

2010

The Warren Court's Regulatory Revolution in Criminal Procedure

Eric J. Miller

Follow this and additional works at: https://opencommons.uconn.edu/law_review

Recommended Citation

Miller, Eric J., "The Warren Court's Regulatory Revolution in Criminal Procedure" (2010). *Connecticut Law Review*. 83.

https://opencommons.uconn.edu/law_review/83

CONNECTICUT LAW REVIEW

VOLUME 43

NOVEMBER 2010

NUMBER 1

Article

The Warren Court's Regulatory Revolution in Criminal Procedure

ERIC J. MILLER

The standard story taught to American lawyers, purporting to describe the Warren Court's criminal procedure "revolution," is mostly wrong. The story 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. But 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, in Terry v. Ohio a cowed Court 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 two-Warren-Courts hypothesis, at least as applied to Fourth Amendment law, results from a tendentious liberal re-reading of the Court's jurisprudence. The dominant theme in the Court's Fourth Amendment jurisprudence was not liberal, but civic republican, one that emphasized inter-branch regulation of the police over the right to privacy. Rather than a rights-expanding and a rights-contracting Warren Court, from the early 1960s onwards, the Court mounted a consistent attack on the pre-existing versions of the right to privacy. Rather than a liberal egalitarian, or privacy-protecting rights regime, the central Fourth Amendment right under the Warren Court was the republican interest in personal security. Extending personal 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 liberal story has produced a barren doctrinal and political account of the Fourth Amendment. Focusing on privacy as the means of generating equality and anti-discrimination ill fits Fourth Amendment doctrine and ignores major developments in the substantive criminal law that include Terry and culminate with Papachristou v. City of Jacksonville. An obsession with 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.

ARTICLE CONTENTS

I. INTRODUCTION	3
II. OUTLINE OF THE ARGUMENTS: HISTORICAL AND POLITICAL	8
A. HISTORICAL ARGUMENT: KAMISAR’S TWO-WARREN-COURTS THESIS	9
B. POLITICAL ARGUMENT: REPUBLICAN REGULATION VERSUS LIBERAL IMMUNITIES	14
C. REPUBLICAN PRECEDENTS	18
III. LIBERAL MISDESCRIPTIONS OF FOURTH AMENDMENT DOCTRINE.....	20
A. EQUALITY: THE WRONG RIGHT	21
B. THE COURT AND RACE: EQUALITY AS ANTI-DISCRIMINATION	23
C. FOUR VERSIONS OF PRIVACY: PROPERTY, LIBERTY, PROTECTED SPACES, AND SECURITY	26
IV. <i>TERRY</i> : EXPANDING REGULATION	48
A. NOT A BOLT FROM THE BLUE: PRE- <i>TERRY</i> LAW OF STOP AND FRISK	50
B. SAFETY, PROFESSIONALISM, AND <i>TERRY</i> ’S EXPANSIVE REGULATION OF THE POLICE	60
C. REGULATING PREVENTATIVE POLICING OUTSIDE THE WARRANT REQUIREMENT.....	62
V. <i>SIBRON</i> , VAGRANCY, AND VAGUENESS.....	65
A. <i>SIBRON</i> ’S FORGOTTEN IMPORTANCE	66
B. VAGRANCY AND RACIAL EQUALITY	71
C. THE REAL RIGHTS REVOLUTION	76
VI. POSITIVE AND NEGATIVE THEORIES OF POLICING.....	76
VII. CONCLUSION.....	80



The Warren Court's Regulatory Revolution in Criminal Procedure

ERIC J. MILLER*

I. INTRODUCTION

There is a standard story taught to American lawyers that purports to describe the Warren Court's criminal procedure decisions as a rights "revolution."¹ Between *Mapp v. Ohio*² and *Miranda v. Arizona*,³ the story goes, the Court—motivated by an emphasis on political, social, and economic equality for racial minorities⁴—engaged in a rights-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. Frightened, however, 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

* Professor of Law, Saint Louis University Law School. My thanks to the following people for their support in the writing of this Article: Alfred Brophy, G. Jack Chin, Frank Rudy Cooper, Adrienne D. Davis, Jelani Jefferson Exum, Naomi Goodno, Kaaryn Gustafson, Arthur Leavens, Charles Ogletree, Eve Brensike Primus, Mae Quinn, and Carol Steiker. Thanks also to my colleagues at Saint Louis University Law School: Matthew Bodie, Joel Goldstein, Samuel Jordan, Kerry Ryan, Molly Walker Wilson, and Anders Walker.

¹ 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) [hereinafter Kamisar, *Warren Court*]; Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 *TULSA L.J.* 1, 2–3 (1995) [hereinafter Kamisar, *Retrospective*].

² 367 U.S. 643 (1961). In his earlier article, Kamisar appears willing to push back the beginning of the rights revolution to the 1956 case, *Griffin v. Illinois*, 351 U.S. 12 (1956). See Kamisar, *Warren Court*, *supra* note 1, at 62–63.

³ 384 U.S. 436 (1966).

⁴ Kamisar, *Retrospective*, *supra* note 1, at 6; see also A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 *MICH. L. REV.* 249, 256 (1968) (emphasizing the Warren Court's jurisprudence guaranteeing disadvantaged minority groups equality before the law).

⁵ E.g., *Katz v. United States*, 389 U.S. 347, 359 (1967); *Mapp*, 367 U.S. at 654–55.

⁶ See, e.g., LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 407–11 (2000) (discussing the impact of public sentiment on crime on Warren Court criminal procedure); Kamisar, *Retrospective*, *supra* note 1, at 3 (“[T]he 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.”).

⁷ 392 U.S. 1 (1968).

to search and seize criminal suspects.⁸ For proponents of the rights revolution theory, this meant that there were in fact two Warren Courts⁹—one liberal and the other more conservative¹⁰—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 historically distinct rights-expanding and rights-contracting phases, but rather constituted one single regulation-promoting continuum. Similarly, the 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 left-liberal egalitarian,¹³ or privacy-protecting rights regime, the central concern of the Warren Court's Fourth Amendment jurisprudence was the republican interest in personal security,¹⁴ understood as non-domination.¹⁵ Extending security into areas

⁸ See Kamisar, *Warren Court*, *supra* note 1, at 64 (describing how the Court “legitimated the police practice of stopping and frisking persons on less than probable cause”); Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts’ Competing Ideologies*, 72 GEO. L.J. 185, 232–34 (1983); Donald A. Dripps, *Beyond the Warren Court and Its Conservative Critics: Toward a Unified Theory of Constitutional Criminal Procedure*, 23 U. MICH. J.L. REFORM 591, 621–22 (1990) (explaining the overarching search and seizure rules); Jerold H. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319, 1388 (1977); Kamisar, *Retrospective*, *supra* note 1, at 35 (discussing different court interpretations that create a diminished security against searches and seizures); Stephen A. Saltzburg, *Foreword: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 GEO. L.J. 151, 153 (1980).

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*.” Kamisar, *Retrospective*, *supra* note 1, at 2–3 (footnotes omitted).

¹⁰ See POWE, *supra* note 6, at 408 (listing the Warren Court’s more “conservative” decisions and discussing the conservative/liberal split). For definitions of these labels, as used in this Article, see *infra* Part II.B.

¹¹ Kamisar, *Retrospective*, *supra* note 1, at 5 (“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.” (footnote omitted)).

¹² See, e.g., *Katz v. United States*, 389 U.S. 347, 351 (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)); *Warden v. Hayden*, 387 U.S. 294, 301–07 (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”); *Hoffa v. United States*, 387 U.S. 231, 233–34 (1967) (permitting undercover wires); *Lewis v. United States*, 385 U.S. 206, 211–12 (1966) (permitting undercover wires).

¹³ See POWE, *supra* note 6, at 446 (claiming that Warren Court criminal procedure was a series of “barely disguised poverty cases”); Kamisar, *Retrospective*, *supra* note 1, at 6 (identifying as central the Warren Court’s value of equality).

¹⁴ See *Katz*, 389 U.S. at 358–59 (bypassing warrant requirement leaves people “secure from Fourth Amendment violations ‘only in the discretion of the police.’” (quoting *Beck v. Ohio*, 379 U.S. 89, 97 (1964))); *Mapp v. Ohio*, 367 U.S. 643, 647 (1961); see also *infra* notes 21–32 and accompanying text.

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.¹⁶ For example, Yale Kamisar, a major exponent of the “two-Warren-Courts” analysis, claims the rights revolution was essentially an equality revolution,¹⁷ and in particular, an anti-discrimination revolution.¹⁸ For others, the Fourth Amendment revolution was a privacy revolution, promoting the negative liberty right to exclude the government from certain places.¹⁹ Both stories are doctrinally and politically barren. Focusing on equality, anti-discrimination, and privacy too easily paints law enforcement in negative liberty terms as a repressive force whose power and numbers should be severely limited. On this view, almost any police activity relying upon the exercise of discretion appears to undermine the immunity of the public in general and criminal defendants in particular.²⁰ This narrow liberalism has turned progressive

¹⁵ PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 51–78 (1997); HENRY S. RICHARDSON, DEMOCRATIC AUTONOMY: PUBLIC REASONING ABOUT THE ENDS OF POLICY 28–36 (2002).

¹⁶ In other words, I subscribe to the critique leveled against Fourth Amendment scholarship by Robert Weisberg:

Hampered by boring models of crime control and due process masked as practical reasoning, scholarship has given way to both imprecise empiricism and shallow deontology. The doctrine has been typically cast by the scholars as a political melodrama with a scripted dramatic story—a pattern of expanded constitutional protection under the Warren Court followed by the retrenchment of the Burger and Rehnquist Courts. The process leads to mechanical outcome counting and evaluation, and assumes the opinions are effectual and significant in the terms in which they are written.

Robert Weisberg, *Criminal Law, Criminology, and the Small World of Legal Scholars*, 63 U. COLO. L. REV. 521, 530 (1992).

¹⁷ Kamisar, *Warren Court*, *supra* note 1, at 62; *see also* 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, 889 (2004) (describing the “close link” between concern with substantive rights and criminal procedure revolution’s “imposi[tion of] national standards on law enforcement”); Kamisar, *Retrospective*, *supra* note 1, at 6. 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, 1954–1968*, 82 ST. JOHN'S L. REV. 1, 25 (2008) (discussing the Court's loss of faith in the Southern judiciary in the context of the criminal justice rights revolution).

¹⁸ In addition to Kamisar's scholarship, other works promoting the anti-discrimination view include: 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); Frank Rudy Cooper, *Cultural Context Matters: Terry's "Seesaw Effect"*, 56 OKLA. L. REV. 833, 840 (2003); Tracey Maclin, *Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271, 1276 (1998).

¹⁹ *See* Samuel C. Rickless, *The Coherence of Orthodox Fourth Amendment Jurisprudence*, 15 GEO. MASON U. C.R. L.J. 261, 264–65 (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.”).

²⁰ *See, e.g.*, David Cole, *Foreword: Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059, 1072 (1999) (“These rules allow the police

attention away from the vital and difficult task of generating a positive doctrinal and political account of policing: its justification, intrinsic limits, and proper means of regulation.

The liberal emphasis on the protection of fundamental rights has obscured the Warren Court's civic republican focus on regulation through the diffusion of power.²¹ Republicanism, in addition, promotes security over privacy, the rule of law over freedom from law, non-arbitrariness over immunity, and competition between government agents over exclusion of government agents. While the liberal emphasis on rights and the exclusionary remedy superficially mimics the republican interest in regulation, that impression hides deeper differences between the theories and hidden problems within liberalism.

The Warren Court's republican, regulatory agenda has passed mostly without comment, swallowed up within the myth of the rights revolution.²² To gain a proper understanding of criminal procedure's evolution during the 1960s, however, requires paying more attention to the Court's regulatory revolution. Understanding the Warren Court's Fourth Amendment regulatory agenda as a form of republicanism produces three interrelated insights.

First, emphasizing regulation allows us to see the Warren Court's major Fourth Amendment cases from *Mapp* to *Terry*, particularly the privacy ones, in their true colors: not, as Kamisar claims, the ebb and flow of the rights revolution, but as extending the Court's scrutiny of the police through inter-branch review of law-enforcement activity.²³

Second, a regulatory approach permits us to revisit and reclaim a variety of other late Warren Court and early Burger Court cases as central

to approach and investigate people for any reason or none at all; the officer's discretion is wholly unregulated. In other settings, the officer's discretion is subject only to the most deferential oversight, as in 'stop and frisk' encounters, which may be predicated on 'reasonable suspicion,' a standard that itself defers substantially to the officer's on-the-scene judgment and experience.").

²¹ The Court's dual emphasis on promoting warrants as an inter-branch check on the police, and restricting arbitrary intrusions on privacy-as-security are typically republican. See, e.g., *Katz*, 389 U.S. at 358–59 (requiring inter-branch scrutiny of proposed police action through warrant process); *Beck v. Ohio*, 379 U.S. 89, 97 (1964) (same); *Mapp v. Ohio*, 367 U.S. 643, 647 (1961) (discussing security from arbitrary police intrusions); cf. JOHN BRAITHWAITE & PHILIP PETTIT, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE 56–57, 87–88 (1990) (arguing that liberal notions of liberty require freedom from restraints or interference with others, but that liberty requires checks on the power of criminal authorities); PETTIT, *supra* note 15, at 4–9; RICHARDSON, *supra* note 15, at 9 (discussing administrative agencies and impacts on individual liberties); Quentin Skinner, *Machiavelli on Virtù and the Maintenance of Liberty*, in 2 VISIONS OF POLITICS 160, 160–85 (2002).

²² And not without reason. See *Mapp v. Ohio*, 367 U.S. 643, 657, 660 (1961) (discussing the Court's exclusionary remedy and the warrant requirement as part of the Fourth Amendment right to be free from unreasonable searches and seizures).

²³ As I shall argue, *infra* Part III.C.3, *Katz*'s protection of "people, not places," fits this republican interest in security rather than exclusion from particular locations by expressly rejecting the sort of liberal emphasis on privacy popularized by John Stewart Mill's *On Liberty* or Justice Brandeis's *Olmstead* dissent.

to the regulation revolution: *Katz v. United States*,²⁴ *Camara v. Municipal Court of San Francisco*,²⁵ and *Terry* and its twin, *Sibron v. New York*.²⁶ Perhaps most importantly, the regulatory approach places these decisions within a line of cases rejecting the criminalization of low-level dissent and nonconformity, vagrancy, and public disorder, culminating in *Papachristou v. City of Jacksonville*.²⁷ Drawing on some recent scholarship, I shall argue that these cases are the ones that truly represent the Court's egalitarian and anti-discriminatory politics, but in a republican, regulatory manner. The public-order and public-protest cases, I shall argue, are closely related to the sort of regulation promoted in *Terry*,²⁸ a style that embraces racial and "lifestyle" diversity²⁹—including the sexual connotations of the latter phrase³⁰—in spaces that are essentially "public" and so outside the liberal realm of protection.³¹

Third, an emphasis on regulation reveals the Court's alternative theory of legitimate law enforcement activity as republican and most strongly justified when premised on joint action by separate branches of government—rather than simply the avoidance of discrimination by state law enforcement agencies.³² Republicanism thus provides a theory of government regulation independent of rights, and a positive account of the nature and limits of policing.

While I focus on such republican elements as security, non-arbitrariness, and the diffusion of power through inter-branch checks, I shall suggest that these need not provide the only alternative political or doctrinal theory of justified police authority to liberalism's emphasis on negative liberty and immunity from police activity. For example, populist theories of direct participation in government decision-making may have a strong political and doctrinal appeal. Nonetheless, republicanism points in

²⁴ 389 U.S. 347 (1967).

²⁵ 387 U.S. 523 (1967).

²⁶ 392 U.S. 40 (1968).

²⁷ 405 U.S. 156 (1972).

²⁸ See, e.g., William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 559–62 (1992) [hereinafter Stuntz, *Bargains*] (discussing the relationship between the Court's regulation of vagrancy laws and stop and frisk statutes).

²⁹ See *Papachristou*, 405 U.S. at 170; *Coates v. City of Cincinnati*, 402 U.S. 611, 616 (1971); Risa L. Goluboff, *Dispatch from the Supreme Court Archives: Vagrancy, Abortion, and What the Links Between Them Reveal About the History of Fundamental Rights*, 62 STAN. L. REV. 1361, 1369 (2010) (discussing the Court's use of the language of lifestyle in its vagrancy opinions).

³⁰ See David Alan Sklansky, "One Train May Hide Another": *Katz*, *Stonewall*, and the Secret Subtext of *Criminal Procedure*, 41 U.C. DAVIS L. REV. 875, 896–97 (2008) [hereinafter Sklansky, *One Train*] (drawing links between *Katz*, *Papachristou*, and the policing of gay men in the 1960s).

³¹ See Goluboff, *supra* note 29, at 1368–69 (describing vagrancy as occurring in public rather than in private).

³² I shall argue in Part II that this republican theory of legitimacy has its roots in, among other cases, Justice Jackson's famous concurrence in *Youngstown Sheet & Tube Co.*, making just this argument. See 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring) (discussing three situations in which the executive branch can garner more or less support for the exercise of its powers).

a direction that other progressive Fourth Amendment theorists would do well to consider if they want to participate in a positive agenda engaged in the directing of police power.

Part II briefly outlines the historical and doctrinal or philosophical arguments and the Warren Court's regulatory regime of inter-branch constraint, dependent upon pre-clearance of police activity by a member of the judiciary. Part III elaborates the ways in which the orthodox story of the 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. Part IV demonstrates that *Terry* extended, rather than contracted, the Court's Fourth Amendment criminal justice jurisprudence by increasing regulation of the police. Part V argues 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, Part VI suggests one way in which a political theory of police authority is needed to energize a broadly progressive approach to the Fourth Amendment.

II. OUTLINE OF THE ARGUMENTS: HISTORICAL AND POLITICAL

In this first section I shall briefly set out two arguments, one historical and one derived from political theory, both of which provide reasons for rejecting the two-Warren-Courts thesis. My central claim is that the thesis promotes a liberal reading of the Court's jurisprudence that fundamentally mistakes central aspects of the Court's operation, and so distorts the historical and doctrinal record. In place of the liberal two-Warren-Courts thesis, I propose the existence of a unitary, republican Warren Court, one that extended throughout the 1960s and whose legacy was felt even into the 1970s.³³

My claim is that the two-Warren-Courts thesis (and a famous variant, Herbert Packer's claim that criminal procedure jurisprudence oscillates between a "crime control" model promoting law-enforcement interests and a "due process" model protecting defendants' rights)³⁴ is not simply some

³³ Intriguingly, Justice Stewart makes a similar-sounding argument in his concurrence in *Roe v. Wade*, 410 U.S. 113, 167-68 (1973) (Stewart, J., concurring), arguing that the Court abandoned the jurisprudence of fundamental rights from 1963-1973.

³⁴ Packer famously views the criminal justice system as a struggle between two value systems: due process and crime control. See, e.g., HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 149-53 (1968) [hereinafter PACKER, *LIMITS*]; Herbert L. Packer, *The Courts, the Police, and the Rest of Us*, 57 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 238, 239 (1966) [hereinafter Packer, *Courts, Police*]; Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 1-23 (1964) [hereinafter Packer, *Two Models*]. He characterizes these value systems as representing a "normative antinomy at the heart of the criminal law," and "polar extremes" between which criminal doctrine veers through "almost infinite modulation and compromise." PACKER, *LIMITS*, *supra*, at 153; Packer, *Courts, Police*, *supra*, at 239.

neutral, descriptive, historical reconstruction of Warren Court doctrine. Rather, liberals like Kamisar and Packer sought to re-interpret the Warren Court as advancing a particular political project. It is with that description and that project I wish to quibble.

A. *Historical Argument: Kamisar's Two-Warren-Courts Thesis*

Kamisar advances two, slightly different, two-Warren-Court theses to support his claim that there was an egalitarian rights revolution in criminal procedure. The first, in *The Burger Court: The Counter-Revolution That Wasn't*, presents the Warren Court as advancing a complex and conflicted set of decisions, particularly in the Fourth Amendment context.³⁵ The second, in the *Tulsa Law Journal*, is somewhat shorter and less circumspect about the jurisprudence (omitting much of the Fourth Amendment discussion), and so expresses with greater certainty the two-Warren-Courts thesis.³⁶ Since I believe, on either account, there were not two Warren Courts—and that any egalitarian revolution occurred outside the Fourth Amendment—my analysis applies to both.³⁷

³⁵ Kamisar, *Warren Court*, *supra* note 1, at 63–65, 67.

³⁶ Kamisar, *Retrospective*, *supra* note 1, at 4–5.

³⁷ In each article, Kamisar sums up the two-Warren-Courts thesis. Here is the first:

In its final years “the Warren Court,” I think it may be argued, was not the same Court that had produced *Miranda* or *Mapp*. One might say there were two Warren Courts: (1) the one most of us think of when we talk about that Court, and (2) the one that so peremptorily sustained the informer’s privilege in 1967 and so gropingly upheld stop and frisk practices in 1968. Before it disbanded, the second (and less publicized) Warren Court had begun a process many associate only with its successor—a process of reexamination, correction, consolidation, erosion, or retreat, depending upon your viewpoint.

Kamisar, *Warren Court*, *supra* note 1, at 67. And the second:

[W]hen we speak of the Warren Court’s “revolution” in American criminal procedure we mean the Warren Court that lasted from 1961 (when the landmark case of *Mapp v. Ohio* was decided) 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*. . . . I think that, in the main, the revolution ended a couple of years before Earl Warren stepped down as Chief Justice. . . . 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.

Kamisar, *Retrospective*, *supra* note 1, at 2–5 (internal citations omitted). Kamisar offers an explanation for the Court’s dramatic volte face. Again, here it is as presented in each of the articles, the earlier first:

The change does seem attributable to “the buffeting of rapid historical developments that incessantly place unprecedented strains upon the Court.” The last years of the Warren Court’s “criminal procedure ‘revolution’” constituted a period of social upheaval, marked by urban riots, violence in the ghettos, and disorders on the campuses [P]residential candidate Richard Nixon’s strong criticism of the Court, the “obviously retaliatory” provisions of the Crime Control Act of 1968, and the ever-soaring crime statistics and ever-spreading fears of the breakdown of public order “combined to create an atmosphere that, to say the least, was unfavorable to the continued vitality of the Warren Court’s mission in criminal cases.”

Kamisar, *Warren Court*, *supra* note 1, at 67 (internal citations omitted). And the later:

The last years of the Warren Court constituted a period of social upheaval marked by urban riots, disorders on college campuses, ever-soaring crime statistics,

The two-Warren-Courts argument is itself two arguments: (1) a rights revolution argument and (2) a rights-contraction argument. The rights revolution argument proposes that the Warren Court introduced a series of fundamental rights directed towards establishing either equality or liberty or both in its criminal justice jurisprudence primarily in the 1960s.³⁸ The rights-contraction argument asserts that, in response to populist reaction to the rights revolution, and in particular to *Miranda v. Arizona*,³⁹ the Court changed sides from due process to crime control, subverting its prior emphasis on fundamental rights by becoming much more open to law-enforcement interests in criminal justice.⁴⁰ The two-Warren-Courts argument thus depends upon showing that (1) there was a rights revolution, and (2) the Court engaged in (a) a rights-contracting reaction caused by (b) a populist backlash to the rights revolution, and specifically *Miranda*. The argument thus proposes a historically specific chain of causation: a rights revolution beginning in 1961 with *Mapp v. Ohio*,⁴¹ a populist backlash in response to the rights revolution, normally dated around 1968 (the era of increasing violence around America and the passage of the *Omnibus Crime Control and Safe Streets Act of 1968*), and then the Court's own response to that backlash, expressed primarily in *Terry v. Ohio*.⁴² There are good reasons for rejecting both prongs of this argument and the two-Warren-Courts theory that it supports.

1. *The First Prong*

The first prong of the argument makes a strong assumption about the doctrinal character of the rights revolution, claiming that it was about fundamental rights, either equality rights or liberty rights. I shall argue that this fundamental rights approach cannot account for the Warren Court's Fourth Amendment jurisprudence. There was no Fourth Amendment fundamental rights revolution; there was a republican, regulatory revolution.

As I shall argue in the next section, the right to privacy, surely the paradigmatic right of the Warren Court's Fourth Amendment

ever-spreading fears of the breakdown of public order, and assassinations and near-assassinations of public figures. Moreover, 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.

Kamisar, *Retrospective*, *supra* note 1, at 3.

³⁸ Kamisar, *Retrospective*, *supra* note 1, at 6–8.

³⁹ 384 U.S. 436 (1966).

⁴⁰ Kamisar, *Retrospective*, *supra* note 1, at 5 (describing *Terry* as “cause for celebration in a goodly number of police stations”).

⁴¹ 367 U.S. 643 (1961). The start of the rights revolution has also been placed in 1956, with the decision in *Griffin v. Illinois*, 350 U.S. 12 (1956). See Kamisar, *Retrospective*, *supra* note 1, at 3 n.3.

⁴² 392 U.S. 1 (1968).

jurisprudence, was not invented by the Warren Court. Instead, there was a right to privacy that pre-dated the Warren Court by almost seventy years, and its central privacy cases by eighty.⁴³ The pre-existing privacy right rested upon a liberal, Lockean version of privacy, one that emphasized immunity from government interference as grounded in property rights,⁴⁴ and one applied, though controversially so, in *Olmstead v. United States*.⁴⁵ This is the right to privacy championed by Justice Douglas in *Griswold v. Connecticut*,⁴⁶ but in the Fourth Amendment context and often in dissent.⁴⁷ Expanding rights would require adopting or expanding this liberal, fundamental rights view of privacy. Instead, the Court—as Kamisar briefly notes⁴⁸—repeatedly contracted the right to privacy.

If the Court did not expand privacy rights, then the first prong of the argument misfires. Without a rights-expanding Court, there was no Fourth Amendment privacy revolution or a Fourth Amendment equality revolution; instead, as this Article argues, there was a Fourth Amendment regulatory revolution, epitomized by the Court's emphasis on security rather than immunity.

2. *The Second Prong*

The second argument is also flawed. That argument depends upon the claim that *Terry*—a Fourth Amendment case—signals a move from a rights-expanding Court to a rights-contracting one. Whatever the merits of egalitarianism and rights-expansion for the other amendments, Kamisar's rights-contracting argument depends primarily upon Fourth Amendment

⁴³ See *Katz v. United States*, 389 U.S. 347, 350 (1967) (discussing the right to privacy in the context of the Fourth Amendment); *Warden v. Hayden*, 387 U.S. 294, 309 (1967) (same); *Boyd v. United States*, 116 U.S. 616, 633 (1886) (same).

⁴⁴ See, e.g., JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 171 (C.B. Macpherson ed., Hackett Publishing Co. 1980) (1690).

⁴⁵ 277 U.S. 438 (1928), *overruled by Katz*, 389 U.S. 347.

⁴⁶ 381 U.S. 479, 484 (1965) (“Various guarantees create zones of privacy.”).

⁴⁷ Douglas dissents on privacy-as-immunity grounds in a number of cases. See *Terry v. Ohio*, 392 U.S. 1, 38–39 (1968) (Douglas, J., dissenting); *Gilbert v. California*, 388 U.S. 263, 286 (1967) (Douglas, J., dissenting); *Warden v. Hayden*, 387 U.S. 294, 313 (1967) (Douglas, J., dissenting) (defending “a zone of privacy that may not be invaded by the police through raids, by the legislators through laws, or by magistrates through the issuance of warrants”); *Cooper v. California*, 386 U.S. 58, 65 (1967) (Douglas, J., dissenting) (discussing “protecti[on] [for] . . . zone of privacy of the individual as prescribed by the Fourth Amendment”); *Schmerber v. California*, 384 U.S. 757, 778 (1966) (Douglas, J., dissenting) (defending “‘a zone of privacy’ which the Government may not force a person to surrender”). He also dissented in *Osborn v. United States*, 385 U.S. 323, 340–41, 46 (1967) (Douglas, J., dissenting), a wiretap case, without giving a reason, and in *Hoffa v. United States*, 385 U.S. 293, 321–22 (1966) (Douglas, J., dissenting), another wiretap case, as improvidently granting certiorari. In *Berger v. New York*, he concurred, but only to restate his dissenting opinion from *Hayden*, that there was an absolute privacy right against wiretapping, “no matter with what nicety and precision a warrant may be drawn.” 388 U.S. 41, 64 (1967) (Douglas, J., concurring).

⁴⁸ Kamisar, *Warren Court*, *supra* note 1, at 63–64 (“Despite its public reputation as a bold, crusading court, more often than not [the Warren Court’s] criminal procedure decisions reflected a pattern of moderation and compromise.”); Kamisar, *Retrospective*, *supra* note 1, at 4 (“The Warren Court’s performance in the field of criminal procedure does not fall into neat categories.”).

cases as signaling the era of rights-contraction.

But the two-Warren-Courts argument also cannot rely on *Terry* because that case is an expansionist, not a contractionist one. Even if one understands the jurisprudence in rights-terms, the Warren Court's Fourth Amendment regulatory jurisprudence remained consistently expansionist. *Terry* may take that expansion in a new direction—in part because the Court was expanding regulation into uncharted waters and in part because it is best understood as an adjunct to the Court's cases dealing with public-order offenses. Nonetheless, it is a regulation-expanding case.⁴⁹

The claim that *Terry* signals the end of a rights-expanding Court is thus doubly mistaken because the Court's Fourth Amendment jurisprudence was not about expanding privacy or equality rights. *Terry*, its sister case *Sibron*, and *Papachristou* expanded regulation, and with it expanded the core Fourth Amendment interest under the Warren Court: security. In *Terry*, as with the earlier regulation expanding cases, the Court again expanded regulation. If the two-Warren-Courts argument is to bite, it cannot rely on *Terry*—or, I would claim, any Fourth Amendment case—to signal a contraction.

Furthermore, as we shall see, Kamisar has a problem dating the end of the rights revolution in a manner consistent with the rights-contraction thesis. The Court's Fourth Amendment jurisprudence places rights-contraction on the table almost from the outset, and certainly before *Katz* or the informer cases. In the Fourth Amendment jurisprudence, it looks like the end occurred in 1963,⁵⁰ 1966,⁵¹ 1967,⁵² or the official end date, 1968.⁵³ On each of these occasions, the Court issued important decisions limiting, if not eviscerating, a pre-existing right to privacy. To the extent the rights revolution is about privacy, the causal aspect of the backlash argument fails.

Put differently, using *Terry*, or any Fourth Amendment case, to date the end of the rights revolution is somewhat odd because, as both Kamisar and, among others, Carol Steiker acknowledge,⁵⁴ the Court never properly

⁴⁹ See *infra* Part IV (discussing *Terry* as a regulation-expanding case).

⁵⁰ See *Lopez v. United States*, 373 U.S. 427, 439–40 (1963) (asserting that there is no Fourth Amendment violation where a government agent recorded a conversation without probable cause or warrant).

⁵¹ See *Hoffa*, 385 U.S. at 302 (concluding that there is no Fourth Amendment violation where an undercover agent wearing a wire recorded a conversation without probable cause or warrant); *Lewis v. United States*, 385 U.S. 206, 211 (1966) (same); *Schmerber*, 384 U.S. at 772 (allowing the government to take a blood sample from a suspect without a warrant under the emergency exception to the Fourth Amendment).

⁵² *Katz v. United States*, 389 U.S. 347, 359 (1967); *McCray v. Illinois*, 386 U.S. 300, 312 (1967).

⁵³ *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

⁵⁴ See Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2472 (1996) [hereinafter Steiker, *Counter-Revolution*] (“It is a bit harder to identify in any neat and simple way the germ of the Warren Court’s Fourth Amendment norms.”).

undertook its own rights revolution in the Fourth Amendment context. The Court was always somewhat internally divided between entrenching fundamental rights and trampling on them, always granting some concessions to the police.⁵⁵

The earlier Kamisar two-Warren-Courts thesis, embracing a doctrinally bipolar Warren Court, accepts and seeks to accommodate this conflict. In so doing, the argument fits comfortably with another central liberal reading of the Court's criminal justice jurisprudence advanced by Herbert Packer. Packer was a central apologist of the Warren Court's rights revolution, someone who was concerned to defend the Court's fundamental rights jurisprudence in terms of a set of due process rights possessed by criminal defendants and available to block the efficiency arguments of law enforcement officials and supporters.⁵⁶ Packer's argument is essentially doctrinal and ahistorical, and so not subject to the sort of causal falsification that Kamisar's historical argument invites. Nonetheless, it presents an important gloss on the two-Warren-Courts thesis.

Packer bifurcates criminal procedure into two sets of values: one oriented towards "crime control" and the other toward "due process." Each "polar extreme[]"⁵⁷ or "normative antinomy"⁵⁸ itself represents a set of values lying on what may loosely be termed the conservative and liberal ends of the political spectrum. Crime control values "the efficient, expeditious, and reliable screening and disposition of persons suspected of crime as the central value[s] to be served by the criminal process. The Due Process model sees that function as limited by and subordinate to the maintenance of the dignity and autonomy of the individual."⁵⁹ These competing values are broadly conservative and liberal in their outlook.⁶⁰

Packer intends the two-model organization of criminal justice as a heuristic device to orient our discussion of criminal procedure.⁶¹ His point is both descriptive and normative. Descriptively, he claims the Warren Court's regime of criminal procedure rights is fleshed out using the intermediate values captured by the crime control and due process

⁵⁵ See, e.g., Kamisar, *Warren Court*, *supra* note 1, at 63 ("Despite its public reputation as a bold, crusading court, more often than not [the Warren Court's] criminal procedure decisions reflected a pattern of moderation and compromise."); *id.* at 67 ("[M]y view [is] that even *Miranda*, 'the high-water mark of the due process revolution,' reflects considerable moderation and compromise." (quoting FRED P. GRAHAM, *THE SELF-INFLICTED WOUND* 157 (1970))).

⁵⁶ Packer, *Two Models*, *supra* note 34 at 13–22 (discussing the due process model).

⁵⁷ Packer, *Courts, Police*, *supra* note 34, at 239.

⁵⁸ PACKER, *LIMITS*, *supra* note 34, at 153.

⁵⁹ Packer, *Courts, Police*, *supra* note 34, at 239. For a more detailed treatment of the underlying values, see Packer, *Two Models*, *supra* note 34, at 6–23.

⁶⁰ See Packer, *Two Models*, *supra* note 34, at 6–23 (providing an overview of the elements of the models).

⁶¹ *Id.* at 6.

models.⁶² Normatively, he believes the two models ought to structure the manner in which jurists and practitioners derive values from the Constitution.⁶³ Each model provides a specification of legislation and constitutional norms that attempts to legitimize the Court's decision to intervene in the process of criminal investigation or to let well alone.

Packer's due process pole operates as a justification of the Warren Court's innovations in criminal procedure.⁶⁴ While the crime control model simply restates values that were commonly assumed to structure criminal procedure before the rights revolution in criminal justice, Packer introduces liberal notions of dignity and autonomy into the concepts of reasonableness and constraint. These are, however, the values associated with the Warren Court, and in particular its decisions in *Miranda*⁶⁵ and *Gideon v. Wainwright*.⁶⁶

But, neither version of liberalism—Packer's ahistorical polarities or Kamisar's historical rights revolution—can account for the parts of the Court's criminal justice jurisprudence I wish most forcefully to focus upon—that is, its Fourth Amendment jurisprudence. Accordingly, if Kamisar is to have his rights revolution in criminal procedure, it must be without the Fourth Amendment or without privacy (or both), and if he is to have his two-Warren-Courts, he must come up with some other case than *Terry* to demonstrate rights-contraction. There may be some cases outside the Fourth Amendment context that would suffice, but the onus is on him to demonstrate which cases these are.

B. *Political Argument: Republican Regulation Versus Liberal Immunities*

The historical thrust of my argument has been to suggest that the

⁶² While the values are ideals, they are useful heuristic devices, Packer believes, because they do approach, even if they slightly distort, the real approach taken by judges, attorneys, and academics when discussing the Constitution. See *id.* (describing the due process and crime control models).

⁶³ *Id.*

⁶⁴ While in *The Courts, the Police, and the Rest of Us* Packer suggests that the Supreme Court's filling the legal "vacuum" with rules that are somewhat "awkward and inept" is a "move[] of desperation," nonetheless, his advice to the police "is simply this: calm down" and engage in "[c]onstructive participation" in the debate over the nature and scope of criminal justice norms and values. Packer, *Courts, Police*, *supra* note 34, at 240–41. Furthermore, he defends both the claim that a legal vacuum exists, and the necessity for some increased regulation of the police by the courts, based upon the problems of racial class inequality that so concerned the Warren Court. *Id.* at 240; see also Tracey L. Meares, *Everything Old Is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice*, 3 OHIO ST. J. CRIM. L. 105, 106–07 (2005) (arguing that Warren Court criminal justice jurisprudence is best understood as motivated by racial issues even when the Court did not expressly base decisions on racial grounds). Packer additionally points out that the experience of African Americans in the South is that "law enforcement unchecked by law is tyrannous," and that the "problem of urban poverty" in the North and West had seriously compromised public confidence in the police. Packer, *Courts, Police*, *supra* note 34, at 240.

⁶⁵ *Miranda v. Arizona*, 384 U.S. 436, 457 (1966) (finding that interrogation practices used by police are "destructive of human dignity").

⁶⁶ 372 U.S. 335, 343–45 (1963) (concluding that the right to assistance of counsel ensures that "every defendant stands equal before the law").

Warren Court's decisions cannot be understood as advancing a liberal rights revolution. The political theory aspect of the argument suggests that the Court instead adopted a republican regulatory revolution and teases out the implications of the republican and liberal positions for the Warren Court and its critics. The Court's liberal critics missed the implications of its republicanism and appropriated the Court's jurisprudence for their own, liberal ends.

Liberalism asks what immunities citizens have,⁶⁷ and seeks to protect them as fundamental rights indemnified from government interference.⁶⁸ The fundamental rights approach thus rejects, as interfering with individuals' rights, crime control arguments that trench upon individuals' privacy rights. Instead, liberalism adopts a blanket prohibition on government interference with fundamental rights, encapsulated in the concept of negative liberty.⁶⁹

Republicanism, on the other hand, asks what duties individuals are under as citizens of a commonwealth, and seeks to regulate the state's authority to enforce those duties.⁷⁰ To the extent republicanism embraces a norm of non-interference, it is a limited one that precludes *arbitrary* government invasions of personal security. The police can interfere, but cannot do so without good reason, and usually only with the authorization of some other branch of government. Republicans enforce non-arbitrariness by regulating government conduct through public, prospective norms (the rule of law, not the whims of men),⁷¹ the diffusion of power across the different branches of government, and promoting competition among government agents.

While liberalism emphasizes some of the same concerns as republicanism, it does so with a much different emphasis. Of particular importance here is the different understandings of the importance of personal security from government interference. For liberals, who by definition emphasize personal freedom, and so the separation of society into public and private spheres, the right to security is primarily what Hobbes called an "immunity": the absence of impediments upon or constraints upon action.⁷² What is secured is government non-interference in the private realm. For republicans, on the other hand, security provides,

⁶⁷ See THOMAS HOBBS, *LEVIATHAN* 149 (Richard Tuck, ed., 2000) (1651) (explaining that freedom consists of an "immunity" from government interference).

⁶⁸ RICHARDSON, *supra* note 15, at 23–24 (describing the liberal's concerns with government action that "undercut[s] or violate[s] fundamental rights").

⁶⁹ PETTIT, *supra* note 15, at 17–19.

⁷⁰ See RICHARDSON, *supra* note 15, at 25–27, 34–36 (discussing the republican concern about government creation of new duties, especially when such creation is arbitrary).

⁷¹ See PETTIT, *supra* note 15, at 172–76 (discussing the centrality of the rule of law to republican thinking); Skinner, *supra* note 21, at 173–76 (discussing Machiavelli's claim that people achieve freedom only if chained by law).

⁷² HOBBS, *supra* note 67, at 149 (describing the immunity theory of liberty).

not an absolute prohibition of the government from the private realm, but instead non-arbitrary interference, understood in modern terms by Philip Pettit as “non-domination.”⁷³ The language of security and arbitrariness, along with its cognates such as whim or irrationality, permeate the Warren Court’s decisions not only at the supposed end of the supposed rights revolution, but also continuing into the Burger Court.⁷⁴

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 reinvigorate progressive theories of policing. The republican 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 and, thus, diffusion of power among the branches of government.⁷⁵ The republican adoption of inter-branch limitations on, primarily, executive power is a constant theme of the Warren Court’s Fourth Amendment jurisprudence, and in particular the opinions authored by

⁷³ PETTIT, *supra* note 15, at 21–27, 92–97.

⁷⁴ *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972) (“Where, as here, there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law. It furnishes a convenient tool for ‘harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.’ It results in a regime in which the poor and the unpopular are permitted to ‘stand on a public sidewalk . . . only at the whim of any police officer.’” (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97–98 (1940); *Shuttlesworth v. Birmingham*, 382 U.S. 87, 90 (1965))); *Terry v. Ohio*, 392 U.S. 1, 8–9 (1968) (“[The] inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs.”); *id.* at 15 (“[C]ourts still retain their traditional responsibility to guard against police conduct which is over-bearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires.”); *id.* at 37 n.3 (“To allow less [than search on probable cause] would be to leave law-abiding citizens at the mercy of the officers’ whim or caprice.”); *Katz v. United States*, 389 U.S. 347, 358–59 (1967) (“[B]ypassing a neutral predetermination of the scope of a search leaves individuals secure from Fourth Amendment violations ‘only in the discretion of the police.’” (quoting *Beck v. Ohio*, 379 U.S. 89, 97 (1964)); *Stanford v. Texas*, 379 U.S. 476, 512 (1965) (“The constitutional impossibility of leaving the protection of those freedoms to the whim of the officers charged with executing the warrant is dramatically underscored by what the officers saw fit to seize under the warrant in this case.”); *Beck*, 379 U.S. at 91 (“To allow less would be to leave law-abiding citizens at the mercy of the officers’ whim or caprice.” (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949))); *Mapp v. Ohio*, 367 U.S. 643, 660 (1961) (“[T]he right to be secure against rude invasions of privacy by state officers . . . can no longer . . . be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment.”).

⁷⁵ *See, e.g., Chimel v. California*, 395 U.S. 752, 758 (1969) (justifying the warrant process in terms of “the desirability of having magistrates rather than police officers determine when searches and seizures are permissible and what limitations should be placed upon such activities”); *Katz*, 389 U.S. 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.’ 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.’” (quoting *Beck*, 379 U.S. at 96, 97)); *Wong Sun v. United States*, 371 U.S. 471, 482 (1963).

Justice Stewart.⁷⁶ 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.⁷⁷

My political-theory claim is that the Warren Court's Fourth Amendment jurisprudence advanced the theory of political republicanism historically exemplified by Machiavelli,⁷⁸ Montesquieu,⁷⁹ Madison,⁸⁰ and Jefferson, but most recently contained in the works of Philip Pettit,⁸¹ Cass Sunstein,⁸² and Frank Michelman.⁸³ While there are many different styles of political republicanism, these writers, to a greater or lesser extent, emphasize a divided government of checks and balances, inter-branch limitation, and factional competition—a radically different vision from liberalism. The Warren Court's Fourth Amendment jurisprudence adopted a republican approach to political theory, centered around the warrant clause as the central tool for regulating government agents and diffusing power among the different branches.

The Court's liberal critics are also concerned—at least in the context of Fourth Amendment jurisprudence—with the impact of the warrant clause, primarily through the exclusionary remedy that follows from its violation.⁸⁴ Liberals concerned with carving out a private space of immunity from government interference would naturally gravitate to a legal rule emphasizing exclusion, even if only the exclusion of evidence from use at trial. I shall suggest, however, that while the Court and its liberal critics attend to the exclusionary remedy, the liberal link between right and remedy is much more attenuated than the republican one.⁸⁵

Republican and liberal critiques and rationalizations of government

⁷⁶ See, e.g., *Chimel*, 395 U.S. at 759 (“To provide the necessary security against unreasonable intrusions upon the private lives of individuals, the framers of the Fourth Amendment required adherence to judicial processes wherever possible. And subsequent history has confirmed the wisdom of that requirement.”); *Katz*, 389 U.S. at 358–59 (“[B]ypassing a neutral predetermination of the scope of a search leaves individuals secure from Fourth Amendment violations only in the discretion of the police.”); *Hoffa v. United States*, 385 U.S. 293, 301 (1966) (“What the Fourth Amendment protects is the security a man relies upon . . . from unwarranted governmental intrusion.”); *Stanford*, 379 U.S. at 512.

⁷⁷ See, e.g., *Katz*, 389 U.S. at 358–59.

⁷⁸ See generally NICCOLO MACHIAVELLI, *THE DISCOURSES* (Bernard Crick ed., 1998) (c. 1515).

⁷⁹ See generally CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* (1989) (1748).

⁸⁰ See generally *THE FEDERALIST* (James Madison).

⁸¹ See generally PETTIT, *supra* note 15.

⁸² See generally Cass R. Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1539 (1988).

⁸³ See generally Frank Michelman, *Law's Republic*, 97 *YALE L.J.* 1493 (1998).

⁸⁴ See, e.g., Yale Kamisar, *In Defense of the Search and Seizure Exclusionary Rule*, 26 *HARV. J.L. & PUB. POL'Y* 119, 126–27 (2003).

⁸⁵ See *infra* Part III.C.5.

power are bound to overlap at various points.⁸⁶ Nonetheless, those critiques and rationalizations diverge in important ways, both as a matter of legal doctrine and political theory. One of my central goals is to ask whether the Court's doctrine fit within the current understandings and traditions of political liberalism, or whether—consciously or unconsciously—the Court drew upon republican rationales.

C. *Republican Precedents*

Two fruitful doctrinal precedents for the Court's republicanism appear in opinions that exerted a major sway over the Warren Court's criminal justice jurisprudence: Justice Jackson's opinion in *Johnson v. United States*⁸⁷ and Justice Brandeis's dissent in *Olmstead v. United States*.⁸⁸ Justice Jackson might be called a hero of the Warren Court's criminal justice jurisprudence. His language was cited repeatedly by the Warren Court,⁸⁹ and progressively less by subsequent courts. In *Johnson*, and in *Youngstown Sheet and Tube Co. v. Sawyer*,⁹⁰ Justice Jackson advances the quintessentially republican tropes of diffusion of power and the productivity of competition as ways of limiting executive power.⁹¹ In each case, Justice Jackson identified the political and constitutional problems presented by an unregulated, sovereign executive engaged in an attempt to arrogate power to itself and exclude others from the field.⁹² Sovereign power need not automatically worry liberals, so long as the sovereign continues to protect fundamental rights. The Hobbesian tradition of liberalism depends on just this view. But Justice Jackson is not only worried about the result—immunity or non-immunity—but the means, a circumstance reflected in some of the major Warren Court Fourth Amendment cases, including *Mapp*, *Katz*, and *Terry*.

Justice Jackson's chosen means was the warrant clause. In *Johnson*, he lauded its utility as a regulatory device in strikingly republican terms: promoting non-arbitrariness in the exercise of police discretion through the diffusion of power among the different branches of governments, while

⁸⁶ Sunstein, *supra* note 82, at 1566–71 (discussing “liberal republicanism” as a merging of the two traditions).

⁸⁷ 333 U.S. 10 (1948).

⁸⁸ 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting).

⁸⁹ *E.g.*, *Terry v. Ohio*, 392 U.S. 1, 12 (1968); *Schmerber v. California*, 384 U.S. 757, 770 (1966); *Aguilar v. Texas*, 378 U.S. 108, 111 (1964); *Wong Sun v. United States*, 371 U.S. 471, 497–98 (1963) (Douglas, J., concurring).

⁹⁰ 343 U.S. 579 (1952).

⁹¹ *See id.* at 635 (Jackson, J., concurring) (“While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.”).

⁹² *Youngstown*, 343 U.S. at 587–88; *Johnson*, 333 U.S. at 14, 17 n.8.

recognizing that the self-interested, competitive nature of government agents might impinge upon the security of the public.⁹³

Justice Brandeis's most famous criminal law opinion, his dissent in *Olmstead*, is rarely acknowledged as republican. Instead—and rightly so—it is celebrated as one of the great liberal paeans to privacy as immunity from government interference.⁹⁴ Brandeis, one of the architects of the legal concept of privacy, argued that, though nowhere appearing in the texts of the Constitution, nonetheless, the founders 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.⁹⁵

What is less well understood is that the opinion had two elements, one seeking to constitutionalize the right of privacy, and one chiding the government for acting contrary to the laws of the state of Washington—laws that prohibited the sort of wiretapping engaged in by the federal

⁹³ It is worth quoting the language in full:

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.

Johnson, 333 U.S. at 10, 13–14 (footnotes omitted).

⁹⁴ Christopher A. Bracey, *Louis Brandeis and the Race Question*, 52 ALA. L. REV. 859, 908 (2001) (“Brandeis rejected the Court’s formalistic approaches in *Whitney* and *Olmstead*, and offered an alternative conceptualization of the issues presented in those cases in accordance with a liberal interpretation both of the Constitution and its normative underpinnings.”); Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1, 10 (2006) (“In his famous dissent in *Olmstead v. United States*, Brandeis sketched constitutional protections for privacy that would foreshadow the subsequent emergence of a liberal communitarianism dedicated to using essential social norms to check the potential abuses of government administration.” (footnote omitted)); Paul M. Secunda, *The (Neglected) Importance of Being Lawrence: The Constitutionalization of Public Employee Rights to Decisional Non-Interference in Private Affairs*, 40 U.C. DAVIS L. REV. 85, 109 (2006) “[T]his very idea of the unencumbered individual sprang directly from more generic forms of classical liberalism. In turn, classical liberalism finds its root in John Stuart Mill’s *On Liberty* and its most vivid expression in Justice Brandeis’ dissent in *Olmstead v. United States* . . .” (footnotes omitted)).

⁹⁵ *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

agents in *Olmstead*.⁹⁶ In fact, Brandeis initially envisaged the opinion as beginning with or making only the lawlessness argument; it was his law clerk, Henry J. Friendly, who helped make the privacy argument the constitutional centerpiece of the decision.⁹⁷

The lawlessness argument is deeply republican, and strikes a note picked up by Justice Jackson's similar worry about well-meaning law-enforcement. Justice Brandeis wrote that:

[I]t is . . . immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.⁹⁸

While the liberty language has strong, liberal overtones, it is not incompatible with republicanism. Certainly, the worry over zealous-but-well-meaning state officials is a staple of republicanism; so also is the claim that "security" is a value best protected by "a government of laws If the government becomes a lawbreaker . . . it invites every man to become a law unto himself; it invites anarchy."⁹⁹ The tropes of security and the rule of law as a protection from anarchy or arbitrariness are all republican.¹⁰⁰ As I shall later argue, these are the aspects of the *Olmstead* dissent that were taken up by the Warren Court majorities in *Mapp* and *Katz*.

III. LIBERAL MISDESCRIPTIONS OF FOURTH AMENDMENT DOCTRINE

Modern liberalism comes in two major forms: an egalitarian liberalism, in which equality is the "sovereign virtue,"¹⁰¹ and a libertarian-liberalism, in which freedom from government interference is the primary value.¹⁰² While theorists such as Yale Kamisar and Kenneth Pye identify equality as a Fourth Amendment value,¹⁰³ a more natural candidate, given the text and predominant interpretation of the Fourth Amendment, is some

⁹⁶ See, e.g., LEWIS J. PAPER, *BRANDEIS* 311–12 (1983); MELVIN I. UROFSKY, *LOUIS D. BRANDEIS: A LIFE* 629–30 (2009).

⁹⁷ See PAPER, *supra* note 96, at 311–12; UROFSKY, *supra* note 96, at 629–30. I am indebted to my colleague, Joel Goldstein, for bringing this to my attention.

⁹⁸ *Olmstead*, 277 U.S. at 479 (Brandeis, J., dissenting).

⁹⁹ *Id.* at 485.

¹⁰⁰ See *supra* notes 70–71 and accompanying text.

¹⁰¹ See generally RONALD DWORKIN, *SOVEREIGN VIRTUE* (2002).

¹⁰² See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* 42–45 & 45 n.23 (1971) [hereinafter RAWLS, *THEORY OF JUSTICE*] (stating that liberty is "lexically prior" to equality and other values).

¹⁰³ See Kamisar, *Retrospective*, *supra* note 1, at 6; Pye, *supra* note 4, at 256 (examining criminal procedure and the Fourth Amendment in the context of civil rights).

version of liberty understood as freedom from government interference. Non-interference, however, may be protected in various ways. Privacy (negative liberty) is one way, security (non-domination) another.¹⁰⁴ Throughout the Warren Court's Fourth Amendment jurisprudence, privacy—even in its libertarian form—is consistently ignored or sacrificed in favor of personal security.

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 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*.¹⁰⁵ 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" cases¹⁰⁶: *Gideon v. Wainwright*,¹⁰⁷ *Miranda v. Arizona*,¹⁰⁸ and *Escobedo v. Illinois*.¹⁰⁹

Kamisar's exemplary equality cases are thus not Fourth Amendment cases, but are primarily Sixth Amendment cases discussing access to counsel.¹¹⁰ Alongside these cases stands a similar line of cases ensuring financial constraints do not preclude access to the critical stages of the

¹⁰⁴ PETTIT, *supra* note 15, at 24, 173–83.

¹⁰⁵ Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (codified as amended in scattered sections of 5, 18, & 42 U.S.C.).

¹⁰⁶ Kamisar, *Retrospective*, *supra* note 1, at 7.

¹⁰⁷ 372 U.S. 335 (1963).

¹⁰⁸ 384 U.S. 436 (1966).

¹⁰⁹ 378 U.S. 478 (1964).

¹¹⁰ Though *Miranda* is also a Fifth Amendment case, it includes a reference to the Sixth Amendment within its warnings. 384 U.S. at 472. 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, *Are Confessions Really Good for the Soul? A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826, 1842–45 (1987).

adversarial process.¹¹¹ A core justification of each right is economic equality—that is, the poor should have the same chance at representation as the rich. Both strands fit within the claim that the Warren Court expressed its liberal egalitarianism through a criminal procedure aimed at ameliorating the obstacles to justice faced by the poor, and in particular, poor minorities.¹¹²

Equality operates in both these circumstances as what Wesley Hohfeld might have called a claim-right.¹¹³ Hohfeld's famous account of legal rights is primarily concerned with distinguishing legal rights from liberties which Hohfeld calls "privileges."¹¹⁴ 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.¹¹⁵ The liberal egalitarian equal treatment argument identifies what might be called a "positive claim-right to specific goods and services"¹¹⁶: 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 one¹¹⁷: the right to be free from government interference.

¹¹¹ See, e.g., *Gardner v. California*, 393 U.S. 367, 370 (1969) (finding that "so long as transcripts are available for preparation of appellate hearings in habeas corpus cases, they may not be furnished those who can afford them and denied those who are paupers"); *Hardy v. United States*, 375 U.S. 277, 288 (1964) (Goldberg, J., concurring) (mandating the provision of transcripts to indigents for appeal as of right); *Draper v. Washington*, 372 U.S. 487, 496 (1963) ("[T]he 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 contentions to the appellate court which are as good as those available to a nonindigent defendant with similar contentions."); *Douglas v. California*, 372 U.S. 353, 355 (1963) (requiring indigents be provided with counsel on appeal "[f]or there can be no equal justice where the kind of an appeal a man enjoys 'depends on the amount of money he has'" (quoting *Griffin v. Illinois*, 351 U.S. 12, 19 (1956))); *Gideon*, 372 U.S. at 344 (requiring provision of a lawyer to indigent defendants under the Sixth Amendment, reasoning that "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*, 351 U.S. at 18–19 (holding that the state may not deny appellate review to indigents while permitting review for those who can afford it).

¹¹² See POWE, *supra* note 6, at 445–46; Kamisar, *Retrospective*, *supra* note 1, at 6–7.

¹¹³ WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* xiii (David Campbell & Philip Thomas eds., 2001).

¹¹⁴ *Id.* at xiii–xiv.

¹¹⁵ Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 986. ("'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.')

¹¹⁶ PETER JONES, *RIGHTS* 15 (1994).

¹¹⁷ For further discussion of negative claim-rights, see *id.* at 15, 19–20.

Negative claim-rights are often treated, in a non-Hohfeldian sense,¹¹⁸ as liberties or immunities.¹¹⁹ In the Fourth Amendment context, the central liberal right is liberty from government interference: the right to privacy.¹²⁰ 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 discussion: whether to demand equality of opportunity or equality of outcome.¹²¹ The Court's egalitarian jurisprudence never applied to the Fourth Amendment in this way. In fact it could not because 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.¹²²

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 to race, arose towards the end of the Warren Court,¹²³ and has continued to influence much recent scholarship.¹²⁴ Scholars have consistently argued that much of the

¹¹⁸ Hohfeldian liberties or "privileges" are simply permissions to do as one pleases. Their correlate is "no right," not a duty. Hohfeldian liberties can, however, be protected by negative claim-rights. See HOHFELD, *supra* note 113, at 36, 38–39; JONES, *supra* note 116, at 15, 19–20.

¹¹⁹ See, e.g., RAWLS, *THEORY OF JUSTICE*, *supra* note 102, at 171–79.

¹²⁰ The right to privacy, according to William Stuntz, "protects the [individual's] interest in keeping information out of the government's hands." William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1017 (1995) [hereinafter Stuntz, *Privacy's Problem*]. He also emphasizes the (republican) right to personal security. *Id.* at 1020–21.

¹²¹ The right to counsel, which can be justified on equal opportunity grounds, does not mandate a particular outcome, measured as a particular standard of representation. See, e.g., Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169, 1169–70 (2003); 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, 77–78 (1993). On the difference between equality of opportunity and equality of outcome, see, for example, DWORKIN, *supra* note 101, at 2, 181–88 (discussing equality of opportunity versus equality of outcome).

¹²² See, e.g., JOHN RAWLS, *POLITICAL LIBERALISM* 122–23, 217–19 (2d ed. 2005) [hereinafter RAWLS, *POLITICAL LIBERALISM*] (discussing the duty of civility as duty of mutual respect).

¹²³ See, e.g., Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 518–19; Packer, *Courts, Police*, *supra* note 34, at 240; Pye, *supra* note 4, at 256.

¹²⁴ See, e.g., Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2001–14 (1998); Maclin, *supra* note 18, at 1271; Tracey L. Meares, *Terry and the Relevance of Politics*, 72 ST. JOHN'S L. REV. 1343, 1343 (1998); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 271 [hereinafter Sklansky, *Traffic Stops*]; Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 841–44 (1994) [hereinafter Steiker, *Second Thoughts*].

Supreme Court's "revolution in criminal procedure"¹²⁵ was its explicit and implicit focus on race- and class-biases in the criminal law¹²⁶:

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 decisions¹²⁷

Legal liberalism's target is precisely this sort of discriminatory policing. Liberals sought to promote "the values of individual autonomy and equality among persons,"¹²⁸ and to establish "a fair and dignified legal process,"¹²⁹ one that "treat[s] all criminal suspects with dignity and respect."¹³⁰

¹²⁵ Kamisar, *Retrospective*, *supra* note 1, at 4 (dating the revolution as lasting from 1961 to 1967 at the latest).

¹²⁶ COLE, *supra* note 18, at 7–9, 43–47 (discussing the anti-egalitarian tenor of much policing).

¹²⁷ Sklansky, *Traffic Stops*, *supra* note 124, at 316 (citing Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1305–06 (1982)); *see also* Allen, *supra* note 123, 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"); Packer, *Courts, Police*, *supra* note 34, at 240 ("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."); Pye, *supra* note 4, at 256; Sklansky, *One Train*, *supra* note 30, at 877–78, 898, 922–23; Steiker, *Counter-Revolution*, *supra* note 54, at 2472; Steiker, *Second Thoughts*, *supra* note 124, at 841–44.

¹²⁸ Dripps, *supra* note 8, at 592.

¹²⁹ H. Richard Uviller, *Evidence from the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 COLUM. L. REV. 1137, 1138 (1987). Professor 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, *supra* note 8, at 219. Arenella cites Justice Brandeis's *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.

Id. at 203 (citing *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting)).

¹³⁰ Arenella, *supra* note 8, at 190; *see also* *Miranda v. Arizona*, 384 U.S. 436, 460 (1966) ("[T]he 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."). As I have mentioned in an earlier article,

Professor William Stuntz seems to suggest that "dignit[y]" may not be a significant interest in criminal procedure, especially when compared with defendant's privacy rights. Instead, he suggests, courts generally do not focus on "the indignity of being publicly singled out as a criminal suspect" or the "stigma" of being publicly targeted by the police. Rather, the courts focus on privacy and information-gathering, to the

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, and could—and David Sklansky has persuasively argued, does and should in the Fourth Amendment context—include distinctions based on sexual orientation.¹³¹

Indeed, that is the force of his endorsement of A. Kenneth Pye's characterization of the Warren Court. Pye insists that "[t]he Court's concern with criminal procedure can be understood only in the context of the struggle for civil rights. . . . Concern with civil rights almost inevitably required attention to the rights of defendants in civil rights cases."¹³² Yet, with the exception of *Terry*, discussion of the rights of minorities as defendants is absent from the Fourth Amendment cases. Indeed, the issues that preoccupied the Court in the Fourth Amendment context—informants, under-cover agents, and wiretaps¹³³—are more the sorts of issues that one would associate with infiltration of un-American organizations in the 1950s than racial inequality in the 1960s.

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*,¹³⁴ do feature minority and economically disadvantaged defendants. Because the claim is for a right of access to services, such as lawyers and transcripts, available to other more advantaged defendants, individuals precluded from these services are perhaps likely to be those least likely to afford them.

In case I should be misunderstood, my point is not to claim that liberal egalitarianism, or egalitarianism more generally, is irrelevant to critiques of the Court's Fourth Amendment jurisprudence. My primary point is that liberalism does not describe the Warren Court's motivation in Fourth

exclusion of other dignitary interests.

Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L. J. 1479, 1569 n.463 (2004) (internal citations omitted) (citing Stuntz, *Privacy's Problem*, *supra* note 120, at 1037 (suggesting that a consistent protection of dignity rights would undermine the present system of criminal procedure)).

¹³¹ Sklansky, *One Train*, *supra* note 30, at 896–97.

¹³² Pye, *supra* note 4, at 256.

¹³³ See, e.g., *Spinelli v. United States*, 393 U.S. 410, 414 (1969), *overruled by Illinois v. Gates*, 462 U.S. 213 (1983); *Katz v. United States*, 389 U.S. 347, 348 (1967); *Berger v. New York*, 388 U.S. 41, 45 (1967); *McCray v. Illinois*, 386 U.S. 300, 302 (1967); *Osborn v. United States*, 385 U.S. 323, 325 (1966); *Hoffa v. United States*, 385 U.S. 293, 295 (1966); *Lewis v. United States*, 385 U.S. 206, 207 (1966); *Aguilar v. Texas*, 378 U.S. 108, 109 (1964), *overruled by Gates*, 462 U.S. 213; *Lopez v. United States*, 373 U.S. 427, 428–29 (1963); *Wong Sun v. United States*, 371 U.S. 471, 473 (1963); *Silverman v. United States*, 365 U.S. 505, 506 (1961).

¹³⁴ 391 U.S. 145 (1968).

Amendment cases. I shall argue in Part IV that the republican regulation of public space, of which *Terry* is a prominent part, does feature egalitarian, albeit *republican* egalitarian interests in racial discrimination and the regulation of disapproved “lifestyles” more generally.¹³⁵

A secondary point, however, is that, to the extent that anti-discrimination provides a critique of Fourth Amendment jurisprudence, that critique is politically limited. Liberal egalitarianism 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.¹³⁶ Nonetheless, anti-discrimination—and liberal egalitarianism more generally—is not an accurate diagnosis of a large chunk of the Fourth Amendment, 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.¹³⁷ Regulation offers a way out.

Thus, while the model of egalitarianism is broadly correct when applied to the Court’s Fifth and Sixth Amendment jurisprudence, it fails to bite in the Fourth Amendment context. Kamisar and the other egalitarians argue for something more than the claim that we should treat people with dignity¹³⁸ for the equal worth of persons,¹³⁹ or some “duty of civility.”¹⁴⁰ Thus, the two-Warren-Courts theory, dependant upon Fourth Amendment cases for its rights-contraction thesis, must be talking about some other set of rights, or rights more generally, in discussing the Fourth Amendment.

C. *Four Versions of Privacy: Property, Liberty, Protected Spaces, and 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

¹³⁵ For a discussion of the Court’s regulation of “lifestyle,” see Goluboff, *supra* note 29, at 1369. Accordingly, while Sklansky may be correct to emphasize Justice Harlan’s concurrence in *Katz* as interested in the protection of gay rights, he might also wish to include Justice Stewart’s republican interest in security as protecting “people, not places,” *Katz*, 389 U.S. at 351, as similarly motivated.

¹³⁶ 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.

¹³⁷ Weisberg, *supra* note 16, at 532.

¹³⁸ See, e.g., RAWLS, *THEORY OF JUSTICE*, *supra* note 102, at 289 (discussing the savings principle).

¹³⁹ See TOM CAMPBELL, *JUSTICE* 37, 39, 52 (1998) (discussing rights and equality in the context of the equal worth of persons).

¹⁴⁰ See RAWLS, *POLITICAL LIBERALISM*, *supra* note 122, at 217–18 (stating that the duty to explain how one advocates political values is justifiable by public reasons).

broadly on Justice Brandeis's dissent in *Olmstead v. United States*,¹⁴¹ 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.¹⁴²

Conventional wisdom insists that privacy interests structure the law of criminal investigation.¹⁴³ There are, however, a variety of ways to describe privacy in the law of criminal procedure. Nowadays, privacy reflects Brandeis's definition, which in turn smacks of John Stuart Mill's argument in *On Liberty*, for the negative liberty of freedom from government intrusion.¹⁴⁴ Privacy, that is, essentially consists of an immunity¹⁴⁵: the individual's right to exclude government from accessing certain areas or interfering in certain activities.¹⁴⁶ However, it was not always so.

¹⁴¹ 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting), *overruled by* *Katz v. United States*, 389 U.S. 347 (1967).

¹⁴² *Id.* at 478; *see also* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1891).

¹⁴³ “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) (quoting *Katz v. United States*, 389 U.S. 347, 360 (1967)); *see also* 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) (stating that the Court embraced “privacy as the Fourth Amendment’s core value”); Stuntz, *Privacy’s Problem*, *supra* note 120, at 1016 (“Almost all talk about the law of criminal procedure . . . assum[es] . . . [that] 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.”).

¹⁴⁴ JOHN STUART MILL, *ON LIBERTY* 48 (1997) (1859) (discussing the prevention of harm as “the only purpose for which power can rightfully be exercised over any member of a civilized community”); *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.”).

¹⁴⁵ HOBBS, *supra* note 67, at 149 (discussing the immunity theory of liberty).

¹⁴⁶ *See* Stuntz, *Privacy’s Problem*, *supra* note 120, at 1016. Professor Stuntz indicates:

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 dignitary interests, as when a police officer publicly accosts someone and treats him as a suspect. Arrests or street stops infringe privacy in this

In what follows, I shall describe four 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-emerged at its conclusion. The only type of privacy, however, consistently protected by the Warren Court was privacy as security.

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

The first type of privacy—privacy as property—gains support from the text of the Fourth Amendment itself—protecting “persons, houses, papers, and effects”¹⁴⁷—but is most famously expounded in two Fourth Amendment cases, *Boyd v. United States*¹⁴⁸ and *United States v. Gouled*.¹⁴⁹ 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.”¹⁵⁰ 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*,¹⁵¹ the Court “held that the seizure of documents is inherently ‘unreasonable’ within the meaning of the first clause of the [F]ourth [A]mendment . . . 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.”¹⁵² 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.¹⁵³ 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.¹⁵⁴

sense because they stigmatize the individual, single him out, and deprive him of freedom.

Id. at 1021.

¹⁴⁷ U.S. CONST. amend. IV.

¹⁴⁸ 116 U.S. 616, 624–26 (1886).

¹⁴⁹ 255 U.S. 298, 305 (1921).

¹⁵⁰ Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1359 (footnote omitted).

¹⁵¹ *Boyd*, 116 U.S. at 623.

¹⁵² Note, *The Life and Times of Boyd v. United States (1886–1976)*, 76 MICH. L. REV. 184, 185 (1978) (footnote omitted).

¹⁵³ *Boyd*, 116 U.S. at 633–34.

¹⁵⁴ *Id.* 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

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 no property interest. However, a person's papers are "the owner's goods[,] . . . his dearest property."¹⁵⁵ Here, the person searched possesses the superior interest and governmental searches of mere evidence, in which it has no property right, are always unreasonable under *Boyd*.¹⁵⁶ Accordingly, even if the state does not break down the door of a house,¹⁵⁷ 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.¹⁵⁸ "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."¹⁵⁹

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*.¹⁶⁰ Though property justification was to fail in both Justice Brandeis's *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."¹⁶¹

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

light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment.").

¹⁵⁵ *Id.* at 627–28.

¹⁵⁶ *Id.* 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 objects seized." Note, *supra* note 152, at 185 n.9. *Gouled*, following *Boyd*, formalized the distinction between superior interests and mere evidence. *United States v. Gouled*, 255 U.S. 298, 308–09 (1921). Under *Gouled*, collecting certain types of data—another's property—is always wrong when taken for use as mere evidence. *Id.* at 309. 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.

¹⁵⁷ *Boyd*, 116 U.S. at 630.

¹⁵⁸ *Id.* at 623.

¹⁵⁹ Note, *supra* note 152, at 189.

¹⁶⁰ 277 U.S. 438, 474–75 (1928) (Brandeis, J., dissenting) ("It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security" (quoting *Boyd*, 116 U.S. at 630)).

¹⁶¹ *Olmstead*, 277 U.S. at 474. Morgan Cloud argues that *Boyd*'s formalism and Brandeis's 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, 560–61, 624–25 (1996) (discussing Brandeis's invocation of *Boyd*).

First, the Court's "intimate relation"¹⁶² 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. Fourth, *Boyd* characterized the categorical protection of privacy-as-property as promoting an underlying value: the protection of individual security from intrusion by the government.¹⁶³

The Warren Court undermined the first three of those prongs: the intimate relation prong in *Schmerber*,¹⁶⁴ and the categorical protection and privacy-as-property prongs in *Hayden*¹⁶⁵ and in *Katz*.¹⁶⁶ 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. Put differently, if the rights-constricting counter-revolution began with *Schmerber*, then the backlash to *Miranda* and the Court's reaction to that backlash took place remarkably quickly: *Schmerber* was decided one week after *Miranda*.¹⁶⁷

Furthermore, the rights-revolution argument has to explain *Mapp*'s embarrassing indifference to the orthodox version of privacy. Whereas the right to be secure from arbitrary government interference inaugurated the Warren Court's modern Fourth Amendment jurisprudence in 1961—and continued until the end of the Warren Court—the protection of informational privacy became a live issue only after the end of the Warren Court.

Of the three major Warren Court cases that 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 the 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.¹⁶⁸ Rather, the "overriding function

¹⁶² *Boyd*, 116 U.S. at 633.

¹⁶³ *Id.* at 618, 630.

¹⁶⁴ *Schmerber v. United States*, 384 U.S. 757, 766–68 (1966).

¹⁶⁵ *Warden v. Hayden*, 387 U.S. 294, 304 (1967).

¹⁶⁶ *Katz v. United States*, 389 U.S. 347, 353 (1967) (citing *Hayden*, 387 U.S. at 304).

¹⁶⁷ *Schmerber*, 384 U.S. 757 (decided June 20, 1966); *Miranda v. Arizona*, 384 U.S. 436 (1966) (decided June 13, 1966).

¹⁶⁸ *Schmerber*, 384 U.S. at 767–68.

of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State,”¹⁶⁹ where the opinion 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* survives, the rest of the *Boyd* privacy rights have been eviscerated and contracted, through a process continued by *Warden v. Hayden*.¹⁷⁰

In *Hayden*, officers in hot pursuit of an armed robber entered and searched a house, discovering among other things a shotgun and a pistol, as well as clothing matching the description of those worn by the robber.¹⁷¹ 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.¹⁷² 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.¹⁷³

In *Hayden*, the Court expressly embraced a “shift in emphasis from property to privacy.”¹⁷⁴ 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.”¹⁷⁵ 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.¹⁷⁶ Accordingly, “the role of the Fourth Amendment was . . . to protect privacy from unreasonable invasions.”¹⁷⁷

Under the orthodox view of privacy, *Hayden* sought to modernize the right to privacy by re-conceiving it in terms divorced from property interests.¹⁷⁸ *Hayden* expanded the zone of searchable things and places while nonetheless invoking the 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 “obscure[d],” not privacy, but

¹⁶⁹ *Id.* at 767.

¹⁷⁰ 387 U.S. 294, 298 (1967).

¹⁷¹ *Id.* at 298.

¹⁷² *Id.* at 301–02.

¹⁷³ *Id.* at 304.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 309.

¹⁷⁷ *Id.* at 305.

¹⁷⁸ See, e.g., Stuntz, *Privacy's Problem*, *supra* note 120, at 1030–34 (discussing the pre-*Hayden* regime that equated privacy with property).

“the reality that the government has an interest in solving crime.”¹⁷⁹ This reality 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.¹⁸⁰ The concept of privacy was transformed precisely to permit this style of policing and the new regulatory regime that seeks to control it.

Privacy was transformed, but not without a fight. Justice Douglas dissented in *Schmerber* and *Hayden*, and did so in the former case citing *Griswold* in favor of a right to privacy phrased in terms of “‘a zone of privacy’ which the Government may not force a person to surrender”;¹⁸¹ and in the latter case, citing *Boyd* and *Gouled*,¹⁸² and arguing that “the Fourth Amendment . . . creates a zone of privacy which no government official may enter.”¹⁸³ Indeed, the losing privacy argument precisely challenged the triumphant republican warrant argument—that the debates over the Bill of Rights “nowhere suggest that [the Fourth Amendment] was concerned only with regulating the form of warrants.”¹⁸⁴

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 by the majority 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.

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

Another challenge to *Boyd* is the “protected spaces” argument attributed to *United States v. Hester*.¹⁸⁵ The idea, affirmed in *Oliver v. United States*, is that certain places, though the property of the suspect, deserve less Fourth Amendment protection than others.¹⁸⁶ *Hester*, thus, apparently places a limit on *Boyd*’s reach, which is now split into lessened and heightened property interests. Nonetheless, *Hester* maintains a focus on privacy-as-property; it is just that some property interests receive

¹⁷⁹ 387 U.S. at 306. It is perhaps worth noting that this property interest is *Boyd*’s version of privacy. Accordingly, a focus on one sort of privacy obscured the government’s interest in solving crime.

¹⁸⁰ *Id.* at 309–10.

¹⁸¹ *Schmerber*, 384 U.S. at 778 (Douglas, J., dissenting) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 484 (1964)).

¹⁸² *Hayden*, 387 U.S. at 318–20 (Douglas, J., dissenting).

¹⁸³ *Id.* at 315.

¹⁸⁴ *Id.* at 316.

¹⁸⁵ 265 U.S. 57, 59 (1924); *see also* *Katz v. United States*, 389 U.S. 347, 351 n.8 (1967) (rejecting the protected spaces argument noted in *Hester*).

¹⁸⁶ 466 U.S. 170, 182–84 (1984).

heightened protection. *Katz* rejects this approach,¹⁸⁷ most expressly by the claim that “the Fourth Amendment protects people, not places.”¹⁸⁸

Perhaps the most prominent case following *Hester*'s logic, prior to *Katz*'s reversal, was *Silverman v. United States*,¹⁸⁹ a wiretap case that sought to distinguish *Olmstead* on the grounds that the government did, in fact, invade a property right in the defendant's home.¹⁹⁰ In *Silverman*, the Court relied upon a *Boyd*-style liberal immunity argument: “The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.”¹⁹¹

Silverman was decided, however, some three months before *Mapp*, and managed to avoid “consider[ing] the large questions which have been argued,”¹⁹² and which would be raised again in the other wiretap cases, and most particularly in *Katz*. Nonetheless, *Silverman* is cold comfort for rights-expansionists: to the extent that it expanded (or maintained) the property-based rights-regime available under *Boyd*, as somewhat limited by *Hester*, it did so on grounds that were to be minimized or rejected by Justice Stewart in *Katz*, and predates the era of Fourth Amendment expansionism inaugurated by *Mapp*.

3. Privacy as Liberty: Brandeis and *Olmstead*

Perhaps the central liberal appropriation of *Boyd* was Justice Brandeis's use of it in *Olmstead* to advance arguments he developed in the famous *Harvard Law Review* article he co-authored with Samuel Warren, equating the right to privacy with “the right to be let alone.”¹⁹³ That article expressly distinguishes the right to privacy from some property right.¹⁹⁴ Instead, they locate the right to privacy in the principle of personal autonomy: “the principle . . . of an inviolate personality.”¹⁹⁵

¹⁸⁷ *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.” (internal citations omitted)).

¹⁸⁸ *Id.*; see also *Oliver*, 466 U.S. at 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.’”).

¹⁸⁹ 365 U.S. 505, 511 (1961) (citing *Hester*). *Hester* is cited in *Katz*, but its vitality is contested. See *Katz*, 389 U.S. at 360 (Harlan, J., concurring) (positively referencing *Hester*); *id.* at 351 n.8 (majority opinion) (negatively referencing *Hester*).

¹⁹⁰ *Hester* was cited in another wiretap case. See *On Lee v. United States*, 343 U.S. 747, 766 (1952) (Burton, J., dissenting) (citing *Hester* for its holding that “in a federal criminal trial, a federal officer may testify to what he sees or hears take place within a house or room which he has no warrant or permission to enter, provided he sees or hears it outside of those premises”). *Hester*'s importance, then, is in identifying the permissible limits of eavesdropping: permissible where there is no physical intrusion; impermissible where there is some physical intrusion. See *id.* at 765–66.

¹⁹¹ *Silverman*, 365 U.S. at 511.

¹⁹² *Id.* at 509.

¹⁹³ Warren & Brandeis, *supra* note 142, at 193.

¹⁹⁴ *Id.* at 200–05.

¹⁹⁵ *Id.* at 205.

Three aspects of this right link it to the fundamental rights, privacy-as-property “formalism” of *Boyd*: its emphasis on (1) a categorical protection for (2) all items identified as private, (3) in the name of personal security. Two features separate Brandeis and Warren’s Fourth Amendment understanding from *Boyd*’s: first, the absence, in *Olmstead*, of some intimate relation between the Fourth and Fifth Amendments, animating the categorical treatment of privacy and second, the non-appearance of property to denominate those items to be categorized private. Instead, Brandeis and Warren ground 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, or in conduct, in conversation, in attitudes”¹⁹⁶—that receives protection as a negative right “against the world.”¹⁹⁷

It is important not to underestimate the stringency of Brandeis’s conception of privacy. For example, Jed Rubenfeld has recently attacked the Brandeisian concept of privacy as a right not to be annoyed. Rubenfeld correctly notes the distinction between security and secrecy in Fourth Amendment jurisprudence, a distinction most forcefully articulated by William Stuntz.¹⁹⁸ Rubenfeld, however, 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, 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

¹⁹⁶ *Id.* at 206.

¹⁹⁷ *Id.* at 213; see also Carol S. Steiker, *Brandeis in Olmstead: “Our Government Is the Potent, the Omnipresent Teacher,”* 79 MISS. L.J. 149, 157–58 (2009) [hereinafter Steiker, *Brandeis*]. In a passage Steiker describes as one of the “most famous of his dissent,” Brandeis developed his view of Fourth Amendment privacy:

“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.”

Id. (quoting *Olmstead v. United States*, 277 U.S. 438, 478–79 (1928) (Brandeis, J., dissenting)).

¹⁹⁸ See, e.g., Stuntz, *Privacy’s Problem*, *supra* note 120, at 1020–21, 1068–77 (discussing privacy-protecting and security-protecting interpretations of the Fourth Amendment).

private actors.¹⁹⁹

Lacking clarity, Rubinfeld's reading of Brandeis 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 Richard Posner gave it, and which Rubinfeld appears to endorse, to include "unwanted telephone solicitation" or "the blare of a sound truck."²⁰⁰ Identifying privacy as the sort of "'solitude' . . . 'valued because it enhances the quality of one's work or leisure,'"²⁰¹ trivializes the right to be let alone into a much broader and much less defensible right not to be annoyed.²⁰²

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, which they called "the principle . . . of an inviolate personality."²⁰³ 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."²⁰⁴ Their "general right to privacy" seeks to protect "thoughts, emotions, and sensations . . . whether expressed in writing, or in conduct, in conversation, in attitudes,"²⁰⁵ language that is effectively repeated in his *Olmstead* dissent.²⁰⁶

¹⁹⁹ Jed Rubinfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 117 (2008).

²⁰⁰ *Id.* (quoting Richard A. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 190).

²⁰¹ *Id.* at 117–18 (quoting Posner, *supra* note 200, at 190, 193).

²⁰² It renders inexplicable why Brandeis would cite *Boyd* in his *Olmstead* dissent. See *Olmstead*, 277 U.S. at 473–78 (Brandeis, J., dissenting) (referencing *Boyd* multiple times); Cloud, *supra* note 161, at 560–61, 624–25 (discussing Brandeis's invocation of *Boyd*).

²⁰³ Warren & Brandeis, *supra* note 142, at 205.

²⁰⁴ *Id.* at 213; see also JONES, *supra* note 116, at 15, 19–20 (explaining that 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. As Professor Cloud persuasively argues, however, both *Boyd*'s and Brandeis's "arguments were based upon the same constellation of values, values derived from natural law concepts inherited from the eighteenth century. And Brandeis's focus upon 'beliefs, thoughts, and emotions' comported with the formalist recognition that papers deserved added protection because they embody ideas." Cloud, *supra* note 161, at 625. Brandeis's 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 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.

²⁰⁵ Warren & Brandeis, *supra* note 142, at 206.

²⁰⁶ See *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting) (arguing that the Framers "sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations [and] conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men").

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.²⁰⁷ 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.²⁰⁸

If the Brandeisian liberty-right was a general right to be left alone by the government, that was not the right identified by the Warren Court in *Katz*, its quintessential privacy case.²⁰⁹ The orthodox, rights-expanding libertarian-liberal version dominates current understandings of the Warren Court's Fourth Amendment jurisprudence, so that privacy scholars typically espouse the view that "[i]n *Katz v. United States*, the Court adopted Brandeis's view, overruling *Olmstead*."²¹⁰

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 informational privacy from the scope of constitutional protection, *Katz*'s regulation of wiretapping looks like a major victory.

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."²¹¹ As David Sklansky describes, the orthodox or canonical reading of *Katz* presents a simple and unitary account of the case: "[I]t changed the Fourth Amendment from a protection against trespass to a protection of 'reasonable expectations of privacy.'"²¹² The defendant, Charlie Katz, made a living calling in bets to out-of-state bookmakers from a set of telephone booths on Los Angeles's

²⁰⁷ Rubinfeld notes:

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, *supra* note 199, at 128 (internal citations omitted).

²⁰⁸ *Id.*

²⁰⁹ Accordingly, Daniel Solove, among others, is incorrect when he makes this assertion. See Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087, 1101 (2002).

²¹⁰ *Id.* Only the second half of this statement is true.

²¹¹ Sklansky, *Traffic Stops*, *supra* note 124, at 223.

²¹² *Id.*

Sunset Strip.²¹³ Federal law enforcement agents, without obtaining a search warrant, placed a stereophonic tape recorder on the outside of the phone booth 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 his conviction.²¹⁴

Commentators mostly overlook the fact that left-libertarian and anti-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 a distracted and obscure survey of the constitutional significance of privacy.²¹⁵ 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] property and of his very life . . . largely to the law of the individual States."²¹⁶

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, nor places, under *Hester's* "protected spaces scheme,"²¹⁷ 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 in 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-arbitrary fits with the majority's emphasis on "people, not places."²¹⁸ A liberal emphasis on privacy results in this phrase being treated mostly as a metaphor at best, and obscure at worst. Yet a republican interest in privacy-as-security—rather than as personality or property—permits a more literal understanding of Justice Stewart's famous

²¹³ *Id.* at 224; see also *Katz v. United States*, 389 U.S. 347, 348 (1967) (describing the evidence at issue).

²¹⁴ *Katz*, 389 U.S. at 359.

²¹⁵ 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).

²¹⁶ *Katz*, 389 U.S. at 350–51.

²¹⁷ Although Justice Harlan does affirm *Hester* in the opening sentence of his concurring opinion in *Katz*, 389 U.S. at 359 (Harlan, J., concurring), Justice Stewart includes it in his dismissal of the government's privacy argument. *Id.* at 351 n.8 (majority opinion). Accordingly, *Hester's* status in *Katz* is precarious, and depends upon whether one selects Justice Stewart's republican reading, or Justice Harlan's liberal one.

²¹⁸ *Id.* at 351.

phrase.²¹⁹ Indeed, the person-not-place formulation, with its indifference to the sorts of spatial concerns liberal readings tend to invoke, seems compatible with the sort of public protection the Court would announce in *Terry*, which, citing *Katz*'s people-not-places language, held that "[t]his inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs."²²⁰ 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 than endorsing its novel privacy doctrine. The clear, central purpose of *Katz* was to emphasize a particular style of regulation as constitutionally mandated.

The warrant requirement, so central to the Court in *Katz*, provides a theory of justified government invasion of privacy interests—whatever they are. The Court's procedure emphasizes republican, interbranch competition; it interposes an impartial judicial officer between citizens and police. The Court, quoting Justice Jackson, held that the goal was to provide a "neutral predetermination of the *scope* of a search,"²²¹ than the sort of "competitive enterprise of ferreting out crime,"²²² that places the

²¹⁹ In an extremely odd reading of the majority opinion in *Katz*, Orin Kerr attempts to demonstrate that Justice Stewart embraced a property-conception of privacy. See Orin S. Kerr, *The Fourth Amendment and New Technologies*, 102 MICH. L. REV. 801, 820–22 (2004). Had Kerr limited his privacy-as-property claim to Justice Harlan's concurrence, I might have been in full agreement. Kerr, however, thinks that the *Katz* Court protects property interests—indistinct and abstract property interests—primarily because the Court says that "[t]he 'narrow view' of property rights simply could 'no longer be regarded as controlling.'" *Id.* at 821 (quoting *Katz*, 389 U.S. at 353). He then reads the rejection of the narrow view to implicitly sanction some "broader approach." *Id.* As proof, he observes that the Court allowed "a person in a telephone booth [to] rely upon the protection of the Fourth Amendment." *Id.* (quoting *Katz*, 389 U.S. at 352). Also cited as proof is Justice Stewart's statement that "[o]ne who occupies [a telephone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world." *Id.* (quoting *Katz*, 389 U.S. at 352). This is a slender reed on which to hang a property-based defense of *Katz*. While Kerr cites to *Jones v. United States*, 362 U.S. 257 (1960), a case more notable for its discussion of standing than privacy, the property regime Kerr describes is much closer to that of *Hester* and the logic of protected spaces, one that the Government sought to rely upon in *Katz*, and which Justice Stewart, citing *Hester*, firmly rejected in the passages immediately preceding and superseding Kerr's tendentious selections. See *Katz*, 389 U.S. at 351 & n.8. Justice Harlan does cite *Hester* approvingly in the first sentence of his concurrence. *Id.* at 360 (Harlan, J., concurring). If a property-based theory of privacy is to be found in *Katz*, it is there and there alone.

²²⁰ *Terry v. Ohio*, 392 U.S. 1, 8–9 (1968). Here is the place from which a discussion of the protection of public or quasi-public spaces, including activity conducted inside public restroom stalls, could be fitted. Accordingly, security as much as privacy could provide the starting point for discussions of the Fourth Amendment and the policing of homosexuality, and put flesh on the bones of Justice Stewart's now-misunderstood emphasis on "people, not places." See, e.g., Sklansky, *One Train*, *supra* note 30, at 895–96 (discussing *Katz* and the policing of gay men).

²²¹ *Katz*, 389 U.S. at 358.

²²² *Johnson v. United States*, 333 U.S. 10, 14 (1948); see also *Spinelli v. United States*, 393 U.S. 410, 415 (1969) (applying the "ferreting out crime" standard to reject informant testimony as falling below probable cause), *overruled by Illinois v. Gates*, 462 U.S. 213, 238 (1983).

Constitution's protections "only in the discretion of the police."²²³ Authorization occurs by means of an official who is part of a separate branch of government, through the magistrate's "objective predetermination of probable cause."²²⁴

Accordingly, privacy does not determine the result in *Katz*.²²⁵ 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 also determining 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 may incidentally, not directly, promote equality and anti-discrimination.

Furthermore, Justice Stewart's opinion promotes the idea that there can be good policing. He endorses the "the Government's position . . . that its agents acted in a[] . . . defensible manner."²²⁶ 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.²²⁷ The Supreme Court after the fact validated each of these judgments²²⁸ and agreed that the agents did not act overzealously:

²²³ *Katz*, 389 U.S. at 358–59 (quoting *Beck v. Ohio*, 379 U.S. 89, 97 (1964)).

²²⁴ *Id.* at 358 (quoting *Beck*, 379 U.S. at 96). Note that while a warrant is always required, according to *Katz*, scrutiny occurs on a case-by-case basis. *Id.* at 356–57.

²²⁵ Indeed, the emphasis on people-not-places could be read as applying in public in the same manner as the Court's regulation of public order statutes. See Goluboff, *supra* note 29, at 1369. Here, the Court's jurisprudence may be responding, as David Sklansky suggests, to contemporary worries about the policing of gay men. Sklansky, *One Train*, *supra* note 30, at 896. Sklansky reads Justice Harlan's *Katz* concurrence as animated by this issue, but Justice Stewart's majority opinion may deal with the policing of gay men as a problem of personal security in public view (visible through the walls of a cubicle, the door of which is closed) rather than privacy.

²²⁶ *Katz*, 389 U.S. at 354. The opinion does *not*, however, agree with the Government that the agents' conduct was "entirely" defensible. *Id.* at 358–59.

²²⁷ See *id.* at 354–56 (listing their procedures and comparing them to the *Olmstead* and *Goldman* cases).

²²⁸ The Court stated:

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.

Id. at 354. The Court further stated:

Based upon their previous visual observations of the petitioner, the agents correctly predicted that he would use the telephone booth for several minutes at

rather, “[i]t is apparent that the agents in this case acted with restraint.”²²⁹ 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 judicial officer.”²³⁰ The agents’ only mistake was a regulatory one. Misjudging the regulatory regime, not privacy, was the operative issue determining the outcome of *Katz*.²³¹

Justice Stewart’s opinion for the majority is thus 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’s *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 categorically protecting certain aspects of individual autonomy, such as property, spaces, personality. Understood as a regulatory case, *Katz* facilitates wiretaps so long as the government follows the correct pre-clearance procedure.

Indeed, perhaps the reason why Justice Stewart’s opinion is so “striking[ly] . . . vague and ambiguous”²³² is precisely because Justice Stewart was not interested in privacy: he was one of two dissenters in *Griswold v. Connecticut*,²³³ 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.”²³⁴ This

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.

Id. at 354 nn.14–15.

²²⁹ *Id.* at 356.

²³⁰ *Id.*

²³¹ Accordingly, had a warrant been 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.

²³² David Sklansky, *Katz v. United States and the Limits of Aphorism*, in *CRIMINAL PROCEDURE STORIES* 223, 247 (Carol Steiker ed., 2006) [hereinafter Sklansky, *Limits*].

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

²³⁴ *Id.* at 530 (Stewart, J., dissenting).

language would resurface, almost verbatim, in *Katz*,²³⁵ aimed even more precisely at the sort of Brandeisian liberal legalism endorsed in *Griswold*.²³⁶

4. *The Court's Privacy-Constricting Jurisprudence*

The libertarian-liberal celebration of *Katz* is either misplaced or tendentious. *Katz* is a warrant case,²³⁷ not some rights-expanding libertarian-liberal opinion about the right to be left alone.²³⁸ 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 the 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*²³⁹—was more categorical and protective than the one in *Katz*.²⁴⁰

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

²³⁵ See *Katz*, 389 U.S. at 350–51 (“[T]he 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.” (footnote omitted)).

²³⁶ Hence, Justice Stewart dismissed the Brandeisian “right to be let alone.” Compare *id.* at 350–51 with *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (discussing privacy in terms of a right to be let alone).

²³⁷ See discussion *infra* notes 280–81.

²³⁸ Recently, a number of commentators have noted this fact. See, e.g., THOMAS K. CLANCY, *THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION* 59 (2008) (observing 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”); 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) (noting 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’” (citing Sklansky, *Limits*, *supra* note 232, at 248; Kitch, *supra* note 215, at 137–38)).

²³⁹ 265 U.S. 57 (1924).

²⁴⁰ Carol Steiker, in a recent article on Brandeis’s *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; rather, their sweeping nature and scope make them so great a threat to liberty that they are constitutionally anathema whatever their source of issuance.

Steiker, *Brandeis*, *supra* note 197, at 165 (quoting *Olmstead v. United States*, 277 U.S. 438, 476 (1928) (Brandeis, J., dissenting)). Steiker argues that the warrant regime contemplated under *Katz*, permitting wiretapping when pre-approved by a judicial magistrate, would not have been endorsed by Brandeis. *Id.*

Court's triple whammy of *Schmerber v. California*,²⁴¹ *Warden v. Hayden*,²⁴² and *Katz* served, in the words of Justice Brennan, to "enlarge the area of permissible searches,"²⁴³ 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.'"²⁴⁴

Katz is a regulation-expanding opinion, demonstrating the steps that even the most professional police must go through in order to follow the correct procedure for lawful investigative activity. Where libertarian privacy is categorical and substantive, Warren Court security is conditional and procedural. Privacy as security does not protect "personality,"²⁴⁵ (as Brandeis terms Mill's "individuality").²⁴⁶ Rather, security is concerned with regulating the police through the warrant requirement. As Anthony Amsterdam points out, "[a] paramount purpose of the [F]ourth [A]mendment 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" ²⁴⁷

The Warren Court's interest in avoiding arbitrariness and non-domination—as a means of protecting personal security—dates to the beginning of its Fourth Amendment revolution. Avoiding arbitrariness is one half of the concept of privacy articulated by *Mapp v. Ohio*. In that case, the Court sought to protect the "security of one's privacy against arbitrary intrusion by the police,"²⁴⁸ where arbitrariness involves the sort of discretionary or lawless²⁴⁹ policing targeted by Amsterdam.²⁵⁰ This is what the Court in *Katz* identified as law enforcement "only in the discretion of the police"²⁵¹ and what the *Mapp* Court characterized as a Fourth Amendment "revocable at the whim of any police officer."²⁵² The other half is non-domination—what the *Mapp* Court called the "right to be secure from rude invasions of privacy by . . . [police] officers"²⁵³ engaged

²⁴¹ 384 U.S. 757 (1966).

²⁴² 387 U.S. 294 (1967).

²⁴³ *Id.* at 309.

²⁴⁴ *Id.* at 309–10 (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)).

²⁴⁵ Warren & Brandeis, *supra* note 142, at 205.

²⁴⁶ For an example of a similar sort of concern, see MILL, *supra* note 144, at 85, which associated liberty with the "free development of human individuality."

²⁴⁷ Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 417 (1974) (footnote omitted).

²⁴⁸ *Mapp*, 367 U.S. 643, 650 (1961) (quoting *Wolf v. Colorado*, 338 U.S. 25, 27–29 (1949)).

²⁴⁹ *Id.* at 655 (discussing "official lawlessness").

²⁵⁰ What I call lawless, Amsterdam calls "ruleless searches." Amsterdam, *supra* note 247, at 417.

²⁵¹ *Katz v. United States*, 389 U.S. 347, 359 (1967) (quoting *Beck v. Ohio*, 379 U.S. 89, 97 (1964)).

²⁵² *Mapp*, 367 U.S. at 660.

²⁵³ *Id.*

in “brutish means of coercing evidence.”²⁵⁴

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.”²⁵⁵ Accordingly, not 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*, or *Katz*, or informant cases such as *McCray v. Illinois*—in fact, it dates to the inception of the Fourth Amendment’s regulatory revolution in *Mapp v. Ohio*.

5. *Mapp*’s Republicanism

If *Mapp* is the inaugural case in the Warren Court’s rights revolution,²⁵⁶ 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*,²⁵⁷ the Court first applied the Fourth Amendment—and its concomitant right to privacy—to the states.²⁵⁸ Accordingly, the central problem in *Mapp* is how we are to understand the relation between right and remedy.

In *Mapp*, the Court was more concerned with the remedy as part of the right, rather than the contours of “the right to privacy free from unreasonable state intrusion.”²⁵⁹ The Court returned to a theory of the relationship between right and remedy that accepted the remedy of exclusion as “part and parcel” of the Fourth Amendment rights regime.²⁶⁰ In re-evaluating the relationship, the Court held that privacy-as-security—the right to be free from arbitrary government intrusions²⁶¹—entails the “privilege” of exclusion.²⁶² The Court’s argument was that unless the right is enforceable, it does not meaningfully exist—it is an “empty promise.”²⁶³

²⁵⁴ *Id.* at 655.

²⁵⁵ *Warden v. Hayden*, 387 U.S. 294, 309 (1967).

²⁵⁶ See Kamisar, *Retrospective*, *supra* note 1, at 5–6 (discussing the rights revolution as starting with *Mapp* and ending by *Terry*).

²⁵⁷ 338 U.S. 25 (1949).

²⁵⁸ See *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.”).

²⁵⁹ *Mapp*, 367 U.S. at 654.

²⁶⁰ See *id.* at 651, 678 (Harlan, J., dissenting).

²⁶¹ See *id.* at 650 (majority opinion).

²⁶² *Id.* at 656. (“[T]he 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.”).

²⁶³ *Id.* at 660.

Mapp translates portions of both *Boyd* and Brandeis's *Olmstead* dissent into republican terms, 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 "indefeasible right of personal security" from "stealthy encroachments."²⁶⁴ Furthermore, the Court relied upon *Boyd*, among other cases, to reinstate the intimate relation between remedy and right or 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*"²⁶⁵—and so insisted upon the "logical[] and constitutional[] necess[ity of] the exclusion doctrine."²⁶⁶

From *Olmstead* the Court integrates what Carol Steiker has identified as the "greatest" part of that dissent²⁶⁷: "his at once lyrical and indignant call for the repudiation of government lawbreaking in the pursuit of its own enforcement goals."²⁶⁸ What the *Mapp* Court takes from Brandeis, then, is not an emphasis on privacy, but upon "judicial integrity"²⁶⁹: 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."²⁷⁰ Put differently, rather than regarding the

²⁶⁴ *Id.* at 647 (quoting *Boyd v. United States*, 116 U.S. 616, 639, 635 (1886)).

²⁶⁵ *Id.* at 655.

²⁶⁶ *Id.* at 656. In the law of criminal investigation, some liberal theorists endorse the more extreme position that rights correlate with not only a duty, but also a specific remedy and style of regulation. The thought is 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 other words, liberal arguments justifying judicial review of police activity by the courts use the exclusionary rule to tie regulation to rights in a manner republicans—who regard rights as a product of law, not an immunity from it—take for granted. This relation between right and remedy is unsupported, however, by the Hohfeldian analysis.

Nowhere in Hohfeld's analysis is there any justification for tying the exclusionary remedy to the privacy right. For Hohfeld, only the right and duty are logically related; he does not correlate duties with remedies for breach of the right. See JONES, *supra* note 116, at 17 (comparing Alan White's conception of the relationship between claim-rights and duties—that while no right logically implies a duty, some rights are "accompanied" by or "associated" with various duties—with that of Hohfeld) (citing ALAN R. WHITE, RIGHTS 70–73 (1984)). Applying Hohfeld, the sort of government duty correlated with the right does not in turn correlate with any particular style of regulation or remedy. The choice of regulatory scheme and remedy is, instead, pragmatic or prudential. Accordingly, a range of regulatory methods or remedies would be equally compatible with protecting the individual's right.

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 right. But 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 the distinctively republican concern with security from "rude" government intrusions.

²⁶⁷ Steiker, *Brandeis*, *supra* note 197, at 167.

²⁶⁸ *Id.*

²⁶⁹ *Mapp*, 367 U.S. at 659–60; see also Steiker, *Brandeis*, *supra* note 197, at 168–69 (discussing Brandeis's government integrity argument).

²⁷⁰ *Mapp*, 367 U.S. at 660.

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 republican insistence upon of the rule of law in the face of “official lawlessness.”²⁷¹

If the central republican problem is that identified by Brandeis—in “fail[ing] to observe its own laws . . . ‘the Government becomes a lawbreaker’”²⁷²—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’s implied solution: a “more robust use of courts’ inherent, non-constitutional supervisory powers to refuse to participate in government wrongdoing and to sanction government actors for law breaking by excluding evidence obtained unlawfully from court.”²⁷³ The cure for arbitrariness or lawlessness is thus a 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.²⁷⁴ 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

²⁷¹ *Id.* at 655. In fact *Mapp* quotes this aspect of Brandeis’s 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 v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting)).

²⁷² *Id.* (quoting *Olmstead*, 277 U.S. at 485 (Brandeis, J., dissenting)).

²⁷³ Steiker, *Brandeis*, *supra* note 197, at 169.

²⁷⁴ In Eric J. Miller, *Putting the Practice into Theory*, 7 OHIO ST. J. CRIM. L. 31, 40 (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, 98–99 (2006), the Court rejected the claim that “the executing officer must present the property owner with a copy of the warrant before conducting his search.” 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. See *Mapp*, 367 U.S. at 644–45. The *Mapp* Court noted:

[T]he 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, “[t]here is, in the record, considerable doubt as to whether there ever was any warrant for the search of defendant’s home.”

Id.

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; second, it ensures policing by consent—not only consent of the judiciary, but of the target of the search.

The republican regulatory regime established in *Mapp* and derived from Brandeis and *Boyd* was consistently enforced throughout the Warren Court.²⁷⁵ The whole point of inter-branch scrutiny through the “warrant procedure [is] 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 policy.”²⁷⁶ Adopting the current preference for retrospective review by a judge²⁷⁷ “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 arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment.”²⁷⁸ This language is quoted verbatim in *Katz*’s strong statement in favor of the warrant regime.²⁷⁹

The security worry and its regulatory fix—a republican regime of inter-branch scrutiny—is at the heart of *Katz*’s rejection of law enforcement “only in the discretion of the police.”²⁸⁰ Where *Katz* rejects *Boyd*, *Hester*, and *Olmstead*’s libertarian-liberal conception of privacy, it too adopts Brandeis’s 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 Steiker is somewhat pessimistic in arguing that “Brandeis’s government integrity argument did not win in *Olmstead*, nor has it triumphed in the

²⁷⁵ See *Terry v. Ohio*, 392 U.S. 1, 20 (1968); *Schmerber v. California*, 384 U.S. 757, 770 (1966); *United States v. Ventresca*, 380 U.S. 102, 105–07 (1965); *Aguilar v. Texas*, 378 U.S. 108, 110–11 (1964); *Wong Sun v. United States*, 371 U.S. 471, 481–82 (1963).

²⁷⁶ *Wong Sun*, 371 U.S. at 481–82.

²⁷⁷ 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. 468 U.S. 897, 919–23 (1984). 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. Ohio, 379 U.S. 89, 97 (1964) (citing *Henry v. United States*, 361 U.S. 98, 102 (1959)).

²⁷⁸ *Beck*, 379 U.S. at 96.

²⁷⁹ See *Katz v. United States*, 389 U.S. 347, 357 (1967).

²⁸⁰ *Id.* at 359 (quoting *Beck*, 379 U.S. at 97). This language is similar to the *Mapp* claim that the Fourth Amendment was “revocable at the whim of the police officer.” *Mapp v. Ohio*, 367 U.S. 643, 660 (1961).

succeeding eighty years.²⁸¹ 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 formally separates the remedy in *United States v. Calandra*,²⁸² and the regulatory regime in *United States v. Leon*.²⁸³

If the foregoing argument is even partially correct, then the first 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 or 1968, and a rights-contracting phase evidenced by the Court's decision in *Terry v. Ohio*. To this point, my argument has been that there was no rights expansion through the right to privacy. Instead, the Court contracted the right to privacy, while simultaneously expanding a particular form of regulatory regime. That regulatory expansion did not stop at, but continued through *Terry*.

Schmerber, Hayden, and Katz reveal a different type of Warren Court than that imagined by the rights revolutionaries. Rather than promoting equality or anti-discrimination through 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, the Warren Court was a rights-maintaining court at best, 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 decisions, epitomized by *Terry* and *Sibron*, undermines the second prong of the rights-revolution argument—a politically cowed Warren Court.

²⁸¹ Steiker, *Brandeis*, *supra* note 197, at 168–69.

²⁸² 414 U.S. 338 (1974). The *Calandra* Court dismissed the exclusionary “rule [as] 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. 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.” *Calandra*, 414 U.S. at 360 (Brennan, J., dissenting) (quoting *Mapp*, 367 U.S. at 651). Brennan also quoted Warren’s language in *Terry* arguing that “[c]ourts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions.” *Id.* at 359 (quoting *Terry v. Ohio*, 392 U.S. 1, 13 (1968)).

²⁸³ 468 U.S. 897, 919–23 (1984) (introducing the good faith exception to the warrant requirement).

Throughout the Warren Court's Fourth Amendment regime, from *Mapp* to *Terry*, what remains of *Boyd* and Brandeis's *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.²⁸⁴ 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.

IV. *TERRY*: EXPANDING REGULATION

In the following two sections I shall highlight two aspects arising out of *Terry*: expanding regulation and preventing arbitrariness. The latter aspect, which I reserve for Part V, is best brought out by considering *Terry*'s sister cases, *Sibron* and *Peters v. New York*,²⁸⁵ as consolidated in *Sibron*, in the context of the Court's regulation of low-level public-order ordinances. *Terry* and *Sibron* should thus be understood against the backdrop of a line of cases in which the Court regulates public, not private, spaces.²⁸⁶

In this section, I shall reclaim the thought that *Terry* does not contract an already-existing privacy or probable-cause doctrine that was then applicable, in principle or in fact, to police encounters. The liberal claim—epitomized by Justice Douglas's dissent—that the Fourth Amendment distinction between what was a seizure and what was not drew the line between encounters and arrests, did (and does) not state the legal doctrine as it existed prior to *Terry*. *Terry* resolved this issue in a manner that counfounded the government's arguments about the scope of privacy rights, and *Sibron* did the same for state legislation. Both cases did so by expanding regulation into an area in which privacy and probable cause applied equivocally, if at all.²⁸⁷

Current readings of *Terry* 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,²⁸⁸ and

²⁸⁴ U.S. CONST. amend. IV.

²⁸⁵ 392 U.S. 40 (1968).

²⁸⁶ See, e.g., Goluboff, *supra* note 29, at 1369 (describing the Court as protecting interests exercised in public rather than private spaces, such as picketing and protesting).

²⁸⁷ And did so, I shall argue, in terms reminiscent of Justice Jackson's republican-sounding dissent in *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).

²⁸⁸ Chief Justice Warren's majority opinion never uses the term "reasonable suspicion." Rather, "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,

(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 language of *Katz*: the constitution "protects people, not places,"²⁸⁹ and "reasonable 'expectation[s] of privacy.'"²⁹⁰ The republican thrust of Justice Stewart's language gains traction from the Court's claim that individuals have an "inestimable right of personal security"²⁹¹ and are "entitled to be free from unreasonable governmental intrusion."²⁹² In fact, over and over again, the *Terry* Court uses the languages of personal security to emphasize the regulatory interest rather than the privacy one.²⁹³ Accordingly, *Terry* fits within the line of republican cases stretching back through *Katz* to *Mapp* that equate privacy-as-security 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 analytical framework . . . reshaped Fourth Amendment doctrine in important respects and led to a significant expansion of police investigative power and discretion."²⁹⁴ 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 the state's law enforcement 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:

In other words, police officers up to today have been

896 (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., concurring) (linking the reasonableness of a stop to an "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).

²⁸⁹ *Terry*, 392 U.S. at 9 (majority opinion) (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)).

²⁹⁰ *Id.* (quoting *Katz*, 389 U.S. at 361 (Harlan, J., concurring)).

²⁹¹ *Id.* at 8–9.

²⁹² *Id.* at 9.

²⁹³ See, e.g., *id.* at 8–9, 11–12, 24–25.

²⁹⁴ Russell L. Weaver, *Investigation and Discretion: The Terry Revolution at Forty (Almost)*, 109 PENN ST. L. REV. 1205, 1206 (2005).

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.²⁹⁵

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.

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

A central aspect of the egalitarian or libertarian-liberal bolt-from-the-blue argument is the claim that Chief Justice Warren’s regulatory approach, which is dependant upon the novel “reasonable suspicion” standard, appeared out of nowhere to remake the Fourth Amendment law of search and seizure.²⁹⁶ If there was any cloud on the horizon, it could only have been the almost contemporaneous decision one term earlier in *Camara v. Municipal Court of San Francisco*, which also applied a reasonableness standard.²⁹⁷ Under the bolt-from-the-blue argument, Justice Douglas’s dissent straightforwardly represents the pre-existing legal regime as it was 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,” and “uncontroversial.”²⁹⁸ Probable cause, he asserts, was the mandatory minimum quantum of evidence required to detain a suspect. 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

²⁹⁵ *Terry*, 392 U.S. at 37 (Douglas, J., dissenting) (emphasis omitted).

²⁹⁶ 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 works by the following civil libertarians: Cooper, *supra* note 18, at 852; Corinna Barrett Lain, *Counter-majoritarian Hero or Zero? Rethinking the Warren Court’s Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1439 (2004); Maclin, *supra* note 18, at 1308).

²⁹⁷ *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 528–29 (1967).

²⁹⁸ Maclin, *supra* note 18, at 1286 n.44 (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); *see also* *Carroll v. United States*, 267 U.S. 132, 153–54 (1925) (noting that if probable cause exists, vehicles may be searched for contraband).

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.’²⁹⁹ But the Court’s two major pre-*Terry* street detention-and-search cases, *Rios v. United States*³⁰⁰ and *Henry v. United States*,³⁰¹ both involved cars. And each of them came out on a different side of the pre-arrest detention debate, with some lower courts following *Rios* to legitimize pre-arrest detentions.³⁰² Accordingly, the analogy to the car cases was not as simple as Professor Maclin suggests.³⁰³

Similarly, Paul Butler’s recent celebration of Justice Douglas’s dissent adopts the liberal line, arguing that “[t]he majority opinion [in *Terry*] 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.”³⁰⁴ Butler argues that the police authority to stop and frisk was 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 suspicion] is the standard that they developed.”³⁰⁵

Like most of the liberal description of the Fourth Amendment rights revolution, almost everything about this story is misleading.³⁰⁶ For example, the Court had first determined that the probable cause standard applied to the states in *Beck v. Ohio* in 1964³⁰⁷—three years after *Mapp* and four years before *Terry*.³⁰⁸ And in *Brinegar v. United States*,³⁰⁹ Justice Jackson, in dissent, identified a central problem with judicial regulation of the police engaged in low-level harassment in similar terms to Justice Warren’s much-maligned speculations about the efficacy of the exclusionary remedy:

²⁹⁹ Maclin, *supra* note 18, at 1286 (quoting *Terry*, 392 U.S. at 16).

³⁰⁰ 364 U.S. 253 (1960).

³⁰¹ 361 U.S. 98 (1959).

³⁰² Comment, *Police Power to Stop, Frisk, and Question Suspicious Persons*, 65 COLUM. L. REV. 848, 858 (1965).

³⁰³ 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).

³⁰⁴ *Id.* at 24.

³⁰⁵ *Id.* at 20.

³⁰⁶ See Wayne R. LaFare, “Street Encounters” and the Constitution: *Terry*, *Sibron*, *Peters*, and *Beyond*, 67 MICH. L. REV. 39, 43 (1969) (“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.”).

³⁰⁷ 379 U.S. 89 (1964); see also Stuntz, *Bargains*, *supra* note 28, at 560 n.29 (discussing *Beck*).

³⁰⁸ See, e.g., Stuntz, *Bargains*, *supra* note 28, at 560 n.29.

³⁰⁹ 338 U.S. 160 (1949) (Jackson, J., dissenting).

Only occasional and more flagrant abuses [of criminal suspects by the police] come to the attention of the courts, and then only those where the search and seizure yields incriminating evidence and the defendant is at least sufficiently compromised to be indicted. If the officers raid a home, an office, or stop and search an automobile but find nothing incriminating, this invasion of the personal liberty of the innocent too often finds no practical redress. There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we courts do nothing, an [sic] about which we never hear.³¹⁰

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.³¹¹ Furthermore, at the state level and through professional bodies such as the American Law Institute³¹² and the American Bar Foundation,³¹³ a detailed set of statutes, cases, and administrative proposals had existed since 1942,³¹⁴ 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*,³¹⁵ and expansively documented in law reviews and treatises.³¹⁶

³¹⁰ *Id.* at 181.

³¹¹ Comment, *supra* note 302, at 860 nn.82–83.

³¹² See MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 2.02 (Tenative Draft No. 1, 1966); Paul M. Bator & James Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 COLUM. L. REV. 62, 64 (1966) (discussing the impetus for the ALI Pre-Arrestment Code).

³¹³ LAWRENCE P. TIFFANY ET AL., DETECTION OF CRIME: STOPPING AND QUESTIONING, SEARCH AND SEIZURE, ENCOURAGEMENT AND ENTRAPMENT 56 (Frank J. Remington ed., 1967) (citing both New York state law and the Uniform Arrest Act).

³¹⁴ See Sam B. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 343–47 (1942) (providing the text of the Uniform Arrest Act).

³¹⁵ 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 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.” Dag E. Ytreberg, *Right To Resist Excessive Force Used in Accomplishing Lawful Arrest*, 77 A.L.R.3d § 2(a) n.8 (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).

³¹⁶ See WAYNE R. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 342–56 (Frank J. Remington ed., 1965); TIFFANY ET AL., *supra* note 313, at 6–10. See generally Lawrence P.

The legislative, judicial, and academic debates preceding the Court's decision in *Terry* sought to define the Fourth Amendment concept of seizure by drawing the line between the binary, non-constitutional alternatives of encounter and arrest. For example, the Ohio Court of Appeals, in deciding *State v. Terry*, took the opposite approach, holding that arrest defined the nature of a seizure.³¹⁷ Accordingly, everything that is not a "full-blown arrest"³¹⁸ 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—undermining the binary nature of the problem, so that an arrest is not the only type of seizure. In that case, certain types of forcible encounter³¹⁹ count as seizures 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. From a regulatory perspective, 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 views of the case. *Terry* is 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.³²⁰ It thus does concern a right to privacy, but not the immunity 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.³²¹ In *Terry*, these two issues—security and immunity—not only overlap, but, unlike *Katz*, they conflict. The Court's decision in *Terry* has the effect of expanding regulation while

Tiffany, *Field Interrogation: Administrative, Judicial and Legislative Approaches*, 43 DENVER L.J. 389 (1966) (providing a detailed analysis of police practices under state law and the Uniform Arrest Act).

³¹⁷ See *State v. Terry*, 214 N.E.2d 114, 121 (Ohio Ct. App. 1966).

³¹⁸ See, e.g., LAFAYE, *supra* note 316, at 340–56; Comment, *supra* note 302, at 853–54; Note, *Stop and Frisk: A Perspective*, 53 CORNELL L. REV. 899, 907–08 (1968); Note, *The Law of Arrest: Constitutionality of Detention and Frisk Acts*, 59 NW. U. L. REV. 641, 647–48 (1965).

³¹⁹ *Terry v. Ohio*, 392 U.S. 1, 32 (1968) (Harlan, J., concurring) (“[I]f 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.”).

³²⁰ *Id.* at 27.

³²¹ *Id.* at 20.

it simultaneously constrains rights.

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;³²² second, whether legislative attempts to pre-determine the standards permitting such evidence gathering legitimately alter the court-cop relation;³²³ third, what form legitimate police work should take, particularly in the context of a highly urbanized and racially diverse society;³²⁴ and fourth, how the newly-expanded reach of the exclusionary rule operates outside the warrant requirement as a judicial tool to regulate police.³²⁵

1. *Law of Arrest*

“The basic issue [was] whether police have the right to frisk a suspect whom they have no right to arrest.”³²⁶ 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 Amendment³²⁷ proposes a strong distinction between encounters falling outside the Constitution’s ambit, and searches and seizures that fall within it.³²⁸ “It is only ‘searches’ or ‘seizures’ that the [F]ourth [A]mendment requires to be reasonable: police activities of any other sort may be as unreasonable as the police please to make them.”³²⁹ 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, states simply did not regulate pre-arrest detentions and searches.

Prior to *Terry*, stopping and searching through the pockets of passersby for evidence of crime could constitute a legitimate preventative strategy for on-the-street policing.³³⁰ States had adopted field interrogations as a tactic

³²² *Id.* at 16–19.

³²³ This is the central concern of *Sibron v. New York*, 392 U.S. 40 (1968), decided the same day as *Terry*.

³²⁴ *Terry*, 392 U.S. at 14 (citing PRESIDENT’S COMM. ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, TASK FORCE REPORT: THE POLICE 183 (1967)); see also *Sibron*, 392 U.S. at 14 n.11.

³²⁵ *Terry*, 392 U.S. at 12–14.

³²⁶ 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. CRIM. L., CRIMINOLOGY, & POLICE SCI. 386, 387 (1960).

³²⁷ See Neil Ackerman, *Considering the Two-Tier Model of The Fourth Amendment*, 31 AM. U. L. REV. 85, 86 (1981) (citing Amsterdam, *supra* note 247, at 388).

³²⁸ “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.” Amsterdam, *supra* note 247, at 388.

³²⁹ *Id.*

³³⁰ “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

in programs designed to confiscate drugs,³³¹ “to get guns and knives off the street,”³³² or simply to ensure order on urban streets or interrogate strangers in suburban neighborhoods.³³³ Law enforcement believed preventative policing depend upon the ability to question and search suspects, with or without probable cause, as a legitimate and necessary tool for ensuring urban order in high-crime neighborhoods.³³⁴ Where some form of criminal law footing was required, vagrancy statutes criminalizing street conduct aided this type of investigation.³³⁵

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,³³⁶ as had New York,³³⁷ Massachusetts,³³⁸ and Rhode Island.³³⁹ 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*.³⁴⁰

By 1968, the Court had twice declined the opportunity to regulate pre-

gang members and others.” Tiffany, *supra* note 316, at 390. The claim 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), is just false. The door was already wide open. Similarly, Tracey Maclin’s claim that stop and frisks were increasing is unsupported. See Maclin, *supra* note 18, at 1278.

³³¹ See *Sibron v. New York*, 392 U.S. 40, 44–45, 67–68 (1968).

³³² TIFFANY ET AL., *supra* note 313, at 398.

³³³ See Charles A. Reich, *Police Questioning of Law Abiding Citizens*, 75 *YALE L.J.* 1161, 1161–62 (1966) (describing police questioning without probable cause or reasonable suspicion in suburban neighborhoods).

³³⁴ See Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 *U. PA. L. REV.* 603, 614 (1956).

³³⁵ *Id.*

³³⁶ See *People v. Mickelson*, 380 P.2d 658, 660 (Cal. 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.”); *People v. Simon*, 290 P.2d 531, 533 (Cal. 1955).

³³⁷ See, e.g., *People v. Taggart*, 229 N.E.2d 581, 585–86, (N.Y. 1967); *People v. Rivera*, 201 N.E.2d 32, 35 (N.Y. 1964).

³³⁸ See *Commonwealth v. Lehan*, 196 N.E.2d 840, 845 (Mass. 1964) (“[A]n 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 (1942))).

³³⁹ *Kavanagh v. Stenhouse*, 174 A.2d 560, 562–63 (R.I. 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. . . . [I]t 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.”).

³⁴⁰ *State v. Terry*, 214 N.E.2d 114, 118 (Ohio Ct. App. 1966) (“[W]e 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.”), *aff’d*, 392 U.S. 1 (1968).

arrest detention and searches of criminal suspects.³⁴¹ 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.³⁴² 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's 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.³⁴³ 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

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 minimized 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. Some states adopted (verbatim 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*.³⁴⁴

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.³⁴⁵ 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, and explanation of his actions," and

³⁴¹ See, e.g., *Rios v. United States*, 364 U.S. 253, 260–62 (1960); *Henry v. United States*, 361 U.S. 98, 102 (1959).

³⁴² See Remington, *supra* note 326, at 386–87; Tiffany, *supra* note 316, at 390.

³⁴³ *Rios*, 364 U.S. at 255–56, 261–62.

³⁴⁴ See Warner, *supra* note 314, at 343–47; MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 2.02(2) (Tentative Draft No. 1, 1966).

³⁴⁵ See Warner, *supra* note 314, at 316–17; see also *Criminal Justice: The Arts of Arrest*, TIME, Mar. 19, 1965, available at <http://www.time.com/time/magazine/article/0,9171,833571-2,00.html> (stating that the UAA was adopted by Delaware, New Hampshire, and Rhode Island).

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]."³⁴⁶ 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*,³⁴⁷ found "substantial indications that the category of 'search for a dangerous weapon' may encompass conduct considerably broader in scope."³⁴⁸ 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, "[t]he answer to the question propounded by the policeman may be a bullet."³⁴⁹ The *Model Code of Pre-Arrest Procedure* adopted a similarly broad view as the *Uniform Arrest Act* of the right to search upon questioning.³⁵⁰

Compare, for example, *Camara v. Municipal Court of San Francisco*,³⁵¹ in which, 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.³⁵² 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*.³⁵³ Nonetheless, *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.³⁵⁴

³⁴⁶ Cf. N.Y. CODE CRIM. PROC. § 180-a (1966); *Sibron v. New York*, 392 U.S. 40, 43–44 (1968); see also Brief of National District Attorneys' Ass'n, Amicus Curiae, in Support of Respondent at 8, *Terry v. Ohio*, 392 U.S. 1 (1968), 1967 WL 113688.

³⁴⁷ 392 U.S. at 40.

³⁴⁸ *Id.* at 60–61 n.20.

³⁴⁹ *Id.* at 63–64 (quoting *People v. Rivera*, 201 N.E.2d 32, 35–36 (N.Y. 1964)). This justification is endorsed by Justice Harlan in his concurrence in *Terry*. See *Terry v. Ohio*, 392 U.S. 1, 33 (1968) (Harlan, J., concurring).

³⁵⁰ See Bator & Vorenberg, *supra* note 312, at 66 (noting the "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 concealed weapons"). This standard was similar to that adopted by the New York Court of Appeals and rejected in *Terry* and *Sibron*. See *Sibron*, 392 U.S. at 43–44; *Terry*, 392 U.S. at 27.

³⁵¹ 387 U.S. 523 (1967).

³⁵² *Id.* at 534–39.

³⁵³ See, e.g., Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383, 385 (1988).

³⁵⁴ See *Camara*, 387 U.S. at 532–33. The *Camera* Court indicated:

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.

Id. (internal citation omitted); see also *Eaton*, 364 U.S. at 271–72. The *Eaton* Court indicated:

In *Camara*, the Court rejected the argument that broad statutory safeguards could serve as an effective limit on official discretion.³⁵⁵ Like *Terry*, *Camara* precluded searches purely designed to turn up evidence of criminal activity,³⁵⁶ but permitted the departure from the traditional measure of probable cause based upon an urban safety rationale.³⁵⁷ As in *Camara*, the *Terry* Court extended the Fourth Amendment into a previously-unregulated area, and provided a limited justification for the intrusion: officer safety.³⁵⁸

Both *Terry* and *Camara* extended the scope of the Fourth Amendment to searches and seizures that were formerly beyond its coverage.³⁵⁹ 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.³⁶⁰ The safety justification, thus, was one that the Court clearly envisioned as a check upon otherwise unconstrained police activity.³⁶¹

In *Terry*, the nature and justification of the officer's right to stop remains obscure—the case is rather about the right to frisk.³⁶² As the Court

[I]f 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.

Id.

³⁵⁵ The *Camara* Court reiterated that the only proper style of regulation depended upon pre-clearance by a magistrate. *Camara*, 387 U.S. at 530, 538–40.

³⁵⁶ See *Camara*, 387 U.S. at 537.

³⁵⁷ 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*, 387 U.S. at 534–37).

³⁵⁸ See *id.* at 19 n.15 (recognizing that the Fourth Amendment governs all public agents regarding “personal security”).

³⁵⁹ 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) (“[T]he 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.” (footnotes omitted)).

³⁶⁰ See *Terry*, 392 U.S. at 17 (“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.”).

³⁶¹ *Terry*, 392 U.S. at 14.

³⁶² *Kamisar, Warren Court, supra* note 1, at 67.

puts it, in avoiding the stop issue, “[t]he crux of this case . . . is not the propriety of [the officer’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 weapons in the course of that investigation.”³⁶³ 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. The Court found that the stops were justified or not based on a standard of probable cause.³⁶⁴ 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.

Indeed, taking its cue from *Sibron*, the *Terry* Court stated that:

the limitations which the Fourth Amendment places upon a protective seizure and search for weapons . . . will have to be developed in the concrete factual circumstances of individual cases. . . . Suffice it to note that such a search, unlike a search without a warrant incident to a lawful arrest, is not justified by any need to prevent the disappearance or destruction of evidence of crime. The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.³⁶⁵

Remember that, 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.³⁶⁶ *Terry*’s holding that (with one exception) all pre-arrest detention must be based upon probable cause, placed a drastic restriction on the police.³⁶⁷ Furthermore, the exception

³⁶³ *Terry*, 392 U.S. at 23.

³⁶⁴ See *Sibron v. New York*, 392 U.S. 40, 59–62 (1968).

³⁶⁵ *Terry*, 392 U.S. at 29 (internal citations omitted).

³⁶⁶ See, e.g., *People v. Taggart*, 229 N.E.2d 581, 585 (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”); *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.”).

³⁶⁷ This was re-stated the same day, in emphatic terms, in the companion case, *Sibron*, 392 U.S. 40.

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.³⁶⁸ A frisk was constitutionally impermissible where no emergency existed.³⁶⁹ Such a standard required probable cause for almost all field searches, including many searches for weapons,³⁷⁰ 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.³⁷¹ The only exception is predicated upon officer safety.³⁷² Accordingly, even programs of sweeping for weapons are regulated. The sweep must be linked to some other indication of danger than simply the discovery of a weapon. If the weapon was obvious, there would be probable cause to establish that a crime was being committed. Absent an obvious, dangerous weapon, there is no reason to search unless some other crime indicates dangerousness.

Kamisar treats the Court's "detour[]" around' the threshold issue of investigative 'stops' as a loss for the defense when it was, by definition, equivocal and may have been a victory had subsequent cases turned out differently. That is, after *Terry* and *Sibron*, by Kamisar's own lights, the path was open for the Court to drastically limit the justification for the stop and subsume both stop and frisk into the law of arrest. Had the Burger Court done so in *Robinson v. California*, the law of arrest might have been more stringent than it is now; an arrest justified on probable cause would lead to a frisk, not of right, but only if justified by dangerousness. According to Kamisar himself, that possible world was at least as close as the actual world that resulted and, which under the Burger Court produced a much less rights-protective result.

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

³⁶⁸ See *id.* at 60 n.20; *Terry*, 392 U.S. at 17–18 n.15.

³⁶⁹ See *Sibron*, 392 U.S. at 60–61 n.20.

³⁷⁰ See *Taggart*, 229 N.E.2d at 581. *Taggart* was criticized by both *Terry* and *Sibron*. See *Terry*, 392 U.S. at 17–18 n.15; *Sibron*, 392 U.S. at 60–61 n.20.

³⁷¹ See, e.g., *Terry*, 392 U.S. at 11 (requiring "voluntary cooperation" in the usual case of searches absent probable cause); *id.* at 20 (insisting on probable cause and a warrant "wherever practicable").

³⁷² *Sibron*, 392 U.S. at 60.

³⁷³ Kamisar, *Warren Court*, *supra* note 1, at 67.

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.³⁷⁴ *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.³⁷⁵ 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.³⁷⁶ 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.³⁷⁷ In other words, the officer “must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous.”³⁷⁸

The safety justification requires the police to engage in more detection and forbids targeting suspects based on guilt by association or prejudice. *Sibron* 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.³⁷⁹ In *Sibron*, Patrolman Martin lacked the facts from which to make the armed-and-dangerous inference.³⁸⁰

Two problems arise, however, with the *Terry* standard. 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 whether the Court would evaluate “reasonableness” from the

³⁷⁴ *Terry*, 392 U.S. at 23 (“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*, 392 U.S. at 65.

³⁷⁵ See Bator & Vorenberg, *supra* note 312, at 64–67 (discussing the importance of consent as a justification for government action).

³⁷⁶ See *Terry*, 392 U.S. at 22, 27; David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1737 (2005).

³⁷⁷ *Terry*, 392 U.S. at 20–21.

³⁷⁸ *Sibron*, 392 U.S. at 64.

³⁷⁹ *Id.*

³⁸⁰ *Id.* at 65–66. (“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.”).

point of view of a reasonable man or 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.³⁸¹

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*.³⁸² Under this reading of *Terry*, McFadden engaged in a race-based investigatory sweep seeking guns. McFadden's lower court testimony and the nature of the charge certainly bolster this view of the case.³⁸³ But that is not the manner in 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.³⁸⁴

Read in this light, the *Terry* Court's comment that "[t]he exclusionary rule has its limitations . . . as a tool of judicial control,"³⁸⁵ 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."³⁸⁶ At that point, the exclusionary rule loses its coercive power.³⁸⁷

C. Regulating Preventative Policing Outside the Warrant Requirement

All of this takes place in a context very different from *Katz*. The

³⁸¹ Maclin, *supra* note 18, at 1303 (quoting *Terry*, 392 U.S. at 27).

³⁸² *Id.* at 1303–04.

³⁸³ *Id.* at 1300–04 (discussing ways in which McFadden's testimony failed to establish probable cause).

³⁸⁴ *Terry*, 392 U.S. at 28.

³⁸⁵ *Id.* at 13.

³⁸⁶ *Id.*

³⁸⁷ *Id.* at 14. ("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.").

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.³⁸⁸ 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*.

The Court thus faced the same problem as in *Camara*: extending regulation to official activity formerly considered beyond the reach of criminal procedure. The republican solution would entail determining non-arbitrary and non-dominating reasons, such as officer safety (or other criminal investigation imperatives), for impinging upon personal security in public places. As alternatives, the Court could have adopted Justice Douglas's rejection of balancing,³⁸⁹ and simply implemented a unitary probable cause standard for all types of searches; 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 make a choice: to determine whether to arrest for some minor crime, such as vagrancy, or to stop and frisk for weapons or evidence and then release the suspect, transforming the stop and frisk into an intrinsic end-in-itself—a form of sanction as part of aggressive policing—rather than an instrumental means to prosecute crime.

The *Terry* majority considered whether voluntary cooperation was required for searches other than those pursuant to an arrest,³⁹⁰ and reiterated the requirement of pre-clearance and a warrant “whenever practicable.”³⁹¹ The circumstances of street encounters, however, “as a practical matter could not be subjected to the warrant procedure.”³⁹² The

³⁸⁸ See, e.g., *id.* at 20–23 (“[W]e deal here with an entire rubric of police conduct—necessarily swift action predicated upon on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure.”); Tiffany, *supra* note 316, at 390–94 (“The failure of police to give adequate attention to the definition and justification of field interrogation results in part from the fact that it occurs on the street in the context of closely related police practices which are designed to prevent the commission of crime . . .”).

³⁸⁹ See *Terry*, 392 U.S. at 38–39 (Douglas, J., dissenting) (arguing that the majority’s decision inappropriately gives a police officer more discretion than a judge).

³⁹⁰ 392 U.S. at 11; see also *id.* at 33 (Harlan, J., concurring) (“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.”).

³⁹¹ *Id.* at 20 (majority opinion).

³⁹² *Id.*

regulatory issue addressed in *Terry* is no longer whether³⁹³ but how to engage in retroactive review of an officer's actions. *Terry* thus affords police officers an incentive to 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 thus remains a live option whatever the outcome in *Terry*. Consistent with even a strong reading of probable cause and the exclusionary rule, the police could continue to harass minorities outside the "legitimate investigat[ory] sphere."³⁹⁴ Where such harassment is the primary purpose of police behavior, the exclusionary rule is powerless to deter.³⁹⁵ 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.³⁹⁶ 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*,³⁹⁷ 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.³⁹⁸ The constraint only works upon police officers 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.³⁹⁹ From a regulatory perspective then, *Terry* and *Sibron*, as handed down in 1968, seem very similar to *Miranda*. It is only from a privacy perspective that they differ.

The second plank of the two-Warren-Courts thesis sought to provide a causal explanation for rights-contraction, that rights-contraction is the

³⁹³ See *id.* at 13–14 ("The exclusionary rule has its limitations, however, as a tool of judicial control. It cannot properly be invoked to exclude the products of legitimate police investigative techniques on the ground that much conduct which is closely similar involves unwarranted intrusions upon constitutional protections.").

³⁹⁴ *Id.* at 15.

³⁹⁵ *Id.*

³⁹⁶ *Id.* at 22–23.

³⁹⁷ 384 U.S. 436 (1966).

³⁹⁸ *Terry*, 392 U.S. at 14; *Miranda*, 384 U.S. at 436.

³⁹⁹ That is, no requirement of counsel's presence in or taping of interviews in *Miranda*, and no probable cause requirement in *Terry*.

Court's response to public and political disapproval of its decision in *Miranda*, expressed through Richard Nixon's tough-on-crime presidential campaign and the *Omnibus Crime Control and Safe Streets Act of 1968*. The evidence for that contraction was *Terry*. In other words, the evidence for contraction is in large part garnered from the Court's Fourth Amendment case law.

Two arguments seem to belie the rights-contraction thesis: first, that the rights-contraction thesis's causal argument is flawed; and second, that *Terry* fits within the Court's jurisprudence of overbreadth and vagueness that extended into the 1970s. In this section, I advanced a regulatory explanation of *Terry* that suggested it did not contract, but rather expanded the dominant Fourth Amendment jurisprudence of the Warren Court: republican regulation. Accordingly, my causal argument rejects the orthodox view that *Terry* was a response to public outrage directed against the Warren Court. In the next section I shall make a second, vagueness-and-overbreadth argument. Starting early and continuing throughout the 1960s and into the 1970s, the Court adopted a republican jurisprudence of security through the rule of law that attacked law enforcement's arbitrary use of statutes and ordinances to criminalize low-level conduct. Accordingly, a series of cases, including *Coates v. Cincinnati*⁴⁰⁰ and *Papachristou v. City of Jacksonville*,⁴⁰¹ fill a policing gap left open by *Terry*, and suggest a Warren Court triumphant, rather than one cowed by public criticism.

V. *SIBRON*, VAGRANCY, AND VAGUENESS

The argument in this section places the Court's *Terry* decision within the context of a separate line of cases through which the Court limited the use of public order statutes and ordinances. The Court's republican, regulatory goal sought to preclude "discriminatory enforcement against those whose association together is 'annoying' because their ideas, their lifestyle, or their physical appearance is resented by the majority of their fellow citizens."⁴⁰² These cases employed the classic republican tools of clarity and specificity, anti-arbitrariness and non-domination to police public spaces, not private ones. In so doing, they struck down a variety of local and state regulations devolving power to the police to "enforce[] . . . an ordinance whose violation may entirely depend upon whether or not a policeman is annoyed."⁴⁰³

⁴⁰⁰ 402 U.S. 611 (1971).

⁴⁰¹ 405 U.S. 156 (1972).

⁴⁰² *Id.* at 616 (footnote omitted).

⁴⁰³ *Id.* at 614.

A. *Sibron's Forgotten Importance*

The liberal, rights-contracting claim that *Terry* signaled a victory for the police, derived from Kamisar's historicist version or Packer's bipolar version, assumes that the police "won" in *Terry*. Instead, the issue was, at best, a wash, and at worst, a loss for law enforcement. There was not one case decided on June 10, 1968, but three: *Terry*, *Sibron*, and *Peters*. The police won *Peters* on grounds even Justice Douglas could agree with: there was probable cause to believe the suspect had committed a crime.⁴⁰⁴ In *Sibron*, the Court held the stop and frisk to be unreasonable.⁴⁰⁵ Even if one agrees with the liberal reading of *Terry*, then, and thinks that it is a victory for the police, law enforcement drew the three-case series surrounding the practice of stop and frisk. Worse for law enforcement was that state attempts to engage in a blanket statutory grant of power to engage in broad, low-level public-order policing were declared unavailing.⁴⁰⁶

The orthodox reaction to *Terry* is exemplified by Kamisar's claim that the Court "resolv[ed] an important and difficult issue [the police practice of stopping and frisking] in favor of law enforcement."⁴⁰⁷ Neither *Terry* nor *Sibron* represented the outcome sought by law enforcement or the states of Ohio and New York. In *Sibron*, the Court struck down a New York statute permitting precisely the regime of stops and frisks recommended by the Interstate Commission on Crime's *Uniform Arrest Act* and the American Law Institute's *Draft Model Code of Pre-Arrest Procedure*.⁴⁰⁸ One of the features of the orthodox liberal reading of *Terry* is the extent to which *Sibron* is confined to the dustbin of history.

Sibron is incompatible with another orthodox claim, again exemplified by Kamisar, who suggests "that these Warren Court decisions [*Terry* and *Sibron*] must have been cause for celebration in more than a few precinct stations throughout the land."⁴⁰⁹ Perhaps, but certainly not in New York, New Jersey, and Massachusetts, all of which had adopted a version of the *Uniform Arrest Act's* law of pre-arrest detention that was laid to rest by *Sibron*. Under those state statutes, as under the American Law Institute draft rules, the officer could simply remove the suspect from the street, take her to the stationhouse, and engage in two hours of questioning. To

⁴⁰⁴ *Sibron v. United States*, 392 U.S. 40, 66 (1968) ("By the time Officer Lasky caught up with Peters on the stairway between the fourth and fifth floors of the apartment building, he had probable cause to arrest him for attempted burglary.").

⁴⁰⁵ *Id.* at 65.

⁴⁰⁶ While the Court refused to declare the statute invalid on its face, it emasculated the statute by applying a case-by-case analysis of the validity of each decision to stop and frisk, a posture that erased the blanket grant of power under the statute. *See id.* at 59–62.

⁴⁰⁷ *Id.*

⁴⁰⁸ Kamisar, *Warren Court*, *supra* note 1, at 65.

⁴⁰⁹ *Id.*

see the Court's decision in *Terry* as equivalent to this style of policing is myopic.

The impact of *Terry* and *Sibron* was to regulate on-the-street policing that targeted urban order despite legislative attempts to remove it from the scope of the Fourth Amendment.⁴¹⁰ The Fourth Amendment could not, however, preclude investigatory searches and seizures consequent to a lawful arrest.⁴¹¹ 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.

The problem presented in both cases was precisely what the officer could do when seeking to engage in an encounter outside the Fourth Amendment which he had reason to believe could be dangerous.⁴¹² Had *Terry* come out the other way—that is, had the Court required the police to show probable cause, or even obtain a warrant, before frisking a suspect—Kamisar, Butler, and other liberal theorists presumably believe that the police would simply decline to engage in these types of encounters. However, as Justice Douglas himself well knew, the police had another, even more invasive option than that provided by the New York statute, the *Uniform Arrest Act*, or the American Law Institute draft rules: arrest under vagrancy or loitering statutes.⁴¹³

The criminal law of vagrancy had been a hot topic during most of the Warren Court, and one that had received a lot of attention, both in the academy and in legal practice. As early as 1953, the *Harvard Law Review* published an article on vagrancy,⁴¹⁴ followed by the *Hastings Law Journal* in 1958,⁴¹⁵ and Justice Douglas's heavily-cited article, *Vagrancy and Arrest on Suspicion*, in the 1960 edition of the *Yale Law Journal*.⁴¹⁶ The petitioner in *Terry* cited Douglas's article, and the parties or amici in

⁴¹⁰ See Foote, *supra* note 334, at 630 (“A number of jurisdictions have tried to deal with this problem by enacting statutes whose elements are believed to be more reliable indicators of professional criminality. Such statutes have had constitutional difficulties as they have strayed from the traditional patterns whose common-law vintage makes them acceptable to courts.” (footnote omitted)).

⁴¹¹ See, e.g., *Pennsylvania v. Mimms*, 434 U.S. 106, 110–11 (1977) (finding that the additional order to “get out of the car” after a driver has been detained is a mere inconvenience when weighed against the safety interest of the police officer).

⁴¹² See *Terry v. Ohio*, 392 U.S. 1, 32 (1968) (Harlan, J., concurring) (“[I]f 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.”).

⁴¹³ William O. Douglas, *Law and the American Character*, 37 CAL. ST. B.J. 753, 764 (1962) (discussing the origin of vagrancy statutes and their disproportionate impact on the economically disadvantaged); William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1, 9 (1960) [hereinafter Douglas, *Vagrancy*] (“[A]rrests for vagrancy are often no more than ‘arrests for investigation.’ And in one of the few vagrancy cases to reach the Supreme Court it seemed plain that an ordinance was used to suppress unpopular speech which, in part at least, was critical of the police.” (footnote omitted)).

⁴¹⁴ Forrest W. Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203, 1203–04 (1953).

⁴¹⁵ Rollin M. Perkins, *The Vagrancy Concept*, 9 HASTINGS L.J. 237, 238–39 (1958).

⁴¹⁶ Douglas, *Vagrancy*, *supra* note 413, at 7–10.

Terry and *Sibron* cited a variety of other articles discussing vagrancy in the context of the law of arrest, including the Foote article and LaFave book.⁴¹⁷

The general consensus was that vagrancy constituted an alternative means of engaging in the sorts of sustained investigative detention outlawed by *Terry*, but one that was fully covered by the law of arrest. Vagrancy operated then much as the combination of overcriminalization⁴¹⁸ and *Atwater v. City of Lago Vista*⁴¹⁹ work now. Because almost anything counted as vagrancy or one of the cognate crimes, such as loitering,⁴²⁰ the police always had the discretion to arrest a suspect, even a law-abiding one.

The Court had faced the use of vagrancy statutes as a means of engaging in searches incident to arrest as early as 1964. In *Preston v. United States*,⁴²¹ the Court acknowledged that in arresting a suspect, the police could engage in the classic search incident to arrest—“the police have the right, without a search warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit the crime”⁴²²—an intrusion much broader than the safety search contemplated by *Sibron* and *Terry*. In *Preston*, the Court considered the applicability of inventory searches of a vehicle after arrest in the context of a vagrancy statute. The officers had “arrested the three men for vagrancy, searched them for weapons, and [taken] them to police headquarters,”⁴²³ precisely the sort of process permissible under the *Uniform Arrest Act* or the American Law Institute draft rules. The *Preston* Court held the inventory search unconstitutional, in part because the search was unrelated to the crime (vagrancy) for which *Preston* was arrested.⁴²⁴ In *Cooper v. California*,⁴²⁵ decided three years later—and so one year before *Terry* and *Sibron*—the Court again discussed the propriety of

⁴¹⁷ Brief for Petitioner, *Terry* at 10, 19, *Terry v. Ohio*, 392 U.S. 1 (1968) (No. 67), 1967 WL 113684 [hereinafter Brief for Petitioner, *Terry*]; Brief of American Civil Liberties Union et al. at 14, *Terry v. Ohio*, 392 U.S. 1 (1968) (Nos. 67, 74, 63), 1967 WL 113689; Brief for the N.A.A.C.P. Legal Defense and Education Fund, Inc. at 2, 5, 10, *Sibron v. New York*, 392 U.S. 40 (1968) (Nos. 63, 74, 67), 1967 WL 113672 [hereinafter Brief for N.A.A.C.P.].

⁴¹⁸ No less a scholar than Sanford Kadish made the overcriminalization connection. See Sanford H. Kadish, *The Crisis of Overcriminalization*, 7 AM. CRIM. L.Q. 17, 30 (1968) (“Another costly misuse of the substantive criminal law is exemplified in the disorderly conduct and vagrancy laws. . . . [T]hey function as delegations of discretion to the police to act in ways which formally we decline to extend to them because it would be inconsistent with certain fundamental principles”).

⁴¹⁹ 532 U.S. 318, 326–27 (2001) (finding that peace officers’ authority to make warrantless arrests for misdemeanors was not restricted at common law to “breach of the peace” cases).

⁴²⁰ See, e.g., *Coates v. City of Cincinnati*, 402 U.S. 611, 615–16 (1971) (invalidating a city ordinance prohibiting loitering on the sidewalk because it was unconstitutionally vague and violated the right of free assembly and association).

⁴²¹ 376 U.S. 364 (1964).

⁴²² *Id.* at 367.

⁴²³ *Id.* at 365.

⁴²⁴ *Id.* at 367–68; see *Cooper v. California*, 386 U.S. 58, 60 (1967) (distinguishing *Preston*).

⁴²⁵ 386 U.S. at 60.

inventory searches, but this time distinguished between police use of vagrancy as a catch-all excuse to search, and a statute sufficiently closely-related to the search to permit the inventory procedure.⁴²⁶

Indeed, the use of vagrancy laws to arrest the law-abiding was a feature of the academic criticism of the doctrine made by Justice Douglas⁴²⁷ and Charles Reich,⁴²⁸ among others, both of whom were cited by the parties or amici in *Terry* and *Sibron*.⁴²⁹ In the 1950s, Professor Caleb Foote had demonstrated the usefulness of vagrancy statutes for preventative policing:

To the extent that the police actually are 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.”⁴³⁰

As late as 1965, Wayne LaFave included the operation of vagrancy laws as one of the police tactics to engage in pre-arrest detention:

When there are not 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, described earlier, are found in Kansas. . . . The vagrancy statutes in the jurisdictions studied are representative of those found elsewhere.⁴³¹

The continued existence of vagrancy-style statutes precluded effective judicial regulation of pre-arrest detention and permitted end-runs around the safety justification.

Vagrancy statutes were soon declared unconstitutional in *Papachristou v. City of Jacksonville*.⁴³² The Court's decision 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

⁴²⁶ *Id.* at 61–62.

⁴²⁷ See Douglas, *Vagrancy*, *supra* note 413, at 4 (commenting on vagrancy statutes and ordinances that disproportionately affect the economically disadvantaged).

⁴²⁸ Reich, *supra* note 333, at 1162 (discussing the author's concerns with preventive police work).

⁴²⁹ Brief for Petitioner, *Terry*, *supra* note 417, at 19 (citing Douglas, *Vagrancy*, *supra* note 413); Brief for the N.A.A.C.P., *supra* note 417, at 23 (citing Reich, *supra* note 333).

⁴³⁰ Foote, *supra* note 334, at 614 (internal citations omitted).

⁴³¹ LAFAVE, *supra* note 316, at 354, 356 (internal citation omitted).

⁴³² 405 U.S. 156, 171 (1972).

thieves.⁴³³ Two others, Jimmy Lee Smith and Milton Henry, were arrested for “walk[ing] back and forth two or three times over a two-block stretch” without identification.⁴³⁴ There was thus less suspicion to arrest than in *Terry*; like the defendants in *Terry*, however, Smith and Henry were African Americans. Similarly, as in *Terry*, the Court in *Papachristou* remained concerned about the effect of low-level preventative policing on minorities.⁴³⁵

Upon being stopped, the police searched each individual prior to arrest.⁴³⁶ 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, engaged in an investigatory 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. For example, in her recent article on vagrancy, Risa Goluboff notes that *Papachristou* is not a privacy case:

The cornerstone of substantive due process as we have come to know it in the decades since *Papachristou* has been “privacy.” But here, in the context of vagrancy laws, Douglas appears to suggest rights to engage in unconventional behavior—or simply to be an unconventional, even “undesirable,” person—precisely where others could, and likely would, encounter such behavior and such people.⁴³⁷

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.⁴³⁸ *Terry*

⁴³³ *Id.* at 160 (discussing police justifications for the arrests of Henry Edward Heath and Hugh Brown).

⁴³⁴ *Id.* at 159 (discussing the arrests of Smith and Henry).

⁴³⁵ See *id.* at 162–63 (“The poor among us, the minorities . . . [are] 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.”).

⁴³⁶ *Id.* at 159–60.

⁴³⁷ Goluboff, *supra* note 29, at 1368–69.

⁴³⁸ See TIFFANY ET AL., *supra* note 313, at 15–16 (“Although crime preventive programs are here distinguished from field interrogation in terms of their primary purpose, this should not be taken to imply that the sole function of field interrogation is arrest for prosecution. . . . [P]olice administrators feel that stopping and questioning of suspects has a substantial crime prevention function . . .”).

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.”⁴³⁹

Accordingly, instead of a Warren Court cowering in the face of social disapproval, *Terry* represents a defiant Warren Court, 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.⁴⁴⁰ 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.

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.⁴⁴¹ *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.⁴⁴² In *Papachristou*,⁴⁴³ the Court continued to close legislative loopholes, primarily connected with vagrancy statutes, used to permit investigative stops, thereby entrenching its expansion of police regulation.

B. *Vagrancy and Racial Equality*

Another reason that the Court and the academy were preoccupied with vagrancy and public disorder statutes was the worry that the police were using low-level criminal ordinances to engage in brief, unsupervised detentions of minorities. Vagrancy is thus linked to the Court’s right-to-protest cases. What they have in common is the use of low-level ordinances to control disorderly minorities and exclude them from public places. Similarly, in *Sibron*, New York adopted a statute permitting the police, at their discretion, to engage in low-level sweeps of the public (and

⁴³⁹ *Terry v. Ohio*, 392 U.S. 1, 14–15 (1968).

⁴⁴⁰ *Id.* at 27.

⁴⁴¹ *See, e.g.*, *Florida v. Royer*, 460 U.S. 491, 499 (1983) (“*Terry* and its progeny nevertheless created only limited exceptions to the general rule that seizures of the person require probable cause to arrest. Detentions may be ‘investigative’ yet violative of the Fourth Amendment absent probable cause.”); *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975) (“These cases together [*Terry* and *Adams v. Williams*, 407 U.S. 143 (1972)] establish that in appropriate circumstances the Fourth Amendment allows a properly limited ‘search’ or ‘seizure’ on facts that do not constitute probable cause to arrest or to search for contraband or evidence of crime.”).

⁴⁴² *Sibron v. New York*, 392 U.S. 40, 60–63 (1968).

⁴⁴³ 405 U.S. 156, 162–63 (1972).

primarily minorities) to check for weapons, particularly guns or knives.⁴⁴⁴ In the context of on-the-street police conduct, these sorts of ordinances concentrated much of the Warren Court's attention, rather than some Fourth Amendment equality right.

Goluboff notices that the protection of undesirables in *Papachristou* mirrors language Justice Stewart used in *Coates v. City of Cincinnati*,⁴⁴⁵ to declare unconstitutional a statute permitting police officers to arrest anyone who happens to annoy them or any passerby.⁴⁴⁶ Justice Stewart sought to protect disapproved-of "lifestyles" from arbitrary police conduct—the type of "discriminatory enforcement against those whose association together is 'annoying' because their ideas, their lifestyle, or their physical appearance is resented by the majority of their fellow citizens."⁴⁴⁷

Coates fits in with a series of cases, including *Brown*,⁴⁴⁸ *Shuttlesworth*,⁴⁴⁹ and *Edwards*,⁴⁵⁰ decided under the First and Fourteenth Amendments protecting public dissent. To that extent, it is much closer to the cases that discuss the substantive right to dissent in the context of racial protest, and which do involve low-level criminal public ordinances. These low-level ordinances accomplish much the same effect as the vagrancy statutes that they mimic or supplant.

On a republican reading, then, *Sibron*, *Terry*, *Coates*, and *Papachristou* are quite straightforwardly race cases, and in their emphasis on security from arbitrary police action, they should be read together with *Mapp*:

In each instance, police used these laws to demarcate who was out of place in a given community—who was denied full respect for their mobility, their autonomy, their lifestyle, or their beliefs. Marginal people shared a vulnerability to regulation by vagrancy law. That is, they shared a vulnerability to arrest at almost any time and place for any

⁴⁴⁴ *Sibron*, 392 U.S. at 43–44.

⁴⁴⁵ Goluboff, *supra* note 29, at 1369.

⁴⁴⁶ See *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) ("[T]hey must conduct themselves so as not to annoy any police officer or other person who should happen to pass by. . . . [The city] cannot constitutionally . . . enact[] and enforce[] . . . an ordinance whose violation may entirely depend upon whether or not a policeman is annoyed.").

⁴⁴⁷ *Id.* at 616. In reaching this conclusion, Justice Stewart cited to the report of a riot, noting "the serious civil disturbances that took place in Cincinnati in June 1967." See *id.* at 616 n.6 (citing NAT'L ADVISORY COMM'N, REPORT ON CIVIL DISORDERS 26–27 (1968)). Rather than retreating in the face of riots and civil disorder, Justice Stewart appeared willing to plough ahead with striking down statutes that would protect against civil disturbance.

⁴⁴⁸ 383 U.S. at 143–44 (Brennan, J., concurring) (finding a breach-of-the-peace statute overbroad for prohibiting the assertion of First Amendment rights).

⁴⁴⁹ *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 93 (1965) (finding a Birmingham loitering ordinance unconstitutional on vagueness grounds).

⁴⁵⁰ *Edwards v. South Carolina*, 372 U.S. 229, 233 (1963) (finding that defendants' "boisterous," "loud," and "flamboyant" conduct resulted in their arrest by police authorities).

behavior or for no behavior at all.⁴⁵¹

Vulnerability, in this sense, is a *security* issue, and therefore a republican one. Liberals, focused on fundamental rights, have missed republican import of these cases, and so their full racial and law enforcement import.

In a variety of civil rights cases, the Court has developed the doctrines of void-for-vagueness and overbreadth to place limitations on substantive criminal law statutes that prohibited constitutionally protected activities and that have been used by states and municipalities to target minorities and other excluded groups for various public order offenses, like vagrancy. Perhaps because many of these limitations arose in the context of civil rights protests,⁴⁵² rather than primarily under criminal law,⁴⁵³ the broad sweep of the Court's limits on substantive criminal law has been commented on relatively little.

The contrast between the Court's language in, on the one hand, low-level criminal offense cases arising as part of its civil rights jurisprudence and, on the other hand, the Court's Fourth Amendment jurisprudence, is stark. Had the Court chosen to use criminal procedure to pursue an anti-discrimination agenda, it would have felt 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.*

⁴⁵¹ Goluboff, *supra* note 29, at 1371.

⁴⁵² See *Walker v. City of Birmingham*, 388 U.S. 307, 316–17 (1967) (upholding criminal contempt conviction for violation of temporary injunction but suggesting that constitutional issue of vagueness may have been present in city parade ordinance); *Brown v. Louisiana*, 383 U.S. 131, 143–44 (1966) (Brennan, J., concurring) (finding that Louisiana breach-of-peace statute is overbroad and posing a serious threat to the exercise of constitutional rights); *Shuttlesworth*, 382 U.S. at 90 (finding a city ordinance leaving use of public sidewalks entirely within the discretion to the “whim of any police officer” to be overly broad); *Dombrowski v. Pfister*, 380 U.S. 479, 491–92 (1965) (striking down the Louisiana Subversive Activities and Communist Control Law and Communist Propaganda Control Law as vague and overbroad); *Cox v. Louisiana*, 379 U.S. 536, 551–52 (1965) (“For all these reasons we hold that appellant’s freedoms of speech and assembly, secured to him by the First Amendment . . . were denied by his conviction for disturbing the peace.”); *Cox*, 379 U.S. at 573–75 (“There is an equally plain requirement for laws and regulations to be drawn so as to give citizens fair warning as to what is illegal; for regulation of conduct that involves freedom of speech and assembly not to be so broad in scope as to stifle First Amendment freedoms”); *Edwards*, 372 U.S. at 237 (“The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views.”).

⁴⁵³ See, e.g., *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162–63 (1972) (“This ordinance is void for vagueness. . . . [It] makes criminal activities which by modern standards are normally innocent.”); *Robinson v. California*, 370 U.S. 660, 666 (1962) (invalidating a California statute that criminalized status of addiction without the requirement of some wrongful act). The vagrancy statutes were often characterized as criminalizing a person’s status. See Douglas, *Vagrancy*, *supra* note 413, at 6, 8 (commenting on the enactment of vagrancy statutes to prevent crimes that were thought to most likely be committed by a vagrant).

Hopkins,⁴⁵⁴ 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 Amendment do not have the sort of 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, such as bookkeepers⁴⁵⁵ and drug dealers⁴⁵⁶—without any suggestion that these defendants are minorities or that they have some disparate impact.

Once we turn to the pretext and lifestyle cases, however, we see statutes much like those at issue in *Sibron*, and police conduct much like that at issue in *Terry*.⁴⁵⁷ Like *Sibron* and *Terry*, these cases involve grants

⁴⁵⁴ 118 U.S. 356, 372–73 (1886) (finding that a municipal ordinance to regulate public laundries was so broad as to allow unjust and unequal discrimination in its application).

⁴⁵⁵ From 1961 to 1969, organized crime cases were defined broadly as cases involving gambling, illegal union activities, or illegal distilling activity. See, e.g., *Spinelli v. United States*, 393 U.S. 410, 418 (1969) (illegal interstate gambling activities); *Recznik v. City of Lorain*, 393 U.S. 166, 167–68 (1968) (convictions for keeping a gambling place and exhibiting a gambling device); *Mancusi v. DeForte*, 392 U.S. 364, 370 (1968) (illegal union activity); *Katz v. United States*, 389 U.S. 347, 348 (1967) (wagering in violation of a federal statute); *Berger v. New York*, 388 U.S. 41, 44 (1967) (conspiracy to bribe chairman of the New York State Liquor Authority); *Osborn v. United States*, 385 U.S. 323, 324 (1966) (attempted bribery of a juror in a prospective criminal trial); *Hoffa v. United States*, 385 U.S. 293, 294–95 (1966) (attempted bribery of members of a jury); *Riggan v. Virginia*, 384 U.S. 152, 153 (1966) (Clark, J., dissenting); *United States v. Ventresca*, 380 U.S. 102, 104 (1965) (illegal distillery operation); *Beck v. Ohio*, 379 U.S. 89, 96–97 (1964) (warrantless search and arrest based on the defendant's previous record of arrests or convictions for violations of the clearing house law); *Chapman v. United States*, 365 U.S. 610, 616–17 (1961) (unlawful manufacture of distilled liquor); *Silverman v. United States*, 365 U.S. 505, 506 (1961) (convictions of gambling offenses under the District of Columbia Code). None of these cases would be considered an anti-discrimination case. Yet they constitute almost a quarter of the Fourth Amendment cases decided from 1961 to 1969.

⁴⁵⁶ From 1961 to 1969, the Supreme Court decided a number of narcotics cases. *Desist v. United States*, 394 U.S. 244, 244 (1969) (conspiracy to import heroin); *Sibron v. New York*, 392 U.S. 40, 44 n.1 (1968) (unauthorized heroin possession); *Sabbath v. United States*, 391 U.S. 585, 586 (1968) (illegal importation of cocaine); *McCray v. Illinois*, 386 U.S. 300, 301 (1967) (narcotics possession); *Cooper v. California*, 386 U.S. 58, 58 (1967) (the seizure and forfeiture of vehicles used in violation of narcotics laws); *Lewis v. United States*, 385 U.S. 206, 207–08 (1966) (the illegal transfer of marijuana); *James v. Louisiana*, 382 U.S. 36, 36 (1965) (narcotics possession); *Aguilar v. Texas*, 378 U.S. 108, 110 (1964) (illegal possession of heroin); *Ker v. California*, 374 U.S. 23, 24 (1963) (marijuana possession); *Wong Sun v. United States*, 371 U.S. 471, 473 n.1 (1963) (the illegal transportation of narcotics). 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 to 1969 were either organized crime or narcotics cases. The major Fourth Amendment race case is *Terry*, although *Mapp* may also be characterized as a race case.

⁴⁵⁷ See, e.g., *Brown*, 383 U.S. at 143–44 (Brennan, J., concurring) (finding breach-of-the-peace statute overbroad as it prohibits asserting First Amendment rights); *Shuttlesworth*, 382 U.S. at 93 (finding Birmingham loitering ordinance unconstitutional on vagueness grounds); *Cox*, 379 U.S. at 573–75 (finding unconstitutional a statute prohibiting picketing near a courthouse due to reliance on discretion of public officials in implementation); *Cox v. Louisiana*, 379 U.S. 536, 551–52 (1965) (finding that a breach-of-peace statute was unconstitutionally vague because it would allow persons to be punished merely for expressing unpopular views); *Edwards*, 372 U.S. at 233 (finding that defendants's "boisterous," "loud," and "flamboyant" conduct resulted in their arrest by police authorities).

of unfettered discretion to the police.⁴⁵⁸ And, as in the pretext and lifestyle cases, the Court struck down the statute in *Sibron*, and precluded arbitrary justifications for interference in *Terry*. The demand for reasonable articulable suspicion in the latter case, based on a demonstrable fear of violence, is both a central feature of republican rule-of-law concerns and perhaps a criminal corollary of the vagueness and over breadth doctrines. Both doctrines, as Goluboff notes in the vagrancy context, fail to carve out a space of immunity through fundamental rights.⁴⁵⁹ Instead, both doctrines permit the police or the legislature to interfere with public freedoms so long as they can articulate some sufficiently specific reason for so doing.

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.

Thus, while Goluboff looks forward to the Court's protection of privacy-as-lifestyle in *Roe v. Wade*, she mostly misses or ignores the voluminous criminal procedure writings on vagrancy, and the connection, through *Coates*, to the First Amendment race cases.⁴⁶⁰ In other words, *Papachristou*, though written by the exemplary liberal on the Court, fits within the regulation revolution—one that is concerned, from a republican perspective, with equality as an aspect of non-domination.

But this is not, as Goluboff suggests, merely a matter of “words.” It is rather a matter of *rules*, and in particular, the republican prioritization of the rule of law over the rule of men. That Goluboff would dismiss this protection so lightly—and in so doing, miss the connection between the Court's race-and-protest jurisprudence and the Court's criminal procedure jurisprudence—is endemic to liberal histories focused on fundamental rights as immunities.⁴⁶¹ Such histories serve to recreate a republican doctrine in egalitarian or libertarian immunity terms, and so minimize or reject protections that do not fit that mold.

⁴⁵⁸ See *Brown*, 383 U.S. at 143 (“[A State] may not invoke regulations as to use—whether they are *ad hoc* or general—as a pretext for pursuing those engaged in lawful, constitutionally protected exercise of their fundamental rights.”); *Shuttlesworth*, 382 U.S. at 90 (“[T]his ordinance says that a person may stand on a public sidewalk in Birmingham only at the whim of any police officer of that city. The constitutional vice of so broad a provision needs no demonstration.”); *Cox*, 379 U.S. at 579 (Black, J., concurring) (“Louisiana has by a broad, vague statute given policemen an unlimited power to order people off the streets . . . whenever a policeman makes a decision on his own personal judgment that views being expressed on the street are provoking or might provoke a breach of the peace.”); *Cox*, 379 U.S. at 557–58 (majority opinion) (“It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not . . .”).

⁴⁵⁹ Goluboff, *supra* note 29, at 1383.

⁴⁶⁰ See *id.* at 1369.

⁴⁶¹ *Id.* at 1375.

C. *The Real Rights Revolution*

In my view, the real rights revolution occurred under the Burger Court, as that Court transformed a series of republican, regulatory decisions into rights-based ones, and at the same time undermined the regulatory basis of these decisions. In *Papachristou*, then, Justice Douglas embraces not only the “lifestyle” language of Justice Stewart,⁴⁶² but also, in part, a republican emphasis on the rule of law—one that he had acknowledged in his 1960 article on privacy.⁴⁶³

My view reverses the argument, propounded by Carol Steiker, that the Warren Court’s rights revolution was undone by an emphasis on regulation.⁴⁶⁴ That argument grants too easily the existence of a rights revolution. While the broad thrust of Steiker’s argument is undoubtedly correct—the Burger Court emphasized rights to the detriment of regulation⁴⁶⁵—the Burger Court did not so much preserve rights-talk as shift it from the Warren Court’s regulatory focus to a rights one. Under the Burger Court, the emphasis on fundamental rights, such as granting immunity from government intrusions, so conducive to liberals, took the focus off regulation. Granting or expanding rights, even in fits and starts, permitted conservatives on the Court to provide a sop for liberals, at the same time as undermining the Warren Court’s regulatory regime. The hard fact about the Burger Court’s (and subsequent courts’) jurisprudence is that liberals are complicit in this move. Left-liberals are generally uninterested in regulation except as a sanction for trenching on immunities understood as fundamental rights. They never understood the regulatory revolution, and were willing to pay the regulatory cost in order to advance their emphasis on rights.

VI. POSITIVE AND NEGATIVE THEORIES OF POLICING

The central problem with left-liberal theories of policing is that they are too negative, providing no real account of good policing practices.

⁴⁶² See *Coates v. City of Cincinnati*, 402 U.S. 611, 616 (1971) (“[S]uch a prohibition, in addition, contains an obvious invitation to discriminatory enforcement against those who association together is ‘annoying’ because their ideas, their lifestyle, or their physical appearance is resented by the majority of their fellow citizens.”); Goluboff, *supra* note 29, at 1369 (discussing the language of “lifestyle” in the *Coates* and *Papachristou* cases).

⁴⁶³ See Douglas, *Vagrancy*, *supra* note 413, at 7 (“One who thumbs through these vagrancy statutes may often wonder whether, apart from everything else, some of the provisions are too vague to satisfy constitutional tests.”).

⁴⁶⁴ See Steiker, *Counter-Revolution*, *supra* note 54, at 2467–71 (“The Burger and Rehnquist Courts have not altered radically . . . the Warren Court’s constitutional norms regarding police practices. . . . Rather than redrawing in any drastic fashion the line between constitutional and unconstitutional police conduct, the Supreme Court has revolutionized the consequences of deeming conduct unconstitutional.”).

⁴⁶⁵ See *id.* at 2470 ([T]he Burger and Rehnquist’s Courts have accepted to a significant extent the Warren Court’s definitions of constitutional ‘rights’ . . .”).

Left-liberals are no more than minimally interested in the process of criminal investigation, because police investigation undermines immunity from state coercion. Instead, left-liberals focus on tightly restricting police discretion, which is usually characterized as, at most, one step away from race or class discrimination.⁴⁶⁶ Lacking a positive theory of policing, left-liberals surrender the discussion of police practices to centrists and conservatives. Left-liberals are left on the fringes seeking to reduce policing as a means of combating state repression.

To the extent that left-liberals are focused on non-interference, they are vulnerable to a classical liberal response.⁴⁶⁷ Classical liberals provide a set of radical but powerful solutions. For example, Hobbesian-style liberal theories argue that, in order to preserve peace and promote security, there must be some omnipotent sovereign power, perhaps located in the executive branch,⁴⁶⁸ because of the extreme nature of the sovereign's power, its sphere of competence must be limited to a public realm. Similarly, Lockean-style libertarians limit the nature of political power to preserving life, liberty, and property.⁴⁶⁹ Accordingly, both the Lockean and Hobbesian forms of liberalism are deeply concerned with negative liberty as non-interference. Both seek to protect individuals from the government and from each other.

Furthermore, the Hobbesian view provides a persuasive positive vision of government power. That is, Hobbesians have a simple, straightforward explanation of executive power in general, and police power in particular. It is an explanation that looks distinctively like Herbert Packer's crime-control understanding of policing, and one that receives its modern form in the type of separation of powers argument that rejects interbranch limits and instead argues for consolidation of police power within the executive

⁴⁶⁶ For examples from the work of two of the most prominent liberal scholars in the field see, David Cole, *Foreword: Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059, 1062 (1999); David Cole, *The Paradox of Race and Crime: A Comment on Randall Kennedy's "Politics of Distinction"*, 83 GEO. L.J. 2547, 2555–62 (1995) (questioning whether increased law enforcement constitutes a public good); Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 201 (1993) (“[T]he central meaning of the Fourth Amendment is distrust of police power and discretion.”); Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925, 926 (1997); Tracey Maclin, *Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271, 1277–78 (1998) (linking police discretion to racial discrimination).

⁴⁶⁷ For two versions of classical liberalism, see generally HOBBS, *supra* note 67, at 117–29; 145–54 (discussing sovereign power and individual liberty); JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 269–78; 350–53 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (discussing natural liberties and political powers of government).

⁴⁶⁸ See, e.g., HOBBS, *supra* note 67, at 120 (describing sovereign as “mortal god” whose judgment on public matters supersedes those of his subjects).

⁴⁶⁹ See, e.g., LOCKE, *TWO TREATISES*, *supra* note 467, at 268 (discussing political power); see also *id.* at 269, 330–32 (discussing natural rights); *id.* at 330–32 (discussing powers citizens hand over to government).

branch of government.⁴⁷⁰ It is, in other words, the type of theory put forward by Chief Justice Rehnquist in *Armstrong v. United States* and by Justice Scalia in his concurrence in *Morrison v. Olsen*.⁴⁷¹ This consolidating aspect of much of the discussions⁴⁷² of the police by the Rehnquist and Roberts Courts is the antithesis of republicanism. It does, however, represent a powerful form of liberalism, and one to which egalitarian and libertarian-liberalism has found no answer in the criminal justice context.

In fact, left-liberals writing in the criminal justice arena are often uninterested in producing a positive account of policing. Their goal, structured by the liberal emphasis on non-interference, is to engage in the project—one they share with Hobbesian-style criminal justice theorists—of circumscribing the range of police powers. They operate, however, from Packer’s opposite pole. They emphasize the limitations on government as consisting in a set of “due process” rights that seek to limit government power. Although Packer expresses the due process model in terms of checks or hurdles placed by the judiciary on government action, that process is at best minimally republican.⁴⁷³ Simply put, for any rights-based theory, including republicanism and fundamental rights liberalism, some form of justiciability is necessary to enforce individual rights. By emphasizing freedom from police interference, left-liberalism becomes trapped in a primarily or exclusively negative theory of policing, one that views any form of police discretion as a license to engage in malicious, that is, usually racist or classist, interference with the public.

The conservative account of policing is more developed, aiming to remove inter-branch checks on executive officials in the name of electoral accountability. Conservatives favor a strong, unitary sovereign as necessary to preserve social order, within the limits permitted by fundamental rights.⁴⁷⁴ Since liberty is generally limited to the home,⁴⁷⁵ conservatives seek to free the executive of interbranch checks and instead empower law enforcement to establish security and protect public order. Law enforcement is primarily understood as self-regulating, subject only to

⁴⁷⁰ See Packer, *Two Models*, *supra* note 34, at 9–13 (discussing Packer’s crime control understanding).

⁴⁷¹ 487 U.S. 654 (1988). Both *Armstrong* and *Morrison* discuss the power of the prosecutor as member of the executive branch and requiring that she be freed from interference by other branches of government.

⁴⁷² See, e.g., *Herring v. United States*, 129 S. Ct. 695, 703 (2009); *Hudson v. Michigan*, 547 U.S. 586, 592 (2004); *United States v. Leon*, 468 U.S. 897, 911 (1984).

⁴⁷³ PACKER, *LIMITS*, *supra* note 34, at 149–246 (1968); Packer, *Two Models*, *supra* note 34.

⁴⁷⁴ Compare, e.g., HOBBS, *supra* note 67, at 145–50, with Justice Scalia’s view of the executive power in his concurrence in *Morrison*, 487 U.S. 654, 728 (1988) (Scalia, J., concurring) (arguing that the primary check upon prosecutorial power is a political one).

⁴⁷⁵ See *California v. Acevedo*, 500 U.S. 565, 584–85 (1991) (Scalia, J., concurring) (suggesting that search warrants should only be required for searches inside the home).

populist political accountability.⁴⁷⁶

Republicanism does not oppose the police or government to the public in the manner of Packer, one of the Warren Court's liberal apologists. Instead, republicanism makes room for both to operate together, and so avoids a barren and simplistic attitude towards the police, one that emphasizes anti-discrimination immunity from government intrusion to the exclusion of all other concerns. Republicanism makes space for a complex relationship between police and public, government and liberty that Kamisar, in his earlier and later versions of the two-Warren-Courts thesis, finds either confounding or antithetical to his vision of the Warren Court as protecting fundamental rights.

A central worry about left-liberal theory is its vulnerability from within to an attack from the conservative right based upon a more stringent—perhaps one might call it quasi-Hobbesian—understanding of liberalism. This quasi-Hobbesian approach emphasizes the necessity of a sovereign executive to enforce the criminal law, and so seeks to free law-enforcement from inter-branch, and in particular judicial, oversight. The quasi-Hobbesian approach, like left-liberalism, rejects the intrinsic value of diffusing power among government agents.⁴⁷⁷ Given, however, the left-liberal disinterest in regulating the police but only in immunity from police conduct, left-liberals concede a regulatory interest in policing to the quasi-Hobbesians. What is left is a consensus over the unregulated and discretionary nature of much of police activity, and an abstract and barren disagreement over whether this is a good or bad thing.

I shall briefly indicate a liberal solution to the problem of policing: popular democratic participation in the process of policing. In general, that solution was considered in the 1960s under the title of consent. For example, in an important article discussing the findings that were to form the basis of the American Law Institute's report, Bator and Vorenberg conclude that consent fundamentally legitimizes police activity.⁴⁷⁸

Famously, the opportunity to engage in consensual policing was lost in *Schnecko v. Bustamonte*,⁴⁷⁹ a decision authored by Justice Stewart, otherwise the hero of the regulatory revolution. Whether *Schnecko* was a missed regulatory opportunity—the interpretation I favor—or a failure of the republican ideal, that decision may provide an opening through which

⁴⁷⁶ See *Hudson v. Michigan*, 547 U.S. 586, 598–99 (2006) (discussing police professionalism as reinforced by internal discipline).

⁴⁷⁷ Left-liberals may like to retain the diffusion of power as an instrumental value. See Packer, *Courts, Police*, *supra* note 34, at 239; Packer, *Two Models*, *supra* note 34, at 6–23. The prime intrinsic left-liberal values, however, are liberty and equality.

⁴⁷⁸ See Bator & Vorenberg, *supra* note 312, at 77–78 (discussing the importance of consent as justifying government action).

⁴⁷⁹ 412 U.S. 218, 281–83 (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).

liberalism can counter-attack republicanism. Accordingly, despite its current unavailability as a constitutional basis for regulating police conduct, demands for videotaping of police interaction with the public, often as a matter of state law, suggest the continuing vitality of the consensual concept.

Populist participation has liberal and communitarian antecedents. One version might be John Rawls's demand that public agents, including the police, rely on "public reasons"—"the reason of equal citizens who, as a collective body, exercise final political and coercive power over one another in enacting laws and in amending their constitution."⁴⁸⁰ Here, the idea of equality transforms political power from hierarchical to egalitarian by virtue of the type of justification state authorities are permitted to use when considering "those [political questions] involving . . . 'constitutional essentials' and basic justice"⁴⁸¹—the very subject matter of criminal procedure. A theory of policing-based reasons each may "reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational"⁴⁸² may provide the sort of content that much of political liberal discussions of policing presently lack.

Populist public deliberation portends a positive engagement with police, not simply to preclude their entrenchment on private spaces, but to provide a positive account of the manner in which the police, as a government agency, can justify their actions. No longer are liberals consigned to knee-jerk anti-police rhetoric, in which any police discretion is regarded as the road to racism. Rather, liberals are provided an opportunity to discuss what good policing looks like. That it may look radically different from today's dominant styles of policing, or those promoted by the current Supreme Court, is not a reason for neglecting this challenge. But the failure to detail positive policing practices is liberal negligence—it cedes the field to the very forces liberals wish to resist and harms the very people they wish to protect. At the very least, that was not the practice of the Warren Court or its republican agenda, and it suggests the superiority of republicanism over immunities-based liberalism. The challenge for liberals is to develop a populist alternative to the left-republican theory of police and policing.

VII. 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

⁴⁸⁰ RAWLS, POLITICAL LIBERALISM, *supra* note 122, at 214.

⁴⁸¹ *Id.*

⁴⁸² *Id.* at 217.

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, extended 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.

The Court consistently rejected self-regulation as the appropriate mode of self-governance,⁴⁸³ 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.”⁴⁸⁴ In *Katz*, the Court demanded a warrant not because the federal agents invaded the defendant’s privacy, but because they did 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 tried to come up with a fix by extending judicial scrutiny to the police officer’s individualized policy decision about who to search and who to let go 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

⁴⁸³ See, e.g., *Beck v. 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.”).

⁴⁸⁴ *Katz v. United States*, 389 U.S. 347, 357 (quoting *United States v. Jeffers*, 342 U.S. 48, 51 (1951)); see also *Chimel v. California*, 395 U.S. 752, 758, 761 (1969) (emphasizing the importance of the warrant process).

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. 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.