

## OUTSOURCED LAW ENFORCEMENT

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### INTRODUCTION

How should the Constitution think about “outsourced law enforcement”—that is, investigative activity carried out by private actors that substitutes, in practice, for the labor of law enforcement officials? Existing doctrine offers a simple answer to this question, centered on chronology. If the government was responsible for outsourcing law enforcement—if a private actor was operating as an “agent or instrument” of the state—Fourth Amendment scrutiny applies, just as it would apply to the conduct of state officials.<sup>1</sup> If, on the other hand,

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<sup>1</sup> See *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971) (“The test . . . is whether [the private actor], in light of all the circumstances of the case, must be regarded as having acted as an ‘instrument’ or agent of the state . . .”); see also *Skinner v. Ry. Labor Excs. Ass’n*, 489 U.S. 602, 615 (1989) (noting that, 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); *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (discussing the “agent of the Government” exception to the private search rule).

the outsourcing transpired voluntarily—if a private actor decided, without prodding, to assist the authorities—no Fourth Amendment scrutiny applies.<sup>2</sup> This rule is often called the “private search” rule. I adopt that label here.

My goal is to suggest that the private search rule suffers a crucial blind spot, one that goes to the heart of Fourth Amendment privacy. When it comes to private searches, what we should care about is not which party—private actor or state official—initiated the relationship. What we should care about is whether the private actor, in monitoring other private actors, effectively stepped into the shoes of law enforcement. The doctrine should ask whether the privacy-eroding conduct underpinning the search was functionally similar to—and should be subject to the same regulation as—the privacy-eroding conduct of law enforcement officials.<sup>3</sup>

Against this backdrop, the private search rule is not so much ill-formed as it is under-inclusive.<sup>4</sup> In fact, it makes sense that if private actors operate as agents or instruments of the state, the Fourth Amendment comes into play—because when that happens, law en-

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<sup>2</sup> See *Jacobsen*, 466 U.S. 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.” (footnote omitted)); see also *United States v. Jarrett*, 338 F.3d 339, 341 (4th Cir. 2003) (holding that a hacker’s search of defendant’s computer, despite breaking the law, did not violate the Fourth Amendment because the hacker was not acting as a “Government agent”); *United States v. Runyan*, 275 F.3d 449 (5th Cir. 2001) (holding that one spouse’s entry onto the other spouse’s property was not a Fourth Amendment search, but rather was a private search, despite the fact that she did not have permission to enter).

<sup>3</sup> This “blind spot” has not gone unnoticed by existing scholarship, but interventions have historically focused on settings where private actors look and feel like law enforcement officials—such as private security guards. See, e.g., Elizabeth E. Joh, *The Paradox of Private Policing*, 95 J. CRIM. L. & CRIMINOLOGY 49 (2004); *id.* at 50 n.6 (compiling other sources); David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165 (1999). In other words, the full scope of the problem in the age of big data—that private actors with no aesthetic similarity to police officers now have the capacity to assist in data-driven law enforcement investigation—has not been fully examined to date. Nevertheless, two recent articles have begun to fill the scholarly gap. See generally Kimberly Brown, *Outsourcing, Data Insourcing, and the Irrelevant Constitution*, 49 GA. L. REV. 607 (2015) (exploring the ways in which outsourcing of government functions, paired with data “insourcing” by state agencies, permits the circumvention of various regulatory mechanisms, including constitutional rules); Kiel Brennan-Marquez, *Private Dragnets* (2016) (unpublished manuscript) (on file with author) (arguing that Fourth Amendment scrutiny should generally extend to dragnet surveillance in the private realm, and in particular to information companies that perform dragnet data surveillance).

<sup>4</sup> Cf. John M. Junker, *The Structure of the Fourth Amendment: The Scope of The Protection*, 79 J. CRIM. L. & CRIMINOLOGY 1105, 1139 (1989) (describing the private search doctrine as “disturbingly broad” in its implications).

forcement clearly is outsourced. But this is not the *only* time law enforcement gets outsourced. It can also be outsourced when private actors take up the mantle of policing voluntarily. In other words, the difficulty with the private search rule is that it turns agency law principles into the linchpin of doctrine, instead of recognizing that agency principles reflect—but are not exhaustive of—the variable we really care about, which is this: did private action effectively supplant the need for law enforcement involvement at a particular stage of the investigative process? By performing the search in question, was the private actor *assisting* the investigative labor of law enforcement; or was the private actor fully *displacing* the investigative labor of law enforcement? In the latter case, Fourth Amendment scrutiny—at least in some measure—is warranted.<sup>5</sup>

This reframing is especially pressing in the age of big data, when private actors increasingly have access—or have the means to *get* access—to large volumes of sensitive information about other people.<sup>6</sup> Against this backdrop, it makes little sense for the doctrine to treat all private searches alike. In a way that has never previously been true, investigative work that has traditionally been the exclusive province of the police (and been subject to Fourth Amendment protection) is increasingly falling to private actors and triggering no constitutional scrutiny of any kind.<sup>7</sup>

This status quo is intolerable. In what follows, I trace the origin of the private search rule in three key Supreme Court cases: *Coolidge v. New Hampshire*,<sup>8</sup> *United States v. Jacobsen*,<sup>9</sup> and *Skinner v. Railway Labor*

<sup>5</sup> In practice, this often means that probable cause is required. But it does not always mean that. See, e.g., *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2451–54 (2015) (striking down an ordinance allowing totally suspicion-less searches of hotel registries, but holding that only an administrative subpoena—i.e., suspicion far short of probable cause—renders the searches constitutionally reasonable).

<sup>6</sup> See Elizabeth E. Joh, *Policing by Numbers: Big Data and the Fourth Amendment*, 89 WASH. L. REV. 35, 38–42 (2014) (offering examples of how private companies have begun collecting and harnessing consumer data); see generally; Brown, *supra* note 3, at 621–34 (exploring how the rise of digital communication—and surveillance—has changed law enforcement practices); Joh, *supra*, at 38–42 (discussing how the availability of big data stands to impact law enforcement practices).  
<sup>7</sup> See, e.g., Chris Jay Hoofnagle, *Big Brother's Little Helpers: How ChoicePoint and Other Commercial Data Brokers Collect and Package Your Data for Law Enforcement*, 29 N.C. J. INT'L L. & COM. REG. 595 (2003); Brennan-Marquez, *supra* note 3, at 6–10.

<sup>7</sup> See, e.g., Chris Jay Hoofnagle, *Big Brother's Little Helpers: How ChoicePoint and Other Commercial Data Brokers Collect and Package Your Data for Law Enforcement*, 29 N.C. J. INT'L L. & COM. REG. 595 (2003); Brennan-Marquez, *supra* note 3, at 6–10.

<sup>8</sup> 403 U.S. 443 (1971).

<sup>9</sup> 466 U.S. 109 (1984).

*Executives' Ass'n.*<sup>10</sup> Having done so, I argue (1) that all three holdings are correct, but (2) that the private search rule is not necessary to ground any of them, because all three are equally—if not more easily—justified by an outsourced law enforcement principle. Finally, I show that the private search rule has, not surprisingly, led to uncomfortable results in practice—and that the discomfort can be remedied by focusing on outsourced law enforcement.

But first, we begin with an outlandish hypothetical, designed to highlight the doctrinal quandary that would result from private conduct becoming a practical substitute for the labor of state officials. One could be forgiven for having thought our constitutional law sturdy enough to contend with such obvious substitution effects. Fortunately, there is room yet to grow.

### I. AN OUTLANDISH HYPOTHETICAL

Imagine a world in which the everyday investigative activity of rank-and-file police officers—patrolling the streets, responding to calls of distress, and so on—has disappeared. Instead, this role is played exclusively by private companies. Security firms, collectively employed by local merchants and homeowners, roam around public streets and sidewalks, scouting out criminal behavior. Detective agencies, hired by victims, locate perpetrators and build cases against them. Communications firms—phone companies, internet service providers, and the like—monitor all user correspondence. Financial institutions employ sophisticated algorithms to track illicit activity. Furthermore, these private companies are not merely engaged in constant surveillance; they also turn over the fruits of their surveillance to law enforcement agencies, who then parley the resulting evidence into (1) search warrants and (2) convictions. In short, imagine a world in which law enforcement has not disappeared, but the initial stages of investigation occur entirely in the private realm.

Naturally, I am not trying to suggest that this state of affairs reflects social reality today—or even that it is likely to reflect social reality in the future.<sup>11</sup> The point is that, in a world like the one just described, Fourth Amendment protection—if understood as existing

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<sup>10</sup> 489 U.S. 602 (1989).

<sup>11</sup> That being said, some of these imagined developments are certainly more plausible than others. Constant, indiscriminate data surveillance by private corporations is increasingly becoming the norm. And private security has, of course, long been a lucrative industry with clear, if complicated, ties to law enforcement. *See, e.g.*, Sklansky, *supra* note 3, at 1117–93 (exploring the role that private security forces play in the contemporary world alongside law enforcement).

doctrine would have it—would fall by the wayside. There would, in effect, be *no* Fourth Amendment. All searches would be private searches, and the private actors carrying out those searches would not be agents or instruments of the government. Thus, when law enforcement used of the fruits of those searches (for example, to authorize subsequent searches), it simply would not qualify as a constitutional event.

But this result seems wrong—indeed, deeply wrong. If the enterprise of criminal investigation were fully privatized, but still formed the basis of public law enforcement, it cannot be that Fourth Amendment protection would simply evaporate. The question, in what follows, is why the private search rule seems to yield this result; and how it might be retooled so as to avoid it.

## II. THE “AGENT OR INSTRUMENT” TEST

To begin, it is worth considering the genesis of the private search rule. What inspired the Court to devise a rule focused on the temporal ordering of collaboration between law enforcement and private actors? And more importantly: do the cases that gave rise to this inspiration genuinely depend on the principle for which they apparently stand?

After the Court’s watershed opinion in *Katz v. United States*,<sup>12</sup> which ushered in the modern era of Fourth Amendment law, its first enunciation of the private search rule came in *Coolidge v. New Hampshire*.<sup>13</sup> The police suspected Edward Coolidge of kidnapping and murdering a fourteen-year-old girl.<sup>14</sup> In the course of building their case, the police visited Coolidge’s home, which resulted in, among other things, their speaking with Coolidge’s wife.<sup>15</sup> At the end of the visit, Mrs. Coolidge voluntarily handed over various items—numerous guns, as well the clothes that Coolidge had been wearing the day the girl disappeared—which ended up incriminating him.<sup>16</sup>

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 offi-

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<sup>12</sup> 389 U.S. 347, 351 (1967) (rejecting the trespass doctrine of Fourth Amendment jurisprudence and, instead, describing the Fourth Amendment as a law that “protects people, not places”).

<sup>13</sup> *Coolidge*, 403 U.S. at 487.

<sup>14</sup> *Id.* at 445–46.

<sup>15</sup> *Id.* at 446.

<sup>16</sup> *Id.*

cials.”<sup>17</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>18</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 . . . 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>19</sup>

Since *Coolidge*, the doctrinal elaboration has been sparse. In fact, only two cases are squarely on point.<sup>20</sup> The first case is *United States v. Jacobsen*, in which the Court held that no search occurred—and therefore, no Fourth Amendment scrutiny applied—when a FedEx handler examined the contents of a broken package and, suspicious that it contained drugs, called the Drug Enforcement Administration (“DEA”).<sup>21</sup> The Court was not impressed by Jacobsen’s argument that the handler’s decision to examine the package and alert the relevant authorities rendered him an agent or instrument of the state.<sup>22</sup> Nor did the Court think it relevant that the handler might have in-

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<sup>17</sup> *Id.* at 487.

<sup>18</sup> *Id.* at 489.

<sup>19</sup> *Id.* at 488.

<sup>20</sup> A third, and related, case is *Walter v. United States*, in which the Court determined—essentially *sub silentio*—that it was not a Fourth Amendment violation for an employee of a (private) company to open a package of video tapes that had mistakenly been delivered to the premises. 447 U.S. 649–51 (1980). The large bulk of the Court’s analysis in *Walter* focused on whether law enforcement could perform a search *beyond* the initial (private) search—if it constituted a Fourth Amendment violation for law enforcement to watch the tapes, when the private actor had not. *See id.* at 651–52. 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. *See id.* at 659. Nevertheless, the premise underlying the *Walter* Court’s analysis was that the initial private search—when the employees opened the package—did not even come under Fourth Amendment scrutiny, much less make out a Fourth Amendment violation. *See id.* For a helpful discussion of the “expanded search” rule, see Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 HARV. L. REV. 531, 554–56 (2005).

<sup>21</sup> *See United States v. Jacobsen*, 466 U.S. 109, 114–15 (1984).

<sup>22</sup> *See id.* (“[T]he fact that agents of the private carrier independently opened the package and made an examination that might have been impermissible for a government agent cannot render otherwise reasonable official conduct unreasonable. . . . [Here] [t]he initial invasions of respondents’ package were occasioned by private action.”).

tentionally—or even *maliciously*—dismantled the package.<sup>23</sup> For the Court, the important point was that the “initial invasion[] of respondents’ package [was] occasioned by private action.”<sup>24</sup> That fact alone ended the analysis.

The second case, *Skinner v. Railway Executives’ Labor Ass’n*, came down a few years after *Jacobsen*.<sup>25</sup> In *Skinner*, the Court confronted a question whose answer was logically implied by the reasoning of *Coolidge* and *Jacobsen*, but was nevertheless an open issue of law: do private actors become agents or instruments of the state if they are legally required to perform searches? The answer, naturally, was yes.<sup>26</sup> 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. In fact, the *Skinner* Court went slightly further, holding that private searches *facilitated* by a regulatory scheme—but not compelled—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>27</sup> In short, it is possible for a statutory scheme to deputize private actors as state agents without explicitly requiring that they perform searches.

So stands the Court’s private search jurisprudence. There are a number of things to notice about *Coolidge*, *Jacobsen*, and *Skinner*. The first is that all three cases are sensible—in fact, I would call them undeniably right—on both normative and pragmatic grounds. We *want* spouses (and roommates, and similarly situated private actors) to be free to cooperate with law enforcement. After all, their safety—or the safety of others in the home, such as children—may depend on it.<sup>28</sup> Similarly, it is hard to find fault with an employee of FedEx determin-

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23 *Id.* at 115 (indicating that it is irrelevant whether the intrusion was “accidental or deliberate”); *see also id.* at 115 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].”).

24 *Id.* at 115.

25 *Skinner v. Ry. Execs.’ Labor Ass’n*, 489 U.S. 602 (1989).

26 *Id.* at 614–16.

27 *Id.* at 615.

28 *See, e.g.*, Transcript of Oral Argument at 7, *Fernandez v. California*, 134 S. Ct. 1126 (2014) (No. 12-7822) (illustrating how counsel for petitioner—in the course of arguing that a Fourth Amendment violation occurred—conceded the importance of letting co-tenants search the private effects of other co-tenants); *Georgia v. Randolph*, 547 U.S. 103, 145–49 (2006) (Thomas, J., dissenting) (explaining the normative rationale behind the *Coolidge* rule).

ing it appropriate, on a one-off basis, to alert the authorities about a suspicious package. Suppose the package is dangerous or suppose that a package's illicit contents are inadvertently revealed—as in *Jacobsen*<sup>29</sup>—and the employee is worried that he, his colleagues, or the company will get into trouble unless he reports the package. In cases like these, it seems plain that the Fourth Amendment should not constrain one-off cooperation with law enforcement. And *Skinner*, finally, may be the easiest case of all.<sup>30</sup> *Of course* a private actor becomes an extension of the government when the law requires, or actively encourages, the actor to perform searches with law enforcement ramifications.

The second thing to notice about *Coolidge*, *Jacobsen*, and *Skinner* is that all three holdings, though forged in the agent or instrument mold, are equally compatible with an outsourced law enforcement test. In cases like *Skinner*, where the law imposes an *obligation* to search, outsourcing is explicit.<sup>31</sup> But more importantly, in neither *Coolidge* nor *Jacobsen* did the private actor—Mrs. Coolidge, or the FedEx handler—step into the shoes of law enforcement. Rather, both actors assisted the police spontaneously. It is possible, of course, that one or both of them was motivated by a desire to further law enforcement ends.<sup>32</sup> But this, by itself, does not mean that their efforts supplanted the need for policing. Rather, they facilitated the enterprise.

The third thing to notice is that *Skinner*, by characterizing a private company's decision to perform urine and breathalyzer tests as state action, already puts strain on the agent or instrument test. According to the Court, when the government *enables* a private search—by, for example, removing a set of regulatory obstacles—the govern-

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<sup>29</sup> See *Jacobsen*, 466 U.S. at 111.

<sup>30</sup> See *Skinner*, 489 U.S. at 613–14.

<sup>31</sup> This points to a broader conceptual relationship between “agent or instrument” test and the “outsourced law enforcement” test. The latter does not repudiate the former; instead, it extends it. Every case that the agent or instrument test 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 law enforcement test would somehow end up being *less protective* than the agent or instrument test. Rather, the outsourced law enforcement test encapsulates all fact patterns that come under the agent or instrument umbrella—and more.

<sup>32</sup> *Jacobsen* is more ambiguous, but in *Coolidge*, this is almost certainly the case. When she handed evidence over to the police, Mrs. Coolidge almost certainly intended to aid law enforcement—though she probably thought her assistance would help *exculpate* her husband, not further incriminate him. See *Coolidge*, 403 U.S. at 486 (indicating that Mrs. Coolidge declared that she and her husband “had [nothing] to hide” when she furnished the incriminating evidence to the police).

ment can be understood, on that basis alone, as “encourag[ing], endor[s]ing, and participat[ing] [in]” the search.<sup>33</sup> Although this result certainly has normative appeal, it represents a departure from the agent or instrument test. Under normal principles of agency law, that *A* enables *B* to do something does not render *B* an agent of *A*; it is possible for the “enabling” condition to be satisfied without any formal agency relationship taking hold.<sup>34</sup> Indeed, *Skinner* itself is an example. There, the private company saw no benefit in exchange for performing searches, nor did it face any penalty for declining to perform searches. Rather, the decision to perform searches was voluntary.<sup>35</sup> By subjecting that decision to constitutional scrutiny, the Court implicitly acknowledged that agency relationships—at least in the sense familiar to agency law—are not the thing (or not the *only* thing) we find troubling about cooperation between law enforcement officials and the private sector.<sup>36</sup>

### III. OUTSOURCED LAW ENFORCEMENT

So, in sum: the agent or instrument test rests on, if not precarious ground, certainly ground less firm than one might glean from a casebook. If—as I tried to show in the last Part—the test is unnecessary, logically or doctrinally, to explain the (sound) holdings of *Coolidge*, *Jacobsen*, and *Skinner*, the question becomes more overtly normative.

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<sup>33</sup> *Skinner*, 489 U.S. at 615–16.

<sup>34</sup> See, e.g., *Redco Constr. v. Profile Props.*, 271 P.3d 408, 421 (Wyo. 2012) (holding that no agency relationship was formed when a landlord approved a tenant to make repairs on the latter’s apartment—notwithstanding the fact that such approval was an enabling condition of the repairs); *Intercity Maint. Co. v. Local 254 Serv. Emps. Int’l Union*, 62 F. Supp. 2d 483 (D.R.I. 1999), *aff’d in part, vacated in part*, 241 F.3d 82 (1st Cir. 2001), *cert. denied*, 534 U.S. 818 (2001) (explaining that agency relationship is created by a manifestation of the principal, not the alleged agent, that the principal consents to have the acts done on his behalf); 19 WILLISTON ON CONTRACTS § 54:14 (4th ed. 2015) (explaining that “[t]he relationship of principal and agent . . . requires mutual consent,” and in particular that it “turns on the intentions and actions of the putative principal, not the agent” (emphasis added)); Brennan-Marquez, *supra* note 3, at 33–34.

<sup>35</sup> Brennan-Marquez, *supra* note 3, at 32; see also *Hollingsworth v. Perry*, 132 S. Ct. 2652, 2666 (2013) (“[A]gency requires more than mere authorization to assert a particular interest. ‘An essential element of agency is the principal’s right to control the agent’s actions.’” (citing Restatement (Third) of Agency § 1.01, Comment f (2005))).

<sup>36</sup> Of course, one variable present in *Skinner*, but not present in the lion’s share of Fourth Amendment cases, is a “special need,” apart from law enforcement, justifying the searches in question. See *Skinner*, 489 U.S. at 619–20 (recognizing the “Government’s interest in regulating the conduct of railroad employees to ensure safety”). So, in a sense, it was very “safe” for the Court to see the private conduct as state action. Even supposing this is true, however, it is still remarkable that the Court was inclined—even under “safe” conditions—to view the conduct as state action despite the clear absence of an agency relationship.

Namely, is the agent or instrument test *desirable*? Does it convincingly resolve the great run of cases that fall into the umbrella category of private searches?

To see why the answer is no, one need look no further than appellate jurisprudence. Charged with filling the considerable gaps left by *Coolidge*, *Jacobsen*, and *Skinner*, lower courts have settled on two criteria of state agency.<sup>37</sup> 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>38</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>39</sup>

As it turns out, however, the second criterion is largely a mirage—as it must be, if “common law agency principles,”<sup>40</sup> from which the agent or instrument test is derived, truly reign supreme. 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*.

37 See, e.g., *id.* at 614–15 (pointing out, not all that helpfully, that the state agency analysis should turn on: (1) the “circumstances” of a search; and (2) “the degree of the Government’s participation in the private party’s activities”).

38 See, e.g., *United States v. Jarrett*, 338 F.3d 339, 345 (2003).

39 *United States v. Ellyson*, 326 F.3d 522, 527 (4th Cir. 2003) (internal quotation marks omitted); see also *United States v. D’Andrea*, 648 F.3d 1, 10 (1st Cir. 2011) (explaining that the agent or instrument 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” (internal quotation marks omitted)); *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.” (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” (internal quotation marks omitted)).

40 See, e.g., *Ellyson*, 326 F.3d at 527; see also *United States v. Koenig*, 856 F.2d 843, 847 n.1 (7th Cir. 1988) (looking to the “common law of agency” to determine whether a private actor was operating as a state agent).

Rather, some action on *B*'s part is necessary.<sup>41</sup> It hardly comes as a surprise, then, a Fourth Amendment test *patterned on* agency principles would inspire courts to treat prodding by law enforcement (of some kind) as a necessary, if not always sufficient, condition of state action.

Consider the following five cases, all of which have come out the same way—no Fourth Amendment violation. What is more remarkable, however, is that all five have come out the same way *for the same reason*—they all involve purely private searches—and this, in spite of the fact that in every case, an intention to assist law enforcement is part of (if not entirely) what brought about the search.<sup>42</sup>

1. *The fearful spouse*: concerned for her safety, Thelma decides to rifle through her husband's things, searching for contraband; when she finds it, she turns the contraband over to law enforcement.<sup>43</sup>
2. *The nosy roommate*: concerned that his roommate may be dealing drugs, Joe decides to look through their apartment for evidence while his roommate is out; when he finds a bag of illicit pills, Joe calls the police.<sup>44</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 appears, on the surface, to contain drugs. When Maureen locates drugs (or something that appears to be drugs), she alerts law enforcement.<sup>45</sup>

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<sup>41</sup> See *supra* note 34 and accompanying text.

<sup>42</sup> Doctrinally, it is not surprising that courts have shied away from making “law enforcement motives” the relevant variable. To do so—that is, to embrace the proposition that a desire to assist law enforcement can, standing alone, transform private conduct into state action—runs headlong into the notion that private actors should be free, as a general matter, to assist law enforcement. See, e.g., *Georgia v. Randolph*, 547 U.S. 103, 116–17 (2005) (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 generally Kiel Brennan-Marquez, *Fourth Amendment Fiduciaries*, 84 FORDHAM L. REV. 101 (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>43</sup> See *United States v. Runyan*, 275 F.3d 449, 458–59 (5th Cir. 2001) (holding that it was purely private conduct when a wife entered her 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 *Randolph*, 547 U.S. at 145 (Thomas, J., dissenting) (“[T]he Court held in [*Coolidge*] that no Fourth Amendment search occurs where, as here, the spouse of an accused voluntarily leads the police to potential evidence of wrongdoing by the accused.”).

<sup>44</sup> See *Bowers*, 594 F.3d at 525–27 (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>45</sup> See *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 particu-

4. *The conscientious corporation*: AOL, deciding 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>46</sup>

5. *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>47</sup>

This is where I suggest that it is astonishing—a sorry example of legal formalism—that existing Fourth Amendment law cannot tell these cases apart. The problem, to be clear, is *not* that all five cases necessarily came out incorrectly (though for some of them, that may be true, too). The problem is that beyond transpiring in the private realm, with no law enforcement involvement, the searches in these cases are not remotely similar.

In the first two cases, the private action looks nothing like law enforcement, and therefore (just as the relevant courts held), it should not implicate, much less *violate*, the privacy interests codified in Fourth Amendment law. Both the fearful spouse and the nosy roommate: (1) opt to investigate another person's activity for personal reasons (because they share living space); (2) have very limited interaction with law enforcement; and (3) cease to engage in any kind of surveillance activity once incriminating evidence is located. One can imagine versions of each case, of course, where some or all of these variables change, and the analysis might change accordingly. For example, suppose Thelma is married to a mob boss and—having experienced a change of heart—begins performing surreptitious surveillance of her husband's activity, including searches of his personal effects, and continually relaying the fruits to law enforcement. In that case, the husband's Fourth Amendment interests may well be

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lar enthusiasm for law enforcement, having “contacted 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.” *United States v. Jacobsen*, 466 U.S. 109, 115 n.3 (1984).

<sup>46</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).

<sup>47</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 “participat[e],” but rather “passively accept[ed] . . . a private party's search efforts”).

implicated.<sup>48</sup> And the *reason* the husband's interests would be implicated is that Thelma has effectively substituted her own efforts for the labor of law enforcement; in the absence of her help, state officials would have to build their own case, in compliance with the Fourth Amendment. (Notice, further, that this analysis would hold equally true if the officials had recruited Thelma—as the agent or instrument test would focus on—or if Thelma stepped into the role of her own accord.)

In the last two cases, by contrast, the private action *does* look quite a bit like law enforcement conduct. And Fourth Amendment interests come, accordingly, to the fore. The cleanest example is the vigilante hacker, who not only targets criminals on a specific and ongoing basis—just as law enforcement officials do—but who also breaks the law to perform the searches in question. The latter is, of course, a privilege we extend to law enforcement officials—they may enter private homes without permission, seize property, and so on—but only if they adhere to specific constraints, as codified in the Fourth Amendment.<sup>49</sup> When a private actor flouts the law in order to investigate criminal activity, equivalent constraints should exist.

A similar analysis applies to the conscientious corporation case. To the extent that AOL's email monitoring violates the law (or, likewise, the company's terms of use), there is a direct analogy to the vigilante hacker case—if anything, the conscientious corporation case is that much *more* disturbing, given the asymmetry of power involved. But even if the email monitoring is not formally against the law, the same core problem arises; it still represents an egregious abuse of AOL's position of power, and its outsized surveillance capacity. At some level, this is *exactly* what the Fourth Amendment aims to safeguard us against. Furthermore, regardless of whether users have

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<sup>48</sup> Although it is well-settled that police may rely on information or evidence voluntarily shared with confidential informants, see, e.g., *United States v. White*, 401 U.S. 745, 749 (1971), courts have refrained—not surprisingly—from extending the same logic to information or evidence procured by a confidential informant *surreptitiously*. See, e.g., *Hoffa v. United States*, 385 U.S. 293, 302 (1966) (explaining that the Fourth Amendment provides no bulwark against “a wrongdoer’s misplaced belief that a person *to whom he voluntarily confides his wrongdoing* will not reveal it” (emphasis added)); *United States v. Davis*, 326 F.3d 361, 366 (2d Cir. 2003) (holding that defendant’s Fourth Amendment rights were not violated when an informant recorded a drug deal because the informant “did not seize anything from [defendant] without his knowledge,” but rather used “[a] hidden camera merely [to] memorialize[] what [he] was able to see as an invited guest”).

<sup>49</sup> See Malcolm Thorburn, *Justifications, Powers, and Authority*, 117 *YALE L. J.* 1070, 1103–07 (2008) (describing the warrant requirement as a “justification”—analogous to justification defenses in criminal—that immunize police officers from liability for otherwise-tortious and/or criminal acts).

been put on notice (formally speaking) about the likelihood of data surveillance, the corporation's activity remains an obvious substitution for that of law enforcement officials, who would otherwise need some degree of particularized suspicion to examine the contents of user email.<sup>50</sup> In short, dragnet email surveillance by private actors works a clear end-run around the Fourth Amendment's protections.

The middle case—the suspicious courier—is the hardest. In one sense, the suspicious courier is simply a hyperbolic version of the handler in *Jacobsen*.<sup>51</sup> In another sense, however, she has clearly ventured farther into the territory of law enforcement than the FedEx worker in *Jacobsen*—her searches are imbued, at every moment, with the desire to catch criminals, and her relationship with the police is ongoing rather than spontaneous. Indeed, from a certain perspective, the suspicious courier case is not unlike the conscientious corporation case; the pre-digital form of an email-hashing program would be (something like) a courier service opening every package that passes through its facilities, and reporting the contents to law enforcement. There is, of course, a difference between a firm-wide policy to examine the contents of every package, on the one hand, and an individual employee's decision (perhaps without the firm's blessing) to open specific packages, on the other.<sup>52</sup> And that may well be a reason not to see the suspicious courier case as outsourced law enforcement. Ultimately, however, it is hard to avoid the conclusion that at *some* point, private investigative activity of the kind on display in *Jacobsen*—and equally, in the suspicious courier example—tips over into substitute law enforcement.

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The point of these examples is not to establish precise criteria of outsourced law enforcement, or to draw fine distinctions between sib-

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<sup>50</sup> See, e.g., *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892, 910 (9th Cir. 2008) (holding that users have a reasonable expectation of privacy in text messages, despite advance warning that the messages could be read), *rev'd on other grounds sub nom.* *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010); *Warshak v. United States*, 490 F.3d 455, 482 (6th Cir. 2007) (holding that users have a reasonable expectation of privacy in the content of stored email), *vacated en banc on other grounds*, 532 F.3d 521 (6th Cir. 2008).

<sup>51</sup> For its part, the Seventh Circuit was undaunted in *United States v. Koenig*, the case from which the suspicious courier case is derived, by the observation that the FedEx worker had a propensity for assisting law enforcement. See *United States v. Koenig*, 856 F.2d 843, 848 (7th Cir. 1988).

<sup>52</sup> It should be noted, however, that in *Koenig*, the handler's ongoing investigative activity *did* have the firm's blessing. See *id.* (explaining that a protocol for detecting and intercepting illicit packages had been codified in at least one internal memorandum).

ling cases. That effort awaits a longer meditation.<sup>53</sup> In fact, I have sought here—on purpose—to paint with a broad brush because doing so helps, I think, to underscore how modest the central claim is. In contrast to existing private search jurisprudence, which can discern no distinction whatsoever between a case like the nosy roommate and a case like the vigilante hacker, I want to urge—in a lawyerly spirit—that distinctions *do* exist, and that in practice, more precise lines can and should be drawn.

One last proviso before concluding: to accept that certain forms of private investigative activity rise to the level of substitute law enforcement is *not* to deem such activity unconstitutional. Rather, it is to acknowledge the need for Fourth Amendment scrutiny—reasonableness review—in the first instance. In other words, the posture of my argument is largely defensive. The point is not that, going forward, private searches will often violate the Fourth Amendment in practice; in some settings they might, while in other settings, they likely will not. The point is that private searches have the capacity to violate the Fourth Amendment *in principle*.

Instead of assuming, as current doctrine does, that private investigative activity can never impinge on our constitutional interests, courts should begin to ask, instead, (1) how it might, and when it does, (2) what qualifies as “reasonable.” I have trouble imagining that the vigilante hacker case could, under any facts, clear this bar. But it is not inconceivable that the conscientious corporation could. Suppose, for example, that the email surveillance program is narrowly (and reliably) targeted to contraband at the exclusion of everything else, such that user email is not examined by a human (an employee or a law enforcement official) until it is virtually certain to contain illicit material. Perhaps in this case, we would want to say that the corporation is performing reasonable searches. Still, the im-

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<sup>53</sup> That said, a number of loose criteria have emerged in the analysis so far. First, did the private search involve a violation of existing law? Second, how ongoing was the relationship—even if it was an entirely voluntary relationship—between the private actor and law enforcement? Third, did the search (or searches) have a suspicion-less, “dragnet” quality that reflects the chief concern of the Fourth Amendment’s ratification at the time of the founding? See also *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1252–53 (2012) (Sotomayor, J., 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.” (citations omitted)).

portant point for our immediate purposes is that the corporation is performing searches *at all*.

#### CONCLUSION: PRIVATE SEARCHES IN THE AGE OF BIG DATA

The agent or instrument construction of the private search rule makes effortless sense in a world where government officials perform the vast majority of surveillance, and the key concern is that private actors will become—often against their will—pawns of the state. The agent or instrument construction makes considerably less sense in a world where, in practice, surveillance often takes root in the private realm, and ground-floor investigative work, once the sole province of the state, is effectively farmed out to private actors. What will law enforcement, and the rules governing law enforcement, look like in such world?

This Essay has sought to propose the rudiments of an answer, by arguing that the agent or instrument test—the Fourth Amendment’s traditional response to the problem of private searching—cannot hope to sustain the normative burden required of it in the digital age.<sup>54</sup> Instead of focusing on the status of the actor who performs a given search, the doctrine should focus on whether the conduct involved in a given search effectively outsources the law enforcement function. In many cases, the two approaches overlap. But in a specific subset of cases, they do not—cases in which private actors, corporate or individual, become like vigilantes, taking up the mantle of law enforcement voluntarily. The rules governing such voluntary support for law enforcement were crafted in an era when private actors had little capacity to keep tabs on one another, much less to collect, archive, and mine vast reservoirs of personal information.

But that era is long past. Ours is an era of ever-multiplying data—and ever-increasing data surveillance. Law enforcement officials have taken note of this new reality. And so have the class of private actors—corporations that deal in big data—best poised to assist them. The Constitution should take note, too.

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<sup>54</sup> See Sklansky, *supra* note 3, at 1230 (referring to the distinction between private actors that have been “officially deputized” and those that have not been as “arbitrary” and responsible for “conspicuous incongruities”).