Legal Reason and the Misguided Quest for Reasonableness

EARLY DRAFT – PLEASE DO NOT CITE OR QUOTE WITHOUT PERMISSION

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This Article tells the story of two developments in widely separate areas of American constitutional law – the "reasonable expectation of privacy" test for the Fourth Amendment Search and Seizure Clause[1] and the "endorsement" test for the First Amendment Establishment Clause.[2] Each story has been told, and critiqued, many times. My contribution is to bring the two stories together[3] and to try to draw some larger conclusions from them about trends, and pathologies, in contemporary legal culture.

I will begin by outlining these two stories. These accounts are intentionally schematic, to emphasize the parallels between them:

Privacy

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[1] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. 4.

[2] "Congress shall make no law respecting an establishment of religion…." U.S. Const. Amend. 1. Both clauses are also enforced against the States by way of "incorporation" under the Fourteenth Amendment.

[3] To my knowledge, the only other piece of legal scholarship that compares the two doctrines, though with purposes very different from mine, is Jesse Choper, *The Endorsement Test: Its Status and Desirability*, 18 J. L. & Politics 499 (2002).

1. In *Katz v. United States*,[4] the United States Supreme Court held that electronic eavesdropping on a phone booth required a search warrant even if the eavesdropping bug was attached to the outside of the phone booth and did not physically penetrate it.

2. The majority opinion in the case was somewhat ad hoc and even conclusory. Building on a long course of development in Fourth Amendment law away from an earlier emphasis on property rights, the Court held that the "Fourth Amendment protects people, not places." Extrapolating from prior cases, it held that "No less than an individual in a business office,' in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment."[5] It also looked to a prior case that found that a "spike mike" attached to a suspect's heating system from the outside required a warrant whether or not the mike's placement was a "technical trespass" as a matter of property law,[6] and held that not even physical penetration was necessary to render the eavesdropping an illegal invasion of the suspect's private communication.

3. The more well-known opinion in *Katz*, however, was Justice Harlan's concurrence. Harlan agreed that the Fourth Amendment protects people, not places, but sensibly added that the scope of that protection still required "reference to a 'place.'"[7] He then

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

[5] *Katz*, 389 U.S., at 352 (footnotes omitted).

[6] Silverman v. United States, 365 U.S. 505, 511 (1961).

[7] *Katz*, 389 U.S., at 361 (Harlan, J., concurring).

argued that those protected places should be identified, not by the rules of property law, but by an inquiry into expectations of privacy. Specifically, he wrote that:

> My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable."[8]

4. Justice Harlan's view, often called the "reasonable expectation of privacy" test, eventually came to dominate Fourth Amendment search and seizure law, resulting in a long line of cases in which courts have held that criminal defendants or others did or did not have a "reasonable expectation of privacy" in one or another type of space, structure, or situation.

5. Nevertheless, this test has also been repeatedly criticized. Critics have pointed out that the test is (a) unclear about how to determine whether a person has an "actual (subjective) expectation of privacy," (b) normatively imprecise about when how such expectations become "reasonable," and (c) particularly unhelpful in teasing out the relationship between, and the relative weight of, the subjective and objective components of the test. Scholars have over the years suggested various alternatives, modifications, revisions, and conceptual reworkings of the test.

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[8] *Katz*, 389 U.S., at 361 (Harlan, J., concurring).

6. The Supreme Court itself has adjusted the test, and in recent cases begun at least partially moving away from it, at least as an exclusive means to answer search and seizure questions.

Establishment of Religion

1. In *Lynch v. Donnelly*,[9] the Supreme Court held that the public display of a Nativity Scene as one part of a larger Christmas display erected by the city of Pawtucket, Rhode Island[10] did not violate the First Amendment's bar to establishments of religion.

2. The majority opinion was somewhat ad hoc and even conclusory. Years earlier, the Court had struck down official prayer in public schools.[11] But *Lynch* was its first major case about an arguably devotional *object*. The Court noted the myriad ways in which government permissibly "acknowledges" the "role of religion in American life," pointing both to practices such as the inclusion of "under God" in the Pledge of Allegiance and to the display of religious

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[9] 465 U.S. 668 (1984).

[10] The display also included

> among other things, a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads "SEASONS GREETINGS."

Lynch, 465 U.S., at 671.

[11] *See, e.g.*, Engel v. Vitale, 370 U.S. 421 (1962).

art "predominantly inspired by one religious faith" in public museums.[12] It held that the constitutional "inquiry calls for line-drawing; no fixed, *per se* rule can be framed."[13] Finally, the Court emphasized that Christmas was a "National Holiday" as well as a religious holy day. Drawing on a traditional doctrinal test that looked to the "purpose" and "effect" of challenged practices, the Court held that the crèche was merely a permissible acknowledgment of the "historical origins" of the largely secular national Christmas celebration.[14]

3. The more well-known opinion in *Lynch*, however, was Justice O'Connor's concurrence. In brief, Justice O'Connor argued that the point of the Establishment Clause was to prohibit

> government from making adherence to a religion relevant in any way to a person's standing in the political community….[The most] direct infringement [on that principle] is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents

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[12] *Lynch*, 465 U.S., at 674-78.

[13] *Lynch*, 465 U.S., at 678.

[14] I have elsewhere criticized **Error! Main Document Only.**the Court's underlying posit that there are in essence two divisible Christmases, one religious and one secular, and that the "national" Christmas holiday is an essentially "secular" celebration, albeit one with religious roots and religious meaning for believers. To the contrary, I suggest, "Santa and the like play a complex, rich, and tension-filled role in the 'religious economy' of Christmas, and … we cannot begin to tackle the constitutional problem of Christmas until we unravel that complexity." Perry Dane, *Christmas*, available at http://ssrn.com/abstract=947613 But all the opinions in *Lynch*, including the dissenters, accepted the premise of a "secular" Christmas, and the argument is beyond the scope of this present essay.

> that they are insiders, favored members of the political community. Disapproval sends the opposite message.[15]

She then suggested that the "purpose" and "effect" prongs of the traditional doctrinal should be interpreted to focus on whether the challenged government practice had either the "purpose" or "effect" of "endorsing" religion, and that these were legal questions "to be answered on the basis of judicial interpretation of social facts."[16] Justice O'Connor amplified on her views in a subsequent case involving a crèche on a courthouse grand stairway. She explained that her "endorsement test" would require the Court to ask whether a "reasonable observer," aware of all the relevant facts and their history and context, would view the challenged practice as "a disapproval of his or her religious choices."[17]

4. Justice O'Connor's view eventually came to dominate Establishment Clause jurisprudence, resulting in a long line of cases in which courts have held various practices, displays, and the like to "endorse" religion or not from the perspective of a hypothetical "reasonable observer."

5. Nevertheless, this test has also been repeatedly criticized. Although the "endorsement test" is not explicitly divided into "subjective" and "objective" prongs, it does rely on both the posited reactions of a set of observers (insiders and outsiders) and the requirement that those reactions be "reasonable." Thus, critics have pointed out that the test is (a) unclear about how to determine how and whether observers come to feel that they are insiders or outsiders (b) normatively imprecise about when how such feelings become "reasonable," and (c)

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[15] *Lynch*, 465 U.S., at 687-88 (O'Connor, J., concurring).

[16] *Lynch*, 465 U.S., at 694 (O'Connor, J., concurring).

[17] County of Allegheny v. ACLU, 492 U.S. 573, 630-31 (1989) (O'Connor, J., concurring).

particularly unhelpful in teasing out the relationship between, and the relative weight of, the subjective and objective dimensions of the test. Scholars have over the years suggested various alternatives, modifications, revisions, and conceptual reworkings of the test.

6. The Supreme Court itself has adjusted the test, and in some cases begun at least partially moving away from it, at least as an exclusive means to answer establishment of religion questions.

Katz and *Lynch* arose in very different constitutional contexts. But the conceptual challenges in the two adjudications were strikingly similar. In each case, the Court was asked to define the limits of state involvement or intrusion with respect to a very specific material object, whether a telephone booth or a crèche. And in each case, changing times made a clear understanding of those material objects particularly difficult – whether because telephone booths and external listening devices were both unknown in earlier centuries or because a secularizing culture has seen fit to blur the devotional and commercial meanings of objects such as a Christmas crèche. In both cases, the majority opinions tried to rely on a litany of comparisons, holding, respectively that the phone booth was analogous to "a business office,' in a friend's apartment, or in a taxicab" and the crèche was analogous to religious art in public museums. The concurrences, though, tried to do better.

But both the "reasonable expectations of privacy" and the "reasonable observer of endorsement" doctrines are seriously flawed. They are unclear, possibly vacuous, and inherently unstable. Why, then, would the Court be so attracted to them? As I suggested at the outset, I want to argue that examining these two otherwise unconnected areas of law in tandem reveals some deeper patterns in contemporary constitutional thinking, or even contemporary legal thinking more broadly. The rest of this outline tries to examine some of those common patterns. Although I engage in a fair amount of critique along the way, my main interest is in uncovering the patterns themselves, and their implications for the overall health of our legal culture.

Of course, two areas of doctrine are by themselves only the thinnest evidence for any more sweeping diagnosis. My claim, though, which this outline only spottily tries to substantiate, is that echoes of the patterns identified here do have larger implications – that the two case studies discussed here are emblematic, albeit in a particularly dramatic way, of a larger story or set of stories.

I. The "reasonable expectations of privacy" and "endorsement" tests both reflect contemporary law's infatuation with the psychological and the subjective, and its suspicion that they are somehow more "real" and germane to human problems than the law's own more traditional categories and arguments. At the same time, these tests, by superimposing a "reasonableness" requirement on a psychological and subjective substrate, only reflect a deep

concern that the pure facts of life not entirely dominate or displace the law and legal argument. That tension, of course, results in the structural opaqueness and instability inherent in both tests.

a. The new focus on the psychological and the subjective is present in many other areas of law, including an increasing concern for "emotional distress" in tort law. It also reflects much broader trends in contemporary American life, as evidenced, for example, by the pervasive culture of aggrievement and victimhood that treats psychological "offense" as a harm at least or more serious than physical injury or deprivation of material or dignitary entitlements. Consider also the growing emphasis on "happiness research" and hedonic values as the measures of success for this or that public policy.

b. In the specific contexts at issue here, the focus on the psychological is problematic for three related reasons:

i. In both the privacy and establishment of religion context, a focus on subjective, psychological, perceptions – however constrained by the "reasonableness" requirement – ignores and risks effacing the often profoundly anti-subjective and counter-psychological values at the heart of these constitutional protections.

Consider, for example, the classic peroration by William Pitt (Lord Chatham) in a 1763 parliamentary debate that American courts have often quoted as embodying the basic principle protected by the Fourth Amendment:

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail — its roof may shake — the wind may blow through it — the storm

> may enter — the rain may enter — but the King of England cannot enter — all his force dares not cross the threshold of the ruined tenement![18]

The point of Pitt's imagery was, of course, to emphasize that even a dwelling such as a "cottage" or a "tenement" that was not physically secure should be – by the sheer operation of the law – secure against government intrusion. Indeed, it helps to remember, as Pitt surely did, that 18th century "cottages" and "tenements" were not in any sense we would understand "private" spaces; "If privacy means the opportunity to withdraw into voluntary isolation, few eighteenth British individuals enjoyed much privacy in their entire lives."[19] In particular, in the typical "cottage" of Pitt's proverbial "poorest man," "many families and their many children "often occupied the same cottage sleeping room, which was not separated from the day room."[20] The same was true of urban "tenements."[21] Pitt's aim was not to vindicate pre-existing "expectations of privacy," but to protect legally-enshrined zones from government intrusion.

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[18] Speech on the Excise Bill, House of Commons (March 1763).

[19] SIMON VAREY, SPACE AND THE EIGHTEENTH CENTURY NOVEL.

[20] JOHN WOODFORDE, THE TRUTH ABOUT COTTAGES: A HISTORY AND AN ILLUSTRATED GUIDE TO 50 TYPES OF ENGLISH COTTAGE.

[21] Even in homes that were less "poor," privacy did not exist in our sense of the word.

> Although interior space within the house was beginning to be specialized, individual members of a family still shared their spaces in two senses. Bedrooms and beds were often still shared and, at least in the more expensive new houses, apparently individual spaces (like bedrooms and 'closets') were connected by a corridor. This internal 'communicating' space fulfilled a function analogous to the space of a street: as house doors give on to the street, so room doors give on to the corridor.

SIMON VAREY, SPACE AND THE EIGHTEENTH CENTURY NOVEL.

A similar point can be made in the Establishment Clause context. For example, the cases in the early 1960's concerning school prayer were not principally concerned with dissenting students' feelings of exclusion. As Justice Black famously put it, echoing Roger Williams, James Madison, and the other authors of the American church-state dispensation, the most "immediate purpose" of the Establishment Clause "rested on the belief that a union of government and religion tends to destroy government and to degrade religion."[22]

ii. The second problem proceeds from the first. Not only does the focus on the subjective and the psychological leave behind the more explicitly normative and indeed "objective" thrust of prior cases, it also suppresses the possibility of *any* objective, normative, conversation. For example, when Justice Black argued that officially sanctioned prayer "degrades religion," he was relying on some specific theological principles that lie at the foundation of the distinct American form of separationism.[23] As Black understood the matter, even adherents to

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[22] Engel v. Vitale, 370 U.S. 421, 430-31 (1962). Specifically, the Court's opinion held that

> Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause, of the First Amendment…. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not…. This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals…. But the purposes underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion.

Id.

[23] *See generally* Perry Dane, **Error! Main Document Only.***Separation Anxiety,* 22 JOURNAL OF LAW AND RELIGION 545 (2007) (review essay on NOAH FELDMAN, DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM).

the "established" religion – O'Connor's "insiders" – should have excellent reasons to oppose government's embrace. Those assumptions cannot be articulated, and either defended or rethought, as long as the Court continues to focus on damage to feelings rather than damage to religion itself.

iii. Finally, even if the focus on psychology were in principle appropriate, the Court, in both the privacy and the religion contexts, ignores the deep cultural context in which psychology is usually embedded. Specifically, both individual "expectations of privacy" and our collective sense of whether religiously-tinged government practices relegate some Americans to the status of political "outsiders" are not (to use the social scientists' jargon) exogenous variables, but are significantly shaped by the law itself.

Indeed, the cultural construction of individual sentiments are particularly acute in exactly these two contexts. Thus, much of the action in the search and seizure cases centers on quickly developing and changing technologies – GPS tracking,[24] DNA testing, thermal imaging,[25] and so on. To a large extent, Americans look to the courts to map out the privacy implications of this brave new world rather than the other way around.

The issue with respect to the establishment clause is different, but the conclusion is the same. As I have emphasized our church-state dispensation is distinctly American, grounded in a

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[24] *See* United States v. Jones, 132 S. Ct. 945 (2012).

[25] *See* Kyllo v. United States, 533 U.S. 27 (2001).

specific historical experience and ideological patrimony. That tradition shapes the grievances of religious minorities – their/our sense of being "outsiders" – as much as it is shaped by them. Other countries, with different traditions, produce different psychologies. It should surprise nobody, for example, that among the leading defenders of the continued privileged status of the Anglican Church in England – the "Church by law established" – have been the former Chief Rabbi Lord Sacks[26] and some leading British Islamic thinkers.[27] Their conception of the advantages and disadvantages of even full-fledged establishment, and its implications for their own status in the polity, are simply different from ours.

Indeed, fascinatingly, Rabbi Sacks's argument for "antidisestablishmentarianism" employs the same insider/outsider trope as Justice O'Connor does, but to very different effect:

> Americans, used since the days of Thomas Jefferson to the separation of Church and State, find it hard to believe that England can be a tolerant place. Surely, they say, the special status of the Church of England means that anyone who has a different faith feels like an outsider. Yet England, for all its shortcomings, is one

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[26] *See* JONATHAN SACKS, THE PERSISTENCE OF FAITH: RELIGION, MORALITY AND SOCIETY IN A SECULAR AGE (2005); Jonathan Sacks, *Antidisestablishmentarianism - a Great Word and a Good Ideal*, THE TIMES OF LONDON, July 20, 2002 [hereinafter Sacks, *Antidisestablishmentarianism*]; Jonathan Sacks, Written Evidence to the House of Lords Joint Committee on the Draft House of Lords Reform Bill (April 2012), *available at* http://www.publications.parliament.uk/pa/jt201012/jtselect/jtdraftref/284/284iii85.htm [hereinafter Sacks, Written Evidence].

[27] *See, e.g.*, Tariq Modood, *Establishment, Multiculturalism, and British Citizenship*, 65 THE POLITICAL QUARTERLY 53 (1994); Tariq Modood, *Anti-Essentialism, Multiculturalism and the 'Recognition' of Religious Groups,* 6 J. POLITICAL PHILOSOPHY 378 (1998) (defending "moderate" forms of European religious establishments and moderate secularism as best mediating the inherent tension between multiculturalism and secularism).

> of the most tolerant societies on Earth. One of the reasons is that the Church helps to sustain that environment.
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> It is like entering a crowded room, knowing no one, and then discovering to your relief that there is a host who greets you, introduces you to others, and makes you feel at home. In a multifaith England, the Church of England is that host. In America, where there is no host, religious groups compete in an open market…. An established Church, secure in its position, can be more hospitable in welcoming and accepting other faiths.[28]

Rabbi Sacks admits that his argument would not work in the United States.[29] But the endorsement test cannot explain why.

II. I have argued that the "expectations of privacy" and "endorsement" tests both reflect an infatuation with the psychological and the subjective. More broadly, though, they reflect an

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[28] Sacks, *Antidisestablishmentarianism*, *supra* note 26.

[29] For example, in a more recent statement on English religious establishment, he explicitly emphasized the importance of understanding the English and American situations in their respective historic and political contexts:

> Each nation charts its own route to freedom, and that becomes part of its history. The United States found it in the Jeffersonian separation of Church and State. Britain found it in successive acts of emancipation and liberalisation, alongside an established church charged with the burden of generosity toward others.

Sacks, Written Evidence, *supra* note 26.

effort to avoid often-difficult normative inquiry by trying to escape to the realm of the purely empirical. This temptation is deeply ingrained in contemporary law, influenced as it has been by legal realism's attacks on formalism, "word magic," and doctrinal essentialism. Much more than academic realism, however, this effort to find empirical answers to non-empirical questions appears all across the ideological spectrum. Thus, for example, the leading "conservative" theories of constitutional interpretation focus on a search for the "original intent" or (more recently) the "original public meaning" of various constitutional passages. This inquiry is specifically described as essentially empirical,[30] a search for a fact of the matter about the (past) world that, its proponents argue, determines (or depending on the precise theory, largely constrains) the (present-day) normative meaning of constitutional texts.[31]

Again, the "reasonableness" element of both tests constrains, but does not ultimately negate, the focus on the empirical. At the end of the day, the focus on "reasonable" expectations and the "reasonable" observer only emphasizes that the essentially empirical inquiry should be careful and moderate, and not be allowed to run wild into fringe subjectivities. But it does not leave room for the Court to challenge, or shape, mainstream subjectivities. And it is precisely that room that the law – particularly constitutional law – needs to do its job. As George Bernard Shaw famously quipped, "The reasonable man adapts himself to the world; the unreasonable one

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[30] *See, e.g.*, Randy Barnett, *Gravitational Force of Originalism*, FORDHAM L. REV. (forthcoming).

[31] To be sure, the search for empirical "facts of the matter" is often a chimera. *See* Jamal Greene, *Guns, Originalism, and Cultural Cognition*, 13 U. PA. J. CONST. L. 511 (2010).

persists in trying to adapt the world to himself. Therefore all progress depends on the unreasonable man."[32]

III. As the preceding paragraph already began to suggest, the deeper patterns embedded in the two doctrinal stories I have been telling are not only substantive. They also go to the very structure of legal reasoning itself.

To begin with, I want to consider that both the "reasonable expectation of privacy" and "endorsement" tests were born in the context of a central, even defining, challenge in legal reasoning – deciding borderline cases.

Let us return to *Katz* and *Lynch* themselves. It is easy to sympathize with the frustrations that Justice Harlan and Justice O'Connor, respectively, must have felt. The majority opinion in each case explicitly or implicitly framed the problem as one of categorization. Despite its rhetorical gesture to the proposition that the Fourth Amendment protected "people," not "places," the majority in *Katz* was effectively asking whether a phone booth was more like a home or more like an open field. And the majority in *Lynch* was asking whether a crèche, included as part of a larger, putatively "secular," public Christmas display was more like a devotional act or more like a gallery of religious paintings in a public museum.

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[32] GEORGE BERNARD SHAW, MAN AND SUPERMAN 238 (1903).

Both the *Katz* and *Lynch* majorities gave reasons for their respective conclusions. They engaged in the typical legal hermeneutic of analogy and distinction, trying to find relevant resemblances to, and differences from, prior and hypothetical cases. They also relied, though, on a certain degree of sheer situation-sense (right or wrong in its conclusions) and, in the end, on some sheer hand-waving. That combination of rational casuistry and semi-articulate instinct is the stuff of many judicial decisions.[33] It is what judges do. But it is also very easy to criticize, and very tempting to try to transcend.[34]

Justice Harlan in *Katz* and Justice O'Connor in *Lynch* were trying to provide a single grand idea – a metric, so to speak – that could decide these and other cases. In fact, for all my griping in this essay, both the "reasonable expectation of privacy" and the "reasonable observer" of an "endorsement of religion" might actually be more or less helpful formulations of the situation-sense necessary to decide difficult and culturally specific borderline cases such as *Katz* and *Lynch*. That is to say, attending to the question of what sort of expectations users have when they enter (or used to enter) phone booths might be a helpful way to think about whether a phone booth is in significant ways like a home. And attending to the views of a "reasonable observer" about whether a display "endorses" religion might be a helpful way to think about how

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[33] *Cf.* CASS SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT (1996).

[34] For a similar argument in the context of moral reasoning, see ALBERT R. JONSEN & STEPHEN EDELSTON, THE ABUSE OF CASUISTRY: A HISTORY OF MORAL REASONING (1988).

to "read" a cultural object such a crèche included in a larger Christmas display[35] and decide whether it is no more constitutionally problematic than a religious painting in a secular museum. The problem, though, is that these formulas were allowed to spread from the edge (the borderline cases) to the core. They did not merely build on the deeper constitutional meanings at stake – whether the Fourth Amendment idea that it is up to the law, sensitive to but not bound by tradition and culture, to enshrine zones of protection from government intrusion or the First Amendment idea that "a union of government and religion tends to destroy government and to degrade religion."[36] Instead, they displaced those deeper principles, or at least tried to. And the result has not been pretty. Not only are the new formulations – understood as overarching principles – shallow and opaque. But they also haven't succeeded in eliminating the embarrassment of casuistic-sounding case-by-case splitting, dicing, and drawing of fine distinctions. To the contrary, these formulations have simply generated a whole new process of judicial elaboration and occasional over-elaboration.

The colonizing of the core by the edge is, however, a recurring temptation in modern legal reasoning. It recurs partly because judges and lawyers overlook the simple truth that the last stage in legal analysis necessarily differs from the steps before it. Principles are important;

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[35] Recall, though, my own doubts about the notion of a "secular" Christmas, which I am bracketing for purposes of this discussion. *See supra* note 14.

[36] Engel v. Vitale, 370 U.S. 421, 430-31 (1962).

they can and should frame the conversation and set the stage. But the reach of principles, in Charles Fried's wonderfully evocative image, stops twenty feet off the ground. Those last few feet must be occupied by the "artificial reason of the law, the working out of detailed doctrine.[37]

Paradoxically, though, the temptation to let the edge bleed into the core also proceeds, I think, from this age's suspicion of the self-confident values embodied in those cores. Hence the appeal of the psychological and the empirical. And hence the effort to measure "reasonable expectations" and depend on "reasonable observers." Hence, in a word, the untoward substitution of "reasonableness" for reason.

Let me put it another way: The common law tradition has always held in creative tension two stories of how it proceeds. The first story posits the existence of broad but powerful principles that can at least guide the way toward specific conclusions, though rarely with the determinate force that some might crave. The second story looks to the iterative accumulation of precedents and reasoning by analogy as the messy but necessary path to a broader wisdom.[38] The most satisfying accounts of the common law do not merely juxtapose or balance these two strains of the tradition but try to make them cohere. In a recent article, Martin Stone, in his reformulation of some of the ideas of Ernest Weinrib, argues that immanent principles such as

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[37] Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 Tex. L. Rev. 54 (1981).

[38] *See, e.g.*, LLOYD L. WEINREB, LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT (2005).

corrective justice are not meant to be determinate guides to deciding specific cases. Nor are they even the "goals" of common law adjudication in the first place.[39] Rather, they are the best and most normatively coherent *explanations* for what is going on in individual, inevitably context-sensitive and fact-specific, legal judgments. I do not want to endorse all the details of Stone's account here. Even if I did, translating his argument about the structure of private law into the realm of public law and in particular constitutional law would be treacherous. But I do want to borrow his insight.

The traditional defense of the "ruined tenement" against official encroachment was not a determinate Fourth Amendment "test" in the modern sense. But it was, along with other ideas, an explanation for what judges were trying to do when they decided whether this or that physical space under this or that circumstance was protected for a warrantless search. Similarly, Justice Black's warning, echoing James Madison, that "a union of government and religion tends to destroy government and to degrade religion" did not determine exactly where, or even how high, the wall of separation between church and state should be erected. But it did explain the wall itself and judicial efforts to map it in individual cases.

The contemporary doctrinal 'tests" of "reasonable expectation of privacy" and "endorsement of religion" as understood by the "reasonable observer" thus reflect a double failure of legal nerve. To begin with, they implicitly renounce constitutional law's mission to

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[39] Martin Stone, *Legal Positivism as an Idea About Morality*, 61 U. TORONTO L. J. 313 (2011).

articulate strong, even occasionally deeply counter-cultural, principles of its own and not merely defend subjective sensitivities (such as "privacy" or "endorsement"). And at the same time, they try – unsuccessfully it turns out -- to short-circuit the patient iterative process of inductive decisionmaking and reasoning by analogy.

At the end of the day, then, this essay is, I suppose, a plea for at least a certain sort of legal formalism – not the illusory axiomatic, determinate, legal formalism, that was the straw man of legal realists,[40] but a more modest yet self-confident formalism that understands law's distinctive role, in concert with other normative languages, in both framing and shaping the world in which we live.

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[40] *See* Brian Tamanaha, *Balanced Realism on Judging*, 44 Val. U. L. Rev. 1243 (2010).