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PRIVACY'S PROBLEM AND THE LAW OF CRIMINAL PROCEDURE

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Almost all talk about the law of criminal procedure begins with two assumptions. The first concerns what that law is about. Although the constitutional doctrines that regulate the police protect a number of values or interests, one — privacy — tops the list. The cases and literature on search and seizure, and to a lesser extent on self-incrimination, routinely emphasize the individual's ability to keep some portion of his life secret, at least from the government. That is why Fourth Amendment cases talk about whether evidence is in plain view (and hence no longer hidden from the world[1]) and whether particular places tend to be the locus of activities that most people like to keep secret.[2] That is also why Fifth Amendment cases talk about the defendant's interest in deciding for himself whether to reveal incriminating information; a major underpinning of this "right to choose" is the defendant's interest in keeping the information to himself.[3] Privacy language and privacy arguments are rampant in criminal procedure.[4]

The second assumption usually goes unspoken: criminal procedure, we all suppose, is a self-contained system. It has little or nothing to do with the rest of constitutional law. Constitutional law courses ignore Fourth and Fifth Amendment doctrine, and criminal procedure courses return the compliment; the literatures of crimi-

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1. The examples are endless, but for two especially revealing ones, see New York v. Class, 475 U.S. 106 (1986), and United States v. Knotts, 460 U.S. 276 (1983).

2. *See, e.g.*, Oliver v. United States, 466 U.S. 170 (1984).

3. *See, e.g.*, Pennsylvania v. Muniz, 496 U.S. 582, 588-89 (1990); California v. Byers, 402 U.S. 424, 450-51 (1971) (Harlan, J., concurring in the judgment).

4. This focus is usually taken for granted, but not always. For a rare and interesting criticism, see Scott E. Sundby, *"Everyman"'s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751 (1994).

nal procedure and constitutional law do not speak to one another,[5] and the cases do not cite each other. There is a lot to argue about in Fourth and Fifth Amendment law, but the arguments seem to have no effect on debates about the scope of the government's power *outside* traditionally criminal areas.

These two assumptions cannot stand together. It seems easy and natural to say that we need to protect the individual's interest in keeping some things secret, or at least away from the government's prying eyes, when we regulate the police. Privacy is a comfortable starting point for Fourth and Fifth Amendment law. Yet much of what the modern state does *outside* of ordinary criminal investigation intrudes on privacy just as much as the kinds of police conduct that Fourth and Fifth Amendment law forbid. A privacy value robust enough to restrain the police should also prevent a great deal of government activity that we take for granted — activity that, at least since the New Deal, is unquestionably constitutional.

To put it differently, a substantive problem lies at the heart of criminal procedure: the law is grounded on the protection of a particular value, privacy, that implies aggressive substantive judicial review of a sort that we have not allowed for the past half-century. Privacy, at least as the word is used in criminal procedure, protects the interest in keeping information out of the government's hands, and information is necessary to both criminal law enforcement (where aggressive constitutional law is thought to be good) and ordinary regulation (where it is mostly thought to be bad). Criminal procedure, or at least privacy-based criminal procedure, thus has a good deal more substantive bite than we tend to suppose, and its substantive implications push in some uncomfortable directions.

This problem casts light on a number of features of criminal procedure, both past and present. The idea that the Fourth and Fifth Amendments guarantee broad privacy protection dates back at least to *Boyd v. United States,*[6] an 1886 Supreme Court decision that

5. There are exceptions. *See, e.g.,* Akhil Reed Amar, *The Bill of Rights as a Constitution,* 100 YALE L.J. 1131 (1991); Louis Michael Seidman, Brown *and* Miranda, 80 CAL. L. REV. 673 (1992); Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory,* 77 GEO. L.J. 19 (1988).

6. 116 U.S. 616 (1886). Actually, the link between privacy and the Fourth and Fifth Amendments predates *Boyd;* indeed, *Boyd* itself relies heavily on eighteenth-century antecedents to the Fourth and Fifth Amendments. *See* 116 U.S. at 624-32. But *Boyd* solidified the link, and it provides a useful starting point from which to assess more contemporary developments.

The statement in the text should perhaps be qualified in another respect as well: *Boyd*'s conception of privacy protection was very much tied to the protection of property rights. *See, e.g.,* Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the*

laid the foundation for modern search and seizure and self-incrimination doctrine. To modern ears, *Boyd* sounds like an odd case to lay that foundation: it was a civil forfeiture action arising out of a tax dispute.[7] And *Boyd* was not unusual in this respect. Case law in the late nineteenth and early twentieth centuries is filled with regulatory disputes — antitrust cases, railroad regulation cases, and the like — in which litigants used the Fourth and Fifth Amendments as shields against government oversight.[8] Yet this civil use of criminal procedure may not be so odd after all. *Boyd*'s broad privacy protection arose around the same time that substantive due process took flight; the substantive implications of Fourth and Fifth Amendment privacy protection may not have seemed as troubling a century ago as they do today. The limits the Court later placed on *Boyd*'s protection may have a great deal to do with changes in the Court's view of those substantive implications.

Broad restraints on government power are more problematic today. Current Fourth and Fifth Amendment law seems to deal with the problem through a series of special rules or exceptions, doctrines that treat some privacy intrusions as if they just don't count. "Regulatory search" cases allow government searches of businesses with little or no suspicion of misconduct,[9] giving the government much more leeway when enforcing fairly trivial regulations than it has when enforcing laws against rape or murder. "Required records" cases allow the government to compel concededly incriminating disclosures via civil regulatory statutes;[10] once again this doc-

Fourth and Fifth Amendments, 90 HARV. L. REV. 945, 951-56 (1977). The temptation is to focus on the property aspect of *Boyd* and ignore privacy. That would be a mistake. Privacy and property are fused in *Boyd;* that is, property seems to be protected as a means of protecting what the *Boyd* Court called "the privacies of life." 116 U.S. at 630. It is appropriate, therefore, to treat *Boyd* as the foundation for contemporary criminal procedure doctrines that aim to protect privacy.

7. The dispute in *Boyd* involved shipments of plate glass for use in the construction of a post office building in Philadelphia. Boyd was accused of misrepresenting the amount of glass on which he had received an exemption from import duties. The government subpoenaed customs invoices to prove the misrepresentation, and Boyd objected to the subpoena. *See* Brief for Plaintiffs at 1-5, *Boyd* (No. 983); Brief for the United States at 1-2. Both briefs are reprinted in 8 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW (Philip B. Kurland & Gerhard Casper eds., 1975).

8. *See infra* notes 114-124 and accompanying text.

9. *See, e.g.*, New York v. Burger, 482 U.S. 691 (1987) (upholding a suspicionless search of an automobile junkyard).

10. *See, e.g.*, Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841 (1984) (upholding a requirement that college students register for the draft in order to apply for student loans, notwithstanding that registration might require admitting earlier criminal nonregistration); Shapiro v. United States, 335 U.S. 1 (1948) (upholding a subpoena requiring a wholesaler to turn over various business records that government regulation required him to keep, notwithstanding the fact that those records were then used against the wholesaler in a criminal prosecution).

trine gives the government greater power when enforcing run-of-the-mill regulations than when investigating serious crime. Finally, the "reasonable expectation of privacy" doctrine permits police officers to uncover the details of a suspect's finances[11] or phone calls,[12] even though the same doctrine reaffirms and constitutionally protects the privacy of lunch bags,[13] cigarette packets,[14] and the underside of stereos.[15] No plausible balancing of government need against individual privacy interests can explain these results. Instead, they are best understood as the inevitable consequence of the conflict between privacy-based criminal procedure and the constitutional revolution of the 1930s. In light of that conflict, it is hard to see which side in these disputes is "liberal" and which is "conservative": broader protection of privacy (the supposedly liberal stance) is the road back to the Four Horsemen, while reduced privacy protection (the "conservative" view) guards the integrity of the 1937 revolution.

There are two ways to resolve the tension. The system could protect privacy consistently, across the board. But that course would entail serious costs to the constitutional order under which we have lived since the New Deal: tax forms, OSHA inspections, routine government employment practices, and a host of other things would be constitutionally suspect. The other alternative is to reorient criminal procedure, to focus the law less on privacy and more on what makes the police different from, and more threatening than, the government in its other guises. That task is already underway, though it is mostly implicit. It needs to proceed further, and more candidly.

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11. *See* United States v. Miller, 425 U.S. 435 (1976) (holding that a government request that a bank turn over copies of an individual's deposit slips and checks is not a Fourth Amendment search). The Right to Financial Privacy Act, 12 U.S.C. §§ 3401-3422 (1982), imposes some restrictions, but they are fairly gentle: law enforcement officers are not bound to show probable cause or even reasonable suspicion as a precondition of obtaining records of such things as bank deposits and withdrawals.

12. *See* Smith v. Maryland, 442 U.S. 735 (1979) (holding that installation and use of a "pen register," which records numbers called by a telephone, is not a Fourth Amendment "search").

13. *See* United States v. Ross, 456 U.S. 798 (1982) (holding that law enforcement officers must have probable cause, though not a warrant, before searching a paper lunch bag found in the trunk of the defendant's car).

14. *See* United States v. Robinson, 414 U.S. 218 (1973) (upholding the search of a crumpled cigarette packet incident to the defendant's arrest). *Robinson* held that the search of the cigarette packet was permissible as long as the arrest was permissible. 414 U.S. at 236. Nowhere did the Court suggest that opening the cigarette packet was anything other than a Fourth Amendment "search." *But cf.* 414 U.S. at 237 (Powell, J., concurring) (arguing that an arrestee "retains no significant Fourth Amendment interest in the privacy of his person").

15. *See* Arizona v. Hicks, 480 U.S. 321 (1987); *see also infra* notes 24-25 and accompanying text.

Part I of this article addresses the connection between privacy-based limits on police authority and substantive limits on government power as a general matter. Part II briefly addresses the effects of that connection on Fourth and Fifth Amendment law, both past and present. Part III suggests that privacy protection has a deeper problem: it tends to obscure more serious harms that attend police misconduct, harms that flow not from information disclosure but from the police use of force. The upshot is that criminal procedure would be better off with less attention to privacy, at least as privacy is defined in the doctrine today. Were the law of criminal procedure to focus more on force and coercion and less on information gathering (a change that is already beginning to happen), it would square better with other constitutional law and better protect the interests most people value most highly.

I. Privacy, Police Investigation, and Substantive Restraint on Government Power

Criminal procedure is about, as the name says, procedure. One can read widely in the cases and literature without uncovering any indication that restraints on police practices have important *substantive* effects. Of course, they do. At a broad level, this observation is trite: all procedural rules have substantive effects. But it is useful to see how criminal procedure casts its substantive shadow, and how the size and shape of that shadow depends on the interests the law chooses to protect.

A. *Defining Privacy*

To understand the implications of privacy-based criminal procedure one must start with some conception of privacy. That turns out to be a problem, for the term means too much. In legal discourse privacy encompasses, among other things, the ability to engage in certain conduct free from government regulation,[16] freedom from being stared at or stalked or "singled out" in public,[17] the "right to be let alone,"[18] and the ability to keep certain information

16. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Stanley v. Georgia, 394 U.S. 557 (1969).

17. *See, e.g.*, Ruth Gavison, *Privacy and the Limits of Law*, 89 Yale L.J. 421, 432-33 (1980). The tort law equivalent is the claim based on intrusion upon seclusion. *See* Restatement (Second) of Torts § 652B (1965).

18. *See, e.g.*, Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); Restatement (Second) of Torts § 652A cmt. a (1965); Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 Cornell L. Rev. 1258, 1335 (1990).

or aspects of one's life secret.[19] If one takes privacy to mean all these things, or some fuzzy and varying combination of them, it quickly becomes impossible to say anything useful on the subject. All outcomes make sense on *some* combination of privacy interests, particularly when one balances them against an equally ill-defined sense of government need.[20]

A more refined definition is needed. In the law of criminal procedure, two kinds of privacy seem to matter. The first is fairly definite: privacy interests as interests in keeping information and activities secret from the government. The focus here is on what government officials can see and hear, what they can find out. The paradigmatic infringement of this kind of privacy is the act of reading someone's correspondence or listening to her telephone conversations, or perhaps rummaging through her bedroom closet. The second kind of privacy is much harder to get one's hands on: it is easier to say what it is not than what it is. It is not, other than coincidentally, about protecting secrets and information. Rather, it is about preventing invasions of dignitary interests, as when a police officer publicly accosts someone and treats him as a suspect. Arrests or street stops infringe privacy in this sense because they stigmatize the individual, single him out, and deprive him of freedom.

Both sorts of privacy are protected in criminal procedure: Fourth Amendment law regulates both wiretaps and arrests. And the two often go together: house searches, the heart of Fourth Amendment concern, involve both types of injury. But the interests are neither equally important to the law nor equally well protected. On the contrary, *informational* privacy — privacy as nondisclosure — is and has been preeminent. When courts decide whether a given police tactic infringed a "reasonable expectation of privacy" and hence whether the tactic is a "search" subject to Fourth Amendment regulation, they ask whether the police saw or heard something that any member of the public might have seen or heard in a similar manner.[21] The question, in other words, is whether what the police did was likely to capture something secret.

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19. *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967).

20. The problem is especially hard if these various meanings hang together in some sense. For an argument that they do, see Gavison, *supra* note 17.

21. *E.g.*, Ciraolo v. California, 476 U.S. 207, 213-14 (1986) (upholding an overflight of a private home against a Fourth Amendment challenge, and noting that "[a]ny member of the public flying in this airspace who glanced down could have seen everything that these officers observed"); United States v. Knotts, 460 U.S. 276, 281-82 (1983) (upholding the electronic tracking of the movements of defendant's automobile against a Fourth Amendment challenge, and noting that "[w]hen [defendant] traveled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was traveling over particular roads

The reasoning of the cases is far from consistent; neither this norm nor any other can fully explain the doctrine. Nevertheless, privacy-as-secrecy dominates the case law.[22]

Two examples should suffice to make the point. The concept of "plain view" — the idea that the police are not subject to any Fourth Amendment constraint when they see something from a vantage point they are entitled to take (sometimes because any member of the public is entitled to the same vantage point) — is the centerpiece of search law. This concept basically defines what is a "search,"[23] and hence defines what police conduct the Fourth Amendment regulates and what conduct it leaves alone. With respect to things that are searches, the plain view concept determines what must be separately justified. In short, it determines in an enormous number of cases whether the Fourth Amendment has or has not been obeyed. The concept makes sense only in terms of informational privacy. It flows out of the interest in keeping secrets, not out of the interest in being free from unreasonable police coercion or from other kinds of dignitary harms that search targets may suffer.

Consider some examples of how the plain view concept is applied. In *Arizona v. Hicks*,[24] police officers legally entered an apartment to investigate a shooting. Once inside, one of the officers noticed a pair of expensive-looking stereos; he turned over the turntables in order to copy down the serial numbers. The stereos turned out to be stolen. The Supreme Court found that looking at the underside of the turntables was a separate Fourth Amendment "search" that needed to be separately justified; because the officer did not have probable cause to believe that the stereos were stolen before looking at the serial numbers, this

in a particular direction, the fact of whatever stops he made, and the fact of his final destination when he exited from public roads onto private property").

22. For one acknowledgment of the point, see RICHARD C. TURKINGTON ET AL., PRIVACY: CASES AND MATERIALS (1992). This recently published casebook on privacy in the law places search and seizure doctrine in a chapter on "Informational Privacy," rather than in chapters on "Privacy Protection for Personality, Identity and Reputation" or "Privacy and Autonomy."

23. *See supra* note 21. I am using *plain view* in its conceptual sense, not in its doctrinal sense. Doctrinally, *plain view* refers to an exception to the warrant requirement for seizures of evidence discovered during an otherwise legitimate encounter or search. The concept of plain view is broader: the idea is that whenever the police see something from a vantage point they are entitled to have, what they see is fair game. This idea is central not only to the plain view exception to the warrant requirement but also to the determination of what a "search" is to begin with.

24. 480 U.S. 321 (1987).

"search" was illegal.[25] On the other hand, in *United States v. Knotts*,[26] the Court held that police stalking of suspects, as long as it is done in public, receives no Fourth Amendment regulation at all. The theory is that an officer is entitled to see anything, including movements on public streets and in public places, that any member of the public could see from a similar series of vantage points.[27] These results do not make sense on any definition of privacy that focuses on the interest in being "let alone" or on protecting against dignitary harm. Given that approach, what happened in *Hicks* would not be worth worrying about: turning over the stereo caused no real dignitary harm. In dignitary terms the only issue would be the legality of the search of the apartment *in general.* But if the law seeks to protect informational privacy, each marginal search, each additional place where the officer casts his eye, represents a separate issue and ought to be separately justified.[28] The point holds true for *Knotts* as well. In dignitary terms *Knotts* seems plainly wrong, but in informational privacy terms it is at least plausible.

The same pattern appears in the relationship between the Fourth Amendment's regulation of searches and its regulation of seizures. Seizures, unlike searches, have no logical connection to informational privacy: seizures are deprivations of property or liberty interests, not disclosures of things the suspect may wish to keep secret. But both searches and seizures are expressly protected by the Fourth Amendment. It follows that the Fourth Amendment must protect something besides privacy-as-secrecy. Yet, as anyone familiar with Fourth Amendment doctrine knows, seizures are far less heavily regulated than searches. A police officer can grab me, spin me around, force me to spread my arms and legs against the wall, and frisk me, all in public view, based on a "reasonable suspicion" — say, a one-in-four chance — that I may have committed a crime.[29] The same officer cannot open the trunk of my car without

25. 480 U.S. at 323-29.

26. 460 U.S. 276 (1983).

27. 460 U.S. at 281-83.

28. Actually, the test appears to be not where the officer casts his eye but where he puts his hand. In *Hicks,* the Court emphasized that the officer had *moved* the stereo in order to see the serial number. 480 U.S. at 324-25.

29. The reasonable suspicion test comes from Terry v. Ohio, 392 U.S. 1, 20-27 (1968). United States v. Hensley, 469 U.S. 221, 227-29 (1985), established that *Terry*'s standard may be satisfied by reasonable suspicion of an already completed crime. As for the "one-in-four chance" language, that is my own extrapolation. The Supreme Court refuses to provide any formulation other than a negative one: reasonable suspicion requires "considerably less than proof of wrongdoing by a preponderance of the evidence." United States v. Sokolow, 490 U.S. 1, 7 (1989). Professor LaFave's treatise says that the requirement is a "substantial possi-

probable cause[30] — a significantly tougher standard. So too, suspects may be arrested and imprisoned for up to forty-eight hours without the approval of a judicial officer and without a showing that getting such approval would have been terribly hard.[31] But an officer cannot cross the threshold of my house without a warrant unless getting one was practically impossible.[32]

These lines show the degree to which the doctrine has been dominated by the desire to protect individuals' interest in keeping some parts of their lives secret, and the degree to which that value has traditionally overshadowed all others in Fourth Amendment jurisprudence. Police-citizen encounters are intrusive, often traumatizing, in many ways and for many reasons. But the law seems to focus relentlessly on the harm caused by *seeing* or *hearing* something. That is what privacy usually means in criminal procedure.

The strength of the informational privacy interest in Fifth Amendment law is less obvious and less strong. It is hard to explain the basic structure of self-incrimination doctrine in informational privacy terms: the privilege does not apply to physical evidence, which can be at least as "private" as testimony,[33] and it does not protect immunized testimony, no matter how "private" in the ordinary sense of that word.[34] Yet the privilege is still bedeviled by the effort to articulate just what the relevant interest *is*. Why it is that a defendant need not answer possibly incriminating questions?[35] A

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bility" of crime. 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 9.3(b), at 431-32 (2d ed. 1987).

30. Under Michigan v. Long, 463 U.S. 1032 (1983), officers may sometimes perform a quick search of the passenger compartment of a car based on reasonable suspicion that weapons might be present. But such a "car frisk" does not include opening the trunk, 463 U.S. at 1048-53, which must be justified by probable cause.

31. United States v. Watson, 423 U.S. 411, 414-17 (1976), establishes the legality of warrantless felony arrests outside the home. Under County of Riverside v. McLaughlin, 500 U.S. 44, 55-58 (1991), arrestees may be held for up to forty-eight hours without being brought before a judicial officer, though shorter periods of detention may be the subject of constitutional attack in particular cases, depending on the context and the reason for the detention.

32. *See* Payton v. New York, 445 U.S. 573 (1980) (holding that warrantless arrests in the home are impermissible absent exigent circumstances).

33. Schmerber v. California, 384 U.S. 757, 760-65 (1966). This apparently includes even personal documents. *See In re* Grand Jury Subpoena Duces Tecum Dated Oct. 29, 1992, 1 F.3d 87 (2d Cir. 1993) (rejecting the argument that a personal calendar was protected, notwithstanding the assumption that the calendar was an extremely personal document); Senate Select Comm. on Ethics v. Packwood, 845 F. Supp. 17 (D.D.C. 1994) (rejecting the argument that Sen. Packwood's diaries are protected by the Fifth Amendment against subpoena by the Senate Ethics Committee during the course of an investigation of sexual harassment claims).

34. Kastigar v. United States, 406 U.S. 441 (1972).

35. Thus the most famous Fifth Amendment writing of the past two decades is an article that aims to show that no justification for the privilege works. *See* David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063 (1986).

large portion of the literature says that the answer is something akin to informational privacy. Peter Arenella, for example, argues that forcing someone to tell of his own wrongdoing violates the privacy of his mind and thoughts;[36] Robert Gerstein suggests that it transgresses the privacy of one's self-judgment.[37] These are basically interests in nondisclosure — in keeping a category of information secret. Of course that is exactly what the privilege protects: compulsion itself is not barred, only compulsion that produces a kind of disclosure. That is why, as recently as a generation ago, privacy protection was the dominant explanation for the privilege among academics and judges alike.[38] The interest in keeping secrets is not as powerful as in Fourth Amendment law, and to a large degree Fifth Amendment law has moved away from it.[39] Yet secrecy remains a conventional answer, though not the only answer, to the question why we have a privilege in the first place.

In other words, though privacy means many things and though Fourth and Fifth Amendment law protect many interests, one fairly well-defined and fairly narrow interest, the interest in secrecy, seems predominant. The primary goal of this article is to consider what follows from protecting that interest. Accordingly, I will use the word *privacy* in the narrower of the two senses mentioned above, meaning an interest in keeping things secret from agents of the government. This is not to say that there are not other sorts of privacy interests (there are) nor that criminal procedure should ignore those interests (it shouldn't). But the brand of privacy that Fourth Amendment law in particular, and Fifth Amendment law to a lesser extent, protect most — privacy as secrecy — has some interesting implications. It deserves more scrutiny than it has received.

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36. Peter Arenella, Schmerber *and the Privilege Against Self-Incrimination: A Reappraisal,* 20 AM. CRIM. L. REV. 31 (1982).

37. Robert S. Gerstein, *Privacy and Self-Incrimination,* 80 ETHICS 87 (1970). For a similar argument that also seeks to ground the privilege in customs involving disclosure between individuals, see R. Kent Greenawalt, *Silence as a Moral and Constitutional Right,* 23 WM. & MARY L. REV. 15 (1981).

38. *See, e.g.,* California v. Byers, 402 U.S. 424, 450-51 (1971) (Harlan, J., concurring); Robert B. McKay, *Self-Incrimination and the New Privacy,* 1967 SUP. CT. REV. 193. One indication of the link between privacy and the privilege is the traditional view of the Fifth Amendment as strongly linked to the Fourth. *See, e.g.,* Mapp v. Ohio, 367 U.S. 643, 656-57 (1961); 367 U.S. at 661-66 (Black, J., concurring).

39. *See, e.g.,* Fisher v. United States, 425 U.S. 391 (1976) (largely abandoning Fifth Amendment protection of the contents of documents, while retaining protection for the incriminating aspects of the act of producing them); *see also infra* notes 192-99 and accompanying text (discussing the abandonment of privacy and autonomy protection in police interrogation law).

B. *The Police, Process, and Substance*

Privacy in this narrower informational sense is a substantive value, but it can also be seen as essentially procedural. Saying that I have a strong privacy interest in the contents of my bedroom is not the same as saying that any given conduct, in or out of my bedroom, should be free from punishment. Privacy-based limits on police investigation are limits on how the police gather information, not on what criminal laws they may enforce. Thus, the probable cause and warrant requirements do not restrict the government's ability to decide what should be a crime, nor does the requirement that suspects be given *Miranda* warnings when they are questioned. That is why Fourth Amendment law and *Miranda* doctrine are aspects of criminal *procedure* and why criminal procedure is not usually seen as having much impact on the contents of substantive criminal law.

Yet procedural limits on police investigation of crime do have substantive effects, just as substantive conduct prohibitions have procedural effects. Consider one famous argument about the Connecticut birth control statute at issue in *Griswold v. Connecticut*.[40] According to the majority opinion in that case, the statute criminalizing the use of contraceptives was improper in part because of the way it would have to be enforced: through police searches of married couples' bedrooms.[41] The same argument arises in debates about drug policy. Criminalizing drug use puts pressure on the legal system to tolerate police tactics such as undercover agents and profile-based street stops.[42] In general, different substantive crimes lead to different kinds of investigative tactics, so that one might plausibly wish to consider the investigatory process when considering what to criminalize.

The relationship works in the other direction as well. Just as a law banning the use of contraceptives would tend to encourage bedroom searches, so also would a ban on bedroom searches tend to discourage laws prohibiting contraceptives. If decriminalizing cocaine dealing would substantially reduce the use of undercover

40. 381 U.S. 479 (1965).

41. 381 U.S. at 485-86 ("Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."). The argument is developed at somewhat greater length in Justice Douglas's opinion in the predecessor to *Griswold*. *See* Poe v. Ullman, 367 U.S. 497, 519-22 (1961) (Douglas, J., dissenting).

42. This argument is standard among proponents of decriminalization. *See, e.g.*, STEVEN B. DUKE & ALBERT C. GROSS, AMERICA'S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS 116-17, 123-27 (1993).

agents in police work, so too would a ban on undercover agents make it harder to punish cocaine dealing.[43] A given rule of police procedure may come close to a ban on the prosecution of some kinds of crimes, and must always harm the prosecution of some crimes more than others.

The substantive shadow cast by restraints on police practices can also extend beyond criminal law. Suppose one were to adopt the definition of self-incrimination used by Justice Douglas: the government compels self-incrimination whenever it forces someone to say something that will cause him serious harm, whether the harm is "infamy" or humiliation or possible criminal liability.[44] The law does not follow this approach to the privilege, but if it did, the privilege would disable every regulatory regime whose enforcement depends on compelling testimony that is unpleasant to the person doing the testifying. That effect could cover a lot of ground, most of which is not paradigmatically criminal. Most criminal prosecutions, after all, do *not* depend on incriminating statements by the defendant.[45] Some legal rules outside ordinary criminal law, on the other hand, may be enforceable only if the government can require witnesses to testify, and the number surely mushrooms if "testify" is broadened to include producing documents.[46] A Douglas-style privilege would render those rules useless.

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43. This relationship between the way police can investigate crimes and the crimes they can investigate is not symmetrical. A ban on searches of bedrooms might indeed render a prohibition of contraceptive use almost unenforceable, and in that sense might look like the equivalent of the holding in *Griswold.* Yet the ban on bedroom searches is both less and more inclusive than the substantive ban on contraceptive laws. It is less inclusive because there are ways of proving contraceptive use other than bedroom searches; these would not be barred by the search rule. It is more inclusive because there are some things police might want to look for in bedrooms other than evidence of contraception. The ban on bedroom searches would thus limit the investigation of other crimes as well: it would make some drug cases harder to solve, while making contraception cases almost impossible.

Indeed, because search and seizure rules cannot be kept wholly secret from offenders, these substantive effects are likely to be greater than they initially appear. If bedroom searches were suddenly forbidden, bedrooms would become a favorite hiding place for contraband that is now hidden in, say, basements. In other words, though limits on police investigation have substantive effects, the effects are complicated, and few procedural rules will be the precise equivalent of direct substantive restraints on the definition of crimes. Nevertheless, the effects themselves are real and may extend quite far.

44. Ullman v. United States, 350 U.S. 422, 449-54 (1956) (Douglas, J., dissenting). As Douglas's dissent indicates, this argument has a long pedigree. *See* 350 U.S. at 452-54 (citing sources).

45. Consider drug cases, in which the key evidence is usually physical, and the police often refuse any conversation with the defendant. *See* H. RICHARD UVILLER, TEMPERED ZEAL 199 (1988) (noting that New York City police officers avoided any conversation with narcotics suspects, relying instead on physical evidence).

46. Through most of Douglas's judicial career, documents were treated the same as oral testimony for most purposes under the Fifth Amendment. Boyd v. United States, 116 U.S. 616 (1886), was still good law when Douglas wrote his dissent in *Ullman, see* 350 U.S. at 440-

From the perspective of constitutional law, this is the kind of substantive shadow that matters most. If constitutional law has an "activist" sphere and a "deferential" sphere, criminal law and procedure belong in activist territory. The fact that criminal procedure limits criminal law is therefore not such a big deal in terms of the larger constitutional structure. For the past generation, day-to-day rules of criminal investigation and trial procedure have been the province of constitutional law.[47] Constitutional limits on the definition of crimes, though less common, are nevertheless more advanced than substantive review of civil rules and regulations.[48] It is surely no accident that *Roe v. Wade*[49] and *Griswold* arose as challenges to criminal statutes. And the most widespread form of substantive due process is one that has been applied almost exclusively to criminal statutes: through void-for-vagueness doctrine, the courts have invalidated a whole generation of vagrancy and loitering statutes and have struck down a variety of other laws that criminalized seemingly innocuous conduct.[50] Substantive review outside criminal law is a good deal rarer, and more threatening: it harks back to a time when the courts regularly second-guessed legislative judgments about regulatory matters.

43, and *Boyd* applied the Fifth Amendment to a subpoena for customs invoices. *See* 116 U.S. at 617-18.

47. Though this system of judge-made constitutional criminal procedure rules is generally taken for granted, it has generated some severe criticism. *See* CRAIG M. BRADLEY, THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION (1993).

48. For a pair of familiar examples (one old and one new), see Robinson v. California, 370 U.S. 660 (1962) (invalidating a statute that criminalized drug addiction), and R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) (invalidating a criminal "hate speech" ordinance).

49. 410 U.S. 113 (1973).

50. The key cases invalidating vagrancy and loitering laws are Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Coates v. Cincinnati, 402 U.S. 611 (1971); and Palmer v. Euclid, 402 U.S. 544 (1971). For a more modern version of the problem, see Kolender v. Lawson, 461 U.S. 352 (1983) (invalidating a statute requiring individuals to produce credible identification to police on demand). For the best discussion of these cases in the literature, see John C. Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes,* 71 VA. L. REV. 189 (1985).

Often vagueness cases have had First Amendment overtones. *See, e.g.,* Smith v. Goguen, 415 U.S. 566 (1974) (invalidating a flag desecration statute on vagueness grounds); Note, *The Void-for-Vagueness Doctrine in the Supreme Court,* 109 U. PA. L. REV. 67 (1960). But that has not always been the case. The problems with vagrancy and loitering statutes went far beyond speech issues, and the statutes themselves covered a great deal of ordinary (non-speech) street conduct. *See* Caleb Foote, *Vagrancy-Type Law and its Administration,* 104 U. PA. L. REV. 603 (1956). That seems to have been the key to their invalidation: vagrancy and loitering statutes allowed criminal arrest and punishment of ordinary citizens for ordinary conduct, which in practice meant punishment for invidious reasons. That is why I refer to these cases as a form of substantive due process — because the courts have essentially imposed substantive limits on what counts as a crime. For a similar argument, see Robert C. Post, *Reconceptualizing Vagueness: Legal Rules and Social Orders,* 82 CAL. L. REV. 491 (1994).

In short, rules governing police practices have substantive effects, both inside and outside criminal law. Privacy-based limits have different substantive effects than other kinds of limits. None of this is problematic unless the substantive effects are themselves problematic. And that's the rub: some ways of regulating law enforcement affect the scope of ordinary criminal law but not much else. Other methods of reining in the police have much broader substantive implications. Privacy-based rules, it turns out, are in the latter camp.

C. *Privacy's Problem*

Law enforcement, civil or criminal, depends on information. That information is often "private" in the sense that it rests in the hands of someone who would like it kept secret. This description fits almost all incriminating evidence in the hands of a criminal defendant, information that sometimes cannot be extracted due to the Fifth Amendment. Much of the information the system needs is also "private" in a more meaningful sense. It is of a type that many people, not just a particular litigant, might care about keeping secret. A cocaine dealer may be convicted because of drugs found in his bedroom closet; even those who comply with the drug laws wish to keep people out of their bedroom closets. A fraud conviction may depend on evidence of a large bank deposit on a given date; even wholly honest citizens value the secrecy of their bank transactions.

Fourth Amendment law purports to protect most information that is private in this second sense. Unless the police have a facially valid warrant or sufficient cause together with a valid exception to the warrant requirement, they may not search for evidence in places that are both (i) hidden from public view and (ii) likely to contain the sorts of things that ordinary people wish to keep to themselves. This basic formula is well established. For example, in *Oliver v. United States*,[51] the Supreme Court held that searches of "open fields" — basically, large tracts of land that are not too close to a house — are not regulated by the Fourth Amendment because large, open tracts of land do not usually house things that their owners wish to keep secret.[52] On the other hand, in *United States v.*

51. 466 U.S. 170 (1984).

52. "[O]pen fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields." 466 U.S. at 179. On the requirement that the place being searched be hidden from public view, see *supra* note 21.

Karo,[53] the Court held that the Fourth Amendment does limit efforts to monitor the movement of things or people inside houses, because houses, unlike fields, *do* contain things that most people want to keep to themselves.[54]

If one starts with this definition of *private*, protecting private information outside the criminal context would have huge substantive effects, especially if the information is protected absolutely — without any provision for disclosure in response to a showing of relevance or need or cause. Some criminal litigation may not depend on compelled disclosure of private material. In an ordinary robbery case, all the testimony may be consensual and all the physical evidence may have been gathered with the cooperation of the victim. But in any system that seeks to do more than pro forma regulation of business or finance or that tries to police the distribution of guns or drugs, absolute protection of private information is unacceptable unless *private* is defined so narrowly as to make the enterprise pointless. Much criminal law enforcement, and an even larger category of civil regulation, would be impossible.

The short-lived regime of *Boyd v. United States*[55] illustrates this proposition. *Boyd* held, basically, that the government could not obtain documents in the possession of their legitimate owner — not through search and seizure, not through subpoena, not through the testimony of the documents' owner.[56] All routes were barred: the documents were absolutely protected by the Fourth and Fifth Amendments. The year after *Boyd* was decided, Congress passed the Interstate Commerce Act.[57] Antitrust and bankruptcy legislation followed shortly thereafter.[58] Before long, railroad officials were raising constitutional objections to ICC investigations,[59] debt-

53. 468 U.S. 705 (1984).

54. 468 U.S. at 713-18.

55. 116 U.S. 616 (1886).

56. The documents in question were customs invoices, and they were subpoenaed in a civil forfeiture proceeding. 116 U.S. at 618. Early in its opinion the Court concluded that the subpoena should be treated no differently than a search. 116 U.S. at 621-22. In the course of discussing whether this "search" was constitutionally unreasonable, the Court declared that it was no different than compelled testimony, which would obviously be barred by the Fifth Amendment. 116 U.S. at 633. Thus, where *Boyd* applied, the means by which the government obtained the evidence apparently did not matter: searches, subpoenas, and oral testimony alike were barred.

57. 24 Stat. 379 (1887) (codified as amended in scattered sections of 49 U.S.C.).

58. The Sherman Antitrust Act was passed three years after the ICA. Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1988)). Federal bankruptcy legislation was passed eight years later. Bankruptcy Act of July 1, 1898, ch. 541, 30 Stat. 544 (repealed by Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 101-1330 (1988)).

59. *See, e.g.*, Brown v. Walker, 161 U.S. 591 (1896); Counselman v. Hitchcock, 142 U.S. 547 (1892).

ors were seeking to bar production of documents in bankruptcy proceedings,[60] and antitrust violators were trying to use the privilege to shield themselves from liability.[61] The Supreme Court shortly concluded that if it took *Boyd* seriously, government regulation would be impossible.[62] That was the beginning of the end of *Boyd.* The Court created a series of arbitrary "outs" from the protection, sometimes explicitly acknowledging that it was doing so in order to avoid disabling the government from pursuing various kinds of socially useful regulation.[63]

Boyd's troubled history shows that absolute protection for any substantial class of private information is incompatible with a lot of government activity.[64] That raises an obvious question: How can the system constitutionally protect private information without casting such a large substantive shadow? The answer seems easy: relax the protection. Privacy can be protected but not absolutely; given some form of balancing, it should be possible to shield individual privacy interests without endangering the modern state's ability to regulate. But balancing does not remove the substantive shadow. Balancing only transforms a flat prohibition into open-ended substantive judicial review.

Consider how balancing might work. It seems initially plausible to suppose that if one weighs the individual's interest in keeping things private against the state's interest in disclosure, one can protect most of what *Boyd* protected while still allowing the government to do its job. The obvious mechanism is some kind of "need" requirement — a regime that forces the government to show that it has a good reason for wanting the stuff, good enough to outweigh the individual's privacy interest. That is what the probable cause and reasonable suspicion standards in Fourth Amendment law are ostensibly about. Those standards say that the police cannot inspect the contents of the glove compartment of my car just because

60. *See, e.g., In re* Harris, 164 F. 292 (S.D.N.Y. 1908), *affd.* 190 F. 1018 (2d Cir. 1911); *In re* Hess, 134 F. 109 (E.D. Pa. 1905); Potter v. Beal, 49 F. 793 (C.C.D. Mass. 1892). In one of his earliest opinions, Judge Learned Hand held that a bankrupt had waived any self-incrimination claim he might make when he turned his books over to the receiver without objection. *In re* Tracy & Co., 177 F. 532 (S.D.N.Y. 1910).

61. *See, e.g., In re* Hale, 139 F. 496 (C.C.S.D.N.Y. 1905), *affd. sub nom.* Hale v. Henkel, 201 U.S. 43 (1906).

62. *See* Hale v. Henkel, 201 U.S. 43, 70 (1906).

63. *See infra* notes 126-34 and accompanying text.

64. One might argue that our system has always protected some pockets of private information through evidentiary privileges outside of the Fifth Amendment. But that sort of privacy protection is different because it protects information that has already been disclosed. In other words, evidentiary privileges encourage disclosure in certain relationships rather than protecting private information *against* disclosure.

some officer wants to look, but the police *can* look if they have good reason to believe the glove compartment contains something that suggests criminal behavior. The government's interest in stamping out crime justifies the search, but only if it can show why, *ex ante,* the search is likely to advance that interest. My privacy seems to be protected, and the government's ability to punish crimes seems only trivially impaired.

Unfortunately, requiring something akin to probable cause or reasonable suspicion is often impractical. The government needs certain kinds of information from taxpayers in order to enforce the tax laws. It cannot require disclosure only in cases in which it has some basis for suspecting a violation, because then it could not uncover violations. If the government must show case-by-case need for the information, it must recast the tax laws so that such information is not important. Privacy protection would act as a substantive prohibition. So too with OSHA inspections, or inspections to enforce building and fire codes, or record-keeping requirements attendant to affirmative action decrees, or proxy statements that must be filed with the SEC. In all these areas, the type of regulation that the government seeks to perform is impossible without compelled "suspicionless" disclosure — disclosure that precedes any showing that the government has a strong interest in obtaining the information *in this case.*

Balancing is still possible in such cases, but it looks a lot like open-ended review of the reasonableness of the government's regulatory regime. Even when suspicionless review is necessary for the particular regulatory regime, the government has an interest, perhaps a strong interest, in getting the information. But that interest is different from the interest in finding out the contents of my glove compartment. The government's "need" argument in these typical regulatory settings is not the need to engage in *this particular search.* Rather, the relevant government interest is the interest *in having the regulatory regime.* The real claim is that without the power to get this information, the government cannot have these tax code provisions, or these OSHA regulations, or these affirmative action orders, or these securities rules.

That claim does not do away with balancing. It just moves the balance to a higher level of generality: Is this regulation important enough to justify the invasion of privacy required to enforce it? Take, for example, a fairly routine item on an individual tax form. One who claims a charitable deduction of noncash property must report the name of the charity to which the property was given if

the property's value exceeds five hundred dollars.[65] Tax forms require many disclosures of this sort, usually as a means of increasing compliance with the law. The disclosure of the name of the donee is not necessary in order to have the underlying revenue rules: it is not like the requirement that gross income be stated. But it is a useful means of reducing fraudulent deductions. Indeed, until a couple of years ago, the same requirement applied to cash donations of over three thousand dollars in any one year to a single recipient.[66]

This information is undoubtedly private in any ordinary sense of the word, and it more than exceeds the Fourth Amendment privacy threshold. The objects of my charity are much more sensitive than the usual contents of my glove compartment, and the latter are protected against unreasonable searches. Meanwhile, a probable cause or reasonable suspicion requirement, the usual response of Fourth Amendment law to threatened privacy interests, would be unworkable in this context. Disclosure must be required across the board or it is useless. Thus constitutional balancing, Fourth Amendment style, would have to look something like the following: On one side is the interest in secrecy of all those who must tell the IRS the names of their favorite charities. On the other side is the government's interest in having the disclosure rule. Though the latter interest may not be trivial, it is hardly overwhelming. The government could structure the rules in ways that required less disclosure, or it could abandon the requirement altogether and simply live with some additional noncompliance. Neither possibility is unthinkable. How substantial is taxpayers' interest in secrecy? It is hard to say, but this privacy interest is surely at least as strong as the interest in the sanctity of glove compartments and lunch bags and jacket pockets — all areas where Fourth Amendment law protects individuals' interest in nondisclosure.

The result of the weighing process may not be absolutely clear. But the nature of the process should be transparent: it is reasonableness review of ordinary regulatory legislation. If the privacy interest is substantial, and in Fourth Amendment terms it plainly is, the tax rule would be upheld only if the government's interest was at least as strong. The weight given the government's interest would be a question for the courts, not for Congress or the IRS, just as courts, and not the police, determine how much weight to attach

65. Schedule A, I.R.S. Form 1040, at l.14 (1993). The name of the organization must be reported on Form 8283, line 1, column (a).

66. *See* I.R.S. Form 1040, Schedule A, at line 14 (1989).

to law enforcement needs when deciding whether particular searches and seizures are reasonable under the Fourth Amendment. A court striking this balance would have to decide whether the government had a good reason, not just a rational basis, for requiring disclosure of this information in this way instead of adopting some other regulatory path.[67] In other words, the court would have to engage in open-ended, nondeferential substantive review of the relevant rule.

That, in a nutshell, is the substantive problem with protecting the kinds of privacy interests we claim to protect in search and seizure cases. Wherever the regulatory state engages in any form of compelled information gathering (and it does so everywhere), there is an enormous cost to taking privacy interests seriously: doing so requires judicial judgments about whether one regulatory path is more reasonable than another. That sounds uncomfortably close to the regime that the Supreme Court sought to bury a half-century ago.

D. *Solutions That Don't Work*

Judges are not about to start invalidating commonplace items on tax forms on Fourth Amendment grounds. Nor should they. But explaining why not turns out to be hard, given that the system protects much weaker privacy interests against invasion by the police. The only principled way to avoid unacceptable outcomes is to find ways to distinguish the kinds of privacy intrusions police inflict on criminal suspects from the kinds of intrusions that civil regulatory regimes inflict on their targets — in order to justify regulating the former quite carefully while leaving the latter pretty much alone.

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67. In an interesting and insightful recent article, Scott Sundby argues that the very pervasiveness of privacy intrusions in the regulatory state might tend to skew this balance: the more regularly privacy is infringed, the less important it seems when weighed against the government's interests. Sundby, *supra* note 4, at 1760-61. Arguably the same thing is true on the criminal procedure side. The kinds of technological advances that make privacy intrusions both possible and more common tend to undermine the importance of the privacy interest in the law of search and seizure. *Id.* at 1761-63.

These points are correct: privacy protection *has* declined in important ways within criminal procedure, and it has almost disappeared elsewhere. But the law has not simply abandoned the interest in keeping secrets. Rather, that interest has been preserved but within a narrowed sphere. To put it another way, different perspectives lead to different conclusions about the degree to which privacy is still protected in Fourth Amendment law. If one compares the current regime to, say, the rule in *Boyd,* one is struck by how little privacy protection remains. On the other hand, if one compares current search and seizure law to the law (such as it is) that governs information gathering outside the context of ordinary criminal investigation, the surprising thing is how *much* Fourth Amendment law protects privacy in run-of-the-mill criminal cases. My aim is to explore the latter comparison, and thereby to get a better sense of the law's inconsistencies.

And several possible separating mechanisms exist. In fact, the law has embraced most of them at one time or another. Unfortunately, none of them works.

1. *Categorical Balancing*

Perhaps privacy interests *are* protected as much outside the sphere of criminal investigation as inside that sphere. The government may have more leeway with tax forms than with drug busts because it has a stronger interest in collecting taxes than in enforcing the drug laws, or because the relevant privacy interests are weaker in the tax context. Perhaps balancing takes place in both areas, but in regulatory settings the government's side of the scale is always heavier.

The argument is tempting, but wrong. The strength of the government's interest in any particular regulatory regime is, to put it mildly, highly contestable. That, after all, is why judicial review of the sort embodied by *Lochner v. New York*[68] was such a problem. Moreover, in a consistent privacy-protective system the government would typically have to defend not the tax code as a whole, but only the particular feature of it that caused the relevant privacy invasion. No court would need to choose between privacy protection and the tax code or OSHA, for the relevant tax or safety rules could always be recast to require less disclosure. Remember that the IRS need not require the charitable contribution disclosure mentioned above: it could always keep the deduction, abandon the disclosure requirement, and live with a little more noncompliance. It is very hard to imagine that the government's interest in particular regulatory rules — rules like the charitable contribution disclosure requirement — is *always* so strong, across the board, that it outweighs the harm to privacy.

Indeed, one would think that the government's interest in most criminal settings would be stronger than the parallel interests at stake in tax disputes or OSHA investigations. Fourth and Fifth Amendment law apply to murder and rape and robbery cases, where the public interest in catching and punishing offenders is very high indeed. Unless there is a huge disparity in privacy interests running in the opposite direction, balancing should give the police more leeway than civil regulators, not less.

Nor are privacy interests obviously stronger in criminal settings than in civil ones. They may be weaker. Building inspections, tax

68. 198 U.S. 45 (1905).

forms, searches of government employees' files — all these involve more intrusion on privacy interests than searches of automobiles and suitcases, not to mention lunch bags and jacket pockets. Of course, there are some things police do that are more intrusive than anything the government does outside the realm of criminal investigation. Wiretaps are a good example: OSHA does not intrude on personal conversations. Searches of private homes may be another, because the regulatory state does not require rummaging through bedroom closets. But most police searches are not in houses and do not involve electronic eavesdropping. With respect to the mass of car searches and street stop-and-frisks, the informational privacy interest at stake does not seem any weightier than the taxpayer's interest in keeping secret the objects of his charity.

Thus, it is hard to see how any plausible balance of privacy interests and government need could yield both current levels of Fourth Amendment protection and current levels of regulatory discretion. The interest in regulation is probably weaker than the interest in criminal law enforcement. Excluding house searches and wiretaps, privacy interests are not obviously different in the two settings, or if they are, the difference cuts in the wrong direction. No consistent regime would both protect privacy interests in briefcases or trunks of cars or jacket pockets when the police wish to search those places and also ignore privacy interests in the sorts of information the government wants in other settings.

2. *Drawing Lines Between Individuals and Institutions*

A good deal of what the regulatory state seeks to regulate is the conduct of institutions: corporations, partnerships, labor unions, and the like. These institutions, most people would say, do not have the same sorts of privacy interests as individuals. A corporation may prefer that some piece of financial information remain secret in order to prevent competitors from copying its investment successes, but this privacy interest is nothing more than the accumulated interests of the shareholders in maximizing the corporation's value, coupled with the interests of employees and officers in keeping their jobs. Since the New Deal, constitutional law has not protected purely economic interests of this sort, at least not outside the Takings Clause. And there is nothing irrational about a regime that protects informational privacy only to the extent it causes some noneconomic, intangible harm — harm of a sort that people, not institutions, can feel.

Current Fourth and Fifth Amendment law draws precisely this line. Fourth Amendment law protects corporations, but only nominally.[69] Meanwhile, the privilege against self-incrimination does not apply to corporations (or other groups, for that matter) at all.[70] This difference in treatment is perhaps an effort to protect individuals against privacy intrusions from the police without protecting institutions' interest in keeping regulation at bay.

Two obstacles, however, prevent solving privacy's problem by drawing lines between individuals and institutions. First, even if one sets criminal investigation to one side, a great deal of government information gathering targets individuals. Tax forms are the most obvious example. Searches of government employees by their employers are another.[71] A line between individuals and institutions may have saved the regulatory state at the turn of the century, but the state's reach is surely too broad for that tactic to work now.

Second, even if harm to privacy is defined in purely dignitary terms, privacy is something that individuals possess within institutions, not just outside them. When the government seeks to find something out about the place where I work, the information it seeks may embarrass me personally. If one is to protect privacy consistently, that interest must receive the same weight as the interest in keeping secret the contents of my briefcase when I am stopped on the street by a police officer. Yet if claims by individuals within institutions "count," the system unravels; the effect is almost the same as giving the institution itself a protectible privacy interest.

This point surfaces in a recent case involving the application of the Fifth Amendment to corporate employees. Individuals may refuse to comply with a grand jury subpoena if the act of producing the thing asked for would tend to incriminate them.[72] Corporations do not have this privilege, as the Court reaffirmed in *Braswell v. United States*.[73] But under *Braswell*, corporate employees are treated not like individuals (which is what they are), but like corporations. A corporate officer cannot refuse to produce corporate

69. For typical statements that businesses receive less Fourth Amendment protection than individuals, see Dow Chemical Co. v. United States, 476 U.S. 227, 237-38 (1986), and Donovan v. Dewey, 452 U.S. 594, 598-99 (1981).

70. *See* Braswell v. United States, 487 U.S. 99, 115-17 (1988).

71. *Cf.* O'Connor v. Ortega, 480 U.S. 709 (1987).

72. Fisher v. United States, 425 U.S. 391 (1976). For the best discussion of this doctrine, see Robert P. Mosteller, *Simplifying Subpoena Law: Taking the Fifth Amendment Seriously*, 73 VA. L. REV. 1 (1987).

73. 487 U.S. 99 (1988).

documents in his custody, even if the act of producing the documents would incriminate the officer personally.[74] The officer's interest does not count for Fifth Amendment purposes as long as he is acting as an officer. The rule that corporations are not covered by the privilege cannot justify this result. The officer loses even if he is trying to protect his own interest, not the corporation's. Yet if the rule were otherwise, the system might not function. Documents that incriminate the corporation also tend to incriminate individuals within the corporation, so a privilege that covered Braswell might not differ much from a privilege that covered his corporate employer.[75]

Braswell shows why it will not do to say that privacy interests can be protected for "individual" activities but not institutional ones. Institutions consist of people, and people care about keeping secrets. Privacy interests run through the whole of individuals' lives, much of which is lived out within institutions. Even if the Constitution protects only real persons and not artificial ones, serious privacy protection cannot avoid interfering with the business of regulating institutions.

3. *The Search-Subpoena Line*

There is a line in criminal procedure that might help resolve the tension between privacy protection within the criminal sphere and its absence without. Although police searches are subject to probable cause and reasonable suspicion standards and sometimes to a warrant requirement, grand jury subpoenas are much less heavily regulated. As long as the material asked for is relevant to the grand jury's investigation and as long as compliance with the subpoena is not too burdensome, the subpoena is enforced. No showing of probable cause or reasonable suspicion is necessary, and courts measure relevance and burden with a heavy thumb on the government's side of the scales.[76]

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74. 487 U.S. at 109-17. The employee does receive partial immunity: in any subsequent criminal prosecution of the employee, the government may not introduce into evidence the fact that the employee personally produced the corporate documents. 487 U.S. at 117-18. Notwithstanding this partial immunity, the government gains enormously from the employee's act of production. The government may use both the documents themselves and evidence of the *corporation's* act of production against the employee, even in cases, like *Braswell,* in which the corporation is wholly owned and administered by the individual claiming the privilege.

75. For an elaboration of this point, see William J. Stuntz, *Self-Incrimination and Excuse,* 88 COLUM. L. REV. 1227, 1279-80 (1988).

76. SARA SUN BEALE & WILLIAM C. BRYSON, GRAND JURY LAW & PRACTICE §§ 6:09, 6:26-27 (1986); 2 CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE §§ 274-75 (1982).

The law's different treatment of searches and subpoenas might stem from a kind of overbreadth problem. When the police search a car, they see anything that happens to be in the car, not just guns or drugs. A subpoena, on the other hand, asks only for the evidence being sought; nothing else need be disclosed. This difference could suggest that searches by their very nature invade privacy more than subpoenas do. To play out the argument, government information gathering in the civil sphere might resemble subpoenas and not searches. Tax forms, after all, ask only for the information the government needs under the tax laws, not for generalized financial disclosure. If the pattern holds elsewhere, the conflict between privacy protection in criminal procedure and its absence elsewhere might be only apparent.

This argument has two serious flaws. First, a great deal of regulatory information gathering does not conform to the subpoena model. OSHA and EPA not only subpoena documents, they search targets' businesses as well.[77] Government employers search employees' desks and file cabinets;[78] school principals search students' lockers.[79] There is no privacy-based reason for treating these searches differently from police searches; the overbreadth phenomenon is the same in both settings. Even if the line between searches and subpoenas makes sense in privacy terms, it can only reduce privacy's substantive shadow, not eliminate it.

The second flaw is more fundamental: the line is incoherent in privacy terms. The *Boyd* Court understood this — the Justices applied the full force of Fourth and Fifth Amendment protection to a *subpoena* for customs invoices — and nothing since *Boyd* has undermined its reasoning. The relevant privacy interest is the interest in keeping secret whatever the government is examining. The problem with a typical search is that the government's agent is examining whatever happens to be there, not just guns or cocaine. There may be no legitimate interest in keeping the guns or cocaine secret,[80] but the officer sees innocent (albeit potentially embarrassing) things as well. Hence the overbreadth concern. But subpoenas do not do away with this problem unless they seek only "guilty" information — which they don't. Subpoenas for financial records

77. *See, e.g.*, Donovan v. Masher Steel Corp., 791 F.2d 1535 (11th Cir. 1986), *cert. denied*, 479 U.S. 1030 (1987); Hartford Assoc. v. United States, 792 F. Supp. 358 (D.N.J. 1992); Pieper v. United States, 460 F. Supp. 94 (D. Minn. 1978), *affd.*, 604 F.2d 1131 (8th Cir. 1979).

78. *See, e.g.*, O'Connor v. Ortega, 480 U.S. 709 (1987).

79. *See, e.g.*, Commonwealth v. Snyder, 597 N.E.2d 1363 (Mass. 1992).

80. *See* United States v. Place, 462 U.S. 696 (1983); Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229 (1983).

or correspondence are common, and these documents can include a great deal of legitimately private information. Just as the police officer must search the whole car to find the hidden cocaine, the subpoena must demand a great deal of innocent-but-private material in order to turn up the "smoking gun" document.

And much more than in criminal investigations, the information the government seeks in civil settings tends to be "innocent" rather than "guilty." The charitable contribution disclosure is a good example. Indeed, in any across-the-board disclosure regime, most of the disclosure is about legitimate conduct. A great many law-abiding taxpayers must disclose a great deal about their finances in order to help catch a few frauds. For privacy purposes, this information should count just as much as the innocent information the government discovers when searching the trunk of a car for drugs. The overbreadth concern is real, but it does not justify any sharp line between the criminal justice system and the regulatory state. On the contrary, it suggests that privacy protection *within* the criminal justice system is seriously incomplete.

4. *The Right-Privilege Distinction*

Let us return to the example of charitable deductions and disclosure of the identity of the donee. The government might argue that the privacy objection to this required disclosure is wholly misguided, because the taxpayer need not disclose anything. If he does not want to share the information, he does not have to claim the deduction. Disclosure is required only as a condition to the receipt of money back from the government — only as a "string" attached to a government "gift." The police invade privacy differently. Police officers who search people's cars are not granting favors; they are forcibly intruding on citizens' lives.

This argument requires one to adopt a very strong version of the right-privilege distinction.[81] In the charitable deduction example, it requires that one treat the money as belonging to the government, which then bestows deductions as a matter of grace on whatever conditions it chooses. But in a regime with such a strong right-privilege distinction, privacy could not be protected in *either* the criminal *or* civil spheres. The state licenses cars and drivers, and it builds the roads they use. The state might grant permission to drive on its roads only in return for permission to search automobiles as its po-

81. A much stronger version than our system has adopted, at least for the past generation. *See* William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

lice forces wish, with or without probable cause. This position is as plausible, or implausible, as the claim that the government can require otherwise private information from taxpayers as a condition of granting tax deductions.

Yet courts would not think of buying the argument for suspicionless car searches.[82] The response would be that whatever power such arguments have, it is too late in the day to regard every potential greater government power as authorizing any exercise of supposedly lesser authority. The same point must hold true for taxes and licensing requirements and the many other regulatory settings in which the government both bestows benefits and requires disclosure. Whatever view of the right-privilege distinction one takes, that distinction cannot separate the criminal sphere from everything else.

5. *Separating Disclosure to the Government From Disclosure to the Public*

One might plausibly say that telling the IRS who receives my charitable contributions does not really intrude on my privacy very much. After all, my friends and neighbors and co-workers do not know; the only people who have the information are a few government employees who have no contact with me, do not know or care who I am, and are under strict orders not to spread such information around. Perhaps one need not take privacy interests very seriously in regulatory contexts because those interests are not seriously infringed.

This is a substantial argument. The harm that stems from the discovery of secrets depends on who does the discovering, and on whether the information is subsequently spread.[83] And a great deal of compelled information gathering occurs in ways that ensure that

82. The Supreme Court *has* recognized the states' "pervasive regulation" of automobiles as a justification for lesser Fourth Amendment protection. New York v. Class, 475 U.S. 106, 113 (1986) (holding that a car owner has no reasonable expectation of privacy in the vehicle identification number, which by law must be visible from outside the car). But lesser protection does not mean *no* protection. 475 U.S. at 112 ("A citizen does not surrender all the protections of the Fourth Amendment by entering an automobile."). The police must have reasonable suspicion in order to stop a car other than as part of a roadblock, Delaware v. Prouse, 440 U.S. 648, 663 (1979), and must have probable cause (although not a warrant) in order to search it, *see, e.g.*, United States v. Ross, 456 U.S. 798 (1982). Thus, the police are subject to substantial constitutional restrictions when searching cars and cannot evade those restrictions by citing the state's sweeping regulatory authority.

83. For a pair of rare acknowledgments of this point in the literature, see Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1 (1991) and Harold J. Krent, *Of Diaries and Data Banks: Use Restrictions Under the Fourth Amendment*, 74 TEXAS L. REV. — (1995).

the information stays secret vis-à-vis the public. Indeed, the federal Privacy Act[84] often requires as much. As long as the handling of the information is carefully policed — as long as the IRS cannot leak the contents of particular tax returns — the system can *both* protect privacy *and* require disclosure of a great deal of private information.

But while it makes sense to discriminate among different kinds of compelled disclosure on the basis of who receives the information, that does not solve the problem with constitutional protection of privacy interests. After all, the argument applies as much to the police as to the IRS. A police officer searching my briefcase will not necessarily tell anyone what he finds as long as he does not find evidence of crime. And if publicizing innocent personal information is the harm the law protects against, the law should regulate police behavior *after* a search much more severely than it now does.[85] Indeed, if public disclosure, as opposed to disclosure to the government, is what the Constitution guards against, Fourth Amendment law should be wholly reoriented. It should restrict police searches a good deal less than it now does, and it should restrict post-search police behavior much more. Such a regime would largely do away with privacy-based restrictions on police evidence gathering: it would make the law governing the police more like the law that now governs the IRS, not the other way around. Distinguishing between public disclosure and disclosure to the government offers no means of reconciling criminal procedure's protection of privacy with the lax approach taken outside the criminal sphere. Instead, it suggests that the kind of privacy protection the criminal procedure system purports to provide is mostly misguided.

6. *Privacy as a Remedy, Not a Right*

Suppose the main point of the constitutional law regulating the police were to limit the use of coercion and violence in law enforcement.[86] One might still see courts paying a great deal of attention to what police officers saw, heard, and found, as long as the dominant remedy for police misconduct was the exclusionary rule. The law might appear to be protecting privacy, but it would actually be

84. Privacy Act of 1974, 5 U.S.C. § 552a (1988).

85. Currently, such regulation is left to state and local law and custom. *See* Paul v. Davis, 424 U.S. 693 (1976).

86. As I argue *infra* in Part III it should be.

using the threat of the suppression remedy to protect something very different. Privacy protection would be a remedy, not a right.[87]

Perhaps this account describes the current system. That would explain the inconsistency with which privacy is protected in criminal procedure. It might also explain why constitutional law treats police searches so differently from other kinds of government information gathering.

This line of argument may be the strongest response to the claim that criminal procedure is out of sync with the rest of constitutional law. Current Fourth Amendment law does tend to protect privacy primarily where there is some danger of police coercion, which suggests that privacy language could be a screen for something else. Yet when police coercion is a potential problem, the law still protects *privacy,* not the freedom from unreasonable coercion. The focus is still on what the police officer saw and what justification he had for seeing it, not on how much force he used and whether it was reasonable under the circumstances. The Supreme Court penalizes an officer for turning over a stereo turntable to look at a serial number without sufficient cause,[88] but the same Court ignores unprovoked police violence during the course of an otherwise legal search of a private home.[89] The law requires more of a justification for searching a suspect's pockets than for grabbing him, spinning him around, and shoving him against the wall of a building.[90]

To be sure, Fourth Amendment law sometimes does focus directly on the level of police coercion. *Tennessee v. Garner,*[91] the case that established Fourth Amendment limits on police use of deadly force, is a prime example. But cases like *Garner* are telling precisely because they are so rare. For every reported decision discussing the law of deadly force, dozens discuss the rules that govern automobile searches.[92] And amazingly, there is virtually no case law governing the use of *non*deadly force.[93] No one knows what

87. This is essentially the argument Professor Seidman makes elsewhere in this issue. *See* Louis Michael Seidman, *The Problem with Privacy's Problem,* 93 MICH. L. REV. 1079, 1086-92 (1995).

88. Arizona v. Hicks, 480 U.S. 321 (1987).

89. *See infra* notes 183-87 and accompanying text (discussing Anderson v. Creighton, 483 U.S. 635 (1987)).

90. *See infra* notes 176-79 and accompanying text.

91. 471 U.S. 1 (1985).

92. *Compare* 2 LAFAVE, *supra* note 29, § 5.1(d), and cases cited therein (discussing deadly force claims) *with* 3 LAFAVE, *supra* note 29, §§ 7.1-7.5, and cases cited therein (discussing various sorts of automobile searches).

93. The law of police use of nondeadly force consists of the requirement that the force be constitutionally reasonable under all the circumstances. *See* Graham v. Connor, 490 U.S.

the Fourth Amendment requires before an officer strikes a suspect because courts do not discuss the issue — they are too busy discussing the terms under which officers can open paper bags found in cars.[94] Coercion becomes the law's focus only in cases like *Garner* — that is, only in the most extreme cases. Elsewhere, the law's chief concern remains privacy.

In other words, privacy protection is more than just a remedy in criminal procedure; it is the heart of the liability rule. For the most part, the law does not suppress evidence when the police have behaved too coercively. It suppresses evidence when the police have seen and heard things they were not supposed to see and hear. Coercion matters in the law of criminal procedure, but privacy matters more. That is the heart of the conflict: in criminal procedure, the law worries a great deal about what the government is and is not supposed to see; elsewhere, the government can see just about anything it wants.

7. *Representation Reinforcement*

Last but certainly not least, one might argue that privacy should be protected in criminal procedure because criminal suspects cannot protect their own interests through the political process. If the Constitution does not protect the privacy interests of this disadvantaged class, those interests will receive no protection at all. The regulatory state's targets are situated differently. They are, broadly speaking, more than able to guard their interests through political means, so constitutional (read: judicial) protection matters a lot less. On this account, there is no inconsistency to explain. Consti-

386, 396-99 (1989). The Court in *Graham* does not define this standard, except to say that it is objective — the police officer's good or bad faith is beside the point, 490 U.S. at 397 — and that

> its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

490 U.S. at 396. One searches in vain for any body of case law that gives this standard some content. *Cf.* Rowland v. Perry, 41 F.3d 167, 173-74 (4th Cir. 1994) (reasoning that nondeadly use of force should be proportional to the crime involved).

Of course, the exclusionary rule has something to do with this: by focusing attention on the illegal discovery of evidence, it tends to focus the law's protection on privacy. *See infra* notes 201-03 and accompanying text. But the exclusionary rule does not *dictate* the degree to which the law focuses on privacy. Courts could, after all, suppress evidence in house search cases when the entry was legal but the search was carried out too violently or with needless humiliation to the occupants. So far as I am aware (and so far as anyone in the literature has noticed), they never do so.

94. *See, e.g.*, Florida v. Jimeno, 500 U.S. 248 (1991) (discussed *infra* at notes 170-75 and accompanying text).

tutional law protects privacy when it needs to and ignores privacy when it can.

This line of argument is powerful, but ultimately unsatisfying. It is powerful because the criminal justice system does indeed have class and race biases. Poor people and black people are more likely to be caught in its web than middle- or upper-class whites.[95] That gives rise to a classic *Carolene Products*[96] argument for special constitutional scrutiny. John Hart Ely made exactly that argument when justifying constitutional search and seizure law in political process terms, calling the Fourth Amendment a "harbinger of the Equal Protection Clause" and noting the "tremendous potential for the arbitrary or invidious infliction of 'unusually' severe punishments on persons of various classes other than 'our own.' "[97] On the other side of the fence, the classes of people most affected by the regulatory state do seem to have at least their share of political clout, so that one must stretch to make process arguments for special judicial protection for, say, taxpayers or the targets of EPA investigations.

But the argument does not go far enough. In order to justify remedying the inadequate privacy protection afforded criminal suspects, one must first show that the protection offered by the political process is inadequate. Here as elsewhere, Ely's argument requires a substantive hook, a judgment that there is a problem worth fixing. In order to justify the phenomenon at issue here, that problem must be tied to privacy, to the interest in keeping secrets from the government.

This is where the political process argument runs into trouble. Fourth and Fifth Amendment law do not simply replicate the pri-

95. The high percentage of defendants whose indigence qualifies them for appointed counsel shows how disproportionately poor criminal defendants are. *See, e.g.*, Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363, 379 n.102 (1993) (noting that "[e]ighty-five percent of criminal defendants in the District of Columbia financially qualify for court-appointed counsel"); Jeffrey R. Rutherford, Comment, Dziubak v. Mott *and the Need to Better Balance the Interests of the Indigent Accused and Public Defenders*, 78 MINN. L. REV. 977, 987 n.48 (1994) (noting that the comparable figure for the two most populous counties in Minnesota is eighty percent). *See also* Andy Court, *Is There A Crisis?*, AM. LAW., Jan.-Feb. 1993, at 46 (estimating eighty percent of defendants nationwide are indigent).

For evidence that the target of police officers' and prosecutors' attention are disproportionately black, see U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 198 (113th ed. 1993); Douglas A. Smith et al., *Equity and Discretionary Justice: The Influence of Race on Police Arrest Decisions*, 75 J. CRIM. L. & CRIMINOLOGY 234 (1984); *Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1495-96 (1988).

96. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

97. JOHN HART ELY, DEMOCRACY AND DISTRUST 97 (1980).

vacy protection that people receive from the regulatory state. On the contrary, Fourth and Fifth Amendment law seems to give criminal suspects *more* privacy protection than ordinary citizens get from government employers, tax collection agencies, and the like. This is the puzzle that needs explaining: informational privacy is taken much more seriously when the police search drug suspects than when localities enforce building codes or the IRS audits tax returns. Constitutional law is not bringing the politically powerless up to the level of the powerful; in this limited sense, the powerless do *better.*

This phenomenon is not just a function of the different consequences of civil regulation and criminal law enforcement. Those subject to police searches often go to jail, while the risks run by regulated actors are usually less serious. But this has nothing to do with privacy protection. When criminal defendants go to jail they do so not because they were searched (except in the most artificial sense), but because they were found guilty of criminal offenses.[98] Indeed, Fourth Amendment law gives no weight to the privacy interest *in evidence of crime;*[99] privacy protection focuses on the interests of those who are *not* charged and convicted, not those who are.

Nor does the gap in privacy protection make sense as a response to other kinds of police misconduct. One might make a very good process theory argument for constitutional regulation of the police, but it does not follow that that regulation should focus on privacy. The puzzle remains: privacy receives more protection in the realm of criminal law enforcement than in the regulatory arena. Representation reinforcement cannot justify that state of affairs.

Indeed, nonconstitutional law — the law most subject to the democratic process — does not seem to give much weight to the interest in keeping secrets. Disclosure requirements abound.[100] There are limits: for example, the Privacy Act[101] severely restricts official use of private information about individual citizens.[102] But as with the Privacy Act itself, those limits mostly bear on what can be done with information once the government has it. The amount of compelled disclosure remains enormous. Aside from limits on

98. For the best elaboration of this point, see John C. Jeffries, Jr., *Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts,* 75 VA. L. REV. 1461, 1474-76 (1989).

99. *See* United States v. Place, 462 U.S. 696 (1983).

100. *See, e.g.,* Kreimer, *supra* note 83, at 3-5 nn.2-4 and sources cited therein.

101. Privacy Act of 1974, 5 U.S.C. § 552a (1988).

102. *See generally* 1 JUSTIN D. FRANKLIN & ROBERT F. BOUCHARD, GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS §§ 2.01-.13 (2d ed. 1986).

electronic eavesdropping[103] and on the ability of government officials to spread information around once they get it, there are few legal constraints on regulators' ability to demand information from ordinary citizens. Either the political process never works — in which case process theory falls apart — or we should take this as a signal that criminal procedure's focus on privacy is misplaced. Either way, the political process argument fails.

E. *The Problem Revisited*

In its guise as an interest in keeping secrets, privacy is a poor separating mechanism: it does not distinguish what the police do from what the rest of the government does. If the government is everywhere, privacy intrusions are everywhere. If we take them seriously when the intruders wear police uniforms, we should presumably do so elsewhere. But taking privacy seriously means a great deal of open-ended judicial balancing of privacy interests against the government's regulatory needs. That is akin to turning "rational basis" review into "reasonableness" review and giving "reasonableness" a good deal of bite. And *that* is akin to what courts did in the *Lochner* era.

This problem casts an interesting light on the typical academic complaint about the law of criminal investigation. A large amount of Fourth Amendment commentary attacks the basic hypocrisy *within* the law of criminal procedure. The system takes privacy very seriously in some settings — house searches, for example — but offers almost no privacy protection in others, such as requests for bank or phone records. The standard theme of this literature is that the law should take house searches as a model, that it should abandon its hypocrisy by giving privacy substantial protection across the board.[104] Yet even if the critics' wishes were answered, a much

103. *See, e.g.*, 18 U.S.C. §§ 2510-2521 (1988 & Supp. V 1993).

104. Much of the best Fourth Amendment literature takes the Supreme Court to task for not applying the probable cause and warrant requirements more broadly. *See, e.g.*, Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468 (1985); Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257 (1984). House searches are the primary locus of the probable cause and warrant requirements — indeed, house searches are almost the only searches left in which both those requirements apply. *See* Craig M. Bradley, *The Court's "Two Model" Approach to the Fourth Amendment: Carpe Diem!*, 84 J. CRIM. L. & CRIMINOLOGY 429 (1993) [hereinafter Bradley, *Carpe Diem!*]. Therefore, this criticism amounts to an argument that house searches should be the model for all of Fourth Amendment law.

Note too that almost all Fourth Amendment literature criticizes the Court for protecting privacy too little. This is one of the major themes of Professor LaFave's treatise. *See, e.g.*, 1 LAFAVE, *supra* note 29, § 2.4(a) (open fields doctrine); 1 *id.* § 2.6(c) (1987 & Supp. 1995) (searches of garbage left for pickup); 3 *id.* § 7.2(c) (1987 & Supp. 1995) (automobile searches); 4 *id.* § 10.11 (1987 & Supp. 1995) (searches of public school students). It is also a

larger and more serious conflict would appear: the different constitutional treatment of privacy in the criminal and civil spheres. There is little point to resolving the smaller conflict unless the larger one can be resolved as well. Indeed, the two may be closely related. A major source of the conflicts within criminal procedure may be the effort to avoid the more basic difficulty — the seeming incompatibility of the modern administrative state and serious protection for informational privacy.

Perhaps that incompatibility should be resolved by protecting privacy more, across the board. But this solution would involve a huge cost to the current constitutional order; it would require revisiting the accommodation between law and politics that has served for the past fifty years. Nor is this just a matter of costs. The fact that informational privacy seems to count for so little outside criminal investigation may suggest that it counts for little in our collective preferences. The law's tolerance of privacy harms inflicted by the regulatory state, inflicted on even (especially?) the politically powerful, implies that keeping secrets from the government is not as important a value as Fourth and Fifth Amendment rhetoric suggests. If we could start over, perhaps privacy would not receive constitutional protection *anywhere.* The anomaly may be criminal procedure, not the regulatory state.

II. Privacy's Problem and Fourth and Fifth Amendment Law

Protecting people's ability to keep secrets tends to limit the government's substantive power. The law of criminal procedure has long sought to protect people's ability to keep secrets, at least from the government. It follows that one of two things must be, and must have been, true: (i) criminal procedure must serve as a surrogate for substantive due process — a source of substantive limits on government power — or (ii) criminal procedure must be filled with arbitrary boundaries or rules that limit privacy protection in order

theme of the literature attacking limits on the scope of the warrant requirement. *See, e.g.,* Bradley, *Carpe Diem!, supra;* Tracey Maclin, *The Central Meaning of the Fourth Amendment,* 35 Wm. & Mary L. Rev. 197 (1993); Christopher Slobogin, *The World Without a Fourth Amendment,* 39 UCLA L. Rev. 1 (1991). Finally, it is the main theme of the literature criticizing the Court's "reasonable expectation of privacy" doctrine. *See* sources cited *infra* note 144. In all this literature the standard rule for house searches — the requirement that the police have both probable cause and a warrant in order to justify the search — is taken, either implicitly or explicitly, as the model to which the law should ordinarily conform. In that sense, virtually all of the vast literature on the Fourth Amendment attacks the hypocrisy mentioned in the text — the gap between the way privacy is protected in the home and the way it is protected on the street.

also to limit its substantive effects. The first was probably true of the law a century ago, when the Supreme Court first linked privacy with the Fourth and Fifth Amendments. The second is emphatically true of the law today.

A. *Privacy Protection in the* Lochner *Era*[105]

In *Boyd v. United States,*[106] the government sought to compel a merchant to produce invoices on twenty-nine cases of imported glass. The government claimed that Boyd had lied about the contents of the shipments in order to evade taxes. The proceeding was civil and *in rem;* the penalty sought was forfeiture of the glass.[107] The Supreme Court held that the subpoena for the invoices violated the Fourth and Fifth Amendments. (The Court read the two amendments to mean essentially the same thing.[108]) Its broad holding appeared to rule out both searches and subpoenas for documents, at least if the purpose of the subpoena was to use the documents as evidence.[109] Justice Bradley's majority opinion contained ringing declarations of the importance of constitutionally protecting "the privacies of life" and the centrality of that mission to Fourth and Fifth Amendment law; the opinion also linked that mission to the protection of property rights.[110] Interestingly, Brad-

105. For a more extended version of the discussion in this subsection, see William J. Stuntz, *The Substantive Origins of Criminal Procedure,* 105 YALE L.J. (forthcoming Nov. 1995).

106. 116 U.S. 616 (1886).

107. 116 U.S. at 617-18.

108. Hence the famous line, "[i]n this regard the Fourth and Fifth Amendments run almost into each other." 116 U.S. at 630. Later in its opinion the Court elaborated on the relationship:

> We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment, and compelling a man "in a criminal case to be a witness against himself," which is condemned in the Fifth Amendment, throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the Fourth Amendment.

116 U.S. at 633.

109. The thrust of the majority opinion was to analogize the subpoena in *Boyd* to the search and seizure of John Entick's books and papers in the famous eighteenth-century case, Entick v. Carrington, 95 Eng. Rep. 807 (K.B. 1765) (discussed in 116 U.S. at 626-30). Thus, *Boyd*'s bar on the subpoena necessarily included a bar on a *search* for documents. Significantly, nothing in the Court's opinion suggests that subpoenas like the one in *Boyd* are permissible given a good enough government justification. The bar was absolute, not conditional.

110.

> The principles laid down in [*Entick v. Carrington*] affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employés of the sanctity of a man's home and the priva-

ley's opinion found it rather easy to apply the Fourth and Fifth Amendments in the *civil* case at hand. The Court concluded that all suits for "penalties and forfeitures incurred by the commission of offences against the law, are of . . . quasi-criminal nature,"[111] which was enough to bring them within the spirit of the Fourth and Fifth Amendments, though not within the amendments' "literal terms."[112]

Today, most constitutional law scholars ignore *Boyd.* Those who teach and write about criminal procedure, on the other hand, tend to treat the case as an icon. Its unfortunate linking of privacy and property aside, *Boyd* is conventionally seen as the *Miranda* of its day, a criminal procedure case that courageously protected the rights (particularly the privacy rights) of individuals against the government. Its passing — essentially nothing in *Boyd*'s holding is good law anymore — is mourned as a sign of citizens' diminished protection against an overly aggressive criminal justice system.[113]

Judging from the appellate case law of its day, however, *Boyd* was more important for its effect on regulatory legislation than for its impact on criminal justice. In the decades following the Court's decision, few ordinary criminal investigations led to *Boyd*-type claims, either in the form of challenges to subpoenas or as trespass actions against officers.[114] On the other hand, regulatory cases were common. In a number of bankruptcy cases, the debtor sought to avoid certain kinds of compelled disclosure.[115] Antitrust cases began to crop up following the Sherman Act in 1890, with defendants raising Fifth Amendment objections to subpoenas or questioning.[116] Railroad regulation disputes were especially numerous and especially high-profile, with corporate officials striving to avoid tes-

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cies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence . . . .

116 U.S. at 630.

111. 116 U.S. at 634.

112. 116 U.S. at 633.

113. For the modern view of *Boyd,* see Robert S. Gerstein, *The Demise of* Boyd: *Self-Incrimination and Private Papers in the Burger Court,* 27 UCLA L. REV. 343 (1979); Eric Schnapper, *Unreasonable Searches and Seizures of Papers,* 71 VA. L. REV. 869 (1985); and Note, *The Life and Times of* Boyd v. United States *(1886-1976),* 76 MICH. L. REV. 184 (1977).

114. Among reported cases, the sole exceptions are fraud cases. *See, e.g.,* United States v. National Lead Co., 75 F. 94 (C.C.D.N.J. 1896) (refusing to force a defendant to produce his books and records in a civil proceeding to recover funds fraudulently obtained).

115. *See supra* note 60.

116. The most famous of these was Hale v. Henkel, 201 U.S. 43 (1906).

tifying or producing documents in ICC proceedings.[117] Indeed, both of the 1890s decisions that defined Fifth Amendment immunity doctrine for the next seventy-five years, *Counselman v. Hitchcock*[118] and *Brown v. Walker*,[119] were railroad regulation disputes.

These cases were not all resolved in the defendants' favor; courts found ways to evade *Boyd*'s seemingly absolute protection.[120] But defendants won often enough, and the ability to compel people to testify and turn over records was important enough, that some turn-of-the-century judges and Justices openly worried that regulation would be impossible if *Boyd*'s privacy protection were given its full scope.[121]

The concern was well founded. Consider *Boyle v. Smithman*,[122] an 1892 Pennsylvania case that adopted *Boyd*-style reasoning, though without citing *Boyd*, as the relevant law was state rather than federal. Pennsylvania had a statute requiring persons in the business of transporting and storing oil to keep records of how much oil they had on hand, where it was stored, and so forth. Boyle, a newspaper publisher, tried to force Smithman, an oil merchant, to produce the required records.[123] The court might have ruled that only the government was entitled to enforce the statute, but instead it found for Smithman on a much broader ground: forcing Smithman to produce the relevant records would

117. Several of the railroad cases made it to the Supreme Court. *See* Interstate Commerce Commn. v. Baird, 194 U.S. 25 (1904); Brown v. Walker, 161 U.S. 591 (1896); Interstate Commerce Commn. v. Brimson, 154 U.S. 447 (1894); Counselman v. Hitchcock, 142 U.S. 547 (1892). These cases constitute the bulk of the Court's Fourth and Fifth Amendment case law in the two decades after *Boyd*.

118. 142 U.S. 547 (1892).

119. 161 U.S. 591 (1896).

120. For example, in *In re* Harris, 164 F. 292 (S.D.N.Y. 1908), the court held that the debtor in a bankruptcy proceeding should turn over his books and papers to the trustee, and if the government ever wished to use them as evidence in a criminal case, the debtor could decide whether to invoke his privilege. 164 F. at 294. *Harris* makes an interesting pair with *In re* Tracy & Co., 177 F. 532 (S.D.N.Y. 1910), in which the recently appointed Judge Learned Hand ruled that when the debtor already *had* turned over his books to the trustee, he had thereby waived any privilege claim he might make.

121. *See* Hale v. Henkel, 201 U.S. 43, 70 (1906) (noting that antitrust regulation would be impossible if *Boyd*'s protection applied to corporations); Brown v. Walker, 161 U.S. at 610 ("If . . . witnesses standing in Brown's position were at liberty to set up an immunity from testifying, the enforcement of the Interstate Commerce law or other analogous acts . . . would become impossible, since it is only from the mouths of those having knowledge of the inhibited contracts that the facts can be ascertained."); United States v. Price, 96 F. 960, 962 (D. Ky. 1899) (restricting the scope of defendant's Fifth Amendment immunity under the Interstate Commerce Act, and noting that if immunity were not so restricted, defendants would find it easy to immunize themselves for wrongdoing by getting themselves investigated for ICA violations).

122. 23 A. 397 (Pa. 1892).

123. 23 A. at 397.

violate the privilege against self-incrimination because the statute specified penalties for any defaults in record-keeping.[124] In other words, Smithman could not be compelled to disclose his records because the records themselves might be inadequate, and if they were, Smithman might have to pay a fine. This holding apparently applied no matter what the nature of the proceeding or who asked for the records. The documents in question were papers, they were therefore private, they belonged to Smithman, and their disclosure might subject him to regulatory penalties. That was that.

Boyle shows just what *Boyd* might have meant for the emerging regulatory state. If people could not be forced to disclose records because they may have violated a record-keeping requirement, the government could not *have* record-keeping requirements, or at least not meaningful ones. If requiring the keeping of records was impermissible, a good deal of regulation would be, as a practical matter, impermissible as well. Meanwhile, more direct disclosure — asking someone to turn over documents in order to show whether the suspect had violated some conduct regulation — was barred by *Boyd* itself. Nor could the government get around this restriction by searching for the documents instead of issuing a subpoena, because *Boyd* treated searches and subpoenas the same. Compelling oral testimony could not work because it would violate the privilege against self-incrimination. People like Boyd and Smithman were, potentially, immune from a great deal of compelled disclosure, and consequently exempt from a great deal of government regulation.

Had the cases continued along this path, *Boyd* might have come to play much the same role in constitutional law, and perhaps the same villain's role in constitutional theory, that *Lochner v. New York*[125] and its ilk came to play. Government regulation required lots of information, and *Boyd* came dangerously close to giving regulated actors a blanket entitlement to nondisclosure. It is hard to see how modern health, safety, environmental, or economic regulation would be possible in such a regime.

As it happened, the cases did not continue along *Boyd*'s path. Beginning in the first decade of this century, *Boyd* was effectively cabined, so much so that its implications for the world outside criminal justice have been largely forgotten. *Hale v. Henkel*[126] held that

124. 23 A. at 398.

125. 198 U.S. 45 (1905).

126. 201 U.S. 43 (1906).

corporations have no privilege against self-incrimination and receive only slight protection against unreasonable searches and seizures.[127] *Marron v. United States*[128] held that instrumentalities of crime could be seized without violating the Fourth or Fifth Amendments, and also that documents could be instrumentalities.[129] *Shapiro v. United States*[130] held that the privilege was not violated by asking someone to produce "required records" — meaning any records that the government ordered him to keep — no matter how incriminating the records' contents might be. These cases left *Boyd* largely inapplicable to the burgeoning world of government regulation. The records in *Boyd* itself were probably instrumentalities under *Marron,*[131] and the documents sought in the various ICC cases of the 1890s might well have been judged "required records" by the standards used a half-century later.

The Court did not explain its position in these cases in privacy terms. By and large, it justified the outcomes by political necessity. *Hale,* which arose out of a grand jury investigation of antitrust violations, is the clearest example. The argument for a corporate privilege was strong: Wigmore, then the foremost expert on the privilege's scope and meaning, thought it applied to corporations as it did to individuals.[132] That was the position the Court had taken with respect to the Due Process Clause,[133] and like that clause the Fifth Amendment privilege applied to "any person." Moreover, the privacy interest in corporate documents was at least as plausible as Boyd's privacy interest in his invoices. Even if a corporation could not "feel" privacy intrusions, its shareholders and employees could; as with due process claims, corporate assertion of the privilege against self-incrimination was a way of protecting the flesh-and-blood people whose money and labor made the corporation run. *Hale* rejected all these arguments in a peremptory paragraph, stat-

127. 201 U.S. at 69-70, 76.

128. 275 U.S. 192 (1927).

129. 275 U.S. at 198-99. *Marron* all but nullified the decision in Gouled v. United States, 255 U.S. 298 (1921), which arguably broadened *Boyd* to apply to *all* searches for evidence, not merely those that involved testimony or documents. *See* Note, *supra* note 113, at 189-95.

130. 335 U.S. 1 (1948).

131. The records at issue in *Boyd* were invoices, and the alleged wrong was misrepresentation for the purpose of evading import taxes on shipments of plate glass. *See supra* note 7. The invoices were necessary to the commission of the wrong, which would seem to bring them within *Marron's* scope

132. 4 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2259, at 3116 (1904) (calling the issue "plain").

133. Santa Clara County v. Southern Pac. R.R., 118 U.S. 394 (1886).

ing that "the privilege claimed would practically nullify" the Sherman Act.[134]

In other words, *Boyd*-style privacy protection was not compatible with activist government, because government cannot be very activist if it cannot force people to tell it things. Cases like *Hale* resolved the conflict by yielding ground — preserving privacy protection, but only within boundaries that themselves had nothing whatever to do with privacy. Privacy's substantive shadow was kept within acceptable bounds, but only by fiat.

B. *Privacy Protection Today*

Part of the problem with Fourth and Fifth Amendment law at the turn of this century stemmed from the absolute nature of *Boyd*'s protection. Under *Boyd,* wherever the Constitution protected privacy, the state simply could not go; the concept of balancing seems to have been foreign to the constitutional culture.[135] Today, of course, balancing plays a central role in Fourth and Fifth Amendment law. All of Fourth Amendment law is conventionally said to represent a balance between law enforcement needs and individual interests, and the balancing is done explicitly in particular cases.[136] Balancing is less pervasive in Fifth Amendment law, but there too the courts sometimes weigh the government's regulatory needs against individual interests in nondisclosure, as in the "required records" cases spawned by *Shapiro.*[137] The advent of balancing reduces *Boyd*'s substantive bite because it allows courts to take account of the government's interest in regulating. Were the *Hale* issue to arise for the first time today, the Court might reason that society has a strong interest in antitrust enforcement and that

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> As the combination or conspiracies provided against by the Sherman Anti Trust Act can ordinarily be proved only by the testimony of parties thereto, in the person of their agents or employés, the privilege claimed would practically nullify the whole act of Congress. Of what use would it be for the legislature to declare these combinations unlawful if the judicial power may close the door of access to every available source of information upon the subject?

201 U.S. 43, 70 (1906). This quotation follows a passage that nicely anticipates Braswell v. United States, 487 U.S. 99 (1988), by raising the specter of corporate agents invoking the privilege to protect other agents or their corporate principal. 201 U.S. at 69-70; *see also supra* text accompanying notes 72-75 (discussing *Braswell*).

135. *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing,* 96 YALE L.J. 943, 948-52 (1987).

136. *See, e.g.,* Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 451-55 (1990); Skinner v. Railway Labor Executives' Assn., 489 U.S. 602, 619-21 (1989).

137. 335 U.S. 1 (1948). *See* California v. Byers, 402 U.S. 424, 458 (1971) (Harlan, J., concurring in the judgment); Bernard D. Meltzer, *Privileges Against Self-Incrimination and the Hit-and-Run Opinions,* 1971 SUP. CT. REV. 1, 16-25.

such enforcement would not be possible in a world where corporations or their officers could claim the privilege with respect to corporate documents. Privacy would be protected, but conditionally.

Making the protection conditional, however, cannot solve the problem. A police officer must have probable cause or consent before he may inspect the trunk of my car for drugs. But the government can force me to disclose pretty much anything it wishes on my tax forms. Consistent privacy protection, even if subject to interest balancing, could not reach these results. The lesson seems clear. Any attempt to give the same weight to individuals' interest in keeping the government from seeing things, across the board, must end in one of two ways: either a great deal of ordinary government activity must be subject to searching judicial review, or privacy-based restrictions on police searches must be drastically reduced. Neither alternative seems palatable.

So the law has followed the path *Hale* marked out: abandon privacy where it might create difficulties outside ordinary criminal procedure. The result is a body of Fourth and Fifth Amendment law filled with strange twists and turns. Consider three examples: the law that defines what a "search" is, the cases that deal with searches by government officials other than the police, and the doctrines that regulate the use of subpoenas.

The definition of *search* matters a great deal because the Fourth Amendment forbids only "unreasonable searches and seizures." Given the laxity of *non*constitutional regulation, if a given police tactic is neither a search nor a seizure, it is probably unregulated by any law. The definition seems initially to take careful account of privacy interests: a search is anything that invades a "reasonable expectation of privacy." According to the cases, this standard means that a search has taken place whenever a police officer looks somewhere that is both hidden from the public and likely to contain the sorts of things that many people would prefer be kept private.[138]

That sounds sensible enough. But many of the cases contradict the formula. According to the Supreme Court, the following police tactics do *not* infringe a "reasonable expectation of privacy" and so are constitutionally unregulated: police overflights of private property,[139] searches of garbage after it has been left for pickup,[140] "pen

138. *See supra* notes 51-54 and accompanying text.

139. Florida v. Riley, 488 U.S. 445 (1989); California v. Ciraolo, 476 U.S. 207 (1986).

140. California v. Greenwood, 486 U.S. 35 (1988).

registers" that record phone numbers that individuals have called from their own homes,[141] and requests made to banks or other financial institutions for individual customers' financial records.[142] On the other hand, if a police officer walks up to a suspect who is holding a rolled-up paper bag, the officer cannot open the bag unless he has probable cause to believe it contains evidence of crime, probable cause to believe the suspect has committed a crime, or reasonable grounds for suspecting the bag contains a weapon.[143] In terms of ordinary privacy expectations and preferences, these results are strange. Contraband aside, the paper bag is likely to contain nothing more private than a sandwich. Garbage contains a good deal more — tossed-out correspondence, for example. And it is hard to dispute the private nature of the times and targets of one's phone calls, not to mention the details of one's finances. The literature makes precisely this point: consistent privacy protection requires a much broader definition of Fourth Amendment searches than the Court has adopted.[144]

There is a pattern to these cases. When the police gather information in ways that involve neither a confrontation nor a trespass, they usually are exempt from Fourth Amendment regulation, no matter how private the information they seek. But when a police officer, acting as a police officer, confronts a citizen, the Fourth Amendment will apply to almost anything the officer examines: one famous case even deals with the search of a crumpled cigarette

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141. Smith v. Maryland, 442 U.S. 735 (1979).

142. United States v. Miller, 425 U.S. 435 (1976).

143. Opening the bag would unquestionably be a Fourth Amendment "search." *E.g.*, United States v. Ross, 456 U.S. 798 (1982) (requiring probable cause but not a warrant to justify the search of a paper bag found in a car). The police could undertake such a search incident to a lawful arrest, but that in turn would require probable cause to justify the arrest. United States v. Robinson, 414 U.S. 218, 235 (1973). If probable cause to arrest were based on the contents of the bag — for example, if the police had probable cause to believe the bag contained cocaine — that would justify both the arrest and the search. Alternatively, if the police had probable cause to believe the bag contained evidence but lacked probable cause to arrest (an unlikely scenario), they could seize and hold the bag while they applied for a warrant to search it. *See* United States v. Chadwick, 433 U.S. 1, 13 (1977) (criticizing the government for not following this procedure). Finally, if the police had reasonable grounds for suspecting that the bag contained a weapon, that would justify a brief search that would include the bag. *See* Terry v. Ohio, 392 U.S. 1 (1968) (authorizing frisks based on reasonable suspicion of the presence of a weapon); *cf.* Michigan v. Long, 463 U.S. 1032 (1983) (authorizing *Terry* frisk that extended beyond the suspect's person and included the suspect's car).

144. *See, e.g.*, Lewis R. Katz, *In Search of a Fourth Amendment for the Twenty-first Century*, 65 IND. L.J. 549 (1990); Brian J. Serr, *Great Expectations of Privacy: A New Model for Fourth Amendment Protection*, 73 MINN. L. REV. 583 (1989). For an interesting combination of this criticism with some empirical research into people's actual privacy preferences, see Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society,"* 42 DUKE L.J. 727 (1993).

packet taken from a suspect's pocket.[145] The difference does not make sense in privacy terms. It nevertheless accomplishes something important. It helps to keep search doctrine focused on what the police do in day-to-day criminal investigation, not on what the government does when gathering information for other purposes. It would be hard to explain, after all, why the police should be subject to serious Fourth Amendment constraints when seeking financial records from banks but other government officials should be able to see a wide range of financial records on request. So too, inspecting suspects' garbage is much more like the sort of thing environmental regulators do than is a typical street stop. Focusing on coercive police-citizen interactions helps keep Fourth Amendment privacy protection in its place.

The second example concerns non-police searches. Environmental regulators need to go on targets' land to take soil samples. OSHA inspectors need to look around places of business. Building code inspections sometimes require entry into private homes. Government employers sometimes want to search employees' desks or file cabinets, and school principals sometimes search students' lockers. All these things are unquestionably Fourth Amendment "searches," even given the strange set of cases discussed in the preceding paragraphs.

These practices are not, however, subject to ordinary Fourth Amendment standards. The Supreme Court says that the ordinary rules, such as the probable cause standard and the warrant requirement, do not apply when the government has "special needs" at stake.[146] Oddly enough, these special needs do not include the need to solve or prevent serious crimes. They do include the need to investigate school[147] or employee misconduct,[148] the need to run a regulatory inspection system,[149] and the like. And when special needs are found, the working Fourth Amendment rule seems to be something like a shock-the-conscience test: unless the government behavior was outrageous, the search is constitutionally reason-

145. United States v. Robinson, 414 U.S. 218 (1973); *see supra* note 14 (discussing *Robinson*).

146. The phrase comes from New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring). It has since become a staple of Supreme Court opinions in nontraditional Fourth Amendment cases. *See, e.g.*, Griffin v. Wisconsin, 483 U.S. 868, 873-74 (1987) (search of probationer); New York v. Burger, 482 U.S. 691, 702 (1987) (search of automobile junkyard); O'Connor v. Ortega, 480 U.S. 709, 725 (1987) (plurality opinion) (search of government employee's office).

147. New Jersey v. T.L.O., 469 U.S. 325 (1985).

148. O'Connor v. Ortega, 480 U.S. 709 (1987).

149. New York v. Burger, 482 U.S. 691 (1987).

able.[150] Indeed, searches are almost automatically "reasonable" when conducted for some reason other than enforcing the criminal law. This result is perverse in privacy terms: the privacy interest in a student's purse does not depend on whether a school principal or a police officer is searching it, and the countervailing government interest is probably stronger in the latter case.

Yet the Court seems to sense in these cases that a different result would lead to something very much like open-ended substantive review. *New York v. Burger*[151] offers a nice example of the problem. In that case the Court sustained a statute[152] that allowed the police to inspect the records and premises of automobile junkyards (presumably in order to prevent them from buying and dismantling stolen cars).[153] The statute required neither probable cause nor reasonable suspicion; inspections were undertaken at the discretion of the police. Suppose the case had come out differently — suppose the Court had required, as a prerequisite to searching, that the officer have probable cause to believe that the junkyard either had violated the law or contained evidence of a violation. The state could easily react by enacting a set of detailed regulations covering every aspect of the junkyard's business, including the kinds of buildings and tools that can be used, the number of employees allowed, the location and type of fences surrounding the property, the number of cars that can be stored, and so forth — regulations the state need not have any intention of really enforcing. If the regulations were detailed enough and if the police did not systematically enforce them, all junkyards would be violating some rule at all times, probable cause would thus be easy to establish, and the police could search whenever they pleased — the same result as under the statute the Court upheld in *Burger*. The only way to avoid this result, the only way to keep the state from evading the limits on police authority, would be to limit the kinds of regulations the state could enact.[154] The Court's decision in *Burger* avoids

150. *See* Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 43 (1991) (noting that "reasonableness" in these cases seems to mean not only less than probable cause but also less than reasonable suspicion); William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 554 (1992) (equating the standard with rational-basis review in constitutional cases).

151. 482 U.S. 691 (1987).

152. N.Y. VEH. & TRAF. LAW § 415-a(5) (McKinney 1986).

153. 482 U.S. at 712.

154. *See* Stuntz, *supra* note 150, at 583-85. The system could avoid this box by limiting the discretion of the police, but that is a terribly difficult business — one reason why police and prosecutorial discretion have been largely exempt from legal regulation. Precisely this choice arose in the cases invalidating vagrancy and loitering laws. A large part of the problem in those cases was connected with the way official discretion was being exercised. *See*

this problem by treating the junkyard owner's privacy interest as of no account. Once again, the law sets a boundary line, protects privacy on one side of the line, and ignores it on the other. The result is to limit criminal procedure's substantive effect.

The third and clearest example of this phenomenon is one that today is taken for granted: the overturning of *Boyd*'s rule barring government inspection of private papers. Beginning with *Fisher v. United States*[155] in 1976, the Court did away with the Fifth Amendment bar on subpoenas for some sorts of documents. Under *Fisher,* suspects may refuse to turn over potentially incriminating documents only if the act of production would incriminate them; the incriminating effect of the documents themselves is not enough.[156] *Fisher*'s rule had two effects. First, *searches* for documents became permissible if backed up by probable cause and, where necessary, a warrant. The absolute bar of the privilege against self-incrimination no longer applied.[157] Second, *Fisher* left *subpoenas* for documents virtually unrestricted. As it stands now, subpoenas are subject only to the twin requirements that the material sought be relevant to a legitimate investigation and that compliance with the subpoena not be too burdensome.[158] These requirements are, in practice, lax. Thus, in the century since *Boyd* we have gone from absolute protection of one's papers to almost no protection.

This change is senseless in privacy terms: as *Boyd* recognized, papers are among one's most private possessions. But the alternative would have a significant effect on the administrative state, given the widespread reliance of regulatory agencies on the subpoena power. Indeed, prior to *Fisher,* the *Boyd* rule was tolerable only because *Hale* denied Fifth Amendment protection to corporations and (usually) corporate officers, while *Shapiro v. United States*[159] and its progeny denied such protection to any records the

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Jeffries, *supra* note 50, at 215-18. The system in effect chose substantive review by invalidating the statutes.

155. 425 U.S. 391 (1976).

156. 425 U.S. at 408-13.

157. This effect was confirmed by Andresen v. Maryland, 427 U.S. 463 (1976). In *Andresen,* decided two months after *Fisher,* the Court upheld the search and seizure of some files in an attorney's office, citing *Fisher* repeatedly for the proposition that the privilege against self-incrimination did not bar the search. 427 U.S. at 472-77.

158. *See supra* note 76 and accompanying text. For the Fourth Amendment limits on subpoenas, see United States v. Dionisio, 410 U.S. 1 (1973). *Dionisio* does not wholly rule out Fourth Amendment challenges to grand jury subpoenas, but it does limit those challenges to subpoenas that are "too sweeping in [their] terms 'to be regarded as reasonable.'" 410 U.S. at 11 (quoting Hale v. Henkel, 201 U.S. 43, 76 (1906)).

159. 335 U.S. 1 (1948).

government required individuals to keep. *Fisher* merely finished the job that *Hale* and *Shapiro* started.

The common theme in these examples seems obvious. Where privacy protection would lead most directly to substantive constraint on government regulation, the law has abandoned all pretense of protecting privacy. That practice has worked, after a fashion: no one today worries about the substantive implications of search and seizure or self-incrimination law. But it leaves huge discontinuities within Fourth and Fifth Amendment doctrine — gaps that cannot be bridged within the existing legal framework.

The reason for these discontinuities also seems obvious. The law is based on a principle — serious protection of informational privacy — that has implications we cannot tolerate. The substantive consequences of privacy protection may have been acceptable in *Boyd*'s era (though not for long even then), but they are not acceptable now. Perhaps it is time to reconsider the protection.

III. Rethinking Privacy Protection

Criminal procedure's focus on privacy has costs that go beyond the lack of analytic tidiness. The cost is not that the police are overregulated, though in some respects they are. On the contrary, the exaltation of privacy in criminal procedure has left the police *under*-regulated, by focusing attention on the least serious injuries that police misconduct can cause. To understand why, one must look at the differences between the sorts of police investigation that infringe on privacy the most and the police tactics that are the most common subjects of constitutional regulation.

A. *House Searches and Street Stops*

The law of criminal procedure has never done a good job of defining its goals with any precision. Instead, the doctrine has seemed to flow out of a few paradigmatic problems — as if to say, whatever else we want to do, we surely want to prevent *this* — leaving courts to analogize new cases to the familiar paradigms. The dominant paradigm in search and seizure law has always been the ransacking of a private home, with an emphasis on rummaging around through the homeowner's books and papers. This image fits the pair of eighteenth-century cases that had the most to do with

the Fourth Amendment's creation:[160] in both *Entick v. Carrington*[161] and *Wilkes v. Wood,*[162] the King's agents searched the plaintiff's home and carted off his books and papers for inspection. It also fits *Mapp v. Ohio,*[163] the most famous Fourth Amendment case of this century: the officers in *Mapp* did a top-to-bottom search of a boarding house, and the evidence they found consisted of a few dirty books that belonged to the house's owner.[164]

Focusing on cases like *Entick* and *Wilkes* and *Mapp,* one can see why courts would use Fourth Amendment law to protect informational privacy. And protecting privacy in the home casts a smaller substantive shadow than protecting privacy in glove compartments or jacket pockets. The regulatory state does not usually snoop around in people's bedrooms, and the privacy content of what police can find there is plausibly distinguishable from the kinds of information the state seeks for regulatory purposes. The same is true for electronic eavesdropping, another police tactic that has generated more than its share of leading cases. *Katz v. United States,*[165] the case that spawned the "reasonable expectation of privacy" doctrine, was a wiretapping case, and the key opinion in that case begins by analogizing the wiretap of a telephone booth to the search of a home.[166] So too, Justice Brandeis's famous dissent in *Olmstead v. United States*[167] argued for a ban on warrantless electronic eavesdropping by emphasizing the interest in privacy and by analogizing the practice to house searches.[168] In these cases the house search paradigm seems to work. It is no surprise that when officers rummage through suspects' dresser drawers, read their correspondence, or listen to their conversations, courts care deeply about individuals' ability to keep some aspects of their lives secret from the government.

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160. *See* Amar, *supra* note 5, at 1176-77 & n.208; *see also* NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 43-50 (1937).

161. 95 Eng. Rep. 807 (K.B. 1765).

162. 98 Eng. Rep. 489 (C.P. 1763).

163. 367 U.S. 643 (1961).

164. 367 U.S. at 644-45. There is another common thread to *Entick, Wilkes,* and *Mapp:* all are free speech cases in disguise. *Entick* and *Wilkes* were both triggered by seditious libel charges. *Mapp* was litigated in the Supreme Court as a First Amendment case. *See* 367 U.S. at 672-73 (Harlan, J., dissenting). The crime charged — possession of obscene materials — was later invalidated on First Amendment grounds. Stanley v. Georgia, 394 U.S. 557 (1969).

165. 389 U.S. 347 (1967).

166. 389 U.S. at 360 (Harlan, J., concurring).

167. 277 U.S. 438 (1928).

168. 277 U.S. at 473-474 (Brandeis, J., dissenting).

But most of what the police do is quite different from house searches and wiretaps. Street encounters and car stops involve much less private disclosure than the kinds of searches in *Mapp* and *Katz;* they also involve other sorts of harm that may not be captured by the law's focus on informational privacy. And there are many, many more street encounters than searches of private homes. House searches turn out not to be so paradigmatic after all.[169]

169. For most of our constitutional history, it made no difference whether house searches were representative of searches generally, because the law of criminal procedure all but ignored contacts between police officers and citizens *outside* the home. Search incident to arrest doctrine made it easy for police to search anyone they could legitimately arrest, and old-style vagrancy and loitering laws made it easy to arrest almost anyone. *See* William O. Douglas, *Vagrancy and Arrest on Suspicion,* 70 YALE L.J. 1 (1960); Foote, *supra* note 50. Plus, before *Mapp,* the only remedy for illegal searches in most jurisdictions was a trespass action against the offending officer. Such suits were rarely a worthwhile response to street encounters. Even if it were otherwise, damages suits are not very valuable to the sorts of plaintiffs of whom juries disapprove, a characterization that probably fits most victims of illegal police behavior on the street. Finally, by the mid-twentieth century the police had good-faith immunity in damages suits, which, given the virtual absence of legal constraint, made establishing liability just about impossible. *See* David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs,* 44 U. COLO. L. REV. 1, 47-55 (1972) (discussing the rise of government officials' good-faith immunity). Nor did the privilege against self-incrimination make up for Fourth Amendment law's deficiencies. Before Miranda v. Arizona, 384 U.S. 436 (1966), the privilege was inapplicable to police questioning. *See* Yale Kamisar, *A Dissent from the* Miranda *Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test,* 65 MICH. L. REV. 59 (1966) (criticizing that state of affairs). It is nothing short of astonishing how little the law of criminal procedure had to do with ordinary law enforcement on the streets.

Then came the 1960s. The exclusionary rule made it possible for victims of police misconduct to avoid hostile juries and provided an incentive to raise claims whenever evidence was found, not just in large-scale search cases. Equally important, vagrancy and loitering laws were invalidated on vagueness grounds, eliminating the *de facto* arrest power (together with its ancillary search authority) that officers had previously held. *See* Stuntz, *supra* note 150, at 559-60 & nn.27-29. These changes made Fourth Amendment law, for the first time, important not only to house searches but also to the mass of informal street encounters between police officers and suspects.

One might have expected some serious rethinking of what the Fourth Amendment is about as the law established itself in this new, vast arena. But the house search paradigm has continued to hold sway. In the past generation, Fourth Amendment cases involving the police have been obsessed with two legal issues: whether a "search" has taken place, and if so, whether the police must get a warrant. The first issue is controlled by an analysis generated in a wiretapping case and modeled on the problem of house searches. *See* Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring) (making the comparison with house searches). Predictably, that analysis focuses on what the officer saw and what he knew when he saw it. This approach may capture the individual interests at stake when officers are rooting around in the bedroom closet, but it does less well when they are performing a pat-down on the street. The warrant issue is also modeled on house searches, for which the warrant requirement is well-settled. In street encounters, requiring warrants would be impossible: warrants involve planning and delay, while most police-citizen encounters are unplanned and require on-the-spot decisions. That is one reason why warrants are rarely required except for searches of private homes. Still, the fact that warrants have been such a persistent issue in other cases shows how much litigation has been shaped by the image of house searches.

Consider a typical 1990s Fourth Amendment case. In *Florida v. Jimeno,*[170] a police officer pulled over the defendant's car, ostensibly because of a minor traffic violation but actually because the officer suspected drug activity. The officer gave Jimeno a ticket, told him that the officer had reason to believe drugs were in the car, and asked permission to search. Jimeno said yes, and the officer found a brown paper bag on the floor of the car. The officer opened the bag, which contained a kilogram of cocaine.[171]

Jimeno is like many, perhaps most, contemporary search and seizure cases. An officer approached a suspect with some suspicion but not enough to justify an arrest, and in the course of the encounter the officer uncovered information that *did* justify an arrest. The Supreme Court's focus in *Jimeno* is also typical. Both the majority opinion and the dissent concerned themselves solely with the question whether Jimeno's consent to search the car included consent to the opening of the paper bag. In other words, all the Justices focused on the scope of the officer's search. The majority concluded that opening the bag was proper because the suspect made no exceptions when he gave consent to search the car.[172] The dissent argued that opening the bag was impermissible because of the supposedly heightened privacy interest in closed containers found in cars.[173]

The Court's conclusion is hardly surprising. The dissenters' argument notwithstanding, the privacy interest at stake in *Jimeno* seems trivial. If Jimeno had been innocent, the paper bag would likely have contained nothing more personal than lunch. This is a far cry from house searches and wiretaps. If privacy is what the system is supposed to protect in cases of this sort, and if the house search paradigm governs, it is easy enough to conclude that the encounter with Jimeno was perfectly reasonable.

Courts nearly always so conclude in cases of this sort. The usual doctrinal vehicle is consent. Nominally, a search is consensual if a reasonable person in the suspect's position would have felt free to decline the officer's request.[174] Of course, if that standard were taken seriously in *Jimeno,* it is hard to imagine anyone concluding that the search in that case was consensual. A uniformed, armed police officer had just stopped Jimeno's car and told him he was

170. 500 U.S. 248 (1991).
171. 500 U.S. at 249-50.
172. 500 U.S. at 251-52.
173. 500 U.S. at 253-55 (Marshall, J., dissenting).
174. *See, e.g.,* Florida v. Bostick, 501 U.S. 429, 431 (1991).

suspected of drug trafficking. Not many people would say "no" to the police under those circumstances. After all, Jimeno was "consenting" to a search that he knew would uncover a kilogram of cocaine. Either he was crazy or, more plausibly, he assumed he had no choice.[175] As the Court's decision suggests, the real standard applied in cases of this sort is not the "reasonable person" test that courts cite but rather a kind of *Jeopardy* rule: if the officer puts his command in the form of a question, consent is deemed voluntary and the evidence comes in.

This approach to consent is perfectly predictable given the law's focus. The privacy interest in *Jimeno* was small, and the officer was not acting on any illegitimate motive. In any balance of law enforcement need and individual *privacy* interest, therefore, the balance tips strongly in the government's favor; pretty much any government interest will suffice. Bending the definition of *consent* to let the evidence in is a natural response.

But privacy is not the primary interest at stake in cases of this sort. If Jimeno had not had drugs in the car, what would have bothered him most about the encounter with the police officer? Surely not the discovery of the contents of the paper bag. The real harm in a case like *Jimeno* arises from the indignity of being publicly singled out as a criminal suspect and the fear that flows from being targeted by uniformed, armed police officers. Street encounters are not like house searches. The harm flows not from the *search* but from the *encounter*. The question should not be whether the officer had the suspect's permission to look at something. Permission will always be more fictive than real anyway. Rather, the question should be whether the officer's behavior was too coercive given the reason for the encounter. It is not the reasonableness of looking in the paper bag that ought to matter; it is the reasonableness of treating Jimeno

175. As the facts in *Jimeno* show, this point often holds true even when the suspect is explicitly told that he need not consent to the search. Jimeno was given such a warning, *see* 500 U.S. at 249, but the officer also told him that if he did not consent the officer would seek a warrant to search the car. *See* Brief for the United States as Amicus Curiae at 3, *Jimeno* (No. 90-622) (citing the record of Jimeno's suppression hearing). On the facts then available to the officer, a warrant seemed implausible. *See id.* at 2 (noting that the officer's suspicion of drug activity was based on a snippet of an overheard conversation on a payphone). At least the officer must have thought so, since, under established Fourth Amendment law, he was free to search the car *without* a warrant if he had probable cause to believe drugs were inside. *See* United States v. Ross, 456 U.S. 798 (1982). Why, then, would the officer threaten to seek a warrant? The likeliest answer is that the officer wished to suggest (1) that if Jimeno refused consent to search, the car would probably be seized by the police pending a warrant application (the threat to seek a warrant would have made no sense if Jimeno could simply drive away), and (2) that in the end, the car would be searched with or without Jimeno's consent.

like he was a probable drug courier. By focusing on privacy and information gathering, the law fails to engage the real issue.

There is also a more serious problem. Consider the facts of a now-venerable Fourth Amendment case, *Terry v. Ohio.*[176] Officer McFadden saw Terry and two friends walking back and forth in front of a downtown Cleveland store; McFadden thought the three men were planning a robbery. The officer walked over and asked them what they were doing. Terry mumbled a response. McFadden grabbed Terry, spun him around, and frisked him, finding a gun. Then McFadden told the men to go inside a nearby store, where they were ordered to spread their arms and legs against the wall.[177] Under current law, there were two key moments in this incident: the moment when Terry and his colleagues were no longer free to walk away, and the search of Terry's pockets for weapons. McFadden needed reasonable suspicion of criminal activity to justify the first[178] and reasonable suspicion that weapons might be present to justify the second.[179] Note that the standard for searching Terry's pockets is harder to meet than the standard for seizing him on the street.

Yet if Terry had had no gun — if he had been doing nothing more than window shopping — what would *he* have thought was the most significant aspect of the encounter? Surely not the violation of the sanctity of his coat pockets. People do not usually carry things in their coat pockets because they are trying to conceal them; they do so because it is convenient. The most important aspect of this or any other street stop to an innocent suspect must be some combination of the stigmatizing nature of the encounter and the police officer's use of force. McFadden didn't just ask Terry to empty his pockets; McFadden grabbed him and spun him around. In one of the companion cases to *Terry,* the officer grabbed the suspect by the shirt collar and frisked him at gunpoint;[180] as in *Terry*

176. 392 U.S. 1 (1968).

177. 392 U.S. at 5-7.

178. 392 U.S. at 27-28. Actually, the *Terry* Court did not take a clear stand on what was required to justify seizing Terry; the Court's opinion is dominated by its discussion of the search of Terry's pockets. *See also* 392 U.S. at 19 n.16 (leaving open precisely when Terry was first "seized"). Since *Terry,* the Court has made clear that the standard for a seizure of this sort is reasonable suspicion of criminal activity. *See* United States v. Hensley, 469 U.S. 221 (1985).

179. 392 U.S. at 20-27.

180. Brief for the American Civil Liberties Union at 5-6, Peters v. New York, 389 U.S. 950 (1967) (No. 74) *in* KURLAND & CASPER EDS., *supra* note 7, at 468-69. Note that the amount of force used in a *Terry* stop can escalate dramatically given any sign of resistance by the suspect — including such mild forms of resistance as asking the officer questions or

the stop and frisk were deemed reasonable.[181] These aspects of the encounter harm innocent suspects. Yet stigma and police use of force, which are obviously at the heart of the *Terry* facts, play a surprisingly small role in *Terry* doctrine. If McFadden had discreetly approached Terry and his friends, quietly telling them not to walk away and to empty their pockets, never laying a hand on them, behaving throughout in a way that called no attention to the encounter, it would have made no legal difference. Legally, the scope of the search matters more than the coerciveness of the encounter. Yet ordinary people in Terry's shoes must care most about the latter.

McFadden's move was a very small instance of a kind of police behavior that happens all the time, often with a good deal more severity, and yet receives astonishingly little legal regulation: low-level violence against suspects. Often the violence is reasonable. (In *Terry,* it probably was.) But that is not always the case. And surely police violence deserves as much regulation as finding out what was in Terry's jacket.

The premise of current doctrine is otherwise. One who studies the law of criminal investigation cannot help wondering at the chasm between the mass of rules and regulations governing where the police can look and what they can touch when they look there, and the virtual absence of any constitutional constraint on when police can strike a suspect.[182] Of course, looking in jacket pockets implicates the interest in keeping secrets, while grabbing suspects, spinning them around, and holding them at gunpoint does not. So at one level the law is easy to explain. It looks primarily to privacy, the backbone of Fourth Amendment doctrine. But in terms of ordinary people's valuation of their own interests, the privacy interest is dwarfed by the interest in avoiding unnecessary violence or the unreasonable exercise of police coercion. All our talk about privacy may have had the effect of stunting constitutional conversation about those more serious problems.

This disease infects even house search cases. Consider one more example: *Anderson v. Creighton,*[183] the leading case on the

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mildly objecting to being stopped. *See* JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 101-03 (1993).

181. Sibron v. New York, 392 U.S. 40, 66 (1968).

182. Compare, for example Professor LaFave's brief treatment of excessive force claims, *see* 3 LAFAVE, *supra* note 29, at 411-14, with his treatment of warrantless searches of persons and personal effects, *see* 3 *id.* at 437-560. The latter is a relatively small slice of the law of searches.

183. 483 U.S. 635 (1987).

scope of police officers' qualified immunity from damages litigation. Officers entered the Creightons' home in search of Mrs. Creighton's brother, who, unbeknownst to the Creightons, was a suspect in an armed robbery. The statement of facts from the court of appeals opinion in the case bears quoting:

> Mr. Creighton asked the officers to put their guns away because his children were frightened, but the officers refused. Mrs. Creighton awoke to the shrieking of her children, and was confronted by an officer who pointed a shotgun at her. She allegedly observed the officers yelling at her three daughters to "sit their damn asses down and stop screaming." She asked the officer, "What the hell is going on?" The officer allegedly did not explain the situation and simply said to her, "Why don't you make your damn kids sit on the couch and make them shut up."
>
> One of the officers asked Mr. Creighton if he had a red and silver car. As Mr. Creighton led the officers downstairs to his garage, where his maroon Oldsmobile was parked, one of the officers punched him in the face, knocking him to the ground, and causing him to bleed from the mouth and forehead. Mr. Creighton alleges that he was attempting to move past the officer to open the garage door when the officer panicked and hit him. The officer claims that Mr. Creighton attempted to grab his shotgun, even though Mr. Creighton was not a suspect in any crime and had no contraband in his home or on his person. Shaunda, the Creightons' ten-year-old daughter, witnessed the assault and screamed for her mother to come help. She claims that one of the officers then hit her.
>
> . . . Mrs. Creighton's mother later brought Shaunda to the emergency room at Children's Hospital for an arm injury caused by the officer's rough handling.[184]

Mrs. Creighton's brother was not in the house. The Creightons sued, claiming that the search violated the Fourth Amendment.

On the facts, the Creightons had two plausible Fourth Amendment claims: (i) the police illegally entered their home, meaning that the police lacked either probable cause or exigent circumstances (the latter being necessary to excuse the failure to get a warrant), and (ii) the conduct of the police *after* they entered the Creightons' home was unreasonable — that is, whether or not the initiation of the search was permissible, the conduct of the search was not. The second claim seems much stronger than the first. After all, the police were in pursuit of a fugitive and had at least some reason, though perhaps not enough, to think the fugitive might be

184. Creighton v. City of St. Paul, 766 F.2d 1269, 1270-71 (8th Cir. 1985), *vacated sub nom.* Anderson v. Creighton, 483 U.S. 635 (1987). The court of appeals was reviewing a decision on defendants' motion for summary judgment, so these are the facts as viewed most favorably for the Creightons.

at the Creightons' home. But it is hard to see how the police could justify their behavior once inside if the Creightons' version of the facts is anywhere close to the truth.

Yet every court that discussed the Creightons' Fourth Amendment claim took for granted that the only possible challenge was to the officers' initial entry.[185] In the end, the defendants won on summary judgment on the ground that reasonable police officers could well have believed that both probable cause and exigent circumstances were present.[186] This posture is typical. In Professor LaFave's treatise on search and seizure, whole chapters are devoted to the doctrines limiting entry into a house and entry into different parts of a house once inside,[187] but one finds almost no discussion of limits on the degree of force used in conducting an otherwise permissible search.

That fits the larger pattern of Fourth Amendment law. A focus on privacy has led to a great deal of law — sometimes fairly protective, sometimes not — about what police officers can *see.* The doctrine pays a good deal less attention to what police officers can *do.* This is part of the cost of a Fourth and Fifth Amendment culture that has worried too much about privacy and too little about everything else.

B. *Solving Privacy's Problem*

There are signs that this state of affairs is changing, that police coercion is displacing privacy as a focus of attention in the law of criminal investigation. This change is a good thing; it should proceed. Yet the shift from privacy to coercion carries with it important difficulties. A reoriented criminal procedure system will have to grapple with some major problems that the current regime manages to suppress or ignore.

The move away from privacy protection has proceeded quite far in Fifth Amendment law. A generation ago, Fifth Amendment law was as firmly anchored in privacy as Fourth Amendment law. Under *Boyd,* the Fifth Amendment protected physical evidence as well as ordinary testimony. The immunity required to overcome that protection was transactional,[188] meaning that the protection

185. *See Anderson,* 483 U.S. 635; *Creighton,* 766 F.2d 1269 (same case); Appendix to Petition for Certiorari at 23a-26a, *Anderson* (No. 85-1520).

186. Creighton v. Anderson, 724 F. Supp. 654, 661 (D. Minn. 1989), *affd.,* 922 F.2d 443 (8th Cir. 1990).

187. *See* 2 LAFAVE, *supra* note 29, §§ 4.5, 4.8, 6.1-6.7.

188. *See* Counselman v. Hitchcock, 142 U.S. 547 (1892).

was, as a practical matter, close to absolute. The law was pretty much where *Boyd, Hale,* and *Shapiro* left it — focused on privacy, but with the protection carefully bounded so as not to interfere too much with ordinary government operations. Justices talked about the Fourth and Fifth Amendments as belonging together, as protecting much the same thing.[189] Today, physical evidence is unprotected,[190] immunity is narrower,[191] and Fifth Amendment protection has generally shrunk. Coercion has come to the fore, and privacy has taken a back seat.

This trend is especially evident in police interrogation doctrine. At its inception, the rule of *Miranda v. Arizona*[192] protected individual privacy and autonomy. By warning suspects that they need not talk and could have legal assistance if they wished, and by placing a "heavy burden" on the government to show that these rights had been waived "voluntarily, knowingly, and intelligently,"[193] *Miranda* seemed to ensure that suspects would not make incriminating disclosures unless they chose — *really* chose — to do so. Language in Earl Warren's majority opinion suggested that the government was not allowed to "persuade, trick, or cajole [the suspect] out of exercising his constitutional rights."[194] *Miranda* was thus of a piece

189. *See* Mapp v. Ohio, 367 U.S. 643, 656-57 (1961) ("We find that, as to the Federal Government, the Fourth and Fifth Amendments and, as to the States, the freedom from unconscionable invasions of privacy and the freedom from convictions based upon coerced confessions do enjoy an 'intimate relation' "); 367 U.S. at 661-66 (Black, J., concurring) (justifying the imposition of the exclusionary rule on the states in terms of the relationship between the Fourth and Fifth Amendments).

190. *See* Fisher v. United States, 425 U.S. 391 (1976); Schmerber v. California, 384 U.S. 757 (1966).

191. Under Kastigar v. United States, 406 U.S. 441 (1972), the government must immunize both the compelled testimony and its fruits, but it need not immunize the entire transaction that is the subject of the compelled testimony. This requirement is narrower than the transactional immunity rule of *Counselman v. Hitchcock.* As Akhil Amar and Renée Lettow demonstrate elsewhere in this issue, there is a plausible argument for narrowing the immunity rule even further. *See* Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause,* 93 MICH. L. REV. 857 (1995).

192. 384 U.S. 436 (1966).

193. 384 U.S. at 444, 475.

194. 384 U.S. at 455. Not everyone would agree with this characterization of *Miranda.* In his fascinating article on the common threads that run through *Brown v. Board of Education* and *Miranda,* Louis Michael Seidman argues that the Court's decision was actually a move in *favor* of law enforcement. According to Seidman, Massiah v. United States, 377 U.S. 201 (1964), and Escobedo v. Illinois, 378 U.S. 478 (1964), had paved the way for true free choice for suspects — no police station confessions without the presence of defense counsel, a rule which would presumably mean almost no police station confessions at all. *See* Seidman, *supra* note 5, at 733-36. In *Miranda,* he claims, the Court took a step back from this position, giving suspects formal protection through the famous warnings, while leaving the substance of the coercive atmosphere of the police station unchanged. *Id.* at 736-47.

Seidman's argument is powerful, and it has strong echoes in current police interrogation doctrine. But if *Miranda* represented a backward step from *Massiah* and *Escobedo,* it was a small step. The fact that the Court went out of its way to condemn trickery as well as arm-

with privacy-protective Fourth Amendment law — just as Fourth and Fifth Amendment law had been closely linked, and linked to privacy, ever since *Boyd.*

But *Miranda* doctrine has moved along a path different from the one Warren's opinion mapped out. The use of undercover agents and other similarly deceptive tactics often do not count as "interrogation" and so are not subject to *Miranda's* restrictions.[195] As for direct questioning, officers are indeed allowed to "persuade, trick, or cajole" suspects into talking, as long as suspects are given the requisite warnings and agree to talk. Taking advantage of suspects' ignorance, mistakes, and poor judgment is routinely permitted.[196] Aside from the famous *Miranda* warnings themselves, two key limits on the police remain: if the suspect asks to stop the questioning, it must stop,[197] and if he asks for a lawyer, questioning cannot start again except by the suspect's decision.[198] This regime does a poor job of protecting the privacy and autonomy interests that *Miranda* sought to guard. It does a much better job of regulating police use of force. Suspects are allowed to decide when the pressure is too

twisting, together with the "heavy burden" of showing waiver the Court placed on the government, suggest that *Miranda,* when it was decided, represented something close to the "free choice" regime at which *Massiah* and *Escobedo* had hinted. Most importantly, no one could have known at the time that large numbers of ordinary suspects in ordinary criminal cases would actually agree to talk to police after being told that they did not have to (indeed, that they could have a state-paid lawyer if they wished). *Miranda* may not look so radical in hindsight, but I suspect it seemed radical in 1966. And it seemed radical in exactly the way that *Boyd* may have seemed radical eighty years before — it served to shield large amounts of information from government scrutiny by placing that information squarely in defendants' control. *Miranda* was, in short, a classic privacy- and autonomy-protective decision.

195. *See* Illinois v. Perkins, 496 U.S. 292 (1990); Arizona v. Mauro, 481 U.S. 520 (1987). For an argument that the Warren Court would have reached the same result, at least with respect to electronic eavesdropping and undercover agents, see Yale Kamisar, *The Warren Court (Was It Really So Defense-Minded?), The Burger Court (Is It Really So Prosecution-Oriented?), and Police Investigatory Practices, in* VINCENT BLASI ED., THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 62, 63-64 (1983).

196. *See, e.g.,* Colorado v. Spring, 479 U.S. 564 (1987); Connecticut v. Barrett, 479 U.S. 523 (1987); Moran v. Burbine, 475 U.S. 412 (1986). For a discussion of the deception-coercion line that these cases draw, see William J. Stuntz, *Waiving Rights in Criminal Procedure,* 75 VA. L. REV. 761, 814-22 (1989).

197. "If [an] individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." Michigan v. Mosley, 423 U.S. 96, 100 (1975) (quoting *Miranda,* 384 U.S. at 473-74). Once a suspect has exercised his right to remain silent the police may resume questioning "after the passage of a significant period of time and the provision of a fresh set of warnings," at least where the second interrogation concerns a different crime than the first. *Mosley,* 423 U.S. at 106.

198. Edwards v. Arizona, 451 U.S. 477 (1981). Once triggered, this protection is stunningly broad. *See* Minnick v. Mississippi, 498 U.S. 146 (1990) (holding that after a suspect has invoked his right to counsel, the police may not reinitiate questioning even after suspect has met with an attorney); Arizona v. Roberson, 486 U.S. 675 (1988) (holding that after a suspect has invoked his right to counsel, the police may not reinitiate questioning even about a different offense).

great by stopping the proceedings or asking for help, and, in theory anyway, their requests must be honored. These rules give the police some incentive to avoid the most coercive tactics, because those tactics will be among the ones most likely to cause the suspect to stop the questioning. The doctrine still has serious problems: for example, tentative requests for counsel are not honored,[199] which dilutes officers' incentive to avoid arm-twisting. But the law has moved in precisely the right direction, away from protecting the interest in nondisclosure and toward protecting the interest in avoiding unreasonable police coercion.

Some developments in Fourth Amendment law might herald a similar change of focus. Recall the pattern in the "reasonable expectation of privacy" cases. The cases increasingly look to whether there has been a coercive encounter between a police officer and a citizen. If there has, a "search" has probably taken place; if not, the Fourth Amendment probably does not apply.[200] Given this pattern, street encounters may be underregulated, but at least they receive more attention than searches of suspects' garbage or flights over backyards. That is as it should be, for the interests at stake in street encounters go far beyond privacy.

Yet the law has a long way to go. Cases like *Jimeno* need to be evaluated in terms of the coerciveness of the police officer's behavior, not just in terms of what the officer saw and what he knew

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199. *Compare* Davis v. United States, 114 S. Ct. 2350 (1994) (declining to give any effect to ambiguous requests for counsel) *with* Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259 (1993) (arguing that ambiguous requests are as far as many defendants will go toward invoking their *Miranda* rights). This nonprotection of ambiguous requests for counsel contrasts strangely with the overprotection of *clear* requests for counsel. *See supra* note 198.

200. Virtually all the Supreme Court decisions in which no reasonable expectation of privacy was infringed also involve no police-citizen confrontation. *See* Florida v. Riley, 488 U.S. 445 (1989) (officers flew over defendant's property); California v. Greenwood, 486 U.S. 35 (1988) (officers examined garbage left for pick-up); United States v. Dunn, 480 U.S. 294 (1987) (officers looked inside a deserted open-air barn); Oliver v. United States, 466 U.S. 170 (1984) (officers walked through a privately owned field); United States v. Knotts, 460 U.S. 276 (1983) (officers used a beeper to monitor automobile movements); Smith v. Maryland, 442 U.S. 735 (1979) (officers received phone numbers called by the defendant through use of a pen register); United States v. Miller, 425 U.S. 435 (1976) (officers obtained defendant's financial records from a bank).

There are, of course, some exceptions to the pattern. Wiretaps are plainly searches, even though they often require no confrontation between a police officer and an individual. The same is true of surreptitious searches of houses. *See* United States v. Karo, 468 U.S. 705 (1984). But wiretaps and house searches aside, Fourth Amendment "searches" do tend strongly to involve some coercive confrontation with the police.

There are other hints of a turn toward coercion in Fourth Amendment doctrine. In Winston v. Lee, 470 U.S. 753 (1985), the Court held that surgery on the defendant to remove a bullet for evidentiary purposes would constitute an unreasonable search absent a demonstration of "compelling need." Though the Court talked about privacy interests in *Winston, privacy* here means the interest in avoiding a kind of physical violence.

when he saw it, and certainly not in terms of the scope of the suspect's fictive consent. In cases like *Anderson v. Creighton,* courts need to pay attention to the behavior of police officers during the course of otherwise legitimate searches and not end the analysis after concluding that *some* search was authorized. Finally, courts need to worry much less than they now do about the privacy interest in glove compartments and jacket pockets and brown paper bags.

Three serious obstacles stand in the way of these changes. The first and most obvious is remedial. Suppression of illegally obtained evidence, the primary tool for enforcing restrictions on the police, is well suited to rules about evidence gathering — rules that limit what the police can see. Suppression is less well suited to regulating police violence, because of the lack of a causal connection between unreasonable use of force and the discovery of incriminating evidence. (There was no evidence gathering in the Rodney King incident.) The existence of the exclusionary rule thus tends to reinforce Fourth Amendment law's emphasis on privacy.

Yet though the exclusionary rule does tilt the system toward privacy, the tilt can be corrected, at least in part. A sensible system might say that when police officers behave as they allegedly did in *Anderson v. Creighton,* any evidence they find in the house should be suppressed.[201] The causal connection between the police misconduct and finding the evidence is convenient, but it need not be crucial.[202] Meanwhile, in the mass of cases like *Jimeno* that use "consent" to justify the search, police coercion *is* causally connected to evidence gathering. Nothing inherent in the suppression remedy bars a court from asking out loud what some judges probably ask *sotto voce:* Did the officer have a good enough reason for singling out the suspect in this way and for using this degree of force? To put it another way, the exclusionary rule does not dictate the substantive content of Fourth Amendment law. *Miranda* doctrine illustrates the point. There, the law has moved sharply in the direction of regulating police coercion, and the exclusionary rule remains the chief enforcement tool.

201. And the law should certainly provide protection for innocent victims of unreasonably performed searches — that is, for people like the Creightons.

202. The law already does something similar with respect to arrest. When suspects are arrested without probable cause, the ordinary remedy is to suppress any incriminating evidence found during or soon after the arrest. Doctrinally, this flows from the fact that so many searches are predicated on legal arrest. *See* 2 LAFAVE, *supra* note 29, §§ 5.2-.3, 5.5. Functionally, this practice serves to deter wrongful arrests in roughly the same way that the suppression remedy could deter excessive force in carrying out house searches.

The remedial problem remains serious. There are some kinds of police violence that the exclusionary rule cannot touch — again, think of Rodney King. Other remedies such as damages actions and criminal punishment have their own problems.[203] But none of these difficulties would prevent courts from paying more attention to coercion and less to privacy in cases like *Terry* and *Jimeno* and *Creighton.*

A second obstacle is more troubling. It is hard to spell out just how much coercion is too much in cases like *Jimeno*, and it is hard to generate legal rules that tell officers how to conduct a house search like the one in *Creighton.* Extremely ambiguous law is probably unavoidable here; a rule structure governing police coercion and violence is probably not a realistic possibility. Police behavior in street encounters may not be susceptible to the *Miranda* solution: a body of clear rules that can plausibly protect the values at stake and be readily communicated to and understood by the police. Some sort of negligence or gross-negligence standard may well be the best the law can do.[204]

Criminal procedure faced precisely this problem during the early years of the Warren Court. Before the 1960s, the chief federal constitutional constraints on the police came from the Due Process Clause.[205] With respect to searches and seizures, due process barred anything that shocked the Court's conscience.[206] With respect to police interrogation, the law forbade the use of "involuntary" confessions;[207] in practice, involuntariness meant anything produced by (once again) shocking police misconduct.[208] These legal standards were hopelessly vague, and according to the conven-

203. The chief problem with both damages and criminal prosecution is overdeterrence. If the remedy is used often enough to deter police misconduct, it will likely deter some *good* police conduct as well.

204. The reason for adopting a gross negligence standard is the problem that underlies qualified immunity: the risk of overdeterrence. *See* PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 71-73 (1983). But qualified immunity may itself take care of that problem by requiring something akin to clear illegality as a precondition to damages liability for constitutional violations. *See* Anderson v. Creighton, 483 U.S. 635 (1987). Thus, qualified immunity may mean that a constitutional negligence standard translates into a gross negligence standard for purposes of damages liability.

205. Federal agents were still bound by the body of Fourth and Fifth Amendment rules that had evolved out of *Boyd.*

206. *See* Irvine v. California, 347 U.S. 128 (1954); Rochin v. California, 342 U.S. 165 (1952).

207. Brown v. Mississippi, 297 U.S. 278 (1936).

208. For a nice discussion of just how little the voluntariness standard constrained the police, see Kamisar, *supra* note 169, at 94-104.

tional wisdom of the time, their vagueness made them useless.[209] The police could not know what was prohibited, so they simply ignored the law and did what they wanted, bearing the slight risk that later on some judge's conscience would be shocked. If this kind of uncertainty is the inevitable result of a legal regime that tries directly to address police coercion, that enterprise does not look promising.

But the constitutional regime that the Warren Court rejected had more problems than its vagueness. Pre-1960s law was not only fuzzy, it was also extraordinarily lenient. Only truly egregious police conduct posed any risk of constitutional sanction. Given such leniency and given that what was truly egregious was never clear, it made perfect sense for police to ignore the governing legal standards. If essentially nothing is clearly *ill*egal, and if most things are clearly *legal,* the governing standards are not likely to shape behavior.[210] One solution — the Warren Court's solution — was to incorporate the privacy value of *Boyd,* the value that was still the centerpiece of Fourth and Fifth Amendment law, into the Due Process Clause and thereby enforce privacy-protective criminal procedure rules against the states. Following that path allowed the Court to generate a detailed rule structure for criminal investigation, much of which still stands today. It also heightened the conflict between criminal procedure and the rest of the constitutional order and avoided doing much of anything about police violence.

A better solution would be simply to make the standards tougher — to do the same thing the Court tried to do before the 1960s but with less of a bias in favor of the police. Even a gross negligence standard for cases like *Creighton* would be a good deal tougher than the "shock the conscience" regime of the 1950s. Moreover, if leniency was as big a problem for 1950s law as was vagueness, tougher standards *would* shape police conduct. Many searches and seizures must be supported by probable cause, and probable cause is defined as a "fair probability," judged under all the circumstances.[211] This is a classically vague standard. But it ap-

209. *See id.;* Arthur E. Sutherland, Jr., *Crime and Confession,* 79 HARV. L. REV. 21, 36-37 (1965). This position led to many calls for "codes" of one sort or another to solve the police interrogation problem. *See* Paul M. Bator & James Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions,* 66 COLUM. L. REV. 62 (1966); Arnold N. Enker & Sheldon H. Elsen, *Counsel for the Suspect:* Massiah v. United States *and* Escobedo v. Illinois, 49 MINN. L. REV. 47, 84-91 (1964).

210. This statement is true unless the penalty for illegal behavior is extremely high. The suppression remedy does not establish a very high penalty because it only forces the officer to disgorge the evidentiary gains from his misconduct.

211. Illinois v. Gates, 462 U.S. 213, 230-41 (1983).

parently shapes behavior: a huge majority of searches pursuant to warrants find evidence listed in the warrant,[212] suggesting that police officers and magistrates manage to apply the probable cause standard with some success. Case-by-case adjudication does, after all, send legal signals. The police are receptive to those signals because they must be: they are very frequent litigants. In short, a fair response to the concern with vagueness is that vague standards are indeed a problem, but they are still worth something and, in any event, are better than no standards at all.

A third obstacle is more serious still, for it goes to basic choices about the way police operate on the streets. As anyone who reads a newspaper knows, we are in the midst of a revival of "community policing." What that term means is not entirely clear, but one central characteristic is sustained personal contact between police officers and citizens outside the context of officers' response to reported crimes.[213] The idea behind this movement is simple and powerful. Community policing is a response to the fact that over the past few decades, policing has become more reactive than it used to be. Officers are less likely to "walk a beat," more likely to patrol their territory in cars, and hence more likely to encounter citizens as suspects and crime victims rather than simply as citizens.[214] This development probably raises police efficiency if good law enforcement consists solely of solving crimes. Police in cars can get to the scene of a reported crime faster than officers on foot. But it may *lower* efficiency if it hampers officers' ability to stop crimes before they happen, perhaps by the judicious exercise of low-level force against potential wrongdoers — anything from brief street seizures to breaking up groups of troublemakers and forcing them to go home. Officers can more easily use these sorts of informal, fundamentally preventive tactics if they are regularly "making the

212. *See* Donald A. Dripps, *Living with* Leon, 95 YALE L.J. 906, 925 (1986) (noting that, according to a study of the warrant process sponsored by the National Center for State Courts, about 74-89% of the searches discover at least some of the evidence named in the warrant).

213. *See generally* JEROME H. SKOLNICK & DAVID H. BAYLEY, THE *NEW* BLUE LINE: POLICE INNOVATION IN SIX AMERICAN CITIES (1986); Geoffrey P. Alpert & Roger G. Dunham, *Community Policing*, 14 J. POLICE SCI. & ADMIN. 212 (1986); Mark Harrison Moore, *Problem-solving and Community Policing*, *in* 15 MODERN POLICING 99 (Michael Tonry & Norval Morris eds., 1992). To date, the legal literature has devoted surprisingly little attention to this revival — an unfortunate omission, as community policing has major implications for the shape of both criminal law and criminal procedure. For an interesting and balanced preliminary discussion, see Debra A. Livingston, *Brutality in Blue: Community, Authority, and the Elusive Promise of Police Reform*, 92 MICH. L. REV. 1556, 1571-76 (1994) (book review).

214. *See, e.g.*, Albert J. Reiss, Jr., *Police Organization in the Twentieth Century*, *in* 15 MODERN POLICING, *supra* note 213, at 51, 91-92.

rounds" on foot. Police cars create distance; they lead to a more detached, and hence more reactive, law enforcement style.

If the advocates of community policing are right, the old way was better. It is worth asking, then, why it was abandoned. One answer bears strongly, and depressingly, on the law's ability to do a good job of regulating police use of force. Before the 1960s, the police could seize just about anyone on the street: vagrancy and loitering laws applied to almost any public behavior, so the police always had probable cause to arrest.[215] When those laws were invalidated in the late 1960s and early 1970s, street seizures immediately became a legal problem.[216] In the absence of blanket authority to arrest, the police needed more specific grounds to justify ad hoc seizures on the street. But in many cases those grounds did not exist — the whole point of informal, preventive police work was to anticipate trouble, not to react to it. The gains to the police from these interventions were and are small, meaning that even a small risk of legal sanctions could generate a large amount of deterrence. So the police reacted to greater regulation by distancing themselves. The movement from foot patrols to cars, from preventive to reactive policing, accelerated. The law created an incentive to wait until crimes happened, after which reasonable suspicion and probable cause would be easier to establish, rather than intervening to stop them.

The story is of course more complicated than that; other variables were also at work.[217] But if this account is even partly correct, it suggests that some forms of policing can work only if the law keeps its distance. Carefully regulating low-level seizures may well be inconsistent with a style of police work that many people are striving to recreate.[218]

Regulation may still be the right move. Community policing may be a bad idea. Still, this tension highlights something important. A large category of reasonable exercises of police coercion — "reasonable" in the sense that given full information, a large majority of people across all major population groups would approve of

215. *See, e.g.*, HERMAN GOLDSTEIN, PROBLEM-ORIENTED POLICING 134 (1990); Douglas, *supra* note 169, at 12-13.

216. It is no accident that the "stop-and-frisk" cases arose at the same time vagrancy and loitering laws were being struck down. *See* Stuntz, *supra* note 150, at 559-60.

217. The two most obvious are rising crime rates and rising political concerns with apparent racism. The latter may have led still-largely-white police forces to scale back their street presence in black neighborhoods.

218. *See* Moore, *supra* note 213, at 112-13 (noting the connection between reactive policing and the protection of individual privacy and liberty).

the police conduct — may not be cost-effective in a system of case-by-case judicial scrutiny. The system may have to choose between foreclosing all such police conduct or permitting it at the cost of also permitting a good deal of *mis*conduct, such as harassing citizens because of their race. Racism combined with broad police discretion was, after all, what prompted courts to invalidate vagrancy and loitering laws in the first place.

The current regime manages to suppress these issues, by focusing attention on suspects' privacy interests and adopting a fictive view of consent that allows a good deal of informal coercion to take place. But this "solution" satisfies no one. Notwithstanding consent search doctrine, the police lack the kind of informal authority that the old regime gave them — the kind of authority that may be essential to effective community policing. Meanwhile, the system does not come close to protecting the interests of people like Terry or Jimeno in being free from police coercion.

Focusing squarely on coercion would force the system to face these trade-offs. Regulating street encounters between the police and the citizenry remains an incredibly hard job. The law of constitutional criminal procedure may be able to do that job only very partially. It may be that most of the regulatory work must be done by police chiefs and citizen review boards, by people and institutions operating outside the realm of constitutional law. But constitutional law can surely do more and better than it does now, if courts focused on the right interest instead of paying so much attention to the wrong one. If unreasonable police use of force is the most important problem for the law of criminal investigation to solve, the fact that all solutions are partial and flawed is not reason enough to abandon the enterprise.

IV. Conclusion

A generation after *Mapp v. Ohio*,[219] we have a large and detailed body of law to tell police when they may open paper bags or the trunks of cars. Meanwhile, the law speaks softly (or not at all) when it comes to the level of force that may be used in making an arrest or conducting a search. This structure is backward. Drawing lessons from isolated cases is risky, but the Rodney King incident may be symptomatic of the real problem of police misconduct. The problem is not information gathering but violence.[220] Notwith-

219. 367 U.S. 643 (1961).

220. For a wide-ranging discussion of that problem, see Skolnick & Fyfe, *supra* note 180.

standing our enormous body of Fourth Amendment law and the enormous volume of Fourth Amendment litigation, that problem has not generated much of a legal response.

The law's relentless focus on privacy as secrecy has produced this state of affairs, because privacy protection has little to do with the worst aspects of police misconduct. And in a broader sense, privacy protection as the centerpiece of criminal procedure is reactionary: it harks back to a constitutional order that placed severe limits on the size and regulatory power of the state, limits that have long since been discarded.

This doctrinal wrong turn may be the product of historical accident. The Supreme Court's decision to intervene heavily in criminal procedure was coupled with the decision to incorporate the Fourth, Fifth, and Sixth Amendments into the Fourteenth Amendment's Due Process Clause. At the time, Fourth and Fifth Amendment law was strongly linked to privacy protection, a product of *Boyd*-era cases. Yet that privacy protection had already been cabined and undermined in order to avoid running afoul of the emerging regulatory state. The incorporation cases of the 1960s thus imported privacy's problem into the day-to-day law of criminal procedure, the law that governs ordinary car stops and arrests.[221] We have been wrestling with the problem ever since. The result is a system that does not consistently protect privacy because it cannot, and hardly protects other interests at all. Criminal procedure needs reorienting.

221. This account is discussed in some detail in Stuntz, *supra* note 105.