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# Property and Probable Cause: The Fourth Amendment's Principled Protection of Privacy

Ricardo J. Bascuas

*University of Miami School of Law*, [rbascuas@law.miami.edu](mailto:rbascuas@law.miami.edu)

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## PROPERTY AND PROBABLE CAUSE: THE FOURTH AMENDMENT'S PRINCIPLED PROTECTION OF PRIVACY

*Ricardo J. Bascuas\**

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### I. INTRODUCTION: YAHOO HANDS UP SHI TAO

Alone in his office in Changsha, Hunan, late on the night of April 20, 2004, Chinese journalist Shi Tao sent an e-mail using his personal Yahoo China account to a Taiwanese colleague in New York

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\* Associate Professor of Law, University of Miami School of Law. Thanks to Samuel Randall for his assistance with research and editing and to Patrick Gudridge for helpful comments on earlier drafts.

City.<sup>1</sup> The e-mail summarized a government document warning against disruptive commemorations on the upcoming fifteenth anniversary of the Tiananmen Square massacre and directing the media to discourage such demonstrations.<sup>2</sup> Two days later, the Beijing State Security Bureau demanded that Yahoo Holdings (Hong Kong) produce identifying information, login times, and e-mail content for the account Mr. Shi had used.<sup>3</sup> The notice stated that the information pertained to an investigation into the provision of state secrets to foreign entities.<sup>4</sup> Yahoo complied, as it had in at least three similar cases,<sup>5</sup> handing over Mr. Shi's identifying information and e-mails.<sup>6</sup>

Seven months later, state police snatched Mr. Shi from a street near his new home in Taiyuan, Shanxi.<sup>7</sup> They transported him the 667 miles south to Changsha, where he was imprisoned.<sup>8</sup> About a month later, China charged Mr. Shi with the crime of "providing state secrets to foreign entities."<sup>9</sup> At his trial on March 11, 2005, Mr. Shi did not contest the charge, but argued that his disclosure did not involve "especially serious circumstances," a contention the court rejected.<sup>10</sup> The court nonetheless imposed a "lenient" sentence of ten years in prison because Mr. Shi admitted his guilt and because his crime did not cause serious harm.<sup>11</sup> Mr. Shi is scheduled to be released from Chishan Prison on November 24, 2014.<sup>12</sup>

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1. Changsha People's Procuratorate of Hunan Province v. Shi Tao, Criminal Verdict (Changsha Interim. People's Ct., Apr. 27, 2005), available at [http://www.lawprofessors.typepad.com/china\\_law\\_prof\\_blog/2005/09/reporters\\_witho.html](http://www.lawprofessors.typepad.com/china_law_prof_blog/2005/09/reporters_witho.html).

2. E-mail from Shi Tao, Editor, Contemporary Trade News, to Hong Zhesheng, Editor-in-Chief, Democracy News (Apr. 20, 2004), available at [http://www.cpj.org/awards05/shi\\_tao.html#govt](http://www.cpj.org/awards05/shi_tao.html#govt).

3. Beijing State Security Bureau, Notice of Evidence Collection (Apr. 22, 2004), available at [http://www.duihua.org/media/news/070725\\_ShiTao.pdf](http://www.duihua.org/media/news/070725_ShiTao.pdf).

4. *Id.*

5. See HUMAN RIGHTS WATCH, RACE TO THE BOTTOM: CORPORATE COMPLICITY IN CHINESE INTERNET CENSORSHIP 5, apps. IV-VI (2006), available at <http://www.hrw.org/reports/2006/china0806/china0806webwcover.pdf> (detailing cases of Li Zhi, Jiang Lijun, and Wang Xiaoning).

6. Catherine Holahan, *Jerry Yang on the Hot Seat*, BUS. WK., Nov. 6, 2007, at 11, available at [http://www.businessweek.com/print/technology/content/nov2007/tc2007115\\_166576.htm](http://www.businessweek.com/print/technology/content/nov2007/tc2007115_166576.htm).

7. HUMAN RIGHTS WATCH, *supra* note 5, at app. III.

8. *Id.*

9. Changsha People's Procuratorate of Hunan Province v. Shi Tao, Criminal Verdict (Changsha Interim. People's Ct., Apr. 27, 2005), available at [http://www.lawprofessors.typepad.com/china\\_law\\_prof\\_blog/2005/09/reporters\\_witho.html](http://www.lawprofessors.typepad.com/china_law_prof_blog/2005/09/reporters_witho.html).

10. *Id.*

11. *Id.*

12. HUMAN RIGHTS WATCH, *supra* note 5, at app. III.

A year after Mr. Shi's trial, executives of Yahoo, Microsoft, Google, and Cisco testified in the House of Representatives regarding their Chinese operations.<sup>13</sup> Michael Callahan, Yahoo's general counsel and senior vice president, said that Yahoo "had no information about the nature of the investigation" when it gave Mr. Shi's information to the Chinese government.<sup>14</sup> Mr. Callahan further asserted that Yahoo could not have withheld the information: "When we receive a demand from law enforcement authorized under the law of the country in which we are operating, we must comply. . . . Failure to comply in China could have subjected Yahoo! China and its employees to criminal charges, including imprisonment."<sup>15</sup>

When a San Francisco-based human rights group released an English translation of the Chinese government's request to Yahoo,<sup>16</sup> it became clear that, contrary to Mr. Callahan's testimony, Yahoo did have reason to know that China suspected Mr. Shi of a political crime. Congress summoned Mr. Callahan back to Washington, along with Yahoo CEO Jerry Wang.<sup>17</sup> Before and during the November 2007 hearing, Mr. Callahan said he was unaware of the wording of the Chinese government's request until October 2006 and apologized for failing to then correct his testimony.<sup>18</sup> The representatives at the hearing accused Mr. Wang and Mr. Callahan of being negligent, if not deliberately deceptive.<sup>19</sup> Representative Tom Lantos said, "While technologically and financially you are giants, morally you are pygmies."<sup>20</sup>

In the United States, neither the Constitution nor any federal law prevents the government from obtaining subscriber information and e-mails from an Internet company, just as China obtained Shi

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13. Tom Zeller, *Web Firms Grilled on Dealings in China*, N.Y. TIMES, Feb. 16, 2006, at C1.

14. *The Internet in China: A Tool for Freedom or Suppression?: Joint Hearing Before the H. Subcomm. on Africa, Global Human Rights and International Operations & H. Subcomm. on Asia and the Pacific of the H. Comm. on International Relations*, 109th Cong. 2 (2006) (testimony of Michael Callahan, Senior Vice President and General Counsel, Yahoo! Inc.).

15. *Id.*

16. Keith Bradsher, *China Cracks Down on News Media as Party Congress Nears*, N.Y. TIMES, Aug. 16, 2007, at A3.

17. *Yahoo Accused of False Testimony; Did Firm Help China in Arrest?*, CHICAGO SUN-TIMES, Oct. 17, 2007, at A4.

18. Corey Boles, *Yahoo Executive Offers Apology to Lawmakers*, WALL ST. J., Nov. 2, 2007, at A10; *Yahoo Executive Apologizes to Congressional Panel*, N.Y. TIMES, Nov. 3, 2007, at C9.

19. Corey Boles, Don Clark & Pui-Wing Tam, *Yahoo's Lashing Highlights Risks of China Market*, WALL ST. J., Nov. 7, 2007, at A1.

20. *Id.*; Catherine Rampell, *Yahoo Lied About China, Legislators Say*, WASH. POST, Nov. 7, 2007, at D5.

Tao's records from Yahoo.<sup>21</sup> Nonetheless, the day after Mr. Callahan's first appearance on Capitol Hill, Representatives Christopher Smith and Lantos sponsored the Global Online Freedom Act.<sup>22</sup> The bill was reintroduced in 2007 and remains pending.<sup>23</sup> Among other things, it bars U.S. companies from divulging (without approval from the Department of Justice) electronically stored information to governments that restrict Internet access.<sup>24</sup> Though ostensibly aimed at preventing Internet companies from behaving "immorally," the proposed Act of course seeks to promote the freedom to speak on political and religious matters.<sup>25</sup> In other words, Yahoo's actions are morally blameworthy only from a perspective that is sympathetic to Shi Tao's ideology and his defiance of Chinese law. After all, like China, the United States both prevents<sup>26</sup> and

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21. In fact, the Stored Wire and Electronic Communications and Transactional Records Access Act vests in government investigators the authority to seize without a warrant electronic communications stored with Internet companies, provided only that the information "[is] relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d) (2006). Some statutes prevent the seizure of documents in particular circumstances. For example, the Privacy Protection Act of 1980 prohibits the government from using criminal search and seizure power to prevent the publication of information. See Pub. L. 96-440, 94 Stat. 1879 (codified as amended in 42 U.S.C. § 2000aa (2006)). But no law prevents a corporation like Yahoo from giving up its customers. Internet companies acknowledge this in their disclosures to their customers. See, e.g., Google Privacy Policy, <http://www.google.com/privacypolicy.html> (last visited Feb. 7, 2008) (stating that Google will divulge "personal information" when it has "a good faith belief that access, use, preservation or disclosure of such information is reasonably necessary to (a) satisfy any applicable law, regulation, legal process or enforceable governmental request, (b) enforce applicable Terms of Service, including investigation of potential violations thereof, (c) detect, prevent, or otherwise address fraud, security or technical issues, or (d) protect against imminent harm to the rights, property or safety of Google, its users or the public as required or permitted by law"); Yahoo Privacy Policy, <http://info.yahoo.com/privacy/us/yahoo/details.html> (last visited Feb. 7, 2008) (stating that Yahoo will divulge "personal information" when "[w]e believe it is necessary to share information in order to investigate, prevent, or take action regarding illegal activities, suspected fraud, situations involving potential threats to the physical safety of any person, violations of Yahoo's terms of use, or as otherwise required by law").

22. HUMAN RIGHTS WATCH, *supra* note 5, at 4.

23. Global Online Freedom Act of 2007, H.R. 275, 110th Cong. (Jan. 5, 2007) (as passed by H. Comm. on Foreign Affairs, Oct. 23, 2007).

24. *Id.* §§ 201, 202.

25. China claims in its constitution to guarantee freedom of expression. XIAN FA art. 35, § 2 (2004) (P.R.C.), translated at [http://english.gov.cn/2005-08/05/content\\_20813.htm](http://english.gov.cn/2005-08/05/content_20813.htm) ("Citizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration."). Obviously, these rights are not honored by the government.

26. See *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190 (9th Cir. 2007) (holding that state secrets doctrine barred disclosure of government document relating to classified intelligence-gathering activities); *El-Masri v. United States*, 479 F.3d 296

punishes<sup>27</sup> the dissemination of “state secrets.” More to the point, those outraged over Mr. Shi’s fate might be surprised to learn that U.S. law enforcement agencies can obtain a person’s information and correspondence from an Internet company as easily as the Chinese government can. They might also be surprised that the Constitution, as currently interpreted by the Supreme Court, would arguably not be implicated had Shi Tao’s case arisen in the United States.

The Fourth Amendment, despite its terms, presently fails to protect from arbitrary government inspection intangible and tangible items that Americans consider theirs. This is because it is generally accepted that the Amendment protects nebulous “expectations of privacy.” This Article argues that the Amendment may protect privacy, but that it does so by protecting property—“persons, houses, papers, and effects”—from searches unsupported by individualized suspicion. Its effectiveness is diminished, not aided, by the pretense that it protects privacy directly and by the fallacy that the constitutionality of a search depends on the government’s need for making it. In addition, the Article argues that the Amendment’s protection of property cannot be realized as long as it remains the law that an easily obtained search warrant essentially forecloses any inquiry into whether the search was made with good cause.

Part II of this Article describes how the Supreme Court came to rely on “expectations of privacy” and on the warrant procedure and discusses the faulty assumptions underlying these pillars of Fourth Amendment jurisprudence. Part III examines the utility of the “expectations of privacy” framework and the warrant procedure by comparing how the two principal Fourth Amendment theories treat each in application. Part IV describes how a pragmatic, nontechnical approach to defining property for Fourth Amendment purposes and focusing on the existence of probable cause rather than on the warrant procedure can form the basis for a more rational, enduring search-and-seizure jurisprudence.

If the Fourth Amendment is to endure with any vitality, the contrived “expectations of privacy” framework, which enables Fourth Amendment protections to be gradated and individualized suspicion

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(4th Cir. 2007) (dismissing tort suit alleging illegal detention and torture because state secrets doctrine barred discovery of information necessary to plaintiff’s case).

27. See, e.g., *United States v. Campa*, 459 F.3d 1121 (11th Cir. 2006) (affirming conviction of Cuban nationals charged with espionage activities); *United States v. Lee*, 589 F.2d 980 (9th Cir. 1979) (affirming conviction for selling defense secrets to Soviet agents in violation of 18 U.S.C. § 794); Dan Eggen, *Report Finds FBI Still Vulnerable to Espionage*, WASH. POST, Oct. 2, 2007, at A4 (discussing two cases in which FBI employees were convicted of spying and sentenced to prison); Christopher Marquis, *Threats and Responses: Espionage; Jury Rules out Death Penalty for Failed Spy*, N.Y. TIMES, Feb. 25, 2003, at A17 (discussing three cases in which government employees convicted of spying were spared death penalty).

to become increasingly dispensable, must be abandoned. Houses, which are currently singled out as bastions of protected privacy, are no longer the primary repository of the very papers and effects the Framers most sought to protect, as the seizure of Mr. Shi's political communiqués makes only too clear. Further, it must be recognized that the much-lauded warrant procedure has evolved to protect the government at the expense of the citizenry. A search warrant now generally offers little if any protection against government invasions of private property and serves primarily to obviate adversarial challenge to the government's claimed reason for searching.

## II. ABSTRACT FOURTH AMENDMENT VALUES: PRIVACY AND PROCEDURE

Black letter law inculcated upon law students for years posits that the Fourth Amendment protects "expectations of privacy" and that it does so by generally requiring police to obtain a warrant before making a search. The cases insist that a judge will issue a warrant only when there is good reason ("probable cause") to believe a crime has been committed or is underway. The so-called "warrant requirement" may be excused only in certain circumstances where practicalities so demand. These premises raise difficult conundrums for students in the classroom, police on the streets, and judges on the bench because they do not square with experience. First, "expectations of privacy" are subjective specters that, like shapes in the clouds, judges view idiosyncratically. The advent of new technologies and shifting social attitudes toward the dissemination of personal information will only exacerbate the difficulties in predicating constitutional protection on anything so abstract and manipulable as privacy. Second, warrants provide marginal if any protection from government overreaching. The vast majority of searches take place without a warrant; it is the exceptional search that is supported by one. Judges are known to issue warrants perfunctorily. Reexamining these Fourth Amendment myths shows how the Amendment's unpredictable and arbitrary jurisprudence can be rationalized only by abandoning these precepts.

### A. *The Divination of "Expectations of Privacy"*

"Expectations of privacy" are a legal fiction of relatively recent invention. Before 1967, a Fourth Amendment violation entailed a government trespass on a property interest.<sup>28</sup> Property interests were defined so legalistically that the Court's jurisprudence distinguished

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28. See, e.g., *Silverman v. United States*, 365 U.S. 505, 509-10 (1961); *Goldman v. United States*, 316 U.S. 129, 134-35 (1942); *Olmstead v. United States*, 277 U.S. 438, 455-57 (1928).

between items that were mere evidence of a crime (which could not be seized) and items used to commit crime or derived from crime (which could be seized).<sup>29</sup> This dichotomy had its roots in *Boyd v. United States*,<sup>30</sup> a forfeiture action. The claimant in *Boyd* appealed a district court order requiring him to produce a certain invoice, which the government wanted to prove its entitlement to property on which duties were allegedly evaded.<sup>31</sup> The challenge having been brought under the Fourth and Fifth Amendments, the Court considered whether the compelled production was an act of self-incrimination and whether it was tantamount to an unreasonable search. Concluding it amounted to an unreasonable search, the Court leapt to the conclusion that mere evidence of a crime could not, by its nature, be the object of a reasonable search.<sup>32</sup> Only property that the government had a right to possess, like contraband, could be the target of a constitutional search and seizure.<sup>33</sup>

This distinction between “mere evidence” and contraband was dubious and unworkable from its adoption. The principal authority for *Boyd*’s holding, *Entick v. Carrington*,<sup>34</sup> proposed no such dichotomy.<sup>35</sup> In that celebrated eighteenth-century English case, Lord Camden upheld a jury verdict in *Entick*’s favor after agents of the Crown ransacked his house searching for seditious writing.<sup>36</sup> Emphasizing the centrality of property rights to English civilization, *Entick* criticized general warrants for lacking the important safeguards that attended warrants to search for specific stolen items.<sup>37</sup> These procedures, which required that the theft victim be present at the search and swear that his stolen property was in a particular place, ensured that an unreasonable search could be quickly redressed.<sup>38</sup> *Entick* is universally agreed to be among the

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29. See, e.g., *United States v. Lefkowitz*, 285 U.S. 452, 465-66 (1932); *Gouled v. United States*, 255 U.S. 298, 306 (1921).

30. 116 U.S. 616 (1886).

31. *Id.* at 617-18.

32. *Id.* at 623. Justice Miller and Chief Justice Waite believed that the production did not constitute a search or seizure but concurred on the ground that it violated the Fifth Amendment. *Id.* at 639-40 (Miller, J., concurring).

33. *Id.* at 623 (majority opinion).

34. 19 Howell’s St. Trials 1029 (C.P. 1765), 95 Eng. Rep. 807 (K.B.).

35. TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 61 (1969).

36. *Entick*, 19 Howell’s St. Trials at 1029.

37. *Id.*

38. *Boyd*, 116 U.S. at 628. The late Professor Telford Taylor likewise emphasized the importance of procedural safeguards to common law searches, likening wiretap authorizations with general warrants. See TAYLOR, *supra* note 35, at 82. He emphasized that, unlike surveillance orders, search warrants required an inventory and a return. *Id.* By requiring that the officer executing the warrant furnish the target



primary inspirations for the Fourth Amendment.<sup>39</sup> *Boyd* departed from *Entick's* focus on the distinctions between specific searches and general searches and held that a search's legality depended on the nature of the items sought. The decision was widely criticized as much for lacking sense as for hampering effective law enforcement.<sup>40</sup>

Justice Brennan's opinion for the Court in 1967's *Warden v. Hayden* abandoned *Boyd's* "mere evidence" rule and held that police officers could seek and seize clothing that matched a description of what a bank robber wore.<sup>41</sup> Noting that searches may be unconstitutional even where the government seizes stolen goods, instrumentalities of crime, or contraband,<sup>42</sup> the Court sonorously declared "that the principal object of the Fourth Amendment is the protection of privacy rather than property."<sup>43</sup> The Court further noted that the remedy of suppression, constitutionally mandated in state as well as federal courts just six years earlier,<sup>44</sup> provided more tailored and effective protection than limits on the type of property that police could seize.<sup>45</sup>

By saying that the Amendment primarily protects "privacy rather than property," *Hayden* cast these as competing rather than complementary Fourth Amendment concerns.<sup>46</sup> Privacy was unnecessarily declared the rightful and exclusive claimant to the

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with an inventory of everything seized, the common law created a record that could be referenced in any controversy over the search. *Id.*

39. See JED RUBENFELD, *REVOLUTION BY JUDICIARY* 32 (2005); TAYLOR, *supra* note 35, at 29-38; 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 Reasonableness*, 2004 UTAH L. REV. 977, 982-87; 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).

40. See *Warden v. Hayden*, 387 U.S. 294, 300 nn.6 & 7 (1967); TAYLOR, *supra* note 35, at 68-70.

41. *Hayden*, 387 U.S. at 309-10.

42. *Id.* at 305.

43. *Id.* at 304.

44. *Mapp v. Ohio*, 367 U.S. 643, 659-60 (1961). Suppression of unconstitutionally seized evidence has been required in federal cases since 1914. *Weeks v. United States*, 232 U.S. 383, 398-99 (1914).

45. *Hayden*, 387 U.S. at 307.

46. They are still commonly discussed as mutually exclusive rather than complementary concepts. See, e.g., Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307 (1998) (treating property and privacy as exclusive or competing values and arguing that Fourth Amendment protects third value of "security").

Amendment's focus.<sup>47</sup> The Court could have departed from a strict, technical trespass requirement without severing the Fourth Amendment's connection to property interests. For example, as Justice Fortas and Chief Justice Warren noted, the case could have been decided simply by expanding the category of items susceptible to government seizure to include identifying clothing.<sup>48</sup>

A few months later, *Katz v. United States*,<sup>49</sup> a case that occasioned five opinions, cemented "expectations of privacy" as the principal object of the Fourth Amendment's protection. Charles Katz was convicted of transmitting wagering information across the country by telephone in violation of a federal statute.<sup>50</sup> He challenged the admission of recordings made without a warrant of calls he placed from a public payphone.<sup>51</sup> Rejecting the doctrine that the hallmark of a Fourth Amendment violation was a trespass on property, the Court held that the wiretap "violated the privacy upon which [Katz] justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment."<sup>52</sup> As Justice Harlan noted, the critical fact was not whether telephone booths were generally public, but that under the circumstances the conversation was private.<sup>53</sup> Justice Harlan's concurrence set out the threshold test still used to determine whether government action implicates the Fourth Amendment: "[F]irst that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"<sup>54</sup> Justice Stewart's majority opinion was less simplistic and therefore of less ready application. Ironically, it declared that "the Fourth Amendment cannot be translated into a general constitutional 'right to privacy.' That Amendment protects individual privacy against certain kinds of

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47. See *Hayden*, 387 U.S. at 306, 308; Morgan Cloud, *A Liberal House Divided: How the Warren Court Dismantled the Fourth Amendment*, 3 OHIO ST. J. CRIM. L. 33, 35-36 (2005). As Professor Cloud notes, *Hayden* also repudiated the link between the Fourth and Fifth Amendments, which had been central to the Court's enforcement of privacy concerns for eighty years. *Id.*; see also *Lopez v. United States*, 373 U.S. 427, 456 & n.7 (1963) (Brennan, J., dissenting) (collecting cases).

48. *Hayden*, 387 U.S. at 311-12. (Fortas, J., dissenting).

49. 389 U.S. 347 (1967).

50. *Id.* at 348.

51. *Id.* at 348-49.

52. *Id.* at 353.

53. *Id.* at 361 (Harlan, J., concurring).

54. *Id.*; see, e.g., *Georgia v. Randolph*, 547 U.S. 103, 130 (2006) (Roberts, C.J., dissenting); *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); see also *Minnesota v. Carter*, 525 U.S. 83, 97-98 (1998) (Scalia, J., concurring) (describing "Katz test").

governmental intrusion, but its protections go further, and often have nothing to do with privacy at all."<sup>55</sup>

*Katz's* nuances have unfortunately been buried by repetition of the pithy notion that the Fourth Amendment guarantees a right to privacy, which *Katz* is now taken to hold.<sup>56</sup> It is true that the concept of privacy figured prominently in the Court's Fourth Amendment decisions before *Hayden* and *Katz*.<sup>57</sup> But prior to 1967, the Court

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55. *Katz*, 389 U.S. at 350.

56. See, e.g., *Randolph*, 547 U.S. at 128 (Roberts, C.J., dissenting) ("The Fourth Amendment protects privacy."); *Horton v. California*, 496 U.S. 128, 133 (1990) ("A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property."); *United States v. Quinn*, 475 U.S. 791, 793 (1986) (Burger, C.J., dissenting from dismissal of certiorari) ("It is axiomatic that the Fourth Amendment guarantee against unreasonable searches and seizures protects personal privacy interests, not property rights."); *Winston v. Lee*, 470 U.S. 753, 758 (1985) ("The Fourth Amendment protects 'expectations of privacy'—the individual's legitimate expectation that in certain places and at certain times he has 'the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.'"); *Illinois v. Andreas*, 463 U.S. 765, 771 (1983) ("The Fourth Amendment protects legitimate expectations of privacy rather than simply places."); *United States v. Place*, 462 U.S. 696, 706-07 (1983) ("The Fourth Amendment 'protects people from unreasonable government intrusions into their legitimate expectations of privacy.'"); *Payton v. New York*, 445 U.S. 573, 589 (1980) ("The Fourth Amendment protects the individual's privacy in a variety of settings."); *Michigan v. Tyler*, 436 U.S. 499, 504 (1978) ("The 'basic purpose of this Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.'"); *United States v. Ortiz*, 422 U.S. 891, 895 (1975) ("[T]he central concern of the Fourth Amendment is to protect liberty and privacy from arbitrary and oppressive interference by government officials."); *Schneckloth v. Bustamonte*, 412 U.S. 218, 242 (1973) ("[T]he Fourth Amendment protects the 'security of one's privacy against arbitrary intrusion by the police.'"); see also JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 96 (1938) (stating that "standard line is" that Fourth Amendment protects privacy); William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1265 (1999) ("[T]here seems to be widespread agreement on the twin propositions that (1) Fourth Amendment law should protect privacy, and (2) the protection should tend to increase as the privacy invasion increases.").

57. See, e.g., *Berger v. New York*, 388 U.S. 41, 53 (1967) ("The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.") (quoting *Camara v. Mun. Court*, 387 U.S. 523, 528 (1967)); *Schmerber v. California*, 384 U.S. 757, 767 (1966) ("The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State."); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) ("Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth Amendment, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government."); *Wolf v. Colorado*, 338 U.S. 25, 27 (1949) ("The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society."); *Zap v. United States*, 328 U.S. 624, 628 (1946) ("[W]hen petitioner, in order to obtain the government's business, specifically

seemed to understand that the Amendment's underlying purpose of protecting privacy was effected through its explicit provision of security for property.<sup>58</sup> Now, the Court attempts to protect privacy directly. Privacy's primacy is so taken for granted that occasionally the Court has had to revisit the idea that the Fourth Amendment protects property interests as well.<sup>59</sup> Generally, and despite its text, the Amendment's solicitude for property has been disregarded.<sup>60</sup>

The Court has never supposed, however, that the Fourth Amendment protects privacy in all its aspects. Privacy is an extremely broad concept that must compete in an open society with the need to keep certain information and activities in the public domain.<sup>61</sup> The type of privacy the Amendment is said to ensure is embraced by the idea that each person is entitled to withdraw from the world (and the government) into a sacrosanct space with his thoughts and ideas. As Justice Brandeis famously formulated the notion, the Fourth Amendment supposedly guarantees "the right to be let alone,"<sup>62</sup> though this is more a rhetorical than a categorical characterization.

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agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts."); *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932) ("The Fourth Amendment forbids every search that is unreasonable and is construed liberally to safeguard the right of privacy."); *see also Katz*, 389 U.S. at 373 (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.").

58. *See, e.g., Jones v. United States*, 362 U.S. 257, 261 (1960) ("The restrictions upon searches and seizures were obviously designed for protection against official invasion of privacy and the security of property.").

59. *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.").

60. *See United States v. Jacobsen*, 466 U.S. 109, 113 & n.5 (1984) (stating that Fourth Amendment "search" entails infringement of privacy interests while "seizure" entails interference with possessory interests and noting that "the concept of a 'seizure' of property is not much discussed in our cases").

61. *See William J. Stuntz, Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1020-21 (1995). For comprehensive analyses of the threats to privacy and possible legal responses to those, *see generally* A. Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461 (2000) (discussing diminution of privacy rights associated with technological advancement); Richard A. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173; Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989) (analyzing extent of constitutional guarantee to privacy and advancing modern conception of privacy doctrine).

62. *Olmstead v. United States*, 277 U.S. 438, 478 (Brandeis, J., dissenting); *see also Samuel D. Warren & Louis D. Brandeis, The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

Fourth Amendment privacy does not embrace the notion that one should be able to venture into the public sphere (whether in the physical world or on the Internet) and enjoy social interaction without having his words and deeds recorded.<sup>63</sup> This type of privacy frees us from having to account for every word uttered and every action taken, permitting spontaneous rather than restrained exchanges.<sup>64</sup> If we are entitled to be obscure and forgettable, it is not because of the Fourth Amendment. The Court made this clear in the 1963 case *Lopez v. United States*, in which the defendant argued that a surreptitious recording of German Lopez's attempt to bribe an IRS agent should be inadmissible.<sup>65</sup>

In other cases, the Court likewise approved the admission of testimony and recorded conversations by informants and undercover agents, reasoning in each case that no property had been trespassed to obtain the evidence.<sup>66</sup> The subsequent adoption of privacy as the Fourth Amendment's primary concern did not occasion reversal of

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63. Froomkin, *supra* note 61, at 1506 (noting that modern Fourth Amendment jurisprudence does not constrain government's ability to conduct surveillance in public forums).

64. As Justice Harlan deftly explained, government monitoring can be destructive of the public sphere:

Authority is hardly required to support the proposition that words would be measured a good deal more carefully and communication inhibited if one suspected his conversations were being transmitted and transcribed. Were third-party bugging a prevalent practice, it might well smother that spontaneity—reflected in frivolous, impetuous, sacrilegious, and defiant discourse—that liberates daily life. Much offhand exchange is easily forgotten and one may count on the obscurity of his remarks, protected by the very fact of a limited audience, and the likelihood that the listener will either overlook or forget what is said, as well as the listener's inability to reformulate a conversation without having to contend with a documented record.

*United States v. White*, 401 U.S. 745, 787-88 (1971) (Harlan, J., dissenting); *see also id.* at 762-63 (Douglas, J., dissenting) ("Monitoring, if prevalent, certainly kills free discourse and spontaneous utterances. Free discourse—a First Amendment value—may be frivolous or serious, humble or defiant, reactionary or revolutionary, profane or in good taste; but it is not free if there is surveillance. Free discourse liberates the spirit, though it may produce only froth."); *United States v. U.S. Dist. Court*, 407 U.S. 297, 314 (1972) ("The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power. Nor must the fear of unauthorized official eavesdropping deter vigorous citizen dissent and discussion of Government action in private conversation.").

65. 373 U.S. 427, 439 (1963) ("Stripped to its essentials, petitioner's argument amounts to saying that he has a constitutional right to rely on possible flaws in the agent's memory, or to challenge the agent's credibility without being beset by corroborating evidence that is not susceptible of impeachment.").

66. *See Hoffa v. United States*, 385 U.S. 293, 302 (1966); *Lewis v. United States*, 385 U.S. 206, 211 (1966); *Lopez*, 373 U.S. at 437-38 (1963); *On Lee v. United States*, 343 U.S. 747, 751-52 (1952).

these decisions.<sup>67</sup> In fact, these decisions would be recast in the privacy rubric to support the idea that information once shared ceases to be private.

Closely related to obscurity is the notion that one is entitled to wander in and out of supermarkets, malls, parks, airports, courthouses, and Web sites anonymously. But the Supreme Court has made clear that the Fourth Amendment does not restrict the government from surveilling us in public, at least with bare human senses: “[I]n fact we have held that visual observation is no ‘search’ at all—perhaps in order to preserve somewhat more intact our doctrine that warrantless searches are presumptively unconstitutional.”<sup>68</sup> Even when technology is employed, the Fourth Amendment may offer no protection. In *United States v. Knotts*, for example, the Court held that using a hidden transmitter to track a defendant’s automobile from Minnesota to Wisconsin did not implicate the Fourth Amendment because it revealed nothing private.<sup>69</sup> “A person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.”<sup>70</sup> Nowadays, police can use a target’s own cellular telephone as a tracking device, and courts have sharply divided over whether this information is private under the Amendment.<sup>71</sup>

Nor does Fourth Amendment privacy keep us from having to identify ourselves to the police. Anonymity was not historically a fact of life. For hundreds of years, the Supreme Court reminds us, nightwalker statutes authorized the detention of strangers walking through town at night.<sup>72</sup> The Fourth Amendment does not deny law enforcement the modern equivalent of being able to spot an outsider in town—being able to ask for identification. In *Hiibel v. Sixth Judicial Court of Nevada*, the Supreme Court rebuffed a Fourth Amendment challenge to a Nevada statute authorizing police to

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67. See *White*, 401 U.S. at 752 (holding that defendant’s expectation that his conversation with police informant would remain private did not require suppression of substance of transmitted or recorded conversation).

68. *Kyllo v. United States*, 533 U.S. 27, 32 (2001). *But see* Akhil Reed Amar, Terry and Fourth Amendment First Principles, 72 ST. JOHN’S L. REV. 1097, 1102 (1998) (arguing that officer’s watching person walk on public sidewalk constituted Fourth Amendment “search”).

69. 460 U.S. 276, 284 (1983).

70. *Id.* at 281.

71. See *In re Application of the U.S.*, No. H-07-613, 2007 WL 3036849, at \*4 & nn.5-6 (S.D. Tex. Oct. 17, 2007); *In re Application of the U.S.*, 509 F. Supp. 2d 76, 78 & n.4 (D. Mass. 2007); *In re Application of the U.S.*, 396 F. Supp. 2d 294 (E.D.N.Y. 2005); *In re Application of U.S.*, 396 F. Supp. 2d 747 (S.D. Tex. 2005).

72. *Hiibel v. Sixth Judicial Court of Nevada*, 542 U.S. 177, 183 (2004); *Atwater v. City of Lago Vista*, 532 U.S. 318, 333-34 (2001).

require identification on pain of arrest.<sup>73</sup> Amazingly, Justice Kennedy's majority opinion manages to never once use the word "privacy," underscoring that Fourth Amendment privacy is arbitrarily defined on the basis of shifting policy concerns.<sup>74</sup>

The species of privacy that the Fourth Amendment protects continues to be primarily that having a direct connection to property. Rather than expanding the Amendment's sweep, *Hayden* and *Katz's* move to the direct protection of privacy allows judges to disregard property interests whenever they find it expedient.<sup>75</sup> Indeed, two Justices once argued that the owner of a boat used for drug smuggling had no expectation that the government would not arbitrarily search *his own* boat because he had never personally used it.<sup>76</sup> The misguided rejection of property as the Amendment's central concern overlooked both its text and the substantial protection that the link to property uniquely afforded, if only because judges and lawyers are more able to discern property interests than expectations of privacy.

Continued insistence by courts and scholars on calibrating Fourth Amendment protections on privacy expectations is doomed to yield only more confusion and dissatisfaction, as technology and new communication fads force a reevaluation of privacy itself.<sup>77</sup> Already,

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73. 542 U.S. at 188.

74. The opinion says only that the government's interest in identifying suspicious characters outweighs "the individual's Fourth Amendment interests," presumably because it would be incongruous in that context to label those interests "privacy." *Id.*

75. See *United States v. Scott*, 450 F.3d 863, 867 (9th Cir. 2006) ("While the *Katz* principle was originally used to *expand* Fourth Amendment protection to cover government invasions of privacy in public places like phone booths, it can also serve to *contract* such protection in private places such as homes."). Compare, e.g., *Jones v. United States*, 362 U.S. 257, 271 (1960) (holding that anyone lawfully on premises searched had standing to contest search), *overruled by United States v. Salvucci*, 448 U.S. 83, 84-85 (1980) (holding that rationale underlying automatic standing doctrine had been undermined by subsequent decision), with *Minnesota v. Carter*, 525 U.S. 83, 90-91 (1998) (holding that person invited into another's home for "commercial purposes" had no legitimate expectation of privacy in that home and could not object to search).

76. *United States v. Quinn*, 475 U.S. 791, 793 (1986) (Burger, C.J., dissenting from dismissal of certiorari, joined by Blackmun, J.).

77. Even while recognizing that the Court's efforts to protect "expectations of privacy" has produced an incoherent and unpredictable jurisprudence, the large majority of scholars seem to accept that the idea is fundamentally sound and capable of being salvaged. See, e.g., Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503 (2007) (arguing that "expectations of privacy" label refers to not one but four distinct approaches that should receive express judicial recognition). Professor Stuntz argues that the Fourth Amendment would work better if it protected other equally abstract values while acknowledging the significant obstacles to developing such a jurisprudence. See Stuntz, *supra* note 61 (arguing that

drug-sniffing dogs and high-tech innovations that amplify the government's surveillance capabilities have rendered the simplistic *Katz* test increasingly less predictable and less useful. *Katz's* flaws are compounded by the seismic transformations in the value that individuals place on keeping information private (i.e., secret) in the Internet age. The past decade has seen adolescents and college students (as well as some older folks) publish intimate details of their lives on social Web sites, apparently emulating the entertainment media's compulsion for sensationalizing every banal detail of celebrities' lives. Web sites such as Myspace and Facebook encourage their members to publicize huge amounts of information historically deemed intimate—who their friends are, whom they are dating, their sexual orientations, their birthdates, what hobbies and sports they enjoy, what political causes they advocate, what movies and television shows they like, what books they read, what music they listen to—and to post pictures of themselves, their relatives, and their friends. Cellular telephone carriers now offer customers “social-mapping services”—the ability to view a map on their cellular phone screens showing where their friends and family members are physically located at that moment.<sup>78</sup> Regardless of whether the exuberant impulse of young people to overestimate how interesting they are sustains itself over the long term, the already amorphous and unpredictable “expectations of privacy” test will become increasingly meaningless in light of the new willingness to share historically private information with virtual “friends.”

### B. *The Vaunting of the Warrant Procedure*

Even when a judge deems an “expectation of privacy” reasonable, the government may invade that privacy if it shows good reason to believe a crime has been committed or is being committed. The Supreme Court has insisted for decades that, whenever possible, courts should determine in advance of a search whether police have such probable cause to believe a crime has occurred and, if so, issue a search warrant. The Court professes ad nauseum that this warrant procedure adds value, repeatedly invoking the legendary “neutral and detached” magistrate who ensures that searches are justified.<sup>79</sup>

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Fourth Amendment should focus on police force and coercion); Stuntz, *supra* note 56 (same and noting that “developing workable rules might be impossible”).

78. Anita Hamilton, *A Wireless Street Fight*, TIME, Feb. 15, 2007 (describing Sprint Nextel's Loopt and Helio's Buddy Beacon services); Laura M. Holson, *Privacy Lost: These Phones Can Find You*, N.Y. TIMES, Oct. 23, 2007, at A1 (same). Customers can disable the tracking service whenever they do not want their location published. *Id.*

79. As the Court once put it:

“Over and over again this Court has emphasized that the mandate of the Fourth Amendment requires adherence to judicial processes,” and that



This magistrate supposedly offers significant protection from overzealous police officers whose judgment may be compromised by their role as law enforcers.<sup>80</sup> The understanding that what the Fourth Amendment offers is "neutral" review of warrant applications was famously (and perhaps best) articulated by Justice Jackson:

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.<sup>81</sup>

Eloquent though this is, the validity of the reasoning is hardly self-evident.

First, the police are not alone in wanting to see criminals brought to justice. So, a judicial officer is comparatively "disinterested" only in the sense that his career advancement does not depend on the number of seizures, arrests, or convictions he makes. But judges and magistrates presumably share their community's interest in seeing criminals punished and, as a result,

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searches conducted outside the judicial process, without prior judicial approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.

*Katz v. United States*, 389 U.S. 347, 357 (1967) (collecting cases) (footnotes omitted); see also *McDonald v. United States*, 335 U.S. 451, 455 (1948) ("The presence of a search warrant serves a high function.").

80. See *United States v. Chadwick*, 433 U.S. 1, 9 (1977) ("The judicial warrant has a significant role to play in that it provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime.'"); *Katz*, 389 U.S. at 359 (Douglas, J., concurring) ("Neither the President nor the Attorney General is a magistrate. In matters where they believe national security may be involved they are not detached, disinterested, and neutral as a court or magistrate must be."); *Jones v. United States*, 357 U.S. 493, 498 (1958) ("Were federal officers free to search without a warrant merely upon probable cause to believe that certain articles were within a home, the provisions of the Fourth Amendment would become empty phrases, and the protection it affords largely nullified."); *Trupiano v. United States*, 334 U.S. 699, 705 (1948) ("In their understandable zeal to ferret out crime and in the excitement of the capture of a suspected person, officers are less likely to possess the detachment and neutrality with which the constitutional rights of the suspect must be viewed.").

81. *Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

ordinarily lack the instinct to greet every one-sided warrant application with skepticism. Second, judicial officers have no particular advantage in terms of expertise, resources, or incentive over police and prosecutors in reviewing requests for warrants. As trained lawyers, judges may be more able to adopt a deontological perspective, realizing that society is ultimately better off even-handedly enforcing the rights of all, although some guilty people escape punishment.<sup>82</sup> But, as Professor Goldstein pointed out, because judges lack the information and the motivation needed to scrutinize a warrant request effectively, the interposition of a judicial officer does little to mitigate the police's assumed consequentialist motives.<sup>83</sup>

That warrant applications are reviewed in secret and without opposition allows for the propagation of the false impression that this review is more probing than it is.<sup>84</sup> This misimpression, in turn, is easily exploited by the executive branch to defend dubious searches and seizures made under a warrant's authority. For example, the Department of Justice defended its secret arrests of material witnesses after September 11, stating that each arrest warrant was judicially approved, thus falsely implying that judges carefully examined the government's claims regarding each detainee.<sup>85</sup> It has long been common knowledge among practitioners and scholars "that judges 'rubber stamp' warrant applications and barely supervise the process."<sup>86</sup> Conceding the lack of empirical proof for this, Professor

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82. See Silas J. Wasserstrom & Louis Michael, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 111 (1988) ("[J]udges may be able to see, in ways that police officers cannot, how assumptions about who is likely to have committed a crime are themselves the product of social contexts.").

83. See Abraham S. Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009, 1024-25 (1974).

84. As the Court put it:

[T]he usual reliance of our legal system on adversary proceedings itself should be an indication that an *ex parte* inquiry is likely to be less vigorous. The magistrate has no acquaintance with the information that may contradict the good faith and reasonable basis of the affiant's allegations. The pre-search proceeding will frequently be marked by haste, because of the understandable desire to act before the evidence disappears; this urgency will not always permit the magistrate to make an extended independent examination of the affiant or other witnesses.

Franks v. Delaware, 438 U.S. 154, 169 (1978).

85. See Ricardo J. Bascuas, *The Unconstitutionality of "Hold Until Cleared": Reexamining Material Witness Detentions in the Wake of the September 11th Dragnet*, 58 VAND. L. REV. 677, 687-88 (2005).

86. Goldstein, *supra* note 83, at 1025; accord TAYLOR, *supra* note 35, at 48 ("At the preliminary show cause hearing, the magistrate will generally rely on the police representations, since he is unlikely to have either the time or the means to go behind them."); William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV.

Goldstein posited that American judges are inhibited in reviewing warrant applications because they habitually rely on counsel to raise issues, are institutionally unaccustomed to supervising prosecutorial processes, and lack adequate staff to dispatch such administrative duties.<sup>87</sup> Professor Goldstein's logic is amply supported by the anecdotal evidence in case reports.<sup>88</sup>

Even assuming that magistrates are as conscientious and thorough as can be, they simply lack the resources to truly test the government's contentions in an *ex parte* warrant-application process. This is demonstrated by the difficulties involved in evaluating the government's recent applications for permission to track a person's cellular telephone.<sup>89</sup> When the government sought reconsideration of the first published order denying such an application, the magistrate sought to appoint a lawyer (obviously without alerting the target) to brief an adversarial position; fortuitously, the Electronic Frontier Foundation sought leave to do so.<sup>90</sup> Subsequently, several district and magistrate judges have noted in such cases that "the best way to test the limit of the Government's authority may be through developed records, trial court opinions on suppression motions, and appellate review."<sup>91</sup> The technical intricacies of those applications highlighted the one-sidedness inherent in every warrant request and our system's entrenched dependence on an adversary to explore an issue thoroughly.

Furthermore, the possibility of an incomplete or unscrupulous presentation makes the task of meaningful review nearly impossible.<sup>92</sup> The Supreme Court has set the standard for the quality

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881, 888 (1991) (describing magistrates' review of warrant applications as typically "slapdash"); Wasserstrom & Seidman, *supra* note 82, at 22 ("[T]he 'rubber stamp' quality of magistrate review of warrant applications is an open scandal, and the Court has done little to show that it takes its own procedures seriously.").

87. See Goldstein, *supra* note 83, at 1024-25.

88. See, e.g., *Groh v. Ramirez*, 540 U.S. 551, 554 (2004) (finding that magistrate judge signed facially defective warrant that was based on tip from "concerned citizen," was drafted by federal agent, and failed to describe object of search). *But see McDonald v. United States*, 335 U.S. 451, 454 (1948) (stating that "there is vague and general testimony in the record that on previous occasions the officers had sought search warrants but had been denied them").

89. These applications are regulated by statutes in addition to the Fourth Amendment, but the principle nonetheless applies.

90. *In re Application of the U.S.*, 396 F. Supp. 2d 295, 299 & n.3 (E.D.N.Y. 2005) (noting court "would benefit from adversarial testing" of government's position).

91. *In re Application of the U.S.*, No. H-07-613, 2007 WL 3036849, at \*1 (S.D. Tex. Oct. 17, 2007) (citing *In re Application of the U.S.*, 509 F. Supp. 2d 76 (D. Mass. 2007)).

92. TAYLOR, *supra* note 35, at 48 ("If the Supreme Court's recent holding, that the identity of informers need not be disclosed on inquiry into probable cause, survives, the protective value of the search warrant hearing will be even smaller than hitherto.").

of information that can support a warrant so low that judges can hardly be expected to uncover a baseless request. A warrant affidavit is sufficient though based only on hearsay—including statements of undisclosed informants—as long as there is a “substantial basis” for crediting the hearsay.<sup>93</sup> The Court countenances surreptitious, unwarranted searches by law enforcement officers<sup>94</sup> and even reckless and outright lies in the warrant affidavit,<sup>95</sup> provided that probable cause independent of the police misconduct justifies the search.<sup>96</sup> In response to the argument that tolerating willful, illegal searches discourages police to seek warrants, the Court simply declared that police would be “foolish” to take such a risk.<sup>97</sup> To complement this laxity, the Court has decreed that warrant affidavits carry a “presumption of validity,” somewhat relaxing the government’s burden of establishing probable cause “supported by Oath or affirmation.”<sup>98</sup>

The same factors that make warrants easy to obtain—judges’ lack of institutional competence to scrutinize warrant requests, the ex parte process, the lax standards, and the presumption that police claims are true—ensure that judges sometimes issue warrants when probable cause turns out to be lacking. The Supreme Court addressed this in 1984 by holding that, when a judge erroneously

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93. *Illinois v. Gates*, 462 U.S. 213, 239-40 (1983); *Aguilar v. Texas*, 378 U.S. 108, 114 (1964), *overruled on other grounds by Gates*, 462 U.S. at 213; *Rugendorf v. United States*, 376 U.S. 528, 533 (1964); *Jones v. United States*, 362 U.S. 257, 271 (1960), *overruled on other grounds by United States v. Salvucci*, 448 U.S. 83, 84-85 (1980).

94. *Murray v. United States*, 487 U.S. 533, 543-44 (1988).

95. *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978).

96. *Murray*, 487 U.S. at 543-44; *Franks*, 438 U.S. at 156. The Court’s permitting the issuance of such warrants reflects an abandonment of the judicial integrity rationale that underpinned not only the Fourth Amendment exclusionary rule but other exclusionary rules as well. See *Mapp v. Ohio*, 367 U.S. 643, 659 (1961) (“The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.”). This rationale underlay the Court’s overturning convictions of Communists in the 1950s. Then, the Court refused to do so much as pass upon the sufficiency of a record sullied by perjured testimony, holding that it would demean the very concept of justice for it to do so. See *Mesarosh v. United States*, 352 U.S. 808, 811 (1956) (“This Court should not pass on a record containing unresolved allegations of tainted testimony. The integrity of the judicial process is at stake.”); *Communist Party of the U.S. v. Subversive Activities Control Bd.*, 351 U.S. 115, 124 (1956) (“When uncontested challenge is made that a finding of subversive design by petitioner was in part the product of three perjurious witnesses, it does not remove the taint for a reviewing court to find that there is ample innocent testimony to support the Board’s findings.”).

97. *Murray*, 487 U.S. at 540. *But see* Craig M. Bradley, *Murray v. United States: The Bell Tolls for the Warrant Requirement*, 64 IND. L. J. 907, 917-18 (1989) (demonstrating that *Murray* encourages police to ignore warrant requirement).

98. U.S. CONST. amend. IV; *Franks*, 438 U.S. at 171.

issues a warrant, the law will pretend that no error was made.<sup>99</sup> Rather than excluding evidence seized under an invalid warrant, which is the usual constitutionally mandated result for Fourth Amendment violations,<sup>100</sup> courts will admit the evidence as though probable cause justified the search. This “good faith” exception to the exclusionary rule proceeds from the idea that excluding evidence in such circumstances would only “punish the errors of judges and magistrates” who, unlike the police, are undoubtedly well-intentioned.<sup>101</sup>

The “good faith” exception has been criticized since its creation,<sup>102</sup> and some state supreme courts have rejected it under their constitutions.<sup>103</sup> However, there is no reason to believe it will be reconsidered or overruled. The Supreme Court has only broadened the scope of unconstitutional searches and seizures that are exempt from the exclusionary rule.<sup>104</sup> Evidence obtained through searches and seizures because a court clerk failed to record the quashing of a warrant<sup>105</sup> or because police mistakenly believed they had consent to search<sup>106</sup> is admissible.<sup>107</sup> The rationale in such cases is that, notwithstanding the lack of probable cause, punishing such mistakes by excluding evidence serves no useful purpose.

### III. DUELING THEORIES IN A MUDDLED JURISPRUDENCE

Despite never seriously doubting that the Fourth Amendment protects an *implied* right to privacy,<sup>108</sup> scholars and Supreme Court Justices have dueled for decades over competing *textualist* theories of

99. *United States v. Leon*, 468 U.S. 897, 920-21 (1984).

100. *Mapp*, 367 U.S. at 643; *Weeks v. United States*, 232 U.S. 383 (1914).

101. *Leon*, 468 U.S. at 916.

102. *See* Donald Dripps, *Living With Leon*, 95 YALE L.J. 906, 906 & n.5 (1986) (collecting authorities).

103. *See, e.g., State v. Gutierrez*, 863 P.2d 1052, 1053 (N.M. 1993); *State v. Guzman*, 842 P.2d 660, 671 (Id. 1992).

104. *See, e.g., Hudson v. Michigan*, 547 U.S. 586, 602 (2006) (holding that violation of Fourth Amendment’s knock-and-announce requirement for home searches did not require exclusion of evidence).

105. *Arizona v. Evans*, 514 U.S. 1 (1995).

106. *Illinois v. Rodriguez*, 497 U.S. 177 (1990).

107. The Court may yet use this rationale to further limit the application of the exclusionary rule. *See Herring v. United States*, 492 F.3d 1212 (11th Cir. 2007), *cert. granted*, 128 S. Ct. 1221 (2008).

108. *But see Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring) (“[The Fourth Amendment] did not guarantee some generalized right of privacy and leave it to this Court to determine which particular manifestations of the value of privacy society is prepared to recognize as reasonable.”) (internal quotations omitted); *Berger v. New York*, 388 U.S. 41, 77 (1967) (Black, J., dissenting) (“It is impossible for me to think that the wise Framers of the Fourth Amendment would ever have dreamed about drafting an amendment to protect the ‘right of privacy.’”).

how it does so and how the warrant procedure furthers this aim.<sup>109</sup> One might suppose that it makes a big difference which theory prevails. But comparing the two in application suggests that inconsistencies in Fourth Amendment jurisprudence are attributable less to any difference between the theories than to problems inherent in their shared premises.<sup>110</sup> In addition to assuming that the Fourth Amendment was meant to regulate all government searches and seizures, both theories assume that the Amendment protects “privacy” in the abstract and that the warrant procedure provides a meaningful check on the executive branch. These fallacies make it impossible for either theory to prescribe meaningful, principled criteria for limiting government searches at the threshold.

The advocates of the “warrant preference” theory and “reasonableness” theory have spilled much ink debating the meaning of the word “unreasonable” in the Fourth Amendment and how its two clauses grammatically relate to each other.<sup>111</sup> Proponents of each approach claim that their interpretation is more faithful to the Framers’ intent and therefore more legitimate.<sup>112</sup> The generally accepted fact that the Framers never intended the Fourth

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109. One striking example of the conflation resulting from enforcing an interpretive core value through textualist construction is seen in Justice Stevens’s dissent in *Kyllo*, which argues that heat emanating from a house cannot be private because the Fourth Amendment “guarantees the right of people ‘to be secure in their . . . houses’ against unreasonable searches and seizures.” *Kyllo v. United States*, 533 U.S. 27, 43 (Stevens, J., dissenting).

110. Fourth Amendment jurisprudence can arguably be broken down into smaller groupings, but the inherent problems of unpredictability and subjectivity persist. See Clancy, *supra* note 39, at 978 (identifying five models of Fourth Amendment analysis); Kerr, *supra* note 77, at 506 (identifying four models). Such groupings, moreover, tend to be descriptive constructs for understanding past decisions rather than top-down theories for organizing Fourth Amendment jurisprudence.

111. See *Groh v. Ramirez*, 540 U.S. 551, 572-73 (2004) (Thomas, J., dissenting); *California v. Acevedo*, 500 U.S. 565, 582-83 (1991) (Scalia, J., concurring). Both interpretations are rooted in decisions that predate the 1967 christening of privacy as the core Fourth Amendment concern, although these early cases do not fully square with either modern theory. See, e.g., *Johnson v. United States*, 333 U.S. 10, 13-14 (1948) (holding that house search without warrant was unconstitutional); *Carroll v. United States*, 267 U.S. 132, 153 (1925) (holding that car search for bootlegged liquor was reasonable without warrant). However, centering the Amendment on a noninterpretivist core value rendered the textualist debate utterly nonsensical.

112. See, e.g., Amar, *supra* note 39, at 1099-1100; Amsterdam, *supra* note 39, at 377-78 (1974); Clancy, *supra* note 39, at 1040; Davies, *supra* note 39, at 591; Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse than the Disease*, 68 S. CAL. L. REV. 1, 7 (1994); James J. Tomkovicz, *California v. Acevedo: The Walls Close in on the Warrant Requirement*, 29 AM. CRIM. L. REV. 1103, 1139-40 (1992).

Amendment to regulate every conceivable government search is essentially ignored by both sides.<sup>113</sup>

The “warrant preference” theory posits that the Amendment’s Warrant Clause modifies its Reasonableness Clause. Searches are generally unreasonable when they are not authorized by a warrant.<sup>114</sup> Warrantless searches are permitted only when so-called “exigent circumstances” or “special needs” make it impossible or impracticable to obtain a warrant in advance. Warrants must be supported by probable cause and describe particularly what is to be searched or seized. They provide a judicial, and thus neutral, determination of whether probable cause exists, as well as notice of the scope of the police’s authority. Searches without probable cause are permitted in (formerly) narrow circumstances, but some individual suspicion is always required absent “special needs.” This vague phrase supposedly comprises government aims distinct from “ordinary law enforcement.” In such cases, the perceived press of the government’s special need is balanced against the perceived import of the privacy interest at stake.<sup>115</sup>

The “reasonableness” theory, on the other hand, postulates that the Reasonableness Clause is grammatically independent of the Warrant Clause. Under this reading, the Fourth Amendment requires only that all searches and seizures be reasonable.<sup>116</sup> “Reasonable” is given varying colloquial glosses on an ad hoc basis. Some searches, primarily those of a home, are reasonable only when authorized by a warrant, but warrants are not generally necessary.<sup>117</sup>

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113. The Framers most likely meant to proscribe only the general searches that stirred resentment among the colonists, leaving specific searches to be regulated by statutory or common law. See Ricardo J. Bascuas, *Fourth Amendment Lessons from the Highway and the Subway: A Principled Approach to Suspicionless Searches*, 38 RUTGERS L.J. 719, 730-31 (2007).

114. See *Acevedo*, 500 U.S. at 592-93 (Stevens, J., dissenting); *New Jersey v. T.L.O.*, 469 U.S. 325, 354 (1985) (Brennan, J., dissenting).

115. *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring) (“Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers.”). That a court should ever be able to disregard a value judgment enshrined in the Constitution is a galling and self-repudiating contention. If Justice Blackmun is correct that the “warrant preference” theory cannot account for some searches, the answer is not to evaluate those searches ad hoc but to adopt a theory that works.

116. See *Acevedo*, 500 U.S. at 581 (Scalia, J., concurring) (“The Fourth Amendment does not by its terms require a prior warrant for searches and seizures; it merely prohibits searches and seizures that are ‘unreasonable.’”).

117. See *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (holding that examination of home with thermal imager constitutes search and is presumptively unreasonable without warrant); *Acevedo*, 500 U.S. at 582 (Scalia, J., concurring) (stating that Fourth Amendment “does not explicitly impose the requirement of a warrant”); *Chimel v.*

Nor are warrants intended to provide any notice to the target of the search or seizure.<sup>118</sup> The “reasonableness” theory seems to conceive of warrants as a way for judges to supervise policework, as it excuses them when police act “reasonably” without one.<sup>119</sup> Some searches are reasonable without probable cause, while others never are, depending on whether privacy interests outweigh government objectives.<sup>120</sup> In other words, the “reasonableness” theory evaluates every search with the balancing test that the “warrant preference” theory reserves for “special needs” cases.<sup>121</sup>

Neither theory is internally consistent and neither leads to predictable results.<sup>122</sup> The “warrant preference” theory fails to provide criteria for assessing the large majority of searches, those that are outside the “general” rule requiring warrants supported by probable cause. The “reasonableness” theory offers no textual or principled explanation for why a warrant or probable cause is *ever* required in the absence of a statute.<sup>123</sup>

The opinions of Justice Scalia and Justice Stevens show that the theories differ more in rhetoric than in result, which obfuscates the crucial points on which they do diverge. Far from defending conservative and liberal viewpoints, as commentators routinely suppose, the opinions of Justices Scalia and Stevens reflect the

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California, 395 U.S. 752, 772-73 (1969) (White, J., dissenting) (stating that Fourth Amendment “does not proscribe ‘warrantless searches’ but instead it proscribes ‘unreasonable searches’ and this Court has never held nor does the majority today assert that warrantless searches are necessarily unreasonable”); *Katz v. United States*, 389 U.S. 347, 363 (1967) (White, J., concurring) (stating that “on the record now before us the particular surveillance undertaken was unreasonable absent a warrant properly authorizing it”); *Carroll v. United States*, 267 U.S. 132, 147 (1925) (framing issue as whether warrantless search of automobile was nonetheless reasonable under Fourth Amendment).

118. See *Grubbs v. United States*, 547 U.S. 90, 99 (2006); *Groh v. Ramirez*, 540 U.S. 551, 562 (2004).

119. See, e.g., *Brigham City v. Stuart*, 547 U.S. 398 (2006); *Illinois v. Rodriguez*, 497 U.S. 177 (1990).

120. Compare *Terry v. Ohio*, 392 U.S. 1 (1968), with *Arizona v. Hicks*, 480 U.S. 321 (1987). Discussing *Hicks*, Professors Silas J. Wasserstrom and Louis Michael Seidman separate the issue of whether a search is reasonable from whether it is supported by probable cause; they claim the Court did not discuss whether the search was reasonable but focused only on whether it was supported by probable cause. Wasserstrom & Seidman, *supra* note 82, at 23. *Hicks*, however, holds that the particular search at issue was not reasonable without probable cause because it occurred in a home. 480 U.S. at 327-28.

121. See, e.g., *Samson v. California*, 547 U.S. 843, 848 (2006).

122. See Wasserstrom & Seidman, *supra* note 82, at 48 (“[I]ndividualized, retrospective balancing provides little prospective direction to police officers, who presumably need clear rules to guide their decisions.”).

123. Invoking the common law at the time of adoption is unavailing, as the Framers did not intend the Amendment to reach all searches and seizures.



debate over the two principal interpretations of the Fourth Amendment.<sup>124</sup> Justice Scalia and Justice Stevens adhere consistently to the “reasonableness” theory and the “warrant preference” theory respectively. As a result, their opinions and votes offer a convenient, if rough, comparison between the two approaches.<sup>125</sup> In contrast, the opinions of some other Justices are not similarly constant. Justice O’Connor, for example, frustratingly decided the legality of every given search on its idiosyncratic details.<sup>126</sup> Notably, many of the modern search cases in which neither Justice Scalia nor Justice Stevens joined the majority (or plurality) opinion were decided expressly on policy grounds or through a rudderless, ad hoc approach.<sup>127</sup>

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124. Characterizing Justice Scalia as a law-and-order conservative and Justice Stevens as a champion of liberty does not explain, for example, why Justice Scalia wrote the Court’s opinion in *Kyllo*, disapproving the challenged search over Justice Stevens’s strident dissent.

125. There was a purer version of the “warrant preference” theory than that described in Justice Stevens’s opinions. That version maintained that, although “exigent circumstances” can excuse the need to obtain a warrant before undertaking a search, there must always be probable cause. See *Terry v. Ohio*, 392 U.S. 1, 35-36 (1968) (Douglas, J., dissenting). The opinions of Justice Brennan and Justice Marshall, as well as those of Justice Douglas, reflected that view to varying degrees. However, *Terry* acknowledged that the pure “warrant preference” theory was unworkable. Since then, the Court has allowed ever more searches without probable cause by expanding the “*Terry* stop” and “special needs” categories. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995). Justice Stevens’s version of “warrant preference,” for better or worse, is the one with continuing, if waning, vitality.

126. See, e.g., *City of Indianapolis v. Edmond*, 531 U.S. 32, 38, 44 (2000) (holding unconstitutional checkpoint “whose primary purpose was to detect evidence of ordinary criminal wrongdoing” but stating that checkpoint to catch terrorist or dangerous criminal would be legal); *Arizona v. Hicks*, 480 U.S. 321, 333 (1987) (O’Connor, J., dissenting) (advocating allowing “cursory inspections” of objects as distinguished from “full-blown searches”); *O’Connor v. Ortega*, 480 U.S. 709, 718 (1987) (O’Connor, J.) (plurality opinion) (holding that “the question whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis”).

127. Cases decided on policy grounds include *Thornton v. United States*, 541 U.S. 615, 622-23 (2004) (Rehnquist, C.J.) (“The need for a clear rule, readily understood by police officers and not depending on differing estimates of what items were or were not within reach of an arrestee at any particular moment, justifies the sort of generalization which *Belton* enunciated.”); *California v. Acevedo*, 500 U.S. 565, 574 (1991) (Blackmun, J.) (“[B]y attempting to distinguish between a container for which the police are specifically searching and a container which they come across in a car, we have provided only minimal protection for privacy and have impeded effective law enforcement.”); and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 679 (1989) (Kennedy, J.) (“The Government’s compelling interests in preventing the promotion of drug users to positions where they might endanger the integrity of our Nation’s borders or the life of the citizenry outweigh the privacy interests of those who seek promotion to these positions, who enjoy a diminished expectation of privacy by virtue of the special, and obvious, physical and ethical demands of those positions.”).

This comparison reveals that the theories differ primarily in two respects: the importance they accord individualized suspicion, which is the one thing the Framers certainly did mean to address, and the purpose they assume search warrants serve. Despite these differences, neither approach is satisfactory. Neither theory introduces any intellectual discipline to the process of assessing privacy expectations and balancing them against claimed government needs. Nor does either theory offer any help in deciding cases that turn on what exactly constitutes a “search” or on the meaning of other terms in the Amendment. Neither theory has a sensible conception of the role warrants play in protecting rights. Owing to its many exceptions, the “warrant preference” theory only rarely requires a warrant when the “reasonableness” theory would dispense with one.<sup>128</sup>

#### A. *Competing Views on Expectations of Privacy*

In April 2002, the Broward County Sheriff’s Office received an anonymous tip that James Rabb was growing marijuana in his house. Four days later, deputies watched Mr. Rabb leave his house and drive north on I-95. They stopped him for making an improper lane change, ordered him out of his car, and walked a drug-sniffing dog around it.<sup>129</sup>

After the dog alerted, the deputies had it sniff the car’s interior. The dog, according to the deputies, indicated there were drugs in the ashtray. The officers found a joint there and arrested Mr. Rabb, whose sock contained two more joints. The deputies then took the dog to Mr. Rabb’s house and pushed him to the front door, where he again alerted. The deputies claimed they too could smell marijuana while standing at the front door. Based on this information, a judge

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Cases decided on an ad hoc basis, articulating no standard, include *Minnesota v. Carter*, 523 U.S. 83, 91 (1998) (Rehnquist, C.J.) (“If we regard the overnight guest . . . as typifying those who may claim the protection of the Fourth Amendment in the home of another, and one merely ‘legitimately on the premises’ as typifying those who may not do so, the present case is obviously somewhere in between.”) and *O’Connor v. Ortega*, 480 U.S. 709, 718 (1987) (O’Connor, J.) (plurality opinion) (“Given the great variety of work environments in the public sector, the question whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis.”).

128. One reason for this is that both theories generally require a warrant to search a house. Another reason is that most searches are within one of the “warrant preference” theory’s many exceptions to the warrant requirement.

129. *State v. Rabb*, 920 So. 2d 1175, 1178 (Fla. Dist. Ct. App. 2006). It is constitutional for police to order drivers stopped for a traffic infraction out of their cars, *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977), and to use minor traffic infractions as pretexts to check cars for drugs, *Whren v. United States*, 517 U.S. 806, 813 (1996).

issued a warrant to search the house. In it, police found sixty-four marijuana plants.<sup>130</sup>

The trial court granted Mr. Rabb's motion to suppress the plants,<sup>131</sup> and the Florida District Court of Appeal affirmed, reasoning that the dog sniff at the door of the house was an unconstitutional, warrantless search.<sup>132</sup> The appellate court further held that there was insufficient evidence without the illegal dog sniff to establish probable cause, invalidating the subsequent search inside the house.<sup>133</sup> The United States Supreme Court remanded the case for reconsideration in light of *Illinois v. Caballes*.<sup>134</sup> That case held that a dog sniff of a car stopped for a traffic infraction was not a Fourth Amendment "search" as long as the sniff did not prolong the stop or reveal anything but the presence of contraband.<sup>135</sup>

On remand, the Florida court undertook to determine whether the dog sniff violated a "constitutionally protected reasonable expectation of privacy."<sup>136</sup> Though the Supreme Court had twice held that dog sniffs are not Fourth Amendment "searches,"<sup>137</sup> the Florida court also had to consider other Supreme Court cases providing near-categorical protection to homes. Most pertinent of these was *Kyllo v. United States*, another growhouse case, which held: "In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes."<sup>138</sup> Danny Lee Kyllo challenged federal agents' use of a thermal imaging device to measure the relative heat emanating from his home.<sup>139</sup> Based on that and an informant's tip, the agents obtained a warrant, searched the home, and uncovered more than one hundred plants.<sup>140</sup> The Supreme Court held that scanning the home with a thermal imaging device

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130. *Rabb*, 920 So. 2d at 1179.

131. *State v. Rabb*, 881 So. 2d 587, 590 (Fla. Dist. Ct. App. 2004).

132. *Id.* at 595.

133. *Id.* at 595-96.

134. *Florida v. Rabb*, 544 U.S. 1028 (2005).

135. *Illinois v. Caballes*, 543 U.S. 405, 409 (2005). Elsewhere, I have argued that *Caballes* was wrongly decided. Bascuas, *supra* note 113, at 776. The case is premised on the notion that "the initial seizure of respondent when he was stopped on the highway was based on probable cause." *Caballes*, 543 U.S. at 407. However, there can never be probable cause to believe a civil traffic infraction has occurred because the term "probable cause" in the Fourth Amendment refers only and specifically to a belief that criminal activity has occurred. Bascuas, *supra* note 113, at 776.

136. *State v. Rabb*, 920 So. 2d 1175, 1182 (Fla. Dist. Ct. App. 2006) (quoting *California v. Ciraolo*, 476 U.S. 207, 211 (1986)).

137. *Caballes*, 543 U.S. at 409; *United States v. Place*, 462 U.S. 696, 707 (1983).

138. 533 U.S. 27, 37 (2001).

139. *Id.* at 29-30.

140. *Id.* at 30.

was an unconstitutional search.<sup>141</sup> Disclaiming any conflict with *Kyllo*, *Caballes* held that contraband is never legitimately private.<sup>142</sup>

Given these two absolute propositions—that homes are always private and that drugs are never private—the Florida court was understandably confounded by whether a dog sniff of a house was constitutional.<sup>143</sup> The deciding factor had to be either that the drugs were in a house or that the dog sniff could detect only contraband.<sup>144</sup> The majority went with the former rationale:

[I]t is of no importance that a dog sniff provides limited information regarding only the presence or absence of contraband, because as in *Kyllo*, the quality or quantity of information obtained through the search is not the feared injury. Rather, it is the fact that law enforcement endeavored to obtain the information from inside the house at all, or in this case, the fact that a dog's sense of smell crossed the "firm line" of Fourth Amendment protection at the door of Rabb's house.<sup>145</sup>

141. *Id.* at 40 ("Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previous have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant.")

142. 543 U.S. at 409-10. ("The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent's hopes or expectations concerning the nondetection of contraband in the trunk of his car.")

143. *State v. Rabb*, 920 So. 2d 1175, 1189 (Fla. Dist. Ct. App. 2006).

144. The court correctly perceived that to be the choice required by the Supreme Court's muddled jurisprudence: "[I]n order to determine whether a search has occurred, we determine whether the place at which the search occurred was subject to a legitimate expectation of privacy while the dissent measures whether the item searched for was subject to a legitimate expectation of privacy." *Id.* at 1190.

145. *Id.* at 1184. The court held that houses are virtually unique, distinguishing another Florida appellate case, *Nelson v. State*, 867 So. 2d 534 (Fla. Dist. Ct. App. 2004), which approved a dog sniff of a hotel room on this basis:

Put simply, we view the reasonable expectation of privacy afforded to locations along a hierarchy from public to private. An airport and a highway are unquestionably public places with little or no privacy, as much as a home is undoubtedly a private place characterized by its very privacy. A hotel room lies somewhere in between, because although it possesses some of the aspects of a home, it also possesses some of the aspects of the itinerant life present in airports and on highways. An individual expects the public to be readily present in the hallways outside a hotel room door, but an individual does not expect the public to be readily present on the porch outside the door to a home.

*Rabb*, 920 So. 2d at 1186-87. Although it stopped short of saying so, the court apparently did not believe that the officers smelled marijuana, or at least did not believe that they would have smelled it had the dog not first alerted. *Id.* at 1191. The dissenting judge criticized the majority for ignoring that the officers averred that they smelled marijuana, arguing that the officers could legally walk up to the front door and inhale. *Id.* at 1194-95 (Gross, J., dissenting).

From all appearances, the police investigating Mr. Rabb went to considerable pains to comply with a jumble of Supreme Court pronouncements on how constitutionally to proceed. In the end, an appellate court determined that the police got it wrong, despite their having obtained a warrant before entering the house and despite the fact that even judges who pondered the case for years could not agree on what the Constitution required. As *Rabb* illustrates, one fundamental problem with current Fourth Amendment jurisprudence is that *Katz's* "expectations of privacy" analysis is inherently subjective. It will *always* yield an arbitrary and unpredictable answer to whether a given action amounts to a "search" that violates a "legitimate" privacy expectation.

### 1. Defining "Searches"

Because both Fourth Amendment theories accept that the Amendment protects privacy expectations, both must contend with an extremely broad notion of what a "search" is. Rather than being read as forbidding only unsupported, dragnet searches, the Fourth Amendment is read under both the "reasonableness" and "warrant preference" theories as an edict regulating every government invasion of privacy.<sup>146</sup> This broad understanding of "search" is a desirable check on government power, but it requires some principled manner of limiting the scope of the term to avoid absurdity. A privacy-based interpretation supplies no limiting principle as to what constitutes a "search," which could include even merely observing someone.<sup>147</sup> Although the Court has limited the type of privacy receiving Fourth Amendment protection, neither of the two Fourth Amendment theories provided a principled means for doing so.

In cases requiring the Court to determine whether a given government action was a Fourth Amendment "search," the two theories, judging from the opinions of Justices Stevens and Scalia, are about as likely to diverge as not. For example, these two Justices agreed in *Arizona v. Hicks* that police officers who entered an apartment to investigate a shooting effected a Fourth Amendment

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146. See *Rakas v. Illinois*, 439 U.S. 128, 143 (1978) (describing *Katz* as holding that "capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place"); see also Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society,"* 42 DUKE L.J. 727 (1993).

147. See *Kyllo v. United States*, 533 U.S. 27, 32 (2001) ("[W]e have held that visual observation is no 'search' at all . . ."). But see Amar, *supra* note 39, at 1102 (arguing that officer's watching person walk on public sidewalk constituted Fourth Amendment "search").

“search” by lifting and turning expensive stereo equipment to read and copy serial numbers.<sup>148</sup> They further agreed that the search was unconstitutional.<sup>149</sup> In another case, however, they disagreed about whether a public hospital’s reporting to police that pregnant patients’ urine samples revealed crack cocaine use was a “search.”<sup>150</sup> Justice Stevens, writing for the majority, concluded these actions “were indisputably searches within the meaning of the Fourth Amendment.”<sup>151</sup> Justice Scalia insisted in dissent that they were not.<sup>152</sup> That same year, the Justices swapped positions over whether using a thermal imager to measure the relative amount of heat emanating from a home amounted to a “search.”<sup>153</sup> That time, Justice Scalia wrote the majority opinion holding that the challenged action was a search because it revealed information about the inside of a home.<sup>154</sup> Justice Stevens insisted in dissent that monitoring emissions outside a house was no more a search of the house than looking at it.<sup>155</sup>

In each case where it was contended that the Fourth Amendment did not apply because no search occurred, the Justices could rely on nothing but their own common sense or personal views on privacy to decide the question. As the cases illustrate, whether privacy is invaded may depend upon whether personal information is uncovered, whether possessions are touched or moved, whether information from inside a home or other particular location is discovered, or whether intrusive means were used to obtain information. None of these approaches is manifestly superior to the others. Neither Fourth Amendment theory can resolve this.

Similarly, the two theories had no impact in cases requiring another word in the Amendment’s text to be defined. *Minnesota v.*

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148. 480 U.S. 321, 324-25 (1987). Analogously, Justices Scalia and Stevens joined the entire Court in holding that a sheriff’s moving a trailer home without legal cause was an unconstitutional “seizure,” notwithstanding the fact that no search occurred. *Soldal v. Cook County*, 506 U.S. 56, 61-62, 73 (1992).

149. *Hicks*, 480 U.S. at 325-27. Justice Scalia’s majority opinion justifies the outcome with reasons that satisfy each theory’s criteria. The search was illegal under the “warrant preference” theory because it was unrelated to the exigent circumstance that justified the warrantless intrusion. *Id.* The search failed under the “reasonableness” theory because searches inside a home are unreasonable unless supported by probable cause. *Id.*

150. *Ferguson v. City of Charleston*, 532 U.S. 67 (2001).

151. *Id.* at 76.

152. *Id.* at 93 & n.1 (Scalia, J., dissenting). Alternatively, Justice Scalia contended that, if examining the women’s urine were a search, the “warrant preference” theory’s “special needs” framework would allow it. *Id.* at 98.

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

154. *Id.* at 40.

155. *Id.* at 45 (Stevens, J., dissenting).

*Carter* asked whether a person could object to the search of an apartment where he was present as a mere visitor.<sup>156</sup> Justice Scalia wrote in a concurrence that the challenge could not be maintained because he construed the word "their" in the Amendment as protecting people only in "their respective houses."<sup>157</sup> Justice Stevens signed Justice Ginsburg's dissent, which applied the *Katz* test to conclude that a visitor has a legitimate expectation of privacy in his host's home, implying that "their" has a communal meaning.<sup>158</sup> In *Wyoming v. Houghton*,<sup>159</sup> Justice Scalia held for the Court that "probable cause" to believe an automobile contains contraband entails probable cause to search every container in it.<sup>160</sup> Justice Stevens dissented, believing that probable cause is specific for each container or package in the car.<sup>161</sup> On the other hand, Justices Scalia and Stevens agreed in *Whren v. United States*<sup>162</sup> that "probable cause" connotes a purely objective inquiry, allowing police officers to stop drivers by using traffic infractions as pretexts for drug interdiction.<sup>163</sup> The Justices define such terms, just as they define "searches," with an irresolvable back-and-forth about the legitimacy of claimed privacy expectations.

It is not difficult to see where the Supreme Court's privacy-based Fourth Amendment jurisprudence went off the rails. In *United States v. Miller*,<sup>164</sup> the Court held that a depositor's bank records were not protected by the Fourth Amendment. The Court distinguished *Boyd* on a property basis, stating that the depositor could "assert neither ownership nor possession. Instead, these are the business records of the bank."<sup>165</sup> The Court went on to hold that *Katz* also did not apply,

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156. 525 U.S. 83, 91 (1998).

157. *Id.* at 92 (Scalia, J., concurring).

158. *Id.* at 107-08 (Ginsburg, J., dissenting).

159. 526 U.S. 295 (1999).

160. *Id.* at 302 ("When there is probable cause to search for contraband in a car, it is reasonable for police officers . . . to examine packages and containers without a showing of individualized probable cause for each one.").

161. *Id.* at 310-11 (Stevens, J., dissenting) ("Whether or not the Fourth Amendment required a warrant to search Houghton's purse, at the very least the trooper in this case had to have probable cause to believe that her purse contained contraband."). Justice Stevens's interpretation likely had better support before the ascent of privacy. See *United States v. Di Re*, 332 U.S. 581, 586 (1948) (disapproving search of person over government's argument that search was necessary "in a case such as this where the contraband sought is a small article which could easily be concealed on the person").

162. 517 U.S. 806 (1996).

163. *Id.* at 818.

164. 425 U.S. 435 (1976).

165. *Id.* at 440.

analogizing banks to *confidential informants*.<sup>166</sup> Citing cases where confidential informants or undercover agents testify against defendants, the Court reasoned:

[T]he Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.<sup>167</sup>

This superficial comparison has been taken to augur that any information shared with another entity loses constitutional protection because it is no longer private.<sup>168</sup> In *Smith v. Maryland*,<sup>169</sup> the Court expanded *Miller's* reasoning to hold that whom people call on the telephone is not private information:

Telephone users, in sum, typically know that they must convey numerical information to the phone company; that the phone company has facilities for recording this information; and that the phone company does in fact record this information for a variety of legitimate business purposes. Although subjective expectations cannot be scientifically gauged, it is too much to believe that telephone subscribers, under these circumstances, harbor any general expectation that the numbers they dial will remain secret.<sup>170</sup>

Illustrating that the *Katz* test is unworkable because Supreme Court majorities are often out of touch with what the public expects

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166. See *id.* at 442-43.

167. *Id.* at 443 (citing *United States v. White*, 401 U.S. 745 (1971) (holding that conversations with bugged informant were not protected by Fourth Amendment); *Hoffa v. United States*, 385 U.S. 293 (1966) (holding that use of defendant's conversations with informant did not violate Fourth Amendment); *Lopez v. United States*, 373 U.S. 427 (1963) (holding that use of undercover agent's testimony did not violate Fourth Amendment)).

168. See *Minnesota v. Carter*, 525 U.S. 83, 107 (1998) (Ginsburg, J., dissenting). For an extensive analysis of the Court's "knowing exposure" cases, see Sherry F. Colb, *What Is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 STAN. L. REV. 119 (2002).

169. 442 U.S. 735 (1979).

170. *Id.* at 743. In dissent, Justice Marshall reiterated the position he had staked out in *Miller* and subsequent cases that information conveyed to a service provider did not cease to be private: "Those who disclose certain facts to a bank or phone company for a limited business purpose need not assume that this information will be released to other persons for other purposes." *Id.* at 749 (Marshall, J., dissenting).

Justice Stewart also dissented but on the more narrow ground that the numbers dialed were indistinguishable from the conversation held private in *Katz*. *Id.* at 746-47 (Stewart, J., dissenting). "What the telephone company does or might do with those numbers is no more relevant to this inquiry than it would be in a case involving the conversation itself." *Id.* at 747.



to remain private, Congress enacted legislation limiting the effects of both decisions. In 1978, Congress passed the Right to Financial Privacy Act, essentially overturning *Miller*.<sup>171</sup> In 1986, Congress required that the government obtain a court order to obtain dialed numbers but required a showing weaker than the Fourth Amendment's probable cause standard.<sup>172</sup> Subsequent legislation, notably the Communications Assistance to Law Enforcement Act of 1994<sup>173</sup> and the Stored Communications Act of 1986,<sup>174</sup> further refined the requirements for various types of electronic and wire surveillance. *Miller* and *Smith* have left courts struggling to understand how to apply these statutes to government demands in a rapidly changing technological environment and to wonder how the Fourth Amendment fits with them.<sup>175</sup>

Without a concrete and consistent value in the light of which to understand the Fourth Amendment's terms, their meaning is dependent on the personalities deciding disputes. When the Amendment is understood to protect something as vague and hard to discern as privacy in the abstract, it is impossible for a prosecutor or a police officer to know whether a given act will later be deemed legal by judges. In *Rabb*, police officers relied on Supreme Court precedent that held a dog sniff is not a Fourth Amendment "search," only to have their case undone years later by competing precedent saying everything inside a house is private. As long as privacy remains the Amendment's core value, its protection will remain forever hazy and doubtful to police and citizens alike.

## 2. Balancing "Expectations of Privacy" and Government "Needs"

Aiming the Fourth Amendment at privacy expectations provides a rationalization for justifying the very harm that most concerned the Framers: general, suspicionless searches. Both theories resort to limiting privacy's vast reach by making pragmatic concessions to

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171. See 12 U.S.C. §§ 3401-3422 (2006).

172. See 18 U.S.C. §§ 3121-3127 (2006); see also *In re Application of the U.S.*, 515 F. Supp. 2d 325, 328-29 (E.D.N.Y. 2007).

173. Pub. L. No. 103-414, 108 Stat. 4279 (1994) (requiring telecommunications carriers to assist law enforcement with surveillance).

174. Pub. L. No. 99-508, 100 Stat. 1860 (1986).

175. See, e.g., *In re Application of the U.S.*, 509 F. Supp. 2d 76, 81-82 (D. Mass. 2007) (holding that statutes provided that government could obtain cellular telephone tracking information without probable cause); *In re Applications of the U.S.*, 515 F. Supp. 2d at 336 (holding that technology has undermined *Smith's* rationale regarding dialed numbers); *In re Application of the U.S.*, 460 F. Supp. 2d 448 (S.D.N.Y. 2006) (reviewing statutes and determining that disclosure of cellular phone tracking information without probable cause was authorized).

government claims of necessity, allowing in some cases random, suspicionless searches for no better reason than expedience. Perhaps the most significant difference between the prevailing theories is how readily they dispense with individualized criminal suspicion. The “warrant preference” theory dispenses with probable cause for *Terry* stops and so-called “special needs” searches, a bizarre category of searches justified by anything “other than the normal need for law enforcement.”<sup>176</sup> Proceeding from the unsupported premise that “unreasonable” in the Fourth Amendment is a colloquial plea for good sense and moderation, the “reasonableness” theory invites balancing in any case.<sup>177</sup> Regardless of the theory employed, cases decided through balancing—weighing judges’ estimation of privacy interests against the government’s claimed reason for searching—make for harrowing reading.

Neither theory offers (or can offer) any guidance to the adjudicative free-for-all that is balancing.<sup>178</sup> Balancing has proven to be unconstrained by logic or evidence. Whether a given privacy expectation receives protection is a matter of judges’ personal opinions and suppositions, rendering balancing utterly indefensible as a mode of adjudicating searches. As Justice Scalia has observed, balancing is for judges “a regrettable concession of defeat—an acknowledgment that we have passed the point where ‘law,’ properly speaking, has any further application.”<sup>179</sup>

In cases decided by balancing, Justice Stevens and Justice Scalia were more likely to agree when the challenged search was supported by some individualized suspicion. For example, they agreed that the government could search a probationer on reasonable suspicion.<sup>180</sup> Both Justices signed Justice White’s opinion for the Court in *California v. Greenwood*,<sup>181</sup> which approved of police searching through a suspect’s garbage without a warrant. The Court reasoned that American society does not generally expect that garbage left on the curb for collection will remain private.<sup>182</sup> Justices Scalia and

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176. *Ferguson v. City of Charleston*, 532 U.S. 67, 74 n.7 (2001).

177. *See, e.g., Stuntz, supra* note 86, at 923 (stating that use of “unreasonable” suggests that Fourth Amendment requires balancing “individual interests against law enforcement needs”).

178. *Wasserstrom & Seidman, supra* note 82, at 22 (“On some occasions, the Court uses a rigid, formal structure for fourth amendment analysis. . . . On other occasions, for reasons that are never made clear, the Court abandons this formal approach and instead employs a free-wheeling, fact-specific balancing of costs and benefits.”).

179. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1182 (1989).

180. *United States v. Knights*, 534 U.S. 112 (2001).

181. 486 U.S. 35 (1988).

182. Oblivious to the absurdity of the decision and ignoring that judges are not representative of society, Justice White confidently chided the dissenting Justices for

Stevens also both believed that the government's interest in determining the cause of railway accidents justified drug testing railroad employees.<sup>183</sup> Joined by only Justice Stevens, Justice Scalia's dissent in *National Treasury Employees Union v. Von Raab* stated that the government had not shown a sufficiently compelling "social necessity" to justify randomly drug testing certain U.S. Customs Service agents.<sup>184</sup> (Justices Marshall and Brennan dissented separately, arguing that balancing was unnecessary because drug testing without probable cause is always unconstitutional.<sup>185</sup>) However, both considered sniffs of cars by drug dogs to be categorically exempt from Fourth Amendment scrutiny. Justice Scalia joined Justice Stevens's majority opinion in *Illinois v. Caballes*,<sup>186</sup> which held that police could have a drug dog sniff a car during a traffic stop so long as the sniffing did not prolong the stop. The Court reasoned that the driver had no legitimate interest in concealing the presence of contraband in his car.<sup>187</sup>

Justices Stevens and Scalia often balanced differently, however, showing how *Katz's* rejection of property makes it possible to require or dispense with individualized suspicion on the basis of only the Justices' own political or social intuitions. In *O'Connor v. Ortega*, for example, the Court held that the government was justified in searching its employees' offices without probable cause by the "special need" of administering agencies.<sup>188</sup> Justice Scalia concurred, contending that the government could search as employer even when it might not be able to as law enforcer.<sup>189</sup> The dissenting Justices, including Justice Stevens, believed no "special need" existed and so the search required probable cause and a warrant.<sup>190</sup>

Writing for the Court, Justice Scalia opined in another case that students playing sports had a "negligible" privacy interest in their

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disagreeing: "Given that the dissenters are among the tiny minority of judges whose views are contrary to ours, we are distinctly unimpressed with the dissent's prediction that 'society will be shocked to learn' of today's decision." *Id.* at 43 n.5 (quoting *id.* at 46 (Brennan, J., dissenting)).

183. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 620-21 (1989); *id.* at 634 (Stevens, J., concurring).

184. 489 U.S. 656, 681 (1989) (Scalia, J., dissenting) ("The Court's opinion in the present case, however, will be searched in vain for real evidence of a real problem that will be solved by urine testing of Customs Service employees.").

185. *Id.* at 679-87 (Marshall, J., dissenting). This opinion reflects the "purer" "warrant preference" theory alluded to earlier.

186. 543 U.S. 405 (2005).

187. *Id.* at 408-09.

188. 480 U.S. 707, 725 (1987) (plurality opinion).

189. *Id.* at 731-32 (Scalia, J., concurring).

190. *Id.* at 742 (Blackmun, J., dissenting).

urine, which the school district could therefore drug test.<sup>191</sup> The reasoning offered in support of this was as outlandish as the conclusion itself. Conceding that “collecting the samples for urinalysis intrudes upon ‘an excretory function traditionally shielded by great privacy,’”<sup>192</sup> the majority posited that athletes are necessarily less inhibited about excreting than nonathletes. “School sports are not for the bashful. They require ‘suing up’ before each practice or event, and showering and changing afterwards.”<sup>193</sup> From that claim, the majority deduced that the composition of athletes’ urine is not very private. Justice O’Connor’s dissent, joined by Justice Stevens, decried the dragnet nature of the searches authorized by the Court.<sup>194</sup>

A few years later, the Court held that the interest of a student participating in *any* extracurricular activity in not being randomly tested for drugs was “not significant.”<sup>195</sup> Scrupulously noting that urination remains a private excretory function, Justice Thomas’s majority opinion, joined by Justice Scalia, assured readers that taking urine samples from schoolchildren was both “minimally intrusive” and “reasonably effective” at deterring drug use.<sup>196</sup> Because extracurricular activities are extensively “regulated,” students engaging in them cannot reasonably expect much privacy, as they sometimes travel together and change clothes.<sup>197</sup> Justice Ginsburg’s dissent, which Justice Stevens signed, seemed to sound a personal note, arguing that nonathletic activities appeal to “the modest and shy along with the bold and uninhibited.”<sup>198</sup> These activities help build self-esteem, are part of the educational program, and involve students least likely to do drugs, she argued.<sup>199</sup> The dissent thought it noteworthy that some choir members at the district in question had devised a way to change into their choir uniforms without being seen.<sup>200</sup> (Justice Breyer concurred only to lament the “serious national problem” of student drug use,

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191. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658 (1995).

192. *Id.* at 658 (quoting *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 626 (1989)).

193. *Id.* at 657.

194. *Id.* at 676 (O’Connor, J., dissenting).

195. *Bd. of Educ. v. Earls*, 536 U.S. 822, 834 (2002).

196. *Id.* at 834, 837. Because the school failed to demonstrate that it was combating a serious drug problem, *id.* at 827, it is unclear whether or how Justice Scalia’s position in *Earls* can be squared with his dissent in *Von Raab*.

197. *Id.* at 831-32.

198. *Id.* at 847 (Ginsburg, J., dissenting).

199. *Id.* at 843-46.

200. *Id.* at 848 n.1.

emphasizing the primacy of political considerations in Fourth Amendment balancing.<sup>201</sup>)

Perhaps the most glaring illustration of how privacy expectations can be used to prioritize expedience over rights is *Samson v. California*.<sup>202</sup> Justice Thomas's majority opinion in that case, joined by Justice Scalia, held that parolees could be searched with no warrant and with no suspicion of wrongdoing whatsoever.<sup>203</sup> Knowing that Donald Samson was on parole, a police officer stopped Samson as he walked along a sidewalk.<sup>204</sup> The Court starkly presented the facts: "[B]ased solely on petitioner's status as a parolee, Officer Rohleder searched petitioner."<sup>205</sup> Nonetheless, the search was "reasonable" because parolees do "not have an expectation of privacy that society would recognize as legitimate."<sup>206</sup> Justice Stevens protested that the Court had held "for the first time, that a search supported by neither individualized suspicion nor 'special needs' is nonetheless 'reasonable.'"<sup>207</sup>

The Court's cases concerning roadway checkpoints further evidence how privacy expectations devalue the Framers' concern for individualized suspicion. Over Justice Stevens's contention that surprise, nighttime checkpoints are the hallmark of totalitarian regimes and are ineffective at curbing drunk-driving fatalities,<sup>208</sup> Justice Scalia joined a majority holding that checkpoints for drunk driving are minimally intrusive.<sup>209</sup> A decade later, Justice Stevens joined a majority holding that drug interdiction checkpoints were unconstitutional while Justice Scalia joined a dissent characterizing them as minimally intrusive.<sup>210</sup> In another case, the Court held that stopping motorists to inquire about a week-old hit-and-run accident was not "onerous" and therefore not unconstitutional.<sup>211</sup> Justice Stevens argued that motorists might well find such a stop "annoying" or even "alarming."<sup>212</sup> Interestingly, Justice Thomas, abandoning his typical adherence to the "reasonableness" theory, alone maintained

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201. *Id.* at 838 (Breyer, J., concurring).

202. 547 U.S. 843 (2006).

203. *Id.* at 846.

204. *Id.* at 846-47.

205. *Id.*

206. *Id.* at 852.

207. *Id.* at 858 (Stevens, J., dissenting).

208. *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 462, 468-69 (1990) (Stevens, J., dissenting).

209. *Id.* at 451-53 (Rehnquist, C.J.).

210. *City of Indianapolis v. Edmond*, 531 U.S. 32, 53 (2000).

211. *Illinois v. Lidster*, 540 U.S. 419, 426 (2004).

212. *Id.* at 428-29 (Stevens, J., dissenting).

that roadblocks are always unconstitutional because they are precisely the sort of dragnet search the Framers sought to bar.<sup>213</sup>

Of course, the constitutionality of highway searches and seizures should not depend on how much judges imagine a typical driver will mind the intrusion. If the First Amendment were interpreted in accordance with what most people would not mind—or, more precisely, what *judges thought* most people would not mind—it would be an easy thing to outlaw blighting forms of communication<sup>214</sup> and many forms of political dissent.<sup>215</sup> Asking whether government policy objectives (or, more melodramatically, government *needs*) outweigh individual rights injects into Fourth Amendment adjudication the hidden premise that the Constitution should, whenever possible, accommodate the government. If Congress outlaws drug possession, balancing itself invites the Court to construe the Fourth Amendment so as to make that law enforceable.<sup>216</sup> In other words, balancing asks each Justice to decide not whether a search violates rights but whether the privacy of the affected group is more valuable to society than the search's utility. Fourth Amendment balancing is tantamount to reviewing law enforcement practices for both wisdom and efficacy. The painfully discursive rationales deployed in balancing show how wanting for legal principles Fourth Amendment theory is.

### B. *Competing Views on the Purpose of Warrants*

On the evening of Saturday, May 20, 2006, about fifteen FBI agents arrived at the Rayburn House Office Building with a warrant to search the office of Louisiana Representative William J.

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213. *Edmond*, 531 U.S. at 56 (Thomas, J., dissenting). How his position could be reconciled with his opinion for the Court in *Earls* is something of a mystery.

214. See *City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994) (holding unconstitutional city ordinance prohibiting residential signs not falling into ten specified exceptions); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 430 (1993) (holding unconstitutional city ordinance outlawing rack for distribution of commercial handbills as opposed to newspapers).

215. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (holding unconstitutional state statute outlawing anonymous campaign literature).

216. Justice Stevens recently criticized such balancing when the result was to permit a high school to punish a student for drug-related speech:

[In the Court's] view, the unusual importance of protecting children from the scourge of drugs supports a ban on all speech in the school environment that promotes drug use. Whether or not such a rule is sensible as a matter of policy, carving out pro-drug speech for uniquely harsh treatment finds no support in our case law and is inimical to the values protected by the First Amendment.

*Morse v. Frederick*, 127 S. Ct. 2618, 2646 (2007) (Stevens, J., dissenting).

Jefferson.<sup>217</sup> It was the first time that law enforcement officers had searched the official office of a member of Congress.<sup>218</sup> The Department of Justice did not give notice of the search to House leadership, the House general counsel, or Congressman Jefferson.<sup>219</sup> The media, however, was on hand to witness the event.<sup>220</sup> The FBI barred Congressman Jefferson, his counsel, House counsel, and the Capitol police from the office during the search, which lasted eighteen hours—from 7 p.m. Saturday until 1 p.m. Sunday.<sup>221</sup> They seized two boxes of documents and fourteen computer hard drives.<sup>222</sup>

Congressman Jefferson challenged the search by bringing a motion for the return of everything seized from his office.<sup>223</sup> He argued that the search violated his legislative privilege and the Fourth Amendment.<sup>224</sup> The House supported Congressman Jefferson's challenge, arguing that the search gravely threatened the separation of powers.<sup>225</sup>

The case was assigned to Chief Judge Thomas Hogan, who rejected the Congressman's challenge after hearing argument but taking no evidence.<sup>226</sup> His decision was practically preordained, as Judge Hogan himself had granted the Department of Justice's *ex parte* request for the search warrant.<sup>227</sup> Repeatedly characterizing the judiciary as the "neutral" branch of government, Judge Hogan emphasized that a judge's involvement—specifically his own—

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217. See *In re Search of Rayburn House Office Bldg. Room No. 2113*, 432 F. Supp. 2d 100, 106 (D.D.C. 2006), *overruled in part by* *United States v. Rayburn House Office Bldg.*, 497 F.3d 654 (D.C. Cir. 2007); Memorandum of the Bipartisan Legal Advisory Group of the U.S. House of Representatives as Amicus Curiae Supporting Affirmance, *In re Search of Rayburn House Office Bldg.*, 432 F. Supp. 2d at 106 (No. 06-231 M-01) [hereinafter Bipartisan Memo].

218. Bipartisan Memo, *supra* note 217, at 1-2.

219. *Id.* at 6.

220. *Id.*

221. *Id.* at 6-7.

222. *Id.* at 7.

223. *In re Search of Rayburn House Office Bldg. Room No. 2113*, 432 F. Supp. 2d 100, 106 (D.D.C. 2006).

224. See Memorandum in Support of Motion for Return of Property at 8, 18, *In re Search of Rayburn House Office Bldg.*, 432 F. Supp. 2d 100 (No. 06-231 M-01).

225. See generally Bipartisan Memo, *supra* note 217. For background on the Bipartisan Legal Advisory Group and the House Office of General Counsel, see Paul Von Zielbauer, *Little Office Becomes Big Player After Raid by the F.B.I.*, N.Y. TIMES, June 16, 2006, at A28.

226. See *In re Search of Rayburn House Office Bldg.*, 432 F. Supp. 2d at 119; Shailagh Murray & Allan Lengel, *Jefferson Loses Ways and Means Seat*, WASH. POST, June 17, 2006, at A07.

227. See Murray & Lengel, *supra* note 226; Kate Phillips, *2 Arms of Government Wrestle in Court*, N.Y. TIMES, June 17, 2006, at A11.

afforded Congressman Jefferson and the legislative branch sufficient protection from any overreaching by the executive branch:

[T]his Court intervened here with the neutral authority of the third branch as a check on the power sought to be exerted by the Executive Branch when it authorized a particularized search warrant only upon a showing of probable cause. The statement by *amicus* that if the search here is upheld, in the future the Government need only to persuade a federal judge to obtain warrants to search other congressional offices, is a gross trivialization of the role of the judiciary. A federal judge is not a mere rubber stamp in the warrant process, but rather an independent and neutral official sworn to uphold and defend the Constitution.<sup>228</sup>

Notwithstanding the conventional wisdom epitomized by Judge Hogan's indignant if not defensive invective, the warrant process did not provide Congressman Jefferson much protection. The question of whether the government had a good reason for searching his office was conclusively resolved secretly and beforehand by the prosecutors and the judge. Though the judge doubtlessly gave this unprecedented search more attention than most, it is safe to assume, as the House counsel did, that a reviewing judge typically functions much like "a mere rubber stamp," if only because of constraints inherent in the process. As with every warrant application, the judge had only the representations of the FBI agents and the Department of Justice lawyers upon which to rely. Once Judge Hogan granted the warrant, the matter of whether the circumstances justified a search was essentially closed. The only available Fourth Amendment arguments were that the warrant was defective in some way or that the search was executed in an unreasonable manner.

The warrant being apparently in proper form, Congressman Jefferson could complain only that he and his attorney were kept out of his office during the search. Relying on a recent Supreme Court decision, Judge Hogan rejected the argument because the Congressman had no right to be present during the search.<sup>229</sup> Affirming his initial decision to grant the warrant before hearing

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228. *In re Search of Rayburn House Office Bldg.*, 432 F. Supp. 2d at 116. Subsequently, Judge Hogan denied Congressman Jefferson's request for a stay of the order, which would have prevented the Department of Justice from reviewing the seized materials until an appeal was decided. *See In re Search of Rayburn House Office Bldg. Room No. 2113*, 434 F. Supp. 2d 3, 4 (D.D.C. 2006). Because of the serious separation-of-powers ramifications, the D.C. Circuit enjoined the Department of Justice from reviewing the seized materials. It ordered that Congressman Jefferson must first be allowed to review the materials, assert specific claims of legislative privilege, and have Judge Hogan rule on his claims. *See id.*

229. *See In re Search of Rayburn House Office Bldg.*, 432 F. Supp. 2d at 117-18 (citing *United States v. Grubbs*, 547 U.S. 90, 99 (2006)).



from the Congressman or the House, Judge Hogan noted that the search was “reasonable under the Fourth Amendment” because the government’s “need to conduct the search” outweighed whatever “invasion” it entailed.<sup>230</sup> As with many decisions regarding whether a search was legal at the outset, the ruling’s rationale is not particularly clear. Judge Hogan purported to balance the government’s “need” for evidence against the Congressman’s interest without specifying the gravity of the need or the nature of the interest. The House’s asserted institutional interest in the incident went unmentioned.

Once it is determined that a challenged search impacts a “legitimate” privacy concern, it must be decided whether the Amendment permits the government to undertake the search. The Supreme Court has made this inordinately difficult for even lawyers to discern. Despite Judge Hogan’s words on the important contribution that the “neutral” judicial branch makes by authorizing searches in advance, the celebrated warrant requirement is “more honour’d in the breach than the observance.”<sup>231</sup> The number of searches made pursuant to an exception to the warrant rule is many times the number made under a warrant’s authority.<sup>232</sup> Likewise, exceptions to the warrant rule, which used to be described as “few in number and carefully delineated”<sup>233</sup> and “jealously and carefully drawn,”<sup>234</sup> have swelled substantially in both number and scope, contributing to confusion in the law.<sup>235</sup> As was true forty years ago about another facet of the Court’s Fourth Amendment jurisprudence, the warrant requirement “has spawned exceptions so numerous and confusion so great, in fact, that it is questionable whether it affords meaningful protection.”<sup>236</sup>

The “warrant preference” theory favors repair to a magistrate for a warrant somewhat more often than the “reasonableness” theory. However, this disparity is rooted in conflicting, anachronistic

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230. *See id.* at 118.

231. WILLIAM SHAKESPEARE, *HAMLET*, act 1, sc. 4.

232. TAYLOR, *supra* note 35, at 48 (“[I]t is abundantly apparent that searches of persons and premises incident to an arrest outnumber manyfold searches covered by warrants.”).

233. *United States v. U.S. Dist. Court*, 407 U.S. 297, 318 (1972).

234. *Jones v. United States*, 357 U.S. 493, 499 (1958); *accord United States v. Leon*, 468 U.S. 897, 960-61 (1984) (Stevens, J., dissenting).

235. *See Groh v. Ramirez*, 540 U.S. 551, 573 (2004) (Thomas, J., dissenting) (describing warrant exceptions as “confusing jurisprudence”); *California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring) (listing twenty-two exceptions to the warrant rule); *Texas v. Brown* 460 U.S. 730, 735-36 (1983) (cataloguing cases illustrating “wide range of diverse situations” in which warrant requirement is excused).

236. *Warden v. Hayden*, 387 U.S. 294, 309 (1967) (discussing “mere evidence” rule).

perspectives on the purposes search warrants serve. In other words, the theories disagree on the very concept of a modern “warrant.” Neither theory’s explanation of what warrants provide is ultimately convincing. Search warrants under current law offer very little, if any, benefit to the target of a search.

In *California v. Acevedo*, police watched Charles Acevedo enter an apartment building known to contain marijuana.<sup>237</sup> While the lead officer went to get a search warrant to search the apartment, Acevedo walked out carrying a paper bag, got into a car, and began to drive away.<sup>238</sup> The police stopped his car, opened the trunk and the paper bag in it, and found marijuana.<sup>239</sup> Justice Scalia agreed with the majority that no warrant was necessary to open the bag.<sup>240</sup> He also, however, agreed with Justice Stevens that it was anomalous to require a warrant to search the bag while Acevedo was walking with it but to dispense with a warrant once Acevedo put the bag in his car.<sup>241</sup> Justice Stevens would have required the police to observe the “general rule” and obtain a warrant.<sup>242</sup> Justice Scalia believed it was “reasonable” to search the bag, as the “general rule” is general in name only.<sup>243</sup>

Whether to require a warrant in *Acevedo* hinges on whether warrants are meant to deter only intentional constitutional violations or inadvertent transgressions as well. If warrants are to keep the police only from deliberately making an unjustified search, a warrant was hardly necessary. The police doubtlessly had probable cause to search the bag, and precedent clearly allowed the search of the trunk. There is no hint that the police did anything to circumvent the letter or spirit of the Fourth Amendment. The majority opinion thus seems to posit that complicating matters for well-meaning officers (who, after all, the opinion gratuitously notes, sought a warrant for the apartment) serves no purpose. If, however, as the dissenting Justices believed, resort to a magistrate serves to ensure that people are not searched without probable cause *even by well-meaning police*, then requiring a warrant made at least some sense.<sup>244</sup>

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237. 500 U.S. 565, 567 (1991).

238. *Id.* at 567 & n.1.

239. *Id.* at 567.

240. *Id.* at 581 (Scalia, J., concurring).

241. *Id.*

242. *Id.* at 593 (Stevens, J., dissenting).

243. *Id.* at 584-85 (Scalia, J., concurring).

244. See *United States v. Leon*, 468 U.S. 897, 953 (1984) (Brennan, J., dissenting) (“[T]he chief deterrent function of the [exclusionary] rule is its tendency to promote institutional compliance with Fourth Amendment requirements on the part of law enforcement agencies generally.”).

The same difference in understanding divided Justices Scalia and Stevens over the poorly reasoned “consent exception” to the warrant requirement. In *Illinois v. Rodriguez*,<sup>245</sup> Justice Scalia, writing for the majority, stated that when police enter a home with the consent of one seemingly authorized to admit them, the entry is constitutionally “reasonable” despite the mistake.<sup>246</sup> Conceptualizing consent as a waiver of rights that can be made only with actual authority, Justice Marshall, joined by Justices Stevens and Brennan, deemed the warrantless intrusion unconstitutional.<sup>247</sup>

*Rodriguez* reveals more starkly than *Acevedo* a disagreement between the theoretical camps over the purpose of warrants. Placing the burden on police to ensure that consent is actually, not merely *apparently*, valid makes little sense if exclusion of evidence is a punitive sanction. If the police have good reason to believe they are welcome into a place, punishing them if by some fluke they are wrong is pointless. However, the dissenters in *Rodriguez* would suppress evidence not to punish the police but to vindicate Edward Rodriguez’s privacy right. Burdening the police with getting a warrant whenever possible, despite apparent consent, makes sense if warrants are meant to minimize even innocent mistakes and misunderstandings.<sup>248</sup>

The “consent exception” itself is built on the “reasonableness” theory’s premise that the warrant and probable cause requirements needlessly hamper well-intentioned police. In approving it, the Court professed to strike an “accommodation” between the government’s desire to investigate suspicious people and the right of those people to not be bothered.<sup>249</sup> In *Schneckloth v. Bustamonte*, the Court held that consent to search an automobile could be voluntary even though police did not inform the driver of his right to refuse.<sup>250</sup> The astounding rationale was that giving notice (although the FBI had

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245. 497 U.S. 177 (1990).

246. *Id.* at 186. Although the police entered Edward Rodriguez’s apartment to arrest him for assaulting his girlfriend rather than to search for anything, the holding applies equally to entries made to effect a search.

247. *Id.* at 198 (Marshall, J., dissenting).

248. Of course, for reasons discussed *supra*, it is doubtful that the warrant process does much to prevent mistakes. See, e.g., *Los Angeles County v. Rettele*, 127 S. Ct. 1989 (2007) (holding that police executed search warrant reasonably though house had been sold three months earlier, occupants were of different race than targets, and police held naked couple at gunpoint); Eric Lichtblau, *Through an Error, F.B.I. Gained Unauthorized Access to E-Mail*, N.Y. TIMES, Feb. 17, 2008, at A1 (discussing how Internet service provider mistakenly produced “far more data” than authorized by judge).

249. *Schneckloth v. Bustamonte*, 412 U.S. 218, 224-25 (1973).

250. *Id.* at 248-49.

routinely done so for years<sup>251</sup>) would make investigating certain crimes impossible, particularly when the police had no good reason to search: “In situations where the police have some evidence of illicit activity, *but lack probable cause to arrest or search*, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence.”<sup>252</sup>

Assuming that to be the case, it does not explain why the police should be able to intimidate or trick people into consenting to a search.<sup>253</sup> In other words, the Court expressly decided the Constitution *must* allow police to exploit people’s ignorance of their rights (or fear of the police) to make unjustified (read “general”) searches.<sup>254</sup> The Court has extended *Schneckloth’s* reasoning and held that a bus passenger’s assent to three police officers’ request to search his luggage after they arrested his traveling companion was voluntary.<sup>255</sup>

Not surprisingly, police exploit the consent rationale to randomly search automobiles<sup>256</sup> and even homes. In 2007, the Boston police commissioner announced that police would go door-to-door in “high-crime neighborhoods” and ask parents for consent to search

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251. *Id.* at 287 (Marshall, J., dissenting).

252. *Id.* at 227 (majority opinion) (emphasis added).

253. In this important regard, *Schneckloth* was a world away from the principal authorities on which it relied to support the premise that Fourth Amendment rights can be waived. Neither *Davis v. United States*, 328 U.S. 582 (1946), nor *Zap v. United States*, 328 U.S. 624 (1946), involved a “general, exploratory search.” Both involved searches of business premises during business hours of documents the government had a property or contractual right to inspect. *Davis*, 328 U.S. at 592; *Zap*, 328 U.S. at 626-28. In *Davis*, the documents were gas ration coupons that the government owned. 328 U.S. at 592-93. In *Zap*, the documents were ledgers of a government contractor whose contract with the government specifically granted the government a right to inspect. *Zap*, 328 U.S. at 627-28. In neither case did the government “obtain access by force, fraud, or trickery.” *Id.* at 629.

254. As Justice Marshall’s thoughtful dissent put it: “[A]ll the police must do is conduct what will inevitably be a charade of asking for consent. If they display any firmness at all, a verbal expression of assent will undoubtedly be forthcoming.” *Schneckloth*, 412 U.S. at 284 (Marshall, J., dissenting).

255. *United States v. Drayton*, 536 U.S. 194, 197-200 (2002).

256. See Bascuas, *supra* note 113, at 761-69 (describing nationwide DEA-sponsored operation to train state and local police to stop random drivers and obtain consent to search for drugs). New Jersey denies officers the ability to leverage traffic stops into consent searches. See, e.g., *State v. Elders*, 927 A.2d 1250, 1266 (N.J. 2007) (holding that police may not request consent to search disabled vehicle without reasonable and articulable suspicion that occupants are engaged in crime); *State v. Carty*, 790 A.2d 903, 912 (N.J. 2002), *modified on other grounds*, 806 A.2d 798 (2002) (holding that police may not request consent to search legally stopped vehicle without reasonable and articulable suspicion that occupants are engaged in crime). *But see State v. Cox*, 171 S.W.3d 174, 181 (Tenn. 2005) (declining to follow *Carty*).

teenagers' rooms for guns.<sup>257</sup> Police in St. Louis had launched a similar program in the late 1990s, which inspired police in other cities to request authorization for similar dragnet sweeps.<sup>258</sup> Although the Boston police promised that, in most cases, any guns or drugs found would be confiscated without prosecution (likely to avoid court challenge to the dragnet sweeps), they reserved the right to prosecute depending on what was found.<sup>259</sup> Newspapers in Boston and St. Louis editorialized against the consent-based sweeps, citing the potential for abuse and harassment.<sup>260</sup>

Interestingly, prior to *Katz's* break with property, the Court understood that any display of firmness by officers would be interpreted as a claim of right to search. In *Amos v. United States*, the Court ordered the return of liquor seized in reliance on the consent of the owner's wife to the search.<sup>261</sup> The Court refused even to consider whether the wife's consent to search her husband's property would be valid.<sup>262</sup> It summarily concluded that it was "perfectly clear" that the agents' demand to search the house amounted to "implied coercion."<sup>263</sup>

The most ill-considered outgrowth of the insidious idea that warrants serve only to discourage deliberate police misconduct (i.e., to enable the courts to supervise policework) is the creation of the "good faith" exception to exclusionary rule. *United States v. Leon*,<sup>264</sup> the case adopting this exception, was decided before Justice Scalia's

257. Marcia Cramer, *Police to Search for Guns in Homes; City Program Depends on Parental Consent*, BOSTON GLOBE, Nov. 17, 2007, at A1.

258. *Id.*; see also Mark Fritz, *Going After Guns*, MIAMI HERALD, Feb. 5, 1995, at 4B; Carmenn Miles, *Gang Members' Homes Targeted*, SAN ANTONIO EXPRESS-NEWS, Feb. 26, 1996, at 7A; Winburn, *Let Cops In To Hunt Guns*, CINCINNATI POST, July 3, 1996, at 18A.

259. See Editorial, *A Questionable Search for Safety*, BOSTON GLOBE, Nov. 21, 2007, at 18A.

260. *Id.* ("[Obtaining consent] doesn't settle the question of why people would waive their rights when it isn't clear what the legal effects might be on other family members, or whether the seizure of other evidence might lead to criminal charges."); Editorial, *SCAT Walks A Fine Legal Line*, ST. LOUIS POST-DISPATCH, Apr. 13, 1995, at 6B ("Police officials initially gave the impression that the program would target homes where suspected gang members live or congregate . . . . It now appears that the program is much broader, aimed at any property where police suspect illegal activities."); Editorial, *Skirting the Constitution*, ST. LOUIS POST-DISPATCH, May 25, 1994, at 6B ("The routine seems to be for an officer or officers to show up at a door and tell the occupant that police have a tip that illegal guns might be inside. This is followed by a request for permission to search the house. Police could use that excuse to gain entry to any property or to harass individuals.")

261. 255 U.S. 313, 316-17 (1921).

262. *Id.*

263. *Id.* at 317.

264. *United States v. Leon*, 468 U.S. 897 (1984).

appointment to the Court, so his position on this specific issue is unknown.<sup>265</sup> Justice White's majority opinion did, however, reflect a "reasonableness" approach, reasoning that excluding evidence seized under a facially valid warrant would not further the exclusionary rule's purpose of deterring police misconduct.<sup>266</sup> Justice Stevens argued in dissent that a magistrate's decision to issue a warrant had never been interpreted as a "guarantee that the ensuing search and seizure is constitutionally reasonable."<sup>267</sup> He also pointed out that the exclusionary rule was grounded not only on a deterrence rationale but also on a belief that courts could not admit unconstitutionally seized evidence without becoming party to the violation.<sup>268</sup>

Because the "reasonableness" theory implicitly but consistently looks at warrants as a means for the judiciary to keep police from misbehaving, it dispenses with a warrant when judicial oversight seems unduly inefficient. The "warrant preference" theory sees warrants as a useful bottleneck that allows a disinterested outsider to inject sound judgment into government actions. Both theories fatuously take it for granted that the process of obtaining a warrant entails a burden on the police and efficacious participation by the magistrate.

#### IV. CONCRETE FOURTH AMENDMENT VALUES: PROPERTY AND PROBABLE CAUSE

Any Fourth Amendment theory that attempts to reach all government searches must contend with the fact that the Framers did not intend the Amendment to have such broad application. Rather, they intended to bar the central government from undertaking general searches without good cause, leaving most other search and seizure issues to common law or statutory evolution.<sup>269</sup> The legislature would decide when warrants were required, but warrants could issue only on a showing of "probable cause." Even today, nothing prevents Congress from statutorily requiring a

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265. Justice Scalia joined the majority in *Arizona v. Evans*, 514 U.S. 1 (1995), which extended *Leon's* "good faith" exception to a warrantless search incident to arrest made because a court clerk failed to record the quashing of a bench warrant. *Id.* at 14-16. No one argued in *Evans* that *Leon* should be overruled.

266. *Leon*, 468 U.S. at 920-21.

267. *Id.* at 969.

268. *Id.* at 977-78.

269. See *United States v. Kirschenblatt*, 16 F.2d 202, 203-04 (1926) (L. Hand, J.); TAYLOR, *supra* note 35, at 41-43; Clancy, *supra* note 39, at 1040; Davies, *supra* note 39, at 668-93.

warrant that the Fourth Amendment is held not to require, for example, to conduct searches at the border.<sup>270</sup>

That is not to say that the Fourth Amendment cannot or even should not apply to school principals rummaging in students' purses for cigarettes,<sup>271</sup> staff members of a public hospital testing pregnant women's urine for traces of crack,<sup>272</sup> and police officers using a homing device to track chemicals into houses.<sup>273</sup> It is only to emphasize the importance of choosing clear principles to guide courts as they attempt to generalize the Framers' concerns and apply them to present day challenges.<sup>274</sup> Thus far, the Supreme Court has looked in all the wrong places: "Indeed, because of the very different nature and scope of federal authority and ability to conduct searches and arrests at the founding, it is possible that neither the history of the Fourth Amendment nor the common law provides much guidance."<sup>275</sup> The Amendment's text is a good place to seek better guideposts.

#### A. *The Pragmatic Protection of Property*

The Fourth Amendment may protect privacy but it does not do so by directing judges to enact into law their own personal instinct of what society regards as private. In fact, this has proven to be a particularly bad way to protect privacy. Asking judges to decide whether society is prepared to endorse a claimed privacy expectation politicizes the Fourth Amendment by forcing judges to guess in essence whether most people<sup>276</sup> would vote to respect the asserted

270. See *United States v. Chemaly*, 741 F.2d 1346, 1348 (11th Cir. 1984), *vacated*, 741 F.2d 1363, *reinstated*, 764 F.2d 747 (11th Cir. 1985) (en banc) (holding that 31 U.S.C. § 5317 required search warrants for border searches). *Chemaly* was superseded by statute one month after it was decided. See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, § 901(d), 98 Stat. 2135 (1985).

271. See *New Jersey v. T.L.O.*, 469 U.S. 325, 354 (1985).

272. See *Ferguson v. City of Charleston*, 532 U.S. 67, 72 (2001).

273. See *United States v. Karo*, 468 U.S. 705, 721 (1984).

274. See *United States v. Chadwick*, 433 U.S. 1, 9 (1977) ("What we do know is that the Framers were men who focused on the wrongs of that day but who intended the Fourth Amendment to safeguard fundamental values which would far outlast the specific abuses which gave it birth."); TAYLOR, *supra* note 35, at 15 ("To achieve its basic purposes, however, the language 'must be capable of wider application than the mischief [which gave] it birth.'") (quoting *Weems v. United States*, 217 U.S. 349, 373 (1910)); Maclin, *supra* note 112, at 7 (arguing that Fourth Amendment interpretation should aim to discover the "broad themes" that animated Framers and apply them to modern law enforcement innovations). *But see Amsterdam*, *supra* note 39, at 400 ("[T]he values which one finds in the history of the Bill of Rights are ineluctably one's own").

275. *Groh v. Ramirez*, 540 U.S. 551, 572 (2004) (Thomas, J., dissenting).

276. That "people" in this inquiry embraces only as diverse a range of perspectives as the ranks of the nation's judiciary is another grave problem embedded in the *Katz* test. Reasoning that privacy can be bought, Professor Stuntz has made the related

privacy expectation.<sup>277</sup> As a result, it demeans the adjudicatory process by requiring judges to answer a question that is inherently legislative and irresolvable through adversary testing of evidence. Unsurprisingly, nothing like a cohesive body of law has emerged.<sup>278</sup>

Rather, the Framers determined that the best way to protect privacy was to protect property—"houses, papers and effects"—as well as people from arbitrary government intrusions.<sup>279</sup> Consistent with this insight or instinct, many scholarly and juridical discussions of the Amendment's protections implicitly or explicitly justify an expectation of privacy by referring to a property interest.<sup>280</sup> For

point that protecting "expectations of privacy" provides less protection to the poor than to the wealthy. Stuntz, *supra* note 56.

277. That this is known as the "objective" prong of the *Katz* test serves only to obfuscate the fact that the inquiry of what judges believe society will respect is just as subjective as what the defendant believes society ought to respect. It is just another perspective and hardly a representative one. For example, in *Florida v. Riley*, 488 U.S. 445 (1989), the Court generated four opinions regarding whether society would recognize the defendant's expectation of privacy in his greenhouse. *Id.* at 446. The greenhouse was surrounded by a fence which bore signs reading "DO NOT ENTER." *Id.* at 448. Though ninety percent of the roof was covered, two panels were missing, exposing a hole through which police looked from a helicopter. *Id.* The Court's various opinions wondered whether the helicopter was flying at a legal height under FAA regulations and how often helicopters flew at that height. *Id.* at 451 n.3, 453-55 (O'Connor, J., concurring in the judgment); *id.* at 458-60 (Brennan, J., dissenting); *id.* at 467-68 (Blackmun, J., dissenting). These are considerations that would hardly be relevant to "society."

278. Submitting policy questions to judges under the guise of constitutional adjudication necessarily leads to arbitrary results:

Political reasons have not the requisite certainty to afford rules of juridical interpretation. They are different in different men. They are different in the same men at different times. And when a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean.

*Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 620-21 (1857) (Curtis, J., dissenting).

279. See Cloud, *supra* note 47, at 72-73; see also *Minnesota v. Carter*, 525 U.S. 83, 93 (1998) (Scalia, J., concurring) (cataloguing state constitutional precursors to Fourth Amendment, which all protected "possessions" and "property").

280. See, e.g., *United States v. Karo*, 468 U.S. 705, 711 (1984) ("It is clear that the actual placement of the beeper into the can violated no one's Fourth Amendment rights. The can into which the beeper was placed belonged at the time to the DEA . . ."); *Rakas v. Illinois*, 439 U.S. 128, 134 (1978) ("A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed."); *Bruce v. Beary*, 498 F.3d 1232, 1239 (11th Cir. 2007) ("The warrantless administrative inspection, however, remains an exception to the Fourth Amendment's general rule that a warrant—supported by probable cause



example, in *United States v. Grubbs*, both the majority and concurring opinions referred to the person targeted by a search warrant as the "property owner."<sup>281</sup> Even *Katz* itself relied on a property interest to justify Charles Katz's expectation of privacy in his telephone call. The Court reasoned that the call was private in large part because Katz *paid the toll* to place the call.<sup>282</sup> In other words, Katz was entitled to expect privacy in his calls because he *bought* those calls.<sup>283</sup> This observation did not work itself into two of the Court's opinions fortuitously. It is the most intuitive and best reason for judges in a capitalistic society to deem the calls private. As *Entick* recognized, the creation of property interests is the law's vehicle for recognizing and affording privacy: "The great end for which men entered into society was to secure their property. . . . By the laws of England, every invasion of private property, be it ever so minute is a trespass."<sup>284</sup>

The Court's error in *Katz* was in hastening to rewrite the Amendment rather than reconceptualizing "property." Acknowledging that the Fourth Amendment protects property interests does not require describing those interests in accordance with state law or in any other legalistic manner, as they were prior to *Hayden*.<sup>285</sup> Doing so risks resurrecting the overly rigid Constitution rightfully buried in 1967.<sup>286</sup> Rather, "property" for Fourth

and specifying what is to be seized—is required when law enforcement seeks to search private property."); Mary I. Coombs, *Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 CAL. L. REV. 1593, 1616-22 (1987); Kerr, *supra* note 77, at 560-63 (arguing that search of hard drive image copied from owner's computer to government's computer would not implicate Fourth Amendment because information resided on government's, not defendant's, computer).

281. 547 U.S. at 98; *id.* at 101 (Souter, J., concurring).

282. *Katz v. United States*, 389 U.S. 347, 352 (1967); *id.* at 361 (Harlan, J., concurring).

283. The Court relied on this observation in *Katz* to explain why a passenger who hires a taxicab is entitled to expect privacy in the cab's rear passenger seat area. *Rakas*, 439 U.S. at 149 n.16 (1978) (discussing *Rios v. United States*, 364 U.S. 253 (1960)).

284. *Entick v. Carrington*, 19 Howell's St. Trials 1029 (C.P. 1765), 95 Eng. Rep. 807 (K.B.).

285. See *Jones v. United States*, 362 U.S. 257, 266 (1960) ("[I]t is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical."), *overruled by United States v. Salvucci*, 448 U.S. 83, 84-85 (1980); Coombs, *supra* note 280, at 1615 n.92 (1987) (suggesting that expansive notion of property could be more satisfactory paradigm than privacy expectations).

286. Some Supreme Court opinions continue to suggest that Fourth Amendment privacy expectations are related to legal property rights. See Kerr, *supra* note 77, at 516-19.

Amendment purposes needs to be interpreted to further the underlying purpose of protecting privacy. This calls for a pragmatic interpretation that takes into account the way people live and what they consider and treat as “their” property:

A thing which you have enjoyed and used as your own for a long time, whether property or an opinion takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man.<sup>287</sup>

Under such a pragmatic approach, even something as ephemeral and intangible as a telephone call can belong to the caller. Indeed, it can belong simultaneously to both or all participants in the call. The Bell companies understood this as far back as 1927. They argued in an *amici curiae* brief filed in *Olmstead v. United States*<sup>288</sup> that telephone calls belong to the people who are conversing during those calls:

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.<sup>289</sup>

This practical conception of property can explain why even an originalist can acquiesce in the *Katz* outcome.<sup>290</sup>

Presumably, service providers would take this position because it helps their business to assure customers that the bargain they have struck entails that customers retain control over their private information.<sup>291</sup> But this position is also in accord with what people consider “their” papers and effects, as reflected in reactions to some of the Supreme Court’s attempts to gauge privacy expectations. Legislation enacted in response to the Court’s decisions reflects that people in our society think of bank records and the telephone

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287. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897).

288. 277 U.S. 438 (1928).

289. Brief for Pacific Telephone & Telegraph Co. et al. as *Amici Curiae*, *Olmstead v. United States*, 277 U.S. 438 (1928) (No. 493).

290. *But see* Wasserstrom & Seidman, *supra* note 82, at 78-79 (“If one focuses on the specific intent of the framers, the fourth amendment surely does not encompass wiretaps.”).

291. Internet service providers have successfully resisted divulging subscribers’ information to copyright holders seeking to discover the identities of people transferring music over the Internet. *See, e.g., In re Charter Commc’ns, Inc.*, Subpoena Enforcement Matter, 393 F.3d 771 (8th Cir. 2005); *Recording Indus. Ass’n of Am., Inc. v. Verizon Internet Servs.*, 351 F.3d 1229 (D.C. Cir. 2003); *In re Subpoena to Univ. of N.C. at Chapel Hill*, 367 F. Supp. 2d 945 (M.D.N.C. 2005).

numbers they dial as “their” information although a service provider maintains it. The same is true of e-mails, even when they are composed or received on accounts that companies such as Yahoo or Google provide for free.<sup>292</sup> We understand that these companies provide e-mail accounts because they hope to make money by attracting people to their sites. We also expect that the companies will hold *our* e-mails in confidence. This is all implicit in *Katz’s* pay-the-toll reasoning.

The Court’s focus on privacy fails to account for this by reasoning that any sharing of information with service providers is no different than sharing information with an informant or friend who might betray the trust. There is, of course, a difference between trusting a turncoat informant not to reveal conversations and entrusting one’s financial dealings to a bank. A depositor has a contractual relationship with a bank that entitles the depositor to retain control over his financial information, regardless of who owns or possesses the records. (Absent that understanding, presumably the depositor would choose another bank.) That agreement is itself a property interest that the Fourth Amendment should recognize in deciding what constitutes a paper or an effect. In contrast, the understanding that one’s social confidantes will honor trust is not cognizable as a property interest. This is exactly how people understand their affairs.

Justice Brandeis’s *Olmstead* dissent borrowed approvingly from the Bell companies’ brief, though that opinion famously swept more broadly. Rather than arguing that the Fourth Amendment should protect intangible as well as tangible property, Justice Brandeis argued that it should protect privacy.<sup>293</sup> Justice Butler, however, focused pointedly on the invasion of property entailed in wiretapping and approved the Bell companies’ position: “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.”<sup>294</sup>

Thus, *Katz’s* ultimate adoption of a privacy rationale for Fourth Amendment protection was not a “translation” of outmoded language that merely accounted for technological innovation.<sup>295</sup> It was a

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292. Where an employer or other organization provides an e-mail account for specific purposes, the sender may be found not to own the information or at least not have exclusive ownership of it. But the idea that one’s employer owns all the e-mails sent over the company e-mail is far more intuitive than an open-ended privacy expectation inquiry.

293. See *Olmstead*, 277 U.S. at 478-79 (Brandeis, J., dissenting).

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

295. But see Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1237-40 (1993) (arguing that Justice Brandeis’s dissent merely “translated” Fourth Amendment’s original concern by adopting privacy rationale).

substantive policy choice and a radical one at that. The Bell companies' position, adopted by Judge Rudkin of the Ninth Circuit before Justice Butler, extended constitutional protection to telephone conversations, but did so merely by interpreting "papers" slightly more broadly than before. If people's thoughts were in the telephonic age to be carried by wires rather than papers, wrote Judge Rudkin, "papers" should be understood to include 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 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.<sup>296</sup>

Importantly, Judge Rudkin did not equate Fourth Amendment protection with absolute secrecy, but thought it sufficient that the conversation was as private as the telephone allowed it to be. This is fundamentally at odds with the Court's repeated notion that the mere risk that information will be shared compromises any privacy expectation.<sup>297</sup>

Vindicating Justice Brandeis's more abstracted view of the Amendment's scope, the *Katz* Court disregarded the text's specific protection of property (and concomitant protection of privacy) in an attempt to protect privacy directly. The Court gave no reason for its abandonment of the Amendment's textual link to property, as Justice Black noted in dissent.<sup>298</sup> *Katz's* attempt to broaden the scope of the Fourth Amendment in fact has enabled the Court to dispense with individualized suspicion and exempt types of property, even tangible property, from its reach when Justices with a different view of

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296. *Olmstead v. United States*, 19 F.2d 842, 850 (9th Cir. 1927) (Rudkin, J., dissenting).

297. See, e.g., *California v. Greenwood*, 486 U.S. 35, 40 (1988); *Smith v. Maryland*, 442 U.S. 735, 740-41 (1979); *United States v. Miller*, 425 U.S. 435, 443 (1976); Colb, *supra* note 168, at 126-44 (discussing Court's equating risk of disclosure with loss of privacy expectation).

298. *Katz v. United States*, 389 U.S. 347, 365 (1967) (Black, J., dissenting) ("While I realize that an argument based on the meaning of words lacks the scope, and no doubt the appeal, of broad policy discussions and philosophical discourses on such nebulous subjects as privacy, for me the language of the Amendment is the critical place to look in construing a written document such as our Constitution.").

privacy were appointed.<sup>299</sup> In other words, substituting privacy for property “abstracts from the right to its purposes, and then eliminates the right.”<sup>300</sup> Though Justice Black predicted that the majority’s rewriting of the Amendment would allow the Court to thwart law enforcement,<sup>301</sup> he would doubtlessly find the resulting judicially created hierarchy of privacy expectations and disregard of probable cause equally disconcerting.

Defining the Constitution’s terms pragmatically to give effect to the Framers’ chosen methods of protecting the values embodied in the Bill of Rights is not an unprecedented approach to constitutional interpretation.<sup>302</sup> Using this interpretive method, the Court recently simplified and rationalized another convoluted body of constitutional precedents. Before the Court’s decision in *Crawford v. Washington*,<sup>303</sup> the Supreme Court interpreted the Confrontation Clause<sup>304</sup> as requiring that hearsay statements admitted against an accused be in some way reliable. Under *Ohio v. Roberts*, statements were deemed admissible despite the Confrontation Clause’s language if they came within a “firmly rooted hearsay exception” or bore other “particularized guarantees of trustworthiness.”<sup>305</sup> This led state and federal courts not only to reach conflicting decisions on the admissibility of statements but to admit the very type of statements that the Confrontation Clause was meant to bar.<sup>306</sup> *Crawford* held that the Confrontation Clause required that reliability be assessed in a particular way—through cross-examination:

Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause’s ultimate goal is to ensure reliability of

299. See generally Goldstein, *supra* note 83, at 1009-10 (describing “due process” and “crime control” as well as idealist and realist views on criminal procedure); Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 9-22 (1964) (describing how “due process” and “crime control” models affect substance and procedure in criminal law).

300. *Maryland v. Craig*, 497 U.S. 836, 862 (1990) (Scalia, J., dissenting).

301. See *Katz*, 389 U.S. at 373 (Black, J., dissenting) (“No general right is created by the Amendment so as to give this Court the unlimited power to hold unconstitutional everything which affects privacy.”).

302. See *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2562 (2006) (holding that right to counsel “commands, not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be best”); *New Jersey v. Portash*, 440 U.S. 450, 459 (1979) (“The Fifth and Fourteenth Amendments provide a privilege against *compelled* self-incrimination, not merely against unreliable self-incrimination.”).

303. 541 U.S. 36 (2004).

304. “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. CONST. amend. VI.

305. 448 U.S. 56, 66 (1980).

306. See *Crawford*, 541 U.S. at 63-64.

evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.<sup>307</sup>

To determine whether a statement is “testimonial” and thus within the Confrontation Clause’s ambit, the Court now uses a practical definition of the term,<sup>308</sup> looking at the purpose of the Clause and the concerns animating its Framers.<sup>309</sup>

*Katz’s* approach to the Fourth Amendment is analogous to *Roberts’s* approach to the Confrontation Clause. Both disregarded the Constitution’s text in a misguided effort to get at its underlying purpose. Both generated inconsistency, confusion, and (worst of all) the very abuses the Constitution was meant to redress.

*Crawford’s* reasoning is readily applied to the Fourth Amendment, requiring just a little rephrasing of Justice Scalia’s opinion: Allowing a judge to decide what is and what is not a legitimate expectation of privacy is fundamentally at odds with the right to be secure in one’s person and possessions. To be sure, the Amendment’s ultimate goal is the protection of privacy, but it accomplishes this indirectly. The Amendment commands not that judges decide when privacy expectations can be honored, but that the government respects privacy in a particular manner: by respecting property interests. The Amendment thus reflects a judgment not only about the desirability of protecting privacy (a point on which there could be little dissent), but about how privacy can best be protected.

Expounding the Bell companies’ pragmatic understanding of property would broaden the Fourth Amendment’s reach beyond tangible, legalistic property. It would also eliminate the guesswork inherent to balancing and the arbitrary hierarchy of privacy expectations by treating all property (including contraband)

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307. *Id.* at 62.

308. See *Davis v. Washington*, 547 U.S. 813, 822 (2006) (emphasizing that *Crawford* provided that “testimonial” should be defined in “colloquial” rather than “technical, legal” manner).

309. Likewise, the Court has long understood “probable cause” as a “practical, nontechnical conception” embracing “the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.” *Illinois v. Gates*, 462 U.S. 213, 231 (1983) (quoting *Brinegar v. United States*, 338 U.S. 160, 176, 175 (1949)); see also *Maryland v. Pringle*, 540 U.S. 366, 370-71 (2003) (collecting cases).

equally.<sup>310</sup> This would result in a much more predictable and consistent jurisprudence.

Balancing privacy expectations became a fixture of Fourth Amendment jurisprudence as a refinement of the *Katz* test, initially in the context of administrative searches<sup>311</sup> but quickly spreading to criminal cases.<sup>312</sup> Because it posits that the government's "need" to search—a consideration rejected as immaterial for centuries—can affect the scope or weight of a constitutional right, balancing necessarily involves courts in political decisions.<sup>313</sup> Lord Camden

310. It merits noting that eliminating the expectations-of-privacy framework would simplify the sometimes vexing issue of Fourth Amendment standing. Rather than asking whether a search invaded a defendant's privacy expectation, *see* *United States v. Payner*, 447 U.S. 727, 735 (1980) (holding that defendant could not contest illegal search of bank officer's briefcase that led to discovery of incriminating loan guarantee at defendant's bank); *Rakas v. Illinois*, 439 U.S. 128, 139 (1978) ("[W]e think the better analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing."), the question would be whether one's property was compromised. Statutes that require service providers to provide information to the government in the name of "cooperating with law enforcement" would be subject to constitutional challenge by the customer who owns the information. In other words, an American in Shi Tao's situation would expect to have standing to challenge the government seizure of his e-mails and might even expect to have a claim against Yahoo. An extended discussion of standing is beyond the scope of this Article.

311. *Camara v. Mun. Court*, 387 U.S. 523, 537 (1967) (holding that reasonableness of search can be determined only by balancing "the need to search against the invasion which the search entails").

312. *Terry v. Ohio*, 392 U.S. 1, 16-17 (1968).

313. Indeed, whenever the Court purports to "balance" a government aim against an individual right, it risks abandoning adjudication for policymaking. Justice Scalia has for this reason decried the Court's politically charged foray into the abortion controversy:

As long as this Court thought (and the people thought) that we Justices were doing essentially lawyers' work up here—reading text and discerning our society's traditional understanding of that text—the public pretty much left us alone. Texts and traditions are facts to study, not convictions to demonstrate about. But if in reality our process of constitutional adjudication consists primarily of making *value judgments* . . . then a free and intelligent people's attitude towards us can be expected to be (*ought* to be) quite different. The people know that their value judgments are quite as good as those taught in any law school—maybe better.

*Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 1000-01 (1992) (Scalia, J., dissenting in part). There are many situations, of course, where judges balance one consideration against another. The probative value of evidence must always be balanced against any unfair prejudice it might inspire or undue delay it might occasion in a trial. *See* FED. R. EVID. 403. Even in the Fourth Amendment context, balancing might be the only way to determine whether the manner in which a search is conducted exceeds permissible bounds. *See, e.g., Tennessee v. Garner*, 471 U.S. 1, 9 (1985) ("The same balancing process applied in the cases cited above demonstrates that, notwithstanding probable cause to seize a suspect, an officer may not always do so by killing him."). However, one can concede that constitutional rights are not

coily dismissed in *Entick* the Crown's appeal to necessity as grounds for allowing the seizure of Entick's papers because there was no authority for it: "Whether this proceedeth from the gentleness of the law towards criminals, or from a consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say."<sup>314</sup> Focused on the invasion of Entick's property interests, Lord Camden saw no need to "balance" government needs against privacy expectations.

Before 1967, the Supreme Court did not either. Justice Jackson's opinion for the Court in *United States v. Di Re*, for example, rejected the government's argument that, along with the power to search cars without a warrant, it needed to make warrantless searches of all passengers:

We meet in this case, as in many, the appeal to necessity. It is said that if such arrests and searches cannot be made, law enforcement will be more difficult and uncertain. But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment.<sup>315</sup>

Because privacy has no inherent limiting principle, the attempt to protect it directly forces courts to resort to balancing and thus gives the government's necessity argument currency that it previously lacked. Thus, considering a similar search of an automobile passenger's purse, the modern Court distinguished *Di Re* in a footnote on the ground that it involved the search of a person and not merely of a person's property.<sup>316</sup> The Court justified its decision, however, by balancing: "Whereas the passenger's privacy expectations are, as we have described, considerably diminished, the governmental interests at stake are substantial."<sup>317</sup>

Balancing denies the very idea of rights by subjecting them to a form of arbitration<sup>318</sup> and invites courts to denigrate the privacy

absolute without admitting that rights must cede whenever a judge finds a government policy objective sufficiently weighty.

314. 19 Howell's St. Trials 1029 (C.P. 1765), 95 Eng. Rep. 807 (K.B.); *see also* TAYLOR, *supra* note 35, at 34.

315. 332 U.S. 581, 595 (1948).

316. *Wyoming v. Houghton*, 526 U.S. 295, 303 n.1 (1999).

317. *Id.* at 304; *see also* *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973).

318. As Justice Jackson wrote: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities *and officials* and to establish them as legal principles to be applied by the courts." *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (emphasis added); *see also* *United States v. Leon*, 468 U.S. 897, 979-80 (1984) (Stevens, J., dissenting).



expectations of people whom judges deem inherently suspicious, based on only the judges' own intuition. The hierarchy of Fourth Amendment "legitimate" privacy expectations has been built by piling such assumptions upon each other. Houses are acknowledged as sitting atop the pyramid, receiving the greatest protection from intrusion. Courts accord Fourth Amendment protection to other effects depending bizarrely on the degree to which doing so burdens the government. Thus, cases turn on such ideas as that owners of junkyards are likely to be dealing in stolen cars,<sup>319</sup> that high school and middle school students are likely to be doing illegal drugs,<sup>320</sup> and that mobile home owners possess the ideal drug distribution vehicle.<sup>321</sup> A property approach would obviate such distinctions.

Declaring that suspicious groups have "lower" privacy expectations erodes the importance of individual suspicion as a threshold condition for a search or seizure. It encourages judges to decide Fourth Amendment questions on the basis of their own personal assumptions about daily life even when balancing is not required, reflecting an aloof judiciary's attempt to imagine how less privileged people live.<sup>322</sup> The Court, for example, has insisted that people do not commonly keep personal possessions in their automobiles,<sup>323</sup> that passengers on a bus might feel free to decline armed officers' request to search their bags,<sup>324</sup> and that travelers passing through a busy airport should not mind having their luggage sniffed by a dog to prove to the police that they are not drug couriers.<sup>325</sup> All of these cases gave short shrift to property rights.

*Katz's* focus on privacy not only begat balancing but also effectively reintroduced *Boyd's* fatal flaw, which *Hayden* meant to

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319. *New York v. Burger*, 482 U.S. 691, 713-14 (1987).

320. *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 836-37 (2002).

321. *California v. Carney*, 471 U.S. 386, 393-94 (1985) ("[T]o fail to apply the [automobile] exception to vehicles such as a motor home ignores the fact that a motor home lends itself easily to use as an instrument of illicit drug traffic and other illegal activity."); *id.* at 399 (Stevens, J., dissenting) ("In this case, the Court can barely glimpse the diverse lifestyles associated with recreational vehicles and mobile living quarters.").

322. This is a reflection of Professor Ely's observation that the political process can be counted on to protect "people like us." ELY, *supra* note 56, at 173. The only "political process" involved in distinguishing legitimate privacy expectations from illegitimate ones is a court decision. Judges can be counted on to protect people from searches that might be inflicted on them or people like them. They are less likely to be sympathetic to high school students, mobile home owners, and junkyard owners.

323. *Wyoming v. Houghton*, 526 U.S. 295, 303 (1999); *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (plurality opinion).

324. *United States v. Drayton*, 536 U.S. 194, 206-07 (2002); *Florida v. Bostick*, 501 U.S. 429, 437-38 (1991).

325. *United States v. Place*, 462 U.S. 696, 704 (1983).

eradicate. Just as *Boyd* distinguished between property that could be trespassed and contraband, *Kyllo* and *Caballes* distinguish between information that is always sacrosanct (anything that happens inside a home no matter how banal) and information that one has no right to conceal (the presence of marijuana in one's trunk). Like *Boyd*, this shifts the Fourth Amendment away from asking whether the police were acting with a good reason to asking what they were seeking. Thus, the privacy regime allows the Court to find that contraband like marijuana, as well as information entrusted to third-party service providers, is not private and therefore not constitutionally protected. This undermines the Amendment's core purpose of curbing arbitrary government inspections.

Declaring that one has no right to conceal drugs from the police is indistinguishable from declaring that one has no right to conceal seditious writings from the Crown. True, it is illegal to possess certain items, and, as a result, the law will not formally recognize a property interest in contraband. Further, Justice Stevens's pronouncement that "any hopes or expectations concerning the nondetection of contraband" are categorically illegitimate seems positively to peal with verity and good sense.<sup>326</sup> But *Caballes* is wrong. Lord Carrington recognized in *Entick* that the authorities could seize materials that were in fact seditious libel because there was no right to possess those.<sup>327</sup> The Crown's right to possess such papers, however, did not imply an ability to search for them without specific, well-grounded suspicions. It follows that the Fourth Amendment's protections cannot depend on whether a search will uncover only contraband.<sup>328</sup>

Recognizing that reliance on the lack of a technical property interest in contraband was a dubious way to render a search legal, the Court noted in *Hayden* that the government has a superior interest in contraband "only because the Government decides to vest such an interest in itself."<sup>329</sup> The *Hayden* majority almost grasped that contraband *must* be protected along with other possessions when it quizzically noted that "there may be limits to what may be

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326. See *Illinois v. Caballes*, 543 U.S. 405, 410 (2005).

327. *Entick v. Carrington*, 19 Howell's St. Trials 1029 (C.P. 1765), 95 Eng. Rep. 807 (K.B.).

328. See *United States v. Jeffers*, 342 U.S. 48, 53 (1951) (holding that contraband nature of narcotics did not justify warrantless search and seizure); see also *Trupiano v. United States*, 334 U.S. 699, 707 (1948), *overruled in part by United States v. Rabinowitz*, 339 U.S. 56, 66 (1950).

329. *Warden v. Hayden*, 387 U.S. 294, 306 n.11 (1967); cf. Lessig, *supra* note 295, at 1230-32 (arguing that states' power between *Wolf* and *Mapp* to alter Fourth Amendment protection of property interests by changing substantive law of trespass augured imposition of exclusionary rule).

declared contraband.”<sup>330</sup> One would have to look hard to find in the Fourth Amendment such a limitation. Rather, what must be recognized is that the constitutionality of a search in no way depends on whether the government seeks seditious writings, uncustomed goods, stolen goods, bootlegged liquor, bank records, e-mails, or marijuana.<sup>331</sup> As Judge Learned Hand colorfully put it, “Nor should we forget that what seems fair enough against a squalid huckster of bad liquor may take on a very different face, if used by a government determined to suppress political opposition under the guise of sedition.”<sup>332</sup> Thus, a dog sniff *is* a search even if it detects only marijuana.<sup>333</sup> It follows that the government has no authority, as Justice Ginsburg perceived but did not explain, to have dogs sniff cars stopped for traffic infractions even if it causes no delay.<sup>334</sup>

One might respond that, even if the Fourth Amendment does protect property, having a dog sniff a car while it is stopped for an unrelated reason is no different from a person looking at that car, which even a property-based Fourth Amendment does not prevent.<sup>335</sup> The Court’s common sense approach to defining “search” in *Hicks* answers this objection. That case held that the police officers’ handling of a turntable was a “search” because it was action beyond simple, incidental observation unrelated to the reason for the initial intrusion.<sup>336</sup> Under that approach, *Caballes* would scarcely raise an issue worth discussing because the dog sniff was not “incidental

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330. *Hayden*, 387 U.S. at 306 n.11.

331. See *Arizona v. Hicks*, 480 U.S. 321, 325 (1987) (“A search is a search, even if it happens to disclose nothing but the bottom of a turntable.”); *United States v. Di Re*, 332 U.S. 581, 595 (1948) (“We have had frequent occasion to point out that a search is not to be made legal by what it turns up.”); *Byars v. United States*, 273 U.S. 28, 29-30 (1927) (“A search prosecuted in violation of the Constitution is not made lawful by what it brings to light.”).

332. *United States v. Kirschenblatt*, 16 F.2d 202, 203 (2d Cir. 1926).

333. In fact, the reliability of drug-detecting dogs is dubious. See *Illinois v. Caballes*, 543 U.S. 405, 411 (2005) (Souter, J., dissenting) (“The infallible dog, however, is a creature of legal fiction.”). Justice Souter’s concerns were validated by *State v. Nguyen*, 726 N.W.2d 871 (S.D. 2007), where the Supreme Court of South Dakota found a drug-detecting dog that falsely alerted fifty-four percent of the time to be reliable based on its certification and training. See *id.* at 875. Despite the fact that the dog was wrong more often than not about the presence of drugs, the court found that the animal’s indication alone constituted probable cause. *Id.* at 884.

334. *Caballes*, 543 U.S. at 420-21 (Ginsburg, J., dissenting) (“The unwarranted and nonconsensual expansion of the seizure here from a routine traffic stop to a drug investigation broadened the scope of the investigation in a manner that, in my judgment, runs afoul of the Fourth Amendment.”).

335. This of course begs the question of what it means to be stopped for an “unrelated reason.” Police who in fact stop cars for a traffic infraction do not conveniently happen to have a drug dog at the ready. Rather, police use traffic stops as a pretext for doing dragnet-style drug interdiction. *Bascuas*, *supra* note 113, at 759-63.

336. *Arizona v. Hicks*, 480 U.S. 321, 328-29 (1987).

observation” and had no connection to the traffic stop. In both *Hicks* and *Caballes*, the police sought without probable cause to determine whether the defendant had something he had no right to possess (stolen stereo equipment and drugs, respectively). Just like lifting the turntable to see its serial number, the dog sniffing the car was action meant to discover information not incidentally observable.

The *Hicks* majority rejected Justice O'Connor's suggestion of allowing police to make “cursory inspections” of suspicious items.<sup>337</sup> Mercifully, the Court held that defining “search” was already confusing enough without sending “police and judges into a new thicket of Fourth Amendment law, to seek a creature of uncertain description that is neither a ‘plain view’ inspection nor yet a ‘full-blown search.’”<sup>338</sup> But that is more or less what the Court sanctioned in *Caballes*: Police cannot open a car's trunk without probable cause; that would be a “search.” But they can have a dog take a cursory sniff that will tell them what is in the trunk.

*Hicks* did not control *Caballes* because the Court had said in *United States v. Place* that a dog sniff that detects only contraband is not a Fourth Amendment “search.”<sup>339</sup> *Place*'s actual holding was that seizing a passenger's suitcase and transporting it from one airport to another to have a drug dog sniff it was an unconstitutional seizure.<sup>340</sup> In prolix dicta addressing an issue that was not briefed,<sup>341</sup> the Court advised police that stopping passengers for a quick whiff of their luggage would be constitutional “[g]iven the enforcement problems associated with the detection of narcotics trafficking and the minimal intrusion that a properly limited detention would entail.”<sup>342</sup> This is a stark illustration of how balancing implicitly posits that the Fourth Amendment must yield to allow for the enforcement of whatever crimes Congress creates, eviscerating the very concept of rights. Through balancing, *Place* exempts from constitutional protection certain property for the express purpose of facilitating drug interdiction.<sup>343</sup>

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337. *Id.* at 333 (O'Connor, J., dissenting).

338. *Id.* at 328-29 (majority opinion).

339. 462 U.S. 696, 707 (1983).

340. *Id.* at 710.

341. *Id.* at 711 (Brennan, J., concurring).

342. *Id.* at 698 (majority opinion).

343. *Id.* at 703. *Place* is far from the only example of the Court interpreting the Fourth Amendment expressly to facilitate enforcement of drug laws. *See, e.g., Bd. of Educ. of Indep. Sch. Dist. v. Earls*, 536 U.S. 822, 834 (2002) (“[T]he nationwide drug epidemic makes the war against drugs a pressing concern in every school.”); *California v. Carney*, 471 U.S. 386, 393-94 (1985) (holding that motor home could be searched without a warrant because “a motor home lends itself easily to use as an instrument of illicit drug traffic and other illegal activity”).

*Kyllo* similarly invited the Court to dispense with any requirement of individualized suspicion for house searches that could detect only evidence of contraband. But the Court held that the measuring of heat waves emanating from a house was a search and could not be undertaken without probable cause and a warrant.<sup>344</sup> The decision did not so much as cite *Place*, although Justice Stevens's dissent pointed out the tension between that case and the Court's holding.<sup>345</sup> Perhaps to explain the distinction, Justice Scalia's majority opinion emphasized that houses were more protected than other property.<sup>346</sup> Had the Court not gone out of its way in *Place* to advise police to keep hounds in every airport, *Kyllo* would have been an easier case. Both cases presented situations where police tried to learn what an individual possessed (whether inside a house or a suitcase) without probable cause.<sup>347</sup>

Despite these needless complexities and irreconcilable rationales, scholars as well as judges generally accept without question that some things are "more private" and therefore entitled to greater constitutional solicitude than others. Professor Orin Kerr, for example, asked what place in the hierarchy personal computers occupy: "Computers are like containers in a physical sense, homes in a virtual sense, and vast warehouses in an informational sense. Which insights should govern?"<sup>348</sup> Adopting Professor Kerr's approach and surveying caselaw from other circuits, the Tenth Circuit recently decided that, within the Fourth Amendment privacy hierarchy, computers "should fall into the same category as suitcases, footlockers, or other personal items that 'command a high degree of privacy.'"<sup>349</sup> The court approved federal agents' warrantless search of a computer relying on the consent of the owner's father, who did not know how to use the computer.<sup>350</sup> Agents arrived at the house at 8:45 a.m. when Ray Andrus, whom they suspected of having images of

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344. 533 U.S. 27, 40 (2001).

345. *Id.* at 47-48 (Stevens, J., dissenting).

346. *Id.* at 40 (majority opinion) (Scalia, J.).

347. Focusing on probable cause would admittedly not answer Justice Stevens's concerns that police should not be prevented from detecting chemical or biological weapons hidden in residences. That eventuality could be dealt with under the test I proposed elsewhere. See Bascuas, *supra* note 113, at 780-91. More fundamentally, it may be impossible to build constitutional rules for a free society that account for a doomsday scenario. The police should undoubtedly go to far greater lengths to keep a pipe bomb from detonating than to keep a marijuana pipe from smoking. *Cf.* *Brinegar v. United States*, 338 U.S. 160, 183 (1949) (Jackson, J., dissenting).

348. Kerr, *supra* note 77, at 533.

349. *United States v. Andrus*, 483 F.3d 711, 718 (10th Cir. 2007) (quoting *United States v. Salinas-Cano*, 959 F.2d 861, 864 (10th Cir. 1992)) (brackets omitted).

350. *Andrus*, 483 F.3d. at 715.

child pornography, was at work.<sup>351</sup> His ninety-one-year-old father “answered the door in his pajamas.”<sup>352</sup> Agents used forensic software to bypass the password protection and read the data without turning the computer on.<sup>353</sup> The court held that the agents reasonably believed Dr. Andrus had authority to consent to the search even though he did not own the computer only because it was in a place where he could *potentially* access it.<sup>354</sup>

Locating a computer’s place in the privacy hierarchy by analogizing it to a suitcase or footlocker is doomed to be unenlightening.<sup>355</sup> The reason for this is that there is nothing more inherently “private” about a suitcase, a footlocker, or a computer than a turntable. What matters is what information *might* be discovered by examining these items. Like lifting Hicks’s turntable, searching Ray Andrus’s computer could disclose his private papers, letters, and photographs. Indeed, the agents, despite believing they lacked probable cause, sought precisely those things.<sup>356</sup> The same was true of Andrus’s credit card records and Internet account, which federal agents were able to search *before* searching his computer because, under current law, they were not sufficiently private.<sup>357</sup>

Approaching Fourth Amendment questions with analogies likening computers to foot lockers or file cabinets is a bad approach because it leaves search law to be molded based on judges’ own personal experiences with new technology and on the impact technology has on attitudes toward privacy.<sup>358</sup> In the near future, for example, it is likely that documents—even extremely private ones—now commonly stored on hard drives will be stored on the servers of companies that offer Internet-based word-processing, spreadsheet, and other applications.<sup>359</sup> Of what use is comparing a computer to a

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351. *Id.* at 713.

352. *Id.*

353. *Id.* at 713-14.

354. *Id.* at 722.

355. *See, e.g.,* Kerr, *supra* note 77, at 555 (“If you analogize a computer hard drive to a suitcase, each file is like its own zippered pocket in the suitcase. A computer is like a container that stores thousands of individual containers in the form of discrete files.”).

356. 483 F.3d at 724 n.4 (McKay, J., dissenting).

357. *See id.* at 713 (majority opinion) (“The credit card number provided to Regpay was determined to belong to Ray Andrus. The email address provided to Regpay, bandrus@kc.rr.com, was determined to be associated with Dr. Bailey Andrus.”).

358. *Kyllo* emphasized that what is deemed private in the future will be a function in part of whether the technology that could reveal sought-after information was “in general public use.” 533 U.S. 27, 40 (2001). This suggests that adopters of privacy-invading technology like GPS-equipped cellular phones can compromise the privacy of those who object to having that information revealed.

359. *See* Gwendolyn Bounds, *Online Tools Give Home-Based Firms Office-Style Services, Providers Like Google and Microsoft Tout Low Cost, Ease of Use*, WALL ST. J.,

footlocker then? The current Fourth Amendment framework risks deeming those documents “not private” because they are shared with the third-party service providers. Of course, given the unpredictability of the *Katz* test, the Court might just as well come out the other way. It is impossible to predict.

Adopting a pragmatic notion of property based on what people consider “theirs” as the Fourth Amendment’s main concern eliminates the confusing talk of “privacy expectations” and the need to balance, thereby removing political considerations and much subjectivity from Fourth Amendment analysis.<sup>360</sup> Even issues regarding government inspection of private information that must be shared with third-party service providers—bank records,<sup>361</sup> e-mails,<sup>362</sup> Web surfing activity,<sup>363</sup> and the like—become much easier to answer. Just as the Bell companies understood in 1927 that their customers owned their phone conversations, today’s service providers understand the need to safeguard their customers’ confidences through contractual arrangements.<sup>364</sup> The Court’s failure to recognize contractual rights as property protected by the Fourth Amendment emboldens the government to force private companies to become surveillance agents and to divulge information that consumers would expect service providers to hold private.<sup>365</sup> The risk of suspicionless,

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Sept. 11, 2007, at B8; Matt Richtel, *Facing Free Software, Microsoft Looks To Yahoo*, N.Y. TIMES, Feb. 9, 2008, at A1; Eric A. Taub, *Help With Your Business, Often Free, On the Web*, N.Y. TIMES, Sept. 12, 2006, at G11.

360. To some extent, courts already do this. See *Minnesota v. Carter*, 525 U.S. 83, 95-96 (1998) (Scalia, J., concurring) (“Of course this is not to say that the Fourth Amendment protects only the Lord of the Manor who holds his estate in fee simple. People call a house ‘their’ home when legal title is in the bank, when they rent it, and even when they merely occupy it rent free—so long as they actually live there.”).

361. Cf. *United States v. Miller*, 425 U.S. 435, 443 (1976) (holding that bank customer had no expectation of privacy in bank records because “depositor takes the risk, in revealing his affairs to [the bank], that the information will be conveyed by that person to the Government”) (citing *United States v. White*, 401 U.S. 745, 751-52 (1971)).

362. Cf. *Warshak v. United States*, 490 F.3d 455, 473 (6th Cir. 2007) (holding that customers of Internet service provider maintain reasonable expectation of privacy in content of e-mails despite reliance on provider to deliver e-mails).

363. Cf. *United States v. Heckenkamp*, 482 F.3d 1142 (9th Cir. 2007) (holding that university student maintained reasonable expectation of privacy in his computer even though he connected to university’s network).

364. See, e.g., *Holson*, *supra* note 78 (stating that phone companies recognize business would be hurt if consumers viewed social-mapping services as too intrusive).

365. See, e.g., Communications Assistance for Law Enforcement Act of 1994, 47 U.S.C. §§ 1001-1021 (2000) (requiring telecommunications carriers and equipment manufacturers to ensure that government agents can conduct surveillance with companies’ facilities). The Bush administration’s recruitment of telecommunications companies to eavesdrop on conversations is the subject of an on-going controversy that merits close study once all the details of the operations come to light. See Eric

generalized searches would be diminished and Fourth Amendment jurisprudence would be simplified by relying on common understandings of ownership. Conversely, information not protected by such a relationship, such as a government employee's Web surfing activity on a government computer, would not be protected.<sup>366</sup>

Rather than analogizing among containers in a contrived privacy hierarchy, courts should focus on whether a search vitiates the Amendment's express protection of "papers and effects," whether locked in a safe, stored on a hard drive, or hidden under a record player.<sup>367</sup> Asking judges to decide whether people consider an e-mail or text message or phone conversation "theirs" minimizes judicial guesswork regarding societal expectations and allows for the presentation of evidence, including the contracts between individuals and service providers,<sup>368</sup> expert testimony, and lay testimony. As a result, a pragmatic property-based approach is much more likely to yield satisfactory, consistent, and predictable results because judges can more readily grasp innovations in the area of property than in the amorphous realm of privacy expectations.

### B. *The Primacy of Probable Cause*

Eliminating the indeterminacy of the "expectations of privacy" framework will be fruitless if the government can neutralize the Fourth Amendment's guarantees by complying with an empty warrant procedure. If the warrant procedure was an empty formalism before the Court's introduction of the "good faith" exception, it is now a vicious deception. Before *Leon*, a magistrate

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Lichtblau, James Risen & Scott Shane, *Wider Spying Fuels Aid Plan For Telecoms*, N.Y. TIMES, Dec. 17, 2007, at A11 (discussing various eavesdropping programs and noting that one company refused to cooperate in tapping calls to Latin America to uncover drug trafficking).

366. Cf. *United States v. Simons*, 206 F.3d 392, 398 (4th Cir. 2000) (holding that federal employee "lacked a legitimate expectation of privacy in the files downloaded from the Internet" to computer owned by federal government). *But see* *United States v. Ziegler*, 474 F.3d 1184, 1190 (9th Cir. 2007) (holding that employee of private company maintained reasonable expectation of privacy in workplace computer).

367. See *Arizona v. Hicks*, 480 U.S. 321, 325 (1987) ("It matters not that the search uncovered nothing of great personal value to respondent—serial numbers rather than (what might conceivably have been hidden behind or under the equipment) letters or photographs. A search is a search . . .").

368. No doubt at least *some* Internet service providers would stop cooperating with the government if the law allowed them to resist such claims. Internet service providers, for example, have expended what must be considerable resources to resist divulging customers' names who allegedly distributed copyrighted music. See, e.g., *In re Charter Comm'ns, Inc., Subpoena Enforcement Matter*, 393 F.3d 771 (8th Cir. 2005); *Record Indus. Ass'n of Am., Inc. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229 (D.C. Cir. 2003). This suggests they see it in the interest of their bottom line to protect customers' information.



judge's review of a warrant application supplemented a defendant's after-the-fact adversarial challenge. By making the warrant procedure the exclusive test of the government's grounds for a search, the Court converted probable cause from a substantive to a procedural requirement and insulated government action from scrutiny.<sup>369</sup>

Despite this fundamental change in the function of a warrant, legal scholarship regarding the sagacity or legality of dispensing with the warrant requirement has continued to assume that warrants protect individuals. Scholars have focused on cataloguing speculative assumptions weighing the warrant requirement's supposed benefits to targets against its costs to law enforcement, ignoring that *Leon* renders the discussion anachronistic.<sup>370</sup> Now, warrants benefit *only* law enforcement and deprive individuals of their opportunity to challenge the prosecution's claim to probable cause.<sup>371</sup> Adding to the decision's irrationality, *Leon* insisted that the "good faith" exception would not reduce the incentive for targets to challenge a magistrate's probable cause finding. It encouraged courts to decide whether probable cause was shown before concluding that the "good faith" doctrine made the point academic.<sup>372</sup> Lawyers, of course, typically do not waste time making such pointless arguments.

Offered the choice between an *ex ante*, *ex parte* proceeding based on one-sided evidence and an adversarial evidentiary hearing where the government must demonstrate probable cause, any criminal defense lawyer (and fully informed defendant) would choose the latter.<sup>373</sup> Warrants, in other words, effectively lower the degree of

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369. See Dripps, *supra* note 102, at 907 ("In effect, *Leon* does less to effect an exception to the exclusionary rule than to substitute a procedural for a substantive definition of probable cause; probable cause within bounds of plain error is whatever a magistrate says it is."); Wasserstrom & Seidman, *supra* note 82, at 31 ("[W]hen the appropriate procedure is utilized, the Court frequently has refused to invalidate the resulting search even though it might have concluded as an original matter that the substantive demands of the amendment were not satisfied.").

370. See, e.g., Stuntz, *supra* note 86, at 897-918 (arguing that warrants may serve to counteract judicial bias against criminal defendants, prevent police perjury in justifying searches, and prevent excessive damages awards to victims of illegal searches); James J. Tomkovicz, California v. Acevedo: *The Walls Close in on the Warrant Requirement*, 29 AM. CRIM. L. REV. 1103, 1156 (1992) ("Like the arguments over the warrant rule's privacy protection value, the arguments over its law enforcement costs are based on speculation and assertion.").

371. *Leon* thus permits something the Fourth Amendment expressly prohibits: warrants not supported by probable cause. See Wasserstrom & Seidman, *supra* note 82, at 33.

372. United States v. Leon, 468 U.S. 897, 924-25 & n.25 (1984).

373. This makes it difficult, if not impossible, to argue that the warrant procedure has any inherent value. A "procedure" that involves only government employees

scrutiny given to the government's reasons for making some of the most intrusive searches (those not subject to an exception to the warrant requirement).<sup>374</sup> The Department of Justice's obtaining a warrant from Judge Hogan before searching Congressman Jefferson's office, for example, afforded the Congressman little if any protection that a warrantless search subject to an after-the-fact hearing would not have provided more effectively. Not having an essentially unreviewable warrant on which to rely would also likely have made the Department of Justice *even more* cautious in undertaking that search. This would have been true even if the reviewing judge had not been the issuing judge; a judge is presumably much more likely to hold that a prosecutor erred in assessing probable cause than that a colleague did.

The Court gravely erred in *Leon* because it assumed that the reason for subjecting a magistrate's ex ante probable cause determination to ex post adversarial testing was to punish the police for cutting constitutional corners. Saying that the exclusionary rule is intended "to deter police misconduct" and that the Fourth Amendment is therefore unconcerned with negligent or careless violations of the rights it safeguards is a silly feat of legerdemain. (In fact, judicial integrity is a more justifiable basis for the Court to create exclusionary rules.<sup>375</sup>) Even if one describes the exclusionary rule's purpose as "detering police misconduct," that *must* mean not only discouraging deliberate violations but also giving law enforcement agencies an incentive to train and supervise officers to carefully observe Fourth Amendment rights.<sup>376</sup>

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(prosecutors, agents, judges) deprives the person whose interests are at stake of any chance to participate.

374. See Wasserstrom & Seidman, *supra* note 82, at 44 (explaining that *Leon* "provides strong incentives" for police to obtain warrants by "virtually insulating the search from attack in cases in which a warrant is secured").

375. This was the view Justice Holmes consistently took of the reason for excluding evidence seized in violation of the Constitution. See *Olmstead v. United States*, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting) ("For those who agree with me no distinction can be taken between the government as prosecutor and the government as judge. If the existing code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such iniquities to succeed."); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) (Holmes, J.) ("The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.")

376. So understood, the exclusionary rule's primary aim is not to afford a remedy for a wronged criminal defendant, but to provide a judicial check on executive power. For that reason, scholarly characterizations of the rule and of the Fourth Amendment generally as being intended to afford tort-like relief akin to restitution are at best imperfect analogies. See Amar, *supra* note 68, at 1119 (describing Fourth Amendment as "constitutional tort law"); Amar, *supra* note 39, at 758 (same); Stuntz, *supra* note

Violations of constitutional rights are strict liability events; no particular mens rea on the part of government agents is required. This proposition is simply the converse of the Court's repeated insistence that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."<sup>377</sup> If the facts turn out to be such that no probable cause existed because either the court or the police made an error, what difference does it make that the police had pure intentions? Why should an officer's subjective belief matter when his intentions are good, but not matter if he stops only Hispanic speeders? *Leon* provides police an incentive simply to do what is necessary to get a warrant, which is a world away from doing what is necessary to respect rights. Worse, *Leon* has been extended to apply when the police make warrantless searches or arrests without intending to violate the Constitution, such as when court or police records incorrectly reflect an outstanding warrant<sup>378</sup> or when it seems they have consent to enter a home but actually do not.<sup>379</sup>

The idea that negligent but unconstitutional searches and seizures should not result in any consequence to the government negates one of the principal assumptions on which the Fourth Amendment depends for it to make any sense. Professor Telford Taylor and Professor Akhil Reed Amar have pointed out that warrants were issued at common law to protect the individual carrying out the search from a future tort suit.<sup>380</sup> If the search was unjustified, a warrant would preclude a damages award.<sup>381</sup> An aggrieved target could, despite any warrant, nonetheless seek the return of anything seized if cause for the search were found lacking.<sup>382</sup> Similarly, if the police violate the Constitution negligently but not deliberately, they are not liable for damages under 42 U.S.C. § 1983 or *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.<sup>383</sup> But the government has *no authority* to make use of the unlawfully seized property. The exclusionary rule thus gives the best incentive for agencies to ensure that probable cause exists for every

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86, at 883-84, 899-900 (describing exclusionary rule as "restitutionary" and Fourth Amendment law as "essentially, tort law for police"). That the defendant who brings a motion to suppress illegally seized evidence benefits does not convert a constitutional limitation of government power into a constitutional tort.

377. *Whren v. United States*, 517 U.S. 806, 813 (1996); accord *Brigham City v. Stuart*, 126 S. Ct. 1943, 1948 (2006); *Georgia v. Randolph*, 547 U.S. 103, 138 (2006); *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004).

378. *Arizona v. Evans*, 514 U.S. 1 (1995); *United States v. Herring*, 492 F.3d 1212 (11th Cir. 2007).

379. *Illinois v. Rodriguez*, 497 U.S. 177 (1990).

380. TAYLOR, *supra* note 35, at 39-41; Amar, *supra* note 39, at 773-74.

381. Amar, *supra* note 39, at 774.

382. TAYLOR, *supra* note 35, at 82.

383. 403 U.S. 388 (1971).

search and seizure, not merely those that are deliberately violative of rights.<sup>384</sup>

Whatever its utility before *Leon*, the warrant procedure with a “good faith” exception offers the target of a search no benefit whatsoever. The Supreme Court used to profess that warrants reassured the person whose property was being searched and seized of the officers’ authority to search and of the limits of that authority.<sup>385</sup> More recently, the Court has held that warrants are not meant to provide any such notice. In *Groh v. Ramirez*, Justice Stevens’s majority opinion noted that the Fourth Amendment does not require law enforcement “to serve notice on the owner before commencing the search.”<sup>386</sup> A few years later, in *Grubbs v. United States*,<sup>387</sup> a different majority reiterated that there was no requirement that warrants be presented at the outset of a search. Despite this, Justice Souter’s concurring opinion quizzically insisted that whether the Constitution ever requires officers to present a warrant before searching remains undetermined.<sup>388</sup>

Nor does the warrant requirement do much to limit the discretion of the police in the manner in which they execute a warrant. Police officers must necessarily exercise judgment in how they make a search and in what they seize. A warrant does not authorize them to do anything that might come within a warrant’s literal terms,<sup>389</sup> but neither does the warrant prevent police from going overboard.<sup>390</sup> Nor is it possible to expect judges in our

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384. See generally Yale Kamisar, *In Defense of the Search and Seizure Exclusionary Rule*, 26 HARV. J. L. & PUB. POL’Y. 119, 123-27 (2003) (arguing that police routinely and deliberately engaged in unconstitutional searches prior to adoption of the exclusionary rule and that alternative remedies are inadequate to prevent abuses).

385. *Illinois v. Gates*, 462 U.S. 213, 236 (1983); *United States v. Chadwick*, 433 U.S. 1, 9 (1977); *Camara v. Mun. Court*, 387 U.S. 523, 532 (1967).

386. *Groh v. Ramirez*, 540 U.S. 551, 562 n.5 (2004) (“Quite obviously, in some circumstances—a surreptitious search by means of a wiretap, for example, or the search of empty or abandoned premises—it will be impracticable or imprudent for the officers to show the warrant in advance.”).

387. 547 U.S. 90, 98-99 (2006) (“This argument assumes that the executing officer must present the property owner with a copy of the warrant before conducting his search. In fact, however, neither the Fourth Amendment nor Rule 41 of the Federal Rules of Criminal Procedure imposes such a requirement.”) (citation omitted).

388. *Id.* at 99-103 (Souter, J., concurring) (“[T]he right of an owner to demand to see a copy of the warrant before making way for the police . . . remains undetermined today.”).

389. See *Maryland v. Garrison*, 480 U.S. 79 (1987).

390. See, e.g., *San Jose Charter of the Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962 (9th Cir. 2005) (holding that seizure of expensive motorcycles, seizure of refrigerator door, seizure of sidewalk removed by jackhammer, and shooting of guard dogs pursuant to execution of warrant to search for “any” indicia of affiliation with motorcycle club was unreasonable); see also *Bruce v. Beary*, 498 F.3d 1232, 1244

adversarial system to supervise the execution of warrants and the gathering of evidence to minimize breaches.<sup>391</sup>

The only remaining utility a warrant might provide a defendant is that it requires the police to create a record of their basis for believing probable cause exists.<sup>392</sup> Probable cause must be determined from the facts known to the police prior to any search, and forcing the police to apply for a warrant makes it more difficult (though not impossible<sup>393</sup>) for them to justify searches after the fact.<sup>394</sup> But the government already bears the burden of proving that the many warrantless searches made under current law are supported by probable cause when they are made.<sup>395</sup> To shoulder that burden, police and prosecutors keep records. Defense counsel are experienced in challenging these assertions. This is also the method used to test whether evidence proffered by the government is the fruit of immunized conversations or testimony.<sup>396</sup> Given that warrant

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(11th Cir. 2007) (holding that warrantless search of auto salvage yard came within administrative-search exception to warrant requirement, but that "para-military" raid by twenty officers "with automatic shotguns and sidearms drawn" was "hardly . . . what the Supreme Court had in mind . . . when it held that the Constitution is not offended by statutes authorizing the regular, routine inspection of books and records required to be kept by auto salvagers").

391. See, e.g., *Kerr, supra* note 77, at 575 ("Given the contingent nature of the process, even a skilled forensic expert cannot predict exactly what techniques will be necessary to find the information sought by the warrant.").

392. See *O'Connor v. Ortega*, 480 U.S. 709, 743 (1987) (Blackmun, J., dissenting) ("Petitioners would have been forced to articulate their exact reasons for the search and to specify the items in Dr. Ortega's office they sought, which would have prevented the general rummaging through the doctor's office, desk, and file cabinets."); *Stuntz, supra* note 86, at 925 (stating that warrants force police to "record what they know before the search takes place, and thus make it harder to lie about what they knew when they testify at suppression hearings").

393. See *Murray v. United States*, 487 U.S. 533 (1988) (holding that officers who conduct illegal search may seek warrant on basis of information obtained independent of illegal conduct and may conceal illegal conduct from issuing judge); *Segura v. United States*, 468 U.S. 796 (1984) (holding that evidence discovered pursuant to search warrant was not subject to exclusionary rule though officers entered apartment illegally before obtaining warrant).

394. See *Katz v. United States*, 389 U.S. 347, 358-59 (1967); *United States v. Di Re*, 332 U.S. 581, 595 (1948) ("We have had frequent occasion to point out that a search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success."); *Byars v. United States*, 273 U.S. 28, 29-30 (1927) ("A search prosecuted in violation of the Constitution is not made lawful by what it brings to light; and the doctrine has never been recognized by this court, nor can it be tolerated under our constitutional system, that evidences of crime discovered by a federal officer in making a search without lawful warrant may be used against the victim of the unlawful search where a timely challenge has been interposed.").

395. *Recznik v. City of Lorain*, 393 U.S. 166, 169-70 (1968).

396. See *Kastigar v. United States*, 406 U.S. 441, 460 (1972) (placing burden of proving that evidence is not fruit of immunized testimony on government).

applications can be supported by hearsay from undisclosed sources, the warrant procedure does little if anything to prevent police from concocting probable cause if they choose. By insulating warrant affidavits from adversary testing, the “good faith” exception makes it that much easier to lie.

Prior to *Leon*, the availability of ex post as well as ex ante review of probable cause underscored that the ex ante determination was contingent and prophylactic. *Leon* made it virtually determinative for the apparent purpose of sparing magistrates the embarrassment of having warrants invalidated. Had *Leon* addressed the problem of defective warrants by eliminating the warrant procedure rather than by eliminating adversarial challenges to probable cause, defendants would be better off. For example, the Department of Justice would have had to decide whether to search a congressional office without the judiciary’s ex ante involvement or approval. It would do this in exactly the way that police now undertake most searches—by having its agents and prosecutors confer and decide on their own and at their peril whether probable cause justified the intrusion. Congressman Jefferson and the House of Representatives would then have been able to challenge that assessment with a thoroughness simply not possible in an ex ante, ex parte proceeding. That opportunity is now denied.

The futility of the warrant procedure shows how far removed current jurisprudence is from the Fourth Amendment’s purpose. The Fourth Amendment cannot curb general searches if it is interpreted in a way that devalues probable cause. A well-grounded, articulable belief that crime is occurring or has occurred is the difference between specific searches and the general searches that the Framers understood were instruments of oppression. While searches without probable cause might well be permitted in situations where imminent physical harm is threatened, such allowances can be made on a principled basis without resort to balancing.<sup>397</sup> Worse than being merely futile, the insistence on warrants has caused the Court to excuse the more fundamental and important requirement of probable cause whenever a warrant issues. Substituting form for substance, the Court has excused compliance with the substantive probable cause showing whenever government agents demonstrate their pure intentions by indulging an empty procedure for obtaining a piece of paper.

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397. See Bascuas, *supra* note 113, at 777-78.

## V. CONCLUSION

Law must be predictable to be of any use.<sup>398</sup> Predicating the Fourth Amendment's protection on "expectations of privacy" makes its scope unpredictable and needlessly complicated. Compounding the confusion is the idea that the warrant procedure provides substantial protection of those privacy interests the Court certifies are legitimate. Refocusing the law on the Amendment's text in light of its historical underpinnings suggests that two reforms are vital to restoring Fourth Amendment jurisprudence to a principled methodology.

First, privacy and property must be understood not as competing Fourth Amendment values or objects of concern but as interrelated concepts. The Fourth Amendment protects privacy by safeguarding property from government intrusion except when there is good cause to believe a crime has occurred or is occurring. Property interests generally delineate privacy interests. Unlike abstract privacy expectations, property interests cannot be compromised through judicial weighing of government "needs." Nor should vague talk of "minimal intrusions" justify government incursions. Property exists to protect an owner's desire, however irrational, to exclude others from having anything to do with it.<sup>399</sup> This idea is inherent in the very root of trespass, as Lord Camden noted:

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.<sup>400</sup>

Property should be understood in a broad, nontechnical sense to protect whatever people consider and treat as "their" property.

Second, it must be acknowledged that the rhetoric regarding the virtues of the warrant procedure has no place in the context of modern Fourth Amendment jurisprudence. Even if warrants ever offered much protection in our adversarial system, they now serve principally to deprive a defendant of an adversary hearing. Rather

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398. See Holmes, *supra* note 287, at 457 ("People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.")

399. See, e.g., *Hudson v. Michigan*, 547 U.S. 586, 619-22 (2006) (Breyer, J., dissenting) (arguing that harm from Fourth Amendment violation results even where there is no damage to property or embarrassment resulting from intrusion on privacy).

400. *Entick v. Carrington*, 19 Howell's St. Trials 1029 (C.P. 1765), 95 Eng. Rep. 807 (K.B.).

than insisting on compliance with the warrant procedure, the Court should insist on across-the-board compliance with the probable cause standard, as the Framers were concerned with unjustified, general searches. The Fourth Amendment's core command is not that all searches be accompanied by a warrant. That, as experience has shown, is impossible. The Amendment's concern is that searches be specific, i.e., that they be made only when there is a good reason to believe that a particular individual has committed a particular crime. That, and only that, is what "probable cause" has always meant: "The substance of all the definitions of probable cause is a reasonable ground for belief of guilt."<sup>401</sup> Warrants may help advance that goal but they have no intrinsic worth. Only by strictly enforcing the Amendment's probable cause requirement and strictly limiting exceptions to those necessary to thwart imminent threats of physical injury can the law serve the Amendment's purpose.

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401. *Brinegar v. United States*, 338 U.S. 160, 175 (1949) (internal quotation marks and citation omitted); *see also* *Henry v. United States*, 361 U.S. 98, 102 (1959) ("Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed. It is important, we think, that this requirement be strictly enforced, for the standard set by the Constitution protects both the officer and the citizen."); *Stacey v. Emery*, 97 U.S. (7 Otto) 642, 645 (1878) ("If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offence has been committed, it is sufficient."); *see* *Bascuas*, *supra* note 113, at 745-48.