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## THE FOURTH AMENDMENT: NOT LIKE FINE WINE

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MORE ESSENTIAL THAN EVER: THE FOURTH  
AMENDMENT IN THE TWENTY FIRST CENTURY.

By *Stephen J. Schulhofer.*

New York: Oxford University Press. 2012. Pp. xi, 192. \$21.95

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When someone gifts an expensive bottle of wine, the recipient is likely to place that bottle in safe-keeping for a “special occasion.” When that occasion arrives, the recipient is more than glad to have a fine bottle of wine to consume. In some respects the Fourth Amendment is like a bottle of fine wine. It is a gift from the Founders - one that is held by every citizen and should be jealously guarded and only used when appropriate. Americans are lucky to have the Fourth Amendment when that “special occasion” occurs.

However, in *More Essential than Ever*, Professor Stephen Schulhofer argues the United States Supreme Court is limiting what qualifies as “special occasions” that invoke the Fourth Amendment right. The Court, along with various social factors, is eroding the

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Fourth Amendment. Metaphorically, unlike fine wine, the Fourth Amendment has not become better with age – quite the contrary.

Prior to his career in academia as a professor at New York University School of Law, Schulhofer served as a law clerk to Justice Hugo Black and practiced law for three years in France.<sup>1</sup> Schulhofer has published numerous books and articles, the majority of which focus on criminal law and liberties of the American people.<sup>2</sup> Based on Schulhofer's previous publications, the topic of liberty appears to be his passion.<sup>3</sup> His interest and focus, at least in *More Essential than Ever*, is not purely academic, but also journalistic in nature as he emphasizes raising awareness of the ever-present erosion of the Fourth Amendment:

A central concern of this book is to demonstrate the importance for all Americans of preserving our capacity to limit the government's access to facts about ourselves – even when practical necessities or goals we choose to pursue oblige us to share those facts with trusted individuals and institutions for limited purposes.<sup>4</sup>

In addition to raising awareness, Schulhofer seeks to disprove common misconceptions regarding the Fourth Amendment; he strives to offer the current reality of the Fourth Amendment in an attempt to enlighten the reader's knowledge and interest in search and seizure law.

Schulhofer identifies the causes of modern Fourth Amendment dilemmas and offers thoughtful explanations as to why the Fourth Amendment is now "more essential than ever." His display of historical knowledge regarding Fourth Amendment law

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<sup>1</sup> New York University School of Law Faculty Profiles, <https://its.law.nyu.edu/facultyprofiles/profile.cfm?section=bio&personID=20270> (last visited Aug. 14, 2012).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> P. 9

and thorough discussion of modern search and seizure issues makes *More Essential than Ever* worth the investment and time to read.

In *More Essential than Ever*, Schulhofer diagnoses two misconceptions about the Fourth Amendment. First is the illogical theory that increasing liberty makes everyone less safe, and the second misconception is that people do not fully understand the Fourth Amendment's intended purpose. Schulhofer not only identifies misconceptions but he discusses them, while stating the adverse effects of recent Supreme Court holdings. Most importantly, he deems the Fourth Amendment a pillar supporting American society, which a variety of forces affect.

A societal misconception identified in *More Essential Than Ever* is that some Americans believe increasing liberty makes everyone less safe, while enhancing security makes people safer. However, Schulhofer argues that decreasing liberty could reduce respect for law enforcement. For example, "[Ordinary citizens] will not help [law enforcement] unless they want to."<sup>5</sup> This makes sense because not all enemies can be caught by the government acting alone – it needs support from its people. Consider:

Worldwide, there are at most only a few thousand Islamic extremists determined to do us harm. But there are more than a million law abiding Muslims in the United States and more than a billion worldwide. To combat terrorism successfully, the support of these communities is imperative. Unless our laws foster trust by guaranteeing transparency and accountability, strong search and surveillance authority quickly becomes self defeating.<sup>6</sup>

Appropriately, Schulhofer quotes Justice Brandeis on the importance of government action and its effect: "Our Government is the potent, the omnipresent teacher .... If the Government becomes a law breaker, it breeds contempt of law; ... it invites anarchy."<sup>7</sup> "Everyone

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<sup>5</sup> P.166.

<sup>6</sup> *Id.* at 168-169.

<sup>7</sup> *Id.* at 66 (Quoting Justice Louis Brandeis).

needs the Fourth Amendment,"<sup>8</sup> even the government. It appears that solutions to Fourth Amendment problems are not as easy as simply giving up liberties and exchanging them for safety. Therefore, Schulhofer offers an "outside the box" approach that in reality, increasing liberty makes us safer.

In addition, Americans misconstrue the nature of the Fourth Amendment. Some people do not understand its purpose. For instance, "[t]he common refrain is 'why should I worry about government surveillance? I have nothing to hide.'"<sup>9</sup> In reality, no one wants his or her personal details known by everyone. Schulhofer explains that proponents of this argument are not saying they "never need confidentiality, but only that they should not worry about keeping details of their private lives from police and prosecutors whose only interest is to [apprehend] those who are up to no good."<sup>10</sup> Schulhofer describes the Fourth Amendment, not as a personal privacy right, but as something much more than that. "When we think of privacy as a constitutional principle, we must remember that the well-being it aims to foster is not only personal but political...it also serves, perhaps more importantly, to sustain the foundation of a true democratic society."<sup>11</sup> In other words, the Fourth Amendment is more than just a guarantee of privacy; it is a shield from government abuse and is essential for a democracy. "When unrestricted search and surveillance powers chill speech and religion, inhibit gossip, and dampen creativity, they undermine politics and impoverish social life for everyone."<sup>12</sup> After considering Schulhofer's arguments, it seems there is more to the Fourth Amendment than America remembers.

In addition to the notion that America has forgotten the "long train of abuses"<sup>13</sup> that governments tend to impose on people, *More Essential than Ever* offers additional causes for erosion of the Fourth

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<sup>8</sup> *Id.* at 179.

<sup>9</sup> P.5.

<sup>10</sup> P.12.

<sup>11</sup> P.13.

<sup>12</sup> P.14.

<sup>13</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

Amendment. One cause is tragic events, such as the Civil War, Pearl Harbor, and the Cold War. "In all these periods, civil liberties came under assault, often by well-meaning citizens convinced they were living through a period of unique danger."<sup>14</sup> A modern reader can relate to this statement because he or she was alive during the tragedy of September 11, 2001. Schulhofer references the September 11th attacks twenty-five times in his work.

Besides tragic landmark events, gradual changes in American ways of life contribute to relaxing Fourth Amendment principles. Urbanization is one such example; housing inspectors need to enter buildings to conduct inspections to make sure the buildings are safe<sup>15</sup> and the rise in transportation creates a public need to keep roads safe. Schulhofer suggests that the Supreme Court has allowed leniency because of these changes in society; moreover, Schulhofer suggests the Court now implements "theoretical distinction between 'primary' or 'secondary' purposes" of law enforcement.<sup>16</sup> This determination is based on law enforcement objectives, and if law enforcement's primary purpose is not criminal prosecution, but some other justified end, the Court allows more flexibility. "The Court's more permissive approach allows police far more leeway than necessary and takes from the traveling public an important part of our traditional 'right... to be secure' from government intrusion."<sup>17</sup>

The most recent and problematic change in society is electronic information sharing, such as Facebook and online banking. Schulhofer's stance in regard to applying the Fourth Amendment to modern innovation is simple: "Fourth Amendment safeguards should apply whenever individuals convey personal information to a service provider or other intermediate institution under promise of confidentiality."<sup>18</sup> His argument is well-supported and attacks the notion that since the information is held by a third party, then it is not

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<sup>14</sup> P.145.

<sup>15</sup> P.93-102.

<sup>16</sup> P.106.

<sup>17</sup> P.106.

<sup>18</sup> P.134.

subject to Fourth Amendment protection. The author references the “third-party doctrine”<sup>19</sup> as “inexcusably formalistic.”<sup>20</sup> Schulhofer’s argument against the third-party doctrine maintains his broader argument that the Fourth Amendment right is not a guarantee of “secrecy but autonomy.”<sup>21</sup> Autonomy is the “right to control” and “what makes privacy valuable are the relationships and projects we develop by sharing information with others.”<sup>22</sup>

Schulhofer places most of the blame on Supreme Court interpretation of the Fourth Amendment. The Court’s interpretation, however, is an “unavoidable concern” in *More Essential Than Ever*.<sup>23</sup> “In the contemporary Court, a majority of justices increasingly put police convenience above original Fourth Amendment priorities.”<sup>24</sup> Judicial oversight is imperative for the Fourth Amendment to operate properly, but there is an “underlying assumption that privacy and judicial oversight are obstacles to our society.”<sup>25</sup> Schulhofer believes “[t]he Court has repeatedly sacrificed protection from government intrusion to unconvincing claims for ease and efficiency.”<sup>26</sup> There are references throughout *More Essential than Ever* blaming the Court for decreasing the liberty of the People “to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”<sup>27</sup>

While there are more positive features of this work than negative ones, *More Essential than Ever* could benefit from restructuring chapter topics. A more definitive shift between

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<sup>19</sup> For a more informative discussion on electronic communication and, more specifically, the third party doctrine *See e.g.*, Christopher R. Brennan, *Katz Cradle: Holding On to Fourth Amendment Parity in an Age of Evolving Electronic Communication*, 53 Wm & Mary L. Rev. 1797 (2012); *See also* Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 Mich. L. Rev. 561 (2009).

<sup>20</sup> P.127.

<sup>21</sup> P.6.

<sup>22</sup> P.8.

<sup>23</sup> P.17.

<sup>24</sup> P.44.

<sup>25</sup> P.158.

<sup>26</sup> P.99.

<sup>27</sup> U.S. CONST. amend. IV.

traditional and modern Fourth Amendment problems and a definition section in the Table of Contents would make it more user-friendly in referencing specific topics. Therefore, this book would benefit from a more rigid and sub-divided format compared to the one Schulhofer provides his reader.

Also, Schulhofer daringly blames the Supreme Court. He accuses the Court with audacious language: "The Supreme Court has failed to understand the Fourth Amendment's central goals or failed to take them seriously."<sup>28</sup> This is the most glaring instance in which Schulhofer allocates blame in his work. Furthermore, Schulhofer's claim is unsubstantiated and incorrectly categorizes all the Supreme Court Justices under one umbrella of criticism. There are other explanations for the legal conclusions drawn by the Justices besides lack of understanding and not taking the Fourth Amendment seriously. However, the positive aspects of the book far outweigh any criticisms.

Schulhofer provides history of the Fourth Amendment at the beginning of the work, focusing mainly on the importance of warrant requirements. He uses history to criticize the leaps in logic made by the Supreme Court in analyzing more modern issues in various chapters. For example, "health and safety inspectors can enter homes and apartments without permission, by using an 'area warrant'." Schulhofer connects the modern warrant to one that is forgotten by most: "The area warrant is nothing more than a modern name for the dreaded general warrant that the Fourth Amendment was meant to forbid."<sup>29</sup> Thereby implying even lessons of history are becoming a thing of the past.

In addition, case law is strategically placed throughout the chapters and provides a broad and educational summary of search and seizure law that supports Schulhofer's arguments. Schulhofer does a thorough and seamless job of explaining previous case decisions while remaining brief and on-point.

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<sup>28</sup> P.115.

<sup>29</sup> P.93-94.

Moreover, Schulhofer's choice of quotations serves to ignite the reader's passion and adoring nature for the history of liberty. To illustrate one such quote:

The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all force dares not cross the threshold of the ruined tenement.<sup>30</sup>

#### CONCLUSION

The premise of *More Essential than Ever* is alarming. Schulhofer's accurate presentation of the current state of Fourth Amendment law presents a most worrisome position for Americans. It is readily apparent that human nature has not changed, but sentiment toward defending civil liberties has, especially the right to be free from unreasonable search and seizure. "Modernization" cannot be a one-way street where the government benefits from new technologies while citizens are left with no protective buffers other than those that sufficed in 1791."<sup>31</sup> In other words, the Fourth Amendment has not aged like fine wine.

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<sup>30</sup> P.22 (quoting William Pitt, speech on the Excise Bill., House of Commons March 1763).

<sup>31</sup> P.121.