to the general warrant requirement. Unlike the dissent, therefore, I do not regard today's holding as some momentous departure, but rather as merely the continuation of an inconsistent jurisprudence that has been with us for years. There can be no clarity in this area unless we make up our minds, and unless the principles we express comport with the actions we take. In my view, the path out of this confusion should be sought by returning to the first principle that the "reasonableness" requirement of the Fourth Amendment affords the protection that the common law afforded.<sup>125</sup>

But as I have labored to show, although Harlan's test is not grounded in the text of the Fourth Amendment, the fundamental principle it was designed to articulate *is*. This principle, rooted in a rights-based theory that is a direct descendant of the natural law theory accepted by Scalia's 18th century heroes, is thoroughly objective and far from self-indulgent. Taken in conjunction with the Court's objectively justified orthodox means of protecting Fourth Amendment rights (namely, WR, PCR, and ER), the principle that Harlan recognized, albeit dimly, represents a coherent, objective, and textually supported normative theory of Fourth Amendment jurisprudence that is more than capable of withstanding the barbs that countless critics have been throwing at the orthodox approach. I submit that it is on this basis (as well as for reasons having to do with the general untenability of "common law originalism")<sup>126</sup> that the Court should, in its future Fourth Amendment decisions, decisively reject Scalia's unprecedented proposals.

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<sup>125</sup> *California v. Acevedo*, 500 U.S. 565, 582-83 (1991).

<sup>126</sup> See David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1744 n.26 (2000).