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Volume 52 | Number 2

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Fall 11-1-2018

## Property, Persons, and Institutionalized Police Interdiction in *Byrd v. United States*

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### Recommended Citation

Eric J. Miller, *Property, Persons, and Institutionalized Police Interdiction in Byrd v. United States*, 52 *Loy. L.A. L. Rev.* 107 (2018).

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# PROPERTY, PERSONS, AND INSTITUTIONALIZED POLICE INTERDICTION IN *BYRD V. UNITED STATES*

*Eric J. Miller\**

*During a fairly routine traffic stop of a motorist driving a rental car, two State Troopers in Harrisburg, Pennsylvania, discovered that the driver, Terrence Byrd, was not the listed renter. The Court ruled that Byrd nonetheless retained a Fourth Amendment right to object to the search. The Court did not address, however, why the Troopers stopped Byrd in the first place. A close examination of the case filings reveal suggests that Byrd was stopped on the basis of his race. The racial feature of the stop is obscured by the Court's current property-based interpretation of the Fourth Amendment's right to privacy.*

*Although the property-based approach is supposed to be an improvement upon the privacy approach, it merely repeats the problems of incoherence or judicial fiat that undermine the privacy regime it is supposed to replace. The Court's new property analysis turns upon traditional property notions of possession, control, and the right to exclude. However, property concepts are not neutral in the manner that the Court envisages. For example, it is not clear that property, rather than tort or agency or even criminal law, is uniquely applicable to determine the outcome of any given dispute, so that where there are multiple eligible options, then the judge can pick the one that best suits her own preference. Furthermore, even within property law, there are different ways in which property concepts may be used to interpret the Fourth Amendment right to privacy, and so the Justices can and do select among a palate of conflicting*

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*property options.*

*We can contrast the property-based approach with Chief Justice Roberts's anti-arbitrariness approach to the Fourth Amendment jurisprudence in two recent Big Data cases, Riley v. California and Carpenter v. United States. In these cases, the Chief Justice repeatedly insists, firstly, that the Fourth Amendment was adopted in response to an institutionalized, state policy targeting the public for mass searches of their homes and persons; and secondly, that technology has transformed personhood in ways that make persons more dependent and insecure. This transformation has made us, not independent, but increasingly dependent and vulnerable, so that we are liable to government searches that go beyond physical limits that would otherwise constrain the scope of the search.*

*The Chief Justice's anti-arbitrariness jurisprudence rejecting unwarranted mass searches of vulnerable persons applies more generally, outside the realm of big data, to other ways in which persons are vulnerable and dependent. For example, his approach also applies to the type of institutionalized drug interdiction of automobiles discernible in the Byrd case, which raises the specter of mass policing of racial minorities. This mass policing of people of color renders the personhood of minority car divers dependent and vulnerable in similar ways to mobile phone users. Accordingly, a better option would be to develop Chief Justice Roberts's personhood analysis to take into account ways in which racially targeted mass policing transform personhood in ways that make them dependent and insecure.*

TABLE OF CONTENTS

I. INTRODUCTION ..... 110

II. TARGETING, STOPPING, AND SEARCHING TERRENCE BYRD..... 119

III. PROPERTY: CONTROL AND EXCLUSION ..... 125

    A. Property Dominant and Property Eligible

        Interpretations of Privacy..... 127

    B. Property Concepts as Neutral Principles ..... 133

    C. The Plurality of Property Concepts ..... 140

IV. THE POLICE AS PUBLIC INSTITUTION ..... 144

    A. The Police Role..... 150

    B. Externalizing the Costs of Policing ..... 153

    C. Harassment..... 160

V. AUTHORITARIAN SEARCHES ..... 163

    A. Chief Justice Roberts and the Jurisprudence of  
        Personal Security..... 166

    B. Justice Sotomayor: Race-Based Vulnerability..... 170

VI. CONCLUSION ..... 172

## I. INTRODUCTION

The United States Supreme Court's recent emphasis on property rights as defining the limits of state power<sup>1</sup> and of the individual's right to exclude the state<sup>2</sup> sublimates some of criminal procedure's core questions: the nature and function of the police; their authority, as public officials, to act on behalf of the state; and the relationship between the public police and the individuals that they police. Those core questions have intermittently preoccupied the Court,<sup>3</sup> and have received renewed interest in the context of mass data collection.<sup>4</sup> However, when Fourth Amendment rights are stated in terms of easements, bailments, and other property concepts, the primary issue becomes the nature of the suspect's ties to property, not the powers of the police. Instead of directing us to interrogate the relationship between civilian and state,<sup>5</sup> they look to the relationship between possessor and possession.<sup>6</sup> Property rights do not tell us much about the conceptual and normative problems surrounding the police and policing. A focus on property interests reveals nothing about what sort of institution the police are nor the police's proper function in a modern, democratic society.

The Court has begun to directly address the role and functions of the police in the context of government collection of large amounts of data through electronic monitoring of the public.<sup>7</sup> The contemporary discussion of electronic monitoring has echoes of Justice Harlan's earlier normative concerns about the scope of government investigation, articulated in a line of cases from *Katz v. United States*,<sup>8</sup> through *Alderman v. United States*,<sup>9</sup> to *United States v. White*.<sup>10</sup> When electronic monitoring renders collection of evidence easy and pervasive, the Court is more likely to express the directly normative worry that the balance of power between state and civilian has tipped

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1. *See, e.g.*, *Byrd v. United States*, 138 S. Ct. 1518 (2018); *Carpenter v. United States*, 138 S. Ct. 2206 (2018); *Fernandez v. California*, 571 U.S. 292, 308 (2014) (Scalia, J., concurring); *Florida v. Jardines*, 569 U.S. 1 (2013); *United States v. Jones*, 565 U.S. 400 (2012).

2. *Byrd*, 138 S. Ct. at 1527–28.

3. *See, e.g.*, *United States v. White*, 401 U.S. 745, 785 (1971) (Harlan, J., dissenting).

4. *See, e.g.*, *Carpenter*, 138 S. Ct. at 2206; *Riley v. California*, 573 U.S. 373 (2014).

5. *Carpenter*, 138 S. Ct. at 2217–18; *White*, 401 U.S. at 781, 785 (Harlan, J., dissenting).

6. *Byrd*, 138 S. Ct. at 1527–30; *Jardines*, 569 U.S. at 5–7.

7. *See* *Carpenter v. U.S.* 138 S. Ct. 2206 (2018).

8. 389 U.S. 347 (1967).

9. 394 U.S. 165 (1969).

10. 401 U.S. 745, 785 (1971).

too far in favor of the state, so that the state impermissibly dominates the public. More recently, Chief Justice Roberts has become persuaded that the state may dominate the public in just this way when the police have comprehensive access to mobile phone data. The normative and conceptual approach to policing, developed by the Chief Justice in the context of mass data,<sup>11</sup> is transferable to the mass interdiction context of *Byrd v. United States*.<sup>12</sup>

The turn *to* property law as a means of avoiding hard, normative questions about the nature and function of the police and policing matches an earlier turn *away* from property law (and towards privacy concepts) to address the same hard normative questions. When working out the implications of its “reasonable expectation of privacy” doctrine,<sup>13</sup> the Court ducked out of addressing what might count as “tolerable technique[s] of law enforcement, given the values and goals of our political system.”<sup>14</sup> Instead, the Court preferred the easier empirical analyses of whether the public regularly do, or on occasion can (or could), discover some putatively hidden evidence.<sup>15</sup>

The empirical privacy discussion assessed societal attitudes towards privacy by considering the search’s location, intrusiveness, and object.<sup>16</sup> In fact, the intrusiveness question and the location

11. *Riley v. California*, 573 U.S. 373 (2014).

12. 138 S. Ct. 1518 (2018).

13. *Katz*, 389 U.S. at 360 (Harlan, J., concurring).

14. *White*, 401 U.S. at 785 (Harlan, J., dissenting). Justice Harlan firmly embraced the normative approach in *White*, at least in the context of electronic surveillance. In rejecting the property-based approach, he suggested that,

[w]hile these [privacy-based] formulations represent an advance over the unsophisticated trespass analysis of the common law, they too have their limitations and can, ultimately, lead to the substitution of words for analysis. The analysis must, in my view, transcend the search for subjective expectations or legal attribution of assumptions of risk. Our expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present.

*Id.* at 786.

15. *See, e.g., Carpenter v. U.S.* 138 S. Ct. 2206, 2265 (2018) (Gorsuch, J., dissenting) (“[W]e still don’t even know what its ‘reasonable expectation of privacy’ test *is*. Is it supposed to pose an empirical question (what privacy expectations do people *actually* have) or a normative one (what expectations *should* they have?)”); *see also Florida v. Riley*, 488 U.S. 445, 451 (1989) (opining that so long as “any member of the public” could legitimately occupy the airspace, then the police could too); *California v. Ciraolo*, 476 U.S. 207, 213–15 (1987) (discussing the “routine” nature of the use of commercial airspace over the defendant’s backyard).

16. *See, e.g., Richard G. Wilkins, Defining the “Reasonable Expectation of Privacy”*: *An Emerging Tripartite Analysis*, 40 VAND. L. REV. 1077, 1100–07 (1987).

question were often linked: location<sup>17</sup> is usually a shorthand for one aspect of intrusiveness. Location substitutes for intimacy: the home is particularly intimate;<sup>18</sup> other places less so.<sup>19</sup> A guiding assumption of the empirical approach to privacy is that we work harder to protect our intimate spaces, and so express how intimate a space or object is by how much effort we require the police to undertake to intrude.<sup>20</sup> The Court's more recent property doctrine transforms this argument from *intimacy* or the effort of intrusion into something different: an argument about *control*.

The Court's property turn appears motivated by the final collapse of privacy's empiricist approach. Descriptive accounts assessing the general public's capacity to observe each other no longer tracks (if it ever did) public sentiment about appropriate government conduct. Earlier generations of police and public had to expend a great deal of effort to fly over neighbors' houses and observe their backyards;<sup>21</sup> or bug their houses and listen to their conversations;<sup>22</sup> or track their movements around the neighborhood over a period of time.<sup>23</sup> In those less technologically sophisticated times, it was easier to exclude both prying neighbors and the police. The amount of energy expended upon surveillance may have loosely tracked civilians' expectations about their susceptibility to state interference.

Furthermore, the actual capacity of the public to observe others, in times past, stood as a rough proxy for the difficult normative discussion about the authority relationship between state and civilian. The balance of power between state and civilian could be represented in broadly empirical terms. From an institutional perspective, the Court could assess whether the steps taken by the state to obtain evidence were ordinary or extraordinary. From a broadly individualistic or atomistic perspective, the Court could look to the

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17. *Id.* at 1102–03 (Location is usually framed in the Fourth Amendment context in terms of home, business, curtilage, or open field.).

18. *Kyllo v. United States*, 533 U.S. 27, 37 (2001).

19. *Collins v. Virginia*, 138 S. Ct. 1663, 1672 (2018).

20. *Riley v. California*, 573 U.S. 373, 393 (2014) (“Before cell phones, a search of a person was limited by physical realities and tended as a general matter to constitute only a narrow intrusion on privacy.”).

21. *Florida v. Riley*, 488 U.S. 445, 451 (1989); *California v. Ciraolo*, 476 U.S. 207, 209 (1986).

22. *United States v. White*, 401 U.S. 745, 746–47 (1971); *Silverman v. United States*, 365 U.S. 505, 509–10 (1961).

23. *United States v. Karo*, 468 U.S. 705, 708–10 (1984); *United States v. Knotts*, 460 U.S. 276, 278–79 (1983).

effort expended by the suspect to exclude the state. In each case, the empirical approach tracked a more-or-less buried normative agenda: one (the institutional approach) more egalitarian; one more individualistic.<sup>24</sup>

Now drones, cameras, mobile technology, and apps have made these surveillance activities easy and commonplace for the public.<sup>25</sup> No longer can the effort expended to access intrusive or sophisticated technology substitute as a proxy for overly invasive government interference. If access is easy, and everyone possesses high-tech surveillance technology, then all of us are vulnerable to highly intrusive surveillance. In the context of electronic surveillance, the pressing questions are explicitly normative ones: whether the government ought to take advantage of this capacity and whether democracy can withstand the government's doing so.<sup>26</sup> These questions, however, apply not only to high-tech forms of surveillance and investigation, but to similarly all-encompassing, aggregative, low-tech forms of mass surveillance as well.

The Court has failed to recognize that the collapse of the empirical approach applies to the mass policing of persons as much as of data. Drug interdiction is an institutionalized, aggregative, high-volume business that is triggered by police hunches, and seeks to operate, for the most part, outside the Fourth Amendment.<sup>27</sup>

24. We can see these agendas overlap in *Kyllo v. United States*, 533 U.S. 27 (2001) (defining a search by measuring the level of intrusiveness of a thermal imaging device used to surveil a home).

25. *See, e.g.*, ANDREW GUTHRIE FERGUSON, *THE RISE OF BIG DATA POLICING: SURVEILLANCE, RACE, AND THE FUTURE OF LAW ENFORCEMENT* 98 (2017) (discussing new surveillance technologies and the pervasiveness of surveillance); DAVID GRAY, *THE FOURTH AMENDMENT IN AN AGE OF SURVEILLANCE* 31–32 (2017).

26. *See* *Carpenter v. United States*, 138 S. Ct. 2206, 2211 (2018) (addressing whether the Government conducts a search when it accesses historical cell phone records that provide a comprehensive overview of a user's past movements); *United States v. White*, 401 U.S. 745, 785 (1971) (Harlan, J., dissenting) (questioning the Majority's distinction between a party revealing to a third-party what someone said to him or recording that conversation and later divulging the recording to the third-party, versus contemporaneously transmitting the conversation to a third-party).

27. CHARLES R. EPP ET AL., *PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP* 37 (2014) (“[R]easonable suspicion of criminal activity, in a legal sense, is not the basis for an investigatory stop. Officers are to pursue stops and searches on the basis of little more than unsatisfied curiosity. . . . [T]he key decision facing the officer is how far to push the investigation, and it is to be made by observing the vehicle and its contents and by asking questions of the driver. When the officer's initial suspicion or curiosity is resolved through these inquiries, the driver is quickly let go. But when the officer's initial curiosity grows during the course of the inquiries, he or she is to push the investigation through to a search of the vehicle.”).



Considered individually, each encounter, stop, and ensuing search may appear to require high effort from the police. Considered *en masse*, however, these encounters reflect deliberate policy choices by the police to target specific groups for police intervention.

The Court has recently confronted normative questions about the proper function of the police in the context of police access to tools permitting massive data storage<sup>28</sup> and mass surveillance<sup>29</sup> using portable, personal devices. These big data cases have made perspicuous, once again, the stakes of policing for a system of democratic governance. But these stakes are not limited to the technological sphere: they bubble under *every* decision about whether and where to deploy the police. In a separate line of cases, Justice Sotomayor has considered, while dissenting, what the burdens of policing are, who shoulders those burdens, and whether they are worth bearing.<sup>30</sup> In different ways, but certainly in the context of data privacy, the Court has begun to reconsider the balance of power between police and public.<sup>31</sup>

Whatever the interpretative approach selected, the Fourth Amendment invites and demands a normative approach to policing (and the institution responsible for it). Historically, the Court has attempted to avoid an expressly normative approach, whilst at the same time making intensely normative decisions. Property initially filled that subversive normative function. For example, in *Olmstead v. United States*,<sup>32</sup> the Court adopted an interpretation of “property” under the Fourth Amendment’s protection of “houses, papers, and effects” that applied only to “tangible” and not to intangible property.<sup>33</sup> That interpretation—that the limits of property law extended only so far as tangible objects—is normative. It tells us what sorts of spaces or objects we ought to protect, using the Fourth Amendment, from state interference whilst hiding that protection in a series of statements about the tangible nature of property (statements

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28. *Riley v. California*, 573 U.S. 373 (2014).

29. *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (discussing surveillance through historical cell phone records); *United States v. Jones*, 565 U.S. 400 (2012) (discussing law enforcement’s use of GPS tracking on a vehicle for 28 days).

30. *See Utah v. Strieff*, 136 S. Ct. 2056, 2064–71 (2016) (Sotomayor, J., dissenting); *Heien v. North Carolina*, 135 S. Ct. 530, 542–47 (2014) (Sotomayor, J., dissenting).

31. *Carpenter v. United States*, 138 S. Ct. 2206 (2018); *Florida v. Jardines*, 569 U.S. 1 (2013); *United States v. Jones*, 565 U.S. 400 (2012).

32. 277 U.S. 438 (1928).

33. *Id.* at 466.

that ignore that property rights may apply to intangible phenomena, such as intellectual property).

Privacy was also domesticated to serve as a non-normative category. The “reasonable” expectation of privacy necessary for Fourth Amendment protection initially was coined with a normative valence in mind.<sup>34</sup> The question was one of what relationship between the government and the individual ought to be recognized as reasonable.<sup>35</sup> However, the Court suppressed the normative interpretation, which appeared to require judicial judgment calls about appropriate state-individual relations, in favor of an empirical one, asking the courts instead to intuit what expectations about their privacy the public does, in fact, entertain.<sup>36</sup> It is this empirical inquiry that includes the normative judgment that the difficulty of obtaining intrusive technology matches the intimacy of the information sought.

Spearheaded by Justice Scalia,<sup>37</sup> four Justices—Kennedy, Thomas, Alito, and Gorsuch<sup>38</sup>—responded to the renewed normative pressure placed on the Fourth Amendment by big data cases, by translating intimacy-based worries about interference with a person’s justified expectations of *privacy* into control-style worries about state interference with a person’s (customary understandings of) *property*.<sup>39</sup> Turning to property law or property analogies has some purported advantages absent from the directly conceptual and normative questions presented by the nature of the police role. First, the Court can turn to extant legal concepts to flesh out the nature and scope of the individual’s rights. These off-the-peg legal concepts may be sufficiently clear and easily applicable to novel circumstances without

34. See *United States v. White*, 401 U.S. 745, 785 (1971) (Harlan, J., dissenting); *Alderman v. United States*, 394 U.S. 165, 191 (1969) (Harlan, J., concurring); *Katz v. United States*, 389 U.S. 347, 362 (1967) (Harlan, J., concurring).

35. *White*, 401 U.S. at 778–95 (Harlan, J., dissenting); *Alderman*, 394 U.S. at 194 (Harlan, J., concurring).

36. *Carpenter*, 138 S. Ct. at 2261–63 (Gorsuch, J., dissenting); *White*, 401 U.S. at 785 (Harlan, J., dissenting).

37. *Florida v. Jardines*, 569 U.S. 1 (2013); *United States v. Jones*, 565 U.S. 400 (2012) (discussing the right to exclude the police from conducting a warrantless search due to rights under property law and the Fourth Amendment); see *Fernandez v. California*, 571 U.S. 292, 308 (2014) (Scalia, J., concurring).

38. See *Carpenter*, 138 S. Ct. at 2206 (Kennedy, J., dissenting) (Thomas, J., dissenting) (Alito, J., dissenting) (Gorsuch, J., dissenting); *Byrd v. United States*, 138 S. Ct. 1518 (2018); *Jardines*, 569 U.S. at 16 (Alito, J., dissenting).

39. Compare *United States v. Jones*, 565 U.S. 400 (2012) (defining a search using traditional property law), with *Florida v. Jardines*, 569 U.S. 1 (2013) (defining a search using a customary property law analysis).

having to invent new legal concepts or doctrines. Second, the Court can use extant property law as a “neutral principle”<sup>40</sup> for deciding cases. The law of property is a system of pre-existing values, independent of the will of the judge.<sup>41</sup> Turning to property concepts enables the Justices to avoid picking and choosing among their personal preferences, so they may instead defer to a legally authoritative source of decision. Third, property concepts have textual and historical roots that can function in arguments about the correct (original) interpretation of the Fourth Amendment. Even if property rights do not provide all the answers, they have the advantage of framing the Fourth Amendment questions in ways that direct the answers away from the Justices’ gestalt moral preferences, and toward a more legally grounded set of responses.<sup>42</sup>

But are these questions the right ones? Property’s personalized approach<sup>43</sup>—its focus on a limited realm of private social ordering as licensing of state action—obscures the *institutionalized* nature of the public police, and the aggregative scope of certain styles of public policing. The property analysis treats the problem as an individualized one in which the police are a derivative, almost incidental concern of Fourth Amendment doctrine, rather than an institutionalized problem of the distribution of state power that puts the role and methods of the police front and center in the Fourth Amendment analysis.

The role of property interpretations in squishing more expressly normative approaches to Fourth Amendment interpretation is apparent from the Court’s recent jurisprudence. In *United States v. Jones*,<sup>44</sup> the property question was whether the police illegally trespassed on an individual’s property, rather than the state’s imposition or distribution

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40. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 9–10 (1959). According to Wechsler, neutral principles are “criteria that can be framed and tested as an exercise of reason and not merely as an act of willfulness or will.” *Id.* at 11; see also Jon O. Newman, *Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values*, 72 CAL. L. REV. 200, 207 (1984) (“The neutral principles that we are enjoined to seek are based on values, not the full range of values each individual judge might be tempted to enlist from among a personal collection of political, economic, or social preferences, but the values that can reasonably be asserted to have legitimacy for the adjudication process.”). Justice Gorsuch makes just this point in his *Carpenter* dissent. See *Carpenter*, 138 S. Ct. at 2264 (Gorsuch, J., dissenting).

41. See Wechsler, *supra* note 40, at 16.

42. *Carpenter*, 138 S. Ct. at 2264 (Gorsuch, J., dissenting).

43. C. B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* 263–64 (1962) (describing political society as designed to protect the individual’s personal property in their physical person and their belongings).

44. 565 U.S. 400 (2012).

of extensive GPS monitoring upon the public.<sup>45</sup> In *Florida v. Jardines*,<sup>46</sup> the question was whether an individual had extended to the police an implied easement to using drug-sniffing dogs, instead of an institutional question about the distribution and method of drug detection permissibly employed by the police.<sup>47</sup> And in *Carpenter v. United States*<sup>48</sup> and *Byrd v. United States*, the property question is whether an individual property-owner had created a bailment by conveying information or some tangible object to a third party,<sup>49</sup> instead of whether the government's power to engage in comprehensive surveillance is arbitrary and oppressive.<sup>50</sup>

In *Byrd*, Justice Kennedy's decision to use the concept of bailment as a jumping off point into a larger discussion of the influence of property concepts on the Fourth Amendment is significant. Property operates as a means to avoid considering the social and institutional (rather than personal) impact of the Fourth Amendment. Justice Kennedy naturalizes and neutralizes property and contrasts his control-based analysis to more artificial or political interpretations of the Constitution.<sup>51</sup> Property is natural, Justice Kennedy claims, in part because derived from the text of the Constitution.<sup>52</sup> And property is neutral because its categories already fit within extant legal doctrine, by contrast with the more "empirical" or "normative" privacy category.<sup>53</sup> Relying on natural, neutral principles of constitutional interpretation, Justice Kennedy implies, allows him (and the other property-promoting Justices) to steer clear of the political thicket of atextual, normative analysis.<sup>54</sup>

45. *Id.* at 418 (Alito, J., concurring); *id.* at 413 (Sotomayor, J., concurring).

46. 569 U.S. 1 (2013).

47. *See id.*

48. 138 S. Ct. 2206 (2018).

49. *Byrd v. United States*, 138 S. Ct. 1518, 1528 (2018); *see also Carpenter*, 138 S. Ct. at 2216–17 (declining to extend the third-party doctrine to data tracking a person's movements through their cell phone).

50. *Carpenter*, 138 S. Ct. at 2266 (Gorsuch, J., dissenting) (stating his belief that the majority erred in guiding lower courts to "avoid 'arbitrary power' and . . . 'place[ed] obstacles in the way of a too permeating surveillance'").

51. *See Byrd*, 138 S. Ct. 1526–27.

52. *See id.* at 1526 (stating that the Court, based on "the Fourth Amendment and its history," disfavors searches that improperly interfere with property rights).

53. *See id.* at 1528–31 (stating that taking a Fourth Amendment centric approach to the facts, as opposed to creating new exceptions, is the best way to rule on this case).

54. *See id.* at 1531. Though new, the fact pattern here continues a well-traveled path in this Court's Fourth Amendment jurisprudence.

However, Justice Kennedy's property analysis in *Byrd* (and also in his *Carpenter* dissent) is not as natural nor as neutral as he might hope. The property analysis does not simply supervene upon the constitutional text. The category "property" is nowhere mentioned in the text of the amendment:<sup>55</sup> the property analysis is a "principled" extrapolation from some parts of the text.<sup>56</sup> Neither does the text determine the interpretive outcome: the correct interpretation of Fourth Amendment doctrine does not emerge in any straightforward way from property doctrine.

The privacy approach has run into problems in the digital age. However, the Court's most recent return to the property approach in *Jones*, *Jardines*, *Byrd*, and *Carpenter*, among other cases, fails to solve the problems of the privacy approach.<sup>57</sup> The Court's new property approach cannot provide a neutral-yet-normative solution to the Fourth Amendment's protection from state interference. As a consequence, the options seem to be whether to double down on the new property regime, return to the privacy one, or choose some other solution. So far, at least, the Court has tentatively gestured at another way forward.

I shall argue that the best option is to take the lesson from *Carpenter* and apply it to *Byrd*: that is, to recognize that the Court's approach to mass policing of data should also apply to mass policing of persons. The Court's approach is a normative one, articulating the relationship between the state and the people, and ensuring that relationship is an equal and balanced one. The Court's big data approach is egalitarian: it protects civilians against domination or subordination, rather than simply focusing on the individual's right to exclude the government. Whilst such an approach has problems of its own, it has the virtue of clearly framing the issue as one of personal security, rather than sublimating the Fourth Amendment issues under some other legal concept.

The argument proceeds in the following fashion. In Part II, I proceed from the perspective of institutionalized police analysis, rather than individualized property analysis. I begin by excavating some of the hidden facts of *Byrd* and the role that institutionalized

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55. See U.S. CONST. amend. IV.

56. See Ronald DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

57. *Byrd v. United States*, 138 S. Ct. 1518 (2018); *Carpenter v. United States*, 138 S. Ct. 2206 (2018); *Florida v. Jardines*, 569 U.S. 1 (2013); *United States v. Jones*, 565 U.S. 400 (2012).

factors played in the initial decisions to target and interfere with Terrence Byrd on Interstate 81 on September 17, 2014.<sup>58</sup> In Part III, I discuss Justice Kennedy's property-based approach in *Byrd v. United States* and claim that his analysis fails to provide a neutral basis from which to interpret the Fourth Amendment. In Part IV, I argue that the property approach fails to distinguish between institutionalized programs directed towards mass searches of individuals and more limited or episodic non-programmatic searches. In treating individualized and mass searches the same, whatever their institutionalized status, the Court has effectively deregulated certain areas of mass policing. The police are permitted to engage in practices that target socially vulnerable individuals with low social capital who are unable to muster the political power to prevent or prohibit this type of policing. In Part V, I compare the Court's recent jurisprudence on privacy and property, describing searches of data, to its case law discussing searches of persons and places. The Court draws different lessons about nature and consequences of searches depending upon whether the primary target is data, or whether it is persons or tangible property. The new challenges of regulating law-enforcement's sweeping power to search and seize electronic data have raised hard normative and conceptual questions about the relationship between law-enforcement institutions and the public, and even the nature of policing and the police. In response, the Court has adopted an institutionalized approach to address the problem of mass searches for data. When addressing searches of persons or vehicles, even the sort of mass search used to search for drugs on the highways, the Court has consistently chosen to employ an individualized approach to the police and policing. The Court's novel property jurisprudence simply continues this practice for searches of persons and vehicles. I suggest that the Court's institutional approach should apply uniformly to all mass searches, whether these be of data or persons and vehicles.

## II. TARGETING, STOPPING, AND SEARCHING TERRENCE BYRD

The facts of the case are deceptively simple. On September 17, 2014,<sup>59</sup> State Trooper David Long was stationed in the median of

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58. See, e.g., *United States v. Byrd*, No. 1:14-CR-321, 2015 WL 5038455, at \*1 (M.D. Penn. Aug. 26, 2015) (describing events leading to Byrd's traffic stop).

59. *Byrd*, 138 S. Ct. at 1524.

Interstate 81, just outside Harrisburg, Pennsylvania.<sup>60</sup> It was rush hour,<sup>61</sup> just after 6:00 p.m.,<sup>62</sup> and the traffic was heavy.<sup>63</sup> Trooper Long was watching a line of traffic back up: two tractor-trailers were driving along the left lane,<sup>64</sup> apparently trying to pass other traffic. As often happens in this circumstance, a line of cars was stuck behind the trucks.<sup>65</sup> Trooper Long could not point to anything particularly noteworthy about the traffic: for example, none of the cars were speeding.<sup>66</sup> Nonetheless, Trooper Long's attention was drawn to the third vehicle in the line, a car positioned behind the two trucks.<sup>67</sup> All Trooper Long noticed was that the driver had his hands at the now disfavored, but still legal, "ten (10) and two (2) o'clock hand position"<sup>68</sup> and was "sitting far back from the steering wheel, and driving a rental car."<sup>69</sup>

Based on these observations, Trooper Long targeted the car for further surveillance,<sup>70</sup> and tailed it for a short while. First one truck moved over to the right lane: the other truck, the rental car, and an SUV stayed in the left lane.<sup>71</sup> While the two cars could have pulled over briefly to the right, they chose instead to stay behind the truck still in the left lane.<sup>72</sup> Once the truck moved over to the right lane, the rental car passed the truck and only then pulled into the right lane.<sup>73</sup> Trooper Long then decided to pull the rental car over for a "possible

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60. *Id.*

61. Brief for Appellant at 4, *United States v. Byrd*, 679 F. App'x 146 (3d Cir. 2017) (No. 16-1509) [hereinafter "Defendant's Brief"].

62. Brief for Appellee at 4, *United States v. Byrd*, 742 F. App'x 587 (3d Cir. 2018) (No. 16-1509) [hereinafter "State's Brief"].

63. Defendant's Brief, *supra* note 61, at 4.

64. *See id.* at 5

65. *Id.*

66. *Id.* at 4.

67. *Id.*

68. PA. DEP'T OF TRANSP., PENNSYLVANIA DRIVER'S MANUAL 60, <https://www.dot.state.pa.us/Public/DVSPubsForms/BDL/BDL%20Manuals/Manuals/PA%20Drivers%20Manual%20By%20Chapter/English/PUB%2095.pdf>.

69. *United States v. Byrd*, 138 S. Ct. 1518, 1524 (2018).

70. Defendant's Brief, *supra* note 61, at 5–7. On the manner in which the police target suspects for interdiction, see Devon W. Carbado, (*E*)racing the Fourth Amendment, 100 MICH. L. REV. 946, 1044 (2002); Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CAL. L. REV. 125, 132–235 (2017); Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456, 1525 (1996).

71. Defendant's Brief, *supra* note 61, at 6.

72. *Id.*

73. *Id.*

traffic infraction.”<sup>74</sup> Soon after, a second State Trooper, Travis Martin, joined Trooper Long at the traffic stop.

What was Trooper Long’s reason for targeting Terrence Byrd, the driver of the rental car? Byrd was not speeding. In fact, he did not appear to be doing anything out of the ordinary, and Trooper Long appears simply to have decided that Byrd looked suspicious.<sup>75</sup> Trooper Long’s reason for *stopping*—rather than for targeting—Byrd was also marginal, at best: that Byrd did not move briefly back into the right lane before overtaking the second truck.<sup>76</sup> There is some dispute about how to apply the Pennsylvania Vehicle Code in this sort of situation.<sup>77</sup> Clearly, however, Trooper Long did not have a (traffic-related) reason for targeting Byrd in the first place, and had a dubitable, at best, reason for seizing him to conduct the traffic enforcement stop.<sup>78</sup> Instead, as in *Utah v. Strieff*,<sup>79</sup> “[t]his case involved a suspicionless stop, one in which the officer initiated this chain of events without justification.”<sup>80</sup>

The stop was a lengthy one. It lasted over forty-five minutes.<sup>81</sup> The Supreme Court’s opinion elides many of the details of the stop, but the pleadings reveal that the stop was what might be called an “investigatory,” rather than a pure “traffic” stop.<sup>82</sup> In other words, the reason for pulling Byrd over was pretextual and designed to allow the police to generate sufficient information to search the car for drugs.<sup>83</sup>

74. *Byrd*, 138 S. Ct. at 1524.

75. *See, e.g.*, EPP ET AL., *supra* note 27, at 53, 59 (“In investigatory stops, officers target people who look suspicious”—“when making an investigatory stop, officers justify the stop with a minor, low-level violation—or they provide no justification at all.”).

76. State’s Brief, *supra* note 62, at 5–6; Defendant’s Brief, *supra* note 61, at 6.

77. Defendant’s Brief, *supra* note 61, at 6.

78. For example, the Pennsylvania Drivers Manual suggests a passing procedure similar to the one Byrd used. *See* PA. DEP’T OF TRANSP., *supra* note 68, at 45–47, 55–57. This is a seizure under *Hodari D. California v. Hodari D.*, 499 U.S. 621 (1991). There is absolutely no probable cause for the stop. From Trooper Long’s evidence, the decision to target, follow, stop, and seize Terrence Byrd’s car was arbitrary, a matter of the law enforcement officer’s “whim.” *Mapp v. Ohio*, 367 U.S. 643, 660 (1961). Indeed, the Third Circuit acknowledged that the traffic law may not justify the search, instead allowing the search as a reasonable, but mistaken, interpretation of the traffic law. *See United States v. Byrd*, 679 F. App’x 146, 149 (3d Cir. 2017) (claiming that a reasonable understanding of a traffic violation, not a detailed understanding of the law, suffices for a traffic stop). That approach fits with the Court’s decision in *Heien*. *See Heien v. North Carolina*, 135 S. Ct. 530, 531 (2014).

79. *Utah v. Strieff*, 136 S. Ct. 2056 (2016).

80. *Id.* at 2070 (Sotomayor, J., dissenting).

81. Brief for Petitioner at 10, *Byrd v. United States*, 138 S. Ct. 1518 (2018) (No. 16-1371) [hereinafter “Petitioner’s Brief”].

82. EPP ET AL., *supra* note 27, at 59.

83. *Id.*



The police tactics during an investigatory stop are not random, but follow a predetermined script designed to obtain consent to search, or generate enough evidence to justify searching.<sup>84</sup> Having pretextually stopped Byrd, Trooper Long was *always* going to find some further pretext to search the interior of Byrd's car.<sup>85</sup> The only question for Trooper Long was: what reasons *could* he find to justify the further search?

Some of the problems that arose during the traffic stop were of Byrd's own doing. He had an interim driver's license that lacked a photograph to identify him.<sup>86</sup> When they ran Byrd's license through their databases, the Troopers discovered that it was also associated with another name,<sup>87</sup> suggesting to the Troopers that Byrd had used an alias in the past.<sup>88</sup> They also found out that Byrd had been convicted on weapons and drug charges and had violated the terms of his probation in New Jersey, and so had an outstanding warrant.<sup>89</sup> The State of New Jersey, however, declined to authorize the Troopers to arrest him for extradition.<sup>90</sup> While these facts likely confirmed the Troopers in their determination to search the car for drugs, none of these facts provided probable cause to suspect Byrd of having committed some specific criminal offense in the State of Pennsylvania that would justify a search of his vehicle.<sup>91</sup>

Almost *forty minutes* after stopping Byrd, the Troopers had amassed insufficient evidence to justify searching his car, and issued Byrd with a traffic warning for using the left lane.<sup>92</sup> At that point, the Troopers had still not started to search Byrd's car, nor asked him for

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84. *Id.*

85. *Id.* ("Officers making investigatory stops commonly have decided to carry out a criminal investigation before they make the stop; they then identify, or create, a pretext to justify the stop.")

86. Defendant's Brief, *supra* note 61, at 7–8. An interim license is a valid identification document issued while the full license is in the mail.

87. *Id.* at 9.

88. *United States v. Byrd*, 138 S. Ct. 1518, 1525 (2018).

89. *Id.*

90. *Id.*

91. *See, e.g., Arizona v. Gant*, 556 U.S. 332, 343 (2009) (offense of arrest versus offense permitting search).

92. Defendant's Brief, *supra* note 61, at 11. At that point, the justification for the seizure evaporated, and Byrd was free to leave. *See Illinois v. Rodriguez*, 497 U.S. 177 (1990). As Epp et al. point out, drivers rarely do so, given the nature of police authority. *EPP ET AL., supra* note 27, at 38.

consent to search.<sup>93</sup> However, Trooper Long had noticed that Byrd was not listed on the car’s rental agreement.<sup>94</sup>

The events at the rental car office are key to the Court’s legal analysis and Byrd’s legal predicament. Earlier that day, Byrd and his fiancée,<sup>95</sup> Latasha Reed, had gone to the local Budget car rental facility in New Jersey, to rent a car.<sup>96</sup> There, they did what many couples do: only Reed signed the rental agreement, whilst it was Byrd who drove the car home.<sup>97</sup> There, he loaded the trunk with a laundry bag containing body armor and forty-nine bricks of heroin and headed south.<sup>98</sup>

Under the terms of Reed’s rental agreement with Budget, Reed was the only person who fit the rental agreement’s category of “authorized driver.”<sup>99</sup> Byrd did not fit any of the other authorized categories: spouse, co-employee, or additional signatory.<sup>100</sup> In block capitals on the rental agreement, a separate clause stated that the renter would “violat[e]” the agreement if an unauthorized driver were to drive the car.<sup>101</sup> At the very least, violating the agreement voided insurance coverage provided under the rental contract. It is not clear that the terms of the contract denied Byrd the right to drive the car.<sup>102</sup> Nonetheless, after a brief discussion with Trooper Long, Trooper Martin opined that, under the rental car agreement, Byrd “has no expectation of privacy.”<sup>103</sup>

Things went downhill fast for Byrd from there. Although the traffic stop was presumably over when the officers issued Byrd with a

93. Defendant’s Brief, *supra* note 61, at 11.

94. *United States v. Byrd*, 742 Fed. App’x 587, 589 (3d Cir. 2018).

95. Adam Liptak, *Pulled Over in a Rental Car, With Heroin in the Trunk*, N.Y. TIMES (Jan. 1, 2018), <https://www.nytimes.com/2018/01/01/us/politics/rental-car-privacy-supreme-court.html>. Latasha Reed is elsewhere described as his girlfriend; *see* Defendant’s Brief, *supra* note 61, at 4.

96. *Byrd*, 138 S. Ct. at 1524 (The rental office was in Wayne, NJ; Byrd lives in Patterson, NJ.).

97. *Id.*

98. *Id.* at 1524–25.

99. *Id.* at 1524.

100. *Id.*

101. “PERMITTING AN UNAUTHORIZED DRIVER TO OPERATE THE VEHICLE IS A VIOLATION OF THE RENTAL AGREEMENT. THIS MAY RESULT IN ANY AND ALL COVERAGE OTHERWISE PROVIDED BY THE RENTAL AGREEMENT BEING VOID . . .” *Id.* at 1524.

102. *See id.* So, there is a question as to whether the clause goes to *possession* or *insurance liability*. Why get into questions of property and contract?

103. *Byrd*, 138 S. Ct. at 1525.

ticket,<sup>104</sup> the Troopers asked Byrd for consent to search the car, which he refused.<sup>105</sup> The Troopers told Byrd his consent was unnecessary, and conducted a search of the passenger compartment, now roughly three-quarters of an hour into what was no longer a pretextual traffic stop,<sup>106</sup> but now expressly a drug interdiction.

Trooper Martin searched the car's trunk, based solely on the claim that Byrd lacked authority to refuse the search.<sup>107</sup> There, Trooper Martin found the laundry bag, and inside it, body armor and forty-nine bricks of heroin.<sup>108</sup> The Troopers arrested Byrd, eventually turning him over to the federal authorities for prosecution, who charged him with distribution and possession of heroin with the intent to distribute in violation of 21 U.S.C. § 841(a)(1) and possession of body armor by a prohibited person in violation of 18 U.S.C. § 931(a)(1).<sup>109</sup> Having failed to persuade the district court and the Third Circuit to suppress the evidence turned up by the search, the Supreme Court granted certiorari to resolve the Fourth Amendment rights of unauthorized drivers of rental cars.<sup>110</sup> The Court eventually held that Byrd had a property-style interest in the car, and so had sufficient personal stake in the search to satisfy the Fourth Amendment, reversing and remanding the case to the Third Circuit, which then upheld its earlier decision on different grounds.<sup>111</sup>

The Troopers' ability to search turned upon whether Byrd had a Fourth Amendment property or privacy interest in the car. However, focusing on Byrd's property and privacy interest obscures a prior

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104. EPP ET AL., *supra* note 27.

105. Petitioner's Brief, *supra* note 81, at 10. During the consent discussion, Byrd admitted he had a "blunt" (a marijuana cigarette) in the car. *United States v. Byrd*, No. 1:14-CR-321, 2015 WL 5038455, at \*2 (M.D. Penn. Aug. 26, 2015). However, instead of consenting to a search of the car, Byrd instead offered to get the Troopers the blunt himself. *Id.* Neither the Court's opinion, nor the Troopers' decision to search, appears to have turned on the revelation that the car contained a blunt. *See id.* at \*3, n.6.

106. *Byrd*, 138 S. Ct. at 1523 ("For this reason, the troopers told Byrd they did not need his consent to search the car, including its trunk where he had stored personal effects."). The search was legally over once the Troopers issued Byrd a traffic ticket. *See* EPP ET AL., *supra* note 27.

107. *Byrd*, 2015 WL 5038455, at \*2. The Troopers asked for permission to search the car, but told Byrd that because the car was a rental and Byrd's name was not on the agreement, they did not need his permission to search. *See id.*

108. *Byrd*, 138 S. Ct. at 1525.

109. *Id.* at 1523; *Byrd*, 2015 WL 5038455, at \*1.

110. *Byrd*, 138 S. Ct. at 1518.

111. *United States v. Byrd*, 742 Fed. App'x 587, 588 (3d Cir. 2018) ("When this case initially returned to us on remand, we issued a non-precedential opinion reaffirming the District Court's decision on the basis of the good faith exception to the exclusionary rule set forth in *Davis v. United States*, 564 U.S. 229, 232 (2011).").

question: why Trooper Long targeted Byrd in the first place. After all, presumably there are many people who drive through Harrisburg, Pennsylvania, which is on a major east-west thoroughfare, with their hands at the ten-and-two position and their seats eased back. Of the three features advanced to justify targeting Byrd, none seems to provide a justification, let alone an explanation for targeting Byrd. Why bother to target such an unremarkable vehicle and driver for further criminal investigation? Trooper Long lacks even an *inarticulate* hunch.<sup>112</sup> His thought process appears mysterious, perhaps even to himself.<sup>113</sup> However, another possibility hidden in the briefings is suggestive: *Byrd is an African American man.*<sup>114</sup> Byrd's race, however, receives no consideration as a factor at any stage of the case.

### III. PROPERTY: CONTROL AND EXCLUSION

Justice Kennedy advanced a number of related arguments in *Byrd*, all of which focused on the defendant's relationship to the car, rather than the police and their program of low-suspicion traffic interdiction. For Justice Kennedy, the central legal question in the case was whether Byrd had a personal stake in the Troopers' search of the rental car.<sup>115</sup> Under current Fourth Amendment jurisprudence, the Fourth Amendment regulates state searches and seizures that interfere with a civilian's property or privacy rights.<sup>116</sup> Those property and privacy rights are personal to the person searched or seized: a criminal defendant cannot assert that *they* suffered a Fourth Amendment harm if only *someone else's* property or privacy rights were violated.<sup>117</sup> The central question in *Byrd*, then, was whether the defendant had a personal property or privacy right in the car, even though he was not mentioned on the car rental agreement.

Justice Kennedy began his opinion for the Court by noting that the Fourth Amendment has a central role in protecting *individual*

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112. See *Terry v. Ohio*, 392 U.S. 1, 22 (1968), for a discussion on hunches.

113. See JOSEPH RAZ, *ENGAGING REASON: ON THE THEORY OF VALUE AND ACTION* 49 (2002) (discussing unintelligibility of action when the agent has no reasons for an action).

114. Joint Appendix, Defendant's Exhibit No. 12, 12-A, Screenshots of Terminal Display, *Byrd v. United States*, 138 S. Ct. 1518 (2017) (No. 16-1371).

115. *Byrd*, 138 S. Ct. at 1527.

116. *Id.* at 1526.

117. See *Rakas v. Illinois*, 439 U.S. 128, 134 (1978).

liberty.<sup>118</sup> “Few protections,” he suggested, “are as essential to individual liberty as the right to be free from unreasonable searches and seizures.”<sup>119</sup> With echoes of James Otis<sup>120</sup> and the Anti-Federalist Papers,<sup>121</sup> Justice Kennedy mentioned the importance of the Fourth Amendment for the Founders, who resented the English practice of issuing general warrants “that permit ‘police officers unbridled discretion to rummage at will among a person’s private effects.’”<sup>122</sup> General warrants, the Revolutionary generation thought, permitted mass, arbitrary searches of the population. The Fourth Amendment, by contrast, with its demand for probable cause, required the state to articulate specific, credible information that they would find some particular criminal evidence on the person or in the place they chose to search.<sup>123</sup>

The liberty argument functions as a set-up for a variety of property-based arguments. Justice Kennedy first considered how to apply the test that determines whether the Fourth Amendment covers Trooper Martin’s search of the trunk. The test is now a multipart one: first, we ask whether the defendant has a property interest in the item searched; if not, then whether they have a privacy interest.<sup>124</sup> The

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118. *Byrd*, 138 S. Ct. at 1526.

119. *Id.*

120. JAMES OTIS, THE COLLECTED POLITICAL WRITINGS OF JAMES OTIS 16 (Richard Samuelson ed., 2015).

121. THE COMPLETE ANTI-FEDERALIST (Herbert J. Storing ed., Univ. of Chi. Press 1981).

122. *Byrd*, 138 S. Ct. at 1526 (quoting *Arizona v. Gant*, 556 U.S. 332, 345 (2009)). Compare THE COMPLETE ANTI-FEDERALIST, *supra* note 121, with OTIS, *supra* note 120, at 16.

123. The Writ of Assistance or general warrant that so incensed the colonists were transferrable written authorizations to search anyone, anywhere, for customs contraband. The possessor of such a writ could search on a whim, without having to provide a justification for selecting some particular person, place, or time selected. They could target a civilian for any reason or no reason or a pretextual reason, *see* OTIS, *supra* note 120, at 16 (“[W]hen a late comptroller of this port, by virtue of his *writ of assistance* FORCEABLY enter’d into and rummag’d the house of a *magistrate* of this town; and what render’d the insolence intollerable was, that he did not pretend a suspicion of contraband goods as a reason for his conduct.”), and interfere with that person for any reason or no reason. *Id.* at 15–16 (worrying about state officials who “rifle,” “ransack[ ],” or “rummag[e]” through people’s houses). Justice Kennedy echoes that worry in citing to *Delaware v. Prouse*, 440 U. S. 648, 662 (1979), a case denying the police the right to set up suspicionless traffic checkpoints for crime-fighting purposes. Even earlier, the Warren Court had echoed Otis’s defense of liberty by declaring that rights to privacy and security were not “revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment.” *Mapp v. Ohio*, 367 U.S. 643, 660 (1961). Otis makes the same point: if searches may be governed by “the jealousies and mere imaginations” of government officials, then none of us are secure. OTIS, *supra* note 120, at 16 (emphasis omitted). Instead, the Fourth Amendment required that the state specify the time and place of a search—what Otis called “special writs, directed to special officers,” OTIS, *supra* note 120, at 12—under oath asserting what the Constitution now calls probable cause.

124. *Byrd*, 138 S. Ct. at 1526.

privacy test is itself split into two parts: did the defendant themselves subjectively manifest their privacy interest (by keeping the item hidden)? And if so, is their privacy interest one that society would respect?<sup>125</sup>

In *Byrd*, the defendant did not properly brief the property issue,<sup>126</sup> so the Court only considered Byrd’s privacy arguments.<sup>127</sup> Because the body armor and the drugs were in the trunk of the car, locked away from prying eyes, the subjective prong of the *Katz v. United States* privacy test is satisfied. The only question was whether the objective second prong is too.

### *A. Property Dominant and Property Eligible Interpretations of Privacy*

Currently, the Court is in the middle of a major debate about the nature of the property interest, and how it interacts with the privacy interest.<sup>128</sup> In *Katz*, Justice Harlan’s objective test famously asked whether the interest was “one that *society* is prepared to recognize as ‘reasonable.’”<sup>129</sup> The Harlan version of the test has a built-in social or relational component.<sup>130</sup> Justice Kennedy, on the other hand, characterized the test as asking what expectations of privacy are “legitimate.”<sup>131</sup> Rhetorically, a “legitimacy” inquiry allows Justice Kennedy to limit the legal issue to those interests that are *legally* recognized, rather than either institutionally recognized (the

125. *Katz v. United States*, 389 U.S. 347, 361 (2006) (Harlan, J., concurring).

126. *Byrd*, 138 S. Ct. at 1518.

127. *Id.*

128. Compare *Carpenter v. United States*, 138 S. Ct. 2206–07 (2018), with *Carpenter*, 138 S. Ct. at 2223 (Kennedy, J., dissenting) (arguing that the Fourth Amendment should be limited to its property-based origins), *Carpenter*, 138 S. Ct. at 2235 (Thomas, J., dissenting) (noting that the case should turn not on whether a search occurred, but whose property was searched), *Carpenter*, 138 S. Ct. at 2246 (Alito, J., dissenting) (decrying the Court for departing from long-standing doctrine by allowing a “defendant to object to the search of a third party’s property”), and *Carpenter*, 138 S. Ct. at 2261 (Gorsuch, J., dissenting) (emphasizing the “original understanding” of the Fourth Amendment as being rooted in property rights).

129. *Katz*, 389 U.S. at 361 (Harlan, J., concurring) (emphasis added).

130. See, e.g., *United States v. White*, 401 U.S. 745, 785–86 (1973) (Harlan, J., dissenting) (proposing that the question, whether some police activity is “a tolerable technique of law enforcement” be “answered by assessing the nature of a particular practice and the likely extent of its impact on the individual’s sense of security balanced against the utility of the conduct as a technique of law enforcement”); *Alderman v. U.S.*, 394 U.S. 165, 193 (1969) (Harlan, J., dissenting) (arguing that the Fourth Amendment’s privacy protection relates to “persons, not places”).

131. See *Carpenter*, 138 S. Ct. at 2227–28 (Kennedy, J., dissenting) (citing *Rakas v. Illinois*, 439 U.S. 128, 143–44, n.12 (1978)).

institutional approach) or empirically socially recognized (the traditional privacy approach).<sup>132</sup>

Property concepts, Justice Kennedy argues, inform what expectations of privacy count as “legitimate.”<sup>133</sup> But how? What is the judge’s duty when property concepts are an available interpretative resource? Is the judge under a mandatory duty to apply property concepts? Or does the judge have discretion to ignore them? Justice Kennedy initially prevaricates, suggesting that property concepts are merely “instructive.”<sup>134</sup> Instructive concepts are helpful devices that judges are free to ignore. However, a few sentences later, Justice Kennedy notes that the Court’s earlier reliance on property concepts was “supplement[ed], rather than displace[d]” by Justice Harlan’s privacy analysis.<sup>135</sup> Justice Kennedy’s framing indicates that judges must expressly consider, and perhaps even must apply, property concepts when they are pertinent.

Justice Kennedy’s interpretative approach deserves a little unpacking here. If the property approach is now mandatory, so that judges are required to use property concepts whenever interpreting privacy ones, there are still further questions to ask. Is the property analysis of privacy inclusive or exclusive? That is, even if the judge is under a mandatory duty to use property concepts, must they use property concepts *to the exclusion of* non-property concepts, or are property concepts simply one among the range of concepts available to interpret Fourth Amendment privacy?

If Justice Kennedy’s view is an inclusive one, so that property is one among other privacy-interpreting concepts, then we have a further question: is property the *dominant* way to interpret privacy, or is the view a more egalitarian one? In other words, is property *primus inter pares*—the most important privacy concept—or is it on a par with the other eligible interpretative concepts?—as the Court in *Oliver v.*

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132. See generally *Carpenter*, 138 S. Ct. at 2261–72 (Gorsuch, J., dissenting) (discussing the theory of reasonable expectation of privacy articulated in *Katz*).

133. See *Carpenter*, 138 S. Ct. at 2227 (Kennedy, J., dissenting) (citing *Rakas v. Illinois*, 439 U.S. 128, 143–44 (1978)).

134. *Carpenter*, 138 S. Ct. at 2268 (Kennedy, J., dissenting).

135. *Byrd v. United States*, 138 S. Ct. 1518, 1526 (2018) (quoting *Florida v. Jardines*, 569 U.S. 1, 11 (2013)).

*United States*<sup>136</sup> put it: “but one element in determining whether expectations of privacy are legitimate.”<sup>137</sup>

Between the Supreme Court’s 1967 opinion in *Katz* and its 2012 opinion in *United States v. Jones*, the Court’s governing approach to interpreting privacy concepts (and the Fourth Amendment in general) has been to treat privacy concepts as eligible but not dominant interpretative aids.<sup>138</sup> Even in *Jones*, Justice Alito’s concurrence attempted to retain the non-dominant, one-element approach to property concepts.<sup>139</sup> Justice Alito quoted *Oliver*’s “one element” language in support of this non-dominant interpretation and emphasized that “[t]he premise that property interests control the right of the Government to search and seize has been discredited.”<sup>140</sup>

Prior to *Jones*, the Court consistently followed Justice Harlan’s *Katz* concurrence down the one-element-among-others property interpretation path. For example, in *Rakas v. Illinois*,<sup>141</sup> the Court insisted that “even a property interest . . . may not be sufficient to establish a legitimate expectation of privacy.”<sup>142</sup> The *Rakas* Court found unpersuasive “arcane distinctions developed in property and tort law between guests, licensees, invitees, and the like.”<sup>143</sup> The Court emphasized that *Katz* had

repudiate[ed] the doctrine . . . that if police officers had not been guilty of a common-law trespass they were not prohibited by the Fourth Amendment from eavesdropping . . . [so that now] the capacity to claim the

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136. 466 U.S. 170, 183 (1984).

137. *Id.* at 183.

138. *See, e.g.*, *Dow Chem. Co. v. United States*, 476 U.S. 227, 238 (1986) (discussing the intrusiveness of searches using enhanced surveillance devices on commercial and private property); *California v. Ciraolo*, 476 U.S. 207, 212 (1986) (discussing the privacy implications of the curtilage); *Oliver v. United States*, 466 U.S. 170, 178 (1984) (interpreting open fields doctrine consistently with right to privacy); *United States v. Knotts*, 460 U.S. 276, 285 (1983) (deciding that law of “physical trespass based on the law of real property” was not dispositive for issues of Fourth Amendment privacy); *Donovan v. Dewey*, 452 U.S. 594, 600 (1981) (holding that commercial property subject to federal regulatory scheme has less claim to Fourth Amendment privacy protection than private property); *Rakas v. Illinois*, 439 U.S. 128, 143 (1978) (holding that “arcane distinctions developed in property and tort law between guests, licensees, invitees, and the like, ought not to control” the Fourth Amendment inquiry).

139. *See United States v. Jones*, 565 U.S. 400, 423 (2012) (Alito, J., concurring) (advocating that property rights are only one part of the consideration when determining the existence of a privacy interest).

140. *Id.*

141. 439 U.S. 128 (1978).

142. *Id.* at 143 n. 12 (citations omitted).

143. *Id.* at 143.



protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.<sup>144</sup>

In two cases decided on the same day in 1980, *Rawlings v. Kentucky*,<sup>145</sup> and *United States v. Salvucci*,<sup>146</sup> the Court “emphatically rejected the notion that ‘arcane’ concepts of property law ought to control the ability to claim the protections of the Fourth Amendment.”<sup>147</sup> In support of its eligibility, one-element-among-others approach, the Court stated that:

legal possession of a seized good is not a proxy for determining whether the owner had a Fourth Amendment interest, for it does not invariably represent the protected Fourth Amendment interest. This Court has repeatedly repudiated the notion that “arcane distinctions developed in property and tort law” ought to control our Fourth Amendment inquiry . . . ‘it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law . . . .’ While property ownership is clearly a factor to be considered in determining whether an individual’s Fourth Amendment rights have been violated, property rights are neither the beginning nor the end of this Court’s inquiry . . . We simply decline to use possession of a seized good as a substitute for a factual finding that the owner of the good had a legitimate expectation of privacy in the area searched.<sup>148</sup>

Shortly afterwards, in a series of cases discussing the state’s right to conduct aerial surveillance of private property, the Court rejected the idea that “the interests vindicated by the Fourth Amendment were . . . identical with those served by the common law

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144. *Id.*

145. 448 U.S. 98, 105–06 (1980).

146. 448 U.S. 83 (1980).

147. *Rawlings*, 448 U.S. at 105–06 (quoting *Rakas*, 439 U.S. at 149–50, n. 17); see *Salvucci*, 448 U.S. at 91 (quoting *Rakas*, 439 U.S. at 143).

148. *Salvucci*, 448 U.S. at 91–92 (citing *Rakas*, 439 U.S. at 143; *Mancusi v. DeForte*, 392 U.S. 364 (1968); *Warden v. Hayden*, 387 U.S. 294 (1967); *Jones v. United States*, 362 U.S. 257, 266 (1960)).

of trespass.”<sup>149</sup> In *Oliver v. United States*, the Court quoted *Katz*, *Warden*, and *Rakas* in support of the non-dominant, one-element-in-the-analysis approach.<sup>150</sup> The *Oliver* Court rejected a turn to the common law of property as determinative of privacy interests, opining that:

The common law may guide consideration of what areas are protected by the Fourth Amendment by defining areas whose invasion by others is wrongful. The law of trespass, however, forbids intrusions upon land that the Fourth Amendment would not proscribe. For trespass law extends to instances where the exercise of the right to exclude vindicates no legitimate privacy interest. Thus, in the case of open fields, the general rights of property protected by the common law of trespass have little or no relevance to the applicability of the Fourth Amendment.<sup>151</sup>

In a series of cases discussing electronic monitoring of public and private spaces, the Court again adopted the property eligible, one-element approach to interpreting the Fourth Amendment. For example, in *United States v. Knotts*,<sup>152</sup> the Court first faced the issue of whether placing an electronic tracking device on or in some item of movable property constituted a Fourth Amendment seizure. The *Knotts* Court rejected the idea that “notions of physical trespass based on the law of real property were . . . dispositive.”<sup>153</sup> One year later, when the Court in *United States v. Karo*<sup>154</sup> addressed the same issue once again, the Court *again* rejected a trespass approach, describing “[t]he existence of a physical trespass [a]s only marginally relevant to the question of whether the Fourth Amendment has been violated.”<sup>155</sup>

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149. *Florida v. Riley*, 488 U.S. 445, 460 n.3 (1989). Justice Powell glossed the Court’s approach in the police overflight cases:

[T]he Court in *Katz* abandoned its inquiry into whether police had committed a physical trespass. *Katz* announced a standard under which the occurrence of a search turned not on the physical position of the police conducting the surveillance, but on whether the surveillance in question had invaded a constitutionally protected reasonable expectation of privacy.

*California v. Ciraolo*, 476 U.S. 207, 219 (1986) (Powell, J., dissenting).

150. *Id.* at 183.

151. *Id.* at 183–84 (citation omitted).

152. 460 U.S. 276 (1983).

153. *Id.* at 285.

154. 468 U.S. 705 (1984).

155. *Id.* at 712–13.

As the *Karo* Court went on to explain, however, “an actual trespass is neither necessary nor sufficient to establish a constitutional violation . . . . [I]f the presence of . . . [an electronic tracking device in some piece of property] constituted a seizure merely because of its occupation of space, it would follow that the presence of any object, regardless of its nature, would violate the Fourth Amendment.”<sup>156</sup> The Court refused to apply property concepts to a “technical trespass on the space occupied.”<sup>157</sup> In the last of these pre-*Jones* electronic surveillance cases, *Kyllo v. United States*,<sup>158</sup> Justice Scalia, citing to *Rakas*, acknowledged that the Court had “decoupled violation of a person’s Fourth Amendment rights from trespassory violation of his property.”<sup>159</sup>

Perhaps the most obvious place in which the Court adopted an inclusive and egalitarian approach to the interpretative role of property concepts was in the determination of joint authority over some thing or object.<sup>160</sup> Indeed, in *Georgia v. Randolph*,<sup>161</sup> considerations of “social custom”<sup>162</sup> appear to dominate “private law”<sup>163</sup> or property concepts when working out the ability of a co-tenant (co-inhabitant, or overnight guest)<sup>164</sup> to assert their Fourth Amendment rights against a police officer wishing to search their premises.

Justice Kennedy’s brief discussion of interpretative approaches to property concepts in *Byrd* is consistent with the more recent, property-dominant or property-exclusive, trend. He maintains the dominant approach from *Byrd* to *Carpenter*, which was decided a few weeks after *Byrd*. In *Carpenter*, Justice Kennedy repeats his view that “property-based concepts that have long grounded the analytic framework that pertains in these cases.”<sup>165</sup> He continues, however, that “‘property concepts’ are, nonetheless, fundamental ‘in determining

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156. *Id.* at 713.

157. *Id.* at 712. Compare *United States v. Jones*, 565 U.S. 400, 404–05, 411 n.8 (holding that a Fourth Amendment violation occurs for a technical trespass if it concerns “persons, houses, papers, and effects”), with *Jones*, 565 U.S. at 423, 431 (Alito, J., concurring) (rejecting the trespass based theory relied on by the majority because a trespass is neither necessary nor sufficient to establish a Fourth Amendment violation).

158. 533 U.S. 27 (2001).

159. *Id.* at 32.

160. *Georgia v. Randolph*, 547 U.S. 103, 103 (2006).

161. 547 U.S. 103 (2006).

162. *Id.* at 120.

163. *Id.*

164. *Id.*

165. *Carpenter v. United States*, 138 S. Ct. 2206, 2224 (2018) (Kennedy, J., dissenting).

the presence or absence of the privacy interests protected by that Amendment.”<sup>166</sup> The interpolation is central to Justice Kennedy’s property-dominant interpretative approach. For *Rakas* emphatically does *not* say that property concepts *are fundamental*.

The property-dominant insertion is all Justice Kennedy’s own invention. *Rakas* adopts a property-eligible interpretation of privacy. What the Court *actually* says is:

These ideas [of a Fourth Amendment controlled by common-law property interests] were rejected both in *Jones . . .* and *Katz . . .* But by focusing on legitimate expectations of privacy in Fourth Amendment jurisprudence, the Court has not altogether abandoned use of *property concepts in determining the presence or absence of the privacy interests protected by that Amendment*.<sup>167</sup>

The rewriting of property-eligible interpretations of privacy to recharacterize them as property-dominant is a feature of the Court’s recent return to property under the Fourth Amendment.

### *B. Property Concepts as Neutral Principles*

Justice Kennedy points, however, to another advantage of property concepts for interpreting the Fourth Amendment. He seems to view property concepts as providing what Herbert Wechsler called “neutral principles” of constitutional interpretation.<sup>168</sup> Justice Kennedy follows the neutral principles approach when he argues that privacy concepts must be fleshed out using conceptions that stand *outside* the Fourth Amendment itself.<sup>169</sup> On his non-originalist reading, we can add the following minor premise to construct a neat syllogism: property concepts stand outside the Fourth Amendment. [Justices Thomas and Alito are unlikely to agree.] Therefore, property concepts are a permissible basis for interpreting the concept of *legitimate privacy interests*. However, some important difficulties

166. *Id.* at 2227 (emphasis added).

167. *Rakas v. Illinois*, 493 U.S. 128, 143 n.12 (1978) (emphasis added).

168. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959).

169. *See Carpenter*, 138 S. Ct. at 2245 (citing *Rakas*, 439 U.S. at 144 n.12) (“To address this circularity problem, the Court has insisted that expectations of privacy must come from outside its Fourth Amendment precedents, ‘either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.’”).

remain in identifying *which* property comments are likely to be “instructive.”

If we are not to focus on common law or contemporary legal understandings of property, then how are we to work out which property concepts matter? Justice Kennedy flits around from lawful possession (with or without control),<sup>170</sup> to exclusive control (with or without possession),<sup>171</sup> to both possession-*and*-control,<sup>172</sup> to mere-possession-*and*-control,<sup>173</sup> to *lawful-possession-and-control*.<sup>174</sup> Each of these presupposes a different vision of the property relationship. And the addition of lawfulness re-introduces legal technicalities into what was supposed to be a non-legal concept. Possession, after all, need not be identified with (normative, legal) property concepts, but rather with (constitutive, lay) physical ones.

These are all different concepts with different bases in the law of property. Actual possession may or may not confer property rights in some item of property, depending in part upon whether the property is real or personal, who has title to the property, the nature and duration of the possession, and so on.<sup>175</sup> In terms of rights to real property, it may matter that some tenant has actual possession and claims rights over the property, as against the title holder, by adverse possession.<sup>176</sup> Actual possession may not be enough if others also have the ability to use the property.<sup>177</sup> For example, the person in physical control of the property may only have custody, and not true possession of the property, though their possession appear to be “actual.” The non-

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170. *Id.* at 2270 (Gorsuch, J., dissenting) (quoting *Christensen v. Hoover*, 643 P.2d 525, 529 (Colo. 1982) (en banc)) (“[W]here a person comes into lawful possession of the personal property of another, even though there is no formal agreement between the property’s owner and its possessor, the possessor will become a constructive bailee when justice so requires.”).

171. *Byrd v. United States*, 138 S. Ct. 1518, 1528 (2018) (“[D]istinction . . . may be made in some circumstances between the Fourth Amendment rights of passengers and the rights of an individual who has exclusive control of an automobile or of its locked compartments.”).

172. *Id.* at 1529 (“No matter the degree of possession and control, the car thief [i.e., unlawful possessor] would not have a reasonable expectation of privacy in a stolen car.”).

173. *Id.* at 1528 (“[T]he sole occupant of a rental car always has an expectation of privacy in it based on mere possession and control.”).

174. *Id.* at 1528–29 (“The Court sees no reason why the expectation of privacy that comes from lawful possession and control and the attendant right to exclude would differ depending on whether the car in question is rented or privately owned by someone other than the person in current possession of it . . . that risk allocation has little to do with whether one would have a reasonable expectation of privacy in the rental car if, for example, he or she otherwise has lawful possession of and control over the car.”).

175. 63C AM. JUR. 2D *Property* § 34, Westlaw (2009).

176. *Id.* § 36.

177. *Id.*

possessor may retain their property interest so long as they have title or control over the property.<sup>178</sup> That constructive property right may exist even if title is jointly shared, and so the possessor lacks *exclusive*, rather than joint, control over the property. Of course, exclusive control could mean control in conjunction with the right to exclude, which is consistent with joint title to property. Furthermore, both the custodian and the person with title may have *lawful* possession of the property, though only the non-possessor has a property right. And the issue of who has possession, exclusive control, and the like arise in criminal law, for example, in the context of drug possession, where there is, in addition to “dominion and control,” the requirement of knowledge or intent to possess.<sup>179</sup>

Worse, focusing on property considerations sometimes leads the Justices into confused legal backwaters. Consider, for example, in *Carpenter*, Justice Kennedy appears to consider that banks’ and phone companies’ property interests result from information contained in their own business records, rather than their having taken custody of the defendant’s own proprietary information.<sup>180</sup> In other words, a fair reading of Justice Kennedy’s position appears to be that the third-party doctrine tracks the Federal Rules of Evidence business records exception to the prohibition on hearsay evidence: evidence that is regularly gathered as part of the regular activity of the business.<sup>181</sup>

Justice Kennedy’s seems an odd understanding of both the law and the realities of collecting the sort of data at issue in these earlier cases. The third-party doctrine includes the transfer and so “knowing exposure” of a much broader range of information than that collected as part of a business record. For example, the sort of information transferred in *United States v. Miller*,<sup>182</sup> a core third-party doctrine case, was financial information prepared by the defendant, and so not a business record in the way Justice Kennedy imagines.<sup>183</sup> Whilst the Federal Rules of Evidence’s business records doctrine might indeed identify information that is the property of the business, because it was

178. *Id.* § 35.

179. 25 AM. JUR. 2D *Drugs and Controlled Substances* § 162, Westlaw (database updated Feb. 2019).

180. *Carpenter v. United States*, 138 S. Ct. 2206, 2226–27 (2018).

181. *See* FED. R. EVID. 803(6).

182. 425 U.S. 435 (1976).

183. *Id.* at 442.

generated by that business, the third-party doctrine includes much more than this proprietary sort of information.

Finally, Justice Kennedy's property argument, following some suggestions in *Rakas v. Illinois*, fastens onto a worry about unlawful possession: whether the vehicle or other object is stolen or not.<sup>184</sup> Under a common law approach, it matters whether Byrd received a valid legal permission to lawfully possess the car. If not, the car was effectively stolen, given the violation of the rental agreement. In that case, possession and control is no longer determinative of Fourth Amendment rights. Bailments cannot be created if the property is stolen. Having stolen the item, despite his possession and control of the item, the thief has no property right, and so, on the property-dominant interpretation, no Fourth Amendment privacy right either.<sup>185</sup> Lawful possession is thus determinative of the bailment issue: there can be no bailment because possession is unauthorized. However, Justice Kennedy's treatment of this issue is cursory, at best.<sup>186</sup> Even though bailment is a quintessential property concept, no longer existing outside the legal context, Justice Kennedy solves the property question primarily by invoking an empirical issue—what expectations are “customary”—rather than by a property issue—the law of bailment.<sup>187</sup>

The no-unlawful-property restriction highlights a difference between the property approach and the prior privacy one. Privacy, at least in this area of Fourth Amendment law, was relational. The “control and exclude” question does not turn on who has possession, but who has *authority*, real or apparent.<sup>188</sup> The property approach thus does not track the more usual apparent authority approach to Fourth Amendment rights.<sup>189</sup> Under the apparent authority approach, the suspect has a Fourth Amendment interest so long as an officer could

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184. *Byrd v. United States*, 138 S. Ct. 1518, 1529–30 (2018).

185. *Id.*

186. *See id.* at 1526–27.

187. *See id.* at 1527.

188. 68 AM. JUR. 2D *Searches and Seizures* § 156, Westlaw (2009).

189. Justice Alito does adopt a property approach in *Fernandez v. California*, 571 U.S. 292 (2014), a joint-authority case. *See Fernandez*, 571 U.S. at 305. But his approach does not turn on the niceties of property law, but only on whether a lawful occupant has authority to consent to a search despite the conflicting property interests of a co-tenant. *See id.* (“Suppose that an incarcerated objector and a consenting co-occupant were joint tenants on a lease. If the objector, after incarceration, stopped paying rent, would he still have ‘common authority,’ and would his objection retain its force? Would it be enough that his name remained on the lease? Would the result be different if the objecting and consenting lessees had an oral month-to-month tenancy?”).

reasonably believe, given the facts as they perceived them, that the suspect had authority to exercise control by excluding uninvited intruders.<sup>190</sup>

Apparent authority exists even if the suspect has no property interest in the object or place they claim to control.<sup>191</sup> Apparent authority emphasizes the circumstances as they present themselves to a reasonable officer, including the relationships between the individuals claiming an interest in that property.<sup>192</sup> Lawful authority emphasizes the legal status of the possessor, even if they are not as they seem.<sup>193</sup> Someone without apparent authority may possess legal authority; someone with apparent authority may lack legal authority.<sup>194</sup> The mere bystander, dropping around for business purposes, may turn out to be the landlord who owns the apartment. The soccer-mum at the door may turn out to be a squatter, refusing to abide by her court-ratified eviction.

Justice Kennedy’s social, “customary” understanding of property seems especially important in cases in which a party claims to enjoy joint control over some thing or place. In a series of cases discussing whether someone without a lawful property interest could consent to the search of a building, the Court held that property interests were not determinative of (or even dominant for) the ability to give consent.<sup>195</sup> Instead, the question was framed primarily in terms of privacy.<sup>196</sup> What mattered to the Court in *Georgia v. Randolph* was “widely shared social expectations,”<sup>197</sup> echoing Justice Harlan, in his *Katz* concurrence, who defined the right to privacy in terms of “expectation[s] . . . that society is prepared to recognize as ‘reasonable.’”<sup>198</sup> These social expectations, however, appear to track interpersonal relationships—the sort of authority others give us to

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190. 68 AM. JUR. 2d *Searches and Seizures* § 156, Westlaw (2009).

191. *Id.*

192. *Id.*

193. *Id.*

194. *See id.*

195. *See Illinois v. Rodriguez*, 497 U.S. 177, 186–90 (1990); *Katz v. United States*, 389 U.S. 347, 352–54 (1967).

196. *See, e.g., Georgia v. Randolph*, 547 U.S. 103, 115 (2006).

197. *Id.* at 111.

198. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).



make decisions on their behalf (and so may be analogous to agency, rather than property relations).<sup>199</sup>

Thus, for example, in *Randolph*, property rights are included as an eligible source for interpreting privacy rights, but they are not the dominant one.<sup>200</sup> Part of the reason is that property imperfectly tracks the interests that co-tenants have in their residence.<sup>201</sup> On one view of the right to exclude, what matters is the sort of authority the person present exercises over some place or item. The source of that authority may derive from the relations of persons *to each other* (sometimes framed in terms of agency relations, but also in terms of marriage, or being a guest, and so on), rather than in terms of persons to property through the law or lawlike concepts.<sup>202</sup>

Customary, shared understandings of the “mutual use” of some place or thing thus need not track the law of property, but rather the norms of agency, or even of etiquette or familial intimacy. All these sources of privacy satisfy the *Rakas* demand that they be found outside the Fourth Amendment.<sup>203</sup>

Here we have a limitation of the neutral-principles argument. While the choice of a principle may be neutral in the sense of “legal” rather than “moral” or “economic,” that principle may not be neutral in the sense of “uniquely required.” The judge may still have discretion to choose from amongst the available principles.

Choice among applicable legal principles can occur on various levels. A decision-maker may be able to choose *among* doctrines and choose *within* doctrines. There is a choice among doctrines if, for example, property is not the only available doctrine applicable as a

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199. *See, e.g.*, *United States v. Matlock*, 415 U.S. 164, 171 n.7 (1974) (“Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements, . . . but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.”).

200. *See Randolph*, 547 U.S. at 111.

201. *See, e.g., id.* at 114.

202. *Cf. Fernandez v. California*, 571 U.S. 292, 307 (2014) (holding that “the *lawful* occupant of a house or apartment should have the right to invite the police to enter the dwelling and conduct a search.” (emphasis added)). Justice Alito authored the majority opinion in *Fernandez*, so it is consistent with his other property-based jurisprudence that he applied a lawful occupant (rather than customary perception) standard. *See, e.g.*, *Florida v. Jardines*, 569 U.S. 1, 16–26 (2013) (Alito, J., dissenting).

203. *See Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978).

principle of interpretation external to the Fourth Amendment. For example, tort law and its notions of privacy and publicity may also apply.<sup>204</sup> There is a choice within doctrines if the doctrine itself contains multiple eligible options for the decision-maker to select among. Having selected property, why prioritize one aspect of property—control and the right to exclude—over others? Thus, even if the first-order principle—property law—is neutral in the sense of “legal” as opposed to “extra-legal,” *these other*, second-order choice-guiding principles may not be. Worse, focusing on the first-order principle may give an undeserved patina of legitimacy to judicial fiat. In an act of interpretative prestidigitation, the judge gets to say, “hey, look, my governing principle is boring old property law,” while drawing our attention away from the raw political or moral decision to pick property law in the first place, or to emphasize one among competing, differently consequential, property-law conceptions.

Property provides a ready-made template for bundling together a group of concepts that is helpful when thinking about the sort of security or privacy guaranteed to civilians by the Fourth Amendment. Possession of some object comes prepackaged, on the property analysis, with the right to control that item, and the power to exclude others from its use.<sup>205</sup> Property law is not the only account of control and exclusion that the law contains, however. Tort law famously does too<sup>206</sup> (but so might family law in the case of joint authority, or even the rules of etiquette). Indeed, it was tort law’s concepts of privacy that provided the dominant interpretation of Fourth Amendment security for the last fifty years.<sup>207</sup>

Privacy also contains a right to exclude—not merely physical persons, but also prying eyes and ears. These privacy concepts are part of a broader tort scheme that regulates, not merely intrusions upon some individual’s secure spaces, but also the ways in which third parties may use the public manifestations of some individual’s personality.<sup>208</sup> And concepts, such as trespass, control, and exclusion, that apply in privacy law also have their cognates in tort. It is unclear,

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

205. 63C AM. JUR. 2D *Property* § 33, Westlaw (2009).

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

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

208. See Warren & Brandeis, *supra* note 206.

unless the Court specifies, whether the Court is relying on privacy or property as a first-order interpretive principle.

There is another reason for worrying that property can serve as a first-order neutral principle. Property should operate to determine any question of interpretation arising under the Fourth Amendment. Possession, control, and the right to exclude, along with the associated property concepts of trespass, custody, bailments, and easements are, however, insufficient to explain a whole carve-out of Fourth Amendment law: the open fields doctrine. When a property owner erects a sign expressly asserting their possession and control of an area of real property, that property is one of their “effects”; and the signage expressly indicates their decision to exclude uninvited guests. Ordinary individuals would be subject to prosecution (criminally or civilly) for their trespass. It is the police, alone, who are granted an easement.

The mere fact that an individual could unlawfully intrude upon the property does not render trespass any less significant, as a property concept. Just as the fact that a passerby could interfere, unlawfully, with my backpack or my car does not render my property interest in it any less determinative of their trespass or theft. The tripartite distinction between open fields, curtilage, and house is thus not a distinction within *property* concepts, but within *privacy* ones.

### C. *The Plurality of Property Concepts*

The problem Justice Kennedy faces in miniature in his opinion in *Byrd* is one that pits the different property-dominant Justices on the Court against each other. Even if property concepts are allowed to determine the interpretation of the Fourth Amendment or the reasonable expectation of privacy, it is worth asking: which property concepts? The Court has a number of options. It could turn to the English common law at 1791, when the Fourth Amendment was ratified, and adopt a Blackstonian or colonial interpretation of property law. Or the Court could turn to current law to provide its property concepts. If the Court does not like overly legalistic approaches, then it could turn to philosophical or sociological accounts of property concepts and use those to help interpret the Fourth Amendment. However, each of these approaches presents disadvantages as an interpretative device.

For example, if the Court relies on Blackstone or the law of the Colonies during the revolutionary era, then the Court must reject the “customary understandings” of property law approach, unless these customary understandings are the understandings of legal technicians or the founding generation. It is doubtful that many contemporary Americans—including many criminal law practitioners or police officers—are familiar with Blackstone or Colonial Era property laws. Indeed, it seems clear from Justice Kennedy’s and Justice Scalia’s rejection of the common law of property that they had a different source of property law in mind.<sup>209</sup> Justices Thomas,<sup>210</sup> Alito,<sup>211</sup> and perhaps Gorsuch,<sup>212</sup> however, seem more amenable to the common law approach.<sup>213</sup>

If contemporary understandings are to be our guide, then we have to wrestle with the problem that fifty states have their own laws of property. Even if these states’ property regimes share rough similarities, they also share broad differences. For example, to determine who is entitled to refuse entry to some house, we might have to consider the question of common ownership. In that case, the western states, with their community property regime, are very different from eastern and midwestern states.<sup>214</sup> And Louisianans are likely to have rather different property understandings from the rest of us.<sup>215</sup>

Picking and choosing among the fifty states’ contemporary property law would run afoul of the Court’s rejection of a localized Fourth Amendment. As the Court put matters in *Virginia v. Moore*,<sup>216</sup> “linking Fourth Amendment protections to state law would cause them to ‘vary from place to place and from time to time.’ Even at the same place and time, the Fourth Amendment’s protections might vary if federal officers were not subject to the same statutory constraints as state officers.”<sup>217</sup> To remain consistent, the Court requires a non-local

209. See *Byrd v. United States*, 138 S. Ct. 1518, 1527 (2018).

210. See *Carpenter v. United States*, 138 S. Ct. 2206, 2235–46 (2018) (Thomas, J., dissenting).

211. See *id.* at 2246–61 (Alito, J., dissenting).

212. See *id.* at 2261–72 (Gorsuch, J., dissenting).

213. Even on this approach, there is a second-order interpretative question: whether a decision-maker should choose Blackstone or the one of the property regimes of the thirteen colonies, if those regimes diverge on a given question of property.

214. See, e.g., *Davis v. State*, 799 S.W.2d 398, 400 (Tex. App. 1990).

215. See, e.g., *State v. Woods*, 526 So. 2d 443, 445 (La. Ct. App. 1988).

216. 553 U.S. 164 (2008).

217. *Id.* at 176 (quoting *Whren v. United States*, 517 U.S. 806, 815 (1996)).

source of property law. That preference explains, in part, the attraction of the originalist approach: Blackstone provides a common, if outdated, property law regime.<sup>218</sup>

The property-dominant interpretation could turn outside the law, to a philosophical or sociological concept of property. That approach fits with the Court's emphasis on the rights to exclude and control as characteristic of property law. But even this approach has its problems. For example, the concept of property is hotly contested as a philosophical matter. To take just two approaches that the Founders would have found familiar: should we adopt a Humean approach to property as artificial bundle of rights<sup>219</sup> (which has found a more modern endorsement in Hohfeld's account of property rights<sup>220</sup>) or should we follow Locke and treat property as grounded in certain natural rights?<sup>221</sup>

These are only a few of the philosophical options. There are yet more potential property approaches,<sup>222</sup> and these have significant consequences for the way in which we approach individual rights. If the Court is empowered to pick among these different, conflicting, second-order interpretative visions of property rights, then the neutral principles approach fails, and with it one of the major attractions of the property solution to Fourth Amendment interpretation.

Instead, the Court could simply attempt to discern empirically what property concepts people have. This sort of empirical or sociological, non-technical understanding of property interests has the advantage of administrability. Ordinary people do not need to know the law of property or the rule against perpetuities in order to know their Fourth Amendment rights. And neither do the police. The Court has elsewhere rejected technical approaches to Fourth Amendment concepts: in their definitions of "probable cause"<sup>223</sup> and

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218. Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 2 (1996). Again, if the laws of the separate Colonial Era states are chosen, then we might have plural property regimes.

219. George E. Panichas, *Hume's Theory of Property*, 69 ARCHIVES FOR PHIL. L. & SOC. PHIL., 391 (1983).

220. Henry E. Smith, *Property Is Not Just a Bundle of Rights*, 8 ECON. J. WATCH 279, 280 (2011) (noting that the bundle of rights theory builds on Hohfeld).

221. David Schultz, *The Locke Republican Debate and the Paradox of Property Rights in Early American Jurisprudence*, 13 W. NEW ENG. L. REV. 155, 155–56 (1991).

222. See, e.g., Timothy M. Mulvaney, *Progressive Property Moving Forward*, 5 CAL. L. REV. CIR. 349 (2014) (discussing a conception of property grounded in property's social nature, rather than in liberal individualism).

223. *Illinois v. Gates*, 462 U.S. 213, 230 (1983).

“reasonableness.”<sup>224</sup> These shared social, commonsense understandings of property law seem relatively easy to discern and apply. Furthermore, Justice Kennedy endorsed the social, “customary” understanding of property in *Byrd*<sup>225</sup> and in *Carpenter*.<sup>226</sup> He is quite clear in *Byrd* that he does not interpret “privacy” using a common-law or legalistic understanding of property concepts.<sup>227</sup> He repeatedly insists that what matters are *not* common law understandings, but something more general and less technical.<sup>228</sup> Thus, his understanding of property appears closest to the sociological approach than to any of the others so far canvassed.

However, Justice Kennedy’s non-technical understanding of property threatens to return us to the empirical morass characteristic of the privacy debate, instead of liberating us from it. Custom is custom, whether it is customary beliefs about property or about privacy. Once we turn to an empirical, non-technical approach to Fourth Amendment doctrine, then the Court is back in the business of projecting the Justices’ Fourth Amendment predilections onto the public. Judicial fiat, rather than some neutral principle, determines what “customary” property understanding wins the day.

Property was supposed to be more attractive than privacy because it was neutrally normative, rather than partisanly empirical.<sup>229</sup> However, even among the Justices, there is little agreement upon what property concepts to apply. In the past six years, five Justices have expressed radically different views of the application of property concepts to the Fourth Amendment. Justice Thomas has taken the most “originalist” approach, arguing that only tangible property rights are covered by the Fourth Amendment and that privacy rights are not covered at all.<sup>230</sup> Justice Alito has adopted a legalistic account of

224. *Ryburn v. Huff*, 565 U.S. 469, 477 (2012).

225. *Byrd v. United States*, 138 S. Ct. 1518, 1527 (2018).

226. *Carpenter v. United States*, 138 S. Ct. 2206, 2223 (2018) (Kennedy, J., dissenting).

227. *Byrd*, 138 S. Ct. at 1527.

228. *Id.* 1522 (“[A] person need not always have a recognized common-law property interest in the place searched to be able to claim a reasonable expectation of privacy in it.”); *id.* at 1526 (quoting *Rakas v. Illinois*, 439 U.S. 128, 144 n.12 (1978)) (“Expectations of privacy protected by the Fourth Amendment, of course, need not be based on a common-law interest in real or personal property, or on the invasion of such an interest.”).

229. *See Carpenter*, 138 S. Ct. at 2264 (Gorsuch, J., dissenting).

230. *Id.* at 2236 (2018) (Thomas, J., dissenting). I put “originalist” in scare quotes, in part because his interpretation of property does not do justice either to the historical period he presumes to interpret, which had a much more diverse set of philosophical influences than he acknowledges, many of which were critical of the Lockean approach he adopts. *See THE FEDERALIST* No. 1

property rights, arguing that legal, or common law property concepts should prevail.<sup>231</sup> Justice Gorsuch asserts that property concepts ought to apply, although he is not sure which ones do, and how they do.<sup>232</sup>

Even Justice Scalia, who led the charge to transform the Fourth Amendment with a property-dominant approach,<sup>233</sup> picked the “common law” understanding of property associated with Justice Alito in *Jones*,<sup>234</sup> and in *Jardines*<sup>235</sup> switched to the customary approach adopted by Justice Kennedy. In *Jardines*, as in *Carpenter*, Justice Alito dissented, serving as the defender of the common law approach against rival customary approach, and in so doing demonstrating the consequential difference that the choice of second-order interpretative property understanding can make for the outcome of criminal procedure cases.<sup>236</sup>

Property takes us no further towards a neutral interpretation of Fourth Amendment protections than privacy did. The fault lies not with these other concepts, but rather with the Fourth Amendment itself. The Fourth Amendment calls for a directly normative interpretation of the state’s police interaction with civilians, resting as it does on inherently vague concepts like “reasonableness” or “security.” The better approach would be to recognize the normative valence of these concepts and develop a jurisprudence to address them.

#### IV. THE POLICE AS PUBLIC INSTITUTION

Trooper Long did not mention Byrd’s race.<sup>237</sup> Nor, indeed, do any of the pleadings or court opinions. Nonetheless, the fourth reason

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(Alexander Hamilton). And in part, because the interpretation of *Lochner* to which he most explicitly cites, Professor Morgan Cloud adopts a much more expansive reading of “property” than does Justice Thomas. *Compare Carpenter*, 138 S. Ct. (Thomas, J., dissenting), with Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555 (1996).

231. *Carpenter*, 138 S. Ct. at 2247–48 (Alito, J., dissenting); *Byrd v. United States*, 138 S. Ct. 1518, 1531–32 (2018) (Alito, J., concurring); *Florida v. Jardines*, 569 U.S. 1, 16, 26 (2013) (Alito, J., dissenting); *United States v. Jones*, 565 U.S. 400, 420–21 (2012) (Alito, J., concurring).

232. *Carpenter*, 138 S. Ct. at 2261–72 (Gorsuch, J., dissenting).

233. *See, e.g., Jones*, 565 U.S. at 404–05; *Jardines*, 569 U.S. at 5–8.

234. *Jones*, 565 U.S. at 420–21.

235. *Jardines*, 569 U.S. at 7, 23.

236. *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (Alito, J., dissenting); *Florida v. Jardines*, 569 U.S. 1 (2013) (Alito, J., dissenting).

237. Joint Appendix, Defendant’s Exhibit No. 12, 12-A, Screenshots of Terminal Display, *Byrd v. United States*, 138 S. Ct. 1518 (2017) (No. 16-1371).

Trooper Long might have singled out Terrence Byrd for drug interdiction on Highway 81 outside Harrisburg, Pennsylvania is one employed by too many law enforcement officials on our highways: Terrence Byrd is an African American man.<sup>238</sup>

Race is *super-salient* for law-enforcement officials:<sup>239</sup> the sort of factor that overdetermines their response to the actions of African American civilians.<sup>240</sup> Race works to explain (though not justify) police activity, even when the police do not know that race is functioning to determine their decision-making process.<sup>241</sup> Race operates for the police as a reason both to *initiate* interactions with the public and *structure* that interaction in ways that focus on interdiction rather than traffic stops.<sup>242</sup> Race explains (though does not justify) why a law-enforcement official's attention is drawn to one group of individuals rather than another,<sup>243</sup> or one driver rather than another in a five-vehicle traffic line (race's *targeting* harm).<sup>244</sup> Race explains (though does not justify) why an officer's response may be more intrusive once an individual is targeted: why the decision may be to engage in a pretextual stop on suspicion of drugs (the *discrimination* harm).<sup>245</sup> Race may even explain (though does not justify) why the suspects that law-enforcement officials stop have outstanding warrants: because they have been profiled in this way in the past, and

238. *Id.*

239. EPP ET AL., *supra* note 27, at 14 (“In speeding stops, the most important influence on who is stopped is how fast you drive. In investigatory stops, the most important influence on who is stopped is not what you do but who you are: young black men are by far the most likely to be stopped.”).

240. See, e.g., Devon Carbado & Patrick Rock, *What Exposes African Americans to Police Violence?*, 51 HARV. C.R.-C.L. LIBERTIES L. REV. 160 (2016); Frank Rudy Cooper, “*Who’s the Man?*”: *Masculinities Studies, Terry Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671 (2009); Cynthia Lee, *Reasonableness with Teeth: The Future of Fourth Amendment Reasonableness Analysis*, 81 MISS. L.J., 1133, 1150 (2012); L. Song Richardson, *Implicit Racial Bias and Racial Anxiety: Implications for Stops and Frisks*, 15 OHIO ST. J. CRIM. L. 73 (2017); Carbado, *(E)racing the Fourth Amendment*, *supra* note 70, at 982.

241. L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2044–47 (2011). Race functions in this way explicitly or implicitly, consciously or unconsciously.

242. *Id.* at 2044–47 (2011) (discussing the manner in which an officer’s implicit biases can impact the determination of Fourth Amendment reasonableness).

243. *Id.*

244. See Tracey L. Meares, *Terry and the Relevance of Politics*, 72 ST. JOHN’S L. REV. 1343, 1348–49 (1998); William J. Stuntz, *Terry’s Impossibility*, 72 ST. JOHN’S L. REV. 1213, 1218 (1998); Colb, *supra* note 70.

245. Colb, *supra* note 70.



ticketed, and failed to pay the ticket (the *ratcheting* harm).<sup>246</sup> And race explains (though does not justify) why law-enforcement officials more easily discount minority motorists' interests in not being stopped in the first place (but also in avoiding lengthy, public detentions) (the *citizenship* harm).<sup>247</sup> Finally, race operates to silence minority drivers who might wish to challenge the stop without risking physical violence (the *resentment* harm).<sup>248</sup>

The police undertake the mass policing of motorists and pedestrians as part of deliberate, institutional, law-enforcement programs. Mass policing is aggregative, rather than individualized.<sup>249</sup> It is “a numbers game; you have to stop a lot of vehicles to get the law of averages working in your favor.”<sup>250</sup> The goal is simply to gather sufficient vehicles to stop so as to hit the jackpot.

The Court has not made much of an effort to understand the nature of *the police* as an institution. The police are first and foremost public officials: they are members of a distinct institution (or set of institutions) within the executive branch of government and serve to represent and enforce state authority.<sup>251</sup> For the most part, however, the Court has only obliquely wrestled with the institutionalized nature of police authority. The Court has more directly debated the manner in which the Warrant Clause does or does not justify *ex ante* interbranch regulation by the judiciary of the police;<sup>252</sup> or (relatedly)

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246. BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE 147 (2007) (“The logic of the ratchet in the policing context is simple: if the police dedicate more resources to investigating, searching, and arresting members of a [particular] group, the resulting distribution of arrests (between profiled and nonprofiled persons) will disproportionately represent members of that [particular] group.”).

247. *United States v. Drayton*, 536 U.S. 194, 210 (2002) (Souter, J., dissenting) (“The police not only carry legitimate authority but also exercise power free from immediate check, and when the attention of several officers is brought to bear on one civilian the imbalance of immediate power is unmistakable.”); Bennett Capers, *Criminal Procedure and the Good Citizen*, 118 COLUM. L. REV. 653, 689–90 (2018); EPP ET AL., *supra* note 27, at 60–61.

248. P.F. STRAWSON, FREEDOM AND RESENTMENT AND OTHER ESSAYS 5 (Routledge ed. 2008); Kate Manne, *Humanism: A Critique*, 42 SOC. THEORY & PRAC. 389, 402–03 (2016).

249. EPP ET AL., *supra* note 27, at 36.

250. *Id.* at 39.

251. *See, e.g.*, JOHN KLEINIG, THE ETHICS OF POLICING 11–15 (1996).

252. *Compare* *Berger v. State of New York*, 388 U.S. 41, 54–55 (1967) (rejecting indiscriminate warrantless electronic searches), *Katz v. United States*, 389 U.S. 347, 357 (1967) (citing *Wong Sun v. United States*, 371 U.S. 471, 481–82 (1963)) (describing Constitution as requiring “that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police”), and *United States v. Jeffers*, 342 U.S. 48, 51 (1951) (“Over and again this Court has emphasized that the mandate of the (Fourth) Amendment requires adherence to judicial processes.”), *with* *United States v. Leon*, 468 U.S. 897, 897 (1984) (permitting good faith exception

whether the police, as a more or less professional body of crime-fighters, ought to be regulated by the judiciary at all,<sup>253</sup> or the right of right of civilians to prevent the police from interfering with their privacy or property.<sup>254</sup>

Nor has the Court taken much of an interest in the nature of *policing*. Policing is necessarily about the power of the state to regulate the public, and the ways in which that power reaches its limits.<sup>255</sup> The activity of policing is not simply “the stuff the police do.”<sup>256</sup> Other officials and agencies engage in policing segments of the public: most notably school teachers<sup>257</sup> and public employers,<sup>258</sup> but also including private security providers, administrative agencies (such as the Environmental Protection Agency or the Occupational Safety and Health Administration), and a host of other institutions.<sup>259</sup> And the sort of stuff the police do goes beyond simply fighting crime.<sup>260</sup> It includes enforcing school rules,<sup>261</sup> or building codes,<sup>262</sup> or work regulations,<sup>263</sup> all of which may be captured under the core policing function of *ensuring good order*, which is increasingly conceptualized as a form of risk management.<sup>264</sup> Much of this “good order” stuff is simply not captured by the criminal law, but requires

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to warrant requirement), *and* *California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring) (“[T]he ‘warrant requirement’ ha[s] become so riddled with exceptions that it [i]s basically unrecognizable.”).

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

254. *Carpenter v. United States*, 138 S. Ct. 2206, 2206 (2018); *United States v. Jones*, 565 U.S. 400, 400 (2012); *United States v. White*, 401 U.S. 745, 785 (1971); *Katz*, 389 U.S. at 360–61 (Harlan, J., concurring).

255. MARKUS DIRK DUBBER, *THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT* 3–5 (2005) (discussing policing power as a distinctive form of social governance).

256. JEAN-PAUL BRODEUR, *THE POLICING WEB* 40–41 (2010); Michael D. Reisig et al., *Suspect Disrespect Toward the Police*, 21 JUST. Q. 241–42 (2004).

257. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 652 (1995); *Safford Unified Sch. Dist. v. Redding*, 557 U.S. 364, 368 (2009); *New Jersey v. T.L.O.*, 469 U.S. 325, 325–26 (1985).

258. *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 633–34 (1989).

259. BRODEUR, *supra* note 256, at 17–42.

260. *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

261. *Safford Unified Sch. Dist. v. Redding*, 557 U.S. 364, 368 (2009); *Vernonia Sch. Dist.*, 515 U.S. at 646.

262. *Camara v. Mun. Court*, 387 U.S. 523, 523 (1967).

263. *Skinner*, 489 U.S. at 602.

264. BERNARD E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* 162–63 (2001); DUBBER, *supra* note 255, at 71–73.

the police to act upon their general duty to govern in cases of public nuisance<sup>265</sup> or more or less serious emergency.<sup>266</sup>

The confounding factor is community pushback: stopping too many individuals with sufficient social capital or political power, who might exert sufficient influence to introduce oversight of the program or terminate it.<sup>267</sup> Accordingly, the police do not stop everyone equally.<sup>268</sup> Instead, the police engage in what might be called (stealing a turn of phrase from Berkeley sociologist L  ic Wacquant) *hyperinvestigation*.<sup>269</sup> The problem is not simply *mass policing* and investigation, which would suggest that *everyone* is equally vulnerable to being targeted, stopped, searched, and arrested.<sup>270</sup> Instead, the problem is hyperinvestigation, which targets individuals based on their class, race, and place.<sup>271</sup>

The property-based approach reinforces this disinterest in the police and policing by treating law enforcement as an episodic activity organized around atomistic encounters between the police and the public. The Fourth Amendment does not trigger, on the property analysis, unless the police interfere with some discrete individual's distinctive property right. *Jardines* is instructive here. Under the majority's customary approach, the Fourth Amendment only comes into play if the police walk down the path to the doorway with a drug-sniffing dog.<sup>272</sup> According to Justice Alito, the Fourth Amendment

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265. See, e.g., *Stuart*, 547 U.S. at 400–03.

266. JOHN KLEINIG, *ETHICS AND CRIMINAL JUSTICE: AN INTRODUCTION* 57 (2008); Eric J. Miller, *A Fair Cop and a Fair Trial* in *OBSTACLES TO FAIRNESS IN CRIMINAL PROCEEDINGS: INDIVIDUAL RIGHTS AND INSTITUTIONAL FORMS* 253 (John Jackson & Sarah Summers eds., 2018). Debra Livingston calls these sorts of instances of police action “community caretaking.” See Debra Livingston, *Police, Community Caretaking, and the Fourth Amendment*, 1998 U. CHI. L. REV. 261, 261 (1998).

267. Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 U. CHI. L. REV. 809, 859 (2011).

268. See *id.* at 854–59.

269. See L  ic Wacquant, *Class, Race & Hyperincarceration in Revanchist America*, 139 DAEDALUS 74, 78 (2010) (describing the targeting of individuals by class, race, and place).

270. See also EPP ET AL., *supra* note 27, at 39 (“[O]fficers cannot possibly stop all drivers, and they cannot possibly search every vehicle that they stop: officers must focus on some, and the race of the driver figures prominently in many discussions of where to focus.”). Compare Wacquant, *supra* note 269, at 78 (Wacquant rejects the term “mass incarceration” because it mistakenly “suggests that confinement concerns large swaths of the citizenry . . . implying that the penal net has been flung far and wide across social and physical space.”), with Wacquant, *supra* note 269, at 78 (suggesting the process of criminal prosecution and confinement is targeted on particular populations, in particular, poor African American men).

271. Wacquant, *supra* note 269, at 78.

272. *Florida v. Jardines*, 569 U.S. 1, 9 (2013).

does not regulate even that activity: the police may presumably adopt a drug interdiction program in which canine units regularly and repeatedly patrol for drugs in the front gardens of some neighborhood's residences.<sup>273</sup> But even under the majority's property approach, the police may adopt a policy of high-intensity, canine-based drug interdiction in a minority neighborhood.<sup>274</sup> So long as the police do not intrude upon the curtilage of anyone's house, they may saturate the streets with officers and drug sniffing dogs, screening individuals as they walk in and out of their front gates or apartment doors.<sup>275</sup> Uniformed, armed officers may even ask every member of the public for consent to search their belongings as the dogs engage in their sniff, so long as the officers do not act in such a way that a reasonable, innocent member of the public would no longer feel free to go about their business.<sup>276</sup> *Jardines's* property-based analysis has nothing to say about this style of policing.

On this episodic understanding of the Fourth Amendment, one encounter is treated as having no bearing on the next.<sup>277</sup> However, this atomistic approach to the police and policing does not reflect actual police practice.<sup>278</sup> Instead, the police, as an institution, adopt more or less explicit policies for many of their law enforcement activities, and especially highway drug interdiction.<sup>279</sup> An institutional approach to the police and the Fourth Amendment would take police policy and practice into consideration when determining the permissibility of police crime-fighting practices.

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273. *Id.* at 16–17.

274. *See id.* at 6.

275. *Id.* at 6, 11–12.

276. *Florida v. Bostick*, 501 U.S. 429, 434 (1991).

277. This episodic approach is also reflected in the Court's probable cause and reasonable suspicion jurisprudence. *See Ornelas v. United States*, 517 U.S. 690, 698 (1996) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 n.11 (1983) ("It is true that because the mosaic which is analyzed for a reasonable-suspicion or probable-cause inquiry is multi-faceted, 'one determination will seldom be a useful 'precedent' for another'"); *see also United States v. Arvizu*, 534 U.S. 266, 275 (2002) ("[I]n many instances the factual 'mosaic' analyzed for a reasonable-suspicion determination would preclude one case from squarely controlling another.")).

278. *See generally* P.A.J. WADDINGTON, *POLICING CITIZENS: POLICE, POWER AND THE STATE* 17–20 (1999) (policing is defined, not by isolated encounters, but by the nature of the authority wielded by the police).

279. *EPP ET AL.*, *supra* note 27, at 11.

### A. *The Police Role*

The police are persons who have a specific institutional role, with certain rights and duties that are constitutive of it. They are executive officials who uphold the authority of the state. The police role requires the police to protect the public, to promote social welfare, and to maintain order. While engaged in these activities, the police must often engage with other people on the street.

Police activity is an expression of the political engagement of the state or municipality with those persons who reside within its jurisdiction. The sort of consideration the police extend tells us a great deal about the way in which the polity values its members. Policing can undermine or support a person's individual moral standing and shared civic bonds: the ways they values themselves, and both values and is valued by their community.

Policing is one way of establishing, not only the value of individuals, but of groups or communities as well: as a collective entity that matters to the state and to the larger polity.<sup>280</sup> The quantity and quality of police engagement with the community as the place in which we "become sociable or communal men and women"<sup>281</sup> has tremendous practical and expressive value in constituting the civic bonds within that community. For example, historically marginalized groups often complain about too much police contact.<sup>282</sup> However, these groups usually object primarily to the sort of policing that undermines individual dignity and safety or compromises community cohesion: police violence or the over-criminalization of petty crime.<sup>283</sup> On the other hand, these same groups often complain about too little policing: about the withdrawal of essential police services, including order-maintenance and crime-fighting.<sup>284</sup> On this account, the problems of too much and too little contact with the police are both sides of the same coin: the problem of overpolicing, like the problem of underpolicing, becomes particularly pressing when the police fail

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280. See, e.g., Alexandra Natapoff, *Underenforcement*, 75 *FORDHAM L. REV.* 1715, 1717–18 (2006).

281. See Michael Walzer, *The Civil Society Argument* in *GROUP RIGHTS: PERSPECTIVES SINCE 1900* 299, 308 (Julia Stapleton ed., 1995).

282. Natapoff, *supra* note 280, at 1716.

283. *Id.*

284. *Id.* at 1729–30.

to recognize the moral and political value of the communities they interact with or abandon.<sup>285</sup>

The police may treat some people or communities with contempt, and others with extreme solicitude. In this way, the police become “the enemy” or “our” police, serving some and excluding others.<sup>286</sup> This sort of partisanship is a deep problem for policing.<sup>287</sup> It operates as a conceptual limit upon “the police” itself, and as a normative limit upon police legitimacy.

To take the conceptual point first: the police are the institution that represents and enforces state authority on the streets.<sup>288</sup> Partisan police are, at the extreme case, not properly police at all. The police are, first and foremost, public officials: members of the executive branch of government. They serve the whole public, not some subset of it. They owe to everyone, equally, duties to protect and to observe the rule of law. This is a logical and conceptual feature of the police given their role in the executive branch. The conceptual question is thus different from the sociological one: what do people who are deputized by the state or municipality *do* when they wander about in police uniforms? The conceptual question is whether what they do when wandering about in those uniforms is something that they do *in the role of police*.

One way of raising the issue of legitimacy is to worry, not (only) that the state under-polices, but that the state or municipality fails to provide certain communities with police *at all*. The people wandering about in uniforms are not acting on the duties they owe as public servants, to everyone, equally. Instead they are acting in a partisan capacity, seeking to protect and treat with respect only the “good” people in the community, much in the same way as vigilantes or hired guns would do. In this “gunman” mode,<sup>289</sup> the police, though perhaps

285. DAVID A. SKLANSKY, *DEMOCRACY AND THE POLICE* 133 (2008); Walzer, *supra* note 281, at 308.

286. *See, e.g.*, EVI GIRLING ET AL., *CRIME AND SOCIAL CHANGE IN MIDDLE ENGLAND: QUESTIONS OF ORDER IN AN ENGLISH TOWN* 132–33 (2005) (discussing notion of “our” police).

287. *See, e.g.*, IAN LOADER & NEIL WALKER, *CIVILIZING SECURITY* 73 (2007) (describing police partisanship as “a means of fortifying either the interests of the state itself, or those of constituencies favored by the present configuration of economic and social relations.”).

288. WADDINGTON, *supra* note 278, at 20 (“What the police do, as opposed to have the potential to do, is exercise authority.”); KLEINIG, *supra* note 251, at 19, 91–93.

289. H.L.A. Hart famously claimed that the criminal law cannot be “the gunman situation writ large.” H.L.A. HART, *THE CONCEPT OF LAW* 7 (3d. ed. 2012).

acting as authorized by the state, are not acting as “real” police.<sup>290</sup> They are a “degenerate example of a police officer, or . . . a police officer not worthy of the name.”<sup>291</sup>

The police are particularly prone to being compromised in this way.<sup>292</sup> Sometimes the state itself is partisan and uses its executive power to repress those segments of the community that challenge its power. Sometimes the community is partisan, seeking to maintain order on behalf of some residents and not on behalf of others. In these communities, one group of community members may appeal to the police in the guise of “law-abiders,” encouraging the police to root out the “law-breakers” who engage in deviant conduct within the neighborhood.<sup>293</sup> In that case, the police represent some faction of the community, one that dominates the rest of the community despite their obligation to treat everyone impartially. In this sort of partisan society, we might worry that the state has failed its citizens in a particularly problematic way.<sup>294</sup>

The fact that the police are particularly prone to being coopted in the service of repression has led some scholars to think that coercion and repression are central to policing.<sup>295</sup> These scholars tend to agree with one of the great modern students of policing, Egon Bittner, who suggests that the police are defined by their legal permission to deploy coercive force, ignoring other more facilitative aspects of police authority.<sup>296</sup> But this emphasis on the police as only or primarily agents of violence or coercion fails to acknowledge the *public, political* character of the police as agents of the state. It cannot distinguish between the police and, for example, vigilantes or organized crime groups, such as the Mafia. When these groups assume

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290. See JOHN GARDNER, *Criminals in Uniform*, in 114 THE CONSTITUTION OF THE CRIMINAL LAW 97, 105 (R.A. Duff et al. eds., 2013), on the claim that the police, even when acting for the state, may nonetheless not count as “real” police.

291. *Id.*

292. See, e.g., WADDINGTON, *supra* note 278, at 40.

293. See, e.g., Natapoff, *supra* note 280, at 1718.

294. See Lisa L. Miller, *What's Violence Got to Do with It? Inequality, Punishment, and State Failure in US Politics*, 17 PUNISHMENT & SOC'Y 184, 186–89 (2015), on the idea of a “failed state” where the state’s punitive orientation targets certain vulnerable groups for discriminatory treatment.

295. See, e.g., PETER K. MANNING, *DEMOCRATIC POLICING IN A CHANGING WORLD* 4 (2010) (discussing Bittner’s formulation of policing as a form of force); WADDINGTON, *supra* note 278, at 20.

296. Bittner claims “the question, ‘What are policemen supposed to do?’ is almost completely identical with the question, ‘What kinds of situations require remedies that are non-negotiably coercible?’” See EGON BITTNER, *THE FUNCTIONS OF THE POLICE IN MODERN SOCIETY* 41 (1970).

the role of ensuring public order in the communities they control, they do not become “the police” just because they provide similar services to a municipal police force. Partisanship explains why: the agents of organized crime represent their crime boss or their criminal institution, not the state. Vigilantes represent the “good” residents, not all of us.

The coercive criteria also cannot distinguish between private security guards, which are often called “private police,” and public police officers. Both exist to coerce individuals, and this may be their sole role. But private security guards are not the police<sup>297</sup>—they owe their allegiance to the people who employ them (corporations, neighborhood groups, landlords, and the like); and the police are not private actors—they owe their allegiance to the state and are precisely *not* supposed to serve as enforcers on behalf of some corporation or subgroup within their jurisdiction. That, indeed, is one way to tell the difference between the two.

### *B. Externalizing the Costs of Policing*

Hyperinvestigation provides a one-way ratchet ensuring that “upscale” and “downscale” communities<sup>298</sup> differentiated by race, class, and geography receive radically different cultural experiences of enforcement.<sup>299</sup> In upscale—rich, suburban, mostly white—communities “the image of the policeman is the friendly face of the school crossing guard. From childhood [upscale individuals] are reared to see government and law enforcement as benign. They pose no threat to *us*.”<sup>300</sup> Because upscale communities possess the social capital necessary to exert power over the law enforcement process, they can externalize the costs of policing so that they experience no enforcement impact of the criminal law. It is as if those laws did not

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297. For more on private policing, see, for example, Elizabeth E. Joh, *The Paradox of Private Policing*, 95 J. CRIM. L. & CRIMINOLOGY 49 (2004).

298. “[B]y ‘poor’ or ‘lower-class’ or ‘downscale’ communities, I mean communities in which unemployment is high, legally acquired wealth and income are low, and educational and social resources are below par. By ‘rich’ or ‘upper-class’ or ‘upscale’ communities, I mean communities that have the opposite characteristics.” William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1801 (1998).

299. See, e.g., GIRLING ET AL., *supra* note 286, at 137 (discussing upscale individuals’ sense of themselves as the proper recipients of police services).

300. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 400 (1974).



apply to *them*.<sup>301</sup> Downscale communities, by contrast, lack the social capital to mitigate the costs of policing.<sup>302</sup>

Institutional approaches to policing in these different communities may be radically dissimilar. The people doing the policing may be different, with upscale communities relying on private security and downscale communities dependent on public police. Private security tends to engage in what Elizabeth Joh calls “compliance-based policing”: preventing violations of the law from happening rather than responding to violations once they have happened by arresting offenders.<sup>303</sup> Some upscale residents of those communities employing private security services may exercise a great deal of control over the people they employ to do their policing.<sup>304</sup> Others may not recognize that the people policing them are private, rather than public, police.<sup>305</sup>

Accordingly, the tendency to externalize the effects of policing may be profound in upscale neighborhoods both because of the different types of crimes that may be committed, but also because of

301. Stuntz is acutely aware of the dissonance between legislative, executive, and social norms.

Actually, the problem is worse still. Given enforcement discretion, criminal statutes need not have majority support in the citizenry to have majority support in the legislature. Suppose a quarter of the population believes strongly that all lies should be crimes; many of those who hold this view would consider it one of the two or three most important factors in deciding for whom to vote. The other three-quarters of the population disagrees, but those who hold this more tolerant view care less about what the law is than about whether they will themselves be prosecuted for lying. Almost none of them will. And when such (rare) prosecutions do happen, the majority will blame not the legislature that voted for the anti-lying statute, but the prosecutors who enforced it . . . Under these circumstances, a self-interested legislature might happily criminalize all lies, since it would gain far more than it would lose by doing so. Which means that legislative crime definition, which should be supermajoritarian, isn't even reliably majoritarian.

William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1894 (2000). He suggests, however, that such dissonance, in the drug sphere at any rate, is not racially motivated. I believe the story is not so simple as that.

302. Paul Butler, *The Evil of American Criminal Justice: A Reply*, 44 UCLA L. REV. 143, 156 (1996).

303. Joh, *supra* note 297, at 79–80.

304. See, e.g., Philip C. Stenning, *Powers and Accountability of Private Police*, 8 EUR. J. CRIM. POL'Y & RES. 325, 345 (2000) (discussing ways in which customers will shift private security companies based upon their views of the policing practices they experience).

305. See, e.g., Joh, *supra* note 297 (suggesting that even if the private security officers also primarily work as public police (and so are moonlighting when policing in a private capacity), those officers nonetheless act differently, not least by performing less arrests than they might if they acted in their public capacity).

the different institutions doing the policing and the different sorts of control exercised over these institutions.<sup>306</sup>

Differences in the financial wellbeing and social organization of upscale and downscale communities can also produce differences in the sorts of criminal activity they experience. Crimes come in different forms, and upscale crimes (such as embezzlement and insider trading), and downscale crimes (burglary and auto theft) are often location-driven in a way that drug crimes are not.<sup>307</sup> Downscale crime requires networks to receive, launder, and distribute stolen goods; upscale crime does not.<sup>308</sup> Downscale crime thus requires a criminal community and a criminal market in order to work efficiently; upscale crime does not.<sup>309</sup> Downscale crimes are relatively institutionalized, with different people holding a variety of normatively structured positions in the criminal enterprise; upscale crimes are much more atomistic.<sup>310</sup>

Differences in types of crime may justify different enforcement practices. Where crime is socially structured (by social networks or markets), socially destructive, and conducted in the open, practices that involve prominent invasions into everyday behavior may be appropriate.<sup>311</sup> Where crime is atomistic (i.e., unstructured), less harmful to the fabric of society, and conducted behind closed doors in the criminal's office or home, more discreet practices are required. Like the crimes they address, these different enforcement practices are community-specific, and location driven. Different communities, with different economic, social, and criminal profiles, will thus experience policing differently.

Drug crime erases distinctions between the types of crime committed in upscale and downscale communities, though in multiple, complex ways. Whilst traditional police enforcement “allocat[es] . . . police resources . . . driven by the incidence and location of the relevant crimes,”<sup>312</sup> drug crimes do not depend upon location in this

306. See Stenning, *supra* note 304, at 336–45 (providing an analysis of the different models of accountability applicable to private security versus public police that are not applicable in the same ways to public police).

307. Stuntz, *supra* note 298, at 1802–03.

308. *Id.* at 1802.

309. *Id.*

310. *Id.*

311. See, e.g., Stuntz, *supra* note 298, at 1813–15.

312. Stuntz, *supra* note 301, at 1875 (“When police seek to catch murderers or burglars, they go to where the murders and burglaries happen.”).

manner. Drug markets, for example, cross the line dividing rich and poor.<sup>313</sup> Because of the number of crimes outstrips resources, the police cannot investigate them all and are free to choose which locations to target and what tactics to use.<sup>314</sup> The locations and tactics they select will, however, be driven by the ability of individuals to contest and complain about policing practices effectively,<sup>315</sup> which in turn is a feature of their social capital and serves to differentiate upscale and downscale policing.

These different styles of policing may be deployed unevenly across society, so that discrete tactics are pursued from place to place to control distinct classes of persons. Some of these differential enforcement practices may be justified given structural differences between rich and poor distribution and consumption networks in the different communities.<sup>316</sup> In downscale communities, where drug distribution and consumption is open, William Stuntz has argued that more frequent targeting of drug crime and the use of a variety of more or less invasive searches and seizures of persons and property may make good sense from the perspective of both detection and prevention.<sup>317</sup> Such practices make less sense in upscale markets where many of the illegal transactions occur in private.<sup>318</sup> All the same, differences in otherwise justified enforcement practice contribute to class and race based differences in policing.<sup>319</sup>

The different tactics used against different forms of drug crime are often matched by differences in the type of police officer using those tactics. The institutional approach to policing recognizes that the police are not a monolith but are constituted by different officers serving different functions. Policing is a complex, plural, and fragmented business. The police reflect that complexity. Some are

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313. Stuntz, *supra* note 298, at 1803.

314. *Id.* at 1819 (“[T]he police . . . must decide *where* to look, in a world where the crimes are happening everywhere. It follows that . . . when they enforce the drug laws, whom they catch depends on where they look.”).

315. See Stuntz, *supra* note 298, at 1800 (discussing ways in which police externalize costs of policing).

316. See Stuntz, *supra* note 298, at 1824; Stuntz, *supra* note 301, at 1876–77.

317. See Stuntz, *supra* note 298, at 1820.

318. *Id.* at 1821; Stuntz, *supra* note 301, at 1898 n.64.

319. Stuntz, *supra* note 301, at 1877–78 (claiming that differential enforcement of prohibition laws “affected the normative punch the law packed”); see *id.* at 1878–79 (“[D]ifferential enforcement breed[s] contempt for the law, which in turn bre[e]d[s] defeat for the norm the law embodied.”).

uniformed, some are plain clothed.<sup>320</sup> Some specialize in the investigation of narcotics crimes; others are generalist crime-fighters and first-responders, ready to cope with whatever comes their way.<sup>321</sup> Some work undercover; others patrol the streets by foot or in a car, responding to calls for help or aggressively stopping and frisking passersby.<sup>322</sup> Where the police use public, visible deployments of uniformed officers and force in downscale neighborhoods, they may use undercover, low-visibility, or invisible deployments of plainclothed officers in upscale neighborhoods. Once again, public perceptions of criminality and experiences of policing will be very different indeed.

Drug transportation, which happens on the nation's shared highways and transportation routes, also confounds place-driven distinctions between upscale and downscale crime. The police may combat both drug markets and drug transportation using preventative rather than only reactive policing techniques, further increasing police discretion to choose where and when to engage in policing.<sup>323</sup> Accordingly, when determining how to tackle drug crimes, the nature of the crime as much as anything else vests the police with a tremendous degree of "enforcement discretion"<sup>324</sup> over whom to target, stop, and arrest.

Taking an institutional approach to the police and policing reveals some important insights about the state's relationship with its subjects. William Stuntz, for example, was highly attentive to some of the cost-benefit incentives of policing. He argued that differences in policing styles may respond to differences between different, upscale and downscale, places.<sup>325</sup> Others have suggested that the types of crimes committed in those places may be incomparable or incommensurable,<sup>326</sup> and so the police rationally may—and perhaps

320. DAVID H. BAYLEY, *POLICE FOR THE FUTURE* 57 (1994).

321. *Id.* at 58.

322. *See, e.g.*, BRODEUR, *supra* note 256, at 139–40; *see also* BAYLEY, *supra* note 320, at 17–43 (discussing the vast number of institutions, including the public police, that perform policing tasks, as the "police assemblage").

323. *See* Stuntz, *supra* note 298, at 1820.

324. Stuntz, *supra* note 301, at 1875.

325. Stuntz, *supra* note 298, at 1802–03.

326. *See, e.g.*, Dan M. Kahan, *Punishment Incommensurability*, 1 *BUFF. CRIM. L. REV.* 691, 694–701 (1998) (discussing social meaning of different crimes and criminal sanctions in terms of incommensurability); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 *U. CHI. L. REV.* 591, 620–21 (1996) (discussing qualitative expressive differences between crimes).

even should—take different approaches to policing those crimes. Stuntz recognized, however, that drug crime does not fit this mold. When policing drug crime, especially on the highways, the police are policing the same space, but treating people differently. The institutional approach may have something to say about both how policing is different for different people in different places. And the institutional approach may also say whether these differences are tolerable, given the nature and function of the public police.

Whatever crime-fighting reasons there may be for discrete policing tactics disappear, however, on the highway. Whatever class- or place-based obstacles to certain policing techniques might justify differential policing of upscale and downscale neighborhoods, these evaporate once rich and poor alike take to the road. Drug enforcement on the nation's highways ought to produce equal treatment across communities.<sup>327</sup> Instead, targeting the nation's highways produces hyperinvestigation of minority motorists through illegitimate, biased, discriminatory policies and practices that undermine the status of the police as a *public* institution.

Choosing to target criminals' shipment of drugs on the highways through a program of drug interdiction does not, however, liberate the police from the sort of public accountability placed upon them by the public. Indeed, nowhere is the distinction between "our police" and "those criminals" more profound than on the roads and freeways. On the one hand, the police are highly effective at traffic policing—one of "those areas of social life where criminal activity is rife."<sup>328</sup> On the other hand, "traffic policing is regarded by police and public alike as a marginal police responsibility, almost a distraction from 'real police work,'"<sup>329</sup> where real police work is supposed to be the policing the sort of street crime which the residents of upscale communities rarely experience but of which they are disproportionately afraid. Upscale individuals may expect a "break" from the police for a violation of the traffic laws, especially if that violation is minor or the first time the

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327. See Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1277–78 (1994) (suggesting similarly that leveling up or down is a (non-compulsory) option).

328. WADDINGTON, *supra* note 278, at 10.

329. *Id.*

person has been caught. And the officer may even face institutional pressure to go along with these perceptions.<sup>330</sup>

Instead, the public police are revealed to be captured, politically, by the expectations of the upscale public and the social capital they are able to leverage to ensure that the police are, and remain, their partisans. The police, for upscale individuals, are “our” police.<sup>331</sup> The same socio-economic factors that separate these communities into upscale and downscale and operate to segregate them by race contribute to the perception of who is an insider, who an outsider. Having witnessed the effects of the disparate criminalization of minority communities, the mostly white upscale community possessing the social capital to end disparate criminalization and partisan policing regularly choose not to do anything about it.

Worse, upscale communities notice none of the ill effects of discriminatory enforcement plaguing minority individuals and communities.<sup>332</sup> In fact, their irrational fear of crime is stoked by their upscale descriptive and evaluative social norms which are not shared by, and which may be antagonistic to, the racial minorities that feel the impact of policing policy and practice.<sup>333</sup> Upscale fear of downscale crime—and upscale perceptions of the racialized nature of that crime bolstered by the political rhetoric surrounding drug crime<sup>334</sup>—puts pressure on executive branch law enforcement officials to negate in partisan, discriminatory enforcement practices.

Political power often rests in the hands of a minority of dedicated, cohesive groups within the upscale community—groups that identify

330. *See, e.g.*, JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* (4th ed. 2011) (discussing institutional pressures not to write traffic tickets to preserve legitimacy).

331. *See, e.g.*, GIRLING ET AL., *supra* note 286, at 133 (discussing notion of “our” police); LOADER & WALKER, *supra* note 287, at 73 (describing police partisanship as “a means of fortifying either the interests of the state itself, or those of constituencies favored by the present configuration of economic and social relations”).

332. Except perhaps disparate ones, such as slightly higher taxes or money distributed away from public schools.

333. *See, e.g.*, GIRLING ET AL., *supra* note 286, at 172 (“The demand for order is rarely all-of-a-piece. Rather, a diversity of legitimate orders are embedded in people’s crime-talk, each of which connects in different ways with considerations of place, the respective obligations of state and citizen, the appropriateness and anticipated efficacy of local and national interventions, and the question of how best to understand and deal with those deemed in breach of the expected requirements of lawfulness, respect and civility.”).

334. *See, e.g.*, Paul Butler, *Retribution, for Liberals*, 46 *UCLA L. REV.* 1873, 1876–77 (1999) (racial majority does not care about criminal law when punishment directed at African American “others”).

select issues as of particular importance to them and organize around such issues to ensure the law reflects their concerns.<sup>335</sup> At the state and federal level, those minority groups that bear the brunt of policing's impact are excluded from making police policy. As a result, policing policy and practice becomes partisan all the way down, from the legislators and courts, to the police on the streets.

### C. Harassment

Hyperinvestigation differs from other forms of policing not only in its targets and tactics, but in its goals and techniques. Instead of *only* aiming at criminal prosecution, the low-level social control exerted by the police on public streets and highways *also* serves to establish their control of these spaces.<sup>336</sup> Much of low-level policing thus depends upon police patrols, not primarily to detect crime, but rather to demonstrate that the state is operative and authoritative in some community. Certainly, the police may use their public authority to search for drugs or to respond to flagrant acts of public criminality, such as traveling well over the speed limit.<sup>337</sup> Nonetheless, a core function of hyperinvestigation is to proclaim police authority over selected segments of the population by requiring the public to comply with their directives. Much of low-level policing might be defined as the deployment of police-characteristic techniques of social control directed towards asserting their distinctive authority on the streets and highways of various states and municipalities around the country.<sup>338</sup>

Hyperinvestigation is not an accident. It responds to a deliberate institutional policy to target certain individuals for criminal justice intervention. The *goal* of the policy is to ensure that the distribution of policing is not equally shared across the population. By selecting the already vulnerable, precarious members of society as targets for police intervention, the police ensure that their strategies are less likely to

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335. See LISA L. MILLER, *THE PERILS OF FEDERALISM: RACE, POVERTY, AND THE POLITICS OF CRIME CONTROL* (2008) (discussing interest groups and crime politics in states); Andrew E. Taslitz, *Fourth Amendment Federalism and the Silencing of the American Poor*, 85 CHI.-KENT L. REV. 277 (2010) (discussing how *Virginia v. Moore*, 128 S. Ct. 1598 (2008), demonstrates how Fourth Amendment rules vary locally which has implications based on race and class); Stuntz, *supra* note 301, at 1872 (discussing how social norms and criminal law drive each other).

336. See, e.g., KLEINIG, *supra* note 251, at 51–70 (discussing the evolving roles of the police).

337. See, e.g., EPP ET AL., *supra* note 27 (discussing how police decide to stop a driver and the racial implications).

338. Rather than crime-fighting directed towards punishing individuals through the court system.

face organized or powerful challenges.<sup>339</sup> Instead, the process of policing re-inscribes the already marginal within a social system that undermines their ability to avoid and resist state intervention in general, and the police in particular.

Hyperinvestigation becomes institutionalized in two distinctive ways. On the one hand, the investigatory stop characteristic of hyperinvestigation has been deliberately created by law-enforcement professionals and refined over time by practitioners and researchers in the criminal justice field.<sup>340</sup> Law enforcement has formalized the patrol police strategy of stopping marginalized members of the community for drug interdiction through policy, training, and institutional incentives.<sup>341</sup> As a consequence, “the investigatory stop ha[s] become scripted, predictable, and deeply institutionalized.”<sup>342</sup>

In addition, however, the practice of hyperinvestigative investigatory stops draws upon informal norms of policing practices.<sup>343</sup> These rules or policies are often not articulated: instead, they are subcultural “recipe rules”: “rules of thumb” distinct from published administrative rules that determine whom to stop, how to record the incident, whether and how to charge, etc.<sup>344</sup> When operating according to these implicit rules of engagement, “reasonable suspicion of criminal activity, in a legal sense, is not the basis for an investigatory stop. Officers are to pursue stops and searches on the basis of little more than unsatisfied curiosity.”<sup>345</sup>

339. One way of conceiving of these vulnerable individuals is as a *precariat*. See Guy Standing, *The Precariat: From Denizens to Citizens?*, 44 POLITY 588 (2012). Whilst the term does not pick out every feature of the sorts of individuals the police might prey upon, some are suggestive: they do not participate in a cohesive form of social organization and lack the ability to participate effectively in the political life of their communities. *Id.* at 590–91.

340. EPP ET AL., *supra* note 27, at 7 (“The investigatory stop is the deliberate creation of police leaders, led by police professional associations, policing researchers, and police chiefs”).

341. *Id.* (“Instead, attention should focus on institutionalized practice: how the structure of incentives, training, and policy in contemporary policing makes it more likely that officers will act on the basis of bigotry or implicit stereotypes, leading to racial disparities in outcomes. It is our thesis that a specific, well-entrenched, institutionalized practice of the investigatory stop is the main source of racial disparities in police stops”); see *id.* at 38 (“First, investigatory stops are an institutionalized practice: while undoubtedly some individual officers may learn the technique on their own, it is taught and propagated by formal police training and shared educational materials.”).

342. *Id.* at 36.

343. *Id.* at 7 (“It is implemented through professional training and the fostering of shared professional norms and culture.”).

344. See RICHARD V. ERICSON, *REPRODUCING ORDER: A STUDY OF POLICE PATROL WORK* 25–26 (1982).

345. EPP ET AL., *supra* note 27, at 37.



That curiosity, however, takes on a distinctive racial caste given the nature of precariousness in American society. Worse, that curiosity tends to operate as an important form of social control, serving to “convey powerful messages about citizenship and equality.”<sup>346</sup> Once investigatory stops are regarded as a form of social control, the point of which is to discipline vulnerable members of the public and to convey messages of exclusion and power, then the low hit rates associated with racial profiling are not a bug but a feature of this program of law enforcement. The goal is not to catch the guilty, but rather the traditional American police policy of harassing the vulnerable.<sup>347</sup> As Charles Epp and his co-authors describe it: “Police stops matter. No form of direct government control comes close to these stops in sheer numbers, frequency, proportion of the population affected, and, in many instances, the degree of coercive intrusion.”<sup>348</sup>

The characteristic way in which the police induce the public’s compliance with their directives is through the use of force. It is not the only possible way to encourage individuals to comply.<sup>349</sup> Nonetheless, it is the paradigmatic social-control tool that the police use to ensure compliance.<sup>350</sup> Indeed, the ubiquity of force as a measure of police authority prompted Egon Bittner’s famous conceptualization of “the police a[s] nothing else than a mechanism for the distribution of situationally justified force in society.”<sup>351</sup>

On this view, police contact with the targeted groups is the whole point of the system; the goal is to establish order by putting members of those groups in their place in terms of both territory and status. In a culturally and politically plural society, maintaining order usually means imposing a particular vision of social order and authority. Low-level hyperinvestigation is not simply a means of *maintaining* order,

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346. *Id.* at 2.

347. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 14–15 (1968) (critiquing the law-enforcement strategy of “wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain”).

348. EPP ET AL., *supra* note 27, at 2.

349. *See, e.g.*, Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283 (2003) (discussing a process-based approach as an alternative to the use of force); *see also* Eric J. Miller, *Role-Based Policing: Restraining Police Conduct “Outside the Legitimate Investigative Sphere”*, 94 CAL. L. REV. 617 (2006) (discussing role-based preventative policing).

350. JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 37 (1993) (“[A]nybody who fails to understand the centrality of force to police work has no business in a police uniform.”).

351. BITTNER, *supra* note 296, at 39.

but of *imposing* it. Hyperinvestigation, as a form of social control, relies upon police decisions as to who belongs where, and what conduct is socially permissible in those localized spaces. These decisions are made against a background of judgments about the status of the social neighborhood, how orderly or disorderly ought the neighborhood to be, and what sorts of people or activities are consistent with the type of communities policed.

The problem of low-level social control by the police is often thus the problem of order- or authority-establishing contacts with the public developing into physical harassment.<sup>352</sup> Harassment as a technique of order-maintenance can be applied indiscriminately, but is often directed at discrete individuals and groups: the poor, racial minorities, and other out-groups that the police select as challenging their notions of order. The police do not usually select those groups on their own. Instead, they reinforce the dominant values of society—which include upscale values that tolerate, or even prize, discrimination against downscale or minority groups regarded as dangerous or criminal.<sup>353</sup>

The determination that some person or activity requires the police to intervene is subject to the problems of explicit or implicit bias. Conscious or unconscious assessments of minority conduct will determine who the police consider disorderly and how to respond.<sup>354</sup> Explicit or implicit bias may cause the police to engage in low-level social control and harassment more frequently and more forcibly when they are dealing with African Americans and other minorities.<sup>355</sup>

## V. AUTHORITARIAN SEARCHES

There is an implicit but inescapable normative valence in the privacy-versus-property debate. The central question, everyone recognizes, is: what ought to be the state's relationship, through the police, to the public? The Court's response has generally been to avoid

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352. See, e.g., *Terry*, 392 U.S. at 15 (“[C]ourts still retain their traditional responsibility to guard against police conduct which is over bearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires.”).

353. See, e.g., WADDINGTON, *supra* note 278, at 40 (“[P]olice officers are rarely perplexed about which values should apply, because certain values prevail since they are the values of dominant groups in society.”).

354. John Van Maanen, *The Asshole* in POLICING: CONTINUITY AND CHANGE 143, 144 (George Alpert, et al. eds., 2d ed. 2015).

355. See, e.g., Cooper, *supra* note 240, at 737; Carbado & Rock, *supra* note 240 at 167; Richardson, *supra* note 241.

tackling this difficult and politically fraught question directly. Instead, the Court has chosen to sublimate the normative, political question by burying it within, on the one hand, legal doctrine or, on the other hand, empirical conjectures about social norms.

Historically, the turn to pop-empirical speculation replaced a failed doctrinal approach grounded in the law of trespass.<sup>356</sup> In other words, a privacy analysis was supposed to make up for the deficiencies of the prior property analysis of Fourth Amendment rights.<sup>357</sup> The empirical approach tended to assess how intrusive a particular method of surveillance was by determining how much effort it took the state to uncover private information. However, police use of “big data”<sup>358</sup> has forced the Court to reconsider this approach: the Court can no longer rely upon the cost or limited availability of some technology to determine its intrusiveness. Big data has made even highly intrusive searches an easy, everyday occurrence.<sup>359</sup>

Now that the Court’s empirical cover has dissipated, the Court’s property-dominant analysis has attempted to fill the gap. This latest property analysis was supposed to make up for problems with privacy’s empirical analysis (which in turn replaced the failings of an earlier property analysis). However, as I have suggested, property analysis fails to provide the sort of neutral principles that have eluded the empirical approach to privacy. We now seem to be in a doctrinal death-spiral in which no one knows how to address the normative core of the Fourth Amendment, at least without projecting their own predilections onto their interpretation.

Chief Justice Roberts has, in the big data context, advanced a competing interpretation. He has articulated, in skeletal form at any rate, a jurisprudence of anti-arbitrariness to protect against mass data policing. That jurisprudence neither embraces the neo-property approach articulated by Justices Kennedy, Alito, Thomas, or

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356. See, e.g., *Rakas v. Illinois*, 439 U.S. 128 (1978) (rejecting *Hester, Olmstead*, and the other trespass cases); *Katz v. United States*, 389 U.S. 347 (1967).

357. *United States v. Matlock*, 415 U.S. 164, 171, n.7 (1974) (“Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements, . . . but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.”).

358. See FERGUSON, *supra* note 25, at 98.

359. *Id.*

Gorsuch—nor does it endorse the return to, or retention of, the empirical privacy analysis advocated by Justice Kagan.<sup>360</sup>

The Chief Justice recognizes that mass data searches which comprehensively expose the details of individuals' personal information upsets the relationship between state and civilian.<sup>361</sup>

Where privacy and property fail to provide sufficient interpretative purchase to articulate Fourth Amendment protections, Chief Justice Roberts has turned to security, or at any rate its political cognate: an anti-arbitrariness that operates by “plac[ing] obstacles in the way of a too permeating police surveillance.”<sup>362</sup> The Chief Justice has tended to find a willing partner in this interpretative enterprise in Justice Sotomayor, who has extended this anti-arbitrariness jurisprudence to certain aspects of street policing.<sup>363</sup>

The goal in this Part is speculative and suggestive. I shall suggest some ways in which more flesh can be put on the Chief Justice's anti-arbitrariness skeleton. The core claim will be that we can identify certain policing practices that, like mass data policing, render persons insecure or vulnerable to thoroughgoing surveillance and interference. Some of these mass policing practices are not high-tech, however: they are distinctively low tech. But they present the same problems as mass data policing: for a relatively low effort, the police can engage in far-reaching searches and seizures that render people vulnerable in the central aspects of their persons<sup>364</sup> that the Court should strike a new balance between the interests of the state and the interests of its subject.

Chief Justice Roberts certainly considers a person's security to be a central aspect of his constitutional reordering. His vision of our dependence on electronic devices projects contemporary persons as virtually cyborgs, in which cell phones are “such a pervasive and insistent part of daily life that the proverbial visitor from Mars might

360. See *Florida v. Jardines*, 569 U.S. 1, 13 (2013) (Kagan, J., concurring).

361. Compare the Court's approach in *Carpenter* and *Riley* with its approach in *Maryland v. King*, 569 U.S. 435 (2013) (permitting collection of “junk” DNA, which gives only limited information about an individual's identity, as part of the routing booking procedure of arrested civilians).

362. *Carpenter v. United States*, 138 S. Ct. 2206, 2214 (2018) (quoting *United States v. Di Re*, 332 U.S. 581, 595 (1948)).

363. *Utah v. Strieff*, 136 S. Ct. 2056, 2064 (2016); *Heien v. North Carolina*, 135 S. Ct. 530, 542 (2014) (Sotomayor, J., dissenting).

364. Kaaryn Gustafson has alerted me to the importance of *persons* as a suppressed Fourth Amendment concept.

conclude they were an *important feature of human anatomy*.<sup>365</sup> They operate as *ankle monitors* broadcasting our location wherever we might be.<sup>366</sup> This intimate, personal, quasi-physical approach to technology breaks down the distinction between physical objects and data, and suggests the focus is really on the manner in which technology transforms our personhood to render us vulnerable to police rummaging through our lives.<sup>367</sup>

The state's ability to rummage, however, need not be limited by technology: after all, Chief Justice Roberts's invocation of the general warrant references the revolutionary era and its avowedly low-tech forms of customs interdiction. Drug interdiction, and, in particular, police policies advocating widespread investigatory stops, contemplate a similar, broad-based investigatory activity to the sort of customs and house searches attacked by James Otis. This type of activity shares the vices of low visibility, altered state-subject relations, and comprehensive effects on the lives of persons that animate the anti-arbitrariness approach from the revolutionary era to the Court's opinions in *Riley v. California*<sup>368</sup> and *Carpenter*.<sup>369</sup>

#### A. Chief Justice Roberts and the Jurisprudence of Personal Security<sup>370</sup>

Chief Justice Roberts's account of the harms of big data policing focuses on changes in nature of personhood. Our dependence upon new technology—our transformation into a type of cyborg—makes us weaker, not stronger. Through our smartphones and their tremendous capacity to record and retain the most intimate details of our personal life on a massive scale, we have become more vulnerable to the state and its intrusions into all aspects of our most intimate details. In this transformed relationship between state and civilian, the state should be resisted, and individual insecurity ameliorated, by placing “obstacles”<sup>371</sup> in the path of the state to equalize the balance between

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365. *Riley v. California*, 573 U.S. 373, 385 (2014) (emphasis added).

366. *Carpenter*, 138 S. Ct. at 2218 (“[W]hen the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone’s user.”).

367. *See, e.g., id.* at 2213 (discussing the use of general warrants).

368. 573 U.S. 373 (2014).

369. *Riley*, 134 S. Ct. at 2494 (discussing revolutionary era prohibitions on rummaging using general warrants).

370. My thanks to Kaaryn Gustafson for pushing me to think of this aspect of the Fourth Amendment in terms of its protections of “persons,” not simply “security.”

371. *Carpenter*, 138 S. Ct. at 2214.

police and public. In this relational—if somewhat sketchy—account of the nature of police and policing, the individual is made more robust in part by weakening the state.

Some features of the Chief Justice’s big data jurisprudence are worth emphasizing here. The first is that he emphasizes the precarious or vulnerable position in which big data places civilians. Big data, he suggests, transforms the nature of personhood. We are no longer whole persons, he suggests, without our mobile phones. They are, he insists, “a pervasive and insistent part of daily life.”<sup>372</sup> His description suggests that we cannot properly exist without them: that mobile phones (and the benefits of access to data that goes along with them) force themselves upon us, rendering us dependent, vulnerable.

Indeed, his discussion asserts that mobile technology is a form of prosthetic device, or even more than that, “an important feature of human anatomy.”<sup>373</sup> Our reliance upon these devices has reshaped who we are as persons. We are no longer whole without them. These devices take us beyond the limits of our physical realities, so searches of individuals with mobile phones are no longer “limited by physical realities [nor] tend[ ] as a general matter to constitute only a narrow intrusion on privacy.”<sup>374</sup> Given this quantitative and qualitative difference from traditional, episodic, individualized searches incident to arrest, limited to the “search a personal item or two in the occasional case,”<sup>375</sup> the Chief Justice, writing for the majority in *Riley v. California*, rejected the “routine,” warrantless searches of such information.<sup>376</sup>

Moreover, in both *Riley v. California* and *Carpenter*, Chief Justice Roberts hearkened back to the revolutionary era, and a particular understanding of its political philosophy. He emphasized the Founders’ dominant *anti-tyrannical* and civic republican philosophy, which focuses on freedom from government domination.<sup>377</sup> His anti-tyranny emphasis, maintained from *Riley* to *Carpenter* contrasts starkly with the liberal or libertarian reading of

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372. *Riley*, 134 S. Ct. at 2484.

373. *Id.*

374. *Id.* at 2489.

375. *Id.* at 2490.

376. *Id.* at 2485.

377. See, e.g., MARY NYQUIST, ARBITRARY RULE: SLAVERY, TYRANNY, AND THE POWER OF LIFE AND DEATH 132 (2013); PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 275–76 (1997).

the revolutionary era writings promoted by Justice Thomas in his encomium to John Locke's property theory in his *Carpenter* dissent.<sup>378</sup>

In both of his big data opinions, Chief Justice Roberts points to the famous speech by James Otis that inspired John Adams, and with him, the American revolt against British rule. In *Riley v. California*, the Chief Justice notes that:

Our cases have recognized that the Fourth Amendment was the founding generation's response to the reviled "general warrants" and "writs of assistance" of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity. Opposition to such searches was in fact one of the driving forces behind the Revolution itself. In 1761, the patriot James Otis delivered a speech in Boston denouncing the use of writs of assistance. A young John Adams was there, and he would later write that "[e]very man of a crowded audience appeared to me to go away, as I did, ready to take arms against writs of assistance." According to Adams, Otis's speech was "the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born."<sup>379</sup>

And describing the protections and purposes of the Fourth Amendment in *Carpenter*, he again emphasizes that:

The Founding generation crafted the Fourth Amendment as a "response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity." In fact, as John Adams recalled, the patriot James Otis's 1761 speech condemning writs of assistance was "the first act of opposition to the arbitrary claims of Great Britain" and helped spark the Revolution itself.<sup>380</sup>

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378. *Carpenter v. United States*, 138 S. Ct. 2206, 2239 (2018) (Thomas, J., dissenting) (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2634 (2015) (Thomas, J., dissenting)) ("The political philosophy of John Locke, moreover, 'permeated the 18th-century political scene in America.'").

379. *Riley*, 134 S. Ct. at 2494 (citations omitted).

380. *Carpenter*, 138 S. Ct. at 2213 (citations omitted).

The arbitrariness worry is a specific one. It invokes a particular model of freedom from government interference.<sup>381</sup> That model emphasizes personal security from arbitrary government invasions of personal security,<sup>382</sup> understood as unchecked interference with the interests of others, often called non-domination.<sup>383</sup> Non-arbitrariness or non-domination generally involves regulating government conduct through public, prospective norms (the rule of law, not the whims of men)<sup>384</sup> and the diffusion of power across the different branches of government.<sup>385</sup> The rule of law, however, must be enforced to prevent arbitrariness; otherwise legal protection remains arbitrary, existing at the whim of the police officer.<sup>386</sup>

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381. Anti-arbitrariness is specifically associated with the political tradition of civic republicanism. *See, e.g.*, FRANK LOVETT, A GENERAL THEORY OF DOMINATION AND JUSTICE 96–97 (2010). The Fourth Amendment’s author, James Madison, certainly regarded himself as an “inheritor[ ]” of this civic republican tradition. *See* ISEULT HONOHAN, CIVIC REPUBLICANISM 103 (2002).

382. For example, contemporary civic republican Frank Lovett defines “social power as arbitrary to the extent that its potential exercise is not externally constrained by effective rules, procedures, or goals that are common knowledge to all persons or groups concerned.” LOVETT, *supra* note 381, at 96 (emphasis omitted). By contrast, Philip Pettit, perhaps the preeminent contemporary civic republican, defines power as arbitrary when it fails to track the interests of the individuals affected. PETTIT, *supra* note 377. Madison operated firmly in this republican tradition, which was “understood mainly as the security of individuals from arbitrary interference through constitutional and legal means.” HONOHAN, *supra* note 381, at 103.

383. HENRY S. RICHARDSON, DEMOCRATIC AUTONOMY: PUBLIC REASONING ABOUT THE ENDS OF POLICY 28–36 (2003); PETTIT, *supra* note 377, at 51–78.

384. *See* Quentin Skinner, *Machiavelli on Virtù and the Maintenance of Liberty*, 2 VISIONS OF POL. 160, 173–76 (2002) (discussing Machiavelli’s claim that people achieve freedom only if chained by law); PETTIT, *supra* note 377, at 172–76.

385. *See, e.g.*, JOHN BRAITHWAITE & PHILIP PETTIT, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE (1990); PETTIT, *supra* note 377; RICHARDSON, *supra* note 383; Skinner, *supra* note 384.

386. I have claimed that this is the view of the Warren Court in *Mapp v. Ohio*, 367 U.S. 643, 660 (1961) (“[W]e can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice.”). The *Mapp* Court calls police activity that is arbitrary in this way “official lawlessness.” *Id.* at 655. Justice Sotomayor echoes this language in her *Strieff* dissent. *See* Utah v. Strieff, 136 S. Ct. 2056, 2065–66 (2016) (Sotomayor, J., dissenting) (“[Th]e ‘exclusionary rule’ removes an incentive for officers to search us without proper justification. It also keeps courts from being ‘made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions.’ When courts admit only lawfully obtained evidence, they encourage ‘those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system.’ But when courts admit illegally obtained evidence as well, they reward ‘manifest neglect if not an open defiance of the prohibitions of the Constitution.’”).



### B. Justice Sotomayor: Race-Based Vulnerability

Given Chief Justice Roberts's turn to an anti-arbitrariness jurisprudence in the context of the vulnerability he identifies with dependence on big data technology, it is unsurprising that he has embraced the warrant requirement more fully than many of his predecessors.<sup>387</sup> His electronic vulnerability jurisprudence, however, with its emphasis on arbitrary intrusions upon personal security, extends beyond the realm of high-tech, mass data policing to implicate police practice in the domain of low-tech mass policing, at least of the hyperinvestigatory sort.

Race, I have suggested, renders individuals vulnerable to institutional police pressures to target and harass minority members of the public as a form of low-level social control. Upscale individuals and communities, with a monopoly on social capital and political power, pressure the police to exclude and discipline members of minority groups so that they know their place. When traveling the nation's highways, or traversing some city's sidewalks, race operates as a form of vagrancy:

police used these laws to demarcate who was out of place in a given community—who was denied full respect for their mobility, their autonomy, their lifestyle, or their beliefs. Marginal people shared a vulnerability to regulation by vagrancy law. That is, they shared a vulnerability to arrest at almost any time and place for any behavior or for no behavior at all.<sup>388</sup>

Vulnerability, in this sense, is a security issue, and therefore an anti-arbitrariness one.

Justice Sotomayor, for one, has recognized that vulnerability to arbitrary police interdiction pervades policing of minority communities. Her impassioned dissent in *Utah v. Strieff* recites the ways in which minority candidates are vulnerable to arbitrary interference by the police.<sup>389</sup> She emphasizes the arbitrary nature of

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387. See, e.g., Benjamin J. Priestler, *A Warrant Requirement Resurgence? The Fourth Amendment in the Roberts Court*, 93 ST. JOHN'S L. REV. 89 (2019) (discussing Roberts Court's embrace of the warrant requirement).

388. Risa L. Goluboff, *Dispatch from the Supreme Court Archives: Vagrancy, Abortion, and What the Links Between Them Reveal About the History of Fundamental Rights*, 62 STAN. L. REV. 1361, 1371 (2010).

389. *Id.* at 2070–71.

such interference: the search is “lawless,”<sup>390</sup> but no longer subject to interbranch judicial control through the exclusion of evidence.

By legitimizing the conduct that produces this double consciousness, this case tells everyone, white and black, guilty and innocent, that an officer can verify your legal status at any time. It says that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged.<sup>391</sup>

The solution would be to extend Chief Justice Roberts’s solicitude for vulnerable personhood on the basis of *data* to persons vulnerable on the basis of *race*. Whilst the Chief Justice’s anti-arbitrariness jurisprudence is not fully developed, his willingness to denominate certain searches *arbitrary*—and certain types of personhood *vulnerable*—has a major legal pay-off. It precludes the police from searching without a warrant and provides a major form of redress—exclusion—for violations of that warrant requirement.

An institutional approach to the police and policing reveals the ways in which minority members of our community are just as vulnerable as people with smartphones to police interference. Police policy, often ratified by local or state politics, justifies targeting minority individuals for differential search practices. These practices operate as a means both of searching for evidence of drug crime and as a form of low-level social control symbolizing subordinate status through vulnerability to searches and seizures. That symbolic message is, as Justice Sotomayor notes, no accident.

[I]t is no secret that people of color are disproportionate victims of this type of scrutiny . . . .

. . . .

We must not pretend that the countless people who are routinely targeted by police are “isolated.” They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere.<sup>392</sup>

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390. *Id.* at 2065.

391. *Id.* at 2070–71.

392. *Id.*

## VI. CONCLUSION

The *Byrd* case appears to present a straightforward question: does the driver of a rental car who is not listed on the rental agreement have a Fourth Amendment right to object to the search of the car? The Court's approach to answering that question, by turning to the property concept of bailment, obscures a major feature of the case: that the stop was suspicionless and race based. Such stops are not an isolated feature of highway patrol, but a core feature of drug interdiction. I have called it *hyperinvestigation*. It works, in part, because of the disenfranchisement of African Americans as a political minority; and it works, in part, to reinforce that disenfranchisement as a form of social control.

I have further suggested that the Court has the tools to address this problem ready at hand. The Court could use its nascent jurisprudence of personhood, security, and anti-arbitrariness, developed in the domain of big data and mobile phone technology, and apply it to mass search programs that depend upon the vulnerability of the people searched. Whilst Chief Justice Roberts has provided important suggestions about that sort of jurisprudence in the context of big data, Justice Sotomayor has provided additional clues about its application in the context of institutional policies that provide for suspicionless searches.