

OVERCOMING HIDDENNESS: THE ROLE OF INTENTIONS IN FOURTH AMENDMENT ANALYSIS

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Sweet Mephostophilis, so charm me here / That I may walk
invisible to all / And do whate'er I please unseen of any.¹

I. INTRODUCTION

At the beginning of some research I was doing five years ago on the subject of pretexts, I tapped in the name “Whren” in a Westlaw search and over 1000 citations appeared. This struck me as a lot of play for a case that had been law for just three years.² I remember then telling myself that if I wanted to continue with the project, I had to assume two things: first, that most of which was written on point would, if confronted, reveal itself to be unhelpful; and second, that if in the future I wanted to write about something about which so much had been said, I would, well, have to remind myself of what I'd told myself earlier. Make what you will of this version of Harold Bloom's “anxiety of influence.”³ Still, while I admit to not being quite up to tapping in the word “privacy” into Westlaw, I don't need to do

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¹ CHRISTOPHER MARLOWE, THE TRAGICAL HISTORY OF THE LIFE AND DEATH OF DOCTOR FAUSTUS, act 3, scene 1, lines 11-13 (Sylvan Barnet ed., Penguin Books USA, Inc. 1969) (1624).

² See *Whren v. United States*, 517 U.S. 806 (1996).

³ HAROLD BLOOM, THE ANXIETY OF INFLUENCE: A THEORY OF POETRY (2d ed. 1997).

that to get a sense of its centrality in legal discourse. All I need to do is look on my desk, which has an offprint I just received from *Legal Studies Forum*, entitled: *Law, Instrumental Music, and Dance: Reflections of a Common Culture*,⁴ which, despite drawing thoughtful comparisons between, for example, Stravinsky's *Le Sacre Du Printemps* and *Macpherson v. Buick Motor Co.*, also contains a five-page disquisition on privacy, the relevance of which I am struggling to make out. I guess perhaps I *could* make it out if I were willing to work that hard, but more important for my purposes here is that privacy is an enormous industry: claiming it (one could say exploiting it), invading it, and not least of all, writing about it. Indeed, privacy is a phenomenon about which most everyone is inspired to jot down a position eventually. Only last week did I notice that the Barnes & Noble near my house in San Diego has on display a book published in 1997 called *The Right to Privacy*, co-authored by President Kennedy's daughter Caroline, who argues therein that "privacy is under siege."⁵ There you have it.

I should not, however, complain about over-participation in the privacy industry. To do so would be to forget a remark that I once heard Yale Kamisar make on an Association of American Law Schools (AALS) panel years ago, where he said, only partly in jest, that *Miranda v. Arizona*⁶ had helped him put three of his kids through college. I don't know if any of us can or will be able to say the same about *Katz v. United States*,⁷ but I think we could reach agreement that it has given us, and will most likely continue to give us, more than a little to chew on. I propose that at a minimum, we be grateful that E.L. Godkin,⁸ and more importantly, Warren and Brandeis,⁹ appropriated Judge Cooley's innocuous description of a right to "personal

⁴ Michael L. Richmond, *Law, Instrumental Music, and Dance: Reflections of a Common Culture*, 27 LEGAL STUDIES FORUM 783 (1999).

⁵ ELLEN ALDERMAN & CAROLINE KENNEDY, *THE RIGHT TO PRIVACY* xiii (1995).

⁶ 384 U.S. 436 (1966).

⁷ 389 U.S. 347 (1967).

⁸ E.L. Godkin, *The Rights of the Citizen: IV.—To His Own Reputation*, 8 SCRIBNER'S MAG. 58, 65-67 (1890).

⁹ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

immunity”¹⁰ from assault and battery and converted it somehow into a highly generalized “right to be let alone.” That we are able to convene here to discuss it—that Professor Clancy can throw a conference like this every year and put his guests up in the comfort he does—indicates that the Fourth Amendment is, contrary to a most popular myth, far from dead. In fact, if it *is* dead, someone should tell Wayne LaFave: his search-and-seizure treatise is in its third edition, is up to five volumes, and has, I suspect, helped make him a wealthy man by academic standards.

This Article rehearses a response to the problems posed to and by the Supreme Court's attempts to work out the meaning and operation of the word “search.” After commencing Part II by meditating on the notion of privacy, I take up its relation to the antecedent suspicion or knowledge that Fourth-Amendment law requires as a justification for all privacy invasions. From there, I look specifically at that uneasy relation in Supreme Court jurisprudence, which has come to privilege privacy over property as a Fourth Amendment value. From there, Part III reviews the sources or bases that can tell us what can *count* as private: 1) the positive laws of property, tort, crime, and contract; 2) laborious questioning of the sort performed by Chris Slobogin; and 3) the routine versus nonroutine nature of the governmental surveillance in question (let's call this the O'Connor position from *Florida v. Riley*,¹¹ recently resurrected in *Bond v. United States*¹²). To the extent that the routine nature of some intrusive actions does not disqualify them as unacceptably intrusive, Part IV suggests an alternative method for determining what constitutes a search. In order to establish that the intentions of both search victim and police should play an important role in this determination, I take some care to look at the unhappy role that intentions currently play in Supreme Court jurisprudence, particularly in the context of so-called “pretexts.” After mapping my criticisms of the Court's analysis of intentions in that context onto the question of what constitutes a search, I am able to take

¹⁰ THOMAS M. COOLEY, COOLEY ON TORTS 29 (2d ed. 1888) (“The right to one's person may be said to be a right of complete immunity: to be let alone.”).

¹¹ 490 U.S. 1014 (1989).

¹² 529 U.S. 334 (2000).

a position on the extent to which spying (as opposed to more coercive police actions) should be regulated by the Fourth Amendment.

II. PRIVACY, PROPERTY, AND THE FUNCTION
OF ANTECEDENT SUSPICION

When Wittgenstein wrote that “[t]he soul is impersonal[.]”¹³ he was commenting on a then rather new concern of epistemology: the notion of privacy. Skepticism's concern with the limits of knowledge was no longer just with identifying the grounds on which we may make claims about the material world. It had branched out inexorably into a concern with identifying the grounds on which we might make claims about how things are with others. This opened up a whole new problem for skeptics: it was no longer a matter of telling (knowing) what's real from what is fake, dummy, toy, pretend, counterfeit, illusion (or delusion); skepticism had trained itself on telling (knowing) how things are with others, a matter of peeking, or at least feeling an urge or need to peek, into their inner lives. Whether, for example, I can “know your pain” is a question quite apart from whether I can know that you exist at all. Even if we are twins or have somehow had identical experiences, still I cannot actually *know* your pain: the limits of my knowledge owe to the privacy of your own experience, here, the privacy of your own body. This concern with attempts to penetrate privacy or overcome somehow our separateness makes responding to one another unmediated by knowledge, since I cannot after all really *know* how things are with you, not the way I can know, say, a formula or a fact. But though I cannot know your pain, I nonetheless *can* respond to you when you tell me that you are in pain, though my response is in no way mediated by what I know about what you are experiencing. In other words, the fact that you are to an extent hidden to me may prevent my knowing what you are experiencing, but it does not prevent my responding to you when you tell me what you are experiencing (here, that you are in pain). I can on the one hand acknowledge it, as in, “I've done all I can for you,” “the serum is being flown in by plane,” or, just, “I know.” On the other hand, I can refuse to acknowledge your pain, which we could count as a repudiation of you, of your situation. These responses or refusals to respond to you, because they are based on a realm of knowing that has nothing at all to do with certainty, are manifestations of the

¹³ STANLEY CAVELL, *THE CLAIM OF REASON: WITTGENSTEIN, SKEPTICISM, MORALITY, AND TRAGEDY* 361 (1979).

problem of privacy. Indeed, that our separateness or hiddenness from one another inevitably creates problems between us—that you are in your body and I am in mine—is constitutive or definitive of privacy.

I know I was not invited to the University of Mississippi to give a disquisition on the body—what Emerson calls that giant I carry around with me. But I do anticipate a payoff in comparing the notion of privacy that precludes our relation to one another from being based on knowledge with the notion of privacy that ruminated in the Supreme Court from 1886 to 1967 and has been limping along ever since. In other words, privacy is, by definition, a problem. Not so much the sort of problem that Bill Stuntz wrote about almost a decade ago when he complained that the right to remain hidden from police is wrongfully privileged over the right to be free from being pushed around by them.¹⁴ Rather, privacy is a problem because, while it creates a tremendous blockage between us, we remain nonetheless responsible for taking positions, making calls, and passing judgment on what others do or fail to do. This must be what Judge Posner is troubled by in his *Economics of Justice*, where he writes that privacy in its secrecy (not seclusion) mode is nothing more than a license to manipulate and defraud others by keeping them in the dark about what you really are.¹⁵ In other words, it is my point that privacy is a problem not because it is a less serious intrusion than is low-level violence, but because it is read on a different plane altogether than being pushed up against a wall, handcuffed, or placed in the backseat of a police cruiser. Privacy is a problem because you could be deceiving me, or misunderstanding me, or I could take what you have done to be on purpose when it could really just be an accident (or what I take to be just an accident really could have been done on purpose). How should I respond to you when what you say could be plagued with various modes of insincerity or when what you do could be extenuated by an excuse? In no case can I really *know* whether whatever is between us contains deception or misunderstanding; nor can I necessarily know whether the harm you've done me was inadvertent as opposed to intentional. And if

¹⁴ William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016 (1995).

¹⁵ RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 271 (1981).

my response to what really happened (is happening) is predicated on what I know, then *that* is what I do: I treat the problem as one of knowledge, and so I may do nothing when perhaps doing something is called-for; but since I condition what I do on what I know, I feel forced to do nothing while I fiddle around perfecting my knowledge.¹⁶ But doing nothing is also something for which I am responsible and something which I must be prepared to elaborate when demanded to do so by someone in a position to question me. Certainly it is *a* response for me to say: "But I didn't know, and since what I do hangs on what I know, I couldn't do anything." But it is just *a* response. It may or may not in a given situation get me off the hook for refusing or taking a certain position when I should not have, or for acting to take a position or for not acting when I should have.

This is all in the hope of sketching out that privacy is a physical limitation that creates more than physical distance between us. It cannot be overcome by "inferences" or any other means of denying what John Henry Wisdom—Wittgenstein's greatest student (apologies to Elizabeth Anscombe)—called "the otherness of others[.]"¹⁷ Privacy is a condition that defines relationships, a condition of community that may explain, for example, that feeling of loneliness we have all experienced when we find others inaccessible or unknowable, or when we see ourselves in the same way.¹⁸ You can be on guard against some of the upshots of privacy's difficulties: for instance, don't believe people whom you have reason to disbelieve. This is not to say, of

¹⁶ STANLEY CAVELL, *The Avoidance of Love: A Reading of King Lear*, in *MUST WE MEAN WHAT WE SAY?* 329-30 (1969).

That couple over there, drinking coffee, talking, laughing. Do I believe they are just passing the time of day, or testing out the field for a flirtation, or something else? In usual cases, not one thing or another; I neither believe nor disbelieve. Suppose the man suddenly puts his hands to the throat of the woman. Do I believe or disbelieve that he is going to throttle her? The time for that question, as soon as it comes to the point, is already passed. The question is: What, if anything, do I do? *What I believe hangs on what I do or do not do and on how I react to what I do or do not do.*

Id. at 329 (emphasis added).

¹⁷ JOHN WISDOM, *OTHER MINDS* 217 (1952).

¹⁸ J.L. AUSTIN, *Other Minds*, in *PHILOSOPHICAL PAPERS* 112 (J.O. Urmson & G.J. Warnock eds., 3d ed. 1979).

All three varieties of worry may arise, and often do, in connexion with the actions of persons whom we know very well. Any or all of them may be at the bottom of the passage from Mrs. Woolf: all work together in the feeling of loneliness which affects everybody at times.

Id. (footnotes omitted).

course, that one should always be on guard: “why believe anyone (ever)?” is borderline nonsense.¹⁹ Indeed, only the worst sort of skeptic—like Othello or like Henry Fonda in Preston Sturges's *The Lady Eve* (1941)²⁰—would be so full of doubt (so obsessed with evidence) that they would believe in a silly handkerchief or a photograph over the flesh and blood woman who loves them. And look what happened to them. But even for the person who doubts only when there are good grounds for doubt, there will be no rescue from that nagging sense both of a need for other people and at once a separateness from them.

Hiddenness prevents knowledge, which in turn prevents or destabilizes our moral judgments, at least to the extent that they are based on knowledge or some version of it. If you want to know what someone is up to, ordinarily the best thing to do is to commune with them, ask them, or perhaps even behold them. But when you have reason to believe that they are deceiving you, or that they will deceive you, or when you are afraid of tipping them off, then asking them what they are up to, or buddying up to them or hanging around them are all unattractive options. In these situations, their hiddenness must be overcome through one of two ways: stealth or coercion. In other words, if they will not let us into their private worlds, then we must let ourselves in. But to do that—to invade their privacy, *legally* speaking—you must already have a certain amount of knowledge about what they are up to, that is, you must be in a position *already* to make a moral judgment about them. But of course if you are already in such a position, then your need to overcome their hiddenness is weak, since you have already overcome it.

Put in Fourth Amendment terms, you cannot violate someone's privacy unless you have a pretty good idea about what you will find if you do. This explains, for example, why search

¹⁹ *Id.* at 115.

The question, pushed further, becomes a challenge to the very possibility of ‘believing another man’, in its ordinarily accepted sense, at all. What ‘justification’ is there for supposing that there is another mind communicating with you at all? How can you know what it would be like for another mind to feel anything, and so how can you understand it? It is then that we are tempted to say that we only mean by ‘believing him’ that we take certain vocal noises as signs of certain impending behaviour, and that ‘other minds’ are no more really real than unconscious desires.

Id.

²⁰ WILLIAM SHAKESPEARE, *OTHELLO*; *THE LADY EVE* (Paramount Pictures 1941).

warrants only infrequently turn up no evidence and therefore only infrequently turn into acquittals for the targets of the searches. Don Dripps put it this way in his discussion of *United States v. Leon*²¹ nearly two decades ago:

[J]udicial hostility to the exclusionary rule, although doubtless present in certain cases, is not the only explanation for a low rate of lost convictions. The second fact about search warrants—their surprising accuracy in predicting the location of criminal evidence—provides an objective indication that the low suppression rate is consistent with the thesis that most warrants are validly issued.

In the [National Center for State Courts] study, the authors measured the frequency with which warrant searches resulted in the seizure of evidence described in the warrant, based on the number of returns filed. In six of seven cities, the proportion of searches that discovered at least some of the evidence named in the warrant ranged from 74% to 89%. That record, reflecting the best available information, is strikingly impressive.²²

Dripps's point here has been proven by a much more recent study conducted by my colleague Larry Benner, who analyzed a random sample of search warrants issued in the San Diego Judicial District in 1998.²³ Focusing on the 122 search warrants for narcotics (49.2% of all cases), Benner found that, of those warrants that were actually executed, some drug was recovered in 73.9% of the cases²⁴ and in an even higher percentage of cases—a whopping 91.7%—where drug-sniffing dogs were deployed.²⁵ Let's accept, therefore, that police who search by warrant have a pretty good idea about what they will find. This "pretty good idea" is what the law calls "probable cause," which while not enough to convict anyone of anything, does put police in a position to get by force, if necessary, the extra evidence that can turn a justified invasion of privacy (based on probable cause that crime has occurred) into a conviction (based on proof beyond

²¹ 468 U.S. 897 (1984).

²² Donald Dripps, *Living with Leon*, 95 YALE L.J. 906, 924-25 (1986) (footnotes omitted).

²³ Laurence A. Benner & Charles T. Samarkos, *Searching for Narcotics in San Diego: Preliminary Findings from the San Diego Search Warrant Project*, 36 CAL. W. L. REV. 221, 224 (2000).

²⁴ *Id.* at 249.

²⁵ *Id.* at 252.

a reasonable doubt that crime has occurred). The rub, therefore, at least as I see it, is getting from a mere hunch to the “reasonable suspicion” (which by Bill Stuntz’s extrapolation, requires about a one in four chance that crime is afoot)²⁶ or probable cause that would justify penetrating the privacy of the target of your suspicion. In other words, when police have low or no suspicion that crime is afoot, but they are nonetheless interested in probing further into the matter, the Fourth Amendment constrains what they may do *with no justification at all* in order to *get* the necessary suspicion or knowledge that will justify their intruding further into the matter and the privacy of their target.

This difficulty for police—that the lawfulness of their intrusions or surveillances are determined by or tied to how much they know about you—makes good sense, too. Hiddenness is not just a sort of problem in that you become defined by, in a sense at least, being unknowable. It is for that very reason also a sort of accomplishment. Some people, some of whom are criminals, are better at remaining hidden than others. I am reminded here of Chief Justice Warren’s quip in *Lewis v. United States*, where he wrote that the unsavory uses of undercover practices and electronic bugging are largely directed at the detection, apprehension, and conviction of morals offenders involved in vice, liquor, or narcotics—activities where “[t]he participants in the crime enjoy themselves” and so are having too much fun to rat each other out.²⁷ It is nearly impossible to exist in a community and block others from picking up a lot about us; our simply being there in the public observable world where what we say, do, and refrain from saying and doing manifests more about us than we sometimes want to reveal or think we are revealing. Someone who reveals nothing or next to nothing at the level of action gives law enforcement the perception that penetrating his or her privacy is necessary not to confirm what they know about him or her already, but instead, in order to know anything at all. People so good at remaining hidden may be deceiving us as all so-called “private” people do.

²⁶ Stuntz, *supra* note 14, at 1023.

²⁷ Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment “Reasonableness”*, 98 COLUM. L. REV. 1642, 1706 n.206 (quoting *Lewis v. United States*, 385 U.S. 206, 210 n.6 (1966) (quoting Model Penal Code § 2.10 commentary at 16 (Tentative Draft No. 9, 1959)).

“He is a private person” is a phrase that Richard Posner insists has a pejorative sense).²⁸ But leaving no trail whatsoever is no mean feat. This may be what Scott Sundby means when he says that the government must trust people against whom it has insufficient amounts of suspicion: that they have achieved a sort of hiddenness that deserves protection, not bashing.²⁹ I take Sundby to be asking not, for example, whether Greenwood had privacy in his opaque garbage bag set by curbside for pickup, but rather, what Laguna Beach police were doing rummaging through it.³⁰ Of course hiddenness rarely inspires trust, though it is in the end a rather neutral fact in that it is hard to know what to make of it.

Hiddenness is a problem: when we make judgments, we cannot always rely on knowledge, so probable cause allows us to take positions on who has done what and under what circumstances. It bears repeating that normally when people seem hidden to us, if we are not in a position to commune with them, we can apply pressure to them: ask them what they're up to. Here, either we do not have enough suspicion (hiddenness blocks us from getting it) or our revealing our interest in what they're up to will cause them to withdraw or close up shop. And what will intruding on others' privacy tell us? In other words, normally our concern with privacy is with how things are with other people (sincerity): the evidence of how things are with them may be in conflict with the real state of affairs (“you *seem* or *look* or *appear* to be nice”). If I cannot count on your forthrightness, that is, if I cannot count on you to reveal yourself in a non-manipulative way, then gathering more evidence without your co-operation, say, by talking to co-workers, an ex, or a neighbor, is meant to overcome problems of sincerity (or, I should say, insincerity) by gathering evidence that you do not or will not voluntarily provide. That evidence, in turn, is supposed to reveal something about your intentions (your actions in prospect) or completed actions that you would not own up to if asked. As an aside, there are good bases for not coming clean in the process or context of being accused, even when the accuser is a position to question us: as Susan Bandes recently observed, confessing to crime rarely leads to reconciliation. Instead, suspects who confess are uniformly charged with and convicted

²⁸ POSNER, *supra* note 15, at 272-73.

²⁹ Scott E. Sundby, “Everyman”’s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?, 94 COLUM. L. REV. 1751 (1994).

³⁰ *Id.* at 1790-93.

of more serious offenses than those who retain bargaining leverage by forcing police to demonstrate their guilt through investigative strategies other than interrogation.³¹

III. THE DOMAIN OF THE PRIVATE IN CONSTITUTIONAL CRIMINAL PROCEDURE

A. Was Katz *All That New*?

What special problems, then, does privacy (hiddenness) pose to community's goal of providing protection for persons and their property? Certainly the Supreme Court recognizes that privacy is both a good and a problem. It has emphasized for over a century the importance of privacy to a fully flourishing life,³² yet at the same time it has resisted converting all surveillance into what the Fourth Amendment calls a "search" that would as such need to be justified by some quantum of antecedent reasonable suspicion or probable cause.³³ Not until the 1960s, however, did the Court begin to worry to death the conflict posed by an individual's right to remain hidden and a governmental need to overcome hiddenness as a condition of protecting persons and their property.³⁴

As the Warren Court worked its way through the 60s, the doctrines of incorporation and nonretroactivity gave it repeated opportunities to review criminal convictions. In those decisions, as scientific investigative techniques emerged as constitutionally superior to bullying (or what Don Dripps calls the arc lamp and

³¹ Susan Bandes & Jack Beermann, *Lawyering Up*, 2 GREEN BAG 2d 5, 12 (1998).

Studies show that suspects who confess are more likely to have charges filed against them, less likely to have charges dropped, and less likely to receive a plea bargain, that they receive worse deals if they do bargain, are more likely to be convicted at trial, and more likely to be convicted of serious charges.

Id.

³² *Boyd v. United States*, 116 U.S. 616, 630 (1886).

³³ *California v. Ciraolo*, 476 U.S. 207, 213 (1986).

³⁴ See discussion *infra* notes 36-41 and accompanying text.

the rubber hose),³⁵ the Court overruled its then half-century-old mere-evidence rule, which for no good reason had threatened to keep the identity of criminals hidden. *Warden v. Hayden*³⁶ held that clothing worn by the suspect in the armed robbery of a taxistand could not be described as fruit, instrumentality, or contraband, but the clothing was nonetheless just the sort of evidence for which police (from then on) could search for and seize.³⁷ The kernel of Justice Brennan's majority opinion is his rejection of a so-called "primary right theory."³⁸ This primary right theory was oweable to *Gouled v. United States*.³⁹ *Gouled* had invalidated the seizure of unexecuted form contracts, which had been described by the lower courts as non-seizeable, since they were neither fruit nor instrumentality or contraband.⁴⁰ In other words, *Gouled* prohibited the search for and seizure of purely evidentiary materials. According to *Gouled's* primary right theory, the government and the search victim would compete over whose interest in the seized property was superior.⁴¹ If the government had the superior interest, then the government could admit the property at trial and retain it afterwards. If the search victim had the superior interest, then he or she could repossess the property before trial and thereby effect its exclusion.

In Justice Brennan's view, the primary-right theory had lost much of its force as early as 1914, when the remedial structure

³⁵ 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, 632 (1990).

[T]he warnings have contributed generally to a more humane police culture, and they surely impose some limits on police tactics in specific cases. The reading of rights affects the questioner, even if it glances off the suspect. Only a corroded conscience could live with reading the *Miranda* card by the glare of the arc lamp. And the law-abiding police interrogator must tread rather lightly; too much pressure and the suspect may invoke the right to counsel.

Id. (footnote omitted).

³⁶ 387 U.S. 294 (1967).

³⁷ *Hayden*, 387 U.S. at 300-01.

³⁸ *Id.* at 303-04.

³⁹ 255 U.S. 298 (1921).

⁴⁰ *Gouled*, 255 U.S. at 305.

⁴¹ *Id.* at 309.

of the Fourth Amendment changed.⁴² Until then, aggrieved persons obtained redress for illegal searches by trespass and replevin actions, which were dependent on proof of a superior property interest, but were unrelated to *how* government obtained the property.⁴³ That remedial structure, Brennan continued, was discredited by the emergence of the privacy model, which had changed both the meaning and consequences of governmental illegality.⁴⁴ Therefore, to declare a search unreasonable after *Hayden* means that the evidence so derived is inadmissible at the search victim's trial, even absent the right to repossess it, as with contraband. Contrariwise, the government now can introduce evidence at trial even absent a superior interest, as with goods stolen from an unidentified victim.⁴⁵

This shift in remedy, Brennan wrote, ended the contest over property interests.⁴⁶ For example, in 1920, in *Silverthorne Lumber Co. v. United States*,⁴⁷ a father and son who ran a lumber yard had conspired to defraud the United States by charging a government-controlled railroad for boards not received.⁴⁸ Brennan reads Justice Holmes's vague opinion in *Silverthorne* to say that, as victims of an unjustified search of their premises, the Silverthornes could replevy their documents pre-trial.⁴⁹

⁴² *Hayden*, 387 U.S. at 304-05 (discussing *Weeks v. United States*, 232 U.S. 383, 393-396 (1914)).

⁴³ *Id.* at 303-05.

⁴⁴ *Id.* at 305-06.

⁴⁵ *Id.* at 307 n.11.

⁴⁶ *Id.* at 305.

⁴⁷ 251 U.S. 385 (1920).

⁴⁸ Brief on Behalf of Plaintiffs-in-Error at 4, *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920) (No. 358).

⁴⁹ *Hayden*, 387 U.S. at 305 (discussing *Silverthorne*, 251 U.S. at 391). The decision reversed a trial judge's contempt charge issued against defendants for their failure to comply with a *subpoena duces tecum* for records, which were illegally seized, then returned. *Silverthorne*, 251 U.S. at 391. Holmes said nothing directly about copies the Government had made of the records, except that illegally obtained evidence should not be used at all. *Id.* at 392. The illegal search and

Brennan adds that while the objectionable evidence included *copies* of documents that the Government possessed legally, and not just the illegally seized documents themselves, the Court nonetheless prohibited the United States from introducing the copies at trial, not on the ground that the copies were the defendants' intellectual property, but because the government must not profit from its own wrong.⁵⁰ Likewise, a year later, Gouled successfully petitioned the Court to prohibit the United States from using papers of evidentiary value only, even though he had lost his pretrial motion for return of the papers.⁵¹ Since defendants in both cases achieved the chief-thing desired⁵² without successfully asserting a superior property right in the object seized, Justice Brennan concluded (rightly or wrongly)⁵³ that the suppression remedy had crowded property law out of the Fourth Amendment limelight.⁵⁴

Seven months after Brennan authored his opinion in *Hayden, Katz v. United States*⁵⁵ would literalize what Brennan had already established: that property law would no longer be the theoretical underpinning of the Fourth Amendment.⁵⁶ But Brennan was right in *Hayden*: the foundation for *Katz* was anything but new. It is by now a familiar story that from the time Congress empowered the Supreme Court to review criminal convictions and sentences, a "search" within the meaning of Fourth Amendment jurisprudence entailed some sort of physical invasion of an area that the search victim could claim as his

seizure occurred when officers, carrying only a subpoena, stripped the company office of all its books, papers, and documents and carried them away. Plaintiff's Brief at 4, *Silverthorne* (No. 358). The subpoena was overbroad, and, like any subpoena, carried with it no right of entry. *Id.* at 5, 9. Seven federal marshals executed the subpoena while the Silverthornes were elsewhere being arrested and admitted to bail. *Id.* at 4-5.

⁵⁰ *Hayden*, 387 U.S. at 305-06 (discussing *Silverthorne*, 251 U.S. at 392).

⁵¹ *Gouled*, 255 U.S. at 312-13.

⁵² See Thomas E. Atkinson, *Prohibition and the Doctrine of the Weeks Case*, 23 MICH. L. REV. 748, 758 (1924).

⁵³ For a criticism of Justice Brennan's position taken in *Hayden*, see Daniel Yeager, *Search, Seizure and the Positive Law: Expectations of Privacy Outside the Fourth Amendment*, 84 J. CRIM. L. & CRIMINOLOGY 249, 263-76 (1993).

⁵⁴ *Hayden*, 387 U.S. at 307.

⁵⁵ 389 U.S. 347 (1967).

⁵⁶ *Katz*, 389 U.S. at 353-54.

own.⁵⁷ What is less familiar is that even in the days of this so-called “trespass doctrine”—which is generally viewed to have begun with *Boyd* in 1886 and to have been extinguished by *Katz* in 1967—privacy was its justification. No doubt Justice Brennan had it on good authority when he noted in *Hayden* that privacy had even then long been a Fourth-Amendment value.⁵⁸ For example, one reason that governmental investigators need a good factual basis to intrude into your constitutionally protected areas—your “persons, houses, papers, and effects”—is that those areas or interests are or can be the situs of matters or activities of intimacy,⁵⁹ or, in the view of Justice Bradley, who authored *Boyd*, it is the Supreme Court’s job to guard against “all invasions on the part of the government . . . of . . . the privacies of life.”⁶⁰ Similar language later appeared in the majority

⁵⁷ See, e.g., *Olmstead v. United States*, 277 U.S. 438 (1928).

⁵⁸ *Hayden*, 387 U.S. at 307-09.

⁵⁹ COOLEY, *supra* note 10, at 346.

An important civil right is intended to be secured by the provisions incorporated in the National and State Constitutions, which, in substance, declare that unreasonable searches and seizures shall be unlawful, and that all persons shall be secure in their persons, houses, papers, and effects against them. In their origin these provisions had in view the mischiefs of such oppressive action by the government or its officers, as the seizing of papers to obtain the evidence of intended crimes; but their protection goes much beyond such cases: it justly assumes that a man may have secrets of business, of friendship, or of more tender sentiments, to which his books, papers, or letters may bear testimony, but with which the public have no concern; that he may even have secrets of shame which are so exclusively his own concern that others have no right to pry into or to discuss them.

Id. (footnote omitted).

⁶⁰ *Boyd v. United States*, 116 U.S. 616, 630 (1886).

opinions of the first Justice Harlan,⁶¹ and Justice Day,⁶² and throughout Prohibition, when privacy played a part in decisions where the Court invalidated the search-by-stealth of Gouled's office⁶³ and two overreaching searches incident to arrest for

⁶¹ Interstate Commerce Comm'n v. Brimson, 154 U.S. 447 (1894).

We do not overlook these constitutional limitations which, for the protection of personal rights, must necessarily attend all investigations conducted under the authority of Congress. Neither branch of the legislative department, still less any merely administrative body, established by Congress, possesses, or can be invested with, a general power of making inquiry into the private affairs of the citizen.

Id. at 478.

⁶² Flint v. Stone Tracy Co., 220 U.S. 107 (1911).

It is urged in a number of the cases that in a certain feature of the statute there is a violation of the Fourth Amendment of the Constitution, protecting against unreasonable searches and seizures. This Amendment was adopted to protect against abuses in judicial procedure under the guise of law, which invade the privacy of persons in their homes, papers and effects, and applies to criminal prosecutions and suits for penalties and forfeitures under the revenue laws.

Id. at 174; *see also* Weeks v. United States, 232 U.S. 383, 390 (1914) ("Resistance to these practices had established the principle which was enacted into the fundamental law in the Fourth Amendment, that a man's house was his castle, and not to be invaded by any general authority to search and seize his goods and papers.").

⁶³ Gouled v. United States, 255 U.S. 298 (1921).

The prohibition of the Fourth Amendment is against all unreasonable searches and seizures and if for a Government officer to obtain entrance to a man's house or office by force or by an illegal threat or show of force, amounting to coercion, and then to search for and seize his private papers would be an unreasonable and therefore a prohibited search and seizure, as it certainly would be, it is impossible to successfully contend that a like search and seizure would be a reasonable one if only admission were obtained by stealth instead of by force or coercion. The security and privacy of the home or office and of the papers of the owner would be as much invaded and the search and seizure would be as much against his will in the one case as in the other, and it must therefore be regarded as equally in violation of his constitutional rights.

Id. at 305-06.

Agnello's cocaine⁶⁴ and Lefkowitz's liquor.⁶⁵

In between *Agnello* and *Lefkowitz*, fuller explication of privacy as a protected interest appeared in Justice Brandeis's famous dissent in *Olmstead v. United States*.⁶⁶ The dissent cautioned that the sort of warrantless, nonconsensual telephone tapping that revenue agents had done to Olmstead invades the privacy of the target and everyone he or she calls, violating "the right most valued by civilized men"—"the right to be let alone."⁶⁷ This reference to this cherished "right to be let alone" was nicked from Judge Thomas Cooley's treatise on tort law,⁶⁸ which makes not a single reference to this right in his treatment of the law of search and seizure.⁶⁹ In the 1940s⁷⁰ and 1950s,⁷¹ the Court spoke

⁶⁴ *Agnello v. United States*, 269 U.S. 20 (1925).

And later, to the end that government employees without a warrant shall not invade the homes of the people and violate the privacies of life, Congress made it a criminal offense, punishable by heavy penalties, for any officer, agent or employee of the United States engaged in the enforcement of any law to search a private dwelling house without a warrant directing such search.

Id. at 32-33.

⁶⁵ *United States v. Lefkowitz*, 285 U.S. 452 (1932).

The disclosed circumstances clearly show that the prohibition agents assumed the right contemporaneously with the arrest to search out and scrutinize everything in the room in order to ascertain whether the books, papers or other things contained or constituted evidence of respondents' guilt of crime, whether that specified in the warrant or some other offense against the Act. Their conduct was unrestrained. The lists printed in the margin show how numerous and varied were the things found and taken.

The 4th Amendment forbids every search that is unreasonable and is construed liberally to safeguard the right of privacy.

Id. at 463-64.

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

⁶⁷ *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting).

⁶⁸ See generally COOLEY, *supra* note 10.

⁶⁹ *Id.* at 346-47.

⁷⁰ *Goldman v. United States*, 316 U.S. 129 (1942). In *Goldman*, officers eavesdropped on conversations through the use of a "detectaphone" that was attached to, but did not penetrate, a common wall between federal agents and their suspects. *Id.* at 131. Justice Murphy, in dissent, relied heavily on Brandeis while describing "the right to privacy" as "[o]ne of the great boons secured to

often of the Fourth Amendment's protection of a right of privacy. Undoubtedly Justice Douglas was the loudest voice,⁷² but not the only one. Bombshells like *Wolf v. Colorado*⁷³ and *Rochin v. California*⁷⁴ explicitly anticipated the abundant privacy-oriented decisions of the 1960s. By 1961, when the Court in *Mapp v. Ohio*⁷⁵ declared, "the right to privacy embodied in the Fourth Amendment is enforceable against the States,"⁷⁶ the privacy rationale that would be pronounced six years later in *Katz* could claim nearly a century of support.

B. *Expectations of Privacy Outside the Fourth Amendment*

1. The Positive Law as a Source of Expectations of Privacy

Once freed from the hold of property law, to what would the Court tie our reasonable expectations of privacy? A decade after *Katz*, the Court recognized that constitutionally protected expectations must lie somewhere outside of Supreme Court

inhabitants of this country by the Bill of Rights." *Id.* at 136 (Murphy, J., dissenting). See also *Brinegar v. United States*, 338 U.S. 160, 176 (1949); *Lustig v. United States*, 338 U.S. 74, 79 (1949); *Wolf v. Colorado*, 338 U.S. 25, 27 (1949); *United States v. Wallace & Tiernan Co.*, 336 U.S. 793, 798 (1949); *Shapiro v. United States*, 335 U.S. 1, 70 (1948) (Frankfurter, J., dissenting); *Johnson v. United States*, 333 U.S. 10, 14 (1948); *Harris v. United States*, 331 U.S. 145, 150 (1947); *Zap v. United States*, 328 U.S. 624, 628 (1946); *Davis v. United States*, 328 U.S. 582, 587 (1946); *Oklahoma Press Publ'g Co. v. Walling*, 327 U.S. 186, 204 n.30 (1946); *Feldman v. United States*, 322 U.S. 487, 492 (1944).

⁷¹ See *Henry v. United States*, 361 U.S. 98, 102 (1959); *Frank v. Maryland*, 359 U.S. 360, 365 (1959); *Jones v. United States*, 357 U.S. 493, 498 (1958); *Rea v. United States*, 350 U.S. 214, 217-18 (1956); *Irvine v. California*, 347 U.S. 128, 132-33 (1954); *Salsburg v. Maryland*, 346 U.S. 545, 544 n.11 (1954); *On Lee v. United States*, 343 U.S. 747, 754 (1952); *Rochin v. California*, 342 U.S. 165, 172 (1952); *Stefanelli v. Minard*, 342 U.S. 117, 119-20 (1951); *United States v. Jeffers*, 342 U.S. 48, 52 (1951); *District of Columbia v. Little*, 339 U.S. 1, 7 (1950); *United States v. Rabinowitz*, 339 U.S. 56, 66 (1950); *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950).

⁷² *E.g.*, *Draper v. United States*, 358 U.S. 307, 318-19 (1959) (Douglas, J., dissenting); *Schwartz v. Texas*, 344 U.S. 199, 205 (1952) (Douglas, J., dissenting); *Pub. Util. Comm'n v. Pollak*, 343 U.S. 451, 467 (1952) (Douglas, J., dissenting); *Beauharnais v. Illinois*, 343 U.S. 250, 285 (1952) (Douglas, J., dissenting); *McDonald v. United States*, 335 U.S. 451, 453 (1948).

⁷³ 338 U.S. 25 (1949).

⁷⁴ 342 U.S. 165 (1952).

⁷⁵ 367 U.S. 643.

⁷⁶ *Mapp*, 367 U.S. at 660.

holdings. That recognition appeared in *Rakas v. Illinois*,⁷⁷ which denied Rakas a privacy expectation in a car in which he was a passenger, evidently for his failure to claim a possessory interest in the car or in the instruments of a robbery found therein.⁷⁸ In his majority opinion, Justice Rehnquist wrote:

Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. One of the main rights attaching to property is the right to exclude others, and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of his right to exclude. Expectations of privacy . . . need not be based on a common-law interest in real or personal property, . . . [but . . . the Court has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by [the Fourth Amendment]].⁷⁹

Rehnquist later clarified in *Rawlings v. Kentucky*⁸⁰ that “in all likelihood” did not mean “in all circumstances.”⁸¹ There, the Court rejected Rawlings's claim that his ownership of drugs found in an unjustified search of an acquaintance's purse violated his privacy. *Rakas*, Justice Rehnquist reasoned, had made “ownership . . . one fact to be considered[,] . . . [but] emphatically rejected the notion that ‘arcane’ concepts of property law ought to control . . . the Fourth Amendment.”⁸²

⁷⁷ 439 U.S. 128 (1978).

⁷⁸ *Rakas*, 439 U.S. at 149.

⁷⁹ *Id.* at 143 n.12 (citation omitted).

⁸⁰ 448 U.S. 98 (1980).

⁸¹ *Rawlings*, 448 U.S. at 104-06.

⁸² *Id.* at 105. In *United States v. Salvucci*, 448 U.S. 83, 94-95 (1980), decided the same day as *Rawlings*, the Court rejected defendants' claim that their having been charged with a possessory offense conferred automatic standing on them to challenge a search conducted under a defective warrant of Salvucci's co-defendant's mother's apartment. “While property ownership is clearly a factor to be considered in determining whether an individual's Fourth Amendment rights have been violated,” wrote the Court, “property rights are neither the beginning nor the end of this court's inquiry.” *Salvucci*, 448 U.S. at 91.

The authors of separate opinions in *Rakas* and *Rawlings* thought that the majorities in both had given property law too much⁸³ or too little⁸⁴ credit, even though nothing in Rehnquist's opinion in either decision tells us how much weight the "consider[ation]" deserves.⁸⁵ Justice Blackmun told us in *Rawlings* that property rights should occupy a position somewhere above that given them by Rehnquist, but below that of the pre-*Katz* era:

Nor do I read this Court's decisions to hold that property interests cannot be, in some circumstances at least, weighty factors in establishing the existence of Fourth Amendment rights. Not every concept of ownership or possession is 'arcane.' Not every interest in property exists only in the desiccated atmosphere of ancient maxims and dusty books. . . . In my view, th[e] 'right to exclude' often may be a principal determinant in the establishment of a legitimate Fourth Amendment interest.⁸⁶

Despite the "weighty" and "principal" status of property law, Blackmun concluded that *Rawlings*'s ownership of the drugs he had deposited in an acquaintance's purse moments before it was invaded by police was insufficient to ground a privacy interest, but more convincing evidence of a bailment contract between the parties (another expectation expressed in the positive law)

⁸³ *Rakas*, 439 U.S. at 156 (White, J., dissenting). Justice White chastised the *Rakas* majority for tying the Fourth Amendment to property law, when the Amendment's privacy basis traditionally had made ownership and possession unnecessary as a condition to a search victim's right to suppress evidence. *Id.* (White, J., dissenting). Cf. *The Supreme Court, 1978 Term*, 93 HARV. L. REV. 62, 178 (1979) ("In the name of developing the *Katz* 'privacy' test, the *Rakas* Court has instead revived the centrality of property and possession by explicitly investing only the owner/possessor with a clear 'legitimate expectation.'").

⁸⁴ *Rawlings*, 448 U.S. at 111-13 (Blackmun, J., concurring); *id.* at 114-20 (Marshall, J., dissenting). Cf. Albert W. Alschuler, *Interpersonal Privacy and the Fourth Amendment*, 4 N. ILL. U. L. REV. 1, 13 (1983) ("*Rakas* did not elevate property rights over privacy rights so much as it diminished the value of both.>").

⁸⁵ Cf. Ira Mickenberg, *Fourth Amendment Standing After Rakas v. Illinois: From Property to Privacy and Back*, 16 NEW ENG. L. REV. 197, 219 (1981) ("*Katz* and *Alderman* . . . [held] that the property right is merely one of many factors to consider in deciding [F]ourth [A]mendment issues. *Rakas* carried this line of reasoning to its logical conclusion by holding that the *Jones* test . . . was not dispositive, and was but one of many issues to consider."); *id.* at 223 ("[T]he *Rawlings* majority . . . list[ed] numerous factors other than possession of the purse which could have given the defendant a legitimate expectation of privacy.>").

⁸⁶ *Rawlings*, 448 U.S. at 112 (Blackmun, J., concurring). *But see* Mickenberg, *supra* note 85 at 223 n.128 (suggesting that Blackmun "urges the adoption of such a fixed rule").

would have led him to conclude otherwise.⁸⁷ (And that the facts of *Rawlings* did lead Professor LaFave—whom the Court has cited 123 times—to recognize *Rawlings* as bailee is a good sign that the Court had missed something essential there).⁸⁸ Justice Marshall dissented, agreeing with Blackmun's statement that not all property law is "arcane."⁸⁹ But Marshall's endorsement, too, at least in this case,⁹⁰ was pitched at too high a level of abstraction to be instructive. "Rejection of those finely drawn distinctions as irrelevant to the concerns of the Fourth Amendment," he wrote, "did not render property rights *wholly outside* its protection."⁹¹ No doubt ownership or possession is for the Court *an* indicia of a protected interest. The uncertainty is over *how* to weight the interest. In the Court's own words, property law remains "marginally relevant," "weighty," "principal," and, according to a 1992 case, *Soldal v. Cook County*,⁹² not altogether "snuffed out."

None of the decisions quoted above cut against the sense

⁸⁷ *Rawlings*, 448 U.S. at 112-13 (Blackmun, J., concurring).

⁸⁸ Professor LaFave properly criticized the Court for its failure to see that a bailment had in fact occurred, and for ignoring the legal consequences of such an arrangement. 4 WAYNE R. LAFAVE, *SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 11.3(c), at 153-58 (3d ed. 1996).

⁸⁹ *Rawlings*, 448 U.S. at 119 (Marshall, J., dissenting).

⁹⁰ In at least one other case, Marshall was explicit.

As the Court acknowledges, we have traditionally looked to a variety of factors in determining whether an expectation of privacy asserted in a physical space is "reasonable." Though those factors do not lend themselves to precise taxonomy, they may be roughly grouped into three categories. First, we consider whether the expectation at issue is rooted in entitlements defined by positive law. Second, we consider the nature of the uses to which spaces of the sort in question can be put. Third, we consider whether the person claiming a privacy interest manifested that interest to the public in a way that most people would understand and respect.

Oliver v. United States, 466 U.S. 170, 189 (1984) (Marshall, J., dissenting) (citation omitted).

⁹¹ *Rawlings*, 448 U.S. at 119 (Marshall, J., dissenting) (emphasis added).

⁹² 506 U.S. 56, 64 (1992).

that, at its inception, *Katz*⁹³ was meant to supplement, not supplant, property law. And to the extent that pre-*Katz* cases such as *Jones v. United States*,⁹⁴ *Silverman v. United States*,⁹⁵ *Chapman v. United States*,⁹⁶ and *Hayden*⁹⁷ made any other reading of *Katz* possible, then those cases, or those interpreting them, were wrong.⁹⁸ At its very narrowest (indeed, superficially), *Katz* solved the specific problem posed by modes of eavesdropping that the law of trespass could not adequately regulate. Or, as Judge Posner puts it, electronic eavesdropping interferes with the secrecy of communications, but not with the seclusion interests of the communicators.⁹⁹ *Katz*'s solution was that proof of a governmental trespass into a constitutionally protected area no longer would be a necessary condition to Fourth Amendment protection against quests for evidence.¹⁰⁰ Necessary, no; sufficient, yes.¹⁰¹ It follows that the positive laws not only of property, but of crime, tort, and contract could easily govern a good number of cases that address when a search occurs, whose interest it invades, and who may privately authorize such a search. The Court purports to recognize this when it declared in *Rakas* that our expectations of privacy "must have a source outside of the Fourth Amendment."¹⁰² That dictum notwithstanding, property law (specifically) and the positive law (more generally) remain relevant, but dilute—mentioned for

⁹³ 389 U.S. 347 (1967).

⁹⁴ 362 U.S. 257 (1960).

⁹⁵ 365 U.S. 505 (1961).

⁹⁶ 365 U.S. 610 (1961).

⁹⁷ 387 U.S. 294 (1967).

⁹⁸ See Yeager, *supra* note 53.

⁹⁹ POSNER, *supra* note 15, at 320-21.

¹⁰⁰ *Katz*, 389 U.S. at 352-53.

¹⁰¹ It is not that property rights are "only marginally" relevant to Fourth Amendment cases, the Court recently explained; rather, as *Hayden* and *Katz* recognized that "protection of privacy" is the "principle object of the Amendment," property no longer is "the sole measure" of protection. But this is not to say, added the Court, that "this shift in emphasis had snuffed out" the relevance of property law to Fourth Amendment cases. *Soldal v. Cook County*, 506 U.S. 56, 64 (1992).

¹⁰² *Rakas*, 439 U.S. at 144 n.12.

unstated reasons and with inconsistency from case to case and justice to justice.¹⁰³ Property law's status, for example, slides awkwardly from "weighty" and "principal" to no status at all.¹⁰⁴ A more formal and less erratic acknowledgment of "expressed expectations of privacy before resorting to unexpressed ones would not only make Fourth Amendment litigation more predictable, but more protective as well—at least where the positive law identifies an interest that a reviewing court could otherwise . . . ignore."¹⁰⁵

The positive law is a source of data about expectations, many of which relate to the right to exclude others. And while I remain convinced that extant positive laws have a way of insinuating themselves into cases even where the Court expressly denies their relevance, here I am not so much interested in asking whether the garbage, liquor, and hotel room were abandoned in *Greenwood*,¹⁰⁶ *Hester*,¹⁰⁷ and *Abel*,¹⁰⁸ whether it was contract law that explains the outcomes in *Stoner*¹⁰⁹ and *Chapman*,¹¹⁰ whether Cox had become the bailee of Rawlings,¹¹¹ whether the Kentucky and Texas laws of criminal trespass are relevant to whether Oliver¹¹² and Dunn¹¹³ were searched, whether Michigan trade-secret law should have (or did) play a

¹⁰³ See Yeager, *supra* note 53, at 306.

¹⁰⁴ *Rawlings v. Kentucky*, 448 U.S. 98, 112 (1980) (Blackmun, J., concurring).

¹⁰⁵ Yeager, *supra* note 53, at 252.

¹⁰⁶ *California v. Greenwood*, 486 U.S. 35 (1988).

¹⁰⁷ *Hester v. United States*, 265 U.S. 57 (1924).

¹⁰⁸ *Abel v. United States*, 362 U.S. 217 (1960).

¹⁰⁹ *Stoner v. California*, 376 U.S. 483 (1964).

¹¹⁰ *Chapman v. United States*, 365 U.S. 610 (1961).

¹¹¹ *Rawlins v. Kentucky*, 448 U.S. 98 (1980).

¹¹² *Oliver v. United States*, 466 U.S. 170 (1984).

¹¹³ *United States v. Dunn*, 480 U.S. 294 (1987).

role in *Dow*,¹¹⁴ whether FAA minimum-overflight regulations are meant to contribute to privacy,¹¹⁵ or whether anything helpful or even intelligible is added by repudiating the privacy claims of nontrespassers like Carter¹¹⁶ and Rakas,¹¹⁷ but not of Olson¹¹⁸ and Jones.¹¹⁹ Instead, I'm being bitten by a bigger, or at least different flea: how should the Fourth Amendment respond if the evidence-gathering strategy is legally kosher, that is, if what the police do offends no expression of the positive law?

2. Laborious Questioning of Others

I doubt that anyone would give me too hard a time for stating that law is a source of expectations of privacy.¹²⁰ But what about the not-insubstantial number of cases where investigators whose acts of observation violate no property law, commit no crime or tort, and cause no breach of contract? *Then* what? To embellish Supreme Court pronouncements on the grammar of searches, Chris Slobogin published an empirical study in *Duke Law Journal* over a decade ago.¹²¹ There he posited that if, according to *Katz* a search occurs when governmental action invades the suspect's reasonable expectation of privacy, then deciding whether a search occurs is an empirical question whose answer should serve as "social authority" (read, "law").¹²² In other words, if the Court is going to reflect rather than dictate our expectations, then Slobogin would

¹¹⁴ *Dow Chem. Co. v. United States*, 476 U.S. 227 (1986).

¹¹⁵ *California v. Ciraolo*, 476 U.S. 207 (1986); *Florida v. Riley*, 488 U.S. 445 (1989).

¹¹⁶ *Minnesota v. Carter*, 525 U.S. 83 (1999).

¹¹⁷ *Rakas v. Illinois*, 439 U.S. 128 (1978).

¹¹⁸ *Minnesota v. Olsen*, 495 U.S. 91 (1990).

¹¹⁹ *Jones v. United States*, 357 U.S. 493 (1958).

¹²⁰ *Oliver*, 466 U.S. at 189 (1984); *see supra* note 90.

¹²¹ CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: REGULATION OF POLICE INVESTIGATION: LEGAL, HISTORICAL, EMPIRICAL, AND COMPARATIVE MATERIALS 219-25 (2d ed. 1998) (reproducing Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society,"* 42 DUKE L.J. 727 (1993)).

¹²² Slobogin & Schumacher, *supra* note 121, at 755.

have us identify systematically what we expect. With that insight in mind, Slobogin asked a group—mostly students—to rate the intrusiveness of various governmental quests for evidence. While he concedes having picked his subjects in a way that might have tilted the results—most are law students or otherwise law sensitive¹²³—still his study provides a far more accurate reflection of privacy expectations than the unidentified sources on which the Court relies. Specific examples of investigative practices that offend the public far more than they do the Court are the government's use of informers and the government's perusal of bank records.¹²⁴ But apart from the positive law and apart from laborious questioning of others about what they find intrusive and how intrusive they find it, there must be some other way, some criteria, for getting at the question of what sorts of actions constitute a search and need as such to be justified by an adequate amount of antecedent suspicion.

My point here is not to undermine the value of Slobogin's survey. Indeed, I would rather bank on his empirical account of how the public assesses various intrusions than wait for the Court's pronouncements, which tend to or at least seem to come from out of nowhere. I say this fully aware, of course, that the Justices, too, are native speakers of English whose utterances are evidence of what we mean by, and how we use, the word "privacy." My intention here is to point to something that the Slobogin study does not: a method by which we could *elaborate* what would make an action count as intrusive enough to require a justification.

3. Three Steps Back to *Katz*: *Ciraolo* to *Riley* to *Bond*

In the published version of a speech he delivered at the University of Arizona in 1986, Wayne LaFave discussed at some length one of two overflight cases that the Court decided on the

¹²³ *Id.* at 737.

¹²⁴ SLOBOGIN, *supra* note 121, at 221.

same day.¹²⁵ In *California v. Ciraolo*,¹²⁶

Santa Clara police received an anonymous tip that marijuana was growing in respondent's backyard. An effort at ground-level surveillance went for naught, as respondent had decided to conceal his gardening and other curtilage-based department from passersby with a solid 6-foot outer fence and 10-foot inner fence. Undaunted, the officer assigned to this investigation then secured a private plane and flew over respondent's house at an altitude of 1,000 feet. He and the officer with him, both trained in marijuana identification, readily identified in a 15 by 25 foot plot in respondent's backyard marijuana plants growing 8-10 feet high

Based upon an affidavit describing the anonymous tip and those observations, a search warrant was issued and executed, resulting in the seizure of 73 marijuana plants.¹²⁷

After Ciraolo's suppression motion was denied, he pleaded guilty to unlawful gardening, but a state appellate court reversed the conviction on the ground that the aerial observation was an illegal search of Ciraolo's "curtilage."¹²⁸ The Supreme Court, however, held that no search had occurred.¹²⁹ To substantiate this conclusion, Chief Justice Burger stated that "[t]he Fourth Amendment simply does not require the police traveling in the public airways at this altitude to obtain a warrant in order to observe what is visible to the naked eye."¹³⁰ In fact, Burger continued, "a 10-foot fence might not shield these plants from the eyes of a citizen or a policeman perched on the top of a . . . 2-level bus."¹³¹ LaFave reports that the Chief Justice had, just before the October 1985 Term, visited London.¹³² LaFave could not confirm that while there Burger had actually ridden one of these buses, which Burger nevertheless imagined

¹²⁵ See Wayne R. LaFave, *The Forgotten Motto of Obsta Principiis in Fourth Amendment Jurisprudence*, 28 ARIZ. L. REV. 291, 295-308 (1986).

¹²⁶ 476 U.S. 207 (1986).

¹²⁷ LaFave, *supra* note 125, at 295-96.

¹²⁸ *Ciraolo*, 476 U.S. at 210.

¹²⁹ *Id.* at 214-15.

¹³⁰ *Id.* at 215.

¹³¹ *Id.* at 211.

¹³² LaFave, *supra* note 125, at 298 n.44.

posed a threat that marijuana growers must guard themselves against. But LaFave did note that “[t]he Chief Justice’s reference to double-decker buses suggests that his travels to London have had a profound effect upon his outlook, but it does not reflect knowledge of the state of affairs in Santa Clara [where] there are no double-decker buses”¹³³ Elaborating the dissenters’ claim that “the actual risk to privacy from commercial or pleasure aircraft is virtually nonexistent,”¹³⁴ LaFave emphasized as well that the majority “fails to acknowledge the qualitative difference between police surveillance and other uses made of the air space. Members of the public use the air space for travel, business, or pleasure, not for the purpose of observing activities taking place within residential yards.”¹³⁵

This position that LaFave and the four dissenters in *Ciraolo* took toward the deployment of airplanes as a way of getting enough information to authorize a subsequent search picked up some real momentum three years later in *Florida v. Riley*,¹³⁶ which featured a helicopter hovering around at 400 feet, a low but lawful height.¹³⁷ While Justice White’s opinion for the plurality relied largely on *Ciraolo*’s risk analysis,¹³⁸ Justice O’Connor wrote separately to express that a search takes place whenever the government positions itself as an observer in a way or from a vantage point that would be non-routine for a private actor to occupy.¹³⁹ The Pasco County Sheriffs’ naked-eye observations made from a helicopter of Riley’s curtilage (a close-to-the-home greenhouse with a missing pane of glass in a rural area known best for the production of Kumquats) were held to be

¹³³ *Id.* at 298 (footnote omitted).

¹³⁴ *Id.* at 300 (citing *Ciraolo*, 476 U.S. at 223 (Powell, J., dissenting)).

¹³⁵ *Id.* at 301 (quoting *Ciraolo*, 476 U.S. at 224 (Powell, J., dissenting)).

¹³⁶ 488 U.S. 445 (1989).

¹³⁷ *Riley*, 488 U.S. at 448.

¹³⁸ *Id.* at 450 (plurality opinion).

¹³⁹ *Id.* at 454-55 (O’Connor, J., concurring).

a nonsearch.¹⁴⁰ Five justices, however, refused to follow the teaching of *Ciraolo*, which ruled that anytime the government is acting lawfully (at least with the unaided eye) it is by definition then not searching, that is, not invading a reasonable expectation of privacy.¹⁴¹ Those five in *Riley* were: O'Connor¹⁴² (who sided with the majority because Riley adduced no evidence that such occurrences were unusual and she saw no need to remand the case for such findings), Blackmun¹⁴³ (who dissented and would remand for such findings), plus Brennan, Marshall, and Stevens (who dissented and saw no need to remand).¹⁴⁴

Despite the pile of *Katz* cases decided by the Court in the 1980s, culminating in *Riley*, there have been precious few in the fifteen years since. There have been two complete non-events: *Padilla*¹⁴⁵ (working out the stake that co-conspirators may have in the property used in their illegal ventures) and *Kyllo*¹⁴⁶ (what I see as a much-ado-about-nothing re-affirming of *Karo v. United States*).¹⁴⁷ There has been one potentially revelatory instance of *Katz* analysis: *Minnesota v. Carter*.¹⁴⁸ In *Carter*, when Officer Thielen cozied up for fifteen minutes to the window of Thompson's apartment—stepping around some shrubs to install himself only a foot from a window almost-but-not-quite-perfectly covered with horizontal blinds—he was violating no Minnesota

¹⁴⁰ *Id.* at 452 (plurality opinion).

¹⁴¹ Certainly I am not the first to notice this. See, e.g., Sherry F. Colb, *What Is a Search? Two Conceptual Flaws in the Fourth Amendment Doctrine*, 55 STAN. L. REV. 119, 132 (2002).

¹⁴² *Riley*, 488 U.S. at 452 (O'Connor, J., concurring).

¹⁴³ *Id.* at 467 (Blackmun, J., dissenting).

¹⁴⁴ *Id.* at 456 (Brennan, J., dissenting).

¹⁴⁵ *United States v. Padilla*, 960 F.2d 854, 859-60 (9th Cir. 1992).

¹⁴⁶ *Kyllo v. United States*, 533 U.S. 27 (2001).

¹⁴⁷ See *id.* at 39 (citing *Karo v. United States*, 468 U.S. 705 (1984)). For the view that *Kyllo* was a significant decision, see Christopher Slobogin, *Peeping Techno-Toms and the Fourth Amendment: Seeing Through Kyllo's Rules Governing Technological Surveillance*, 86 MINN. L. REV. 1393 (2002) and Raymond Shih Ray Ku, *The Founders' Privacy: The Fourth Amendment and New Technologies After Kyllo*, 86 MINN. L. REV. 1325 (2002).

¹⁴⁸ 525 U.S. 83 (1998).

law I know of.¹⁴⁹ This was no search of casual business guests Carter and Johns, we were told, though we got no answer on whether it was a search *at all*, meaning, whether it was a search of Thompson, in whose apartment the criminal drug-packaging venture was being pursued. Only Justice Breyer ruled on the question, stating for only himself in just one page that Thielen's Peeping Tomming was no search: that type of intrusion is lawful and a risk you run living in a garden apartment with a crack in your blinds.¹⁵⁰

There has been one most interesting though compressed, recent, post-*Riley* decision on point, however: *Bond v. United States*.¹⁵¹ Bond and Wiggs (a co-defendant at trial) were passengers on a Greyhound Bus traveling on I-10 en route to Little Rock, Arkansas when it was boarded by U.S. Border Patrol Agent Cesar Cantu Jr. at an immigration checkpoint near El Paso, Texas.¹⁵² After doing some "immigration checks," Agent Cantu reports: "as I was working my way out, I felt a green bag that I could feel a brick-like object in it."¹⁵³ Bond and Wiggs were seated together beneath the green canvas bag, which measured "about maybe a foot and a half long by a foot tall, about a foot width."¹⁵⁴ Because agents frequently find narcotics packaged in brick shapes, this one aroused the suspicions of Agent Cantu.¹⁵⁵ When Cantu then asked who owned the bag, Bond (who had been established as lawfully in the country) claimed ownership and became nervous.¹⁵⁶ Cantu asked for permission to search the

¹⁴⁹ *Carter*, 525 U.S. at 85.

¹⁵⁰ *Id.* at 105-06 (Breyer, J., concurring); see also Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment "Reasonableness"*, 98 COLUM. L. REV. 1642, 1681 nn.155-83 (1998).

¹⁵¹ 529 U.S. 334 (2000).

¹⁵² *Bond*, 529 U.S. at 335.

¹⁵³ *Id.* at 339 (Breyer, J., dissenting).

¹⁵⁴ Hearing on Motion to Suppress Evidence Held on September 18, 1997, at 10, *United States v. Bond* (No. EP-97-CR-682-H).

¹⁵⁵ Hearing at 10, *Bond* (No. EP-97-CR-682-H).

¹⁵⁶ *Id.* at 11-12.

bag; Bond granted it.¹⁵⁷ The brick-shaped object was 1.34 pounds of methamphetamine¹⁵⁸ wrapped in a pair of pants.¹⁵⁹ After Bond and the bag were taken off the bus, Cantu returned and squeezed Wiggs's backpack, which also had a similar brick-shaped object in it.¹⁶⁰ When Cantu asked who owned it, Wiggs claimed ownership,¹⁶¹ admitted that he and Bond were traveling together,¹⁶² and apparently consented to a search of his backpack,¹⁶³ which revealed a 1.32-pound brick of methamphetamine.¹⁶⁴ The men were Mirandized, waived their rights, and in response to a brief interrogation, confessed that a man in California named Tony Alvarez was going to pay them for delivering the drugs to an un-named man at a Holiday Inn in Little Rock.¹⁶⁵ The suspects were then handed over to the DEA.¹⁶⁶

While squeezing a backpack in an overhead luggage rack is perfectly lawful, the Court, through Chief Justice Rehnquist, still held that it was an unjustified search.¹⁶⁷ It would follow, therefore, that the consent which the suspects gave the agent was a fruit of that unjustified search.¹⁶⁸ The majority distinguished *Ciraolo* and *Riley*, which "involved only visual, as opposed to tactile, observation. Physically invasive inspection is

¹⁵⁷ *Id.* at 12.

¹⁵⁸ *Id.* at 18.

¹⁵⁹ *Id.* at 12-13.

¹⁶⁰ *Id.* at 15-16.

¹⁶¹ *Id.* at 16.

¹⁶² *Id.*

¹⁶³ *Id.* at 17.

¹⁶⁴ *Id.* at 18.

¹⁶⁵ *Id.* at 19-22.

¹⁶⁶ *Id.* at 24.

¹⁶⁷ *Bond*, 529 U.S. at 338-39.

¹⁶⁸ *Id.* at 336 n.1.

simply more intrusive than purely visual inspection.”¹⁶⁹ The Court then alikened the frisk of the bag to another “great indignity”:¹⁷⁰ a *Terry* pat-down of the outer clothing.¹⁷¹ Passengers do, the Court conceded, run certain risks regarding the way their luggage will be handled by passengers and carrier personnel.¹⁷² But what Agent Cantu did “far exceeded the casual contact [petitioner] could have expected from other passengers.”¹⁷³

The distinction that the four dissenters and concurring Justice O'Connor had acknowledged in *Riley*—that even when police are in a lawful vantage point, still they conduct a “search” when they act in a way that few people would¹⁷⁴—must have somehow succeeded in introducing through *Bond* a new, or, I should say, renewed, version of *Katz*. But still, how would we know how routine or non-routine what Agent Cantu did should be established? How would we know, apart from the sort of laborious questioning of others that Professor Slobogin performed? What were the bases of the Court's conclusions in *Bond*? How *Bond* squares with other sorts of risk analyses—that of undercover agents in whom you misplace confidence, of your bank or phone company letting others peruse your records, of overflight in helicopters or fixed-wing aircraft in public navigable airspace, or that your friend's car that you are riding in will be unjustifiably searched—remains opaque. We get little elaboration in these decisions, though the facts certainly are representative of the sorts of observations that police make from lawful vantage points.

That Justice Breyer would dissent in *Bond*, taking the position that this was a non-search, should be unsurprising, given the sort of extended risk-analysis he applied to Officer

¹⁶⁹ *Id.* at 337.

¹⁷⁰ *Id.*

¹⁷¹ See *Terry v. Ohio*, 392 U.S. 1, 16-17 (1968).

¹⁷² *Bond*, 529 U.S. at 338.

¹⁷³ Brief for the Petitioner at 18-19, *United States v. Bond*, 529 U.S. 334 (2000) (No. 98-9349) (internal quotations omitted).

¹⁷⁴ *Florida v. Riley*, 488 U.S. 445, 452-68 (1989).

Thielen's lurking around outside Thompson's apartment in *Carter*.¹⁷⁵ Writing for himself and Justice Scalia in *Bond*, Breyer cites the same cases as Rehnquist does for the majority, and even alludes to O'Connor's concurrence in *Riley*,¹⁷⁶ which I remind you asks whether the "intrusion is a sufficiently routine part of modern life" to qualify as a non-search.¹⁷⁷ What the majority and dissenters differ on is ultimately a complicated empirical question: whether baggage routinely gets explored the way the suspects' bags did here. In concluding that it does, Breyer relied on the lower court's ruling, plus three snippets from newspaper articles and a Seventh Circuit opinion that address how luggage in overhead bins gets "shoved," "crammed," "recrammed," and "rearranged."¹⁷⁸ I am not going to get into whether passengers with bad manners should set our expectations. But I am quite convinced that none of these descriptions of what happens to luggage, however—true or not—captures the mode in which Agent Cantu was operating. And how, exactly are they different?

IV. THE ROLE OF INTENTIONS IN FOURTH AMENDMENT ANALYSIS

I begin with an important bit of common ground in the majority and dissenting opinions in *Bond*: both cite *Whren v. United States*¹⁷⁹ and other cases¹⁸⁰ for the proposition that "the subjective intent of the law enforcement officer is irrelevant in determining whether that officer's actions violate the Fourth Amendment."¹⁸¹ Yet no one would dispute, I take it, that the intentions of the suspect or search victim *do* matter in determining whether the officer's actions violate the Fourth Amendment. *Katz* can be read to say that to be a search victim,

¹⁷⁵ *Minnesota v. Carter*, 525 U.S. 83, 103 (1998).

¹⁷⁶ *Bond*, 529 U.S. at 341.

¹⁷⁷ *Id.*; see also *Riley*, 488 U.S. at 453.

¹⁷⁸ *Bond*, 529 U.S. at 340.

¹⁷⁹ 517 U.S. 806 (1996).

¹⁸⁰ *Bond*, 529 U.S. at 339 n.2 (citing *California v. Ciraolo* 476 U.S. 207, 212 (1986)); *Bond*, 529 U.S. at 342 (Breyer, J., dissenting) (citing *United States v. Dunn*, 480 U.S. 294, 304-05 (1987)).

¹⁸¹ *Bond*, 529 U.S. at 339 n.2 (citing *Whren*, 517 U.S. at 814); *Bond*, 529 U.S. at 342 (Breyer, J. dissenting) (citing *Whren*, 517 U.S. at 813).

you must “have demonstrated an intention to keep activities and things . . . private”¹⁸² For example, when Katz deposited a dime in the public pay phone and closed the door, he demonstrated an intention to exclude the “uninvited ear,” even though he did not succeed, given that the government-installed listening device intercepted his conversations.¹⁸³

What the Court repeatedly insists upon is that a police officer's intentions play no role in Fourth Amendment analysis. Its fullest explication of this notion appears in *Whren*: the case that both the majority and dissent cited for that very proposition in *Bond*. *Whren* purported to solve the so-called pretext problem. The solution, in turn, relied heavily on the Court's view of the role that intentions play in Fourth Amendment law. I am hoping that a fairly close reading of *Whren* will pay dividends in our arriving at discovery or agreement on whether police intentions or motivations (as the Court is fond of putting it) have anything to tell us about what constitutes a search.

A. What Is a Pretext?

To say that the action claimed is not the action that occurred is not to describe the action as pretextual, except in a too-extravagant sense. With pretexts, the action is not feigned. What is concealed is a special reason, a motive: what is concealed is something in the world to be achieved or set up by the action, something that normally would not strike someone as the upshot of the action. A pretext is a criticism we make of an action that has a motive that is, like all motives, at odds in some way with the action: the motive for the generous action toward the fragile relative is to inherit under the will. The motive could be greed (because greed is directed at something—here, the money that the will would make available). If the generous action is just plain generous without such directedness, then it is nonsense to speak in terms of motive, though there may be reasons for the generosity (for example, feeling good about oneself). But such

¹⁸² See LaFave *supra* note 125, at 299 (citing Eric Dean Bender, Note, *The Fourth Amendment in the Age of Surveillance: Curtains for the Curtilage?*, 60 N.Y.U. L. REV. 725, 753-54 (1985)); see also *supra* note 90.

¹⁸³ *Katz v. United States*, 389 U.S. 347, 352 (1967).

reasons are not motives if they are psychological or inner,¹⁸⁴ even though we tend to think of motives as inner states rather than as explanations of something to be attained in the world by a certain course of action.¹⁸⁵ And while it is common among psychologists to suggest that all actions have motives (or are motivated),¹⁸⁶ in fact we use the word "motive" only infrequently in ordinary speech.¹⁸⁷ We use the word only in reference to actions we feel the need to assess, to make sense of.¹⁸⁸ Among those actions that do have reasons, not all reasons are necessarily directed. Considerateness or punctuality, for example, are reasons for actions, yet they are not motives; they have no aim, no directedness; they are not setting anything up.¹⁸⁹

Thus, references to motives come up in moral discourse where we need to make sense of an action. If we say, "what was his motive?" it must be because it looks to us as though the action had to be directed at something untoward, but we cannot figure out what it was. When we say that Macbeth's motive in killing Duncan was ambition, we are not referring to a feeling or some internal perturbation of Macbeth,¹⁹⁰ instead, the motive of ambition refers to some other actions, some other ends to be attained by the killing, whether or not the actions are known to him.¹⁹¹ Likewise, if a man looks pleased when praised for something trivial, or upset when mildly criticized, we can say he is vain, but we cannot say vanity is his motive for being pleased

¹⁸⁴ See Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17, 72-73 (1991).

¹⁸⁵ See, e.g., *Massachusetts v. Painten*, 389 U.S. 560, 565 (1968) (White, J., dissenting) ("[S]ending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources.")

¹⁸⁶ R.S. PETERS, *THE CONCEPT OF MOTIVATION* 31 (R.F. Holland ed., 1958).

¹⁸⁷ *Id.* at 28; N.S. Sutherland, *Motives as Explanations*, 68 MIND 145, 153 (1959).

¹⁸⁸ PETERS, *supra* note 186, at 29.

¹⁸⁹ *Id.* at 32.

¹⁹⁰ Gudel, *supra* note 184, at 73.

¹⁹¹ *Id.*

when praised.¹⁹² Vanity may explain certain actions, but it cannot be considered a motive for them.¹⁹³ Pretext is, therefore, an inquiry into a motive that the actor is covering up. Any actor, once put on the spot by being questioned about his motives, will either confirm or dispel our suspicions by going on record and offering a reason for the action or denying having any reason at all. If we accept that the action had no motive, or perhaps had no reason whatsoever (as in “I just did it” or “I just felt like doing it”),¹⁹⁴ then the action cannot be pretextual. Thus “pretext” is the term we apply to an action that we conclude was directed in an unconventional or untoward way that the actor was aware of, regardless of whether he is willing to admit to it. Put slightly differently, if after confronting the explanation for the action, we cannot accept the action as conventional or ordinary, then we may be inclined to call it a pretext. For example, we may say: “Your motive in marrying her was greed; you married her for her money.” If the accused in such a pinch were to respond: “No, I married for love,” to that we may respond: “No, you are incapable of love. The marriage is for you just a pretext for moneymaking.” That is to say, love is the conventional, ordinary reason for marriage, but it is not the reason for this one. Accordingly, pretext is a way of criticizing an action that had a motive that is incompatible with the ordinary, conventional reasons, if any, for the action.¹⁹⁵

B. Pretextual Police Action

¹⁹² *Id.*

¹⁹³ See ROY LAWRENCE, MOTIVE AND INTENTION: AN ESSAY IN THE APPRECIATION OF ACTION 23 (1972).

¹⁹⁴ Gudel, *supra* note 184, at 75.

¹⁹⁵ There is alternative way of seeing the matter. J.L. Austin, for example, states that “[a] pretext may be not a genuine reason or not your real reason: a pretence may be something you are not genuinely doing or not what you are really doing.” J.L. AUSTIN, *Pretending*, in PHILOSOPHICAL PAPERS, *supra* note 18, at 262 n.1. By this account, in the above example, the marriage would be a pretence and love a pretext.

Likewise, pretextual police action occurs when police do the right thing for the wrong reasons,¹⁹⁶ i.e., they perform a lawful action with an improper motive. For example, the Supreme Court has held that a search of an arrestee follows automatically from a lawful arrest.¹⁹⁷ This bright-line rule prevents the destruction of evidence and protects the arresting officers from weapons within the arrestee's reach.¹⁹⁸ But what happens if an officer arrests and searches someone who has violated a law against, say, public drunkenness, when the officer's motive in arresting is to look for obscene materials in the arrestee's satchel?

Defense attorneys insist that obscene materials or other evidence found on the arrestee should be suppressed on grounds of pretext.¹⁹⁹ The suppression hearing, their argument runs, should demand from the arresting officer an account of his reasons for his actions: "Why did you arrest *that* person *then*? You had no interest in enforcing the public drunkenness laws, did you?"²⁰⁰ It is the trial judge's job under such a view to decide whether the officer did the right thing (arrest a drunk) for the wrong reason (to search for obscene materials). If the officer did arrest the drunk *just* to explore for obscene materials, defense attorneys have long argued that the trial judge should invalidate the otherwise lawful police action on grounds of pretext.²⁰¹ Invalidating the arrest as unconstitutional would justify the exclusion of the evidence, if any, "come at by exploitation of that illegality."²⁰²

1. *Whren v. United States*

¹⁹⁶ See John M. Burkoff, *Bad Faith Searches*, 57 N.Y.U. L. REV. 70, 101 (1982).

¹⁹⁷ *Chimel v. California*, 395 U.S. 752, 763 (1969).

¹⁹⁸ *Chimel*, 395 U.S. at 763.

¹⁹⁹ Burkoff, *supra* note 196, at 72-84.

²⁰⁰ See James B. Haddad, *Pretextual Fourth Amendment Activity: Another Viewpoint*, 18 U. MICH. J.L. REFORM 639, 641-43 (1985).

²⁰¹ See *id.* at 644-46.

²⁰² *Wong Sun v. United States*, 371 U.S. 471, 488 (1963) (quoting JOHN MACARTHUR MAGUIRE, *EVIDENCE OF GUILT: RESTRICTIONS UPON ITS DISCOVERY OR COMPULSORY DISCLOSURE* 221 (1959)).

The viability of this defense strategy culminated in *Whren v. United States*, where an unmarked police car containing two officers and an investigator stopped two African-American youths in a Nissan Pathfinder for some trivial traffic offenses.²⁰³ In effecting the stop, police peered into the truck and saw in passenger Whren's lap some cocaine that was later used to convict him and driver Brown of serious drug, not traffic, offenses.²⁰⁴ Because it was plainclothes vice-squad officers in an unmarked car enforcing the District of Columbia's traffic laws—an action that their own departmental regulations prohibited—Whren and Brown insisted that the traffic stop was a pretext for a drug investigation that could not have warranted the car stop based merely on the officers' flimsy (but accurate) hunch that drug activity was afoot.²⁰⁵

Though the case made it all the way to the Supreme Court, it is unclear just what the parties or the courts take to be the criteria of pretexts. For example, in its brief, the ACLU asserted: “[H]ad the police conducted themselves in accordance with the regulation a court could presume, subject to rebuttal, that the search was not pretextual.”²⁰⁶ Yet in actuality, it is not the search that was even arguably pretextual; it is the traffic stop. As for the relevance of the departmental regulations, compliance with them would make a stronger, not weaker, case of pretext. That is, police compliance with departmental regulations would make it easier to conclude that it really was a traffic stop, which is a necessary condition of a pretextual traffic stop.

Most of the oral argument in *Whren* involved discussion of a departmental regulation forbidding plainclothes officers in unmarked cars to make traffic stops unless the traffic violation

²⁰³ *Whren v. United States*, 517 U.S. 806, 808 (1996); see also *United States v. Whren*, 53 F.3d 371, 372 (D.C. Cir. 1995), *aff'd*, 517 U.S. 806 (1996).

²⁰⁴ *Whren*, 517 U.S. at 808-09. “Whren was sentenced to 168 months incarceration and five years supervised release on count one, 168 months incarceration and ten years supervised release on count two, one year imprisonment and one year supervised release on each of counts three and four. All terms were to be served concurrently.” *Whren*, 53 F.3d at 373. Brown received a nearly identical sentence. *Id.* at 373-74.

²⁰⁵ *Whren*, 517 U.S. at 815.

²⁰⁶ Brief of Amicus Curiae American Civil Liberties Union in Support of Petitioners at 14 n.6, *Whren v. United States*, 517 U.S. 806 (No. 95-5841).

“is so grave as to pose an *immediate threat* to the safety of others.”²⁰⁷ To the petitioners, the police who stopped Whren, Officers Soto, Littlejohn and Investigator Howard,²⁰⁸ violated the Fourth Amendment because reasonable officers would not have made a stop that their employer precluded them from making.²⁰⁹ To this, the Court responded that all the Department need do is have the unmarked car ask a marked car to make the stop.²¹⁰ The Court's suggestion, however, would leave petitioners' question unanswered: How should the Fourth Amendment, not the police, respond when the police violate their own rules?²¹¹

The real payoff of a discussion of the fact that police deviated from departmental regulations lies in its ability to tell us not whether police abused their discretion (so what if they did?), but more importantly, to tell us *what they were doing*. The real relevance of their breaking their own regulations, accordingly, is that it is a piece of evidence that bears on the issue of *what they were actually doing*. An officer's pulling someone over when he lacks the authority to do so does not, without more, make the stop a traffic stop, much less a pretextual traffic stop.

This angle was only adumbrated at oral argument, where the interlocutors briefly touched on snippets from Soto's and Littlejohn's testimony from the suppression hearing in *Whren*.²¹² There, Soto testified that the truck was stopped at a stop sign for over twenty seconds,²¹³ though earlier, at the preliminary hearing, he had said he did not know how long the truck waited

²⁰⁷ *Whren*, 517 U.S. at 815 (citing Metropolitan Police Department, Washington, D.C., General Order 303.1, pt. 1, Objectives and Policies (A)(2)(a)(4) (Apr. 30, 1992)).

²⁰⁸ *Whren*, 53 F.3d at 372. The Supreme Court mentioned only Officer Soto by name. See *Whren*, 517 U.S. at 808-10.

²⁰⁹ See Brief for the Petitioners at 32, *Whren v. United States*, 517 U.S. 806 (No. 95-5841); Brief of Amicus Curiae National Association of Criminal Defense Lawyers in Support of Petitioners at 6-7, *Whren v. United States*, 517 U.S. 806 (No. 95-5841) (discussing the “purely objective” approach).

²¹⁰ Oral Argument at 11, *Whren v. United States*, 517 U.S. 806 (No. 95-5841).

²¹¹ See *id.* at 3-29.

²¹² Oral Argument at 35-38, *Whren* (No. 95-5841).

²¹³ Brief for the Petitioners at 5, *Whren* (No. 95-5841).

at the stop.²¹⁴ And while Soto testified at the suppression hearing that the truck failed to signal before turning right,²¹⁵ he had made no mention of that infraction at the preliminary hearing or in the police report.²¹⁶ The only infraction that Soto insisted on throughout the case was that the truck “sped off quickly,” presumably after seeing the unmarked police car perform a u-turn.²¹⁷ But even with regard to the infraction for speeding, Soto admitted at the suppression hearing that he “wasn’t going to issue a ticket to him at all.”²¹⁸ Rather, he explained, “My intention[] was to pull him over and talk to him [about the full time and attention and speed violations].”²¹⁹ Departmental regulations, however, prohibited oral warnings except under narrow circumstances not present there.²²⁰ As for Littlejohn, he never saw the stop as a response to any traffic violations at all. For him, the delay at the stop sign gave them reasonable suspicion, though he never came out and said what it was that he suspected.²²¹

Oral argument brought out not only that the officers acted contrary to departmental regulations, but also that (1) the officers were neither in agreement nor consistent in their claims that they observed any traffic violations, and (2) the officers admitted that they did not intend to *enforce* the traffic laws at all. And what, exactly, is the relevance of these details? The officers’ deviation from their department’s own rules, along with the way they comported themselves during the pursuit and stop

²¹⁴ *Id.* at 5 n.5.

²¹⁵ *Id.* at 6.

²¹⁶ *Id.* at 6 n.6.

²¹⁷ *Id.* at 5.

²¹⁸ *Id.* at 6-7.

²¹⁹ *Id.* at 7 (second alteration in original).

²²⁰ *Whren*, 517 U.S. at 815 (citing Metropolitan Police Department, Washington, D.C., General Order 303.1, pt. 1, Objectives and Policies (A)(2)(a)(4) (Apr. 30, 1992)).

²²¹ Oral Argument at 39-40, *Whren* (No. 95-5841); Brief for the Petitioners at 6 n.7, *Whren* (No. 95-5841).

of the truck (as well as when they went on record about the pursuit and stop in subsequent legal proceedings), gives us an account of what they were doing. To figure out what police were doing is a crucial matter, far more so than why they were doing it, which is potentially interesting but almost always doctrinally irrelevant. The real issue is whether this was a constitutional, that is, plain view sighting of drugs pursuant to a lawful traffic stop.²²²

In upholding the convictions, however, the Court never fully engages the real issue, thus replicating the indirection of the oral argument. Rather, the Court puts most of its capital into an attempt at distinguishing earlier precedents which had indicated that Fourth Amendment doctrine must deter pretextual searches and seizures.²²³ Whatever success *Whren* might have had in attempting to reconcile its prior pretext cases, it did succeed in establishing that there is very little room for pretext arguments in Fourth Amendment law.²²⁴ The conclusion makes good sense; what remains mysterious is why.

To be sure, *Whren's* argument is hard to take too seriously, given that it directs reviewing courts to zero in, not so much on *what* police were doing (enforcing traffic laws? drug laws? both?), but *why* they were doing it (to make the roads safer? catch drug dealers? get promoted? kill time?). Petitioners' argument was that what justifies a search or seizure is not merely whether police have a certain amount of suspicion or knowledge about whether crime is afoot—"probable cause" in Fourth Amendment terms—but in addition, "whether a police officer, acting reasonably, would have made the stop for the reason given."²²⁵ Indeed, the implications of suggesting that police articulate *why* they decided to stop a bad driver are potentially absurd, leading inexorably to the following: two drivers speeding down the street, one of whom police believe (but not strongly enough to justify a stop) is also a drug dealer.²²⁶ The implication of petitioners' argument is that in such circumstances police should be allowed to stop *only* the speeder whom they do *not* also

²²² See *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

²²³ *Whren*, 517 U.S. at 811-13.

²²⁴ *Id.* at 813.

²²⁵ *Id.* at 810.

²²⁶ Haddad, *supra* note 200, at 690; James B. Haddad, *Well-Delineated Exceptions, Claims of Sham, and Fourfold Probable Cause*, 68 J. CRIM. L. & CRIMINOLOGY 198, 211 (1977) [hereinafter Haddad, *Well-Delineated Exceptions*].

suspect of some other crime. In other words, to rule in Whren's favor would leave us with a doctrine which says, at least to a point, that the more suspicions you have, the less justification you have to act on them.²²⁷

In dismissing Whren's suggestion that reviewing courts ask questions along these dead-end lines ("Why, officer, did you stop *that* bad driver?"),²²⁸ the Court was on the right track in remarking that it saw "no realistic alternative to the traditional common-law rule that probable cause justifies a search and seizure."²²⁹ And this much is true: If Whren really had been driving in violation of D.C. law, then police were right to stop him. Indeed, if police saw him break traffic laws, then who cares whether police hoped for or even expected a bonus (be it drugs or whatever) to be realized during the stop? What matters is *whether* they were enforcing the traffic laws, not why.

2. Pretextual or Unconstitutional? How to Tell the Difference

The happy part of *Whren* is the Court's insistence that probable cause that traffic laws had been violated is the key to any evaluation of the constitutionality of the stop and search of the truck. The unhappy part is that the Court made no effort to establish *how* we would determine that it was the probable cause on which police were relying when they got themselves into a position to see cocaine in Whren's lap. Nowhere does the Court acknowledge that, even with probable cause to stop the car, police still might have performed an unconstitutional seizure to verify a hunch about drug activity rather than perform a lawful traffic stop.

And how would we tell the difference between a lawful traffic stop and an unlawful drug investigation? That depends on whether what the officers claim to have done is consistent with what was seen in the public, observable world. In other words, it

²²⁷ See *Abel v. United States*, 362 U.S. 217, 253 (1960) (Brennan, J., dissenting); Brief for the United States at 25, *Whren v. United States*, 517 U.S. 806 (No. 95-5841) ("[I]t would be unreasonable to forbid a police department from focusing its finite resources disproportionately on those observed traffic offenders whom officers in the field suspect may also be engaged in more serious offenses."); Haddad, *Well-Delineated Exceptions*, *supra* note 226, at 211.

²²⁸ *Whren*, 517 U.S. at 815-19.

²²⁹ *Id.* at 819.

is at this point that the distinction between intentions and motives, and their roles, should begin to reveal itself. Suppose, for example, a case in which officers search a house at night under the authority of a daytime-only search warrant, discover evidence of crime, and claim later in the litigation that their intent in entering the house was to make a warrantless emergency arrest.²³⁰ That the officers did not intend to execute such an arrest is demonstrated by the fact that they applied for a search warrant for an illegal distillery, took the warrant to the house, produced it before entering, and searched the house after locating the suspect. This is not a pretextual, warrantless entry to arrest; it is not a warrantless entry to arrest *at all* because it lacks the characteristics of an action directed at arresting rather than searching. As a result, any evidence obtained in the house or on the arrestee's person should be excluded.²³¹ Indeed, this is an unconstitutional warrantless entry to search *even if* there was probable cause to believe the search victim was a dangerous felon. Unless police conducted themselves at the house in a way that is consistent with an intention to rely on the doctrine they now cite as the authority for their actions, then it is not so much that police were *arresting* pretextually (so what if they were?), but that they were *searching* unconstitutionally.

If it really was a warrantless entry to arrest, then who cares why it was performed? What matters is what the police were doing. Did they have probable cause that a serious crime had been committed? Would getting a warrant have posed a danger to themselves or the public? Did they enter the premises without a warrant and commit themselves in a way that indicated that they were looking to get their hands on a dangerous person, not for evidence squirreled away in the house?²³² If so, then they have performed a lawful, warrantless entry to arrest a dangerous criminal,²³³ and any reason or motive external to the action that they might have had is irrelevant.

Once we insinuate the enforcement of traffic laws into the

²³⁰ Haddad, *supra* note 200, at 655-57 (citing *Jones v. United States*, 357 U.S. 493 (1958)). This hypothetical is based very loosely on *Jones*, which in actuality was a much closer case, far too close to demonstrate much of anything. There, despite what the majority found, police really did have reason to believe that Jones, whom they knew was running an illegal still, was inside at the time of the entry. See *Jones*, 357 U.S. at 500-03 (Clark, J., dissenting).

²³¹ See *Wong Sun v. United States*, 371 U.S. 471, 479-80 (1963).

²³² See, e.g., *Minnesota v. Olsen*, 495 U.S. 91, 100 (1990).

²³³ *Id.*

Fourth Amendment, however, determining what police really were doing becomes harder. Take, for example, the case of a male officer who stops an attractive female motorist who suspects that she has been stopped for his amusement, not to make the roads safer. Of course it is always open to the officer to *invent* a traffic offense, but the motorist in such a case has worries quite apart from why the traffic stop occurred, that is, quite apart from whether it was pretextual. Indeed, to claim that the stop was pretextual is incompatible with a claim that the police later invented the justification for the stop. Although police perjury is far from trivial,²³⁴ with pretexts the claim is that police are lying not about what they have done, but about why they have done it.

The only concern here is with suspects whom police *do* have some justification in stopping. What the motorist who really is a traffic offender is expressing when she complains about her encounter with the overly friendly officer is either (1) despite facts justifying some police action, it is not that justified action which police were really taking; or (2) despite facts justifying this police action, the action had a “social” motive. While these two objections to what police have done tend to be treated as though they are coterminous, they are not. The first objection is to call the stop unconstitutional; the second objection is to call it pretextual. Pretexts may be dead as means of depicting police illegality, but the core of what many defendants claiming pretext are getting at is not, if only because of a snag in distinguishing pretextual from unconstitutional police action. That is, what remains open to defendants who could justifiably have been stopped, but who question the conditions of the stop anyway, is to argue that police were not doing what they said they were doing: their actions (regardless of their motives, if motives there be) did not have the *intention* that police claim at the suppression hearing to have had on the street.

Assuming the motorist was violating the traffic laws, there must be some procedures we can use to reveal what this officer's motives were. If the officer approached the car and asked the driver out for a date, then it was not a pretextual traffic stop; it

²³⁴ See, e.g., Donald A. Dripps, *Police, Plus Perjury, Equals Polygraphy*, 86 J. CRIM. L. & CRIMINOLOGY 693 (1996); Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775 (1997); Christopher Slobogin, *Testifying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037 (1996).

was an unconstitutional one, that is, it was not a *traffic stop* at all, even with probable cause. It *could have been* a traffic stop, but the officer chose to conduct a social stop instead. If, however, the officer asked her for her license and registration, advised her of what she had done and issued her a ticket or warning, then we can conclude that the officer acted, in the public, observable world, like someone who intended to enforce the traffic code. In other words, he *was* enforcing the traffic code.

When I discussed this issue with some San Diego police officers who had been admonished for mixing the personal with the professional in this very way, I received a range of responses, which included this one: "So you mean that if I give her a ticket first and then ask her out it's okay, but if I ask her out first then it's not?" The answer to this is, of course, "Yes, from a Fourth Amendment standpoint." In other words, there is little more we can ask when taking positions on what has occurred in the public, observable world than that people act in a way that can be reconciled with their claims about their own actions. (If I am always nice to you—I treat you well, attentively, even tenderly—then it makes little difference whether I "really" like you.)

Yet to require only that the officer have the intent to rely on the doctrine in question may not sufficiently protect against pretexts or abuse of the doctrine. Professor Haddad suggests that when a doctrine is intolerably susceptible to abuse—to pretextual police action—the doctrine should be altered to eliminate that susceptibility.²³⁵ The Court recognized as much in *Chimel v. California* by putting a stop to thorough searches of residences incident to the arrest of occupants.²³⁶ Before *Chimel*, officers were conducting arrests at suspects' residences and converting those arrests into exploratory searches of the residences without first obtaining search warrants.²³⁷ The arrests, one could say, were pretextual means of realizing the motive of ransacking the house. Unhappy with the hazards posed by a doctrine that permitted such abuse of the power to arrest, the Court limited the permissible scope of a search incident to arrest to the arrestee and his grab-area.²³⁸

²³⁵ Haddad, *supra* note 200, at 652-53.

²³⁶ *Chimel v. California*, 395 U.S. 752, 764-68 (1969).

²³⁷ *See, e.g.*, *United States v. Rabinowitz*, 339 U.S. 56 (1950); *Harris v. United States*, 331 U.S. 145 (1947).

²³⁸ *Chimel*, 395 U.S. at 764-68.

This approach, which Haddad dubs “the hard-choice approach,”²³⁹ has the appeal of avoiding intractable attempts at uncovering the motive or motives behind the action, in favor of changing the law in order to take away the incentive to stage pretextual police actions. Take, for example, a hypothetical of Haddad's:

Suppose that defense counsel claims that the police have executed a dated but valid traffic arrest warrant as a pretext to enter a narcotics suspect's house, hoping to discover heroin either in plain view or within the scope of a search incident to arrest.

One approach would be to narrow the scope of the underlying power: the right to enter a home to execute an arrest warrant. The Supreme Court could declare that arrest warrants expire after a certain period of time, at least where the police efforts to execute the warrant have lapsed. Or the Court could make a less drastic alteration in [F]ourth [A]mendment law by declaring that after a period of time, absent continuous diligent effort to execute a *misdemeanor* arrest warrant, the warrant, though still valid for some purposes, would not authorize entry into a suspect's home. The Court would reason that if authorities place such a low priority on a prompt arrest, the governmental interest does not outweigh the individual's right to be free from police entry into his home at the nearly unbridled discretion of the police.²⁴⁰

In other words, Haddad's hard-choice approach, itself traceable to Justice Brennan's dissent in a 1960 case,²⁴¹ would treat the pretext problem as resolvable *doctrinally*: not by condemning a given police search or seizure as pretextual, but by changing the background rules against which police act. Quibbling over whether the entry was a pretext fails to tell us much, even if the real reason for the action (why the officer was doing that) rather than what the action was (the intention of the action) was easily accessible to us. Accordingly, when a pretext problem arises, if we do not like what police are doing in such cases, Haddad would have us ask: Did police demonstrate the intent to rely on the doctrine in question? And if their having

²³⁹ Haddad, *supra* note 200, at 651-53.

²⁴⁰ *Id.* at 652 (footnotes omitted).

²⁴¹ *Abel v. United States*, 362 U.S. 217, 248-56 (1960) (Brennan, J., dissenting).

done so does not dispel our concerns about abuse of the doctrine, then we should consider altering the doctrine.

Whren, however, is a flinty case, resistant to evaluating what it was that police were really doing. Assume that the traffic violations alluded to by Officer Soto did occur. When Soto and Littlejohn took the stand at the pretrial hearing where Whren and Brown moved to suppress the cocaine, one could have asked: What, if anything, was said between the officers before the stop? Did they discuss the Nissan's erratic movements? Did they discuss their then-unsubstantiated suspicions about drug activity? Did the officers explain the point of the stop to the driver? If not, then why not? Was it due to their being distracted? By what? Seeing the drugs? Did the officers ultimately ticket the driver? Why not? Because it seemed trivial compared with what was discovered? By questioning the intentions of the officers in this manner, we get, in their elaboration of what they were doing, a chance to respond to their going on record when they tell us, and expect us to rely on them when they tell us, what their intentions were. And despite what the Supreme Court may say, this inquiry into intentions is a way of determining what happened and is not meant to be a way of peeking into what went on *behind* what happened.

In Whren's case, even if the police did initiate a traffic stop, in light of their prompt plain-view sighting of cocaine, there was good reason for their not following through on that original intention or plan. The traffic stop might well have been the original plan, but it might have dropped out when, after undertaking that original plan, police saw that they had their hands on some drug offenders.²⁴² In this situation, their failure to follow through—their failure to treat this as a traffic stop—by no means demonstrates that the stop was, at its inception, a drug investigation, though it may certainly give us pause.

The difference between this case and the case of the officer who used the traffic laws to improve his social life has something to do with what changes in plan, what sorts of distractions, can count in our attempt to come to grips with what action the officer was performing. In other words, we could ask: Was *Whren* a drug investigation (masquerading as a traffic stop), and was the officer who stopped the attractive motorist embarking on a social adventure (also masquerading as a traffic stop)? When the officers converted Whren's traffic stop into a drug investigation, their overlooking the traffic offenses makes good sense (though it

²⁴² Cf. Haddad, *supra* note 200, at 678 n.178 (citing cases that hold that a traffic stop need not culminate in a citation or warning in order to be constitutional).

would lead to their being given a hard time in the witness box at the suppression hearing). After all, the plain view discovery of evidence that could lead to decades of imprisonment is just the sort of distraction to which we may expect law enforcers to yield when the plan began as a stop that could by itself culminate in no more than the issuance of a citation and summons.

But then why suggest that the failure to pursue the traffic infractions in *Whren* “may certainly give us pause”? Because that is a response that is open whenever someone says that they were doing something—here, enforcing the traffic laws—that is at least arguably at odds with the way they comported themselves. But with the officer who asks the motorist for a date, we would likely be a good deal more skeptical about the basis of the distraction. Why be distracted by *that*? And even if the distraction is quite literally natural, that does not adequately explain actually yielding to it, not in the context of policing. Indeed, the basis of the distraction in such a case is trivial when compared to that in *Whren*: trivial, again, in light of the objectives of policing. And even if the officer who asked the motorist for a date really did observe a traffic offense and really saw himself as committed, *at first*, to performing a traffic stop, all we have to evaluate the action is what we see in the public, observable world, including of course his account of it. While it is perfectly plausible that the officer who asked the motorist for a date was every bit as committed to carrying out the original plan as the officers in *Whren* were, when his actions suggest a social call, it is an account that is more likely to be rejected, given that it is hard to count desire as a distraction *in that context*. Such an account would have no real sway, not in light of what could pass for a commitment to enforce the traffic laws in the first instance.²⁴³

3. The Role of Intentions in Fourth Amendment Analysis

²⁴³ *But cf.* Haddad, *Well-Delineated Exceptions*, *supra* note 226, at 205 (suggesting that evidence discovered against a traffic offender who was stopped as a pretext for asking the driver out on a date would be *less* likely to be challenged by defense counsel as a pretext than would evidence discovered against a traffic offender who was stopped as a pretext for a drug investigation).

The procedures I suggest for unraveling the problem posed by pretextual police action entail questioning police so that we may take a position on what they were doing (confronting their intentions) as opposed to why they were doing it (confronting their reasons, their motives, their purposes). *Whren's* weakness is not that it kills off pretext claims—that is really no weakness at all—but that it threatens to kill off any meaningful evaluation of what police do. For instance, at one point the *Whren* Court remarks that “[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”²⁴⁴ For reasons that remain foggy, this is a phrase of which the Court is particularly fond.²⁴⁵ And it is safe to say the parties only compound the problem.²⁴⁶

But what could this utterance possibly mean? In this context the word “subjective” is borderline nonsense, as it must be whenever used to modify “intention” or any other term of inculcation or exculpation. In other words, there is no such thing as a subjective intention. Subjective as opposed to what? Objective? What would the difference denote exactly? Could one imagine any specific application of utterances such as, “His subjective intention was *X* but his objective intention was *Y*”? If so, then what would it be? His intention according to him (subjective) as opposed to his intention according to others whom we may identify through laborious questioning (objective)? In other words, is it to say that a subjective intention is a claim you make about your intentions, but an objective intention is a claim someone else makes about your intentions? If so, then what makes others' claims objective? Their distance? That is, their ability to know how things are with us better than we do ourselves? So there really are two *kinds* of intentions? That cannot be the law (or the grammar of “intention” either).

When we refer to intentions, we are trying to make sense out of an action in a context where subjective and objective have

²⁴⁴ *Whren v. United States*, 517 U.S. 806, 813 (1996).

²⁴⁵ See, e.g., *United States v. Knights*, 534 U.S. 112, 123 (2001) (Souter, J., concurring); *Arkansas v. Sullivan*, 532 U.S. 769, 772 (2001); *Atwater v. City of Lago Vista*, 532 U.S. 318, 372 (2001) (O'Connor, J., dissenting); *City of Indianapolis v. Edmond*, 531 U.S. 32, 45 (2000); *Bond v. United States*, 529 U.S. 334, 338 n.2 (2000); *Crawford-El v. Britton*, 523 U.S. 574, 604 (1998) (Rehnquist, C.J., dissenting); *Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998); *Ohio v. Robinette*, 519 U.S. 33, 38 (1996).

²⁴⁶ See, e.g., Brief for the United States at 15, *Whren* (No. 95-5841) (“An inquiry into whether an officer's action was ‘pretextual’ is inherently an inquiry into his subjective intent.”). A Westlaw search of the term “subjective-intent!” in the United States Supreme Court database returns eighty-one cases.

no specific application. Indeed, speaking in terms of intentions as subjective *or* objective plays into one of the great myths of legal notions of responsibility: that references to intentions are references to something inside us.²⁴⁷ Intentions are said to be subjective because they are secret “mental states,” which can only be inferred by others (objectively) through close observation of behavior.²⁴⁸ Take this perfectly conventional and representative account from a leading book of criminal law theory where legal philosopher Michael Moore holds: “My own intentions are usually known to me in a way different from how they are known to a third-person observer, the latter having to make behavioral inferences since he lacks my first-person experience.”²⁴⁹ Moore says we must infer, a second-rate form of knowing, but if close enough attention is paid to the data, to the way the body moves and what the mind must have willed it to do, then we can discover this thing called the “intention.”

This psychologizing of intentions, however, misses out on why we talk about intentions:

Descriptions of mental events or processes are not acceptable as answers to questions about what our intentions are. A request for our intentions is not a request for a description of something inside us, but a request for us to perform a certain act that requires us to go on record or to

²⁴⁷ See *Graham v. Connor*, 490 U.S. 386, 396-97 (1989); *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716-17 (1983).

The state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else.

Aikens, 460 U.S. at 716-17 (quoting *Edgington v. Fitzmaurice*, 29 Ch. D. 459, 483 (1885)).

²⁴⁸ See RICHARD A. POSNER, *OVERCOMING LAW* 397 (1995).

Judges and juries do not, as a precondition to finding that a killing was intentional, peek into the defendant's mind in search of the required intent. They look at the evidence of what the defendant did and try to infer from it whether there was advance planning or some other indication of a high probability of success, whether there was concealment of evidence or other indicia of likely escape, and whether the circumstances of the crime argue a likelihood of repetition

Id.

²⁴⁹ MICHAEL S. MOORE, *ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW* 94 (1993).

commit ourselves in a certain way that justifies the reliance of other persons on what we profess our intentions to be.

It is not, then, that intentions are difficult to observe or to have “direct evidence” of. Intentions simply are not the sorts of things that *can* be observed, any more than one can observe the number five (not some particular written or printed instance of the number five, but the number itself). This does not mean they are necessarily hidden; it only means that the concept of “observation” has no obvious application to them. When we say something like, “The intentions of another cannot be directly observed,” we have no coherent idea of what it would mean to “observe another’s intention.” If anything is meant by this phrase at all, it probably is something along the lines of “observe his intention as he himself observes it.” But there is no such thing as this; there is no thing called “the intention” we observe by introspection just before every action we take. Intentions are not observed, either by ourselves or by others.

We use the language of intentions, and impute intentions to persons, *as a way of making human actions intelligible to ourselves*. We do not make actions intelligible to ourselves by adverting to an inner event that preceded that action. *Our interest in human actions is not usually in how they were produced, but in how they can be more fully understood*. Because this is what the attribution of intentions does, the language of intentions has reference to the public, observable world, not to an inaccessible world of inner events.²⁵⁰

Professor Paul Gudel offered this as a response to the Supreme Court’s so-called “mixed motives” problem in employment discrimination cases,²⁵¹ but it has point in any context where questions of responsibility arise. References to intentions are made in order to limit responsibility by demanding that the accused go on record, typically by proffering an excuse. That is,

²⁵⁰ Gudel, *supra* note 184, at 84-85 (footnotes omitted) (second and third emphases added).

²⁵¹ *Id.* at 18.

[I]magine a supervisor who is biased against women and who actively dislikes dealing with women in the workplace. Imagine also that one of his employees is a woman who has her failings as an employee—perhaps she is chronically absent from work or achieves consistently low performance levels. At some point, the supervisor fires her.

Now imagine that the woman sues the employer for sex discrimination and at trial introduces evidence that her supervisor was biased against women. The employer introduces evidence that the woman was fired because she was a poor employee. This is what the courts have called a “mixed motives” case. How do we sort out the relationship between the facts submitted by both sides and the employer’s decision?

Id.

in asking what your intentions were, we are asking for an explanation of your actions, but we are not asking for you to make reports about something inside you, be it a mental state or any other sort of internal perturbation.

So if we get rid of that misleading referent—subjective—we are left with the following utterance: “[I]ntentions play no role in ordinary, probable-cause Fourth Amendment analysis.”²⁵² Now what? Could the Court really emphasize that probable cause to stop the car was what made the stop impervious to criticism in *Whren*, but say at once that what police intended to do is irrelevant? But what makes probable cause critical to the constitutionality of searches and seizures is that it is strongly suggestive that police act *on* that knowledge, that is, they act with a certain intention. If the police officers' account of their intentions — their going on record and telling us that we can rely on them when they tell us what they were doing — is irrelevant, then how would we be able to take positions on what it was that they were doing? How would we be able to tell that it was the traffic violations that occasioned the stop and not some unsubstantiated hunch, or racism (a reason that *does* matter),²⁵³ or spite (a reason that, rightly or wrongly, does not)? Without confronting their intentions, we would know it was a stop sure enough, but we would not know if it was a traffic stop, a stop to investigate drug activity, a stop to kill time, or whatever. In other words, we cannot know what to make of the action once it is called into question unless we take a stab at getting the accused to go on record about how things were with him. *Of course* the intentions of police matter; investigating intentions and finding out what was done are on the same level, part of the same enterprise; indeed, they *are* the same enterprise. When we get to the suppression hearing in criminal cases, questioning police about their intentions is essential to our evaluation of what they have done. Otherwise we would not know how to respond to what happened. But to say, as the Court did in *Whren*, and has reiterated since, that the intentions of police are

²⁵² See *Whren*, 517 U.S. at 813.

²⁵³ *Id.* (“We of course agree . . . that the Constitution prohibits the selective enforcement of the law based on considerations such as race.”).

irrelevant,²⁵⁴ is to say that our interest in what police have *done* is irrelevant. And that much is wrong.

But in this particular and peculiar utterance, it is evident what the Court is getting at, or more accurately, what it is revealing: a view of intentions which casts them as internal states, the content of which is inferred through close observation. Yet if intentions are part of the secret, subjective selves, then how can we ever avoid being held hostage by lies and indirection (“No one can tell me what I was thinking!”) except by, in the *Whren* Court's words, “root[ing] out . . . subjective intent through ostensibly objective means”²⁵⁵ (whatever that means). By making this recommendation, what the Court is responding to is the difficulty in knowing others, that difficulty accounting for the development of a doctrine that makes the hidden, secret selves—the “state of mind”²⁵⁶ of others—irrelevant whenever possible. This, however, badly mischaracterizes what an intention is, which is simply a device, a way of talking about human action, for making action intelligible where there is some reason to question what was done.

All this seems to only glance off the Court. When the Court elaborates in *Whren* that “the Fourth Amendment's concern with ‘reasonableness’ allows certain actions to be taken in certain circumstances, *whatever* the subjective intent[,]”²⁵⁷ it is hard to get a picture of what, in the Court's view, would constitute an action without an intention, subjective or otherwise. By definition, an action has an intention.²⁵⁸ If you are pushed or stung by a bee or are having a seizure, then you are not *acting* at all; if you harm someone by mistake or accident, then you have acted, though there your intentions in one way or another

²⁵⁴ See *supra* note 245.

²⁵⁵ *Whren*, 517 U.S. at 814.

²⁵⁶ *Id.* (“Instead of asking whether the individual officer had the proper state of mind, the petitioners would have us ask, in effect, whether (based on general police practices) it is plausible to believe that the officer had the proper state of mind.”).

²⁵⁷ *Id.*; see also Kenneth Gavsie, Note, *Making the Best of “Whren”: The Problems with Pretextual Traffic Stops and the Need for Restraint*, 50 FLA. L. REV. 385, 387 n.22 (1998) (“[P]robable cause for any traffic violation will suffice for a reasonable stop regardless of an officer's true intentions.”).

²⁵⁸ See J.L. AUSTIN, *Three Ways of Spilling Ink*, in PHILOSOPHICAL PAPERS, *supra* note 18, at 280-81 (“I may ‘have no purpose (whatsoever)’ in doing something, just as I may take no care. But I don't ‘have no intention (whatsoever)’ in doing something.”).

misfire: you take the wrong one or something befalls. In other words, an action without an intention is a happening or an occurrence, but not an action.²⁵⁹ You perform an action intentionally only if you have some idea of what you are doing, when you are putting yourself to whatever is realized.²⁶⁰ J.L. Austin captures what he calls this “most subtle . . . notion[]” of intention when he writes:

I must be supposed to have *as it were* a plan, an operation-order or something of the kind on which I'm acting, which I am seeking to put into effect, carry out in action: only of course nothing necessarily or, usually, even faintly, so full-blooded as a plan proper. When we draw attention to this aspect of action, we use the words connected with intention.²⁶¹

As Stanley Cavell puts it, “[Y]ou can't be intending to do a thing if you don't *know* you're doing it, or rather don't know how what you are doing could have that consequence (if you didn't know about the child, you can't have intended to frighten it).”²⁶² Thus, a police officer who does not mean to do anything at all is not acting, period. Accordingly, “in assessing official responsibility for police acting *as police*, it makes good sense to require that police *intend* to investigate crime or enforce laws before they may be held responsible in their investigative or enforcement capacities.”²⁶³ Likewise, when we are confronting the question of whether a search or seizure is constitutional, we cannot get an accurate picture of what was done without confronting what it was that police were putting themselves to. A traffic stop is characterized as such not merely by the fact that police pull someone over intentionally; that would demonstrate only that it was a stop. But by claiming to foreclose on inquiries into police intentions, the Supreme Court threatens to foreclose on our

²⁵⁹ See CARLOS J. MOYA, *THE PHILOSOPHY OF ACTION* 12 (1990).

²⁶⁰ AUSTIN, *supra* note 258, at 283.

²⁶¹ *Id.* (footnote omitted).

²⁶² STANLEY CAVELL, *A Matter of Meaning It, in MUST WE MEAN WHAT WE SAY?*, *supra* note 16, at 233.

²⁶³ Daniel Yeager, “Oops!”: *Inadvertence, Intentionality, and the Police*, 24 SEARCH & SEIZURE L. REP. 157, 157 (1997).

telling the difference between a plan (though nothing so full-blooded as a plan) to effect a traffic stop, a drug investigation, or an instance of harassment, racial or otherwise. Evaluating the constitutionality of the stop entails coming to grips with the officers' account of their intentions in the context of the other facts available. And to the extent that the Court says otherwise—and they do—is more than a little misleading.

C. The Role of Intentions in the Law of Search

1. In Theory: Seeing and Snooping

If I have made some headway in describing and lightly criticizing the Court's view of the role of intentions in Fourth Amendment law, then I'd like to put myself to mapping this discussion specifically on to the Court's view of *Katz*. Please recall that both the majority and dissent in *Bond* proclaimed that intentions are irrelevant in Fourth Amendment analysis.²⁶⁴ Recall as well that in addition to citing *Whren*, both majority and dissent cited for that proposition two cases in which the Court held that no search occurred. In the first, *Ciraolo*, it was Chief Justice Burger's position for the majority that the fact that police—not commercial or recreational air travelers—were flying above *Ciraolo*'s marijuana plot made no constitutional difference in determining whether a search occurred.²⁶⁵ In the second, *United States v. Dunn*, Justice White's majority opinion cited *Ciraolo* to support his conclusion that the question of what constitutes a protected curtilage as opposed to an unprotected open field is invariant to the intentions of police.²⁶⁶ More precisely, White ruled that shining a flashlight into a barn that was obscured by fishnetting (and to which access was impeded by a fence and a locked gate at the end of a driveway) is not made a search by the intentions of police to discover evidence.²⁶⁷ The pertinent utterance from *Ciraolo* on which White relies in *Dunn* is:

We based our holding [in *Ciraolo*] on the premise that the Fourth Amendment “has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares.” Importantly, we deemed it

²⁶⁴ See *supra* notes 181-83 and accompanying text.

²⁶⁵ *California v. Ciraolo*, 476 U.S. 207, 213 (1986).

²⁶⁶ *United States v. Dunn*, 480 U.S. 294, 304-05 (1987).

²⁶⁷ *Dunn*, 480 U.S. at 304.

irrelevant that the police observation at issue was directed specifically at the identification of marijuana plants growing on an area protected by the Fourth Amendment.²⁶⁸

What kind of argument is this? To make intentions irrelevant to a discussion like this requires that we describe the activity in question at the highest level of generality imaginable. In other words, we would have to describe the activity in question as “flying,” from which it follows that police investigators, like recreational and commercial travelers, are in the most generalized sense doing the same thing: flying. But everyone knows that flying and spying aren't the same thing. I suppose (if we felt the need to, if we felt staked in saying so) we could call it “flying for the purpose of spying.” But isn't that what spying *is*? (These two “elements” are here no more severable than the chicken's crossing the road and the “purpose” of getting to the other side: their intimacy or non-severability explains why it is a funny joke). Escaping from police and going for a personal best in a ten kilometer race both instantiate “running,” but we would no more describe those actions in merely that way than we would describe shooting a gun at a range and at an enemy merely as “shooting.” Indeed, even when a shooting is admittedly directed at or intended to kill another, the applicability of the defense of justification turns entirely on the intention of the shooter: it is self-defense if the shooter intended to defend himself from a deadly or near-deadly threat (and had grounds for sensing such a threat), but it is murder if the shooter intends to kill someone who poses or seems to pose no such threat. A murder leads at a minimum to a lengthy imprisonment while a justified killing can lead to a medal, yet both are, at the highest level of abstraction, “shootings.” That the intention alone explains why we treat these vaguely similar actions differently strikes me, though apparently not the Supreme Court, as manifest.

As I argued above in my discussion of *Whren*, the intention is what characterizes the action as an action at all, as opposed to a mere occurrence or happening. Intentions are never irrelevant to ascriptions of responsibility, which is what inquiries into whether a search took place are: if it was a search, then police would have to justify it by reference to a sufficient amount of

²⁶⁸ *Id.* at 304-05 (citing *Ciraolo*, 476 U.S. at 213) (citation omitted).

antecedent suspicion. Absent sufficient suspicion or the intention to act on that suspicion, suppressing evidence so derived would be an expression of our holding the government responsible for causing an unjustified harm.

Inadvertent revelations or discoveries are always read on a different moral plane than intentional ones. That is, just as one is not being lewd when one undresses unaware that the curtains are open, neither is one being nosy when one overhears a conversation or reads correspondence that was sent to him or her inadvertently or by mistake. Bringing something about that was outside your plan is something most of us would forgive you for. I recall a friend (now a law dean) recounting how she once had a houseguest, who, while my friend was at work, helped herself to a quick perusal of the high-school yearbook off the shelf. When my friend returned, she was greeted with: "you looked so sad in high school." I suppose we could, if you insist, describe the friend's act as "reading," but that boiled-down description doesn't quite capture the action, not at least in the way I assess it. But since here the act of choosing that book was directed at a discovery about her host's past, we would ask (as Scott Sundy would ask about Greenwood's garbage): why look at *that* book, *then*, *there*? I suppose at this point it is plausible to say: you should have locked the book in the attic or taken the precaution of enjoining your guest from looking at it. These are plausible responses, but as responses go, they are evasive if not weak. What is being evaded is an acknowledgement of what sort of action had been performed: reading or snooping? There must be a way to tell the difference, and in a legal regime wedded to privacy, telling the difference between reading and snooping—between seeing and spying—is the point.

2. In Action: Is Spying Really All That Bad?

The privacy approach, much better than the trespass approach, recognized that many governmental attempts to ferret out evidence—searches—would take place when the search victim is present, but the government is not. That is, one could say that all sorts of eavesdroppings, electronic or otherwise, occur in the search victim's *present*, but not in his or her *presence*. This type of surveillance, which lacks the sort of supervision over the body that Foucault insists is such a crucial aspect of what makes imprisonment punitive, invades, but it does not coerce.²⁶⁹ That it does not coerce in no way trivializes

²⁶⁹ MICHEL FOUCAULT, DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON 195-230 (Alan Sheridan trans., Vintage Books, 2d ed. 1995) (1975).

the *wrong*, though it does potentially trivialize the *harm*, at least in those cases in which the search victim not only has no felt sense of being observed, but even never learns of it at all, if only because insufficient evidence on which to commence a prosecution is gathered.

It bears repeating that this is not to discount the wrong or harm caused by a search that occurs outside the presence of the search victim, that is, where the search victim is absent during the police entry or, if present, is unaware that he or she is being watched. Thus, I am not recommending that spying is preferable in any way to an unjustified face-to-face encounter, which may in fact involve coercion against the body of the search victim incident to the assertion of authority over the searched area. In other words, somewhat unusual decisions such as *Michigan v. Summers*²⁷⁰ demonstrate that the authority which police have over a place derivative of their right to search can also entail an authority over the body of the search victim as well to facilitate the search, prevent escape or the destruction of evidence, or prevent the suspect's obtaining a weapon that could be used against the officers before, during, or after the execution of the search.²⁷¹ Without belaboring a comparison between the powers to search and arrest, it strikes me as uncontroversial to say that searches that occur outside the presence of the search victim are just as wrong as coercive encounters if, to lift a term of Yale Kamisar's, "comparative reprehensibility"²⁷² matters. The harm could conceivably be just as lasting, too, I'm sure. But that, too, is of little moment to me, at least now. What does currently strike me as staked is how the harm when a search occurs in the presence of the search victim differs from when a search occurs outside the presence of the search victim, quite apart from the difference that may arise out of those instances when searching an area allows for (doctrinally) seizing, arresting, or otherwise coercing (pushing around) the search victim. Or, as Judge Posner has stated the distinction, when police tap your telephone (as opposed to burst in on you when you are home), there is an

²⁷⁰ 452 U.S. 692 (1981).

²⁷¹ See generally *id.*

²⁷² Yale Kamisar, "Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule, 86 MICH. L. REV. 1, 2 (1987).

invasion of privacy, but “[t]here is no interruption—no breaking in on your solitude or concentration.”²⁷³

Consider, for example, *United States v. Knotts*.²⁷⁴ In that case, the seller of a can of chloroform allowed police to place an electronic beeper in the can so they could track it and its possessors.²⁷⁵ The Court held that the use of the beeper was not a search of the can or the car in which it traveled because the beeper did nothing that visual surveillance could not.²⁷⁶ In fact, the driver knew that police were following him, so one could perhaps say that the “stalking” of the driver coerced him into driving evasively.²⁷⁷ Indeed, Bill Stuntz made this very point nearly a decade ago in the *Michigan Law Review*, where he complained that privacy was over-regulated by a Supreme Court that, as a result, left police coercion or low-level police-violence under-regulated.²⁷⁸ But suppose the driver in *Knotts* did not know he was being followed. In that case, Stuntz would say that no search occurred because the sense of coercion is missing.

There is something strange about saying that spying must be “felt” in order to be wrong. This is not to say that undetected spying is as bad as stalking; it probably is not. Stalking describes the constant, one-sided spying that made Bentham's Panopticon—a work camp where inmates knew a guard would surveil them from a central tower into which the prisoners could not see—such a brilliant method of control, without the high costs of the dungeon's isolation.²⁷⁹ But as punitive as stalking may be, it only partially captures what is wrong with spying.

Greek myth has it that Gyges, a barbarian, succumbed to the king of Lydia's requests that he spy on the king's own wife and “peruse her person” while she undressed.²⁸⁰ Gyges knew well the old saying “[l]et each look on his own,” or, in the queen's

²⁷³ RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 29.1, at 639 (3d ed. 1986).

²⁷⁴ 460 U.S. 276 (1983).

²⁷⁵ *Knotts*, 460 U.S. at 285.

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 278.

²⁷⁸ See Stuntz, *supra* note 14, at 1023-24.

²⁷⁹ FOUCAULT, *supra* note 269, at 199-200.

²⁸⁰ See HERODOTUS, *THE PERSIAN WARS* ch. 8 (George Rawlinson trans., 1942).

words, to not “behold what is not lawful for you.”²⁸¹ So when he “gazed on her [nakedness],” Gyges knew he acted “wickedly.”²⁸² In Plato’s *The Republic*, Glaucon told a different version of the myth. Gyges stole a ring from a corpse he discovered after an earthquake.²⁸³ When Gyges learned that by turning the collet of the ring towards himself he would become invisible, he used this power to seduce the queen and seize the empire.²⁸⁴ Glaucon argues that even a just man with Gyges’s ring could not “stick by justice and bring himself to keep away from what belongs to others and not lay hold of it, although he had license to take what he wanted from the market without fear.”²⁸⁵ Socrates, however, immediately instructs Glaucon that “the soul must do the just things, whether it has Gyges’ ring or not.”²⁸⁶

Whichever version of the myth you prefer, I assume you will concur that whatever made Gyges’s actions unjust had nothing to do with his being caught. Thus not only is Justice Stevens correct when he says that “[a] bathtub is a less private area when the plumber is present even if his back is turned[,]”²⁸⁷ but the reverse is true as well: the plumber’s presence ruins the privacy of even a blind or inattentive bather. Spying does lose some of its aggressiveness when it is undetected, though it remains aggressive to the extent that we *fear* being spied on; but undetected spying never loses its privacy-bashing essence. Indeed, the Court acknowledged as much when in *Massiah v. United States*²⁸⁸ it cited with approval a lower-court judge who had said that surreptitious investigations conducted by

²⁸¹ *Id.*

²⁸² *Id.* at chs. 8, 10.

²⁸³ PLATO, *THE REPUBLIC* 359d-e, at 37 (Allan Bloom trans., 2d ed. 1991).

²⁸⁴ *Id.* at 360a-b, at 37-38.

²⁸⁵ *Id.* at 360b, at 38.

²⁸⁶ *Id.* at 612b, at 295.

²⁸⁷ *United States v. Karo*, 468 U.S. 705, 735 (1984) (Stevens, J., concurring in part and dissenting in part).

²⁸⁸ 377 U.S. 201 (1964).

undercover agents who converse with “friends” constitute “more serious impos[itions]” than do interrogations conducted by government agents known by the accused to be government agents.²⁸⁹

Stuntz acknowledges the harm of undetected spying by exempting two “paradigmatic” encounterless searches from his thesis: house searches and wiretaps.²⁹⁰ But why exempt them? Stuntz explains that the contents of houses and phone conversations are “personal”²⁹¹ and “plausibly distinguishable from the kinds of information the state seeks for regulatory purposes,”²⁹² though elsewhere he admits that “[t]here is no privacy-based reason for treating [regulatory] searches differently from police searches; the overbreadth phenomenon [or what Michael Seidman calls “collateral damage”²⁹³] is the same in both settings.”²⁹⁴ Despite this wrinkle, for Stuntz it makes sense in privacy terms that police need a very good reason to raid our houses or intercept our phone calls.

Stuntz's thesis thus leaves some room for the protection of privacy without coercion, but only for “good secrets,” which concern what we do and keep in our houses and what we say on the phone, as opposed to “bad secrets,” which concern those outside-the-house facts like the concealment of a sandwich in a paper sack.²⁹⁵ But even the house loses some of its luster in Stuntz's regime. For example, Stuntz says that *Arizona v. Hicks*²⁹⁶ depicts the Court's obsession with secrecy or what I have here been referring to as “hiddenness.”²⁹⁷ *Hicks* instantiates the “plain view” doctrine, which allows police to

²⁸⁹ *Massiah*, 377 U.S. at 206 (quoting *United States v. Massiah* 307 F.2d 62, 73-74 (2d Cir. 1962) (Hays, J., dissenting)).

²⁹⁰ Stuntz, *supra* note 14, at 1060-62.

²⁹¹ *Id.* at 1063.

²⁹² *Id.* at 1061.

²⁹³ See Louis Michael Seidman, *The Problems with Privacy's Problem*, 93 MICH. L. REV. 1079, 1086-92 (1995).

²⁹⁴ See Stuntz, *supra* note 14, at 1039.

²⁹⁵ *Id.* at 1063.

²⁹⁶ 480 U.S. 321 (1987).

²⁹⁷ See Stuntz, *supra* note 14, at 1022-23.

seize evidence as a bonus if they discover it while lawfully searching for or seizing something or someone else.²⁹⁸ In *Hicks*, the Court held that a police officer who lawfully entered Hicks's apartment soon after Hicks had shot his neighbor through the floor could look only for Hicks, his victims, or his weapons absent independent probable cause to look for something else.²⁹⁹ While there, the officer also peeked under Hicks's turntable to get the serial numbers to find out if the two fancy stereos in the "squalid" apartment were stolen, which they were.³⁰⁰ Because the officer lacked probable cause that the stereos were stolen, moving a turntable for inspection was an unjustified search.³⁰¹ As a result, Hicks got away with theft, but not with the stereos.³⁰²

Stuntz objects to *Hicks*, which he reads as saying that "each marginal search, each additional place where the officer casts his eye, represents a separate issue and ought to be separately justified."³⁰³ We are wrong, Stuntz insists, to perpetuate a doctrine that privileges trivial dignitary interests (i.e. the secrecy of the underside of your stereo) over non-trivial interests (i.e. the right to be free from police coercion) which, like Hicks himself, was absent.³⁰⁴ Thus for Stuntz, what matters in *Hicks* is not the officer's roving eye, but "the legality of the search of the apartment in general."³⁰⁵

But searches are *never* general. Surely Stuntz is not saying that the right to enter a house is the right to ransack it. Stuntz

²⁹⁸ *Id.* at 1023.

²⁹⁹ *Hicks*, 480 U.S. at 325-26.

³⁰⁰ *Id.* at 323.

³⁰¹ *Id.* at 326.

³⁰² *Id.* at 324.

³⁰³ Stuntz, *supra* note 14, at 1023.

³⁰⁴ See *State v. Hicks*, 707 P.2d 331, 332 (Ariz. Ct. App. 1985) (noting that the apartment manager opened door for police, who "[i]n a quick search . . . determined that no people were in the apartment."), *aff'd*, 480 U.S. 321 (1987).

³⁰⁵ See Stuntz, *supra* note 14, at 1023.

knows that searches must be carried out, not just initiated, in a reasonable manner.³⁰⁶ Stuntz also knows that an officer can cast his eye anywhere he wants—that's why we call it "plain view."³⁰⁷ To be sure, police had good cause for being in Hicks's apartment;³⁰⁸ but unless they thought Hicks, a victim, or a gun³⁰⁹ was hiding beneath or behind the turntable, they were no more justified in moving the stereo than they would have been in pumping Hicks's stomach or looking for him in a jewelry box. The serial numbers were hidden, so the "view" was not at all "plain."³¹⁰ Perhaps what annoys Stuntz is that where the police looked, like an "open field," was not "likely to contain the sorts of things ordinary people wish to keep to themselves."³¹¹ But how could police know that nothing private would be there? A turntable can hide a love letter or an ACLU membership card, each bespeaking "those telltales of personality" that in no sense trivialize what we mean by "private."³¹²

Although the meaning of "private" is wider than the meaning of "secret" (a crucial distinction noted in a dissent by Justice Brennan the Term *before Katz* was decided),³¹³ Stuntz

³⁰⁶ *Id.* at 1066-68 (pointing out that the court in *Anderson v. Creighton*, 483 U.S. 635 (1987), and many commentators, failed to discuss the Fourth Amendment implications of the officer's conduct during the search).

³⁰⁷ *Id.* at 1023.

³⁰⁸ *See Hicks*, 480 U.S. at 324.

³⁰⁹ *See Warden v. Hayden*, 387 U.S. 294, 299-300 (1967).

³¹⁰ *Id.* at 324-25.

³¹¹ *See Stuntz*, *supra* note 14, at 1030 (stating that "houses, unlike fields, *do* contain things that most people want to keep to themselves").

³¹² *See Dripps*, *supra* note 22, at 920-21.

The evil of the search lies not in the discovery of criminal evidence, but in the concomitant exposure to the government, and thereby the world, of all those telltales of personality revealed in any place we take for private. To view the exclusionary rule as a personal right is to constitutionally enshrine the pistol in the basement or the cocaine in the coffee can, and to ignore as immaterial the music on the stereo, the books on the shelf, and the fading letters in the bedroom bureau drawer.

Id.

³¹³ *See Lopez v. United States*, 373 U.S. 427, 449 (1963) (Brennan, J., dissenting).

The other half of the Government's argument is that Lopez surrendered his right of privacy when he communicated his "secret thoughts" to Agent Davis. The assumption, manifestly untenable, is that

uses the terms interchangeably. Stanley Cavell employs a less stingy or more ordinary definition of the private when he writes that “[a] private conversation is one that I do not want others to hear, not one they necessarily cannot hear. My private entrance is one through which I can invite others; in principle, anyone in the world can be as well acquainted with it as I am.”³¹⁴ While Cavell's reflections are meant to capture what he calls a “metaphysical” as opposed to “political” sense of privacy, still he reminds us that privacy largely depends on the intentions of the interest-holder. We may safely assume that, to paraphrase Edward Shils, those who intend to conceal mean to control the outward flow of information about themselves, regardless of whether the information is embarrassing³¹⁵ and regardless of the unimagined risks that eavesdropping and betrayal pose.³¹⁶ But generous conceptions of privacy like Cavell's, Shils's and Brandeis's familiar “right to be let alone,”³¹⁷ or even the one I

the Fourth Amendment is only designed to protect secrecy. If a person commits his secret thoughts to paper, that is no license for the police to seize the paper; if a person communicates his secret thoughts verbally to another, that is no license for the police to record the words. On Lee certainly rested on no such theory of waiver. The right of privacy would mean little if it were limited to a person's solitary thoughts, and so fostered secretiveness. It must embrace a concept of the liberty of one's communications, and historically it has.

Id. (citation omitted).

³¹⁴ CAVELL, *supra* note 13, at 330; *see also* SISSELA BOK, *SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION* 288 n.20 (1982) (collecting sources on relation of secrecy to privacy).

³¹⁵ *See* Edward Shils, *Privacy: Its Constitution & Vicissitudes*, 31 *LAW & CONTEMP. PROBS.* 281, 290 (1966).

³¹⁶ *See* *United States v. White*, 401 U.S. 745, 752 (1971).

Inescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police. If he sufficiently doubts their trustworthiness, the association will very probably end or never materialize. But if he has no doubts, or allays them, or risks what doubts he has, the risk is his.

Id.

³¹⁷ *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

pieced together above from *Florida v. Riley*,³¹⁸ are too open for Stuntz, too hard to pin down. They are, as such, too easily converted into an obsession over what police may see and hear while disengaging us from what really matters: physical intimidation.

At its worst, privacy is a greedy concept that promotes hypersensitivity or an unjustified wish to manipulate and defraud others. Here I borrow from Judge Posner, who, like Stuntz, is less skeptical of seclusional claims, i.e., our right to retire from the public to the private. For Posner, again, the difference between police bursting into your living room on the one hand and tapping your telephone on the other is the difference between disturbing your seclusion as opposed to (merely) discovering your secrets.³¹⁹ Posner is deeply skeptical of secrecy or informational claims that do nothing but enhance one's reputation by keeping others in the dark unless the secret or information has some innovative or entrepreneurial component relevant to the capture of competitive market advantages.³²⁰ If "good" privacy claims are seclusional and "bad" privacy claims are strictly secretive or informational and provide no competitive advantage in a market, then does that mean closed containers such as cars, pockets, paper bags or cigarette packets ordinarily are not the sources of seclusional interests? Because Stuntz thinks these places are about convenience, not privacy, he would replace privacy protection in containers with an emphasis on what police do to us (to our bodies) to reveal the contents of those containers.³²¹

Obviously we are at an impasse: I say closed containers are private, in part because coercion is not the Fourth Amendment's only worry; Stuntz says they are not private because privacy invasions tend to matter only when they are occasioned by police coercion.³²² If we treat this as an empirical problem in need of

³¹⁸ 488 U.S. 445 (1989). In *Riley*, Justices O'Connor, Blackmun, Brennan, Marshall, and Stevens agreed we have a right to be free from unusual modes of surveillance. *Riley*, 488 U.S. at 452-68 (O'Connor, J., concurring and Brennan & Blackmun, JJ., dissenting).

³¹⁹ See POSNER, *supra* note 273.

³²⁰ See Richard S. Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 403 (1978).

³²¹ See Stuntz, *supra* note 14, at 1065-66; William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L. J. 393 (1995) [hereinafter *Substantive Origins*].

³²² See Stuntz, *supra* note 14, at 1065-66.

laborious questioning, Slobogin's survey strongly implies that closed containers are private.³²³ But because Stuntz's aim is to impose coherence on modern constitutional law, he must foreclose on the privacy of closed containers.³²⁴

He strongly suggests, perhaps inadvertently, that suspicionless closed-container searches are okay so long as there is no coercion involved, that is, so long as the suspect is absent when the search takes place. But it is hard to believe that Stuntz would go so far as to say that a police officer who, in a place he or she has a right to be, may on a whim open Robinson's cigarette package,³²⁵ Belton's zippered jacket pocket,³²⁶ Lafayette's shoulder bag,³²⁷ or Jimeno's paper sack.³²⁸ This, by the way, is what Officer Biro did in *United States v. Ceccolini*.³²⁹ Was Biro's snooping an unjustified search because it was an *envelope* in which he looked?³³⁰ So there really are private and non-private, worthy and unworthy closed containers? That cannot be

³²³ Slobogin & Schumacher, *supra* note 121, at 737-64 (confirming that while we place the most cherished privacies of life in our phone conversations and our houses, which contain our books and papers, searches of office doors, trunks of cars, footlockers found in cars, and of schoolchildren's lockers were also rated as significantly invasive).

³²⁴ See Stuntz, *supra* note 14, at 1068-78; *Substantive Origins*, *supra* note 321, at 433-42.

³²⁵ See *United States v. Robinson*, 414 U.S. 218, 223 (1973).

³²⁶ See *New York v. Belton*, 453 U.S. 454, 462 (1981) (holding that power of arrest included power to search arrestee's jacket).

³²⁷ See *Illinois v. Lafayette*, 462 U.S. 640, 646-47 (1983) (deciding search of arrestee's bag was a valid inventory search).

³²⁸ See *Florida v. Jimeno*, 500 U.S. 248, 250 (1991).

³²⁹ 435 U.S. 268 (1978).

³³⁰ See *Ceccolini*, 435 U.S. at 270. The unlawfulness of Biro's search of Ceccolini's envelope was uncontested. The Supreme Court ruled that a fruit of that illegality—the discovery of a witness named Lois Hennessey—was admissible despite that illegality. That ruling owes to what dissenting Justice Marshall criticized, in obvious frustration with the majority, as a hypothetical inevitable discovery rule. *Id.* at 287-88 (Marshall, J., dissenting).

(and in fact is not) the law.³³¹ Please recognize that Stuntz is not duplicating Scalia's position in *California v. Acevedo*³³²—that container searches should take place on probable cause without regard to the nature of the container.³³³ Instead, Stuntz's coercion theory requires no antecedent suspicion at all to authorize encounterless or nonconfrontational invasions of closed containers.³³⁴

3. Telling a Search from a Non-search

This impasse could be resolved by upgrading the role of intentions in assessments of when a search takes place. It really makes little difference what privacy is used for, though we sometimes do lose sight of that. For example, in discussing what she calls an “innocence model” of Fourth-Amendment privacy, Sherry Colb presupposes that privacy does not protect criminal activity.³³⁵ In other words, only the innocent have privacy. Once we “abuse” our privacy for criminal purposes, as she puts it, our privacy is “forfeited.”³³⁶ Thus, I take it that on her account, if I was working preparing my federal-income taxes in my study, the activity would be private until I decided to fudge a deduction, at which point the activity would cease to be private, though still occurring in my study. You can see already what I think of this idea: indeed, privacy would do few of us any good at all unless we were in some way embarrassed by what we were doing. That is, abuse of seclusion is what privacy is *for*. A crime committed in seclusion is done in private; it is just that once police have knowledge of the criminal activity, they are justified in invading the private realm for crime-control purposes.

If our goal is to find out without first violating someone's

³³¹ See *United States v. Ross*, 456 U.S. 798, 822 (1982) (“[A] constitutional distinction between ‘worthy’ and ‘unworthy’ containers would be improper”); *Robbins v. California*, 453 U.S. 420, 426 (1981) (holding that the Fourth Amendment “protects people and their effects, and it protects those effects whether they are ‘personal’ or ‘impersonal’ Once placed within such a container, a diary and a dishpan are equally protected”).

³³² 500 U.S. 565 (1991).

³³³ See *Acevedo*, 500 U.S. at 584 (Scalia, J. concurring).

³³⁴ See generally Stuntz, *supra* note 14, at 1068-78 (presenting applications of the coercion thesis to search and seizure cases).

³³⁵ Sherry Colb, *Innocence, Privacy, and Targeting Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456, 1477 (1996).

³³⁶ See *id.* at 1501.

privacy whether we have enough suspicion about them to justify our violating their privacy, then one move we can make is to call as much action as we plausibly can “nonsearches.” This move is expressed in the Court's cases that rule, to name just a few, that on a whim, police can: have drug-sensitive dogs sniff your luggage, hover over your property in airplanes or helicopters, sift through your garbage, study your bank and phone records, trespass onto your property, shine flashlights into your car or barn, use your friends as undercover agents, and track your movements with transmitters hidden in your effects (at least to a point). Yet in each of these cases there is no doubt that police intended to overcome the hiddenness of their targets, who had until then kept their activities secluded.

Two decades before *Katz*, bewitched by its own trespass doctrine, the Court held in *McDonald v. United States*³³⁷ that when D.C. Vice Officer Ogle (I kid you not) mounted a chair and peeked through the transom into a leased room, he conducted no search.³³⁸ As Judge Miller put it for the lower court: “The only problem in the case is whether looking through the transom amounted to an unlawful search. It was not gentlemanly to spy on McDonald in that manner, but his constitutional rights were not thereby invaded.”³³⁹ As interesting a case as *McDonald* is (I recommend particularly Justice Jackson's radical notion of standing expressed in his separate opinion), my interest in it is in what the Court would say about this sort of spying today. Spying is not very gentlemanly, to be sure. But it is, one could say, very professional. Indeed, I recall when the law school where I work amended our Student Honor Code in response to a hate-speech incident that was not covered by our regulations, which read like a version of the California Penal Code, with the same sorts of defenses and terminology, e.g., intoxication, specific intent, and so on. One critic of the Committee's recommended amended Code said that it smacked more of a Gentleman's Club Charter than a Professional Code of Conduct. As criticisms go, however, this one struck me as flimsy: who

³³⁷ 335 U.S. 451 (1948).

³³⁸ *McDonald*, 335 U.S. at 453-54.

³³⁹ *McDonald v. United States*, 166 F.2d 957, 958 (D.C. Ct. App. 1948), *rev'd*, 335 U.S. 451 (1948).

would you rather be judged by, after all, a gentleman or a professional? I, for one, would much rather take my chances with a gentleman any day.

In other words, I am impressed by Judge Miller's choice of words here, words which condemn Officer Ogle for his being ungentlemanly, a standard that regrettably had no constitutional force whatsoever in 1948. After *Katz*, however, would not the ungentlemanly or uncivilized mode of action—here, spying—have point in constitutional law? It is an unreasonable, even antisocial (though obviously legal) mode of action if there ever were one. This is, I take it, precisely the upshot of *Bond*. Certainly common-carrier personnel or fellow travelers could conceivably conduct a tactile inspection of your bag stored in an overhead rack, but what would you say to them if they did? Again, they are not merely moving your bag or rearranging the other luggage to make room for their own: they are inspecting your bag. And to what end, exactly? To find out what you have hidden from them, I assume. Or, put slightly differently, how would they feel if you saw them performing this nosy tactile inspection? (In a wildly different but nonetheless apposite context, my civil procedure professor dubbed this the “spotlight theory,” which holds that the rightness of your positions—the rightness of what you do—can be assessed by imagining that they are being viewed).

I am quite sure that Officer Thielen (who peeked through the bushes through the apartment blinds in *Minnesota v. Carter*)³⁴⁰ in his role as private actor would be unlikely to stick his nose up against a neighbor's window to see through a crack in the blinds, nor would he, were he in his own home, likely to write off discovering someone doing the same to him as a “risk” of apartment life. Just as no one would describe peeking through blinds as “seeing” or “seeing while standing in a lawful place,” no one would describe what federal agents did in *Katz* as “hearing.” To do so cuts off the action from its intention, plan or operation-order. Application of *Katz* in “what is a search” cases strikes me as a straightforward matter: did the putative search victim demonstrate the intention to conceal his activities (here, possession of an incriminating thing or fact)? If so, then did police intend to defeat (and succeed in defeating) that intention?

This sort of assessment of responsibility based on the intentions both of victim and wrongdoer is nothing new to criminal law (to law more generally, or, for that matter, to the

³⁴⁰ See *supra* notes 148-50 and accompanying text.

world).³⁴¹ Theft law turns on the intentions both of the thief to permanently deprive the prior possessor and on whether the prior possessor consented to the would-be thief's acquisition. The illegality of coerced sexual exchanges also turns on intentions, defined by the same relation between the intentions of victim and wrongdoer. These are not isolated instances: the whole idea of self-defense demands that we attend equally to the actions of both victim and defendant.

While we can easily reach agreement that under this approach Katz manifested his intention to exclude the uninvited ear while federal agents simultaneously manifested their intentions to overcome his privacy by electronically eavesdropping on his conversations, his is a rather easy case under the approach that I have identified here. Perhaps a greater demand on assessing the role of intentions in these "what is a search" cases is provided by what I, for one, found to be a riotously funny episode of *Seinfeld*, though its particular hilarity was lost on those with whom I viewed it. In that episode, when George learns that Jerry's new object of affection—Laura the deaf tennis lineswoman (played by the radiant Marlee Matlin)—reads lips, he persuades her to "read" a conversation at an upcoming party, where George hopes to find out why a woman there (Gwen) had broken up with him. As we know, most problems with understanding are not acoustical, but there are some difficulties that here quite literally are, at least if we count them as misreadings rather than as projections. For example, Laura reads "sex" when Jerry says "six." These snags aside, the plan misfires and ends badly, of course, for George, who, for anyone who takes *Katz* at all seriously, got what he deserved for his skepticism, or more precisely, for his play at penetrating the privacy of others. Ungentlemanly? Obviously. This special skill of Laura's not only is extraordinary, but just as importantly, is one which she knows well that others cannot know when to be on guard against. Is lip-reading a privacy invasion? Would it pass for argument to say that it is a risk of living in a world where a tiny percentage of people can read lips? But so is World War III a risk (perhaps an infelicitous example)—but how do I guard against it? Nor is it especially persuasive to refer to it as her

³⁴¹ See generally, DANIEL YEAGER, J.L. AUSTIN AND THE LAW: EXCULPATION AND THE EXPLICATION OF RESPONSIBILITY (forthcoming 2005) (discussing criminal law and its association with responsibility for human action).

mode of "hearing." That's true enough, as far as it goes, but that is the same sort of highly abstract or generalized description that would label *Ciraolo* and *Riley* instances of "flying" as opposed to "spying." That may be how she hears, but that does not mean that her powers, however necessary they may be to her flourishing, cannot be abused.

So what do we do with, say, the paper lunch sack on the floorboard of Jimeno's car? Is it private or not? Stuntz insists that the sandwich's presence in the sack is a matter of convenience, not privacy. Not only could the same be said about much that is situated in our pockets, our satchels, our cars and our homes, but worrying about whether secluding an item or information is an assertion of privacy as opposed to a matter of convenience will only get us into inquiries into motives: *why* did you keep your drugs in the sack? Such inquiries strike me as unlikely to bear fruit when weighed against the fact that the drugs were, after all, *in* the sack. Whether concealing something may have other benefits or even purposes does not defeat it as an act of concealment. Opening it is a penetration of the private world. I can see no other way to see this serious matter.

V. CONCLUSION

While the Supreme Court keeps enjoining litigants from making intentions relevant to Fourth Amendment discourse, it is difficult to abide by an injunction whose terms you do not comprehend. The situation is far from hopeless, however. Getting to the point where we can assess whether an action in question really is constitutional requires a confrontation with the officer's account of his intentions, a confrontation that the Supreme Court threatens to preclude in *Whren* and replicated by both majority and dissent in *Bond*. If *Bond* is an optimistic decision from the standpoint of *Katz*, then its repudiation of the function of intentions in assessing police actions is its most obvious drawback. Intentions really do get a bad rap in the Supreme Court.

The Justices' concerns about subjectivity would be well founded if such inquiries really did require mind reading—encounters with inner, hidden, secret selves. If that is what confrontations with intentions entail, as so often it is suggested they do,³⁴² then they *should* be enjoined. But

³⁴² See, e.g., Diana Roberto Donahoe, "Could Have," "Would Have." *What the Supreme Court Should Have Decided in Whren v. United States*, 34 AMER. CRIM. L. REV. 1193, 1200-01 (1997) ("Although pretext, by definition, entails an assessment of motive, the Supreme Court has clearly held that an inquiry into the officer's subjective state of mind is inappropriate. This rule makes sense when one

confrontations with intentions are not attempts to penetrate privacy; they are attempts to evoke responses about how things were with the person whose intentions we question. And by asking that they explain how things were with them—what they were doing, what the plan was, what remained incidental, what went wrong—we are asking them to elaborate the public, observable world when we feel the need to make sense of an action that strikes us as unusual or untoward. Without leaving room in constitutional criminal procedure for so central, so homely an activity as the proffering of an excuse, we impede the entire project of regulating police, whose actions can be neither meaningfully praised nor meaningfully blamed if they cannot be understood.

By arguing here for the relevance, even centrality, of intentions in any regime directed at regulating the police, I am not suggesting that motives themselves are hidden or inner and should, for that reason, be banished from criminal-procedure discourse. They are not. Motives themselves are directed in a way that they can be assessed, given that they tend to culminate in the realization or setting up of a plan. It is not, therefore, that motives are interior any more than intentions are. The problem with motives, that is, what accounts for their limited relevancy to evaluations of human action, is that motives are by definition external to the action: their “directedness” points the actor at other actions, other plans, other upshots. And given that in moral discourse, be it in the context of law or in garden-variety settings, we are generally more concerned with what people are doing than why they are doing it (what they hope to get out of it), the Supreme Court is correct to deeply discount the importance of motives in evaluations of police practices. What is left now is only to see the extent to which the criteria of motives diverge from those of intentions; to acknowledge as much is essential in assessing whether a search or seizure is pretextual as opposed to unconstitutional, or here, whether a search takes place at all, a serious matter for the Fourth Amendment.

considers the difficulty of reading the officer's mind as he makes quick decisions on the street.”) (footnotes omitted).