Ethical Analysis of Searches with Addendum on Search Efficacy

In contemporary U.S. criminal justice practice, agents of the state are empowered to search people and their possessions, cars, houses, etc. under certain rules and then seize the object of their searches. This section is a brief libertarian analysis and critique of those powers from a deontological perspective. For a libertarian who grounds his theory of ethics in natural law (e.g., Rothbard's Ethics of Liberty), there are a few basic principles with which search powers can be critiqued. The reader is to bear in mind that these are armchair, or theoretical principles of natural law, and so no citations to positive, man-made law are appropriate to support arguments, here.

Firstly, a search of any type is a trespass of property unless there are compelling countervailing arguments to conduct the search. This necessarily raises the tangled issue of burden of proof and possible balancing tests, which will be dealt with below. Secondly, an important principle of libertarian justice is equality of authority (ref. Roderick Long, Equality: The Unknown Ideal). If the action is just, then any private person should be at liberty to perform it, as well as any state agent. So, if a search can justly be carried out by a policeman, then the witness whose oath allowed a warrant to be issued could also justly carry out the search -- indeed, anyone in possession of the relevant information. More broadly, since the libertarian advocates the abolition of security forces that are funded through taxation, these critiques are another way of considering what a non-tax-funded ("private") security company's powers should be with regard to searches and seizures.

Is a balancing test for searches just?

Why could it be just to search for something or someone? The modern rationale is that there are two burdens of proof, one for search and one for conviction. The burden of proof to convict a person of a crime is beyond a reasonable doubt. But to obtain evidence to make such a case, one could not possibly have met such a burden already, so that the burden of proof to conduct a search is merely probable cause. But this begs the question of the justice of searching by assuming that we can search at all. Why, indeed, can I go looking for a bloody knife in the house of a man I suspect of murder? It might be argued that in the absence of searches, the clearance of crimes would be nearly impossible, and so searches are necessary to effect the important social function of deterrence by the means of increasing clearance rates at the expense of property rights. But surely this is the opposite of natural law: we don't trespass on a man's property to do good for him or for others. Instead, if such a thing as searches on probable cause is to a man's benefit, then he can be persuaded to consent to it explicitly in return for some consideration -- perhaps being a member of a mutual defense organization. We need not descend into theorizing about possible voluntary arrangements in a future libertopia. We need only point out that there seems to be no need to trespass on property, even for consequentialist reasons. What this leaves us with, then, is that as in other cases, the libertarian rejects balancing tests of any sort between the individual and society at large, and defends the sanctity of property.

But another type of balancing test looms. One might bend the Hand Rule into service. The Hand Rule (United States v. Carroll Towing Co.) famously stated that a barge owner had a duty to undertake a burden of precaution at least equal to P x L where P is the probability that the barge would become unmoored, and L is the injury resulting from the barge unmooring. One might suggest that the owner of the object of search has a duty to undergo a search when the disutility of the search is less than P x L, where P is the probability that the item will be found and L is the gravity of the larger case in question. For instance, if there is circumstantial evidence that A is culpable for a murder (L is large), and if a neighbor of A saw a bloody knife on a bookshelf just as A opened the door briefly to check his mail (P is large), can we apply a balancing test to say that his disutility of search is small compared to the possible very large gain to the victim's heirs and the community at large to seeing justice done? Though this is intuitively tempting, there seems to be no justice in it. If there is not enough evidence to convict A (be it in a civil court or criminal court -- we won't argue the merits of that standard of justice here), then there is no proof of criminality that allows us, in justice, to claim that his property rights are diminished. Again, we can imagine all sorts of possible voluntary arrangements that might work around this problem, but we will not consider them here.

Another argument could be advanced. We can imagine someone breaking in to retrieve the knife on the

chance that it would "make the case", and living with the consequences of a trespass suit if they didn't. In this case, the individual or company would weigh the various outcomes and their estimated probabilities. They might think that the chances that the knife is the murder weapon are pretty good (50-50?), and that they could get the knife with little effort, and that in case the knife is not the murder weapon, what they would owe for trespass would be small. They would also have to consider low-probability, high-disutility outcomes, such as the owner being home and shooting and killing the officers searching for the weapon. In such a case, the knife would not have been obtained and so no case against A could be made, and so the search is really an unjustified trespass that resulted in a very bad outcome. This is the sort of anarcho-capitalist arrangement that has no regard for libertarian ethics (ref. David Friedman, Machinery of Freedom), and we think that it flies in the face of 1000 years of the development of English and American law. The search warrant developed as a document of justification for sheriffs and constables and other state agents. As such, search warrants were and still are public documents, concerned with justifying the search rationally. The laws of justice act as "side contraints" to our prospective actions (Nozick, Anarchy, State, and Utopia). For these reasons, this sort of argument -- that we can trespass against A to get a knife with the prospect of making the case post hoc -- fails miserably as justificatory.

In sum, we can't seem to find any arguments to justify searching A's house that are also compatible with A's property rights and also the fact that, by hypothetical stipulation, A cannot be convicted of any wrongdoing. Some may see this as a weakness of propertarian libertarianism, but for those who are persuaded by libertarianism's justness, we must follow the argument where it leads us.

We concede the loophole that might invite one to drive a Mack truck through: that a search is forbidden as long as A has not been convicted of any wrongdoing. Most people have committed minor crimes. Speeding, private use of the company's office supplies, maybe even shoplifting a candy when young. What sort of conviction would warrant the slackening of one's rights such that searches could be conducted on his property? Since recidivism is a known criminological phenomenon, a reasonable rule that conforms to libertarian rights is that recent previous conviction under a similar offense is sufficient warrant to reduce property rights to allow for search. For instance, if A were previously convicted of a battery, then searching for purposes related to assault, battery, rape, murder, and even theft would be appropriate if the conviction is within the recent past -- say, fewer than 5 years. However, if A were previously convicted of check kiting, then he would still enjoy the protection of his property against searches for greater offenses, such as assault, battery, rape, and murder; but, he would be susceptible to search of his property in a case of suspected theft. These are acceptable hypothetical rules that are not inconsistent with libertarian ethical theory. Indeed, this sort of estoppel or temporary squelching of Fourth Amendment rights is part of contemporary US practice under some probation sentences, where searches for contraband such as weapons are performed at unannounced intervals by authorities, and we think that this practice is consistent with libertarian ethics.

With these basics in mind, we can now proceed to consider other specific elements of contemporary US practice.

Consent searches. In some cases, police will ask to search a person or his property. As long as consent to the search is not coerced, there is no libertarian objection to the search. Even when consent is obtained through identity deception, this is not generally objectionable. For instance, if an acquaintance asks a man to see whether he is armed, and the man shows him that he is, it is immaterial whether the acquaintance is a policeman or has told the man so. This analysis largely accords with contemporary US practice.

Plain view doctrine and seizure. In some cases, police will discover evidence in plain view. For instance, the policeman is invited into a house and he observes a bloody knife on the bookcase, or a document might be sitting on the seat of a car, and the document is legible through the window of the car. As long as the police officer is not trespassing when he peers through the car window, then the fact that he has ascertained that there is an incriminating document on the seat of a car is unobjectionable. Given the fact that the item is clearly incriminating, seizure of the item for evidence is just, since the perpetrator has every incentive to destroy or hide the item once he knows that it has been found. This analysis largely accords with contemporary US practice.

Arrest

Searches are sometimes for people, not just objects. In such cases, the object of the search is to locate the person and arrest him. What does the libertarian have to say about arrest? There seem to only be two good reasons to arrest a person: when the person has been convicted of a crime and is judged to be a standing threat to others, and therefore can justly be forcibly removed to a prison or at least ejected from a safe zone; or, when the person has been convicted of a crime, punishment is due, and he must be forcibly made to endure punishment. In either case, arrest follows conviction. This is in direct opposition to contemporary practice.

Contemporary practice is to arrest a man upon probable cause (which is a burden of proof lower than prepoderance of the evidence), hold a probable cause hearing to ensure the standard is met and if it is, arraign him (read charges and hear his plea), and then hold a bail hearing, where the judge rules whether he is a danger to the community, a flight risk, or there are other reasons (such as potential witness tampering) to deny bail. These practices do not accord with libertarian ethics. To deprive a man of his liberty, even if only for a day, one must have proven a case against him to an acceptable burden of proof. We will not quibble here whether it be reasonable doubt or preponderance of the evidence, but certainly it must be higher than probable cause. So, an arrest on probable cause is outside the bounds of justice.

If the same basic steps must be undertaken within the bounds of justice, and minimal changes to contemporary US practice were made, then we might see a suspect served notice of an arraignment, then the arraignment is held whether or not the suspect attends. As with mute defendents, his absence would indicate the entry of a "not guilty" plea. At the same time (either immediately before or after arraignment), a bail hearing could be conducted. Again, the suspect's attendance should not be compelled, since a case against him has not been proven. If the case were made that he is a threat to the community, then his arrest could justly be ordered. If the case were made that he is a flight risk, then his arrest *might* be ordered. In modern society, as long as the suspect is well-identified (name, ID cards, relations, etc.), it is very difficult for flight to be anything other than a dilatory tactic. So, if a flight risk is judged to be high, then detention for the purposes of gathering identification might be the most one needs to do. One must keep in mind the history of arrest and jailing. The original intent of jailing was to prevent flight -- to hold the suspect before the arrival of the judge. And the establishment of which offenses were bailable were primarily decided on the basis of flight risk. Indeed, in the US both the Judiciary Act of 1789 and the Bail Reform Act of 1966, both were concerned primarily with flight risk issues. (FN: Only the excessive leniency of the Bail Reform Act of 1966 brought a backlash and subsequent legislation in 1984 that allowed for pre-trial detention of individuals based upon their danger to the community, not just flight risk.) But as the world has grown more populous, the intensification of the division of labor means that isolation from society at large is not a real option. One cannot live well in the wild in autarky. So, the suspect that flees has great incentives to continue to be a part of society -- to work, to shop, etc. Also, with the rise of identification technologies and information storage, transmission, and retrieval technologies, surrepticiously changing or hiding one's identity is difficult. The historical evolution of bail setting should also reflect this. The true risk of flight of a suspect caught in 1275, when the Statute of Westminster first regulated the setting of bail, is much larger than the risk of flight of a suspect caught in 2010.

All of this discussion is not meant to be prescriptive in all details. The intent of this section is to point out the broad considerations of justice that are lacking in our criminal justice institutions. To sum up, the main objection that the libertarian has to the modern practice of arrest is that arrest is made before a case is proven against the suspect, whether it be for the underlying crime, as a standing threat to society, or as a flight risk. These procedures should come before the arrest or detention, not after. And, we must also look very hard at the risk of flight, since it has diminished significantly over the centuries with little change in bail practices. The gathering of information may be all that is warranted.

Hot pursuit, absent property owners, and arrest vs. detention

If a criminal is caught in the act, then immediate arrest may be warranted. The attempt to arrest a criminal caught in the act could result in a hot pursuit. If a criminal flees into a house, what is the security officer to do? Follow him or not? Does the officer have the right to enter the home of an absent property owner in

pursuit of a known criminal? Here, it is useful to invoke the legal doctrine of quasi-contract. In quasi-contract, we apply the rule of what the property owner should have or would have contracted for. For instance, a man in a restaurant has a heart attack and a nearby doctor attends to him. The doctor sends him a bill at the going market rate and the man must pay, because quasi-contract tells us that if he were in a condition to contract for such services, he would have. In the case of a known criminal fleeing into a house, the house is either that of the criminal, in which case we are justified to enter his property; or, the house is that of a third party, in which case we could credibly argue that any reasonable homeowner would prefer a security officer to remove the criminal from his property. These notions are largely in accord with contemporary US practice.

Now, given the case that a criminal is caught in the act, can we, in justice, arrest him? Here, we suggest that the security officer is justified in either detaining the criminal for purposes of gathering identification (in our modern age, fingerprints, check for identification cards, verify the genuineness of identification cards, photo, and possibly iris scan) or actually arresting him. An arrest, as we have explained above, is justified only in cases of standing threat, exceptional flight risk, or punishment for crime. Even though the security officer is in possession of virtually all facts of the case (by stipulation of our hypothetical), he does not typically have the standing to mete out punishment. So, it is only within the purview of the security officer to assess standing threat or flight risk. And so, someone caught in the act of a murder would definitely be arrested, whereas someone caught in the act of vandalism would not be, with debatable cases in between. Security officers are within the bounds of justice if they err on the side of caution, since in this case the criminal has already violated person or property. Of course, any arrest would then be followed by a bail hearing to formally assess the questions of flight risk and danger to the community. These notions are almost all in alignment with contemporary US practice. The main difference is that every perpetrator is arrested, regardless of the severity of the offense; and, because of this, all identification processes ("booking") are done at the jail.

Reasonable suspicion and detention

Reasonable suspicion is a lower standard of proof than probable cause. In modern US practice, officers are empowered to detain and question people that a reasonable person would suspect has been, is, or is about to commit a crime. While this "Terry stop" doctrine (see Terry vs. Ohio) is well-established in the US, and much jurisprudence has grown up around it (e.g., http://www.cga.ct.gov/2007/rpt/2007-R-0036.htm) we must drawn a bright line. Detention of a person is a restriction of liberty, and that restriction must be justified before it can be undertaken. This ethical stricture must be understood in the context of a pretty continuous history of state agents doing whatever they claim they can lawfully do, with legislatures and courts curbing the scope of their powers and abuses little by little over centuries of English and American history. Libertarian ethics are in no way compatible with detention on reasonable suspicion, nor their attendant "frisking".

Exigent circumstances

In some cases, modern US practice allows police to search and seize when they otherwise couldn't, under the condition that there is imminent danger to life, danger of serious destruction of property, escape of a suspect, or destruction of evidence. In US law, such exigent circumstances make an otherwise warrantless search lawful if probable cause exists. That is, the same standard of search applies (probable cause), but it can be a warrantless lawful search if exigent circumstances mean that obtaining a warrant would result in loss of quarry. Of course, libertarian ethics must come down hard on this practice, as well. Libertarian ethics require that the standard for search be more stringent, limited to cases of previous conviction of a similar underlying crime as described above. However, the notion that exigent circumstances can result in shortcutting standard procedures is a sound one. So, if a typical search of a convicted criminal required a written warrant, then exigent circumstances would justify search without a written warrant.

The search object: evidence vs. contraband

We have discussed arrest above (when the object of search is a person). When the object of search is a thing (document, weapon, shirt, DNA swab from the mouth), then the libertarian analysis can start doing

heavy lifting. The elephant in the room in the discussion of search powers is that they are mostly used to enforce laws that libertarians do not regard as crimes. Searches are made for drugs, weapons, evidence for consensual crimes like prostitution, goods for which there are trade restrictions, and goods that originate from embargoed countries. Above all, searches are used to collect taxes and ferret out "tax cheats", and to stop the free flow of money without it being taxed or its black-market source being discovered (the so-called crime of money laundering). Historically, state searches have been concerned with bullion controls, trade restrictions, enforcing guild regulations, upholding monopolies, regulating the behavior of the lower classes, finding political dissenters, finding religious dissenters, and taxes, taxes, taxes. So, the libertarian calls for an end to all searches for state-decreed contraband, an end to all searches that are used to enforce malum prohibitum laws. Just searches are for evidence, not state-decreed contraband.

Exclusionary rule

After having more or less completely vitiated the case for searches on reasonable doubt and probable cause, and therefore advocated for what would certainly result in a lower clearance rate on crimes, we can at least throw in a bone that the modern US doctrine of the exclusionary rule is unjust. The exclusionary rule states that if evidence is obtained either from a warrantless search, or from a search whose warrant is defective, then the quarry of that search is inadmissable in a criminal trial. This rule does not affect civil cases. Given the fact that criminal trials are state-based creations and that only civil trials conform to libertarian ethical standards (see on this account Benson, The Enterprise of Law: Justice without the State), the libertarian does not have a big "dog in the hunt", so to speak. Kinsella and Huebert (http://www.lewrockwell.com/kinsella/kinsella14.html) maintain that the exclusionary rule should be abolished. Taken as a single issue, we agree that it is unjust. Whether, on balance, justice is served by further strengthening the position of the criminal prosecutor is a more difficult call. Do criminal convictions help the victim or hurt the victim more? They help, in the sense that in the current system, substantial punishment (such as a prison term or death sentence) is only meted out in a criminal trial. But they hurt the victim, in the sense that a criminal conviction often results in a prison term, which means that any damages that are awarded in a subsequent civil trial have less probability of being paid, or paid promptly. It seems to us that these things depend on the case, and so we take no strong stand on the exclusionary rule.

Asset Forfeiture

In modern US practice, there are two types of forfeiture: civil forfeiture and criminal forfeiture. In civil forfeiture, the government must establish to the standard of probable cause that the property is subject to forfeiture. If it succeeds, then the owner must prove on a preponderance of the evidence that it is not, or the asset is forfeit to the state. For a property to be subject to forfeiture, it must have been used in the commission of a crime. This type of forfeiture proceeding is used most often in combatting drug crimes and other vice crimes like gambling, prostitution, and especially organized vice crimes. Of course, the libertarian objects first that such vices are not crimes (ref. Lysander Spooner, Vices are not Crimes). Secondly, the libertarian objects that even for an actual, malum in se crime -- say, kidnapping -- the asset should not be forfeit to the state, but forfeit to the victim. Thirdly, the libertarian objects to the fact that there is no proportionality test. Given that a wrong was committed, the punishment or restitution should match the severity of the offense. No such criteria are applied in asset forfeiture cases. Fourthly, the libertarian objects that the legal procedure itself is unjust. Before seizure, the prosecution should have to prove its case to the proponderance of the evidence standard. Only once the burden of proof has been met can a man be justly deprived of his property. Of course, the ridiculous notion of having to prove a negative (that the property was not involved in the commission of a particular alleged crime) to a high standard like "preponderance of the evidence" is a much higher hurdle than it might initially sound. Proving a negative is notoriously difficult.

In the modern US practice of criminal forfeiture, a man must be convicted to the criminal standard of reasonable doubt, and then a forfeiture proceeding is used as a punitive action. As in the civil forfeiture, the seized property is sold at auction with the proceeds funding law enforcement activities. And so, as in the civil forfeiture criticism above, the libertarian objects to the lack of proportionality, the fact that the proceeds do not go to the victim, and (separately) that they enrich the state.

Theory of Search Efficacy

According to Ahlberg and Knutsson (The Risk of Detection), there are three classes of crime. Each class of crime has a different characteristic of risk detection, a different characteristic mode of investigation, and a different set of incentives regarding searches. Those classes are: victim-crime with interaction, victim-crime without interaction, and detection-and-intervention crimes. Examples of victim-crimes with interaction include murder, rape, robbery, assault, battery, and fraud. Examples of victim-crimes without interaction include vandalism, theft and burglary. Examples of detection-and-intervention crimes include all malum prohibitum offenses, such as drunk driving, drug use and trafficking, prostitution, smuggling, tax evasion, and money laundering.

In a victim-crime with interaction, the majority of the evidence to convict, if conviction is possible, is at hand. Victim-crime with interaction means that there may be blood, semen, DNA, fingerprints, and eyewitness testimony of the victim. Besides the information that is present on the victim's body or clothes, there is usually one key datum required to clear the crime: the identity of the criminal. In some cases, finding and forensically investigating the weapon used may be necessary to make the case. If the victim can supply a name in these cases, the crime is almost always cleared. Failing that, many times a composite sketch can be drawn and leads can be followed to find suspects that match the description. Searches may aid the investigator once a suspect is identified, either to search for a weapon or obtain forensic samples to match to crime scene data. However, it is often the case that the mere identification of the suspect, and having the victim identify him from a photograph, is sufficient to make the case.

In victim-crime with no interaction, again, the majority of the evidence to convict, if conviction is possible, is at hand. In these cases, we may have fingerprints, markings from the use of a crowbar, boot prints, or tire marks. These cases are notoriously difficult to solve unless solid leads are available that lead to the identity of the criminal. Searches may aid the investigator as above, but only once a suspect is identified. Again, the identification of the suspect is usually the end of the investigation.

In detection-and-intervention crimes, the participants to the crime are not interested in the state detecting the crime, and either hide or work to prevent detection (consider radar detectors and the old speakeasy lookouts). The state must observe the crime to have a chance at solving the case. Where more than one person is party to the crime, if one person is caught (e.g., in possession of contraband), he will be offered leniency or outright immunity to inform on the other parties to the crime. So, a man may be found in possession of marijuana and offered immunity if he will give the name and whereabouts of his dealer or dealers. Alternatively, a third party may become aware criminal activity and this informant reports what he knows to the investigators – typically, name and whereabouts of the suspect(s). Once in possession of these leads, the investigator is still not very far. In the victim-crimes, if a suspect is identified, the case is generally made – not so in the detection-and-intervention crimes. Here, the search power is virtually essential to move the case forward. Unlike the other two crime categories, the detection-and-intervention crimes start with the identification of a suspect and must proceed with searches. The only other tool that the investigator has is to attempt to arrange a "sting", where he and his fellow investigators pose as criminals themselves, offering to engage in gambling or prostitution or drug trafficking.

The table below offers more information and sums up the discussion.

		Where is the majority of the evidence?	How does investigation start?	Primary object of investigation	Search Power
Victim-crimes with interaction	Murder	Person of the Victim	Victim complaint, offers evidence and leads	Identity of the suspect	Can assist once suspect is identified
	Kidnapping	Scene, eyewitnesses, ransom note	Monitor communications	Identity of the suspect	Not generally necessary
	All others	Person of the Victim	Victim discovery, offers evidence and leads	Identity of the suspect	Not generally necessary
Victim-crimes without interaction	Damage only (arson, vandalism)	Property of the Victim	Victim complaint, offers evidence and leads	Identity of the suspect	Can assist once suspect is identified
	Theft, burglary		Victim complaint, offers evidence and leads	Identity of the suspect and possibly recovery of goods	Can assist once suspect is identified
Detection-and-Intervention Crimes	Solo (speeding, drunk driving)	Property of the Criminal	Public observation	Witness and apprehend	Not generally necessary
	Interactive (drug trafficking, prostitution, smuggling)		Informant offers suspects	Contraband or proof of transaction	Essential – must be used to advance case, or use of “sting”