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The Fourth Amendment in the Information Age

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THE FOURTH AMENDMENT IN THE INFORMATION AGE

*Ricardo J. Bascuas**

ABSTRACT

*In 2013, the Supreme Court tacitly conceded that the expectations-of-privacy test used since 1967 to assess claims of Fourth Amendment violations was inadequate. It asserted that the previous property-based test for Fourth Amendment violations had never—despite widespread agreement to the contrary—been overruled. The Court compounded its artfulness by applying a new, significantly weaker trespass test that, like the expectations-of-privacy test, enjoys no legal pedigree. This new trespass test, which is to be applied together with the expectations-of-privacy test, suffers from the same defect as the test it purportedly supplements. It does not require the government to respect private property rights absent probable cause. Part I describes *Olmstead v. United States*, an early missed opportunity to have created a pragmatic Fourth Amendment trespass test that set the stage for the unpredictable and unprincipled jurisprudence that Justice Brandeis' ill-conceived dissent later inspired. Part II explains how the expectations-of-privacy test that originated with *Katz v. United States* in 1967 allowed the Court to put sensitive records and communications as well as contraband beyond the Fourth Amendment's scope. *Katz* also helped turn the ever-growing number of pervasive corporations against their customers and into surveillance agents for the government. Part III demonstrates how *Katz*'s superfluous and sweeping pronouncements about privacy expectations added no significant constitutional*

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protection that the trespass test it supplanted did not already afford. Instead, it enabled the erosion of significant rights that had existed. Jones consciously perpetuates these flaws, affording courts no help in adjudicating Fourth Amendment claims involving new technology. Part IV shows that, in federal fraud cases, the Court identifies property interests using a pragmatic, flexible, common-law approach consistent with the pre-Katz trespass test. It argues that this same analysis could be applied to Fourth Amendment claims, resolving the problems that the expectations-of-privacy approach has generated.

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In October 2009, Sprint Nextel’s manager of electronic surveillance spoke at a conference in Washington, D.C., for telecommunications company employees and law enforcement and intelligence agents.¹ He boasted that the cellular telephone carrier had created an automated system for law enforcement officers to easily learn

¹ Christopher Soghoian, *DEA Rejects FOIA for 38 Pages of Docs Related to Sprint’s Digital Surveillance API*, SLIGHT PARANOIA (March 23, 2011), <http://paranoia.dubfire.net/2011/03/dea-rejects-foia-for-38-pages-of-docs.html>.

the location of any Sprint Nextel customer.² Federal agents accessed the automated tracking system eight million times between September 2008 and October 2009 without oversight or demonstration of good cause.³ Paul Taylor, the Sprint Nextel manager, boasted about the Drug Enforcement Agency's use of the company's state-of-the-art interface:

We have a pilot program with them, where they have a subpoena generation system in-house where their agents actually sit down and enter case data, it gets approved by the head guy at the office, and then from there, it gets electronically sent to Sprint, and we get it ... So, the DEA is using this, they're sending a lot and the turn-around time is 12-24 hours. So we see a lot of uses there.⁴

Privacy researcher and blogger Christopher Soghoian, who was in attendance, posted recordings of the panel discussion on the Internet.⁵ The blog post drew attention to Soghoian's ongoing efforts to ascertain the scope of government surveillance conducted with corporate help.⁶ Two days later, TeleStrategies, the company hosting the "Intelligence Support Systems for Lawful Interception, Criminal Investigation and Intelligence Gathering" conference, forced Soghoian to remove the videos, claiming copyright infringement.⁷ Sprint Nextel disingenuously said via Twitter that Taylor's unabridged comments were "taken out of context."⁸

² *Id.*

³ *Id.*

⁴ *Id.* (alteration in original).

⁵ Christopher Soghoian, *8 Million Reasons for Real Surveillance Oversight*, SLIGHT PARANOIA (Dec. 1, 2009), http://paranoia.dubfire.net/2009_12_01_archive.html.

⁶ Jon Stokes, *Sprint Fed Customer GPS Data to Cops over 8 Million Times*, ARS TECHNICA (Dec. 1, 2009, 6:38 PM), <http://arstechnica.com/telecom/news/2009/12/sprint-fed-customer-gps-data-to-leos-over-8-million-times.ars>.

⁷ Soghoian, *supra* note 5.

⁸ Rich Pesce, *Sharing Location Information*, SPRINT COMMUNITY (Dec. 1, 2009, 3:30 PM), <http://community.sprint.com/baw/community/sprintblogs/announcements/blog/2009/12/01/sharing-location-information>.

In his blog post publicizing Sprint Nextel's disclosure, Soghoian pointed out that Sprint Nextel is not the only company handing over customer data to the government: "These Internet/telecommunications firms all have special departments, many open 24 hours per day, whose staff do nothing but respond to legal requests. Their entire purpose is to facilitate the disclosure of their customers' records to law enforcement and intelligence agencies" ⁹ The information routinely disclosed includes "the telephone numbers dialed, text messages, emails and instant messages sent, web pages browsed, the queries submitted to search engines, and geolocation data, detailing exactly where an individual was located at a particular date and time." ¹⁰ The scale on which this type of surveillance occurs is unknown.

Soghoian had long been working to learn how much government surveillance is conducted through telecommunications companies. Before the 2009 ISS World conference, he theorized that knowing the rates these companies charge the government for each surveillance request—they do not do this for free—would help him estimate the frequency of requests. Soghoian made Freedom of Information Act requests to federal law enforcement agencies to learn the prices carriers charged them for customer data. ¹¹ Carriers objected, claiming that all information related to their disclosures to law enforcement agencies is secret. ¹² After the conference, Soghoian specifically requested information regarding the DEA's use of Sprint Nextel's system; the DEA declined to produce any information. ¹³

Even small, local police departments now routinely obtain location information, text messages, and other data from cellular carriers. ¹⁴

⁹ Soghoian, *supra* note 5.

¹⁰ *Id.*

¹¹ Christopher Soghoian, *FOIA Returns 91 Invoices for Yahoo Surveillance, 1 for Google*, SLIGHT PARANOIA (Jan. 18, 2010), <http://paranoia.dubfire.net/2010/01/foia-returns-91-invoices-for-yahoo.html>; Soghoian, *supra* note 5.

¹² Soghoian, *supra* note 5.

¹³ Soghoian, *supra* note 1.

¹⁴ Eric Lichtblau, *Police Are Using Phone Tracking as a Routine Tool*, N.Y. TIMES, Apr. 1, 2012, at A1.

Providers of Internet, email, cloud-storage, and “social-networking” services also provide information.¹⁵ Companies and government agencies seek to minimize the attention paid to this practice undoubtedly because of the Orwellian flavor to the idea that the corporations responsible for everyone’s personal communications and files are government clients. One police department, for example, instructed officers not to discuss cellular tracking publicly and not to mention it in police reports.¹⁶ But neither do agencies and corporations conceal their information trade, which is, from the point of view of big government and big business, just the natural result of the way things are. The corporations have information, the government can subpoena it, and the corporations have no choice but to turn it over. It’s that way in China,¹⁷ and it’s that way in the United States of America.

For more than 80 years, the Supreme Court has fretted over the surveillance capabilities the information age has provided the federal, state, and local governments. Listening devices,¹⁸ recording equipment,¹⁹ tracking devices,²⁰ surveillance aircraft,²¹ thermal imagers,²² urinalysis,²³

¹⁵ See, e.g., *Transparency Report*, GOOGLE, <http://www.google.com/transparencyreport/userdatarequests/US/?p=2011-12> (last visited Apr. 20, 2013).

¹⁶ Lichtblau, *supra* note 14.

¹⁷ See Ricardo J. Bascuas, *Property and Probable Cause: The Fourth Amendment’s Principled Protection of Privacy*, 60 RUTGERS L. REV. 575, 575–80 (2008) (describing Congressional hearings over an email service provider’s giving a political dissident’s emails to the Chinese government, which then imprisoned the dissident).

¹⁸ *United States v. White*, 401 U.S. 745 (1971) (plurality opinion) (holding that conversations with bugged informant were not protected by the Fourth Amendment); *Silverman v. United States*, 365 U.S. 505, 509 (1961) (holding use of “spike mike” unconstitutional and describing parabolic microphone).

¹⁹ *Lopez v. United States*, 373 U.S. 427 (1963) (holding that recording of undercover agent’s conversation with defendant did not violate the Fourth Amendment).

²⁰ *United States v. Karo*, 468 U.S. 705 (1984); *United States v. Knotts*, 460 U.S. 276 (1983).

²¹ *Florida v. Riley*, 488 U.S. 445 (1989); *California v. Ciraollo*, 476 U.S. 207 (1986).

²² *Kyllo v. United States*, 533 U.S. 27 (2001).

²³ *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002); *Ferguson v. City of Charleston*,

and hemanalysis²⁴ have had justices fretting over the Fourth Amendment's ability to protect private life from technological encroachment. In 1928, Justice Brandies forebodingly warned: "Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home."²⁵ Nearly 40 years later, Justice Douglas feared the situation had grown dire: "We are rapidly entering the age of no privacy, where everyone is open to surveillance at all times; where there are no secrets from government."²⁶ "The law, though jealous of individual privacy, has not kept pace with these advances in scientific knowledge," concluded Justice Clark a year later.²⁷

Consternation over tomorrow's surveillance technology has been the constant feature of an otherwise haphazard Fourth Amendment jurisprudence. The Court tried proceeding incrementally, as in 1961's *Silverman v. United States*, when Justice Stewart's majority reached a narrow holding rather than attempting one that would curtail the use of parabolic microphones "and other frightening paraphernalia which the vaunted marvels of an electronic age may visit upon human society."²⁸ Forty years later, another majority took the opposite tack. Alarmed that X-ray vision "is a clear, and scientifically feasible, goal of law enforcement research and development," Justice Scalia's opinion in *Kyllo v. United States* sought to craft a future-proof holding: "While the technology used in the present case was relatively crude, the rule we adopt must take account of more sophisticated systems that are already in use or in development."²⁹

532 U.S. 67 (2001); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656 (1989).

²⁴ *Schmerber v. United States*, 384 U.S. 757, 767 (1966).

²⁵ *Olmstead v. United States*, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting).

²⁶ *Osborn v. United States*, 385 U.S. 323, 342–43 (1966) (Douglas, J., dissenting in two cases and concurring in one); *see also Schmerber*, 384 U.S. at 778–79 (Douglas, J., dissenting).

²⁷ *Berger v. New York*, 388 U.S. 41, 49 (1967).

²⁸ *Silverman v. United States*, 365 U.S. 505, 509 (1961).

²⁹ *Kyllo v. United States*, 533 U.S. 27, 35 & n.3 (2001).

The Court has vacillated not only over the breadth of its holdings but also over the substance of what the Fourth Amendment prohibits. Until 1967, the Court evaluated Fourth Amendment claims using property law concepts, reasoning that the amendment prohibited government from trespassing property without good reason. So, in 1928's *Olmstead v. United States*, the Court upheld wiretaps of telephone lines used by the defendants but physically located outside their homes and offices.³⁰ The intercepted conversations, being neither papers nor effects, could not be seized, reasoned the Court.³¹ After years of intermittent progress toward repudiating *Olmstead's* faulty reasoning, the Court abandoned the property framework in 1967, holding in *Katz v. United States* that the Fourth Amendment protects an implicit right to privacy.³² This created a great many problems and solved none.

Forty-five years after *Katz*, a bare majority of the Court implicitly conceded what had for decades been obvious: that the *Katz* test often sanctions intrusions that the Fourth Amendment ought, by its plain terms, to condemn. The Court unanimously concluded in *United States v. Jones* that police officers violated the Fourth Amendment when they attached a tracking device to a Jeep parked in a public lot—but divided over why.³³ Four justices believed GPS tracking infringed on “expectations of privacy”³⁴ while the majority invoked the pre-*Katz* property framework,³⁵ claiming that “the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test.”³⁶ If this

³⁰ *Olmstead*, 277 U.S. at 464.

³¹ *Id.*

³² *Katz v. United States*, 389 U.S. 347, 259 (1967).

³³ *United States v. Jones*, 132 S. Ct. 945 (2012).

³⁴ *Id.* at 958 (Alito, J., concurring).

³⁵ This is not the first time Justice Scalia has channeled Chief Justice Taft in a Fourth Amendment case. In *Wyoming v. Houghton*, 526 U.S. 295 (1999), Justice Scalia applied the same methodology that Chief Justice Taft used for determining whether a search was unreasonable in *Carroll v. United States*, 267 U.S. 132 (1925). See Ricardo J. Bascuas, *Fourth Amendment Lessons from the Highway and the Subway: A Principled Approach to Suspicionless Searches*, 38 RUTGERS L.J. 719, 739–41 (2007).

³⁶ *Jones*, 132 S. Ct. at 952.

were true, it would mean that the Court had been lying for years.³⁷ Nearly every justice to sit on the Court since *Katz*—including every justice on the *Jones* Court (except the recently confirmed Justice Elena Kagan)—had until *Jones* said that *Katz* overruled *Olmstead*—and not by elaborating on its approach but by supplanting the property framework with one based only on an ill-defined notion of privacy.³⁸ An earlier majority opinion,

³⁷ None of the cases on which *Jones* relied to support its re-characterization of *Katz* lent support. On the contrary, these cases went to great pains to explain why the *Katz* formulation alone sufficed to determine whether a search occurred and pretended that the *Katz* test invariably offers broader Fourth Amendment protection than the trespass test it supplanted. *Alderman v. United States*, 394 U.S. 165 (1969), gave a property owner standing to object to the admission of conversations other people had in his premises not on the basis of a trespass theory, but on the theory (coincidentally also espoused by Justice Scalia’s majority opinion in *Kyllo v. United States*) that everything inside a home is private. The Court held that, whether there is a trespass or not, “officialdom invades an area in which the homeowner has the right to expect privacy for himself, his family, and his invitees, and the right to object to the use against him of the fruits of that invasion, not because the rights of others have been violated, but because his own were.” *Id.* at 179 n.11. *Oliver v. United States* predicated its holding not on “open fields” being outside of the Fourth Amendment’s scope, but on their not being private: “The existence of a property right is but one element in determining whether expectations of privacy are legitimate.” 466 U.S. 170 (1984). *United States v. Soldal* involved a seizure, not a search, and consequently it was enough that the mobile-home owners had been unlawfully dispossessed of their property: “[S]eizures of property are subject to Fourth Amendment scrutiny even though no search within the meaning of the Amendment has taken place.” 506 U.S. 58, 68 (1992).

³⁸ See *City of Ontario v. Quon*, 130 S. Ct. 2619, 2629 (2010) (opinion of the Court by Kennedy, J., joined by Roberts, C.J., & Stevens, Thomas, Ginsburg, Breyer, Alito & Sotomayor, JJ.) (citing *Olmstead* as being overruled by *Katz*); *United States v. Knotts*, 460 U.S. 276, 280 (1983) (opinion of the Court by Rehnquist, C.J., joined by Burger, White, Marshall, Powell & O’Connor, JJ.) (noting that in *Katz*, “the Court overruled *Olmstead* saying that the Fourth Amendment’s reach ‘cannot turn upon the presence or absence of a physical intrusion into any given enclosure’”); *United States v. Johnson*, 457 U.S. 537, 559 (1982) (opinion of the Court by Blackmun, J., joined by Brennan, Marshall, Powell & Stevens, JJ.) (citing *Katz* as overruling *Olmstead*); *Rakas v. Illinois*, 439 U.S. 128, 143 (1978) (opinion of the Court by Rehnquist, J., joined by Burger, C.J., & Stewart, Blackmun & Powell, JJ.); (stating that *Katz* “repudiate[ed] the doctrine derived from” *Olmstead* and *Goldman*); *Kaiser v. New York*, 394 U.S. 280, 282 (1969) (opinion of the Court by Stewart, J., joined by Warren, C.J., & Brennan, White & Marshall, JJ.) (“[*Olmstead*], then, stated the controlling interpretation of the Fourth Amendment with respect to wiretapping until it was overruled by [*Katz*].”); *Desist v.*

also penned by Justice Scalia, outright said that the Court had “decoupled violation of a person’s Fourth Amendment rights from trespassory violation of his property”³⁹ *Katz* itself hinted as much when it held that *Olmstead*’s underpinnings “have been so eroded by our subsequent decisions that the ‘trespass’ doctrine there enunciated can no longer be regarded as controlling.”⁴⁰ Until *Jones*, *Katz*’s overruling of *Olmstead* was

United States, 394 U.S. 244, 247–48 (1969) (opinion of the Court by Stewart, J., joined by Warren, C.J., & Brennan, White & Marshall, JJ.) (“Our holding [in *Katz*] that [*Goldman*] and [*Olmstead*] ‘can no longer be regarded as controlling’ recognized that those decisions had not been overruled until that day.”) (citation omitted); *see also* *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 920 (2010) (Roberts, C.J., concurring, joined by Alito, J.) (citing *Olmstead* as being overruled by *Katz*); *Harper v. Va. Dep’t of Taxation*, 509 U.S. 86, 109 (1993) (Scalia, J., concurring) (same); *Florida v. Riley*, 488 U.S. 445, 459 n.3 (1989) (Brennan, J., dissenting, joined by Stevens, J.) (“And of course [*Katz*], which overruled *Olmstead*, made plain that the question whether or not the disputed evidence had been procured by means of a trespass was irrelevant.”); *California v. Greenwood*, 486 U.S. 35, 51 (1988) (Brennan, J., dissenting, joined by Marshall, J.) (“The Court properly rejects the State’s attempt to distinguish trash searches from other searches on the theory that trash is abandoned and therefore not entitled to an expectation of privacy.”); *California v. Rooney*, 483 U.S. 307, 320 (1987) (White, J., dissenting from dismissal of writ of certiorari, joined by Rehnquist, C.J., & Powell, J.) (assuming that petitioner retained ownership of garbage and stating, “Rooney’s property interest, however, does not settle the matter for Fourth Amendment purposes, for the reach of the Fourth Amendment is not determined by state property law”); *United States v. Jacobsen*, 466 U.S. 109, 138 (1984) (Brennan, J., dissenting, joined by Marshall, J.) (“Fortunately, we know from precedents such as [*Katz*], overruling the ‘trespass’ doctrine of [*Goldman*] and [*Olmstead*], that this Court ultimately stands ready to prevent this Orwellian world from coming to pass.”); *United States v. Peltier*, 422 U.S. 531, 547 n.5 (1975) (Brennan, J., dissenting, joined by Stewart & Marshal, JJ.) (citing *Katz* as having “explicitly” overruled *Olmstead*); *Williams v. United States*, 401 U.S. 646, 653–54 (1971) (plurality opinion by White, J., joined by Burger, C.J., & Stewart & Blackmun, JJ.) (“[*Katz*] overruled [*Olmstead*] and [*Goldman*] and gave expanded Fourth Amendment protection against nonconsensual eavesdropping.”); *United States v. White*, 401 U.S. 745, 748–49 (1971) (plurality opinion by White, J., joined by Burger, C.J., & Stewart & Blackmun, JJ.) (recognizing that the Court in *Katz* overruled *Goldman* and *Olmstead*); *id.* at 780 (Harlan, J., dissenting) (“[*Katz*] added no new dimension to the law. At most it was a formal dispatch of [*Olmstead*] and the notion that such problems may usefully be resolved in the light of trespass doctrine”).

³⁹ *Kyllo v. United States*, 533 U.S. 27, 32 (2001) (citing *Rakas*, 439 U.S. at 143).

⁴⁰ *Katz v. United States*, 389 U.S. 347, 353 (1967).

such a foregone certainty that the most influential legal style manual used *Olmstead* to illustrate how to cite an overruled case.⁴¹

Katz declared “expectations of privacy” to be the concept at the core of the Fourth Amendment, disregarding its language as well as the trespass standard. With *Katz*, the Court licensed itself to withdraw the Fourth Amendment’s protection from virtually all modern records and communications and from contraband—two types of property that the Fourth Amendment was most certainly meant to protect. In the process, the Court turned corporate service providers against their customers and conscripted them into service as government spies.⁴² Given that relationships with giant corporations penetrate even the most intimate aspects of modern life, the expectations-of-privacy framework has ironically proven deeply inimical to individual privacy.

Despite its pretensions, *Jones* does not redress *Katz*’s flaws so much as mimic them. *Jones* creates a new trespass test, just as malleable as *Katz*’s expectations-of-privacy approach. The test combines a narrow, recently contrived definition of “seizure” with narrow, colonial-era notions of houses, papers, and effects. *Jones* thus repudiates the idea, embodied in the Court’s pre-*Katz* holdings, that technological innovation yields new forms of property entitled to full Fourth Amendment protection. By 1967, the Court had made significant progress toward a pragmatic, flexible understanding of “papers” and “effects”—one adaptable to technological change—repudiating *Olmstead*’s two key premises. It ruled that the amendment protected against trespasses in a broad rather than a legalistic sense and that conversations, despite being intangible, were protected “papers” or “effects”. The Court’s post-*Katz* Fourth Amendment jurisprudence, including *Jones*, has disregarded that pragmatic, principled understanding of a Fourth Amendment violation. But the property notions underlying it have endured. Outside of the Fourth Amendment context, the Supreme Court and the lower federal courts have

⁴¹ THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 10.7.1(c)(i), at 102 (Columbia Law Review Ass’n et al. eds., 19th ed. 2010).

⁴² See Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 773 (1964) (“Today it is the combined power of government and the corporations that presses against the individual.”).

shown that they have relatively little difficulty identifying new forms of property in a changing world. Because the Fourth Amendment expressly protects property, it can do the work it was designed to do only if it is understood as protecting property in all its forms against unjustified intrusion.

I. *KATZ'S* FLAWED FOUNDATION

In 1927, when a wired telephone was cutting-edge communications technology, AT&T and the other phone companies of the day sided with their customers against the government in a case testing the scope of the Fourth Amendment. The text's guarantee of the people's right "to be secure in their persons, houses, papers, and effects" was understood as a right to exclusive dominion over their property (and their bodies).⁴³ The case, *Olmstead v. United States*, asked whether this protection extended to the telephone conversations of a large-scale Seattle bootlegging operation.

It was the dawn of the information age, a time when AT&T was completing its consolidation of regional telephone carriers into the Bell System, with the audacious aim of linking the entire world. "Indeed, the phrase used to describe the era that the Bell scientists helped create, the age of information, suggested we had left the material world behind. A new commodity—weightless, invisible, fleet as light itself—defined the times."⁴⁴ Ethereal though it might be, from the telephone companies' standpoint, that commodity—information—was no less property because it was not recorded on paper. They urged the Court to recognize that

⁴³ *Boyd v. United States*, 116 U.S. 616, 630 (1886) (noting that the Fourth Amendment's underlying principles "apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property . . .").

⁴⁴ JON GERTNER, *THE IDEA FACTORY* 11 (2012).

telephone calls were, like letters sent through the mail, protected by the Fourth Amendment from unauthorized tapping by federal agents:

When the lines of two “parties” are connected at the central office, they are intended to be devoted to the exclusive use, and in that sense to be turned over to the exclusive possession, of the parties. A third person who taps the lines violates the property rights of both persons then using the telephone, and of the telephone company as well.⁴⁵

While “deplor[ing] the use of their facilities in furtherance of any criminal or wrongful enterprise,” the phone companies maintained that “it is better that a few criminals escape than that the privacies of life of all the people be exposed to the agents of the Government, who will act at their own discretion, the honest and the dishonest, unauthorized and unrestrained by the courts.”⁴⁶

Judge Frank Rudkin, who was on the Ninth Circuit panel that considered the case, likewise envisioned a Fourth Amendment encompassing new forms of property created by technology. (The phone companies’ brief and one of the petitioners’ briefs quoted his dissent.⁴⁷) Judge Rudkin relied on *Ex parte Jackson*,⁴⁸ a landmark nineteenth-century case holding that the Fourth Amendment protected mailed letters and packages from inspection. If people’s thoughts were in the telephonic age to be carried by wires rather than papers, he reasoned, the word “papers” in the Fourth Amendment was capacious enough to embrace those messages:

[I]t is the contents of the letter, not the mere paper, that is thus protected. What is the distinction between a message sent by letter and a message sent by telegraph or by

⁴⁵ Brief for Pac. Tel. & Tel. Co. et al. as Amici Curiae at 4, *Olmstead v. United States*, 277 U.S. 438 (1928) (No. 493) (citing *Int’l News Serv. v. Assoc. Press*, 248 U.S. 215 (1918)).

⁴⁶ *Id.* at 9.

⁴⁷ *Id.* at 7; Brief of Petitioners Edward H. McInnis, Charles S. Green, Emory A. Kern, Z.J. Hendrick, Edward Erickson, William P. Smith at 11–12, *Olmstead v. United States*, *Green v. United States*, *McInnis v. United States* (Feb. 6, 1927).

⁴⁸ 96 U.S. 727, 733 (1877).

telephone? True, the one is visible, the other invisible; the one is tangible, the other intangible; the one is sealed, and the other unsealed; but these are distinctions without a difference. A person using the telegraph or telephone is not broadcasting to the world. His conversation is sealed from the public as completely as the nature of the instrumentalities employed will permit, and no federal officer or federal agent has a right to take his message from the wires, in order that it may be used against him.⁴⁹

This pragmatic view of information constituting property drew support from the Supreme Court's 1918 decision in *International News Service v. Associated Press*.⁵⁰ The Associated Press sought to enjoin International News Service from republishing news that AP reporters had gathered and published.⁵¹ As Justice Holmes noted, the telegraph and telephone made it possible for the INS to republish AP-generated news very shortly after—and, on the west coast, sometimes before—AP published it.⁵² The Court undertook to decide whether information gathered by a news company's reporters constitutes property and, if so, whether that news loses its character as property once it is published.⁵³ Rather than trying to determine whether news would have technically constituted property at common law, the Court used a functional approach to sustain its jurisdiction over the cause.⁵⁴ Applying this same pragmatic view of property to the merits, the Court had little trouble concluding that

⁴⁹ *Olmstead v. United States*, 19 F.2d 842, 850 (9th Cir. 1927) (Rudkin, J., dissenting), *aff'd*, 277 U.S. 438 (1928).

⁵⁰ Brief for Pac. Tel., *supra* note 45, at 4 (citing *Int'l News Serv.*, 248 U.S. 215).

⁵¹ 248 U.S. at 231.

⁵² *Id.* at 247 (Holmes, J., dissenting).

⁵³ *Id.* at 232 (majority opinion).

⁵⁴ *Id.* at 236–37 (“In order to sustain the jurisdiction of equity over the controversy, we need not affirm any general and absolute property in the news as such. The rule that a court of equity concerns itself only in the protection of property rights treats any civil right of a pecuniary nature as a property right and the right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already acquired.” (citations omitted)).

the news gathered by AP reporters was the company's property because it took effort to acquire and was marketable:

Not only do the acquisition and transmission of news require elaborate organization and a large expenditure of money, skill, and effort; not only has it an exchange value to the gatherer, dependent chiefly upon its novelty and freshness, the regularity of the service, its reputed reliability and thoroughness, and its adaptability to the public needs; but also, as is evident, the news has an exchange value to one who can misappropriate it.⁵⁵

The Court rejected the idea that news ceased to be property for these purposes upon publication: "The peculiar value of news is in the spreading of it while it is fresh; and it is evident that a valuable property interest in the news, as news, cannot be maintained by keeping it secret."⁵⁶

Ten years later, however, the Court was far more rigid in evaluating the Bell Companies' contention that a telephone conversation similarly constituted property. Chief Justice William Howard Taft's opinion for the Court in *Olmstead* framed the issue as whether the Fourth Amendment could be violated by a wiretap effected "without trespass upon any property of the defendants."⁵⁷ The majority held that the case did not implicate the Fourth Amendment for two reasons. First, the conversations themselves, being intangible, were not papers or effects and could not be seized.⁵⁸ Second, because the wiretaps were made without entering the defendants' houses or offices, there was no trespass of any property.⁵⁹

⁵⁵ *Id.* at 238.

⁵⁶ *Id.* at 235.

⁵⁷ *Olmstead v. United States*, 277 U.S. 438, 455–57 (1928).

⁵⁸ *Id.* at 466.

⁵⁹ *Id.* ("Neither the cases we have cited nor any of the many federal decisions brought to our attention hold the Fourth Amendment to have been violated as against a defendant unless there has been an official search and seizure of his person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house 'or curtilage' for the purpose of making a seizure.").

Only Justice Pierce Butler would have sustained AT&T's contention that the Court should give "papers" and "effects" a more flexible definition and treat telephone conversations the same way as mailed correspondence: "The contracts between telephone companies and users contemplate the private use of the facilities employed in the service. The communications belong to the parties between whom they pass."⁶⁰

In a dissent regrettably destined to be more influential, Justice Louis Brandeis availed himself of some of the more colorful flourishes from the phone companies' brief. (For example, the brief stated: "[T]he telephone system offers a means of espionage compared to which general warrants and writs of assistance were the puniest instruments of tyranny and oppression."⁶¹ Justice Brandeis' opinion: "As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire tapping."⁶²) But Justice Brandeis' argument swept far more broadly and metaphysically than the Bell System's. It grandiloquently trumpeted that the Framers of the Fourth Amendment intended to protect not mere property but the thoughts and feelings comprising every individual personality:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.⁶³

⁶⁰ *Id.* at 487 (Butler, J., dissenting).

⁶¹ Brief for Pac. Tel., *supra* note 45, at 7–8.

⁶² *Olmstead*, 277 U.S. at 474 (Brandeis, J., dissenting) (footnotes omitted).

⁶³ *Id.* at 478.

This was a quite romantic view of history. It was not the Founders but Louis Brandeis himself and his law partner, Samuel Warren, who sought legal recognition of “man’s spiritual nature, of his feelings and of his intellect,” in their 1890 *Harvard Law Review* article, *The Right to Privacy*.⁶⁴ That article suggested how tort law might develop to deal with invasions of privacy committed not by the government but by a sensational press eager to meet the timeless demand for scandal. In 1890, “instantaneous photographs” made possible “the unauthorized circulation of portraits of private persons” while newspapers freely publicized people’s words and acts.⁶⁵ The article lamented the proliferation of photography and yellow journalism, precursors to today’s costless propagation of compromising images, videos, and other information on the Internet. Brandeis and Warren complained that the newspapers’ profiteering from vice and banalities muffled civic discourse:

Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. ... When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance.⁶⁶

The article has a lot to say about whether being “tagged” in an embarrassing photograph on Facebook should give rise to a cause of action⁶⁷ but nothing at all to do with government surveillance or the Fourth Amendment.

⁶⁴ Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

⁶⁵ *Id.* at 195.

⁶⁶ *Id.* at 196.

⁶⁷ See, e.g., Christopher Danzig, *No, You Can’t Sue Your Uncle for Putting Embarrassing Family Photos on Facebook*, ABOVE THE LAW (Feb. 16, 2012), <http://abovethelaw.com/2012/02/no-you-cant-sue-your-uncle-for-putting-embarrassing-family-photos-on-facebook/#more-136286>.

Despite its immateriality to constitutional interpretation, Justice Brandeis' conception of a right to privacy gained traction in Fourth Amendment adjudication.⁶⁸ Concern that technology made spying possible without a trespass led some justices to call for abandoning the trespass test in favor of a privacy inquiry.⁶⁹ In 1967, *Katz v. United States*⁷⁰ cemented the notion that the Fourth Amendment protects the right to privacy with its holding that a warrantless government wiretap of a telephone booth used for illegal bookmaking was unconstitutional. That there was no trespass on the defendant's property was irrelevant.⁷¹ Rather, what mattered was that, given "the vital role that the public telephone has come to play in private communication," a person was entitled to expect "that the words he utters into the mouthpiece will not be broadcast to the world."⁷² *Katz* thus emphasized its purpose of more readily bringing modern forms of communication within the Fourth Amendment's scope. The Court's definition of "privacy" was sourced to Brandeis and Warren's *The Right to Privacy*.⁷³

⁶⁸ See, e.g., *Warden v. Hayden*, 387 U.S. 294, 299, 303, 305–06 (1967) ("We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts."); *id.* at 310–11 (Fortas, J., concurring); *Davis v. United States*, 328 U.S. 582 (1946) (stating that the Fourth Amendment protects "the privacy of the individual, his right to be let alone"); see also *Katz v. United States*, 389 U.S. 347, 373 (1967) (Black, J., dissenting) ("With this decision the Court has completed, I hope, its rewriting of the Fourth Amendment, which started only recently when the Court began referring incessantly to the Fourth Amendment not so much as a law against *unreasonable* searches and seizures as one to protect an individual's privacy.").

⁶⁹ See, e.g., *Osborn v. United States*, 385 U.S. 323, 342–43 (1966) (Douglas, J., dissenting in two cases and concurring in one) ("[T]here begins to emerge a society quite unlike any we have seen—a society in which government may intrude into the secret regions of man's life at will."); *Silverman v. United States*, 365 U.S. 505, 513 (1961) (Douglas, J., concurring) ("[O]ur sole concern should be whether the privacy of the home was invaded."); *Goldman v. United States*, 316 U.S. 129, 138–40 (1942) (Murphy, J., dissenting) ("Physical entry may be wholly irrelevant.").

⁷⁰ 389 U.S. 347.

⁷¹ *Id.* at 359.

⁷² *Id.* at 352.

⁷³ See *id.* at 350 n.6 (citing Warren & Brandeis, *supra* note 64).

Katz was an infelicitous vindication of Justice Brandeis' wide-ranging *Olmstead* dissent. Justice Stewart's majority opinion set out not merely to overrule *Olmstead* but to broaden the scope of the Fourth Amendment by rendering its text illustrative rather than binding. As vague as it was ambitious, the opinion offered courts no practical help in giving effect to this new "right to privacy."⁷⁴ So, they turned to Justice John Harlan's concurrence. The test for deciding whether the Fourth Amendment applied to an official intrusion became whether the government disappointed a "reasonable expectation of privacy."⁷⁵ A privacy expectation is "reasonable" if the judiciary decides that "society is prepared to recognize [it] as 'reasonable.'"⁷⁶ The Supreme Court later adopted this circular inquiry as law, committing judges to a jurisprudence lacking a well-articulated core concept and necessarily requiring guesswork about what Americans think about privacy claims.⁷⁷ Justice Black's dissent in *Katz* rightly lambasted the Court for "referring incessantly to the Fourth Amendment not so much as a law against *unreasonable* searches and seizures as one to protect an individual's privacy."⁷⁸ But he incorrectly predicted that the reimagined amendment would be the Court's "vehicle for holding all laws violative of the Constitution which offend the Court's broadest concept of privacy."⁷⁹

Katz shared its theoretical underpinnings with *Griswold v. Connecticut*,⁸⁰ which invalidated a law criminalizing the use of contraceptives during spousal relations on the basis of a constitutional

⁷⁴ See Peter Winn, *Katz and the Origins of the "Reasonable Expectation of Privacy" Test*, 40 MCGEORGE L. REV. 1, 6 (2009).

⁷⁵ *Katz*, 389 U.S. at 361 (Harlan, J., concurring); see, e.g., *Kyllo v. United States*, 533 U.S. 27, 33 (2001); *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *Smith v. Maryland*, 442 U.S. 735, 740–41 (1979).

⁷⁶ *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

⁷⁷ See *Kyllo*, 533 U.S. at 32–34 (discussing *Katz* test); *Minnesota v. Carter*, 525 U.S. 83, 97–98 (Scalia, J., concurring) (describing *Katz* test as "self-indulgent" and lacking any "plausible foundation in the text of the Fourth Amendment").

⁷⁸ *Katz*, 389 U.S. at 373 (Black, J., dissenting).

⁷⁹ *Id.*

⁸⁰ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

right to marital privacy.⁸¹ These two cases are products of the mid-century belief that a right to privacy must be implied in the Bill of Rights to serve as a bulwark against government spying and oppression.⁸² They describe a single “right to privacy” emanating from several constitutional provisions.⁸³

Not surprisingly, then, the critique that Professor Henry Monaghan leveled at *Griswold* applies equally to *Katz*.⁸⁴ Instead of interpreting the Fourth Amendment’s words to account for new ways of doing old things—as the Bell Companies suggested in 1927—*Katz* posits that an individual’s property rights must yield whenever a court decides the government’s interest in trespassing is more important. For judges to find the Fourth Amendment’s meaning not “in its history or in judicial precedent, but in current social consensus”⁸⁵ of what ought to be private is as illegitimate as it is unworkable. With the text no longer constraining interpretation, the inherent “difficulty of relating ancient norms to a world radically different from that of the Framers” leaves courts to resolve search-and-seizure challenges by “balancing the interests at stake, with the constitutional guarantees assessed in functional, rather than historical, terms.”⁸⁶

The Court’s notion that the law could protect abstract privacy directly was a doomed exercise in “perfectionist”⁸⁷ or “noninterpretivist”⁸⁸ constitutional interpretation with little connection to the Fourth Amendment’s wording. This is neither surprising nor accidental. “[I]n a society that chiefly values material well-being, the power to control a particular portion of that well-being is the very foundation of

⁸¹ *Id.* at 485.

⁸² See *United States v. Watson*, 423 U.S. 411, 445 (1976) (“Indeed, the privacy guaranteed by the Fourth Amendment is quintessentially personal.”) (discussing *Katz* and citing *Roe v. Wade*, 410 U.S. 113 (1973), and *Griswold*, 381 U.S. 479).

⁸³ *Griswold*, 381 U.S. at 484.

⁸⁴ Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. Rev. 353 (1981).

⁸⁵ *Id.* at 355.

⁸⁶ *Id.* at 393.

⁸⁷ *Id.* at 358.

⁸⁸ JOHN HART ELY, *DEMOCRACY AND DISTRUST* 1 (1980).

individuality.”⁸⁹ Justice Harlan’s formulation of *Katz* instead tied the Fourth Amendment’s scope to the judiciary’s best guess as to what most Americans consider private. For judges insulated by constitutional design from popular sentiment, gauging America’s privacy expectations is an impossible task.⁹⁰

II. *KATZ*’S CURTAILMENT OF PRIVACY

Rather than broadening the amendment’s protection, *Katz* teed up a narrowing of its scope when the Burger Court adopted a more parsimonious view of privacy than the Warren Court had envisioned. Despite the *Jones* majority’s unsupported claim that “*Katz* did not narrow the Fourth Amendment’s scope,”⁹¹ *Katz* diluted the rights of those who are not, in one way or another, like a typical judge—the young, the poor, the uneducated, the technologically savvy, and the nonconforming.⁹² It proved, however, steadfastly solicitous of privacy concerns with which judges could immediately identify.⁹³ For example, although the justices could not agree on a majority rationale, the Supreme Court unanimously held that government employees have a constitutional expectation of privacy in their government offices.⁹⁴

It took just a few years for an insular and out-of-touch judiciary operating with a cabined understanding of privacy to remove two core

⁸⁹ Reich, *supra* note 42 at 733, 774.

⁹⁰ Monaghan, *supra* note 84, at 386 (“[Courts] are the least capable of divining what is acceptable to the populace.”).

⁹¹ *United States v. Jones*, 132 S. Ct. 945, 951 (2012).

⁹² See *Bascuas*, *supra* note 17, at 630 & n.322; see also *United States v. Robinson*, 414 U.S. 218, 257 (1973) (Marshall, J., dissenting); *United States v. Pineda-Moreno*, 617 F.3d 1120, 1123 (9th Cir. 2010) (Kozinski, C.J., dissenting from denial of rehearing en banc).

⁹³ See *Kyllo v. United States*, 533 U.S. 27, 34 (2001) (describing *Katz* test as circular, subjective, and unpredictable); *Jones*, 132 S. Ct. at 962 (Alito, J., concurring) (same); *Minnesota v. Carter*, 525 U.S. 83, 97–98 (1998) (Scalia, J., concurring) (same).

⁹⁴ *O’Connor v. Ortega*, 480 U.S. 709, 717 (1987) (plurality opinion); *id.* at 731 (Scalia, J., concurring); *id.* at 737 (Blackmun, J., dissenting).

categories of “papers and effects” from the Fourth Amendment’s protection. First, the records corporations maintain on behalf of their customers were held to be not private on the theory that customers voluntarily disclose that information to corporations to obtain services. Second, whether someone possessed contraband, the Court concluded, was not worthy of constitutional protection because, on balance, society’s interest in getting that information outweighed any individual’s interest in withholding it. *Katz* distorts Fourth Amendment jurisprudence by penalizing the sharing of information and by balancing the perceived desirability of enforcing a right against that of enforcing a criminal statute.

A. *KATZ*’S FAILURE TO PROTECT “PAPERS”

Just as the *Associated Press* decision recognized that “a valuable property interest in the news . . . cannot be maintained by keeping it secret,”⁹⁵ the Warren Court understood privacy to include not only a right to keep information secret but also a right to control its dissemination. As Justice Brennan recognized in a pre-*Katz* opinion: “The right of privacy would mean little if it were limited to a person’s solitary thoughts, and so fostered secretiveness. It must embrace a concept of the liberty of one’s communications, and historically it has.”⁹⁶ But, because the *Katz* notion of “privacy” was not rooted in the Constitution’s text, future decisions could limit the Fourth Amendment’s scope by adopting a narrower view of privacy.

Less than a decade after *Katz*, the Burger Court defined what is constitutionally “private” as that which is secret—rather than that which is not public.⁹⁷ In *United States v. Miller*,⁹⁸ the Court held that a bank customer, by revealing his transactions “to a third party” (i.e., the bank),

⁹⁵ *Int’l News Serv. v. Assoc. Press*, 248 U.S. 215, 235 (1918).

⁹⁶ *Lopez v. United States*, 373 U.S. 427, 449 (1963) (Brennan, J., dissenting).

⁹⁷ *Compare Katz v. United States*, 389 U.S. 347, 351 (1967) (“What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.” (emphasis added)).

⁹⁸ 425 U.S. 435 (1976).

risked that the government might subpoena the information.⁹⁹ The Court reasoned that a depositor conducting business with his bank takes the same risk as a criminal who mistakenly confides in an undercover agent or informant.¹⁰⁰ Three years later, *Smith v. Maryland* held that the numbers people dial on their telephones are not private because people must realize that the carriers can record, and hence reveal, that information.¹⁰¹ *California v. Greenwood*¹⁰² extended this notion even further. In that case, the Supreme Court held that police can search and seize garbage put out for collection without probable cause or a warrant, reasoning that, because it is “common knowledge” that raccoons, children, and reporters sometimes get into garbage, people cannot expect police not to search it.¹⁰³

By equating “privacy” with “secrecy” and banks with government informants, the Court helped make all corporations, willing or unwilling, de facto government agents, transforming the relationship among individuals, the government, and corporations in America.¹⁰⁴ In an earlier age, correspondence and sensitive records were protected as “papers” typically kept in “houses.”¹⁰⁵ Building on that history, the telephone companies in 1927 saw it in their interest to argue that their customers owned their telephone conversations. But, after *Miller* and *Smith*, corporations no longer had that option. Corporate records, despite being not public, were not private and, hence, were thrown open to the

⁹⁹ *Id.* at 442–43.

¹⁰⁰ *Id.* at 443 (citing *United States v. White*, 401 U.S. 745 (1971) (plurality opinion) (holding that conversations with a bugged informant were not protected by Fourth Amendment); *Hoffa v. United States*, 385 U.S. 293 (1966) (holding that use of an informant to infiltrate a suspect’s inner sanctum did not violate Fourth Amendment); *Lewis v. United States*, 385 U.S. 206 (1966) (holding that an undercover agent’s entering a suspect’s home to purchase marijuana did not violate the Fourth Amendment)).

¹⁰¹ 442 U.S. 735, 743 (1979).

¹⁰² 486 U.S. 35 (1988).

¹⁰³ *Id.* at 40–41.

¹⁰⁴ See Charles A. Reich, *The Individual Sector*, 100 YALE L.J. 1409, 1429–30 (1991) (arguing that the distinction between the government and corporations has been eviscerated).

¹⁰⁵ *Boyd v. United States*, 116 U.S. 616, 630 (1886).

government. This transformation was part of a broader alignment of power between government and large corporations based on the “conviction that private power was a chief enemy of society and of individual liberty. Property was subjected to ‘reasonable’ limitations in the interests of society.”¹⁰⁶

Communications companies today generally do not question the government’s right to buy customers’ personal information with public funds. The carriers sell their services to the public and then quietly receive government payments to divulge the sensitive information those services generate. The permeation of every aspect of life by mammoth corporations promising ever more efficient and convenient ways of archiving, processing, and transmitting information means that, if only what is secret is private, then not much of any significance is private.

Equating privacy with secrecy convolutes Fourth Amendment analysis by requiring judges to make factual findings about how Americans understand new technology to work as well as about how new technology actually does work. If communicating or storing information entails conveying it to someone else, then the Fourth Amendment may not apply.¹⁰⁷ The analysis is all the more difficult because it is predicated on the near contradiction that telephone conversations are private (as *Katz* evidently held), but information shared with entities like banks and telephone companies is not (as *Miller* and *Smith* said). Because “expectations of privacy” are too difficult to discern objectively, the post-*Katz* Fourth Amendment’s application to new ways of communication and storing information is always uncertain and unpredictable.¹⁰⁸

¹⁰⁶ Reich, *supra* note 42, at 773.

¹⁰⁷ See, e.g., *United States v. Forrester*, 512 F.3d 500, 510 (9th Cir. 2008) (following *Smith v. Maryland* and holding that the names of people with whom one corresponds by email as well as the addresses of the websites one visits are not private because users “should know that this information is provided to and used by Internet service providers for the specific purpose of directing the routing of information”).

¹⁰⁸ Cf. Reich, *supra* note 104, at 1445 (“It is quite useless, for example, to repeat in case after case the formula—little better than an incantation—about an ‘expectation of privacy.’”).

The Supreme Court itself is hopelessly confused. The Court threw up its hands in 2010 and confessed that it had no idea how to apply its own Fourth Amendment jurisprudence to text messages.¹⁰⁹ *City of Ontario v. Quon* raised the issue of whether the Fourth Amendment protected text messages sent by a municipal police sergeant with a two-way pager issued by his department.¹¹⁰ Seeking to determine whether the officer was sending too many personal messages while on duty, the police department got transcripts of his messages from the carrier. Nearly all of the messages turned out to be personal, and many of them were sexually explicit. The sergeant was disciplined, and he audaciously sued the city for violating his “right to privacy.”¹¹¹ Even with the briefs of both parties and ten amici curiae, the Court said that it could not discern societal expectations of privacy in text messages.¹¹²

In its apologia (from which Justice Scalia disassociated himself¹¹³), the Court frankly admitted that, with respect to anything other than age-old ways of transacting business and communicating, it can predict neither subjective privacy expectations nor “the degree to which society will be prepared to recognize those expectations as reasonable.”¹¹⁴ Instead of deciding the case, the Court assumed *arguendo* that text messages enjoy constitutional protection.¹¹⁵ The Court then sidestepped another issue that the *Katz* test had failed to resolve (for more than 20 years) by further assuming that the department’s action, obtaining and reading its

¹⁰⁹ See, e.g., *City of Ontario v. Quon*, 130 S. Ct. 2619, 2625 (2010) (comparing how text messages and emails are transmitted).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 2626 (the officer’s main text-message correspondents—his estranged wife, his girlfriend, and a fellow sergeant—were also plaintiffs).

¹¹² *Id.* at 2629.

¹¹³ *Id.* at 2635 (Scalia, J., concurring) (“To whom do we owe an additional explanation for declining to decide an issue, once we have explained that it makes no difference?”); *id.* (“The Court’s implication that where electronic privacy is concerned we should decide less than we otherwise would . . . —or that we should hedge our bets by concocting case-specific standards or issuing opaque opinions—is in my view indefensible. The-times-they-are-a-changin’ is a feeble excuse for disregard of duty.”).

¹¹⁴ *Id.* at 2630 (majority opinion).

¹¹⁵ *Id.*

employee's text messages, was a search.¹¹⁶ And, finally, the Court assumed that government employees have the same expectation of privacy in electronic messages as they do in the things they keep in their offices.¹¹⁷ Having thus ignored all the technological aspects of the case, the Court decided the search was constitutional because the police department had a "noninvestigatory work-related purpose" for reading the texts.¹¹⁸

Evincing no appreciation of the irony, the Court explained that the expectations-of-privacy inquiry—the one that promised to make the Fourth Amendment flexible enough to deal with technological change—necessitated *moving slowly*: "The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear."¹¹⁹ How a text-messaging pager was an "emerging technology" in 2010—three years after Steve Jobs unveiled the first iPhone—went unexplained. More revealing was the citation used to illustrate the sort of error the judiciary risked by "elaborating too fully" on legal questions: The Court cited *Katz*'s overruling of *Olmstead*. In other words, the *Quon* Court suggested that *Olmstead* was decided incorrectly because the Court moved precipitously in 1928—when the telephone had been in widespread use for about 35 years.¹²⁰

¹¹⁶ *Id.* In *O'Connor v. Ortega*, 480 U.S. 709 (1987), the Court could not agree on a methodology for deciding whether a government employee can expect privacy in his office. The case generated no majority opinion. Later decisions skirted the issue, and the *Quon* Court passed on it as well: "In the two decades since *O'Connor*, . . . the threshold test for determining the scope of an employee's Fourth Amendment rights has not been clarified further. . . . The case can be decided by determining that the search was reasonable even assuming *Quon* had a reasonable expectation of privacy." *Quon*, 130 S. Ct. at 2628–29.

¹¹⁷ *Quon*, 130 S. Ct. at 2630.

¹¹⁸ *Id.* at 2631 (quoting *O'Connor*, 480 U.S. at 726 (plurality opinion)). The Court avoided having to decide whether the officer's co-respondents had a Fourth Amendment claim because they failed to claim their own privacy was unconstitutionally violated. *Id.* at 2633.

¹¹⁹ *Id.* at 2629 (citing *Katz v. United States*, 389 U.S. 347, 353 (1967)).

¹²⁰ *A Brief History: Origins, AT&T*, <http://www.corp.att.com/history/history1.html> (last visited Apr. 20, 2013).

For a court to assume but not decide that a right exists is not a harmless ploy; it insulates government illegalities, even deliberate ones, from redress. A month after the *Quon* debacle, the Eleventh Circuit considered a suit against a Georgia district attorney and chief investigator who, as a favor to the management of a local hospital, conspired to falsely charge a troublesome hospital employee with various crimes.¹²¹ In the course of their malicious prosecution, the prosecutor and the investigator subpoenaed the employee's phone records and emails from his communications carriers.¹²² Relying on *Miller* and *Smith*, the court in *Rehberg v. Paulk* had no trouble concluding that "Rehberg lacked a legitimate expectation of privacy in the phone and fax numbers he dialed."¹²³

Whether the illegal demand for the emails that Rehberg sent and received offended the Fourth Amendment was, the court believed, a close question.¹²⁴ Even while criticizing *Quon* for its "marked lack of clarity in what privacy expectations as to content of electronic communications are reasonable,"¹²⁵ the appellate court refused to decide whether the emails were constitutionally protected. If the Supreme Court was unable "to answer the constitutional question of whether the plaintiff's privacy expectation was reasonable or even to set forth the governing principles to answer that question," then the court of appeals would not try.¹²⁶ Instead, the court held that, even if the Constitution were violated, the prosecutor and his investigator were entitled to immunity.¹²⁷ Bizarrely, the court faulted the plaintiff for failing to show that "his alleged constitutional right"—the one that courts only hypothetically assume exists—"was clearly established."¹²⁸ Keeping rights hypothetical means that police and

¹²¹ *Rehberg v. Paulk*, 611 F.3d 828 (11th Cir. 2010), *aff'd on other grounds*, 132 S. Ct. 1497 (2012).

¹²² *Id.* at 842.

¹²³ *Id.* at 843.

¹²⁴ *Id.*

¹²⁵ *Id.* at 844.

¹²⁶ *Id.* at 845, 846.

¹²⁷ *Id.* at 846.

¹²⁸ *Id.* at 846.

prosecutors enjoy immunity for even the flagrant abuses of power perpetrated on Rehberg.

A few months later, the Sixth Circuit acknowledged that *Katz* discourages courts from acknowledging and enforcing rights and observed that the problem is an intractable aspect of *Katz*'s atextual interpretation of the Fourth Amendment. In *United States v. Warshak*, the court refused to assume a Fourth Amendment violation just for the sake of argument before deciding that the aggrieved was not entitled to any remedy.¹²⁹ The court recognized that judicial shirking of Fourth Amendment questions gives the government "*carte blanche* to violate constitutionally protected privacy rights."¹³⁰ It also recognized that email had achieved a "prominent role" and, indeed, that "an explosion of Internet-based communication has taken place."¹³¹ Reasoning that emails had become as prevalent as letters and telephone calls, the court relied on *Ex parte Jackson*'s protection of the mails¹³² and *Katz*'s protection of the wires to conclude that emails stored by an Internet carrier are constitutionally protected.¹³³ The court distinguished *Miller* on the ground that the bank in *Miller* was not an intermediary but the intended recipient of the records seized.¹³⁴

Because it was forced to build on the *Katz* framework, *Warshak* perpetuated the idea that messages cease to be private once they reach the intended recipient, from whom they can be seized. Worse, despite its pretense to progressivism, the decision reaffirmed the notion that legitimate expectations of privacy coalesce only once a practice is so pervasive as to be utterly mainstream. So, just as *Katz* anachronistically intimated that the telephone had only recently come into widespread use and *Quon* called two-way pagers an "emerging technology" in 2010, *Warshak* described email that same year as though it were new. Conditioning the constitutional status of a private message on who happens to have possession of it when the government intercepts it and

¹²⁹ *Warshak*, 631 F.3d at 292.

¹³⁰ *Id.* at 282 n.13.

¹³¹ *Id.* at 284.

¹³² *Ex parte Jackson*, 96 U.S. at 733.

¹³³ *Warshak*, 631 F.3d at 284.

¹³⁴ *Id.* at 288.

how popular the medium used to create it has become produces an arbitrary and needlessly complex jurisprudence.

If the Fourth Amendment applies only to ways of keeping and communicating information that Supreme Court justices consider prevalent, all indications are that it will stay perpetually obsolete. Speaking to a group of bankruptcy judges in late 2011, Justice Elena Kagan said that the justices “ignore 25 years of technology” and “do not email each other.”¹³⁵ “The clerks e-mail each other, but the justices do not.”¹³⁶ Instead, they dispatch messengers carrying paper notes to communicate with each other.¹³⁷ During oral argument, rather than using the Internet to consult source materials, the justices have pages, who sit out of sight behind the bench, fetch opinions or books.¹³⁸ At conference, each justice has, rather than a laptop or an iPad, a cart piled with “all the briefs they need to consult during deliberations.”¹³⁹

Such superannuated practices would seem quaint but innocuous if *Katz* did not require judges to gauge America’s privacy expectations in the present. But, until some critical mass of the judiciary recognizes society’s adoption of a new technological norm, the expectations-of-privacy framework wrongfully denies constitutional protection to new ways of communicating and recording ideas. In the meantime, courts fumble about trying to discover society’s privacy expectations by drawing analogies to the past: Emails are like letters.¹⁴⁰ Computers are like file cabinets.¹⁴¹ Furthermore, *Katz*’s failure to grapple with the realities of everyday life

¹³⁵ *Supreme Court Justice Elena Kagan Speaks in Tampa*, TAMPA TRIBUNE, Oct. 15, 2011, <http://tbo.com/news/crime/supreme-court-justice-elena-kagan-speaks-in-tampa-272250>.

¹³⁶ *Id.*

¹³⁷ *Id.*; see also JOHN PAUL STEVENS, FIVE CHIEFS 73 (2011).

¹³⁸ STEVENS, *supra* note 137, at 117.

¹³⁹ *Id.* at 213.

¹⁴⁰ See, e.g., *United States v. Warshak*, 631 F.3d 266, 284 (6th Cir. 2010).

¹⁴¹ See, e.g., *United States v. Williams*, 592 F.3d 511 (4th Cir. 2010) (“At bottom, we conclude that the sheer amount of information contained on a computer does not distinguish the authorized search of the computer from an analogous search of a file cabinet containing a large number of documents.”).

also reaches backward as courts reconsider the Fourth Amendment's application to ancient media. Under the expectations-of-privacy framework, a letter can cease to be private once the Post Office delivers it to the intended recipient, even if that happens to be the writer's spouse.¹⁴² This means that the government is barred by *Ex parte Jackson* from reading mail while it is in transit.¹⁴³ But, the moment the message reaches its recipient, government agents can search the recipient's house (or computer) without cause, seize the correspondence, and use it against the sender, who, having suffered no invasion of privacy, lacks standing to complain.¹⁴⁴

B. *KATZ*'S FAILURE TO PROTECT "EFFECTS"

Katz put contraband as well as correspondence and records outside the Fourth Amendment's protection. Before *Katz*, the Court had repeatedly affirmed that, although the federal and state governments could by statute extinguish the right to possess certain taboo things, like whiskey, the Fourth Amendment nonetheless protected those things from unreasonable search and seizure. Contraband, in other words, could be trespassed like any property for Fourth Amendment purposes, even though technically it could not be owned.¹⁴⁵ This made sense as both a matter of

¹⁴² *United States v. King*, 55 F.3d 1193, 1195–96 (6th Cir. 1995) (“In this case, King voluntarily mailed the letters at issue to his wife. Although he may have instructed her to preserve the confidentiality of the letters, there is no evidence that he expected her to return the letters to him. Under those circumstances, his expectation of privacy in the letters terminated upon delivery of the letters to his wife.”); *see also* *United States v. Knoll*, 16 F.3d 1313, 1321 (2nd Cir. 1994) (holding that expectation of privacy in correspondence terminates upon delivery); *Ray v. United States Dep't of Justice*, 658 F.2d 608, 611 (8th Cir. 1981) (same).

¹⁴³ *Ex parte Jackson*, 96 U.S. at 733.

¹⁴⁴ *Cf. United States v. Payner*, 447 U.S. 727 (1980) (defendant lacked Fourth Amendment standing to move for suppression of documents that IRS agents illegally seized from another person's briefcase and surreptitiously photocopied).

¹⁴⁵ *See United States v. Jeffers*, 342 U.S. 48, 53 (1951) (holding that Congress' declaring cocaine to be contraband was “intended to aid in their forfeiture . . . rather than to abolish the exclusionary rule formulated by the courts in furtherance of the high

history and of law. The Fourth Amendment's protection of contraband is at the very core of its guarantee, given that the amendment was directed at the general warrants that the English crown had used to search for libelous writings, whose possession was if not itself illegal at least evidence of guilt.¹⁴⁶ Today, whether a person possesses something that the legislature has banned is, according to numerous decisions, a fact not entitled to any privacy.¹⁴⁷

Before 1967, contraband was treated like all other effects for Fourth Amendment purposes, except that the government was in all events entitled to confiscate it. In *Trupiano v. United States*, the Court suppressed an illegal still, alcohol, and brewing equipment seized during a warrantless raid on a farm because agents had surveilled the bootleggers for weeks and could easily have obtained a warrant.¹⁴⁸ The Court ruled the seizure unconstitutional even though there was no trespass except to the contraband itself. Because the agents could see a man operating the illegal still inside the leased barn from a place where the farm's owner allowed them to be, they were allowed to arrest him without a warrant.¹⁴⁹ That, however, did not excuse their failure to obtain a warrant to seize the contraband. While the evidence was deemed property for Fourth Amendment purposes, its statutory status as contraband meant that the petitioners had "no right to have it returned to them."¹⁵⁰

Just two years before *Katz*, the Court affirmed *Trupiano*'s protection of contraband in *One 1958 Plymouth Sedan v. Pennsylvania*.¹⁵¹

purposes of the Fourth Amendment").

¹⁴⁶ *Bascuas*, *supra* note 17, at 631; *Warden v. Hayden*, 387 U.S. 294, 313–15 (1967) (Douglas, J., dissenting).

¹⁴⁷ *See, e.g.*, *Illinois v. Caballes*, 543 U.S. 405, 408–09 (2005); *United States v. Place*, 462 U.S. 696, 707 (1983).

¹⁴⁸ 334 U.S. 699, 707 (1948), *overruled in part by* *United States v. Rabinowitz*, 339 U.S. 56, 66 (1950); *see also* *Lewis v. United States*, 385 U.S. 206, 210 (1966) (holding that marijuana and statements obtained at defendant's home by undercover officer were admissible because defendant voluntarily made the statements and sold the marijuana); *id.* at 213 (Brennan, J., concurring).

¹⁴⁹ *Trupiano*, 334 U.S. at 704–05.

¹⁵⁰ *Id.* at 710.

¹⁵¹ 380 U.S. 693 (1965).

Relying on a statute that made vehicles carrying illegal liquor contraband, Pennsylvania argued that a car could be searched without probable cause because it was contraband—as established by liquor discovered in it during a search.¹⁵² Rejecting that bootstrapping argument, the Court reiterated that the Fourth Amendment protects contraband just like any other property.¹⁵³ The Court held that the liquor had to be suppressed from the proceeding to forfeit the car.

After *Katz*, the Court could—and did—treat contraband more cavalierly because its status as property was beside the point. Framing the issue as whether one has a “legitimate expectation of privacy” in hidden contraband left little doubt as to how the Court would resolve it. In *United States v. Place*, the Court stated that “briefly” seizing a person’s luggage so that a dog can sniff it for drugs does not implicate the Fourth Amendment because “the sniff discloses only the presence or absence of narcotics, a contraband item” and “does not expose noncontraband items that otherwise would remain hidden from public view.”¹⁵⁴ Because *Katz* fails to accord due deference to property rights, the opinion fails to acknowledge a person’s right to stubbornly—even irrationally—refuse to hand over one’s suitcase for even an instant absent probable cause. *Place* thus holds that the privacy-based Fourth Amendment subordinates property rights to the courts’ view of the communal good.¹⁵⁵

The following year, the Court heard *United States v. Jacobsen*,¹⁵⁶ a case in which Federal Express employees reported a package containing cocaine to the Drug Enforcement Agency. Justice John Paul Stevens’ majority opinion held that the Fourth Amendment did not apply to the inspection of the package or to the field test for cocaine because neither infringed a privacy expectation. The opening of the package did not infringe privacy because “the Federal Express employees had just examined the package and had, of their own accord, invited the federal

¹⁵² *Id.* at 694 & n.3.

¹⁵³ *Id.* at 699.

¹⁵⁴ 462 U.S. 696, 707 (1983).

¹⁵⁵ *See Reich, supra* note 42 at 774.

¹⁵⁶ 466 U.S. 109 (1984).

agent to their offices for the express purpose of viewing its contents.”¹⁵⁷ Relying on *Place*, the Court further held that the seizure of the package’s contents was reasonable because “it is well-settled that it is constitutionally reasonable for law enforcement officials to seize ‘effects’ that cannot support a justifiable expectation of privacy without a warrant, based on probable cause to believe they contain contraband.”¹⁵⁸

Justice Brennan complained in dissent that the Court’s “new Fourth Amendment jurisprudence” was not proceeding along the lines he had expected when the Court decided *Katz*.¹⁵⁹ Brennan disagreed “with the blanket assumption, implicit in *Place* and explicit in this case, that individuals in our society have no reasonable expectation of privacy in the fact that they have contraband in their possession. . . .”¹⁶⁰ He worried that the Court’s refusal to recognize a privacy interest in contraband meant that “law enforcement officers could release a trained cocaine-sensitive dog to roam the streets at random, alerting the officers to people carrying cocaine.”¹⁶¹ He was prescient on this point but did not live to see the DEA fully realize his nightmare two decades later.¹⁶² In *Illinois v. Caballes*, the Court, again speaking through Justice Stevens, extended *Place*’s rationale to systematic, routine dog sniffs of cars pulled over for speeding: “We have held that any interest in possessing contraband cannot be deemed ‘legitimate,’ and thus, governmental conduct that only reveals the possession of contraband ‘compromises no legitimate privacy interest.’”¹⁶³

Comparing *Trupiano* to *Jacobsen* suggests Prohibition might have fared better under the post-*Katz* Fourth Amendment. *Jacobsen* presented essentially the same facts as *Trupiano*. In both cases, a private actor (the farm owner in *Trupiano*, the Federal Express employees in *Jacobsen*) called federal agents to report trafficking in prohibited substances (booze,

¹⁵⁷ *Id.* at 119.

¹⁵⁸ *Id.* at 121–22.

¹⁵⁹ *Id.* at 137 (Brennan, J., dissenting).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 138.

¹⁶² Bascuas, *supra* note 35, at 761–63 (describing DEA’s Operation Pipeline).

¹⁶³ 543 US. 405, 409 (2005).

cocaine). In both cases, federal agents investigated without getting a warrant, although they surely could have. In the pre-1967 regime, the Court divided five to four over whether the seizure was constitutional despite the failure to get a warrant. After 1967, a majority of the Court decided that the Fourth Amendment *did not even apply* to the inspection of a private package because a third party had destroyed the aggrieved's expectation of privacy in his belongings.

Katz's disregard of contraband is not confined to drug cases. It means that any unpopular group can have its Fourth Amendment rights curtailed through the enactment of possession offenses.¹⁶⁴ Indeed, it is not hard to find examples of how the argument that contraband is outside the Constitution's protection could be applied to suppress political dissent and marginalize minority viewpoints.¹⁶⁵ *Walter v. United States*,¹⁶⁶ on which *Jacobsen* relied, involved a shipment of "12 large, securely sealed packages containing 871 boxes of 8-millimeter film depicting homosexual activities."¹⁶⁷ The box was misdirected and opened by employees of a company that was not the intended recipient. Each individual box of film was labeled with "suggestive drawings" and "explicit descriptions of the contents."¹⁶⁸ The employees alerted the Federal Bureau of Investigation, whose agents later viewed the films without a search warrant.

No justice who had been on the Court when *Katz* was decided thought the viewing of these films was constitutional—but it was *Katz* that

¹⁶⁴ See generally Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. Crim. L. & Criminology 829, 836 (2001) ("So broad is the reach of possession offenses, and so easy are they to detect and then to prove, that possession has replaced vagrancy as the sweep offense of choice.").

¹⁶⁵ See, e.g., *Uphaus v. Wyman*, 364 U.S. 388, 407 n.3 (1960) (Douglas, J., dissenting from dismissal of appeal) ("The Attorney General of New Hampshire in the motion to dismiss in this case states, 'Those who voluntarily and knowingly appear with, consult with, confer with, attend functions with and otherwise act in concert with Communists or former Communists in America cannot possibly have any reasonable right of privacy in regard to such activities.'").

¹⁶⁶ 447 U.S. 649 (1980).

¹⁶⁷ *Id.* at 651 (plurality opinion).

¹⁶⁸ *Id.* at 652.

let four more recent appointees conclude that it was.¹⁶⁹ Although the decision generated no majority opinion, six justices agreed that, under *Katz*, the legality of the search depended on whether the FBI agents went beyond what the company employees already had done. Justices Stevens and Stewart believed that, because the employees did not view the films, the FBI agents' viewing of them was a further invasion of privacy that required a warrant.¹⁷⁰ The four dissenters contended that the "employees so fully ascertained the nature of the films before contacting the authorities" that the FBI's screenings were not an "additional search subject to the warrant requirement."¹⁷¹ They reasoned that, because it "was obvious from the drawings and labels on the containers" that "the films were of an explicit sexual nature," the "petitioners had no remaining expectation of privacy" in the films.¹⁷² Only Justices White and Brennan believed that ascribing dispositive significance to whether the employees happened to watch the films was an unsatisfactory way to determine the scope of a constitutional right:

The notion that private searches insulate from Fourth Amendment scrutiny subsequent governmental searches of the same or lesser scope is inconsistent with traditional Fourth Amendment principles.¹⁷³

Underlying *Walter* and *Jacobsen* is the idea that once private property is trespassed, any subsequent trespass inflicts no harm (or only trivial harm) on the owner. So, it is not wrongful. It is as though, once property is trespassed, its owner loses the exclusivity of dominion and control that is property's essence. Then, anyone, including government agents, can have a look. To believe that is to believe that the Founding Fathers would not have been offended had a messenger read seditious

¹⁶⁹ Justice Marshall concurred only in the judgment in *Walter* and recused himself in *Katz* because he had been solicitor general while the case was pending.

¹⁷⁰ *Id.* at 654.

¹⁷¹ *Id.* at 663–64 (Blackmun, J., dissenting) (citing *Walter v. United States*, 592 F.2d 788, 793–94 (5th Cir. 1979)).

¹⁷² *Id.* at 663.

¹⁷³ *Id.* at 660–61 (White, J., concurring in part).

writings entrusted to him for delivery and then handed them over to agents of the Crown.

III. *KATZ, JONES, AND THE POSTMODERN FOURTH AMENDMENT*

That *Katz* puts personal information and contraband beyond the Fourth Amendment's protection is all the more lamentable because the decision made no countervailing contribution to the nation's jurisprudence. By the time *Katz* was decided, the Court had already repudiated *Olmstead*'s holdings (reaffirmed in 1942¹⁷⁴) that electronic surveillance entailing no trespass did not implicate the Fourth Amendment and that conversations were incapable of being seized. *Olmstead*'s rationale having already been repudiated, *Katz* could have been decided applying the more pragmatic, flexible trespass test that was Fourth Amendment law in the 1960s.

In 1961, *Silverman v. United States* held that the slightest imaginable warrantless conversion of a defendant's property—even if it was not technically a trespass under local law—violated the Fourth Amendment.¹⁷⁵ In *Silverman*, police officers inserted a spike mike from a vacant row house into the neighboring house until it hit the defendants' heating duct, “thus converting their entire heating system into a conductor of sound.”¹⁷⁶ The Court unanimously held that this violated the Fourth Amendment.¹⁷⁷ Two years later, *Wong Sun v. United States* relied on *Silverman* to conclude for the first time that conversations could, like “papers” and “effects,” be the subject of a Fourth Amendment seizure.¹⁷⁸

¹⁷⁴ *Goldman v. United States*, 316 U.S. 129, 135 (1942).

¹⁷⁵ *Silverman v. United States*, 365 U.S. 505, 511–12 (1961).

¹⁷⁶ *Id.* at 506–07.

¹⁷⁷ *Id.* at 511–12 (“This Court has never held that a federal officer may without warrant and without consent physically entrench into a man's office or home, there secretly observe or listen, and relate at the man's subsequent trial what was seen or heard.”).

¹⁷⁸ *Wong Sun v. United States*, 371 U.S. 471, 485 (1963) (“It follows from our holding in [*Silverman*] that the Fourth Amendment may protect against the overhearing

Building on *Silverman*, *Wong Sun* equated oral communications with written ones for Fourth Amendment purposes.

In the term before *Katz*, *Berger v. United States* made express what *Wong Sun* and *Silverman* implied. It held that conversations were a species of “papers” or “effects” within the Fourth Amendment’s terms. *Berger* struck down a New York statute that authorized wiretapping a private office without a proper warrant. An indispensable premise of the Court’s rationale was that *Olmstead* was wrong in holding that conversations were not capable of being seized: “Statements in the opinion that a conversation passing over a telephone wire cannot be said to come within the Fourth Amendment’s enumeration of ‘persons, houses, papers, and effects’ have been negated by our subsequent cases as hereinafter noted.”¹⁷⁹ Further in the opinion, the Court again described conversations as a type of property. Explaining that New York’s statute did not require a warrant “particularly describing . . . the persons or things to be seized,”¹⁸⁰ the Court observed that the statute was defective for not requiring “that the ‘property’ sought, the conversations, be particularly described.”¹⁸¹

So, by 1967, the two premises that the Bell System and Justice Butler had urged in *Olmstead* were validated. First, rather than conditioning the Fourth Amendment’s protection on the vagaries of local property law, courts would decide whether the government, as a practical matter, converted or trespassed property. Second, conversations could be “seized” under the Fourth Amendment just as tangible property. This was enough to convert the old trespass test into a highly flexible but principled

of verbal statements as well as against the more traditional seizure of ‘papers and effects.’ . . . Thus, verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officers’ action in the present case is no less the ‘fruit’ of official illegality than the more common tangible fruits of the unwarranted intrusion.”).

¹⁷⁹ *Berger v. New York*, 388 U.S. 41, 51 (1967).

¹⁸⁰ U.S. CONST. amend. IV.

¹⁸¹ *Berger*, 388 U.S. at 58–59; see also *Katz v. United States*, 389 U.S. 347, 372 (1967) (Black, J., dissenting) (“It is the Court’s opinions in this case and *Berger* which for the first time since 1791, when the Fourth Amendment was adopted, have declared that eavesdropping is subject to Fourth Amendment restrictions and that conversation can be ‘seized.’”).

tool for applying the Fourth Amendment to new forms of property without risking diminution of its traditional protection.

The outcome in *Katz* was thus assured by very recent precedent. There was no need for the decision to do anything more than clarify certain ambiguities *Berger* created regarding the procedures for authorizing a wiretap and reiterate that conversations were within the Fourth Amendment's protection of papers and effects.¹⁸² Had the Court refrained from broad and vague pronouncements regarding a supposed right to privacy, judges could have set about refining the pragmatic property approach adopted in *Silverman* and *Berger* using common-law methods restrained by the text's solicitude for property rights.¹⁸³ This endeavor would have yielded a more predictable and principled jurisprudence and facilitated applying the amendment to new technology. Instead, they spent more than four decades attempting to divine societal expectations of privacy. Over Justice Black's pointed criticism, *Katz* needlessly and heedlessly brushed aside the Fourth Amendment's text to give the Court an unbounded jurisprudential tool for dealing with the threat it perceived from electronic surveillance.

Katz allowed the Court to withdraw the Fourth Amendment's protection whenever it felt that the interests of "society" outweighed an individual's property rights—and the Court did so repeatedly.¹⁸⁴ It

¹⁸² See *Katz*, 389 U.S. at 364 (Black, J., dissenting) ("The Court's opinion in this case . . . removes the doubts about state power in this field and abates to a large extent the confusion and near-paralyzing effect of the *Berger* holding."); see also *Lopez v. United States*, 373 U.S. 427, 463 (Brennan, J., dissenting) (explaining that the Court had feared that bringing electronic surveillance within the Fourth Amendment's reach would effectively outlaw its use because complying with the warrant requirement would be impossible); Winn, *supra* note 74, at 2–6.

¹⁸³ Monaghan, *supra* note 84, at 394 ("One could, after all, argue that elaboration of the specific guarantees of the bill of rights exhibits characteristics of both common law and statutory interpretation: common law because their content is worked out in the manner of the analogical and precedential reasoning characteristic of the common law courts; statutory because, so far as is practicable, emphasis has been and still should be placed on historical setting and original intent.").

¹⁸⁴ See Reich, *supra* note 42, at 761; see also, e.g., *United States v. Place*, 462 U.S. 696, 703 (1983) (holding that the Fourth Amendment's scope is ascertained by "balancing the competing interests to determine the reasonableness of the type of seizure

extended no countervailing protection that the trespass test it displaced would not have afforded. The vast majority of the Supreme Court's cases invalidating a search would, like *Jones* and *Katz* itself, turn out the same way under either a trespass or an expectations-of-privacy analysis.

Kyllo v. United States, decided in 2001, is one of those rare cases to invalidate a search entailing no trespass.¹⁸⁵ It held that using a thermal imager to measure the relative amount of heat emanating from a house constituted a search because the Fourth Amendment shields all information about the inside of a home “from prying government eyes.”¹⁸⁶ Struggling to imagine what, if any, consequence a thermal imager might reveal, Justice Scalia's majority opinion posited that it “might disclose, for example, at what hour each night the lady of the house takes her daily sauna and bath—a detail that many would consider ‘intimate’” The trespass test, as Justice Stevens' dissent implied, would have led to the conclusion that no Fourth Amendment search or seizure occurred. The dissent explained that, while warrantless “through-the-wall” surveillance (which entails a trespass in the *Silverman* sense) would violate the Fourth Amendment, “off-the-wall” measurement of heat emanating from a house does not.¹⁸⁷ “[P]ublic officials should not have to avert their senses or their equipment from detecting emissions in the public domain such as excessive heat, traces of smoke, suspicious odors, odorless gases, airborne particulates, or radioactive emissions, any of which could identify hazards to the community.”¹⁸⁸

Kyllo is no justification for *Katz*. Its strange equating of constitutional privacy with a Victorian sort of modesty or prudishness allowed the Court to be magnanimous regarding the hypothetical Mrs. *Kyllo*'s toilet habits. But that same wordplay exposed many actual people to more revealing searches. An earlier decision, also written by Justice Scalia, held that high school football players could be subjected to random

involved”); *Texas v. Brown*, 460 U.S. 730, 739 (1983) (plurality opinion).

¹⁸⁵ It is arguably the only such case. *Katz*, as *Silverman* and *Berger* make clear, is not one.

¹⁸⁶ *Kyllo v. United States*, 533 U.S. 27, 37 (2001).

¹⁸⁷ *Id.* at 46 (Stevens, J., dissenting).

¹⁸⁸ *Id.* at 45.

urinalysis testing for drugs on the bizarre rationale that players see each other nude: “School sports are not for the bashful. They require ‘suing up’ before each practice or event, and showering and changing afterwards. Public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford.”¹⁸⁹ Putting aside the fact that many athletes *are* bashful, even the most uninhibited exhibitionist is entitled to be free from suspicionless seizures and searches of his bodily fluids. The Court made this clear in a pre-*Katz* case involving forced blood testing of a man suspected of driving drunk: “Such testing procedures plainly constitute searches of ‘persons,’ and depend antecedently upon seizures of ‘persons,’ within the meaning of [the Fourth] Amendment.”¹⁹⁰ More recently, the Court held that police can, at least in some circumstances, strip search anyone arrested for anything, indicating that *Kyllo*’s protection is not very far-reaching.¹⁹¹ It is hard to find merit in a jurisprudence that considers the timing of showers “intimate” information but countenances compelling schoolchildren to urinate for their teachers and misdemeanants to be strip searched.

*Jardines v. Florida*¹⁹² further illustrates that neither *Katz* nor *Kyllo*’s specific application of it offers any significant analytical benefit. That case pitted *Kyllo*’s holding that all information about what happens inside a home is constitutionally protected against *Place*’s holding that whether someone possesses illegal drugs never is. Police officers confirmed that marijuana was being cultivated inside a home by walking a drug-sniffing dog up to the front door. Justice Scalia’s majority opinion held that the officers unconstitutionally searched the house because “they gathered that information by physically entering and occupying [a constitutionally protected] area to engage in conduct not explicitly or implicitly permitted by the homeowner.”¹⁹³ The Court noted, “One virtue

¹⁸⁹ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995).

¹⁹⁰ *Schmerber v. United States*, 384 U.S. 757, 767 (1966).

¹⁹¹ *Florence v. Bd. of Chosen Freeholders of Burlington*, 132 S. Ct. 1510 (2012); *see also Hudson v. Michigan*, 547 U.S. 586, 597 (2006) (stating that knock-and-announce rule protects “the right not to be intruded upon in one’s nightclothes”).

¹⁹² 133 S. Ct. 1409 (2013).

¹⁹³ *Id.* at 1414.

of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy."¹⁹⁴ Justice Kagan's concurrence, joined by Justices Ginsburg and Sotomayor, reached the same conclusion using *Katz*'s expectations-of-privacy rubric. The concurrence believed that the case was "already resolved" by *Kyllo*, "suggesting that a focus on Jardines' privacy interests would make an 'easy case easy' twice over"¹⁹⁵

Jones v. United States, decided the year before *Jardines*, acknowledged that *Katz* is a failed experiment that should never have been allowed to escape the laboratory, but it did not repudiate its unworkable test. All nine justices agreed on the outcome in *Jones*, but the majority gratuitously purported to resuscitate what it called the "common-law trespassory test," suggesting some fundamental dissatisfaction with *Katz*.¹⁹⁶ Nonetheless, Justice Scalia's majority opinion agreed with the concurrences that expectations of privacy remain important to Fourth Amendment jurisprudence. (Four justices disputed that any trespass test survived *Katz* and would have relied exclusively on *Katz*.¹⁹⁷ Justice Sonia Sotomayor's separate concurrence intimated that she believed the GPS tracking of an automobile violates both the *Katz* test and the trespass test.¹⁹⁸)

Jones, however, actually creates a new trespass test, one that incorporates an unduly restrictive, *Katz*-era definition of "seizure". Whereas *Silverman* reasoned that any conversion of property is a seizure, Justice Alito's *Jones* concurrence asserted, and the majority agreed, that a seizure of property "occurs, not when there is a trespass, but 'when there is some meaningful interference with an individual's possessory interest in

¹⁹⁴ *Id.* at 1417.

¹⁹⁵ *Id.* at 1419, 1420 (Kagan, J., concurring) (brackets omitted).

¹⁹⁶ *Jones v. United States*, 132 S. Ct. 945, 952 (2012). The Court attempted to revive the trespass test once before in a unanimous decision by Justice White, then the only remaining member of the *Katz* Court. See *Soldal v. Cook County*, 506 U.S. 56, 62 (1992) ("[O]ur cases unmistakably hold that the Amendment protects property as well as privacy."). *Soldal* had little impact. See *Bascuas, supra* note 35, at 736–37 & n.110; see also *Minnesota v. Carter*, 525 U.S. 83, 97–98 (1998) (Scalia, J., concurring).

¹⁹⁷ *Jones*, 132 S. Ct. at 955–56 (Sotomayor, J., concurring); *id.* at 964 (Alito, J., concurring).

¹⁹⁸ *Id.* at 955, 957 (Sotomayor, J., concurring).

that property.”¹⁹⁹ By this, the Court apparently meant that, as long as Antoine Jones’ Jeep functioned, it was not seized. The majority instead concluded that attaching the GPS to the Jeep was an unconstitutional *search* because “[t]he Government physically occupied private property for the purpose of obtaining information.”²⁰⁰

The *Jones* Court’s cabined definition of “seizure” was concocted in 1984’s *United States v. Jacobsen*²⁰¹ and is inconsistent with the pre-*Katz* trespass test that *Jones* purports to apply. Under *Silverman*, property is seized regardless of whether its owner’s enjoyment of it is at all impeded; any conversion of private property to the government’s own use suffices because what the owner is entitled to is *exclusive* use. The spike mike used in *Silverman* made contact with a pipe, “usurping part of the petitioners’ house or office—a heating system which was an integral part of the premises occupied by the petitioners”²⁰² The heating system presumably worked just as before, a fact the Court gave no attention. Yet, on the basis of mere contact with a pipe the Court distinguished *Goldman v. United States*,²⁰³ a 1942 case that affirmed *Olmstead*’s trespass test in which agents used a listening device that did not touch the target’s property.²⁰⁴ While the opinion might be more clear on the point, *Silverman*’s emphasis on the government’s “usurpation” or conversion of the heating system is more naturally characterized as a seizure of that system than as a search of the house.²⁰⁵

¹⁹⁹ *Jones*, 132 S. Ct. at 951 n.5 (quoting *id.* at 958 (Alito, J., concurring)). To carry the Coke analogy forward, this adulterating definition of seizure is the high fructose corn syrup in the *Jones* mix.

²⁰⁰ *Id.* at 949 (majority opinion).

²⁰¹ 466 U.S. 109, 113 (1984).

²⁰² *Silverman v. United States*, 365 U.S. 505, 511 (1961).

²⁰³ 316 U.S. 129 (1942).

²⁰⁴ *Silverman*, 365 U.S. at 512.

²⁰⁵ Justice Douglas’ concurrence indirectly supports this reading of the case. Anticipating *Katz*’s approach, he would have characterized the invasions of privacy in both *Silverman* and *Goldman* as Fourth Amendment searches because “the invasion of privacy is as great in one case as in the other.” *Id.* at 512 (Douglas, J., concurring). But, given that the Court’s view at the time was that the amendment protected property, the majority opted for a different approach, presumably one that entailed characterizing the

Claiming that “the concept of a ‘seizure’ of property is not much discussed in our cases,” *Jacobsen* adapted language the Court had used to determine whether a person was seized—whether there was meaningful interference with his freedom of movement—to invent its new definition.²⁰⁶ None of the cases it cited as direct authority for this definition applied it. The only pre-*Katz* case, dated to 1906, dealt with a challenge to a subpoena to produce corporate documents, and referred to a seizure as ordinarily “contemplat[ing] a forcible dispossession of the owner” in passing.²⁰⁷

Any doubt that this definition of seizure substantially departed from *Silverman* is dispelled by Justice Stevens’ opinion in *United States v. Karo*, a case decided just three months after *Jacobsen*. Relying on *Silverman*, the author of the *Jacobsen* majority clarified that any conversion of property to the government’s use satisfies the “meaningful interference” criterion. Joined by Justices Brennan and Marshall, Justice Stevens argued that the government’s placing a tracking device inside a container owned by the defendant was a Fourth Amendment seizure because it deprived the owner of exclusive use of his property:

The attachment of the beeper, in my judgment, constituted a “seizure.” The owner of property, of course, has a right to exclude from it all the world, including the Government, and a concomitant right to use it exclusively for his own purposes. When the Government attaches an electronic monitoring device to that property, it infringes that exclusionary right; in a fundamental sense it has converted the property to its own use. Surely such an invasion is an “interference” with possessory rights; the right to exclude, which attached as soon as the can respondents purchased was delivered, had been infringed. That interference is also “meaningful”; the character of the property is profoundly

invasions more naturally as a seizure of the heating system.

²⁰⁶ *Jacobsen*, 466 U.S. at 113 n.5.

²⁰⁷ *Hale v. Henkel*, 201 U.S. 43, 76 (1906).

different when infected with an electronic bug than when it is entirely germ free.²⁰⁸

Antoine Jones relied on the quoted passage from Justice Stevens' *Karo* opinion to argue that attachment of the GPS tracking device was a seizure of his Jeep.²⁰⁹ Had anyone anticipated that the Court would decide the case using a trespass test, Mr. Jones might have argued that requiring a showing of "meaningful interference" makes no sense in a world where the Fourth Amendment is understood to protect property rather than (or in addition to) privacy. Instead, the parties naturally accepted that *Jacobsen* redefined "seizure" to account for *Katz*'s abandonment of property law in Fourth Amendment adjudication. Thus, the government responded to Mr. Jones' contention by explaining that the *Karo* Court rejected Justice Stevens' reasoning on the ground "that placing the beeper in the can amounted at most to a technical trespass, which was only 'marginally relevant' to the Fourth Amendment inquiry. The same is true here."²¹⁰

Of course, once the Court decided that a trespass was (once again) an event of constitutional significance, the government's concession that installing a GPS device was a "technical" trespass should have been dispositive. *Karo* assumed trespasses were only marginally relevant to the Fourth Amendment analysis because at the time a trespass merely informed the expectations-of-privacy inquiry. As soon as *Jones* held that trespasses were *independently* significant, the government's own logic should have lead inexorably to the conclusion that it had seized Mr. Jones' Jeep.

The Court did not mention Mr. Jones' seizure argument, much less explain why it was wrong. This is odd as it puts a tremendous strain on the language to call what happened to Mr. Jones a "search". It is not at all clear what "the place to be searched"²¹¹ was in this case. Attaching the tracking device to the Jeep did not "search" it in the sense of revealing

²⁰⁸ *Karo*, 468 U.S. at 729 (1984) (Stevens, J., concurring in part and dissenting in part).

²⁰⁹ Brief for Respondent at 45–52, *United States v. Jones*, 132 S. Ct. 945 (2012) (No. 10-1259).

²¹⁰ Reply Brief for the United States at 18, *Jones*, 132 S. Ct. 945 (No. 10-1259).

²¹¹ U.S. CONST. amend. IV.

what was inside it. If anything was searched, it was the metropolitan area around Washington, D.C., throughout which the government tracked the Jeep's movements. It makes much more sense to say the Jeep was seized, in the sense that the government "usurped" or converted the Jeep to its own use.²¹² In other words, because the government interfered with Mr. Jones' exclusive use of the Jeep, it seized it.²¹³ This linguistic contortion has one obvious effect. It preserves the results in cases like *Miller*, *Jacobsen*, and *Place* that withdrew constitutional protection from personal records and contraband.²¹⁴ The holdings in those cases depended on the assumption that the seizure test of *Wong Sun*, *Silverman*, and *Berger* did not survive *Katz*. Jones' new trespass test provides a way to preserve the outcomes in these decisions.

Jacobsen's "meaningful interference" requirement has no basis in a jurisprudence that purports to be solicitous of property rights. A trespass has never required a showing of harmful effect, and that is demonstrably true of the trespasses that concerned the framers of the Fourth Amendment. *Entick v. Carrington*, an eighteenth-century English case universally agreed to be among the primary inspirations for the Fourth Amendment,²¹⁵ firmly declared that government agents must respect property rights to the same degree as private actors:

²¹² *Jones*, 132 S. Ct. at 949 n.2 (noting that Mr. Jones' wife was the registered owner of the Jeep, a fact to which the Court attached no consequence because, as an authorized user, he effectively had the rights of an owner).

²¹³ Common understanding regarding the extent of property rights is relevant to understanding the scope of those rights. See O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897).

²¹⁴ In *Miller*, that would entail conceiving of the bank records as information that, like a conversation, is capable of being seized. In *Place*, even the most fleeting seizure of luggage for a dog to sniff it would be a seizure. In *Jacobsen*, the federal agents' handling of a package entrusted to Federal Express for delivery would likewise be a seizure. The "meaningful interference" concept allows courts to avoid what some might view as undesirable implications of a property-based Fourth Amendment.

²¹⁵ See JED RUBENFELD, *REVOLUTION BY JUDICIARY* 32 (2005); TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 29–38 (1969); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 772–75 (1994); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 411–12 (1974); Thomas K. Clancy, *The Fourth Amendment's Concept of*

No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil.²¹⁶

This explains why, for example, Justice Scalia or Justice Alito would be irked to find his car scratched, dinged, or otherwise minutely vandalized and would not be much consoled by the car being just as functional as before. Indeed, one might well be angered if someone else so much as spit on his car. Having property means being able to exclude all other people from it, even to the point of irrationality. “Liberty is more than the right to do what the majority wants, or to do what is ‘reasonable.’ Liberty is the right to defy the majority, and to do what is unreasonable.”²¹⁷

Requiring a showing of harm before an unjustified government intrusion is legally condemned is like arguing that only people who have something to hide should complain about pervasive government surveillance. This thinking encourages the proliferation of suspicionless, general searches for contraband—precisely the sort of searches that animated the Fourth Amendment in the first place. Before *Katz*, *Silverman* made clear that any unauthorized “usurpation” of a person’s property by the government—even if it did not affect the use of that property at all—violated the Fourth Amendment. *Schmerber v. United States* concomitantly held that taking a person’s bodily fluids for testing entailed both a seizure and a search of that person.²¹⁸ After *Katz*, the Court held that forcing students to produce urine for drug testing, requiring travelers to surrender their luggage to be sniffed by a dog, and stopping drivers to conduct random searches were all constitutional without any

Reasonableness, 2004 UTAH L. REV. 977, 982-87 (2004); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 603-07 (1999); William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 396-97 (1995).

²¹⁶ *Entick v. Carrington*, (1765) 19 Howell’s State Trials 1029 (K.B.).

²¹⁷ Reich, *supra* note 42.

²¹⁸ *Schmerber v. California*, 384 U.S. 757, 767 (1966).

particularized suspicion.²¹⁹ “In none of these cases did the courts attempt to assign any weight to the value of unfettered exercise of constitutional rights.”²²⁰

This is why the Fourth Amendment makes no sense unless it is understood to protect all forms of property, including informational property and contraband. Property is what creates space for dissenting from controversial regulations—ranging from those suppressing political activities to those enacting temperance crimes:

Property draws a circle around the activities of each private individual or organization. Within that circle, the owner has a greater degree of freedom than without. Outside, he must justify or explain his actions, and show his authority. Within, he is master, and the state must explain and justify any interference. . . .

Thus, property performs the function of maintaining independence, dignity and pluralism in society by creating zones within which the majority has to yield to the owner. Whim, caprice, irrationality and “antisocial” activities are given the protection of law; the owner may do what all or most of his neighbors decry.²²¹

Katz put many activities that had been within the circle of property’s protection outside of it.

Characterizing the attachment of a GPS device to Mr. Jones’ Jeep as a search rather than a seizure makes a difference in cases involving government surveillance of documents or other data created by an

²¹⁹ See *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); *United States v. Place*, 462 U.S. 696, 706 (1983) (holding that “some brief detentions of personal effects” are constitutional without probable cause); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *Mich. Dep’t. of State Police v. Sitz*, 496 U.S. 444 (1990); *Texas v. Brown*, 460 U.S. 730, 739 (1983) (plurality opinion) (stating that “routine” driver’s license checkpoints are constitutional); *Delaware v. Prouse*, 440 U.S. 648, 654–55, 663 (1979) (suggesting that random driver’s license checkpoints would be constitutional under the *Katz* balancing test).

²²⁰ Reich, *supra* note 42 at 776.

²²¹ *Id.* at 771.

individual. This potentially means that emails and other documents stored on remote computers are open to government copying and inspection without restriction. Even if the information is deemed to be the author's property, there is no meaningful interference with it if the government merely copies it. And, because the information resides on a server that does not belong to the author, the author has no standing to complain about it.²²² Thus, the "meaningful interference" requirement works to curtail the protection extended to intangible forms of property that could plausibly be said to be owned by an individual targeted by the government.

The view that a seizure requires "meaningful interference", for example, leaves the federal, state, and local governments free to continue tracking people by obtaining location data from mobile telephone carriers. By the time *Jones* was decided, cellular telephone tracking without judicial oversight was already widespread, involving thousands of demands for data per day, and rapidly growing even more commonplace.²²³ In her concurrence, Justice Sotomayor agreed that *Jones* did not necessarily say anything about tracking people through their own electronic devices. "Owners of GPS-equipped cars and smartphones do not contemplate that these devices will be used to enable covert surveillance of their movements."²²⁴ Even while endorsing the *Katz* test, she asked whether *Miller* and *Smith* should be reconsidered to handle the challenges to privacy posed by a digitalized world necessitating the constant sharing of personal information.²²⁵ Justice Sotomayor's notion that this problem can be worked out within the *Katz* framework is simply question begging. If the privacy-equals-secrecy holdings of *Miller* and

²²² Compare *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 391–92 (1920) (holding that government could not make use of copies of documents unconstitutionally seized from defendant's office).

²²³ See Eric Lichtblau, *Cell Carriers Called on More in Surveillance*, N.Y. TIMES, July 9, 2012, at A1, available at <http://www.nytimes.com/2012/07/09/us/cell-carriers-see-uptick-in-requests-to-aid-surveillance.html?pagewanted=all>; Lichtblau, *supra* note 14.

²²⁴ *United States v. Jones*, 132 S. Ct. 945, 956 (2012) (Sotomayor, J., concurring).

²²⁵ *Id.* at 956.

Smith were overruled, the *Katz* test would require some other definition of privacy, and Justice Sotomayor proposed none. She disagreed with Justice Alito's claim that societal expectations of privacy erode as information becomes more public, but offered no criteria for distinguishing disclosures that vitiate privacy from those that do not. Recognizing that the Fourth Amendment protects informational property from unjustified seizure even if there is no further "meaningful interference" with it solves the problem.

Cellular data tracking is not the only government tool to render the *Jones* holding obsolete no sooner than it was handed down. Cameras deployed throughout the country by state and municipal police scan license plates at the rate of dozens per second to track the movements of millions of people.²²⁶ They are fixed on roadways and attached to police cruisers.²²⁷ It is hard to argue with the idea "that a motorist has no reasonable expectation of privacy in the information contained on his license plate" ²²⁸ Consequently, the *Katz* framework forces those concerned about such pervasive tracking techniques to argue that the government's use of computers to agglomerate and manipulate data implicates the Fourth Amendment.²²⁹ (*Jones* echoes this argument in its concern over the accumulation of GPS data.) Saying that the government violates the Fourth Amendment by accessing data it lawfully collected stretches the notion of "search" further than seems plausible. The problem, if there is one, must inhere in how the data is collected.

IV. PRAGMATIC PROPERTY IN THE INFORMATION AGE

The trespass test the Court had developed and reaffirmed in the term before *Katz* is more faithful to the Fourth Amendment's aims and

²²⁶ Cyrus Farivar, *Your Car, Tracked: The Rapid Rise of License Plate Readers*, ARS TECHNICA (Aug. 15, 2012), <http://arstechnica.com/tech-policy/2012/09/your-car-tracked-the-rapid-rise-of-license-plate-readers>.

²²⁷ *Id.*

²²⁸ *United States v. Ellison*, 462 F.3d 557, 561–63 (6th Cir. 2006) (collecting cases).

²²⁹ *See, e.g., id.* at 567–68 (Moore, J., dissenting).

would have averted, had it endured, many of the difficulties that *Katz* introduced into the law. It recognized that a trespass or conversion is complete despite there being no interference with an owner's use; that property can be tangible or intangible; that sharing property does not vitiate an owner's ability to preclude government inspection; and that a strong government interest does not make an unjustified intrusion any less of a trespass. Adopting this test today would resolve the shortcomings that *Jones*' weaker trespass test perpetuates, but doing so might well mean that the government cannot without suspicion have dogs sniff luggage²³⁰ or cars²³¹ for drugs; force adolescents to produce urine for testing;²³² or stop cars on the highway without individualized suspicion.²³³ The *Katz* framework sanctions such invasions of privacy only because, by trivializing the property interests involved, it subjugates unprivileged individuals into ritual compliance with a false notion of the public interest. "High-status people do not undergo drug testing. Lawyers, professors, executives, judges, and other members of the professional and administrative class are exempt from this calculated humiliation."²³⁴ Predicating the Fourth Amendment's protection on a pragmatic understanding of property leads to more equal treatment.

The Supreme Court already enforces, as a matter of federal common law, an understanding of property consistent with *Silverman* and *Berger* in mail and wire fraud prosecutions, which generally require proof of intent to deprive²³⁵ the victim of property.²³⁶ When interpreting federal

²³⁰ *United States v. Place*, 462 U.S. 696 (1983).

²³¹ *Illinois v. Caballes*, 543 U.S. 405 (2005).

²³² *See Bd. of Educ. v. Earls*, 536 U.S. 822 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

²³³ *See Illinois v. Lidster*, 540 U.S. 419 (2004); *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

²³⁴ Reich, *supra* note 104, at 1425.

²³⁵ This common formulation of fraud (or any form of theft) is linguistically rooted in a different type of "privacy" than *Katz*. To deprive means to de-privatize in the sense of stripping the owner's exclusivity of use.

²³⁶ For present purposes, honest-services fraud can be set aside. *See Cleveland v. United States*, 531 U.S. 12, 18–20 (2000) (every fraud charge must specify whether the object was a property-deprivation fraud or an honest-services-deprivation fraud; thus the

fraud statutes, the Court has had no difficulty recognizing deprivations of property interests—despite arguments that there was no meaningful interference, that the assets were merely intangible, and that the victim had shared the information. The result is a coherent, logical, flexible understanding of property that could readily be used in Fourth Amendment cases, obviating any need to ever discuss privacy expectations again.

In 1987, the Court unanimously rejected in *Carpenter v. United States* two fraud defendants' claims that their convictions were invalid because their actions did not interfere with the victim's use of the property they allegedly stole.²³⁷ A *Wall Street Journal* reporter who co-wrote "Heard on the Street," a column reviewing stocks, partnered with some stockbrokers to trade on information to be printed in the column.²³⁸ It did not matter that the *Journal* was able to use the information exactly as it would have in the absence of any scheme. In fact, the success of the scheme depended on the *Journal's* doing so. If the *Journal* did not proceed to publish the information, the defendants would not have profited from their investments. In *Jones*, Justice Alito used that rationale to conclude there was no seizure, reasoning that the government's surveillance technique depended on Mr. Jones being able to use the Jeep notwithstanding the tracking device.²³⁹ But the *Carpenter* Court rejected it. What mattered was that the defendants did something with the *Journal's* property that the *Journal* did not authorize: "[I]t is sufficient that the *Journal* has been deprived of its right to exclusive use of the information, for exclusivity is an important aspect of confidential business information and most private property for that matter."²⁴⁰ In this same

fraud cases elaborating on what constitutes a property interest are unadulterated by the cases discussing a deprivation of honest services).

²³⁷ 484 U.S. 19 (1987).

²³⁸ *Id.* at 23.

²³⁹ *United States v. Jones*, 132 S. Ct. 945, 958 (2012) (Alito, J., concurring) ("Indeed, the surveillance technique that the officers employed was dependent on the fact that the GPS did not interfere in any way with the operation of the vehicle, for if any such interference had been detected, the device might have been discovered.").

²⁴⁰ *Carpenter*, 484 U.S. at 26–27; see also *id.* at 26 ("The *Journal* had a property right in keeping confidential and making *exclusive* use, prior to publication, of the

way, attaching a tracking device to someone's property deprives the owner of the exclusive use of the property.

Carpenter also demonstrates that the idea, approved in *Silverman*, *Wong Sun*, and *Burger*, that intangible information constitutes property endures after *Katz*. The *Carpenter* defendants argued that their fraud convictions could not stand because “the Journal’s interest in prepublication confidentiality for the ‘Heard’ columns is no more than an intangible consideration”²⁴¹ Relying on 1918’s *International News Service v. Associated Press* (just as AT&T and Justice Butler advocated in *Olmstead*), the *Carpenter* Court concluded that intangible information is property: “Here, the object of the scheme was to take the *Journal*’s confidential business information—the publication schedule and contents of the ‘Heard’ column—and its intangible nature does not make it any less ‘property’ protected by the mail and wire fraud statutes.”²⁴²

Carpenter’s view of property does not penalize one who shares his property with another. Unlike in *Miller* and *Smith*, the *Carpenter* Court did not suggest that the *Journal* assumed the risk that an employee would divulge or use information acquired through his work. On the contrary, the Court pointed out that “even in the absence of a written contract, an employee has a fiduciary obligation to protect confidential information obtained during the course of his employment.”²⁴³ The employment-at-will relationship hardly distinguishes *Miller* and *Smith*. The depositor in *Miller* and the telephone customer in *Smith* had contractual agreements with the bank and with the carrier respectively. No less than the *Journal*’s employee, these entities were obliged “to protect confidential information obtained during the course” of performing their contractual duties.

This same idea—whether information, once shared, became public—was a sticking point in *Associated Press*. But the Court then recognized that some information is only valuable when it is shared: “The

schedule and contents of the ‘Heard’ column.” (emphasis added)).

²⁴¹*Id.* at 25.

²⁴²*Id.*; see also *United States v. O’Hagan*, 521 U.S. 642, 654 (1997) (reaffirming *Carpenter* on this point).

²⁴³*Carpenter*, 484 U.S. at 27 (quoting *Snepp v. United States*, 444 U.S. 507, 515 (1980) (per curiam)).

peculiar value of news is in the spreading of it while it is fresh; and it is evident that a valuable property interest in the news, as news, cannot be maintained by keeping it secret.”²⁴⁴ The same is true, of course, of instructions to the bank, telephone numbers dialed, web sites visited, and nearly all the information that consumers share with corporations to receive their services. There is no reason why the information the Associated Press shares with its subscribers should be deemed property while the information than an individual communicates to corporate service providers should be held to be in the public domain.

Sharing information can result in its communication to the government, of course, but that does not mean the government is entitled to it. AT&T argued in *Olmstead* that participants to a conversation are “co-owners” of it. The Court approved this notion at least implicitly in *Silverman*, *Wong Sun*, *Berger*, and *Katz*. The idea that the intended recipient of information becomes a co-owner of it means that the recipient may divulge it voluntarily without implicating the Fourth Amendment. This explains a line of cases decided in the years between *Wong Sun* and *Berger*, holding that the government’s use of false friends, undercover agents, and informants to transmit or record conversations constituted neither a search nor a seizure.²⁴⁵ In each of those cases, the government became a “co-owner” of information voluntarily communicated to it by a defendant.²⁴⁶ That the defendant did not expect to have his confidence betrayed or his words recorded did not implicate the Constitution. These holdings survived *Katz* intact and, somewhat ironically, formed the basis for *Miller* and *Smith*. (For a short time after *Katz*, the Court was equally

²⁴⁴ *Int’l News Serv. v. Assoc. Press*, 248 U.S. 215, 235 (1918).

²⁴⁵ *Osborn v. United States*, 385 U.S. 323, 327 (1966); *Hoffa v. United States*, 385 U.S. 293 (1966); *Lewis v. United States*, 385 U.S. 206 (1966); *Lopez v. United States*, 373 U.S. 427, 439 (1963).

²⁴⁶ *Osborn*, 385 U.S. at 327 (upholding “the use by one party of a device to make an accurate recording of a conversation about which that party later testified”); *Lewis*, 385 U.S. at 210 (“During neither of his visits to petitioner’s home did the agent see, hear, or take anything that was not contemplated, and in fact intended, by petitioner as a necessary part of his illegal business.”); *Lopez*, 373 U.S. at 438 (“The only evidence obtained consisted of statements made by Lopez to Davis, statements which Lopez knew full well could be used against him by Davis if he wished.”).

divided over the narrow question of whether *Katz* limited the use of informants wired with transmitters.²⁴⁷ But, after Justices Black, Harlan, and Douglas retired, the Court quietly adopted the view that it did not.²⁴⁸)

Another advantage of the pre-*Katz* property approach is that it discourages judicial balancing of interests. Property rights are, compared to privacy interests, well defined and, consequently, cannot be easily overridden by platitudes about societal good. Thirteen years after *Carpenter*, the Court concluded in *Cleveland v. United States*²⁴⁹—again unanimously—that a state license to operate computerized poker machines was not property under the federal fraud statutes.²⁵⁰ The government alleged that the petitioner schemed to obtain a gaming license, concealing his participation because he would not have met Louisiana’s moral and fiscal integrity requirements.²⁵¹ Tracking *Carpenter*, the Court distinguished the state’s regulatory interest as sovereign in the licensing scheme “from traditional concepts of property.”²⁵² The Louisiana licensing scheme specified that a license “is not property or a protected

²⁴⁷ See *United States v. White*, 401 U.S. 745, 751 (1971) (plurality opinion); *id.* at 755 (Brennan, J., concurring); *id.* at 762–63 (Douglas, J., dissenting); *id.* at 787–89 (Harlan, J., dissenting); *id.* at 795–96 (Marshall, J., dissenting). Justice Black, insisting that *Katz* itself was fundamentally illegitimate, took no position on its implications. *Id.* at 754 (Black, J., concurring). Justice Harlan’s dissent in *White* did the best job of explaining why this might be so. A person might willingly risk voicing unpopular or controversial views to someone he knows well, knowing the friend might betray him. That risk becomes unacceptably high when the government can bribe or cajole a person’s close friends into becoming government agents. One is a world where people can’t trust others they don’t know very well. The other is a world where people cannot afford to trust anyone. Justice Harlan is self-consciously focused on what makes sense for our political system and society. He is not asking what the defendant actually risked. He is asking what the nation can afford to risk.

²⁴⁸ See *United States v. Miller*, 425 U.S. 435, 443 (1976) (citing *White*, 401 U.S. at 751 (plurality opinion)); *United States v. Caceres*, 440 U.S. 741, 743 n.2 (1979) (same).

²⁴⁹ 531 U.S. 12 (2000).

²⁵⁰ Although there was a circuit split over whether a license constitutes property of which a state may be defrauded, the large majority of the circuits had concluded that it did not. *Id.* at 17–18.

²⁵¹ *Id.* at 15–16.

²⁵² *Id.* at 24.

interest under the constitutions of either the United States or the state of Louisiana.”²⁵³ The Court, however, noted that the federal courts were not bound by that declaration, stating, “the question whether a state-law right constitutes ‘property’ or ‘rights to property’ is a matter of federal law.”²⁵⁴ The Court concluded that Louisiana’s “sovereign right to exclude applicants deemed unsuitable to run video poker operations” was not a property interest under federal law.²⁵⁵

In the same way that whether an interest constitutes property in a federal fraud case is a matter of federal common law, whether a tangible or intangible thing constitutes a “paper” or an “effect” has been, since at least the time of *Olmstead*, a matter of federal constitutional law. A legislature’s declaration that certain beverages, plants, chemicals, movies, or books are contraband does not place them outside the Constitution’s protection, especially given that searches for seditious libels inspired passage of the Fourth Amendment. The amendment protects even effects whose possession Congress or a state legislature decides to outlaw. Property law has long accommodated the idea that a person may have legally cognizable interests in property despite a legal incapacity to possess it. In one case, for example, the Seventh Circuit blocked the federal government’s attempt to confiscate and destroy a convicted felon’s firearms holding that the government had to sell, bail, or store the weapons for him.²⁵⁶ Because of this distinction between ownership rights and possessory rights, there is no reason for treating contraband as outside the Fourth Amendment’s ambit and a good reason for not doing so: it causes the proliferation of suspicionless dragnet searches.²⁵⁷

By focusing on exclusivity of dominion over private property, including information obtained pursuant to a contract for services, the pre-

²⁵³ *Id.* at 25 n.4 (quoting La. Rev. Stat. Ann. § 27:301(D) (2000)).

²⁵⁴ *Id.* (quoting *Drye v. United States*, 528 U.S. 49, 58 (1999)).

²⁵⁵ *Id.* at 24, 25 n.4 (quoting *Drye*, 528 U.S. at 58).

²⁵⁶ See, e.g., *United States v. Miller*, 588 F.3d 418, 420 (7th Cir. 2009) (“Because the United States did not commence a timely forfeiture proceeding, Miller’s property interest in the firearms continues even though his possessory interest has been curtailed.”).

²⁵⁷ See *Bascuas*, *supra* note 35, at 758–69 (describing Operation Pipeline).

Katz test facilitates resolution of issues that are needlessly convoluted under *Jones* as well as *Katz*. Rather than musing wincingly in *California v. Greenwood*²⁵⁸ about nocturnal foragers and dirty urchins getting into garbage cans, the Court could have answered the real question: whether garbage put at the curb is abandoned for Fourth Amendment purposes. Colorable arguments might be made on either side, but courts are better able to credibly determine when an individual's property rights in trash are extinguished than when one's expectation that her trash is "private" becomes unreasonable.

Justice Sotomayor's concern over cellular telephone tracking would be easily assuaged. Mobile telephone users would have standing to complain that the government converted their telephones into tracking devices, trespassing (and thereby seizing) the devices by depriving the owner of exclusive use of the phone and the information it generates. The telephone, after all, reveals the user's location only incidentally to achieving its function of putting the user in telephonic contact with others. It is the user who pays for the telephone and the communications service. Today's mobile phones and the information that flows from them are, for Fourth Amendment purposes, no different from *Silverman*'s heating pipes and the conversations that echoed throughout them in 1958. Tapping the phone to seize information is functionally indistinguishable from tapping the pipes to seize conversations.

Similarly, viewed from *Silverman*'s vantage, the problem with license plate tracking is the license plate itself and the purpose it serves. Requiring every driver to affix a license plate to a car as part of a vehicle taxing scheme might not constitute a Fourth Amendment "seizure" any more than requiring a building to have plumbing does. This is not because the license plate does not "meaningful interfere" with the car's use. Rather, it is because the reason why the government does something is

²⁵⁸ 486 U.S. 35, 51 (1988) (Brennan, J., dissenting) ("The Court properly rejects the State's attempt to distinguish trash searches from other searches on the theory that trash is abandoned and therefore not entitled to an expectation of privacy."); *see also* *California v. Rooney*, 483 U.S. 307, 320 (1987) (White, J., dissenting from dismissal of writ of certiorari) ("Rooney's property interest, however, does not settle the matter for Fourth Amendment purposes, for the reach of the Fourth Amendment is not determined by state property law.").

often a critical question in determining whether the action is allowed or prohibited.²⁵⁹ The government can require plumbing as a health and safety regulation, but it does not follow that it can then tap the pipes to overhear conversations. In the same way, it does not follow from the government's being able to require license plates to raise revenue that it can use them as tracking devices without committing an unconstitutional conversion of each automobile.²⁶⁰ The Fourth Amendment may well require changes to license plates to make tracking impossible or suppression of evidence obtained through license-plate tracking even if requiring license plates for a purpose other than tracking is permissible.

Had the Court abandoned expectations of privacy and relied instead on property concepts, it would not have had to duck the critical issues in *City of Ontario v. Quon*. Rather than having to divine whether society expects text messages to be private, the Court could have undertaken to decide whose property the messages were, just as it decided in *Carpenter* that the *Journal* owned the information its reporter gathered. That is not to say that the question of ownership over text messages sent on city equipment issued to police officers is free from all doubt. Its resolution might have been influenced by the city's having acquiesced in the police sergeant sending personal text messages so long as he reimbursed the city for the cost.²⁶¹ Rather, the point is that framing the question with reference to property concepts rather than expectations of privacy makes it possible for a court to answer it with authority.

²⁵⁹ See *Jardines v. Florida*, 133 S. Ct. 1409, 1416–17 (2013) (“Here, however, the question before the court is precisely whether the officer’s conduct was an objectively reasonable search. As we have described, that depends upon whether the officers had an implied license to enter the porch, which in turn depends upon the purpose for which they entered. Here, their behavior objectively reveals a purpose to conduct a search, which is not what anyone would think he had license to do.”); *National Aero. & Space Admin. v. Nelson*, 131 S. Ct. 746, 757 (2011) (holding that the government has greater latitude in gathering personal information when it acts as an employer than when it acts as sovereign).

²⁶⁰ Cf. Reich, *supra* note 104, at 1428 (“Regulatory power over the right to drive is delegated by the people to the state for one purpose alone—to ensure safety on the public highways. It is a manifest abuse for the state to use its licensing power for any purpose whatsoever except to ensure safe driving.”).

²⁶¹ *City of Ontario v. Quon*, 130 S. Ct. 2619, 2625–26 (2010).

This is not to say that courts never have any trouble identifying property interests.²⁶² Appeals involving fraudulent schemes to obtain unearned frequent-flier travel awards, for example, mistakenly have focused on the question of whether frequent-flier miles are “property” of the airline.²⁶³ But that is not the actual issue. In *United States v. Loney*, American Airlines was not defrauded out of frequent flier miles when the defendant fraudulently obtained tickets and sold them. It was defrauded of the value of the travel service it provides, whether that is measured as the amount for which the defendant sold the tickets or as the full retail value of the tickets. The miles probably are not property at all, but the Fifth Circuit’s alternative rationale—that the scheme deprived the airline of its “lawful revenues”—is more or less correct.²⁶⁴ (There is a needless discussion to the effect that proof of harm is not an element of federal fraud, but there is no doubt that American was harmed because it flew at least two passengers without being compensated.²⁶⁵) *United States v. Schrier* likewise erroneously focuses on whether airline miles are property, but the late Judge Edward Dumbauld’s brief concurring opinion is on the money in concluding that issued tickets were property.²⁶⁶ Whatever the difficulties entailed in identifying property interests as a matter of federal common law, the process is a customary one for judges and lawyers, while identifying expectations of privacy is not.

V. CONCLUSION

Olmstead, *Katz*, and *Jones* each presented the same basic problem: how to meet the challenge to privacy posed by the technological advances

²⁶² See, e.g., *Jolly v. United States*, 170 U.S. 402 (1898) (analyzing whether unissued postage stamps have “intrinsic value” and are thus property of the United States).

²⁶³ See, e.g., *United States v. Loney*, 959 F.2d 1332, 1335–36 (5th Cir. 1992) (discussing *Trans-World Airlines v. Am. Coupon Exch.*, 913 F.2d 676 (9th Cir. 1990)).

²⁶⁴ *Id.* at 1336.

²⁶⁵ *Id.* at 1337 n.13.

²⁶⁶ 908 F.2d 645, 648 (10th Cir. 1990) (Dumbauld, J., concurring).

of the Information Age. That challenge has not been met by the Court's long experiment with protecting expectations of privacy directly. On the contrary, the *Katz* test has been a dismal failure, yielding an arbitrary and unpredictable jurisprudence that allowed the Court to withdraw the amendment's protection over some traditional forms of property, like contraband. The *Katz* framework is irremediable because, even assuming that anyone can correctly gauge societal expectations of privacy, courts have shown that they cannot. *Jones* fails to improve upon it because, like *Katz*, it proceeds from a misguided assumption that minor conversions of property are allowed even without any individualized suspicion.

Meeting the challenge to privacy in the Information Age requires understanding "persons, houses, papers, and effects" in a way that is grounded in law yet can evolve as quickly as surveillance and communication technology. It means interpreting those terms in a way that is consistent with our understanding of property across various fields of law and is therefore principled and predictable. The federal courts' interpretation of federal fraud statutes shows that courts are capable of doing just that. Courts have for years successfully identified new forms of property created by new forms of storing and transmitting data and new ways of transacting business. The Supreme Court has protected informational property against fraud, rejecting the rationales and justifications it deploys to allow the government to infringe on property rights. The federal courts can and should protect all property from government incursions in the same way that they protect it from fraudsters.

Understanding that the Fourth Amendment protects property is unavailing unless it is also accepted that the amendment protects property from even slight incursions. A government trespass or conversion of property is not "reasonable" in a constitutional sense because a court deems it minor or in society's interest. Conversions of private property are reasonable only when they are justified by individualized suspicion amounting to probable cause. Despite its pretensions, *Jones* fails to restore the Fourth Amendment's protection of property because it adopts an unduly narrow understanding of "seizure", one that excludes many government conversions of property from the amendment's reach. This perpetuates the abuses that *Katz* fostered—abuses of the very sort the framers sought to curb. It encourages corporations to sell sensitive

information to government agencies on an unprecedented scale and encourages police to conduct dragnet searches for contraband. Over the long run, this fuels the government's agglomeration of data to track individuals' thoughts and movements while degrading them by demanding urine from schoolchildren, stopping drivers at highway checkpoints, and searching travelers' personal belongings on the basis of a dog's instinct. As *Silverman* illustrates, a Fourth Amendment seizure is complete with the government's slightest touching of private property.