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THE END OF PRIVACY

Jed Rubenfeld

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INTRODUCTION.....	102
I. THE PROBLEM WITH PRIVACY.....	105
A. Katz.....	105
B. <i>Circularity</i>	106
C. <i>Widely Shared Social Expectations</i>	107
D. <i>Privacy and the Perfect Stranger</i>	109
1. <i>Reasoning like a stranger</i>	109
2. <i>The Stranger Principle</i>	110
E. <i>The Untenability of the Stranger Principle</i>	113
II. FROM PRIVACY TO SECURITY: HOW THE FOURTH AMENDMENT'S PRIVATIZATION FAILS TO DO JUSTICE TO ITS TEXT	115
A. <i>The Right To Be Let Alone and the Privatization of the Fourth Amendment</i>	115
B. <i>Repoliticizing the Fourth Amendment</i>	118
C. <i>Reading the Fourth Amendment as Written</i>	119
III. A JURISPRUDENCE OF SECURITY	122
A. <i>The Core Meaning of the Fourth Amendment</i>	122
1. <i>General warrants</i>	123
2. <i>Probable cause</i>	124
B. <i>The Meaning of Security</i>	126
C. <i>Personal Security as the Security of Personal Life</i>	127
D. <i>The Test of Generalizability</i>	131
E. <i>Applying the Test of Generalizability</i>	132
1. Katz, <i>circularity</i> , and the <i>Stranger Principle</i>	132
2. <i>Undercover agents</i>	133
3. Randolph.....	135
4. <i>Standing</i>	137
IV. UNLAWFUL ENEMY COMBATANTS, DATA MINING, AND WIRETAPPING	138
A. <i>Unlawful Combatant Detentions</i>	138
1. <i>The fundamental requirement</i>	140
2. <i>The Fourth Amendment at war</i>	141
3. <i>Quirin and Korematsu</i>	144
4. <i>Quarantines and psychiatric confinements</i>	145

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5. <i>Emergency wartime exceptions</i>	148
B. <i>Information from Telephone Companies and Internet Service Providers</i>	151
C. <i>Wiretapping</i>	152
1. <i>Nonprosecutorial motive for surveillance</i>	154
2. <i>International communications</i>	155
3. <i>One party reasonably believed to be an al-Qaeda agent</i>	156
4. <i>The significance of FISA</i>	157
CONCLUSION	160

INTRODUCTION

How fragile a thing, law.

Not long ago, the notion that Americans could be seized off the streets, arrested, and jailed without probable cause might have seemed laughable. The power to incarcerate on mere suspicion or executive say-so belonged to dictatorships. “We allow our police to make arrests only on ‘probable cause,’” we used to be told; “[a]rresting a person on suspicion, like arresting a person for investigation, is foreign to our system.”¹

But in 2002, the President of the United States claimed and exercised the power to designate an individual, including an American citizen seized on American soil, an “unlawful enemy combatant”—and to imprison him on that basis, without probable cause and with limited if any judicial review.²

Not long ago, it was possible to believe that the government could intercept Americans’ telephone calls only with probable cause and, absent exigent circumstances, judicial authorization. As late as 2004, the President declared:

Now, by the way, any time you hear the United States Government talking about wiretap, it requires—a wiretap requires a court order. Nothing has changed, by the way. When we’re talking about chasing down terrorists, we’re talking about getting a court order before we do so. It’s important for our fellow citizens to understand, when you think Patriot Act, constitutional guarantees are in place when it comes to doing what is necessary to protect our homeland, because we value the Constitution.³

These statements, it turned out, were not true. As the President would later admit, he had in 2002 personally but secretly authorized (and then repeatedly reauthorized) the National Security Agency (NSA) to intercept Americans’ telephone calls and e-mail messages in certain circumstances without probable cause and without a court order.⁴ At the same time, the NSA reportedly procured from major telecommunications companies access to communications

1. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 169 (1972).

2. *See infra* Part IV.A.

3. Press Release, White House Office of the Press Sec’y, President Bush: Information Sharing, Patriot Act Vital to Homeland Sec. (Apr. 20, 2004), <http://www.whitehouse.gov/news/releases/2004/04/20040420-2.html>.

4. *See infra* Part IV.C.

data on tens of millions of people unsuspected of any crime.⁵

This Article is about the Fourth Amendment. It is an attempt to recover that amendment's core meaning and core principles.

Why has the Fourth Amendment, despite explicitly governing seizures of the person, played so minimal a role in the judicial response to the "unlawful combatant" detentions?⁶ What allows courts to find no Fourth Amendment search or seizure when the government obtains records from telephone companies or Internet service providers showing whom you have communicated with and when and for how long?⁷ What allowed the Sixth Circuit last summer to dismiss a challenge to the NSA's covert wiretapping on grounds implying that the program might never be reviewed under the Fourth Amendment at all?⁸ What flaw, in short, in modern doctrine has made the Fourth Amendment so irrelevant to the present search and seizure debates—and how could it reclaim its relevance? This Article tries to answer these questions.

At the heart of search and seizure law today, there is a kind of doctrinal black hole, known as the "reasonable expectation of privacy."⁹ This concept, the "touchstone of Fourth Amendment analysis,"¹⁰ has never been able to do the work required of it.

The most obvious problem with expectations-of-privacy analysis is circularity, but this problem, as we shall see, is much exaggerated.¹¹ A second, more fundamental difficulty is that expectations of privacy do not really speak to *arrests* or *imprisonment*—that is, to seizures of the person. Arrests *can*

5. See *infra* Part IV.B.

6. In the *Padilla* proceedings, the legality of the President's power to seize an American citizen on American soil as an "unlawful enemy combatant" (without probable cause) came before five different courts, each of which disposed of the issue without Fourth Amendment discussion. *See Padilla v. Hanft*, 389 F. Supp. 2d 678 (D.S.C. 2005) (invalidating the seizure), *rev'd*, 423 F.3d 386 (4th Cir. 2005) (upholding it); *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002) (Mukasey, J.) (upholding the seizure), *aff'd in part, rev'd in part sub nom. Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003) (invalidating it on statutory grounds), *rev'd*, 542 U.S. 426 (2004) (not reaching the merits). Consider also the Supreme Court's *Hamdi* and the Fourth Circuit's *Al-Marri* decisions, in both of which the majority subjected the administration's position on unlawful combatants to stringent constitutional examination, but did not seem even to see a Fourth Amendment issue, focusing instead solely on statutory, treaty, and due process arguments. *See Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007).

7. E.g., *Smith v. Maryland*, 442 U.S. 735 (1979); see *infra* Part I.D. The government's recent program of obtaining such information is discussed *infra* Part IV.B.

8. The court found no Fourth Amendment standing because plaintiffs could not show their own conversations had been intercepted. *See ACLU v. NSA*, 493 F.3d 644, 655 (6th Cir. 2007). Under this ruling, so long as the government never discloses whose conversations it secretly taps, the wiretapping's constitutionality will apparently never be judicially reviewable. *See infra* Part III.E.

9. See *infra* Part I.A.

10. *California v. Ciraolo*, 476 U.S. 207, 211 (1986).

11. See *infra* Part I.B.

impinge on privacy, of course, but that is not what makes an unconstitutional arrest unconstitutional; an arbitrary arrest would still violate the Fourth Amendment however scrupulously it preserved privacy. Hence an oddity: the “touchstone” of modern Fourth Amendment law fails to touch one of the paradigmatic abuses—arrests lacking probable cause made under a general warrant—that the Fourth Amendment was enacted to forbid.¹² It is no coincidence that a Fourth Amendment centered on expectations of privacy has little to contribute to the dispute over suspicion-based incarceration of unlawful enemy combatants.

But even with respect to surveillance, modern privacy-based doctrine fails to stand against practices that seem to cry out for constitutional check. It may not speak to everyone, but let me try to illustrate with a hypothetical.

Imagine a society in which undercover police officers are ubiquitous. Nearly every workplace has at least one, as does nearly every public park, every store and restaurant, every train and plane, every university classroom, and so on. These undercover agents wear hidden microphones and video cameras, recording and transmitting everything they hear or see. Your colleagues, coworkers, or closest friends may be spies. Perhaps there is one in your own family.

Existing Fourth Amendment law would find nothing wrong with this picture. Whenever we speak with others, the Supreme Court has held, we assume the risk that they might report what we say to the police; hence no reasonable expectation of privacy is violated if our interlocutors do in fact transmit what we say to the police, and hence no Fourth Amendment safeguards apply.¹³ Yet the ubiquitous deployment of secret police spies would seem to represent an almost totalitarian form of surveillance deeply antithetical to the freedom from state scrutiny of our personal lives for which the Fourth Amendment stands.

In this Article, I will argue that Fourth Amendment law should stop trying to protect privacy. The Fourth Amendment does not guarantee a right of privacy. It guarantees—if its actual words mean anything—a right of security.¹⁴

Despite privacy’s triumph, the right “to be secure” that the Fourth Amendment actually protects has never died. It still flickers in the case law and scholarship,¹⁵ even if without much doctrinal function and even if

12. See *infra* Part III.A.

13. E.g., *United States v. White*, 401 U.S. 745 (1971); see *infra* Part III.D.

14. It is the “right of the people *to be secure* in their persons, houses, papers, and effects” that under the Fourth Amendment “shall not be violated.” U.S. CONST. amend. IV (emphasis added).

15. See, e.g., *Brendlin v. California*, 127 S. Ct. 2400, 2410 (2007) (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976) (stating that the Fourth Amendment protects “the privacy and personal security of individuals”)); *New Jersey v. T.L.O.*, 469 U.S. 325, 354 (1985) (Brennan, J., dissenting) (referring to the “Fourth Amendment’s protections

unsatisfactorily defined.¹⁶ By revitalizing the right to be secure, Fourth Amendment law can vindicate its text, recapture its paradigm cases, and find the anchor it requires to stand firm against executive abuse.

Part I of this Article analyzes the logical dead end to which “reasonable expectations of privacy” doctrine leads. Part II addresses the broader question of what Fourth Amendment jurisprudence lost when it took privacy as its central term; I argue here that among the things it lost was an interpretation of the Fourth Amendment’s text that reads it as written, with a right of security as its central commitment. Part III lays out the central tenets of a Fourth Amendment committed to security and explains where a jurisprudence of security would agree, and where it would disagree, with existing case law. Part IV applies the Fourth Amendment’s right of security to three of the most prominent detention and surveillance controversies that have arisen since September 11.

I. THE PROBLEM WITH PRIVACY

A. Katz

Modern Fourth Amendment doctrine begins with *Katz v. United States*,¹⁷ which declared unconstitutional the wiretapping (without probable cause) of a public telephone booth. The Fourth Amendment, the *Katz* Court famously held, “protects people, not places.”¹⁸ Thus untethered from the law of trespass,¹⁹ the Fourth Amendment required a new principle, and in a concurrence that eventually supplanted the majority opinion, Justice Harlan provided it.

of personal privacy and personal security”); *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968) (describing the “inestimable right of personal security” set forth in the Fourth Amendment). In its focus on security, this Article builds on Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307 (1998) (arguing that Fourth Amendment law should give a much more central place to security and collecting cases in which security has played a role), but departs from Clancy on the question of what security means. *See infra* note 16.

16. In *Terry*, for example, the Court defined personal security as a freedom from bodily restraint—a “right to . . . possession and control of [one’s] person, free from all restraint”—which treats personal security essentially as a synonym for physical liberty. *Terry*, 392 U.S. at 9 (citation omitted). For Thomas Clancy, the “right to be secure is the right to exclude.” Clancy, *supra* note 15, at 356. In my judgment, this is another unfortunate definition, equating security more with private property than with physical liberty, but equally depriving security of its distinctive constitutional meaning and value. A different conception of security will be pursued here. *See infra* Parts II.C-D, III.

17. 389 U.S. 347 (1967).

18. *Id.* at 351.

19. *See id.* at 353 (affirming that the Fourth Amendment may be violated “without any ‘technical trespass under . . . local property law’”) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

To state a valid Fourth Amendment claim, wrote Harlan, an individual must have “exhibited an actual (subjective) expectation of privacy,” and that expectation must have been “reasonable.”²⁰ Not long after *Katz*, the full Court adopted Justice Harlan’s formulation.²¹ Fourth Amendment law has sought to protect “reasonable expectations of privacy” ever since.²²

B. Circularity

Commentators have long condemned the “reasonable expectations of privacy” test as ineluctably circular.²³ The threat of circularity—or more accurately of a kind of prospective self-validation—is easy to see. Suppose the President announces that all telephone conversations will henceforth be monitored. Arguably, no one thereafter can reasonably expect privacy in his phone calls, and the announced eavesdropping will have constitutionalized itself. The same problem will afflict legislative and judicial pronouncements about police searches or seizures.

So long as judges determine people’s “reasonable expectations of privacy” by asking what conduct people have reason to expect *specifically from*

20. *Id.* at 361 (Harlan, J., concurring) (“My understanding of the rule that has emerged from prior decisions is that there is 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.’”).

21. One year after *Katz*, the Court declared that “wherever an individual may harbor a reasonable ‘expectation of privacy,’ [Katz, 389 U.S.] at 361 (Mr. Justice Harlan, concurring), he is entitled to be free from unreasonable governmental intrusion.” *Terry*, 392 U.S. at 9.

22. See, e.g., *Samson v. California*, 547 U.S. 843, 846 (2006); *Kyllo v. United States*, 533 U.S. 27, 32 (2001); *Bond v. United States*, 529 U.S. 334, 338-39 (2000); *Minnesota v. Olson*, 495 U.S. 91, 95 (1990); *California v. Greenwood*, 486 U.S. 35, 38 (1988); *Maryland v. Garrison*, 480 U.S. 79, 90-91 (1987) (Blackmun, J., dissenting); *Smith v. Maryland*, 442 U.S. 735, 740 (1979); see also *California v. Ciraolo*, 476 U.S. 207, 211 (1986) (“The touchstone of Fourth Amendment analysis is whether a person has a ‘constitutionally protected reasonable expectation of privacy.’”) (quoting *Katz*, 389 U.S. at 360 (Harlan, J., concurring)).

23. See, e.g., Richard A. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 188 (“[I]t is circular to say that there is no invasion of privacy unless the individual whose privacy is invaded had a reasonable expectation of privacy; whether he will or will not have such an expectation will depend on what the legal rule is.”); see also, e.g., RICHARD A. EPSTEIN, PRINCIPLES FOR A FREE SOCIETY: RECONCILING INDIVIDUAL LIBERTY WITH THE COMMON GOOD 210 (1998) (“It is all too easy to say that one is entitled to privacy because one has the expectation of getting it. But the focus on the subjective expectations of one party to a transaction does not explain or justify any legal rule, given the evident danger of circularity in reasoning.”); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 384 (1974) (“An actual, subjective expectation of privacy . . . can neither add to, nor can its absence detract from, an individual’s claim to fourth amendment protection. If it could, the government could diminish each person’s subjective expectation of privacy merely by announcing half-hourly on television that . . . we were all forthwith being placed under comprehensive electronic surveillance.”).

policemen or other government agents, this circularity will be unavoidable. For then any surveillance measure adopted by the police, announced by the executive, prescribed by statute, or upheld by the courts could in principle generate the pertinent privacy expectations (or rather lack-of-privacy expectations) and thereby validate itself.

The Court, however, has long been aware of this logical trap²⁴ and has rarely (if ever) fallen into it.²⁵ The Court's escape route has been fairly straightforward. To avoid self-validation, the Court has sought to root individuals' privacy expectations in widespread social norms drawn from "outside of the Fourth Amendment"²⁶—that is, from outside the law enforcement context. This strategy, however, escapes circularity only at the price of endorsing a principle (which I will call the Stranger Principle) that ultimately undoes the Fourth Amendment's most basic commitments. The recent case of *Georgia v. Randolph* is illustrative.²⁷

C. Widely Shared Social Expectations

Randolph held that police could not enter a house on the basis of one resident's consent when another physically present coresident objected.²⁸ The Court rested this holding on "widely shared social expectations," specifically the "customary social understanding" of what a "caller" or "visitor" would do if invited into a home by one occupant while "a fellow tenant stood there saying, 'stay out.'"²⁹ According to the Court, "no sensible person would go inside under those conditions."³⁰

This conclusion is not circular; unless one indulges in implausibly exalted notions about the Supreme Court's influence on social norms, there is no reason to believe that the Court's opinion in *Randolph* will bring about the

24. See, e.g., *Smith v. Maryland*, 442 U.S. 735, 740 n.5 (1979) ("For example, if the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry, individuals thereafter might not in fact entertain any actual expectation of privacy regarding their homes, papers, and effects.").

25. But compare, for example, *United States v. Payner*, 447 U.S. 727, 732 n.4 (1980), in which the Court found that the defendant lacked a reasonable expectation of privacy in banking information in part on the basis of statutes requiring banking information to be reported. This kind of reasoning could, if extended, allow statutes compelling individuals to submit to searches to be self-validating.

26. *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978). In *Rakas*, the Court expressly observed that the way out of "tautolog[y]" in determining reasonable expectations of privacy is to locate those expectations in "a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Id.*

27. 547 U.S. 103 (2006).

28. *Id.*

29. *Id.* at 111-13, 121.

30. *Id.* at 113.

"customary social understanding" on which the opinion relies.³¹ Nor does the *Randolph* reasoning threaten to make legislative or presidential decisions about police conduct self-validating. In theory at least, Americans' "widely shared social expectations"—which the Court has invoked in one form or another in numerous Fourth Amendment cases³²—are independent, ascertainable social facts on the basis of which state intrusions can be judged.

Unfortunately, when regarded in just this way, as a finding of fact concerning customary social norms, the Court's conclusion in *Randolph* seems patently incorrect. Many sensible people *would* enter a house in the *Randolph* circumstances.

Assume, as in *Randolph*, that the consenting resident is female, while the nonconsenting occupant is male. Wouldn't the consenting resident's boyfriend be expected to enter in these circumstances—at least if not in physical fear of the man telling him to "stay out"? Wouldn't the woman's family members feel free to enter as well, again if not in fear? In fact, any decent friend of the consenting resident might be expected to enter if we stipulate to certain facts—for example, that the objecting male resident is widely known to be a useless loser who hangs around the house all day vetoing entry by everybody but his own useless friends.

In other words, a sensible caller could well be expected to enter even in the presence of a nonconsenting coresident *depending entirely on who the caller is and what the caller knows about the residents*.

This indeterminacy is not unique to the *Randolph* facts. On the contrary, it reflects a critical flaw in the entire widely shared social expectations approach. To figure out the applicable privacy norm under a widely shared social expectations approach, the question can never be what any sensible person would have done. The pertinent social expectations will almost always turn on the specific identity of the caller, including his relationship to and knowledge of the individual claiming a privacy violation. But if the caller's identity has to be specified in order to know what the customary social expectations of behavior will be, it would seem to follow that courts must ask what, specifically, a *policeman* would be reasonably expected to do in the circumstances of the case.

Which is the one question the Court cannot ask.

Avoiding self-validation, the invocation of widely shared social expectations is meant to measure police conduct by reference to the behavior of

31. As Professor Post puts it, "judicial interpretations of 'reasonable expectations' will affect the actions of law enforcement agencies, which will in turn affect the actual social norms that define privacy.... But it is not true that social norms are entirely a product of legal action." Robert C. Post, *Three Concepts of Privacy*, 89 GEO. L.J. 2087, 2094 (2001).

32. See, e.g., *Bond v. United States*, 529 U.S. 334, 338-39 (2000); *California v. Greenwood*, 486 U.S. 35, 40-41 (1988) (finding no reasonable expectations of privacy in garbage deposited outside house on the basis of prevailing trash norms, habits, and practices); *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978).

well-socialized or sensible *non-law-enforcement* callers. This means that the caller's specific identity as a *policeman* cannot be reinserted back into the equation. For if the real question in *Randolph* turned out to be whether a reasonable person in those circumstances would expect a *policeman* to enter the house, the analysis would indeed become circular, and the Court's answer to that question (whichever way the Court came out) would indeed be self-validating. Yet with the policeman's identity stripped away, there can be no definite widely shared social expectations.

The virtue of the "social expectations" approach is that it avoids circularity. The vice is that it yields no answers. No definable privacy expectations attach to an undefined visitor calling on undefined residents. Everything turns on who the caller is. But if Fourth Amendment expectations of privacy turn out to depend on what people have reason to expect a *policeman* to do under the circumstances, Fourth Amendment law will have fallen into the very circularity the social expectations approach was supposed to avoid.

D. Privacy and the Perfect Stranger

But there is a way out of this trap, and if this final avenue of escape held good, it would vindicate not only *Randolph*, but a great deal of the rest of current Fourth Amendment law too. By leaving the caller's identity unspecified, it might be said, the *Randolph* Court meant to invoke a quite specific kind of visitor—a caller *unknown* to the residents, with *no* particular relationship to them. The caller at the door is not unspecified. He is, specifically, a *stranger*.

For if we picture a perfect stranger at the door in *Randolph*, the Court's reasoning begins to sound plausible. Surely a polite stranger would not wish to offend either of the disputing residents or to exacerbate their quarrel. How awkward it would be to enter a house when a (male) resident of that house had told one to stay out. Yes, with a perfect stranger in mind, wasn't the Court right to say that no sensible person would accept the disputed invitation?

Let's assume so. The question is why Fourth Amendment law would be interested in what a perfect stranger would do. There are two possible answers. The first is fairly easy to dismiss. The second is more complicated and will bring us to the real heart of the matter.

1. Reasoning like a stranger

First, someone might say that a reasonable policeman ought to reason like a stranger. A policeman is an agent of the state. He shouldn't take into account any of the special considerations that might inform the reasoning of the boyfriend, father, or good friend of one of the two residents. He must be neutral toward both and, in a liberal society, paternalistic toward neither. Thus the status of the policeman as agent of a neutral, liberal state dictates that he should

reason like a stranger.

This is the position I referred to above as relatively easy to dismiss. For very good reasons, we neither want nor require our policemen to reason like strangers. In *Randolph*, for example, the chief concerns of a sensible stranger would presumably include: the demands of etiquette; the potential offense he might give; the potential for embarrassment to himself; and, perhaps most prominently, the likely unpleasantness to follow, including the risk of forcible ejection, were he to enter. These concerns should not be a policeman's chief motivations.

The policeman's job is to enforce the law, keep the peace, and in some cases aid people in danger. Accordingly, policemen must ignore reasons for inaction that strangers will bear foremost in mind. Indeed, if a stranger would be expected to withdraw in the *Randolph* circumstances, he would likely withdraw for reasons that cannot logically apply to policemen. Specifically, he would be expected to withdraw precisely, in part, because *he is not a policeman*.

In the *Randolph* circumstances, entering the house would have raised a not-far-fetched possibility of violence. Policemen are trained and armed to incur that kind of danger. Yes, perhaps no sensible stranger would choose to enter if confronted by a (male) resident of a house telling him to "stay out," even when another (female) resident declares, as Mrs. Randolph did, that crimes are being committed inside the house and asks him to come in. But this stranger's reasoning cannot offer a compelling—or even an intelligible—template for a law enforcement officer, when the stranger would likely be saying to himself, "Well, it's not like I'm FBI or anything."

2. *The Stranger Principle*

The second, more sophisticated defense of asking what a perfect stranger would have done in *Randolph* does not maintain that a policeman ought to reason as a stranger would. Instead, it claims that strangers play a crucial role in determining reasonable expectations of privacy, which in turn determine what policemen may and may not do.

Why would that be?

For a simple reason (it might be said): *that which we have exposed to perfect strangers, we cannot claim to be private*. Call this the Stranger Principle. According to the Stranger Principle, to the extent we have opened something otherwise private to a perfect stranger, the police may intrude into it as well.

The Stranger Principle can claim support both in intuition and in case law. Consider the well-established "plain view" doctrine, which allows a patrolman to look anywhere, even inside a home, provided that he does no more than what

a stranger could have done—e.g., standing on the sidewalk and looking through an uncurtained window.³³ Then there is the rule, strongly suggested in some cases, that even technologically enhanced police surveillance (rather than naked-eye observation) does not effect a search if the technology deployed was “in general public use.”³⁴ These doctrines appear to confirm—indeed to be based on—the idea that no justifiable expectation of privacy exists in information or things exposed to strangers.

Even more strikingly, consider *United States v. Miller*³⁵ and *Smith v. Maryland*.³⁶ In *Miller*, the Supreme Court upheld the government’s acquisition of financial data from a bank because that data had been shared with strangers: “All of the documents obtained, including financial statements and deposit slips, contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business.”³⁷ As a result, the *Miller* Court held, such information could no longer be considered private, “even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.”³⁸

In *Smith*, the Court reaffirmed *Miller* and upheld the government’s use of a “pen register” to monitor the phone numbers an individual had dialed:

When he used his phone, petitioner voluntarily conveyed numerical information to the telephone company and ‘exposed’ that information to its equipment in the ordinary course of business. . . . The switching equipment that processed those numbers is merely the modern counterpart of the operator who, in an earlier day, personally completed calls for the subscriber. Petitioner concedes that if he had placed his calls through an operator, he could claim no legitimate expectation of privacy.³⁹

The Court was categorical: “*a person has no legitimate expectation of privacy*

33. See, e.g., *Horton v. California*, 496 U.S. 128 (1990) (holding that evidence discovered in “plain view” is admissible); *California v. Ciraolo*, 476 U.S. 207 (1986) (holding that a police flyover to search for marijuana in the homeowner’s backyard did not require a warrant because the yard was visible from public airspace).

34. “So long as thermal imagers are ‘not in general public use,’ employing those devices to read the heat emissions from a property in which the target has a reasonable expectation of privacy will constitute a search within the meaning of the Fourth Amendment.” *United States v. Huggins*, 299 F.3d 1039, 1044 n.5 (9th Cir. 2002) (quoting *Kyllo v. United States*, 533 U.S. 27, 40 (2001)); see also, e.g., *People v. Katz*, 2001 Mich. App. LEXIS 2592, at *7 n.4 (Mich. Ct. App. 2001) (upholding police use of night vision binoculars) (“Such devices are sold at retail and may very well be ‘in general public use’ such that their use by police would not be considered an illegal search by the *Kyllo* majority.”); *State v. Citta*, 625 A.2d 1162, 1165 (N.J. Super. Ct. Law. Div. 1990) (collecting cases and holding that police effect no search when they use vision-enhancing “devices commonly used by and available to the general public”).

35. 425 U.S. 435 (1976).

36. 442 U.S. 735 (1979).

37. *Miller*, 425 U.S. at 442.

38. *Id.* at 443.

39. *Smith*, 442 U.S. at 744.

in information he voluntarily turns over to third parties.”⁴⁰

The Stranger Principle is also consistent with the *Randolph* line of cases. A stranger who receives an “undisputed” invitation into a house—i.e., consent to enter from one resident when no other resident is physically present and objecting—would presumably feel free to enter. Hence under the Stranger Principle, the pre-*Randolph* cases are correctly decided. But *Randolph* was correctly decided too. Because a reasonable stranger in the *Randolph* circumstances would be expected to back off, Randolph had not opened his house to a stranger. Thus he retained a legitimate expectation of privacy, and the Court properly ruled the police entry unconstitutional.

The Stranger Principle would also support the executive branch’s recent efforts to force Google and other telecommunications service providers to turn over individuals’ search histories and calling data.⁴¹ And it would find unproblematic, just as the Court did in *United States v. White*,⁴² the use of undercover informants—at least to the extent that these informants were more or less strangers to those with whom they interacted.

Indeed, it seems we should go further. The implication of current doctrine seems to be that exposure of a thing or piece of information to any “third party,” as the *Smith* Court put it, surrenders privacy in that thing or information. Possibly an exception might be made in the case of family, intimate friends, and certain professionals like lawyers or doctors. But whenever we expose information outside this zone of intimates, we assume the risk of disclosure to the authorities.⁴³ And where an individual has “assumed the risk” of disclosure,” as the Court said in *Smith*, “it would be unreasonable for him to expect [the information] to remain private.”⁴⁴

If we extend the Stranger Principle in this way—so that it includes most “third parties”—we arrive at a highly general, almost comprehensive conception of privacy justifying a great deal of modern Fourth Amendment law. To retain privacy in a thing or place, we must not allow its exposure to “third parties.” From the early third-party consent decisions to *Randolph*, from *White* to *Smith*, from the plain-view decisions to the cases upholding the use of surveillance technology “in general public use,” much of modern Fourth Amendment doctrine can be explained by the simple idea that a person has “no legitimate expectation of privacy” in any information or thing he “voluntarily turns over to third parties.”⁴⁵

40. *Id.* at 743-44 (emphasis added).

41. See *Gonzales v. Google*, 234 F.R.D. 674 (N.D. Cal. 2006).

42. 401 U.S. 745 (1971).

43. See *United States v. Jacobsen*, 466 U.S. 109, 117 (1984) (“It is well settled that when an individual reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities . . .”).

44. *Smith*, 442 U.S. at 744.

45. *Id.* at 743-44.

E. The Untenability of the Stranger Principle

The only problem: the Stranger Principle is completely untenable. It implies that, once an individual has exposed information to a third party, the government may seize that information—with or without that third party’s assistance. And that implication would spell the end of the Fourth Amendment almost altogether.⁴⁶

The cases we have been considering do not involve private parties choosing *sua sponte*, or purely voluntarily, to turn information over to the police. Even in *Smith*, where the police had “requested” the telephone company to install a pen register,⁴⁷ the Court decided the case on the assumption that the telephone company acted as an “agent” of the police.⁴⁸ In *Miller*, the government obtained the bank’s records by subpoena—i.e., by compulsory process.⁴⁹ And in *United States v. Payner*, the government *forcibly seized* a bank officer’s suitcase to acquire the defendant’s records.⁵⁰ But the *Payner* Court, relying on *Miller*, held that defendant still had no Fourth Amendment claim because he had no legitimate expectation of privacy in information already exposed to the bank and its employees.⁵¹

This reasoning makes sense only if we embrace the following logic. By giving information to a third party, we not only assume the risk that the third party will go to the police; much more, we can no longer regard the information as private at all. And if we can no longer regard the information as private, we have no further Fourth Amendment interest in it.

That, after all, is exactly what the Court held in *Payner*, and it is exactly how the *Smith* Court justified the compulsory seizure of bank information in *Miller*: “Because the depositor ‘assumed the risk’ of disclosure, the [*Miller*] Court held that it would be unreasonable for him to expect his financial records to remain private.”⁵² The *Smith* Court’s reasoning plainly implied that

46. Many others have also worried that what I am calling the “Stranger Principle” would eviscerate the Fourth Amendment. See, e.g., Donald L. Doernberg, “Can You Hear Me Now?: Expectations of Privacy, False Friends, and the Perils of Speaking Under the Supreme Court’s Fourth Amendment Jurisprudence, 39 IND. L. REV. 253, 292-93 (2006); Stephen E. Henderson, *Nothing New Under the Sun?: A Technologically Rational Doctrine of Fourth Amendment Search*, 56 MERCER L. REV. 507, 562-63 (2005); Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 103 (1991) (suggesting that if we took the Court’s “assume the risk” analysis seriously, “the only sphere of privacy still protected from unnecessary government intrusion would be what we kept to ourselves”); Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1083, 1086-87 (2002); Joseph T. Thai, *Is Data Mining Ever a Search Under Justice Stevens’s Fourth Amendment?*, 74 FORDHAM L. REV. 1731, 1734 (2006).

47. *Smith*, 442 U.S. at 737.

48. *Id.* at 740 n.4.

49. *United States v. Miller*, 425 U.S. 435, 437 (1976).

50. 447 U.S. 727 (1980).

51. *Id.* at 731.

52. *Smith*, 442 U.S. at 744.

telephone companies could be compelled to install pen registers without effecting a Fourth Amendment search, and so the lower courts subsequently held.⁵³ In the words of the Second Circuit, the Supreme Court's *Smith* decision means that "the installation of a pen register is not a Fourth Amendment search" and is therefore constitutional even if installed directly by police agents on the wires outside an individual's home "with no assistance" from the telephone company.⁵⁴

No matter how firmly this reasoning might be said to be established by *Miller*, *Smith*, and *Payner*, it is still untenable and has never been fully incorporated into Fourth Amendment law. It could not be. Consider the implications.

You call me on the telephone. Perhaps I'm someone you hardly know; perhaps, like the bookmaker whom defendant Katz called in the famous case bearing his name,⁵⁵ I'm simply a person you want to do business with. I am free to report your statements to the police, as you are to report mine. *And therefore the police can tap the call.*

That result is inescapable once the law has backed itself into the *Miller-Smith-Payner* corner. If those cases are taken at face value—if they are interpreted as the lower courts have in fact interpreted them—then exposing something to a "third party" entails much more than the risk that the third party might choose to go to the police. Having run *that* risk, these cases imply, a person who exposes information to third parties has surrendered his privacy in that information altogether, rendering it subject to police acquisition with or without the third party's assistance. And that logic means the end of *Katz*.⁵⁶

But this flaw is not limited to the *Miller-Smith-Payner* line of cases. It afflicts every branch of Fourth Amendment doctrine that draws sustenance from the Stranger Principle. The notion that surveillance effects no Fourth Amendment search if the police use only technology "in public use" could just as easily undermine *Katz*.⁵⁷ All that would be necessary is the development and

53. See, e.g., *United States v. N.Y. Tel. Co.*, 434 U.S. 159 (1977) (upholding power of lower courts to compel pen registers); *United States v. X*, 601 F. Supp. 1039 (1984) (issuing order requiring telephone companies to provide toll records).

54. *United States v. Todisco*, 667 F.2d 255, 258 (2d Cir. 1981).

55. *Katz v. United States*, 389 U.S. 347, 348 (1967).

56. See Doernberg, *supra* note 46, at 292-93 ("What is to stop the police from eavesdropping on any conversation, circumventing the protection that the Fourth Amendment would otherwise offer, by arguing that there was no reasonable expectation of privacy because the listener *might have been* wired or otherwise cooperating with the police?").

57. See *Kyllo v. United States*, 533 U.S. 27, 46-47 (2001) (Stevens, J., dissenting); Christopher Slobogin, *Peeping Techno-Toms and the Fourth Amendment: Seeing Through Kyllo's Rules Governing Technological Surveillance*, 86 MINN. L. REV. 1393, 1394 (2002) ("As the dissenters in *Kyllo* rightly pointed out, varying Fourth Amendment regulation of technology on the prevalence of that technology is troublesome, because 'the threat to privacy will grow, rather than recede, as the use of intrusive equipment becomes more readily available.'") (quoting *Kyllo*, 533 U.S. at 47 (Stevens, J., dissenting)).

widespread sale of a device allowing ordinary citizens to listen in on private telephone conversations.

Thus modern Fourth Amendment “expectations of privacy” analysis cannot even sustain its inaugural case—*Katz*. If tied to what a citizen ought to know about the norms specifically governing policemen, Fourth Amendment law becomes a self-validating logical circle in which any police practice can be justified (through its own adoption) and in which any judicial decision will vindicate reasonable expectations of privacy (because the judicial decision will itself warrant the expectations or lack of expectations it announces). If, on the other hand, “expectations of privacy” analysis abstracts away from the law enforcement context, and seeks its purchase in generalized “social expectations” concerning what an unspecified private “caller” or “visitor” would do, Fourth Amendment law becomes wholly indeterminate (because no determinate privacy expectations attach to undefined, unspecified callers). Finally, if “saved” through the Stranger Principle, with its thesis that information exposed to third parties is no longer private, the Fourth Amendment ends up a hollow shell, because in an increasingly digitized, networked world with ever-expanding privacy-invading technologies, virtually all information is exposed to third parties. Even *Katz* had exposed the seized information to a third party; hence *Katz* itself becomes inexplicable.

The Fourth Amendment must cut anchor with the expectations-of-privacy apparatus. This is not a consequence to be mourned. Despite what we have been taught, privacy is not the Fourth Amendment’s proper end. Or so I will argue in the next Part.

II. FROM PRIVACY TO SECURITY: HOW THE FOURTH AMENDMENT’S PRIVATIZATION FAILS TO DO JUSTICE TO ITS TEXT

The term “privacy” cannot be found in the United States Constitution. This absence has been much remarked on,⁵⁸ but typically in connection with a different right of privacy, the one announced in *Roe v. Wade*.⁵⁹ It’s as true of the Fourth Amendment, however, as of the Fourteenth, that the text makes no mention of privacy—or reasonable expectations thereof. What, then, did Fourth Amendment law accept when it accepted privacy as its central term? And what did it lose?

A. *The Right To Be Let Alone and the Privatization of the Fourth Amendment*

Before 1890, there was exactly one Supreme Court decision in which the

58. See, e.g., Sarah Weddington, *Reflections on the Twenty-fifth Anniversary of Roe v. Wade*, 62 ALB. L. REV. 811, 824 (1999) (“The word ‘privacy’ does not appear in the Constitution.”).

59. 410 U.S. 113 (1973).

terms “privacy” and “Fourth Amendment” both appear.⁶⁰ In that year, Brandeis and Warren published their now-famous article,⁶¹ and as the new century unfolded, a “right to privacy” began to figure more prominently in search and seizure law. In at least three cases from 1910 to 1920,⁶² the Supreme Court described Fourth Amendment violations as invasions of “privacy.” In 1928, Justice Brandeis wrote his celebrated *Olmstead* dissent,⁶³ and by 1946, with the great man dead five years, the Court could characterize the Fourth Amendment’s central purpose in unmistakably Brandeisian terms as the “protection of the privacy of the individual, his *right to be let alone*.⁶⁴

At the same time, to retell a familiar story, this “right to be let alone” branched out in tort and statutory law with increasing fecundity.⁶⁵ Privacy protections were established at every level of American law—common,⁶⁶ regulatory,⁶⁷ and statutory.⁶⁸ By the end of the twentieth century, the Fourth Amendment could be seen as just one piece of a much more extensive network of privacy law. “Privacy” casebooks appeared in which the Fourth Amendment’s “expectations of privacy,” tort law’s “right to privacy,” and statutory privacy law were all brought together as if they were subdivisions of a single legal subject (which also includes *Griswold*,⁶⁹ *Roe*,⁷⁰ and so on, since any legal right named “privacy” must refer to the same object of concern).⁷¹

60. See *Boyd v. United States*, 116 U.S. 616, 630 (1886).

61. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

62. *Perlman v. United States*, 247 U.S. 7, 14 (1918); *Weeks v. United States*, 232 U.S. 383, 389-90 (1914); *Flint v. Stone Tracy Co.*, 220 U.S. 107, 174-75 (1911).

63. *Olmstead v. United States*, 277 U.S. 438, 471-85 (1928) (Brandeis, J., dissenting).

64. *Davis v. United States*, 328 U.S. 582, 587 (1946) (emphasis added); see also Okla. Press Publ’g Co. v. Walling, 327 U.S. 186, 204 n.30 (1946).

65. See generally WARREN FREEDMAN, THE RIGHT OF PRIVACY IN THE COMPUTER AGE 1-31 (1987) (discussing legal remedies for violations of the right of privacy); Anita L. Allen, *Privacy in American Law*, in PRIVACIES: PHILOSOPHICAL EVALUATIONS 19-30 (Beate Rössler ed., 2004) (detailing expansion of privacy protection in constitutional law, common law, and state and federal statutory law).

66. See, e.g., William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960) (observing “a complex of four” distinct common law privacy torts, which had developed since the Warren and Brandeis article). This “complex of four” privacy torts is now included in the *Second Restatement. RESTATEMENT (SECOND) OF TORTS* § 652B-E (1977).

67. See, e.g., Children’s Online Privacy Protection Rule, 16 C.F.R. §§ 312.1-12 (2008); Family Educational Rights and Privacy Act (FERPA) Regulations, 34 C.F.R. §§ 99.1-.76 (2008).

68. See, e.g., Federal Privacy Act of 1974, 5 U.S.C. § 552a (2000); Children’s Online Privacy Protection Act of 1998, 15 U.S.C. §§ 6501-6506 (2000); Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510-2521, 2710-2711, 3121-3127 (2000 & Supp. 2002); Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g (2000).

69. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

70. *Roe v. Wade*, 410 U.S. 113 (1973).

71. See, e.g., MADELEINE SCHACHTER, INFORMATIONAL AND DECISIONAL PRIVACY vii-xv (2003); DANIEL J. SOLOVE, MARC ROTENBERG & PAUL M. SCHWARTZ, INFORMATION

In other words, the Brandeisian turn meant that the Fourth Amendment came to be seen as protecting the same basic interests that the nation's other privacy laws protected. Fourth Amendment norms became increasingly understood to replicate against state actors the privacy norms that apply more generally throughout the private sphere.⁷² A case like *Randolph* both illustrates and culminates this development: under the widely shared social expectations approach, the constitutional norms applicable to police entries are precisely equated with those applicable to private callers.

So conceived, the Fourth Amendment loses any distinctive political valence—any specifically political meaning. It is, precisely, *privatized*.

To privatize the Fourth Amendment is to understand its purposes increasingly in terms of values that, instead of speaking to the distinctive dangers of state surveillance and detention, speak rather to an individual's comfort, dignity, tranquility, respectability, and fear of embarrassment. These are of course important interests, and they happen—not coincidentally—to be precisely the same interests that chiefly motivated Brandeis and Warren's seminal essay, which had nothing to do with the Fourth Amendment, but dealt instead with invasions of privacy by gossip columnists and other private actors.⁷³

Conceptualized as a “right to be let alone,” the interest that the Fourth Amendment allegedly protects (privacy) is violated not by the police officer who without probable cause breaks down your door in the nighttime, ransacks your home and takes you to prison, but also by the family member who walks in on you while you’re in the bathroom—or the salesman who calls you as you sit down to dinner. These intrusions differ of course in degree, but all disrupt our “right to be let alone.” This way of thinking is what allows for Richard Posner to compare an unconstitutional search of one’s house to an “unwanted telephone solicitation” or “the blare of a sound truck.”⁷⁴ For Posner, the Fourth

PRIVACY LAW xi-xxiv (2d ed. 2006); RICHARD C. TURKINGTON & ANITA L. ALLEN, PRIVACY LAW xiii-xxxi (2d ed. 2002).

72. See, e.g., *Minnesota v. Olson*, 495 U.S. 91, 98-99 (1990) (“To hold that an overnight guest has a legitimate expectation of privacy in his host’s home merely recognizes the everyday expectations of privacy that we all share. Staying overnight in another’s home is a longstanding social custom that serves functions recognized as valuable by society. . . . From the overnight guest’s perspective, he seeks shelter in another’s home precisely because it provides him with privacy”); *Robbins v. California*, 453 U.S. 420, 428 (1981) (plurality opinion) (“Expectations of privacy are established by general social norms”); James A. Bush & Rece Bly, *Expectation of Privacy Analysis and Warrantless Trash Reconnaissance After Katz v. United States*, 23 ARIZ. L. REV. 283, 293 (1981) (“[S]ocial custom . . . serves as the most basic foundation of a great many legitimate privacy expectations.”).

73. See Warren & Brandeis, *supra* note 61, at 196 (“To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle.”).

74. Richard A. Posner, *The Uncertain Protection of Privacy by the Supreme Court*,

Amendment protects “solitude,”⁷⁵ and it “is valued because it enhances the quality of one’s work or leisure.”⁷⁶

This conclusion is perfectly sensible provided that one accepts the premise that the Fourth Amendment is dedicated to protecting an individual’s privacy. From this point of view, the Fourth Amendment brings no special, constitutional norms to bear against state actors; rather it enforces against state actors privacy norms—freedom from embarrassment, peace and quiet, and so on—equally applicable to and indeed derived from the private sphere. Expectations of privacy in a given society depend largely on the habits, practices, and rules (customary or legal) governing the relations of private persons in that society. As a result, a Fourth Amendment dedicated to privacy must—and *Randolph* is once again a good illustration—ultimately reduce itself to duplicating private-sphere privacy expectations.

There is nothing wrong with a Fourth Amendment so conceived, except that it will have no understanding of what it really stands for. It will see its role inevitably shrinking as information technology expands. So long as Fourth Amendment privacy is parasitical on private-sphere privacy, the former must die as its host dies, and this host is undoubtedly faltering today in the networked, monitored and digitized world we are learning to call our own.

B. Repoliticizing the Fourth Amendment

What would it mean to repoliticize the Fourth Amendment?

The point of the Fourth Amendment is not to make state actors obey generally applicable, private-sphere privacy norms. It is to lay down the law—a distinctive body of law—for those who enforce it.

Why? Because, to state the obvious, the government’s law enforcement power is unique. The difference is both quantitative and qualitative. The ability of government to intrude, monitor, punish, and regulate is greater than that of private actors by many orders of magnitude. But more than this, the state has a right and duty to intrude into people’s lives that private parties do not.

As the nation’s principal law enforcer, the state can and should take actions with respect to private property that would constitute trespass or theft if done by private parties. Policemen can and should enter homes when no sensible person or reasonable stranger would.

But precisely because the state’s law enforcement power gives it a license to intrude into our homes and lives in ways that private parties cannot, the state poses dangers to a free citizenry that private parties do not. The Fourth Amendment must be responsive both to the distinctive needs of law enforcement and to its distinctive threats. Search and seizure law is the site of

1979 SUP. CT. REV. 173, 190.

75. *Id.*

76. *Id.* at 193.

the delicate but critical negotiation between the use and abuse of the police power.

This observation ought to be so obvious as to be banal: who would disagree that the Fourth Amendment's central function is to navigate the minefield between too much and too little police power? Yet it is just this function that modern doctrine disables. A Fourth Amendment dedicated to privacy cannot meet the Fourth Amendment's core task head-on. Instead of taking specific aim at the distinctive needs, responsibilities, and dangers of the government's awesome law enforcement power, the Fourth Amendment becomes, in the words of one federal circuit court—yes, the Seventh Circuit—a guarantor of “peace and quiet” and “relaxation.”⁷⁷

Fourth Amendment doctrine needs to be repoliticized. It needs a new foundation, responsive to that amendment's essential concern with the use and abuse of police power.

That foundation can be discovered, as it happens, in the text itself. The Fourth Amendment does not guarantee “peace and quiet,” “relaxation,” solitude, dignity, freedom from embarrassment, expectations of privacy, or a right to be let alone. It guarantees a right of security.

C. *Reading the Fourth Amendment as Written*

The first words of the Fourth Amendment are: “The *right of the people to be secure* in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ”⁷⁸

The italicized words play little role in current doctrine. Fourth Amendment case law does not inquire into “reasonable expectations of security.” There is little or no jurisprudence of security. The right to security has not been completely lost, but when “personal security” makes its occasional appearance on the modern Fourth Amendment stage, it does so with little or no development and is treated essentially as a kind of archaic synonym for physical liberty, a right to be free from arbitrary bodily restraint.⁷⁹

There is one place in current Fourth Amendment thinking where the concept of security does play a decisive role, but the exception is perverse. Security is frequently invoked as a thing *weighing against* and *overriding*

77. *United States v. Kramer*, 711 F.2d 789, 793 (7th Cir. 1983). Judge Posner did not deliver the opinion in *Kramer*, but he was on the panel. *See id.* at 791.

78. U.S. CONST. amend. IV (emphasis added).

79. For example, in *Terry v. Ohio*, 392 U.S. 1 (1968), where the Court upheld a stop-and-frisk, the Court several times described the Fourth Amendment as protecting “personal security,” but described this “inestimable right of personal security” as “‘the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.’” *Id.* at 8-9 (quoting *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891)).

Fourth Amendment rights.⁸⁰

Yes, it's logically possible to read the Fourth Amendment's text in a way that justifies the erasure of the "right . . . to be secure." For this right (someone might say) is guaranteed only "against unreasonable searches or seizures," and thus the latter term is the sole legally operative one. After all, if the Fourth Amendment had provided, "The right of the people to be *protected* in their houses against unreasonable searches and seizures shall not be violated," no one would fault courts for failing to develop a Fourth Amendment "jurisprudence of protection." Judges would skip the word "protected" and get on with the business of defining unreasonable household searches and seizures.

If "secure" is read essentially to mean "protected," the "right to be secure" becomes a kind of grammatical excess in the Fourth Amendment's text, playing no operative or independent role of its own. On this view, the Fourth Amendment is just wordy. What it really means is, "The right of the people against unreasonable searches and seizures of their persons, houses, papers, and effects shall not be violated."

We have read the Fourth Amendment this way for a long time, eliminating altogether the words "to be secure." The next step: eliminate more words until the Fourth Amendment simply becomes, "The right against unreasonable searches and seizures shall not be violated"—which is in fact exactly how modern doctrine construes it.⁸¹

Observe that along with the elision of the "right to be secure," another term has vanished here as well: *the people*. The Fourth Amendment differs in an important respect from the criminal procedure guarantees that immediately follow it. In the Fifth Amendment, the rightholder is expressly made singular: "nor shall any *person* be . . . compelled in any criminal case to be a witness against *himself*."⁸² Similarly, the Sixth Amendment's rights bearer is the singular "accused," who is granted, for example, the right "to be confronted with the witnesses against *him*".⁸³ But in the Fourth Amendment, the rightholders are the *people*, who are "to be secure in *their* persons, houses, papers, and effects."⁸⁴ It is not only security, but "the right of *the people* to be secure" that vanishes when the Fourth Amendment is read simply to prohibit "unreasonable searches and seizures."⁸⁵

80. See, e.g., Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 665-66, 674 (1989) (holding that "national security hazards" must be "balance[d] [against] the individual's privacy expectations").

81. See, e.g., United States v. Arvizu, 534 U.S. 266, 273 (2002) ("The Fourth Amendment prohibits 'unreasonable searches and seizures' by the Government . . ."); Florida v. Bostick, 501 U.S. 429, 439 (1991) ("The Fourth Amendment proscribes unreasonable searches and seizures . . ."); New York v. Class, 475 U.S. 106, 116 (1986) ("The Fourth Amendment by its terms prohibits 'unreasonable' searches and seizures.").

82. U.S. CONST. amend. V (emphasis added).

83. Id. amend. VI (emphasis added).

84. Id. amend. IV (emphasis added).

85. See AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 64-

What if, through all this elision and erasure, the modern reading of the Fourth Amendment has omitted what the amendment was enacted centrally to protect?

Suppose the people's right to security was no grammatical excess in Revolutionary American legal thought. Suppose instead that security was at that time considered a fundamental right, on the same exalted plane as liberty and property, but different from both. Suppose that this triumvirate—security, liberty, and property—represented the three primary, absolute rights, each essential to freedom, with security coming first.

Americans of the founding generation would have been likely to see things this way. Blackstone had told them so. “[S]uch rights as are absolute,” Blackstone wrote, “are few and simple,”⁸⁶ and “these may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty, and the right of private property.”⁸⁷ Only when all three of these “great and primary rights” are “inviolate,” said Blackstone, is “the subject . . . perfectly free.”⁸⁸

The concept of *security* was, moreover, linked in Revolutionary America with special centrality (and this was in important respects an original development, not a mere recitation of Blackstone) to the conviction that certain kinds of searches and seizures were intolerable.⁸⁹ Prominent Americans repeatedly argued against the writs of assistance on the ground that they violated people's security.⁹⁰ The word “secure” or its cognates appeared in several early state constitutional search and seizure provisions,⁹¹ then in

67 (1998).

86. 2 WILLIAM BLACKSTONE, COMMENTARIES *125.

87. *Id.* at *129.

88. *Id.* at *141, *144.

89. See Clancy, *supra* note 15, at 350-53 (collecting sources).

90. A 1762 Massachusetts newspaper article, probably written by James Otis himself, protested the writs of assistance on the ground that “every householder in this province, will necessarily become *less secure* than he was before this writ.” BOSTON GAZETTE, Jan. 4, 1762, reprinted in M.H. SMITH, THE WRITS OF ASSISTANCE CASE 562 (1978). John Dickinson, in his Pennsylvania Farmer letters, attacked the writs as “dangerous to freedom, and expressly contrary to the common law, which ever regarded a man's house as his castle, or a place of perfect security.” 1 JOHN DICKINSON, THE POLITICAL WRITINGS OF JOHN DICKINSON, ESQ., LATE PRESIDENT OF THE STATE OF DELAWARE, AND OF THE COMMONWEALTH OF PENNSYLVANIA 230 (Baltimore, Bonsal & Niles 1801) (emphasis omitted). In Boston in 1772, a town committee condemning the writs concluded:

Thus our Houses, and even our Bed-Chambers, are exposed to be ransacked, our Boxes, Trunks and Chests broke open, ravaged and plundered, by Wretches, whom no prudent Man would venture to employ even as Menial Servants . . . By this we are cut off from that domestic security which renders the Lives of the most unhappy in some measure agreeable.

JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY BETWEEN 1761 AND 1772, at 467 (New York, Russell & Russell 1865).

91. See, e.g., MASS. CONST. of 1780, pt. 1, art. XIV (“Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers,

Madison's initial draft of the Fourth Amendment,⁹² and then of course in the Fourth Amendment itself. In the early nineteenth century, Kent and Story would write that the Fourth Amendment (as well as other constitutional provisions, state and federal) had memorialized the common law's sacred right to personal security.⁹³

Grant, then, if only provisionally and for the sake of argument, that we ought to read the Fourth Amendment as written. Stipulate that the people's right "to be *secure* in their persons, houses, papers, and effects" is a thing of independent meaning and value, and that guaranteeing it was and is the amendment's whole point. A different command then emerges from the Fourth Amendment's text.

Instead of deleting the "right to be secure" on the way to "unreasonable searches or seizures," we would be required to *read the latter term in light of the former*. The meaning of "unreasonable" in the Fourth Amendment is of course a critical interpretive question for search and seizure doctrine. Reading the Fourth Amendment as written, the meaning of "unreasonable" would not, however, be the ultimate question. The meaning of "unreasonable" would instead depend on the meaning of "the people's right to be secure."

In other words, a search or seizure would be *unreasonable if and only if it violates the people's right of security*. That is the reading of the Fourth Amendment lost when modern doctrine accepted privacy as its touchstone.

III. A JURISPRUDENCE OF SECURITY

What would a Fourth Amendment committed to security look like? In what respects would it agree with current doctrine, and how would it differ?

A. *The Core Meaning of the Fourth Amendment*

To recover the Fourth Amendment's right to security, a good place to begin is with the amendment's core meaning—its foundational paradigm cases.⁹⁴

and all his possessions."); N.H. CONST. of 1784, pt. 1, art. XIX ("Every subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions.").

92. JAMES MADISON, *Speech to the House of Representatives* (June 8, 1789), in 12 THE PAPERS OF JAMES MADISON 197, 201 (Robert A. Rutland et al. eds., 1977). The Virginia ratifying convention's proposal for the amendment also referred to "a right to be secure." EDWARD DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 184 (1957).

93. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 1, 12 (New York, O. Halsted 1826); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1902, at 648 (Melville M. Bigelow ed., 5th ed., Boston, Little, Brown, & Co. 1891) (1825).

94. To pursue paradigm-case interpretation, as I will here, is to follow a particular set of interpretive commitments; privileging the constitutional text and that text's foundational applications, treating the latter as paradigmatic for all subsequent interpretation. And to

1. General warrants

The Fourth Amendment was enacted above all to forbid “general warrants.”⁹⁵ Of these general warrants, there were for Revolution-era Americans two principal exemplars: those used in the Wilkesite cases in England⁹⁶ and, perhaps to a lesser extent, those used against the colonists themselves in the “wrts of assistance” controversies.⁹⁷

In both instances, these general warrants were unparticularized, unsworn search warrants, unsupported by probable cause. A typical 1761 Boston writ of assistance, for example, authorized entry into any “House Shop Cellar Warehouse or Room or other place”—in short any location at all—“suspected” of containing goods on which custom duties had not been paid; the holder of the writ (along with all whom he selected to give him “assistance”) was empowered “to break doors chests trunks & other package” in order to discover such goods.⁹⁸ Similarly, the Wilkesite warrants authorized the search of private houses (and other premises) for “papers” that would be evidence of criminal activity.⁹⁹

But these general wrts were not only search warrants. The wrts of assistance called for the seizure of uncustomed property.¹⁰⁰ And the Wilkesite warrants were arrest warrants.¹⁰¹

John Wilkes himself was arrested under a warrant that, without naming any specific individuals, authorized the pursuit and seizure of all authors,

follow one set of interpretive commitments is, of course, implicitly to reject others. For example, I will not be asking what the “original understanding” of the Fourth Amendment was (in the way that term is usually understood) or what Blackstone had in mind when he used the term “personal security.” For more on the paradigm-case method, see JED RUBENFELD, REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW chs. 1-3 (2005).

95. 2 STORY, *supra* note 93; *see* Boyd v. United States, 116 U.S. 616, 625 (1886); AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 13 (1997); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 668 (1999).

96. *See* Entick v. Carrington, (1765) 95 Eng. Rep. 807 (K.B.); Wilkes v. Wood, (1763) 98 Eng. Rep. 489 (K.B.). For overviews of the Wilkes affair and its significance to the Fourth Amendment, see Powell v. McCormack, 395 U.S. 486, 527-41 (1969); *Boyd*, 116 U.S. at 625-30; AMAR, *supra* note 95, at 11-14; PAULINE MAIER, FROM RESISTANCE TO REVOLUTION 162-69 (1972); 2 STORY, *supra* note 93, § 1902, at 648-50.

97. For an overview of the wrts of assistance and their significance to the Fourth Amendment, see Davies, *supra* note 95, at 550-70. Amar believes the significance of the wrts of assistance in the original understanding has been overstated. *See* AMAR, *supra* note 85, at 66.

98. Writ of Assistance, Dec. 2, 1762, in SELECT CHARTERS AND OTHER DOCUMENTS ILLUSTRATIVE OF AMERICAN HISTORY 1606-1775, at 258-59 (William MacDonald ed., New York, MacMillan 1899) [hereinafter Writ of Assistance].

99. *See* 7 ENGLISH HISTORICAL DOCUMENTS 1714-1783, at 256 (D.B. Horn et al. eds., 1996).

100. Writ of Assistance, *supra* note 98, at 260-61.

101. *See* 7 ENGLISH HISTORICAL DOCUMENTS, *supra* note 99.

publishers, and printers of a particular “seditious and treasonable” issue of a newspaper.¹⁰² (In other instances, the Wilkesite warrants were not general; they did name particular individuals to be arrested, but again without any evidence, much less probable cause, in support.¹⁰³) In all, almost fifty people—mainly printers and suspected associates—were arrested and jailed under these general warrants, on mere suspicion, with no evidence of probable cause against them.¹⁰⁴

2. Probable cause

The lack of particularization—the absence of a specific description of the persons, things, or places to be seized or searched—is obviously a hallmark of general warrants. But I have emphasized the lack of probable cause because that omission is more critical still.

The intolerable “generality” of general warrants is not a result, ultimately, of their failure to name particular locations or individuals. It is a result of their dispensing with probable cause. In the well-established formulation, “probable cause” means evidence sufficient to make a reasonable person believe—not suspect, but *believe* or *conclude*—that a particular individual is involved in a crime or that a particular place contains objects pertaining to a crime.¹⁰⁵ Whenever this standard is required, there can be no “general” searches or seizures.

The reason is the inverse correlation between the quantum of evidence required for a search or seizure and the number of targets potentially subject to it. A thousand people may be *suspected* of being a particular wanted criminal. But only one can be *believed* to be the culprit.

Say that a certain criminal is known to have fled to a certain neighborhood. On a mere-suspicion standard, the police could in principle search *every* house and arrest *every* resident. Under a probable cause standard, they cannot.¹⁰⁶ In

102. *Id.*

103. *Id.*

104. See *Huckle v. Money*, (1763) 95 Eng. Rep. 768-69 (K.B.); NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 43-44 (1937); *see also Payton v. New York*, 445 U.S. 573, 608 (1980); *Stanford v. Texas*, 379 U.S. 476, 482-83 (1965) (discussing arrests made in the Wilkes affair).

105. See, e.g., *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979) (“[P]robable cause’ to justify an arrest means facts and circumstances . . . sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense.”); *see also Carroll v. United States*, 267 U.S. 132, 162 (1925) (stating that probable cause refers to evidence “sufficient in [itself] to warrant a man of reasonable caution in the belief’ that a felony has been committed by the individual in question).

106. See, e.g., *United States v. Winsor*, 846 F.2d 1569, 1572 (9th Cir. 1988) (en banc) (holding that, where fugitive fled into hotel and police went room-to-room demanding entry, search was unconstitutional because “at the time the police knocked on Winsor’s door, they

principle, they can search at most one house and arrest one resident.¹⁰⁷

In other words, what makes general warrants objectionable—their generality—depends on their implicit use of a standard for searches and seizures well below probable cause. That's why the Fourth Amendment's second clause not only mandates that all warrants "particularly describ[e]" the person, things, or places to be searched or seized, but also expressly prohibits the issuance of a warrant "but upon probable cause."¹⁰⁸

The particular-description requirement is not unimportant. It ensures in theory (but perhaps only in theory) that the warrant's issuer—a magistrate or judge—has himself applied the probable cause standard to the particular person, place, or thing in question and found that standard satisfied by the evidence put before him. But it is the probable cause requirement that prevents "general" searches and seizures.

Without that requirement, the Fourth Amendment's demand for particular descriptions would be feckless. A warrant describing with perfect accuracy whom and what it targeted would still have the intolerable vices of a "general warrant" if, for example, it particularly described each adult male inhabitant of a given town and each house located therein. Nor would this vice be cured by requiring that a single warrant could target only a single person or place. Such requirements would be nugatory so long as police could obtain a thousand such warrants, one for each resident and house in town, as in principle they could do if mere suspicion were sufficient. No particular-description requirement can preclude this result; it is the probable cause requirement alone that does so.

In short, the core meaning of the Fourth Amendment's right of security is to deny government the power to effect generalized arrests or searches of homes without probable cause.¹⁰⁹

had *reasonable suspicion* to believe that the suspected bank robber was inside, but *did not have probable cause* to believe so" (emphasis added)).

107. That is, they can search only one house if they are looking for the criminal himself and arrest only one person as the criminal himself; the case is of course different if we add accomplices to the story or evidence scattered throughout various houses.

108. U.S. CONST. amend. IV.

109. On the view that I have just presented, it follows that generalized *warrantless* arrests and home searches on less than probable cause would violate the Fourth Amendment just as paradigmatically as would the same arrests and home searches effected under a general warrant. This view could, in principle, be rejected. If the Fourth Amendment's probable cause requirement, which appears in the amendment's second clause (the "Warrant Clause"), is read as a safeguard that applies *only* against warrants, on the theory that warrants in general (rather than *general warrants*) were "an enemy," see AMAR, *supra* note 95, at 13 (quoting TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 41 (1969)), then police might in principle have the constitutional authority to conduct exactly the same searches and seizures licensed by general warrants—i.e., systematically invading people's homes, searching through their papers, making arrests, and holding people in jail on mere suspicion or no suspicion at all—provided the police were shrewd enough to do so without a warrant. My view is that this outcome would violate the Fourth Amendment's core meaning. On the other hand, a security-based Fourth Amendment would not hold that *all* searches and seizures require probable cause (or a warrant); they require probable cause only

B. *The Meaning of Security*

But the prohibition of general warrants is an old, familiar story. The question is how to do justice to the Fourth Amendment in light of that prohibition. How, outside the context of general warrants, must the Fourth Amendment be interpreted if we are to capture both its text and its paradigm cases?

Following long-established usage, which can be traced through Story, Kent, and Blackstone, I will refer to the “right of the people to be secure in their persons, homes, papers, and effects” as establishing a right of “personal security.”¹¹⁰ So the question is: how are we to understand the right of personal security given that it paradigmatically prohibits generalized arrests and home searches in the absence of probable cause?

A narrow construction of personal security is perfectly possible. For example, personal security can be interpreted as a freedom from bodily restraint; so the Court seems to have understood the term in modern Fourth Amendment cases.¹¹¹ Personal security would thus become essentially synonymous with physical liberty.

But this understanding of security fails to capture the amendment’s paradigm cases: it doesn’t grasp the harm that general warrants actually inflict.

Imagine for a moment the police systematically violating the Fourth Amendment’s paradigmatic prohibitions. How might such a society look? Perhaps police routinely sweep people off the streets, out of airports, out of restaurants, out of their houses, and these people disappear into detention, with no right to a hearing at which the state must show probable cause to believe that they committed a crime. Say that police with impunity seize thousands of people in this way, on the basis of mere “suspicion.” Imagine too that government agents can and systematically do enter into people’s homes, without warning, if not to arrest them then at least to ransack their papers and effects, all on mere suspicion.

Is there a loss of physical liberty in this imagined society? Of course, individuals imprisoned on suspicion are (obviously) denied their physical liberty. Yet we would miss something fundamental if we identify the constitutional harm here solely in terms of the loss of physical liberty suffered by the individuals imprisoned. We would equally miss something fundamental

when, as with arrests and invasions of the home, permitting them on mere suspicion would destroy the security the Fourth Amendment exists to protect. *See, e.g., infra* Part III.E.2.

110. *See supra* note 15 and Part II.C. The term “personal security” can be viewed either as a shorthand solely for the people’s security in their “persons,” so that the security of their “houses, papers, and effects” becomes an analytically distinct concept, or as a shorthand for the entire right of security guaranteed by the Fourth Amendment. My own view is that the latter understanding is best, but nothing in the argument I will present turns on this point.

111. *See supra* note 79.

if we said that the constitutional harm lay in the loss of privacy suffered by those whose homes were searched.

The missing element is the much more pervasive harm reaching beyond the (very substantial) injuries inflicted on the particular individuals searched or seized. As noted above, the Fourth Amendment's treatment of the *people* as its rightholder is a distinctive feature of its text completely ignored in modern search and seizure jurisprudence. But the Fourth Amendment's *rightholder* is directly connected to the *right* the amendment actually protects. The fundamental constitutional harm created by systematic suspicion-based arrests and searches is the pervasive and profound *insecurity* such measures inflict *on the people as a whole*.

What is this insecurity?

It is the stifling apprehension and oppression that people would justifiably experience if forced to live their personal lives in fear of appearing "suspicious" in the eyes of the state. The idea here is not fancy or complex. Agree with it or not, it is the Fourth Amendment's central idea. Freedom requires that people be able to live their personal lives without a pervasive, cringing fear of the state. A fear produced by the justified apprehension that their personal lives are subject at any moment to be violated and indeed taken from them if they become suspicious in the eyes of governmental authorities.

C. Personal Security as the Security of Personal Life

This idea is no anachronism. Consider what Francis Lieber, the great mid-nineteenth-century scholar of American law, said of the Fourth Amendment.¹¹² Lieber, persecuted in his native Germany before fleeing to England and then to Boston in 1827,¹¹³ was a strong admirer of America's Fourth Amendment, in which he saw a kind of commandment laid down not only on the state, but on the individual: "Be a man, thou shalt be sovereign in thy house."¹¹⁴ At the same time, wrote Lieber, the Fourth Amendment expresses Anglo-American law's "direct antagonism" to the "police government"¹¹⁵ of the continental European countries, where the arm of the state "enters at night or in the day, any house or room, breaks open any drawer, seizes papers or anything it deems fit, without any other warrant than the police hat, coat and button."¹¹⁶

Lieber's language may be out of date. The views he expressed are not.

To "[b]e a man" is to have sufficient independence, courage, and freedom

112. 1 FRANCIS LIEBER, ON CIVIL LIBERTY AND SELF-GOVERNMENT 76-84 (Phila., Lippincott 1853).

113. FRANK FRIEDEL, FRANCIS LIEBER: NINETEENTH CENTURY LIBERAL vii, 27-62 (photo. reprint 2003) (1947).

114. LIEBER, *supra* note 112, at 78.

115. *Id.*

116. *Id.* at 78-79.

to express and to act on one's true beliefs, principles, and desires. In place of this phrase, but with the same meaning, let's speak of people being *their own men and women*—being the men and women they choose to be, rather than the men and women an authority or a majority tells them to be. People robbed of security, whose bodies, homes, papers, and effects can be invaded at any time and who live with a pervasive fear of imprisonment as the price of falling under state suspicion, precisely cannot be their own men and women. They are instead under an intense pressure to conform to public norms and this renders them potentially suspicious, even in their personal lives—a pressure not to express their true opinions or desires, if these would put them in conflict with public norms, in their letters, e-mail, Internet history, or personal conversations, all of which could be seized, searched, and scrutinized without probable cause.

We are all familiar with the thought that democracy requires a flourishing “public life.” Less familiar, but equally essential, is the idea that a self-governing people requires a flourishing *personal life*.

As I use the term here, personal life denotes that sphere of activity and relations where people are supposed to be free from the strictures of public norms, free to be their own men and women, free to say what they actually think, and to act on their actual desires or principles, even if doing so defies public norms. Freedom requires a robust personal life for two reasons: first, because personal life is a thing of fundamental, inherent value to human beings and second, because it is the crucible of self-government.

This was John Stuart Mill's theme in *On Liberty*, where he repeatedly stressed the vital importance not only to personal but social and political being of “individuality,” of “nonconformity,” of a space for personal life well insulated from the eye of “public opinion.”¹¹⁷ Particularly in a democracy, Mill warned, where majority will and public opinion loom so large politically, people must be free in their personal lives to defy public norms—to speak what they think and act as they choose.¹¹⁸ For if people fear to say what they think or act on their principles in personal life, they are most unlikely to do so in public life.

In short, if what we are looking for is a conception of personal security that can serve as a foundation for an alternative search and seizure jurisprudence, capturing the Fourth Amendment's text in light of its paradigm cases, but moving us beyond the privatized jurisprudence of modern case law, we might say this: *personal security means the security, indeed the securing, of personal life.*

The concept of a constitutionally protected personal life yields a clean, compelling understanding of the Fourth Amendment's opposition to totalitarianism. Totalitarianism is the name we give to that form of government

117. JOHN STUART MILL, ON LIBERTY 70, 71, 81 (Elizabeth Rapaport ed., Hackett Publ'g Co. 1978) (1859).

118. *Id.* at 11-13.

which aims, precisely, at the obliteration of personal life. Totalitarian states embrace with a vengeance the idea that the personal is political. It demands that individuals conform to public norms at all times and in all places. This is why the Fourth Amendment is correctly understood as anti-totalitarian.¹¹⁹ The Fourth Amendment prohibits government in the United States from turning into what Lieber called “police government”¹²⁰—or what we today would call a “police state.” It secures the existence of personal life as the domain in which individuals can defy public norms if and as they choose.

Paradigmatically, the freedom to defy public norms includes the freedom to criticize those in power, a freedom obviously essential to democracy (Wilkes was targeted, after all, for sedition). But it is not only political dissidence that the Fourth Amendment enables. It protects all the freedoms—indeed the existence—of personal life. But there is one important freedom that falls *outside* this ambit: the license to break validly enacted criminal laws.

The freedom to defy public norms that a democratic citizenry requires is not a license to ignore democratically enacted laws. The Fourth Amendment is not violated by searches and seizures that make *criminals* insecure. It is violated by searches and seizures that rob the *law-abiding* of their security. Yes, like the proof-beyond-a-reasonable-doubt standard, the Fourth Amendment lets some criminals escape justice. But that is a consequence of the Fourth Amendment, not its purpose.¹²¹ The Fourth Amendment exists not to increase marginal criminality, but to give people the security they need to exercise the freedoms that the state’s prohibitory laws leave open to them (including but not limited to their constitutional freedoms of speech, of religion, and so on).

Here we see the logic that ultimately explains the Fourth Amendment’s probable-cause requirement. To have personal security is to have a justified belief that if we do not break the law, our personal lives will remain our own. The reason probable-cause searches and seizures are constitutional is not that probable cause marks the point, as the conventional wisdom would have it, at which the public’s interests “outweigh” the individual’s¹²²—a balancing-test

119. See, e.g., *United States v. White*, 401 U.S. 745, 765 (1971) (Douglas, J., dissenting) (counseling the majority to “spend some time in totalitarian countries [to] learn firsthand the kind of regime they are creating” by allowing warrantless wired police informants); Solove, *supra* note 46, at 1084-86.

120. LIEBER, *supra* note 112, at 78.

121. See, e.g., Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1229 (1983).

122. See, e.g., *Whren v. United States*, 517 U.S. 806, 817 (1996) (“It is of course true that in principle every Fourth Amendment case, since it turns upon a ‘reasonableness’ determination, involves a balancing of all relevant factors. With rare exceptions . . . the result of that balancing is not in doubt where the search or seizure is based upon probable cause.”); *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) (“Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not

explanation of the probable cause requirement that fails to explain anything.¹²³ The reason probable-cause searches and seizures are constitutional is that they do not violate the security the Fourth Amendment protects. When the police can jail or invade homes only on probable cause, the vast number of law-abiding citizens will remain robustly secure in their persons and houses. Yes, there will certainly be cases in which the state has probable cause to arrest an innocent man. But the probable cause standard not only greatly reduces the number of people it subjects to arrest; it also distributes amenability to arrest in a distinctive way. Apart from traffic violations, the overwhelming majority of law-abiding people are likely never to be determined on the basis of probable cause to have committed a crime. At any given moment, on any given day—especially in their homes—the vast majority of law-abiding citizens will justifiably not consider themselves targets of imminent probable-cause arrest or surveillance. That is why the probable-cause standard vindicates the Fourth Amendment right of security.

What exactly is personal life? I offer no formal definition—the hope is that the concept is familiar and workable enough to do without one—but three things are clear. First, the primary foci of personal life are people’s “persons, houses, papers, and effects,”¹²⁴ so that the Fourth Amendment’s text gains coherence when the right of security it protects is understood as the security of personal life. Second, personal life undoubtedly includes personal communications and other interactions among individuals even when those communications and other interactions occur outside the home. And third, personal life is a collective good. Precisely because personal life consists, to a great degree, of interactions among individuals, each individual’s capacity to

hesitated to adopt such a standard.”).

123. The pitfalls of this explanation are many. For example, the notion that probable cause tips the balance in favor of the state appears to rest on a comparison of incommensurables or a quantification of unquantifiables (the “cost” of lives threatened, say, versus the “price” of lost liberty). Moreover, even assuming quantifiability, how could judges, who typically adjudicate two-party adversarial proceedings, possibly be in a position to evaluate social costs and benefits involving hundreds of millions of people along multiple dimensions (as they would have to do if “in principle every Fourth Amendment case . . . involves a balancing of all relevant factors”)? *Whren*, 517 U.S. at 817. Finally, if a balancing of interests really explained the probable cause requirement, surely that balance ought to vary—the quantum of evidence required for an arrest ought to change—depending on the gravity of the crime involved (because the social costs of failing to apprehend criminals are obviously much higher for certain crimes than for others). But under both text and doctrine, the probable cause requirement applies to *all* warrants and *all* arrests, with no variation for heinousness, for lesser or greater social harms, and so on. See, e.g., U.S. CONST. amend. IV (“[N]o Warrants shall issue, but upon probable cause.”); *Dunaway v. New York*, 442 U.S. 200, 208 (1979) (stating that “[t]he [probable cause] standard applied to all arrests, without the need to ‘balance’ the interests and circumstances involved in particular situations”).

124. I mean only that “houses” should be read to include, for example, apartments, and that “papers” should be read to include electronically stored documents or visited web pages, and so on. I don’t mean that judges have some sort of general license to “update” the constitutional text to suit contemporary needs or values.

have a personal life depends in part on others' having that capacity as well—which is perhaps the decisive reason why the Fourth Amendment's rightholder is collective, rather than singular.

We are now in a position to set out a basic doctrinal test of constitutionality for searches and seizures under a Fourth Amendment committed to security.

D. *The Test of Generalizability*

The most basic change a jurisprudence of security would introduce into Fourth Amendment doctrine is the introduction of a *test of generalizability*.

Plainly, no single search or seizure, by itself, can destroy the people's security. It is rather the *generalization* of the power underlying a particular search or seizure that has the potential to do so. The idea of generalization here is drawn from the paradigm case: "general warrants." A single arrest on suspicion may have a negligible or nonexistent effect on popular security. But a general warrant is different. It is, precisely, a warrant authorizing the police to arrest or invade homes *generally* on mere suspicion. It is this generalized power to search and seize that made general warrants so noxious—because of their profoundly destructive effect on security.

The test of generalizability systematizes this logic. Every act of governmental surveillance or detention asserts a power: the power to search or seize under a particular standard, or in a particular kind of fact pattern. If judges uphold the search or seizure, they uphold the power, deeming such-and-such searches or seizures warranted in such-and-such circumstances. We might put it this way: by upholding the power, courts *generalize the warrant*. They confer on the state a general license to search or seize in the same fact pattern, or under the same standard, in all cases, which affects the security of every person potentially subject to the search or seizure power at issue. When such a power would, *if unchecked*, allow the state to destroy the security of law-abiding people, that power *cannot* go unchecked.

Hence, despite what many modern courts say, judges adjudicating searches and seizures under the Fourth Amendment are *not* engaged in a balancing of the target's privacy interests against the state's law enforcement interests. They are asking whether the search-and-seizure power the state has asserted could be generalized without destroying the people's right of security.

This means that judges must ask what the effect would be on the people's right of security if the surveillance or detention power the government has asserted were to be systematically implemented. By "systematically implemented," I do not mean that the judiciary must imagine the government searching or seizing every single person or thing to which the power at issue could potentially apply. It is enough to imagine the challenged surveillance or seizure generalized into a regular, routine, widespread practice—implemented on a scale broad enough to become part of people's common knowledge and everyday life.

The doctrinal test demanded here is a remote cousin of Kant's famous formulation of the categorical imperative.¹²⁵ A search or seizure is unconstitutional if the "maxim" that would uphold it cannot be generalized: if the surveillance or detention power the government asserts cannot systematically be implemented without undermining the popular security the Fourth Amendment guarantees.

The next several Subparts apply the test of generalizability to various areas and issues raised earlier in this Article, each of which presents difficulties for modern Fourth Amendment law.

E. Applying the Test of Generalizability

1. Katz, circularity, and the Stranger Principle

A Fourth Amendment committed to security would share many important points of convergence with modern, privacy-based doctrine. One is the pathbreaking holding in *Katz*. We saw earlier that the "expectations of privacy" analysis launched in *Katz* ultimately undermines the very outcome the Court reached in that case (because it presses the doctrine inexorably toward the Stranger Principle, under which conversations with third parties, like the one at issue in *Katz*, are *not* subject to legitimate expectations of privacy). Under the test of generalizability, *Katz* becomes an easy case, and it no longer undermines itself.

In terms of their role in personal life, the various types of personal communications are no different from each other whether conducted over the telephone, through written correspondence, via e-mail, or in person. Conversing with others is a vital and central element of personal life; without such communication, personal life is hardly imaginable.

If the government can pry into such communication at will, it can systematically open our letters, listen in by parabolic microphone as we chat in the street or park, tap all our telephone conversations, and read all our e-mail. In this way, communication between individuals would essentially be removed from personal life. It would cease to exist as a sphere of human activity insulated from the demands and scrutiny of public authority. Where people can speak to one another only in fear that government agents somewhere are listening in through bugs and wires, the security of a vital piece of personal life is lost.

This reasoning escapes the circularity problem that afflicts expectations-of-privacy analysis. An announcement that all telephone calls will henceforth be

125. IMMANUEL KANT, GROUNDWORK FOR THE METAPHYSICS OF MORALS 37 (Allen W. Wood ed. & trans., Yale Univ. Press 2002) (1785) ("Act only in accordance with that maxim through which you can at the same time will that it become a universal law.").

monitored deprives people of their reasonable expectations of privacy in such calls. But, it does not deprive people of their right to security in such calls. The right to security attaches to all those domains of interaction in which people are outside the public sphere—all those domains of personal activity in which people who live in a free society ought to be free to be their own men and women, speaking and acting as they would, ungoverned by the censorious eye of public authority, defying prevailing social norms if they choose. Personal communication is plainly such a domain, and it is therefore protected by the Fourth Amendment regardless of whether the President or the Congress announces that such communication is no longer private.

At the same time, the right of security would be fully protective of interactions with strangers, which cause so much difficulty in current privacy-based Fourth Amendment doctrine. In personal life, people frequently interact with strangers. In fact, we will sometimes share information or activities with strangers that we would not share with those we know better. Perhaps in such cases, people surrender their “reasonable expectations of privacy” (because they cannot reasonably be assured that a stranger will keep their confidences), but they do not somehow cease to be engaging in personal life. The Stranger Principle, which holds that by exposing information to third parties we lose our Fourth Amendment rights in that information, would have no support in a jurisprudence of security.

2. Undercover agents

In *United States v. White*, a plurality of the Court reasoned that the use of a wired informant effects no Fourth Amendment search because it violates no reasonable expectations of privacy; an individual has no “justifiable and constitutionally protected expectation that a person with whom he is conversing will not then or later reveal the conversation to the police.”¹²⁶ Thus *White* and its progeny hold that the use of undercover agents triggers no Fourth Amendment scrutiny at all.¹²⁷ In other words, current doctrine grants the government an unchecked power to implant undercover agents anywhere it chooses.

The *White* doctrine fails the test of generalizability. Because it focuses exclusively on the privacy interests of the individuals whose conversations are monitored, the *White* analysis never takes into consideration the effect on people more generally. It completely neglects the harm that an unchecked power to use undercover agents threatens for popular security, beyond the violation (or nonviolation) of whatever privacy interests a particular defendant

126. 401 U.S. 745, 749 (1971) (plurality opinion).

127. *See id.* at 750-51; *see also United States v. Lee*, 359 F.3d 194, 199 (3d Cir. 2004) (rejecting defendant’s challenge to video and audio recording by an informant); *United States v. Davis*, 326 F.3d 361, 362 (2d Cir. 2003).

may (or may not) have had. This threat is what I tried to capture at the beginning of this Article, when I asked readers to imagine a society in which undercover agents were ubiquitous.

In such a society, there might perhaps be no violation of reasonable expectations of privacy—because everyone would understand that they could not reasonably expect privacy in confidences shared with third parties. But there would be a violation of personal security.

The true injury threatened by the *White* doctrine is borne by everyone, including those who are never spied on (therefore suffering *no* governmental invasion of their privacy), and those who stop saying anything personal to anyone else (therefore never suffering an exposure of anything private at all).¹²⁸ A society with ubiquitous undercover agents would be a secret police state,¹²⁹ in which one of the essential domains of personal life—personal communications between individuals—has been effectively destroyed as a domain of personal life, just as (to take the eighteenth-century analogy) a systematic practice of opening and reading everyone’s private letters would have effectively destroyed the security of that domain of personal life.

To repeat: state action that causes personal life to be lived under a cloud of fear—fear that the state is omnipresent; fear of retaliation for saying or doing the wrong things—violates the security the Fourth Amendment centrally protects. In such a society, the freedom to speak one’s mind would not die altogether, but it would subsist in anemic or solipsistic form. Personal communication between individuals is among the most central constituents of personal life. For this simple reason, it cannot be the law that undercover agents trigger no Fourth Amendment scrutiny of any kind. The Fourth Amendment must provide some check, some level of scrutiny.

This is not to say that the Fourth Amendment bars all covert police operations. Under the test of generalizability, the appropriate Fourth Amendment rules for undercover agents would vary according to context. For example, the Fourth Amendment need not restrict undercover agents offering to buy or sell narcotics on the street. This practice, even if generalized, would create no significant threats to personal life, which could flourish in perfect health even if one had to regard every stranger who solicited one to engage in a criminal transaction as a potential police spy.

On the other hand, because the home is so central to private life, all

128. As Justice Douglas said in his dissent in *White*, “[M]ust everyone live in fear that every word he speaks may be transmitted or recorded and later repeated to the entire world? I can imagine nothing that has a more chilling effect on people speaking their minds and expressing their views on important matters. The advocates of that regime should spend some time in totalitarian countries and learn firsthand the kind of regime they are creating here.” 401 U.S. at 764-65 (Douglas, J., dissenting) (citation omitted).

129. See, e.g., MARIA ŁOŚ & ANDRZEJ ZYBERTOWICZ, PRIVATIZING THE POLICE-STATE: THE CASE OF POLAND 31-32 (2000) (describing the ubiquitous use of covert agents as part of the “anatomy” of a police state).

undercover entries into the home might properly be subjected to the standard announced in *Terry*: a reasonable, articulable suspicion of past or imminent law violation.¹³⁰ The *Terry* standard here would prevent government agents from obtaining entry into everyone's home by posing as private actors (utility employees, strangers in need of assistance, and so on), but it would permit them to do so where they had an articulable suspicion of criminality reasonably directed at a specific individual's home.¹³¹

By contrast, the most exacting Fourth Amendment safeguards—probable cause and a warrant—could be required where the state attempts to plant undercover agents into the heart, as it were, of an individual's personal life. For example, the probable cause standard might apply where the government turned an individual's spouse into a wired informant inside his house, or used an undercover agent to seduce an individual—not just on a single occasion, but repeatedly and over time, becoming his intimate. Although current doctrine apparently has no objection to it,¹³² this practice works a profound corruption of personal life. If implemented on a widespread scale, it would utterly undermine—in a fashion current doctrine has no tools to grasp—people's security in their homes and personal conversations.

3. Randolph

The Court in *Randolph*, it will be recalled, held that police cannot enter a house where one resident consents while another physically present co-occupant objects.¹³³ The Court rested this conclusion on a finding that a “sensible” social “caller” would have withdrawn in such circumstances.¹³⁴ Hence Randolph, who objected to the entry, retained a reasonable expectation of privacy in his house, and hence the police entry violated the Fourth Amendment.¹³⁵

As should be clear by now, the analysis proposed in this Article rejects the *Randolph* Court's reasoning in its entirety.

130. See *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (“In *Terry*, we held that an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot.”); *Terry v. Ohio*, 392 U.S. 1, 20-21 (1968).

131. See Lewis R. Katz, *In Search of a Fourth Amendment for the Twenty-first Century*, 65 IND. L.J. 549, 582 (1990) (advocating an intermediate, reasonableness standard of review for the use of a “wired confidant . . . planted in the betrayed person's home or entourage”).

132. Cf. *United States v. Squillacote*, 221 F.3d 542, 551 (4th Cir. 2000) (suggesting that the FBI's use of a “mature male undercover agent” to “capitalize on [the defendant Squillacote's] fantasies and intrigue” did not require a warrant or even implicate the Fourth Amendment).

133. *Georgia v. Randolph*, 547 U.S. 103, 106 (2006).

134. *Id.* at 113.

135. *Id.* at 114-15.

Police conduct is not, under the Fourth Amendment, to be evaluated by reference to private-sphere expectations of privacy. Police are not constrained to intrude into people's homes or things only when sensible private actors would do likewise. The whole point of the Fourth Amendment—the difficult but necessary task it imposes on its interpreters—is to lay down the law for those who enforce the law. And law enforcement agents must sometimes enter homes when private persons would not. But they must also, in some circumstances, refrain from entering people's private lives when private actors would.

Under the test of generalizability, *Randolph* would have been an easy case. There is no constitutional barrier to a police entry in the *Randolph* circumstances.

A spouse calls the police. She asserts that her husband has kidnapped her child. Later, when the police are on the scene and the child appears to be safe, she tells them that her husband has illegal narcotics inside the house and asks them to enter to see for themselves. The husband objects. One's judgment about whether the police *ought* to enter in these circumstances may depend in part on one's view about narcotics crimes, about the degree to which the child's or woman's safety was or was not at that point still a colorable issue, or a host of other factors. But the question of whether a police entry was wise in the *Randolph* circumstances should not be confused with the question of whether the power asserted by the police in *Randolph*, if generalized, posed a threat to the conditions, existence, or health of personal life. There was no such threat.

Personal life is not categorically off-limits to the law. Family law regulates it. Contract law regulates it. Property law governs it. And there are circumstances in which police intrude into our personal lives without threatening the conditions of personal life. When one person in a home or marriage calls the police for help and asks them to enter, the police do not undermine the possibility or flourishing of personal life by giving the help requested.

The fact that the police in *Randolph* were responding to a voluntary call made by one of the residents deserves emphasis. It is critical for Fourth Amendment purposes that this call, along with the subsequent consent to police entry, was made by a private person not otherwise acting in concert with, or in response to inducements offered by, the state. In other words, we deal here with a rupture in personal life instigated by an inhabitant of personal life, not by the police or by a state actor.

This is not to say that the Randolphs' home and marriage were already sundered and hence the police entry could do them no further damage. That issue has no relevance to the Fourth Amendment, the function of which is not to make police conduct the best marital therapy it can be. The sole point of relevance is that generalizing the *Randolph* entry would not undermine the conditions of private life. There is little or no threat to private life in allowing the police the systematic power to enter the home of individuals who call them,

who tell them that their spouse (or any other co-occupant) is committing crimes inside the home, and who ask them to enter for a limited purpose for a limited time to search for a particular thing—even if all this occurs against the will of the other spouse.

Randolph's privacy may have been violated in *Randolph*. His reasonable expectations of privacy as against third parties or strangers may have been defeated. But the police entry into his home did not imply a power that threatened the conditions of personal life. Nor did it in any other way threaten the right of the people to be secure in their persons or homes.

4. *Standing*

Finally, consider the law of Fourth Amendment standing. Under current doctrine, Fourth Amendment claimants must allege a violation of their own reasonable expectations of privacy in order to have standing.¹³⁶ This doctrine is quite logical given the prevailing understanding of what the Fourth Amendment protects (privacy). Unfortunately, it fails to vindicate the right the amendment is supposed to protect.

Take a surveillance measure that, although known to the public at large, is conducted in secret so that no individual knows whether he has been targeted by it. This was precisely the fact pattern recently confronted by the Sixth Circuit when a group of plaintiffs challenged the covert NSA eavesdropping program mentioned at the beginning of this Article.¹³⁷ The appellate court dismissed for lack of standing. No plaintiff could claim or show that his own conversations had been intercepted; hence no plaintiff could allege a violation of his or her own expectations of privacy.¹³⁸ It followed that none had standing.

The result: privacy-based Fourth Amendment law has created a standing doctrine abnegating the right the Fourth Amendment protects. Under the Sixth Circuit's ruling, the government could publicly announce that it is engaging in a widespread, systematic, unconstitutional surveillance program, yet a Fourth Amendment challenge to that program would apparently never be justiciable so long as the government never disclosed whom, specifically, it had targeted. The flaw in the court's reasoning is that it has omitted the people's right of security.

If a particular kind of search is unconstitutional (I will return later to the constitutionality of the NSA program), it is unconstitutional because it undermines the security of law-abiding citizens. The destruction of security can

136. See, e.g., *United States v. Payner*, 447 U.S. 727, 731-32 (1980).

137. *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007).

138. See *id.* at 655 (“If, for instance, a plaintiff could demonstrate that her privacy had actually been breached (i.e., that her communications had actually been wiretapped), then she would have standing to assert a Fourth Amendment cause of action for breach of privacy. In the present case, the plaintiffs concede that there is no single plaintiff who can show that he or she has actually been wiretapped.”).

be fully effected even when no particular individual can show a violation of his reasonable expectations of privacy. It can be fully effected simply by the knowledge that a certain form of surveillance is being exercised.

The Fourth Amendment injury caused by unconstitutional surveillance is not the disappointment of someone's expectations of privacy. It is the undermining of security. Anyone who reasonably believes his personal communications are subject to unconstitutional eavesdropping suffers a loss of security—even if he has not lost his privacy. Accordingly, anyone who can allege a reasonable belief of this kind (and there was no doubt that the plaintiffs in *ACLU v. NSA* had made that showing) has alleged the relevant constitutional injury and, for standing purposes, ought to be allowed to sue.

The unacceptability of the Sixth Circuit's result becomes apparent if one imagines a systematic suspicion-based abduction and detention program in which the detainees simply disappear without a trace, the cause of their vanishing unprovable, their whereabouts undisclosed. Obviously, all individuals "disappeared" in this way suffer a constitutional injury, but they are not the only ones to do so. The widespread fearfulness, uncertainty, and loss of self-sovereignty—in short the insecurity—under which everyone potentially subject to this practice is forced to live is the precise evil against which the Fourth Amendment takes aim. Yet under the Sixth Circuit's ruling, it would be possible for the state to announce a new "National Security Disappearance Program" of just this sort—and for no one to be able to challenge the program until it began to claim victims. Indeed, under the Sixth Circuit's approach, there might never be standing to challenge the program. The "disappeared" would be unavailable, and no one else could show a violation of his own privacy.

Current Fourth Amendment standing doctrine fails to do justice not only to the right the Fourth Amendment actually protects, but to the rightholder that the amendment actually specifies—the *people*, rather than the individuals targeted. A Fourth Amendment committed to security would correct these errors.

IV. UNLAWFUL ENEMY COMBATANTS, DATA MINING, AND WIRETAPPING

In this Part, I consider three of the most important detention and surveillance programs the federal government has implemented since the attacks of September 11, 2001. Let me emphasize that I address here only searches and seizures directed at United States citizens on United States soil. The Fourth Amendment surely applies more broadly, but I must leave to future work issues of noncitizens and extraterritoriality.

A. *Unlawful Combatant Detentions*

In 2002, federal agents in Chicago arrested an American citizen, Jose

Padilla, and held him without probable cause or criminal charge.¹³⁹ The government's early explanations of the arrest were unstable. Initially, Padilla was called a "material witness,"¹⁴⁰ indicating an incarceration to procure testimony at someone else's criminal proceeding, but the administration simultaneously asserted that Padilla had been planning a "dirty bomb" attack inside the United States.¹⁴¹ No arraignment, however, ever took place; no probable cause hearing was ever held. On June 9, 2002, the President designated Padilla an "enemy combatant," and the government transferred him to a "Naval Brig" in South Carolina, asserting that the President's power to imprison individuals so designated was not subject to judicial oversight.¹⁴²

The *Padilla* case reached the Supreme Court, but the Court did not reach the merits.¹⁴³ The Fourth Circuit, however, upheld the detention,¹⁴⁴ and Padilla's imprisonment as an "enemy combatant"—shackled, blindfolded and held in solitary confinement, if photographs published in 2006 can be believed¹⁴⁵—continued for more than three years.¹⁴⁶ Many commentators have supported the administration's asserted power to imprison those it suspects of being unlawful combatants.¹⁴⁷ Most recently, Congress arguably gave its authorization to such detentions in the Military Commissions Act of 2006.¹⁴⁸ In the summer of 2007, the Fourth Circuit struck down the detention of a noncitizen deemed by the executive to be an unlawful combatant, but the two

139. See Rumsfeld v. Padilla (*Padilla IV*), 542 U.S. 426, 430-31 (2004). For a succinct description of the facts, see Padilla v. Hanft (*Padilla VIII*), 547 U.S. 1062 (2006) (Kennedy, J., concurring in denial of certiorari).

140. *Padilla IV*, 542 U.S. at 430.

141. Declaration of Michael H. Mobbs, Special Advisor to the Under Secretary of Defense for Policy, Padilla v. Bush, No. 02 Civ. 4445 (S.D.N.Y. Aug. 27, 2002), available at <http://www.cnss.org/Mobbs%20Declaration.pdf>; see also Padilla v. Rumsfeld (*Padilla III*), 352 F.3d 695, 701 (2d Cir. 2003), *rev'd*, 542 U.S. 426 (2004).

142. *Padilla III*, 352 F.3d at 700.

143. *Padilla IV*, 542 U.S. at 430.

144. Padilla v. Hanft (*Padilla VI*), 423 F.3d 386 (4th Cir. 2005).

145. Deborah Sontag, *A Videotape Offers a Window Into a Terror Suspect's Isolation*, N.Y. TIMES, Dec. 4, 2006, at A1 (describing images of Padilla); Posting of Patrick Cooper to USA Today: On Deadline, *Video, Stills of Padilla's Captivity Emerge*, http://blogs.usatoday.com/ondeadline/2006/12/video_stills_of.html (Dec. 4, 2006, 9:26 EST).

146. The government transferred Padilla into civilian custody in 2006, apparently in order to avoid further Supreme Court review of his confinement. Hanft v. Padilla (*Padilla VII*), 546 U.S. 1084 (2006) (granting the order for transfer); see also Linda Greenhouse, *Justices Let U.S. Transfer Padilla to Civilian Custody*, N.Y. TIMES, Jan. 5, 2006, at A22.

147. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2107-33 (2005); John Yoo, *Courts at War*, 91 CORNELL L. REV. 573, 588 (2006); cf. Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1037 (2004) (supporting a new constitutional framework that grants the President the power to "detain suspects without the criminal law's usual protections of probable cause or even reasonable suspicion" for a "temporary state of emergency").

148. Pub. L. No. 109-366, 120 Stat. 2600 (2006).

judges in the majority did so on due process grounds—apparently not even seeing a Fourth Amendment issue—and their decision is currently on appeal.¹⁴⁹

How would a Fourth Amendment committed to security deal with unlawful combatant detentions?

1. The fundamental requirement

The argument for these detentions obviously boils down, in one form or another, to the exigencies of war, because, absent such an argument, the power the President has asserted is grossly unconstitutional.

In one of the Constitution’s clearest, most categorical mandates, the Fourth Amendment prohibits the issuance of any warrant without probable cause. By reference to its paradigm cases, this prohibition foundationally applies to the issuance of a warrant calling for the arrest of named or unnamed individuals deemed by the executive to be (“seditious”) enemies of the state. This simple, clear command governs—and ought fully to dispose of—the power the present administration claims.

The Warrant Clause does not somehow apply only to judges. A warrant lacking probable cause would be as unconstitutional under this provision if issued by an executive officer as it would if issued by a magistrate. (Indeed, a warrant issued unilaterally by the executive should, if anything, be subject to more stringent constitutional review than one issued by a magistrate.) If, without probable cause, the President promulgated an order giving executive officers a roving commission to arrest citizens suspected of being enemies of the state, the President would have issued nothing less than an unconstitutional general warrant. If, without probable cause, the President signs a piece of paper designating a particular citizen to be an enemy of the state, thereby authorizing executive officers to arrest this individual, the President has issued an unconstitutional arrest warrant.

There should be no doubt about any of this; it is the Fourth Amendment’s core meaning. The “right of the people to be secure” is paradigmatically the right of citizens in a democratic polity to an assurance that they cannot be imprisoned without probable cause solely because the executive has declared them to be enemies of the state. Personal life has no security in a society where the executive wields such power.

American courts used to be quite clear about the categorical and inviolable nature of the probable cause requirement as a condition of arrests. Beyond the briefest of stops, “*any further detention*,” the Court used to hold, “must be based on consent or probable cause.”¹⁵⁰ This requirement was impervious to

149. Al-Marri v. Wright, 487 F.3d 160 (4th Cir. 2007).

150. United States v. Brignoni-Ponce, 422 U.S. 873, 882 (1975) (emphasis added); see, e.g., Papachristou v. City of Jacksonville, 405 U.S. 156, 169 (1972) (“We allow our

balancing: the probable cause standard “applied to all arrests, without the need to ‘balance’ the interests and circumstances involved in particular situations.”¹⁵¹ And in order to confine a person *after* arrest, a judicial determination of probable cause was necessary:

When the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty. Accordingly, we hold that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest.¹⁵²

The only question, therefore, is whether war—or, more broadly, a serious threat to national security—suspends what would otherwise be the Fourth Amendment’s clear requirement.

2. *The Fourth Amendment at war*

An argument can be made that such a suspension is already recognized in the case law. The clearest expression of this thought might be the Court’s declaration two decades ago, in an opinion written by then Chief Justice Rehnquist, that “the Government’s regulatory interest in community safety can, in appropriate circumstances, outweigh an individual’s liberty interest,” and that “in times of war or insurrection, when society’s interest is at its peak, the Government may detain individuals whom the Government believes to be dangerous.”¹⁵³ This dictum, it might be said, plainly indicates that the executive branch has a unilateral, general warrant in wartime to imprison individuals it deems “dangerous,” with or without probable cause.¹⁵⁴ So understood, Chief Justice Rehnquist’s formulation is certainly bracing.

The present “war on terror” is predicted to last at least a generation, if not more. Can it really be the law of the United States that for the next ten or twenty years, if not much longer, the executive branch may imprison every individual it deems “dangerous”? If so, then as surely as imprisonment is more intrusive than surveillance, the police also have the power to break into the houses of all individuals whom the Executive deems “dangerous,” to open their mail, tap their conversations, and so on. Which is to say: in our lifetimes, the Fourth Amendment as we have known it no longer exists, and the President of

police to make arrests only on ‘probable cause’”).

151. *Dunaway v. New York*, 442 U.S. 200, 208 (1979).

152. *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975). Thousands upon thousands of proceedings are based on these holdings, including for example, every post-arrest, probable-cause hearing. *See 22 C.J.S. Criminal Law § 452 (2008)* (discussing post-arrest probable cause hearings).

153. *United States v. Salerno*, 481 U.S. 739, 748 (1987). The Court also relied on this language in *Hamdi v. Rumsfeld*, 542 U.S. 507, 591 (2004).

154. The quoted sentence can be interpreted more narrowly, as a reference to the executive’s power to detain when Congress has suspended habeas corpus. *See infra* note 178.

the United States could in principle lawfully create here the same kind of police state East Germany enjoyed before the fall of the Iron Curtain.

The notion that the Fourth Amendment was made for times of peace, and so does not apply when the nation is at war, is untenable. Immediately preceding the Fourth Amendment is a constitutional guarantee explicitly limited to peacetime.¹⁵⁵ The Fourth Amendment contains no such limitation. How then can it be argued that Fourth Amendment rights cease to apply when the nation is at war?

Proponents of suspending the Fourth Amendment in wartime do not admit that that's what they propose. Rather, they claim that the Fourth Amendment bans only "unreasonable" searches or seizures and that in wartime what is reasonable is essentially unfettered presidential discretion to wield every tool available to respond to the enemy.¹⁵⁶ This argument not only fails (as we have seen) to do justice to the Fourth Amendment's text. It also fails to come to grips with the Constitution's history.

The United States Constitution was enacted under conditions not of ease and tranquility, but of political crisis and insurrection, with war a fresh memory and invasion an ever-present anxiety. Given the Fourth Amendment's text and foundational paradigm cases, it is impossible to argue that the judiciary could issue a general warrant authorizing the executive to arrest, without probable cause, everyone the executive deems dangerous upon a determination that the individual is covertly making war (or allied with forces making war) against the country. But if Chief Justice Rehnquist's formulation is interpreted in the manner described above, *that is exactly what the Court has done*.

Say that the Supreme Court issued a document entitled "*General Warrant*," purporting to authorize the executive for the next five or ten years to arrest all those (unnamed) persons within the United States deemed by the executive, without probable cause, to be involved in sedition—committing or plotting acts of hostility against the United States. There would be no question that the Court had violated the core command of the Fourth Amendment.

Why should the result differ if the Supreme Court issues a document purporting to confer on the executive the very same authorization, but instead of using the title "*General Warrant*," the Court's document carries the caption "*United States v. Salerno*" or "*Hamdi v. Rumsfeld*"? So long as the Court has issued a piece of paper purporting to authorize the executive to arrest all persons within the United States deemed by the executive, without probable cause, to be involved in committing or plotting acts of hostility against the United States, it doesn't matter what the document is called. However

155. U.S. CONST. amend. III ("No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.").

156. See John Yoo, *The Terrorist Surveillance Program and the Constitution*, 14 GEO. MASON L. REV. 565, 586-87 (2007).

denominated, the Court has violated the Fourth Amendment, giving the executive an unconstitutional general warrant.

In one of its earliest criminal cases, the Supreme Court applied and enforced the probable cause requirement in favor of individuals who in today's language could be called suspected, unlawful enemy combatants.¹⁵⁷ In 1807, the Supreme Court reviewed the pretrial incarceration of two individuals charged with levying war against the United States.¹⁵⁸ The details of the Burr Conspiracy—in which the prisoners were implicated—are too arcane and controversial to be recounted here,¹⁵⁹ but the threat of war in that period was undoubtedly real.¹⁶⁰ The safety, independence, and borders of the United States were at the time far from established certainties. Yet the Justices scrutinized the evidence against the two prisoners as if dealing with an ordinary criminal case.¹⁶¹ No Justice made reference to any special detention powers that sprang into existence by virtue of the war that President Jefferson, at least, believed was being plotted against the United States.¹⁶² Although the two defendants' involvement in a plot to attack the United States was attested to by a brigadier general of the United States army, the Justices carefully scrutinized that general's statement and, finding a lack of probable cause, ordered both men released.¹⁶³

The Supreme Court understood in 1807—when the nation's safety and its very existence were things not to be taken for granted—that imprisonment on mere suspicion is not lawful, even when the individual imprisoned is suspected of being in league with forces attempting to make war against the United States.

157. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 130, 135-36 (1807). In fact, in the early days, probable cause was often considered *insufficient* to guarantee the legality of an arrest. See Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 624-34 (1999) (describing how at early common law an officer could be found liable for arresting a man, even though on probable cause, who turned out to be innocent).

158. *Ex parte Bollman*, 8 U.S. at 75.

159. For details of the Burr Conspiracy, see THOMAS PERKINS ABERNETHY, THE BURR CONSPIRACY (1954); BUCKNER F. MELTON, JR., AARON BURR: CONSPIRACY TO TREASON (2002).

160. MELTON, *supra* note 159, at 56 ("[T]he cauldron that was Mississippi Valley was always simmering, threatened by sea and by land. Louisiana might be big, but it was wild and unpeopled. The frontiersmen might have the Mississippi, but with France and Spain and England at war, and the United States a very weak country, New Orleans might fall to an enemy. The foreign lands that ringed the valley were thus both threats and targets.").

161. *Bollman*, 8 U.S. (4 Cranch) at 125-26.

162. Justice Story, in his *Commentaries*, explicitly condemned Jefferson's argument that the dangers of war waived or modified the executive's duty to comply with the Fourth Amendment's requirements for a lawful arrest and seizure. See 2 STORY, *supra* note 93, § 1902, at 649-50 n.2.

163. *Bollman*, 8 U.S. (4 Cranch) at 135-37.

3. Quirin and Korematsu

Some will say, however, that the World War II cases of *Korematsu*¹⁶⁴ and *Quirin*¹⁶⁵ support the wartime detention of individuals, including United States citizens, suspected by the executive of being unlawful enemy combatants. Much has been written recently about *Korematsu* and *Quirin*,¹⁶⁶ and I am not going to discuss either case at length. Certainly *Korematsu* is not to be viewed as a sacrosanct expression of constitutional doctrine. For present purposes, it is sufficient to show that neither *Korematsu* nor *Quirin* stands for the power the present administration asserts.

The facts of *Quirin*—stipulated to by all parties¹⁶⁷—are as follows. The prisoners, all German residents, had “received training at a sabotage school near Berlin, where they were instructed in the use of explosives”; were in the pay of the German government at least during this period of training; had crossed the Atlantic by German submarine; had landed “in the hours of darkness” in Florida and New York, wearing German military caps or other parts of German military uniforms; had buried their military apparel upon landing; had made their way “in civilian dress” to Jacksonville and New York City; and had been carrying with them explosives as well as United States currency given to them by the German military along with instructions to destroy American war facilities, “for which they or their relatives in Germany were to receive salary payments from the German Government.”¹⁶⁸ The *Quirin* defendants were all captured and all charged with criminal offenses. The only question in the case was whether the defendants were to be tried by military tribunal or by an ordinary court.

In other words, no Fourth Amendment issue was raised or reached in *Quirin*, and on the facts conceded by defendants themselves, *there undoubtedly was probable cause to believe the defendants guilty of crimes*. The prisoners’ defense was evidently that they did not intend to carry out their military orders. But this claim, whether truth or fabrication, is irrelevant to the Fourth Amendment question. The agreed-upon facts in *Quirin* were easily sufficient to make out probable cause. As a result, *Quirin* in no way stands for the proposition that in wartime the executive can seize and imprison Americans without probable cause.

164. *Korematsu v. United States*, 323 U.S. 214 (1944).

165. *Ex parte Quirin*, 317 U.S. 1 (1942).

166. See, e.g., Bradley & Goldsmith, *supra* note 147; Lee Epstein et al., *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. REV. 1 (2005); Jack Goldsmith, *Justice Jackson’s Unpublished Opinion in Ex Parte Quirin*, 9 GREEN BAG 232 (2006); Aya Gruber, *Raising the Red Flag: The Continued Relevance of the Japanese Internment in the Post-Hamdi World*, 54 U. KAN. L. REV. 307 (2006).

167. *Quirin*, 317 U.S. at 20 (reciting the undisputed facts as they “appear from the petitions or are stipulated”).

168. *Id.* at 21-22.

By contrast, the Japanese Americans interned in camps in the western United States were *not* held on probable cause. Their confinement was unquestionably an instance of unadorned preventive detention on mere suspicion of potential dangerousness. But the Court in *Korematsu*, despite what we often read, did *not* uphold this internment. Rather, it upheld the exclusion of people of Japanese descent from certain geographical areas.¹⁶⁹ The Court confronted the internment in a separate case and did *not* uphold it there either.¹⁷⁰

The exclusion of Japanese Americans from the coast, shameful as it may have been, is not the same as internment. For one thing, an exclusion order may or may not effect a Fourth Amendment seizure. An exclusion order is a very extreme measure, but the hardships and adverse consequences it brings about are not equivalent to the nearly complete deprivation of personal life that most prisoners suffer. A person whose house is condemned to make room for a highway also suffers an exclusion from a particular area, including his home—indeed he suffers a permanent loss of his home—yet this exclusion triggers only a right of compensation under the Fifth Amendment, not a categorical ban under the Fourth. Thus even *Korematsu* does not stand for the proposition that American citizens on American soil can be seized and imprisoned in wartime upon an executive determination of dangerousness, without probable cause.

4. Quarantines and psychiatric confinements

Courts have long upheld quarantines¹⁷¹ and psychiatric confinements.¹⁷² In both cases, individuals are held on grounds of dangerousness without evidence, much less probable cause, of a past criminal act. According to some commentators, these forms of confinement prove that the Fourth Amendment's probable cause requirement yields in instances of especially weighty countervailing state interests—and therefore support the detention of those

169. *Korematsu*, 323 U.S. at 215-16 (“Civilian Exclusion Order No. 34 . . . directed . . . all persons of Japanese ancestry [to] be excluded from [the] area [of San Leandro].”).

170. *Ex parte Endo*, 323 U.S. 283, 297 (1944).

171. See, e.g., *Compagnie Française de Navigation à Vapeur v. La. State Bd. of Health*, 186 U.S. 380, 387 (1902) (“That . . . state quarantine laws and state laws for the purpose of preventing, eradicating, or controlling the spread of contagious or infectious diseases, are not repugnant to the Constitution of the United States . . . is not an open question.”); *Ex parte Culver*, 202 P. 661, 663 (Cal. 1921) (“There can be no doubt that . . . the state board of health has power to order the quarantine of persons who have come in contact with cases and carriers of contagious diseases . . .”); *Kirby v. Harker*, 121 N.W. 1071 (Iowa 1909); *Haverty v. Bass*, 66 Me. 71 (1876).

172. See, e.g., *Addington v. Texas*, 441 U.S. 418, 426 (1879) (“The state has a legitimate interest . . . in providing care to its citizens who are unable because of emotional disorders to take care of themselves . . . [and in] protect[ing] the community from the dangerous tendencies of some who are mentally ill.”).

whom the President declares enemy combatants.¹⁷³

If the constitutionality of quarantines and psychiatric commitments had to be explained as instances in which specially compelling state interests outweighed ordinary Fourth Amendment rights, this argument might have some initial plausibility. After all, the harms to society threatened by the mentally ill pale in comparison to those threatened by terrorists, who today can inflict death and destruction of an unprecedented magnitude.

But the constitutionality of quarantines and psychiatric commitments cannot be explained as exceptions to the “ordinary” probable cause requirement mandated by a balancing of this kind.

Assume for a moment what the argument contends: that the dangerousness of the mentally ill is a state interest so weighty that it justifies their incarceration on less than probable cause. Why then doesn’t the dangerousness of suspected or potential criminals also justify *their* incarceration on less than probable cause? A considerable amount of criminality would presumably be deterred if police were permitted to engage in pure preventive detention and arrests on suspicion. With psychiatric confinement understood as a case of weighty state interests overriding the probable cause requirement, the probable cause requirement itself (as applied in criminal cases) no longer makes sense. The only way to make sense of it would be to claim that the dangers to society posed by the mentally *sound* are somehow less costly than the dangers posed by the mentally *ill*—a proposition one would not like to be assigned in a debate.

Moreover, as noted earlier, the rhetoric of balancing cannot explain the probable cause requirement’s inelasticity over the whole field of criminal arrests. On the balancing view, the probable cause requirement ought to be suspended for particularly heinous or high-cost crimes. But the probable cause standard applies to all warrants and “to *all* arrests.”¹⁷⁴

Reorienting the Fourth Amendment away from balancing and back to the right of security offers a better approach to quarantines and psychiatric confinements.

A seizure never violates the Fourth Amendment merely because it intrudes on what Rehnquist calls “an individual’s liberty interests.” Requiring drivers to stop at red lights (or toll booths) also impinges on liberty interests—and may do so for quite a while, depending on the traffic—but triggers no Fourth Amendment scrutiny. To violate the Fourth Amendment, a detention must

173. See, e.g., Bruce Ackerman, *This Is Not a War*, 113 YALE L.J. 1971, 1881 (2005) (using the hypothetical of a quarantine to justify an emergency executive power to detain); Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1, 46 n.203 (2003); Yung Tin, *Ending the War on Terrorism One Terrorist at a Time: A Noncriminal Detention Model for Holding and Releasing Guantanamo Bay Detainees*, 29 HARV. J.L. & PUB. POL’Y 149, 155-56 (2005) (proposing a noncriminal system of detention analogous to procedures for pretrial detention for dangerousness, quarantine, and civil commitment).

174. *Dunaway v. New York*, 442 U.S. 200, 208 (1979) (emphasis added).

violate the right the Fourth Amendment protects: the right of security.

A Fourth Amendment committed to security would scrutinize both quarantines and psychiatric confinements carefully. But with the proper safeguards, neither violates the Fourth Amendment right of security—which is why they do not count as instances where especially substantial state interests “outweigh” Fourth Amendment rights.

The peculiar constitutional danger in psychiatric confinement is that the state will use this form of detention to target “deviance,” dangerousness, or subversiveness. Such abuse of psychiatry is well known in totalitarian states and is exactly the kind of violation of personal security the Fourth Amendment was enacted to prohibit. Thus a Fourth Amendment committed to security *would* demand a form of probable cause for such confinement, *just as current doctrine already does*: the state would be required to prove at least more probably than not that the individual to be confined is both deranged and dangerous. Where the tendered “proof” consists merely or largely of evidence of “deviance” or a refusal to conform to public norms, courts should be prepared to reject the confinement.

But where a person is shown genuinely to be deranged, their confinement cannot be said to count as an instance where especially substantial state interests “outweigh” ordinary Fourth Amendment rights, because Fourth Amendment rights are simply not implicated. Fourth Amendment security protects a certain kind of freedom—the freedom of personal life. The constitutional premise of this freedom is (obviously) a respect for the decisions people make in their personal lives. For this reason, a confinement on the basis of psychosis, subject to proper procedures, proves nothing about the reach of the Fourth Amendment. It is predicated on a determination that the individual’s mind is so compromised that his exercise of will is not entitled to the full respect that the Fourth Amendment presupposes. When children are denied access to certain kinds of speech, this denial does not prove that weighty state interests can override the First Amendment; it proves only that a child’s decisions are not treated with the same full constitutional respect as an adult’s. The confinement of psychotics similarly proves nothing about the Fourth Amendment rights of people of sound mind.

With quarantines too, a Fourth Amendment committed to security would not accept without review a declaration on the executive’s part that incarceration is necessary. Indeed, certain quarantines upheld by judges in the past would and should be struck down under a Fourth Amendment devoted to security. For example, sixty years ago, police in California were permitted to quarantine women found living in “suspicious” quarters; the basis for the quarantine was that these women might be prostitutes, might thereby have contracted a venereal disease, and might communicate that disease to others if left to their wicked devices.¹⁷⁵ This quarantine was in fact a seizure that should

175. See, e.g., *Ex parte Martin*, 188 P.2d 287 (Cal. Ct. App. 1948) (upholding the

have been held to violate the Fourth Amendment.

Any “quarantine” based on suspected sexual licentiousness or deviance ought to attract the strictest Fourth Amendment scrutiny because of its close connection to the danger of detention for failure to conform to public norms. Under the Fourth Amendment, the state has no power to incarcerate individuals based merely on the assertion that they might engage in dangerous sexual misconduct at some future time. Courts should similarly scrutinize any quarantine that, because of its over- or underbreadth, appears to be a pretext for incarcerating “undesirable,” “deviant,” or “suspicious” groups.¹⁷⁶

However, so long as a confinement is genuinely and properly based on the danger of spreading a contagious disease, the claim behind the confinement is that the person has a condition he cannot control and poses a threat to others *whether he wills it or not*. The claim is not, in other words, that a law-abiding person has demonstrated suspicious tendencies and is therefore subject to preventive detention.

When an individual is designated an “unlawful enemy combatant” without probable cause, the situation is different. The enemy-combatant designation necessarily depends on evidence going to the individual’s suspicious conduct: his associating with the wrong organizations or individuals, his expression of dangerous opinions, his abnormal activity, and so on. If this evidence amounted to probable cause, then the Fourth Amendment’s right of security would be satisfied. But if it does not, the government is asserting the power to imprison people who have exercised their freedom “suspiciously” and who, as a result, are claimed to be candidates to exercise their free will criminally in the future. Such a power cannot rest on the constitutionality of quarantines and psychiatric confinement.

5. Emergency wartime exceptions

But is it really impossible under our Constitution to detain individuals suspected of plotting to kill tens of thousands of people (or more) when the nation is at war, simply because probable cause cannot be proved?

No, it’s not impossible. Emergency suspensions of the Fourth Amendment are possible, but they cannot take the form of a general warrant authorizing the executive to imprison anyone it deems dangerous. They must rather be thought through, and cabined, much more carefully.

The Fourth Amendment, like every other constitutional guarantee, does

quarantine of two women to prevent the transmission of venereal disease based upon evidence that the women lived in an establishment, De Luxe Rooms, at which prior arrests for prostitution had occurred).

176. See, e.g., *Jew Ho v. Williamson*, 103 F. 10 (N.D. Cal. 1900) (striking down quarantine of all of San Francisco’s Chinatown); *Wong Wai v. Williamson*, 103 F. 1 (N.D. Cal. 1900) (invalidating a San Francisco quarantine supposedly directed at carriers of bubonic plague where the quarantine applied only to Chinese).

admit of emergency exceptions. These exceptions do not follow from a free-floating balancing test in which rights are said to yield to compelling state interests. They follow from a logic of non-pointlessness: in some circumstances seemingly enforcing a constitutional right does not actually enforce it.

The first such circumstance would be a catastrophic situation in which refusing to enforce the Fourth Amendment is necessary to protect the nation from imminent destruction or conquest. This exception is justified because the nation's destruction or conquest would also fail to vindicate the Fourth Amendment. No constitutional right can be said to be "enforced" when enforcing it would actually surrender it—which is only to say that the Constitution is not a suicide pact. But this exception is not to be regarded as an opening for every national security claim the political branches might make. The exception must be treated in accordance with its own logic, narrowly limited to circumstances of imminent grave threat to the constitutional order itself.

The second exception involves another catastrophic circumstance, in which warfare has broken out on American soil,¹⁷⁷ and the fighting or destruction is so severe that individuals' right to be secure in their persons and homes is already demolished. Where personal life has already lost its security, enforcing the Fourth Amendment is no longer possible, because the Fourth Amendment would then be grasping at a security that has already been destroyed. In those circumstances, the executive and judiciary can therefore properly refuse to enforce the probable cause requirement.

Neither of these exceptions remotely applies to the present situation. To be sure, there are differences of opinion on whether the "war on terror" is a war in the true legal sense or only in the "war on drugs" or "war on poverty" sense. My own view is that the attacks of September 11, 2001 were indeed acts of war (not merely crimes). But whether the war on terror is "really" a war makes no difference to the question under discussion here. Once we have put aside the two catastrophic circumstances just described, where constitutional rights *cannot* be vindicated, the existence of war does not by itself give a President any power to act in derogation of constitutional rights.

There is one final wartime circumstance in which the Fourth Amendment does not require release of a prisoner held without probable cause: when habeas corpus has been suspended. But this is the rare exception that does in fact prove the rule.

The United States Constitution contains no general state of emergency clause, no provision putting constitutional rights on holiday in times of crisis. It does, however, authorize the suspension of habeas corpus "in Cases of Rebellion or Invasion."¹⁷⁸ It is by reference to this clause that we should

177. See, e.g., *Moyer v. Peabody*, 212 U.S. 78, 84 (1909) (upholding temporary detention without probable cause during state of insurrection).

178. U.S. CONST. art. I, § 9. A suspension of habeas is usually understood not as

understand Chief Justice Rehnquist's statement, quoted earlier, that "in times of war or insurrection . . . the Government may detain individuals whom the Government believes to be dangerous."¹⁷⁹

The Suspension Clause is the American Constitution's concession to military necessity, and it is a large concession. It means that a wartime President *can* imprison people without probable cause provided that Congress has exercised its fateful authority to suspend habeas corpus. But Congress's power to suspend habeas—which is subject to limits of its own—refutes the notion that the existence of war by itself vests the executive branch with a general authority to imprison whomever it chooses (or deems suspicious or designates an enemy combatant). If war gave the President that power, there would be no need for Congress to suspend habeas.

In other words, Congress's power to deny individuals their Fourth Amendment liberty in wartime (through a suspension of habeas) owes its constitutional significance precisely to the fact that *the President has no such power acting on his own*. War does not render constitutionally reasonable the imprisonment of Americans whom the President designates covert enemy agents. A citizen's right to liberty under the Fourth Amendment can be taken away not by executive "designation," but only by a suspension of habeas corpus.

The nation was also at war—at least to the same extent that the nation is at war today—when the Supreme Court invalidated the President's forcible seizure of steel mills.¹⁸⁰ Is the seizure of property a matter of greater constitutional solicitude than the seizure of persons? In the *Steel Seizure Case*, the Court essentially held that the assertion of military necessity and the existence of armed conflict abroad do *not* allow the President to convert the United States into one gigantic theater of war, where he can do to American citizens and American property what he might do to foreign combatants or their property.¹⁸¹ The same principle applies today.

affecting the legality of a seizure, but rather as affecting only the prisoner's remedies—in particular, preventing the prisoner from obtaining release. See WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 171 n.118 (1980) ("It should be noted that suspension did not legalize arrest and detention. It merely suspended the benefit of a particular remedy in the specific case."); Trevor W. Morrison, *Hamdi's Habeas Puzzle: Suspension as Authorization*, 91 CORNELL L. REV. 411, 435-37 (2006). *But see* David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59 (2006) (arguing the opposite position). This view implies that even when habeas is suspended, an individual imprisoned on the basis of an enemy-combatant designation might still have other remedies—for example, monetary remedies—if a court were later to determine that his detention violated the Fourth Amendment.

179. *United States v. Salerno*, 481 U.S. 739, 748 (1987).

180. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure Case)*, 343 U.S. 579 (1952).

181. *See id.* at 587 ("Even though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order

The President of the United States has awesome powers. He can reduce countries to ruins. He can lead the nation into wars of his choosing, at which point, outside this country, he can order the killing of enemies, the bombing of homes, and the seizure of suspected spies and other unlawful combatants. But for better and worse, the Constitution prohibits him from making the United States itself an executive war zone.

Undoubtedly, this principle reflects a kind of provincialism. Our Constitution does not protect people outside this country in the way it protects people inside. But this provincialism is, for better or worse, democratically fundamental. By prohibiting the President, even in wartime, from doing here what he may do abroad, the Constitution prevents a President from shutting down the liberties of the electorate, which must at the end of the day have the ultimate right and ability to override the President's warmaking.

B. *Information from Telephone Companies and Internet Service Providers*

The National Security Agency (NSA) has reportedly procured from the nation's telecommunications companies, such as AT&T, a massive database of "call-detail" information—numbers called, numbers calling, time of call, and so on—for tens of millions of people unsuspected of any crime.¹⁸² At the same time, according to court filings, the NSA built a secret facility on the premises of at least one major telecommunications company through which all Internet traffic was diverted, allowing direct access to the data stream and at a minimum permitting the government access to sender and addressee information for millions of e-mails.¹⁸³ Assuming the NSA did not use this access to monitor the actual contents of people's telephone or e-mail communications, these programs essentially represent a gigantic deployment of the government's power, upheld by the Supreme Court in the *Smith* case, to obtain "pen register" data from telephone companies without effecting a Fourth Amendment search.¹⁸⁴

Smith was, as we know, predicated on the Stranger Principle. That is, the Court reasoned that call-detail information is not private because it has been exposed to strangers: "[A] person has no legitimate expectation of privacy in

to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities.").

182. See Leslie Cauley, *NSA Has Massive Database of Americans' Phone Calls*, USA TODAY, May 11, 2006, at A1; Seymour M. Hersh, *Listening In*, THE NEW YORKER, May 29, 2006, at 24.

183. See Dan Eggen, *Lawsuits May Illuminate Methods of Spy Program*, WASH. POST, Aug. 14, 2007, at A1. Independently, federal law enforcement officers have also attempted, at least in some instances successfully, to obtain from Internet service providers search history data on millions of people. See Gonzales v. Google, 234 F.R.D. 674 (N.D. Cal. 2006).

184. See *Smith v. Maryland*, 442 U.S. 735 (1979); *supra* Part I.C-D and notes 54-55.

information he voluntarily turns over to third parties.”¹⁸⁵ As we also know, a Fourth Amendment committed to security would reject the Stranger Principle. People may lose their privacy, but they do not lose their Fourth Amendment right to the security of their personal lives, just because they have shared a part of their lives with third parties or even strangers.

Personal communications, as I have said, are central and vital to personal life. Choosing whom to speak with is likewise a central element of personal life. The government’s watching over the identity of every person we choose to communicate with may not undermine the freedoms of personal life as severely as the government’s knowing what we say to them, but it significantly undermines these freedoms all the same. In a free society, every man and woman ought to be free to speak to any other individual they please without the scrutinizing eye of authority interposing itself into that decision.

Smith, which gave the government a general warrant to tap into everyone’s personal communications (without any suspicion, much less probable cause) to discover who is speaking to whom and when, was wrongly decided. It is true that private companies, even ones as large as AT&T, would not violate the Fourth Amendment (because they are not state actors) if they *sua sponte* turned over call-detail data to the government. But assuming that the companies cooperating with the NSA have been doing so, as in *Smith*, as “agents of the state,” or under governmental coercion, the NSA call-detail data acquisition program should be held unconstitutional.¹⁸⁶

This is not to deny the government all power to collect “pen register” data in the absence of probable cause. If the executive has reasonable grounds to suspect that a particular individual, phone number, or IP address is involved in some way in hostile acts against the United States (or, for that matter, in any other crime), the analysis could change. Pen register searches might, in other words, be constitutional on reasonable suspicion. The critical fact about the NSA data mining program was the suspicionless, totally generalized net it cast—under which the government claimed in principle the power to know with whom each of us is communicating at every moment of our lives.

C. Wiretapping

In 2006, the President acknowledged that, despite his earlier statements to the contrary, he had secretly authorized the NSA to intercept certain telephone calls and e-mails without a court order—indeed without judicial review of any

185. *Smith*, 442 U.S. at 743-44.

186. However, for similar reasons, there would be no constitutional difficulty if the government chose to immunize (even retroactively) companies cooperating with the NSA from private-party damage-seeking lawsuits. Such immunity would confirm the existence of state action in such cases, and so long as the state remained responsible for any constitutional violations, immunizing the private companies would not be unconstitutional.

kind.¹⁸⁷ Although many details of the NSA wiretapping program remain unknown, the administration has claimed that communications were subject to interception only if: (1) “one party to the communication [was] outside the United States;” and (2) there was “a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda.”¹⁸⁸

In January 2007, the federal government asserted that this program would not be reauthorized.¹⁸⁹ In July 2007, the Sixth Circuit dismissed a challenge to the program on the ground (discussed earlier) that plaintiffs lacked standing.¹⁹⁰ The NSA wiretapping program’s probable violation of the Foreign Intelligence Surveillance Act (FISA)¹⁹¹ raises serious criminal liability and separation-of-powers issues.¹⁹² I will not address those issues here. I take up FISA below, but only in connection with the Fourth Amendment analysis.

There are two sets of Fourth Amendment questions to be considered. The first concerns whether any of the asserted limiting features of the NSA wiretapping program create exceptions to the Fourth Amendment’s probable cause requirement for eavesdropping on personal communications. The second has to do with the administration’s efforts to keep the NSA program secret: what are the Fourth Amendment implications, if any, of the President’s effort to deceive the public, to elude the congressionally sanctioned procedures for such wiretaps, and to shield the NSA program from judicial review?

The basic Fourth Amendment analysis of wiretapping is straightforward. As we know, a Fourth Amendment committed to security would support the landmark *Katz* decision, where the Court held wiretapping unconstitutional

187. See James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A20; President George W. Bush, President’s Radio Address (Dec. 17, 2005), available at <http://www.whitehouse.gov/news/releases/2005/12/print/20051217.html> (“In the weeks following the terrorist attacks on our nation, I authorized the National Security Agency, consistent with U.S. law and the Constitution, to intercept the international communications of people with known links to al Qaeda and related terrorist organizations.”). For a summary of the facts of the program, see *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006).

188. Att’y Gen. Alberto Gonzales & Gen. Michael Hayden, Principal Deputy Dir. for Nat’l Intelligence, Press Briefing (Dec. 19, 2005), available at <http://www.whitehouse.gov/news/releases/2005/12/print/20051219-1.html>.

189. See Eric Lichtblau & David Johnston, *Court to Oversee U.S. Wiretapping in Terror Cases*, N.Y. TIMES, Jan. 18, 2007, at A1.

190. *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007).

191. Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801-1811, 1821-1829, 1861-1862 (2000).

192. See, e.g., *ACLU v. NSA*, 438 F. Supp. 2d 754, 779 (E.D. Mich. 2006) (holding that the “secret authorization[s] . . . violate the Separation of Powers ordained by the very Constitution of which this President is a creature”); Jack M. Balkin & Sanford Levinson, *The Process of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489, 499-500 (2006).

except with probable cause and, absent exigent circumstances, a warrant.¹⁹³ Communication with others, shielded from the scrutiny of public authorities, is the soul of personal life. The probable cause requirement, in surveillance as in detention, provides law-abiding people with the crucial security on which the freedom to engage in such communication without fear of public scrutiny depends.

The NSA program dispensed with probable cause. But if the administration's statements about the program's limits can be believed, consideration must be given to (1) the assertion that the primary purpose of the interceptions was to gather foreign intelligence, and to protect the nation from acts of war, as distinct from prosecuting crimes; (2) the international nature of the intercepted communications; and (3) the assertion that there was a "reasonable basis" for suspecting that one of the parties thereto was an al Qaeda agent or "supporter." I discuss these considerations in order.

1. *Nonprosecutorial motive for surveillance*

The notion that searches are subject to less stringent Fourth Amendment requirements when their purpose is not criminal prosecution might be said to follow from the Supreme Court's "special needs" cases, where the probable cause requirement has been held inapplicable to searches not ostensibly directed at uncovering evidence of criminal wrongdoing.¹⁹⁴ But the "special needs" doctrine would be rejected wholesale in a Fourth Amendment committed to security.

The Court has explained "special needs" searches in the language of balancing, meaning that their purported justification lies in a claim either of greater benefits to society (as compared to criminal law enforcement searches) or lesser costs inflicted on individuals.¹⁹⁵ Either way, the doctrine is untenable. The claim of greater benefits, suggested by the very phrase "special needs," is particularly baffling. Given that the probable cause requirement applies to the most serious, heinous crimes—such as serial murders, mass killings, and airplane hijackings—it borders on absurdity to say that searches outside the arena of criminal law involve "special" state interests so substantial (as compared to criminal searches) that they "outweigh" individuals' ordinary Fourth Amendment rights.

The second position—that noncriminal-law searches impose lower "costs"

193. *Katz v. United States*, 389 U.S. 347 (1967).

194. See, e.g., *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989).

195. See *Vernonia Sch. Dist.*, 515 U.S. at 652-53 ("[W]hether a particular search meets the reasonableness standard 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" (quoting *Skinner*, 489 U.S. at 619)); *Von Raab*, 489 U.S. at 676.

on the individuals they target—is at least logical. Noncriminal-law searches do not (in principle) threaten people with imprisonment (unless of course they make the executive suspect someone of being an “unlawful enemy combatant”). Because the prospective consequences to the searched individual are not as grave, it might be thought that the applicable Fourth Amendment restrictions could be lower as well. But this way of thinking completely misunderstands the Fourth Amendment’s purpose, which is not to balance the interests of the individual target of a search against society’s interests, but to protect the right of the people as a whole to be secure.

When there is a search without probable cause, the threat to the people’s security is not lessened by the (supposed) lack of criminal punishment facing the particular individual targeted. Say that government agents break into your home searching for evidence of conduct deemed immoral and suspicious. They have no probable cause (and therefore, of course, no warrant), but they explicitly disclaim any interest in prosecuting you. As a result, the overall situation may be better for *you*. Unfortunately, it does nothing for the security of the rest of us. Our security is still destroyed if a court upholds this search, because the power to search your house on mere suspicion or no suspicion implies a power to search everyone’s house on mere suspicion or no suspicion. And if government holds that power, the people no longer have any security in their homes, where they were supposed to be free to speak and act insulated from public scrutiny and public norms. Perhaps we will not be prosecuted, but we will have lost a vital part of personal life.

So much for the idea that a noncriminal-law motive makes a search unobjectionable or less objectionable under the Fourth Amendment. The next potential justification of the covert NSA wiretapping program lies in its (asserted) application only to international communications.

2. International communications

The bare fact that a communication crosses a national border plainly cannot deprive it of Fourth Amendment protection.

Communicating across a border is not like traveling across a border. The reason that suspicionless international border searches (or airport searches) are permissible is that they have minimal effect on personal life. The search of my person and carry-on bag at the airport may intrude on my privacy, may embarrass me, and may (let’s hope) stop me from hijacking a plane, but its effect on my personal life will usually be very small. Such searches pass the test of generalizability. Let them be made systematic and even universal (as they already are); they still impose only negligible burdens, if any, on the security of people’s personal lives.

The situation is different with respect to international communication. If the Fourth Amendment’s ultimate purpose in protecting personal life is to guarantee people the freedom to question and challenge society’s prevailing

public norms, preventing Americans from speaking freely with people outside our borders poses a clear threat to that freedom. If the state were free to listen in on every international communication we make, that part of our personal lives would cease to belong to us. It would lose the insulation from public scrutiny essential to the freedom of personal life. Hence the fact that a communication is international cannot as such take it out of the protection of the Fourth Amendment.

3. One party reasonably believed to be an al-Qaeda agent

Finally, there is the administration's claim that the covert NSA wiretaps were deployed only when there was a "reasonable basis to conclude" that one of the parties to the communication was a member of, affiliated with, or "working in support of" al Qaeda. At present we do not know what this claim means or if it is true. But if, for purposes of argument, we take the administration at its word and indulge in certain friendly assumptions, this limitation on the NSA program offers the strongest argument in its favor.

For more than one reason, the government may constitutionally wiretap all communications of members of a foreign military power with which America is at war, particularly where such individuals are not U.S. citizens and are outside of the United States. Personal life does not require conversations with members of a military making war on the United States. Al Qaeda is no different—except for the fact that identifying its members is far more difficult—and an excellent argument can therefore be made for a blanket rule of constitutionality every time the government wiretaps a conversation involving a member of al Qaeda, even where the other parties to such a conversation were United States citizens inside the United States. So there is reason to hope that at least some of the intercepts made under the covert NSA wiretapping program were constitutional.

The analysis changes, however, as we move beyond this limited set of conversations. On the face of the administration's description of the NSA intercepts, the program would appear to have included, as individuals suspected of having al Qaeda "links" or of having worked in "support" of al Qaeda, U.S. citizens inside the United States who were not themselves said to be members of al Qaeda. If the "reasonable basis" for suspecting that such individuals had "supported" al Qaeda was, for example, their having opposed the war in Iraq, then the administration would in principle have claimed the authority to wiretap every international communication made by United States citizens who had expressed opinions opposing government policy.

I am not suggesting that the NSA program went so far; the point is only that if it did, it would plainly not be defensible according to the justification described immediately above. A great deal, therefore, depends on how the NSA defined who was appropriately targeted as a suspected al Qaeda agent. The more tightly circumscribed this definition was, the better the argument for the

program's constitutionality.

4. The significance of FISA

Assuming that the program extended somewhat or a great deal beyond the zone of constitutionality described above, the most important feature of the NSA eavesdropping program, under a Fourth Amendment committed to security, might be its apparent violation of FISA, along with the administration's attempt to circumvent judicial, legislative, and electoral checks by running the program in secret.

FISA is exactly drawn to restrict the interception of Americans' communications in the context of foreign intelligence surveillance conducted by the executive branch. For example, in permitting wiretapping without a court order for periods up to one year, FISA requires that such wiretapping be directed at communications "*exclusively* between or among foreign powers," where "there is no substantial likelihood" that the wiretapping will pick up communications to which a "United States person" (basically a citizen or lawful immigrant) is a party.¹⁹⁶ While al Qaeda presumably qualifies as a "foreign power" under FISA, the covert NSA wiretapping plainly could not be justified under this provision, because it was not "*exclusively*" directed at communications "*between or among foreign powers*," and because there was a substantial certainty that the communications of United States persons *would be* intercepted.

FISA also permits wiretapping of United States persons, but under narrowly limited circumstances. Americans can be deemed "foreign agents" under FISA and become subject to wiretapping if, for example, they "knowingly engage[] in clandestine intelligence gathering . . . on behalf of a foreign power," "knowingly engage[] in . . . international terrorism . . . or activities that are in preparation therefor . . . on behalf of a foreign power," or "knowingly aid[] or abet[] any person in [such] conduct."¹⁹⁷ These terms are much more demanding than anything described in the covert NSA program. Moreover, Americans cannot be found to qualify as "foreign agents" on the basis of evidence solely consisting of First Amendment activity.¹⁹⁸ But the critical point is this: except in circumstances not pertinent here, FISA permits wiretapping of even these "foreign agents" *only* if the executive applies to a FISA judge, furnishes evidence demonstrating probable cause to believe that the targeted individual falls in one of the defined categories, and obtains a court order.

As noted earlier, I am making no claims here about whether the NSA program was, because of a violation of FISA, a criminal enterprise for which

196. 50 U.S.C. § 1802(a)(1) (2000) (emphasis added).

197. 50 U.S.C.A. § 1801(b) (West 2006).

198. 50 U.S.C. § 1805(a)(3)(A) (2000).

the President himself might properly be prosecuted or impeached. The question is solely the extent to which FISA bears on Fourth Amendment analysis. Violating a statute is never equivalent to violating the Fourth Amendment, just as satisfying a statute is never equivalent to satisfying the Fourth Amendment. Nonetheless, there is very good reason to accord special weight to FISA in the Fourth Amendment analysis of the NSA program.

The reason is security. FISA was enacted in 1978 in a conscious effort to provide assurance to the public against a background of considerable Fourth Amendment uncertainty. For years the White House had asserted a power to search and seize outside the Fourth Amendment's ordinary requirements when acting to obtain intelligence for "national security" purposes. As reports emerged concerning FBI surveillance of domestic organizations and United States citizens, controversy swelled.¹⁹⁹ In 1972, the Supreme Court rejected the executive's position in a case involving FBI surveillance of a domestic organization, but the Court expressly reserved judgment with respect to surveillance of foreign powers and their agents located in America.²⁰⁰ The Court's 1972 decision provoked sharp dispute about the limitations, if any, on the executive's power to conduct foreign intelligence gathering.²⁰¹

FISA was a legislative effort to resolve that dispute, creating a framework of checks and balances in which the executive continues to wield extensive foreign intelligence surveillance power, but must comply with numerous substantive and procedural requirements when exercising this power. These requirements interpose both congressional checks on executive wiretapping (if only because the statute was passed by Congress) and judicial checks. Notably, FISA requires the executive not only to obtain authorization from specially designated judges in almost all wiretapping cases involving United States

199. See, e.g., S. REP. NO. 94-465 (1975) (detailing the results of the investigation by the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities), available at <http://www.aarclibrary.org/publib/church/reports/ir/contents.htm> (part of an online collection of Church Committee reports on the formation, operation, and abuses of U.S. intelligence agencies).

200. *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 321-22 (1972) ("We have not addressed and express no opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents.").

201. Several courts upheld warrantless foreign intelligence surveillance. See, e.g., *United States v. Truong Dinh Hong*, 629 F.2d 908, 914 (4th Cir. 1980) (ruling on surveillance that took place before passage of FISA) ("[B]ecause of the need of the executive branch for flexibility, its practical experience, and its constitutional competence, the courts should not require the executive to secure a warrant each time it conducts foreign intelligence surveillance."); *United States v. Buck*, 548 F.2d 871, 875 (9th Cir. 1977); *United States v. Butenko*, 494 F.2d 593, 606 (3d Cir. 1974). The District of Columbia Circuit, however, took a different view. See *Zweibon v. Mitchell*, 516 F.2d 594, 614 (D.C. Cir. 1975); see also *Chagnon v. Bell*, 642 F.2d 1248, 1258 (D.C. Cir. 1980) ("[T]he state of the law with respect to electronic surveillance of foreign agents of foreign powers was, at best, unsettled in 1977-1978 . . .").

persons,²⁰² but also to notify these judges—and, to a lesser extent, congressmen too—of foreign intelligence wiretaps even when no authorization is required and even when the surveillance exclusively targets foreign powers.²⁰³ In addition, the attorney general is required to establish procedures for minimizing the use of information gathered concerning United States persons and to notify FISA judges of the procedures adopted.²⁰⁴

FISA has stuck. The circuit courts have upheld it,²⁰⁵ successive White Houses have (until recently) apparently accepted it, and while the Supreme Court has never definitively ruled on it, the statute has for thirty years functioned to fill the constitutional gap left by the Court's 1972 decision.²⁰⁶

This positive or constructive relationship of a statute to the Fourth Amendment is very difficult to conceptualize satisfactorily within the modern "reasonable expectations of privacy" analysis. Courts could find that a statute, by virtue of its own enactment, tells people (as a matter of fact) what they have to expect—thereby creating the unacceptable Fourth Amendment self-validation problem discussed at the beginning of this Article. Or courts could treat the statute as expressing a legislative judgment about what expectations of privacy are (normatively) reasonable, and courts could choose to "defer" to that judgment. This reasoning would not be circular, but it would risk overempowering the legislature, giving Congress too great an authority to erode or erase Fourth Amendment rights. Congress has no inherent superiority to the courts on the question of what searches or seizures are constitutional; arrests without probable cause would be just as unconstitutional if Congress passed a statute purporting to authorize them.

A Fourth Amendment committed to security would have a clearer grip on this problem. In certain circumstances, a well-crafted statute can create exactly the kind of *security* the Fourth Amendment demands. By involving all three branches, by laying down in carefully delineated terms the applicable rules, by prohibiting all wiretapping not expressly permitted, by taking special care to avoid spying on Americans, by establishing minimization requirements, by requiring probable cause to believe that an American has knowingly engaged in clandestine intelligence-gathering or terrorism-supporting activity on behalf of

202. 50 U.S.C. § 1802(b) (2000).

203. 50 U.S.C. § 1802(a)(3) (2000).

204. 50 U.S.C. § 1806 (2000).

205. See, e.g., *United States v. Pelton*, 835 F.2d 1067, 1075 (4th Cir. 1987) ("FISA's numerous safeguards provide sufficient protection for the rights guaranteed by the Fourth Amendment within the context of foreign intelligence activities."); *United States v. Duggan*, 743 F.2d 59, 73 (2d Cir. 1984) ("We regard the procedures fashioned in FISA as a constitutionally adequate balancing of the individual's Fourth Amendment rights against the nation's need to obtain foreign intelligence information.").

206. See KEITH WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 194-201 (1999) (arguing that FISA was the product of "constitutional construction" in which constitutional meaning was elaborated through primarily political, not judicial, means).

a foreign power before a judge may allow that person to become a wiretapping target, by prohibiting wiretapping of Americans based solely on First Amendment-protected activity, and by requiring notice to congressmen and judges even when no court order is required, FISA provides law-abiding people with a remarkable degree of *security*—an assurance that their personal communications will be secure—even while allowing the executive to engage in very substantial foreign intelligence wiretapping.

In other words, FISA’s well-drawn, successful framework of checks and balances is worthy of constitutional respect because respecting it creates the very security the Fourth Amendment exists to protect, particularly given the prior conditions of high Fourth Amendment uncertainty (and thus insecurity) that FISA helped resolve.

Accordingly, when the White House unilaterally and covertly operates outside the FISA framework—especially while deceiving the public about it—judges should meet such behavior with intense constitutional suspicion. Unilateral, secret executive surveillance risks undoing all the security-enhancing work accomplished by the statute.

On the other hand, there is an ironic case to be made that what the people don’t know can’t hurt their Fourth Amendment security. If the executive is going to operate secret detention and eavesdropping programs (someone might say), it *should* systematically deny their existence, deceiving not only the public but also Congress and the courts. Thus the people will remain cheerfully confident in their deluded belief that their personal lives are still secure.

State secrets have a way of leaking out. The security most Americans take for granted depends in part on a justified belief that in this country the rule of law is a reality. This is an achievement of some slight constitutional value. If one were looking for an ideal means of undermining it, large-scale covert surveillance and detention programs—undertaken by the executive behind the backs of the electorate, Congress and the judiciary, unsupported by probable cause, circumventing existing channels of legislative oversight and judicial review, discovered by journalists in the face of denials by the President himself—would be an excellent strategy.

CONCLUSION

There is such a thing as believing in constitutional law: believing in its reality, its fundamental meanings, its promise. Ten years ago, it was almost inconceivable to most of those who believed in constitutional law that the United States government would assert the power to do to American citizens (and others) what apparently has been done to them since September 11. To be sure, believing in constitutional law may have been the mistake. But if not, it would be well to acknowledge in advance that there will be more terrorism in this country, and that what still seems inconceivable today might, after a future series of bombings, come to pass: martial law, for example, or a secret police

state with forms of surveillance and detention far exceeding what we have already seen. It is worthwhile to consider now what it is in our Constitution, if anything, that categorically rejects such developments.

The Fourth Amendment ought to be central to the answer. But today's Fourth Amendment—the privatized, balancing-test Fourth Amendment that emerged in the twentieth century—is unable to serve this function. The Fourth Amendment ought to have categorically and immediately blocked the imprisonment as an “unlawful enemy combatant” of an American citizen seized without probable cause on American soil. The reason it did not do so, I have argued, is that its central purpose, to protect the people’s right to be secure, has been lost, supplanted by an effort to protect individuals’ expectations of privacy that has turned the Fourth Amendment away from its paradigm cases and its core principles.

The ultimately important question, however, is not whether this diagnosis is the right one. The question is whether we can still recognize a constitutional cancer when we see it—and whether we will be able to treat the next one.

