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INTRODUCTION

An ideological split has come to dominate contemporary debate about the nature and scope of the Fourth Amendment right of privacy.[1] Civil libertarians view privacy from government as a critically important entitlement that must be guarded even—and perhaps especially—when invoked by criminal defendants. Proponents of strong crime control, by contrast, care more about protecting the public's security from crime than about protecting the privacy of criminals.[2] Accordingly, they urge a less vigilant approach to privacy when it comes at a cost to criminal law enforcement.[3]

In spite of their differences, however, the competing approaches share the view that the Fourth Amendment privacy right is a matter of individual entitlement.[4] In other words, the Fourth Amendment gives every person an *individual* right to be free from "unreasonable searches."[5]

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1. The Fourth Amendment provides:

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

U.S. Const. amend. IV.

I use the phrase "right of privacy" to refer to "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches." Id.; see also Katz v. United States, 389 U.S. 347, 350–53 (1967) (discussing the Fourth Amendment in terms of reasonable expectations of privacy). Although the Fourth Amendment does not use the word "privacy" explicitly, it is apparent that privacy concerns animate the right against unreasonable searches. Even a textualist like Justice Black does not deny this proposition but instead claims that the scope of this Fourth Amendment right ought to be limited to the items listed in the text. See *Katz*, 389 U.S. at 364 (Black, J., dissenting).

2. For a discussion of the two models, see Herbert L. Packer, The Limits of the Criminal Sanction 153–73 (1986) (describing the "crime control" and "due process" models of criminal justice); John Kaplan, The Limits of the Exclusionary Rule, 26 Stan. L. Rev. 1027, 1027–28 (1974) (crediting Packer with recognition of the "crime control" and "due process" models).

3. See, e.g., County of Riverside v. McLaughlin, 500 U.S. 44, 71 (1991) (Scalia, J., dissenting) (noting that "one hears the complaint, nowadays, that the Fourth Amendment has become constitutional law for the guilty; that it benefits the career criminal (through the exclusionary rule) often and directly, but the ordinary citizen remotely if at all"). But cf. Arizona v. Hicks, 480 U.S. 321, 329 (1987) (Scalia, J.) (asserting that "the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all").

4. See, e.g., Alderman v. United States, 394 U.S. 165, 174 (1969) ("Fourth Amendment rights are personal rights which . . . may not be vicariously asserted."); see also Rakas v. Illinois, 439 U.S. 128, 133 (1978) (quoting *Alderman*); Brown v. United States, 411 U.S. 223, 230 (1973) (same).

5. This Article focuses almost entirely on the right against "unreasonable searches" as defined through the requirement of pre-search evidence on the part of the state. The right to be free from unreasonable seizures and the right not to be subjected to police conduct that is shocking because of its cruelty or invasiveness, see, e.g., Winston v. Lee, 470 U.S. 753 (1985); Rochin v. California, 342 U.S. 165 (1952), will remain largely outside the scope of this discussion. This Article will also not attempt to analyze the so-called probable

Most individual rights provisions of the Constitution protect the freedom to engage in conduct or to make choices.[6] Civil libertarians would allow people to exercise such rights until the point at which their exercise causes harm to other people,[7] whose rights must also be respected.[8] For example, an individual has a constitutionally protected interest in the use and enjoyment of her property,[9] but that right does not protect her property to the extent that it creates a nuisance.[10]

Unlike that of most personal rights, however, the outer boundary of the Fourth Amendment privacy right does not coincide with the point at which one's privacy begins to hurt other people's interests (by concealing evidence of a crime, for example). Instead, the right ends when the state *comes to have evidence* that the privacy is hurting others' interests. In the conventional account, it is the government's state of knowledge—probable cause, reasonable suspicion, "reasonableness"—that mediates the question when the individual has a right not to have a particular search take place. Some government searches are unconstitutional, then, because the government lacked knowledge before the fact that would have provided a legitimate motive for the search.[11] This feature of the

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cause and warrant requirements. These requirements together represent one approach to ensuring that police acquire sufficient information prior to performing searches. The purpose of this Article is instead to clarify the relationship between the government's failure to acquire such information, regardless of what such acquisition might entail (i.e., probable cause, warrant, probable cause and warrant, or general reasonableness), and the individual's personal entitlement to privacy.

6. See, e.g., U.S. Const. amend. I (protecting "freedom of speech" and "free exercise" of religion); see also Michael C. Dorf, Facial Challenges to State and Federal Statutes, 46 Stan. L. Rev. 235, 265–66 (1994) (distinguishing between protected primary conduct and procedural rights).

7. The concept of harm is, of course, quite complex; the question of which detriments to others ought to count as "harms" is therefore subject to debate. See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1024–25 (1992) (arguing generally that "the distinction between 'harm-preventing' and 'benefit-conferring' [land use] regulation is often in the eye of the beholder" and specifically that "[o]ne could say that imposing a servitude on [petitioner's] land is necessary in order to prevent his use of it from 'harming' South Carolina's ecological resources; or, instead, in order to achieve the 'benefits' of an ecological preserve").

8. See Declaration of the Rights of Man and the Citizen (1789) *in* Louis R. Beres, The United States and Nuclear Terrorism in a Changing World: A Jurisprudential View, 12 Dick. J. Int'l L. 327, 332 n.13 (1994) ("Liberty is the capacity to do anything that does no harm to others. Hence the only limitations on the individual's exercise of his natural rights are those which ensure the enjoyment of these same rights to all other individuals.").

9. See *Lucas*, 505 U.S. at 1014.

10. See id. at 1022.

11. By using the term "motive," I do not intend to suggest that courts are, or ought to be, engaging in a subjective inquiry into officers' true motives. On the contrary, I propose that it is the objective lack of adequate pre-search information that tells us that something else—some inappropriate motive—is filling in the gap between the officer's prior evidence and her decision to search. See infra notes 88–97 and accompanying text (discussing the scope of the justiciable targeting harm as an objective rather than a subjective inquiry). It is still the case, however, that it is the officer's access to pre-search information and not the existence of such information somewhere in the world that

privacy right is somewhat paradoxical: the factors that determine whether a person possesses the right in a particular case lie largely outside the person who owns the right. It is thus an individual right, the scope of which is defined by a matter extrinsic to the individual and his or her conduct and culpability: what the government knows.

This distinction between Fourth Amendment privacy and other constitutional rights may seem merely semantic. The state, after all, can never act on a problem of which it is unaware. What distinguishes the Fourth Amendment, however, is that the *state's knowledge alone* appears to define the boundaries of the right. This is not true for most other constitutional entitlements. The right to free speech, for example, does not include the right to incite a riot, even if the government never learns of the riot.[12] Although the state cannot without evidence prosecute or punish someone for incitement, this prohibition is a feature of due process and the right to a jury trial, not of the right to free speech.

By contrast, we understand everyone to retain her right to privacy within the meaning of the Fourth Amendment as long as the state does not acquire enough knowledge of criminal activity to invade that privacy. In an important sense, then, the process *is* the right.

There is more to the story, however, than what the government knows. People feel differently about guilty versus innocent holders of Fourth Amendment privacy rights. The right is not *entirely* independent of what a person does with it. All of us begin with an entitlement to privacy, but some seem by their actions to forfeit part of that entitlement. The idea of forfeiture captures the intuition that guilty people really do not deserve the right when its exercise consists of the concealment of incriminating evidence.[13]

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renders a search valid. If, for example, one officer sees a perpetrator pulling a body into a house but keeps his knowledge a secret, then another officer who knows nothing about the body and decides nonetheless to search the house performs an unreasonable search under the Fourth Amendment. To that extent, the "state of mind" inquiry attached to a probable cause determination focuses on what the particular officer knew of the suspect's activities. An officer, of course, may conduct a search on the basis of a radio communication from a different officer who himself has probable cause, even when the searching officer lacks personal knowledge of the facts justifying the search. See Whiteley v. Warden, 401 U.S. 560, 568 (1971). This allowance, however, is consistent with the proposition that only a state actor who has personal access to information justifying the search (whether directly or indirectly) may perform such a search. See id. at 565 n.8 (explaining that "an otherwise insufficient affidavit cannot be rehabilitated by testimony concerning information possessed by the affiant when he sought the warrant but not disclosed to the issuing magistrate").

12. See Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969) (discussing the distinction between incitement and permissible speech).

13. I agree with Akhil Amar that the intuitions of ordinary people about the circumstances under which a person is entitled to privacy from a search ought not to be ignored. See Akhil R. Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757, 761 (1994). George Thomas and Barry Pollack would give voice directly to those intuitions by letting a pretrial jury decide whether a search was reasonable. See George C. Thomas III & Barry S. Pollack, Saving Rights from a Remedy: A Societal View of the Fourth

The intuition that those who conceal evidence of crime forfeit the privacy used in such concealment is one shared by prominent liberals and conservatives alike. Chief Justice Earl Warren, for example, argued that an individual who uses her home as a "commercial center to which outsiders are invited for purposes of transacting unlawful business" forfeits any reasonable, home-based expectation of privacy that would serve to protect the business.[14] Though the Supreme Court ordinarily considers the home a sacred place within the hierarchy of Fourth Amendment privacy,[15] Chief Justice Warren explained that a home used for an illegal business "is entitled to no greater sanctity than if [the business] were carried on in a store, a garage, a car, or on the street."[16] Similarly, Chief Justice Warren Burger believed that an individual who uses his garden to grow illicit drugs has no reasonable expectation of privacy from at least some inspections of that garden.[17] Once again, an individual may forfeit the privacy that normally obtains in an area associated with the home[18] by using that area to conduct and conceal criminal activity.

Moreover, if a government official knows that an individual is using her privacy to commit crimes and to hide evidence of those crimes, the official is legally entitled to a warrant authorizing a search of the individual's premises. By committing a crime, the individual in effect creates the circumstances that may ultimately relieve the government of its obligation to respect her privacy. The forfeiture idea is accordingly one way of expressing the reality that Fourth Amendment privacy is not limitless: its limits are theoretically dictated by the lawful or unlawful nature of the uses to which one puts one's private spaces.

There is thus a continuing philosophical clash between the intuition that all "the people" hold a collective entitlement to governmental compliance with the Fourth Amendment and the competing intuition that the guilty forfeit part of their privacy. This clash is evident in the wide-

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Amendment, 73 B.U. L. Rev. 147, 150 (1993) (proposing that a small jury panel sit in grand jury style to rule on reasonableness of a search, with the judge deciding whether to impose the exclusionary rule if the search is found to be unreasonable). Of course, people will not all share the same intuitions about a given issue, including the right of privacy. I believe, however, that the intuition that the Fourth Amendment right of privacy belongs to everyone, but that innocence is not entirely irrelevant to this right, is common enough to be familiar to the reader, even if the reader does not individually share the intuition.

14. Lewis v. United States, 385 U.S. 206, 211 (1966).

15. See, e.g., Payton v. New York, 445 U.S. 573, 602–03 (1980) (finding arrest warrant mandatory for home arrest); Chambers v. Maroney, 399 U.S. 42, 47–48 (1970) (contrasting reduced expectations of privacy in a car to greater expectations of privacy in a home).

16. *Lewis*, 385 U.S. at 211.

17. See California v. Ciraolo, 476 U.S. 207, 213–14 (1986) (discussing aerial inspections).

18. See, e.g., United States v. Dunn, 480 U.S. 294, 300–01 (1987) (explaining the contours of privacy accorded the curtilage); Oliver v. United States, 466 U.S. 170, 178–79 (1984) (contrasting the open field with the curtilage).

spread public debate over the exclusionary rule.[19] That debate, in turn, brings to light a discomfort with permitting the guilty, the "undeserving," to benefit from the inevitable consequences of what the Fourth Amendment does indeed appear to give everyone.

Few would challenge the contention that the guilty have Fourth Amendment rights in some form. They do. However, to the extent that privacy in one's "person[ ], houses, papers and effects" is a substantive right that is intimately connected to the individual and how he or she is using that right, the guilty seem undeserving, even unworthy, of the privacy they have abused, much like the hypothetical person who uses a speech to incite a riot.[20]

This Article challenges the prevailing discourse about the Fourth Amendment. That discourse compels a choice between procedure and substance in interpreting the right to be free from unreasonable searches. I examine the importance of both the procedural and the substantive features of the Fourth Amendment.

The dominant and purely procedural model of the Fourth Amendment fails to capture the substantive significance of the Amendment and hence relegates innocence to the status of an irrelevancy. An alternative and recently emerging substantive model of the Fourth Amendment approaches innocence as the only factor worth considering. This model fails to answer the procedural command of the Fourth Amendment. Thus, neither model recognizes the tension inherent in the Amendment, and each misses half of its dual significance.

Supreme Court jurisprudence has done little to resolve this tension. While the Court has adhered in theory to the dominant procedural model in most Fourth Amendment cases, it has also shown an affinity for the alternative model, at times choosing to highlight one or the other feature of the right without acknowledging the tension and what that tension might signify.

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19. Compare Another Search-And-Seizure Loophole, N.Y. Times, Mar. 4, 1995, at 18 (opposing exceptions to the exclusionary rule); Michael Gartner, GOP Clueless on Democracy, USA Today, Mar. 28, 1995, at 13A (criticizing Republican opposition to the exclusionary rule as unwarranted); Gerald Goldstein, Rule Deters Overzealous Law Officers, Dallas Morning News, Apr. 17, 1995, at 11A (opposing the good faith exception to the exclusionary rule); and Cynthia Tucker, As I See It, Bill Of Rights' "Technicalities" Protect Us All, S.F. Chron., Sept. 11, 1995, at 21A (defending limits on police power—however unpopular with citizens frustrated with crime—as preferable to the alternative) with Harold J. Rothwax, Guilty: The Collapse of Criminal Justice 41–42 (1996) (arguing against the exclusionary rule on the basis of text and history); Peter Reinharz, Rule of Law: The Court New York Criminals Love, Wall St. J., Jan. 31, 1996, at A15 (characterizing the exclusionary rule, as developed by liberal judges, as all-purpose protection for criminals); and Roger Simon, Exclusionary Rule Is Aimed at Procedure, Not the Truth, Baltimore Sun, July 6, 1994, at 2A (explaining public disenchantment with the exclusionary rule as a result of its tendency to leave criminals free to continue criminal activity).

20. As I explain below, the guilty do not lose all entitlement to privacy but only that privacy which conceals their wrongdoing. See infra text accompanying notes 112–114.

This Article presents a model of Fourth Amendment freedom from unreasonable searches that integrates the competing qualities of the right and explains why both civil libertarian and crime-control oriented intuitions are valid: the Fourth Amendment is a right of the innocent[21] and of the guilty,[22] but it is not exactly the same right for both.

I call the dominant model of the Fourth Amendment the Formalist model. This model conceives of the prohibition against baseless searches as a means of protecting all persons with respect to whom the police lack adequate suspicion, regardless of the guilt or innocence of the particular searchee. The Formalist position accordingly fails to acknowledge any distinction between the *ex ante* state of knowledge that public officials must have in order to perform a search, on the one hand, and the *ex post* state of affairs that requiring such knowledge is an attempt to approximate, on the other. The major consequence of this approach, for purposes of this discussion, is that it equates violations of the privacy rights of the innocent with violations of those of the guilty.[23]

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21. When I speak of the innocent, I refer to those who are factually innocent of both criminal activity and the concealment of evidence of criminal activity. Although all criminal defendants benefit procedurally from an evidentiary presumption of innocence, that presumption does not mean that such defendants are actually "innocent" until convicted. The presumption ensures that the government meets a high standard of proof, but it does not define the actual culpability of the defendant. Conversely, a person who is convicted of a crime but who is in fact innocent does not become "guilty" at the point of conviction. It is accordingly neither a logical nor a factual contradiction to speak of guilty people who have not (yet or ultimately) been convicted of any offense, on the one hand, and of innocent people who have been convicted, on the other. Factfinders are fallible and therefore do not always know whether a defendant is guilty or innocent. That fallibility, however, does not preclude a theory of benefits and burdens to which those who are actually innocent or guilty are ideally suited. In short, I reject the radical skeptic's view of the universe, in which facts do not exist apart from a factfinder's construction of them. See generally Dennis Patterson, Law and Truth 5–6 (1996) (contrasting such a view—"anti-realism"—under which there are no actual facts in the real world apart from human perception and description, with "realism," an approach that posits a reality that transcends our perceptions and which we might therefore accurately or inaccurately understand and describe).

22. When I speak of the guilty, I refer to those who are guilty of criminal activity *and* of concealment of evidence of that criminal activity. If they are guilty of crime but have no evidence on their person or in their possession, then there is no reason to interfere with their privacy directly by searching them. See infra text accompanying notes 112–114 (discussing the scope of the privacy forfeited by the guilty). I also wish to emphasize that, like Akhil Amar, "I do not here challenge or betray the defendant's legal presumption of innocence and its doctrinal entailments." Amar, supra note 13, at 797 n.144. In other words, I am not suggesting that everyone on whom evidence is found is guilty but instead positing that those who are in fact guilty *and* are in fact concealing evidence (the "guilty") are distinct from those who do not fall into this category.

23. Candidates for the title of Fourth Amendment "Formalist" would include a number of distinguished Supreme Court Justices and scholars who have, respectively, carried out and supported the Supreme Court's development of modern doctrine governing the Fourth Amendment and other criminal procedure protections. Justice Brennan strongly advocated the position that the Fourth Amendment guarantees criminals apprehended through its violation the *right* to have the evidence suppressed (rather than

The alternative Innocence model, by contrast, holds that the purpose of the Fourth Amendment prohibition against unreasonable searches is to protect only those who are innocent and are not concealing evidence of crime from official searches. Under this model, a search that reveals nothing incriminating is very different from a search that uncovers evidence of crime: the latter search, however unreasonable from an *ex ante* perspective, is not that much of a Fourth Amendment harm, though it may literally violate the Fourth Amendment.[24]

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considering the failure to detect the guilty an incidental side effect of a right belonging to the innocent). See United States v. Calandra, 414 U.S. 338, 360 (1974) (Brennan, J., dissenting) (noting that exclusion "'gives to the individual no more than that which the Constitution guarantees him'" (quoting Mapp v. Ohio, 367 U.S. 643, 660 (1961))). He would therefore be likely to agree with the proposition that the guilty and innocent are situated identically with respect to the Fourth Amendment right against unreasonable searches. Justice Marshall might also fall into the category of Formalists. See Tracey Maclin, Justice Thurgood Marshall: Taking the Fourth Amendment Seriously, 77 Cornell L. Rev. 723 (1992) (praising Justice Marshall's resistance to the notion that the interest in controlling criminal activity ought to play a role in construing the Fourth Amendment).

Yale Kamisar would also (and proudly, I expect) join the ranks of Fourth Amendment Formalists who argue that innocence is irrelevant to the right to privacy. See, e.g., Yale Kamisar, Remembering the "Old World" of Criminal Procedure: A Reply to Professor Grano, 23 U. Mich. J.L. Reform 537, 560–69 (1990) (maintaining that the exclusionary rule is necessary to prevent contamination of the judicial process by police illegality and thereby dismissing implicitly the taint of the judicial process occasioned by disregarding evidence of private crime); Yale Kamisar, "Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule, 86 Mich. L. Rev. I, 43 (1987) [hereinafter Kamisar, Comparative Reprehensibility] (dismissing explicitly the argument that failure to punish a criminal as a consequence of suppression taints the judicial conscience).

I do not intend here to provide an exhaustive list of people who inhabit the "Formalist camp," but only to give the reader a concrete sense of the influential role of the Formalist approach to innocence in Fourth Amendment judicial and scholarly discourse. As I refer throughout this Article to Formalists or to a given Formalist, I mean to invoke the approach I describe in the text rather than any specific judge's or scholar's individual way of handling Fourth Amendment questions.

24. Arnold Loewy develops a version of the Innocence model. See Arnold H. Loewy, The Fourth Amendment as a Device for Protecting the Innocent, 81 Mich. L. Rev. 1229, 1229 (1983) (arguing that the Fourth Amendment is designed to protect the innocent alone, and only incidentally provides cover for the concealment of evidence); see also William J. Stuntz, Waiving Rights in Criminal Procedure, 75 Va. L. Rev. 761, 766, 780–82 (1989) (describing the Supreme Court's approach to Fourth Amendment searches as reflecting a desire to protect not all privacy but only "law-abiding privacy," and posing illustrative hypothetical case). Akhil Amar suggests that at common law a strong version of the Innocence model governed:

> Even if a constable had no warrant, and only weak or subjective grounds for believing someone to be a felon or some item to be contraband or stolen goods, the constable could seize the suspected person or thing. The constable acted at his peril. If wrong, he could be held liable in a damage action. But if he merely played a hunch and proved right—if the suspect *was* a felon, or the goods *were* stolen or contraband—this ex post success apparently was a complete defense.

Amar, supra note 13, at 767.

Amar's theory is supported by early American case law: "At common law, any person may at his peril, seize for a forfeiture to the government; and if the government adopt his seizure, and the property is condemned, he will be completely justified . . . ." Gelston v.

In interpreting the Fourth Amendment, I propose what I call the *Innocence plus Targeting model.* This model contends that the Fourth Amendment takes account of two distinct types of harm. The first harm, the "privacy harm," is the substantive deprivation of privacy that is suffered when an individual's private space is scrutinized by the government. The second harm, the targeting harm, is the procedural indignity that is suffered when the government singles out an individual for a privacy invasion without a sufficient evidentiary foundation.

Under the Innocence plus Targeting model, the core purpose of the Fourth Amendment prohibition against unreasonable searches is to prevent searches of innocent people who are concealing nothing while, to the extent possible, preserving the feasibility of searches of guilty people concealing evidence of crime. From the standpoint of core Fourth Amendment values, then, when an unreasonable search occurs, only the *innocent* victim experiences a substantive wrong, the privacy harm.

What distinguishes the Innocence plus Targeting model from the Innocence model is that the former identifies an additional, secondary purpose to the prohibition against unreasonable searches: treating the individual fairly and not utilizing available discretion to target her for unfavorable treatment without a legitimate basis. From the perspective of this "targeting" concern, anyone who is singled out and searched without adequate pre-search justification is harmed, regardless of his guilt or innocence. Like the Formalist model, the Innocence plus Targeting approach recognizes all unreasonable searches as creating Fourth Amendment harms. The Innocence model is incomplete because it neglects the harm that stems entirely from government targeting rather than from individual entitlement. To distinguish this harm from the privacy harm, which is unique to innocent people, I refer to it as the "targeting harm."

A model that takes account of both harms achieves a necessary synthesis between the focus of Formalists—governmental culpability—and the focus of Innocence model proponents—innocent-individual loss of privacy. It demonstrates how both of these constitute actual, albeit different, injuries to the individual.

In elaborating the Innocence plus Targeting model, I draw on constitutional text, history, doctrine, and moral reasoning.[25] Because the

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Hoyt, 16 U.S. (3 Wheat.) 246, 310 (1818) (Story, J.) (quoted in Amar, supra note 14, at 767 n.30). It is also borne out by at least one English common law treatise:

> And where a Man arrests another, who is actually guilty of the Crime for which he is arrested, it seems, That he needs not in justifying it, set forth any special Cause of his Suspicion, but may say in general, that the Party feloniously did such a Fact, for which he arrested him.

2 William Hawkins, A Treatise of the Pleas of the Crown 77 (Professional Books Ltd. 1973) (1721) (footnote omitted) (quoted in Amar, supra note 14, at 767 n.30).

25. Cf. Philip Bobbitt, Constitutional Interpretation 12–13 (1991) (identifying, *inter alia,* the historical, textual, doctrinal, ethical, and prudential modalities of constitutional law); Richard H. Fallon, Jr., A Constructivist Coherence Theory of Constitutional

Fourth Amendment contains the inherently open-ended term "unreasonable," the moral inquiry assumes a central role in my theory. The inquiry proceeds through an analysis of several related hypothetical cases that invite the reader to consult her intuitions about privacy and justice.[26]

Part I of this Article examines in detail the Formalist and Innocence models of the Fourth Amendment freedom from unreasonable searches. Part II offers the Innocence plus Targeting model as an alternative conception of the right at issue. It presents the strengths of the Innocence plus Targeting model, provides analogies to other areas of the law, and explains why the privacy right can be forfeited while the anti-targeting right ought to be inalienable. Part III advances a critical evaluation of existing doctrine and its tendency to confound the privacy and targeting harms and thereby obscure the meaning of the Fourth Amendment. Finally, Part IV examines some of the consequences of the Innocence plus Targeting model for practical Fourth Amendment problems. The Innocence plus Targeting model does not resolve definitively the controversial question whether the Fourth Amendment exclusionary rule ought to be retained.[27] It does, however, offer a clearer picture than competing

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Interpretation, 100 Harv. L. Rev. 1189, 1189–91 (1987) (developing a similar typology of constitutional legal argument).

26. See generally Ronald Dworkin, Life's Dominion 16 (1993) (asking the reader to consult her intuitions about whether Frankenstein's Monster would have had legally cognizable interests prior to Dr. Frankenstein's throwing the switch and analogizing to status of a fetus); Laurence H. Tribe & Michael C. Dorf, On Reading the Constitution 112–17 (1991) (describing method as standard part of law school instruction and alternatively as common law method).

27. The exclusionary rule continues to have its defenders. See, e.g., Yale Kamisar, Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?, 16 Creighton L. Rev. 565 (1983) (defending the exclusionary rule as following necessarily from Fourth Amendment principles rather than relying primarily on the rule's efficacy as a deterrent of police misconduct); Tracey Maclin, When the Cure for the Fourth Amendment Is Worse than the Disease, 68 S. Cal. L. Rev. 1 (1994) (critiquing Amar, supra note 13); Carol S. Steiker, Second Thoughts About First Principles, 107 Harv. L. Rev. 820 (1994) (defending the exclusionary rule as the only reliable vehicle for enforcing compliance with the Fourth Amendment, given the modern scope of the criminal justice system). Its detractors, too, continue to voice their opinions. See, e.g., Amar, supra note 13 (arguing, *inter alia*, that the Supreme Court's Fourth Amendment doctrine flies in the face of the Amendment's text and history and that the Court's current requirements—probable cause, warrant, exclusion—are accordingly misconceived and should be replaced by a reasonableness standard coupled with a civil remedy for victims); Randy E. Barnett, Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice, 32 Emory L.J. 937 (1983) (defending restitution as superior alternative to exclusion for victims of police misconduct); Richard A. Posner, Excessive Sanctions for Governmental Misconduct in Criminal Cases, 57 Wash. L. Rev. 635, 638–41 (1982) (arguing that from economic standpoint, exclusionary rule produces deadweight loss by suppressing evidence and creates too much deterrence by imposing a cost on government that exceeds the social cost of police misconduct). Finally, there are those interested in a compromise position in which some but not all evidence found as a consequence of illegal activity must be suppressed. See, e.g., Kaplan, supra note 3, at 1046–49 (advocating application of the exclusionary rule to trials for all but the most serious criminal offenses); Thomas & Pollack, supra note 13 (arguing for severing the

models of what is at stake in attempting to answer this and other questions.[28]

I. FORMALIST AND INNOCENCE MODELS OF THE FOURTH AMENDMENT

This Part's first section describes the Formalist model of the Fourth Amendment right of privacy. It first develops a series of hypothetical police searches to critique the model. These scenarios illustrate why a theory that fails to take into account the behavior of the individual rights-holder in evaluating her claim of privacy is incomplete and counterintuitive. To bolster the arguments elaborated through the search scenarios, the section then develops a set of hypothetical cases in two areas outside of criminal procedure: substantive criminal law and torts.

The second section describes the Innocence model, the current theoretical alternative to Formalism. Through further discussion and elaboration of the earlier hypothetical search scenarios, this section defends the Innocence model. It then examines the relationship between the doctrine of First Amendment overbreadth and the use of the exclusionary rule under an Innocence model approach. Section B concludes by demonstrating that the history of the Fourth Amendment is consistent with the Innocence model.

A. *Fourth Amendment Formalism*

Formalism represents the leading school of thought about the Fourth Amendment. This model is not characterized by any distinct approach to the quantum of evidence or the state interest that is necessary as a condition for a legal investigation. It is, instead, characterized by its refusal to identify or articulate any continuum of privacy entitlement that turns on the conduct of the claimant. For the Formalist, the privacy right is defined *solely* by reference to the government's state of knowledge and justification prior to a search.[29] If, for example, the Fourth Amend-

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determination that the Fourth Amendment has been violated from the decision to impose exclusion as a remedy in a particular case).

28. I address the question of exclusion throughout this Article, because its character as either part of the Constitution or as one possible remedy for the violation of the Fourth Amendment implicates both the content of Fourth Amendment law and remedies questions.

29. In Hohfeldian terms, we might say that for the Formalist, the key feature of the Fourth Amendment is the duty it places on the government, and individual Fourth Amendment privacy rights arise entirely as correlatives of the government's duties. See Wesley N. Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning 35–37 (Walter W. Cook ed., 1964) (describing the relation between rights and duties). But cf. Henry P. Monaghan, Federal Statutory Review Under Section 1983 and the APA, 91 Colum. L. Rev. 233, 236–41, 245–46, 257–60 (1991) (criticizing one Justice's appeal to the Hohfeldian paradigm in attempting to decide when a petitioner who would have benefitted from governmental compliance with a regulation ought to be able to sue the government for its failure to comply, a question better resolved by resort to the distinction between intended and incidental beneficiaries of a governmental duty).

ment requires that a police officer have probable cause and a warrant to perform a search, then the individual has the right to privacy against state searches to the extent that a police officer lacks either one. The behavior of the individual—her guilt or innocence, her use of putatively "private" space—is irrelevant. Indeed, anything that lies outside the scope of the state's "mens rea," or state of mind, in performing a search is immaterial to the privacy entitlement of the person searched.

Whether the Fourth Amendment right is defined by original intent, textual reference, or doctrinal development, any violation of the right is a constitutional infringement that constitutes a coguizable harm. The set of parties injured by unreasonable searches thus consists of all persons searched without the appropriate level of pre-search knowledge on the part of the relevant public official. Accordingly, when the public official has the requisite prior knowledge, there is no violation of the right of privacy and no constitutional harm. Focusing as it does solely on governmental conduct, the Formalist model lacks a vision of the ideal Fourth Amendment beneficiary, a vision that would permit the Formalist to identify the costs and unintended benefits of violating the letter of the law in a given case.

Formalists assert that the purpose of the Fourth Amendment is to prevent governmental overreaching so that every individual, regardless of what she has done, may feel security and freedom from governmental intrusion.[30] It is, of course, not *per se* formalistic to focus upon the importance of governmental compliance with the law.[31] In explaining the meaning of "overreaching," however, it is necessary to articulate some rationale for the contours of the right that explains why the government's acquisition of something like "probable cause" does and ought to define the difference between the legal and the illegal search.

The Fourth Amendment privacy right does not place an absolute bar on government searches. The limits placed on the right announce a competing value that will not be completely subordinated to individual privacy. This competing value, efficacious criminal investigation, con-

30. See, e.g., Anthony G. Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 367 (1974) (explaining that from the perspective of the Amendment as "a regulation of governmental conduct," the Fourth Amendment is "essentially a regulatory canon requiring government to order its law enforcement procedures in a fashion that keeps us collectively secure in our persons, houses, papers and effects, against unreasonable searches and seizures"). Amsterdam argues in favor of this regulatory conception, asserting that "the fourth amendment may require the police to promulgate and observe written rules governing certain aspects of their activities" and that although one could explain such a requirement in terms of safeguarding individuals' particular spheres of Fourth Amendment rights, "it would find a firmer footing in the . . . conception of the amendment as a general command to government to respect the collective security of the people in their persons, houses, papers and effects, against unreasonable searches and seizures." Id. at 372.

31. Indeed, the targeting harm that I describe below, see infra notes 88–97 and accompanying text, turns entirely on governmental culpability and not at all on an individual's private conduct.

cerns ferreting out[32] actual criminals and actual evidence of crime so that the state may punish the perpetrators. The government derives no benefit from performing a search "upon probable cause" that fails to further the process of bringing a criminal to justice. Conversely, in the individual case where a search must be foregone because it cannot be justified by pre-search evidence, the goal is not to provide privacy to all and only those individuals about whom the police have no evidentiary basis for suspicion. The compromise between absolute privacy and absolute governmental authority to search that is apparent in the Fourth Amendment reflects instead a value placed on the privacy associated with those about whom there is no cause for suspicion (those who seem innocent) and a coordinate value placed on the power of the government to investigate those about whom there is cause for suspicion (those who appear guilty).

The failure of the Formalist model to link the limits of Fourth Amendment privacy with the criminal activities that generate these limits makes the model conceptually unsatisfying. Put differently, the model fails to explain some general intuitions about privacy and law enforcement. To illustrate these intuitions (or perhaps provoke them in the reader), I will describe a series of hypothetical cases, accompanied by the approach the Formalist model would take to each of them.

1. *Paradigm Cases to Question Formalism.* — Consider the following cases. *A* and *B* each separately commits the crime of murder against persons similarly situated with respect to *A* and *B*. After committing their crimes, *A* and *B* drag their respective victims home in garbage bags and hide the bodies in foyer closets, near the doors to their houses. *A*, however, does one thing differently from *B*. *A* sprays the leading brand of room deodorizer near the body every evening and thereby manages to disguise the smell of the decaying corpse. *B* uses a cheaper but less effective room deodorizer, and the smell of the decaying corpse wafts through the house and beyond.

A police officer patrolling the neighborhood smells the odor emanating from *B*'s house as she walks by one evening. She immediately contacts the magistrate on call with a cellular phone and obtains a telephonic search warrant via her cellular facsimile machine. The warrant is predicated on probable cause, provided by the police officer, to believe that the victim of a homicide is concealed in the home of *B*. The officer knocks on *B*'s door and announces her intentions. Upon *B*'s letting her into the house, the officer steps inside, opens the foyer closet and sees the corpse. *B*'s fingerprints are ultimately found to be all over the body; the physical evidence is overwhelming.

While all this is happening to *B*, *A* feels confident that his crime will never be discovered, because he sprayed the more effective room deodorizer. However, he turns out to be wrong. As a different police officer

32. Law enforcement officers are said to be "engaged in the often competitive enterprise of ferreting out crime." Arizona v. Evans, 115 S. Ct. 1185, 1193 (1995).

walks by *A*'s house, she decides that she would like to look around inside. She is not exactly sure why, but she has a bad feeling about *A*. He wears his hair in a ponytail, and he has a bumper sticker on his car that says "Pro-life? Then act like it!" She does not like this fellow, and she is going to have a look around.

She knocks on the door. *A* opens it and asks what the problem is. She walks past him and begins her search, opening the foyer closet door. Upon seeing the corpse, she stops, shocked, and proceeds to arrest *A*. The evidence in *A*'s foyer closet overwhelmingly proves that he, like *B*, is guilty of murder.

Consider the similarities and differences between *A* and *B* from their own perspective. Each committed murder. Each used his private space to conceal evidence of murder. These are the similarities. *A*, however, sprayed an effective room deodorizer around his victim. *B* sprayed an ineffective room deodorizer around his. *That* is the difference. It is true that from the perspective of a police officer walking by the house prior to performing a search, the distinct smell meant that there was a major difference between these two individuals: probable cause to believe *B* but not *A* was concealing evidence of murder. Therefore, the first officer behaved properly with respect to *B*, and the second officer behaved culpably with respect to *A*.

But what did *B* do to deserve less privacy than *A*? Spraying a less effective room deodorizer is not a morally relevant act. Both *A* and *B* attempted to conceal evidence of their wrongdoing by hiding bodies and by spraying room deodorizers. These are the morally relevant acts, and they do not distinguish between the two men.[33] The difference between

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33. The two alternative ways of conceptualizing the difference between *A* and *B*—"the same for purposes of entitlement" versus "completely different for purposes of the government's authority"—correspond roughly with Charles Nesson's alternative characterizations of jury verdicts. See Charles R. Nesson, The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts, 98 Harv. L. Rev. 1357 (1985). The finding of guilt in a criminal trial, explains Nesson, can carry the meaning that the defendant did the criminal act and will pay the penalty. Alternatively, the verdict can carry the meaning that corresponds with the government's authority by emphasizing that a person will be convicted and punished only if the evidence enables proof beyond a reasonable doubt. The first characterization—the legal rule—will encourage law-abiding behavior. The second—the proof rule—will encourage action that will avoid successful proof of guilt. The purpose of the criminal law will be undermined if the second characterization comes to represent society's view of the meaning of verdicts. See id. at 1357–63. By analogy, the primary purpose of prohibiting searches where an officer lacks evidence of wrongdoing is to protect the privacy of law-abiding individuals. The rule that an officer must obtain probable cause before searching, for example, is a proof rule in the service of a legal rule about the security of law-abiding citizens. To place an emphasis on this proof rule and to say, accordingly, that *A* is entitled to privacy because the officer lacks proof of wrongdoing, is to miss the primary meaning of the right against unreasonable searches and to transform lawlessness accompanied by effective concealment into a state of legal entitlement.

Meir Dan-Cohen similarly conceptualizes the divide between what we require of the police and what we hope these requirements will provide in the way of benefits to the general public. See Meir Dan-Cohen, Decision Rules and Conduct Rules: On Acoustic

them is that *A* was better at the concealment. Under any moral theory of an individual's right to privacy in his closet, *B* was just as entitled or unentitled to the continued exercise of the right as *A*. Judging from the actual behavior of *A* and *B* rather than from the information obtained about their conduct by the police officers prior to their searches, there is no material difference between the two individuals searched.

The Formalist would deny this equivalence. For the Formalist,[34] *A* had a right to privacy, and *B* did not, because the officer lacked probable cause to search *A* but had probable cause to search *B*. The officer therefore harmed *A* but not *B*, and *A* but not *B* experienced the violation of a right that had in no way been forfeited or abused. Under the Formalist model, there is all the difference in the world between *A* and *B*.

Now add a third party to the hypothetical case. *C* has the misfortune of smelling like a decomposing corpse. He uses a personal deodorant and room deodorizer to disguise the smell, but they are the same brand as the room deodorizer used by *B* and they are not very effective. As a result of the smell that consequently emerges from *C*'s home, a passing police officer becomes alarmed and acquires a search warrant in the same manner as the officer who searched *B*. After entering *C*'s house, the officer first opens the foyer closet but finds only one item, *C*'s pornographic videotape, adjudicated not to be obscene in the relevant community. The officer then proceeds to the main part of the house but realizes as she does so that the smell grows fainter when she moves away from *C* and stronger when she approaches *C*. She asks *C* for an explana-

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Separation in Criminal Law, 97 Harv. L. Rev. 625, 627 (1984) (analyzing the relationship and discontinuity between "conduct rules," rules that delineate prohibited conduct, and "decision rules," rules that direct the nature and scope of governmental regulation of those who violate the conduct rules). In the cases of both the privacy right and the criminal law, there is not a precise fit between the underlying purpose and the manner in which that purpose is effectuated. On the theory that *A* and *B* are entitled to the same treatment, innocent people are supposed to feel secure as long as they conform their behavior to the law; guilty people are accordingly supposed to feel insecure in the privacy that they used to conceal wrongdoing, because like the criminal whose conduct is deserving of punishment (under the theory of the "conduct rule"), they have forfeited the entitlement to be left alone by the government. Yet the government must perform only reasonable searches (those that are justified from the perspective of the rules governing public officials). Therefore, those who do nothing wrong but attract police attention through innocent but suspicious-looking behavior will feel insecure, and criminals who are effective at concealing all evidence of wrongdoing will feel secure. Similarly, the criminal who is either willing to "do the time" as a tax on otherwise personally desirable behavior, or to prevent the government from learning of his criminal act and from acquiring proof beyond a reasonable doubt, defies the purpose of the criminal law. In the context of both the Fourth Amendment and substantive criminal law, however, the rules governing the state are designed to control crime and protect the innocent, rather than simply to control evident crime or to protect the apparently innocent.

34. The following discussion assumes that the Formalist believes that probable cause and a warrant are required for the search of a home. One can, however, substitute readily for probable cause and a warrant whatever a particular Formalist considers the requirements for a valid home search.

tion, and he promptly produces a letter from his doctor explaining his "dead-body odor" condition. The officer chuckles and then apologizes to *C* and leaves his house.

If one had to classify the conduct of the officers in the three cases, one would probably say that the officer who searched *A*'s home acted culpably in a way that the other two officers did not. Shifting our attention from the officers to the people searched, let us consider how we might classify the three searchees, *A*, *B*, and *C*. My intuitions (and I suspect most people's) lead to the conclusion that *C* is less like either *A* or *B* than *A* and *B* are like each other. *C*, unlike *A* and *B*, has committed no offense and has concealed no evidence of crime. *C*, unlike *A* and *B*, has in no way abused his right of privacy with respect to his closet.

The Formalist, however, will say that *C* and *B* are alike and that *A* is different. In the cases of both *C* and *B*, a police officer searched a person's home on probable cause and with a warrant. In neither case did the officer violate the Fourth Amendment. Therefore, in neither case was there a Fourth Amendment harm. By contrast, the police officer violated *A*'s right of privacy guaranteed by the Fourth Amendment. *A* is the only victim of the three. The intuition that *C* (the odoriferous one) deserved more privacy than *B*, even though there was probable cause in both cases, and the intuition that *C* deserved more privacy than *A* (the one who sprayed the effective deodorizer), even though it is *A* and not *C* who was searched without probable cause, are completely unacknowledged under the Formalist model.

Why do many of us have these intuitions about guilt, the concealment of evidence, and the Fourth Amendment right of privacy that conflict with the Formalist model and with the doctrinal requirements of the Fourth Amendment? Despite any discomfort that we might have with the result, most of us would still agree that the Formalist's reaction to the hypothetical cases coincides with the Fourth Amendment's specifications. Yet many among us would be (perhaps secretly) glad that *A* was searched and discovered to be a murderer, and most would also be unhappy that *C* was searched.

If we could avoid the precedent inevitably set by condoning the search of *A*, given the lack of *ex ante* information indicating that he was concealing anything incriminating, or the precedent inevitably set by requiring the police officer to iguore the sort of smell emerging from *C*'s home, we might happily permit *A* to be searched and *C* to be ignored *in these particular cases.*

Our potential comfort with the search of *A* and discomfort with the search of *C*, moreover, do not stem from some sentimental infatuation with the innocent, wholly disconnected from Fourth Amendment values. Instead, the intuitions behind this willingness conform to at least one set of Fourth Amendment values better than a strict and unquestioning adherence to the literal requirements of that Amendment.

The Fourth Amendment tells us that searches must not be performed unless they are "reasonable." To be reasonable, a search must generally be justified by the prior acquisition of some quantum of evidence that makes it likely that the search will uncover further evidence of wrongdoing. It follows that the Fourth Amendment requirement that searches be reasonable is in part an attempt to maximize the number of searches that are performed against people concealing evidence while minimizing the number of searches conducted against persons concealing nothing.

The search that discloses evidence is, in other words, the "ideal" search under the Fourth Amendment, and the search that discloses nothing is the "worst case" search against which the prohibition of unreasonable searches is designed to gnard. Therefore, when the officer in our hypothetical case searched *A*, she performed the "ideal" search under the Fourth Amendment, the kind of search that "reasonableness" or "probable cause" is supposed to maximize.

The problem with the search of *A* was therefore not a problem with this search but with the risk created by the *ex ante* state of mind of the police officer performing the search. Lacking the requisite level of justified suspicion, the willingness to perform *this* search will tend to result in many searches of innocent persons concealing nothing; it will tend to maximize the "worst case" search, which will be most of the searches performed without *ex ante* justification.

Conversely, the search of *C* (the odoriferous one) is the "worst case" search from an *ex post* perspective. It invades an innocent person's privacy without furthering the goals of criminal law enforcement.[35] *C* suffered an invasion of his private space and the accompanying insecurity and embarrassment against which the Fourth Amendment is designed to protect. In addition, no evidence was discovered.

In balancing privacy against the need for effective law enforcement, a balance implicit in a power to search that is constrained by pre-search knowledge of crime on the part of the state, the search of *C* is an unambiguous harm. Nonetheless, there is no violation of the letter of the Fourth Amendment: requiring an officer to forego the search of *C*, given the information that the officer had before entering *C*'s home, would result in neglect of the officer's responsibilities—responsibilities that are recognized as legitimate by the Fourth Amendment's failure to adopt an

35. Of course, the search of an innocent person who is suspected of crime will sometimes assist the police in locating the true offender by eliminating one suspect, just as a preliminary search of one location can eliminate or confirm police suspicions and result in their avoiding unproductive searches and pursuing only productive searches. Cf. Murray v. United States, 487 U.S. 533, 542–43 (1988) (holding that where there is an illegal (warrantless) preliminary search of a location and a subsequent search of the same location pursuant to a warrant, the fruits of the latter search must generally be suppressed where the initial illegal search narrowed down the warrants that would be sought by eliminating suspects and, accordingly, places to be searched).

absolute prohibition against searches. In other words, the likelihood of encountering evidence in *C*'s case is sufficiently high, *ex ante*, that requiring the officer not to search *C*'s home would reduce the number of ideal searches by too great a number.

The paradigm cases of *A*, *B*, and *C* teach us that there is tension inherent in the Fourth Amendment between the rule and its applications. On the one hand, the requirement that searches be reasonable maximizes desired outcomes over time. On the other hand, there are specific applications of the rule that are themselves undesirable when considered against the purpose of the rule. The Formalist's failure to acknowledge this tension tends to undermine respect for the Fourth Amendment and may account for public disenchantment with this portion of the Bill of Rights, a portion that sometimes makes a murderer's home his castle. Recognition of this tension—that the search of *A* is basically beneficial and the search of *C* basically unfortunate—would be an important step in restoring moral coherence to the Fourth Amendment.[36]

2. *Analogies from Substantive Criminal Law and Torts.* — A brief survey of some paradigm cases from outside the criminal procedure context will help illustrate the tension between the Fourth Amendment rule and its applications. Consider first a hypothetical example from substantive criminal law. Imagine that Jane Doe takes a registered firearm from her gun rack, walks over to the bedroom window of her fifth-story apartment, closes her eyes, and fires in a downward direction toward the crowded street below. Imagine further that the bullet fired from the gun hits *P*. *P*, as it turns out, was holding a gun to the head of the President of the United States and was himself about to shoot his target. Jane Doe's shot, however, prevents this assassination plan from coming to fruition and saves the President's life by killing *P*.

Based upon her behavior (from *her* point of view), we would certainly regard Jane Doe as either a criminal[37] or dangerously mentally ill.

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36. To the extent that one does not consider crime control an important concern in interpreting the Fourth Amendment, one would likely disagree with the positions articulated here (both that the search of *A* is basically good and that the failure to say so compromises the moral coherence of the Fourth Amendment). This Article assumes that crime control is important (in part because the need to control crime is implicitly acknowledged in the Fourth Amendment's prohibition against only *unreasonable* rather than *all* searches) and therefore finds unsatisfactory any theory of the Fourth Amendment that takes no account of this interest in assessing the quality of *A*'s Fourth Amendment claims.

37. The Model Penal Code says that for a justification defense to apply, the act to be justified must be one which "the actor believes to be necessary to avoid a harm to himself or to another." Model Penal Code § 3.05 (1985). The defense of "protection of another" accordingly requires a corresponding belief in the necessity of intervention. Id. Most states' criminal codes apply an objective "reasonable belief" test but otherwise track the Model Penal Code. See Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law § 5.8, at 463 (2d ed. 1986). Therefore, one must be aware of the facts manifesting the necessity of one's action in order to believe (subjectively or reasonably) that such action was necessary.

Either way, she probably should be removed from free society, through either incarceration or civil commitment.[38] *P*, however, the victim of Jane Doe's shooting, is not in a very good position to complain about being shot (and not just because he is now dead).

P's actions made killing him at that moment a justifiable act. If Jane Doe had known the facts, then her shooting *P* deliberately would have been blameless. In legal terms, she would have committed justifiable homicide in defense of another. Jane's behavior, considered from her perspective, is wrong only because shooting randomly out a window into the street will rarely turn out to accomplish a positive result. It will generally create a significant risk that someone will be hit, and when that risk is realized, the result will almost always be injury or death that is unjustified, even considered *ex post*. The harm in her act, in other words, lies in the risk that her willingness to shoot into the street poses to people other than *P*, people who should not be shot.

In the abstract, then, what Jane did is harmful. However, viewed from the perspective of what *P* was actually doing at the time, Jane's act was legally, and arguably morally, justified. Jane Doe is accordingly like the officer who searched *A*'s home. Jane Doe is culpable and her act was likely to cause harm. In this instance, however, her act resulted in a benefit. Indeed, it resulted in the kind of benefit acknowledged and contemplated by the law prohibiting her conduct in the first place, through the creation of an exception to the prohibition when this outcome is intended *ex ante* by the actor.

Turn now from criminal law to torts for an additional illustration. Probable cause or Fourth Amendment reasonableness may be compared usefully to the principle of unreasonable risk in the law of negligence.[39] Since the decision in *Palsgraf v. Long Island R.R.*, the modern law of negligence has required a plaintiff to prove the following: that the defendant acted in a way that created a foreseeable risk of injury to the plaintiff; that the risk was realized because of this action; and that the plaintiff was consequently injured.[40] Of course, just about every risk is foreseeable at some level, and no activity (or inactivity) is risk-free. To be negligent, however, is to create an unreasonably high risk of injury, with reasonable-

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Because Jane Doe was unaware of the facts that necessitated her action, the homicide justification of "protection of another" is unavailable to her.

38. See generally Sherry F. Colb, Freedom from Incarceration: Why Is This Right Different from All Other Rights?, 69 N.Y.U. L. Rev. 781, 824 (noting that "there is a compelling interest in protecting citizens from violence and the threat of violence").

39. As Akhil Amar observes, the Fourth Amendment's "global command that all government searches and seizures be reasonable sounds not in criminal law, but in constitutional tort law." Amar, supra note 13, at 758. Though Amar makes this observation as part of an argument that the Fourth Amendment is not primarily concerned with criminal law enforcement, my appeal to tort law is premised not on this argument but instead on the analogous structure of both the mental state and injury components of negligence and the Fourth Amendment prohibition against unreasonable searches.

40. 162 N.E. 99, 99–100 (N.Y. 1928).

ness contingent on a balancing of the burden of injuries and their likelihood of occurring against the benefits created by the defendant's actions.[41]

Thus, if a defendant acts in a way that is very likely to injure someone, for example by driving at twice the speed limit, but somehow does not injure anyone and instead saves someone's life by shielding a man lying on a park bench from a flying tree branch that bounces off the speeding car, then the harm sought to be avoided by the negligence rule *was* avoided. This was the "ideal case" envisioned by the negligence rule. In other words, the avoidance of injury is the purpose of the negligence rule, and in this case injury was avoided not in spite of but *because of* the negligent conduct. The conduct was nonetheless negligent—culpable and irresponsible—because it was very likely to lead to injury. Absent actual harm, however, no liability attaches.

The converse of this negligence scenario is the non-negligent actor: the driver who obeys the traffic laws and drives carefully, but nonetheless hits and kills a child on roller skates who suddenly bolts in front of the car from inside an apartment building lobby. Here, the driver is in no way culpable. He has obeyed the rules, which are designed to minimize injury. Yet the outcome in this specific case is contrary to the purposes of negligence law: this is the "worst case," sought to be avoided by constraints around the driver's conduct.

The driver in the first scenario is, in the long run, more likely to cause harm than the driver in the second scenario, and those likelihoods make the first and not the second driver culpable. Yet we are much more displeased by the events in the second scenario than we are by the events in the first scenario, in which the speeding driver saved a life. We experience these reactions, which are in tension with the culpability states of the respective actors, much in the way that we might have been pleased with the search of *A* (the effective deodorizer) and displeased with the search of *C* (the odoriferous man). Our reactions in both cases are guided by the disparity between the odds—which drive the rule—and the unlikely events that actually took place.

The main harm, then, of searches that are unlikely to yield evidence—searches not based on adequate information—is not the low likelihood in the particular case but the consequence of that low likelihood: the invasion of the privacy of innocent persons who are not concealing evidence.[42] As in the law of negligence in torts, the police can be "negli-

41. See United States v. Carroll Towing, 159 F.2d 169, 173 (2d Cir. 1947) (Learned Hand, J.) (explaining that "[p]ossibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B < PL").

42. William Stuntz relies on this mode of reasoning in attempting to make sense of the Supreme Court's approach to waiver in the context of Fourth, Fifth, and Sixth Amendment rights. See Stuntz, supra note 24, at 779–83. Specifically, Stuntz describes the Supreme Court's approach to Fourth Amendment rights as reflecting the view that "the

gent" with no harmful result in terms of privacy—that is the case of *A*—and the police can exercise reasonable care and nonetheless cause injury—that is the case of *C*. This is simply a consequence of our imperfect knowledge of the universe and our imperfect ability to predict when, in the individual case, there will or will not be an injury if people act in a particular way.

This lack of fit between the rule and some specific applications that we see in the negligence area is more pronounced in the context of the Fourth Amendment. This is so because there is no doctrinal vehicle for taking into account the difference between harmful and beneficial results in the particular case as there is in the negligence context (where there is no liability absent harm). Existing remedies for Fourth Amendment violations turn entirely on the culpability of the state actor and not at all on harm. Indeed, in the case of the exclusionary rule, the availability of the remedy *requires* a beneficial result—the obtaining of evidence of crime—and a remedy is unavailable in the worst case scenario in which an innocent person harboring no evidence of criminal conduct is searched.

B. *The Innocence Model*

There is an alternative model of the Fourth Amendment that responds to these intuitions about harm and thus considers *A* (effective deodorizer) and *B* (ineffective deodorizer) to be equally situated with respect to their Fourth Amendment entitlements. This model deems injury to have occurred when and only when the innocent are searched. I will refer to this model as the Innocence model.[43]

Under the Innocence model, the guilty person concealing evidence who is able to avoid detection because of the Fourth Amendment right of privacy is a cost and not an intended beneficiary of that right of privacy. He is a known cost, because in striking a "reasonableness" balance that prohibits many searches, the Fourth Amendment has the inevitable consequence of allowing some criminals to avoid being discovered. Similarly, the search of some innocent people hiding nothing is an inevitable con-

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fourth amendment protects not all privacy but rather law-abiding privacy only." Id. at 780. He illustrates the distinction between the two through a hypothetical case in which an officer searches a closed suitcase without probable cause and the suitcase turns out to be filled with cocaine. Under his analysis:

> It follows that a police officer's decision . . . causes no "fourth amendment injury" to the suitcase's owner . . . . The search does cause some harm cognizable under the fourth amendment, but that harm consists of the diminished security that innocent suitcase owners feel in a world in which police officers are free to open suitcases at will.

Id.

43. See, e.g., Loewy, supra note 24, at 1229 (developing a version of the Innocence model); Stuntz, supra note 24, at 786 (explaining the Supreme Court's Fourth Amendment precedents as reflecting a model that turns on the value of privacy for law-abiding behavior alone).

sequence of striking a balance that permits searches to take place without absolute certainty that something illegal is being concealed. Although the search of *C* is allowed, it nonetheless represents a Fourth Amendment "harm" under this model, and although the search of *A* is not allowed, it nonetheless represents a Fourth Amendment gain. The state of mind of the officer who performs the search of *A*'s home without prior knowledge to justify the search is problematic not in relation to this particular searchee, *A*, but because it is likely eventually to victimize innocent people.

Under the Innocence model, the Fourth Amendment restriction on searches is concerned exclusively with protecting the innocent from invasions of privacy.[44] The requirement of probable cause is simply a rough way of achieving this goal while permitting evidence-gathering to take place. Probable cause is thus an imperfect proxy for ensuring that the official will find evidence concealed on the person or property of any individual searched. If there were some method of ensuring this outcome without requiring the officer to have particular knowledge prior to the search, that method might be equally acceptable. If, for example, officials could search wherever they felt like searching, but some magnetic field—without their knowledge—prevented them from wanting to search in places where there was no evidence, then the lack of probable cause or justification for a search might seem largely irrelevant.[45]

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44. See Loewy, supra note 24, at 1229 (asserting that "the primary purpose of [the Fourth Amendment] is to protect the innocent").

45. Along similar lines, Arnold Loewy describes a hypothetical "divining rod" that would guide the police to perform only productive searches:

> In a Utopian society, each policeman would be equipped with an evidence-detecting divining rod. He would walk up and down the streets and whenever the divining rod detected evidence of crime, it would locate the evidence. First, it would single out the house, then it would point to the room, then the drawer, and finally the evidence itself. Thus, all evidence of crime would be uncovered in the most efficient possible manner, and no innocent person would be subject to a search. In a real society (such as ours), the fourth amendment serves as an imperfect divining rod.

Loewy, supra note 24, at 1244.

I choose the magnetic field metaphor, rather than that of the divining rod, because the police officer who knows the divining rod will lead her to the evidence has not acted "unreasonably," even from her own perspective. By contrast, the police officer who simply searches wherever he pleases (without realizing that the magnetic field will block his will to search places housing no evidence) is still behaving "unreasonably" and therefore resembles the officer in *A*'s hypothetical case above (deodorizing murderer) who is misbehaving and yet does not cause a privacy harm.

Along related lines, a recent student Note observes that advances in computer technology permit us to consider an actual "perfect search" instrument taking the form of a "Net-wide search" that would detect only those computer files the possession of which is illegal, such as digital videos of child pornography. See Michael Adler, Note, Cyberspace, General Searches, and Digital Contraband: The Fourth Amendment and the Net-Wide Search, 105 Yale L.J. 1093, 1093–97 (1996). Adler correctly points out that the Court's jurisprudence of how the Fourth Amendment is triggered would find no fault with such an investigative tool. See id. at 1106–08 (discussing the holdings in United States v. Place, 462

An example of an acceptable search without individualized probable cause occurred in *United States v. Jones*.[46] In that case, postal inspectors discovered that a postal employee was stealing certified checks from the mail. To determine who was committing this offense, they organized a sting operation. The inspectors planted an electronic monitor and certified check inside an envelope that would pass through the post office where the checks had been stolen. The monitor would reveal to the inspectors its own location (and therefore the location of the envelope into which it was placed) at a given time. The hope was that the thief would strike again and steal the planted envelope, thereby revealing himself and his (as well as the envelope's) whereabouts to the postal inspectors.

The United States Court of Appeals for the Fourth Circuit held that the use of this monitoring device did not violate the Fourth Amendment rights of Jones, who was ultimately found with the stolen envelope and arrested.[47] The court held that monitoring the whereabouts of the envelope was not a "search" within the meaning of the Fourth Amendment, because no one had a reasonable expectation of privacy in the whereabouts of the envelope. Therefore, the court reasoned, there was no need for individualized suspicion or probable cause to justify the investigative activity. This reasoning, although consistent with existing doctrine, was not the only available means of disposing of this case—nor was it the best.

The judges in the majority[48] may have felt constrained by Fourth Amendment doctrine: if they had deemed the monitoring a search, it would have followed that the inspectors needed individualized probable cause and a warrant for the investigation to take place. In other words, the judges may have believed that there was no Fourth Amendment violation but may have seen no vehicle for expressing that view other than through a holding that the investigation did not constitute a search at all. What the judges may have failed to recognize in their own belief that the monitoring was legal is that this belief probably derived in part from (1) the fact that the person complaining of the Fourth Amendment violation—Jones—was monitored only because he had stolen the certified check envelope into which the monitor had been placed and (2) the fact

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U.S. 696, 707 (1983) (finding that a dog sniff of luggage does not constitute a search because there is no reasonable expectation of privacy in concealing whether or not one's luggage contains narcotics, the only fact disclosed by the dog sniff) and United States v. Jacobsen, 466 U.S. 109, 123 (1984) (holding that a field test of white powder legally seized does not constitute a search because there is no reasonable expectation of privacy in concealing whether one's white powder is or is not cocaine)).

46. 31 F.3d 1304 (4th Cir. 1994). Although the facts here provide an example of what might be the "perfect search" under a model that takes innocence into account, the court did not decide the case on this theory (which after all is not currently the legal standard for evaluating police activity under the Fourth Amendment).

47. See id. at 1311.

48. Judge Faber wrote the opinion of the court in which Judge Hall joined, and Chief Judge Ervin wrote an opinion concurring in part but dissenting from the determination that the use of the electronic device was not a search. See *Jones*, 31 F.3d at 1316–17 (Ervin, J., concurring in part and dissenting in part).

that the monitoring device was the least invasive and the most precise way to determine who had stolen the envelope.

Even if the court had considered it invasive to detect the location of a particular article of mail, and therefore had held that monitoring an envelope in a person's possession generally *is* a search regulated by the Fourth Amendment, the search of Jones should still be legal because it was based on something *better than* individualized probable cause: the practical guarantee (rather than mere probability) inherent in the investigative vehicle that only the guilty person concealing evidence of crime would be searched, and that only to the extent necessary to discover evidence of the crime.[49]

Without the monitor, the inspectors probably would have lacked probable cause to look through Jones's car.[50] The inspection at issue in this case, however, involved the determination of where the envelope had been taken and would therefore affect only the person who illegally took possession of that envelope and would reveal only where the envelope (which should not have been removed from the mails) was taken. Such precision in the scope of a search is the aim (though better than the reality) of the probable cause requirement.

Had the court decided *Jones* on this alternative ground, it would have upheld an obviously legitimate sting operation without opening the door to monitoring the whereabouts of the private possessions of innocent persons, an unfortunate consequence of holding that placement of a monitor in an envelope does not constitute a search.[51] The Innocence model, in this example, gives coherence to the notion that someone like Jones

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49. Note that there was an outside chance that someone would steal the envelope and then plant it on someone else. This, however, was exceedingly unlikely to occur, given that the envelopes were not marked as containing a monitor.

50. The Postal Inspectors knew only that Jones had been the mail driver on prior occasions when deposited envelopes had disappeared and that on this occasion he had taken longer than usual to balance his truck. See *Jones*, 31 F.3d at 1310.

51. See also United States v. Knotts, 460 U.S. 276, 281 (1983) (police use of electronic tracking device to follow defendants' travel in an automobile to a hidden drug laboratory upheld as constitutional because a person has no reasonable expectation of privacy in his movements over the public streets, which are observable by anyone who wants to look). But see United States v. Karo, 468 U.S. 705, 715–16 (1984) (holding that continuous monitoring of defendant's home for three days by means of an electronic tracking device constituted a search because it revealed "a critical fact about the interior of the premises that the Government is extremely interested in knowing and that it could not otherwise have obtained without a warrant"). The *Jones* court distinguished *Karo* on the grounds that in *Karo*, agents placed the monitoring device on private property, so the surveillance was an intrusion into an item in which Karo had a legitimate privacy interest. Jones, by contrast, had no privacy interest in the stolen envelope. See *Jones*, 31 F.3d at 1310–12. Of course, Jones did have a privacy interest beneath the driver's seat of his car, the place where the monitor was ultimately found. One might plausibly object to the monitoring of someone situated similarly to Jones, if he were innocent. One example might be the government's attachment of monitors to publicly-placed flyers advertising abortions in order to record the whereabouts of people who pick up such flyers. Although the flyer is located originally in a public place and does not belong to the person searched, it

lacks a privacy interest in the location of the stolen mail, and it does so without jeopardizing Jones's legitimate privacy interests or the privacy interests of innocent people who are otherwise similarly situated.

1. *Innocence and Overbreadth.* — In contrast to the unusual facts presented in *Jones*, it usually is impossible for the government to confine searches to the guilty and thereby protect only the innocent. Absent presearch information about a particular individual, it is ordinarily necessary to grant privacy protection to everyone as a means of maximizing the privacy of the innocent. Permitting police to justify their searches by reference to the evidence ultimately discovered would leave the innocent vulnerable to invasions of their privacy.

This is why there is an affirmative case under the Innocence model for allowing the guilty to litigate Fourth Amendment violations, in spite of the undeserving character of such individuals. Such litigation takes the form of the suppression motion, of which only people in whose possession evidence has been discovered may avail themselves.[52]

Under the Innocence model, the criminal defendant who invokes the Fourth Amendment exclusionary rule to suppress incriminating evidence against him is very much like the criminal defendant who invokes the First Amendment overbreadth doctrine to dismiss the prosecution against her.[53] The First Amendment overbreadth doctrine permits a person whose conduct is not itself protected by the First Amendment to avoid prosecution under a law that reaches too broadly and prohibits protected activity along with unprotected activity.[54]

The concurring opinion in *R.A.V. v. City of St. Paul* provides a good illustration of the resemblance between the Fourth Amendment exclusionary rule and First Amendment overbreadth doctrine.[55] In *R.A.V.*, four Justices would have disposed of the criminal defendant's First Amendment claim on overbreadth grounds.[56] A white juvenile with the

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ultimately becomes private property; more importantly, it reveals the private interests and whereabouts of a person who has not engaged in any wrongdoing.

52. See infra Part IV.B.

53. See, e.g., R.A.V. v. City of St. Paul, 505 U.S. 377, 413 (1992) (White, J., concurring) (finding ordinance unconstitutionally overbroad because it criminalizes protected expressive conduct as well as unprotected fighting words); City of Houston v. Hill, 482 U.S. 451, 455, 462–63 (1987) (invalidating Houston ordinance making it illegal to "oppose, molest, or interrupt" a police officer in the performance of his duties because "[t]he Houston ordinance . . . is not limited to fighting words nor even to obscene or opprobrious language, but prohibits speech that 'in any manner . . . interrupt[s]' an officer" (footnotes omitted)); Thornhill v. Alabama, 310 U.S. 88, 97 (1940) (striking down statute prohibiting all forms of picketing, including peaceful picketing, as unconstitutionally overbroad).

54. See Dorf, supra note 6, at 245 (analogizing overbreadth doctrine to Fourth Amendment exclusionary rule).

55. See *R.A.V.*, 505 U.S. at 397 (White, J., concurring).

56. Although the Court itself also struck down the law on First Amendment grounds, it did so on the basis of the law's content discrimination rather than its overbreadth. See id. at 383–86.

initials R.A.V. burned a cross on the lawn of an African-American family. He was prosecuted under a St. Paul, Minnesota criminal ordinance that prohibited hate speech expressing messages that degrade on the basis of specified invidious classifications.[57]

R.A.V. claimed that although cross-burning on a neighbor's property is not itself protected by the First Amendment, the criminal ordinance reached beyond acts of violence and vandalism to speech and symbolic speech that are constitutionally protected. In other words, R.A.V. made the claim that he could not be prosecuted under the Minnesota ordinance because the regulating rule was invalid: other persons whose conduct might not be so regulated were affected by that ordinance. The ordinance violated the free speech of rights-bearing individuals and accordingly had to be invalidated, even though it was being applied here to otherwise regulable conduct, R.A.V.'s cross-burning.[58]

Some might ask, why should there be an overbreadth doctrine in the First Amendment area when those engaging in protected conduct have not themselves been prosecuted? Some might similarly question the litigation of Fourth Amendment rights by the guilty through the exclusionary rule and wonder why the law should restore the defendant's privacy when those deserving of privacy have not been searched in this instance. The conventional answers to the two questions are similar.

Those persons who had planned to express themselves in constitutionally protected ways that were nonetheless prohibited by the St. Paul ordinance might be chilled by the ordinance from doing so but probably would not bother to bring lawsuits to enjoin enforcement of the ordinance against them. They would be more likely simply to refrain from speaking. It is R.A.V. who has an incentive to complain about the potentially unconstitutional applications of the ordinance, because such a complaint might have the effect of preventing his prosecution. Similarly, the defendant in the criminal case who might avoid conviction for his or her crime by challenging the unconstitutional investigative conduct of the government—*A*, for example—has a strong incentive to bring that challenge, a stronger incentive than the innocent (and deserving) persons who generally suffer the violations of their privacy in silence.[59]

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57. See *R.A.V.*, 505 U.S. at 380.

58. See id. at 413 (White, J., concurring) ("Although the ordinance as construed [by the Minnesota courts] reaches categories of speech that are constitutionally unprotected, it also criminalizes a substantial amount of expression that—however repugnant—is shielded by the First Amendment.").

59. At least one set of findings suggests that victims of Fourth Amendment harms do not generally seek civil remedies, and that those who do are ordinarily unsuccessful. Between 1971 and 1986,

> [p]laintiffs have filed an estimated 12,000 *Bivens* actions [i.e., lawsuits against federal officials for violating the Constitution]. In only five cases have the defendants actually paid damages, and it is not known whether any of these involved illegal search and seizure. With respect to suits under 42 U.S.C. § 1983, the [Justice] Department's research discovered "fewer than three dozen reported

The innocent person who is searched without probable cause is unlikely to bring suit under 42 U.S.C. § 1983 to try to recover for the violation of his right to privacy. He probably would not recover very much money, and the lawsuit would be potentially as intrusive as the search, if private items were uncovered in the course of that search. The criminal defendant thus functions as a private attorney general,[60] ever-vigilant in preventing government misconduct that would otherwise eventually harm those the Fourth Amendment was intended to protect. He may be a good surrogate for the real victims, because there is a payoff—albeit a morally ambiguous one from the perspective of society—if he prevails.

2. *Innocence and History.* — We have seen that the Innocence model is generally compatible with current Fourth Amendment doctrine, including the application of the exclusionary rule, even though this latter benefit is unavailable to the innocent who are not in possession of any incriminating evidence. We have also seen that the logic of the Fourth Amendment text and shared normative intuitions provide support for the Innocence model. Now let us examine the history of the Fourth Amendment and assess the fit between the Innocence model and that history.

There appears to be a consensus among historians of the Fourth Amendment that the provision prohibiting unreasonable searches and seizures was designed specifically to prevent the federal government from employing search and seizure devices like the "general warrants" and

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> fourth amendment cases over the past 20 years." The Report identifies two obvious reasons for the failure of civil plaintiffs to enforce the fourth amendment: first, juries sympathize with the police and not with criminals; second, search and seizure activity, however unconstitutional, ordinarily does not cause the kind of actual damages that our tort system compensates. With respect to internal discipline, the Justice Department documents only seven investigations into fourth amendment violations by its agents since 1981; none resulted in the imposition of sanctions. The Department did obtain two criminal convictions for violation of fourth amendment rights, but the defendants were subsequently pardoned by the President.

Donald Dripps, Beyond the Warren Court and Its Conservative Critics: Toward a Unified Theory of Constitutional Criminal Procedure, 23 U. Mich. J.L. Reform 591, 629 (1990) (footnotes omitted) (quoting Office of Legal Policy, U.S. Dep't of Justice, Truth in Criminal Justice Series, Report No. 2, Report to the Attorney General on the Search and Seizure Exclusionary Rule (1986), reprinted in 22 U. Mich. J.L. Reform 573, 630 (1989) (footnote omitted)); see also Richard Posner, Excessive Sanctions for Governmental Misconduct in Criminal Cases, 57 Wash. L. Rev. 635, 638–39 (1982) (noting that losses sustained by improperly searched individuals may in the aggregate be very large, but are "too small to give any one person an incentive to sue" (footnote omitted)).

60. See Amar, supra note 13, at 796 (explaining that on deterrence theory of exclusionary rule, criminal defendant acts as a "kind of private attorney general"); Daniel J. Meltzer, Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General, 88 Colum. L. Rev. 247, 249 (1988) (discussing nature of the private attorney general idea that drives "deterrent remedies" in the area of criminal procedure). But cf. Richard H. Fallon, Jr. et al., Hart & Wechsler's The Federal Courts and the Federal System 191 (4th ed. 1996) (raising questions about legitimacy of judicial remedies to which complaining litigant is concededly not entitled).

"writs of assistance" that were used by agents of the British Crown.[61] The general warrant authorized its holder to " 'seize, take hold and burn . . . books, and things . . . offensive to the state.' "[62] As its name suggests, the general warrant was open-ended as to both the person to be searched and the timing of any seizure.[63] The warrants were valid for the life of the monarch under whose name they were issued.[64] The writ of assistance was a specific form of the general warrant that was used by customs officials to search for smuggled goods. Like the general warrant, the writ also permitted its holder to search anyone during the life of the reigning monarch.[65]

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61. Writs of assistance issued by the Crown were used primarily by British customs agents to search and seize goods on which taxes had not been paid. These warrants conferred the general power to search without the need to justify the search. See Nelson B. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 28–35 (1937). The Fourth Amendment was a direct response to these warrants and was intended to abolish the practice. See Telford Taylor, Two Studies in Constitutional Interpretation 38–41 (1969). John Adams claimed that the "child Independence was born" when James Otis made his argument against the legality of general warrants. Editorial Note to John Adams, Petition of Lechmere, *in* 2 Legal Papers of John Adams 106, 107 (L. Kirvin Wroth & Hiller B. Zobel eds., 1965). Though Otis lost his case, the speech is considered to have had profound political effect on the drafting of the Fourth Amendment. See, e.g., United States v. Ehrlichman, 376 F. Supp. 29, 32 (D.D.C. 1974); see also Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2398 (1995) (O'Connor, J., dissenting) (arguing that blanket searches based on subjective and largely unenforceable individualized suspicion were the evil at which Fourth Amendment was aimed).

Akhil Amar disputes the centrality of the writs of assistance in forming the historical backdrop against which the Fourth Amendment was framed. See Amar, supra note 13, at 772. Tracey Maclin takes a contrary stance. See Maclin, supra note 27, at 14–16 (arguing that historical opposition to writs of assistance provides support for Fourth Amendment warrant requirement). For purposes of this Article, the distinction between general warrants and writs of assistance (and hence between the two approaches outlined in this footnote) is not of great consequence. My discussion focuses on the nonspecific nature of both the general warrants and the writs of assistance, without taking a position on the implications of this history for the legitimacy of the warrant requirement. Moreover, it is clear that warrantless searches based upon a standardless and undisciplined application of police discretion would raise the same problems historically associated with the general warrants and writs of assistance. For a second response to Amar's critique of the warrant requirement (as well as Amar's critique in the same issue of the probable cause requirement and the exclusionary rule), see Steiker, supra note 27, at 820.

62. Potter Stewart, The Road to *Mapp v. Ohio* and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases, 83 Colum. L. Rev. 1365, 1369 (1983) (quoting Jacob W. Landynski, Search and Seizure and the Supreme Court: A Study in Constitutional Interpretation 21 (1966)).

63. See id. (citing Landynski, supra note 62, at 21–22).

64. See id.

65. See id. at 1370. The framers apparently viewed as evil and tyrannical both the substantive goals underlying the warrants and their arbitrary procedural implementation. Censorship of views critical of the government and the unilateral imposition of taxes and other costs on trade contributed to the outrage felt by the English colonists. In the words of James Otis, a prominent colonial-era lawyer in Massachusetts Bay Colony, this was "[t]axation without representation." See Joseph Ricchezza, Are Undocumented Aliens

Although the general warrant and writ of assistance were used in the enforcement of civil rather than criminal laws,[66] their connection to the area of conduct against the government is apparent. The general warrants were used by the British Crown to identify and stop printers from disseminating pamphlets critical of the government.[67] The writs of assistance were used to curb the colonists' practice of smuggling goods and thereby avoiding import taxes and other restrictions on trade.[68] Thus, though the "wrongs" that the government attempted to address were civil rather than criminal, they were also public rather than private. This is the type of harm currently addressed principally by criminal as opposed to tort law.[69] Moreover, the search and seizure accompanying the use of the warrants at that time resemble current forfeiture provisions associated with violations of the criminal law.[70]

The Innocence model is consistent with the need to address the kinds of governmental abuses historically associated with the use of general warrants and writs of assistance in the pursuit of evidence against perpetrators of perceived public wrongs. Under the Innocence model, the essence of what makes a search wrongful is the innocence of the person searched. Since the government can only determine the innocence or guilt of a person, *ex ante,* with particularized evidence, the general war-

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"Persons" Within the Context of the Fourth Amendment?, 5 Geo. Immigr. L.J. 475, 478 n.17 (1991). Other portions of the Constitution were aimed more specifically at addressing the substantive abuses. See, e.g., U.S. Const. amend. I (protecting freedoms of speech and press); id. art. I (establishing representative governing body).

66. See Stewart, supra note 62, at 1370.

67. See id. at 1369.

68. See id. at 1370.

69. As described in one influential text:

> The distinction between them [tort and crime] lies in the interests affected and the remedy afforded by the law. A crime is an offense against the public at large, for which the state, as the representative of the public, will bring proceedings in the form of a criminal prosecution. The purpose of such a proceeding is to protect and vindicate the interests of the public as a whole, by punishing, by eliminating the offender from society, either permanently or for a limited time, by reforming or rehabilitating, by teaching the offender not to repeat the offense, or by deterring others from similar conduct. . . . The civil action for a tort, on the other hand, is commenced and maintained by the injured person, and its primary purpose is to compensate for the damage suffered, at the expense of the wrongdoer.

W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 2, at 7 (5th ed. 1984) (footnotes omitted).

70. See, e.g., Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C., § 1964(a) (1994) ("The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise . . . ."). Convicted violators may also be prohibited from engaging in the same type of enterprise in the future, their investments may be reasonably restricted, or the enterprise may be dissolved (so long as its activities affect interstate commerce, and the rights of innocent third parties with an interest in the enterprise are protected). See id.

rants and writs of assistance were offensive because they increased the likelihood that innocent people who deserved to retain their privacy would be searched. Put differently, the framers of the Fourth Amendment were not opposed to the idea of searches for evidence of wrongdoing. What they rejected was the use of search instruments too blunt to distinguish those deserving of government scrutiny from the large majority of individuals whose privacy should be preserved. With no requirement of reasonableness or probable cause, officials are able to search indiscriminately and are therefore likely to harm innocent people much of the time.

Under the Innocence model, then, what is offensive about unrestrained governmental authority to search is not the discretion itself, but the consequence of such discretion: the inability of innocent and law-abiding individuals to feel secure in the privacy of their persons, houses, papers and effects. The Innocence model thus captures an important part of what was offensive to the framers about the searches and seizures that inspired the creation of the Fourth Amendment.[71]

II. An Alternative to Formalism and Innocence: Innocence Plus Targeting

This Part provides a critical analysis of the Innocence model and concludes that it does not describe fully the values at stake in the prohibition against unreasonable searches. The Part begins with a discussion of two hypothetical scenarios that would be classified as identical under the Innocence model of the Fourth Amendment even though significant theoretical distinctions can be drawn. From these distinctions, the "targeting harm" is identified as the piece missing from the Innocence model's approach. The Innocence plus Targeting model and the utility of adding the targeting component are elaborated through a discussion of Supreme Court cases in the Fourth Amendment area as well as in the employment discrimination context. This Part then defends the Innocence plus Targeting model by returning to the overbreadth analogy and by demonstrating that the Innocence plus Targeting model is most consistent with the historical background of the Fourth Amendment. Finally, the Part discusses the experience of suffering the targeting harm.

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71. I qualify the statement as I do because the Innocence model obviously does not account, nor does it attempt to account, for the opposition to censorship that was also an important aspect of the framers' opposition to the general warrant. If censorship were the only harm, however, then the First Amendment would have constituted an adequate remedy. Cf. Henry P. Monaghan, First Amendment "Due Process," 83 Harv. L. Rev. 518 (1970) (addressing the procedural protection that is a necessary feature of the substantive right of free speech). The Fourth Amendment adds to the substantive right of free speech a substantive right of privacy which, under the Innocence model, is concerned exclusively with maximizing the extent to which the government searches the right (guilty) people, on the implicit assumption that they are searching for evidence of legitimately proscribed activity.

A. *The Missing Piece in the Innocence Model*

The Innocence model, which conceives of the Fourth Amendment as a provision dedicated to protecting the privacy of the innocent, is appealing. The model captures the widely-held intuition that someone like *A* (effective deodorizer) is no more entitled to privacy than someone like *B* (ineffective deodorizer), and that people like *C* (odoriferous one) are casualties of the Fourth Amendment.[72] When judges find it difficult to feel much sympathy for the murderer who was caught because a police officer had a "feeling" but nothing solid justifying the search that uncovered the crime, the Innocence model makes that difficulty coherent and even laudable; furthermore, it does so as a matter of Fourth Amendment values.

The Innocence model does, however, leave a part of the picture unexplained. The state of mind of the public official performing the search does color the nature of a search so that the experience of the search is qualitatively different when the official is motivated by something other than evidence-based suspicion. The guilty searchee is thus not *merely* a surrogate for the innocent in registering his complaints of official wrongdoing.

Consider the following hypothetical case as an illustration. *Z*'s home is searched without probable cause. The search uncovers nothing that is incriminating (though much that is embarrassing). *Y*'s home is searched *with* probable cause, but this search also uncovers nothing incriminating (but again, much that is embarrassing).[73] Both *Z* and *Y* experience undeserved invasions of privacy. Each would have retained his privacy in the ideal Fourth Amendment world, in which all productive searches and no unproductive searches take place. Neither *Z* nor *Y* abused his private space by concealing evidence there. Therefore, each deserved to retain his privacy in that space.

Z (no probable cause), however, has been harmed more than *Y* (probable cause). It is not simply that the officer's conduct with respect to *Z* endangers more innocent people than the officer's conduct with respect to *Y*. That danger—the abstract harm of creating a risk to innocent others—is not an individual injury to *Z* that would distinguish the search of *Z from Z*'s perspective. The additional harm to *Z* is that he is left wondering, "Why me?[74] Why have the police singled me out when they lacked an evidentiary basis? Why didn't they search someone else instead or as well? What gave them the gut feeling that I am a criminal?"

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72. See supra Part I.A.1.

73. *Y*'s case is a less specific version of *C*'s case, described supra Part I.A.I.

74. Cf. Laurence H. Tribe, American Constitutional Law § 9-6, at 605-07 (2d ed. 1988) (considering the harm of arbitrarily sacrificing the few to the many in the context of takings clause jurisprudence, and alluding specifically to the question "Why me?" that is posed by Fifth Amendment takings "from the perspective of the individual harmed").

The harm that *Z* but not *Y* experiences is the *targeting harm*, the harm of being singled out from others through an exercise of official discretion that is not based on an adequate evidentiary foundation. When the police decide to search *Z*, they are doing so because they find something about *Z* suspicious. They are not searching everyone, nor are they performing a random search of every nth person. Moreover, they are not acting on an adequate evidentiary basis.[75] They are instead exercising discretion illegitimately to focus upon *Z*. It is this unfounded focus that defines the targeting harm.

Unlike *Z*, *Y* has been singled out because of evidence—perhaps a photograph of a perpetrator who looks almost exactly like *Y*. The police are not out to get *Y*; they have acted reasonably toward him, but have nonetheless needlessly (in retrospect) disturbed his privacy. *Y* has therefore suffered only a privacy harm within the meaning of the Fourth Amendment, while *Z* has experienced both a privacy harm and a targeting harm. There are thus two distinct Fourth Amendment harms that occur when an innocent person is searched without the requisite level of pre-search evidence.

The Innocence plus Targeting model helps to identify the reason that some unreasonable searches appear "bad" and others still worse, even when the doctrine fails to address the underlying intuitions that drive these judgments. The model holds that some unreasonable searches implicate only one of the two Fourth Amendment search harms while others implicate both.

The leading Supreme Court cases addressing the issues surrounding a police officer's stop of a private vehicle elucidate the nature of the targeting harm as a significant component of the Fourth Amendment. In *Terry v. Ohio*, the Supreme Court held that persons who appear to be engaged in criminal activity may be stopped briefly by police without a warrant or probable cause, based on reasonable suspicion.[76] After *Terry* was decided, a number of other cases arose that tested the boundaries of the "stop and frisk" doctrine as applied to stops of motor vehicles in transit. In *Delaware v. Prouse*, an officer had some spare time and decided to spend it by stopping the respondent's vehicle and "check[ing] the driver's license and registration."[77] The Supreme Court held that the officer violated the Fourth Amendment, because he lacked reasonable suspicion to justify the stop.[78] This seemed to follow from a straightforward

75. Doctrinally, this situation would mean that they lack probable cause (or a warrant througb which a neutral magistrate has recognized that there is probable cause). However, if the standard were higher or lower, that would change not the nature of the targeting harm, but only the point at which it would occur.

76. 392 U.S. 1, 27 (1968) (holding that probable cause to arrest is not required for a police officer to subject to a limited stop an individual the officer reasonably believes may be engaged in illegal activity). The brief stops authorized by this case have come to be known as "Terry stops."

77. 440 U.S. 648, 650 (1979).

78. See id. at 663.

application of *Terry*, but the Court's specific reasoning branched out in a new direction.

The Court stated that what was unconstitutional about the stop in *Prouse* was that it singled out a particular individual without any special reason to suspect him of driving without a license or registration. If instead of stopping one person, however, the officer had set up a checkpoint at which every person driving by would have to stop briefly, there would have been no Fourth Amendment violation.[79] In other words, the Court distinguished between two classes of cases where the tangible intrusions—the "seizures"—are physically indistinguishable from one another and where the lack of pre-invasion information is also identical. The Court nonetheless distinguished between them on the basis of whether the person seized was singled out or targeted.[80]

The exercise of "unbridled discretion" to single out one individual from others, where none has done anything to arouse suspicion, constitutes a distinct harm against the individual that was recognized by the Court in *Prouse*.

The Fourth Amendment, as the Court explained, requires either "less intrusion" (in terms of the substantive seizure harm) "or [methods] that do not involve the unconstrained exercise of discretion."[81] Where intrusions are of a limited nature, as are *Terry* stops, the targeting feature of the officer's conduct comes to occupy as significant a place in the doctrine as the intrusion itself. Where there is no targeting—as in regularized stops at checkpoints—there is no Fourth Amendment violation.[82]

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79. See id. at 655–57, 663.

80. Then-Justice Rehnquist found this distinction bizarre and unconvincing. He wrote that by drawing the distinction, "[t]he Court thus elevates the adage 'misery loves company' to a novel role in Fourth Amendment jurisprudence." Id. at 664 (Rehnquist, J., dissenting).

81. Id. at 663. The Court made a similar argument in the context of a challenged random urinalysis requirement in a public school district's interscholastic athletics program. See Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2396 (1995). The majority, upholding the drug policy, explained that contrary to the respondent's contention, a drug-testing program based on suspicion of drug use would not necessarily be less intrusive than the challenged policy. The suspicion-based program might "transform[ ] the process into a badge of shame" and therefore provoke opposition in parents who support the current system. Id. Moreover, "[r]espondents' proposal [that only suspected drug users be tested] brings the risk that teachers will impose testing arbitrarily upon troublesome but not drug-likely students." Id. The Court here identified the targeting harm.

82. See *Prouse*, 440 U.S. at 657 (asserting that "[a]t traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion [than a driver subject to a random stop]" (quoting United States v. Ortiz, 422 U.S. 891, 894–95 (1975), quoted in United States v. Martinez-Fuerte, 428 U.S. 543, 558 (1976))); see also Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 453 (1990) (holding that "[t]he intrusion resulting from the brief stop at the sobriety checkpoint is for constitutional purposes indistinguishable from the [border] checkpoint stops we upheld in [United States v.] Martinez-Fuerte, [428 U.S. 543 (1976)]"). Though *Prouse* and *Sitz* are cases about seizures—stops—there is nothing about the Court's analysis that would confine the

Sometimes the presence of the targeting harm may not seem to coincide with the absence of justification for a given search. For example, when the police officer stopped Prouse instead of some other driver, it might have been because the officer was listening to a radio show about the frequency of people driving without license and registration and decided at that moment to stop the next driver to pass by and ask for license and registration. If this decision were made before any cars were in view, it would seem as fair as stopping every tenth car at a checkpoint.[83] There is, in other words, no *ex ante* factor in the officer's decisionmaking process that renders a person having Prouse's attributes more vulnerable to a stop than a person lacking these attributes. Therefore, the harm of being singled out illegitimately might have been absent in the very case in which the Court acknowledged it.

Moreover, some searches that are entirely justified in an evidentiary sense are in fact motivated by illicit factors. If Prouse were speeding, for example, but the officer had used the speeding as a pretext for stopping him because of his "Reagan for President" bumper sticker, the officer would seem to have engaged in illicit targeting. The targeting harm would therefore appear almost indistinguishable from that visited upon a nonspeeding Reagan supporter. Yet the definition of targeting presented above does not include such pretextual activity: while the officer was not motivated exclusively by the available evidence, that evidence was sufficient to sustain the stop. The definition of the targeting harm as the illegitimate use of official discretion to single out an individual for an intrusion without an adequate evidentiary foundation thus appears to be both overinclusive and underinclusive.

This appearance, however, does not reflect a flaw in the definition of the targeting category. It demonstrates instead the inevitable imprecision of applying an objective standard to questions of targeting. As illustrated below, the objective standard nonetheless remains the most effective means of smoking out the targeting problem.

Consider again the officer who singled out Prouse for a stop without any evidentiary justification. Though he might have made his decision without reference to any fact about Prouse, this possibility is not the most plausible explanation for the stop. It is more likely that something about Prouse caused the officer to want to stop him, even if only subconsciously. Even if the officer had decided to stop the next car to drive by, he might have changed his mind and restrained himself upon seeing a car driven by someone with different attributes (that might reflect race, class, gender or politics), much in the way that a person decides against approaching a particular pedestrian for directions after having resolved to ask the

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targeting principle to this part of the Fourth Amendment. Indeed, the stop—as explained in *Terry*—is often immediately followed by a "frisk," or limited search for weapons. See Terry v. Ohio, 392 U.S. 1, 10 (1968).

83. See *Prouse*, 440 U.S. at 663–64 (Blackmun, J., concurring) (extrapolating from the reasoning of the majority opinion the legitimacy of stopping every tenth car).

next passerby.

Though the Court did not identify a specific fact about Prouse that might have motivated the officer, it spoke of the importance of an "objective standard" for police intrusions and described the exercise of "unconstrained discretion" as an "evil."[84] Rather than focus on the state of mind of the officer, the Court chose instead to focus on the objective lack of justification. It is this *absence* that suggests both to the Court and to the typical individual that something particular to him accounted for the officer's decision to stop him. A person's perception that he has been targeted is, of course, a critical element of what makes the targeting harm damaging to him and therefore a cognizable harm under the Fourth Amendment.

Conversely, the ready availability of a justification for a search provides good evidence for both the person searched and a court of law that the search was legitimately motivated. As a general rule,[85] it makes sense to regard objectively justifiable searches as legitimately motivated as well.[86] Pretextual searches should consequently not be actionable under

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84. Id. at 661.

85. One important exception to such a rule would apply in the case of invidiously motivated harassment. An example of such harassment might be the disproportionate number of highway stops visited upon African-American drivers. See generally infra note 111 (citing various commentators who have discussed the racial factor in police decisions about whom to stop).

86. It makes sense both because the government's possession of an objective justification suggests as an evidentiary matter that the search was legitimately motivated *and* because an individual subjective inquiry would be too costly to administer. There are thus two levels at which I classify investigative activity relative to evidentiary justification: first, there may be a legitimate reason of which the government is unaware (the case of *A*); second, there may be a legitimate reason of which the government is aware (the case of *B*). The first manifests the targeting harm, and the second does not. The second could be conceptually divided into two parts: first, the case in which the government's actual reason for the activity is the same as the known legitimate basis; second, the case in which the government's actual reason is different from the known legitimate basis. I choose not to divide the category of known justification in this way because improper subjective motivation is usually very difficult to discern in a case in which a legitimate justification was known to the actor. If an officer knows of facts that provide a legitimate justification for his actions, it therefore seems appropriate in the context of the Fourth Amendment to conclude that the known justification actually motivated the act.

For similar reasons, if a person kills a life-threatening attacker under circumstances in which the intended victim knows that he must kill to save himself from the attacker, we classify this act legally as self-defense even if the intended victim actually hates the attacker and kills in anger. The criminal case of Bernhard Goetz provides a dramatic illustration of this principle. In this case, a group of minority youths approached Goetz (a white man) in a subway car and asked him to give them five dollars. He responded by shooting at the men with his illegal firearm. See George P. Fletcher, A Crime of Self-Defense: Bernhard Goetz and the Law on Trial 1 (1988). Goetz was apparently motivated in the shooting by racial prejudice (manifested at an earlier time by an intention, as he described it, to rid his neighborhood of "spics and niggers," id. at 136) as well as a desire to kill the men who had approached him. See id. at 17. Notwithstanding the apparent presence of an invidious reason to commit the alleged crime, the judge nonetheless permitted Goetz to present the defense of justifiable homicide on the grounds of self-defense. The fact that he was also

the Fourth Amendment in most cases.[87]

B. *Understanding the Targeting Harm*

How serious a harm is targeting? The two Fourth Amendment harms—the privacy invasion and the targeting or singling out of an individual—are not equivalent.[88] While *Z* (the innocent person searched without probable cause) has suffered a meaningful harm that *Y* (the innocent person searched with probable cause) has not, there seems to be a still greater difference between *C*, the innocent odoriferous man whose closet is searched on probable cause, and *B*, the guilty murderer whose closet is searched on probable cause. In other words, the right to privacy (deserved by the innocent) is primary and the right not to be targeted (deserved by everyone) is secondary. As an injunction against unreasonable searches rather than unreasonable conduct more generally, the Fourth Amendment itself supports such a hierarchy. The ultimate desire of those who framed the Fourth Amendment "was not that the government be reasonable but rather that the people be *secure* in their persons, houses, papers, and effects."[89]

Nonetheless, the targeting harm causes a substantial injury to the person targeted, notwithstanding the fact that the harm originates in the hidden thoughts of the police officer. An analogy from anti-discrimination law will help illustrate the way in which the targeting state of mind on the part of an official transforms the nature of her conduct. In *McKennon v. Nashville Banner Publishing Co.*, petitioner, a 62-year-old woman who had worked for respondent as a secretary for 30 years, claimed that she was fired because of her age.[90] After the lawsuit was filed, respondent employer discovered misconduct committed by petitioner that would have led automatically to petitioner's discharge had it been known to respondent beforehand. Respondent brought a summary judgment motion, producing evidence of this misconduct and claiming that it viti-

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acting from racially prejudiced motivations did not lessen the exculpatory significance of his belief that force was necessary to prevent the robbery.

87. As the Court explained in Whren v. United States, " 'the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.' " 116 S. Ct. 1769, 1774 (1996) (quoting Scott v. United States, 436 U.S. 128, 138 (1978)). The *Whren* Court held that when an officer has an objectively legitimate basis for stopping a vehicle, the stop is legal under the Fourth Amendment regardless of the officer's actual subjective motivation for the stop. See id. at 1775; see also Horton v. California, 496 U.S. 128, 137–42 (1990) (rejecting petitioner's contention that plain view seizure is invalid if discovery of item in plain view was not inadvertent; given difficulty of determination, officer's subjective state of mind is not a proper subject for inquiry).

88. Under existing doctrine, they approach equivalence only in the context of very limited Fourth Amendment privacy invasions, such as the stop discussed in *Prouse*. See supra text accompanying notes 77–82.

89. Adler, supra note 45, at 1120.

90. See 9 F.3d 539 (6th Cir. 1993), rev'd, 115 S. Ct. 879 (1995).

ated petitioner's age-discrimination claim. The district court granted the motion, and the Sixth Circuit affirmed. The theory was that an employee who commits acts that would have led to her discharge had the acts been known to the employer at the time of termination does not have a cause of action for age discrimination, even if the employer in fact terminated her *because of* her age.[91]

The court of appeals envisioned the right against discrimination as inseparable from the employee's actual qualification for the particular job she holds. It is therefore the right of an employee who is *otherwise deserving of her job* not to be mistreated or terminated because of her age. If the employee has engaged in job-related misconduct, if she does not "deserve" her job, then she may be fired for an invidious reason without legal consequence. At some level, this result makes sense. How can petitioner claim that she should not have been fired if, in fact, she deserved to be fired?[92] The mistake would have been retaining her, not firing her. It might have seemed logical to the court that a substandard employee who is fired lacks moral "standing" to complain about her termination.

The complaining employee resembles the character *A* in our earlier hypothetical case. Recall that *A* was concealing in his foyer closet the body of the person he had murdered. An officer lacking any legitimate reason to suspect *A* of wrongdoing nonetheless searched *A*'s closet and found the body. *A* did not deserve to be free of the search any more than *B* (as to whom there was probable cause) did or any more than petitioner McKennon deserved to keep her job. The only problem with the search of *A* and the termination of petitioner McKennon was the state of mind, respectively, of the officer performing the search and the employer effecting the termination.

In spite of the force of these arguments, however, it would seem that respondent employer committed a harm against petitioner McKennon that stemmed from the interaction of the motive it had for terminating her and the act of termination. Similarly, although less powerfully, we have an intuition that the officer actually wronged *A* by searching him *because of* his strange hair or his bumper sticker or whatever combination of traits made her dislike *A*. The Supreme Court found accordingly and held that petitioner had stated a cause of action for age discrimination but that the scope of the remedy might depend on whether her misconduct rendered her independently deserving of termination.[93]

Actors' motives thus transform the nature of the conduct that they motivate. Being searched *because* one is "different" and being fired *because* one is elderly are experiences that are qualitatively different from

91. See id. at 542–43.

92. What made the particular case rather bizarre is that the petitioner's "misconduct" consisted of looking at the employer's confidential files about herself in order to ascertain whether she was going to be terminated because of her age. See *McKennon*, 115 S. Ct. at 883. This fact did not, however, play any role in the disposition of the case.

93. See id. at 885–86.

being searched because of wrongdoing and being fired because of misconduct or incompetence.

The intuition that motive transforms conduct and cannot easily be separated from the conduct it motivates animated another Supreme Court decision, *Wisconsin v. Mitchell*.[94] In that case, a defendant found guilty of inciting a group of teenagers to commit an assault and battery on a young boy was given an increased sentence because his crime was found to have been motivated by racial animus toward the victim. The defendant, respondent in the Supreme Court, challenged this sentence enhancement under the First Amendment and claimed that he was being penalized because of his thoughts. He argued that the difference between a hate crime and a non-hate crime is what lies in the mind of the offender, and the contents of one's mind may not be subject to criminal punishment. His argument failed, and the Supreme Court held that like anti-discrimination law—which takes a category of conduct and prohibits it if and only if it is motivated by a discriminatory animus—the Wisconsin hate-crime sentence-enhancement provision was legitimate because acts that are motivated by invidious animus are different from the "same" acts motivated by something else.[95]

Unlike the Fourth Amendment, of course, anti-discrimination law and hate-crime sentencing enhancements are designed almost entirely to address the targeting harm, the harm of being singled out for mistreatment for an illegitimate reason. Where the Fourth Amendment limit on searches is primarily about privacy for people who are not (to the knowledge of the authorities) concealing evidence, the anti-discrimination law is not primarily about job retention for those who are (to the knowledge of the employer) performing their jobs well.

What signals a violation of the Fourth Amendment right against unreasonable searches is the *absence* of a specific state of mind—the intention to perform a search on the basis of known information from which one could reasonably infer that a search would disclose evidence. What triggers the application of anti-discrimination law, by contrast, is the *presence* of a specific state of mind—the intention to terminate (or otherwise disadvantage) an employee because of her race, sex, or other protected status. In other words, the focus of the Fourth Amendment is on the state of mind that *fulfills* the legal requirements by seeking evidence of crime based on probable cause, while the focus of anti-discrimination law is on the state of mind that *violates* the law, by intending harm on the basis of a prohibited category.

This tells us that the Fourth Amendment right against unreasonable searches is fundamentally about limiting investigative activity to searches that uncover crime, and it confronts targeting only within that specific

94. 113 S. Ct. 2194 (1993).

95. See Laurence H. Tribe, The Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate Crime and Animal Sacrifice, 1993 Sup. Ct. Rev. 1, 6.

context. It similarly reveals that the anti-discrimination law is fundamentally about avoiding employment practices that single people out because of their membership in specified groups, and it confronts employees' merit or qualifications only within that specific context.

The fact that addressing the targeting harm is not the *main* purpose of the Fourth Amendment does not mean, however, that this is not a significant secondary purpose, just as the fact that securing job proficiency is not the main goal of the anti-discrimination law does not make merit inconsequential to that body of law. If an employee deserves to be fired because she has engaged in conduct for which she would have been terminated had the employer known of the conduct, that employee does not deserve the job, even though she deserves not to be fired *because of* her age. The *McKennon* Court accordingly refused to hold that reinstatement would be an appropriate remedy for the petitioner, because the wrong she suffered was not the loss of the job, which was—on the facts conceded at summary judgment—deserved; the wrong she suffered was the bias-motivated termination.[96] Similarly, if an individual deserves to be searched because he has engaged in concealment for which he would have been legally subject to a search had the police officer known of that concealment, that individual does not deserve privacy from the search, even though he deserves not to be searched *because of* an arbitrary decision to target him. It is accordingly not clear that we should "reinstate" his privacy by overlooking any evidence found in his possession.[97] The

96. See *McKennon*, 115 S. Ct. at 886 (determining that award of frontpay and reinstatement would be inappropriate).

97. To the extent that the exclusionary rule is considered part and parcel of the Fourth Amendment, that is exactly what it does. Justice Brennan has been one of the staunchest proponents of this view of the rule. See, e.g., United States v. Leon, 468 U.S. 897, 930 (1984) (Brennan, J., dissenting) ("A proper understanding of the broad purposes sought to be served by the Fourth Amendment demonstrates that the principles embodied in the exclusionary rule rest upon a far firmer constitutional foundation than the shifting sands of the Court's deterrence rationale."); United States v. Janis, 428 U.S. 433, 460 (1976) (Brennan, J., dissenting); United States v. Calandra, 414 U.S. 338, 360 (1974) (Brennan, J., dissenting); see also Mapp v. Ohio, 367 U.S. 643, 657 (1961) (noting that exclusion is "an essential part of both the Fourth and Fourteenth Amendments"); Kamisar, Comparative Reprehensibility, supra note 23, at 36 n.151, 47–48. The crux of the argument is that if officials forego searches for which they lack adequate *ex ante* justification, as they are required to do under the Court's long-held understanding of the Fourth Amendment, then some criminal activity will go undetected. That is a necessary price to pay, however, for privacy and freedom from a totalitarian government. It follows, the argument goes, that when police violate the Fourth Amendment and thereby acquire evidence of crime, that evidence constitutes unjust enrichment of the government and its use at the searchee's criminal trial is forbidden by the Fourth Amendment. Foregoing its use is accordingly a restoration of the state of affairs envisioned by the Fourth Amendment itself, independent of any deterrent or other consequences that such suppression might incidentally have.

As opposed to those who view exclusion as a constitutional mandate, most scholars and lay people are somewhat uncomfortable with the cover that the Fourth Amendment gives guilty people to perpetrate their crimes. Nonetheless, they favor exclusion of illegally obtained evidence as a means of deterring violations of the Fourth Amendment. See

individual's privacy was appropriately invaded; it was the *unreasonableness* of the search that constituted the wrongdoing and that should therefore be rectified. It is this distinction that renders the exclusionary rule so discomfiting and makes it appear incoherent as a "requirement" of the Fourth Amendment: it addresses a harm that did not take place, a harm to a deserved privacy right.

C. *Overbreadth and History Revisited*

We saw earlier that the Innocence model provides a theory of the Fourth Amendment that is similar in some ways to First Amendment overbreadth doctrine. We also reviewed the history of the Fourth Amendment and observed that the Innocence model is consistent with that history. Let us return now to overbreadth and to history in the light of the Innocence plus Targeting model.

1. *Innocence Plus Targeting and Overbreadth.* — The analogy of First Amendment overbreadth doctrine further illuminates the weakness of the exclusionary rule as a remedy for the harm experienced by the guilty under the Innocence plus Targeting model—the targeting harm. Justice White's concurring opinion in *R.A.V. v. City of St. Paul* argued that the Minneapolis ordinance was unconstitutional because it reached beyond

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Stewart, supra note 62, at 1381 (arguing that exclusion is a necessary means of effectively enforcing the Fourth Amendment, even though the Constitution, as understood through text and history, does not itself require exclusion). Those who subscribe to this approach include members of the Supreme Court who continue to support the exclusionary rule, albeit with limited enthusiasm. See *Leon*, 468 U.S. at 918 (questioning the deterrent effect of the exclusionary rule); Stone v. Powell, 428 U.S. 465, 467 (1976) (refusing to extend the exclusionary rule to habeas corpus proceedings); *Calandra*, 414 U.S. at 348 (refusing to extend the exclusionary rule to grand jury proceedings). Indeed, as Henry Monaghan explains, by the end of its 1974 Term the Supreme Court had flatly rejected the idea of exclusion as a personal right and had reconceptualized the Fourth Amendment exclusionary rule as a judicially created deterrent vehicle. See Henry P. Monaghan, The Supreme Court, 1974 Term—Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1, 3–5 (1975).

To those who wish to retain the exclusionary rule in its current form, the opposition of some crime-control proponents to privacy rights for the guilty often appears unprincipled. The proponents, in other words, seem simultaneously to support the idea of Fourth Amendment privacy (which benefits both guilty and innocent) and to balk at the inevitable consequences of such privacy: occasional criminal cover. See Silas Wasserstrom & William J. Mertens, The Exclusionary Rule On The Scaffold: But Was It a Fair Trial?, 22 Am. Crim. L. Rev. 85, 87–88 n.21 (1984) (referencing various studies which assess the cost of exclusion as extremely low—one percent or less—when measured by indices such as the percentage of arrests that are rejected for prosecution because of illegally seized evidence, the percentage of suppression motions that are granted, and the percentage of cases declined by prosecutors primarily because of illegal searches); compare Harry M. Caldwell & Carol A. Chase, The Unruly Exclusionary Rule: Heeding Justice Blackmun's Call to Examine the Rule in Light of Changing Judicial Understanding About Its Effects Outside the Courtroom, 78 Marq. L. Rev. 45, 50–52 (1994) (explaining that although few prosecutions are lost because of exclusion and few suppression motions are granted, the exclusionary rule breeds public hostility toward the criminal justice system).

the unprotected conduct of R.A.V. to the protected conduct of others.[98] On this argument, R.A.V., the unprotected cross-burner, was permitted to assert the defense of overbreadth in order to allow him to act as a surrogate for the protected speakers who are likely to be chilled by the ordinance but who will not complain. Recall the analogy to *A* (the effective deodorizer), who is given the suppression vehicle so that he has the incentive to make unreasonable searches costly for the police and thereby protect the deserving innocent who are unlikely to litigate their claims.

In the light of the Innocence plus Targeting model, we reexamine the analogy between R.A.V. and *A* to determine whether *A* might be entitled to assert an individual claim rather than simply acting as a surrogate for the deserving innocent. The Innocence model would deny any personal claim and treat the availability of the suppression motion as exclusively an instrumental means of providing a deterrent against future government misconduct. The Innocence plus Targeting model, however, recognizes that *A* has suffered a harm to his own individual interests. A different conception of the overbreadth doctrine provides a useful analogy.

We need not view R.A.V. as merely a surrogate for people chilled by the challenged statute from exercising protected speech. R.A.V. himself has suffered the harm of being judged by an invalid law. Though R.A.V. could be legitimately prosecuted under a law that prohibits vandalism, intimidation, or even prejudice-motivated vandalism and intimidation,[99] he cannot be legitimately prosecuted for expressing a disapproved message, and this is precisely what the St. Paul ordinance criminalized.[100]

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98. See 505 U.S. 377, 397 (1992) (White, J., concurring).

99. The *R.A.V.* Court described the situation as follows:

> What we have here, it must be emphasized, is not a prohibition of fighting words that are directed at certain persons or groups (which would be *facially* valid if it met the requirements of the Equal Protection Clause); but rather, a prohibition of fighting words that contain (as the Minnesota Supreme Court repeatedly emphasized) *messages* of "bias-motivated" hatred and in particular, as applied to this case, messages "based on virulent notions of racial supremacy."

Id. at 392 (quoting In re Welfare of R.A.V., 464 N.W.2d 507, 508, 511 (Minn. 1991)) (second emphasis added).

100. On this view, the vociferous disagreement between the majority and the concurrence masks deep methodological kinship. Both opinions would allow the regulation of cross-burning, but neither would allow R.A.V. to be prosecuted for his cross-burning under a statute that fails to distinguish between what R.A.V. did and the constitutionally protected expression of one's viewpoint. The majority attacks the underinclusiveness of the ordinance (its limitation of prosecution to those fighting words expressing a particular message), see id. at 392, while the concurrence attacks its overinclusiveness (its extension to people who wish to express R.A.V.'s message through constitutionally protected avenues), see id. at 397 (White, J., concurring); cf. Akhil R. Amar, Comment, The Case of the Missing Amendments: *R.A.V. v. City of St. Paul*, 106 Harv. L. Rev. 124 (1992) (noting various common assumptions in the respective approaches of the majority and the concurrence in *R.A.V.* and exploring potential alternatives to these approaches that would have been available if the Justices had considered the Thirteenth Amendment as part of their analysis).

Under the theory that there is a right to be judged by a valid law,[101] punishing R.A.V. under the ordinance would be like punishing him for his race or because he is a communist. The invalid law punishes R.A.V. for the wrong reason. The fact that he independently happens to deserve to be punished does not redeem the source or reason for his punishment in the particular case.

There is a Fourth Amendment parallel to this overbreadth harm of being judged by an invalid law. *A* (the effective deodorizer) had a right not to be targeted or singled out for an illegitimate reason, the police officer's dislike of his personal style. *A* retained this right in spite of the fact that he actually deserved the outcome of the targeting in this particular case: having the hiding place of the dead body searched and the evidence discovered. As with R.A.V., the harm is not in the substantive result (prosecution of R.A.V. and revelation of *A*'s hiding place) but in the process that motivated that result. In other words, R.A.V. has not suffered a speech harm,[102] and *A* has not suffered a privacy harm.

The parallel, however, between overbreadth and exclusion for purposes of the targeting harm ends there. The overbreadth remedy is far better suited to curing the actual harm experienced by R.A.V. than is the Fourth Amendment exclusionary rule for redressing *A*'s injury. Even when the overbreadth doctrine has been applied, it is still permissible for the government to prosecute cross-burners like R.A.V. for the right reason, under a different (valid) law. The dismissal of the invalid prosecution remedies the government's use of an invalid law, while the wrongdoer is still punished for his misdeed.

Under the exclusionary rule, by contrast, it is generally not possible to conduct a search for the "right reason" once a finding is made that the original search was unreasonable. The information on which a second search would be based will almost certainly be derived from (and therefore tainted by) the initial illegal decision to search.[103] When an officer searches *A* without probable cause, it is likely to be the case that *no* officer has probable cause to search *A* at that time. Therefore, an attempt to restore the status quo prior to the Fourth Amendment violation will likely

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101. See Henry P. Monaghan, Overbreadth, 1981 Sup. Ct. Rev. 1, 3; see also Dorf, supra note 6, at 242–51 (justifying Monaghan's conclusion that there is a general right to be prosecuted under a valid law).

102. This is the view of the concurrence in *R.A.V.*, which conceptualized the case as one of overbreadth. See *R.A.V.*, 505 U.S. at 397 (White, J., concurring). By contrast, the majority viewed R.A.V. as a victim of content and viewpoint discrimination, on the theory that he was being punished because of the views expressed by his conduct. See id. at 393–94; see also Dorf, supra note 6, at 257–61 (discussing implications of majority response to concurrence).

103. Note, of course, that if it can be proven that the fruit of the illegal search would inevitably have been discovered legitimately, even if the illegal search had not taken place, then the evidence will be admitted. See Nix v. Williams, 467 U.S. 431, 444 (1984). This will usually be difficult to prove, however, and the possibility of proving inevitable discovery also serves to undermine any deterrent effect that exclusion might otherwise have had.

include restoring some aspect of the privacy of the criminal by prohibiting the admission of the found evidence. This restoration of privacy is problematic, because the criminal had no right to retain his privacy.

Moreover, there is no way to undo the targeting harm, since it has already been completed with the performance of the search. Under the Innocence plus Targeting model, then, the exclusionary rule is flawed *as a remedy* for the person searched, both because it returns to him a benefit that he did not deserve to have and because it fails to rectify the loss that he did not deserve to suffer.

This is not to say, however, that exclusion is inconsistent with the Innocence plus Targeting model. As a deterrent, exclusion has the same costs and benefits under the Innocence plus Targeting model as it does under the Innocence model.[104] Under both these models, however, the exclusionary rule is not dictated by the Fourth Amendment rights of defendants who are unreasonably searched. If it is adopted, it is purely as a means of eliminating a police incentive for performing unreasonable searches.[105] The Innocence plus Targeting model—like the Innocence model—is therefore agnostic as to whether there ought to be a Fourth Amendment exclusionary rule. The resolution of this doubt, however, would turn primarily on empirical rather than theoretical questions.

2. *Innocence Plus Targeting and History.* — As we saw earlier, the Innocence model is consistent with the historical purposes of the Fourth Amendment prohibition against unreasonable searches.[106] The Innocence plus Targeting model, however, provides a more complete account of the evils that inspired the framing of the Fourth Amendment.[107] The

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104. See supra notes 52–60 and accompanying text (discussing innocence and overbreadth).

105. Henry Monaghan has criticized the Supreme Court's assumed authority to fashion its own common law remedies for Fourth Amendment violations by state officials. See Monaghan, supra note 97 at 3–5; see also Akhil R. Amar, The Future of Constitutional Criminal Procedure, 33 Am. Crim. L. Rev. (forthcoming November 1996) (on file with the Columbia Law Review). Amar explains his view by using the metaphor of the "Leavenworth Lottery":

> Judicial remedies must fit the scope of the right. For example, a court is not free, as a matter of constitutional law, to play the "Leavenworth lottery": Because the government violated the constitutional rights of *A*, judges spin the wheel and spring some lucky (but unrelated) convict *B* from Leavenworth. This scheme might indeed deter—and a legislature might have the power to enact this into law—but courts have no such power as a matter of traditional remedial theory. And without [the argument that the Constitution compels exclusion, which the Supreme Court has rejected repeatedly], exclusion is analytically indistinguishable from the "Leavenworth lottery."

Id. at 8.

106. See supra notes 61–71 and accompanying text.

107. Jed Rubenfeld explains that history illuminates the purposes behind a constitutional provision by providing "the paradigm cases of a right's applicability." Jed Rubenfeld, Reading the Constitution as Spoken, 104 Yale L.J. 1119, 1170 (1995). Such cases are the "particular evils or abuses felt to be intolerable at the time of enactment" of a constitutional guarantee. Id. at 1169. These abuses, in turn, do more than dictate the

general warrants and writs of assistance, two vehicles used by agents of the British Crown to invade the colonists' privacy, were offensive to early Americans because the warrants permitted groundless and arbitrary searches. Searches that are unlikely to yield evidence are unjustified largely because of the virtual certainty of invading innocent people's privacy. This aspect of the problem is captured well by the Innocence model.

However, the Innocence model leaves unexplained the problem of why the particular individuals subjected to searches were chosen to undergo this indignity. The American colonists considered the general warrants and writs of assistance both substantively and procedurally illegitimate. Substantively, the warrants were used to single out and censor the views of those who dared to criticize the government. Opposition to this objective is reflected in the First Amendment freedoms of speech and the press.[108] In the case of the writs of assistance, the singling out of individuals in an effort to enforce excessive trade restrictions and taxes imposed by the British Crown was also seen as improper.[109]

Along these lines, even those people who were "guilty" because they were in possession of the evidence sought should not have been subjected to unreasonable searches. The value placed on avoiding mistreatment of even the "right" people for the "wrong" reasons is reflected in what this Article has called the targeting harm. We have seen, of course, that the presence of the targeting harm is not contingent upon the nature of the "guilty" person's conduct. Whether a person is engaged in criticizing the government or in growing marijuana, he has a right not to be singled out without a legitimate basis.[110]

The Innocence plus Targeting model therefore captures the multiplicity of harms manifest in the British practices that helped inspire the framing of the Fourth Amendment. The model describes a privacy harm that results from the official authority to search anyone at any time for any reason: no one—however law-abiding and innocent—can feel secure from government intrusion. Furthermore, the model describes a targeting harm that occurs when officials base their decisions to search upon illegitimate considerations: distrust of anyone who appears critical of the government, for example. One could indeed characterize the act of governmental targeting as essentially a decision to single out nonconformists for investigation. In this sense, the spirit of the First Amendment

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continued commitment of the Constitution to *their* abolition; they also provide a valuable starting point in assessing the constitutional meaning of a modern governmental action. See id. at 1170.

108. See U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .").

109. See supra note 68 and accompanying text.

110. Cf. Colb, supra note 39, at 790–94 (arguing that the violation *vel non* of a person's fundamental right to be free from physical confinement should not turn on whether the conduct for which the person has been incarcerated is or is not constitutionally protected).

right to dissent is more than simply a right not to be punished or sued for that dissent; is a right, as well, not to be subjected to the indignity of governmental intrusions motivated by a disrespect for difference. This spirit suffuses the Fourth Amendment as well.

D. *Experiencing the Targeting Harm*

Upon learning about the targeting harm allegedly experienced by the guilty, a proponent of the Innocence model might respond with the following argument: a person who is subjected to a search and who is concealing evidence of crime should assume that the reason she has been searched is that she is, in fact, concealing such evidence. The targeting harm is experienced only when the person targeted *knows* that she has been singled out for reasons stemming from something other than the evidence sought. Since there is no way for the person who is searched to know what is in the minds of the police officers, as long as she is guilty, she should attribute the search to that guilt and not to an illegitimate motive. Therefore, no remedy at all is necessary for the targeted guilty, since no Fourth Amendment harm is actually experienced.

One flaw in this argument is that although there is no direct way for a victim to know the contents of a perpetrator's mind, there are indirect ways to determine why a particular act was committed. This inquiry is ubiquitous in the criminal law. For example, an actor's mental state can be the difference between conviction and acquittal, even when the physical acts are undisputed. The person who is searched might judge the motive of the police officer conducting the search by listening to what the officer says in the course of the search (Is murder mentioned? Does the officer seem to fear for her safety? Does the officer have a warrant?) or by inquiring afterward what led the officer to the particular suspect. Such information is often revealed, for example, during testimony at trial.

Furthermore, people who are targeted because something about them is unappealing to the police are likely to have the experience happen more than once.[111] This pattern of targeting may also enlighten the suspect about the motives behind her selection.

Finally, the potential ignorance of the victim in a given case does not distinguish the Fourth Amendment from anti-discrimination law, which

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111. It is common knowledge, for example, that minorities and the poor are disproportionately singled out for invasions of their privacy. This disparity is most prevalent in informal (and largely unmonitored) "on the street" interactions with the police. See, e.g., David A. Harris, Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked, 69 Ind. L.J. 659, 679–81 (1994) (discussing how judicial construction of "reasonableness" necessarily produces a disproportionate impact on minority communities and on the poor); Tracey Maclin, "Black and Blue Encounters," Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter? 26 Val. U. L. Rev. 243, 250–62 (1991); Gregory H. Williams, The Supreme Court and Broken Promises: The Gradual but Continual Erosion of *Terry v. Ohio*, 34 How. L.J. 567, 583–86 (1991).

compensates people who have been singled out for mistreatment because of a specified motive. Some members of an oppressed group might imagine that all slights are motivated by prejudice even though some, in fact, are not. Conversely, some individuals might not be aware that they are being treated in a certain way because of group membership even when they are being singled out.

The legal recognition of a kind of harm does not ordinarily turn on whether the harm was perceived by the victim at the time. The law sensibly concludes that where there is an accusation of illicit targeting (which takes place whenever there is a suppression motion or an anti-discrimination suit) and that accusation turns out to be accurate, the victim of the targeting correctly perceived what happened to her and accordingly experienced its attendant indignity.

How then do we understand the beneficial outcome in the violation of Fourth Amendment rights against unreasonable searches? The privacy right, as distinct from the right against targeting, turns on the conduct of the private individual rather than that of the government. In utilizing one's private space in a legally permissible manner, one retains a Fourth Amendment privacy interest. By abusing that private space through illegal activity and concealment of evidence, by contrast, one forfeits one's Fourth Amendment privacy interest. Though the government may not act on that forfeiture until it has some level of knowledge about it, perhaps probable cause, the forfeiture is no less real from the perspective of the individual.[112]

By claiming that the guilty concealer of criminal evidence forfeits a right of privacy in being free from a search of the place of concealment, I am not suggesting that criminals deserve no privacy as a general matter. Indeed, the Fourth Amendment does not permit blanket searches of people even when the police *know* they are guilty. The searches must be tailored to the areas of concealment. The forfeiture of one's privacy entitlement, in other words, extends only so far as the abuse of the privacy right. If the criminal is hiding nothing, he forfeits no privacy.

Suppose, then, that *B* has three houses and that a police officer knows that *B* is concealing a dead body in house #1 and that there is no evidence in houses #2 and #3. The officer may not search houses #2 and #3. In pragmatic terms, it is not necessary or useful to search those houses, since there is no evidence there. In moral terms, the criminal has forfeited his privacy only in the place where he abused it, house #1.

Inevitably, a line must be drawn between the area of the proper search and the area where searching is impermissible. In the real world, where police have limited information, such a line is drawn in terms of

112. Cf. supra text accompanying note 12 (discussing how speech, incitement, and the government's lack of knowledge of an incident of incitement affects the propriety of its intervention from the perspective of government responsibility but not the individual's entitlement to incite freely).

likely places of concealment for the particular evidence sought. Often, an entire house will be searched if there is probable cause to believe that the house contains evidence of murder. In issuing a warrant, a magistrate must decide how far the probable cause extends and articulate specifically the "place[s] to be searched."[113]

The inquiry in the "ideal" Fourth Amendment world—where we know in advance what we will find and we focus on how much privacy the person searched deserves—will be quite similar to the real-world magistrate's inquiry. The line must now be drawn between the space in which the evidence *is* concealed, however one wishes to define that space, and all other spaces.

One could describe *A* (deodorizing murderer) as having forfeited his privacy right to his closet or as having forfeited his privacy right to the portion of his closet where the body is hidden but not of some other severable portion. One might even choose to describe the body as hidden in *A*'s house, with *A* having forfeited the privacy in his entire house by hiding a murder victim there.

The most appealing formulation, it seems to me, mirrors the pragmatic one: *A* forfeits the portion of his private space that, if kept private, would preclude uncovering the body. This forfeiture would include the entry path in the hallway and the portion of the closet in which the body is hidden. Just as in the probable cause inquiry, where one must define at some level of generality the location where one is *likely* to find evidence, the privacy entitlement inquiry requires specific definition of the location where the evidence *is* hidden. The criminal is therefore not simply "bad" and consequently deserving of no privacy at all. He has been "bad" in a particular way: he has used his privacy to obstruct justice. Similarly, if and when the criminal goes to prison, he will lose that level of freedom inconsistent with the need for his secure institutionalization.[114]

III. A Critical Evaluation of Existing Doctrine

In considering various models of the Fourth Amendment, we saw that the Formalist model most faithfully tracks the doctrinal requirements of the Fourth Amendment. This correspondence is no coincidence. The essence of Formalism is that when the law prohibits specific state action, there is a harm only when that state action occurs. What the model lacks, however, is an overarching theory of the Fourth Amendment to ensure the continuing vitality of the doctrine as it confronts new and challenging fact patterns. Such a theory could explain our reactions to cases in which the rule and the apparent policies behind the rule are in tension. Specifically, it might help us to understand our reservations about applying the Fourth Amendment to the guilty.

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113. U.S. Const. amend. IV.

114. See Colb, supra note 39, at 822.

The Innocence model furnishes us with an overarching theory and still manages to cohere with most existing doctrine, including the exclusionary rule. The Innocence model, however, is incomplete. It fails to account for the effect of police officers' intentions on the people who are subjected to searches. It leaves out the harm of being targeted illegitimately and it thereby treats the "reasonableness" rule of the Fourth Amendment as irrelevant to its underlying purposes. The targeting harm provides the missing element and, together with the important insights of the Innocence model, helps to form a more comprehensive picture of the Fourth Amendment.

Having considered the targeting harm and its importance to the Fourth Amendment,[115] it may be tempting to merge targeting and privacy harms and reject the notion that some searches result in only one but not the other kind of harm. In other words, we might choose to reject the complex relationship between innocence and the privacy harm and instead take the simpler view that the Fourth Amendment is about targeting people for privacy invasions without proper justification.

Accordingly, in the absence of targeting (singling out the persons searched without proper justification), there would be no privacy harm, regardless of innocence, and in the presence of targeting, there would be a privacy harm, regardless of guilt. Under this scheme, motivational harm and privacy harm would be inseparable. This approach would lead us back to the simplicity of Formalism, which we now understand to be concerned exclusively with the motivational harm that I have identified as targeting.

The analytic struggle between the simplicity of Formalism and the normative intuition that innocence has a significant role to play in the drama of the Fourth Amendment has made its way into Supreme Court precedent. It is worth examining this struggle, because the ensuing confusion provides support for the argument that the Innocence plus Targeting model is necessary and, despite its complexity, improves upon both alternatives.

A. Zurcher: *A Case Study in the Formalist and Innocence Models*

An important case demonstrating the Supreme Court's efforts to determine its own theory of the Fourth Amendment is *Zurcher v. Stanford Daily*.[116] In *Zurcher*, a group of student reporters was present at a Stanford University hospital when a riot broke out, during which several police officers were assaulted and seriously injured. The police were unable to ascertain the identities of the assailants but were hopeful for a

115. See supra notes 73–97 and accompanying text.

116. 436 U.S. 547 (1978). For a valuable critique of the Court's treatment of the facts presented in *Zurcher* and its failure to consider the dangers of importing the probable cause and warrant requirements into the area of searches for mere evidence, see Amar, supra note 13, at 765–66, 779–80 & n.87.

lead when the paper ran a special issue about the protest, which included a photograph.[117]

The police obtained a warrant that authorized a search of the newspaper office for evidence associated with the hospital attack. The warrant affidavit contained no allegation of involvement by the newspaper in any criminal activity.

The search was extensive. Photographic laboratories, filing cabinets, desks, and wastepaper baskets were examined. Police officers also read notes and correspondence in the course of their search. The inspection ultimately turned up nothing.

A month after the search, the Stanford Daily brought an action against all those involved in the search, seeking declaratory and injunctive relief under 42 U.S.C. § 1983. The newspaper prevailed in the district court on two separate theories, only one of which is pertinent to our discussion.[118] The district court held that a search of someone not suspected of crime may only be authorized where there is probable cause to believe that a subpoena duces tecum[119] would be impracticable and when it also appears that the possessor of the objects sought would disobey a court order forbidding their removal or destruction.[120] The United States Court of Appeals for the Ninth Circuit affirmed the district court decision and adopted its reasoning,[121] but the Supreme Court reversed,

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117. See *Zurcher*, 436 U.S. at 551.

118. The first theory contended that because the newspaper was engaged in First Amendment activity, the standard for "reasonableness" should have been heightened relative to the usual probable cause inquiry. The district court held that

> [b]ecause a search presents an overwhelming threat to the press's ability to gather and disseminate the news, and because 'less drastic means' exist to obtain the same information, third-party searches of a newspaper office are impermissible in all but a very few situations. A search warrant should be permitted only in the rare circumstance where there is a clear showing that 1) important materials will be destroyed or removed from the jurisdiction; and 2) a restraining order would be futile. To stop short of this standard would be to sneer at all the First Amendment has come to represent in our society.

Stanford Daily v. Zurcher, 353 F. Supp. 124, 135 (N.D. Cal. 1972) (footnotes and emphasis omitted), aff'd, 550 F.2d 464 (9th Cir. 1977), rev'd, 436 U.S. 547 (1978).

Constitutional law scholars have treated *Zurcher* as essentially a case about the First Amendment. See, e.g., Tribe, supra note 74, § 12–22, at 974. However, as this Article suggests, *Zurcher* is an extremely significant Fourth Amendment case as well. Indeed, although there are free speech and free press rights that are incidentally affected by this decision, the Supreme Court explicitly rejected the characterization of the case as a First Amendment case and emphasized that only Fourth Amendment considerations drove the decision. See *Zurcher*, 436 U.S. at 565.

119. A subpoena duces tecum is a "court process, initiated by party in litigation, compelling production of certain specific documents and other items, material and relevant to facts in issue in a pending judicial proceeding, which documents and items are in custody and control of person or body served with process." Black's Law Dictionary 1426 (6th ed. 1990).

120. See *Zurcher*, 353 F. Supp. at 124.

121. See Stanford Daily v. Zurcher, 550 F.2d 464, 465 (9th Cir. 1977), rev'd, 436 U.S. 547 (1978).

holding that if there is a warrant and probable cause, then a search is reasonable. The Court explained that "whether the third-party occupant is suspect or not, the State's interest in enforcing the criminal law and recovering the evidence remains the same."[122]

In other words, because the purpose of an authorized Fourth Amendment search is to locate evidence of crime, the limitations that the Fourth Amendment places upon searches rest exclusively upon the likelihood of finding such evidence.[123] It follows that if the likelihood is great (or reasonable) that evidence will be found, the identity of the person searched ought to be immaterial.

By invoking the recovery of evidence as the overriding interest defining Fourth Amendment reasonableness, the Court adopts a pragmatic alternative to the Innocence model, where innocence is replaced by the absence of any evidence on one's person or property. Under this approach, innocence itself is not an important fact in the Court's Fourth Amendment scheme.

Reexamination of the hypothetical cases of *A*, *B*, and *C* discussed above clarifies the Court's position and the relationship of that position to the Innocence model.[124] In developing the Innocence model, we regarded *A* (deodorizing murderer) and *C* (smelly innocent) as an unintended beneficiary and an unintended casualty, respectively, of the balance struck by the Fourth Amendment. This balance—the standard of probable cause—is an effort to predict with incomplete information whether a search will uncover evidence, as in the case of *A*, or whether it will simply invade privacy without uncovering any evidence, as in the case of *C*. In the world of perfect information, people in *A*'s position would always be searched and people like *C* never would be. Is it the guilt of *A* and the innocence of *C*, though, that are determinative? Judge now the case of *D*.

D is an innocent person. In *D*'s closet, *D*'s landlord *Z* has hidden a corpse. *D* does not suspect anything, because he does not realize that *Z* secretly made a copy of *D*'s house key before turning over the house for rental. *Z* was able to go into *D*'s home to hide the corpse in a garbage bag in the closet while *D* was away at work. *D* does not learn of the presence of the corpse because he has a chronic allergic condition that blocks his sense of smell. A police officer passing *D*'s home, however, smells the decaying body and obtains a warrant leading to a search and the consequent revelation of the corpse in *D*'s closet.

D, like *C*, is an innocent person who "deserves" privacy in the sense that he has done nothing culpable to forfeit his privacy. Just as there seemed to be no moral distinction between *A* (deodorizing murderer)

122. *Zurcher*, 436 U.S. at 560.

123. See supra text accompanying notes 40–43 (discussing negligence analogy to the Fourth Amendment).

124. See supra Part I.B (defining and discussing Innocence model).

and *B* (nondeodorizing murderer), there seems to be no moral distinction to be drawn between *C* and *D*. Yet the outcome of the search of *D* seems to conform to the goals of the Fourth Amendment better than the outcome of the search of *C*.

The relevant distinctions, however, now appear to be more about utility than about an individual's culpability. If the difference between the person who "deserves" to be searched and the person who does not is simply the presence or absence of evidence—divorced from the culpability of the searchee—then perhaps it is not pertinent to speak of desert at all in the context of the Fourth Amendment. Perhaps the only question of harm to the person searched should be that of targeting, since the only actor whose good or bad behavior counts is that of the officer conducting the search (or that of the chief of police or magistrate authorizing that search).

This resolution is attractive, because it returns us to the simplicity of the Formalist model via a different route. Though the value of the search may turn on the *ex post* question of whether it uncovers evidence of crime, the harm experienced by the individual—the sense in which a search violates her individual constitutional interest—turns exclusively on *ex ante* reasonableness. As we will see, however, and as the Court in *Zurcher* implicitly concedes, this variant on the Formalist model is inadequate as an explanatory tool. Consider *D*'s situation again.

The search of *D* (innocent with evidence) does appear to be significantly different from the search of *B* (guilty with evidence), if we compare them more carefully. As the Supreme Court indicates in *Zurcher*, the governmental interest served by both searches is the same: finding evidence of crime. In both cases, that interest is fulfilled. The search of *D*, however, seems to be an unfortunate but perhaps necessary evil.

D has not done anything to forfeit his privacy, but it may be necessary to search *D* in order to serve the important governmental interest in uncovering evidence of crime. *B*, on the other hand, deserves to be searched. He has abused his right to privacy by using it to conceal evidence of crime and he therefore should not rightfully retain the privacy that he has abused in this fashion.

D (innocent third party) is like *C* (smelly innocent), though at a different level of generality. The Fourth Amendment permits the search of *C*, because given the existence of probable cause, prohibiting that search would have the consequence of permitting too many people like *B* (and *A*) (the murderers) to go undetected. The search of *C* is itself an unfortunate by-product of allowing the kind of search that will normally expose people like *B*. We value the evidence we will obtain from all the *B*s more than we value the few *C*s' individual privacy, in other words, even though *C* fully deserves that privacy and has done nothing to abuse it.

Similarly, we might permit the search of *D* because we value the evidence we will find in his closet more than we value his privacy. The utilitarian balance struck by the Fourth Amendment may implicitly place a

higher value on obtaining evidence (when that evidence is likely to be obtained) than on preserving the privacy of those who deserve it. This calculus does not, however, negate the fact that *D*'s loss of privacy remains a cost from the perspective of the Fourth Amendment, albeit one that must be borne.

One might argue, moreover, that even within the framework of purely utilitarian Fourth Amendment concerns, there is an important distinction between *D* and *B*. Since no one believes that *D* has participated in criminal activity, it is apparent that he will likely cooperate with the police and provide the necessary evidence without the need for a search.[125] Searching *D* is therefore arguably inappropriate, even considered *ex post*. Because the goal is to obtain evidence, if evidence may be obtained without violating an individual's private space, it would appear "unreasonable" to violate that private space. Conversely, the fact that a guilty person would be likely to destroy rather than hand over evidence requested by the prosecution makes his guilt an important factor in deciding the necessity of a search. The relationship between innocence and privacy accordingly coincides with the pragmatic purposes of the Fourth Amendment.

If we knew ahead of time that a search of a given person would be unnecessary—either because the person searched had no evidence on her premises *or* because she would have cooperated happily with the police without being subjected to a search—the search of this person, a person like *C* or a person like *D*, would be undesirable under the apparent goals of the Fourth Amendment. Innocence, in other words, would continue to matter.

There is one additional and obvious argument for considering the difference between innocence and guilt a relevant facet of Fourth Amendment law and, therefore, for rejecting the formalism of the holding in *Zurcher*. The Fourth Amendment permits, though with some restrictions, searches for evidence of crime.[126] This means that a person's privacy is protected only until there is evidence amounting to probable cause (or some other standard of "reasonableness") to believe that a guilty person could be apprehended through an intrusion upon that privacy, and ultimately prosecuted, convicted, and deprived of virtually all

125. *D* could cooperate either by removing the body bag himself or by permitting the police to remove the evidence after *D* has had a chance to hide his own personal effects.

126. But see Amar, supra note 13, at 758. Amar believes that viewing the Fourth Amendment as solely or even primarily a criminal provision of the Constitution is a mistake. He explains that:

> [T]he Fourth Amendment applies equally to civil and criminal law enforcement. Its text speaks to all government searches and seizures, for whatever reason. Its history is not uniquely bound up with criminal law. . . . And the Amendment presupposes a civil damage remedy, not exclusion of evidence in criminal trials; its global command that all government searches and seizures be reasonable sounds not in criminal law but in constitutional tort law.

Id.

privacy[127] (and even liberty)[128] upon conviction. Innocence (or apparent innocence) is where privacy begins, and guilt (or apparent guilt) is where (to a great extent) it ends. It seems to follow from this that the search of an innocent person is a harm not only because it is unnecessary, but also because the innocent person deserves better.

Similarly, the search of the guilty person is acceptable—putting aside the targeting harm—not only because it uncovers evidence of crime but because the abuse of his privacy through concealment of evidence of crime constituted a forfeiture of that privacy. The interest in finding "evidence" cannot be conceptually dissociated from the ultimate reason one cares about finding evidence of wrongdoing: the consequent ability to punish the wrongdoer.[129]

As Justice Stevens explains in his dissent in *Zurcher*, when the person whose home contains evidence is likely to be a criminal,[130] "[t]he probability of criminal culpability justifies the invasion of his privacy."[131] Justice Stevens's statement invokes the moral dimension of the Fourth Amendment, that dimension concerned with innocence.

Justice Stevens separately articulates the pragmatic aspect of the Fourth Amendment: "[T]he need to accomplish the law enforcement purpose of the search [when the person is guilty] justifies acting without advance notice and by force, if necessary."[132] Compared with searching the guilty, then, searching the innocent serves neither the moral nor the pragmatic dimensions of the Fourth Amendment.

Though the *Zurcher* holding appears unresponsive to the contention that privacy rights are linked to innocence of crime, the discussion in the

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127. See, e.g., Hudson v. Palmer, 468 U.S. 517, 526 (1984) (determining that "society is not prepared to recognize as legitimate any subjective expectation of privacy that a [convicted] prisoner might have in his prison cell"); see also Bell v. Wolfish, 441 U.S. 520, 557 (1979) (finding that prisoners jailed and awaiting trial in federal detention facility lack a legitimate expectation of privacy sufficient to render unscheduled inspections of their cells "searches" within the meaning of the Fourth Amendment).

128. See Colb, supra note 39, at 824 (arguing that so long as incarceration serves a compelling state interest, such as protecting the safety of citizens from harm, an offender may, through imprisonment, be constitutionally deprived of his fundamental right to liberty).

129. Cf. id. at 794–95 (arguing that it is constitutionally improper to dissociate act of incarceration from reasons for incarceration).

130. Because, for example, he possesses "contraband or the proceeds or tools of crime." Zurcher v. Stanford Daily, 436 U.S. 547, 581 (1978) (Stevens, J., dissenting).

131. Id. It is Justice Stevens's position that the rule prior to Warden v. Hayden, 387 U.S. 294 (1967) was the "correct" reading of the Fourth Amendment: warrants could be used only to search for contraband, weapons, and plunder, not for "mere evidence." *Hayden*, 387 U.S. at 301. This rule, Justice Stevens explained, guaranteed that only when it seemed likely that the object of the search would be uncooperative—because he had apparently participated in the relevant crime—could a search take place. If the person in whose possession the evidence was located was an innocent third party, however, efforts would be made to avoid a search through the cooperation of the individual. See *Zurcher*, 436 U.S. at 581 (Stevens, J., dissenting).

132. *Zurcher*, 436 U.S. at 581 (Stevens, J., dissenting).

majority opinion betrays a sympathy for that position and accordingly for the Innocence model of the Fourth Amendment. After indicating that the state's interest in searching for evidence is the same regardless of the searchee's guilt or innocence, the majority makes a series of additional arguments to justify its holding.

First, it explains that if the allegedly innocent third party knows that there are illegal materials on her property, then she is "sufficiently culpable to justify the issuance of a search warrant."[133] Furthermore, if the third party is iguorant of the presence of evidence on her property, she will be "so informed when the search warrant is served, and it is doubtful that [s]he should then be permitted to object to the search."[134] In other words, the third party either is guilty for knowingly concealing evidence of crime or else becomes guilty—and consequently undeserving of privacy—by refusing to cooperate with police upon being informed of her previously unknowing concealment.

The Court next argues that police may not know whether a third party is innocent or guilty at the time of the search.[135] Apparently, as a result, the possessor of evidence of crime must be presumed guilty for purposes of the search, in order to avoid loss or destruction of evidence in the event that such a presumption proves to be accurate. Finally, the majority explains that "in the real world," on those occasions when a subpoena duces tecum would do the job, police will use it rather than go to the trouble of obtaining a search warrant.[136]

Most of the Court's reasoning, then, is predicated on the view that an innocent person should not be searched if such a search is avoidable. Notice the construction of the arguments: first, the person is not really innocent; second, the person appears to the police not really to be innocent; third, the police will protect the innocent without our commanding them to do so. Innocence is therefore connected with one's entitlement to privacy, even according to the majority in *Zurcher*.[137]

B. United States v. White: *The Need to Make Innocence Count*

The Court's belief in the relevance of innocence to Fourth Amendment entitlements, evidenced in *Zurcher* despite the Court's formal announcement to the contrary, is even more apparent in cases in which guilty rather than innocent parties claim a Fourth Amendment right. In

133. Id. at 560 (Opinion of the Court).

134. Id.

135. See id. at 561. This argument seems particularly unconvincing as applied to the case of the Stanford Daily newspaper.

136. Id. at 563.

137. One could assert that the discussion of innocence by the *Zurcher* majority is beside the point. However, it does seem telling that after indicating that innocence is not material to the reasonableness inquiry under the Fourth Amendment, the Court proceeds to expend as much effort as it does dispelling the idea that it is condoning the government's authority to search innocent third parties.

United States v. White, a case decided seven years prior to *Zurcher*, the Supreme Court considered the question "whether the Fourth Amendment bars from evidence the testimony of governmental agents who related certain conversations which had occurred between defendant White and a government informant . . . and which the agents overheard by monitoring the frequency of a radio transmitter carried by [the informant] and concealed on his person."[138] Because the government officials involved in this surveillance did not have a warrant justifying a "search," the question in this case was whether the surveillance activity amounted to a "search" at all, within the meaning of the Fourth Amendment.

Since *Katz v. United States*,[139] the question of defining a search has been resolved by determining whether the party subjected to the surveillance had a reasonable expectation of privacy that was violated or intruded upon by the particular kind of surveillance involved.[140] The Court in *White* was operating against a background of cases holding that a person does not have a reasonable expectation of privacy in the friends in whom she confides secrets.[141]

Normally, the expectation of privacy of a criminal defendant bringing a suppression motion or an appeal of a conviction must be described without reference to the criminal activity that happened to be disclosed by the surveillance activity. In other words, even though the petitioner in *Katz* was using a public telephone to place interstate bets, the question whether his expectation of privacy in using the telephone was "reasonable" had to be answered without regard to the content of the telephone conversation.[142] This is because police can learn of the content of the conversation only *after* breaching the suspect's privacy.

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138. 401 U.S. 745, 746–47 (1971).

139. 389 U.S. 347 (1967).

140. In *Katz*, this meant that a warrant would have to be obtained to record the telephone conversation of someone using a public telephone, because such a person has a reasonable expectation of privacy in his conversation. See id. at 352.

141. See Hoffa v. United States, 385 U.S. 293, 302 (1966) (finding no reasonable expectation of privacy in defendant's voluntary conversations with accomplice who turned out to be government informer); Lewis v. United States, 385 U.S. 206, 211 (1966) (finding no reasonable expectation of privacy in defendant's voluntary conversations with undercover agent when government undercover agent, having been invited in for the purpose of conducting a felonious transaction, made drug buy in defendant's home); On Lee v. United States, 343 U.S. 747, 751 (1952) (finding no Fourth Amendment search or seizure when government informant wore a radio transmitter that allowed federal agents to eavesdrop on conversations regarding drug buy that defendant willingly entered into with informant).

142. See Bowers v. Hardwick, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting). *Hardwick* involved a criminal prosecution of a man for engaging in consensual sexual relations with another man. Hardwick was wrongly prosecuted, in Justice Blackmun's view, because his privacy rights had been violated:

> This case is no more about a "fundamental right to engage in homosexual sodomy," as the Court purports to declare, than *Stanley v. Georgia* was about a fundamental right to watch obscene movies, or *Katz v. United States* was about a fundamental right to place interstate bets from a telephone booth. Rather, this

Justice White, writing for a plurality in *White*, deviates from the usual rule requiring that the Court ignore the criminal activity discovered by the surveillance in framing the expectation of privacy, the reasonableness of which must be assessed. First, Justice White characterizes *Hoffa v. United States*[143] and *Lewis v. United States*[144] as holding that "the law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent."[145] Notice that the reasonableness of one's expectation of privacy is now described as turning in part on one's status as a "wrongdoer." It follows from these cases, explains Justice White, that "neither should [the Fourth Amendment] protect [the wrongdoer] when that same [police] agent has recorded or transmitted the conversations which are later offered in evidence to prove the State's case."[146]

Again, the searchee's status as a wrongdoer who is later prosecuted for crime is no longer separated from the process of defining the normative reasonableness of the searchee's subjective expectation of privacy. "Inescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police. . . . But if he has no doubts, or allays them, or risks what doubt he has, the risk is his."[147]

Justice Harlan wrote one of the several dissenting opinions published in *White*. He criticized the plurality for conceiving of the question presented in such narrow terms, as a question about whether guilty people have a reasonable expectation of privacy in conducting their wrongful activities. Justice Harlan explained that

> [I]t is too easy to forget—and hence, too often forgotten—that the issue here is whether to interpose a search warrant procedure between law enforcement agencies engaging in electronic eavesdropping and the public generally. By casting its "risk analysis" solely in terms of the expectations and risks that "wrongdoers" or "one contemplating illegal activities" ought to bear, the plurality opinion, I think, misses the mark entirely. *On Lee*[148] does not simply mandate that criminals must daily run the risk of unknown eavesdroppers prying into their private affairs; it subjects each and every law-abiding member of society to that risk.[149]

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case is about "the most comprehensive of rights and the right most valued by civilized men," namely, "the right to be let alone."

Id. (citations omitted).

143. 385 U.S. 293 (1966).

144. 385 U.S. 206 (1966).

145. United States v. White, 401 U.S. 745, 752 (1971).

146. Id.

147. Id.

148. See On Lee v. United States, 343 U.S. 747, 754 (1952).

149. *White*, 401 U.S. at 789 (Harlan, J., dissenting). James Boyd White offers one way to reconcile Justice Harlan's concerns with protecting the relationships of innocent people and Justice White's perception that guilty people confide their criminal plans at their own risk. See James B. White, The Fourth Amendment as a Way of Talking About People: A Study of *Robinson* and *Matlock*, 1974 Sup. Ct. Rev. 165, 230–31. He demonstrates that such

Justice Harlan emphasized the importance of defining Fourth Amendment expectations of privacy, even when they arise in criminal cases, in a way that will protect the interests of the law-abiding members of society, because the consequences of decisions like *White* will be visited upon the innocent as well as the guilty.

Scholars have often argued that the reason the Supreme Court sometimes makes the doctrinal mistake of taking a defendant's guilt into account in determining whether there has been a search is that the exclusionary rule distorts the meaning of the Fourth Amendment by making the viability of a criminal conviction turn on a narrow interpretation of the Fourth Amendment right, an interpretation which will then apply to guilty and innocent alike.[150] Such scholars contend that even when the Court is not as explicit about what it is doing as Justice White is in *White*, the Court cannot help but distort the law in an effort to avoid the injustice of reversing the conviction of a person who is clearly guilty of a seri-

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a reconciliation is possible if we permit only those deceptions in which the deceiving state actor pretends to be a criminal. "To permit such deceptions will, after all, expose to police spying only those people who express to strangers a willingness to engage in criminal activity. The ordinary citizen can be secure, so far as the law can make him secure, from such intrusions." Id. at 230. Amar notes his own affinity for this kind of analysis when he distinguishes, through a rhetorical question, between types of deception: "Is winning a suspected hit man's confidence by posing as a mobster different from winning entrance into someone's home or car by posing as a stranded motorist?" Amar, supra note 13, at 804 & n.167 (citing White, supra).

Edmund Kitch characterizes Justice Brennan's concurring opinion in Lewis v. United States, 385 U.S. 206, 212 (1966) (Brennan, J., concurring) as reflecting similar values:

> [S]omeone willing to sell marijuana to any caller cannot reasonably rely on the privacy of his communications with the strangers who call. Although the undercover agent's surveillance was a search, it did not intrude on privacy. In the same way, in the *Lopez* [v. United States, 373 U.S. 427 (1963)] situation, a citizen who approaches a federal agent with a bribe offer cannot reasonably rely on the privacy of his offer.

Edmund W. Kitch, *Katz v. United States*: The Limits of the Fourth Amendment, 1968 Sup. Ct. Rev. 133, 145. William Stuntz draws a corresponding distinction between use of undercover agents in ways that "jeopardize only criminal privacy," such as what occurred in *White* and *Lopez*, and the use of deceptive techniques that "are not so discriminating." Stuntz, supra note 24, at 791–93. An example of the latter might consist of FBI agents infiltrating an organization of recovering alcoholics to listen to members' disclosures and perhaps learn of criminal activity in the process.

150. See, e.g., Amar, supra note 13, at 799 (arguing that "[j]udges do not like excluding bloody knives, so they distort doctrine, claiming that the Fourth Amendment was not really violated"); Craig M. Bradley, The Emerging International Consensus as to Criminal Procedure Rules, 14 Mich. J. Int'l L. 171, 174 (1993) (discussing judicial "hedging and fudging"). Although the broad rationale that drives *White* and its predecessors—the idea that the target of an investigation has no Fourth Amendment right to expect that his chosen confidants will be trustworthy if the investigation ultimately produces incriminating evidence—endangers the security of innocent and guilty alike, Amar would support the decision in *White* and would find no doctrinal distortion there if it were driven by the idea described in Stuntz, supra note 24, at 791–92, that undercover agents posing as criminals do not endanger the relational privacy of law-abiding citizens. Telephone Conversation with Akhil R. Amar, Southmayd Professor, Yale Law School (Feb. 9, 1996).

ous crime. But are these scholars correct that the Supreme Court generally, and Justice White in particular, err when taking guilt into account in answering the question, "Did the defendant have a reasonable expectation of privacy?"

In assessing whether a person has a reasonable expectation of privacy, the Court focuses on one or both of two alternative formulations of the word "reasonable." One is an empirical formulation: an expectation of privacy is reasonable, on this approach, if it is realistic to expect privacy under these circumstances. The second formulation is normative: a privacy expectation is reasonable if we aspire to a society in which people have privacy under such circumstances.[151]

When a person intending to conspire to commit murder with another person reveals incriminating information to that second person in a secret conversation, the question is whether the first person has a reasonable expectation of privacy in that conversation. From an empirical standpoint, the answer might be yes: people normally can depend upon their confidants not to reveal secrets.[152] From a normative standpoint, however, one might argue that what a person should reasonably be able to expect ought to turn in part on the content of that person's conversation.

From the perspective of the police officer, of course, it is impossible to take into account facts unknown to her at the time she undertook an investigative activity. Whether the officer is "guilty" of violating the Fourth Amendment must turn on *her* state of mind at the time of her act. However, whether the searchee is *entitled* to privacy, whether his expectation of privacy is normatively a "reasonable" one, turns on the manner in which he is using his private space. The guilty concealer of evidence, under this theory, is not entitled to privacy in the location of concealment and therefore lacks a normatively reasonable expectation of privacy.

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151. See Oliver v. United States, 466 U.S. 170, 177 (1984) ("Since *Katz v. United States*, the touchstone of Fourth Amendment analysis has been the question whether a person has a 'constitutionally protected reasonable expectation of privacy.' The Amendment does not protect the merely subjective expectation of privacy, but only those 'expectation[s] that society is prepared to recognize as 'reasonable.' " (alteration in original) (citations omitted) (quoting *Katz*, 389 U.S. at 360)). In *Oliver* itself, the Supreme Court held that there is no reasonable expectation of privacy in the open field. The Court explained that one factor in determining whether expectations of privacy are reasonable is "our societal understanding that certain areas deserve the most scrupulous protection from government invasion." *Oliver*, 466 U.S. at 178. In rejecting petitioner's claim that open fields merit such protection, the Court cites both the normative point that "[t]here is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields," and the empirical fact that "as a practical matter these lands usually are accessible to the public and the police in ways that a home, an office, or commercial structure would not be." Id. at 179.

152. This is not obviously the case, of course, but the question is at least a debatable one. It may be that secrets are kept only until there is pressure from the state (or others) to disclose them.

Under this reformulation, a criminal lacks a reasonable expectation of privacy in the place where she hides evidence of crime. This reflects the intuition that when guilty people conceal evidence of crime in their normally private spaces, they forfeit their right to privacy in those spaces.

The harm that occurs when an officer searches those spaces without the requisite determination of probable cause is a targeting harm and *not* a privacy harm. Requiring courts to say that a privacy harm was experienced by a criminal like White in order to preserve a privacy right for innocent people in their personal conversations will cause many to balk and therefore to craft exceptions that have the effect of "subject[ing] each and every law-abiding member of society to [the] risk" appropriately assumed by the wrongdoer in the place of wrongdoing.[153]

Thus, the focus on guilty persons is not a confusion driven solely by the exclusionary rule. The focus, instead, reflects a purpose underlying the Fourth Amendment itself: the protection of privacy for the innocent, rather than the guilty.

C. *Integrating Innocence and Targeting into the Doctrine*

Formulating the "search" question in terms of the particular searchee's reasonable expectation of privacy has the rhetorical effect of granting privacy entitlements to people who, based on their criminal activities, do not deserve that privacy. This is because people who conduct criminal activity do not expect to be apprehended, and that expectation might even be empirically realistic. It is not, however, reasonable—in the sense of normatively legitimate or deserving of protection—for a person to expect that he will be able to retain privacy in his closet when he abuses that privacy by concealing evidence there. It is this meaning of "reasonable" that appears inappropriate when applied to the person bringing a suppression motion. Such a person should not expect privacy in his criminal endeavors.

The search question should therefore explicitly inquire whether an *innocent* person should have a right to expect privacy under a given set of circumstances. In *White*, the question might have been whether an innocent person communicating secrets to friends should, from a normative standpoint, be able to expect these confidences to remain secret.

If the answer to this question is yes, then the next question ought to be whether the invasion of privacy was unreasonable from the perspective of the government—whether, in other words, a targeting harm has taken place. Have the police (or has a magistrate, where a warrant is required) made the necessary *ex ante* evidentiary determination that this person has forfeited his privacy, or was the decision to search based instead on other (perhaps illicit) criteria?[154]

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153. *White*, 401 U.S. at 789 (Harlan, J., dissenting).

154. Whenever a person is singled out for a search for a reason other than an appropriate level of suspicion arising out of pre-search evidence, that person has heen

Although this modification in current doctrine might yield substantially the same results as the prevailing Formalist approach, its impact would be to clarify the nature of the wrong in the search of a guilty person. Justice White, for instance, was not concerned merely about the exclusion of probative evidence in a criminal case, although this matter was certainly significant to him.[155] He was apparently quite offended by the idea that criminals ought to be able to expect their conspiratorial confidences to remain private and elude law enforcement efforts.[156]

Regardless of what an innocent person might rightfully expect from a trusted friend, the criminal's privacy expectations are his own problem, his own risk. An acknowledgment that the criminal had no legitimate expectation of privacy might have helped Justice White to conceptualize the issues as Justice Harlan wished he had. As a general matter, reframing the issues in this way will draw the Court's attention to the fact that it is making law that applies to the innocent and that is designed primarily to protect the privacy of the innocent.

IV. CONSEQUENCES AND APPLICATIONS

This Article thus far has been primarily a legal-philosophical enterprise concerned with illuminating the theoretical justifications for the Fourth Amendment, independent of the particular decisions one might make in applying this body of law to specific cases. The presentation and defense of the Innocence plus Targeting model does, however, have practical implications for Fourth Amendment doctrine. This section will outline some of these practical implications and suggest various ways in which adhering to an Innocence plus Targeting model might assist judges in deciding Fourth Amendment cases that arise in the future.

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improperly targeted. One cause for concern about such targeting is that it is often directed repeatedly at the same people (members of minority groups and the poor, for example; see supra note 113), and such people are thus subjected to continual indignities. Although such targeting includes racial discrimination, it is not confined to classifications considered "suspect" for purposes of Equal Protection analysis. Targeting a person for a search (in the "improper" sense used earlier) is always a violation of the Fourth Amendment. Targeting suspect classes triggers Equal Protection strict scrutiny as well, a standard under which subjective motivations might also come into play. See Whren v. United States, 116 S. Ct. 1769, 1774 (1996) (explaining that although "the Constitution prohibits selective enforcement of the law based on considerations such as race . . . the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment."); see also McCleskey v. Kemp, 481 U.S. 279, 292 (1987) (suggesting that if McCleskey had proved a racially discriminatory purpose on the part of the jury who sentenced him to death, he would have prevailed in his Equal Protection challenge, notwithstanding the fact that McCleskey was himself eligible for the death penalty and therefore, in the absence of discrimination, his execution would be justified).

155. See *White*, 401 U.S. at 752–53.

156. See id.

A. *Redefining Fourth Amendment "Searches"*

We have already seen one practical implication of the Innocence plus Targeting model in the need to reframe the question of when the Fourth Amendment applies.[157] Under the Innocence plus Targeting model, the existence of a normatively reasonable expectation of privacy ought to turn in part on the manner in which a person has used or abused his personal space. Therefore, the threshold determination of when a search has happened should not rest on an inquiry about the *petitioner's* reasonable expectations of privacy. The doctrine should instead explicitly replace the guilty petitioner with a hypothetical innocent person concealing legitimate activity and ask whether such an innocent person could reasonably expect to have that activity remain private.[158] In addition to creating conceptual clarity, this approach acknowledges the compelling intuition that one who conceals crime forfeits the right to the privacy involved in that concealment.

B. *Remedies*

The potential practical implications of the Innocence plus Targeting model are not confined, however, to the conceptual reframing of the "search" question. The model might also have an impact on the structure of Fourth Amendment remedies. Since the various models differ in defining the legitimate complaints of different "victims" of Fourth Amendment violations, the compensatory side of remedies can easily reflect these differences.

Take for example *A*, the murderer who concealed his victim in his closet and effectively camouflaged the smell, but was nonetheless searched by a police officer. Assume that *A* brings a § 1983 suit against the police officer and/or the city by which the officer is employed.[159] Currently, the Fourth Amendment question is whether the officer violated *A*'s Fourth Amendment rights by acting culpably or unreasonably.[160] There is no avenue for considering the culpability of the plaintiff

157. See supra notes 139–154 and accompanying text (discussing *White* and reframing the question of what is a search).

158. See supra notes 117–137 and accompanying text.

159. See 42 U.S.C. § 1983 (1994).

160. Of course, there are two important preliminary questions in all such lawsuits that often dispose of the case before the "merits" are reached: (1) did the officer allegedly violate a clearly established rule in behaving as she did? and (2) were her actions allegedly performed pursuant to a custom or policy of the municipality? The first question must be answered in the affirmative in order to avoid dismissal of claims against individual officers, because police officers have qualified immunity. See Anderson v. Creighton, 483 U.S. 635, 638–40 (1987). The second question must be answered in the affirmative in order to pursue a suit against the municipality, because otherwise the municipality is not vicariously liable for its employees' actions. See Monell v. Dep't of Social Servs., 436 U.S. 658, 691 (1978). If these preliminary questions are answered in the affirmative, then the substantive disposition of the case turns only on the culpability of the defendant, not on the culpability of the plaintiff.

and whether evidence was in fact being concealed in the location searched. This doctrinal rule conforms to the Formalist model of the Fourth Amendment.

The Innocence model would replace the current doctrinal approach to Fourth Amendment lawsuits with one that includes a consideration of innocence. The plaintiff would accordingly have to prove not only that the police officer acted unreasonably but that he, the plaintiff, was not abusing his private space by concealing evidence of criminal activity in that space. Under such a model, of course, *A* would not be entitled to any recovery.

Under the Innocence plus Targeting model, *A* would do a little better. He would be able to recover some damages simply for the targeting harm, if he were able to demonstrate that the police officer behaved unreasonably and targeted him without adequate justification. He would not, however, be permitted to recover as much as a plaintiff with "clean hands." While the latter would have experienced both a privacy harm *and* a targeting harm, *A*'s harm would consist only in targeting.[161] The monetary value to be placed on each type of harm would likely be left for judicial development in the way that such matters are developed in tort law generally.[162]

One practical argument in support of the Innocence plus Targeting model grows out of this consideration of remedies. Formalism would require that any foreseeable cost to the searchee resulting from an unreasonable search be corrected, if possible, or compensated. This is because the violation is an injustice, according to Formalists, that cannot be broken down into harmful and innocuous components. As Formalists sometimes say, exclusion "gives to the individual no more than that which the

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161. Although Amar opposes the exclusionary rule as a windfall to the guilty, he does not claim that a guilty plaintiff ought to recover less in a civil suit, his favored remedy for Fourth Amendment violations, than an innocent plaintiff. He urges the courts to "open[ ] their doors to any civil suit brought against wayward government officials, even one brought by a convict." Amar, supra note 13, at 793. Moreover, in describing two hypothetical twins who are unreasonably searched but upon only one of whom evidence is found, Amar approvingly states that "under traditional principles, . . . [the twins] recover equal amounts." Id. at 795. Thus, although he posits that innocence ought to matter to the Fourth Amendment (so that a remedy that benefits only the guilty is not merely incomplete but perverse), he does not propose that the remedy for Fourth Amendment violations distinguish the guilty from the innocent in any way.

Arnold Loewy adopts a pure innocence model and argues that the innocent are the only intended beneficiaries of the Fourth Amendment. Yet he too fails to entertain the possibility of providing differential remedies for unreasonable searches that depend on the guilt or innocence of the claimant, perhaps because he rejects alternatives to the exclusionary rule as implausible means of deterring Fourth Amendment violations. See Loewy, supra note 24, at 1263–68.

162. Generally, damages are assessed by the factfinder, usually a jury. See John G. Flemming, The American Tort Process 123 (1988) (explaining that "[b]y far the widest scope for jury discretion is its power to assess damages").

Constitution guarantees him."[163] If we take it seriously, this position has disturbing consequences.

Assume that the police wish to find a man who has kidnapped a three-year-old girl and has written to her parents that he plans to starve her to death. Assume also that the police know only that the kidnapper is located somewhere in Newark, New Jersey. A mass search of all homes in Newark would unquestionably violate the Fourth Amendment. Suppose that such a search nonetheless takes place and turns up the kidnapped girl, tied to a chair, in one of the homes searched. Current law would require the exclusion of evidence of kidnapping found at the location.[164] On the Formalist theory, the basis for such exclusion is the mandate of restoring the *status quo ante* the illegal search, to the extent possible. A true restoration of the *status quo ante*, however, would include returning the three-year-old girl to (or leaving her in) the kidnapper's custody. Had the illegal search not occurred, after all, the child would not have been discovered and rescued and the police would not have been praised as heroes by the family of the victim and the public at large. If the Fourth Amendment itself prohibits not only the unreasonable search but also the enjoyment by the government of any benefits that arise from the unreasonable search, then the girl must remain with the kidnapper. Although such a result borders on the absurd, it follows inexorably from the position that all consequences of adhering to the Fourth Amendment are constitutionally guaranteed components of the individual right against unreasonable searches.[165]

The Formalist's position that we ought to restore the status quo is problematic even in a more familiar context. Recall the case of *A* (deodorizing murderer). Suppose that *A* pleads guilty to murder and is then sentenced to prison. One foreseeable injury he suffers (as a result of the unreasonable search that led to his arrest and ultimately to his decision to plead guilty) is the prison term he serves.[166] Most people would agree,

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163. United States v. Calandra, 414 U.S. 338, 360 (1974) (Brennan, J., dissenting) (quoting Mapp v. Ohio, 367 U.S. 643, 660 (1961)).

164. See Davis v. Mississippi, 394 U.S. 721 (1969) (holding that the fingerprints of an accused rapist should have been suppressed at his trial because they were obtained in the course of a mass fingerprinting of African-American men against none of whom there was any reasonable suspicion of involvement in the rape that was ultimately prosecuted).

165. Of course, I would not expect any Formalist (or anyone else, for that matter) actually to take the position that the child ought to be returned to the kidnapper. The hypothetical case illustrates dramatically, however, why an approach to the consequences of the Fourth Amendment that does not differentiate between that which is intended and that which is incidental is unsound.

166. If he had gone to trial and raised the Fourth Amendment claim but lost, this adjudication would have precluded the Fourth Amendment issue for purposes of a § 1983 suit. See Allen v. McCurry, 449 U.S. 90 (1980). A guilty plea, however, does not constitute a waiver of an antecedent Fourth Amendment claim for purposes of a civil action under § 1983. See Haring v. Prosise, 462 U.S. 306 (1983).

however, that *A* should not be monetarily compensated for the prison term, because the prison term was just.[167]

It is difficult to justify this position, however, if one assumes that the plaintiff deserved to retain his privacy in the location where he concealed the evidence of crime. After all, if we attempt to restore the status quo ante as a means of compensation, one unavoidable feature of the status quo prior to the search was the concealment of evidence that led to the plaintiff's conviction. If *A* deserved privacy in his closet, then the disclosure of evidence against him was wrong. The resulting conviction and sentence, then, is rightly a compensable injury if innocence is irrelevant to the Fourth Amendment.

Under the Innocence plus Targeting model, however, the impropriety in what happened to *A* is neither the search nor the uncovering of the evidence, but rather the state of mind of the officer in deciding to target *A*. It follows that there is no need to attempt to restore the status quo that existed prior to the search or to compensate for the consequences of the loss of privacy.[168] Instead, monetary compensation should be tailored to the *unreasonableness* of the decision to search, to the insult to *A* in being targeted in the way that he was. This tailoring of the remedy to the specific right violated resembles the Supreme Court's refusal to accept an argument that the petitioner in *McKennon* was entitled to reinstatement or full compensation for all of the time she spent out of work.[169]

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167. Amar's illustration is a helpful one:

> Consider the following situation. Police suspect two identical twins, who live in identical, adjoining houses. Police search both equally with equal but insufficient justification. In twin Adam's house, they find nothing; in twin Bob's, the bloodstained shirt. The shirt is introduced as evidence in Bob's murder trial, and he gets twenty years. Now, both Adam and Bob bring independent civil actions for damages. The result: under traditional principles, Adam and Bob recover equal amounts. Bob does not recover more for his twenty years. The factual harms of seizure, evidentiary use, conviction, and sentence are not *legally* cognizable; only the prior unconstitutional search is.

Amar, supra note 13, at 795–96 (footnotes omitted); see also 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) (discussing the fairness of not compensating the victim of a productive search more, notwithstanding his increased likelihood of criminal charges, trial, conviction and punishment). For a similar defense of the legitimacy of confining remedies to cognizable injuries in the context of two very different bodies of law (antitrust and search and seizure law), see Douglas Laycock, Modern American Remedies: Cases and Materials 184 (1985).

168. As Daniel Meltzer explains,

> [t]he law of remedies does not provide relief from every harmful consequence caused in fact by wrongful conduct, but only for those kinds of harm for which redress is appropriate under the applicable substantive law. For example, it is doubtful that a prisoner convicted after admission of illegally obtained evidence could obtain compensation in a constitutional tort action not only for the invasion of his protected interests but also for the damage suffered as a result of his conviction and imprisonment.

Meltzer, supra note 60, at 270 (footnotes omitted).

169. See supra notes 92–93 and accompanying text.

In contrast to *A*, who forfeited his right to privacy and is therefore entitled to a remedy only for the targeting harm, *C* did not forfeit his right to privacy. *C* also did not suffer a targeting harm, because the police officer behaved reasonably given the information that she had and did not unfairly target *C* for a search.

Under a compensation scheme that provides a remedy for the undeserved privacy *and* targeting harms, *C* should be compensated for his loss of privacy in spite of the lack of governmental culpability. In other words, truly taking into account the privacy harm as an independent harm might appropriately entail the proposition that *C* should not have to bear the cost of the reasonable pursuit of criminals without some compensation.[170] A strict liability regime in tort law operates in a comparable manner.[171] When the defendant causes an injury to the plaintiff, the defendant must compensate for that injury even if the defendant behaved reasonably. In other words, when the type of harm that a reasonableness standard is generally meant to avoid comes to pass, the victim of the harm should be compensated, notwithstanding the reasonableness of the defendant's actions. Such a regime ensures that the inevitable victims of an otherwise beneficial industry—here the crime-detection industry—are compensated for their undeserved loss of privacy.[172]

This compensation strategy, under which criminals forfeit compensation for invasions of their privacy and under which searches upon probable cause may still result in payment of damages, raises two potential dangers: underdeterrence and overdeterrence. The risk of underdeterrence results from the minimal amount of damages that juries award for

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170. One might describe the search of *C* as a type of governmental "taking" that is legitimate provided there is just compensation. Cf. Jules L. Coleman & Jody Kraus, Rethinking the Theory of Legal Rights, 95 Yale L.J. 1335, 1356–58 (1986) (analyzing the distinction between compensation as a remedy for harms resulting from actions that should not have been taken at all, and compensation as a means of eliminating the unfair distributional effects of an otherwise legitimate action, the latter of which is analogous to a governmental taking under the Fifth Amendment); Madeline Morris, The Structure of Entitlements, 78 Cornell L. Rev. 822, 847–49 (1993) (contrasting entitlements associated with efficiency with those associated with distributive justice); Catharine P. Wells, Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication, 88 Mich. L. Rev. 2348, 2350–53 (1990) (contrasting entitlements intended to compensate with those intended to correct).

171. The common law rule of search and seizure apparently operated in a fashion that greatly resembles strict tort liability. If a constable lacked both a warrant and objectively reasonable grounds for suspicion, the constable could seize the suspected person or item. If the constable turned out to be incorrect, he would be liable for damages, but if he turned out to be correct, his success rendered the search retroactively "reasonable." In other words, absent a warrant, *ex ante* reasonableness did not play any direct role in determining compensation. See Amar, supra note 13, at 767 (citing Gelston v. Hoyt, 16 U.S. (3 Wheat.) 246, 310 (1818) (Story, J.); 2 William Hawkins, A Treatise of the Pleas of the Crown 77 (Professional Books Ltd. 1973) (1721)).

172. See Guido Calabresi, Some Thoughts on Risk Distribution and the Law of Torts, 70 Yale L.J. 499, 500–34 (1961) (discussing ethical and economic justifications for imposing liability on an enterprise that causes injury, regardless of fault).

Fourth Amendment violations that do not involve police brutality or extreme forms of intrusion.[173] The small size of a potential award has the effect of reducing the number of Fourth Amendment plaintiffs, in turn reducing the absolute amount that the government must pay for its failure to comply with the requirements of the Fourth Amendment.[174]

Those who have the most to gain from pursuing a Fourth Amendment claim are criminal defendants who may avoid conviction and even trial through a successful suppression motion. Because it is criminal defendants who have this strong incentive to bring a Fourth Amendment claim, the exclusionary rule might be necessary to motivate police compliance with the Fourth Amendment and thereby to protect the deserving many—those who have in no way forfeited their right to privacy—from both privacy and targeting harms resulting from underenforcement.

One possible solution to the underenforcement problem would be to create a statutory entitlement to a nontrivial sum of money for any individual who can demonstrate that she has suffered undeserved privacy invasions or targeting harms. Such proceedings could take place in an expedited fashion so that petitioners would not be required to undertake the burdens of protracted litigation against the government.[175] This would motivate people to come forward and complain of Fourth Amendment harms and would make noncompliance more expensive for the government.[176]

The risk of such a scheme is overdeterrence. If police departments had to pay large sums of money to innocent people who were searched upon probable cause (for privacy harms) and to guilty people who were searched without probable cause (for targeting harms) as well as to innocent people searched without probable cause (for both), they might

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173. Damages may be minimal in the ordinary case because there is little injury to a person or to property. See Loewy, supra note 24, at 1264 n.156 (observing that "even if a jury decides in favor of the innocent victim, damages may be so minimal as to discourage legal action by innocent persons").

174. See, e.g., Amar, supra note 13, at 814 (discussing problem of underdeterrence that results when only compensatory damages are awarded for Fourth Amendment violations litigated).

175. Other scholars have theorized about similar ways to correct this underdeterrence problem. See Amar, supra note 13, at 814–16 (proposing a variety of ways to address the underdeterrence problem, including punitive damages, class action suits, presumed damages, attorney's fees, injunctions and administrative remedies); Jeffries, supra note 167, at 1476 ("Perhaps there might be a scheme of presumed or liquidated damages, calculated to redress the . . . injury of abusive invasion of privacy by unlawful search."). Opponents of such alternatives to exclusion maintain that such remedies would not work in practice because of a combination of sympathy for the police on the part of the public and the judiciary and a lack of sympathy for victims of unconstitutional searches. See Maclin, supra note 27, at 55–56 & n.262; Myron W. Orfield, Jr., Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts, 63 U. Colo. L. Rev. 75, 126 (1992).

176. Police department budgets could be structured to reflect inversely the amount of money paid out in damages by the government for each department.

choose to forego many reasonable searches in an effort to avoid the prohibitive expense. Such a state of affairs would be as undesirable as the previously described regime of underenforcement. We would not want the police to forego legitimate investigative activity as a defensive strategy.

It may be, then, that we must choose between a serious compensation scheme that will award damages to those who truly deserve them and tailor the damages to the specific right violated, on the one hand, and a behavior modification scheme that will effectively deter unreasonable searches without making appropriate criminal investigation excessively costly for the police, on the other. Because the Fourth Amendment requires specifically that searches be reasonable, the highest priority would seem to be the creation of a scheme that motivates police to carry out only reasonable searches in the first place. Moreover, if "an ounce of prevention is worth a pound of cure," it may be wiser to focus on deterrence than to focus on compensation after the fact. Many have accordingly praised the exclusionary rule, in spite of its apparent unfairness, for performing the prevention function more or less effectively.[177]

C. *Beyond the Fourth Amendment: Implications of Innocence Plus Targeting*

This Article has devoted itself in large measure to defining and explaining the substantive component of the Fourth Amendment right against unreasonable searches—the right to privacy—and to defending the position that individuals retain or forfeit this substantive right depending upon how they use their private space. Accordingly, the Article has divided the Fourth Amendment right against unreasonable searches in two: the procedural right of *every* individual to have the police behave in a reasonable manner toward her, the violation of which constitutes a targeting harm, and the substantive right to retain one's privacy so long as one is not abusing it by concealing evidence of criminal activity.

The argument in support of this dichotomy has clear implications for criminal procedural protections other than the Fourth Amendment

177. Compare Barnett, supra note 27, at 947–51 (discussing how police officers' emphasis on securing arrests rather than convictions lessens the deterrence effect); Kaplan, supra note 2, at 1032–35 (discussing the institutional impediments to deterrence as well as contemporary statistical evidence of a lack of an appreciable deterrent effect) and Richard A. Posner, Rethinking the Fourth Amendment, 1981 Sup. Ct. Rev. 49, 56 (arguing that to the extent that the exclusionary rule is followed, it results in overdeterrence), with Yale Kamisar, Is the Exclusionary Rule an "Illogical" or "Unnatural" Interpretation of the Fourth Amendment?, 62 Judicature 66, 70–73 (1978) (discussing flaws in data suggesting exclusionary rule does not influence police behavior and examining new evidence to the contrary); Stewart, supra note 62, at 1395 (relying on the increase in warrants issued as proof that exclusion has a deterrent effect) and supra notes 98–103 and accompanying text (discussing the analogy between overbreadth and exclusion, in that both effectively motivate compliance with the Constitution, though the beneficiary is undeserving from the perspective of the harms against which the Constitution is meant to guard). The continuing vitality of the exclusionary rule ought largely to depend, then, on how effectively it works and at what cost to police investigation. These, in turn, are questions that are outside the scope of this discussion.

right of privacy. One important example is the criminal defendant's Due Process right to have a jury determine his guilt beyond a reasonable doubt as a prerequisite to conviction.[178]

Why require such a weighty showing as proof beyond a reasonable doubt? It is to ensure, consistent with a viable criminal justice system, that few, if any, people are found guilty of crimes they did not commit.[179] Like the Fourth Amendment's requirement of probable cause, of course, a demanding standard of proof at trial imposes serious costs.

In the case of requiring proof of guilt beyond a reasonable doubt, the cost is acquittal of many guilty people. The guilty individual's ability to obtain an acquittal because of the heavy burden of persuasion is understood to be an unfortunate consequence of a protection that is designed to safeguard the innocent.[180] Notably, the saying goes, "better that ten guilty persons escape, than that one innocent suffer."[181] No one has ever articulated the sentiment, "better that ten guilty persons escape, than that ten guilty suffer."

The guilty person who is acquitted because of the strict standard of proof is a loss rather than a gain from the perspective of the substantive right in question. Another way of saying this is that a guilty person does not have a substantive right to an acquittal and freedom, regardless of how weak the evidence is.

When we read a book in which the villain is able to escape detection or avoid conviction because of the standard of proof, we feel that an injustice has occurred. Conversely, when we find out years later that an innocent person was convicted and sentenced for a crime that she did not commit, it is small comfort that the evidence supported the conviction at the time. At an important level, every guilty person charged ought to be convicted and sentenced and every innocent person charged has a right to be acquitted.[182]

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178. See Sullivan v. Louisiana, 508 U.S. 275, 281–82 (1993) (holding that an error in the burden of persuasion instruction in a criminal case which violates the Due Process Clause cannot be harmless error); In re Winship, 397 U.S. 358, 364 (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); In re Gault, 387 U.S. 1, 30–31 (1967) (holding that a juvenile delinquency proceeding must conform to the requirements of the Due Process Clause).

179. See *Winship*, 397 U.S. at 364 ("It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.").

180. As Amar maintains, "[t]he deep logic of the criminal procedure provisions of the Bill of Rights is not to protect truly guilty defendants—especially those who have committed violent crimes—from conviction, but primarily to protect truly innocent defendants from erroneous conviction." Amar, supra note 13, at 790 n.125 (emphasis omitted).

181. 4 William Blackstone, Commentaries *352.

182. In the death penalty context, by analogy, a majority of the Court has agreed with the proposition that a person who is actually innocent has a constitutional right not to be

Yet the guilty person who is convicted on insufficient evidence, despite his guilt, has still been deprived of something important. He has suffered a harm akin to the targeting harm in the area of the Fourth Amendment. In other words, he has been treated in a certain way without adequate justification on the part of the actor.

The actor—the jury or the judge—who convicts the defendant without proof beyond a reasonable doubt has not merely created a risk for the innocent but has also failed to treat the particular individual on trial properly. Mob justice is wrong, for example, even when directed against a murderer, both because of the risk such action creates for innocent people *and* because of the failure to establish (through a trial) that the putative criminal is guilty.

Though the killer does not deserve to be free of punishment, he has still suffered the harm of being punished without a procedurally sound determination of his guilt. This is a harm from the perspective of the Due Process Clause, just as there is a harm from the perspective of the Fourth Amendment in the analogous search case.

What makes the Fourth Amendment a matter of special concern in terms of the substantive/procedural dichotomy is the fact that the guilty are so prominent in litigating privacy violations. The public tends to focus less on the standard of proof at a criminal trial than on the idea that everyone is "innocent until proven guilty." Though the public is sometimes made aware of a person's guilt after he has been acquitted or convicted of a lesser charge, this is rare. Once a person is charged with a crime, the evidence presented to the jury will normally not be supplemented for public consumption after the trial. Therefore, though there are undoubtedly guilty people who are acquitted by virtue of the "beyond a reasonable doubt" standard, we are not specifically aware of who most of them are.

In the area of the Fourth Amendment, by contrast, we are constantly faced with the costs, because it is individuals against whom evidence is found who bring (sometimes successful) suppression motions.[183] There

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executed. See Herrera v. Collins, 506 U.S. 390, 419 (1993) (O'Connor, J., joined by Kennedy, J., concurring); id. at 431 (Blackmun, J., joined by Stevens and Souter, JJ., dissenting).

183. Unlike the remedy for the deprivation of some rights, nothing captures the imagination or raises anger to the same extent as the exclusion of incriminating evidence—the bloody knife or the dead body that lets the bad guys "get off on a technicality." See Amar, supra note 13, at 799 ("In the popular mind, the [Fourth] Amendment has lost its luster and become associated with criminals getting off on crummy technicalities."); Stewart, supra note 62, at 1393 (discussing how the most common criticism of the exclusionary rule is that "[i]t deprives the courts of reliable, often direct, evidence and thereby results in the freeing of persons guilty of crimes—sometimes crimes that shock and horrify the entire community") (footnotes omitted); Thomas & Pollack, supra note 13, at 147 (arguing that "[t]he possibility of these 'erroneous acquittals' [that result from the application of the exclusionary rule] may cause courts to twist the facts and doctrine to avoid finding Fourth Amendment violations") (footnotes omitted).

is therefore a danger peculiar to the Fourth Amendment that the public will confound substance and procedure and become cynical about the right to privacy itself. For this reason, it is important to acknowledge the dual nature of the Fourth Amendment entitlement.

The public's intuition that the guilty do not deserve privacy can be vindicated by the language of the law, even as the freedom of the guilty from unreasonable searches is protected. Though it may be better for ten guilty people to evade detection than for one innocent person to be searched, we must hold on to all the ideals of the Fourth Amendment even as we unavoidably must balance them against each other: that all the innocent enjoy their privacy, that all criminal behavior be detected, and that no individual be targeted for improper reasons.

CONCLUSION

The purpose and utility of the Fourth Amendment often become submerged in the controversies that rage about guilty people "getting off on technicalities." Those who care most deeply about the Fourth Amendment are viewed by many as being primarily concerned with protecting the privacy rights of criminal defendants, regardless of guilt or innocence.

This Article has argued that the occasional benefits that compliance with the Fourth Amendment confers upon the guilty should be understood as an incidental burden imposed on society by our lack of perfect searching tools rather than as an intended consequence of the Fourth Amendment. From the perspective of the Fourth Amendment, it is a harm whenever an innocent person is searched, and it is costly whenever a guilty person harboring evidence is not searched. These are the substantive values that animate the Fourth Amendment.

Viewed *ex ante* through the eyes of a government lacking perfect information, however, the guilty are on the same plane as the innocent. Every person has a right not to be targeted without justification. The Fourth Amendment includes not only the right of the innocent to be secure in their persons, houses, papers and effects, but the right of all people to be treated fairly and hence to be searched and perhaps punished because the government knows (to some set level of certainty) that they deserve to be searched and punished.