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You Can't Teach Old Katz New Tricks: It's Time to Revitalize the Fourth Amendment

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NOTES

You Can't Teach Old *Katz* New Tricks: It's Time to Revitalize the Fourth Amendment

JEREMY CONNELL*

For over half a century, the Court's decision in Katz v. United States has been the lodestar for applying the Fourth Amendment. The Katz test has produced a litany of confusing and irreconcilable decisions in which the Court has carved exceptions into the doctrine and then carved exceptions into the exceptions. These decisions often leave lower courts with minimal guidance on how to apply the framework to new sets of facts and leave legal scholars and commenters befuddled and frustrated with the Court's explanations for the rulings. The Court's decision in Carpenter v. United States represents the apex of Katz's unclear standard, counterintuitive application, and lack of guidance for lower courts.

This Note examines the evolution of the Court's Fourth Amendment jurisprudence both before and after the Katz decision and argues that the Carpenter decision epitomizes Katz's legacy as a flawed precedent that is incapable of adequately applying the Fourth Amendment to new sets of facts

* Executive Editor, *University of Miami Law Review*, Volume 78. Juris Doctor Candidate, 2024, University of Miami School of Law. Thank you to Professor Tamara Lave for sparking my interest in criminal law, to the dedicated and inspiring attorneys at the Office of the Miami-Dade Public Defender for introducing me to its practice, to my fellow Editors at the *University of Miami Law Review* for all their efforts, and to my wife Katherine for her abundant support and patience.

in the twenty-first century and beyond. This Note further argues that Katz should be abandoned as the Fourth Amendment standard in lieu of a hybrid approach that combines privacy and property protections and incorporates positive law in determining the scope of the Fourth Amendment.

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INTRODUCTION

The current Fourth Amendment framework has been roundly criticized for decades as being unpredictable and subject to manipulation by the members of the Court.¹ Additionally, it has been questioned whether the doctrine has any legitimate constitutional underpinnings at all.² In the decisions that followed *Katz v. United States*, the Court has repeatedly hidden the goalposts on what exactly the test means and how exactly it is applied.³ The Court has created exceptions that are incompatible with the plain text of the original opinion and has issued a litany of irreconcilable and inscrutable opinions.⁴ This Note argues for a new Fourth Amendment framework that combines originalist concepts with the contemporary framework and supplements those models with a positive law approach in order to create a stable doctrine that is adaptable to new sets of facts, while remaining true to the Fourth Amendment's original purpose.

¹ See Daniel J. Solove, *Fourth Amendment Pragmatism*, 51 B.C. L. REV. 1511, 1512 (2010) (“Few commentators are particularly fond of Fourth Amendment law. U.S. Supreme Court decisions applying the reasonable expectation of privacy test have been attacked as ‘unstable’ and ‘illogical,’ and even as engendering ‘pandemonium.’”); see also Donald R.C. Pongrace, *Stereotypification of the Fourth Amendment’s Public/Private Distinction: An Opportunity for Clarity*, 34 AM. U. L. REV. 1191, 1208 (1985) (discussing that the Fourth Amendment doctrine is in a “state of theoretical chaos”); John B. Mitchell, *What Went Wrong with the Warren Court’s Conception of the Fourth Amendment?*, 27 NEW ENG. L. REV. 35, 40 (1992) (explaining that the *Katz* test is capable of “taking on many alternative meanings” and is “open to ready manipulation”); Richard A. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 188 (1979) (“And it is circular to say that there is no invasion of privacy unless the individual whose privacy is invaded had a reasonable expectation of privacy; whether he will or will not have such an expectation will depend on what the legal rule is.”).

² *Carpenter v. United States*, 138 S. Ct. 2206, 2236 (2018) (Thomas, J., dissenting) (“The *Katz* test has no basis in the text or history of the Fourth Amendment. And, it invites courts to make judgments about policy, not law.”); *id.* at 2265 (Gorsuch, J., dissenting) (“Even taken on its own terms, *Katz* has never been sufficiently justified.”).

³ *Id.* at 2265 (Gorsuch, J., dissenting) (“[W]e still don’t even know what [*Katz*’s] ‘reasonable expectation of privacy’ test is. Is it supposed to pose an empirical question (what privacy expectations do people *actually* have) or a normative one (what expectations *should* they have)?”).

⁴ See discussion *infra* Sections III.A, III.B, III.C, III.D, III.E.

In Part I.A, this Note examines the Court's early Fourth Amendment jurisprudence and the theoretical underpinnings of those decisions. An examination of the early cases reveals that the Court acknowledged that a functionalist approach was necessary in order for the Amendment to fulfill its purpose. The Court also recognized that the Fourth Amendment was an effectuation of underlying privacy rights and that cabinining the Amendment's reach to those sets of facts that gave rise to its passage would strip it of its objective. In Parts I.B and I.C, this Note discusses the *Olmstead* line of cases and argues that the Court's repeated rejection of positive law concepts was irreconcilable with the regime's focus on trespass theory. Additionally, this Note argues that the Court's disregard of positive law contributed to the counterintuitive results that began to strip the Amendment of its effectiveness and led the Court to reshape the regime altogether in *Katz*. In Part II, this Note then discusses the *Katz* decision and argues that, while the Court was correct that privacy interests are a necessary consideration in a Fourth Amendment framework, the Court erred in diluting the role of property rights in the framework. In Part III, this Note discusses the fallout of the *Katz* decision over the next several decades, with particular emphasis on and criticism of the "third-party doctrine."

In Part IV, this Note examines the *Carpenter* decision and argues that the Court should have discarded the third-party doctrine entirely because it is inconsistent with an approach that combines both property rights and privacy rights. This Note explores Justice Gorsuch's dissent and argues that his Fourth Amendment analysis provides a roadmap to build a new Fourth Amendment regime that is both grounded in history and capable of providing expansive substantive protections. In Part V, this Note then briefly surveys how some lower courts are applying *Carpenter*'s standard to the third-party doctrine. Finally, in Part VI, this Note argues that a Fourth Amendment framework that combines the privacy interests of the *Katz* test with the property interests of the *Olmstead* regime, and that looks to positive property law in determining whether government action constitutes a search, is the best way forward for Fourth Amendment jurisprudence.

I. THE ROAD TO *KATZ*

The Fourth Amendment reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁵

The Court's early decisions applying the Fourth Amendment did not substantively examine what it meant for an action to constitute a "search."⁶ Rather, the Court presumed that all searches were physical in nature and resembled the British "writs of assistance" or "general warrants" that prompted the Founders to draft the Fourth Amendment.⁷ The Court's decisions instead focused on whether searches were or were not "reasonable" under given circumstances.⁸ Early decisions included *Ex Parte Jackson*,⁹ *Boyd v. United States*,¹⁰ *Weeks v. United States*,¹¹ and *Hester v. United States*.¹²

⁵ U.S. CONST. amend. IV.

⁶ See *Ex Parte Jackson*, 96 U.S. 727, 732–37 (1877); see also *Boyd v. United States*, 116 U.S. 616, 617–38 (1886); *Weeks v. United States*, 232 U.S. 383, 386–99 (1914); *Hester v. United States*, 265 U.S. 57, 57–59 (1924).

⁷ *Boyd*, 116 U.S. at 624–25 ("In order to ascertain the nature of the proceedings intended by the Fourth Amendment to the Constitution under the terms 'unreasonable searches and seizures,' it is only necessary to recall the contemporary or then recent history of the controversies on the subject, both in this country and in England. The practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book;' since they placed 'the liberty of every man in the hands of every petty officer.'").

⁸ *Id.* at 641 (Miller, J., concurring) ("The things here forbidden are two—search and seizure. And not all searches nor all seizures are forbidden, but only those that are unreasonable. Reasonable searches, therefore, may be allowed, and if the thing sought be found, it may be seized.").

⁹ 96 U.S. at 727.

¹⁰ 116 U.S. at 616.

¹¹ 232 U.S. at 383.

¹² *Hester v. United States*, 265 U.S. 57, 57 (1924).

In these decisions, the Court insisted that the Fourth Amendment needs inherent flexibility in order to provide substantive protections to new sets of facts, but the Court also used a rigid framework of what constitutes a “search” for Fourth Amendment purposes and did not fully explore that question in its opinions.¹³ The Court also emphasized that the Fourth Amendment was not meant to target only a specific type of conduct; it was designed to prevent underlying fundamental rights from infringement.¹⁴ Although the Court did not look to positive law to delineate whether a given action was prohibited by the Fourth Amendment, the throughline of its early decisions is that the Court considered the Amendment to be an effectuation of both property rights and privacy rights.¹⁵

A. *The Court’s Early Decisions: Don’t Tread on Me, but Make Yourself at Home in My Open Fields*

In 1877, the Court decided *Ex Parte Jackson*.¹⁶ In *Jackson*, the Court confronted the Fourth Amendment ramifications of a congressional statute that prohibited the distribution of lotteries by mail.¹⁷ While the Court held that Congress had the power to circumscribe what could be mailed through the United States Postal Service, the Court was emphatic that an individual’s sealed papers were protected by the Fourth Amendment, and the Court drew a hard line between items “intended to be kept free from inspection” such as sealed letters and packages, and “what is open to inspection” such

¹³ See *Boyd*, 116 U.S. at 635 (“[I]llegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.”).

¹⁴ *Id.* at 630 (“It is not the breaking of his doors, and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . .”). Twenty-eight years later, Justice Day would quote this passage in the *Weeks* decision. *Weeks*, 232 U.S. at 391.

¹⁵ See *Boyd*, 116 U.S. at 630 (holding Fourth Amendment effectuates the “sacred right” to “personal security, personal liberty and private property.”).

¹⁶ 96 U.S. 727 (1877).

¹⁷ *Id.* at 736.

as newspapers, magazines, or other printed materials.¹⁸ The former category, the Court held, was subject to Fourth Amendment protection and could not be searched without a proper warrant.¹⁹ The latter category could be inspected without a warrant.²⁰

In 1886, *Boyd v. United States* presented the question of whether the compulsory production of private papers constituted a search and seizure under the meaning of the Fourth Amendment.²¹ The defendant in *Boyd* was charged with not paying duties on the importation of plate glass from England.²² To prove its case, the government compelled Boyd to produce his invoice for the glass.²³ Boyd objected that compelling him to produce the invoice was effectively a search under the Fourth Amendment.²⁴ The Court agreed.²⁵ In its opinion, the Court discussed that, though the principal type of search that prompted the Fourth Amendment's passage was the writ of assistance or general warrant, the Fourth Amendment was meant to safeguard fundamental rights rather than to ban only certain types of conduct:

The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property

. . . .

¹⁸ *Id.* at 732–33.

¹⁹ *Id.* at 733.

²⁰ *Id.*

²¹ 116 U.S. 616, 622 (1886).

²² *Id.* at 617–18.

²³ *Id.* at 618.

²⁴ *Id.*

²⁵ *Id.* at 638.

. . . Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.²⁶

In 1914, in *Weeks v. United States*, the Court again decided a case involving the distribution of lottery tickets by mail.²⁷ The defendant was arrested at a train station; a separate set of police went to his residence in order to conduct a warrantless search.²⁸ A neighbor told the police where to find the key to Weeks's room, and the police used the key to enter, search the premises, and seize items.²⁹ Justice Day's forceful prose issued a caution to overzealous government agents:

The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike,

²⁶ *Id.* at 630–35.

²⁷ *Weeks v. United States*, 232 U.S. 383, 386 (1914).

²⁸ *Id.*

²⁹ *Id.*

whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.³⁰

In *Hester v. United States*, decided in 1924, the Court formulated what would become known as the “open fields” doctrine.³¹ Charlie Hester was convicted of bootlegging after two government agents trespassed onto Hester’s father’s land—where Hester lived—in order to covertly observe his activities.³² The agents witnessed Hester handing a bottle of moonshine to another individual, pursued Hester, and arrested him.³³ Hester argued that the agents’ entry onto his land and subsequent observations violated the Fourth Amendment.³⁴ In a terse opinion by Justice Holmes, the Court stated that “the special protection accorded by the Fourth Amendment to the people in their ‘persons, houses, papers, and effects,’ is not extended to the open fields,” and that the “distinction between the latter and the house is as old as the common law.”³⁵

³⁰ *Id.* at 391–92. The *Weeks* decision also established the exclusionary rule for federal courts, holding that evidence obtained as a result of a Fourth Amendment violation could not be introduced against a defendant in court. *Id.* at 393.

³¹ See *Hester v. United States*, 265 U.S. 57, 59 (1924). On the “open fields” doctrine, see generally Rowan Themer, Comment, *A Man’s Barn is Not His Castle: Warrantless Searches of Structures Under the “Open Fields Doctrine,”* 33 S. ILL. U. L.J. 139, 139–45 (2008).

³² *Hester*, 265 U.S. at 57–58.

³³ *Id.* at 58.

³⁴ *Id.* at 57–58.

³⁵ *Id.* at 59. Justice Holmes cited to Blackstone for this proposition, but, curiously, though Holmes claimed the concept was “as old as the common law,” Blackstone never used the phrase “open fields” at all. See S. Bryan Lawrence III,

Hester's "open fields" doctrine specifically eschewed consideration of positive law in delineating the bounds of the Fourth Amendment; according to the Court, whether government agents trespassed onto private land in order to make their observations was immaterial to a Fourth Amendment analysis if their actions did not fit the definition of a "search."³⁶ This disregard of positive law in Fourth Amendment jurisprudence opened the door to the Court later explicitly holding it constitutional that the police may commit criminal trespass onto private residential property in order to look for information, even without a warrant.³⁷

Additionally, the Court's reasoning is circular: The Court says that whether the agents trespassed is immaterial because the agents' actions did not constitute a search, but, as Justice Scalia would point out much later in *United States v. Jones*³⁸ and *Florida v. Jardines*,³⁹ the very act of trespassing onto another's property in order to obtain information that would not be available without such a trespass *is itself a search*.⁴⁰ Whether one believes the primary purpose of the Fourth Amendment is to effectuate a right to privacy or to safeguard property rights, each rationale has tension with the *Hester* decision. It is intuitive that a right to privacy would include the right to be free from secretive observation by trespassers on one's land. It is also equally intuitive that if the Fourth Amendment is an effectuation of property rights, it makes little sense to, when determining whether

Curtilage or Open Fields?: Oliver v. United States Gives Renewed Significance to the Concept of Curtilage in Fourth Amendment Analysis, 46 U. PITT. L. REV. 795, 799 (1985) (arguing that Holmes failed to consider whether *Hester* was in the curtilage of the home and that a review of the facts indicates the jar of moonshine *Hester* threw would have been in the curtilage).

³⁶ *Hester*, 265 U.S. at 58 ("It is obvious that even if there had been a trespass, the above testimony was not obtained by an illegal search or seizure.")

³⁷ See *Oliver v. United States*, 466 U.S. 170, 183 n.15 (1984); see also *Themer*, *supra* note 31, at 143–45.

³⁸ *United States v. Jones*, 565 U.S. 400, 404–05 (2012) ("It is important to be clear about what occurred in this case: The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted.")

³⁹ *Florida v. Jardines*, 569 U.S. 1, 11 (2013) ("That the officers learned what they learned only by physically intruding on *Jardines*' property to gather evidence is enough to establish that a search occurred.")

⁴⁰ *Jones*, 565 U.S. at 404–05.

the police's actions are constitutional, entirely disregard whether the police violated an individual's property rights.

It is important to note that despite the Court's disregard of positive property law in its analysis, the Court nonetheless decided *Hester* using a property-based theory; the word "privacy" does not appear a single time in the opinion.⁴¹ The "open fields" doctrine thus signifies that originalist constructions of the definition of "search" can—and almost certainly will—lead to absurd results, even without any reference to expectations of privacy, if the analysis disregards positive law.⁴²

B. Olmstead: *The Police Listen to Olmstead, No One Listens to Brandeis*

Nearly 100 years ago, in *Olmstead v. United States*, the Court confronted one of its first questions regarding the intersection of sophisticated surveillance technology and the Fourth Amendment.⁴³ Roy Olmstead was the alleged leader of an international bootlegging operation.⁴⁴ Government agents placed wiretaps in the telephone wires outside the homes of several suspected members of the operation and outside the operation's "chief office."⁴⁵ The telephone lines and corresponding wiretaps were located in the streets near the homes and in the basement of the large office building that functioned as the chief office.⁴⁶ The wiretaps were installed "without trespass upon any property of the defendants."⁴⁷ For months, the government used the wiretaps to collect recordings, amassing a sizable body of evidence.⁴⁸

In *Olmstead*, the Court rejected the idea that wiretaps, without trespass, could constitute a search under the meaning of the Fourth Amendment.⁴⁹ The majority opinion asserted that, while Congress

⁴¹ *Hester*, 265 U.S. at 57–59.

⁴² Conversely, rigid adherence to "expectations of privacy" without affording significant weight to property rights or positive law has led to equally absurd results. See discussion *infra* Sections III.A, III.B, III.C, III.D.

⁴³ *Olmstead v. United States*, 277 U.S. 438, 456–57 (1928).

⁴⁴ *Id.* at 455–56.

⁴⁵ *Id.* at 456–57.

⁴⁶ *Id.*

⁴⁷ *Id.* at 457.

⁴⁸ *Id.*

⁴⁹ *Olmstead*, 277 U.S. at 465–66.

was free to safeguard the privacy of telephonic communication through legislation, courts “may not adopt such a policy by attributing an enlarged and unusual meaning to the Fourth Amendment.”⁵⁰ According to the Court, “The reasonable view is that one who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside, and that the wires beyond his house and messages while passing over them are not within the protection of the Fourth Amendment.”⁵¹ The Court’s reasoning resembles an early formulation of what would later be codified as the “third-party doctrine.”⁵² Although the decision ultimately hinged on the idea of constitutionally protected areas, rather than the subjective expectations of individuals, the Court’s rationale seems to hint at what would ultimately become the *Katz* standard, the idea that the Fourth Amendment does not protect what an individual does not reasonably expect to be kept private.⁵³

The Court’s declaration that covert government surveillance of private residences is permissible under the Fourth Amendment did not just implicitly authorize governmental conduct that invades individual privacy or violates positive law, it explicitly sanctioned it: “A standard which would forbid the reception of evidence if obtained by other than nice ethical conduct by government officials would make society suffer and give criminals greater immunity than has been known heretofore.”⁵⁴ According to the Court, even the violation of positive state law in collecting evidence would not, by itself, raise Fourth Amendment issues: “In the absence of controlling legislation by Congress, those who realize the difficulties in bringing offenders to justice may well deem it wise that the exclusion of evidence should be confined to cases where rights under the Constitution would be violated by admitting it.”⁵⁵ Even if police violated

⁵⁰ *Id.*

⁵¹ *Id.* at 466.

⁵² See discussion *infra* Sections III.A, III.C.

⁵³ It is a dubious proposition, though, that because an individual conveys information to another, the individual can no longer harbor a reasonable expectation of privacy to that information. See discussion *infra* Sections III.A, III.E, IV.C.

⁵⁴ *Olmstead*, 277 U.S. at 468.

⁵⁵ *Id.*

state law by intercepting telephone communications, according to the Court, that would not render the evidence inadmissible.⁵⁶

Justice Brandeis, however, disagreed.⁵⁷ In an opinion that foretold a century of Fourth Amendment jurisprudence yet to come, Brandeis's dissent warned his fellow Justices of what lay ahead:

Moreover, "in the application of a constitution, our contemplation cannot be only of what has been but of what may be." The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping. Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions. "That places the liberty of every man in the hands of every petty officer" was said by James Otis of much lesser intrusions than these. To Lord Camden, a far slighter intrusion seemed "subversive of all the comforts of society." Can it be that the Constitution affords no protection against such invasions of individual security?⁵⁸

Brandeis rejected a rigid originalist constitutionalism in favor of a functionalist view in which the text of the Constitution could readily adapt to new sets of facts.⁵⁹ Brandeis's chilling warning that gov-

⁵⁶ *Id.* at 468–69 ("The statute of Washington, adopted in 1909, provides . . . that: 'Every person . . . who shall intercept, read or in any manner intercept or delay the sending of a message over any telegraph or telephone line . . . shall be guilty of a misdemeanor.' This statute does not declare that evidence obtained by such interception shall be inadmissible, and by the common law, already referred to, it would not be.").

⁵⁷ *Id.* at 479 (Brandeis, J., dissenting).

⁵⁸ *Id.* at 474.

⁵⁹ *Id.* at 472–73 ("Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a

ernment surveillance was on the verge of outpacing the Court's ability to constrain it without a sufficiently flexible Fourth Amendment framework would be repeatedly vindicated over the next century of jurisprudence.⁶⁰

C. Goldman, Silverman, and Hayden: *The Court Begins to Retreat from Olmstead*

In 1942, the Court affirmed its commitment to the *Olmstead* holding and its lukewarm treatment of positive law in Fourth Amendment jurisprudence in the case of *Goldman v. United States*.⁶¹ Martin Goldman was arrested after two federal agents occupied the office next to Goldman's, applied a device known as a "detectaphone"⁶² to the adjoining wall, and used the device to overhear Goldman's conversations in his office.⁶³ The night before, police had trespassed into Goldman's office and planted a different listening device within the same wall, but could not get that listening device to work the next day and used the detectaphone instead.⁶⁴

The Court first held that, although the agents trespassed into the office building to install the listening device, and even though the

principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall "designed to approach immortality as nearly as human institutions can approach it." The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality." (quoting *Weems v. United States*, 217 U.S. 349, 373 (1910)).

⁶⁰ See, e.g., *Goldman v. United States*, 316 U.S. 129, 135 (1942); *United States v. Knotts*, 460 U.S. 276, 285 (1983); *California v. Ciraolo*, 476 U.S. 207, 215 (1986); *Florida v. Riley*, 488 U.S. 445, 452 (1989).

⁶¹ *Goldman*, 316 U.S. at 134–36.

⁶² *Id.* at 131 (The Court's opinion described the detectaphone only as a device that had "a receiver so delicate as, when placed against the partition wall, to pick up sound waves originating in Shulman's office, and means for amplifying and hearing them.").

⁶³ *Id.* at 131–32.

⁶⁴ *Id.*

very presence of the listening device might have constituted a continuing trespass, the lower court was correct in finding that “the trespass did not aid materially in the use of the detectaphone.”⁶⁵ Next, the Court affirmed *Olmstead* as controlling precedent and held that, even though the recording of Goldman was not of him speaking into the phone—and he was thus not intending to project his voice to the outside world through telephone wires, as was the case in *Olmstead*—this did not change the Court’s Fourth Amendment analysis.⁶⁶ The *Goldman* ruling thus not only affirmed *Olmstead* as controlling precedent, it reduced the scope of Fourth Amendment protection that *Olmstead* had provided. While the *Olmstead* Court’s analysis emphasized that Olmstead had intended to convey his voice beyond his home through the use of telephone wires, the *Goldman* Court held that communication intended to stay within the room in which it was made was entitled to no greater protection.⁶⁷

⁶⁵ *Id.* at 134–35.

⁶⁶ *Id.* at 135.

⁶⁷ *Goldman*, 316 U.S. at 135. Justice Murphy, however, dissented; in his opinion, he invoked Justice Brandeis’s dissent in *Olmstead* and expressed similar concerns to Brandeis’s:

There was no physical entry in this case. But the search of one’s home or office no longer requires physical entry, for science has brought forth far more effective devices for the invasion of a person’s privacy than the direct and obvious methods of oppression which were detested by our forebears and which inspired the Fourth Amendment. Surely the spirit motivating the framers of that Amendment would abhor these new devices no less. Physical entry may be wholly immaterial. Whether the search of private quarters is accomplished by placing on the outer walls of the sanctum a detectaphone that transmits to the outside listener the intimate details of a private conversation, or by new methods of photography that penetrate walls or overcome distances, the privacy of the citizen is equally invaded by agents of the Government and intimate personal matters are laid bare to view. Such invasions of privacy, unless they are authorized by a warrant issued in the manner and form prescribed by the Amendment, or otherwise conducted under adequate safeguards defined by statute, are at one with the evils which have heretofore been held to be within the Fourth Amendment, and equally call for remedial action.

Goldman, 316 U.S. at 139–40 (Murphy, J., dissenting).

By 1961, however, signs of the Court's retreat from *Olmstead* were evident in the case of *Silverman v. United States*.⁶⁸ Julius Silverman was convicted of gambling offenses after police used a "spike mike," a microphone attached to a long spike; the police inserted the spike through the wall of an adjoining row house, bringing the microphone into contact with the heating duct of Silverman's house.⁶⁹ In its opinion, the Court remarked that there may be "frightening paraphernalia" on the horizon that the "vaunted marvels of an electronic age" may soon "visit upon human society."⁷⁰ While the Court hinted that the advent of such technology might merit reshaping the *Olmstead* regime, it declined to do so in *Silverman* because it was not necessary to reach the desired result.

The Court nonetheless took a small step back from the *Olmstead* framework and held that use of the spike microphone was unconstitutional, even though the appellate court had applied *Olmstead* and found that "[a] distinction between the detectaphone employed in *Goldman* and the spike mike utilized here seemed . . . too fine a one to draw."⁷¹ The Court did so using the conclusion that the spike microphone brushing up against the outside of the heating duct constituted a physical intrusion into a constitutionally protected area, even though *Olmstead* and *Goldman* both suggested that listening *outside*, rather than *inside* the area, was permitted.⁷² While the Court purported to be applying the old regime, the opinion reads as though the Court moved the framework's goalposts just enough to reach the result that it desired.

Silverman was also yet another case where positive law would have provided a clear, bright line for the Court, but the Court made it a point of emphasis to reject considering it: "[W]e need not pause to consider whether or not there was a technical trespass under the

⁶⁸ *Silverman v. United States*, 365 U.S. 505, 511–12 (1961).

⁶⁹ *Id.* at 506–07.

⁷⁰ *Id.* at 508–09 ("We are favoured with a description of 'a device known as the parabolic microphone which can pick up a conversation three hundred yards away.' We are told of a 'still experimental technique whereby a room is flooded with a certain type of sonic wave,' which, when perfected, 'will make it possible to overhear everything said in a room without ever entering it or even going near it.' We are informed of an instrument 'which can pick up a conversation through an open office window on the opposite side of a busy street.'").

⁷¹ *Id.* at 512.

⁷² *Id.* at 511–12.

local property law . . . Fourth Amendment rights are not inevitably measurable in terms of ancient niceties of tort or real property law.”⁷³ The Court’s repeated insistence on discounting positive property law in a regime rooted in property-based concepts clearly made its analyses more strained, opaque, and unpredictable than if the Court simply acknowledged that breaking local trespass law could sometimes be dispositive in a trespass-based analysis.

In a case decided just seven months before *Katz*, the Court in *Warden, Maryland Penitentiary v. Hayden* tackled the question of whether the government may legally search and seize items that were “merely evidentiary” and not “fruits” of a crime or “instrumentalities and means by which a crime is committed.”⁷⁴ Although answering this question did not turn on the *Olmstead* rationale, Justice Brennan’s majority opinion navigated the intersection of property law and the Fourth Amendment, and in doing so, conclusively asserted, “The premise that property interests control the right of the Government to search and seize has been discredited. . . . We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property”⁷⁵ The Court’s rejection of a property-based view of the Fourth Amendment in favor of an approach rooted in privacy interests thus destabilized the underlying rationale of the *Olmstead* line of cases and put *Olmstead*’s status as constitutional precedent on life support.

Weakening the link between property interests and the Fourth Amendment, though, did more than just pave the way for the demise of the *Olmstead* regime; it dramatically weakened the scope of Fourth Amendment protections in the process.⁷⁶ And while Brennan cited *Silverman* for the proposition that the Fourth Amendment’s principal object was privacy, rather than property interests, *Silverman* established no such principle.⁷⁷ Brennan discredited longstanding Fourth Amendment jurisprudence rooted in property rights in

⁷³ *Id.* at 511.

⁷⁴ *Warden v. Hayden*, 387 U.S. 294, 295–96 (1967).

⁷⁵ *Id.* at 304.

⁷⁶ See Morgan Cloud, *A Liberal House Divided: How the Warren Court Dismantled the Fourth Amendment*, 3 OHIO ST. J. CRIM. L. 33, 59 (2005) (“Abandoning these property-based theories also meant abandoning the idea that protected the Fourth Amendment.”).

⁷⁷ *Id.* at 58 (“*Silverman* rejected the idea that only the seizure of tangible things was regulated by the Amendment, indirectly establishing that intangible

favor of a predominantly privacy-based regime that he believed was sufficiently expansive in its protections,⁷⁸ but the erosion of property-based underpinnings would in fact lead to obscene results in later cases in which the scope of the Fourth Amendment was delimited.⁷⁹

II. THE *KATZ* DECISION

I do not believe that the words of the Amendment will bear the meaning given them by today's decision.⁸⁰

After Justice Brennan reshaped the Court's conception of the Fourth Amendment in *Hayden*, the next logical step for the Court was to define what the new regime would look like. It did so in the seminal decision of *Katz v. United States*.⁸¹ In *Katz*, Justice Stewart's majority opinion posited a hybrid approach that focused on both privacy rights and property rights.⁸² Unfortunately, the majority opinion was opaque and did not effectively spell out how courts should apply this new regime.

Instead, it was Justice Harlan's concurrence, which embraced Justice Brennan's proclamation in *Hayden* that privacy was now the predominant focus of the Fourth Amendment, that effectively and clearly spelled out a test for future courts to follow.⁸³ Harlan's "reasonable expectation of privacy" test discarded the *Olmstead* line of cases in lieu of an approach that accommodated the Warren Court's

conversations also could be seized. . . . [T]he opinion did nothing to derogate the rights of those whose tangible property had been seized, but instead extended the Amendment's protections to other situations not already covered by the Amendment.").

⁷⁸ *Id.* at 59 ("Brennan . . . concluded that privacy would be adequately protected by the procedural mechanisms contained in the Warrant Clause after the substantive protections offered by property rights and the mere evidence rule were abandoned . . .").

⁷⁹ See discussion *infra* Sections III.A, III.B, III.C, III.D.

⁸⁰ *Katz v. United States*, 389 U.S. 347, 364 (1967) (Black, J., dissenting).

⁸¹ *Id.* at 361.

⁸² *Id.* at 350 ("[The Fourth] Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all.").

⁸³ See *id.* at 361.

focus on a constitutional right to privacy. By rejecting a hybrid approach that would incorporate both property and privacy concepts in favor of a privacy-dominated regime, the Court inadvertently paved the way for the systematic reduction of substantive Fourth Amendment protections.

A. *The Facts*

In early 1965, agents of the Federal Bureau of Investigation (“FBI”) were investigating Charles Katz on suspicion of placing bets by wire.⁸⁴ The agents observed that Katz, on an “almost daily basis,” would make phone calls from three public phone booths during certain hours.⁸⁵ In order to listen in on Katz’s conversations, the agents taped microphones to the tops of two of the phone booths; the other booth was placed out of order by the phone company.⁸⁶ This activity involved no physical penetration of the interior of the phone booths by either the microphones or the agents who installed them.⁸⁷ Agents observed the booths and turned on the microphones only when Katz was approaching and inside the booths.⁸⁸ Katz entered the booths, shut the door behind him, and made phone calls in which he placed bets.⁸⁹ These conversations were recorded by the FBI,⁹⁰ used to obtain a warrant to search Katz’s residence,⁹¹ and later introduced against Katz at trial.⁹²

At trial, Katz argued that the FBI obtained the recorded conversations as a result of an illegal search and seizure in violation of the Fourth Amendment.⁹³ Katz asserted that when he entered the booth and closed the door for the purpose of having a personal conversation, he was, in effect, in his own residence.⁹⁴ The trial court and Ninth Circuit rejected Katz’s claims and held that, because there was

⁸⁴ *Katz v. United States*, 369 F.2d 130, 131 (9th Cir. 1966), *rev’d*, 389 U.S. 347 (1967).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Katz*, 369 F.2d at 131.

⁹¹ *Id.* at 131.

⁹² *Id.* at 131–32.

⁹³ *Id.* at 133.

⁹⁴ *Id.*

no physical intrusion into the phone booth, there was no search under the Fourth Amendment.⁹⁵ The Supreme Court then granted certiorari.⁹⁶

B. *The Majority Opinion*

Justice Potter Stewart delivered the majority opinion in *Katz*.⁹⁷ The Court's analysis began by rejecting Katz's desired framing of the issue.⁹⁸ While Katz presented the questions to the Court as whether a public phone booth was a constitutionally protected area that harbored a right to privacy and whether physical penetration of a constitutionally protected area is necessary in order for a search to violate the Fourth Amendment, the Court declined to adopt this view of the issues.⁹⁹

The Court first opined that "the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase 'constitutionally protected area.'"¹⁰⁰ The Court next asserted that the Fourth Amendment "cannot be translated into a general constitutional 'right to privacy'" and that while the Amendment "protects individual privacy against certain kinds of governmental intrusion," its protections "go further, and often have nothing to do with privacy at all."¹⁰¹

⁹⁵ *Id.* at 133–34. The Ninth Circuit cited to *Olmstead* and *Goldman* to support its holding, along with *Corngold v. United States*, 367 F.2d 1, 1 (9th Cir. 1966). *Corngold* concerned the use of a radiation-detecting device in public hallways in an apartment building. 367 F.2d at 3. The Ninth Circuit also cited to *Smayda v. United States*, 352 F.2d 251, 257 (9th Cir. 1965), which featured the bizarre holding that police officers observing activity in a public toilet stall through a secret hole in the ceiling was not an unreasonable search under the Fourth Amendment.

⁹⁶ *Katz v. United States*, 389 U.S. 347, 349 (1967).

⁹⁷ *Id.* at 348.

⁹⁸ *Id.* at 349–50.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 350.

¹⁰¹ *Id.* Here, Justice Stewart cited to Justice Black's dissent in *Griswold v. Connecticut* for the proposition that the Fourth Amendment is not a manifestation of an underlying right to privacy and that privacy concerns are, in fact, only a part of the Fourth Amendment's purview. See *Griswold v. Connecticut*, 381 U.S. 479, 509 (1965) (Black, J., dissenting). Justice Stewart, like Justice Black, had also dissented in *Griswold*; each wrote a dissenting opinion that was joined by the other. *Id.* at 507–27; *id.* at 527–31 (Stewart, J., dissenting). The majority's rejec-

The Court quickly dispensed with the notion that the case centered on whether the phone booth was a “protected area.”¹⁰² The Court cautioned that an effort to decide whether “a given ‘area,’ viewed in the abstract, is ‘constitutionally protected’ deflects attention from the problem presented by this case.”¹⁰³ This is because the Fourth Amendment “protects people, not places.”¹⁰⁴ The Court unequivocally stated that although “[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection,” what he “seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”¹⁰⁵

tion of the *Griswold* rationale thus advocated a broader scope of Fourth Amendment protection, one that did not rest solely on privacy concerns in its application, than the test that Justice Harlan laid out in his concurrence.

¹⁰² *Katz*, 389 U.S. at 351.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 351–52. The Court’s use of this language would prove to be especially disastrous for the scope of Fourth Amendment protection, as it is the basis for the “third-party doctrine” formulated in *United States v. Miller*. See discussion *infra* Sections III.A, III.B, III.C, III.D, IV.B, and IV.C To support it, the Court cited to *Lewis v. United States*, 385 U.S. 206, 210 (1966), *United States v. Lee*, 274 U.S. 559, 563 (1927), *Rios v. United States*, 364 U.S. 253 (1960), and *Ex Parte Jackson*, 96 U.S. 727, 733 (1877). In *Lewis*, the Court held that the defendant’s home lost its Fourth Amendment protections when the defendant invited an undercover officer into the home for the purpose of transacting unlawful business. 385 U.S. at 211. While the *Lewis* case appears obviously relevant to evaluating whether the Fourth Amendment protects areas or individuals, the *Lee* case seems less on point. *Lee* involved the search of a boat by the Coast Guard, and the case featured arguments about maritime authority and analogues to *Carroll v. United States*. 274 U.S. at 562–63. A review of that decision reveals no discussion whatsoever about expectations of privacy or knowingly exposing information to the public, so it is unclear what support the case provided for Justice Stewart’s proposition. See *Lee*, 274 U.S. at 560–63. The *Rios* decision involved a factual dispute regarding whether a bag of narcotics was in plain view of the officers before they began their arrest of the defendant—the question in the case was whether the officers had probable cause to conduct a lawful search incident to arrest, but the Court’s opinion did articulate that had *Rios* “voluntarily revealed the package of narcotics to the officers’ view,” a subsequent arrest would have been lawful. 364 U.S. at 256–62.

C. *Harlan's Concurrence*

The majority's opaque opinion in *Katz* prompted a concurrence from Justice Harlan that would supplant the majority opinion as the defining Fourth Amendment test in the post-*Olmstead* regime.¹⁰⁶ Harlan's opinion, though, contained counterintuitive and self-contradictory analysis. Harlan began the opinion by defining the Fourth Amendment's protections multiple times in terms of areas:

I join the opinion of the Court, which I read to hold only (a) that an enclosed telephone booth is an area where, like a home, and unlike a field, a person has a constitutionally protected reasonable expectation of privacy; (b) that electronic as well as physical intrusion into a place that is in this sense private may constitute a violation of the Fourth Amendment; and (c) that the invasion of a constitutionally protected area by federal authorities is, as the Court has long held, presumptively unreasonable in the absence of a search warrant.¹⁰⁷

However, in the immediately following sentence, Harlan stated that “[a]s the Court’s opinion states, ‘the Fourth Amendment protects people, not places,’” but that generally, determining the scope of its protection “requires reference to a ‘place.’”¹⁰⁸ Harlan thus cautioned that the Fourth Amendment does not protect places, but then asserted that the places we are in will often be dispositive of the scope of Fourth Amendment protection afforded to the people in that space.

Rather than making irreconcilable claims that the Fourth Amendment does not protect places, yet the scope of Fourth Amendment protection can sometimes be determined solely by reference to places, it makes more sense to assert that the Fourth Amendment *can* protect places, but only by reference to people. The language of the Fourth Amendment clearly protects both places and items from government intrusion, and does so by reference to the people with whom the places and items are associated: “The right of the people

¹⁰⁶ See discussion *infra* Sections III.A, III.B, III.C, III.D, III.E.

¹⁰⁷ *Katz*, 389 U.S. at 360–61 (Harlan, J., concurring) (citations omitted).

¹⁰⁸ *Id.* at 361.

to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated”¹⁰⁹ It makes little sense to state that your home is not protected by the Fourth Amendment, but *you* are, yet whether *you* are protected will sometimes depend on whether you are in your home or not. This kind of doublespeak puts lower courts, legal scholars, attorneys, and everyday citizens in difficult positions when attempting to apply the Fourth Amendment to new sets of facts. Harlan then went on to create the famous formulation that would define the meaning of “search” under the Fourth Amendment for at least a half century: “My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a *person have exhibited an actual (subjective) expectation of privacy* and, second, that *the expectation be one that society is prepared to recognize as ‘reasonable.’*”¹¹⁰

This formulation of the Fourth Amendment eschews the majority’s claim that privacy concerns are not the exclusive purview of the Fourth Amendment and that its protections “often have nothing to do with privacy at all.”¹¹¹ Harlan’s interpretation discarded the possibility that property rights or positive law could form the basis of Fourth Amendment protection, and this omission paved the way for a sharp reduction in Fourth Amendment protection in the years to come.

III. THE ROAD TO *CARPENTER*

A regime rooted in the premise that the Fourth Amendment is not controlled by delineable property interests—instead primarily focusing on a nebulous concept like “privacy”—was sure to produce absurd results. In the decades that followed the *Katz* decision, such results were plentiful: Over the next several decades, the Court would declare that the Fourth Amendment does not protect individuals’ banking records¹¹² or telephone records,¹¹³ does not protect in-

¹⁰⁹ U.S. CONST. amend. IV.

¹¹⁰ *Katz*, 389 U.S. at 361 (Harlan, J., concurring) (emphasis added).

¹¹¹ *Id.* at 350 (majority opinion).

¹¹² *United States v. Miller*, 425 U.S. 435, 437 (1976).

¹¹³ *Smith v. Maryland*, 442 U.S. 735, 745–46 (1979).

dividuals from secret electronic trackers cataloguing their movements,¹¹⁴ does not prevent the police from rifling through one's garbage cans,¹¹⁵ and does not prevent the police from invading the airspace above one's property in order to spy on one's home.¹¹⁶

As the steady erosion of Fourth Amendment protections marched into the twenty-first century, the Court mercifully tapped the brakes and finally restored some of the Fourth Amendment's underpinnings that the opinions in *Hayden* and *Katz* had pushed aside.¹¹⁷ The opinions in *Jones* and *Jardines* were a rallying cry against a regime run amok and can provide a pathway forward for a renaissance of substantive Fourth Amendment protections at a time when government surveillance technology threatens to outpace those offered by the *Katz* rule.

A. *Smith and Miller: What's Yours Is Yours, as Long as You Don't Ever Show It to Anyone*

The inadequacy of a privacy-based approach that does not sufficiently incorporate property rights or positive law reared its head early in 1976 when the Court decided *United States v. Miller*.¹¹⁸ Like Charlie Hester, Miller was convicted of bootlegging.¹¹⁹ Miller's case, however, did not feature covert government surveillance of his property, but rather concerned subpoenas issued by the United States Attorney's Office—not by a court—to two banks at which Miller held accounts.¹²⁰ The subpoenas directed each bank to produce all of Miller's records.¹²¹ The banks complied, disclosed all of Miller's financial records, and made copies of some of his documents for agents.¹²² The banks did not inform Miller of the subpoenas or of the disclosure of his information to authorities.¹²³ Miller

¹¹⁴ *United States v. Knotts*, 460 U.S. 276, 285 (1983).

¹¹⁵ *California v. Greenwood*, 486 U.S. 35, 37 (1988).

¹¹⁶ *Florida v. Riley*, 488 U.S. 445, 451–52 (1989); *California v. Ciraolo*, 476 U.S. 207, 215 (1986).

¹¹⁷ *United States v. Jones*, 565 U.S. 400, 404–11 (2012); *Florida v. Jardines*, 569 U.S. 1, 5–10, (2013).

¹¹⁸ *United States v. Miller*, 425 U.S. 435, 437 (1976).

¹¹⁹ *Id.* at 436.

¹²⁰ *Id.* at 437–38.

¹²¹ *Id.*

¹²² *Id.* at 438.

¹²³ *Id.*

was subsequently indicted by a grand jury.¹²⁴ At trial, Miller moved to suppress the bank documents, and the court denied the motion.¹²⁵ The Fifth Circuit reversed, finding that the bank records constituted Miller's private papers and were thus protected under *Boyd*.¹²⁶

The Supreme Court disagreed.¹²⁷ In an opinion by Justice Powell, the Court reached the baffling conclusion that Miller had no Fourth Amendment interest in his own bank records.¹²⁸ Powell asserted that anyone who does business with a bank "takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government."¹²⁹ Even though the Court's analysis dubiously concluded that Miller had no possessory interest in his own bank records, that conclusion hardly mattered in light of the Court's pronouncement: If, in revealing one's affairs to another, one "takes the risk" that the information "will be conveyed by that person to the Government," then any possessory interest in that information becomes moot under the *Katz* regime because the Court has determined that one can have no reasonable expectation of privacy to that information. This logic conflicts with the *Katz* decision itself, which protected Katz's conversation that he was voluntarily sharing with another person in a public phone booth.¹³⁰

Justices Brennan and Marshall dissented.¹³¹ Brennan wrote that he would uphold the Fifth Circuit's decision because Miller had a

¹²⁴ *Miller*, 425 U.S. at 438.

¹²⁵ *Id.*

¹²⁶ *Id.* at 439.

¹²⁷ *Id.* at 437.

¹²⁸ *Id.* at 440.

¹²⁹ *Id.* at 443.

¹³⁰ See Tonja Jacobi & Dustin Stonecipher, *A Solution for the Third-Party Doctrine in a Time of Data Sharing, Contact Tracing, and Mass Surveillance*, 97 NOTRE DAME L. REV. 823, 874 (2022) ("Miller and Smith base their rule on the simplistic formalism that if a person shares information, that information is compellable by the government precisely and only because it was shared. But that is inconsistent with the facts of *Katz*. In *Katz*, the very case that birthed the third-party doctrine, Mr. Katz was on the phone with another person, actively sharing information, yet that communication retained its Fourth Amendment protection. A standard higher than simple sharing is implied by the facts alone.").

¹³¹ *Miller*, 425 U.S. at 447–55 (Brennan, J., dissenting); *id.* at 455–56 (Marshall, J., dissenting).

reasonable expectation of privacy to his own bank records.¹³² Brennan's conclusion that individuals have a reasonable expectation of privacy to their own banking information, regardless of whether the bank is mandated to make records of it, is certainly more intuitive than the majority's contrary analysis. The idea that an individual "voluntarily" relinquishes his expectations of privacy to financial information presupposes that individuals have a legitimate choice whether or not to do business with banks in the first place.¹³³ An even more sensible analysis is that the Fourth Amendment protection of an individual's "papers" should not require any analysis at all of whether the individual "expects" privacy to those papers. A property-based approach whereby individuals retain protected possessory interests in their own financial records would dispense with confusing and subjective academic analysis in favor of logically consistent results. Because individuals have possessory interests in their financial records, the records could be protected "papers" or "effects" under the Fourth Amendment, and the government would need a warrant to obtain them.

Three years later, the Court expounded on *Miller's* rationale in *Smith v. Maryland*.¹³⁴ Michael Smith was convicted of robbery, in part based on evidence obtained through the use of a "pen register" by police, a device that monitors the outgoing numbers dialed by a landline telephone.¹³⁵ Without obtaining a warrant or court order, police contacted Smith's telephone company and arranged for the company to install a pen register at the company's office in order to record the outgoing numbers that Smith dialed from his home phone.¹³⁶ Through the use of the register, police discovered that Smith had been making calls to the recent victim of a robbery; police used this information to obtain a warrant to search Smith's home, and, after that search, Smith was arrested.¹³⁷ Smith filed a motion to

¹³² *Id.* at 448–49 (Brennan, J., dissenting).

¹³³ While individuals do have such a choice, it is a choice only in an artificial and academic sense; individuals are free to choose whether to do business with power and water companies, to buy food, and to earn income, but it strains credulity to suggest that most individuals make any sort of meaningful "choice" to do so.

¹³⁴ *Smith v. Maryland*, 442 U.S. 735, 744–46 (1979).

¹³⁵ *Id.* at 736–38.

¹³⁶ *Id.* at 737.

¹³⁷ *Id.*

suppress the fruits of the pen register because the police installed it without a warrant; the trial court denied the motion, and the appellate court affirmed.¹³⁸

In an opinion by Justice Blackmun, the Supreme Court affirmed Smith's conviction.¹³⁹ The Court held that because all telephone users realize "that they must 'convey' phone numbers to the telephone company," and that "the phone company has facilities for making permanent records of the numbers they dial," then it is "too much to believe that telephone subscribers . . . harbor any general expectation that the numbers they dial will remain secret."¹⁴⁰ Smith argued that regardless of the expectations of "telephone users in general," he nonetheless had an expectation of privacy in the private use, within his home, of his personal phone.¹⁴¹ The Court responded that while Smith might have had an expectation of privacy of the content of his communications, the fact that he must have known that the numbers that he dialed would be revealed to the phone company foreclosed any possibility that he had a subjective expectation of privacy to those numbers.¹⁴² Moreover, the Court said, even if he did have a subjective expectation of privacy, society was not willing to recognize it as reasonable.¹⁴³ The Court cited *Miller* as standing for the unshakable tenet that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties."¹⁴⁴

Justices Marshall and Brennan again dissented, as they had in *Miller*, but this time, they were accompanied by the author of the majority opinion in *Katz*, Justice Stewart—barely a decade after *Katz* was written, the author of the majority opinion was already dissenting from the absurd results the regime was generating.¹⁴⁵ Justice Stewart pointed out that it made little sense that the Court in *Katz* held that there was a reasonable expectation of privacy to the

¹³⁸ *Id.* at 737–38.

¹³⁹ *Id.* at 736–46.

¹⁴⁰ *Smith*, 442 U.S. at 742–43.

¹⁴¹ *Id.* at 743.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 743–44.

¹⁴⁵ *Id.* at 748–52 (Marshall, J. dissenting); *id.* at 746–48 (Stewart, J., dissenting).

use of public pay phones, but in *Smith*, the Court declared that individuals have no reasonable expectation of privacy to numbers they dial in their own homes.¹⁴⁶ Both Justice Stewart and Justice Marshall also made a crucially important observation: The “choice” that the Court was insisting telephone subscribers make to “voluntarily” turn over information to phone companies is not actually a choice at all.¹⁴⁷

B. *Knotts and Karo: Beep, Beep! It's the Police*

In 1983 and 1984, the Court decided a pair of cases that each presented the question whether police using an electronic “beeper” to track an individual’s location was a Fourth Amendment search.¹⁴⁸ In *United States v. Knotts*, police suspected that a man named Armstrong was buying chloroform in order to manufacture drugs.¹⁴⁹ Police arranged with a seller to place a “beeper”¹⁵⁰ into a drum of chloroform that was then sold to Armstrong.¹⁵¹ After purchasing the

¹⁴⁶ *Smith*, 442 U.S. at 746–48 (Stewart, J., dissenting).

¹⁴⁷ *Id.* at 746–47 (“Nevertheless, the Court today says that those safeguards do not extend to the numbers dialed from a private telephone, apparently because when a caller dials a number the digits may be recorded by the telephone company for billing purposes. But that observation no more than describes the basic nature of telephone calls. A telephone call simply cannot be made without the use of telephone company property and without payment to the company for the service. The telephone conversation itself must be electronically transmitted by telephone company equipment, and may be recorded or overheard by the use of other company equipment. Yet we have squarely held that the user of even a public telephone is entitled ‘to assume that the words he utters into the mouthpiece will not be broadcast to the world.’”); *id.* at 749–50 (Marshall, J., dissenting) (“Implicit in the concept of assumption of risk is some notion of choice. At least in the third-party consensual surveillance cases, which first incorporated risk analysis into Fourth Amendment doctrine, the defendant presumably had exercised some discretion in deciding who should enjoy his confidential communications. By contrast here, unless a person is prepared to forgo use of what for many has become a personal or professional necessity, he cannot help but accept the risk of surveillance. It is idle to speak of ‘assuming’ risks in contexts where, as a practical matter, individuals have no realistic alternative.” (citations omitted)).

¹⁴⁸ *United States v. Knotts*, 460 U.S. 276, 277 (1983); *United States v. Karo*, 468 U.S. 705, 707 (1984).

¹⁴⁹ *Knotts*, 460 U.S. at 278.

¹⁵⁰ *Id.* at 277 (“A beeper is a radio transmitter, usually battery operated, which emits periodic signals that can be picked up by a radio receiver.”).

¹⁵¹ *Id.* at 278.

chloroform, Armstrong met with another individual, Petschen, and transferred the drum to him.¹⁵² Although the police initially supplemented the beeper tracking with visual surveillance, Petschen made “evasive maneuvers” and the police lost sight of his vehicle.¹⁵³ Using the signal from the beeper, police then tracked the drum’s location to a secluded cabin that belonged to Knotts, obtained a warrant, and raided the cabin.¹⁵⁴ Knotts was subsequently convicted of drug manufacturing.¹⁵⁵ The Eighth Circuit reversed, finding that the use of the beeper violated Knotts’s reasonable expectation of privacy.¹⁵⁶

The Supreme Court reversed.¹⁵⁷ In an opinion by Chief Justice Rehnquist that reads as a laundry list of inadequacies of the *Katz* doctrine, Rehnquist first cited *Katz* for the proposition that “the Fourth Amendment’s reach ‘cannot turn upon the presence or absence of a physical intrusion into any given enclosure.’”¹⁵⁸ Rehnquist next approvingly cited *Smith* for *Katz*’s proposition that “society” can readily negate an individual’s subjective expectation of privacy if it is one that “society” is unwilling to recognize as reasonable.¹⁵⁹ Finally, Rehnquist outlined one of the most central failures of the *Katz* regime: By hinging the definition of a search on whether an individual “can reasonably expect privacy” to a piece of information, invasive actions that would fit most sensible definitions of the term “search” may not be defined as searches under the *Katz* test if a reviewing court can envision some other action that could reveal the same information in a manner that was not invasive. In *Knotts*, the Court said that it is simply beside the point *how* the po-

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 278–79.

¹⁵⁵ *Knotts*, 460 U.S. at 279.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 280.

¹⁵⁸ *Id.* (quoting *Katz v. United States*, 389 U.S. 347, 353 (1967)).

¹⁵⁹ *Id.* at 280–81. Particularly on point here is Justice Scalia’s concurrence in *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring), in which he sardonically described the Court’s method of divining society’s views on privacy: “[U]nsurprisingly, those ‘actual (subjective) expectation[s] of privacy’ ‘that society is prepared to recognize as “reasonable,”’ bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable.” (second alteration in original) (citation omitted).

lice obtained the information, because Knotts did not have a reasonable expectation that the information would not be obtained in *some other way*:

Visual surveillance from public places along Petschen's route or adjoining Knotts' premises would have sufficed to reveal all of these facts to the police. The fact that the officers in this case relied not only on visual surveillance, but also on the use of the beeper to signal the presence of Petschen's automobile to the police receiver, does not alter the situation.¹⁶⁰

Rehnquist's blithe assertion that Petschen "voluntarily conveyed" his movements on the roadways to "anyone who wanted to look" is starkly at odds with the actual facts of the case; in fact, Petschen drove evasively in order to prevent his precise movements from being catalogued.¹⁶¹ Rehnquist's claim that anyone who wanted to look could have known where Petschen went is belied by the fact that the police were doing just that—attempting to look—and were unable to track his movements to the cabin without the use of the beeper.¹⁶² This logical leap is illustrative of just how tightly the third-party doctrine allows courts to restrict Fourth Amendment protections. According to the Court, the mere fact that someone "chose" to use public roadways (as opposed to what, exactly?) negated any subjective expectations of privacy against being tracked by secret technology even where traditional surveillance had failed to reveal his movements.

A key detail of the *Knotts* case was that, though the beeper had been taken into Knotts's cabin, there was no evidence in the record

¹⁶⁰ *Knotts*, 460 U.S. at 282.

¹⁶¹ *See id.* at 278–82.

¹⁶² *See id.* at 278. In fact, even the beeper alone was unable to track Petschen to Knotts's cabin; the police actually lost the signal from the beeper and had to use a "monitoring device located in a helicopter" in order to finally pick up the signal, an hour after they had lost track of Petschen. *Id.* The Court's assertion that the beeper revealed no more to police than was revealed to "anyone who cared to look" thus flies in the face of reality; in truth, the police employed visual surveillance, an electronic beeper, and the use of a tracking helicopter, and still were nearly unable to locate the cabin to which Petschen drove. *Id.*

that the beeper had been used while it was *inside* the cabin.¹⁶³ One year later, the Court considered another beeper case, one in which the beeper was used while inside a home.¹⁶⁴ In *United States v. Karo*, the Court held that covert use inside Karo's home of a beeper like the one in *Knotts* was an unconstitutional Fourth Amendment search, absent a warrant.¹⁶⁵ However, the hoops through which the Court was required to jump in order to reach this seemingly obvious conclusion were again illustrative of the failures of the *Katz* regime. Although the Fourth Amendment plainly speaks of the inviolable "right of the people to be secure" in their "houses,"¹⁶⁶ *Katz* required the Court to pose and answer the nebulous and subjective question of whether Karo's expectation of privacy against being surveilled inside his own house was something that "society" was prepared to recognize as "reasonable."¹⁶⁷

C. Greenwood: *One Man's Trash Is a Policeman's Treasure*

In 1988, the absurd results continued to mount as the Court held in *California v. Greenwood* that police may warrantlessly search through garbage that individuals put out on the street for collection.¹⁶⁸

Police suspected that Billy Greenwood might be involved in narcotics trafficking.¹⁶⁹ After observing his home from the street and seeing that Greenwood seemed to have an unusual number of late-

¹⁶³ *Id.* at 278–79. ("The record before us does not reveal that the beeper was used after the location in the area of the cabin had been initially determined."). It is telling though, that Justice Rehnquist began his Fourth Amendment analysis by stating that "in *Katz* . . . the Court overruled *Olmstead* saying that the Fourth Amendment's reach 'cannot turn upon the presence or absence of a physical intrusion into any given enclosure.'" *Id.* at 280 (citation omitted).

¹⁶⁴ *United States v. Karo*, 468 U.S. 705, 709–10 (1984).

¹⁶⁵ *Id.* at 715–18.

¹⁶⁶ U.S. CONST. amend. IV.

¹⁶⁷ Justice White's prose illustrated the absurdity of applying the *Katz* test to situations that the Fourth Amendment's plain text clearly protects: "At the risk of belaboring the obvious, private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable. Our cases have not deviated from this basic Fourth Amendment principle." *Karo*, 468 U.S. at 714.

¹⁶⁸ *California v. Greenwood*, 486 U.S. 35, 37 (1988).

¹⁶⁹ *Id.*

night visitors who stopped in only briefly, police enlisted the assistance of the neighborhood trash collector to dig through Greenwood's garbage for evidence of drugs.¹⁷⁰ The collector obliged; he first emptied his truck of other refuse, next picked up Greenwood's trash as usual, and then took the bags to police, who opened and rifled through them.¹⁷¹ The opinion does not indicate that the police found actual drugs, but rather found "items indicative of narcotics use."¹⁷² The police used that information to obtain a warrant and arrest Greenwood.¹⁷³

The trial court dismissed the charges against Greenwood and held that the warrantless search of Greenwood's trash violated the Fourth Amendment.¹⁷⁴ The state court of appeals affirmed.¹⁷⁵ After the California Supreme Court denied review, the Supreme Court granted certiorari and overturned the result.¹⁷⁶ In an opinion by Justice White, the Court ruled that, despite two California courts interpreting California's constitution to hold otherwise, Greenwood lacked a reasonable expectation of privacy to the items concealed within his opaque trash bags.¹⁷⁷ The opinion paid homage to the third-party doctrine, but only after explaining that Greenwood lacked a reasonable expectation of privacy even without consideration of the third-party doctrine.¹⁷⁸

According to Justice White, it is "common knowledge" that everyone's trash is "readily accessible to animals, children, scavengers, snoops, and other members of the public," and it is therefore unreasonable to expect privacy to items put out for collection in sealed opaque bags.¹⁷⁹ Moreover, according to the Court, the third-party

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 37–38.

¹⁷³ *Id.* at 38.

¹⁷⁴ *Greenwood*, 486 U.S. at 38.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 39.

¹⁷⁷ *Id.* at 43.

¹⁷⁸ *Id.* at 41.

¹⁷⁹ *Id.* at 40. Justice Gorsuch's dissent in *Carpenter* memorably pointed out the ridiculousness of this rationale. *Carpenter v. United States*, 138 S. Ct. 2206, 2266 (2018) (Gorsuch, J., dissenting) ("But the habits of raccoons don't prove much about the habits of the country. I doubt, too, that most people spotting a neighbor rummaging through their garbage would think they lacked reasonable

doctrine allowed the police to order the garbage collector to turn the items over to them, irrespective of any subjective expectation of privacy by *Greenwood*.¹⁸⁰

The Court cited to a litany of decisions to support its propositions, but interestingly, many of those decisions relied on an abandonment theory, a property-based concept that holds that individuals relinquish their rights to items when they intentionally discard them.¹⁸¹ The Court's premise that individuals "expect" that people and animals will rummage through their trash is quite dubious. Equally dubious is the assertion that individuals "assume the risk" that trash collectors will open their bags, turn their items over to the police, and identify to the police precisely from whom the trash came; surely this is completely at odds with most societal expectations of what trash pickup entails. Thus, it appears that what really drives the Court's analysis in *Greenwood* is an underlying property-based concept: The Court builds its reasonable expectation of privacy analysis on top of a theory of property abandonment.¹⁸²

The *Greenwood* opinion thus suggested that the Court was willing to implicitly allow property concepts to drive a *Katz* analysis when an approach that focused purely on a defendant's expectation

grounds to confront the rummager. Making the decision all the stranger, California state law expressly *protected* a homeowner's property rights in discarded trash. Yet rather than defer to that as evidence of the people's habits and reasonable expectations of privacy, the Court substituted its own curious judgment." (citation omitted)).

¹⁸⁰ *Greenwood*, 486 U.S. at 40–41 ("Moreover, respondents placed their refuse at the curb for the express purpose of conveying it to a third party, the trash collector, who might himself have sorted through respondents' trash or permitted others, such as the police, to do so. Accordingly, having deposited their garbage 'in an area particularly suited for public inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it,' respondents could have had no reasonable expectation of privacy in the inculpatory items that they discarded." (citation omitted)).

¹⁸¹ *Id.* at 49 n.2 (Brennan, J., dissenting) ("Of 11 Federal Court of Appeals cases cited by the Court . . . 7 rely entirely or almost entirely on an abandonment theory.").

¹⁸² See Jon E. Lemole, *From Katz to Greenwood: Abandonment Gets Recycled from the Trash Pile—Can Our Garbage be Saved from the Court's Rummaging Hands?*, 41 CASE W. RES. L. REV. 581, 611 (1991) ("*Greenwood*'s reasonable-expectation-of-privacy analysis actually amounts to a veiled abandonment approach identical to the analysis employed in pre-*Katz* cases.").

of privacy did not achieve the Court's desired results. This suggested that perhaps *Hayden* and *Katz* had not fully dismissed a property-based analysis of the Fourth Amendment and that the Court remained willing to defer to such analysis in order to drive the Court's reasonable expectation of privacy test to the desired results when necessary.

D. *Ciraolo and Riley: It's a Bird . . . It's a Plane . . . It's . . . The Police!*

In 1986 and 1989, the Court considered a pair of cases that each posed the question of whether police conducting aerial surveillance of a private residence constituted a Fourth Amendment search.¹⁸³ In each case, the Court concluded that police may warrantlessly spy on homes from overhead aircraft.¹⁸⁴

In *California v. Ciraolo*, police received an anonymous tip regarding a marijuana grow operation.¹⁸⁵ Following up on the tip, the police went to the property but were unable to see over Ciraolo's privacy fence.¹⁸⁶ The police then took the extraordinary step of chartering an airplane and flying it over Ciraolo's house with two officers who were trained in marijuana identification and equipped with a 35mm camera.¹⁸⁷ Based on the officers' observations, police obtained a warrant, raided the home, seized seventy-three marijuana plants, and arrested Ciraolo.¹⁸⁸ At trial, Ciraolo moved to suppress the fruits of the search; the court denied the motion, and Ciraolo pleaded guilty.¹⁸⁹ On appeal, Ciraolo argued that the police flight was not a routine patrol or commercial flight, but a calculated search conducted by the police that revealed information that routine overhead flights would not; the state court of appeals agreed, reversing and holding that the aerial observation constituted a warrantless search of Ciraolo's property.¹⁹⁰ The court pointed to Ciraolo's use

¹⁸³ *California v. Ciraolo*, 476 U.S. 207, 209 (1986); *Florida v. Riley*, 488 U.S. 445, 447–48 (1989).

¹⁸⁴ *Ciraolo*, 476 U.S. at 215; *Riley*, 488 U.S. at 451–52.

¹⁸⁵ *Ciraolo*, 476 U.S. at 209.

¹⁸⁶ *Id.* at 216 (Powell, J., dissenting).

¹⁸⁷ *Id.* at 209 (majority opinion).

¹⁸⁸ *Id.* at 209–10.

¹⁸⁹ *Id.* at 210.

¹⁹⁰ *Id.*

of a privacy fence as evidence that Ciralo had a reasonable expectation of privacy that the area would not be surveilled.¹⁹¹ The California Supreme Court denied review, and the Supreme Court granted certiorari.¹⁹²

In an opinion by Chief Justice Burger, the Court reversed the state court of appeals and held that Ciralo had no reasonable expectation of privacy to a fenced-in area of his own backyard.¹⁹³ Burger's analysis began by acknowledging that Ciralo clearly had a subjective expectation of privacy and expected that the fence would keep prying eyes away from his backyard.¹⁹⁴ According to Burger, though, Ciralo's subjective expectation of privacy did not matter, because he failed to "shield [the] plants from the eyes of a citizen or a policeman perched on the top of a truck or a two-level bus," despite the fact that the record contained no evidence of anyone, police or otherwise, standing on top of trucks or two-level buses near Ciralo's home.¹⁹⁵ Here, like in *Knotts*, the Court again used a fictional set of actions that police *could* have taken to negate an expectation of privacy against the sophisticated form of surveillance that the police *actually did* use.¹⁹⁶

Four Justices dissented, asserting that Ciralo clearly had an expectation of privacy in his own enclosed backyard.¹⁹⁷ In Justice Powell's dissent, which was joined by Justices Brennan, Marshall, and Blackmun, Powell pointed out that the entire purpose of abandoning the *Olmstead* line of cases and adopting the *Katz* framework in the first place was because the *Olmstead* regime was inadequate to safeguard against searches by the police that were conducted without physical trespass into constitutionally protected areas.¹⁹⁸

¹⁹¹ *Ciralo*, 476 U.S. at 210.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 211.

¹⁹⁵ *Id.*

¹⁹⁶ Aptly, Burger's opinion approvingly cited to *Knotts* for the proposition that "the mere fact that an individual has taken measures to restrict some views of his activities" does not "preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible," despite the fact that the police, in *Knotts*, did not do that, and in fact located *Knotts* only through a secret electronic tracker. *Id.* at 213. See also discussion *supra* Section III.B.

¹⁹⁷ *Ciralo*, 476 U.S. at 215–26 (Powell, J., dissenting).

¹⁹⁸ *Id.* at 215–19.

Powell also invoked Justice Marshall's dissent in *Smith*, pointing out that the majority's assertion that Ciraolo had "knowingly exposed" his fenced-in backyard to people flying in airplanes was nonsensical.¹⁹⁹

The Court's holding in *Ciraolo* would lead to an even more incredulous result in *Florida v. Riley*.²⁰⁰ Michael Riley lived in a mobile home that was isolated on five acres of residential property.²⁰¹ On the property, he had a partially enclosed greenhouse that was "obscured from view from surrounding property by trees, shrubs, and the mobile home."²⁰² Police received an anonymous tip that Riley was growing marijuana in the greenhouse, and, like in *Ciraolo*, an officer visited the location and was unable to see inside the greenhouse due to the measures Riley had taken to prevent observation.²⁰³ The officer then returned in a helicopter.²⁰⁴ The officer descended to just 400 feet above Riley's property and was able to peer inside the structure and observe what he "thought" was marijuana.²⁰⁵ Riley was subsequently arrested.²⁰⁶

Riley argued that the officer flying a helicopter onto his property and above his greenhouse was an unconstitutional search.²⁰⁷ The Court, in an opinion by Justice White, cited to *Ciraolo* and concluded that Riley had no reasonable expectation of privacy against the aerial observation of his greenhouse by a helicopter just 400 feet above his property.²⁰⁸ Despite the numerous steps that Riley had taken to secure his property from view, and despite the fact that there was no evidence in the record that helicopter flights were ever con-

¹⁹⁹ *Id.* at 224 n.9 ("Some of our precedents have held that an expectation of privacy was not reasonable in part because the individual had assumed the risk that certain kinds of private information would be turned over to the police. None of the prior decisions of this Court is a precedent for today's decision. As Justice Marshall has observed, it is our duty to be sensitive to the risks that a citizen 'should be forced to assume in a free and open society.'" (citations omitted)).

²⁰⁰ 488 U.S. 445, 451–52 (1989).

²⁰¹ *Riley*, 488 U.S. at 448.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 448–49.

²⁰⁷ *Riley*, 488 U.S. at 449–50.

²⁰⁸ *Id.* at 450–52.

ducted over Riley's property, the Court nonetheless held that, because the officer did not violate FAA regulations in his operation of the helicopter, it would be unreasonable for Riley to expect that no one would fly a helicopter over his property and peer into his greenhouse.²⁰⁹

In his opinion, Justice White made the claim that "we would have a different case if flying at that altitude had been contrary to law or regulation."²¹⁰ It is hard to take the Court at face value that it would give dispositive weight to whether positive law was violated, given its past decisions.²¹¹ While Justice White was certainly correct to outline that positive law should play a role in the Court's reasonable expectation of privacy analysis, the role that it played in *Riley* was the complete inverse of a sensible framework. The Court held that because the police were *not* violating any positive law, the Fourth Amendment was not violated even though the police both entered private property and invaded an individual's expectation of privacy. Thus, under the twentieth-century Fourth Amendment framework, police violating positive law is irrelevant to a Fourth Amendment analysis, but police compliance with positive law will tip the scale in the government's favor.

E. Jones and Jardines: *Scalia to the Rescue*

In 2012, after just over forty-five years of the *Katz* regime, Justice Scalia's opinion in *United States v. Jones* finally restored some of the property-based protections of the pre-*Katz* era back into the Fourth Amendment framework.²¹²

Police suspected Antoine Jones of trafficking narcotics.²¹³ After surveilling Jones and collecting evidence, the police applied for a warrant in order to place a GPS tracking device on a car registered to Jones's wife.²¹⁴ The warrant was issued, and the police were authorized to place the tracking device on Jones's car within ten days

²⁰⁹ *Id.* at 447–52.

²¹⁰ *Id.* at 451.

²¹¹ *See, e.g.,* *Oliver v. United States*, 466 U.S. 170, 183 n.15 (1984) (holding that police may commit criminal trespass onto private property to conduct warrantless search without violating Fourth Amendment).

²¹² *See* *United States v. Jones*, 565 U.S. 400, 406–09 (2012).

²¹³ *Id.* at 402.

²¹⁴ *Id.*

of the issuance; per the terms of the warrant, the police were only authorized to place the device in the District of Columbia.²¹⁵ Instead, the police installed the tracker eleven days later in Maryland.²¹⁶

The police then tracked Jones's location for twenty-eight days and collected two thousand pages of data regarding Jones's whereabouts.²¹⁷ Based on this evidence, Jones was indicted and charged with drug trafficking.²¹⁸ Jones moved to suppress the evidence from the GPS tracker because it was effectively done without a warrant, since the police did not comply with the conditions of the warrant they did have.²¹⁹ The trial court cited to *Knotts* and held that Jones had no reasonable expectation of privacy to his movements on public roadways.²²⁰ The District of Columbia Court of Appeals reversed, and the Supreme Court granted certiorari.²²¹

In a triumph for substantive property rights, Justice Scalia's majority opinion began its analysis, not with the rigamarole of the *Katz* test, but by cutting straight to the obvious issue: "The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted."²²² The majority finally acknowledged what had been lost when the *Olmstead* framework had been overturned: "The text of the Fourth Amendment reflects its close connection to property, since otherwise it would have referred simply to 'the right of the people to be secure against unreasonable searches and seizures'; the phrase 'in their persons, houses, papers, and effects' would have been superfluous."²²³ Scalia then made the transformative proclamation that whether or not Jones had a reasonable expectation of privacy to his movements was immaterial because "Jones's Fourth Amendment rights do not rise or fall with the *Katz* formulation. . . . [T]he *Katz* reasonable-expectation-of-privacy

²¹⁵ *Id.* at 402–03.

²¹⁶ *Id.* at 403.

²¹⁷ *Id.*

²¹⁸ *Jones*, 565 U.S. at 403.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.* at 404.

²²² *Id.* at 404–05.

²²³ *Id.* at 405.

test has been *added to*, not *substituted for*, the common-law trespassory test.”²²⁴

Scalia distinguished *Knotts* as controlling precedent because the police there had installed the beeper when the container was in the possession of a third party, rather than Knotts himself.²²⁵ Justice Sotomayor joined Scalia’s majority opinion and wrote her own concurrence, in which she agreed that the *Katz* test should no longer be the Court’s exclusive test and that the “physical trespass into a constitutionally protected area” rationale of the *Olmstead* regime should be incorporated alongside the “reasonable expectation of privacy” test.²²⁶ Justice Sotomayor also called for the reconsideration of the third-party doctrine:

[I]t may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. . . . I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection.²²⁷

The *Jones* opinion was a long-awaited revolution in abating the erosion of Fourth Amendment protections. By restoring a property-based approach while maintaining protections for privacy interests, Justice Scalia’s analysis was able to concisely apply the Fourth Amendment and protect private property in a way that was consistent with the Amendment’s original intent. However, while *Jones* laid the groundwork for the restoration of substantive Fourth Amendment protections that had gone by the wayside under the *Katz* regime, a property-based approach limited to physical incursion does not limit the third-party doctrine’s sweeping nullification of Fourth Amendment rights.²²⁸

²²⁴ *Jones*, 565 U.S. at 406–09.

²²⁵ *Id.* at 409.

²²⁶ *Id.* at 413–14 (Sotomayor, J., concurring).

²²⁷ *Id.* at 417–18.

²²⁸ See Ricardo J. Bascuas, *The Fourth Amendment in the Information Age*, 1 VA. J. CRIM. L. 481, 538–39 (2013) (“Despite its pretensions, *Jones* fails to restore the Fourth Amendment’s protection of property because it adopts an unduly narrow understanding of ‘seizure,’ one that excludes many government conversions

The Court reaffirmed the resurgence of the property-based theory in *Florida v. Jardines*.²²⁹ In *Jardines*, the police received a tip that Joelis Jardines was growing marijuana in his home.²³⁰ The police then, without a warrant, walked up to Jardines's front porch with a drug-sniffing dog.²³¹ The dog alerted, and police used that information to obtain a warrant to search the premises.²³² The search led to Jardines's arrest and prosecution; at trial, Jardines argued that the police approaching his home with a drug-sniffing dog was an unconstitutional Fourth Amendment search.²³³

The *Katz* framework had previously led the Court to conclude that, because individuals have no reasonable expectation of privacy to possessing drugs, the use of drug-sniffing dogs by police on its own is not enough to constitute a search under the Fourth Amendment.²³⁴ However, now that *Jones* had re-established the trespassory test from *Olmstead*, the Court in *Jardines* held that because the officers entered Jardines's private property for the purpose of obtaining information, whether or not Jardines had a reasonable expectation of privacy to the drugs was irrelevant.²³⁵ At long last, the Court was now ruling that academic analyses regarding subjective expectations of privacy should take a backseat when the facts clearly indicate that police actions constitute "searches" under the plain meaning of the Fourth Amendment.²³⁶

of property from the amendment's reach. This perpetuates the abuses that *Katz* fostered—abuses of the very sort the framers sought to curb. It encourages corporations to sell sensitive information to government agencies on an unprecedented scale and encourages police to conduct dragnet searches for contraband.”).

²²⁹ 569 U.S. 1, 5 (2013).

²³⁰ *Id.* at 3.

²³¹ *Id.* at 3–4.

²³² *Id.* at 4.

²³³ *Id.* at 4–5.

²³⁴ See *United States v. Place*, 462 U.S. 696, 706–07 (1983).

²³⁵ *Jardines*, 569 U.S. at 11.

²³⁶ *Id.* (“[W]e need not decide whether the officers’ investigation of Jardines’ home violated his expectation of privacy under *Katz*. One virtue of the Fourth Amendment’s property-rights baseline is that it keeps easy cases easy. That the officers learned what they learned only by physically intruding on Jardines’ property to gather evidence is enough to establish that a search occurred.”).

IV. THE *CARPENTER* DECISION

The unsustainability of the third-party doctrine and the *Katz/Jones* regime finally came to an apex in *Carpenter v. United States*.²³⁷ In *Carpenter*, the Court confronted head-on the problem that Justices Brennan and Marshall had pointed out when *Smith* and *Miller* were first decided: The “choice” that defendants were ostensibly making to turn their information over to third parties was often not a choice at all. The *Carpenter* case presented an opportunity for the Court to either finally discard the third-party doctrine or to fully incorporate property rights and positive law under the umbrella of the Fourth Amendment. Unfortunately, the Court did neither.

A. *The Facts*

Timothy Carpenter was prosecuted for the armed robbery of several Radio Shacks and T-Mobile stores.²³⁸ Based on the testimony of a suspect the police arrested for the crimes, the police believed that Carpenter was one of the robbers.²³⁹ Using this information, prosecutors obtained court orders that required Sprint and MetroPCS to disclose records of Carpenter’s cell site data—data that established the relative location of Carpenter’s cell phone at various points in time.²⁴⁰ Using the cell site data, police created maps

²³⁷ *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018).

²³⁸ *Id.* at 2212.

²³⁹ *Id.*

²⁴⁰ *Id.* The Court summarized how cell site data works:

Cell phones continuously scan their environment looking for the best signal, which generally comes from the closest cell site. Most modern devices, such as smartphones, tap into the wireless network several times a minute whenever their signal is on, even if the owner is not using one of the phone’s features. Each time the phone connects to a cell site, it generates a time-stamped record known as cell-site location information (CSLI). The precision of this information depends on the size of the geographic area covered by the cell site. The greater the concentration of cell sites, the smaller the coverage area. As data usage from cell phones has increased, wireless carriers have installed more cell sites to handle the traffic. That has led to increasingly compact coverage areas, especially in urban areas.

of Carpenter's movements that placed him near four of the robberies at the time they were committed.²⁴¹ Carpenter objected to the use of his cell site data, arguing that the police violated the Fourth Amendment by obtaining the data without a warrant.²⁴² The trial court denied the motion.²⁴³ The Sixth Circuit affirmed the judgment, citing the third-party doctrine and holding that because Carpenter voluntarily disclosed his cell site data to his cellular providers, he therefore lacked a reasonable expectation of privacy to the data.²⁴⁴

B. *The Majority Opinion*

In an opinion by Chief Justice Roberts, the Supreme Court reversed the Sixth Circuit's decision.²⁴⁵ Rather than discredit the third-party doctrine as nonsensical on its face, the Court ostensibly kept the doctrine in place, stating, "We decline to extend *Smith* and *Miller* to cover these novel circumstances."²⁴⁶ Roberts asserted that, because of the "unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user's claim of Fourth Amendment protection."²⁴⁷ The Court narrowly held that "an individual maintains a legitimate ex-

Wireless carriers collect and store CSLI for their own business purposes, including finding weak spots in their network and applying "roaming" charges when another carrier routes data through their cell sites. In addition, wireless carriers often sell aggregated location records to data brokers, without individual identifying information of the sort at issue here. While carriers have long retained CSLI for the start and end of incoming calls, in recent years phone companies have also collected location information from the transmission of text messages and routine data connections. Accordingly, modern cell phones generate increasingly vast amounts of increasingly precise CSLI.

Id. at 2211–12.

²⁴¹ *Id.* at 2212–13.

²⁴² *Carpenter*, 138 S. Ct. at 2212.

²⁴³ *Id.*

²⁴⁴ *Id.* at 2213.

²⁴⁵ *Id.* at 2211–23.

²⁴⁶ *Id.* at 2217.

²⁴⁷ *Id.*

pectation of privacy in the record of his physical movements as captured through CSLI.”²⁴⁸ Thus, in *Carpenter*, the Court carved an exception into the third-party doctrine, which is itself an exception to the general rule that the Fourth Amendment protects that which individuals seek to preserve as private—that is, as long as “society” recognizes that expecting privacy is “reasonable.”

It is difficult, though, to see what is so unique about cell site data in an increasingly digital age. *Smith* and *Miller* took place nearly four decades ago, and even then, the police recognized they could capture a wealth of information about an individual by obtaining records from his bank or his phone company.²⁴⁹ Are an individual’s photos, emails, text messages, smartwatch data, browser history, credit card purchases, or film and television streaming patterns significantly less revealing than a record of his public movements? As those activities increasingly involve the transmittal of digital data to third parties, does it really make sense to split hairs about which of them are “unique” enough in the degree of privacy they entail to determine whether the government can freely obtain records of them without a warrant?

C. *Gorsuch’s Dissent*

Justice Gorsuch dissented, but his opinion reads less like a dissent and more like a concurrence on other grounds.²⁵⁰ Gorsuch began his opinion by explaining that the Court’s application of the third-party doctrine is inconsistent with *Smith* and *Miller*:

Today the Court suggests that *Smith* and *Miller* distinguish between *kinds* of information disclosed to third parties and require courts to decide whether to ‘extend’ those decisions to particular classes of information, depending on their sensitivity. But . . . no

²⁴⁸ *Carpenter*, 138 S. Ct. at 2212.

²⁴⁹ See discussion *supra* Section III.A.

²⁵⁰ Ashley Baker, “Gorsuch’s Dissent in ‘Carpenter’ Case Has Implications for the Future of Privacy,” THE HILL (June 26, 2018, 2:45 PM), <https://thehill.com/opinion/cybersecurity/394215-gorsuchs-dissent-in-carpenter-case-has-implications-for-the-future-of> (“[Gorsuch’s] dissent went farther than the majority and was more like a concurrence on other grounds. The technical reason for Gorsuch deeming it a dissent was that *Carpenter*’s lawyers did not make the property-based argument Gorsuch favors.”).

balancing test of this kind can be found in *Smith* and *Miller*.²⁵¹

Gorsuch then questioned how the Court's carveout for CSLI data was distinguishable from the financial records in *Smith* or the phone records in *Miller*.²⁵² He asserted that the real problem is the third-party doctrine itself, because it distorts and misapplies the *Katz* test that spawned it.²⁵³

Gorsuch then discussed the ways in which the *Katz* regime had eroded Fourth Amendment protections:

The Amendment's protections do not depend on the breach of some abstract "expectation of privacy" whose contours are left to the judicial imagination. Much more concretely, it protects your "person," and your "houses, papers, and effects." Nor does your right to bring a Fourth Amendment claim depend on whether a judge happens to agree that your subjective expectation to privacy is a "reasonable" one. Under its plain terms, the Amendment grants you the right to invoke its guarantees whenever one of your protected things (your person, your house, your papers, or your effects) is unreasonably searched or seized. Period.²⁵⁴

Next, Gorsuch discussed the historical origins of the Fourth Amendment and acknowledged that, while the drafters developed the Amendment in response to specific types of conduct, the purpose undergirding it was to effectuate a right to privacy, albeit one that the *Katz* regime was ill-equipped to protect.²⁵⁵

Gorsuch then pointed out that the majority opinion left little to no guidance for lower courts on how the *Carpenter* decision should

²⁵¹ *Carpenter*, 138 S. Ct. at 2262 (Gorsuch, J., dissenting).

²⁵² *Id.*

²⁵³ *Id.* at 2262–64.

²⁵⁴ *Id.* at 2264.

²⁵⁵ *Id.* ("No doubt the colonial outrage engendered by these cases rested in part on the government's intrusion upon privacy. But the framers chose not to protect privacy in some ethereal way dependent on judicial intuitions.").

be applied going forward.²⁵⁶ Additionally, Gorsuch questioned how lower courts could even apply *Katz* or the third-party doctrine going forward, since the majority apparently left both regimes in place but suggested that inside a *Katz* analysis, a separate, *Katz*-like analysis needs to be performed to determine whether the third-party exception will apply.²⁵⁷

Gorsuch next suggested that the clearest way forward for Fourth Amendment jurisprudence is to supplement the *Katz* analysis with a property-based approach that looks to positive law in order to delineate the bounds of reasonable expectations of privacy and the scope of an individual's property rights for Fourth Amendment purposes.²⁵⁸ This approach, said Gorsuch, would help solve many of the murky and difficult questions posed by applying a *Katz* analysis to things like CSLI or financial records: An approach that incorporates positive law could look to bailment law and find that individuals retain a possessory interest in digital data that is "lent" to servicers.²⁵⁹ This approach would alleviate the third-party doctrine's nonsensical outcomes concluding that individuals have no Fourth Amendment rights in information just because that information is

²⁵⁶ *Id.* at 2266 ("The Court today says that judges should use *Katz*'s reasonable expectation of privacy test to decide what Fourth Amendment rights people have in cell-site location information, explaining that 'no single rubric definitively resolves which expectations of privacy are entitled to protection.' But then it offers a twist. Lower courts should be sure to add two special principles to their *Katz* calculus: the need to avoid 'arbitrary power' and the importance of 'plac[ing] obstacles in the way of a too permeating police surveillance.' While surely laudable, these principles don't offer lower courts much guidance. The Court does not tell us, for example, how far to carry either principle or how to weigh them against the legitimate needs of law enforcement. At what point does access to electronic data amount to 'arbitrary' authority? When does police surveillance become 'too permeating'? And what sort of 'obstacles' should judges 'place' in law enforcement's path when it does? We simply do not know." (alteration in original) (citations omitted)).

²⁵⁷ *Carpenter*, 138 S. Ct. at 2267 (Gorsuch, J., dissenting) ("The Court says courts now must conduct a *second Katz*-like balancing inquiry, asking whether the fact of disclosure to a third party outweighs privacy interests in the 'category of information' so disclosed. But how are lower courts supposed to weigh these radically different interests? Or assign values to different categories of information?" (citation omitted)).

²⁵⁸ *See id.* at 2267–68.

²⁵⁹ *Id.* at 2268–69 (citations omitted).

held by someone with whom the individual has a contractual relationship.²⁶⁰

Justice Gorsuch's opinion offers well-founded criticism of the *Katz* regime that points out its ahistorical aspects, propensity for judicial abuse, and tendency to produce absurd results that corrode substantive Fourth Amendment protections. His suggestion that the Court move to a Fourth Amendment framework that protects both privacy and property rights while looking to positive law in making delineations about the scope of those rights would solve many of the issues of not only the *Katz* test and the third-party doctrine, but also the Court's pre-*Katz* jurisprudence as well.

V. HOW SOME COURTS ARE APPLYING *CARPENTER*

It has been consistent in the post-*Carpenter* jurisprudence that *Smith* and *Miller* are alive and well, despite *Carpenter*'s apparent contravention of their rationale.²⁶¹ Courts are routinely sidestepping *Carpenter* due to its narrow scope and are continuing to apply *Smith* and *Miller* to reject claimed expectations of privacy.²⁶² Courts are demonstrating *Carpenter*'s limited reach by either pointing to “affirmative acts” on the parts of defendants—in order to distinguish away the passively collected CSLI in *Carpenter*—or by finding that the “nature of the particular documents sought” by defendants is less revealing than the data at issue in *Carpenter*.²⁶³

A. Whipple

In *United States v. Whipple*, an Eastern District of Tennessee court emphasized that a defendant made an “affirmative choice” to pay for his purchase via an app—rather than with cash—and that this choice was fatal to his Fourth Amendment claim.²⁶⁴ The case arose after law enforcement agents investigating a robbery issued a

²⁶⁰ *Id.* at 2269 (citations omitted).

²⁶¹ See discussion *infra* Sections V.A, V.B, V.C, V.D.

²⁶² See discussion *infra* Sections V.A, V.B, V.C, V.D.

²⁶³ See discussion *infra* Sections V.A, V.B, V.C, V.D.

²⁶⁴ *United States v. Whipple*, No. 3:20-CR-31, 2022 WL 3684593, at *3 (E.D. Tenn. Aug. 25, 2022).

subpoena to Walmart Pay²⁶⁵ for records of a particular transaction and identification of the purchaser.²⁶⁶ Walmart Pay disclosed the identity of Whipple, who had made the purchase.²⁶⁷ Whipple argued that the transactional data of his payment through Walmart Pay was protected under *Carpenter*.²⁶⁸ The court disagreed.²⁶⁹ The court found that Whipple's "affirmative choice" to use an app-based payment method negated any expectation of privacy to his transactional data, stating that the defendant "could have used a more anonymized method of payment or completed the transaction in cash."²⁷⁰ The proposition that customers are making "affirmative choices" to render their transactional data exposed to government surveillance by not doing business in cash is questionable.²⁷¹ But *Smith* and *Miller*—both of which were cited by the trial court²⁷²—encourage courts to find privacy-negating "affirmative choices" in many aspects of routine, everyday life.²⁷³

B. Gratkowski

The *Whipple* court supported its reasoning by stating the defendant knew he was using an unsecured method of payment and could have used "a more anonymized method of payment."²⁷⁴ What might such a "more anonymized" payment have been? Bitcoin, perhaps? It has been suggested that Bitcoin is a currency often used by criminals so that they may do "illicit business without revealing their

²⁶⁵ Walmart Pay is a "mobile wallet" similar to Google Pay and Apple Pay that allows for touch-free payment in Walmart stores. Holly D. Johnson, *Guide to Walmart Pay*, BANKRATE (Jan. 29, 2021). It is described as "encrypted over secure networks" and prospective users have been told that "actual credit card information never transfers to Walmart stores." *Id.*

²⁶⁶ *Whipple*, 2022 WL 3684593, at *2.

²⁶⁷ *Id.*

²⁶⁸ *Id.* at *3.

²⁶⁹ *Id.* at *3–4.

²⁷⁰ *Id.* at *3.

²⁷¹ The Pew Research Center reports that as of 2022, as many as 41% of Americans report making zero cash transactions during a typical week. Michelle Favero, *More Americans are Joining the 'Cashless' Economy*, PEW RSCH. CTR. (Oct. 5, 2022).

²⁷² *Whipple*, 2022 WL 3684593, at *3.

²⁷³ See discussion *supra* Sections III.A, III.B, III.C.

²⁷⁴ *Whipple*, 2022 WL 3684593, at *3.

names or locations.”²⁷⁵ However, in *United States v. Gratkowski*, the Fifth Circuit held that using Bitcoin as a payment method was another “affirmative act” that nullified any potential privacy interest in transactional data stored either on the Bitcoin blockchain²⁷⁶ or with Coinbase, the virtual currency exchange through which the transaction was conducted.²⁷⁷ The *Gratkowski* court likened Coinbase’s records to traditional bank records and invoked *Miller* for the principle that they were thus unprotected by the Fourth Amendment.²⁷⁸ The defendant argued that his transactional data was protected under *Carpenter*, but the court rejected that argument and found that the data at issue did not provide an “intimate window into a person’s life” and was thus distinguishable from the CSLI in *Carpenter*.²⁷⁹

The court also pointed out that Gratkowski had “the option to maintain a high level of privacy by transacting without a third-party intermediary”—that is, the option to pay someone in Bitcoin without going through Coinbase—but this assertion appears inconsistent with the earlier part of the court’s opinion.²⁸⁰ The court had already held that Gratkowski “lacked a privacy interest in his information on the Bitcoin blockchain” and that the blockchain itself could be analyzed to “determine the identities of Bitcoin address owners.”²⁸¹ So, on the one hand, users have no expectation of privacy to the Bitcoin blockchain, but on the other hand, Coinbase users are making an “affirmative” choice to “sacrifice” a “high level of privacy” that they would otherwise enjoy if they traded Bitcoin directly with other users.²⁸²

²⁷⁵ Nicole Perloth et al., *Pipeline Investigation Upends Idea That Bitcoin is Untraceable*, N.Y. TIMES (June 9, 2021).

²⁷⁶ A blockchain is a decentralized ledger of transactions on a peer-to-peer network. *Making Sense of Bitcoin, Cryptocurrency and Blockchain*, PWC, <https://www.pwc.com/us/en/industries/financial-services/fintech/bitcoin-blockchain-cryptocurrency.html> (last visited Aug. 28, 2023).

²⁷⁷ *United States v. Gratkowski*, 964 F.3d 307, 310–13 (5th Cir. 2020). For an overview of how Coinbase works, see Todd Haselton, *Here’s What Coinbase is and How to Use It to Buy and Sell Cryptocurrencies*, CNBC (Apr. 14, 2021, 10:08 AM).

²⁷⁸ *Gratkowski*, 964 F.3d at 312.

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 312–13.

²⁸¹ *Id.* at 312.

²⁸² *Id.* at 312–13.

C. Plotka

In *United States v. Plotka*, a court for the Northern District of Alabama upheld a warrantless subpoena that required Apple to disclose information about a user's email account, including associated account names and information about what types of data were being stored on the account's iCloud service.²⁸³ The court applied *Smith* and *Miller* and found that information about a user's email account is "comparable to the bank records sought in *Miller*."²⁸⁴ The *Plotka* court did not conduct an analysis on whether Plotka forfeited Fourth Amendment protection through the affirmative act of creating an email account; rather, the court found that the "nature of the particular documents sought" was distinguishable from that of the CSLI in *Carpenter*.²⁸⁵ According to the court, the nature of the documents was akin to those in *Smith* and *Miller*.²⁸⁶ The court preempted any question about whether the nature of the documents in *Smith* and *Miller* were even distinguishable from the CSLI in *Carpenter* by pointing out that the *Carpenter* Court "explicitly declined to overturn those cases."²⁸⁷

D. Brown

In *United States v. Brown*, the Eastern District of New York found that the defendants had no reasonable expectation of privacy to GPS tracking data from rental cars.²⁸⁸ Like in *Plotka*, the *Brown* court did not hinge its analysis on affirmative acts by the defendants, but rather on an inquiry into the nature of the particular documents sought.²⁸⁹ Rather, the court reasoned that because "significantly fewer Americans use rental cars than cell phones," rental cars are thus "not so intimately intertwined with the daily life of the user" as to give rise to the level of surveillance at issue in *Carpenter*.²⁹⁰ The court also reasoned that because "the GPS data stored in a rental car is not used for the benefit of the renter . . . rather, it is for the benefit

²⁸³ *United States v. Plotka*, 438 F. Supp 3d 1310, 1319–21 (N.D. Ala. 2020).

²⁸⁴ *Id.* at 1321.

²⁸⁵ *Id.* at 1320.

²⁸⁶ *Id.* at 1321.

²⁸⁷ *Id.*

²⁸⁸ *United States v. Brown*, 627 F. Supp. 3d 206, 220–25 (E.D.N.Y. 2022).

²⁸⁹ *Id.* at 221.

²⁹⁰ *Id.* at 223.

of the company,” the GPS data was akin to the dialed numbers in *Smith*.²⁹¹

The court also asserted that because “people typically rent cars for short periods of time,” this mitigates the risk of “long-term, unbroken surveillance” like the kind used in *Carpenter*.²⁹² However, one of the defendants in *Brown* had rented their car for a period of “roughly four months.”²⁹³ The court reasoned that four months of GPS data is “substantially less invasive than the five-year tracking concern expressed in *Carpenter*.”²⁹⁴ This assertion is vexing: Although the *Carpenter* opinion did feature discussion about the fact that CSLI could be retained for up to five years, the actual data that was produced and at issue in *Carpenter* was 127 days’ worth of data—roughly four months.²⁹⁵ The court nonetheless held that the length of the rental period was insufficient to overcome the “other factors distinguishing rental car GPS data from cell-site location information” and that the defendant thus had no expectation of privacy to the rental car data.²⁹⁶

These cases highlight that, despite the fact that *Carpenter* is fundamentally inconsistent with *Smith* and *Miller*, the narrow scope of the opinion did little to fix the inherent problems of the third-party doctrine. Courts are still applying the third-party doctrine to find that it is unreasonable for individuals to expect privacy to their transactional data, email account information, and even location history.²⁹⁷

VI. THE DIRECTION THE COURT SHOULD TAKE GOING FORWARD

Because the *Carpenter* majority did not fully acknowledge the elephant in the room that the *Katz* regime and third-party doctrine are completely unworkable in the digital age but did indicate that the Court is willing to issue rulings contrary to those mandated by the

²⁹¹ *Id.*

²⁹² *Id.* at 224.

²⁹³ *Id.* at 225.

²⁹⁴ *Brown*, 627 F. Supp. 3d at 224.

²⁹⁵ *Carpenter v. United States*, 138 S. Ct. 2206, 2212–18 (2018).

²⁹⁶ *Brown*, 627 F. Supp. 3d at 225.

²⁹⁷ See discussion *supra* Sections V.A, V.B, V.C, V.D.

third-party doctrine, Fourth Amendment jurisprudence is left in an uncertain state of flux. So where do we go from here?

There are at least three potential options that the Court could choose from. First, the Court could take the path of least resistance and double down on the *Katz* framework, leaving *Carpenter* as a guidepost for how to evade application of the third-party doctrine when it threatens to produce unpalatable results. Alternatively, the Court could abandon the *Katz* experiment for good and return to the *Olmstead* and *Goldman* rationale that Justice Scalia revived in *Jones*. Finally, the Court could use Justice Gorsuch's dissent in *Carpenter* as a framework for a hybrid approach, one that not only protects both privacy and property rights, but also looks to positive law in order to orient those rights in the Fourth Amendment landscape.

The simplest—or rather, the least radical—option for the Court would undoubtedly be to carry on business as usual with the Fourth Amendment and continue the *Katz-Jones* framework that *Carpenter* employed. This approach at least has the benefit of a weakened third-party doctrine now that *Carpenter* has opened the door to evading application of the doctrine in certain scenarios. That benefit, however, comes at a cost: As if the *Katz* analysis was not confusing enough on its own, use of the third-party doctrine will now require its own analysis of whether the factors that the Court used in *Carpenter* to sidestep the third-party doctrine will apply. Things get even more confusing when one considers that the fact patterns of *Smith* and *Miller* themselves would likely be decided differently under the *Carpenter* rationale.

The privacy and lack-of-free-choice concerns that the Court cited in declining to apply the third-party doctrine to CSLI data would appear equally likely to apply to the financial records in *Miller* and the phone records in *Smith*. A bank account is “required to operate in our modern world,”²⁹⁸ and exposing information to a third party “cannot be knowing if it is shoehorned into an activity required by society.”²⁹⁹ Further, banking is increasingly performed remotely, and individuals can now facilitate account transactions without interacting with bank employees at all, so the idea that individuals are knowingly exposing their financial information to others simply by conducting business with a bank seems more far-fetched with each

²⁹⁸ Jacobi & Stonecipher, *supra* note 130, at 882.

²⁹⁹ *Id.*

passing year.³⁰⁰ Likewise, the facts of *Smith* would likely be exempt from the third-party doctrine as well under *Carpenter*.³⁰¹ Even at the time it was decided, Justice Marshall's dissent noted the "vital role telephonic communication plays in our personal and professional relationships."³⁰² And, just as a record of an individual's movements acts as an "intimate window into a person's life, revealing . . . his 'familial, political, professional, religious, and sexual associations,'"³⁰³ a record of an individual's phone calls reveals the same kind of sensitive information.

The majority's cabining of the *Carpenter* decision and refusal to reconsider the many failures of the *Katz* regime has left *Katz* and the third-party doctrine in a state of increasing confusion in which each new case threatens to create its own new rule or its own new exception; Justice Alito distilled as much in his dissent: "The other possibility is that this Court will face the embarrassment of explaining in case after case that the principles on which today's decision rests are subject to all sorts of qualifications and limitations that have not yet been discovered."³⁰⁴ The majority's unwillingness to acknowledge that *Katz* and its progeny are ill-equipped to handle increasingly common situations, but willingness to distort *Smith* and *Miller* in order to restrict the reach of government surveillance, is reminiscent of *Silverman*, where the Court purported to apply *Olmstead*'s rationale, but moved the goalposts just enough that the government came up short.

The *Katz* regime gave rise to the third-party doctrine in the first place and was responsible for not only the absurd results in *Smith* and *Miller*, but the bewildering results in *Knotts*, *Greenwood*, *Ciraolo*, and *Riley*. It has been clear for decades that *Katz* is a road that leads directly to the erosion of substantive Fourth Amendment protections if it is not accompanied by additional safeguards that can provide Fourth Amendment protections based in property rights and positive law.

³⁰⁰ *Id.* at 882.

³⁰¹ *See id.* at 882.

³⁰² *Smith v. Maryland*, 442 U.S. 735, 751 (1979) (Marshall, J., dissenting).

³⁰³ *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018) (quoting *United States v. Jones*, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring)).

³⁰⁴ *Id.* at 2261 (Alito, J., dissenting).

However, a return to the *Olmstead* regime would only serve to remove existing Fourth Amendment protections now that *Jones* and *Jardines* have reincorporated *Olmstead* back into the *Katz* framework; removing *Katz* from the equation would dramatically reduce the Fourth Amendment's reach if it left us only with the property-based theory and no analysis of privacy expectations. Additionally, the *Olmstead* line of cases was always inadequate to effectuate the substantive rights the Fourth Amendment was meant to guard.³⁰⁵ While it would streamline a Fourth Amendment analysis to do away with privacy considerations altogether, it would do little to effectuate the underlying rights that the Fourth Amendment was created to protect.³⁰⁶

Alternatively, some commentators have advocated that the *Katz* regime should be entirely supplanted by a positive law approach that defines “searches” and “seizures” under the Fourth Amendment through purely originalist concepts.³⁰⁷ While it is difficult to envision a Fourth Amendment jurisprudence that provides adequate substantive protections without the incorporation of positive law, it is equally difficult to envision a regime that provides such protections without the incorporation of privacy interests. The very reason that the *Katz* regime transformed the framework in the first place was because an approach focused only on trespass theory was inadequate to protect individuals against advancing technology: A positive law approach may not have protected *Katz*'s call from a public phone booth.³⁰⁸ A model that focuses exclusively on positive law in defining searches and seizures would miss the mark because a proper

³⁰⁵ See Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 748–49 (1999) (“In the final analysis, however, the value of recovering the authentic history of search and seizure doctrine lies largely in the broader perspective it provides. Commentators who have made recent claims that the generalized-reasonableness construction affords the protection intended by the Framers have often also suggested that constitutional doctrine had integrity and continuity until the Warren Court departed from the true path by imposing unprecedented constraints on police authority. That combination of claims smoothes the way for further expansions of police power. However, the authentic history prompts a different outlook.”).

³⁰⁶ See discussion *supra* Section I.A.

³⁰⁷ See William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1887–89 (2016).

³⁰⁸ Such an approach may also not have protected the defendant in *Kyllo v. United States*, where police, stationed on a public street, used a thermal imaging

originalist understanding of the Fourth Amendment still recognizes that the purpose of the Amendment is to effectuate a right to privacy.³⁰⁹

Because marching forward with current doctrine would involve applying precedents that themselves would likely be decided differently under the current framework, because each new third-party case would potentially create its own new rules and exceptions, and because *Katz* is a failed experiment in which new cases constantly involve re-litigation of established Fourth Amendment protections, the Court should decline to pursue the failed regime and its accompanying third-party doctrine, and instead head for clearer waters that can yield more predictable results that are grounded in substantive property and positive law.

Consider how some of the absurd twentieth century results might look if the Court had decided the case under an approach that incorporated expectations of privacy, property theory, and positive law all at once. In *Hester*, the police trespassed onto private property to obtain information;³¹⁰ that could be a Fourth Amendment search if the police committed actionable trespass. In *Olmstead*, the police secretly listened in on private phone calls;³¹¹ that could be a search because it violated a reasonable expectation of privacy. In *Smith*, the police accessed an individual's bank records;³¹² if the Court found that Smith retained a possessory interest in his financial records, then an approach that incorporated bailment law could render accessing those records to be a search of his "papers" or "effects."

In *Greenwood*, a local ordinance actually mandated that Greenwood dispose of his trash on a weekly basis by placing it out for curbside pickup;³¹³ a privacy approach that incorporates positive

gun to create a crude physical map of the interior of the defendant's home. See *Kyllo v. United States*, 533 U.S. 27, 29–31 (2001).

³⁰⁹ See discussion *supra* Section I.A; see also Davies, *supra* note 305, at 577 n.67 ("The Framers' concern with preventing breaches of the privacy of the house is evident from their determination to prevent issuance of general warrants." (emphasis omitted)).

³¹⁰ See discussion *supra* Section I.A.

³¹¹ See discussion *supra* Section I.B.

³¹² See discussion *supra* Section III.A.

³¹³ *California v. Greenwood*, 486 U.S. 35, 54–55 (1988) (Brennan, J., dissenting) ("Greenwood can hardly be faulted for leaving trash on his curb when a county ordinance commanded him to do so, Orange County Code § 4–3–45(a)

law in delineating which expectations of privacy are reasonable might not conclude that Greenwood voluntarily exposed his trash to the public if he was required by law to do so. In *Carpenter*, the cell phone companies had contractual agreements with Carpenter regarding the collection and management of his data; a positive law approach could look to bailment law to determine whether Carpenter retained possessory interest in that data and thus had a property interest sufficient to qualify the CSLI records as his papers or effects under the Fourth Amendment.³¹⁴

CONCLUSION

Interpretations of the Fourth Amendment based purely on trespass theory or purely on privacy theory have each produced decisions that eroded the substantive protections that the Fourth Amendment was originally meant to provide.³¹⁵ The *Olmstead* framework and the *Katz* framework both proved to be inadequate to safeguard individual liberty against government intrusion. The original intent of the Fourth Amendment was to effectuate a right to privacy as well as to protect personal property rights,³¹⁶ and only a comprehensive approach combining privacy and property can realize the Amendment's goals. Further, positive law should play a significant role when analyzing whether a given expectation of privacy is "reasonable."

While *Jones* was a step in the right direction toward creating a hybrid approach that can dually protect both property interests and privacy rights, *Carpenter* showed that even absorbing the *Olmstead* rationale into the *Katz* regime is still inadequate to protect privacy

(1986) (must 'remov[e] from the premises at least once each week' all 'solid waste created, produced or accumulated in or about [his] dwelling house'), and prohibited him from disposing of it in any other way, see Orange County Code § 3-3-85 (1988) (burning trash is unlawful)." (alterations in original)).

³¹⁴ *Carpenter v. United States*, 138 S. Ct. 2206, 2268–69 (Gorsuch, J., dissenting) ("Entrusting your stuff to others is a *bailment*. A bailment is the 'delivery of personal property by one person (the *bailor*) to another (the *bailee*) who holds the property for a certain purpose.' . . . Just because you entrust your data—in some cases, your modern-day papers and effects—to a third party may not mean you lose any Fourth Amendment interest in its contents.").

³¹⁵ See discussion *supra* Sections I.A, I.B, I.C, III.A, III.B, III.C, III.D, III.E.

³¹⁶ See discussion *supra* Section I.A.

interests under the Court's current jurisprudence without twisting the doctrine into knots.³¹⁷ Restoring the trespass-based theory certainly allows cases like *Jardines* to be decided easily rather than through superfluous academic pontificating about whether and to what degree an individual has an expectation of privacy to his own home and his physical possessions. However, reincorporating trespass theory does not help answer any questions about the future of the third-party doctrine in an increasingly digital age, and *Carpenter* raised more questions than it answered because its holding both seems inconsistent with the framework it was decided under and yet fails to chart the way forward.

If the Court is serious about safeguarding substantive Fourth Amendment rights, it must incorporate positive law alongside a hybrid property-privacy framework in order to properly ground the Court's analyses. Incorporating positive law can allow courts to hold the government accountable when it breaks the law in order to secure evidence, can provide brighter lines for delineating which expectations of privacy are "reasonable," and can also provide a bailment law framework that could mitigate the corrosive effects of the third-party doctrine.³¹⁸

Going forward, the Court should abandon the *Katz* framework for a comprehensive Fourth Amendment approach that safeguards both privacy and property interests and allows positive law to play a substantial role in the Court's Fourth Amendment jurisprudence. Justice Gorsuch's dissent provides a roadmap for an approach that would keep any benefits of the *Katz* regime by continuing to protect privacy interests, while simultaneously restoring substantive property protections and incorporating positive law, thereby broadening the Amendment's reach. The Fourth Amendment was meant to be a shield against government intrusion, but that shield has been gathering dust on the mantle for far too long. It's time to pick it up and wield it.

³¹⁷ See Bascuas, *supra* note 228, at 538.

³¹⁸ See Baude & Stern, *supra* note 307, at 1871–76; see also Jeremy M. Hall, *Bailment Law as Part of a Property-Based Fourth Amendment Framework*, 28 GEO. MASON. L. REV. 481, 504–05 (2020).