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Forget Privacy: The Warren Court's Regulatory Revolution in Criminal Procedure

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FORGET PRIVACY: THE WARREN COURT'S REGULATORY REVOLUTION IN CRIMINAL PROCEDURE

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Abstract

The standard story describing the Warren Court's criminal procedure "rights revolution," claims that the Court, motivated by liberal egalitarianism, engaged in a rights-expanding jurisprudence that made it harder for the police to search, seize, and interrogate criminal defendants. Frightened by the popular backlash against high crime rates, a cowed Court in Terry v. Ohio shifted from its rights-expanding to a rights-constricting phase, making it easier for the police to search and seize criminal suspects. Measured by this rights revolution, there were in fact two Warren Courts, a liberal and a more conservative one, emblematically separated by Terry.

The standard story is wrong. The Warren Court's Fourth Amendment jurisprudence cannot be separated into rights-expanding and contracting phases. Rather than introducing a privacy right, the Warren Court, from the early 1960s onwards, mounted a consistent attack on pre-existing versions of the right to privacy. Rather than a privacy-protecting rights regime, the central Fourth Amendment right under the Warren Court was personal security. Extending security into areas hitherto unregulated by the law was a major concern of the Terry Court: an expansionist Terry cannot be squared with a Court in retreat in response to public outcry over crime rates.

Worse, the story produced a barren doctrinal and political account of the Fourth Amendment. Focusing on equality, anti-discrimination, and privacy too easily paints law enforcement as a repressive force whose power and numbers should be severely limited. This narrow liberalism has turned progressive attention away from the vital and difficult task of generating a doctrinal and political account of policing: its justification, intrinsic limits, and proper means of regulation.

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INTRODUCTION

There is a standard story taught to American lawyers that purports to describe the Warren Court's criminal procedure decisions as a "revolution."¹ Between *Mapp v. Ohio*² and *Miranda v. Arizona*,³ the story goes, the Court (motivated by liberal egalitarianism),⁴ engaged in a rights-

¹ See Yale Kamisar, *The Warren Court (Was It Really So Defense-Minded?)*, *The Burger Court (Is It Really So Prosecution-Oriented?)*, and *Police Investigatory Practices*, in *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* 62 (Vincent Blasi ed., 1983) (henceforward Kamisar, *Warren Court*); Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 *TULSA L.J.* 1, 2-3 (1995) (henceforward Kamisar, *Quarter-Century Retrospective*).

² 367 U.S. 643 (1961).

³ 384 U.S. 436 (1966).

⁴ Kamisar, *Quarter-Century Retrospective* at 6; A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 *MICH. L. REV.* 249, 258 (1968) (emphasizing Warren Court jurisprudence of guaranteeing disadvantaged minority groups equality before the law).

expanding jurisprudence that made it harder for police to search, seize, and interrogate criminal defendants.⁵ The Fourth Amendment right most emblematic of the Court's expansionist jurisprudence was its newly-minted right to privacy. However, frightened by the popular backlash against high crime rates, and in particular the passage of the Omnibus Crime Control and Safe Streets Act of 1968,⁶ a cowed Court shifted from its rights-expanding to a rights-constricting phase in *Terry v. Ohio*⁷, making it easier for the police to search and seize criminal suspects.⁸ For proponents of the rights revolution theory, this meant that there were in fact two Warren Courts,⁹ a liberal and a more conservative one,¹⁰ emblematically separated by *Terry*.¹¹

Almost everything about this story is wrong. Contrary to prevailing opinion, the Warren Court's Fourth Amendment jurisprudence cannot be separated into rights-expanding and rights-contracting phases, but rather constituted one single regulation-promoting continuum. Similarly, the

⁵ See, e.g., *Mapp*, 367 U.S. at 654-55 (Fourth Amendment right against unreasonable searches and seizures); *Katz v. United States*, 389 U.S. 347 (1967).

⁶ See, e.g., Lucas A. Powe, Jr., *The Warren Court and American Politics* 407-411 (2000) (discussing impact of public sentiment on crime on Warren Court criminal procedure); Kamisar, *Quarter-Century Retrospective* at 3 ("the strong criticism of the Court by many members of Congress and by presidential candidate Richard Nixon and the obviously retaliatory provisions of the Omnibus Crime Control and Safe Streets Act of 1968 contributed further to an atmosphere that was unfavorable to the continued vitality of the Warren Court's mission in criminal cases."); MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* 95-96 (1998) (citing Kamisar).

⁷ 392 U.S. 1 (1968).

⁸ See Kamisar, *Quarter-Century Retrospective*; Kamisar, *Warren Court*; Jerold H. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319 (1977); Stephen A. Saltzburg, *Foreword: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 GEO. L.J. 151 (1980); Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185 (1983); Dripps, Donald A., *Beyond the Warren Court and Its Conservative Critics: Toward a Unified Theory of Constitutional Criminal Procedure*, 23 U. MICH. J.L. REF. 591 (1990).

⁹ "[W]hen we speak of the Warren Court's 'revolution' in American criminal procedure we mean the Warren Court that lasted from 1961 ... to 1966 or 1967. In its final years, the Warren Court was not the same Court that had handed down *Mapp* or *Miranda v. Arizona*." Yale Kamisar, *Quarter-Century Retrospective*, at 2-3.

¹⁰ See Powe, WCAP at 408 (discussing Warren Court's more "conservative" decisions).

¹¹ "The Chief Justice's majority opinion in *Terry v. Ohio*, an important 1968 'stop and frisk' case, is a dramatic demonstration of the Warren Court's change in tone and attitude ... I truly believe that if say, in 1971, the Burger Court had written the same opinion in the 'stop and frisk' cases that the Warren Court wrote in 1968, ... its opinion would have been considered solid evidence of the emerging counterrevolution in criminal procedure." Kamisar, *Quarter-Century Retrospective* at 4-5.

Warren Court did not introduce a new privacy right in the 1960s, so much as mount a consistent attack on three pre-existing versions of the right to privacy.¹² Rather than a liberal egalitarian,¹³ or privacy-protecting rights regime, in other words, the central concern of the Warren Court was personal security.¹⁴ Extending security into areas hitherto unregulated by the law was a major concern of the Warren Court throughout its tenure, exemplified by its decision in Terry.

Worse, the rights revolution story produced a barren doctrinal and political account of the Fourth Amendment.¹⁵ For example, Yale Kamisar, a major exponent of the “two Warren Courts” analysis, claims the rights revolution was essentially an equality revolution,¹⁶ and in particular, an anti-discrimination revolution.¹⁷ For others, the Fourth Amendment revolution was a privacy revolution, promoting the negative liberty right to exclude the government from certain places.¹⁸ Both stories are doctrinally

¹² See, e.g., *Hoffa v. United States*, 387 U.S. 231 (1967) (permitting undercover wires); *Lewis v. United States*, 385 U.S. 206 (1966) (same), *Warden v. Hayden*, 387 U.S. 294 (1967) (overruling *Gouled v. United States*, 255 U.S. 298 (1921), and in so doing, rejecting property-based view of privacy and so permitting search and seizure of “mere evidence”) *Katz v. United States*, 389 U.S. 347 (1967) (rejecting Brandeis’s liberty-protecting version of privacy and the “protected spaces” understanding of privacy propounded in *Hester v. United States*, 265 U.S. 57 (1925)).

¹³ See Kamisar, *Quarter-Century Retrospective* 2-3 (identifying central Warren Court value as equality); Powe, WCAP at 443-446 (claiming Warren Court criminal procedure was a series of “barely disguised poverty cases”).

¹⁴ See *Mapp v. Ohio*, 367 U.S. 643, 647 (1961) (“the essence of the offense; but it is the invasion of his infeasible right of personal security”); *Katz*, 389 U.S. at 659 (bypassing warrant requirement leaves people “secure from Fourth Amendment violations only in the discretion of the police.”). See also discussion at notes ____, *infra*.

¹⁵ Robert Weisberg, *Criminal Law, Criminology, and the Small World of Legal Scholars*, 63 U. COLO. L. REV. 521, 532 (1992).

¹⁶ See Kamisar, *Quarter-Century Retrospective* 2-3; Kamisar, Warren Court 62; Michal R. Belknap, *The Real Significance of Brown v. Board of Education: The Genesis of the Warren Court's Quest for Equality*, 50 WAYNE L. REV. 863, 888-89 (2004) (“close link” between concern with substantive rights and criminal procedure revolution’s “imposi[tion of] national standards on law enforcement”). A rights regime also justifies federal review of the decisions authored by state-court judges, another way in which the Court can ensure uniformity across jurisdictions. See, e.g., *David J. Garrow, Bad Behavior Makes Big Law: Southern Malfeasance and the Expansion of Federal Judicial Power*, 1954-196, 82 ST. JOHN'S L. REV. 1, 25 (2008) (discussing Court’s loss of faith in Southern judiciary in context of criminal justice rights revolution).

¹⁷ See, e.g., Tracey Maclin, *Terry v. Ohio's Fourth Amendment Legacy: Black Men And Police Discretion*, ST. JOHN'S L. REV. 1271 (1998); Frank Rudy Cooper, *Cultural Context Matters: Terry's "Seesaw Effect,"* 56 OKLA. L. REV. 833, 850-52 (2003); DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* 7-9, 43-47 (1999) (discussing anti-egalitarian tenor of much policing).

¹⁸ See Samuel C. Rickless, *The Coherence of Orthodox Fourth Amendment*

false and politically naive. Focusing on equality, anti-discrimination, and privacy too easily paints law enforcement as a repressive force whose power and numbers should be severely limited. This narrow liberalism has turned progressive attention away from the vital and difficult task of generating a doctrinal and political account of policing: its justification, intrinsic limits, and proper means of regulation.

The Warren Court's regulatory agenda has passed mostly without comment, swallowed up within the myth of the rights revolution.¹⁹ To gain a proper understanding of criminal procedure's evolution during the 1960s, however, requires paying more attention to the Court's regulation revolution. Understanding the Warren Court's regulatory agenda produces three interrelated insights. First, emphasizing regulation allows us to see Terry in its true colors: not, as Kamisar claims, the end of the rights revolution, but rather as extending the Court's scrutiny of the police (even as it limited liberal understandings of the Fourth Amendment as right to exclude the government from private places).²⁰ Second, a regulatory approach permits us to revisit and reclaim three other late-Warren Court cases as central for the regulation revolution: *Katz v. United States*,²¹ *Camara v. Municipal Court of San Francisco*,²² and Terry's twin, *Sibron v. New York*.²³ Third, an emphasis on regulation reveals the Court's alternative theory of legitimate law enforcement activity, one premised on joint action by separate branches of government (rather than simply the avoidance of discrimination by state law-enforcement agencies). Inter-branch checks need not be the only political or doctrinal theory of justified police authority. Nonetheless, it points in a direction other progressive Fourth Amendment theorists would do well to follow.

In Part II, I elaborate the ways in which the orthodox story of the

Jurisprudence, 15 GEO. MASON U. CIV. RTS. L.J. 261, 264-265 (2005) ("Since the loss of dignity or security consequent upon a search or seizure conducted by a government agent is a direct function of loss of privacy, the Court, when applying the Fourth Amendment, has understandably focused its efforts on protecting privacy from unreasonable searches and protecting liberty and property from unreasonable seizures.").

¹⁹ And not without reason. In *Mapp v. Ohio*, for instance, the Court presented its exclusionary remedy and the warrant requirement as part of the Fourth Amendment right to be free from unreasonable searches and seizures. See *Mapp v. Ohio*, 367 U.S. 643 ___ (1961).

²⁰ As I shall argue, *infra* Section ____, *Katz*'s protection of people, not places, treats privacy as an activity and expressly rejects a the sort of liberal emphasis on privacy popularized by John Stewart Mill's *On Liberty* or Justice Brandeis's *Olmstead* dissent.

²¹ 389 U.S. 347 (1967).

²² 387 U.S. 523 (1967).

²³ 392 U.S. 40, 60-61 (1968).

Warren Court's rights revolution is wrong about the rights at issue. The Fourth Amendment does not deal with equality; to the extent that privacy has become the core Fourth Amendment right, it was under siege during the Warren Court. In Part III, I discuss the Warren Court's regulatory regime of inter-branch constraint, dependent upon pre-clearance of police activity by a member of the judiciary. In part IV, I demonstrate that Terry extended, rather than contracted, the Court's Fourth Amendment criminal justice jurisprudence by increasing regulation of the police. In Part V, I argue that the Warren Court, rather than retreating from its criminal justice jurisprudence in the face of civil unrest and Congressional action, continued to expand regulation of the police. Finally, in Part VI, I suggest one way in which a political theory of police authority is needed to energize a broadly progressive approach to the Fourth Amendment.

I. THE PROBLEM WITH LIBERAL THEORY: WRONG ABOUT RIGHTS

Modern liberalism comes in two major forms: an egalitarian liberalism, in which equality is the "sovereign virtue,"²⁴ and a libertarian liberalism, in which freedom from government interference is the primary value.²⁵ To the extent that theorists such as Kenneth Pye²⁶ and Yale Kamisar,²⁷ and historians such as Lucas Powe, Jr., have identified equality as a Fourth Amendment value, they are conceptually mistaken. The value protected by the Fourth Amendment is some version of liberty: freedom from government interference. Liberty, however, may be protected in various ways. Privacy is one way, security another. Throughout the Warren Court's Fourth Amendment jurisprudence, privacy — even in its libertarian form — is consistently ignored or sacrificed to personal security.

Fourth Amendment liberalism is thus wrong about rights. In what follows, I shall argue that characterizing the Court's Fourth Amendment jurisprudence as an anti-poverty or anti-discrimination manifesto for equality fails to understand the nature of the Fourth Amendment and its protection from government interference. I shall then argue that, while that protection is most naturally characterized as a liberty right, the Warren Court specifically rejected characterizing it as a privacy right to be free from government interference. Moreover, the Court consistently attacked other, property-based and geographical understandings of privacy. What

²⁴ See, e.g., RONALD DWORKIN, *SOVEREIGN VIRTUE* (2002).

²⁵ See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* 37-40 (1971) (liberty is "lexically prior" to equality and other values).

²⁶ See Pye, WCCP at 256.

²⁷ See Kamisar, *Quarter-Century Retrospective* at 6.

emerges, I believe, is a jurisprudence concerned with protecting personal security and limiting police discretion.

A. Equality: The Wrong Right

The rights revolution analysis suggests that the Warren Court's criminal procedure was strongly egalitarian, expanding the scope of rights available to the defendant until chastened by a strong public reaction to its emphasis on the rights of criminal defendants, resulting in the passage of the Omnibus Crime Control and Safe Streets Act of 1968. What truth there is in this story lies outside the Fourth Amendment, and primarily in the Fifth and Sixth Amendment cases captured in what Kamisar identifies as the emblematic Warren Court "equal justice"²⁸ cases: *Gideon v. Wainwright*,²⁹ *Miranda*, and *Escobedo v. Illinois*.³⁰

Rather than equality cases, however, Kamisar's exemplary cases are primarily Sixth Amendment cases discussing access to counsel.³¹ Alongside these cases stands a similar line of cases ensuring financial constraints do not preclude access to the critical stages of the adversarial process.³² A core justification of each right is economic equality: that the

²⁸ See Kamisar, *Quarter-Century Retrospective* at 7.

²⁹ 372 U.S. 335 (1963).

³⁰ 378 U.S. 478 (1964).

³¹ Though *Miranda* is also a Fifth Amendment case, it includes a reference to the Sixth Amendment right within its warnings. Requiring the presence or absence of counsel during an interrogation was a central part of the *Miranda* discussion, which eventually came down on the side of advertising the right to counsel rather than requiring her presence. See Charles J. Ogletree, Jr., *Are Confessions Really Good For The Soul?: A Proposal To Mirandize Miranda*, 100 HARV. L. REV. 1826, 1842-45 (1987).

³² See, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (provision of lawyer to indigent defendants under Sixth Amendment) ("in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."); *Griffin v. Illinois*, 351 U.S. 12 (1956) (state may not deny appellate review to indigents while permitting review for those who can afford it); *Douglas v. California*, 372 U.S. 353 (1963) (requiring indigents be provided with counsel on appeal "there can be no equal justice where the kind of an appeal a man enjoys 'depends on the amount of money he has.'"); *Draper v. Washington*, 372 U.S. 487 (1963) ("the duty of the State is to provide the indigent as adequate and effective an appellate review as that given appellants with funds-the State must provide the indigent defendant with means of presenting his contention to the appellate court which are as good as those available to a nonindigent defendant with similar contentions."); *Hardy v. United States*, 375 U.S. 277, 288 (1964) (mandating provision to indigents of transcript for appeal as of right in federal system given duties of attorney in such a system); *Gardner v. California*, 393 U.S. 367, 369-70 (1969) (Fourteenth Amendment provides that where right to appeal exists, transcript must be furnished to indigent defendant).

poor should have the same chance at representation as the rich. Both strands fit within the claim that the Warren Court's liberal egalitarianism was expressed through a criminal procedure aimed at ameliorating the obstacles to justice faced by the poor, and in particular, poor minorities.³³

Equality operates in both these circumstances as what Wesley Hohfeld might have called a claim-right.³⁴ Hohfeld's famous account of legal rights is primarily concerned to distinguish legal rights from liberties (Hohfeld calls them "privileges").³⁵ He famously distinguishes between different colloquial uses of "rights" and their opposites, and claims that all legal relations may be characterized in terms of them.³⁶ The liberal egalitarian equal treatment argument identifies what might be called a "positive claim-right to specific goods and services":³⁷ either the Sixth Amendment right to be represented by counsel or the Fourteenth Amendment right to receive a trial transcript or its equivalent on appeal. The positive claim-right imposes a correlative duty upon the government to provide counsel or a transcript to the indigent. In other words, the argument from equality demands that indigents access the same services available to the well-off.

The Fourth Amendment right is not a positive claim-right, but a negative one:³⁸ the right to be free from government interference. Negative claim-rights are often treated (in a non-Hohfeldian sense)³⁹ as liberties.⁴⁰ In the Fourth Amendment context, the central right is liberty from unjustified government interference: the right to personal security or to privacy.⁴¹

³³ See Kamisar, *Quarter-Century Retrospective* at 7; Powe, WCAP at 445-46.

³⁴ WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* 38 (Walter Wheeler Cook ed., 1919).

³⁵ WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* 32-39 (Walter Wheeler Cook ed., 1919).

³⁶ "Rights' are claims, enforceable by state power, that others act in a certain manner in relation to the rightholder. 'Privileges' are permissions to act in a certain manner without being liable for damages to others and without others being able to summon state power to prevent those acts. 'Powers' are state-enforced abilities to change legal entitlements held by oneself or others, and 'immunities' are security from having one's own entitlements changed by others." Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 986 (1982).

³⁷ PETER JONES, *RIGHTS* 15 (1994).

³⁸ On negative claim-rights, see *id.* at 15, 19-20.

³⁹ Hohfeldian liberties or "privileges," Hohfeld, FLC at 38-39, are simply permissions to do as one pleases. See Jones, R at 15, 19-20. Their correlate is a "no right," not a duty. See Hohfeld, FLC at 36, 38-39. Hohfeldian liberties can, however, be protected by negative claim-rights. See Jones, R at 19-20.

⁴⁰ See, e.g., Rawls, TJ at 171-79.

⁴¹ The right to personal security is emphasized by William Stuntz. See William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016,

Liberty presents a fundamentally different (negative) type of claim than that presented by equality.

The difference is illustrated by a feature of the Sixth Amendment right-to-counsel debate that is mostly absent from the Fourth Amendment one: whether to demand equality of opportunity or equality of outcome.⁴² The Court's egalitarian jurisprudence never applied to the Fourth Amendment in this way. In fact it could not: the sort of distributional equality of outcome or opportunity applicable to increased access to counsel or transcripts through the Sixth and Fourteenth Amendments makes no sense under the Fourth Amendment. Rather than increasing access to goods under conditions of relative scarcity, the Fourth Amendment, if it promotes equality, promotes political equality of respect among citizens.⁴³

Thus, while the model of rights expansion is broadly correct when applied to the Court's Fifth and Sixth Amendment jurisprudence, it is completely inaccurate in the Fourth Amendment context. And since the "two Warren Courts" thesis depends mostly upon Fourth Amendment cases for its rights-contraction thesis, it also contributes to a serious political and doctrinal misunderstanding of Fourth Amendment values.

B. *The Court and Race: Equality as Anti-Discrimination*

The orthodox account, emphasizing Warren Court jurisprudence as focused on equal justice, and linking equal justice race, arose towards the end of the Warren Court,⁴⁴ and has continued to influence much recent

1020-21 (1995). The right to privacy, according to Stuntz, "protects the [individual's] interest in keeping information out of the government's hands." *Id.* at 1018.

⁴² The right to counsel, which is can be justified on equal opportunity grounds, does not mandate a particular outcome, measured as a particular standard of representation. *See, e.g.,* Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 AM. CRIM. L. REV. 73, 93-94 (1993); Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169, 1169-70 (2003). On the different between equality of opportunity and equality of outcome, *see, e.g.,* Dworkin, SV at 2, 181-88 (discussing equality of opportunity versus equality of outcome).

⁴³ *See, e.g.,* JOHN RAWLS, POLITICAL LIBERALISM 122-23, 217-19 (2d. ed., 2005) (discussing duty of civility as duty of mutual respect).

⁴⁴ *See, e.g.,* A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249, 256 (1968); Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 519, and Herbert L. Packer, *The Courts, the Police, and the Rest of Us*, 57 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 238, 240 (1966).

scholarship.⁴⁵ Scholars have consistently argued that much of the Supreme Court's "revolution in criminal procedure,"⁴⁶ was its explicit and implicit focus on race- and class-biases in the criminal law.⁴⁷

It is almost commonplace by now that much of the Court's criminal procedure jurisprudence during the middle part of this century was a form of race jurisprudence, prompted largely by the treatment of black suspects and black defendants in the South. The Court's concern with race relations served as the unspoken subtext of many of its significant criminal procedure decisions.⁴⁸

Legal liberalism's target is precisely this sort of discriminatory policing. Liberals sought to promote "the values of individual autonomy and equality among persons,"⁴⁹ and to establish "a fair and dignified legal process,"⁵⁰

⁴⁵ Tracey Maclin, *Terry v. Ohio's Fourth Amendment Legacy: Black Men And Police Discretion*, ST. JOHN'S L. REV. 1271 (1998); Tracey L. Meares, *Terry and the Relevance of Politics*, 72 ST. JOHN'S L. REV. 1343 (1998); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271(1997) ; Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 841-44 (1994)); Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 Mich. L. Rev. 2001, 2001-14 (1998).

⁴⁶ See, e.g., Kamisar, *Quarter-Century Retrospective* at 4 (dating the revolution as lasting from 1961-1967 at the latest);

⁴⁷ DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* 7-9, 43-47 (1999) (discussing anti-egalitarian tenor of much policing).

⁴⁸ David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 316 (1997) (citing Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1305-06 (1982); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 841-44 (1994)); *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249, 256 (1968)). See also Herbert L. Packer, *The Courts, the Police, and the Rest of Us*, 57 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 238, 240 (1966). ("What we have seen in the South is the perversion of the criminal process into an instrument of official oppression. The discretion which, we are reminded so often, is essential to the healthy operation of law enforcement agencies has been repeatedly abused in the South: by police, by prosecutors, by judges and juries.... We have had many reminders from abroad that law enforcement may be used for evil as well as for beneficent purposes; but the experience in the South during the last decade has driven home the lesson that law enforcement unchecked by law is tyrannous."); Allen, *supra* note 3, at 523 (stating that although charges of inequality have not been confined to the criminal law, but have encompassed nearly every aspect of society, such charges "possess an even sharper bite when they are hurled at a system that employs as its sanctions the deprivation of property, of liberty, and, on occasion, of life itself.").

⁴⁹ Dripps, *Beyond the Warren Court and Its Conservative Critics* at 592.

⁵⁰ Ulliver, *Evidence from the Mind of the Criminal Suspect* at 1138. Arenella asserts that "A public trial, if fairly conducted, sends its own message about dignity, fairness, and justice that contributes to the moral force of the criminal sanction." Arenella, *Rethinking*

one that “treats all criminal suspects with dignity and respect.”⁵¹

What is less consistent, indeed almost absent from the Court’s Fourth Amendment discussions, is any mention of an anti-discrimination principle derived from the right to equal treatment in terms of dignity or political equality. Equality speaks, in Kamisar’s terms, primarily to race and class distinctions. Indeed, that is the force of his endorsement of Pye’s characterization of the Warren Court.

But, as before, the distinction between the Fourth Amendment and the Court’s other criminal procedure jurisprudence is profound. In the Fifth and Sixth Amendment context, cases like *Miranda* and *Escobedo* — liberal egalitarianism’s exemplary Warren Court cases — along with, for example, *Duncan v. Louisiana*,⁵² do feature minority and economically disadvantaged defendants. Because the claim is for a right of access to services available to other more advantaged defendants (lawyers, transcripts, trial), individuals precluded from these goods are perhaps likely to be those least likely to afford them.

These major cases may address the claims of minority victims more through luck than design. More likely candidates for true reform might be

the Functions of Criminal Procedure at 203, 219. Arenella cites Justice Brandeis’ *Olmstead* dissent to support the point:

If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means — to declare that the Government may commit crimes in order to secure the conviction of the private criminal — would bring terrible retribution.

Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) (cited in Arenella, *Rethinking the Functions of Criminal Procedure* at 203).

⁵¹ Arenella, *Rethinking the Functions of Criminal Procedure* at 190. See also *Miranda v. Arizona*, 384 U.S. 436, 460 (1966) (“the constitutional foundation underlying the privilege [against self-incrimination] is the respect a government ↓ state or federal ↓ must accord to the dignity and integrity of its citizens.”). Professor William Stuntz has suggested that “dignity” may not be a significant interest in criminal procedure, especially when compared with defendant’s privacy rights. William J. Stuntz, *Privacy’s Problem And The Law Of Criminal Procedure*, 93 MICH. L. REV. 1016, 1037 (1995) (suggesting that a consistent protection of dignity rights would undermine the present system of criminal procedure). Instead, he suggests, courts generally do not focus on “the indignity of being publicly singled out as a criminal suspect,” *id* at 1064, or the “stigma” of being publicly targeted by the police. *Id.* at 1066. Rather, the courts focus upon privacy and information-gathering, to the exclusion of other dignitary interests. *Id.* at 1065.

⁵² 391 U.S. 145 (1968).

the Court's limitations on substantive criminal law statutes that prohibited constitutionally protected activities, and so were used to target minorities and other excluded groups for various public order offenses, like vagrancy. Perhaps because many of these limitations arose under the First Amendment,⁵³ rather than due process⁵⁴ or the Eighth and Fourteenth Amendments,⁵⁵ the broad sweep of the Court's limits on substantive criminal law has been relatively little commented upon.

One reason law scholars have not focused on such rulings may be that they do not fit the liberal rights revolution orthodoxy. After all, the Court's attack on the racially biased misuse of public order statutes, while it fits squarely within the liberal egalitarian framework, is very different from its Fourth Amendment jurisprudence. One would think that the Court, if it chose to use criminal procedure to pursue an anti-discrimination agenda would feel free to discuss the racial impact of policing in this context as much as in the civil rights context. Moreover, if the liberal egalitarian claim is that the police are applying one set of rules to minorities and another to everyone else, we should expect the Court to adduce some sort of argument similar to that propounded in *Yick Wo v. Hopkins*,⁵⁶ to the effect that the police were engaged in a process of racially selective arrests.

Instead, the sort of cases the Court addresses under the Fourth

⁵³ *Edwards v. South Carolina*, 72 U.S. 229 (1963) ("The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views."); *Cox v. Louisiana*, 379 U.S. 536, 551-552 (1965) (striking down breach of the peace statute as unconstitutionally overbroad); *Cox v. Louisiana*, 379 U.S. 559, 573-75 (1965) (striking down civil rights protester's conviction for obstruction of justice during peaceful demonstration, and requiring "laws and regulations to be drawn so as to give citizens fair warning as to what is illegal"); *Walker v. Birmingham*; *Shuttlesworth v. Birmingham*; *Dombrowski v. Pfister*, 380 U.S. 479, 490-91 (1965) (striking down Louisiana Subversive Activities and Communist Control Law and Communist Propaganda Control Law as vague and overbroad); *Brown v. Louisiana*, 383 U.S. 131, 143-44 (1966) (Brennan, J., concurring) (breach-of-the-peace statute overbroad to the extent it prohibits asserting First Amendment rights).

⁵⁴ See, e.g., *Papachristou v. City of Jacksonville* 405 U.S. 156, 162-65 (1972) ("The poor among us, the minorities, the average householder are not in business and not alerted to the regulatory schemes of vagrancy laws; and we assume they would have no understanding of their meaning and impact if they read them. Nor are they protected from being caught in the vagrancy net by the necessity of having a specific intent to commit an unlawful act."). Though *Papachristou* is not a Warren Court case, it is, as I shall argue, *infra* at ____, essentially linked to the Warren Court's Fourth Amendment jurisprudence in general, and to *Terry* in particular.

⁵⁵ See *Robinson v. California*, 370 U.S. 660, 666 (1962) (invalidating statute that criminalized status of addiction without requirement of some wrongful act).

⁵⁶ 118 U.S. 356 (1886).

Amendment do not have the sort of stark disparate impact of *Yick Wo* or other race cases. The lack of disparate treatment is reflected in the types of defendants prosecuted in many of the most significant Fourth Amendment cases. Only *Mapp* and *Terry* prominently feature minorities. Most of the other cases feature organized crime or drugs — bookkeepers⁵⁷ and drug dealers⁵⁸ — without any suggestion that these defendants are minorities.

The limitation of liberal egalitarianism is that, in promoting a primarily anti-discrimination Fourth Amendment jurisprudence, it excludes large numbers of people who are potentially police targets. Progressive critics of the criminal justice system should certainly focus on race and class issues: however, these figure most strongly when they are part of a more general theory of criminal justice.

In case I should be misunderstood, my point is not to claim that liberal egalitarianism does not apply to Fourth Amendment jurisprudence. My primary point is that liberal egalitarianism does not describe the Warren Court's motivation. A secondary point, however, is that anti-discrimination provides a limited critique of Fourth Amendment jurisprudence.

⁵⁷ From 1961 to 1969, organized crime cases, defined broadly as cases involving gambling, illegal union activities, or illegal distilling activity, include: *Silverman v. United States*, 365 U.S. 505 (1961) (gambling); *Chapman v. United States*, 365 U.S. 610 (1961) (illegal distilling activity); *Beck v. Ohio*, 379 U.S. 89 (1964) (gambling); *United States v. Ventresca*, 380 U.S. 102 (1965) (operating illegal distillery); *Riggan v. Virginia*, 384 U.S. 152 (1966) (gambling); *Osborn v. United States*, 385 U.S. 323 (1966) (union official attempting to bribe juror); *Hoffa v. United States*, 385 U.S. 293 (1966) (union official attempting to bribe juror); *Berger v. New York*, 388 U.S. 41 (1967) (conspiracy to bribe chairman of the New York State Liquor Authority); *Katz v. United States*, 389 U.S. 347 (1967) (gambling); *Mancusi v. DeForte*, 392 U.S. 364 (1968) (illegal union activity); *Recznick v. City of Lorain*, 393 U.S. 166 (1968) (gambling); *Spinelli v. United States*, 393 U.S. 410 (1969) (gambling). None of these cases would count as an anti-discrimination case. Yet they constitute almost a quarter of the Fourth Amendment cases decided from 1961 to 1969.

⁵⁸ From 1961 to 1969, narcotics cases include: *Wong Sun v. United States*, 371 U.S. 471 (1963) (transportation of narcotics); *Ker v. California*, 374 U.S. 23 (1963) (marijuana possession); *Aguilar v. Texas*, 378 U.S. 109 (1964) (possession of heroin); *James v. Louisiana*, 382 U.S. 36 (1965) (narcotics possession); *Lewis v. United States*, 385 U.S. 206 (1966) (marijuana possession); *Cooper v. California*, 386 U.S. 58 (1967) (selling heroin); *McCray v. Illinois*, 386 U.S. 300 (1967) (narcotics possession); *Sabbath v. United States*, 391 U.S. 585 (1968) (importation of cocaine); *Sibron v. New York*, 392 U.S. 40 (1968) (heroin possession); *Desist v. United States*, 394 U.S. 244 (1969) (conspiracy to import heroin). Of these cases, perhaps *Wong Sun* and *Aguilar* could be characterized as race cases, yet they are not usually discussed in these terms. Accordingly, almost half the Fourth Amendment cases from 1961-1969 were either organized crime or narcotics cases. The major Fourth Amendment race case is *Terry*; *Mapp* may also be characterized as a race case.

Conversely, it presents a powerful challenge to racially targeted practices like racial profiling or pretextual policing. Furthermore, it correctly emphasizes that criminal procedure burdens the poor and minorities more than other members of our society.⁵⁹ Nonetheless, anti-discrimination — and liberal egalitarianism more generally — are not an accurate descriptions of Fourth Amendment a large chunk of Fourth Amendment issues, and in particular is under-inclusive of those people who are not minorities. This is perhaps the greatest failure of liberal Fourth Amendment theory — it is the one identified by Weisberg as leading to the dead end of modern rights theorizing. Regulation offers a way out.

C. Four Versions of Privacy: Property; Liberty; Protected Spaces; Security

If egalitarian liberalism fails to explain the Warren Court's Fourth Amendment jurisprudence, then perhaps libertarian liberalism, with its emphasis on freedom from government interference, can fare better. Libertarian liberals emphasize privacy rather than equality, drawing broadly on Justice Brandeis's dissent in *Olmstead v. United States*,⁶⁰ in which he argued that the founders intended to:

protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect, that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.⁶¹

Conventional wisdom insists that privacy interests structure the law of criminal investigation.⁶² There are, however, a variety of different possible

⁵⁹ Accordingly, a critical-race-theory or anti-discrimination approach provide powerful critiques of the Court's Fourth Amendment jurisprudence. I am simply skeptical that they provide a universal account of the Court's jurisprudence. There is more to criticize than the Court's racial performance.

⁶⁰ 277 U.S. 438 (1928) (overruled by *Katz*).

⁶¹ *Olmstead* at 471 (Brandeis, J., dissenting). See also Warren & Brandeis, *The Right to Privacy*, 4 Harv.L.Rev. 193 (1890).

⁶² “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.’” *Oliver v. United States*, 466 U.S. 170, 177 (1984). See also William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1016 (1995) (“Almost all talk about the law of criminal procedure ... assum[e]s ... [that]

ways to describe privacy in the law of criminal procedure. Nowadays privacy reflects Brandeis' definition, which in turn smacks of John Stuart Mill's argument, in *On Liberty*, for the negative liberty of freedom from government intrusion.⁶³ Privacy, that is, essentially consists in the individual's right to exclude government from accessing certain areas or interfering in certain activities.⁶⁴ However, it was not always so.

In what follows, I shall describe for different theories of privacy: privacy as property; privacy as protected spaces; privacy as liberty; and privacy as security. All of these theories predate the Warren Court, and two of them — liberty and protected spaces — re-emerge at its conclusion. However, the only type of privacy consistently protected by the Warren Court was privacy as security.

The legal-libertarian version of privacy, derived primarily from Justice Brandeis' dissent in *Olmstead* (but perhaps also drawing upon Justice Douglas' opinion in *Griswold v. Connecticut*)⁶⁵ depends upon a substantive protection of persons individuality from government intrusion or

one [value or interest] — privacy — tops the list. ... Fourth Amendment cases talk about whether evidence is ... hidden from the world ... and whether particular places tend to be the locus of activities that most people like to keep secret. ... Fifth Amendment cases talk about ... the defendant's interest in keeping the information to himself. Privacy language and privacy arguments are rampant in criminal procedure.”); Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 504 (2007) (“The reasonable expectation of privacy test is the central mystery of Fourth Amendment law. According to the Supreme Court, the Fourth Amendment regulates government conduct that violates an individual's reasonable expectation of privacy.”); Scott E. Sundby, “*Everyman's Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*” 94 COLUM. L. REV. 1751, 1756 (1994) (the Court “embrac[ed] privacy as the Fourth Amendment's core value”).

⁶³ JOHN STUART MILL, *ON LIBERTY* __ (1997) (1859) (discussing the harm principle as preserving a realm of individual freedom protected from intervention by (among others) governments). See also Jamal Greene, *Beyond Lawrence: Metaprivacy And Punishment*, 115 YALE L.J. 1862, 1886-87 (2006) (“Like Mill's, Brandeis's individualism was civic-minded; he believed that the political dialogue necessary for a healthy democratic state presupposed a respect for individual liberty.”).

⁶⁴ “In the law of criminal procedure, two kinds of privacy seem to matter. The first is fairly definite: privacy interests as interests in keeping information and activities secret from the government. The focus here is on what government officials can see and hear, what they can find out. ... The second kind of privacy ... is about preventing invasions of dignity interests, as when a police officer publicly accosts someone and treats him as a suspect. Arrests or street stops infringe privacy in this sense because they stigmatize the individual, single him out, and deprive him of freedom.” William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1016, 1021 (1995).

⁶⁵ 381 U.S. 479 (1965).

intervention.⁶⁶ That is not the protection provided by the Warren Court's understanding of security. Where libertarian privacy is categorical and substantive, Warren Court security is conditional and procedural. Privacy as security does not protect "personality,"⁶⁷ (as Brandeis terms Mill's "individuality").⁶⁸ Rather, security is concerned with regulating the police through the warrant requirement: as Anthony Amsterdam points out, "[a] paramount purpose of the Fourth Amendment is to prohibit arbitrary searches and seizures as well as unjustified searches and seizures. The warrant requirement was the framers' chosen instrument to achieve both purposes."⁶⁹

Avoiding arbitrariness is one half of the concept of privacy articulated by *Mapp v. Ohio*, which sought to protect the "security of one's privacy against arbitrary intrusion by the police,"⁷⁰ where arbitrariness involves the sort of discretionary or lawless⁷¹ policing targeted by Amsterdam:⁷² what the Court in *Katz* identified as law enforcement "only in the discretion of the police"⁷³ and what the *Mapp* Court characterized as a Fourth Amendment "revocable at the whim of any police officer."⁷⁴ The other half is protection against capricious searches: what the *Mapp* Court called the "right to be secure from rude invasions of privacy by ... police officers"⁷⁵ engaged in "brutish means of coercing evidence."⁷⁶

If the orthodox, rights-based concern with privacy identifies where the police can and cannot go, the Court's regulation-based concern with security identifies how the public is treated. Rather than defending the orthodox version of privacy, in other words, the Warren Court launched an all-out assault upon it, often at the expense of criminal defendants or at the cost of "enlarg[ing] the area of permissible searches."⁷⁷ Accordingly, not

⁶⁶ For a similar sort of concern, *see, e.g.*, JOHN STUART MILL, ON LIBERTY 85 (1997) (1859) (associating liberty with the "free development of human individuality).

⁶⁷ Warren & Brandeis, RP at 205.

⁶⁸ For a similar sort of concern, *see, e.g.*, JOHN STUART MILL, ON LIBERTY 85 (1997) (1859) (associating liberty with the "free development of human individuality).).

⁶⁹ Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 417 (1974).

⁷⁰ *Mapp*, 367 U.S. at 650.

⁷¹ *Mapp*, 367 U.S. at 655 (discussing "official lawlessness").

⁷² What I call lawless Amsterdam calls "ruleless searches." Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 417 (1974).

⁷³ *Katz*, 389 U.S. at 359.

⁷⁴ *Mapp*, 367 U.S. at 660.

⁷⁵ *Mapp*, 367 U.S. at 660.

⁷⁶ *Mapp*, 367 U.S. at 655.

⁷⁷ *Warden v. Hayden*, 387 U.S. 294, 309 (1967).

only did the Court have a pre-existing privacy jurisprudence, but that jurisprudence came under attack well before the Court's supposed *volte face* in *Terry* — in fact it dates to the inception of the Fourth Amendment's regulatory revolution in *Mapp v. Ohio*.

1. The Court's Privacy-Constricting Jurisprudence

The libertarian-liberal rights-expanding thesis is easily stated: in overruling *Olmstead*, *Katz* affirmed the broader and more protective Brandeisian concept of privacy. Since the *Olmstead* majority excluded of informational privacy from the scope of constitutional protection, then *Katz*'s regulation of wiretapping looks like a major victory.

The libertarian-liberal celebration of *Katz* is either misplaced or tendentious. *Katz* is not properly understood as a privacy case,⁷⁸ but a warrant case.⁷⁹ While it protects certain conversations, *Katz* undermines the categorical protection of property or personality proposed by the majority (property) and Justice Brandeis (personality) in *Olmstead*, by permitting wiretapping so long as the police follow right process.. Put differently, the notion of privacy at issue in the prior major Fourth Amendment privacy cases — *Boyd v. United States*, *Olmstead*, and *Hester v. United States* — was more categorical and protective than the one in *Katz*.

Katz is not a rights-expanding case. It is not an egalitarian liberal opinion about restraining unprofessional, forcible police, and so to that extent can be differentiated from *Mapp v. Ohio*.⁸⁰ It is not a libertarian liberal opinion about the right to be let alone. *Katz* is a regulation-expanding opinion, demonstrating the steps that even the most professional

⁷⁸ Recently, a swath of commentators have begun to notice this fact. See Catherine Hancock, *Warrants For Wearing A Wire: Fourth Amendment Privacy And Justice Harlan's Dissent In United States v. White*, 79 MISS. L.J. 35, 52 (2009) (describing Justice Stewart's opinion for the *Katz* majority as "ambiguous") (citing David A. Sklansky, *Katz v. United States: The Limits of Aphorism*, in CRIMINAL PROCEDURE STORIES 247, 248 (Carol S. Steiker, ed., 2006) (observing that "the most striking thing" about the *Katz* Court's reasoning "was how vague and ambiguous it was," and that the "affirmative case" for the holding "was left largely unstated"); THOMAS K. CLANCY, *THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION* 59 (2008) (noting that the *Katz* Court's "embrace of privacy was not without reservation and [Justice] Stewart did little to explain what he meant by the term"); Edmund W. Kitch, *Katz v. United States: The Limits of the Fourth Amendment*, 1968 S. CT. REV. 133, 137-38 (identifying ambiguities in *Katz* opinion, and noting that because of the Harlan concurrence, "it seems clear that the [majority] opinion is deliberately ambiguous").

⁷⁹ See discussion *infra*, notes ____ — ____.

⁸⁰ *Mapp*, 367 U.S. at 655, 660.

police must go through in order to follow the correct procedure for lawful investigative activity. Indeed, perhaps the reason why Justice Stewart's opinion is so "striking[ly] ... vague and ambiguous"⁸¹ is precisely because Justice Stewart was not interested in privacy: he was one of two dissenters in *Griswold v. Connecticut*,⁸² where he claimed that he could "find no ... general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court,"⁸³ language that would resurface, almost verbatim, in *Katz*,⁸⁴ and even more precisely aimed at the sort of Brandeisian liberal legalism endorsed in *Griswold*.⁸⁵

Katz replaced the pre-existing privacy concepts (all of which were premised upon an absolute exclusion of the government from gathering or using certain sorts of information) with a relatively porous understanding of privacy as security. Accordingly, rather than enlarging privacy protection and contracting the police authority to search, the Warren Court's triple whammy of *Schmerber v. California*,⁸⁶ *Warden v. Hayden*,⁸⁷ and *Katz* served, in the words of Justice Brennan, to "enlarge the area of permissible searches,"⁸⁸ and so contract the concept of privacy. In return, the search target received the small comfort of knowing that "the intrusions are ... made after fulfilling the probable cause and particularity requirements of the Fourth Amendment and after the intervention of a 'neutral and detached magistrate.'"⁸⁹

2. Privacy as Property: *Boyd v. United States*'s Categorical Protection of Privacy

The first type of privacy — privacy as property — gains support from the text of the Amendment itself (protecting "persons, houses, papers, and

⁸¹ David Sklansy, *Katz v. United States and the Limits of Aphorism*, in *CRIMINAL PROCEDURE STORIES* 223, 247 (Carol Steiker, ed., 2006).

⁸² 381 U.S. 479, 530 (1965). I owe this insight to my colleague, Joel Goldstein.

⁸³ *Griswold*, 381 U.S. at 530 (Stewart, J., dissenting)

⁸⁴ *See Katz*, 389 U.S. at 250-51 ("the protection of a person's general right to privacy — his right to be let alone by other people — is, like the protection of his property and of his very life, left largely to the law of the individual States.").

⁸⁵ Hence Justice Stewart's dismissal of the Brandeisian "right to be let alone," *see Katz*, at 389 U.S. at 250-51; compare *Olmstead*, 277 U.S. 478 (Brandeis, J., dissenting) (discussing privacy in terms of a right to be let alone).

⁸⁶ 384 U.S. 757 (1966).

⁸⁷ 387 U.S. 294 (1967).

⁸⁸ *Hayden*, 387 U.S. at 301.

⁸⁹ *Hayden*, 387 U.S. at 301.

effects”⁹⁰), but is most famously expounded in two Fourth Amendment cases, *Boyd v. United States*,⁹¹ and *United States v. Gouled*.⁹² Although the introduction of privacy into Fourth Amendment law is often attributed to *Katz*, “*Boyd v. United States*, decided in 1886, first specifically wed the notion of privacy to the guarantee against unreasonable searches and seizures in the Fourth Amendment.”⁹³ While some aspects of *Boyd*’s vaulting rhetoric would be embraced by the Warren Court, its definition of privacy in terms of property rights would not withstand the Court’s withering scrutiny.

In *Boyd*,⁹⁴ the Court “held that the seizure of documents is inherently ‘unreasonable’ within the meaning of the first clause of the fourth amendment ... whenever the government’s sole claim to them is based on their possible utility as evidence in a criminal proceeding against the individual who both owns and possesses them.”⁹⁵ The *Boyd* Court advances two arguments to justify this position. The first is that a person cannot be convicted using his own private property against him.⁹⁶ The Court claims that there is an “intimate relation” between the Fourth and Fifth Amendments, such that they operate together to render the use of a person’s property against him in a criminal trial inherently unreasonable.⁹⁷

The second argument considers who has the superior interest in the property. The Court acknowledges that the government has a property interest in certain goods: duties, taxes, and so on, as well as stolen goods (in which the possessor by definition has not property interest). However, a person’s papers are “the owner’s goods ... his dearest property.”⁹⁸ Here the person searched possesses the superior interest, and governmental searches of mere evidence, in which it has no property right, are always unreasonable

⁹⁰ U.S. Const. Amend. IV.

⁹¹ 116 U.S. 616 (1886).

⁹² 225 U.S. 298 (1921).

⁹³ Ken Gormley, *One Hundred Years of Privacy*, 1992 Wis. L. Rev. 1335, 1359 (1992).

⁹⁴ *Boyd*, 116 U.S. at 623.

⁹⁵ Stanton D. Krauss, *The Life and Times of Boyd v. United States (1886-1976)*, 76 MICH. L. REV. 184, 185 (1978)

⁹⁶ *Boyd*, 116 U.S. at 633-34.

⁹⁷ *Boyd*, 116 U.S. at 633 (“For the ‘unreasonable searches and seizures’ condemned in the fourth amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the fifth amendment; and compelling a man ‘in a criminal case to be a witness against himself,’ which is condemned in the fifth amendment, throws light on the question as to what is an ‘unreasonable search and seizure’ within the meaning of the fourth amendment.”).

⁹⁸ *Boyd*, 116 U.S. at 627-28.

under *Boyd*.⁹⁹ Accordingly, even if the state does not break down the door of a house,¹⁰⁰ the act of forcing a person to hand over their property to the state (and then attempting to convict him in a criminal trial using that property) is inherently unreasonable.¹⁰¹ “Consequently, the scope of the privilege embodied in the unreasonable search clause came to be defined in terms of the law of property. In that respect, the doctrine contained the seeds of its own destruction.”¹⁰²

The *Boyd* decision advanced, however, two other strands of privacy analysis that were conceptually distinct from the property argument. These are the claim that privacy operates as a categorical exclusion of the government from certain places, and the argument from personal security, quoted with approval by Brandeis in *Olmstead v. United States*:¹⁰³ Though property justification was to fail in both Justice Brandeis’ *Olmstead* dissent and the Warren Court’s cases, the separate security rationale remained firm throughout those decisions: so much so that Justice Brandeis could characterize the security-protecting *Boyd* as “a case that will be remembered as long as civil liberty lives in the United States.”¹⁰⁴

Boyd thus provided a four-pronged, expansive protection of privacy.

⁹⁹ *Boyd*, 116 U.S. at 623. “This was the essence of the mere evidence rule, which provided that the fourth amendment permitted searches and seizures only if the government had a superior claim of title to the items seized.” Stanton D. Krauss, *The Life and Times of Boyd v. United States (1886-1976)*, 76 MICH. L. REV. 184, 185 n.9 (1978). *Gouled*, following *Boyd*, formalized the distinction between superior interests and mere evidence. Under *Gouled*, collecting certain types of data — another’s property — is always wrong when taken for use as mere evidence. Instead, the state must have superior interest in the property in order to assert title to it. If the state does not have a superior interest to the defendant, then the state engages in an unreasonable trespass.

¹⁰⁰ *Boyd*, 116 U.S. at 630.

¹⁰¹ *Boyd*, 116 U.S. at 623.

¹⁰² Stanton D. Krauss, *The Life and Times of Boyd v. United States (1886-1976)*, 76 MICH. L. REV. 184, 189 (1978)

¹⁰³ 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting) (“It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security.”) (quoting *Boyd*, 116 U.S. at 630).

¹⁰⁴ *Olmstead*, 277 U.S. at 474 (Brandeis, J., dissenting). Morgan Cloud argues that *Boyd*’s formalism and Brandeis’ pragmatism shared the same underlying presupposition: that privacy operates as a categorical exclusion of the government from certain places. Both decisions reflect the view that personality is inviolable, but differ over the proper grounds for its protection. Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property, And Liberty In Constitutional Theory*, 48 Stan. L. Rev. 555, 560, 624-25 (1996) (discussing Brandeis’ invocation of *Boyd*).

First, the Court's "intimate relationship"¹⁰⁵ argument integrated Fourth and Fifth Amendment protections, so that the Fourth Amendment right to be free from unreasonable searches and seizures linked to the Fifth Amendment protection against self-incrimination. Second, and as a consequence of the intimate relationship argument, *Boyd* extended a categorical protection to those items identified as private. Third, *Boyd* identified those items denominated private on the basis of the defendant's property right in them. And fourth, *Boyd* characterized the categorical protection of privacy-as-property as promoting an underlying value: protecting individual security from intrusion by the government.

The Warren Court undermined the first three of those prongs: the intimate relation prong in *Schmerber*,¹⁰⁶ and the categorical protection and privacy-as-property prongs in *Hayden* and in *Katz*.¹⁰⁷ Accordingly, while a rights-revolution argument might try to accommodate these cases by arguing that this privacy contraction occurs towards the end of Warren Court, in 1966-67, that argument would further shrink the lifespan of the revolutionary Warren Court by two years. Furthermore, the argument has to explain *Mapp*'s embarrassing indifference to the orthodox version of privacy. Whereas the right to be secure from arbitrary government interference inaugurates the Warren Court's modern Fourth Amendment jurisprudence in 1961 — and continues until the end of the Warren Court — the protection of informational privacy becomes a live issue only after the end of the Warren Court.

Of the three major Warren Court cases repudiated *Boyd*: *Schmerber*, *Hayden*, and *Katz*, *Schmerber* broke the intimate relation between Fourth and Fifth Amendments, requiring that the testimonial aspects of evidence be protected by the right against self-incrimination, rather than the right against search and seizure. The *Schmerber* Court adopted a procedural interpretation of Fourth Amendment: no longer was the government to be categorically excluded from some inviolable zone of privacy; and no longer was privacy defined in substantive terms as a set of items or places to be protected. Rather, the "overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the state,"¹⁰⁸ where the option meant what it said quite literally: those procedures are unjustified that fail to obtain a warrant unless "special facts" permit otherwise. While the procedural notion of security adopted by *Mapp*

¹⁰⁵ *Boyd*, 116 U.S. at 633.

¹⁰⁶ *Schmerber v. United States*, 384 U.S. 757, 766-68 (1966).

¹⁰⁷ *Hayden*, 387 U.S. at 304; and *Katz*, 389 U.S. at 353 (citing *Hayden*).

¹⁰⁸ *Schmerber*, 384 U.S. at 767.

survives, the rest of the *Boyd* privacy rights are eviscerated and contracted, a process continued by *Warden v. Hayden*.

In *Hayden*,¹⁰⁹ officers in hot pursuit of an armed robber entered and searched a house, discovering among other things shotgun and a pistol, as well as clothing matching the description of those worn by the robber.¹¹⁰ While the guns and ammunition were, under the *Boyd* analysis, instrumentalities of the crime that the government could seize, *Hayden* argued that the clothing was “mere evidence,” and so subject to exclusion.¹¹¹ The Court rejected *Boyd*’s property-based analysis, instead reformulating the relation between privacy and police searches to expand the range of items subject to governmental search and seizure.

In *Hayden*, the Court expressly embraced “a shift in emphasis from property to privacy.”¹¹² No longer would privacy protect some inviolate set of things or places to which the police could never gain access. Instead, the traditional use of “property interests” to delimit “the right of the Government to search and seize” was “discredited” and “discarded.”¹¹³ So long as the police obtained a valid warrant (or acted under an exception to the warrant requirement), they could search and seize private property, even “mere evidence” of crimes.¹¹⁴ Accordingly, “the role of the Fourth Amendment was ... to protect privacy from unreasonable invasions.”¹¹⁵

Under the orthodox view of privacy, *Hayden* sought to modernize and the right to privacy by re-conceiving it in terms divorced from property interests.¹¹⁶ *Hayden* expanded the zone of searchable things and place while nonetheless invoking concept of privacy. The *Hayden* Court, in delivering privacy from property (and a literal reading of the Fourth Amendment) rendered privacy in further and urgent need of definition and elaboration, yet stopped short of providing a precise articulation of the concept. In *Hayden*, the property interest “obscured,” not privacy, but “the reality that the government has an interest in solving crime”¹¹⁷ This reality

¹⁰⁹ 387 U.S. 294 (1967).

¹¹⁰ *Hayden*, 387 U.S. at 298.

¹¹¹ *Hayden*, 387 U.S. at 301, 302.

¹¹² *Hayden*, 387 U.S. at 304.

¹¹³ *Hayden*, 387 U.S. at 304.

¹¹⁴ *Hayden*, 387 U.S. at 309.

¹¹⁵ *Hayden*, 387 U.S. at 305.

¹¹⁶ See, e.g., William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1030-1034 (1995) (discussing the pre-*Hayden* regime that equated privacy with property).

¹¹⁷ *Warden v. Hayden*, 387 U.S. 294, 306 (1967). It is perhaps worth noting that this

required, not a new right, but a new approach to police regulation, dependent upon the use of warrants to scrutinize and control searches and seizures.¹¹⁸ The concept of privacy was transformed precisely to permit this style of policing, and the new regulatory regime that seeks to control it.

Accordingly, *Schmerber*, *Hayden*, and, as we shall see, *Katz* each strike blows that aim at the privacy-as-property argument. To the extent that *Boyd* is cited, it is mentioned primarily in the context of personal security. While the security rationale draws on the inviability of property or personality argument, the Warren Court repeatedly stops short of it, preferring a less categorical approach to privacy, and in the process undermining a relatively progressive, pre-existing privacy regime.

3. Privacy as Protected Spaces: *Hester v. United States*

One challenge to *Boyd* is the “protected spaces” argument attributed to *United States v. Hester*.¹¹⁹ The idea, affirmed in *Oliver v. United States*,¹²⁰ is that certain places, though the property of the suspect, deserve less Fourth Amendment protection than others. *Hester* thus apparently places a limit *Boyd*’s reach, which is now split into lessened and heightened property interest. Nonetheless, *Hester* is rejected in *Katz*,¹²¹ most expressly by the claim that the Fourth Amendment protects people, not places.¹²²

4. Privacy as Liberty: Brandeis and *Olmstead*

Brandeis and Warren’s famous Harvard Law Review article equating the right to privacy with “the right to be let alone,”¹²³ expressly

property interest is *Boyd*’s version of privacy. Accordingly, a focus on (one sort of) privacy obscured the government’s interest in solving crime.

¹¹⁸ *Hayden*, 387 U.S. at 309.

¹¹⁹ 265 U.S. 57 (1924); see *Katz*, 389 U.S. At 351 n.8 (rejecting protected spaces argument attributed to *Hester*).

¹²⁰ 466 U.S. 170 (1984) (suggesting that some areas deserve more Fourth Amendment protection than others).

¹²¹ *Katz*, 389 U.S. At 351 n.8 (“In support of their respective claims, the parties have compiled competing lists of ‘protected areas’ for our consideration. It appears to be common ground that a private home is such an area, but that an open field is not,” citing *Hester*).

¹²² 389 U.S., at 351. See also *Oliver*, 466 U.S. 187 (Marshall, J., dissenting) (“ In *Katz v. United States*, we expressly rejected a proffered locational theory of the coverage of the Amendment, holding that it ‘protects people, not places.’”).

¹²³ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV.

distinguishes the right to privacy from some property right.¹²⁴ Instead, they locate the right to privacy in the principle of personal autonomy: “the principle of an inviolate personality.”¹²⁵ Three aspects of this right link it to the privacy-as-property “formalism” of Boyd: its emphasis on a categorical protection for all items identified as private, in the name of personal security. What separates Brandeis’ Fourth Amendment understanding from *Boyd’s* is his lack of some intimate relation between Fourth and Fifth Amendments animating the categorical treatment of privacy or the use of property to denominate those items to be categorized private. Instead, Brandeis justifies each through grounding privacy in the protection of personal autonomy — “a general right to privacy for thoughts, emotions and sensations ... [that] should receive the same protection whether expressed in writing, in conduct, in conversation, in attitudes ...”¹²⁶ — that receives protection as a negative claim right “against the world.”¹²⁷

It is important not to underestimate the stringency of Brandeis’ conception of privacy. For example, Jed Rubenfeld has recently propagated a mistake made by Richard Posner in attacking Brandeisian privacy. Rubenfeld correctly notes the distinction between security and secrecy in Fourth Amendment jurisprudence, one most forcefully articulated by William Stuntz,¹²⁸ but gives it an awkward twist.

To privatize the Fourth Amendment is to understand its purposes increasingly in terms of values that, instead of speaking to the distinctive dangers of state surveillance and detention, speak rather to an individual's comfort,

193, 196 (1891).

¹²⁴ Warren & Brandeis, RP at 200-205.

¹²⁵ Warren & Brandeis, RP at 205.

¹²⁶ Warren & Brandeis, RP at 206.

¹²⁷ Warren & Brandeis, RP at 213. *See also* Carol S. Steiker *Brandeis in Olmstead: “Our Government Is the Potent, the Omnipresent Teacher”* 79 MISS. L.J. 149, 158 (2009) (“In what is probably the most famous passage of his dissent, Brandeis expounded on his idea of privacy as the foundation the Fourth Amendment: ‘The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.’”).

¹²⁸ *See, e.g.,* William J. Stuntz, *Privacy’s Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1020-21, 1068-77 (1995) (discussing privacy protecting and security protecting interpretations of the Fourth Amendment).

dignity, tranquility, respectability, and fear of embarrassment. These are of course important interests, and they happen — not coincidentally — to be precisely the same interests that chiefly motivated Brandeis and Warren's seminal essay, which had nothing to do with the Fourth Amendment, but dealt instead with invasions of privacy by gossip columnists and other private actors.¹²⁹

Rubinfeld's reading of Brandeis, because it lacks charity, is both right and wrong: the Brandeisian notion of privacy (and certainly the one that made it into the Fourth Amendment) does not warrant the extension that Posner gives it, and which Rubinfeld appears to endorse, to include "unwanted telephone solicitation" or "the blare of a sound truck."¹³⁰ Identifying privacy as the sort of "solitude ... valued because it enhances the quality of one's work or leisure,"¹³¹ trivializes the right to be let alone into a much broader and much less defensible right not to be annoyed.¹³²

Brandeis and Warren had in mind a much more weighty right. They sought to make a Millian point about the value of personal autonomy, understood primarily in a principle of personal authenticity: what they called "the principle of an inviolate personality."¹³³ It is precisely this idea of personality that Rubinfeld and Posner, in cheapening the right, miss. Brandeis and Warren's goal was to identify within the pre-existing (and *Boyd*-style) civil property understanding of privacy a negative claim-right "against the world."¹³⁴ Their "general right to privacy" seeks to protect

¹²⁹ Jed Rubinfeld, *The End Of Privacy*, 61 Stan. L. Rev. 101, 117 (2008)

¹³⁰ Rubinfeld, EP at 117.

¹³¹ Rubinfeld, EP at 117 (quoting Richard A. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 190).

¹³² It renders inexplicable why Brandeis would cite *Boyd* in his *Olmstead* dissent. See *Olmstead*, 277 U.S. ___ (Brandeis, J., dissenting); see also Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property, And Liberty In Constitutional Theory*, 48 Stan. L. Rev. 555, 560, 624-25 (1996) (discussing Brandeis' invocation of *Boyd*).

¹³³ Brandeis & Warren, RP at 205.

¹³⁴ Brandeis & Warren, RP at 213. See Jones, R at 15, 19-20 (negative claim rights are generally *in rem* rights against the world). Brandeis and Warren's civil discussion of privacy-over-property thus fits with the orthodox Fourth Amendment rejection of *Boyd*'s pre-existing property notion of privacy. However, as Professor Cloud persuasively argues, both *Boyd*'s and Brandeis' "arguments were based upon the same constellation of values, values derived from natural law concepts inherited from the eighteenth century. And Brandeis' focus upon "beliefs, thoughts, and emotions" comported with the formalist recognition that papers deserved added protection because they embody ideas."). *Id.* at 625. Brandeis' argument in *Olmstead*, however, mirrors that in his *Right to Privacy* article, because, according to Cloud, "Brandeis did not base his argument upon property rights. As

“thoughts, emotions and sensations ... whether expressed in writing, in conduct, in conversation, in attitudes ...”;¹³⁵ language that is effectively repeated in his *Olmstead* dissent.¹³⁶

Accordingly, the Brandeis right to privacy-as-liberty, the one that subsequent Fourth Amendment scholars have endorsed, is the more robust liberty right that Rubinfeld, like Brandeis, derives from Mill.¹³⁷ Rubinfeld calls it the right to “personal life ... that sphere of activity and relations where people are supposed to be free from the strictures of public norms, free to be their own men and women, free to say what they actually think, and to act on their actual desires or principles, even if doing so defies public norms.”¹³⁸

Carol Steiker, in a recent article on Brandeis’ *Olmstead* dissent, emphasizes the categorical nature of his privacy argument:

This view of wiretapping—as just another garden-variety search and seizure that can be deemed reasonable (or not constitutionally “unreasonable”) when authorized by a judicial warrant—is wholly out of sync with Brandeis’s view that wiretapping was fundamentally inconsistent with the preservation of Fourth Amendment freedoms. Recall that in Brandeis’s view, “writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire tapping.” Such writs would not be rendered acceptable if issued by a neutral magistrate;

he had nearly forty years earlier, Brandeis argued for the protection of privacy. Indeed, in 1890 he had argued that in some cases involving the publication of private letters, common law judges had erred by asserting that property law defined the sender’s rights when, in fact, it was privacy that was at stake. In those opinions, he contended, property law served as an awkward and inadequate surrogate for privacy.”). *Id.*

¹³⁵ Brandeis & Warren, RP at 206.

¹³⁶ See *Olmstead*, 277 U.S. 478 (Brandeis, J., dissenting) (arguing that the Framers “sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men.”).

¹³⁷ “This was John Stuart Mill’s theme in *On Liberty*, where he repeatedly stressed the vital importance not only to personal but social and political being of ‘individuality,’ of ‘nonconformity,’ of a space for personal life well insulated from the eye of ‘public opinion.’ Particularly in a democracy, Mill warned, where majority will and public opinion loom so large politically, people must be free in their personal lives to defy public norms — to speak what they think and act as they choose. For if people fear to say what they think or act on their principles in personal life, they are most unlikely to do so in public life.” Rubinfeld, EP at 128

¹³⁸ Rubinfeld, EP at 128.

rather, their sweeping nature and scope make them so great a threat to liberty that they are constitutionally anathema whatever their source of issuance.¹³⁹

Steiker argues that the warrant regime contemplated under *Katz*, permitting wiretapping where pre-approved by a judicial magistrate, would not have been endorsed by Brandeis.¹⁴⁰

If the Brandeisian liberty-right was a general right to be left alone by the government, that was not the right identified by the Court in its quintessential privacy case, *Katz*.¹⁴¹ The orthodox, rights-expanding libertarian liberal version dominates current understandings of the Warren Court's Fourth Amendment jurisprudence, so that privacy scholars standardly adopt the view that "in *Katz v. United States*, the Court adopted Brandeis's view, overruling *Olmstead*."¹⁴²

Katz is one of the few "watershed" criminal procedure decisions that has managed to retain its status "as one of the most important Fourth Amendment cases ever decided."¹⁴³ As David Sklansky describes, the orthodox or canonical reading of *Katz* presents a simple and unitary account of the case: "it changed the Fourth Amendment from a protection against trespass to a protection of 'reasonable expectations of privacy.'"¹⁴⁴ The defendant, Charlie Katz, made a living calling in bets to Miami and Boston bookmakers from a set of telephone booths on Los Angeles's Sunset Strip.¹⁴⁵ Federal law enforcement agents, without obtaining a search warrant, placed a stereophonic tape recorder on the outside of the phone booths to record Katz's conversations and obtained incriminating evidence used to convict him at trial. The Supreme Court found that the police recording violated Katz's right to privacy and reversed.

Commentators mostly overlook the fact that left-libertarian and anti-

¹³⁹ Carol S. Steiker BiO at 165.

¹⁴⁰ Carol S. Steiker BiO at 165.

¹⁴¹ Accordingly, Daniel Solove, among others, is just flat out wrong when he asserts that

¹⁴² Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087 (2002). Only the second half of this statement is true.

¹⁴³ David Sklansky, *Katz v. United States and the Limits of Aphorism*, in CRIMINAL PROCEDURE STORIES 223, 223 (Carol Steiker, ed., 2006).

¹⁴⁴ David Sklansky, *Katz v. United States and the Limits of Aphorism*, in CRIMINAL PROCEDURE STORIES 223, 223 (Carol Steiker, ed., 2006).

¹⁴⁵ David Sklansky, *Katz v. United States and the Limits of Aphorism*, in CRIMINAL PROCEDURE STORIES 223, 224 (Carol Steiker, ed., 2006); see also *Katz v. United States*, 389 U.S. 347, 348 (1967).

discriminatory privacy interests do not explain either the result or the reasoning in *Katz*. Justice Stewart's articulation of the relation between the Fourth Amendment and the right to privacy is distracted and obscure survey of the constitutional significance of privacy.¹⁴⁶ At best, Stewart mounts a surprising (for left-libertarians) attack on the Brandeis and Mill model of privacy-as-negative-liberty. To the extent the Court considers Justice Brandeis's famous discussion of privacy, it is not to embrace negative liberty but to leave "the protection of a person's ... right to be let alone by other people ... largely to the law of the individual States."¹⁴⁷

The central statement of the Fourth Amendment's libertarian right to privacy occurs in Justice Harlan's clear, concise concurrence: "a person has a constitutionally protected reasonable expectation of privacy."¹⁴⁸ Absent a search warrant, "the invasion of a constitutionally protected area ... is ... presumptively unreasonable."¹⁴⁹ However, Justice Stewart, writing for the *Katz* majority states that "the protection of a person's general right to privacy — his right to be let alone by other people — is, like the protection of his property and of his very life, left largely to the law of the individual States."¹⁵⁰ To the extent that "privacy" is protected, it is not protected as a general claim right against the world, but a particular claim right against certain government agents: in particular the police. To the extent the Court embraces a privacy jurisprudence, it does not protect property, under *Boyd's* privacy scheme, not places, under *Hester's* "protected spaces scheme," but the people's security from certain types of unauthorized government interference. The categorical schemes of privacy protection envisaged by *Boyd*, *Hester*, and Brandeis in *Olmstead* as well as his Right to Privacy article all fall before the security-based concept of privacy.

Given the emphasis on police regulation through the warrant regime, the idea of privacy as anti-arbitrariness fits with the majority's emphasis

¹⁴⁶ See, e.g., Edmund W. Kitch, *Katz v. United States: The Limits of the Fourth Amendment*, 1968 Sup. Ct. Rev. 133, 135 (describing the majority opinion as "inattentive to the ... task of articulating and applying" a principled account of privacy) (cited in David Sklansy, *Katz v. United States and the Limits of Aphorism*, in *CRIMINAL PROCEDURE STORIES* 223, 248 n.126 (Carol Steiker, ed., 2006)).

¹⁴⁷ *Katz*, 389 U.S. at 351.

¹⁴⁸ *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J. concurring).

¹⁴⁹ *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J. concurring).

¹⁵⁰ *Katz*, 389 U.S. at 350-51.

on “people, not places.”¹⁵¹ Leaving the libertarian embrace of privacy to Justice Harlan’s concurrence, Justice Stewart’s majority opinion in *Katz* appears more concerned with re-emphasizing the regulatory use of warrants as a limitation on police activity as it does endorsing its novel privacy doctrine. The clear, central purpose of *Katz* is to emphasize a particular style of regulation as constitutionally mandated.

The warrant requirement, so central to the Court in *Katz*, provides a its theory of justified government invasion of privacy interests (whatever they are). The Court’s procedure emphasizes due process: it interposes an impartial judicial officer between citizens and police. The goal is to provide a “neutral predetermination of the scope of the search” rather than the sort of “competitive enterprise of ferreting out crime,”¹⁵² that places the Constitution’s protections “only in the discretion of the police.”¹⁵³ Authorization occurs by means of an official who is part of a separate branch of government: the magistrate’s “[o]bjective predetermination of probable cause.”¹⁵⁴

Accordingly, privacy does not determine the result in *Katz*. It is the failure to accede to the required method of regulation, rather than a failure to properly evaluate the suspect’s privacy expectations, that dooms the federal agent’s activity as unlawful. The Court mandates a procedure that requires independent authorization before the police can act. The warrant requirement thus necessitates joint action by the judicial and executive branches if the procedure is to be authorized by the Constitution. Here, the Court’s worry is not (just) rogue cops, but is what counts as a legitimate justification for state action in a government of limited powers. The Court thus provides, through its warrant clause, a robust, positive solution to the problem of official arbitrariness, one that, while it may promote equality and anti-discrimination, is not directly animated by either of these concerns.

The agent’s only mistake was a regulatory one, and a procedural one

¹⁵¹ *Katz*, 389 U.S. at 352.

¹⁵² *Johnson v. U.S.*, 333 U.S. 10, 14 (1948). See also *Spinelli v. United States*, 393 U.S. 410, 415 (1969) overruled by *Illinois v. Gates*, 462 U.S. 213 (1983) (applying “ferreting out crime” standard to reject informant testimony as falling below probable cause).

¹⁵³ *Katz*, 389 U.S. at 359.

¹⁵⁴ *Katz*, 389 U.S. at 358. Note that while a warrant is always required, according to *Katz*, scrutiny occurs on a case-by-case basis.

at that. Justice Stewart's opinion endorses the "the Government's position ... that its agents acted in a [] ... defensible manner."¹⁵⁵ The agents correctly judged the presence of probable cause and the permitted range of police monitoring, both based on prior case law and under the Court's new privacy standard.¹⁵⁶ The Supreme Court, after the fact validated each of these judgments,¹⁵⁷ and agreed that the agents did not act overzealously: rather, "It is apparent that the agents in this case acted with restraint."¹⁵⁸ The agents did make, however, one, critical, error: they failed to follow the Court's newly-minted Fourth Amendment regulatory scheme, which required obtaining judicial pre-authorization of the search through the warrant process. Accordingly, "the inescapable fact is that th[e] restraint was imposed by the agents themselves, not by a

¹⁵⁵ *Katz v. United States*, 389 U.S. 347, 354 (1967). The opinion does *not* however, agree with the government that the agents' conduct was "entirely" defensible. *Id.*

¹⁵⁶ *See Katz v. United States*, 389 U.S. 347, 354-56 (1967).

¹⁵⁷

They did not begin their electronic surveillance until investigation of the petitioner's activities had established a strong probability that he was using the telephone in question to transmit gambling information to persons in other States, in violation of federal law. Moreover, the surveillance was limited, both in scope and in duration, to the specific purpose of establishing the contents of the petitioner's unlawful telephonic communications. The agents confined their surveillance to the brief periods during which he used the telephone booth, and they took great care to overhear only the conversations of the petitioner himself.

Katz v. United States, 389 U.S. 347, 355 (1967).

Based upon their previous visual observations of the petitioner, the agents correctly predicted that he would use the telephone booth for several minutes at approximately the same time each morning. The petitioner was subjected to electronic surveillance only during this predetermined period. Six recordings, averaging some three minutes each, were obtained and admitted in evidence. They preserved the petitioner's end of conversations concerning the placing of bets and the receipt of wagering information. ... On the single occasion when the statements of another person were inadvertently intercepted, the agents refrained from listening to them.

Katz v. United States, 389 U.S. 347, 354 n.14, n.15(1967).

¹⁵⁸ *Katz v. United States*, 389 U.S. 347, 356 (1967).

judicial officer.”¹⁵⁹ Misjudging the regulatory regime, not privacy, was the operative issue determining the outcome of *Katz*.¹⁶⁰

Justice Stewart’s opinion for the majority is inattentive to privacy, but quite precise about regulation. The Court goes to great lengths to require law enforcement to pre-clear investigation through a magistrate rather than judge the propriety of the search themselves. If the Warren Court was a rights-expanding court rather than a rights-constricting, or even rights-maintaining one, we would expect the court to embrace more than just the security argument requiring some appropriate process. Instead, we would expect the Court to embrace some form of the pre-existing categorical protection argument advanced (in different ways) in *Boyd*, *Hester*, or Brandeis’ *Olmstead* dissent. But Justice Stewart never wraps his arms around any version of categorical protection. Instead, *Katz* is best understood as a case about regulation rather than rights: a massive defeat for the libertarian notion of privacy as a categorically protecting certain aspects of individual autonomy (property, spaces, personality). Understood as a regulatory case, *Katz* facilitates wiretaps so long as the government follows the correct pre-clearance procedure.

Throughout the Warren Court’s Fourth Amendment regime, from *Mapp* to *Terry*, what remains of *Boyd* and Brandeis’ *Olmstead* dissent is the right to security. Security is the quintessential Fourth Amendment interest: it is, after all, “the right of the people to be secure” that the Fourth Amendment protects.¹⁶¹ Accordingly, the Warren Court’s central Fourth Amendment innovation is not inventing a new right — privacy — that expands its ability to protect criminal defendants in general, and minorities in particular. The central innovation is establishing, or insisting upon, a particular mode of regulating the police — through the warrant — and remedying police misconduct using exclusion.

II. REGULATION

The court-sponsored creation of rules governing criminal procedure faces a central problem: the courts must have some justification, in the absence of detailed statutory provisions, for engaging in “comprehensive control over the law enforcement process.”¹⁶² Rights provide a concise

¹⁵⁹ *Katz v. United States*, 389 U.S. 347, 356 (1967).

¹⁶⁰ Accordingly, had a warrant issued prior to the agents’ interception of Katz’s comments, those comments would still have been admissible under the new standard announced by the Court.

¹⁶¹ U.S. Const. Amend. IV.

¹⁶² Herbert L. Packer, *The Courts, the Police, and the Rest of Us*, 57 J. CRIM. L.

solution if they can be shown to entail both some remedy and a particular style of regulation. Under this regime, where constitutional rights provide a warrant for judicial intervention, courts can extrapolate a “constitutional code of criminal procedure.”¹⁶³

One plausible foundation for this view might be to argue that rights correlate with regulation and remediation in the manner suggested by Wesley Hohfeld. He famously argued that legal rights emerge from a series of bilateral relations between persons with opposing but structurally matched interests.¹⁶⁴ The right does not simply exist as an attribute of a person or thing, but in the relation between related, or what he calls “correlative,”¹⁶⁵ legal interests. Thus, according to Hohfeld, to assert that someone has a right entails that someone else has a duty.¹⁶⁶

In the law of criminal investigation, some endorse a more extreme position: that rights correlate with not only a duty, but also a specific remedy and style of regulation. The most famous statement of this position in the law of criminal procedure is the warning regime established by *Miranda v. Arizona*.¹⁶⁷ The *Miranda* case is most famous for the series of warnings it mandates prior to custodial questioning, and most infamous for its insistence that those warnings emanate from Fifth and Sixth Amendment rights the Court sought to protect.¹⁶⁸ It thus embodies the argument that rights, regulation, and remediation come as a conceptually linked package, in which the style of regulation and type of remedy are determined by the nature and scope of the right or value at issue. In the previous section, however, I suggested that *Boyd v. United States*, Justice Brandeis in his Olmstead dissent, and the Court in *Mapp v. Ohio* made the same argument for privacy (understood as security, or property, or personal integrity), the

CRIMINOLOGY & POLICE SCI. 238, 240 (1966).

¹⁶³ This phrase was coined — and the rights regime attacked — by Judge Henry Friendly. See Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929 (1965).

¹⁶⁴ See WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS (Walter Wheeler Cook eds., 1919).

¹⁶⁵ WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 36 (Walter Wheeler Cook eds., 1919)

¹⁶⁶ See WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 36, 38 (Walter Wheeler Cook eds., 1919). See also J.M. Balkin, *The Hohfeldian Approach to Law and Semiotics*, 44 U. MIAMI L. REV. 1119, 1122 n.7 (1990) (“The nature and extent of a person’s rights are dependent upon the correlative duties of others.”).

¹⁶⁷ 384 U.S. 436 (1966).

¹⁶⁸ See, e.g., Yale Kamisar, *Foreword: From Miranda to §3501 to Dickerson To . . .*, 99 MICH. L. REV. 879 (2001); Yale Kamisar, *Miranda Thirty-Five Years Later: A Close Look at the Majority and Dissenting Opinions in Dickerson*, 33 ARIZ. ST. L.J. 387 (2001).

warrant regime, and the remedy of exclusion.

Take the right, established in *Miranda*, of free choice to speak or remain silent. The right correlates with a government duty not to coerce a confession. It does not follow, however, that the appropriate remedy is to preclude the government from using any information it obtains in violation of that right in a criminal trial. Only the right and duty are logically related.¹⁶⁹ Hohfeld does not correlate duties with remedies for breach of the right. The sort of government duty correlated with the right does not in turn correlate with any particular style of regulation or remedy.¹⁷⁰ The choice of regulatory scheme and remedy is, in that case, pragmatic or prudential. Accordingly, a range of regulatory methods or remedies would be equally compatible with protecting the individual's right.

The point that claim rights logically entail duties, but do not logically entail regulation or remedies, does not take sides in the debate over whether the *Miranda* warnings regime is necessitated by the Fifth Amendment.¹⁷¹ A particular regulatory regime or remedy may be so closely associated with the right that the right could not exist without it. That is, the warning scheme may not be logically entailed by the right, but it is pragmatically entailed by it:¹⁷² the right would be completely ineffective without some warning scheme. That is precisely the argument made by the majority in *Mapp*, and it is essentially the argument made by *Miranda*'s defenders: the voluntariness scheme was cumbersome to the point of uselessness, 18 U.S.C. §3501 was similarly flawed, and so pragmatically the warning scheme is necessary to put the right into effect. If the right cannot be enforced through the legal system, it does not exist as a right, and so the Court, in *Dickerson v. United States*,¹⁷³ was right to endorse the *Miranda*

¹⁶⁹ See PETER JONES, RIGHTS 17 (1994) (claim-right and duty may be logically related, but other requirements merely "associated" with the right).

¹⁷⁰ On de-licensing, see Roger L. Goldman & Steven Puro, *Revocation Of Police Officer Certification: A Viable Remedy for Police Misconduct?*, 45 ST. LOUIS U. L.J. 541 (2001).

¹⁷¹ This is to suggest that in the *Miranda* debate, both sides were to a certain extent right. Those who argued that the right did not entail the warnings are right if they are employing Hohfeld's analyses of claim rights: the right entails only a governmental duty, but is ambivalent about enforcement. From the Hohfeldian perspective, the right may be enforced using the voluntariness standard rejected in *Miranda*, or by *Miranda*'s warning scheme, or by some other scheme, as contemplated by 18 U.S.C. §3501, also known as Title II of the Omnibus Crime Control and Safe Streets Act of 1968.

¹⁷² On something like pragmatic entailment, see Eric J. Miller, *Judicial Preferences*, 44 HOUSTON L. REV. 1275, 1332 (2008) (discussing related concept of pragmatic permissions).

¹⁷³ 530 U.S. 428 (2000).

warning scheme as constitutional in nature.

If right and remedy (or regulatory scheme) are pragmatically, rather than logically, interrelated, then administrators (including courts) have leeway in constructing equally effective regulatory regimes. Accordingly, they can choose among regimes in which an official may be personally liable in criminal¹⁷⁴ or tort law¹⁷⁵ for an infraction, or may suffer negative employment consequences imposed by a superior or third party ranging from a reprimand on the official's employment record to de-licensing.¹⁷⁶ Alternatively, officials may be held liable only in their capacity as a representative of a particular institution. Institutional sanctions include termination of the unlawful institutional activity, monetary damages, or being precluded from using the products of an activity, and may be imposed prospectively to preclude future action or retrospectively to punish or compensate for past action. The scope of the sanction can be quite general, enjoining a wide range of activities, to the more specific remedy of exclusion, which applies to particular conduct in a given circumstance.¹⁷⁷ Both *Mapp* and *Dickerson* (and more recently, *United States v. Herring*) suggest that, in deciding whether to retain or reject regulatory regimes or remedies, their ability of to render rights pragmatically effective are one of the core criteria.

Typically, regulation can be divided into three forms, one granting pre-clearance of future conduct; one demanding contemporaneous monitoring of current conduct; and one requiring after-the-fact review of past conduct by comparison with some set of norms or regulations. Each form of regulation comes in two broad classes, categorical and case-by-case.¹⁷⁸ Regulation may, but need not, require the imposition of a sanction for failure to act in conformity with the relevant directive. In the law of criminal investigation, courts regulate cops primarily through pre-clearance

¹⁷⁴ See, e.g., 18 U.S.C. § 242 (making it a crime to deprive citizens of their constitutional rights).

¹⁷⁵ See, e.g., *Hudson v. Michigan*, 547 U.S. 586, 599 (2006).

¹⁷⁶ Roger L. Goldman, *State Revocation of Law Enforcement Officers' Licenses and Federal Criminal Prosecution: An Opportunity for Cooperative Federalism*, 22 ST. LOUIS U. PUB. L. REV. 121 (2003); Roger L. Goldman & Steven Puro, *Revocation of Police Officer Certification: A Viable Remedy for Police Misconduct?*, 45 ST. LOUIS U. L.J. 541 (2001).

¹⁷⁷ Arguably, the exclusionary rule is a sanction terminating a criminal investigation.

¹⁷⁸ As we shall see, these classes do not precisely track the categories of rules or standards, which apply only loosely to the operative part of criminal investigation. See text and footnotes at ____, *infra*.

and after-the-fact review.¹⁷⁹ The central sanction is suppression of unlawfully obtained evidence.

Pre-clearance entails gaining advance permission to act from some other party. In the case of law enforcement, these may include legislatures, licensing boards, ombudsmen, or the target of the official activity. Contemporaneous monitoring requires some form of regular scrutiny of official conduct during the course of the regulated activity. After-the-fact review generally retrospectively evaluates conformity of some completed official activity to some norm describing proper performance.

Breaking regulation into three broad forms and disconnecting them from the various sanctions imposed serves to clarify some of the stakes in the various regulatory debates. First, taking a general overview of regulation brings to consciousness its pervasive use in the law of criminal investigation. Second, and perhaps more importantly, remembering the variety of forms of regulation that could operate in criminal investigation helps to tie criminal procedure to other branches of constitutional law.¹⁸⁰ Third, a more nuanced understanding of the different forms of regulation reminds us that the different forms of regulation can be interrelated in different ways to achieve a multiplicity of outcomes, a fact that is obscured when particular combinations are presented as effects of, or necessary to protect particular types of, privacy.

If we look at things primarily from a regulatory rather than a rights perspective, and ask what right is most directly protected by the Warren Court's regulatory regime, it is neither privacy nor equality, but security from "rude" government intrusions. If the right to equality entails a Hohfeldian positive claim — access to the same resources as others — or a negative claim — to be free to maintain a sphere of personal expression free from intervention by others or the government — then it is not altogether clear that the warrant regime and exclusionary remedy are entailed by the

¹⁷⁹ It is not the courts, but citizens and lawyers that engage in contemporaneous monitoring. See *Schneckloth v. Bustamonte*, 412 US 218, 281-82 (1973) (Marshall, J., dissenting) (arguing that something equivalent to Miranda warnings should be provided prior to obtaining consent to search to forestall implication of coercion); *Miranda v. Arizona*, 384 U.S. 436, 445 (1966) (scope of interrogation determined by defendant's voluntary waiver of rights).

¹⁸⁰ See, e.g., David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988); see also William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881 (1991); William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016 (1995); William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393 (1995)

right. Given the style of regulation and the remedy proposed, the most likely candidate for protection is the right to security, not privacy: there are better ways to protect informational privacy than pre-investigation pre-clearance or contemporaneous monitoring of police conduct.

If *Mapp*¹⁸¹ is the inaugural case in the Warren Court's rights revolution,¹⁸² then it is worth remembering that its innovation was not to apply a right to the states, but a remedy. Twelve years before *Mapp*, in *Wolf v. Colorado*,¹⁸³ the Court first applied the Fourth Amendment (and its concomitant right to privacy) to the states.¹⁸⁴ Accordingly, the central problem in *Mapp* is how we are to understand the relation between right and remedy.

In *Mapp*, the Court is more concerned with the remedy as part of the right, rather than the contours of "the right to privacy free from unreasonable state intrusion."¹⁸⁵ The Court returned to a theory of the relationship between right and remedy that accepted the remedy of exclusion is "part and parcel" of the Fourth Amendment rights regime.¹⁸⁶ In re-evaluating the relationship, the Court held that privacy-as-security — the right to be free from arbitrary government intrusions¹⁸⁷ entails the "privilege" of exclusion.¹⁸⁸ The Court's argument was that unless the right is enforceable, it does not (meaningfully) exist — it is an "empty promise."¹⁸⁹

Mapp expressly follows both *Boyd* and Brandeis' *Olmstead* dissent, both in emphasizing security and in devising a regime to regulate the police. From *Boyd* the Court takes, among other things, the need to protect the

¹⁸¹ 367 U.S. 643 (1961).

¹⁸² See Kamisar, *Quarter-Century Retrospective* at 6 (discussing rights revolution as starting with *Mapp* and ended by *Terry*).

¹⁸³ 338 U.S. 25 (1949).

¹⁸⁴ *Id.* at 27-28 ("The security of one's privacy against arbitrary intrusion by the police — which is at the core of the Fourth Amendment — is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause.").

¹⁸⁵ *Mapp*, 367 U.S. at 654.

¹⁸⁶ *Mapp*, 367 U.S. at 651; see also *id.* at 678 (Harlan, J., dissenting).

¹⁸⁷ See *Mapp*, 367 U.S. at 651 (quoting *Wolf*, 338 U.S. at 27).

¹⁸⁸ *Mapp*, 367 U.S. at 656 ("the admission of the new constitutional right by *Wolf* could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment.").

¹⁸⁹ *Mapp*, 367 U.S. at 660.

“indefeasible right of personal security” from “stealthy encroachments.”¹⁹⁰ Furthermore, the Court relied upon, among other cases, *Boyd* to reinstate the intimate relation between remedy and right: the worry that the right would not exist without the remedy — “[t]he right to privacy ... was not susceptible of destruction by avulsion of the sanction upon which its protection and enjoyment had always been deemed dependent under ... *Boyd*”¹⁹¹ — and so insisting upon the “logically and constitutionally necess[ity of] the exclusion doctrine.”

From *Olmstead*, the Court integrates what Carol Steiker has identified as the “greatest” part of that dissent:¹⁹² “his at once lyrical and indignant call for the repudiation of government lawbreaking in the pursuit of its own enforcement goals.”¹⁹³ What the *Mapp* Court takes from Brandeis, then, is not an emphasis on privacy, but upon “judicial integrity”:¹⁹⁴ being governed by legal rules applicable to everyone rather than the arbitrary “whim of any police officer who ... chooses to suspend [the Constitution’s] enjoyment.”¹⁹⁵ Put differently, rather than regarding the executive in general, or the police in particular, as some Hobbesian sovereign or Austinian “uncommanded commander” unconstrained by the rules it applies to others, the Court adopts a more Lockean or Millian insistence upon of the rule of law in the face of “official lawlessness.”¹⁹⁶

If the central problem is that identified by Brandeis: in “fail[ing] to observe its own laws ... ‘the Government becomes a lawbreaker,’”¹⁹⁷ then the *Mapp* Court reframes it as a separation of powers issue: just as the department of justice, by associating itself with unlawful police work, endorses lawbreaking, so the judiciary, as a separate branch of government cannot endorse lawbreaking by the executive branch. The Warren Court adopts Brandeis’ implied solution: “more robust use of courts’ inherent, non-constitutional supervisory powers to refuse to participate in

¹⁹⁰ *Mapp*, 367 U.S. at 647 (quoting *Boyd*, 116 U.S. at 635, 638).

¹⁹¹ *Mapp*, 367 U.S. at 655.

¹⁹² Steiker, BiO at 167.

¹⁹³ Steiker, BiO at 167.

¹⁹⁴ *Mapp*, 367 U.S. at 650, repeated at 660. See also Steiker, BiO at 168-69 (discussing Brandeis’ government integrity argument).

¹⁹⁵ *Mapp*, 367 U.S. at 660.

¹⁹⁶ *Mapp*, 367 U.S. at 655. In fact *Mapp* quotes this aspect of Brandeis’ dissent at length: “Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. ... If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.” *Id.* at 659 (quoting *Olmstead*, 277 U.S. at 485 (Brandeis, J., dissenting)).

¹⁹⁷ *Mapp*, 367 U.S. at 655 (quoting *Olmstead*, 277 U.S. at 485 (Brandeis, J., dissenting)).

government wrongdoing and to sanction government actors for law breaking by excluding evidence obtained unlawfully from court.”¹⁹⁸ The cure for arbitrariness or lawlessness is thus court-sponsored regulatory regime: a warrant process that permits external judicial review of police conduct.

In *Mapp*, the warrant regime is powerfully regulatory: it permits monitoring of the police at all stages of investigation. The warrant requires external review through antecedent monitoring by a magistrate who would determine that the police have sufficient evidence to search and prescribe the scope of the search.¹⁹⁹ Furthermore, a warrant detailing what is sought and where to search permits the target of the search to engage in contemporaneous monitoring. Finally, the warrant permits a court (as well as the target of the search) to determine, after the fact, whether the police followed the terms of the warrant. The warrant regime thus serves two functions: first, inter-branch integrity through judicial review and authorization of the warrant process. But second, it ensures policing by consent — not only consent of the judiciary, but of the target of the search.

The regulatory regime established in *Mapp* and derived from Brandeis and Boyd was consistently enforced throughout the Warren Court. The whole point of inter-branch scrutiny through the “warrant procedure [i]s to insure that the deliberate, impartial judgment of a judicial officer will be interposed between the citizen and the police ... To hold that an officer may act in his own, unchecked discretion ... would subvert this fundamental

¹⁹⁸ Steiker, BiO at 169.

¹⁹⁹ In Eric J. Miller, *Putting the Practice into Theory*, 7 OHIO ST. J. CRIM. L. 31 (2009), I erroneously suggested that the warrant did not enforce contemporaneous monitoring. While it is true that, under *United States v. Grubbs*, 547 U.S. 90 (2006) rejects the claim that “the executing officer must present the property owner with a copy of the warrant before conducting his search,” *id.* at 98-99, nonetheless, were the officer to present the target with a copy of the search warrant, such a process would permit contemporaneous monitoring by the target of the search. It is worth noting that if *Grubbs* were applied to *Mapp*, Dollree Mapp may have had no way of asserting that there was a constitutional violation. The problem in *Mapp* was, in part, a warrantless search: the government could not produce the warrant. *Mapp*, 367 U.S. at 644-45. (“ the officers knocked on the door and demanded entrance but appellant, after telephoning her attorney, refused to admit them without a search warrant. ... A paper, claimed to be a warrant, was held up by one of the officers. [Dollree Mapp] grabbed the 'warrant' and placed it in her bosom. A struggle ensued in which the officers recovered the piece of paper ... At the trial no search warrant was produced by the prosecution, nor was the failure to produce one explained or accounted for. At best, 'There is, in the record, considerable doubt as to whether there ever was any warrant for the search of defendant's home.'”).

policy.”²⁰⁰ Adopting the current preference for retrospective review by a judge²⁰¹ “bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure on an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment.”²⁰² This language is quoted verbatim in *Katz*’s strong statement in favor of the warrant regime.²⁰³

The security worry and its regulatory fix — a regulatory regime of inter-branch scrutiny — is at the heart of *Katz*’s rejection of law enforcement “only in the discretion of the police.”²⁰⁴ Where *Katz* rejects *Boyd*, *Hester*, and *Olmstead*’s libertarian liberal conception of privacy, it too adopts Brandeis’ regulatory regime: a unitary government of inter-branch cooperation. *Katz*’s regulatory approach — pre-clearance of police investigation after external review by a judicial officer — is consistently adopted by the Warren Court, from *Mapp* onwards. Accordingly, Carol

²⁰⁰ *Wong Sun v. United States*, 371 U.S. 471, 481-82 (1963).

²⁰¹ The current regime arises from a preference for freestanding reasonableness rather than a warrant requirement. The freestanding reasonableness analysis gained its major impetus from *United States v. Leon*’s good-faith exception to the warrant requirement. *United States v. Leon*, 468 U.S. 897, 919-23 (1984) (introducing good faith exception to warrant requirement). The Warren Court had considered and rejected the good faith argument: “We may assume that the officers acted in good faith in arresting the petitioner. But ‘good faith on the part of the arresting officers is not enough.’ If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be ‘secure in their persons, houses, papers, and effects,’ only in the discretion of the police.” *Beck v. State of Ohio*, 379 U.S. 89, 97 (1964) (citing *Henry v. United States*, 361 U.S. 98 (1959)).

²⁰² *Beck v. State of Ohio*, 379 U.S. 89, 96 (1964).

²⁰³ See *Katz*, 389 U.S. at 357 (“Searches conducted without warrants have been held unlawful ‘notwithstanding facts unquestionably showing probable cause,’ for the Constitution requires ‘that the deliberate, impartial judgment of a judicial officer * * * be interposed between the citizen and the police’ *Wong Sun v. United States*, 371 U.S. 471. ‘Over and again this Court has emphasized that the mandate of the (Fourth) Amendment requires adherence to judicial processes,’ and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions.”); *Id.* at 358-59 ““Omission of such authorization ‘bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the * * * search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment.’ *Beck v. State of Ohio*, 379 U.S. 89. And bypassing a neutral predetermination of the scope of a search leaves individuals secure from Fourth Amendment violations ‘only in the discretion of the police.’ *Id.*, at 97”).

²⁰⁴ *Katz*, 389 U.S. at 359. This language is similar to *Mapp* claim that the Fourth Amendment is “revocable at the whim of the police officer.” *Mapp*, 367 U.S. at 660.

Steiker is somewhat pessimistic in arguing that “Brandeis's government integrity argument did not win in *Olmstead*, nor has it triumphed in the succeeding eighty years.”²⁰⁵ On the contrary, from 1961 until 1974, the judicial integrity argument ruled the roost, with a strong warrant requirement as the principle evidence of its dominance. Furthermore, although Steiker is correct to suggest that the right and remedy are conceptually distinct, the Court joins them in *Mapp*, and only separates the remedy in *United States v. Calandra*,²⁰⁶ and the regulatory regime in *United States v. Leon*.²⁰⁷

Of far more interest to the Court that spelling out this right was its interest in promoting a particular regulatory limit on government activity, that of its warrant regime.

III. TERRY: EXPANDING REGULATION

Current readings of *Terry v. Ohio*²⁰⁸ are often colored by one or both of two factors: (1) the lens of hindsight, which has distorted the case because of the “reasonable suspicion” doctrine it is alleged to have spawned;²⁰⁹ and

²⁰⁵ Steiker, BiO at 168-69.

²⁰⁶ 414 U.S. 338 (1974). The *Calandra* Court dismissed the exclusionary “rule [a]s a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.” *Id.* at 348. Focusing on the rule’s deterrent effect reconstituted it as a prophylactic device, rather than a constitutionally mandated aspect of the Fourth Amendment right, compare *Dickinson v. United States*, ___, and undermined the judicial integrity rationale articulated by Justice Brandeis in *Olmstead* and adopted by the Court in *Mapp*. Justice Brennan’s dissent was prescient: rejecting the claim that the exclusionary rule is no more than a “judicially created remedy,” Brennan reiterated the Court’s holding in *Mapp* that the exclusionary rule is “part and parcel of the Fourth Amendment’s limitation upon [governmental] encroachment of individual privacy.” *Id.* at 360 (Brennan, J., dissenting). Mirroring the language of Justice Brandeis in *Olmstead*, Brennan complained that “[c]ourts which sit under our Constitution cannot and will not be made part to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions.” *Id.* at 359

²⁰⁷ 468 U.S. 897, 919-23 (1984) (introducing good faith exception to warrant requirement).

²⁰⁸ 392 U.S. 1 (1968)

²⁰⁹ Chief Justice Warren's majority opinion never uses the term “reasonable suspicion.” Instead, “the opinion carefully employs and adapts the language of *Brinegar v. United States*, the classical statement of the probable cause standard, while recognizing that officers may conduct protective searches when possessed of a lesser quantum of information.” Earl C. Dudley, Jr., *Terry v. Ohio, The Warren Court, and the Fourth Amendment: A Law Clerk's Perspective*, 72 ST. JOHN'S L. REV. 891 (1998). The reasonable suspicion standard is, in fact, codified in Justice Harlan’s concurrence rather than the majority opinion. See *Terry v. Ohio*, 392 U.S. 1, 33 (1968) (Harlan, J.,

(2) the lens of privacy, which picks out a particular interpretation of the Fourth Amendment as protecting individuals from government regulation while obscuring the way in which the courts sought to regulate the police.

The orthodox account can certainly fit *Terry* within its affirmation of privacy's central place in criminal investigation doctrine. In establishing that the Fourth Amendment applies to this sort of search, the Court quotes the privacy language in *Katz*: the constitution “protects people, not places,” and “reasonable ‘expectation[s] of privacy.’”²¹⁰ However, the Court also uses the non-liberal language, suggesting that individuals have an “inestimable right of personal security,”²¹¹ and are “entitled to be free from unreasonable governmental intrusion,”²¹² thus emphasizing the regulatory interest rather than the privacy one. Accordingly, *Terry* fits within the line of cases stretching back through *Katz*, *Mapp*, and *Wolf* that equate privacy with non-arbitrary government conduct.

The egalitarian and libertarian liberal anti-discrimination or privacy-prioritizing approach to the Fourth Amendment regards *Terry* as a significant increase in the police power to search and seize: “*Terry*’s analytic framework ... reshaped Fourth Amendment doctrine in important respects and led to a significant expansion of police investigative power and decision.”²¹³ Under the orthodox, expansionist view, if the Fourth Amendment protects privacy, then any decision that enables the police to invade a subjectively manifested reasonable expectation of privacy on less than probable cause and without warrant expands police power.

Often missed in discussions of *Terry* is the then-controversial nature of seizures under the Fourth Amendment. The orthodox approach contends that encounters defined the nature of a seizure, such that everything that was not an encounter is a seizure. That is the approach taken by Justice Douglas in his celebrated dissent:

concurring) (linking reasonableness of stop to “articulable suspicion of a crime of violence.”). The phrase “reasonable suspicion” only appears in Justice Douglas’s dissent. *See id.* at 37 (Douglas, J., dissenting).

²¹⁰ *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (citing *Katz v. United States*, 389 U.S. 347, 351 (1967); *id.* at 361 (Harlan, J., concurring)).

²¹¹ *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968)

²¹² *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (citing *Katz v. United States*, 389 U.S. 347, 351 (1967); *id.* at 361 (Harlan, J., concurring)).

²¹³ Russell L. Weaver, *Investigation and Discretion: The Terry Revolution at Forty (Almost)*, 109 Penn St. L. Rev. 1205, 1206 (2005).

In other words, police officers up to today have been permitted to effect arrests or searches without warrants only when the facts within their personal knowledge would satisfy the constitutional standard of probable cause. At the time of their 'seizure' without a warrant they must possess facts concerning the person arrested that would have satisfied a magistrate that 'probable cause' was indeed present.²¹⁴

I shall call this the “bolt from the blue” argument: that the reasonable suspicion standard inaugurated in *Terry* is completely novel. Like other aspects of the liberal case, the bolt-from-the-blue argument is substantially misleading.

It is easy to see why: the Ohio State Court of Appeals, in deciding *Terry*, took the opposite approach, holding that arrest defined the nature of a seizure. Accordingly, everything that is not a “full-blown arrest”²¹⁵ is an encounter, and so a brief investigatory detention that does not result in an arrest is not a seizure under the Fourth Amendment. So even if the bolt-from-the-blue argument is literally true, the Court could have satisfied Justice Douglas’s desire to maintain the clarity of probable cause by denying that stop-and-frisks were seizures-and-searches, as many states had done up to that point.

The final approach is that taken by the *Terry* majority: arrest is not only model of seizure, and so certain types of forcible encounter²¹⁶ counts as well. In expanding the law of arrest to include pre-arrest detentions, the Court could include more types of police activity than hitherto regulated by the states or the federal government. Accordingly, if, however, we focus on its regulatory aspects, what emerges from *Terry* is a significant contraction of the police power to investigate criminal activity. The regulatory approach reminds us that the judiciary controls and supervises law enforcement using the law governing pre-arrest detention and searches.

The regulatory reading of *Terry* conflicts with the dominant, liberal

²¹⁴ *Terry*, 392 U.S. at 37 (Douglas, J., dissenting).

²¹⁵ See, e.g. WAYNE R. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 340-56 (1965); Note: Stop and Frisk: A Perspective, 53 Cornell L. Rev. 899 (1968); Note: *The Law of Arrest: Constitutionality of Detention and Frisk Acts*, 59 Nw. U. L. Rev. 641 (1965); Note: Police Power to Stop, Frisk, and Question Suspicious Persons, 5 Colum. L. Rev. 848 (1965).

²¹⁶ “*Terry*, 392 U.S. at 32 (Harlan, J., concurring) (“if the frisk is justified in order to protect the officer during an encounter with a citizen, the officer must first have constitutional grounds to insist on an encounter, to make a forcible stop.”).

views of the case. *Terry* is indeed about security: it concerns whether a police officer can interfere with the person of a suspect on less than probable cause where there is no illegal activity under way, but only some objective indication that dangerous and illegal activity is contemplated.²¹⁷ It thus does concern a right to privacy, but not the one liberals are keen to promote. Instead, the case is about personal security and police regulation: what standard the Court should use to regulate police activity at the borders of the Fourth Amendment, and what interests must be implicated for judicial regulation to become appropriate.²¹⁸ In *Terry*, these two issues not only overlap, but (unlike *Katz*) they conflict. The Court's decision in *Terry* has the effect of expanding regulation while it simultaneously constrains privacy.

Focusing on the regulatory aspects of the case requires placing *Terry* in the context of four major investigatory concerns: first, how the law of arrest and the Fourth Amendment operate to distinguish legitimate from illegitimate evidence gathering before and after an arrest;²¹⁹ second, whether legislative attempts to pre-determine the standards permitting such evidence gathering legitimately alter the court-cop relation;²²⁰ third, what form legitimate police work should take, particularly in the context of a highly urbanized and racially diverse society;²²¹ and fourth, how the newly-expanded reach of the exclusionary rule operates outside the warrant requirement as a judicial tool to regulate police.²²²

A. *Not a Bolt From the Blue: Pre-Terry Law of Stop-and-Frisk*

A central aspect of the egalitarian or libertarian liberal case against *Terry* is the bolt-from-the-blue argument: that the regulatory approach advocated by Chief Justice Warren and depending upon the novel "reasonable suspicion" standard appeared, like a bolt from the blue, to remake the Fourth Amendment law of search and seizure.²²³ If there was any

²¹⁷ *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

²¹⁸ *Terry v. Ohio*, 392 U.S. 1, 20 (1968).

²¹⁹ *Terry v. Ohio*, 392 U.S. 1, 16-19 (1968).

²²⁰ This is the central concern of *Sibron v. New York*, 392 U.S. 40 (1968), decided the same day as *Terry*.

²²¹ *Terry v. Ohio*, 392 U.S. 1, 14 (1968); *see also id.* at 14 n.11 (citing President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police 183 (1967)).

²²² *Terry v. Ohio*, 392 U.S. 1, 12-14 (1968).

²²³ For a list of "civil libertarian critics" endorsing the bolt-from-the-blue argument, *see* Craig S. Lerner, *Reasonable Suspicion and Mere Hunches*, 59 VAND. L. REV. 407, 424, 425 n.67 (2006) (listing the following civil libertarians: Corinna Barrett Lain,

cloud on the horizon, it could only have been the almost contemporaneous decision one term previously in *Camara*, which also applied a reasonableness standard. Under the bolt-from-the-blue argument, Justice Douglas' dissent states the pre-existing legal regime as it presented to the Court: every encounter that was more than a simple exchange of words was a seizure, and every seizure was governed by the Fourth Amendment, thus implicating the Court's regulatory regime of probable cause and warrants.

For example, Professor Tracey Maclin has argued that, prior to *Terry*, and by analogy to the context of car searches, the law governing stop-and-frisks "was settled ... left [in] no doubt ... uncontroversial": probable cause was the mandatory minimum quantum of evidence required to detain a suspect.²²⁴ Citing the language in *Terry*, Maclin notes that, "[i]f probable cause was the constitutional minimum to justify a car search, then surely an equivalent degree of evidence is required before that officer can undertake 'a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons.'"²²⁵ But the Court's two major pre-*Terry* street detention-and-search cases, *Rios v. United States*,²²⁶ and *Henry v. United States*,²²⁷ both involved cars. And each of them came out on different sides of the pre-arrest detention debate, with some lower courts following *Rios* to legitimize pre-arrest detentions.²²⁸ Accordingly, the analogy to the car cases was not as simple as Professor Maclin suggests.²²⁹

Similarly, Paul Butler's recent celebration of Justice Douglas's dissent adopts the liberal line, arguing that "[t]he majority opinion [in *Terry*]

Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution, 152 U. PA. L. REV. 1361, 1439 (2004); Frank Rudy Cooper, *Cultural Context Matters, Terry's "Seesaw Effect"*, 56 OKLA. L. REV. 833, 852 (2003); Tracey Maclin, *Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271, 1308 (1998)).

²²⁴ Tracey Maclin, *Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police*, 72 ST. JOHN'S L. REV. 1271, 1286 (1998) (citing *Brinegar v. United States*, 338 U.S. 160, 176-77 (1949) (noting that an individual who has engaged in behavior likely to involve the transportation of forbidden goods is not immune from searches while traveling on public highways); *Carroll v. United States*, 267 U.S. 132, 153- 54 (1925) (noting that if probable cause exists, vehicles may be searched for contraband)).

²²⁵ Tracey Maclin, *Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police*, 72 ST. JOHN'S L. REV. 1271, 1286 (1998) (quoting *Terry v. Ohio*, 392 U.S. 1, 16 (1968)).

²²⁶ 364 U.S. 253 (1960).

²²⁷ 361 U.S. 98 (1959).

²²⁸ Note: *Police Power to Stop, Frisk, and Question Suspicious Persons*, 5 Colum. L. Rev. 848 (1965).

²²⁹ Paul Butler also cites to *Henry* to bolster the bolt-from-the-blue argument. See Paul Butler, "A Long Step Down the Totalitarian Path": *Justice Douglas's Great Dissent in Terry v. Ohio*, 79 MISS. L.J. 9, 20 (2009).

offered no settled jurisprudential reason for departing from the ‘warrant clause predominates’ rule that had governed Fourth Amendment analysis. Rather, the Court’s analysis was premised on its perception on the realities of police work in the mean months of 1967.”²³⁰ Butler argues that the police authority to stop and frisk derived primarily from two sources: first, their training in the academy or on the street; and second, state law, because “[s]tate courts in New York were one of the few court systems that prior to 1967 had considered the constitutionality of stop and frisks, and [reasonable suspicions] is the standard that they developed.”²³¹

Like most of the liberal description of the Fourth Amendment rights revolution, almost everything about this story is either false or misleading.²³² While it is true that the Supreme Court had made no definitive statement about the law of pre-arrest detention before 1968, it had decided two cases in 1959 and 1960 that sent conflicting messages to the lower courts about the propriety of stops-and-frisks.²³³ Furthermore, at the state level and through professional bodies such as the American Law Institute²³⁴ and the American Bar Foundation,²³⁵ a detailed set of statutes, cases, and administrative proposals had existed since 1942,²³⁶ and produced a law of pre-arrest detention far more permissive than the ultimate result in *Terry*. Thus, *Terry* was not a bolt from the blue, but an effort to remake and constrain the far more expansive liberties granted to the police under state law and the advisory Uniform Arrest Act,²³⁷ and expansively documented in

²³⁰ Butler, LSDTP at 24.

²³¹ Butler, LSDTP at 20.

²³² See Wayne R. LaFave, “*Street Encounters*” and the Constitution: *Terry, Sibron, Peters, and Beyond*, 67 MICH. L. REV. 39, 43 (1968) (“Perhaps stop and frisk was a low-visibility procedure in one sense, but striking illustrations of the practice did reach trial and appellate courts with some frequency. Indeed, they arose in almost every context except that which would require a direct answer to the question of whether stop and frisk was constitutional. This is because what the police viewed as a distinct procedure simply did not fit comfortably within any extant legal pigeonhole.”).

²³³ Note: *Police Power to Stop, Frisk, and Question Suspicious Persons*, 5 Colum. L. Rev. 848 (1965)

²³⁴ See MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE §2.02 (Tent. Draft No. 1, 1966); Paul M. Bator and James Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 COLUM. L. REV. 62, 64 (1966) (discussing impetus for ALI Pre-Arrestment Code).

²³⁵ Lawrence P. Tiffany, et al., DETECTION OF CRIME: STOPPING AND QUESTIONING, SEARCH AND SEIZURE, ENCOURAGEMENT AND ENTRAPMENT (1967) (Report of the American Bar Foundation’s Survey of the Administration of Criminal Justice in the United States).

²³⁶ See Sam B. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 343-347 (1942).

²³⁷ The text of the Uniform Arrest Act appears in INTERSTATE COMM’N ON CRIME, INTERSTATE CRIME CONTROL 86-89 (1942). The Uniform Arrest Act was “drafted under

law reviews and at treatises.²³⁸

1. Law of Arrest

“The basic issue [wa]s whether police have the right to frisk a suspect whom they have no right to arrest.”²³⁹ From a regulatory perspective, any appreciation of the Court’s holding in *Terry* depends upon how one chooses to characterize the law of arrest facing the Court. The “monolithic” model of the Fourth Amendment²⁴⁰ proposes a strong distinction between encounters falling outside the Constitution’s ambit, and searches and seizures that fall within it.²⁴¹ “It is only ‘searches’ or ‘seizures’ that the fourth amendment requires to be reasonable; police activities of any other sort may be as unreasonable as the police please to make them.”²⁴² After *Mapp*, some courts and legislatures began to contemplate whether field interrogations — questioning a suspect before arrest, sometimes leading to a detention and brief search of the suspect’s person — fell inside or outside the Fourth Amendment line. Mostly, however states simply did not regulate pre-arrest detentions and searches.

Prior to *Terry*, stopping and searching through the pockets of passersby

the auspices of the ‘Interstate Commission on Crime,’ and enacted in a few jurisdictions in 1941... It should be noted that this is not a “Uniform Act” adopted by the National Conference of Commissioners on Uniform State Laws.” *Right To Resist Excessive Force Used In Accomplishing Lawful Arrest*, 77 A.L.R.3d 281 (Originally published in 1977). The Interstate Commission on Crime was a body formed by several states under the auspices of a program enacted by Congress in 1934 to grant “consent ... in advance ... to compacts entered into by the states concerning crime and its control.” Justin Miller, *Crime Control as an Interstate Problem*, 22 WASH. U. L. Q. 382, 386 (1937).

²³⁸ WAYNE R. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 340-56 (1965); Lawrence P. Tiffany, *Field Interrogation: Administrative, Judicial and Legislative Approaches*, 43 DENVER L. J. 389 (1966); Lawrence P. Tiffany, et al., DETECTION OF CRIME: STOPPING AND QUESTIONING, SEARCH AND SEIZURE, ENCOURAGEMENT AND ENTRAPMENT (1967).

²³⁹ Frank J. Remington, *The Law Relating to “On the Street” Detention, Questioning and Frisking of Suspected Persons and Police Arrest Privileges In General*, 51 J. OF CRIM. L.C. AND P.S. 386, 386 (1960).

²⁴⁰ See Neil Ackerman, *Considering The Two-Tier Model Of The Fourth Amendment*, 31 Am. U. L. Rev. 85, 86 (1981) (citing Anthony Amsterdam, *Perspectives On The Fourth Amendment*, 58 MINN. L. REV. 349, 388(1974)).

²⁴¹ “To label any police activity a ‘search’ or ‘seizure’ within the ambit of the amendment is to impose those restrictions upon it. On the other hand, if it is not labeled a ‘search’ or ‘seizure,’ it is subject to no significant restrictions of any kind.” Anthony Amsterdam, *Perspectives On The Fourth Amendment*, 58 MINN. L. REV. 349, 388(1974).

²⁴² Anthony Amsterdam, *Perspectives On The Fourth Amendment*, 58 MINN. L. REV. 349, 388(1974).

for evidence of crime could constitute a legitimate preventative strategy for on-the-street policing.²⁴³ States had adopted field interrogations as a tactic in programs designed to confiscate drugs,²⁴⁴ “to get guns and knives off the street,”²⁴⁵ or simply to ensure order on urban streets or interrogate strangers in suburban neighborhoods.²⁴⁶ Law enforcement believed preventative policing depend upon the ability to question search suspects, with or without probable cause, as a legitimate and necessary tool for ensuring urban order in high-crime neighborhoods.²⁴⁷ Where some form of criminal-law footing was required, vagrancy statutes criminalizing street conduct aided this type of investigation.²⁴⁸

Most jurisdictions that had decided the stop-and-frisk issue, had done so in favor of the police. For example, California had taken the lead in holding that pre-arrest detentions were permissible, and had re-affirmed the practice in light of *Mapp*'s application of the Fourth Amendment to the states,²⁴⁹ as had New York state,²⁵⁰ Massachusetts,²⁵¹ and Rhode Island.²⁵²

²⁴³ “These preventative practices include ... search and seizure programs designed to confiscate dangerous weapons in order to lessen the incidence of serious, assaultative conduct on the streets by gang members and others.” Lawrence P. Tiffany, *Field Interrogation: Administrative, Judicial and Legislative Approaches*, 43 DENVER L. J. 389, 390 (1966). So claims that “*Terry* opened the door for a host of police encounters that do not involve warrants or probable cause,” Stephen A. Saltzburg, *Criminal Procedure in the 1960s: A Reality Check*, 42 DRAKE L. REV. 179, 191 (1993), are just false. The door was already wide open. Similarly, Tracey Maclin’s claim that stop-and-frisks were on the increase is unsupported. See Tracey Maclin, *Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police*, 72 ST. JOHN'S L. REV. 1271 (1998).

²⁴⁴ See *Sibron v. New York*, 392 U.S. 40, 60-61 (1968).

²⁴⁵ Lawrence P. Tiffany, *Field Interrogation: Administrative, Judicial and Legislative Approaches*, 43 DENVER L. J. 389, 398 (1966)

²⁴⁶ See Charles A. Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L. J. 1161, 1161-2 (1966) (describing police questioning without probable cause or reasonable suspicion in suburban neighborhoods).

²⁴⁷ See Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603 (1956).

²⁴⁸ See Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 614 (1956).

²⁴⁹ See *People v. Simon*, 45 Cal. 2d 645, 290 P.2d 531 (1955); *People v. Mickelson*, 59 Cal. 2d 448, 380 P.2d 658 (1963) (“We do not believe that our rule permitting temporary detention for questioning conflicts with the Fourth Amendment. It strikes a balance between a person's interest in immunity from police interference and the community's interest in law enforcement.”).

²⁵⁰ See, e.g., *People v. Rivera*, 201 N.E.2d 32, 35 (N.Y. 1964); *People v. Taggart*, 229 N.E.2d 581, 585-86, (N.Y. 1967).

²⁵¹ See *Commonwealth v. Lehan*, 196 N.E.2d 840, 2-5 (Mass. 1964) (“an officer may act reasonably to assure that the inquiry can proceed in a manner consistent with the officer's safety.”) (citing Uniform Arrest Act, § 3).

Accordingly, the Ohio Appellate Court, in concluding that pre-arrest detention did not violate the constitution, fell in line with the major jurisdictions to determine the matter post-*Mapp*.²⁵³

By 1968, the Court had twice declined the opportunity regulate pre-arrest detention and searches of criminal suspects.²⁵⁴ It had, like most courts, entertained the issue as one of whether there were any grounds to make the arrest: either a valid arrest took place before the search, and so the search was legal, or there were no grounds to arrest, and so the search was illegal.²⁵⁵ For example, in *Rios*, two officers, in plain clothes and an unmarked car, observed the defendant look up and down the street before getting into a cab in a neighborhood known for drug activity. The officers followed the cab, and when it stopped one of the officers opened *Rios*' door, whereupon the suspect may have dropped a powder-filled condom on the floor of the cab. Rather than decide what sort of detentions constituted a seizure, the Court remanded the case to the District Court to determine when *Rios* was "arrested" for purposes of the Fourth Amendment.²⁵⁶ As the constitutional law of criminal investigation began to define the quantum of evidence necessary to engage in a warrantless arrest, it became obvious that the Court would eventually consider the constitutionality of warrantless evidence-gathering prior to arrest.

2. Legislative attempts to pre-determine standards

²⁵² *Kavanagh v. Stenhouse*, 93 R.I. 252, 174 A.2d 560 (1961), appeal dismissed, 368 U.S. 516 (1962). ("If the period of detention is reasonably limited, is unaccompanied by unreasonable or unnecessary restraint, and is based upon circumstances reasonably suggestive of criminal involvement, the legislature may lawfully make a distinction between such mere detention and an arrest ... it seems to us that the general assembly exercised its police power on behalf of the individual member of society by protecting him against the ignominy or humiliation of a premature arrest where the detaining officer may have had reason to suspect that the person detained was guilty of wrongdoing. ... Further, we are of the opinion that the words 'reason to suspect' establish a just standard for detention as distinguished from arrest.)

²⁵³ *State v. Terry*, 5 Ohio App.2d 122, 126 214 N.E.2d 114, 118 (1966) ("we hold, in line with the great weight of authority, that a policeman may, under appropriate circumstances such as exist in this case, reasonably inquire of a person concerning his suspicious on-the-street behavior in the absence of reasonable grounds to arrest.")

²⁵⁴ *See, e.g., Henry v. United States*, 361 U.S. 98 (1959); *Rios v. United States* 364 U.S. 253 (1960).

²⁵⁵ *See Frank J. Remington, The Law Relating to "On the Street" Detention, Questioning and Frisking of Suspected Persons and Police Arrest Privileges In General*, 51 J. OF CRIM. L.C. AND P.S. 386, 387 (1960); Lawrence P. Tiffany, *Field Interrogation: Administrative, Judicial and Legislative Approaches*, 43 DENVER L. J. 389, 390 (1966).

²⁵⁶ *Rios*, 364 U.S. at 261-62.

One reason for the Court's interest in deciding the validity of pre-arrest searches, then, was not that they became any less private, but that they became codified and so regulated. The states had sought either to preclude judicial regulation of low-level, on-the-street detentions and searches, or to legislate standards of regulation that minimalized the nature of the Fourth Amendment intrusion. Their goal was to legislate a standard permitting a highly intrusive style of policing, justified by the realities of crime in an urban environment. States like New York adopted (straight up or in modified form) the distinction between arrests and pre-arrest detentions advanced by the Interstate Commission on Crime's Uniform Arrest Act or the American Law Institute's Draft Model Code of Pre-Arrest Procedure.²⁵⁷

The Uniform Arrest Act, which applied in three states by the time *Terry* came before the Court, permitted a police officer to stop and detain an individual for up to two hours for questioning, during which time the individual could be searched for weapons.²⁵⁸ The New York version adopted sections 2(1) and (3) of the Act but somewhat broadened its scope by adding to the range of crimes, failing to specify the consequences of a failure to give a "name, address, or explanation of his actions," and altering the Act's permission to search for weapons when there are "reasonable grounds to believe" that physical danger exists to grant permission based upon "reasonabl[e] susp[icion]."²⁵⁹ Furthermore, while the Uniform Arrest Act and the New York stop-and-frisk law precluded searches for evidence prior to arrest, the Court in *Sibron v. New York*,²⁶⁰ found "substantial indications that the category of 'search for a dangerous weapon' may encompass conduct considerably broader in scope,"²⁶¹ the New York Court of Appeals established a right to frisk whenever police officers engaged in conversation with a suspect on the street. After all, the court reasoned, "The answer to the question propounded by the policeman may be a bullet."²⁶² The Model Code of Pre-Arrest Procedure adopted a

²⁵⁷ See Sam B. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 343-347 (1942); American Law Institute, *Draft for a Model Code of Pre-Arrest Procedure*, §2.02(2) (1996).

²⁵⁸ See Uniform Arrest Act §§ 2 & 3, Sam B. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 343-347 (1942).

²⁵⁹ Compare Uniform Arrest Act §§ 2 & 3, Sam B. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 343-347 (1942) to N.Y. Code Crim. Proc. §180-a (cited in *Sibron v. New York*, 392 U.S. 40, 43-44 (1968)).

²⁶⁰ 392 U.S. 40 (1968).

²⁶¹ *Sibron*, 392 U.S. at 60 n.20 (citing *People v. Taggart*, 229 N.E. 2d 581 (1967)); for example, in *People v. Rivera*, 201 N.E. 2d 32 (N.Y. 1964).

²⁶² *Sibron*, 392 U.S. at 35. This justification is endorsed by Justice Harlan in his

similarly broad view as the Uniform Arrest Act of the right to search upon questioning.²⁶³

Compare, for example, *Camara v. Municipal Court of San Francisco*.²⁶⁴ Just one year before *Terry*, the Court had reconsidered and rejected similar attempts to rewrite probable cause out of the administrative sphere through legislative pre-clearance of domestic searches. In the 1959 case, *Frank v. Maryland*,²⁶⁵ the Court upheld the conviction of a homeowner who refused to permit a warrantless inspection of his residence for the purposes of determining whether his was the source of a local rat infestation. The *Frank* Court held that civil administrative searches of this sort “touch at most upon the periphery of the important interests safeguarded by the Fourteenth Amendment’s protection against official intrusion,”²⁶⁶ and so refused to require a warrant before searching. In effect, the *Frank* Court permitted a form of categorical pre-clearance whereby the legislature could justify civil searches by means of statutes authorizing officials to make warrantless health and safety inspections of all residences within a particular jurisdiction.²⁶⁷ The statute defines a category of cases that escape *post-hoc* review, and so avoids an individualized evaluation of each case on the merits.²⁶⁸ Individualized pre-clearance by means of a warrant embraces limits the scope of conduct receiving pre-clearance, requiring the magistrate to determine the reasonableness of the policy in each case.

In the two Warren Court cases to reconsider *Frank*, *Eaton v. Price* and

concurrency in *Terry*. See *Terry v. Ohio*, 392 U.S. 1, 33 (1968) (Harlan, J., concurring).

²⁶³ See Paul M. Bator and James Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 COLUM. L. REV. 62, 66 (1966) (noting “limited case law bearing on th[e] question” of permissible standards for stop-and-frisks, and the “fairly general agreement that if a stop is to be authorized, the officer must be permitted to search the person stopped for weapons”). This standard was similar to that adopted by the New York Court of Appeals and rejected in *Terry* and *Sibron*.

²⁶⁴ 387 U.S. 523 (1967).

²⁶⁵ 359 U.S. 360 (1959).

²⁶⁶ *Frank*, 359 U.S. at 367.

²⁶⁷ See, e.g., *Eaton v. Price*, 364 U.S. 263, 265 n.2 (1960). Unlike the Maryland statute in *Frank v. Maryland*, 359 U.S. 360 (1959), the Ohio statute at issue in *Eaton* did not require that the inspector “have cause to suspect that a nuisance exists in any house, cellar or enclosure,” but rather operated as a blanket permission to search. *Camara*, 387 U.S. at 530 n.4.

²⁶⁸ Categorical pre-clearance is thus “categorical” in the same way “categorical balancing” is. See Silas J. Wasserstrom, & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO L.J. 19, 48 (1988) (describing categorical balancing test). Indeed, balancing may be a method of justifying categorical pre-clearance, just as it may be a method of justifying after-the-fact review.

Camara, the Court required some form of individualized consideration of the policy underlying the search.²⁶⁹ That the Court chose a standard that equated the reasonableness of the policy to the existence of probable cause has caused some to doubt the value of *Camara*.²⁷⁰ Nonetheless, both *Eaton* and *Camara* adopted a warrant regime that increased regulation as compared to the pre-existing regime, and imposed judicial oversight upon legislative grants of authority to search houses in the name of avoiding arbitrary searches.²⁷¹

Both *Terry* and, in particular, its companion case, *Sibron v. New York*, shared these same regulatory concerns. In *Sibron*, the Court confronted the legality of New York's stop-and-frisk statute (loosely based on the Uniform Arrest Act), which sought to pre-authorize searches in an urban setting on less than probable cause. As in *Sibron*, the *Camara* Court had emphasized the necessity of safety searches in an urban environment: in this case of dwellings to determine compliance with building codes.²⁷² Nonetheless, the Court in both *Sibron* and *Camara* held that safety searches could not evade constitutional scrutiny altogether.²⁷³

In *Camara*, the Court rejected the argument that broad statutory safeguards could serve as an effective limit on official discretion.²⁷⁴ Like

²⁶⁹ See *Eaton*, 364 U.S. at 271-72; *Camara*, 387 U.S. at 532-33.

²⁷⁰ See, e.g., Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief Of Camara and Terry*, 72 MINN. L. REV. 383 (1988).

²⁷¹ See *Eaton* 364 U.S. at 271-72 (“if we were to assume that the inspectors were proceeding according to a plan, and even if evidence of the plan were put in at the trial, we think that the result should be the same. The time to make such justification is not in the criminal proceeding, after the householder has acted at his peril in denying access. The time to make it is in advance of prosecution, and the place is before a magistrate empowered to issue warrants, which will put the seal of legitimacy—the seal the Constitution specifically provides for—on the demand of the inspector, if indeed it is a reasonable one. Such a warrant need not be sought except where the householder does not consent.”); *Camara*, 387 U.S. at 532-33 (“The practical effect of this system is to leave the occupant subject to the discretion of the official in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search. We simply cannot say that the protections provided by the warrant procedure are not needed in this context; broad statutory safeguards are no substitute for individualized review, particularly when those safeguards may only be invoked at the risk of a criminal penalty”).

²⁷² *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 535 (1967).

²⁷³ *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 530-534 (1967); *Sibron v. New York*, 392 U.S. 40, 65 (1968).

²⁷⁴ The *Camara* Court reiterated that the only proper style of regulation depended upon pre-clearance by a magistrate. *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 530, 539-40 (1967), overruling *Frank v. Maryland*, 359 U.S. 360 (1959).

Terry and *Sibron*, *Camara* precluded searches purely designed to turn up evidence of criminal activity,²⁷⁵ but permitted the departure from the traditional measure of probable cause based upon an urban safety rationale.²⁷⁶ As in *Camara*, the *Terry* Court extended the Fourth Amendment into a previously-unregulated area,²⁷⁷ and provided a limited justification for the intrusion: officer-safety.

Both *Terry* and *Camara* extended the scope of the Fourth Amendment to searches and seizures that were formerly beyond its coverage.²⁷⁸ In *Camara*, that extension was to civil government officials enforcing administrative, statutory, regulations. In *Terry*, it was to beat officers engaging in something more than an encounter based on officer safety.²⁷⁹ The safety justification thus was one that the Court clearly envisioned as a check upon otherwise unconstrained police activity.²⁸⁰

In *Terry*, the nature and justification of the officer's right to stop remains obscure: the case is rather about the right to frisk. As the Court puts it, in avoiding the stop issue, "[t]he crux of this case ... is not the propriety of Officer McFadden's taking steps to investigate petitioner's suspicious behavior, but rather, whether there was justification for McFadden's invasion of Terry's personal security by searching him for

²⁷⁵ *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 537 (1967).

²⁷⁶ The *Camara* test required the court to "focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen," and then to "balanc[e] the need to search (or seize) against the invasion which the search (or seizure) entails." *Terry v. Ohio*, 392 U.S. 1, 20-21 (1968)(quoting *Camara v. Municipal Court*, 387 U.S. 523, 534-535, 536-537 (1967)).

²⁷⁷ *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 530 (1967).

²⁷⁸ See, e.g., Scott E. Sundby, *An Ode to Probable Cause: A Brief Response to Professors Amar and Slobogin*, 72 ST. JOHN'S L. REV. 1133, 1133-34 (1998) (suggesting that "the two watershed cases for the Supreme Court's gradual movement towards an all-encompassing reasonableness balancing test — *Camara v. Municipal Court* and *Terry v. Ohio* — were efforts to make the Fourth Amendment as expansive as the Court thought possible under the circumstances. *Camara*, for the first time, brought housing inspections within the ambit of the Amendment, and *Terry* ensured that "stops and frisks" were covered by the Amendment's protections rather than left constitutionally unregulated.").

²⁷⁹ See *Terry v. Ohio*, 392 U.S. 1, 17 (1968) ("The danger in the logic which proceeds upon distinctions between a 'stop' and an 'arrest,' or 'seizure' of the person, and between a 'frisk' and a 'search' is twofold. It seeks to isolate from constitutional scrutiny the initial stages of the contact between the policeman and the citizen. And by suggesting a rigid all-or-nothing model of justification and regulation under the Amendment, it obscures the utility of limitations upon the scope, as well as the initiation, of police action as a means of constitutional regulation.")

²⁸⁰ *Terry*, 392 U.S. at 14.

weapons in the course of that investigation.”²⁸¹ In *Sibron*, the stops are clearly justified or not based on a standard of probable cause. Understood in light of *Sibron*, *Terry* does not provide some broad grant of power to engage in investigative stops and frisks. Rather, it provides an emergency exception to the general prohibition on searches or seizures on less than probable cause.

Prior to *Terry* and *Sibron*, where the law did permit judicial control and scrutiny of field interrogations, it granted the police the right to detain and frisk suspects.²⁸² *Terry*’s holding that (with one exception)²⁸³ all pre-arrest detention must be based upon probable cause, placed a drastic restriction on the police. Furthermore, the exception could not be justified by investigatory imperatives, but only by a reasonable, objective apprehension of an emergency caused by the presence of a dangerous weapon.²⁸⁴ Where no emergency existed then a frisk was constitutionally impermissible.²⁸⁵ Such a standard required probable cause for almost all field searches, including many searches for weapons,²⁸⁶ and so rendered unconstitutional statutes purporting to pre-authorize warrantless field searches on less than probable cause where no emergency existed.

Accordingly, to the extent that stop and frisk is a tactic of police investigation, *Terry* and *Sibron* make a huge difference. All investigatory stop and frisks are now off limits unless the suspect consents or probable cause is established.²⁸⁷ The only exception is predicated upon officer

²⁸¹ *Terry*, 392 U.S. at 23.

²⁸² See, e.g., *People v. Rivera*, 201 N.E.2d 32, 35 (N.Y. 1964) (“If we recognize the authority of the police to stop a person and inquire concerning unusual street events we are required to recognize the hazards involved in this kind of public duty. The answer to the question propounded by the policeman may be a bullet; in any case the exposure to danger could be very great. We think the frisk is a reasonable and constitutionally permissible precaution to minimize that danger.”); *People v. Taggart*, 229 N.E.2d 581, 585-86, (N.Y. 1967) (“Assuming that [the officer] did have at least a reasonably based suspicion that the defendant was committing a crime, not only warranting but requiring some kind of police action, it follows that under the present rules he had a right to ‘search’ [the] defendant”).

²⁸³ Re-stated the same day and in emphatic terms in the companion case of *Sibron v. New York*, 392 U.S. 40 (1968).

²⁸⁴ See *Terry v. Ohio*, 392 U.S. 1, 17-18 n.15 (1968); *Sibron v. New York*, 392 U.S. 40, 60 n.20 (1968).

²⁸⁵ See *Sibron v. New York*, 392 U.S. 40, 60 n.20 (1968).

²⁸⁶ That was the issue in *People v. Taggart*, 229 N.E.2d 581 (1967), criticized by both *Terry*, see *Terry v. Ohio*, 392 U.S. 1, 17-18 n.15 (1968), and *Sibron*, see *Sibron v. New York*, 392 U.S. 40, 60 n.20 (1968).

²⁸⁷ See, e.g., *Terry v. Ohio*, 392 U.S. 1, 11 (1968) (requiring “voluntary cooperation” in the usual case of searches absent probable cause); *id.* at 20 (insisting on probable cause and a warrant where practicable).

safety.²⁸⁸ Accordingly, even programs of sweeping for weapons are regulated; the sweep must be linked to some other indication of dangerousness than simply the discovery of a weapon. If the weapon was obvious, there would be probable cause to establish that crime was being committed; absent an obvious, dangerous weapon, there is no reason to search unless some other crime indicates dangerousness.

B. Safety, Professionalism and Terry's Expansive Regulation of the Police

A central issue in both *Terry* and *Sibron* is the issue of good police work. The Court essentially separates order-maintenance from investigation, and requires probable cause to stop and reasonable suspicion to frisk. The probable cause requirement, present in *Sibron*, thus precludes the police from using order maintenance or preventative policing as a technique of criminal investigation. Both cases recognize that certain situations require the police to engage in more investigation.²⁸⁹ *Terry* and *Sibron* place limits on the style of such an investigation. Where the police have no more than an inarticulate hunch, more work is required. Even when such a hunch is confirmed by some further indicia of criminality, unless such evidence rises to the traditional level of probable cause, the police are limited to asking questions or obtaining consent to search.²⁹⁰ The only exception to the prohibition on searches absent traditional probable cause is a very narrow and definite one: officer safety.

The safety justification thus excludes and permits certain styles of policing. *Terry* in fact constrains the police power to stop and frisk by requiring some “articulable suspicion” of dangerousness.²⁹¹ The articulable suspicion standard does have some teeth: it requires objective, “specific ... facts which, taken together with rational inferences from those facts, reasonably warrant [a safety-based] intrusion” upon the defendant’s person.²⁹² In other words, the officer “must be able to point to particular facts from which he reasonably inferred that the individual was armed and

²⁸⁸ *Sibron*, 392 U.S. at 60.

²⁸⁹ *Terry*, 392 U.S. 1, 23 (1968) (“It would have been poor police work indeed for an officer of 30 years’ experience in the detection of thievery from stores in this same neighborhood to have failed to investigate this behavior further.”); *SIBRON*

²⁹⁰ See Paul M. Bator and James Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 COLUM. L. REV. 62 (1966) (discussing importance of consent as justifying government action).

²⁹¹ See *Terry v. Ohio*, 392 U.S. 1, 22, 27 (1968); David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1735-6 (2005).

²⁹² *Terry v. Ohio*, 392 U.S. 1, 20-21 (1968).

dangerous.”²⁹³

The safety justification requires the police to engage in more detection and forbids targeting suspects based on guilt by association or prejudice. *Sibron* itself is a good example: Patrolman Martin had engaged in lengthy observation of Sibron and some known drug dealers, but had not attempted to ascertain the content of Sibron’s conversation or otherwise establish that criminal activity was afoot.²⁹⁴ In *Sibron*, Patrolman Martin lacked the facts from which to make the armed-and-dangerous inference.²⁹⁵

Two problems arise with the *Terry* standard, however. The first is probable cause: in the context of officer safety, the majority apparently sought to reformulate rather than to dispense with probable cause. The second is the perspective from which the Court would evaluate “reasonableness”: from the point of view of a reasonable man or of a reasonable police officer. This latter concern replicates the problem of scrutiny: who gets to decide what counts as good policing.

Tracey Maclin emphasizes that Chief Justice Warren’s opinion for the majority in *Terry* “explains that an officer’s actions in this context must be judged by asking ‘whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.’ This standard is taken from the Court’s cases discussing the meaning of probable cause.”²⁹⁶ The problem, as Maclin sees it, is that the majority failed to apply the traditional probable cause standard in assessing Officer McFadden’s efforts in *Terry*.²⁹⁷ Under this reading of *Terry*, McFadden engaged in a race-based investigatory sweep seeking guns. Officer McFadden’s lower court testimony and the nature of the charge certainly bolster this view of the case.²⁹⁸ But that is not the manner in

²⁹³ *Sibron v. New York*, 392 U.S. 40, 64 (1968) (emphasis added).

²⁹⁴ *Id.*

²⁹⁵ “His testimony shows that he was looking for narcotics, and he found them. The search was not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception — the protection of the officer by disarming a potentially dangerous man. Such a search violates the guarantee of the Fourth Amendment, which protects the sanctity of the person against unreasonable intrusions on the part of all government agents.” *Sibron v. New York*, 392 U.S. 40, 65-66 (1968).

²⁹⁶ Tracey Maclin, *Terry v. Ohio’s Fourth Amendment Legacy: Black Men and Police*, 72 ST. JOHN’S L. REV. 1271, 1300-01 (1998) (quoting *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (citing *Beck v. Ohio*, 379 U.S. 89, 91 (1964) and *Brinegar v. United States*, 338 U.S. 160, 174-76 (1949))).

²⁹⁷ Tracey Maclin, *Terry v. Ohio’s Fourth Amendment Legacy: Black Men and Police*, 72 ST. JOHN’S L. REV. 1271, 1300-01 (1998).

²⁹⁸ See Tracey Maclin, *Terry v. Ohio’s Fourth Amendment Legacy: Black Men and*

which the Court assessed the evidence, rather indicating that Terry and Chilton's comings and goings objectively indicated an intent to commit a potentially armed daylight robbery.²⁹⁹

Read in this light, the *Terry* Court's comment that "[t]he exclusionary rule has its limitations ... as a tool of judicial control,"³⁰⁰ is no more than an acknowledgment of the limitations of this sanction to scrutinize and control certain types of searches. Exclusion, as a tool for regulating the court-cop regulatory relation, operates effectively only where the purpose of police conduct is related to criminal prosecution, and so the exclusion of evidence will have an effect. "Encounters[, however,] are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to a desire to prosecute for crime."³⁰¹ At that point, the exclusionary rule loses its coercive power.³⁰²

C. Regulating Preventative Policing Outside the Warrant Requirement.

All of this takes place in a context very different from *Katz*. The police operating in the field engage in prevention as well as detection or investigation. These roles promote a series of low-level encounters in criminogenic locations or with known criminals.³⁰³ Often, circumstances or lack of hard evidence preclude the police from obtaining consent or a warrant to search an individual for evidence or weapons.

Accordingly, whereas in *Katz* the regulatory issue had been developing a procedure for third-party pre-authorization of police action, that option was foreclosed in the context of certain styles of street policing. Given that field interrogations occur where there is no possibility for pre-clearance, the Court had to develop some alternative form of regulation from that used in *Katz*.

Police, 72 ST. JOHN'S L. REV. 1271, 1300-01 (1998) (discussing ways in which McFadden's testimony fails to establish probable cause).

²⁹⁹ *Terry v. Ohio*, 392 U.S. 1, 13 (1968).

³⁰⁰ *Terry v. Ohio*, 392 U.S. 1, 13 (1968).

³⁰¹ *Terry v. Ohio*, 392 U.S. 1, 13 (1968).

³⁰² "Regardless of how effective the rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal." *Terry v. Ohio*, 392 U.S. 1, 14 (1968).

³⁰³ *See, e.g., Terry v. Ohio*, 392 U.S. 1, 20-23 (1968). Lawrence P. Tiffany, *Field Interrogation: Administrative, Judicial and Legislative Approaches*, 43 DENVER L. J. 389, 390-98 (1966).

The Court thus faced the same problem as in *Camara*: extending regulation to official activity formerly considered beyond the reach of criminal procedure. The *Camara* solution would entail determining the appropriate balance between the individual privacy interests and officer safety (or other criminal investigation imperatives) for different categories of search and seizure. As alternatives, the Court could have adopted Justice Douglas's rejection of balancing, and simply implement a unitary probable cause standard for all types of search; or it could have decided to apply a balancing test on a case-by-case basis. Adopting the probable cause standard would not increase regulation, but rather force the police to determine whether to arrest for some minor crime, such as vagrancy, or to stop-and-frisk (transforming the stop-and-frisk into an intrinsic end-in-itself — a form of sanction as part of aggressive policing — rather as an instrumental means to prosecute crime). Balancing would preclude *Camara*'s regulatory innovation: setting a broad rule governing extending judicial scrutiny to otherwise uncovered cases.

The *Terry* majority considered whether voluntary cooperation was required for searches other than those pursuant to an arrest,³⁰⁴ and reiterated the requirement of pre-clearance and a warrant “whenever practicable.”³⁰⁵ The circumstances of street encounters, however, “as a practical matter could not be subjected to the warrant requirement.”³⁰⁶ The regulatory issue addressed in *Terry* is no longer whether³⁰⁷ but how to engage in retroactive review of an officer's actions. *Terry* thus affords cops an incentive search primarily for investigatory rather than harassment purposes and to litigate the legality of the search: if they can point to objectively reasonable facts indicating dangerousness, the search was legitimate.

Harassment remains a live option whatever the outcome in *Terry*. Consistent with the even a strong reading of probable cause and the exclusionary rule, the police could continue to harass minorities outside the

³⁰⁴ *Terry v. Ohio*, 392 U.S. 1, 11 (1968). See also Justice Harlan's concurrence, where he suggests that, “There is no reason why an officer, rightfully but forcibly confronting a person suspected of a serious crime, should have to ask one question and take the risk that the answer might be a bullet.” *Terry v. Ohio*, 392 U.S. 1, 33 (1968) (Harlan, J., concurring).

³⁰⁵ *Terry v. Ohio*, 392 U.S. 1, 20 (1968).

³⁰⁶ *Terry v. Ohio*, 392 U.S. 1, 20 (1968).

³⁰⁷ See *Katz v. United States*, 389 U.S. 347, 356 (1967) (government seeks *post hoc* review of probable cause; Court rejects that method of review in favor of pre-authorization by magistrate).

“legitimate investigatory sphere.”³⁰⁸ Where such harassment is the primary purpose of police behavior, the exclusionary rule is powerless to deter.³⁰⁹ Exclusion alone will not constrain the sort of on-the-street harassment that never makes it to court. Exclusion can only touch conduct that constitutes investigative policing, that is, policing designed to detect crime.

Terry provides some criteria to clearly separate what constitutes harassment from what does not, in part by demarcating investigation from prevention and order-maintenance. But *Terry*’s (and *Sibron*’s) failure to preclude malicious police activity does not really distinguish its regulatory regime from that of *Miranda v. Arizona*, one of the central cases of the rights revolution. In both cases, *Miranda* and *Terry*, the Court excluded a practice or policy of physical and mental harassment on Constitutional grounds, and instituted a regulatory regime designed to exclude the fruits of harassment from courts. Both cases recognize that harassment can continue if the police do not want to use the evidence at trial. The constraint only works upon cops primarily engaged in the activity of investigating crime, rather than those primarily engaged in harassing minorities. Neither case seeks to exclude the form of evidence gathering entirely; each adopts a form of scrutiny that is less onerous for the police than it might have (no requirement of counsel’s presence or taping of interviews in *Miranda*; no probable cause requirement in *Terry*). From a regulatory perspective then, *Terry* and *Sibron*, as handed down in 1968, seem much of a muchness with *Miranda*. It is only from a privacy perspective that they differ.

IV. THE COURT AND PUBLIC DISAPPROVAL: THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968

If the foregoing argument is even partially correct, then one plank of the rights revolution argument has fallen away. The argument depends upon there being two phases of the Warren Court, a rights-expanding phase that lasts until 1967, and a rights-contracting phase evidenced by the Court’s decision in *Terry v. Ohio*. The explanation for rights-contraction is the Court’s response to public and political disapproval, expressed through the Omnibus Crime Control and Safe Streets Act of 1968, of its Fourth Amendment jurisprudence. In other words, the motivation for contraction is in large part a Fourth Amendment motivation.³¹⁰

³⁰⁸ *Terry v. Ohio*, 392 U.S. 1, 15 (1968).

³⁰⁹ *Terry v. Ohio*, 392 U.S. 1, 15 (1968).

³¹⁰ It could have been a response to *Miranda v. Arizona*’s grant of rights to suspects during interrogation. See 384 U.S. 436 (1966) (premising admissibility of confession upon defendant’s voluntary waiver of rights). However, the rights revolution argument does not

Schmerber, *Hayden*, and *Katz* reveal a different type of Warren Court than that imagined by the rights revolutionaries. Rather than promoting equality, anti-discrimination, or privacy, the Warren Court's Fourth Amendment jurisprudence from *Mapp v. Ohio* to *Katz v. United States* ignored the sorts of egalitarian liberal concerns addressed under its Sixth Amendment jurisprudence, and eviscerated libertarian liberal jurisprudence under its privacy-as-security jurisprudence. In simple terms: at best, Warren Court was a rights-maintaining court, and a rights-contracting court at worst.

Without the rights-expanding argument, the first prong of the rights revolution thesis disappears. If the Court was contracting the pre-existing rights regime in 1966 and 1967, then it could not have been motivated by the 1968 Act. A regulation-expanding reading of the Warren Court, epitomized by *Terry* and *Sibron* undermines the second prong of the rights-revolution argument: a politically cowed Warren Court.

The regulatory reading of *Terry* conflicts with the orthodox liberal view of the case. The rights-revolution view suggests that if the rights are constricted — in this case by limiting the government's duty — then governmental power must have expanded. Such a view presupposes too strong a relationship between rights and regulation: if regulation is merely associated with, rather than entailed by, constitutional rights, then, as in *Terry*, regulation can expand as rights contract.

Taken seriously, the regulatory reading of *Terry* challenges the rights-revolution claim that there were “two” Warren Courts, one protecting individual rights, another constricting them.³¹¹ That account identifies *Terry* as representing the move from a rights-affirming to a rights-denying Court.³¹² The regulatory account suggests that picture is overly simplistic: that even if the Court in *Terry* and *Camara* ended the rights revolution, it continued to expand its regulatory revolution in criminal investigation.

use the Fifth or Sixth Amendment as examples of rights-contraction.

³¹¹ See Yale Kamisar, *The Warren Court (Was It Really So Defense-Minded?)*, *The Burger Court (Was It Really So Prosecution-Oriented?)* and *Police Investigatory Practices*, in *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* 62, 62-63, 90 (V. Blasi ed. 1983).

³¹² See, e.g., Yale Kamisar, *The Warren Court (Was It Really So Defense-Minded?)*, *The Burger Court (Is It Really So Prosecution Oriented?)*, and *Police Investigatory Practices*, in *THE BURGER COURT : THE COUNTER-REVOLUTION THAT WASN'T* 62, 64 (Vincent Blasi, ed., 1983).

My reading of *Terry* is thus quite different from the orthodox liberal assessment of its current doctrinal importance. Starting in the mid-1970s, cases cited *Terry* to permit investigative stops based upon suspicion of criminal activity rather than fear for officer safety.³¹³ *Terry* has thus become emblematic of a much different style of policing and judicial oversight while *Sibron* is now almost forgotten; yet as late as 1972 it might have seemed that *Sibron* would be the more important case. *Sibron* demonstrated that legislative attempts to permit investigative stops and searches on anything less than probable cause would violate the Fourth Amendment. In *Papachristou v. City of Jacksonville*,³¹⁴ the Court continued to close legislative loopholes, primarily connected with vagrancy statutes, used to permit investigative stops, thereby entrenching its expansion of police regulation.

The impact of *Terry* and *Sibron* was to regulate on-the-street policing targeting urban order despite legislative attempts to remove it from the scope of the Fourth Amendment.³¹⁵ The Fourth Amendment could not, however, preclude investigatory searches and seizures consequent to a lawful arrest.³¹⁶ Accordingly, an effective law-enforcement solution to the problem presented by *Terry* was to use vagrancy statutes criminalizing a vast array of street conduct to permit this type of investigation. In the 1950s, Professor Caleb Foote had demonstrated the usefulness of vagrancy statutes for preventative policing:

To the extent that the police are actually hampered by the restrictions of the ordinary law of arrest [and] by the illegality of arrests on mere suspicion alone ... vagrancy-type statutes facilitate the apprehension, investigation, or harassment of suspected criminals. When suspects can be arrested for nothing else, it is often possible to “go and vag” them.³¹⁷

As late as 1965, Wayne LaFave included the operation of vagrancy laws

³¹³ See, e.g., *United States v. Brignoni-Ponce*, 422 U.S. 873, 881-882 (1975) (*Terry* permits temporary seizure for the purpose of questioning limited to the purpose of the stop); *Pennsylvania v. Mimms*, 434 U.S. 106, 110-11 (1977) (permissible to order suspect from car to conduct safety search); *Florida v. Royer*, 460 U.S. 491, 498-99 (1983) (under *Terry*, investigative detentions permissible where reasonable)

³¹⁴ 405 U.S. 156 (1972).

³¹⁵ See Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603 (1956).

³¹⁶ See, e.g., *Pennsylvania v. Mimms*, 434 U.S. 106, 110-11 (1977).

³¹⁷ Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 614 (1956).

as one of the police tactics to engage in pre-arrest detention

Where there are no sufficient grounds to arrest for the offense suspected, police sometimes obtain custody by making an arrest for a lesser offense which the suspect has committed ... One variation, observed in Milwaukee, is the so-called ten-day vag check. ... In some other Wisconsin communities, a conviction of vagrancy is always attempted in those cases. ... Somewhat similar practices ... are found in Kansas. The vagrancy statutes in the jurisdictions studied are representative of those found elsewhere.³¹⁸

The continued existence of vagrancy-style statutes precluded effective judicial regulation of pre-arrest detention and permitted end-runs around the safety justification. Such statutes were soon declared unconstitutional in *Papachristou*.³¹⁹

The Court's decision in *Papachristou* encompassed a series of cases in which the police used vaguely-worded vagrancy statutes to arrest Henry Edward Heath and Hugh Brown because they were "reputed to be a thief."³²⁰ Two others were arrested for "walk[ing] back and forth over a two-block stretch" without identification.³²¹ There was thus less suspicion to arrest than in *Terry*; like the defendants in *Terry*, however, Smith and Henry were African Americans. Like *Terry*, the Court in *Papachristou* remained concerned about the effect of low-level preventative policing on minorities.³²²

Upon being stopped, the police searched each individual prior to arrest.³²³ Accordingly, the vagrancy statutes permitted law-enforcement officials to engage in low-level harassment of reputed criminals. As in *Sibron*, the police appear to have targeted at least two of the suspects based on their criminal reputation rather than any specific activity, and in the absence of any evidence of dangerousness, and engaged in an investigatory

³¹⁸ WAYNE R. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 354-56 (1965).

³¹⁹ 405 U.S. 156 (1972).

³²⁰ *Papachristou*, 405 U.S. at 160 (discussing police justifications for arrests of Henry Edward Heath and Hugh Brown).

³²¹ *Papachristou*, 405 U.S. at 159 (discussing arrest of Jimmy Lee Smith and Milton Henry).

³²² *See id.* at 162-63 ("The poor among us, the minorities ... are not alerted to the regulatory schemes of vagrancy laws.").

³²³ *Papachristou*, 405 U.S. at 160 (discussing arrests of Heath and Brown). *See also id.* at 159 (search of Smith and Henry prior to arrest).

search of the type *Sibron* prohibited. *Papachristou* can thus be read as expanding, or shoring up, the regulatory regime associated with *Terry* and *Sibron*. Re-emphasizing *Sibron* and linking it to the style of policing promoted by the vagrancy statute in *Papachristou* demonstrates the continuing extension of regulation despite the constriction of rights.

If the vagrancy argument is correct, then the Court did not stand pat in 1968, but expanded regulation outside the investigative sphere and into what had been regarded up to that point as preventative policing.³²⁴ *Terry* forcefully limited state and professional efforts to provide an expansive power to engage in pre-arrest investigative detentions. Instead, the Warren Court drastically constricted the practice of weapons searches used primarily against minorities and other “undesirables.”

Accordingly, instead of a Warren Court cowering in the face of social disapproval, *Terry* represents a Warren Court defiant, thumbing its nose at popular opinion and the demands of law enforcement officials, and permitting only a minor officer-safety exception to the law of arrest. Rather than the black sheep of the Warren Court’s criminal procedure jurisprudence, *Terry* should be celebrated alongside *Miranda* as one of its great — though flawed — cases.

V. LIBERALISM'S NEW AGENDA

The police are to liberals as government is to libertarians: an enemy force to be starved of funds and shrunk to the minimum necessary for the necessities of society. The central problem with liberal theories of policing is that they are negative, and provide no real proposals for what good policing looks like, or for what justifies having a police force or criminal investigation. Lacking a positive theory of policing, liberals surrender the debate to centrists and conservatives, and are left on the fringes to whine about discrimination.

The new agenda for a liberalism bereft of the rights revolution argument should be to forget a political theory of policing grounded primarily in privacy, and re-engage with the Warren Court’s regulatory jurisprudence of security. My point is not that privacy has no place in Fourth Amendment criminal procedure, but that it is not easily or obviously protected by a

³²⁴ Lawrence P. Tiffany, et al., DETECTION OF CRIME: STOPPING AND QUESTIONING, SEARCH AND SEIZURE, ENCOURAGEMENT AND ENTRAPMENT 15-17 (1967) (“field interrogation programs may share crime prevention function of other types of many of the on-the-street police activity.”).

warrant regime or by freestanding reasonableness. Security may be protected by both.

The liberal emphasis on rights and privacy is much less revolutionary than the Warren Court's regulatory agenda. I understand the Warren Court to be interested in remaking policing; privacy preserves the types of policing dominant at the time of the Warren Court: "preventative" sweeps of groups of suspects searching for drugs and weapons; and the use of confidential informants and confessions to produce criminal convictions. A large part of the Warren Court's jurisprudence was directed against the practice of using confidential informants: the Court's probable cause standard was developed to regulate this practice.³²⁵ And *Terry* and *Sibron* were developed to prevent broad use of preventative policing, as legitimized by state legislatures and rules of professional procedure.

Understanding the political theory behind the Warren Court's emphasis on the warrant regime and on *Terry*'s attempt to regulate practices falling outside the warrant can re-invigorate liberal theories of policing. The Warren Court's preferred method for political regulation of the police was inter-branch limitation on executive and legislative activity. The Court's warrant jurisprudence repeatedly emphasized the benefits of external review of executive investigative activity. The theory of inter-branch limitation on (primarily) executive power is a constant theme of the Warren Court's Fourth Amendment jurisprudence. On the one hand, the Court recognizes that warrants make policing more costly; on the other, the Court seeks to impose this cost as a means of making the police more professional and more accountable to the public through its officials in other branches of government.

Regulatory strategies often turn upon the Court's understanding of police professionalism. If the police are "managerial"³²⁶ and governed by the chain of command, then the Court, if it is to engage in the business of regulating the police, "should articulate bright-line rules that can be applied on the street, not complicated, multi-factored tests that smell of the lamp."³²⁷ If, however, the police on the street operate more like

³²⁵ *Aguilar v. Texas*, 378 U.S. 109 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969); see also Alexandra Natapoff, *Underenforcement*, 75 *Fordham L. Rev* 1715 (2006) (discussing over-reliance upon informants in policing).

³²⁶ On the managerial model of police professionalism, see the difference between street and management cops in E. Reuss-Ianni & F.A. Ianni, *Street Cops and Management Cops: The Two Cultures of Policing*, in *CONTROL IN THE POLICE ORGANIZATION* 251-74 (Maurice Punch, ed., 1983).

³²⁷ Daniel Yeager, *Searches, Seizures, Confessions, and Some Thoughts on Criminal*

“craftsmen” who deal in unpredictable situations irreducible to broad policy guidelines,³²⁸ the Court may choose to constrain conduct through advance individualized pre-authorization of activity impinging upon individual liberties, or facilitate conduct through empowering police to use their training and experience. The pre-authorization mode of regulation is designed to check police engaged in the “often competitive business of ferreting out crime.”³²⁹ The regulatory style that seeks to facilitate experience tends to promote a much narrower view of the Constitution’s role in setting procedural norms, instead defining rights through a process of individualized balancing that defers to law-enforcement characterizations of their interests.

If we want to encourage the police to act as craftsman, then empowering the officer on the street as both policy-maker and judge of competence seems essential. Prospective norms guiding behavior are sub-optimal: what we want is experienced, street savvy officers as the source of regulation, operating after the police have had a chance to size-up and respond to the situation, using case-by-case evaluations of competence. If we want to constrain the police and scrutinize their craftsman-like conduct, then we will want some independent source to ensure that policing comports with constitutional norms (and so independently authorize police activity), probably before the police have a chance to act, while engaging in an individualized analysis of proposed action to remain responsive to the situational nature of the craft. Either of these proposals requires a complex regulatory regime of rules and standards operated by a panoply of officials.

Operating from the perspective of constitutional rights, many theorists think that the solution to arbitrariness is some set of rules or guidelines: they worry that the rules are over-inclusive, excluding, not only arbitrary decisions, but accurate, justice-enhancing ones. In the criminal

Procedure: Regulation of Police Investigation-Legal, Historical, Empirical, and Comparative Materials, 23 FLA. ST. U. L. REV. 1042, 1046 (1996) (discussing Christopher Slobogin’s pragmatic or empirical approach to criminal procedure).

³²⁸ See JAMES Q. WILSON, VARIETIES OF POLICE BEHAVIOR: THE MANAGEMENT OF LAW AND ORDER IN EIGHT COMMUNITIES 283 (1968) (“The patrolman is neither a bureaucrat nor a professional but, a member of a *craft*”); JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 231, 196-97 (1966) (discussing police as craftsman).

³²⁹ *Johnson v. U.S.*, 333 U.S. 10, 14 (1948). See also *Spinelli v. United States*, 393 U.S. 410, 415 (1969) *overruled by Illinois v. Gates*, 462 U.S. 213 (1983) (applying “ferreting out crime” standard to reject informant testimony as falling below probable cause); *Dunaway v. New York*, 422 U.S. 200 (1979) (applying “ferreting out crime” standard to reject seizure and removal to police station on less than probable cause).

investigation context, liberals tend to want rules or guidelines to trump standards, on the theory that even if the result is an unjust windfall for a criminal suspect (the bad guy gets off), the rule operates to protect the rights of citizens (the cop also acted unlawfully in violating the constitution). Conservatives, prioritizing accuracy,³³⁰ often want standards to trump rules. The goal is to prevent windfalls to guilty criminals so long as the decision-making process, though inconsistent, incoherent or impermissible, is independently reasonable (that is, it properly assess the existence of probable cause).

The Court consistently rejected self-regulation as the appropriate mode of self-governance,³³¹ and instead “[o]ver and again ... emphasized ... adherence to judicial processes,’ and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment.”³³² In *Katz*, the Court demanded a warrant not because the federal agents invade the defendant’s privacy, but because they do so without the proper individualized authorization from another branch of government. In *Camara*, the Court required individualized authorization of legislative justifications for administrative searches. In *Terry*, the Court tries to come up with a fix extending judicial scrutiny to the police officer’s individualized policy decision about who to search and who to let to free.

The legality of government searches and seizures turns upon whether to believe the executive branch’s factual claim that there existed sufficient evidence that a particular individual was likely engaged in criminal activity. Inter-branch scrutiny, justified under the separation of powers, prevents the executive from amassing unrestrained power to engage in investigative activity. It thus prevents the sort of lawless government behavior that so worried Justice Brandeis in his *Olmstead* dissent. While a political theory of inter-branch scrutiny may not be the only acceptable — or even the most persuasive — liberal theory of legitimate police activity, it provides a positive account of police authority, and so is better than the negative and partial egalitarian or libertarian liberal discussions of policing.

³³⁰ See, e.g., Joseph D. Grano, *Ascertaining the Truth*, 77 CORNELL L. REV. 1061, 1062-64 (1992) (rejecting due-process rules as “truth defeating”).

³³¹ See, e.g., *Beck v. State of Ohio*, 379 U.S. 89, 97 (1964) (“If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be ‘secure in their persons, houses, papers, and effects,’ only in the discretion of the police.”).

³³² *Katz* 389 U.S. 347, 356-57 (citing *United States v. Jeffers*, 342 U.S. 48, 51 (1951). See also *Chimel v. California*, 395 U.S. 752, 758, 761 (1969) (emphasizing importance of the warrant process).

Accordingly, the Warren Court's regulatory jurisprudence provides a better place to start the conversation about what constitutes good policing than the liberals rights-based jurisprudence.

CONCLUSION

The liberal story of the Warren Court's limited rights revolution, with its ignominious and cowardly end in the face of populist political pressure, cannot be supported by the Fourth Amendment jurisprudence upon which it relies. Instead, the two planks of the rights revolution story — rights expansion before *Terry*, and rights contraction in *Terry* — are mistaken and misleading. The Court never embraced Fourth-Amendment egalitarianism, and spent a large part of the rights-revolution attacking the central libertarian liberal right: privacy. Accordingly, the Warren Court should be understood as a rights-contracting court — or at the least, strongly limiting pre-existing categorical libertarian liberal privacy doctrines.

Terry, rather than limiting privacy, extends regulation outside the normal investigatory sphere into preventative policing. Two major aspects of regulating preventative policing were to bring stop-and-frisks under the Fourth Amendment, and prevent end-runs around the regulatory scheme by police or legislatures relying on vagrancy laws. That means that the second prong of the rights revolution argument fails too. Rather than a Court on the retreat, *Terry*, *Sibron*, and *Papachristou* evidence a Warren Court triumphant.

What triumphed was a demand for policing regulated by an individualized judicial pre-authorization regime. This theory of permissible investigation based on inter-branch authorization provided a positive theory of policing, and a cure for police lawlessness and capriciousness. That the theory did not outlast the Warren Court is cause for regret; nonetheless, it also provides the basis for a progressive political theory accounting for the role and justification of the police in a modern regulatory state.