

Michigan Law Review

Volume 83 | Issue 4

1985

ABSCAM and the Constitution

Louis Michael Seidman
Georgetown University Law Center

Follow this and additional works at: <https://repository.law.umich.edu/mlr>

Part of the [Criminal Law Commons](#), and the [Law Enforcement and Corrections Commons](#)

Recommended Citation

Louis M. Seidman, *ABSCAM and the Constitution*, 83 MICH. L. REV. 1199 (1985).
Available at: <https://repository.law.umich.edu/mlr/vol83/iss4/55>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

ABSCAM AND THE CONSTITUTION†

*Louis Michael Seidman**

ABSCAM ETHICS: MORAL ISSUES AND DECEPTION IN LAW ENFORCEMENT. Edited by *Gerald M. Caplan*. Cambridge, Mass.: Ballinger Publishing Co. 1983. Pp. x, 156. \$19.95.

This book, which consists of essays by some very smart people about ABSCAM and police undercover techniques, serves primarily to document our present confusion about criminal justice issues. In this essay, I want to identify two kinds of confusion from which we suffer and to show how each is linked to underlying problems with a separate theory of constitutional interpretation.

I

One sort of confusion, which is associated with a theory I will call “left-wing activism,” emerges on the very first pages of the book. In the course of his spirited and otherwise cogent defense of the ABSCAM operation, Irvin Nathan writes:

Detractors of ABSCAM attempt to portray an image of high-level Justice Department officials engaged in a crusade against selected public officials or seeking to test the honesty or morality of randomly chosen politicians. The truth of the matter, as shown by the evidence developed in eight public trials, is far different. [P. 5.]

Now, it may be, as Nathan asserts, that ABSCAM involved “no targeting” (p. 4), and that there was “[no] government selection process” (p. 4). It is possible as well, as he also asserts, that the government wisely refrained from “offer[ing] a bribe to randomly selected public officials” (p. 9). But surely “the truth of the matter” must be one way or the other. Either targets were selected deliberately, or they were chosen randomly.¹ Nathan’s simultaneous denial of both pro-

† My thanks to Thomas Krattenmaker, Robert Pitofsky, Warren Schwartz, Girardeau Spann, Mark Tushnet, and Silas Wasserstrom, who commented on an earlier draft of this review, and to Mary Morton, who provided valuable research assistance.

* Professor of Law, Georgetown University Law Center. A.B. 1968, University of Chicago; J.D. 1971, Harvard Law School. — Ed.

1. At various places in his essay, Nathan seems to argue that there was no “government selection process” because the choice of targets was left to “corrupt intermediaries.” *See, e.g.*, pp. 4, 9. But, of course, the decision to set traps for those politicians identified by third parties itself constitutes a method of selection. It is unclear why Nathan thinks that this decision to delegate the selection process to private individuals, who were not publicly accountable and who, Nathan concedes, told “outright lies” about a number of politicians, p. 4, is a point in favor of the operation.

Presumably, Nathan’s insistence on the absence of “government selection” is motivated by

positions makes him like one of my former clients who testified at his robbery trial that he had not been at the scene of the crime, but that, in any event, the complainant could not possibly identify him because of the mask he was wearing at the time.

Nathan's desire to have it both ways is interesting because it corresponds to conflicting intuitions that most of us share about appropriate constraints on police activity. On the one hand, we seem to believe that police intrusion is justified if the police know specific facts about the individual target sufficient to make it reasonable to single him out. Thus, Mark Moore quite sensibly argues that

[a] rational enforcement enterprise (mindful of its obligation to solve crimes at low cost) would not willingly spend its resources searching in areas where the likelihood of finding a crime or a criminal was very low. . . . In this respect, the economizing interests of enforcement agencies parallel a legal interest in assuring that some justification can be given for focusing unusually extensive and intensive information gathering in a limited area. [P. 24.]

Yet on the other hand, we also think that police intrusion is justified if the police are *not* singling out an individual on the basis of any specific facts they know about him. Thus, Lawrence Sherman maintains that "relying on tips and other citizen-initiated methods of obtaining probable cause to start an investigation is a wasteful and inequitable procedure" (p. 125), and that equitable law enforcement requires "selecting individual targets for deceptive investigations in a way that gives each member of the target group an equal probability of being selected" (p. 131).

It is easy to see how current fourth amendment doctrine is caught between these two intuitions. In some contexts, the Supreme Court has told us that invasions of privacy are permissible only if the police demonstrate probable cause to believe that they will find what they are looking for.² Yet the courts have also permitted practices like airport searches,³ police roadblocks⁴ and inventory searches⁵ on the theory

the desire to rebut the claim that the method of selection was invidious. And, indeed, there is no reason to doubt him when he asserts that "[n]o political official was put off limits; no allegation, regardless of the party, power, or position of the official involved was disregarded as too hot to pursue." P. 4. But the important institutional issue about ABSCAM is not the good faith of the particular officials who ran the operation, but the adequacy of safeguards against officials operating in bad faith. When the problem is viewed from this perspective, there is no escape from the fact that government officials must opt for some method of selection, that they may well know in advance the distributional consequences of the method they choose, and that they can, if they wish, manipulate their choice to achieve undesirable objectives. *See* text at notes 44-47 *infra*.

2. *See, e.g., Chambers v. Maroney*, 399 U.S. 42, 51 (1970) ("In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution.").

3. *See, e.g., United States v. Davis*, 482 F.2d 893, 907 (9th Cir. 1973) ("The search . . . occurred as part of a screening process directed not against appellant or any other person as such, but rather against the general introduction of weapons or explosives in a restricted area. The search was indiscriminate, and . . . necessarily so, absent a foolproof means of isolating in advance those few individuals who were genuine hijack risks.").

that the police lack any special reason to believe that a particular search will be productive. Indeed, in a stunning reversal of the central meaning of the fourth amendment,⁶ the Court has on occasion held that the Constitution *requires* issuance of general warrants designed to *insure* that there is no particular basis for individual searches.⁷

A second sort of confusion, which is associated with a theory I will call "right-wing activism," is illustrated by Sanford Levinson's eloquent and erudite essay on the hidden costs of police undercover techniques. Levinson argues that "our security about our lives is radically dependent on being able to trust 'normal appearances,' and attacks on this ability to trust may be devastating" (p. 51). Because undercover techniques are "deeply subversive of the possibility of friendship, love, and trust" (p. 50), those who advocate their use should have the burden of proving their fairness. "Perhaps [they] can be defended, just as nonpacifists recognize the appropriate occasions for directed violence, but we should place greater barriers, including legal ones, in the way of casually embarking on such use" (p. 51).

Levinson is surely right when he argues that in a sane society things must generally be as they appear to be. But his reasoning from this proposition to skepticism about undercover techniques masks a double paradox.

First, undercover operations destroy our trust in "normal appearances" only in a certain sense. To be sure, on an individual level, the informer or double agent fools his victim. But on a societal level, the government has abused no one's trust. On the contrary, it is usually perfectly open about the use of undercover techniques.⁸ Indeed, the deterrent effect of undercover police work depends upon potential criminals knowing precisely the way things are. Only if the government publicizes its use of double agents will people think twice about engaging in criminal conspiracies.⁹ Levinson's argument thus depends

4. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 559 (1976). Cf. *Delaware v. Prouse*, 440 U.S. 648, 663 (1979) (stopping all traffic at roadblock may sufficiently constrain police discretion to satisfy fourth amendment).

5. See, e.g., *South Dakota v. Opperman*, 428 U.S. 364 (1976).

6. The fourth amendment was directed primarily at the problem of "general" or overbroad warrants not specifying the place to be searched or thing to be seized. See *Boyd v. United States*, 116 U.S. 616, 624-29 (1886); T. TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 41 (1969).

7. See *Marshall v. Barlows, Inc.*, 436 U.S. 307 (1978); see also *See v. City of Seattle*, 387 U.S. 541 (1967); *Camara v. Municipal Court*, 387 U.S. 523 (1967).

8. For example, shortly after the ABSCAM operation was disclosed, FBI Director William Webster publicly announced that there were presently 50 similar operations underway across the country. P. 3.

9. In defense of ABSCAM, Nathan argues that there is evidence that it has had a substantial deterrent effect. He cites testimony by FBI officials to the effect that suspects in continuing investigations attribute their caution to concerns about ABSCAM-type probes. P. 3. Obviously, this deterrent effect is possible only if potential violators know of the possibility that undercover operations are underway.

upon an undefended preference for accurate information when we make individual, rather than collective, choices.

Second, it is, of course, true that when Congressman Kelly stuffed \$25,000 in cash into his pockets before a hidden videotape camera, things were not the way they seemed to him at the time. But we should not lose sight of the fact that if Kelly was guilty, as the jury found him to be, he himself was engaged in undermining our trust in "normal appearances." While passing himself off as a public servant making decisions in the public interest, he in fact had a radically different agenda. Thus, from a different perspective, ABSCAM was an effort to restore our trust in normal appearances by apprehending those who violated it. Levinson's attack on operations of this sort rests on an undefended distinction between governmental action that deceives and governmental inaction that allows private deception to continue.¹⁰ This distinction is especially ironic in the ABSCAM context, where the targets of the operation were themselves government officials engaged in deception.

The problems in Levinson's essay, like those in Nathan's, are reflected in current fourth amendment doctrine. The problem posed by the dichotomy between individual and collective choice is reflected in the well-known circularity of the "reasonable expectation of privacy" test. The Court purports to apply this test to judge whether an individual's fourth amendment interests have been invaded.¹¹ Yet those individual expectations are crucially conditioned by our collective judgments about what kinds of privacy we wish to preserve.¹² Individual expectations are protected when they are reasonable. But they are reasonable only because we have collectively announced that we are going to protect them.¹³

10. In fairness, it should be noted that Levinson himself perceives this problem, although he provides no satisfactory solution for it. See p. 58.

11. See, e.g., *Oliver v. United States*, 104 S. Ct. 1735 (1984) (no fourth amendment interest in "open field" because owner has no reasonable expectation of privacy).

12. In *United States v. Miller*, 425 U.S. 435 (1976), for example, the court held that a depositor's fourth amendment rights were not implicated by a search of bank records in part because "[t]he lack of any legitimate expectation of privacy concerning the information . . . was assumed by Congress in enacting the Bank Secrecy Act, the expressed purpose of which is to require records to be maintained because they 'have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings.'" 425 U.S. at 442-43.

13. On rare occasions, the Court has glimpsed the nature of its dilemma. In *Smith v. Maryland*, 442 U.S. 735 (1979), for example, the majority noted that "if the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry, individuals thereafter might not in fact entertain any actual expectation of privacy regarding their homes, papers and effects." 442 U.S. at 740 n.5. In such cases, where expectations could be said to have been "'conditioned' by influences alien to well-recognized Fourth Amendment freedoms," the Court acknowledged that expectations could "play no meaningful role in ascertaining what the scope of Fourth Amendment protection was," and that "a normative inquiry would be proper." 442 U.S. at 741 n.5. But the Court gave no hint of how it would generate such norms when not guided by collective decisions about the amount of privacy we wish to protect.

The second problem in Levinson's essay, posed by the dichotomy between public and private deception, is reflected in the incoherence of our fourth amendment rules regarding state action, privacy in one's relations with others, and searches conducted with the consent of third parties. Under current doctrine, an individual has a relatively strong expectation that the government will not employ its own mechanisms of coercion or deception to invade an existing privacy interest. But individuals have no constitutional right to affirmative government *protection* from private invasions.¹⁴ Nor is there a right to prevent the government from taking advantage of any private invasion that does occur.¹⁵ Thus, in a real sense, the Constitution leaves citizens isolated in their privacy. A person who barricades himself alone in his home can be relatively secure in his person, house, papers and effects. But the government provides no security for those without the means to so protect themselves, and as soon as a person establishes an intimate relationship with another, he is said to "assume the risk" that he will be betrayed.¹⁶ Indeed, ironically enough, the more intimate the relationship destroyed by the deceptive conduct, the less protection the fourth amendment affords. Thus, the fourth amendment rights of a hotel guest are violated if the manager gives the room key to the police, because the guest has a "reasonable expectation of privacy" in his room.¹⁷ Yet if the suspect's spouse admits the police to a house they share,¹⁸ or his best friend turns double agent and tells the police about their most private conversations,¹⁹ no fourth amendment problem arises.

II

I suppose I had better make clear that I have not a clue as to how these various paradoxes and anomalies should be resolved. I do think, however, that there is something to be learned by putting them into a broader context. A peculiar coincidence in the history of academic discourse about criminal justice has, I believe, artificially narrowed its scope: At roughly the same time that the modern flowering of constitutional theory began, the Warren Court's criminal justice decisions became too numerous and complex to fit comfortably into courses on constitutional law. It was also during this period that the clinical movement began to take hold. The result has been the development of

14. See, e.g., *United States v. Jacobsen*, 104 S. Ct. 1652, 1656 (1984); *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921).

15. See *Burdeau*, 256 U.S. 465 (1921).

16. See, e.g., *Hoffa v. United States*, 385 U.S. 293, 303 (1966); *Lopez v. United States*, 373 U.S. 427, 465 (1963) (Brennan, J., dissenting).

17. *Stoner v. California*, 376 U.S. 483, 490 (1964).

18. See, e.g., *United States v. Matlock*, 415 U.S. 164, 171 (1974); *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971).

19. See, e.g., cases listed at note 16 *supra*.

separate criminal law courses staffed by academics, many of whom think of themselves as pursuing a discipline different from "standard" constitutional law. This split has tended to obscure the fact that the fourth, fifth and sixth amendments are, after all, parts of the Constitution, and that the same theories that have influenced application of the rest of the document have implications for our thinking about control of the police. If we consider police undercover work in this broader context, I think we can see that the problems in the Nathan and Levinson essays reflect our ambivalence about competing theories of constitutional adjudication.

In the unlikely event that the man from Mars is an avid reader of our major law journals, he would no doubt suppose that this competition between theories consists primarily of an argument between advocates of judicial activism and judicial restraint. For the past several generations, academic discussion has been dominated by efforts to wrestle with the "counter-majoritarian difficulty" and to develop a comprehensive theory justifying and limiting judicial review. It would, of course, be possible to view the problem of police undercover work through this lens. Were we to do so, we would look for a justification — in the text of the Constitution, in political theory, or in moral philosophy, depending on one's taste in these matters — for overriding the judgment of the police and, by extension, that of the political branches regarding the proper tradeoff between privacy and crime control.

But it should be apparent to anyone not from Mars that this dispute is sadly out of date. Academics who believe that judicial activism is fundamentally illegitimate may, in some abstract sense, be right, but the simple fact of the matter is that today advocates of judicial restraint are everywhere in retreat. There is not now a single authentic such advocate sitting on the Supreme Court, and there has not been one in recent memory.²⁰ If one wants to understand what modern constitutional debate is really about, the beginning of wisdom is that the fault line is not between activism and restraint, but between differing styles of activism.

For the sake of convenience, and at the risk of considerable oversimplification, these styles may be labelled "left-wing" and "right-wing." Left-wing judicial activists believe in an active court *as part of* an active government. They believe that government as a whole should intervene vigorously in the private sphere to redistribute assets

20. Justice Rehnquist, widely considered the most likely candidate, is certainly not in this category. He has dissented from the Court's relatively lenient constitutional scrutiny of statutes benefiting racial minorities, *see Fullilove v. Klutznick*, 448 U.S. 448, 522 (1980) (Stewart, J., with whom Rehnquist, J., joins, dissenting), and has insisted on the Supreme Court's duty to invalidate federal invasions of state sovereignty despite the absence of any clear textual justification for the assertion of this power. *See National League of Cities v. Usery*, 426 U.S. 833 (1976); *see also* Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 302-07 (1976).

in a more just and equitable fashion and to correct the abuses of private power. When the political branches default in this obligation, then the courts must intervene to achieve the same ends.²¹ Cases such as *Brown v. Board of Education*,²² *Shapiro v. Thompson*²³ and *Craig v. Boren*²⁴ are representative of this tradition.

In contrast, right-wing judicial activists believe in an active court *because* they believe in a passive government. They believe that outcomes reached by the private sphere should be protected from governmental intermeddling. When the political branches invade this sphere, then it becomes the duty of courts to restrain them through vigorous and expansive assertion of constitutional values.²⁵ Cases such as *Lochner v. New York*,²⁶ *Roe v. Wade*²⁷ and *The Pentagon Papers*²⁸ fall squarely in this tradition.

To be sure, like all models, this way of categorizing empirical data oversimplifies reality. In particular, it would be a mistake to suppose that the views of any individual Justice can be neatly categorized under one rubric or another. There are numerous crosscurrents that influence the Justices' votes and the results in individual cases. Nonetheless, the model has considerable explanatory power. For one thing, it helps explain how it is that a Court appointed by Presidents who made "judicial activism" dirty words has turned out to be one of the most activist in our history.²⁹ The political attack on the Court in the

21. For a representative example of this view, see Wright, *The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint?*, 54 CORNELL L. REV. 1, 6 (1968):

Where the choice is between the Court struggling alone with a social issue and the legislature dealing with it expertly, legislative action is to be preferred. All too often, however, the practical choice has been between the Court doing the job as best it can and no one doing it at all. Faced with these alternatives, the court must assume the legislature's responsibility. If the legislature simply cannot or does not act to correct an unconstitutional status quo, the Court, despite all its incapacities, must finally act to do so.

22. 347 U.S. 483 (1954).

23. 394 U.S. 618 (1969).

24. 429 U.S. 190 (1976).

25. For a classic statement of this view, see *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923) (McReynolds, J.):

[The "liberty" protected by the Constitution] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience and generally to enjoy those privileges long recognized by common law as essential to the orderly pursuit of happiness by free men. . . .

. . . .
That the state may do much, go very far indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected.

26. 198 U.S. 45 (1905).

27. 410 U.S. 113 (1973).

28. *New York Times v. United States*, 403 U.S. 713 (1971).

29. To cite but one dramatic example, by striking down the legislative veto provision at issue in *Immigration & Naturalization Serv. v. Chadha*, 103 S. Ct. 2764 (1983), the Burger Court invalidated in a single day more federal statutes than had previously been struck down in the

'60s and early '70s was not really an attack on activism at all, but rather an attack on left-wing activism. The Burger Court's response to that attack has not been a retreat from the exercise of judicial power, but rather an expansive reading of the Constitution to protect private power centers from governmental interference. For example, the Court has virtually ceded the troubling abortion question to the American College of Obstetricians and Gynecologists to resolve in any way it sees fit.³⁰ The press,³¹ organized religion,³² families³³ and corporations³⁴ have all been told in one way or another that the Constitution leaves them free to exercise private power without having to account to public institutions for the manner in which that power is exercised.

Moreover, the model also helps explain some contradictions that otherwise appear inexplicable. The abortion funding controversy provides a particularly revealing example. How can the same Court that vigorously defends a woman's right to an abortion also permit the government to "penalize" a woman for exercising that right by withholding funds that she could have if she chose to have a live birth?³⁵ This seemingly anomalous result becomes perfectly sensible once one understands that *Roe* was a product of right-wing activism. The distinction between the imposition of a burden and the withholding of a benefit, although ultimately incoherent,³⁶ is crucial to the right-wing world view, and reliance on the distinction has become a hallmark of the Burger Court.³⁷ Thus, on this view, *Roe* was right because it left a woman and her doctor free to resolve the abortion question without

entire history of the country. See Spann, *Deconstructing the Legislative Veto*, 68 MINN. L. REV. 473, 473 (1984). See also notes 30-34 *infra*.

30. See, *Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. 2481, 2495-96 (1983) (deferring to judgment of American College of Obstetricians and Gynecologists as well as American Public Health Association on permissibility of out-patient abortions); see also *Colautti v. Franklin*, 439 U.S. 379, 396-97 (1977) (determination whether fetus is viable must be left to attending physician).

31. See, *e.g.*, *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976) (invalidating prior restraint in press coverage of criminal trial).

32. See, *e.g.*, *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 504 (1979) (application of National Labor Relations Act to employees of church-related schools would raise serious free exercise clause problems).

33. See, *e.g.*, *Parham v. J.R.*, 442 U.S. 584, 602-03 (1979) ("Our jurisprudence historically has reflected Western Civilization concepts of the family as a unit with broad parental authority over minor children. . . . The statist notion that government power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition.").

34. See, *e.g.*, *First Natl. Bank v. Bellotti*, 435 U.S. 765 (1978) (invalidating statute prohibiting expenditures by banks and corporations for purpose of influencing votes on referenda proposals).

35. See *Harris v. McRae*, 448 U.S. 297 (1980).

36. See note 42 *infra* and accompanying text.

37. As Justice Powell wrote for the Court in *Maher v. Roe*, 432 U.S. 464, 475-76 (1977): There is a basic difference between direct state interference with protected activity and state encouragement of an alternative activity consonant with legislative policy. Constitutional

government intermeddling. But for precisely the same reasons, *Harris v. McCrae* was also right because government funding of abortions was itself a kind of interference with outcomes that would be reached in the private sphere without government interference.

Of course, the left-wing activist sees things quite differently. He believes that government has an obligation to intervene when private forces (in this case the market) lead to inequitable outcomes. Indeed, his support for *Roe* in the first place was premised on the assumption that it would lead to a redistribution of power between men and women.³⁸ Through attacks on the right-privilege distinction and exploitation of the "fundamental interest" stand of equal protection jurisprudence, the Warren Court had laid the doctrinal groundwork that would have supported a constitutional obligation for government to subsidize abortions.³⁹ But the days of the Warren Court are long behind us. Because *Roe* was a right-wing rather than a left-wing decision, the result in *Harris* was foreordained.

III

If the man from Mars has managed to slog his way through this much of the *Michigan Law Review*, he might suppose that protection from police abuse was high on the agenda of the right wing. In fact, there *is* a surprisingly conservative flavor to much of our fourth amendment jurisprudence — a flavor that comes through in Levinson's essay. The fourth amendment, after all, is a restraint on the exercise of government power, and it pretty much leaves people where it finds them. If they live in overcrowded slum housing with paper thin walls, then, at least under present doctrine, they have the right to the kind of privacy one would expect in that environment. But if they live in mansions with private security guards, the government is restrained from changing this "natural" state of affairs by imposing additional privacy costs that would not otherwise exist.

Of course, in the real world, it has been the right wing that has led the attack on the fourth amendment. The reasons why this is so are of interest, I believe, because they help to demonstrate the problems with right-wing activism generally.

There are two sorts of problems with the right-wing view which,

concerns are greater when the state attempts to impose its will by force of law; the state's power to encourage actions deemed to be in the public interest is necessarily far broader. For some examples of Burger Court decisions resting on this distinction, see *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540 (1983); *Snepp v. United States*, 444 U.S. 507 (1980); *Wyman v. James*, 400 U.S. 309 (1971).

38. For a defense of *Roe* on these grounds, see Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 980-81 (1984).

39. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Sherbert v. Verner*, 374 U.S. 398 (1963). See generally Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

usefully enough, correspond to the anomalies in Levinson's essay. The first stems from the need to reconcile right-wing activism with a coherent theory of freedom. All too often, it is supposed that recognition of constitutional rights leaves individuals free. But of course nothing could be further from the truth. Disabling government does not make people free; it simply substitutes private for public coercion. Thus, getting the government out of the abortion business does not leave a woman "free" to choose which course to follow. She remains at the mercy of her doctor, or her parents, or her husband, all of whom may exercise coercive power over her.⁴⁰ Indeed, *government intervention to control* the exercise of private power may be an essential precondition to real freedom.⁴¹

Similarly, constitutional restraints on undercover police work hardly guarantee a society where privacy and expectations in "normal appearances" are protected. They simply mean that con-men and thugs rather than the police will control our lives. This is why Levinson's failure to defend a distinction between government action that deceives and government inaction that allows private deception to continue is troubling. For conservatives, the prospect of government inaction in this context is especially troubling because criminals, unlike, say, the *New York Times* or General Motors, are likely to use their unrestrained power to effect a substantial change in the way assets are presently distributed.

Right-wing activists might avoid these dilemmas by claiming that theirs is not a theory based on freedom in the first place. They might claim instead that government should be restrained because the defects in the political process prevent it from aggregating individual preferences as accurately as private markets. Of course, choices in private markets are "coerced" in the sense that everything has a price. But the trades that occur in such markets are nonetheless desirable because the necessity to pay the price assures that utility will be maximized.

But there is a problem with reconciling this utility-based view with right-wing activism as well. The problem is that government intervention is necessary in order to determine and protect the initial assignment of property rights that allows the market to function. The way in which it functions, in turn, will depend upon the kind of property rights government chooses to recognize at the outset. For example, if

40. The internal tensions in the right-wing position are particularly apparent when dealing with minors, for here the problem of private coercion is acute. Arguably, this problem has caused the Court to turn the principle of *Roe* on its head. Instead of removing government from the abortion decision, the Court has held that in some circumstances the Constitution *requires* a government official to make the decision for immature minors. See *Bellotti v. Baird*, 443 U.S. 622, 643-44 (1979) (Powell, J.).

41. Of course, such intervention leaves the people controlled by it less free. Thus, the real choice is not between tyranny and freedom. Whatever the government does — or does not do — one group will get its way and the other will not. The real choice is simply between the competing claims of those groups.

we start by recognizing a property right in medical benefits to fund abortions (in which case, their withdrawal is an unconstitutional burden), the market for abortions will be different than it would be if we recognize no such property right (in which case, the failure to provide the benefits is a constitutional refusal to subsidize). Which course we follow can be determined only by some sort of collective, governmental choice.⁴²

The problem of choosing a starting point for measuring fourth amendment violations is precisely analogous, and it is this problem that is reflected in Levinson's difficulties in distinguishing between the legitimacy of individual and collective decisions. It is fine to say that the police should not upset reasonable privacy expectations. But this command is coherent only if we establish as an initial matter what claims of privacy we are prepared to recognize as reasonable, and this initial choice must, again, be a collective decision. Once the decision is made — and however it is made — it will then crucially influence the kinds of expectations private individuals have and the ways in which they behave. Hence, the notion of private individuals exercising power without government influence or interference is logically incoherent.

Unfortunately, there are similar logical difficulties with the theory of left-wing activism. At first, it may seem strange that left-wing activists are worried about the fourth amendment at all. Vigorous police activity represents an exercise of government power that arguably serves to redistribute the cost of crime in a more equitable fashion. Police protection is a kind of public subsidy for people without the means to protect themselves.

But of course, left-wing activists know that the cost of this subsidy is not equitably distributed. Far from redistributing power in a fairer fashion, left-wing activists fear that the police will aggravate the existing maldistribution of wealth and power by picking on "discrete and insular minorities." It is this fear, I think, that lies behind Nathan's impulse to insist that ABSCAM targets were not deliberately selected and Lawrence Sherman's proposal that "sting" victims be randomly chosen.⁴³ It is not the simple fact of government selection that trou-

42. In *Harris*, for example, the majority concedes that "[a] substantial constitutional question would arise if Congress had attempted to withhold all medicaid benefits from an otherwise eligible candidate simply because that candidate had exercised her constitutionally protected freedom to terminate her pregnancy by abortion." 448 U.S. at 317 n.19. In contrast, the failure to provide medicaid funds for abortions was a mere "refusal to fund protected activity" which, "without more, cannot be equated with the imposition of a 'penalty' on that activity." 448 U.S. at 317 n.19. But it should be obvious that this distinction between "penalties" and "failures to subsidize" depends entirely on how one characterizes the baseline entitlement against which government conduct is measured. If one characterizes the baseline as "medicaid benefits" then the exclusion of funds for abortion is a mere failure to subsidize. But if one characterizes it instead as "benefits available to pregnant women," then the withdrawal of those benefits from the class of women who make a constitutionally protected choice with regard to their pregnancy begins to look more like a penalty.

43. See pp. 118-33.

bles them, but the risk that any selection process will be abused so as to punish unpopular minorities. This fear also explains much that otherwise appears contradictory in fourth amendment law. Because we cannot trust the police to distribute privacy costs equitably, they must *either* convince a judicial official that they have a sound basis for picking out individuals for special treatment, *or* distribute costs widely enough so that we can be sure that the political check on their activity will not be negated by the powerlessness of a specially disadvantaged group.

There are, I think, two sorts of difficulties with this position. First, left-wing activists need to get straight what they think about government. One view, which seems to lie behind the left-wing version of the fourth amendment, is that private inequalities will inevitably translate into unequal political power. We therefore cannot trust the political branches to distribute privacy costs equitably when they go about the task of fighting crime. But it is hardly sensible to believe this while simultaneously looking to government as an engine for social reform. And it seems particularly bizarre to expect judges — who remain far richer, better educated, whiter, and maler than the majority of us — to be the government officials who rescue us from these difficulties and bring about a just redistribution.

A second problem stems from an ambiguity in the concepts of “randomness” and “equality” that lie at the heart of the left-wing theory.⁴⁴ Sherman argues that it is a requirement of equitable law enforcement that “each member of the target group [have] an equal probability of being selected” (p. 131). But it is hard to know precisely what he means by this requirement. Suppose, for example, that the police are looking for heroin hidden in automobiles and are choosing between three criteria for selecting the cars to be searched. They can search all cars with odd-numbered license plates, they can search all cars in those neighborhoods where heroin traffic is concentrated, or they can search all cars driven by people who, for one reason or another, appear not to be members of the middle class.

The first thing to notice about this choice is that none of the options is “random” if one means by this term a method of choice involving no criterion of selection. Indeed, given determinist premises, such a requirement is impossible to satisfy. Nor can any choice satisfy a requirement of “equality,” if one means by this term that *ex ante* all cars will have an equal probability of selection. An important theme reflected in a number of essays in this book is that this requirement is also impossible to satisfy. The government must decide upon some method of selection, and any method it chooses will have distributional consequences. Thus, as Mark Moore (p. 37), Wayne Kerstetter (pp. 135-36), and Peter Reuter (p. 115) all argue, our traditional “reac-

44. I am grateful to one of my students, David Post, for introducing me to this problem.

tive" mode of law enforcement, under which police investigations are triggered by victim complaints and probable cause is required for privacy invasions, leaves white-collar and "victimless" crimes substantially underenforced. Similarly, in some sense, searching only those cars with certain license plates "discriminates" against the people who happen to have those plates.

Presumably, then, Sherman's insistence on randomness and equality does not require that the mode of selection have no distributional consequences, but rather that the person choosing the mode not know the consequences in advance.⁴⁵ Under this definition, the first method of selection is "random," because having odd-numbered license plates is unlikely to be systematically associated with any other trait government officials will be aware of when they choose this method. In contrast, the second two methods of selection are not random because middle-class appearance and location in a particular area are associated with other traits.

If this is what Sherman means, his definition is at least logically coherent, but it is not immediately apparent why he thinks that this kind of randomness is a virtue. From an efficiency perspective, it seems silly to search all cars with odd-numbered license plates when we could find more heroin at a lower cost by concentrating our search on cars more likely to contain the drug.⁴⁶ Nor is it clear how equality is promoted by this policy. There is nothing "equal" about applying the same criterion to two groups who are differently situated with respect to the criterion. Thus, persons having traits making them less likely to possess drugs can complain of unequal treatment because they have the same chance of being searched as persons for whom the search is more likely to be productive. Similarly, owners of cars with odd-numbered license plates are victimized by unequal treatment because they are treated differently on the basis of a trait that has no association with the goal the government wishes to advance. This

45. Of course, the person choosing the mode of selection will know the distributional consequences with respect to the criterion for selection. Thus, searching cars with odd-numbered license plates has distributional consequences, known in advance, for the class of persons with those license plates. But no one is likely to know in advance what other traits are possessed by this class.

46. Thus, in *Delaware v. Prouse*, 440 U.S. 648 (1978), the Court held unconstitutional "random" or "discretionary" stops of motor vehicles to check for vehicle registration, in part because "finding an unlicensed driver among those who commit traffic violations is a much more likely event than finding an unlicensed driver by choosing at random from the entire universe of drivers. . . . In terms of actually discovering unlicensed drivers or deterring them from driving, the spot check does not appear sufficiently productive to qualify as a reasonable law enforcement practice under the Fourth Amendment." 440 U.S. at 659-60. But given this objection, it is unclear, to say the least, why the Court was ready to approve "methods for spot checks that . . . do not involve the unconstrained exercise of discretion." 440 U.S. at 663. One gets a sense of the amount of confusion it is possible to generate about this issue from Justice Blackmun's readiness to approve techniques like the search of every tenth car because they are said to be "not purely random." 440 U.S. at 664 (Blackmun, J., concurring).

kind of "randomness" is indistinguishable from the sort of irrationality that makes government conduct unconstitutional under even minimal equal protection scrutiny.⁴⁷ The possibility of condemning "randomness" on these grounds presumably accounts for Nathan's desire to deny that the selection of ABSCAM targets was random.

Thus, from both equality and efficiency perspectives, it seems more sensible to prefer a nonrandom method of selection based, for example, on the area of the city in which the car is located. And yet, I think at least some of us would be troubled by this method, and more troubled still by a method of selection based on lower-class or deviant appearances, even if it could be shown that there was a correlation between these traits and drug use. Presumably, we are worried that the police have chosen these criteria not because of the correlation, but because the group selected is a "discrete and insular minority" victimized by prejudice and unable to form the sort of political coalitions that would protect it from discriminatory treatment. Insisting on ignorance of distributional consequences thus sacrifices some efficiency, but in return we gain assurance that the system will produce no permanent losers made to bear disproportionate costs because of prejudice against them.

But the difficulty with making this sacrifice is that it ignores the possibility that a group selected for disfavored treatment is a discrete and insular minority precisely because of the correlation that makes picking this group out the sensible and equitable thing to do. Of course, there are losers in the political process who consistently and over a broad range of issues come out on the bottom. But it is at least theoretically possible that some of these groups consistently lose because they deserve to lose in the sense that membership in the group in fact consistently correlates with undesirable activity that society wishes to discourage.

It is also true that other groups may be singled out for "discriminatory" treatment based, not on the incidence of undesirable activity, but on "prejudice." The dominant culture may have a distorted view of the characteristics of the disfavored group or may fail to count fairly their desires in determining social policy. But the important point is that mere political powerlessness, even when coupled with "discreteness" and "insularity," is insufficient to demonstrate prejudice. Political powerlessness may reflect no more than a loss "on the merits." Permitting judges to reverse political decisions when they are "suspi-

47. See, e.g., *Logan v. Zimmerman Brush Co.*, 445 U.S. 422, 442 (1982) (Blackmun, J., concurring):

So far as the State's purpose is concerned, every . . . claimant's charge, when filed with the [Fair Employment Practices] Commission, stands on the same footing. Yet certain randomly selected claims, because processed too slowly by the State, are irrevocably terminated without review. . . . This, I believe, is the very essence of arbitrary state action [violating the Equal Protection Clause].

cious" that the decision is based on "prejudice" permits them, in effect, to redetermine the merits. Left-wing activists have yet to explain how the cause of social justice is advanced by this transfer of power.

IV

One of the important contributions of *ABSCAM Ethics* is that it accurately captures the ambivalence many of us feel about police undercover work. The public clearly enjoys watching criminals or corrupt politicians get "stung," and the essays by Nathan, Moore, and Reuter make a convincing case that such operations may, on occasion, serve useful purposes. Yet this public approval is tempered by a vague feeling of unease — an inchoate sense, reflected in last year's DeLorean verdict and captured dramatically in Gary Marx's essay, that "we may be taking small but steady steps toward the paranoia and suspicion that characterize many totalitarian countries" (p. 94).

In part, I think this ambivalence reflects the fact that many of us are torn between the attractions of left-wing and right-wing activism. We want strong leaders and a competent government that will protect us and provide for us. Yet we also want to be left alone.

But I think that there is also a sense in which our ambivalence stems from the internal incoherence of both the left-wing and right-wing views. I have argued that some of our confusion about criminal justice issues can be clarified by sharply distinguishing between these views. But in important ways, both theories are also alike. They are both distorted by our loss of confidence in our ability to articulate any substantive vision of how we wish to interact with each other. Right-wing activists need a substantive theory of freedom that will explain the way people would act in a world where they were not coerced. Left-wing activists need a substantive theory of equality that will explain how groups would be aligned in a just society. In the absence of such theories, both camps have directed their attention to "value-free" procedural questions, while professing indifference to the outcomes produced by these procedures. Thus, left-wing activists see courts as intervening when necessary to correct defects in public markets, while right-wing activists see them as intervening when necessary to prevent interference with private markets. Because both of these procedural approaches are seriously flawed, it is predictable that our thinking about controlling the police — and about constitutional law in general — will remain unsatisfactory.