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Citation
Carol S. Steiker, Of Cities, Rainforests, and Frogs: A Response to Allen and Rosenberg, 72 St. John's L. Rev. 1203 (1998).

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St. John's Law Review

Volume 72
Issue 3 *Volume 72, Summer-Fall 1998, Numbers 3-4*

Article 19

2012

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Recommended Citation
Steiker, Carol S. (1998) "Of Cities, Rainforests, and Frogs: A Response to Allen and Rosenberg," *St. John's Law Review*: Vol. 72: Iss. 3, Article 19.
Available at: http://scholarship.law.stjohns.edu/lawreview/vol72/iss3/19

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OF CITIES, RAINFORESTS, AND FROGS: A RESPONSE TO ALLEN AND ROSENBERG

CAROL S. STEIKER*

I find much of interest in Ron Allen and Ross Rosenberg's paper on the Fourth Amendment—much that is thought-provoking, and much that is convincing. Indeed, I am in agreement with three of the major points that they make, only to find myself disagreeing with their ultimate conclusion. My reaction to their paper reminds me of the old story about the biological researcher and the frog:

> A biological researcher was experimenting on a frog which would jump whenever he clapped his hands and said, "Jump!" The researcher cut off one of the frog's legs, clapped his hands and said "jump"—the frog jumped. The researcher wrote in his notebook, "Cut off one leg, frog still jumps." The researcher cut off a second leg, clapped his hands and said "jump"—the frog jumped. He wrote in his notebook, "Cut off second leg, frog still jumps." The researcher cut off a third leg, clapped his hands and said "jump"—the frog jumped. He wrote in his notebook, "Cut off third leg, frog still jumps." The researcher cut off the fourth leg, clapped his hands and said "jump"—the frog just sat there. The researcher clapped his hands harder and said "Jump!"—the frog did not move. He clapped his hands even harder and shouted "JUMP!!" Still no reaction. He wrote in his notebook, "Cut off fourth leg, frog goes deaf."

I do not mean to suggest that anything in Allen and Rosenberg's analysis suffers from the obvious defects of the medical researcher's conclusion, but I do mean to say that I find many of the individual points that they make more persuasive than their ultimate conclusion, which I would question, or at least moderate. Let me elaborate, beginning with the three "legs" of Allen and Rosenberg's analysis with which I agree.

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* Professor of Law, Harvard Law School. I thank St. John's Law Review and St. John's University School of Law for organizing such an interesting and dynamic conference on a topic that still has the capacity to generate light as well as heat thirty years later.

First, I agree in large part with Allen and Rosenberg's critiques of the work Tony Amsterdam[1] and Akhil Amar,[2] and with both their praise for and reservations about Bill Stuntz's[3] work. Amsterdam's incredibly eloquent and justly famous *Perspectives on the Fourth Amendment*[4] is flawed by his single-minded focus on the problem of police discretion to the virtual dismissal of the role of text and history in constitutional interpretation. Allen and Rosenberg are correct; any convincing theory of the Fourth Amendment must include a theory of the role of the Constitution's text and history. Amar's thought-provoking and widely read work is undermined, as I have argued elsewhere,[5] by *too much* emphasis on text and history, and by *his* virtual dismissal of the role of modern police forces, and the problem of racial discrimination in law enforcement.[6] I also agree with Allen and Rosenberg that Bill Stuntz's important work, especially his recent essay on the relationship between criminal procedure and criminal justice,[7] is ground-breaking in its understanding of the reasons for the failure of constitutional criminal procedure. Furthermore, I agree that Stuntz's proposals for reform are less convincing than his diagnosis of the problem, but not for the reasons advanced by Allen and Rosenberg.

Allen and Rosenberg think that Stuntz's proposals (judicial regulation of substantive criminal law, criminal justice funding, and police coercion under the Constitution) are unconvincing, not so much on their own terms, but because they represent "a general theoretical solution to the problem of the Fourth Amendment."[8] Indeed, Allen and Rosenberg argue that the weakness of

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[4] Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974).

[5] *See* Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 824 (1994) (responding to Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994)).

[6] *See* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759 (1994) ("We need to read the [Fourth] Amendment's words and take them seriously: They do not require warrants, probable cause, or exclusion of evidence, but they do require that all searches and seizures be reasonable.").

[7] *See* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 6 (1997) (suggesting that the reasons for the failure of constitutional criminal procedure lie in the necessary allocation of power between courts and legislatures).

[8] Ronald J. Allen & Ross Rosenberg, *The Fourth Amendment And The Limits Of*

Stuntz's prescriptions and the much greater weaknesses of Amsterdam's and Amar's theories of the Fourth Amendment are proof that "top-down" theories always fail.[9] This is where my view diverges from that of Allen and Rosenberg. While I agree with their sharp-eyed identification of weaknesses in the theories of the authors they discuss, I believe that these failings are simply proof that there are some flawed top-down theories. Top-down theorists have to be careful about the risk of solipsism—believing that the things that they see best are the only things there are to see; they must be careful to have theories that are not too reductionist or context-insensitive. However, the identification of weaknesses in some theories is hardly proof that theorizing is a pointless exercise.

Second, I agree with Allen and Rosenberg that Hayek's distinction between "made" and "grown" systems is fascinating and useful.[10] We should be wary of anyone who tells us that we can restructure all of criminal procedure (or many other areas of law) by theorizing about it without doing damage to certain important features of the system as a grown system. I would use Allen and Rosenberg's insight about grown systems to add to their critiques of Fourth Amendment theorists like Amsterdam, and especially Amar, by noting that none of these theorists has developed an adequate (or really *any*) theory of precedent. This failure is truly debilitating for Fourth Amendment law as a "system," because it is precisely by the mechanism of precedent that the system "grows" in Hayek's sense.

Third, and finally, I agree with Allen and Rosenberg that "[t]he model to apply to the Fourth Amendment is the model of the common law, with its capacity to adjust to quite fine distinctions."[11] Fourth Amendment law has grown very much like the common law, changing with minute modifications in the enormous range of factual scenarios that give rise to challenges to "search and seizure" by state actors. I agree with Allen and Rosenberg that this course of growth is both inevitable and salubrious, given the Fourth Amendment's unelaborated proscription of

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Theory: Local vs. General Theoretical Knowledge, 72 ST. JOHN'S L. REV. 1149.

[9] *See id.*

[10] *See id.* (citing F.A. HAYEK, LAW, LEGISLATION, LIBERTY: RULES AND ORDER 35-54 (1973) (explaining that a "made" order originates from the design of its creator, whereas a "grown" order arises without a plan)).

[11] *Id.*

searches and seizures that are "unreasonable." This concept is so general and therefore so context-specific, that it requires the kind of slow and careful elucidation over time that has characterized Fourth Amendment law in the United States Supreme Court and other federal and state courts.

Despite these three important areas of agreement, I nonetheless question Allen and Rosenberg's ultimate conclusion—their deep skepticism about theory and their call for "local knowledge" in its stead.[12] In part, I question the evidence they marshal to support their skepticism. Furthermore, in larger part, I question the capacity of the idea of "local knowledge" to explain how Fourth Amendment law has grown in the past or how it should grow in the future.

First, consider the evidence Allen and Rosenberg offer to convince us to join in their skepticism of Fourth Amendment theory. Allen and Rosenberg initially point to the cacophony of scholarly prescriptions for Fourth Amendment law as proof that the Fourth Amendment is not susceptible to theory generally.[13] In their words:

> Each author . . . praises some aspects of other scholars' work and some of the cases, criticizes much of the scholarship and many of the cases, and adds something unique to the conversation. . . . That the air remains filled with the contending voices is strong evidence of part of our thesis, in particular that no unifying, true theory of the fourth amendment exists to be found.[14]

The mere fact, however, that there is widespread disagreement among scholars as to Fourth Amendment prescriptions (or anything else, for that matter) is hardly proof that general theorizing is useless or that there is no "truth" here that can be sought. The concept of "academic disagreement" is the very opposite of an oxymoron; such disagreement is inevitable in all scholarly disciplines—it is the academic full-employment plan! Serious scholarly disagreement, even about first principles, is proof of nothing more than that we are in "academic land."

Allen and Rosenberg go on to claim that "local knowledge" about the Fourth Amendment is so complete that there is no

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[12] *See id.*
[13] *See id.*
[14] *Id.*

"robust set of issues in need of clarification"[15] and, therefore, no need for general theorizing. I disagree, not with the inference that they draw from this observation, but with the observation itself as a factual characterization of the world of Fourth Amendment law. In contrast to Allen and Rosenberg, I find that a laundry list of "robust" and unresolved Fourth Amendment issues leaps to mind immediately. Such a list is indispensable to any law professor who uses, as many law professors do, questions of the "issue spotter" variety on law school exams. The fact that I (and all of the other criminal procedure professors that I know) can come up with new "issue spotters" that are genuinely difficult and that generate a diversity of opinion among our students, year after year, suggests that Allen and Rosenberg are simply wrong when they claim that Fourth Amendment law "is close to a model of clarity."[16] Any laundry list of such issues would include:

• What is, and should be, the role of race (or ethnicity) as a factor in creating reasonable suspicion or probable cause, whether as a part of a criminal "profile" or on its own? This vexing question has divided courts and commentators, and remains an important subject in contemporary judicial, academic, and public debate.[17]

• Will we, and should we, expand the currently narrow "good faith" exception to the exclusionary rule[18] into a more generalized "good faith" exception for reasonable, yet erroneous, police judgments outside of the warrant context? Not long ago, the United States asked the Supreme Court to decide this issue,[19] and members of Congress have proposed it as a legislative "solution" to the costs of the judicially enforced exclusionary rule.[20] Any such

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[15] *Id.*

[16] *Id.*

[17] For example, an entire chapter of Randall Kennedy's recent and powerful book on racial issues in the criminal justice system deals with this issue, and chronicles the debate among judges and others. *See* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 136-67 (1997).

[18] *See* United States v. Leon, 468 U.S. 897, 926 (1984) (holding that the exclusionary rule should not apply to a search made in good faith reliance on a warrant that was, in the eyes of reviewing courts, unsupported by probable cause).

[19] *See* Arizona v. Evans, 514 U.S. 1, 16 n.5 (1995) (noting the request of the United States as amicus curiae but declining to decide the question).

[20] *See* Kenneth Jost, *Exclusionary Rule Reforms Advance*, A.B.A. J., May 1995, at 18 (describing House bill that would expand the current good faith exception to searches conducted without a warrant). The Bill was passed by the House of Repre-

change would not merely create one more exception to the operation of the exclusionary rule, but would likely reset the standard of Fourth Amendment "reasonableness" as well.[21]

- What is, and should be, the scope of searches that are not based on suspicion, such as regimes of random drug-testing? Our "local knowledge" tells us that such testing is reasonable, under certain circumstances, for railway employees,[22] customs officials,[23] and high school athletes,[24] but not for state public officials.[25] What about the rest of us? What about other forms of searches that are not based on suspicion, such as the creation of fingerprint or DNA data banks? The scope of the "special needs" exception to ordinary Fourth Amendment requirements is a huge area of speculation and contention in state and federal courts and among academics.[26]

- What uses by law enforcement agents should courts permit of technological enhancement—not just thermal imaging, which Allen and Rosenberg acknowledge as unresolved,[27] but the general use of high-powered cameras, binoculars, microphones, videotapes, etc.? As technology advances with startling rapidity,

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sentatives, but never left the Senate Judiciary Committee.

[21] As I stated in a more detailed discussion:

> *Leon* may do more than establish its already significant good-faith exception for reliance on judicial warrants; broadly construed, it may end up resetting the standard to which law enforcement agents will be held in their conduct by enforcing through evidentiary exclusion not the current Fourth Amendment norms, but rather a "reasonable" approximation of those norms.

Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2514-15 (1996).

[22] *See* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 632-33 (1989) (finding that drug and alcohol tests serve a legitimate safety interest, and do not unreasonably infringe upon covered employees' privacy even when there is no suspicion of impairment).

[23] *See* National Treasury Employees Union v. Von Raab, 489 U.S. 656, 677 (1989) (holding that testing of customs employees who deal with illegal drugs or carry weapons while on duty does not violate the Fourth Amendment).

[24] *See* Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 664-65 (1995) (concluding that drug-testing of student athletes is constitutional because it deters drug use among a particularly susceptible group and is not particularly invasive).

[25] *See* Chandler v. Miller, 117 S. Ct. 1295, 1298 (1997) (holding that "Georgia's requirement that candidates for state office pass a drug test . . . does not fit within the closely guarded category of constitutionally permissible suspicionless searches").

[26] *See* Carol S. Steiker, *The Limits of the Preventive States*, J. CRIM. L. & CRIMINOLOGY (forthcoming summer 1998) (discussing the unsettled scope of the "special need" exception).

[27] *See* Allen & Rosenberg, *supra* note 8.

the possibility for enormous encroachments on personal privacy grows with similar speed. The courts have not come close to creating a body of sensible and predictable "local knowledge" in this area as it already exists, much less a way of dealing with future developments.[28]

But even if local knowledge proliferated in these areas, too, I would still question Allen and Rosenberg's conclusion. Even the most comprehensive development of "local knowledge" could not suffice as a Fourth Amendment system that either describes current law or adequately prescribes future developments. Allen and Rosenberg's call for local knowledge ultimately fails because the common law and constitutional criminal procedure, while they may share many of the non-top-down attributes of "grown" as opposed to "made" systems, differ in one crucial respect. The common law and constitutional criminal procedure are not like a rain-forest or a spontaneously developed city like 15th-century Bruges, in that these bodies of law tend to grow by a distinctive cognitive process of decision-makers called analogy or analogical reasoning. As my colleague, philosopher Scott Brewer, has recently demonstrated, analogical reasoning requires the reasoner to posit a higher-level theory to explain why it is that two situations are analogous.[29] To give an example that leaps out from Allen and Rosenberg's own description of Fourth Amendment "local knowledge," we know a lot about Fourth Amendment rules regarding houses and cars. You need a warrant to search a house; you do not need a warrant to search a car. Inevitably, the question will come up, what about a motor home? Whether a motor home is more like a house or more like a car depends on whether the reason that you need a warrant to search a house but not a car is, on the one hand, the special privacy of dwellings or, on the other hand, the exigent mobility of cars.[30] It is pre-

[28] *See, e.g.*, Robert C. Power, *Technology and the Fourth Amendment: A Proposed Formulation for Visual Searches*, 80 J. CRIM. L. & CRIMINOLOGY 1, 4 (1989) (noting that the Supreme Court's pronouncements on technological enhancement and the Fourth Amendment "have resulted in a crazy melange of rules and principles").

[29] *See generally* Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923 (1996) (explaining the structure of legal reasoning by analogy).

[30] *See* California v. Carney, 471 U.S. 386, 392-93 (1985) (determining that a motor home does fit into the vehicle exception to search warrant requirements because it is mobile and subject to regulations not applicable to actual homes).

cisely these reasons that Fourth Amendment law is lamentably short on, as Allen and Rosenberg themselves acknowledge.[31] An enormous amount of Fourth Amendment law depends on analogy. Is a frisk of a car[32] or of a house[33] "like" a *Terry* frisk of a person? Is "plain feel" "like" "plain view"?[34] Is a sobriety checkpoint[35] more like a random stop for identification (prohibited)[36] or a random drug test of a railroad employee (permitted)?[37]

The centrality of analogy as the primary engine in the growth of both Fourth Amendment law and the common law generally suggests that a certain amount of theory is not only desirable, but absolutely necessary in Fourth Amendment jurisprudence. This is not to say that a single, over-arching theory is necessary, or even helpful. In this respect, I am in agreement with Allen and Rosenberg, and would suggest that Cass Sunstein's idea of "incompletely theorized agreements" as key to a healthy judiciary can be of significant help here.[38] To a certain degree Sunstein shares Allen and Rosenberg's skepticism about the possibility and usefulness of "high-level" or "top-down" theory for judges deciding cases.[39] Instead of rejecting theory alto-

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[31] *See* Allen & Rosenberg, *supra* note 9 ("When the question mutates from 'what' are the demands of the fourth amendment with regard to houses to 'why' they are what they are, ambiguity sets in. Again, most of the 'what' questions [regarding cars] have clear answers. 'Why' questions considerably less so.").

[32] *See* Michigan v. Long, 463 U.S. 1032, 1049 (1983) (holding that a warrantless search of the areas of a car where weapons may be concealed is constitutional, provided that the police officer reasonably believes that the suspect is dangerous and could gain control of the weapon).

[33] *See* Maryland v. Buie, 494 U.S. 325, 334 (1990) (authorizing protective sweeps of homes in order to protect officers executing an arrest).

[34] *See* Minnesota v. Dickerson, 508 U.S. 366, 374-75 (1993) (noting that the plain-view doctrine is analogous to a situation in which illegal drugs are found "through the sense of touch during an otherwise lawful search").

[35] *See* Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 447 (1990) (holding that highway sobriety checkpoints are constitutional).

[36] *See* Brown v. Texas, 443 U.S. 47, 52 (1979) (determining that it is unconstitutional for a police officer to stop an individual and request identification if he does not have a reasonable belief that the individual is engaged in illegal activity).

[37] *See* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 633 (1989) (concluding that drug-testing is constitutional because the government's interest in safety outweighs the railroad employees' interest in privacy).

[38] *See generally* Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995) (describing an "incompletely theorized agreement" as an agreement on a particular issue without agreement on the underlying fundamental principle, and suggesting that such a strategy can produce consensus in a pluralistic democracy).

[39] *See id.* at 1752-53 (suggesting that use of large-scale theories by judges can be

gether, however, Sunstein urges that judges "adopt a presumption . . . against high-level theorization" and attempt to decide cases at a lower theoretical level.[40] In doing so, judges will produce mid-level rules and principles that have the capacity to generate more widespread agreement, both within the judiciary, and within our pluralistic democracy.[41] I believe that Sunstein's insight could be applied profitably to Fourth Amendment law: What we need is a proliferation of mid-level theories, which may or may not be ultimately amenable to complete rationalization with each other. Therefore, I end up somewhere between top-down theory and what I take to be Allen and Rosenberg's anti-theoretical concept of "local knowledge."

It might turn out, of course, that what Allen and Rosenberg really mean by "local knowledge" is mid-level theory, or they might accept this idea as a friendly amendment to their current views. If so, I may have to either change my opening anecdote or frankly acknowledge that maybe frogs *do* go deaf when you cut off all of their legs.

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problematic, and urging a more modest approach).

[40] *Id.* at 1767.

[41] *See id.* at 1771.