

9.7.15

Dear colleagues:

Attached is an essay that will come out this fall—in more or less the form you see here—in the University of Pennsylvania Journal of Constitutional Law. I certainly welcome thoughts on the essay itself. The broader purpose, however, is to convey my general thinking about “law enforcement outsourcing,” an issue that I suspect will become highly germane to police practices, as well as the constitutional rules regulating those practices, in the near future. This is one aspect of a general theme—big data policing—that I hope to explore on Wednesday. The second aspect of that theme is whether (and in what sense) the government has an affirmative duty to investigate crimes, as opposed to a duty to avoid certain forms of invasive activity *while* investigating crimes. Existing constitutional rules are organized around the latter frame—a suspect’s (negative) right to be free from certain forms of violation. I am interested in whether there is room (and whether big data expands the room) for thinking about a suspect’s (positive) right to have the state exercise a particular threshold of diligence before, among other things, bringing a criminal prosecution.

I look forward to the discussion on Wednesday.

Kiel

# Vigilantes and Good Samaritans

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## I. The Private Search Rule

The Constitution turns a blind eye—categorically—to “private searches.” As the Supreme Court has explained, Fourth Amendment protection is “inapplicable to a search or seizure, even an unreasonable one, effected by an individual not acting . . . with the participation or knowledge of any governmental official.”<sup>2</sup> This principle remains in force, moreover, even when a private search “deliberate[ly] inva[des]” another person’s expectation of privacy,<sup>3</sup> and even if—according to some circuits—the search was occasioned by illegal conduct.<sup>4</sup> But the private search rule also yields to an important exception. If a private actor operates as an “instrument or agent” of the state,<sup>5</sup> a search that would otherwise qualify as private converts into state action, and comes back within the Fourth Amendment’s sweep. I refer to this exception—whose contours are traced more fully in Part I—as the “state instrumentality” test.

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<sup>2</sup> *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (internal citations omitted).

<sup>3</sup> *Id.* at 115 (“The initial invasions of respondents’ package were occasioned by private action. . . . Whether those invasions were accidental or deliberate, and whether they were reasonable or unreasonable, they did not violate the Fourth Amendment because of their private character.”).

<sup>4</sup> *See, e.g., United States v. Jarrett*, 338 F.3d 339 (4th Cir. 2003) (holding that a hacker’s search of defendant’s computer, despite breaking the law, did not violate the Fourth Amendment); *United States v. Runyan*, 275 F.3d 449 (5th Cir. 2001) (holding that a spouse’s entry onto the other spouse’s was not a Fourth Amendment search despite the fact that she did not have permission to enter).

<sup>5</sup> *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971). *See also Skinner v. Railway Labor Exec. Ass’n*, 489 U.S. 602, 615 (1989) (if the “specific features of [a regulatory regime] combine” in a way that strongly encourages or facilitates private searching, that can convert private searches into state action); *Jacobsen*, 466 U.S. at 113 (discussing the “agent of the Government” exception to the private search rule).

The point of this Essay is simple. Although the “state instrumentality” test produces satisfying results in the great run of cases, it has a crucial blind spot.<sup>6</sup> In practice, the test has not distinguished—and, because of its analytic foundation in agency law, the test *cannot* distinguish—between Good Samaritans, who stumble on evidence by happenstance and decide to alert the authorities, and vigilantes, who deliberately seek out incriminating evidence in order to assist law enforcement. As far as the doctrine concerned, neither actor, Good Samaritan or vigilante, is an instrumentality of the state, because both perform searches without any prodding from law enforcement. And that is the end of the matter.

In short, by making law enforcement involvement the lynchpin of doctrine, the “state instrumentality” test necessarily treats Good Samaritans and vigilantes as identical. For much of the twentieth century, this identity may have been justified—or, if not justified, at least harmless—because comprehensive surveillance was, for most practical purposes, the exclusive province of the state. Because private surveillance occurred sparingly, it posed little concern. No longer. Today, powerful surveillance technology is cheap, surreptitious, and widely available—think: aerial drones—and it will only become more so as time goes on. Furthermore, corporations now routinely archive and monitor vast amounts of personal data, much of which is innocuous, but some of which—for example, real-time footage of what is going on inside one’s home<sup>7</sup>—is highly sensitive.

In tandem, these developments—the increased availability of surveillance technology among individuals, and the drive toward data surveillance among corporations—require rethinking the notion that vigilante behavior falls categorically beyond Fourth Amendment scrutiny. Today, private actors possess (or at least have the *means* to possess) enormous volumes of information about other people—a reality that puts strain on the traditional rule that private actors have carte blanche to assist law enforcement in whatever measure, and to whatever extent, they please. Instead of treating all private searches alike, doctrine should become sensitive to the way in which private actors not only *aid* law enforcement today, but also have the capacity—at the initial stages of investigation, at least—to fully *supplant* law enforcement. In a way that has never before been true, investigative work that has traditionally fallen to the police, and therefore has traditionally been subject to Fourth Amendment protection, now falls to private actors—and meets with no constitutional scrutiny of any kind.

With these concerns in mind, I argue that the “state instrumentality” test should be replaced by an “outsourced policing” test. Instead of asking whether a private search was compelled or encouraged by the state at its outset, the doctrine should ask whether the private actor, by performing the search in question, effectively stepped into the shoes of law enforcement. Was the private actor merely assisting the police—trying to alert the authorities to (the possibility of) criminal behavior—or was the private actor outsourcing the policing

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<sup>6</sup> Cf. John M. Junker, *The Structure of the Fourth Amendment*, 79 J. CRIM. L. & CRIMINOLOGY 1105, 1139 (1988) (describing the private search doctrine as “disturbingly broad” in its implications).

<sup>7</sup> Consider, for example, the company Nest Labs, which pioneered the burgeoning industry of “smart home” devices. One of the services purveyed by Nest is home surveillance—usually of young children or pets—when the user is not home. Putting aside whether this service improves or (further) disintegrates social life, the point for our purposes is that every time Nest takes footage of goings-on in the home, it possesses that footage forever—and is free, under normal property principles, to use the footage as it will.

function? If so, then Fourth Amendment scrutiny—at least in *some* measure—is warranted.<sup>8</sup> Concretely, I argue that the “outsourced policing” test should depend on four variables: first, whether the private search was motivated by an *ex ante* intention to aid law enforcement; second, whether the private search involved illegal conduct; third, whether the private search stemmed from a “dragnet” program of searching; and fourth, whether the private actor who performed the search has an ongoing relationship with law enforcement.

The rest of the Essay is tripartite. Part II traces the origin of the state instrumentality test: how it emerged in the appellate jurisprudence to fill a vacuum left by the Court, and how it flows from the combination of (1) a state action requirement and (2) familiar precepts of agency law. Part III spotlights the shortcomings of the state instrumentality test, and argues that the outsourced policing test is superior, because it reaches all the cases the state instrumentality test gets right, while also accounting for the cases (related to vigilantes) it gets wrong. Part IV lays—very preliminary—groundwork of a normative defense of the outsourced policing test, a project that remains to be fleshed out in future work.

## II. The “State Instrumentality” Test

After the Court’s watershed opinion in *United States v. Katz*,<sup>9</sup> its first enunciation of the private search rule came in *Coolidge v. New Hampshire*, a case about the admissibility of evidence conveyed to the police by a suspect’s spouse. The police suspected Edward Coolidge of kidnapping and murdering a fourteen year-old girl. In the course of building their case, the police visited Coolidge’s home, which resulted in, among other things, the police speaking with Coolidge’s wife. At the end of the visit, Mrs. Coolidge voluntarily handed over various items to the police—numerous guns, as well the clothes that Coolidge had been wearing the day the girl disappeared—that ended up implicating him in the crime.

Coolidge moved to suppress the items on the grounds that “when Mrs. Coolidge brought out the guns and clothing, and then handed them over to the police, she was acting as an ‘instrument’ of the officials.”<sup>10</sup> The Court rejected Coolidge’s argument, reasoning that the police had not “coerce[d] or dominate[d] [Mrs. Coolidge], or, for that matter, [] direct[ed] her actions by the more subtle techniques of suggestion that are available to officials in circumstances like these.”<sup>11</sup> In short, when Mrs. Coolidge provided evidence to the police, she was acting of her own volition, not as an instrument of the state. So the Fourth Amendment, far from being violated, was not even *triggered*. As the Court put it:

[I]t is no part of the policy underlying the Fourth [A]mendment[] to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals. If, then, the exclusionary rule is properly

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<sup>8</sup> In practice, this often means that probable cause is required. But it does not *always* mean that. *See, e.g.,* *Patel v. City of Los Angeles*, \_\_\_ U.S. \_\_\_ (2015) (striking down an ordinance allowing totally suspicion-less searches of hotel registries, but holding that only an administrative subpoena—i.e., suspicion short of probable cause—is necessary).

<sup>9</sup> 389 U.S. 347 (1967).

<sup>10</sup> *Coolidge*, 403 U.S. at 487.

<sup>11</sup> *Id.* at 489.

applicable to the evidence taken from the Coolidge house . . . it must be upon the basis that some type of unconstitutional police conduct occurred.<sup>12</sup>

In the four decades since *Coolidge*, the Court’s jurisprudence on private searching has been sparse. In fact, only two cases are squarely apposite.<sup>13</sup> The first is *United States v. Jacobsen*, in which the Court held that no search occurred when a FedEx worker examined the contents of a broken package and, suspecting that it contained contraband, alerted the authorities. The Court was not impressed by Jacobsen’s argument that the FedEx worker’s decision to call in the package rendered him a state agent. Nor did the Court think it relevant that the FedEx worker may have *intentionally*—or even maliciously—dismantled the package.<sup>14</sup> For the Court, the important point was that the “initial invasion[] of respondents’ package [was] occasioned by private action.”<sup>15</sup> That fact alone concluded the analysis.

The second case in the post-*Coolidge* era, *Skinner v. Railway Executives’ Labor Association*, came down a few years after *Jacobsen*.<sup>16</sup> In *Skinner*, the Court confronted a question whose answer was logically implied by the reasoning of *Coolidge* and *Jacobsen*, but was nevertheless as an open question of law: do private actors become state agents if they are legally required to perform searches? The answer, of course, was yes. Were it otherwise, legislative bodies could circumvent Fourth Amendment protection at will—by deputizing private actors to perform searches that would otherwise fall to law enforcement officials. In fact, the *Skinner* Court went slightly further, holding that private searches *facilitated* by a regulatory scheme—but not compelled by it—can nonetheless qualify as Fourth Amendment searches, if the government “remove[s] all legal barriers to [a given type of search] and indeed [makes] plain not only its strong preference for [searches], but also its desire to share the fruits of [the] intrusions.”<sup>17</sup> In short, it is possible for a statutory scheme to deputize private actors as state agents without explicitly *requiring* that they perform searches.

From there, lower courts have been left to fill in the gaps. Equipped with the fact patterns of *Coolidge*, *Jacobsen*, and *Skinner*—as well as the Court’s indication that analysis

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<sup>12</sup> *Id.* at 488.

<sup>13</sup> The third case is *Walter v. United States*, in which the Court determined—essentially *sub silentio*—that it was not a Fourth Amendment violation for a private actor to open a package of video tapes that had mistakenly been delivered to the premises. 447 U.S. 649 (1980). The large bulk of the Court’s analysis in *Walker* focused on whether law enforcement could perform a search *beyond* the initial (private) search—whether it constituted a Fourth Amendment violation for law enforcement to watch the tapes, when the private actor had not. The Court said yes, on the theory that when law enforcement expands the scope of a private search, the Fourth Amendment clock resets, to so speak. Nevertheless, the premise underlying the *Walter* Court’s analysis was that the initial private search did not even come under Fourth Amendment scrutiny, much less make out a Fourth Amendment violation. For a helpful discussion of the “expanded search” rule, see Orin Kerr, *Searches and Seizures in a Digital World*, 119 HARV. L. REV. 531, 554-56 (2005).

<sup>14</sup> *Jacobsen*, 466 U.S. at 115 (indicating that it is irrelevant whether the intrusion was “accidental or deliberate”); *id.* n.10 (“A post-trial affidavit indicates that an agent of Federal Express may have opened the package because he was suspicious about its contents, and not because of damage from a forklift. . . . [But this] affidavit is of no relevance to the issue we decide [here].”).

<sup>15</sup> *Id.* at 115.

<sup>16</sup> 489 U.S. 602 (1989).

<sup>17</sup> *Id.* at 615.

should track the “[specific] circumstances” of a search,<sup>18</sup> and should turn, in some measure, on “the degree of the Government's participation in the private party’s activities”<sup>19</sup>—the federal Courts of Appeals have settled on two criteria of state agency. The first is whether the state instigated, compensated, or otherwise encouraged the search. The second is whether the private actor, in performing the search, intended to assist law enforcement. Some courts, furthermore, have simply “compressed” the two criteria together,<sup>20</sup> into a “fact-intensive inquiry” that asks “whether the government knew of and acquiesced in the intrusive conduct and whether the private party's purpose for conducting the search was to assist law enforcement efforts or to further her own ends.”<sup>21</sup>

Although there is certainly no logical tension between these two criteria, they focus, so to speak, on different sides of the equation. The first concerns the actions of government officials—did the police do anything to instigate or encourage the search?—whereas the second concerns the motivations of private actors. In many cases, both questions cut the same way. But there is a specific (and particularly important) subset of cases in which they pull apart: cases in which law enforcement did nothing to propel a search, but the reason behind the search was a private actor’s desire to *aid* law enforcement.

Cases of this type run a fairly wide gamut. Consider the following fact patterns, all patterned on real life, in which (1) a private search was motivated by the desire to assist law enforcement, but (2) involved no prodding from law enforcement:

1. The fearful spouse: concerned for her safety, Thelma decides to rifle through her husband’s things, in search of contraband, which she then finds and gives to law enforcement.<sup>22</sup>

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<sup>18</sup> *Id.* at 614.

<sup>19</sup> *Id.*

<sup>20</sup> *United States v. Jarrett*, 338 F.3d 339, 345 (4th Cir. 2003).

<sup>21</sup> *United States v. Ellyson*, 326 F.3d 522, 527 (4th Cir. 2003). *See also* *United States v. D'Andrea*, 648 F.3d 1, 10 (1st Cir. 2011) (the state instrumentality test depends on “the extent of the government's role in instigating or participating in the search, its intent and the degree of control it exercises over the search and the private party, and the extent to which the private party aims primarily to help the government or to serve its own interests”); *United States v. Reed*, 15 F.3d 928, 931 (9th Cir. 1994) (“The general principles for determining whether a private individual is acting as a governmental instrument or agent for Fourth Amendment purposes have been synthesized into a two part test. According to this test, we must inquire: (1) whether the government knew of and acquiesced in the intrusive conduct; and (2) whether the party performing the search intended to assist law enforcement efforts or further his own ends.”) (internal citations omitted). Some courts tend—at least in the abstract—to give one prong of the analysis more weight than the other. *Compare* *United States v. Huber*, 404 F.3d 1047, 1053-54 (8th Cir. 2005) (suggesting that law enforcement must have some involvement in the search for it to become state action—no matter how much the private actor is motivated by a law enforcement purpose), *with* *United States v. Bowers*, 594 F.3d 522, 526 (6th Cir. 2010) (holding that for a search to be private, “the intent of the private party conducting the search [must be] *entirely independent* of the . . . collect[ion] [of] evidence for use in a criminal prosecution”) (emphasis added and internal citations omitted).

<sup>22</sup> *See* *United States v. Runyan*, 275 F.3d 449 (5th Cir. 2001) (holding that it was purely private conduct when wife entered husband’s ranch without his permission—indeed, over his attempt to keep her out—to search the premises). In some sense, this result is already encapsulated by *Coolidge* itself. *See* *Georgia v. Randolph*, 547 U.S. 103, 145 (2004) (J. Thomas, dissenting) (“the Court held in [*Coolidge*] that no Fourth Amendment search occurs

2. The nosy roommate: concerned that his roommate may be dealing drugs, Joe decides to look through their apartment for evidence, while his roommate; when he finds a bag of illicit pills, Joe calls the police.<sup>23</sup>
3. The suspicious courier: Maureen, a FedEx worker, and an avid proponent of the war on drugs, takes it upon herself to dismantle and examine the contents of any package that appear, on the surface, to contain drugs. When Maureen locates drugs (or something that appears to be drugs), she alerts law enforcement.<sup>24</sup>
4. The neighborhood watchman: Jamal is an electronics enthusiast with copious free time, who spends his days flying aerial drones around his neighborhood, looking for criminal activity (and sending the fruits of his surveillance to law enforcement). As his operation becomes more sophisticated, Jamal starts learning where the highest concentration of criminal activity is, and he targets his surveillance effort accordingly.<sup>25</sup>
5. The conscientious corporation: AOL, having decided that it wants to support the war against child pornography, begins filtering user email for attachments that resemble known contraband; when its algorithm turns up a match, AOL sends in a human observer to verify the result and to prepare a report for the National Center for Missing and Exploited Children.<sup>26</sup>

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where, as here, the spouse of an accused voluntarily leads the police to potential evidence of wrongdoing by the accused.”).

<sup>23</sup> See *United States v. Bowers*, 594 F.3d 522, 525-27 (6th Cir. 2010) (holding that it was a purely private search when defendant’s roommate and her boyfriend entered defendant’s room, removed a photo album, and gave it to the police).

<sup>24</sup> See also *United States v. Koenig*, 856 F.2d 843, 848 (7th Cir. 1988) (holding, per *Jacobsen*, that the private search rule applies to the activity of a FedEx employee who exhibited particular enthusiasm for law enforcement, having “contact[ed] the DEA at least eight times” over the course of his employment). This reasoning, it bears note, was prefigured by *Jacobsen* itself, when the Court deemed it irrelevant to the private search analysis that the FedEx employee “may have opened the package because he was suspicious about its contents, and not because of damage from a forklift.” *Jacobsen*, 466 U.S. at 115 n.10.

<sup>25</sup> See *Spetalieri v. Kavanaugh*, 36 F. Supp. 2d 92, 103 (N.D.N.Y. 1998) (holding that a private actor’s “participation in a neighborhood watch group does not transform her actions into state action”); *Weber v. Bland*, 1998 WL 341823, at \*4 (N.D. Ill. June 17, 1998) (same). Of the six examples, this one is the most hypothetical at present—but only because technology has not yet evolved to the point that this kind of private surveillance is cheap and wieldy. It will be soon enough. And of course there is also a question about whether aerial drone surveillance actually *violates* the Fourth Amendment, even when the actor that performs the surveillance is (unlike Jamal) unambiguously bound by the Fourth Amendment’s requirements. Under *United States v. Jones*, I think there is a strong case to be made that aerial drone surveillance, even when carried out entirely from “public” vantage points, triggers the Fourth Amendment when it becomes too ongoing or extensive. But that is certainly not a foregone conclusion.

<sup>26</sup> See *United States v. Stevenson*, 727 F.3d 826, 829-30 (8th Cir. 2013) (holding that AOL was operating as a private actor, not a state agent, when it decided to hash email traffic for child pornography and other contraband); *United States v. Richardson* 607 F.3d 357, 366-67 (4th Cir. 2010) (same).

6. The vigilante hacker: Erica, a skilled programmer, decides to locate criminals, hack into their computers—illegally—and furnish whatever evidence she finds to law enforcement.<sup>27</sup>

In practice, courts have understood all six of these cases to involve purely private searches—notwithstanding the fact that *in every single case*, a private actor was inspired to search by the desire to assist law enforcement. Though certainly not dispositive, this suggests that the “law enforcement motivation” prong of the state instrumentality test ultimately does little work in the analysis—when the chips are down, courts focus on what law enforcement officials *actually did*, not on the inspiration for private action.<sup>28</sup> And this makes sense. As numerous courts have noted—and as the phrase “instrument or agent of the government” already implies—the state instrumentality test flows from “common law agency principles.”<sup>29</sup> It is black-letter agency law that A does not become B’s agent simply because A acts (1) in a way that benefits B, and (2) out of a *desire* to benefit B. Rather, some action on B’s part is necessary.<sup>30</sup>

The niceties of agency law are beside the point. The point is that if action by a principal—in whatever sense—is normally necessary to establish an agency relationship, it stands to reason that a test *patterned on* agency law would incorporate the same requirement. That hypothesis is just what the case law bears out. In practice, courts see prodding by law enforcement (of some kind) as a necessary, if not always sufficient, condition of state agency for Fourth Amendment purposes. Hence the uniform treatment of the six cases above, despite their manifest differences. The nature of those differences—and an exploration of how doctrine might grow to appreciate them—is the topic of the next Part.

### III. The “Outsourced Policing” Test

The state instrumentality test makes perfect sense in a world where law enforcement officials perform the vast majority of surveillance (and other investigative work). It makes

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<sup>27</sup> See *United States v. Jarrett*, 338 F.3d 339, 344-45 (4th Cir. 2003) (holding that an anonymous hacker’s search of defendant’s computer did not violate the Fourth Amendment—despite involving the commission of a criminal offense—because the Government did not “participate[],” but rather “passively accept[ed]” . . . a private party’s search efforts”).

<sup>28</sup> This is not surprising, because the proposition that “law enforcement motivation” can, standing alone, transform private conduct into state action runs directly into the proposition that private actors should be free, as a general matter, to assist law enforcement. See, e.g., *Randolph*, 547 U.S. at 116–17 (2006) (explaining that when private parties relay incriminating evidence to law enforcement, it serves “society’s interest” in “bringing criminal activity to light”). That is not to say the two propositions are irreconcilable, but a more nuanced account is required. See Kiel Brennan-Marquez, *Fourth Amendment Fiduciaries*, *FORDHAM L. REV.* (forthcoming 2015) (arguing that when information fiduciaries—whom we expect to hold our information in trust—voluntarily assist with law enforcement, it poses distinct privacy concerns, which might theoretically limit the scope of the “law enforcement motivation” principle).

<sup>29</sup> See, e.g., *Ellyson*, 326 F.3d at 527.

<sup>30</sup> B’s action can, under limited circumstances, occur after the fact (“ratification”)—CITE—but the core point holds.



considerably less sense in a world where, as a practical matter, surveillance has been farmed out to private actors.

Consider, again, the six examples sketched above: the fearful spouse; the nosy roommate; the suspicious courier; the neighborhood watchman; the conscientious corporation; the vigilante hacker. As noted earlier, courts have—faithful to the state instrumentality test—treated all six of these cases the same way. Because none of the searches involved prodding from law enforcement, all six were wholly private, beyond the Fourth Amendment’s reach. In my mind, however, this result is entirely unsatisfying. *Not* because the court got all six questions wrong—on the contrary, some of these holdings seem unassailably right—but because the six cases are not even remotely uniform. In fact, it is possible that some (or all) of these cases came out correctly. But the *reason* they came out correctly is that it was impossible for the private actors, because of their status as private actors, to perform Fourth Amendment searches. Rather, the reason these cases came out correctly (to the extent they did) is either (1) that the private actors in question did not outsource the law enforcement function, or (2) that even if they *did* outsource the law enforcement function, they did so in a way that satisfies the Fourth Amendment’s reasonableness requirement.

What do I mean by “outsourcing the law enforcement function”? Ultimately, the analysis is destined be multifarious and fact-bound—but the formal point is that there is a difference between (1) a private actor assisting in a criminal investigation and (2) a private actor effectively supplanting the need for law enforcement involvement at a particular stage of the investigative process. Unlike the former, which can (and often does) occur under circumstances when a private actor has no *ex ante* intention of finding evidence of criminal behavior—she simply stumbles on incriminating evidence and alerts the authorities—the latter requires that a private actor intend to help catch criminals. In other words, an intention to assist law enforcement is a necessary but insufficient condition of outsourced policing; if that element is missing, private investigative activity—even highly invasive investigative activity; and even investigative activity that might incur civil or criminal liability—does not qualify as outsourced law enforcement.<sup>31</sup>

Beyond that, the outsourced policing test should turn, in practice, on a combination of the following variables. First, did the private actor in question have to violate the law in order to perform a given search (or searches)?<sup>32</sup> Second, did the search (or searches) have the sort of suspicion-less, “dagnet” quality that, we know from the history of the Fourth Amendment’s adoption, go directly to the core of constitutional privacy?<sup>33</sup> Third, how frequent and longstanding is the private actor’s relationship with law enforcement—is the

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<sup>31</sup> This conclusion follows from the so-called “special needs doctrine,” which holds **MORE**. What is true for law enforcement officials is also true, *a fortiori*, of private actors.

<sup>32</sup> **Scholars suggesting that this line matters**

<sup>33</sup> *See, e.g.,* Messerschmidt v. Millender, 132 S.Ct. 1235, 1252-53 (2012) (J. Sotomayor, dissenting) (“The Fourth Amendment was adopted specifically in response to the Crown’s practice of using general warrants and writs of assistance to search ‘suspected places’ for evidence of smuggling, libel, or other crimes. Early patriots railed against these practices as ‘the worst instrument of arbitrary power’ and John Adams later claimed that ‘the child Independence was born’ from colonists’ opposition to their use.”) (citing *Boyd v. United States*, 116 U.S. 616, 625-26 (1886)).

private actor a “repeat vigilante,” or was the actor inspired to assist the authorities in a specific and isolated instance?

These elements are listed in descending order of salience. It is possible, for example, to come up with cases that involve “repeated searching” but nevertheless seem not to qualify as outsourced policing—say, a variation on the fearful spouse case, where Thelma does not just help the police incriminate her spouse once, but continually helps the police incriminate her spouse every time Thelma is threatened. In this example, Thelma has an ongoing relationship with the authorities, but that hardly means that her private decisions have effectively outsourced the law enforcement function (and it hardly means that, in an everyday sense, we would call Thelma a “vigilante”).

By contrast, I find it difficult to imagine *any* private search that violates the law (at least the criminal law) but does not qualify as outsourced policing. After all, one of things that make the police distinctive in our legal and political culture is that they are empowered to flout legal rules—and norms of civilized behavior—without normal reprisal. But along with such power, of course, come certain responsibilities: police are immune from the legal consequences of their actions only if they comply with established constitutional rules. The same should be true for private actors that outsource the policing function.

#### A. *On its Face*

Before considering, in more granular terms, how these elements apply to the six cases described above, it will be useful to pause and head off a point of natural skepticism. Reconstructing *Coolidge*, *Jacobsen*, and *Skinner*, it certainly appears that—in the Court’s eyes, at least—the state instrumentality test flows directly from the private search rule, which itself seems to flow directly from the Fourth Amendment’s state action requirement. In other words, the state instrumentality test in effect codifies the proposition that only the actions of law enforcement officials or their agents trigger constitutional scrutiny—why doesn’t this proposition follow, by necessity, from the bedrock principle that only state actors are bound by the Constitution? If it does, then it hardly seems to matter how well or poorly the state instrumentality test tracks normative intuition in edge cases; the test must be affirmed on its face, for its conceptual structure is, quite simply, the conceptual structure of constitutional law writ large.

In fact, the private search rule—and the Fourth Amendment’s state action requirement more broadly—is ambiguous between two ways of thinking about private investigative activity. The first is a *status-based* test (like the state instrumentality test) that asks whether the party who performed the search was, actually or constructively, a state official. The second is a *conduct-based* test that asks whether the party who performed the search was playing a role in the investigative process that has traditionally been delegated to state officials—and traditionally been regulated, therefore, by the Constitution.

To shore up the point, recall the *Coolidge* Court’s claim that

it is no part of the policy underlying the Fourth [Amendment] to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals. If, then, the exclusionary rule is properly

applicable to the evidence taken from the Coolidge house . . . it must be upon the basis that some type of unconstitutional *police conduct* occurred.<sup>34</sup>

The premise of the Court’s reasoning is that when “citizens [] aid[] . . . in the apprehension of criminals,” they necessarily *are not* engaged in “police conduct.” That is precisely the dichotomy the Court aims to draw. And the premise is obviously correct—indeed, it becomes tautological—if “police conduct” simply means “conduct by a police officer.” But the issue becomes more complicated if “police conduct” instead is defined, more subtly and more realistically, to mean “conduct that is traditionally associated with law enforcement investigation and has the capacity to erode privacy.” Under that definition, it does not follow that only law enforcement can engage in “police conduct.” Rather, the presence of a law enforcement officer is a sufficient but unnecessary condition of “police conduct.” Private actors, too, can engage in police conduct—to the extent they effectively step into the shoes of law enforcement. I refer to this standard as the “outsourced policing” test—as in, has a private actor effectively taken up the mantle of policing, arrogating to himself, herself, or itself a function traditionally entrusted to law enforcement?

Three things bear noting, up front, about the outsourced policing test. The first is that the expansive definition of “police conduct” on which it rests—focusing on the nature of the search, rather than the identity of the searcher—cannot truly be avoided. Even the state instrumentality test, as adopted in *Coolidge*, relies on the expansive definition of “police conduct.” After all, the idea behind the state instrumentality test—notwithstanding the contrary rhetoric from *Coolidge* cited a moment ago—is that, in certain contexts, it *is* part of Fourth Amendment policy to discourage citizens from aiding the apprehension of criminals: namely, when citizens act as instruments or agents of the state. In other words, to rationalize the state instrumentality test, “police conduct” must sweep more broadly than “conduct by a police officer.” The whole point of the test is that Fourth Amendment protection should *not* be limited to conduct by police officers.

The second thing to note about the outsourced policing test is that it harmonizes with—that is, it simultaneously predicts and is bolstered by—the Court’s jurisprudence on private searches. *Coolidge* and *Jacobsen* would both have come out the same way under the outsourced policing test,<sup>35</sup> because in neither case was a private actor stepping into the shoes of law enforcement. Rather, both Mrs. Coolidge and the FedEx worker were assisting the police on a one-off, spontaneous basis. To be sure, one or both of them may have been motivated by a *desire* to further law enforcement ends. In *Jacobsen*, for example, facts on the record suggested that the FedEx worker had dismantled the offending package deliberately (though that question was ultimately left unresolved by the Court). And Mrs. Coolidge was almost certainly inspired by a “law enforcement purpose” when she handed evidence to the police, even if she—mistakenly—thought her assistance would exculpate her husband, not incriminate him. That these private actors had law enforcement in mind when searching, however, does not mean that they were outsourcing the law enforcement function. Their efforts did not supplant the need for policing. They facilitated the enterprise.

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<sup>34</sup> *Coolidge*, 403 U.S. at 488 (emphasis added).

<sup>35</sup> And so would *Walter* and *Skinner*—but that is not a terribly momentous, given that both of those cases involved the Court finding Fourth Amendment *violations*. So it comes as little surprise that a more protective standard would reach the same result.

The third thing to note is that the outsourced policing test does not repudiate the state instrumentality test; it extends it. Put simply, every case that the latter reaches, the outsourced policing test *also* reaches, because whenever private actors operate as instruments of the state, they are—by necessity—outsourcing the police function. There is no risk, in other words, that an outsourced policing test would somehow end up being less protective than the state instrumentality test; in terms of the fact patterns they both reach, the latter is effectively a subset of the former (though they rest on different justifications).

In sum, both the state instrumentality test *and* the outsourced policing test require a broader definition of “police conduct” than simply “conduct by police officers.” Likewise, both tests vindicate the results of *Coolidge* and *Jacobsen*. Finally, both tests capture the baseline of protection set forth—wisely—by the state instrumentality test: that private actors become like law enforcement (subject to the Fourth Amendment) when conscripted by the state into a law enforcement role. Given these significant points of overlap, the question therefore becomes overtly normative. Which test is preferable? Which better captures the cases we think the private search doctrine should apply to?

### B. *As Applied*

Once again, then, we return to the six cases outlined above: the fearful spouse; the nosy roommate; the suspicious courier; the neighborhood watchman; the conscientious corporation; the vigilante hacker. The first two cases—the fearful spouse and the nosy roommate—almost certainly do not qualify as outsourced policing. In both cases, a private actor opted to investigate another person’s behavior for purely personal reasons, and once the incriminating evidence surfaced, the reigns were turned back over to the police. Furthermore, in neither case did obtaining the incriminating evidence require violating the law. Nor, finally, did either private actor have an ongoing relationship with law enforcement; the decision to search seemed entirely isolated the particular event. In light of these variables, one would be hard-pressed, I think, to argue that the first two private searches in any way “outsourced” the law enforcement function.

By the same token, the last two cases—the conscientious corporation and the vigilante hacker—plainly seem like examples of outsourced law enforcement. In both, a private actor (a corporation in one case, an individual in the other) decided to step into the law enforcement role, substituting its own labor for that of the police. Furthermore, in both cases, the private actor had to flout expectations of normal, civilized conduct in order to secure the evidence they did. One literally broke the law, while the other simply breached its users’ trust. But in the both settings, the same point holds. By engaging in activity so far outside the norm, both private actors *behaved like law enforcement*—like guardians of the public peace who, because of their official role, are not bound by normal parameters. Finally, both private actors had ongoing relationships with the police. They were not one-time vigilantes; rather, they made clear their intent to continue performing searches—and law enforcement presumably began to rely on those searches—over time.

Of course, to conclude that the conscientious corporation and vigilante hacker are both examples of outsourced policing is *not* to say that the searches in these cases are

necessarily unlawful. It is simply to say that Fourth Amendment scrutiny applies, and that the searches must be evaluated for their “reasonableness.” I have trouble imagining that the vigilante hacker would clear this bar. But it is not inconceivable that the conscientious corporation would. For example, suppose that AOL’s algorithm exclusively targets child pornography (or another type of indisputable contraband without any recognized expressive component), and that its hashing protocol is designed in such way that no human observer ever reads the contents of user email. Under those circumstances, it seems plausible that AOL would be performing reasonable searches. But the important point, still, is that AOL is performing searches *at all*—that the reason its hashing program is permissible is *not* that AOL is a private actor, but that its conduct does not unreasonably imperil constitutional privacy. (Naturally, reasonable minds might disagree on the latter front; but if so, the disagreement will be about what it means for private email hashing to violate the Fourth Amendment, not about whether, in principle, it *can* do so.)

The middle two cases are more difficult. In some sense, the suspicious courier is simply a hyperbolic version of the private actor in *Jacobsen*.<sup>36</sup> But in another sense, the suspicious courier has clearly ventured further in the law enforcement direction than the FedEx worker in *Jacobsen*—Maureen’s searches are infused, at every moment, with the effort to catch criminals, and her relationship with the police is ongoing rather than spontaneous. All told, I would be inclined to see Maureen’s activity as outsourced policing, for essentially the same reasons as the conscientious corporation example.

Likewise with respect to the neighborhood watchman. In some respect, this figure is no different from the nosy roommate who decides to breach clear expectations of privacy (and civilized conduct) by performing a private search. But there is another sense in which the neighborhood watchman has taken on a more thoroughgoing—and constitutionally significant—role in criminal investigation than the nosy roommate. The watchman appoints himself community protector. His surveillance stretches well beyond counterparties with whom he has a preexisting relationship. Rather, like the police, his concern is with wrongdoing more broadly—and with punishing it. To my ear, this sounds like the bread and butter of police work. Even if it is not necessarily *illegal* for a private actor to shoulder the burden of law enforcement this way,<sup>37</sup> his decision to do so effectively relieves law enforcement from doing the same. And it effectively circumvents one of the greatest stumbling blocks to the investigative process—Fourth Amendment protection.

#### IV. Conclusion

What will law enforcement—and the rules governing law enforcement—look like in a world where substantial aspects of criminal investigation unfold in what has traditionally been understood as the private realm? This Essay has proposed the early rudiments of an

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<sup>36</sup> For its part, the Seventh Circuit was undaunted—in *United States v. Koenig*, the case from which the hypothetical is derived— by the fact that the FedEx worker clearly had a propensity for assisting law enforcement. *See Koenig*, 856 F.2d at 848.

<sup>37</sup> Though it may well incur civil liability; Margot’s stuff.

answer, by showing that the “state instrumentality” test cannot hope to sustain the conceptual or normative burdens required of it in the digital age.

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