

May 1989

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Thomas E. Baker, *"The Right of the People to be Secure...": Toward a Metatheory of the Fourth Amendment*, 30 Wm. & Mary L. Rev. 881 (1989), <https://scholarship.law.wm.edu/wmlr/vol30/iss4/5>

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“THE RIGHT OF THE PEOPLE TO BE SECURE . . .”:
TOWARD A METATHEORY OF THE FOURTH
AMENDMENT

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I. INTRODUCTION

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹

Those fifty-four words exemplify a basic dualism running throughout our constitutional heritage. The history and tradition of the document comprehend a tension between two very different sets of concerns. On the one hand, the Constitution serves as an ideal, the article of our political faith. Aspirational concerns for individual self-fulfillment and government morality, at times, predominate constitutional analysis. On the other hand, more immediate and pragmatic concerns often have determined the constitutional course. Felt necessities of political boundaries, organizational arrangements, and institutional integrity also are prominent in the governing arts. So it has been for the fourth amendment. The amendment expresses a philosophy that aspires toward an abiding government respect for the individual and individual privacy. At the same time, it recognizes a practical governmental authority to seek out and punish law violators. The people have two rights to be secure, first, from government and, second, from each other.

* Professor of Law, Texas Tech University. The author owes an intellectual debt to the opinions of countless jurists in the common law tradition and to the previous scholarship of many others, especially: F. Allen, A. Amsterdam, R. Bacigal, R. Bloom, J. Grano, S. Hufstedler, W. LaFave, H. Lasson, C. Moylan, P. Polyviou, R. Posner, S. Saltzburg, T. Taylor, L. Tribe (who originated this approach), A. Westin, L. Weinreb, and J. White.

1. U.S. CONST. amend. IV.

While the duality of the aspirational and the pragmatic underlies all of constitutional law, the theory of the fourth amendment has been brought into high relief by the conjunction of the warrant clause with the reasonableness clause. Ultimately, the theory of the amendment is the theory of this conjunction. That theory, however, is in doctrinal disarray. The case law is a surrealistic series of holdings about the constitutionality of particular searches and seizures. The fourth amendment scholarship likewise suffers from a profound dissonance, as commentators defend their preferred jurist's position or posit their own theoretical construct.

The point of this essay is that, before we can understand or evaluate fourth amendment theory, we should consider what form the ideal theory should take. What is not needed is still another fourth amendment theory. To develop a set of criteria for understanding and evaluating existing theory, one must escape to a higher level of abstraction and consider what would be an ideal theory. This metatheory, or theory of theories, may sound somewhat metaphysical. It is a bit like going beyond counting—to choreographing—the angels' proverbial dance on the head of the pin. First, we must describe the *premises*—the propositions and assumptions upon which a fourth amendment theory is based. Second, we must consider the *structure* of the theory—how it is put together. Third, we must create an acceptable *methodology*—the proper procedures and techniques of analysis of search and seizure issues. Fourth, we must demarcate *boundaries*—limits of content and substance within which the theory operates and beyond which the theory has no force or effect.

This introduction has the smell of the scholar's lamp, and its smoke may do more to cloud than its light to illuminate. Any thoughtful effort to understand law, however, demands serious attention to theory. Discussion of the metatheory sequence should shed some light on the theory of the fourth amendment, including existing theory and how it can be improved.

II. PREMISES

It is true also of journeys in the law that the place you reach depends on the direction you are taking. And so, where one comes out on a case depends on where one goes in.²

An ideal theory builds on a small number of broadly stated but basic assumptions. These premises should be self-justified, two dimensional, complementary, broad, and realistic, but first must be articulated clearly. The universally recognized lack of consistency and clarity in fourth amendment theory may be traced to a judicial failure to articulate its underlying premises. For example, a still unanswered question is whether the amendment is oriented toward an individual perspective, emphasizing the protection of individual rights, or toward a regulatory perspective, emphasizing general limitations on police activity, or toward both, depending on the issue. More important than which orientation is chosen is that the choice be explicit in the theory.

We must articulate the appropriate philosophical referents for finding and protecting fourth amendment interests. A major defect in present theory is that the right is defined solely by the wrong, and, as a result, there is no need to define the right separately. The fourth amendment theory must reflect the constitutional assumptions of individualism, limited government, and private property. To say that the amendment protects reasonable expectations of privacy is not to say why. Privacy embodies a self-justifiable, almost spiritual, concept. The belief that "persons, houses, papers, and effects" should be protected against the reach of government serves the ideal of human dignity through self-fulfillment and personal relationships. Privacy is so important as to be an end in itself. When government invades our privacy, it injures us in our humanity; but a preference for secrecy and solitude is just the starting point for an inclusive, objective and sociologically accurate definition. Such a premise is the beginning of a theory.

The premises must be two dimensional and account for the pragmatic half of the dualism as well. The text of the fourth amendment admits that even privacy may be disturbed, for an overriding

2. *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).

social need, under procedural safeguards. Any set of premises would be incomplete without this second dimension. Law enforcement is one of the most significant of the constitutional police powers. Some premise must be articulated to serve this broad end.

Furthermore, the premises must complement one another. Some premise must order the others. Hierarchy is needed. A misconception in current theory is that law enforcement always is arrayed against the individual interest, but this ignores government's efforts to protect us from others who would commit crimes against us and our privacy.

Breadth distinguishes general premises from more narrow rules and allows for their adaptation. Recall how technology eclipsed the old trespass premise of the fourth amendment. Technology has increased government access dramatically. Theoretical responses to electronic monitors, surveillance with computer data bases, and a growing crime problem must be even and consistent. Matching slogans, like "privacy" with "law and order," will not do.

Another concern is for a realistic fit between theory and practice. Consider the avowed preference for a warrant. Most searches are conducted without a warrant. This concern is not to suggest that theory should follow reality. The priority of the Constitution is that reality should conform to theory, but practical consequences should inform theory. Assuming the posture of an ostrich does not improve theory or reality.

Generally, fourth amendment theorists have failed to articulate their assumptions and how they relate theory and practice. Premises must come first. If we do not know where we are going in, how can we know where we should come out?

III. STRUCTURE

This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added.³

An important result of setting the protection against unreasonable searches and seizures in the Constitution is the judicial responsibility to elaborate a complex and detailed body of law, based on a

3. *Douglas v. Jeannette*, 319 U.S. 157, 181 (1943) (Jackson, J., dissenting).

few broad premises. This organization is important because it establishes the pattern of privacy in our society. In an ideal theory, the premises order structure and the structure must be orderly to insure a coherence. Coherence is the result of unity and harmony.

Traditional fourth amendment analysis built upon four questions: (1) defining the circumstances in which the protection applied—the scope of the amendment; (2) determining the factors to be considered in deciding constitutionality—the warrant and reasonableness standards; (3) dictating consequences for violations—the remedy; and (4) identifying who may raise a violation and when—standing. Since *Katz v. United States*,⁴ these distinct inquiries have been collapsed into one standard calling for the protection of privacies variously labelled “reasonable,” “justifiable,” and “legitimate.” We can look to Justice Harlan’s concurring opinion,⁵ as most have, for some semblance of structure in objective and subjective expectations of privacy. However, that becomes a facade when we ask: first, if the government may undo “subjective” expectations by notice and, second, if “objective” expectations are normative and matters of right or merely descriptive of those the people have in fact.

Unity requires that the parts be related to the whole theory, not only as distinct levels of analysis, but also as an integrated and complementary sequence of thought. The text of the amendment itself poses, but does not resolve, the most basic structural question: how the warrant clause and the reasonableness clause relate. Logic gives three choices: (1) the two clauses are coextensive in effect, so that warrantless intrusions are per se unreasonable; (2) although the reasonableness requirement does not authorize warrantless intrusions, it does require that each warranted intrusion also satisfy a separate test for reasonableness; (3) warranted intrusions are exempted from further examination, and only warrantless intrusions must satisfy a reasonableness test. At times, the Court has given primacy to one clause then to the other, and on occasion has considered the degree of compliance with both clauses. The Court even has gone so far as to ignore the structural

4. 389 U.S. 347 (1967).

5. *Id.* at 360 (Harlan, J., concurring).

issue, upholding challenged procedures as adequate substitutes for the two clauses.

Every theory is faced with irresistible counterexamples, those situations in which a consistent application would yield an untoward result. An amorphous theory copes by creating endless ad hoc corollaries, alternative parallel lines of analysis each with an independent justification. In a harmonious theory, each component is justified and each justification is intrinsic in every component. Structure is weakened when different components of a theory would yield different results for the same facts. This can happen now, for example, between the search incident to arrest and the automobile search exceptions to the warrant requirement. The present free-form warrant clause perhaps best illustrates Justice Jackson's observation.⁶ The warrant preference itself becomes an empty promise when a structureless theory allows the magistrate to wield merely a rubber stamp. Decisions that recognize and apply warrant exceptions belie an announced preference for warrants and are inconsistent. Within categories, the exceptions have grown beyond their original intrinsic justification. Automobile searches, for example, can occur long after the police end any exigency.

The collapse of structure underscores the need for unity and harmony. Failure to satisfy these criteria of coherence leaves the theory without rigor. *Katz* destroyed an old structure based on property and tort concepts, but its promise for a new order is still unfulfilled. In present theory, borrowed concepts provide ad hoc rationalizations that defy reconciliation. The temple is not in danger of collapsing only because it is in ruins already.

IV. METHODOLOGY

[T]o attempt by analysis and exposition to unwind [the Supreme Court's fourth amendment decisions] and thereby arrive at a "true rule" . . . would require the mind of a medieval scholastic. . . .⁷

The content of a theory is filled by methodology. Methodology holds the structure together and is the means by which the prem-

6. See *supra* text accompanying note 3.

7. *United States v. Sutton*, 341 F. Supp. 320, 322 (W.D. Tenn. 1972) (Brown, C.J.).

ises order the structure. An ideal fourth amendment theory should establish accepted modes of argument and identify procedures and techniques that characterize appropriate debate. The theory must identify what questions to ask and how to go about answering them, in short, a methodology for analyzing search and seizure issues. Any methodology should be possessed of two qualities—consistency and depth.

It is not enough to invoke a broad premise, to rely on history, to urge the plain meaning, to argue the framers' intent, to suppose a functionalism, or to claim to balance interests, each only when the particular approach supports a perceived right result. The methodology should provide consistency by creating a hierarchy for using these techniques and should establish which techniques apply in which particular contexts. Beyond consistency, a methodology should have a certain depth. To achieve consistency at all cost would not improve methodology. A theory without discernment is no theory at all.

Our constitutional dualism thus creates a tension in methodology between flexibility and fixity. The premises served by the fourth amendment could generate numerous, complicated, and subtle rules, but any methodology must be possessed of sufficient simplicity to allow some measure of certainty or predictability for all their users. Some approaches tilt toward the aspirational and some tilt toward the pragmatic, and some others seem to be suspended in between. Although the Court has not articulated an exclusive methodology, several competing methodologies may be considered toward an understanding of this component of an ideal theory.

The totality of the circumstances approach, which quickly passed from the scene, was something of an "un-methodology," part of the "I know it when I see it" school, a kind of jurisprudence of the ad hoc. To have no methodology leaves that central function unperformed and assigns consistency and depth to the whim of the decision maker. Such a cataloging of the facts followed by an unrelated conclusion on constitutionality does nothing to further a theory.

A method that solely contemplated reasonableness would appear completely consistent; each search and seizure would be measured for reasonableness. Such epithetical jurisprudence often is the easi-

est way out of conceptual difficulty. Find a term to which the law has attached some consequence, apply the term to the situation at hand, and the legal result is determined automatically. Although hidden, the slippage in such an approach is often profound. If a new fact pattern is not truly like the old, the term takes on new meaning while the familiar form of logical decision has been followed. Whatever it means in other fields, in constitutional law a reasonableness inquiry is so shallow as to be next to meaningless, a conclusion reached via some unarticulated balance of undisclosed interests subjectively assigned relative weights. The approach provides answers but no method for reaching them. Volumes of reasonableness decisions have not provided any more insight than the years' probable cause decisions, which is not much at all.

From time to time, the Court became enamored with balancing fourth amendment interests just as it has in other constitutional areas. Balancing, however, seems to have undone more methodology than it has developed. Pure balancing achieves the highest order of flexibility but sacrifices almost all fixity. Ultimate balancing methodology asks two questions in deciding each case: (1) how much and what type of privacy does a free society require and (2) how much and what type of intrusion upon privacy is required to preserve a reasonably ordered society. A methodology so obtuse is not particularly helpful, however, when deciding specific cases. Consistency is lost in plumbing such depths. A breakdown of balancing methodology further detracts from the approach. The determination of the weight of the government's purpose is virtually standardless, as it contemplates such imponderables as weighing the legislative intent for the severity of the crime and the hindsight need for the evidence. No wonder the Court has gone only so far as applying adjectives such as "legitimate," "weighty," "urgent" or "vital." In the other pan of the balance, the Court must assign weights to a diverse spectrum of privacy interests in measuring the severity of the intrusion. At one end point, the methodology could locate the lowest cognizable interest on the significant side of a *de minimis* interest in hiding incriminating evidence and, at the other end point, the highest privacy interest beyond which the government may not go. So far the Court has only spoken about the severity of the intrusion within broad contexts of home searches in conclusory terms. The Court also might be obliged to

balance the feasibility of alternative procedures and the potential for abuse, although no decision has gone so far. First, the balancing methodology requires the Court to scale values from several perspectives: societal interests, privacy concerns, the efficiency issue, the potential for abuse, and the alternative administrative burden. Second, these perspectives must be integrated into a common methodology of privacy. Admittedly, the intricacy of this approach may prevent success.

A phenomenon of the last decade, the so-called "bright line rule" provides the last considered methodology. In the warrant exception for searches incident to arrest, for example, once the Court strayed from the original concerns about safety and contraband, the shift from a functional approach to a doctrinal approach became inevitable. Thus, a lawful custodial arrest of an occupant of an automobile may authorize the full search of the interior compartment. The methodology of such bright line rules does have a certain simplicity, but simplifying police procedures alone is not a sound methodology. Even devotees of bright lines suggest criteria for evaluating them: (1) Does the rule have clear and certain boundaries that minimize the need for case-by-case evaluation? (2) Do results under the rule approximate projected results under an impracticable case-by-case evaluation? (3) Is there a genuine need to forego an otherwise impracticable case-by-case approach? and (4) Is the rule not readily manipulable? The bright-line methodology is acceptable only if we can with confidence answer each question in the affirmative. Otherwise, a straightforward doctrinal approach is preferred for consistency and depth.

Methodology is crucial to the formulation and legitimacy of any theory. Consistency and depth allow some evaluation of methodologies, but the former cannot become a foolish theory's hobgoblin and the latter cannot be pursued to infinite regress. The extant methodologies might be viewed as complementary efforts to achieve a deeper understanding of the premises and structure of the fourth amendment. The Court can be faulted for beginning and ending in the middle of the sequence. Premises must order a structure before an ordered methodology may be achieved. Ironically, the Court's preoccupation with methodology, to the exclusion of premises and structure, prevents an accommodation of method-

ologies. Only when this preoccupation is overcome will the dark ages of theory end.

V. BOUNDARIES

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.⁸

Every theory must define outer limits beyond which it cannot go. Theoretical boundaries ought to be precise at the limits and internally uniform. Before exploring the fourth amendment boundaries of content and substance, consider the significance of that border. Deciding that the conduct involved is within the amendment does not outlaw the technique, but merely imposes judicial supervision. Principles of neutrality, sufficiency and particularity are triggered, sometimes before and always after. Beyond the border, the conduct is exempt of constitutional control. The line keeps straight burglars and government.

The orbit of the fourth amendment has some perigee and apogee. At minimum, the amendment protects interests akin to property and torts, interests in possessions, bodily integrity, and mental tranquility. At maximum, the amendment protects those interests plus the broadest sense of secrecy and solitude—the liberty to keep personal information unknown to others and to keep oneself separate from others—whether from individuals or from government. For our boundary-drawing to achieve an optimum level of privacy, theory must distinguish between the protection of the right to certain expectations and protections of actual expectations. Missing in the *Katz* objective-subjective expectations analysis is the precise inquiry into what we are entitled to expect from government, independent of what government might allow us to expect.

Several limiting techniques exist. A means-oriented model invokes the general search paradigm of unconstitutionality and expands or contracts by analogy and precedent in the common law

8. *Mapp v. Ohio*, 367 U.S. 643, 660 (1961) (Clark, J.).

tradition. An atomistic model focuses on the personal constitutional right, drawing a protective barrier around individual interests in secrecy and security. A regulatory model focuses on the collective "right of the people" to be protected against law enforcement excesses. Precision is lost, however, when the limits of the theory are defined differently for different searches. Fourth amendment boundaries blur when, for example, administrative searches follow a means model and standing doctrine follows an atomistic model and the exclusionary rule follows a regulatory model. Such a hegemony will not do.

When drawing the boundary, the theory should explain the significance, if any, of the accused's interest in avoiding the result of the search and punishment. Beyond the debate over remedy, exclusion and insulation from prosecution have warped fourth amendment theory regarding the scope of the protection, who can raise claims, and the various doctrines of warrant preference and exceptions. This distortion narrows the scope of the protection and blurs conceptual limits. The ideal theory would overcome this seeming inability to address the remedy directly by defining it in a reasoned and uniform manner. A metatheory would expect a uniformity in doctrine of right and remedy, for the two play an indivisible role in drawing boundaries. This approach calls for a single boundary, within generous limits, which contemplates general minimization of violations and compensation and punishment for particular violations. The bifurcated approach we have is unconvincing and conspicuously unstable.

Related to the question of boundary is the inquiry into the topology of the theory, the use of intensity to define outer reaches. As a pebble hits a pond, the theory could posit an inviolate interest in privacy that emanates outward and weakens as it moves away from core values. Intensity could determine the legitimacy of activity by imposing progressive procedural protections until reaching a fourth amendment sanctum sanctorum. Interests in bodily integrity, the home, and highly private papers are examples of the most important values in such a hierarchy. Even if feasible, this approach may expect too much internal uniformity. Indeed, much of the vacillation in existing theory may be attributed to subjectivity in shifting emphases and changing perceptions of privacy. The intensity inquiry, at most, reinforces conclusions at the

extreme that a given situation is within or without the boundary of the theory.

Boundaries of theory must be marked by a sound methodology. Structure also is influential. To be precise at the limits and internally uniform, a boundary must be true to the premises of a theory. Without boundaries, we cannot know the limits of thought about the fourth amendment. Reason and truth require no more nor no less for the individual and for government.

VI. CONCLUSION

Admittedly, the Court's work in the fourth amendment area is as difficult as it is important. The persistence of the same fact situations, the same issues, and the same uncertainties, however, suggests that its theory is at fault. The voice of fourth amendment scholarship must lead this dialogue toward harmony. We must articulate some premises, build a structure, agree on a methodology, and define the boundary, in our theory. We must follow the metatheory sequence until we reach the central paradoxes that mark our constitutional dualism. Asking new questions of our theory, we need to formulate new answers, new ways of thinking, even new theories about the fourth amendment. A metatheory will help that effort and, perhaps, along the way make angels better dancers.

Whatever the state of present and future theory, our understanding of those fifty-four words keeps fiction from becoming prediction:

There was of course no way of knowing whether you were being watched at any given moment . . . It was even more conceivable that they watched everybody all the time . . . You had to live—did live, from habit that became instinct—in the assumption that every sound you made was overheard, and, except in darkness, every movement scrutinized.⁹

9. G. ORWELL, NINETEEN EIGHTY-FOUR 4 (1949).