Journal of Criminal Law and Criminology

Volume 84
Issue 2 *Summer*

Article 1

Summer 1993

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0091-4169/93/8402-0249
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 84, No. 2
Printed in U.S.A.

CRIMINAL LAW

SEARCH, SEIZURE AND THE POSITIVE LAW: EXPECTATIONS OF PRIVACY OUTSIDE THE FOURTH AMENDMENT

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"The Fourth Amendment is about privacy, not property."[1] In criminal procedure circles, this aphorism is uncontroversial, at least when it comes to identifying when a search occurs and whose interest it invades.[2] While catchy, the slogan obscures that the guarantee against unreasonable searches and seizures is about privacy *and* property. To say that privacy is the Amendment's controlling purpose ignores that only the government's property interest in the items it seizes provides the authority to ferret out, take, destroy, or

* Associate Professor, California Western School of Law. I thank Mike Belknap and Barbara Cox for their thoughtful comments, and Peter Appel, Wayne LaFave, and Toni Massaro for their exceedingly careful, line-by-line criticisms on draft versions of this Article. Mistakes, of course, are mine alone. I also thank colleagues at California Western who attended the workshop where I first presented some of the ideas that follow, and Dean Michael Dessent for providing me with a grant to pursue this project. Karen Beretsky was a clever, meticulous, dependable research assistant, and I thank her.

[1] *E.g.*, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 393-94 (1971) ("[O]ur recent decisions . . . have made it clear beyond peradventure that the Fourth Amendment is not tied to the niceties of local trespass laws."); Mancusi v. DeForte, 392 U.S. 364, 368 (1968) ("*Katz* . . . makes it clear that capacity to claim the protection of the Amendment depends not upon a property right in the invaded place . . . .").

[2] Seizures of chattels are defined in property terms. Thus, the aphorism is rarely applied to that aspect of Fourth Amendment protection. *See infra* note 220 and accompanying text. *See also* Soldal v. Cook County, 113 S. Ct. 538 (1992) (unanimously reversing Seventh Circuit's holding that carrying away someone's mobile home without legal process or the homeowner's consent is not a Fourth Amendment seizure). Seizures of persons involve the suspect's liberty interest and can also involve privacy, depending on the location of the detention or arrest. *See* Katz v. United States, 389 U.S. 347, 350 (1967) ("The Fourth Amendment . . . protections . . . often have nothing to do with privacy at all.").

sell for its own benefit, a prior possessor's property. A property interest makes lawful the government's temporary (for purposes of trial) or permanent (upon forfeiture) confiscation of property from another's possession.

For nearly forty years, the United States Supreme Court's property-based Fourth Amendment doctrine proved "hopelessly inept" as the sole measure for protecting against intrusions of privacy through sophisticated forms of surveillance.[3] Then, in 1967, the Court protected from electronic eavesdropping the conversational privacy of a prolific basketball handicapper,[4] simply because he had closed the door to the pay phone booth in which he was placing his wagers, even though the listening federal agents violated no law of property.[5] Nearly two decades later, when federal agents criminally trespassed onto a suspect's land to view the cultivation of marijuana plants, the Court found no privacy violation, even though a well-established property interest was trammeled along with the blades of grass.[6] The first case, *Katz v. United States*,[7] abandoned a property-based, formalistic definition of the Fourth Amendment and replaced it with a relativist definition based on privacy rights.[8] But *Katz*'s virtue—its open-ended standard of privacy—also proved to be its vice,[9] insofar as the Court's freedom from the formalism of

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[3] Berger v. New York, 388 U.S. 41, 49 (1967) ("The law, though jealous of individual privacy, has not kept pace with . . . advances in scientific knowledge."); Mary I. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 CAL. L. REV. 1593, 1607-08 (1987) ("The development of electronic wiretapping and bugging brought to the surface certain inadequacies of property . . . [which, when forced] to fit new technology, . . . led to patent absurdities . . . ."); Richard G. Wilkens, *Defining the "Reasonable Expectation of Privacy:" An Emerging Tripartite Analysis*, 40 VAND. L. REV. 1077, 1114 (1987).

[4] *See* 65 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 142 (Philip B. Kurland & Gerhard Casper eds., 1975) (statement of Burton Marks, one of Katz's three Beverly Hills attorneys, made at the end of day-long oral argument in *Katz*, 389 U.S. at 347).

[5] *See Katz*, 389 U.S. at 347.

[6] Oliver v. United States, 466 U.S. 170 (1984).

[7] 389 U.S. at 347.

[8] Donald R.C. Pongrace, *A Symposium of Critical Legal Study: Stereotypification of the Fourth Amendment's Public/Private Distinction: An Opportunity for Clarity*, 34 AM. U. L. REV. 1191, 1205-06, 1205 n.78 (1985) (commentators at first applauded *Katz* for expanding the scope of Fourth Amendment protections, but have since criticized its failure to do the same).

[9] *See* Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 385 (1974) ("*Katz* . . . offers neither a comprehensive test of Fourth Amendment coverage nor any positive principles by which questions of coverage can be resolved."); Lewis R. Katz, *In Search of a Fourth Amendment for the Twenty-first Century*, 65 IND. L.J. 549, 554 (1990) ("[I]n the two decades since *Katz* was decided, the Court has applied the standard to reduce rather than enhance Fourth Amendment protections."); Ira Mickenberg, *Fourth Amendment Standing After* Rakas v. Illinois: *From Property to Privacy and Back*, 16 NEW

the property model allowed it to ignore the government's trespass in the second case, *United States v. Oliver*.[10]

This Article is about the misunderstood relationship between the Fourth Amendment and the positive law.[11] It shows how state property law and other expressions of the positive law are more resilient and useful to Fourth Amendment analysis than the Court's decisions of the past three decades recognize. Although history confirms the intimate relationship between property law and the Fourth Amendment, the high court repeatedly has said that our privacy-based Fourth Amendment has in mind a reduced, if not altogether "snuffed out"[12] role for the positive law. Currently, that role is one of pure *dictum*, while the Amendment remains controlled by the *Katz* case, the stated purpose of which was to describe and protect our reasonable expectations of privacy. But *Katz* has been a dismal failure—unpredictable and saddled with a stingy conception of privacy. A renewed faith in the positive law would provide a concrete inventory of expectations drawn from local property, tort, contract, and criminal laws. Only when the positive law recognizes no privacy interest in a given case need we resort to *Katz*, which cer-

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ENG. L. REV. 197, 226 (1981) ("The vague, all-encompassing test of *Katz*, with its dependence on questions of fact for deciding fourth amendment issues, has proved just as useful for restricting constitutional protections in the 1970's as it was for expanding those protections a decade ago."); Richard B. Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275, 296 (1974) ("The clearer the understanding of what privacy is, the wiser judgments will be concerning when to protect it and when to sacrifice it."); Pongrace, *supra* note 8, at 1208-11 (suggesting that Burger Court capitalized on *Katz*'s relativism, forever undermining any hope of reinstituting a credible formalism as a means of protecting Fourth Amendment rights); James J. Tomkovicz, *Beyond Secrecy for Secrecy's Sake: Toward an Expanded Vision of the Fourth Amendment Privacy Province*, 36 HASTINGS L.J. 645, 650-51 (1985) ("The majority opinion [in *Katz*] . . . bestowed a controlling role upon privacy, but neglected to provide any clear or comprehensive standards for determining whether a relevant privacy interest is threatened in a particular case."); *see also* Coombs, *supra* note 3, at 1611 ("By defining the scope of the Fourth Amendment in terms of privacy expectations and relegating property interests to a secondary role, the Court has left lower courts without a coherent body of law with which to analyze Fourth Amendment claims. Consequently, the courts have had to attempt to define the amorphous concept of privacy.").

10 466 U.S. 170 (1984).

11 The key tenets of positivism may be stated as follows:

> 1) The law of a community is a special set of rules . . . for the purpose of determining which behavior will be punished or coerced by the public power. These special rules can be identified and distinguished by specific criteria, by tests having to do not with their content but with their *pedigree* or the manner in which they were adopted or developed . . . .
> 2) The set of these valid legal rules is exhaustive of "the law" . . . .
> 3) To say that someone has a "legal obligation" is to say that his case falls under a valid legal rule that requires him to do or to forbear from doing something . . . .

RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 17 (1978).

12 Soldal v. Cook County, 113 S. Ct. 538, 544-45 (1992).

tainly may recognize a privacy interest that the positive law has missed, but cannot be used to overcome a privacy interest that the positive law has identified. Recognizing expressed expectations of privacy before resorting to unexpressed ones would not only make Fourth Amendment litigation more predictable, but more protective as well—at least where the positive law identifies an interest that a reviewing court could otherwise choose to ignore.

Part I of this Article analyzes the legal bases for governmental confiscation of property by search and seizure. It traces the doctrine that identifies which property may be searched for and seized; that is, contraband and property of a public nature,[13] so-called "fruits," instrumentalities of crime and escape,[14] and, since 1967, "mere evidence" of crime, such as an armed robber's clothing.[15] Because the laws that authorize searches, seizures, and forfeitures cannot accurately be said to create anything but property interests, the Supreme Court's claim that property law and its "fictional and procedural barriers"[16] have been "discredited"[17] or "discarded"[18] is incorrect. I thus question whether the Court has really discredited property law, and to the extent that it has, am convinced that this changed only the way we think and talk about the Fourth Amendment, and was not worth the effort.

In Part II, I criticize the distorted manner in which the property-privacy tension has been phrased. To pit these two interests against each other incorrectly assumes that they are competing and that one of them must prevail. Certainly, the trespass- or property-based model protected a range of interests very similar to those protected by the privacy model. Indeed, privacy's "shift" into primacy[19] occurred not because property law ignores privacy concerns, but because traditional property concepts failed to protect against electronic eavesdropping. In its effort to address this narrow prob-

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13 *Cf.* James M. Shellow, *The Continuing Vitality of the Gouled Rule: The Search for and Seizure of Evidence*, 48 MARQ. L. REV. 172, 174 (1964) ("[R]equired records and public documents, because they do not possess the character of private chattels, have been held [seizable]."). Property of a public nature includes gasoline ration coupons, *see* Davis v. United States, 328 U.S. 582, 589-93 (1946), and draft cards, *see* Harris v. United States, 331 U.S. 145, 154 (1947).

14 *Harris*, 331 U.S. at 154 n.17.

15 Warden v. Hayden, 387 U.S. 294 (1967).

16 *Id.* at 304.

17 *Id.* at 306.

18 *Id.* at 304.

19 *Id.* (arguing that the substitution of suppression for replevin subordinated property interests "through a subtle interplay of substantive and procedural reform"); Katz, *supra* note 9, at 559 ("[T]he Court recognized personal security as the core Fourth Amendment value and shifted from a trespass to privacy analysis.").

lem, the Court and its critics wrongly concluded that the Fourth Amendment demands a choice between property and privacy values. To the contrary, these values are not only compatible, but are often coterminous. As a result, I conclude in Part II that the ascendancy of privacy as a Fourth Amendment standard, "without more," is insufficient to support the dismissal of property law.

Part III tracks the Court's uninspired discussions of property and other positive laws, and its habitual conclusion that those laws, while relevant, should not dictate Fourth Amendment outcomes. Currently, the positive law remains relevant but diluted—mentioned for unstated reasons and with inconsistency from case to case and justice to justice. In assessing the subordinate role in which the Court has cast property law, I argue that the contextual, relativist nature of the Court's privacy analysis inhibits clarity[20] and, ironically, sometimes even the privacy of those whose activities the government observes.

Finally, I conclude that although selecting which positive laws should control Fourth Amendment outcomes may generate new headaches in place of the familiar problems of *Katz*, infusing local law into the Constitution would nevertheless be a desirable change. The perceived threats that reliance on property law could commodify constitutional protections and complicate federal law with idiosyncratic local preferences are not enough to outweigh the ways in which reference to property law and other expressions of the positive law would enhance, not diminish, the functioning of the Fourth Amendment. Specifically, reference to local law would fulfill the Court's stated objective of looking outside its own holdings for the expectations it purports to reflect.

I. THE AUTHORITY FOR SEARCHES AND SEIZURES

A. PRE-ESPIONAGE ACT

History confirms that the Executive's power to get warrants to search for and seize persons and property requires legislative authorization.[21] The oppressive general warrants that authorized the

[20] *See* Wilkins, *supra* note 3, at 1088 ("[*Katz*] seemed to banish to legal limbo much of the judiciary's prior experience with the Fourth Amendment, and the highly elastic boundaries of [its] test made judicial construction of the amendment quite haphazard."); Michael D. Granston, Note, *From Private Places to Private Activities: Toward a New Fourth Amendment House for the Shelterless*, 101 YALE L.J. 1305, 1309-10 (1992) ("In the process of updating Fourth Amendment jurisprudence, the Court was forced to abandon the adjudicative simplicity of the trespass doctrine.").

[21] Statutes authorizing searches and seizures were enacted as early as the early 1300s in England. *See* NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH

King's messengers to search for and seize the books and papers of any person suspected of the publication of offensive papers[22] were declared "universally invalid, except as specifically provided for by act of Parliament."[23] Likewise, the equally abhorrent writs of assistance,[24] which gave tax collectors unfettered discretion to search for and seize undutied goods, were legislative creations,[25] and the pro-

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AMENDMENT TO THE UNITED STATES CONSTITUTION 23 (1937) (citing 9 Edw. III, St. II, ch. 11 (1335) (giving innkeepers in port passages right to search for and seize, and share in profits from forfeiture of, "false money imported")). Laws passed under Henry VI, the 15th Century Parliament, the Court of Star Chamber, Henry VIII, the Privy Council, James I, Charles I, and Charles II all justified searches and seizures for various types of undutied goods and for evidence of British subjects' dissent. *Id.* at 23-39. In a comprehensive account of the origins of the Fourth Amendment, M.H. Smith observed:

> The occasions when the common law sanctioned a power of entry and search on a man's property were few. Certainly search for smuggled goods was not one of them. The only instance in any degree comparable occurred with stolen goods. For these the common law did allow the issuance of a search warrant (possibly on the principle that respect for one form of property ought not to thwart protection of another), but that was as far as it went. If there was to be a power of entry and search for smuggled goods that the common law courts would recognize it must be given by statute.

MAURICE H. SMITH, THE WRITS OF ASSISTANCE CASE 16 (1978).

Of particular importance is the 1662 statute passed for England under Charles II, which purportedly created the writs of assistance, "for better enforcement of the customs laws," LASSON, *supra* at 28, and SMITH, *supra* at 16, and the Licensing Act, which regulated the press. LASSON, *supra* at 37 n.90. When the Licensing Act expired in 1679, Charles II received a favorable court ruling that "found" a common law authority for achieving the same results as under the 1662 statute. However, because the Chief Justice issued too many warrants on the authority of his own ruling, the House of Commons promptly overturned that ruling by impeaching him. *Id.* at 38; *see also* JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 195 (1986) ("[H]ad there been a statute authorizing them, general warrants would have been upheld.").

22 Shirley M. Hufstedler, *Invisible Searches for Tangible Things: Regulation of Governmental Information Gathering*, 127 U. PA. L. REV. 1483, 1487-88, 1487 n.11 (1979).

23 LASSON, *supra* note 21, at 49. "[T]he usage since the Revolution of issuing these warrants, not based on any statutory authority, was absolutely illegal . . . . None of the law officers of the Crown defended the legality of the warrant in the course of the parliamentary debate." *Id.* at 48.

24 Writs of assistance were tax collection devices, receiving their first parliamentary authorization in 1662, commanding all officers and subjects of the crown to assist in their execution. The writs permitted any person in the company of a civil officer to search any house, shop, warehouse, or other facility to find and remove uncustomed goods, and to break down doors and open chests or packages as they saw fit. Hufstedler, *supra* note 22, at 1487. A similar provision for the colonies was more than thirty years distant. SMITH, *supra* note 21, at 16 (referring to the Act of Frauds of 1696).

25 *See, e.g.*, LASSON, *supra* note 21, at 53, 58 (citing 13 & 14 Char. II, ch. 11, § 5 (1662) (Act of Charles II was first parliamentary authorization giving English Court of Exchequer broad tax collection device); 7 & 8 Wm. III, ch. 22, § 6 (1696) (Act of William III gave customs officers in America " 'the same powers and authorities' and the 'like assistance' that officials had in England."); Prov. St. 11 Wm. III (1699) (provincial statute giving Superior Court jurisdiction of English Courts of Exchequer, King's Bench, and Common Pleas)). In the 1760s, the colonists repeatedly contended that the statutes

longed legal battle over their validity was purely a matter of statutory construction.[26]

The First Congress saw the need for legislative authorization.[27] The first volume of Statutes at Large contained four separate acts, each passed under the authority of the taxing power, each authorizing search warrants for daytime searches for and seizures of specific types of property whose possession was illegal.[28] In the 1800s, Congress continued to pitch its search and seizure laws at narrow classes of conduct and property. For instance, an 1863 act permitted search warrants for books and papers relating to customs fraud,[29] while an 1894 act struck at the distribution of obscene or immoral materials, contraceptives or abortion-inducing drugs, and lottery tickets.[30]

Yet whether such statutory authority for the issuance of search

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authorizing the writs were void as to them. Although the House of Commons ratified the writs as late as 1767, the controversial seizure of John Hancock's sloop "Liberty," the emergence of the concept of "constitutionality," and Boston's publication of its "Infringements and Violations of Rights" sounded the death knell of the writs, and the birth of revolution. LASSON, *supra* note 21, at 57-73.

26 LASSON, *supra* note 21, at 57-78.

27 This constraint operates on the local level as well. Long before the passage of the Bill of Rights, two states said as much in their constitutions. Connecticut's Constitution of 1776 stated, "no man's goods shall be taken away from him, unless clearly warranted by the laws of this state." 1 BENJAMIN P. POORE, FEDERAL AND STATE CONSTITUTIONS 258 (1877); LASSON, *supra* note 21, at 82 n.17. Four years later, Massachusetts required that warrants issue "with the formalities, prescribed by the laws." *See* POORE, *supra* at 959; LASSON, *supra* note 21, at 82 nn.15 & 17. A half-century later, the Massachusetts Supreme Court observed that while their constitution prohibited unreasonable searches, "[t]he legislature w[as] not deprived of the power to authorize search warrants for probable causes." Commonwealth v. Dana, 43 Mass. (2 Met.) 329, 336 (1841).

Much more recently, the Arkansas Supreme Court affirmed this principle. *See* Grimmett v. State, 476 S.W.2d 217 (Ark. 1972). Recognizing that no such right existed under the common law, which, like many states, Arkansas had incorporated into its own law, *see* Ark. Stat. Ann. § 1-101 (1956), the court suppressed a physician's books and records under a statute that did not authorize the particular invasion in question. *See* Ark. Stat. Ann. § 82-2109 (1967). *See also* City of Shreveport v. Maroun, 64 So. 388 (La. 1914) (issuance of warrant not authorized by law is an unreasonable search and seizure); State *ex rel* King v. District Court, 224 P. 862 (Mont. 1924) (same); State v. Wills, 114 S.E. 261 (W. Va. 1922) (same).

28 Act of July 31, 1789, ch. 5, § 24, 1 Stat. 29, 43; Act of August 4, 1790, ch. 35, § 48, 1 Stat. 145, 170; Act of March 3, 1791, ch. 15, § 32, 1 Stat. 199, 207; Act of March 2, 1799, ch. 22, § 68, 1 Stat. 627, 677, *repealed by* Tariff Act of 1922, ch. 356, § 641, 42 Stat. 858, 989. *See* John Kaplan, *Search and Seizure: A No Man's Land in the Criminal Law*, 49 CAL. L. REV. 474, 476-77, 476 n.16, 477 n.17 (1961).

29 Act of March 3, 1863, ch. 76, § 7, 12 Stat. 737, 740, *repealed by* Act of March 2, 1867, ch. 188, § 2, 14 Stat. 546, 547, *amended by* Act of June 22, 1874, ch. 391, § 12, 18 Stat. 186, 188. The Court held the search provision unconstitutional in Boyd v. United States, 116 U.S. 616, 638 (1886).

30 Act of August 27, 1894, ch. 349, §§ 10 & 12, 28 Stat. 509, 549, *repealed by* Act of July 24, 1897, ch. 11, § 34, 30 Stat. 151, 213.

warrants is an essential condition of their validity has never excited much interest.[31] The few sources that touch on the subject make only conclusory references to a "self-executing" Fourth Amendment,[32] a blanket need for congressional authorization,[33] and a middle ground, where searches and seizures are valid if they are "declaratory of history or common law."[34] Although the absence of thoughtful work on what authority must exist for searches and seizures is remarkable, if legislation is an essential condition, it became available in the Espionage Act of 1917. Before reviewing facets of that legislation, however, I turn to the key Supreme Court decisions that preceded it, because this history highlights the Court's rather loose approach to the question of where the government gets its power to gather evidence of crime.

In 1886, the Court in *Boyd v. United States*[35] held unconstitutional a statute that forced Boyd to comply with a *subpoena duces tecum* (lest the prosecutor's assertions about invoices named in the subpoena be taken as true). There the Court first defined the scope of searches and seizures, and held that they were limited to quests for "contraband" (possession of which the legislature has made criminal), and "fruits of crime" (because the government is acting in its role as recoverer of victims' stolen property).[36] Although the Court

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31 *E.g.*, Osmond K. Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361, 380 (1921); Charles M. Hough, *Law in War Time*, 31 HARV. L. REV. 692, 698 (1918) ("Title XI search warrants are authorized under many circumstances—a right long withheld by Congress to the detriment of the public in many ways."); Harris v. United States, 331 U.S. 145, 162 (1947) (Frankfurter, J., dissenting) ("Congress always has been chary in allowing the use of search warrants.").

32 United States v. McHie, 194 F. 894, 897-98 (N.D. Ill. 1912) ("The suggestion that no federal statute authorizes a commissioner's warrant for the seizure of property used in the abuse of the mails is without force since the constitutional provisions referred to are self-executing.").

33 United States v. Jones, 230 F. 262, 266-70 (N.D.N.Y. 1916) (whether statutory authority is required is "an important question," answered in the affirmative). *See supra* note 27 (citing state supreme court decisions invalidating search warrants in absence of statutory authorization); *see also* Agnello v. United States, 269 U.S. 20, 32 (1925) ("Congress has never passed an act purporting to authorize the search of a house without a warrant.").

34 *See* United States v. Maresca, 266 F. 713, 725 (S.D.N.Y. 1920) (a confusing opinion in which court acknowledges that a New York statute "may be regarded as a special grant of authority," but authority comes not from the state's procedural code, "but because it is declaratory of history or common law"). District Judge Alexander Holtzoff, Secretary of the Advisory Committee that drafted the Federal Rules of Criminal Procedure, stated that legislation "is not the exclusive source of existing law as to search and seizure. Much of the law is common law, tradition, [and] decisions . . . ." 6 NEW YORK UNIVERSITY SCHOOL OF LAW INSTITUTE, FEDERAL RULES OF CRIMINAL PROCEDURE 146 (1946) (discussing Rule 41(b)).

35 116 U.S. 616 (1886).

36 A fruit is the "end product . . . of criminal activity" or, in a philosophical sense,

purported merely to rely upon British practice,[37] a noticeable difference lay between the negative part of the Court's holding, which invalidated the statute, and the affirmative part, which concluded that government has a property interest in contraband and fruits of crime.

Thus, when in 1904 the Court declared that the government's right to issue a search warrant also extended to warrants to search for the *means* of committing crimes, and claimed that this right was "too long established to require discussion,"[38] the Court's refusal to substantiate its position was not enough to make it true.[39] The Court was correct in claiming that seizure of "instrumentalities" boasted an impressive pedigree, and was justified by the need to bar the tools of crime from further use.[40] But no positive act of law then

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"the final cause of the crime." Note, *Evidentiary Searches: The Rule and the Reason*, 54 GEO. L.J. 593, 607 (1966). Typically, fruits are stolen goods. *But see* SIR EDWARD COKE, FOURTH INSTITUTE 176 (1797) (even stolen property cannot be seized). The word encompasses money and other material objects, including those objects purchased with fruits.

37 Without any other guide as to what "unreasonable" meant, *Boyd* relied on an old British civil case entitled Entick v. Carrington, 95 Eng. Rep. 807 (1765). Commentators have criticized the Court's reliance because *Entick* was a self-incrimination case, not a search and seizure case. *See, e.g.*, Note, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664, 694 (1961); Comment, *Criminal Law: The Mere Evidence Rule Discarded*, 52 MINN. L. REV. 901, 902-03 (1968); Comment, *Search, Seizure, and the Fourth and the Fifth Amendments*, 31 YALE L.J. 518, 521 (1922) (stating that Justice Bradley's dovetailing of the Fourth and Fifth Amendments in *Boyd* amounted to "dictum on a previous dictum of Lord Camden").

38 Adams v. New York, 192 U.S. 585, 598 (1904) (adding that "[t]he right of seizure of lottery tickets and gambling devices, such as policy slips, under such warrants, requires no argument to sustain it this day.").

39 *See* M.H. SMITH, *supra* note 21.

40 The Government's right to seize and retain instruments of crime is traceable to deodand (from the Latin *Deo dandum*—to be given to God), which entailed "the forfeiture of any object that caused the death of one of the King's subjects." Lawrence A. Kasten, Note, *Extending Constitutional Protection to Civil Forfeitures that Exceed Rough Remedial Compensation*, 60 GEO. WASH. L. REV. 194, 198 (1991). So, "a sword used to kill a person . . . was . . . forfeited to God, by way of the church." *Id.* Similarly, "if a bull gored a person to death, the animal was declared a deodand, and was put to death." *Id.* at 198-199. *See also* Austin v. United States, 113 S. Ct. 2801, 2806 (1993) (discussing rejection of deodand in colonies); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680-83 (1974) (same); Kaplan, *supra* note 28, at 478 (finding it "difficult to believe" that "metaphysical fault" on which 13th century fiction rested "has been frozen into our Constitution"). *But cf.* Henry C. McFadyen, Jr., Comment, *Constitutional Law—Criminal Law—The "Mere Evidence" Rule—Applicability to the States*, 45 N.C. L. REV. 512, 514 (1967) (suggesting vitality of deodand). An instrumentality is a tool of crime and escape. *See, e.g.*, Abel v. United States, 362 U.S. 217 (1960) (finding birth certificate was instrumentality of crime of espionage because with it, one could pose as American citizen); United States v. Guido, 251 F.2d 1 (7th Cir.) (holding that shoes worn by defendant were instrumentalities because they "would facilitate a robber's getaway and would not attract as much public attention as a robber fleeing barefoot from the scene of the holdup"), *cert. denied*, 356 U.S. 950 (1958).

ratified the search warrants for this type of evidence. Rather, the extant authorizing legislation addressed only "fruits" and "contraband." Congressional, and soon after, more elaborate judicial[41] recognition of this third species of seizable property—*instruments* of crime—did not occur until a decade later.

B. THE ESPIONAGE ACT OF 1917

Congress drafted the Espionage Act of 1917 in part, "to better enforce the criminal laws of the United States."[42] The Act described Congress' view of seizable property at a high level of generality, leaving out the limiting references to specific chattels, such as lottery tickets,[43] illicit liquors,[44] and gambling paraphernalia[45] that characterized its previous search-and-seizure laws. Title XI of the Act empowered federal courts to issue search warrants for "property stolen or embezzled in violation of a law of the United States," or "used as a means of committing a felony."[46] Although the Act

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[41] *Cf.* Weeks v. United States, 232 U.S. 383, 392-93 (1914) (*Weeks* does not involve search incident to arrest for "fruits or evidences of crime," "nor is it the case of burglar's tools or other proofs of guilt found upon his arrest within the control of the accused"); United States v. Kirschenblatt, 16 F.2d 202, 203 (2d Cir. 1926) (explaining ancient basis of power to seize fruits or tools of crime).

[42] 40 Stat. 217 (1917). The legislative history reveals Congress' intent to make the Act one of "general applicability, and attempts to limit its provisions to espionage matters were rejected." *Evidentiary Searches*, *supra* note 36, at 602 n.50 (citing 55 CONG. REC. 1720, 1838-39 (1917)); U.S. Att'y Gen., Recommendations for Legislation Amending the Criminal and Other Laws of the United States with Reference to Neutrality and Foreign Relations 28-29 (1916); *cf.* Charles Cheney Hyde, *The Espionage Act*, 12 AM. J. INT'L. L. 142 (1918) (explaining various aims of Act).

[43] Act of July 24, 1897, ch. 11, § 16, 30 Stat. 151, 208.

[44] Act of March 3, 1791, ch. 15, § 32, 1 Stat. 199, 207; Act of February 14, 1917, ch. 53, § 17, 39 Stat. 903, 906-907, *repealed by* Act of April 13, 1934, ch. 119, 48 Stat. 583.

[45] Tariff Act of August 5, 1909, ch. 6, § 11, 36 Stat. 11, 86, *repealed by* Tariff Act of 1913, ch. 16, § IV(S), 38 Stat. 114, 201.

[46] Espionage Act of June 15, 1917, ch. 30, tit. XI, 40 Stat. 217, 228. The third section of Title XI authorized warrants for "property or any paper, [that] is possessed, controlled, or used in violation of section twenty-two of this title," which punished illegal possession of property or papers "in aid of any foreign Government." 40 Stat. at 230. *See also* Kaplan, *supra* note 28, at 477 & n.20. Congressman Webb noted that Title XI "was based upon the New York law on this subject, and follow[ed] generally the policy of that law." H.R. CONF. REP. No. 69, 65th Cong., 1st Sess. 20 (1917). The New York law was at the time "declared an embodiment of the historical doctrine." *See* Fraenkel, *supra* note 31, at 380. The categories of property subject to seizure emerged during the bill's refinement. H.R. CONF. REP. No. 30, 65th Cong., 1st Sess. 8 (1917), required a recitation of "the property or papers sought," but said nothing about what was meant by "property." Subsequent House and Senate reports contained language identical to that which appeared in the law's final form. *See* H.R. CONF. REP. No. 69, 65th Cong., 1st Sess. 13 (1917); H.R. CONF. REP. No. 65, 65th Cong., 1st Sess. 13 (1917); S. CONF. REP. No. 44, 65th Cong., 1st Sess. 13 (1917); S. CONF. REP. No. 37, 65th Cong., 1st Sess. 13 (1917).

did not mention contraband, the omission was deliberate, as discrete statutes that declared possession of certain property to be illegal also dictated how that property could be searched for and seized.[47]

If ever the relationship between Congress and the Fourth Amendment was provocative, it was during the 1917 floor debates over Title XI.[48] On May 4, the House debated the merits of Title XI. At issue was the suggested amendment of Congressman George Graham (R-Pa.), which would allow search warrants only "for the purpose of enforcing the provisions of this act"—to identify traitors.[49] Except where otherwise provided by the statutes of the United States, Graham opposed "an unlimited power to issue a search warrant in every case where the agencies of the Government assume to exercise their power."[50]

In response, Congressman William Stevenson (D-S.C.) asked: "Where is there a statute of the United States providing for the issuance of warrants except this?"[51] Congressman Edwin Webb (D-N.C.), who favored the law's original version, answered by noting that "[t]here are only a few cases where a search warrant can be issued now under the laws of the United States."[52] Even Congressman Graham's home state, Webb continued, like all other states in the Union, "has a very full and thorough law . . . granting the right to issue search warrants."[53] Why cannot the United States also, if "carefully safeguarded," "have a general law . . . [to] aid . . . in the detection of crime of whatever character it may be?"[54] After Graham insisted on his amendment, Webb read from a prepared statement of Attorney General Thomas Gregory,[55] which summarized the arguments in favor of a general search warrant provision:

> [E]nforcement of the general Federal criminal laws [makes] some provision for the issue of search warrants . . . imperatively necessary. At

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47 *See* Davis v. United States, 328 U.S. 582, 618-20 (1946).

48 Members of the Senate anticipated the controversy on the eve of debate. Senators Lee Overman (D-N.C.) and Albert Cummins (R-Iowa) predicted that the "very important subject matter" of the search provision would "cause a great deal of debate" because it was a "radical departure from all the legislation of the United States." *See* 55 CONG. REC. 1801 (1917).

49 *Id.* at 1838.

50 *Id.*

51 *Id.*

52 *Id.*

53 *Id.*

54 *Id.*

55 Assistant Attorney General Charles Warren was the chief author of the espionage bill. *See* David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1218 & n.47 (1983).

> present the issue of search warrants is practically authorized only in statutes relative to customs and internal revenue. There are also a few statutes authorizing searches in certain particular cases . . . . In general, however, there is no provision for the issuance of a search warrant in the enforcement of the Federal criminal laws . . . . It is a legitimate function of a search warrant to gain possession of such property . . . . The court in the *Adams* case said: "The right to issue a search warrant to discover stolen property or the means of committing crime is too long established to require discussion."[56]

Repulsed by all searches for private papers, Congressman Graham continued to jab at Webb, until Webb responded that, so long as the provision tracks the probable cause and particularity requirements of the Fourth Amendment, "th[e] House ought to be willing to give the Department of Justice power to detect and break up crime of whatever nature against the United States."[57] Nonetheless, Graham's amendment passed, by a seventy-one to forty-five margin.[58]

The next day the Senate debated the merits of Title XI, but ignored the House's effort. The Senate drafted and inserted its own bill instead, absent the restrictive Graham amendment.[59] In discussion mostly between Senators Thomas Walsh (D-Mt.) and Albert Cummins (R-Ia.), the latter stressed his disapproval of the search warrant provision. What bothered Cummins most was his perception that the statute would permit searches for evidence that was not contraband, fruit, or instrumentality.[60] He relented, however, after Senator Walsh answered that Title XI allowed searches only "for property and for documents that have been used or are intended to be used in the commission of crime."[61] After apologizing to the Senate President for "protest[ing] against the legislation which seems to be thought necessary by the administration,"[62] Cummins attached to the record a copy of the *Boyd* case, to which he implored his colleagues to "pay some respect."[63]

Senator Lawrence Sherman (R-Il.) took up the concerns of Gra-

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56 55 CONG. REC. 1838 (1917).

57 *Id.* at 1839.

58 *Id.*

59 *Id.* at 2067.

60 In response to a question from Senator Duncan Fletcher (D-Fla.), Cummins asked:

> A search warrant is issued in a counterfeiting case and the counterfeiting tools are seized in the possession of the person accused. They may be used as evidence for whatsoever their possession will prove; but suppose the counterfeiter has in his pocket a letter in which he admits that he has been guilty of the offense, and the officer seizes the letter, does the Senator say it can be offered in evidence against him or that it can be lawfully taken from his person?

Id. at 1854.

61 *Id.* at 1855.

62 *Id.*

63 *Id.* at 1853.

ham and Cummins, even more passionately. Like Graham, Sherman would have accepted the warrant provision had it been limited to searches for treasonous materials, especially in times of war.[64] But, as drafted, he feared the bill would, "under the guise of public peril, . . . legislate in matters that are purely private and that are made for the purpose of safeguarding persons and property in time of peace."[65] When Senator Thomas Sterling (R-S.D.) pointed out that search warrants currently could issue "by special statutes" in cases involving obscene publications, gambling, and illegally sold liquor, Sherman reiterated his willingness to add searches for evidence of treason to that list,[66] but nothing more.

At this point, Senator Walsh re-entered the debate to advise Sherman that he wished only to give the federal government what authority state legislators had given their law enforcers.[67] In response, Sherman conveyed how he would feel were he to be the victim of a search warrant for instruments of various crimes unrelated to the war power, among them an excise law requiring saloon keepers to cancel the revenue stamp on open cigar boxes.[68] Because the excise law in question had nothing to do with war, Sherman then said he would advise any client in violation of that law to "load his firearms and shoot any United States Marshal who crosses his threshold" to search his belongings.[69]

To justify searches beyond those related to the war power, specifically the paper searches denounced in *Boyd*, Senator Walsh stated (in error) that the warrant provision under consideration had been proposed by Senator Robert Owen of Oklahoma some two years earlier,[70] and never had its basis in the war power. Walsh saw no

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64 *Id.* at 2065.

65 *Id.*

66 *Id.* at 2065-66.

67 He also expressed concern about Sherman's apparent hearing disorder, which Walsh feared would lead to a rehashing of old ground. *Id.* at 2066-67.

68 *Id.* at 2067.

69 *Id.*

70 *Id.* at 2068. An extended search of the Congressional Record Index spanning the 10-year period prior to Senator Walsh's remark on the floor revealed no such proposal by Senator Owen. However, various pieces of legislation enabling the federal government to issue search warrants were before both Houses prior to 1917. In 1910, Senator Clarence Clark (R-Wyo.) introduced S. 6566 "to authorize the issuance of search warrants for stolen or misappropriated property." 45 CONG. REC. 2065 (1910). The bill died in Committee. In the House, Congressman Richard Parker (R-N.J.) introduced a similar measure, H.R. 21338, on the same day. *Id.* at 2115. The House version survived the Committee on the Judiciary, became H.R. REP. No. 1096, 61st Cong., 2d Sess. 1-2 (1910), was debated on the floor, 45 CONG. REC. 7490-91 (1910), but never became law. Parker introduced an identical measure in 1911, H.R. 30798, which was also unsuccessful. *See* 46 CONG. REC. 642 (1911). In 1912 and 1914, Congressman Henry Clayton (D-

problem with searches for evidence of nontreasonous crimes, viewing the Fourth Amendment's warrant strictures as a sufficient check on overreaching federal officers. "The very paper [sought to be seized]," he noted, "just like the very piece of property, must be intended to be used in the commission of a crime."[71] So, despite the efforts of Graham in the House, the Senate Bill, absent the treason-only language, went to conference, was again rewritten, and became law.[72]

The Espionage Act therefore did not generally authorize searches for mere evidence, probably because Congress thought it lacked the constitutional power to do so.[73] In fact, early versions of the bill permitted warrants to issue for papers, but by the time the bill reached its final form, warrants could reach only those papers that qualified as fruits or instrumentalities. The one exception to this restriction was for papers possessed with the intent to give aid and comfort to the enemy.

Months after the Act became law, the Federal Trade Commission urged Congress to expand the Act's warrant provision to encompass papers.[74] The Commission earlier had failed in its attempts to secure an examination of the papers of Swift & Company, which the Commission had accused of conspiring to fix prices with four other meat packers. The Commission's plea to Congress failed to produce a bill, but courts' imaginative interpretations of fruits and instrumentalities achieved the Commission's desired end for the next half-century,[75] until the Court and Congress officially expanded the classes of evidence that could be searched for and seized.

Ala.) introduced H.R. 22762 and H.R. 16474, bills to authorize and regulate the issuance of search warrants for "property belonging to the United States." *See* 48 CONG. REC. 4227 (1912); 51 CONG. REC. 8481 (1914). These also failed. Finally, in 1916, Senator Charles Culberson (D-Tex.) introduced S. 6819, 53 CONG. REC. 12411 (1916), the text of which was read into the Record as Chapter XIV of S. 8148, an early version of the legislation that was to become the Espionage Act of 1917. 54 CONG. REC. 3422 (1916).

71 55 CONG. REC. 2068 (1917).

72 *See* Brief for Respondent at 56-57, Gouled v. United States, 255 U.S. 298 (1921) (No. 250).

73 *Cf.* Fraenkel, *supra* note 31, at 380.

74 SPECIAL REPORT OF FEDERAL TRADE COMMISSION SUBMITTING RECOMMENDATIONS FOR ADDITIONAL LEGISLATION, H.R. DOC. No. 961, 65th Cong., 2d Sess. 4-7 (1918).

75 *See, e.g.*, Parman v. United States, 399 F.2d 559 (D.C. Cir.) (corpse, blood, and objects with blood stains on them are fruits of the crime of murder), *cert. denied*, 393 U.S. 858 (1968); United States v. Rees, 193 F. Supp. 849 (D. Md. 1961) (rejecting prosecution's claim that perpetrator's written, lurid account of brutal sex crime was fruit because of satisfaction it produced for its writer).

C. FROM *GOULED* TO *HAYDEN*: EVIDENTIARY SEARCHES, THE FEDERAL RULES OF CRIMINAL PROCEDURE, AND THE REVISED TITLE 18

Four years after the Espionage Act became law, the Court confirmed that to search for and seize "mere evidence" was unconstitutional. In *Gouled v. United States*,[76] Felix Gouled bribed Army purchasing agents into awarding him a lucrative raincoat manufacturing contract.[77] At his federal fraud trial, the United States sought to introduce, *inter alia*, three papers seized by warrants issued under the Espionage Act. Prosecutors alleged that an unexecuted form contract between Gouled and a nonparty (Steinthal), a written contract between Gouled and another nonparty (Lavinsky), and a bill to Gouled for services from an acquitted private lawyer (Podell), were instruments of crime and therefore admissible.

In language that became the crux of the mere-evidence rule, the Court relied on *Boyd* in affirming that search warrants

> may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding, but that they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or the right to the possession of it, or when a valid exercise of the police power renders possession of the property of the accused unlawful and provides that it may be taken.[78]

Papers falling within these principles, said the Court, would receive no special sanctity. A contract between Gouled and the United States *could* have been an instrument of crime, which the government could seize to protect the public from further frauds.[79] But apparently feeling bound by the lower court's failure to so describe the contracts, the Court deemed the papers inadmissible.

Promptly after the decision, law professor Zechariah Chafee offered the following insight:

> Unfortunately, the form in which the case was certified to the Supreme Court makes it impossible to limit the decision to the sensible proposition of statutory construction, that Congress had not as yet authorized the seizure of purely evidentiary material. The decision necessarily holds that such a seizure violates the Constitution, so that Congress

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76 255 U.S. 298 (1921).

77 *Name Army Officers in Raincoat Scandal*, N.Y. TIMES, Sept. 25, 1918, at 3; *Captain Indicted in Raincoat Fraud*, N.Y. TIMES, July 31, 1918, at 7.

78 *Gouled*, 255 U.S. at 309 (citing Boyd v. United States, 116 U.S. 616, 623-24 (1886)).

79 *Id.* at 310-11.

cannot authorize it hereafter, even with a search warrant.[80]

Chafee referred to the Second Circuit's six certified questions,[81] which appeared in Gouled's brief. None asked the Court to consider the scope of the Espionage Act, but four went to the scope of the Fourth and Fifth Amendments. The form of the certified questions thus may explain why the Court in *Gouled* ignored that identifying the objects of search and seizure is first a legislative responsibility; yet it does not explain why the Court since *Gouled* continued to ignore this crucial condition.

Together, the Espionage Act, *Boyd*, and *Gouled* led to Rule 41 of the Federal Rules of Criminal Procedure, which, with few exceptions, tracks the Court's view of the Fourth Amendment.[82] In 1968, Congress, "which can move more quickly than the rulemaking apparatus," amended a search-and-seizure provision of Title 18 in response to the Court's decision in *Warden v. Hayden*,[83] which had loosened the Fourth Amendment limits on seizeable property.[84] Because the Court cannot create property rights,[85] Congress had to

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80 Zechariah Chafee, *The Progress of the Law, 1919-1922*, 35 HARV. L. REV. 673, 699 (1922).

81 *See* Sup. Ct. R. 19; 28 U.S.C. § 1254(2) (1988).

82 The Federal Rules were the result of enabling legislation passed on June 29, 1940 "[t]o give the Supreme Court . . . authority to prescribe rules of pleading, practice, and procedure with respect to proceedings in criminal cases." Enabling Act, ch. 445, 54 Stat. 688 (1940) (originally codified in 18 U.S.C. § 687 (1940)). The Rules became effective by order of the Court on March 21, 1946, *see* Order of February 8, 1946, 327 U.S. 825 (1945), and were codified in the revised Title 18 of the United States Code on June 25, 1948, which, in turn, repealed Title XI of the Espionage Act. Act of June 25, 1948, ch. 645, 62 Stat. 683 (1948) ("To revise, codify and enact into positive law, Title 18 of the United States Code."). What had been 18 U.S.C. §§ 611-33 (1917), became the Federal Rules which, in turn, became 18 U.S.C. §§ 3101-16 (1948). The revised Title 18 also presented a revised version of the 1940 enabling statute. Act of June 25, 1948, ch. 645, 62 Stat. 683, 846 (codified in 18 U.S.C. § 3771 (1948)). In 1988, Congress repealed § 3771 and replaced it with 28 U.S.C. §§ 2071-72 (1988), designed to "increase participation in [the rulemaking] process by all segments of the bench and bar." *See* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, tit. IV, § 404(a)(1), 102 Stat. 4642, 4651 (1988).

83 387 U.S. 294 (1967). *See also* 18 U.S.C. § 3103(a) (1988), *added by* Act of June 19, 1968, Pub. L. No. 90-351, tit. IX, § 1401(a), 82 Stat. 197, 238 (recognizing the Court's abrogation of the mere evidence rule).

84 3 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 664 (2d ed. 1982). Since then, the Federal Rules Committee has amended the search-and-seizure rules in 1972, 1977, 1979, and 1989, each time in step with the Court's precedents, and disclaiming any impact or opinion on the exclusionary rule. Its scope is left to the Court. FED. R. CRIM. P. 41(e) originally enumerated grounds of exclusion which later versions of the Rules did not. *See* 6 NEW YORK UNIVERSITY SCHOOL OF LAW INSTITUTE, FEDERAL RULES OF CRIMINAL PROCEDURE 68-69, 146-48 (1946); FED. R. CRIM. P. 41(e) advisory committee's notes (1989).

85 Some cases flout this assertion. One involved a professional photographer who organized an outing to permit, for a fee, other photographers to take pictures of models,

amend Title 18 to grant the government the right to search for and seize the mere evidence that the Court's new decision addressed. To wait for the Rules Committee to amend the Rules would have meant a lengthy interim during which law enforcement could not take advantage of the more relaxed limits.[86] Four years after Congress acted, the Rules were amended[87] to comport with the Court and Congress' understanding of the matter.

Because of its timing and its content, *Warden v. Hayden*[88] deserves close analysis. The timing was critical because it preceded *Katz v. United States*[89] by only one term and contributed significantly to that bombshell. The content was important for its attempt to use history to free the Fourth Amendment from the fetters of property law. Described by Charles Alan Wright as "strong,"[90] Justice Brennan's opinion for the 8-1 majority[91] is on the whole unconvincing,

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some of whom posed nude, in a rustic setting. He pleaded guilty to the crime of "outraging public decency" and paid his fine. When he sued to recover the admission of the fees that the sheriff had confiscated upon arrest, the New York Court of Appeals refused to entertain the action, despite the sheriff's lack of statutory justification or colorable claim to the money. The court refused to grant relief "to one who would prove his wrongdoing as a basis of his supposed rights." Carr v. Hoy, 139 N.E.2d 531, 533 (N.Y. 1957). R.H. Helmholz, *Wrongful Possession of Chattels: Hornbook Law and Case Law*, 80 Nw. U. L. REV. 1221, 1227 (1986) (calling *Carr* either "wrongly decided" or "prudish").

86 The following exchange took place between one of Katz's attorneys and the Court:

> MR. SCHNEIDER: . . . The Court, in the majority opinion in *Hayden*—
> THE COURT: In which case?
> MR. SCHNEIDER: In *Hayden*, Your Honor.
> —stated that Rule 41 followed the *Gouled* decision and incorporated the test of *Gouled*. It also . . . indicates that 41 is a limitation . . . on the enforcement officers to their warrant, under a situation where mere evidence—only or exclusively—is sought, or in addition. We think that the Congress has the right to make a statute, or a Rule as in this case, more restrictive than that which is minimally required by this Court.
> THE COURT: This is not a constitutional argument. This is just that there is presently no federal law which authorizes the seizure of mere evidence, although we've now said that, as a constitutional matter—
> MR. SCHNEIDER: —it's permissible.
> THE COURT: —it's permissible.
> . . . .
> MR. SCHNEIDER: Unless there is another legislative enactment, I think that 41 still is the law.

See LANDMARK BRIEFS, *supra* note 4, at 114.

87 *See* FED. R. CRIM. P. 41 advisory committee's note (1972) ("Subdivision (b) is also changed to modernize the language used to describe the property which may be seized with a lawfully issued search warrant and to take account of a recent Supreme Court decision . . . and recent congressional action . . . which authorize the issuance of a search warrant to search for items of solely evidential value.").

88 387 U.S. 294 (1967).

89 389 U.S. 347 (1967).

90 WRIGHT & MILLER, *supra* note 84, at 607.

91 Justice Fortas and Chief Justice Warren concurred, but only because the evidence was obtained in "hot pursuit" and determined Hayden's identity. Justice Douglas dissented on the ground that the seizure of mere evidence violated Hayden's right to pri-

and, in saying far more than necessary, ultimately has done more harm than good to the goal to which it granted primacy.

Hayden robbed a taxicab company and fled on foot. A driver saw him and noted his race, size, and clothing, then saw Hayden enter his house, to which police were summoned. Several police officers lawfully entered in hot pursuit, and discovered Hayden in bed feigning sleep. Strewn about the house were weapons, ammunition, and clothing that matched a witness' description of those worn by the robber. Hayden sought to suppress the clothing because it was mere evidence of crime, and thus barred by *Gouled*. The Court granted certiorari to settle the constitutionality of searches for and seizures of purely evidentiary materials.[92]

The kernel of Justice Brennan's opinion is his rejection of *Gouled*'s long-held "primary-right" theory, under which government and search victim would compete over whose interest in the property seized was superior. If government had the superior interest, then government could admit the property at trial and retain it afterwards. If the search victim had the superior interest, then she could repossess the property before trial and thereby effect its exclusion.

In Justice Brennan's view, the primary-right theory had lost much of its force in 1914, when the remedial structure of the Fourth Amendment began to change from a Lockeian, property-based model, to one based on privacy. Until then, aggrieved persons obtained redress for illegal searches by trespass and replevin actions, which were dependent on proof of a superior property interest, but unrelated to how government obtained the property.[93] This structure, Brennan continued, had since been discredited by the emergence of the privacy model, which changed both the meaning and the consequences of governmental illegality.[94] Therefore, to declare a search unreasonable now means that the evidence so derived is inadmissible at the search victim's trial, even absent the right to

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vacy. *Cf.* Arnold H. Loewy, *The Fourth Amendment As a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1232 (1983) ("In my view, no reasonable method of constitutional adjudication supports Justice Douglas' conclusion.").

92 Only a year earlier, the Court decided Miranda v. Arizona, 384 U.S. 436 (1966), which clearly favored scientific investigative techniques over bullying. The mere evidence rule, which could impair scientific discovery of a suspect's identity, could restrict the use of a scientific approach to police investigations. *See* Note, 32 ALB. L. REV. 229, 236 (1967); Howard P. Roy, Note, 36 GEO. WASH. L. REV. 452, 456-57 (1967); Robert A. Kelly, Recent Decision, 6 DUQ. L. REV. 60, 65 (1967-68); McFadyen, *supra* note 40, at 518 (citing Hayden v. Warden, 363 F.2d 647, 658 (4th Cir. 1966)).

93 *Hayden*, 387 U.S. at 303-05.

94 *Id.* at 305-06.

repossess it, as with contraband. Conversely, the government can introduce evidence at trial even absent a superior interest, as with goods stolen from an unidentified victim.[95]

This shift in remedy, Brennan wrote, ended the contest over property interests. For example, in *Silverthorne Lumber Co. v. United States*,[96] a father and son who ran a lumber yard had conspired to charge a government-controlled railroad for boards not received.[97] They could not replevy their property during trial because the objectionable evidence included *copies* of documents that defendants had possessed legally, and not the illegally seized documents themselves.[98] Nonetheless, the Court prohibited the United States from introducing the copies at trial, not on the ground that the copies were the defendants' intellectual property, but because the government must not profit from its own wrong.[99] Likewise, a year later Felix Gouled successfully prohibited the United States from using papers of evidentiary value only, even though he had lost his pretrial motion for return of the papers.[100] Since defendants in both cases achieved the chief thing desired[101] without successfully asserting a superior property right in the object seized, Justice Brennan concluded that the suppression remedy had crowded property law out of the Fourth Amendment limelight.

Brennan did acknowledge some governmental interest in stolen property—the fruits of crime—and how the government's interest had "gradually extended" to contraband and instrumentalities.[102] But there are reasons for each extension, he asserted, that have nothing to do with property law. The right to search for and seize stolen property originally involved the government's acting on be-

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95 *Id.* at 307 n.11.

96 251 U.S. 385 (1920).

97 Brief on Behalf of the Plaintiffs-in-Error at 4, Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) (No. 358).

98 *Silverthorne Lumber Co.*, 251 U.S. at 391. The decision reversed a trial judge's contempt charge issued against defendants for their failure to comply with a *subpoena duces tecum* for records, which were illegally seized, then returned. Holmes said nothing directly about copies the Government had made of the records, except that illegally obtained evidence should not be used at all. The illegal search and seizure occurred when officers, carrying only a subpoena, "stripped [the company office] of all its books, papers and documents and carried them away." Plaintiff's Brief at 4, *Silverthorne Lumber Co.* (1920) (No. 358). The subpoena was overbroad, and, of course, carried with it no right of entry. Seven federal marshals executed the subpoena while the Silverthornes were elsewhere being arrested and admitted to bail. *Id.* at 4-5.

99 *Silverthorne*, 251 U.S. at 392.

100 Gouled v. United States, 255 U.S. 298 (1921).

101 *See* Thomas E. Atkinson, *Prohibition and the Doctrine of the* Weeks *Case*, 23 MICH. L. REV. 748, 758 (1924).

102 *Hayden*, 387 U.S. at 303.

half of an identified victim of theft.[103] Now that the identity of the theft victim no longer is required to authorize a search, government still can obtain the property, based on the "separate governmental interest in seizing evidence to apprehend and convict criminals."[104] This, in Brennan's view, meant that government asserts no property interest in the stolen goods. As for instruments of crime, he continued, they are seizable and nonreturnable not because of the government's property interest in them, but to prevent their being used to perpetrate further crime.[105] Mere evidence, he added, can be seized on the same ground, since identifying criminals is as important as seizing the instruments of crime.[106] Contraband, Brennan conceded, involves a superior governmental interest, but only because the government creates that interest. That interest is not in property, he insisted, but is "hardly more than a form through which the Government seeks to prevent and deter crime."[107]

Justice Brennan's thesis—that the Fourth Amendment has put property law out to pasture—rests on two points: 1) the government's interest in searching for and seizing evidence of crime is not a property interest, but some other type of interest; and 2) the shift in aggrieved parties' remedies has subordinated a defendant's interest in repossession to suppression. I will address each observation in turn.

When Justice Brennan and others[108] say that government's in-

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103 *Id.* at 307 n.11.

104 *Id.* at 303.

105 For decades, the Court struggled openly with the meaning of "instrumentality." *See* LANDMARK BRIEFS, *supra* note 4, at 115 (During oral argument in *Katz*, Katz's attorney, Harvey Schneider, said: "I don't mean to make light of the situation—but if he dials the telephone with his index finger, then the Government's entitled to an amputation. I don't think that's the law.").

106 *Hayden*, 387 U.S. at 307 n.11.

107 *Id.*

108 *E.g.*, *Criminal Law: The Mere Evidence Rule Discarded*, *supra* note 37, at 905 ("[O]bjects are generally not sought or seized to vindicate a property right, but rather to aid in proving the guilt of the accused."); Note, 32 ALB. L. REV. 229, 235 (1967) (slew of exceptions to rule resulted from tension between purpose of rule—to protect against assertions of other-than-superior property rights—and purpose of Fourth Amendment, which has "long been to enable the police to obtain information to prevent and prosecute crime"); Recent Cases, *Criminal Law: The "Mere Evidence" Rule Is Expressly Abolished*, 20 VAND. L. REV. 1350, 1354 (1967) (endorsing abolishment of rule not only because courts could call almost any evidence an "instrumentality," but also because the rule "served as nothing more than an illogical impediment to the gathering and use of relevant evidence"); *Evidentiary Searches*, *supra* note 36, at 622-23 (Fourth Amendment should not turn on property-based theory, but Fifth Amendment may); Comment, *Limitations on Seizure of "Evidentiary" Objects: A Rule in Search of a Reason*, 20 U. CHI. L. REV. 319, 323-24 (1953) ("The title rationale, however, is insufficient to explain the seizure of weapons used to commit a crime and of required records."); Yale Kamisar, *Public Safety v. Individual Liberties: Some "Facts" and "Theories"*, 53 J. CRIM. L. CRIMINOLOGY & POLICE

terest in certain types of property is "hardly more than a form through which the Government seeks to prevent and deter crime," that "form" is a property interest. Congress created that interest[109] under the authority of Article I, limited by the takings,[110] due process,[111] and, as here, search and seizure[112] clauses. Because there is no general forfeiture statute, a variety of federal laws transfer title to property from classes of wrongdoers to the United States.[113] These laws, scattered throughout the United States Code, empower federal courts to order evidence delivered to the permanent custody of various agencies.[114] They define property forfeitable to the United States narrowly, e.g., firearms used in violent felonies,[115] and broadly, e.g., fruits or instrumentalities of money laundering,[116] drug,[117] or racketeering offenses.[118] Absent such a statute, a court's

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SCI. 171, 177 (1962); Kaplan, *supra* note 28, at 478; Roger J. Traynor, Mapp v. Ohio *at Large in the Fifty States*, 1962 DUKE L.J. 319, 330.

109 *Cf.* Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 739 (1964) ("Property . . . is the creation of law."); *id.* at 771 ("Property is not a natural right but a deliberate construction by society.").

110 U.S. CONST. amend. V.

111 *Id.*

112 U.S. CONST. amend. IV.

113 *See, e.g.*, 15 U.S.C. § 11 (1988) (forfeiture to government of property in interstate commerce derived from violation of antitrust laws); 15 U.S.C. §§ 1177, 1955(a) (1988) (property used in connection with illegal gambling); 18 U.S.C. § 1963 (1988) (property used in connection with violation of RICO); 21 U.S.C. § 334 (1988) (adulterated or misbranded food, drugs, or cosmetics); 26 U.S.C. § 7201 (1988) (forfeiture of property connected to tax avoidance); 1 David B. Smith, Prosecution and Defense of Forfeiture Cases (MB) § 2.03 (1985); U.S. DEP'T OF JUSTICE, ASSET FORFEITURE: COMPILATION OF CIVIL STATUTES 319-32 (1987) (listing 138 statutory forfeiture provisions, the property forfeitable, and the underlying offense triggering forfeiture).

114 *See* M.H. SMITH, *supra* note 21, at 12 & n.5 (From the year 1275 A.D. on, "customs forfeiture was invariably a matter of specific statutory enactment.").

> [T]he prominent targets for forfeiture are assets used by those who engage in drug trafficking and narcotics use. But the breadth of state and federal forfeiture statutes permit the seizure of property acquired in violation of antitrust laws, property used for illegal gambling, vehicles used in violation of liquor laws, guns or other equipment used unlawfully in national parks, and property smuggled in violation of customs laws. Many states have generated forfeiture statutes that permit the seizure of virtually any property used as an instrumentality of a crime.

Mary M. Cheh, *Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1339 (1991).

115 18 U.S.C. § 924 (1988).

116 18 U.S.C. § 981 (1988).

117 21 U.S.C. § 853 (1988) (*in personam* action part and parcel of sentence for drug offenses provides for forfeiture of proceeds and property connected to narcotics transactions); 28 U.S.C. § 881 (1988) (government may proceed *in rem* against property that merely may have been involved in an illegal drug transaction). Under § 881, the government need only prove that there is probable cause to believe the property is subject to forfeiture. In the forfeiture context, probable cause has been interpreted as a "reasonable ground for belief of guilt, supported by less than prima facie proof, but more than

refusal to return the property to the search victim would be an unreasonable seizure.[119]

What interest has Congress given government with regard to searches and seizures? More specifically, what interest does government assert when it seizes evidence for presentation at trial? The answer must be a property interest, insofar as when government takes possession of property pursuant to a proper search and seizure, its possession cannot be disturbed; its dominion is deemed to be exclusive.[120] I see no other way to describe that exclusive possession than as an interest in property.[121]

Even Blackstone's rigid definition of property fits our needs. For him, property is "that sole and despotic dominion which one . . . claims and exercises over the external things of the world, in total

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mere suspicion." Lalit K. Loomba, Note, *The Innocent Owner Defense to Real Property Forfeiture Under the Comprehensive Crime Control Act of 1984*, 58 FORDHAM L. REV. 471, 474 & n.25 (1989) (quoting United States v. One 1978 Chevrolet Impala, 614 F.2d 983, 984 (5th Cir. 1980)). Many procedural protections afforded criminal defendants do not apply in civil actions, nor do the Federal Rules of Criminal Procedure. *See* FED. R. CRIM. P. 54(b). To facilitate the transfer of properties involved in drug transactions, Congress has back-dated the United States' title to the date of the illegal transaction, thus avoiding the Government's being thwarted by preferential transfers.

118 18 U.S.C. § 1963 (1988).

119 That refusal may also constitute an uncompensated "taking" within the meaning of the Fifth Amendment. *See* U.S. CONST. amend. V.

120 *See* Davis v. United States, 328 U.S. 582, 618-20 (1946) (lists federal statutes authorizing seizure of contraband, which under no circumstances may search victim repossess).

As a condition precedent to forfeiture, valid searches and seizures facilitate the perfection of the government's title where the forfeiture laws allow. Even when the government plans no criminal prosecution, seizures for purposes of civil forfeiture must obey the Fourth Amendment. *See* United States v. One Hundred Twenty-Eight Thousand Thirty Five Dollars ($128,035.00) in U.S. Currency, 628 F. Supp. 668 (S.D. Ohio 1986) (civil forfeiture is quasi-criminal in nature, so procedural protections attach); Douglas Clark Hollmann, *Forfeitures and the Fourth Amendment*, 5 CRIM. JUST. J. 1, 20 (1981) ("Acts of Congress cannot authorize a search or seizure which violates the Fourth Amendment; accordingly, the Fourth Amendment applies to a seizure for *forfeiture*."). *Id.* at 3 (citing United States v. 1960 Bags of Coffee, 12 U.S. (8 Cranch) 398, 405 (1814)).

121 I am indebted to the work of Professor Fernand Dutile, who, in his short piece in the 1971 CATHOLIC UNIVERSITY LAW REVIEW, suggested that *Hayden* would have made much more sense had it retained the superior-interest theory, "but should have extended it to include the right to possession for whatever period of time the course of prosecution makes necessary." Fernand N. Dutile, *Some Observations on the Supreme Court's Use of Property Concepts in Resolving Fourth Amendment Problems*, 21 CATH. U. L. REV. 1, 24 (1971). Dutile's insights into the formal relationship between the government and the evidence seized were timely and thoughtful. While I am not altogether sure that he fulfilled his stated promise to "assess the true role of the property concept in delimiting the scope of the amendment," *id.* at 3, his work must be acknowledged for its appreciation of *Katz*'s cumulative rather than substitutional role in Fourth Amendment jurisprudence. *Id.* at 30-31.

exclusion of the right of any other individual in the universe."[122] Neither Blackstone, nor any other commentator or court requires that the interest be perpetual. As Professor Joseph Singer has observed, "[m]uch of the first-year property course in law schools is devoted to examining ways in which property interests can be shared or divided up."[123] There is nothing exotic about Congress' vesting law enforcement with a temporary (for trial purposes) and potentially permanent (upon forfeiture) possession of property.

When describing lawfully seized property, few would dispute that the government has a right to exclusive possession. If a defendant were to be acquitted on the merits, few would hesitate to say, "the defendant gets to keep her property." *All* possession is lawful only until the legislature says that a superior interest rests in the government, either forever, or for the course of the litigation.[124] However weak the government's title may be before trial—as with instrumentalities[125] and mere evidence—that interest is perfected on judgment of conviction and forfeiture or escheat.[126] In property terminology, the search victim holds the property in fee, subject to partial divestment upon the onset of criminal proceedings, and total divestment if noncontraband evidence is lawfully seized, admitted,

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122 2 WILLIAM BLACKSTONE, COMMENTARIES *2.

123 Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 637 (1988). In Singer's view, it would be "nonsense" to conclude that the image of one with a property right is only one of a "single 'owner' " "with ultimate control over the disposition of a thing." *Id.* (citing Kenneth Vandevelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325 (1980)). Property rights can be divided in various ways, including: 1) over time; 2) into co-ownership; 3) into leases; 4) into trusts; 5) into easements and covenants; and 6) into mortgages. *Id.* at 638.

124 *See* FED. R. CRIM. P. 41(e) advisory committee's note (1989) (return of property judged by "reasonableness under all of the circumstances," and if "need" on part of United States is "investigation or prosecution, its retention of the property generally is reasonable").

125 Instrumentalities pose a different case than do fruits or contraband because, unlike the latter, "where defendant's title is minimal at best," "it is usually the case that mere possession of [instrumentalities] is perfectly lawful." *Evidentiary Searches*, *supra* note 36, at 622 n.190 (citing Marron v. United States, 275 U.S. 192 (1927) (ledger and bills obtained during search of saloon/casino for illicit liquor were "part of the outfit or equipment actually used to commit the offense."). Likewise, some instrumentalities, like a cancelled check, cannot be used in crime again and certainly pose no danger to the public or the searching officers. McFadyen, *supra* note 40, at 515.

126 Escheat is a right originating in both the royal prerogative and on the feudal concept of tenure. The lands of tenants who committed high treason were forfeited to the Crown, and for all other felonies (or serious breaches of the feudal bond), the felon or breacher's lands returned to the Lord. CORNELIUS J. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 21-22, 21 n.4 (1962); Kasten, *supra* note 40, at 197, 198 nn.20-23. In all states there are statutes vesting in the state (or a political subdivision thereof) title to lands of a person who dies intestate and without heirs. MOYNIHAN, *supra* at 27.

and forfeited by conviction. The government's interest is contingent or temporary, as are many property interests, none of which we call "a mere form," except insofar as property is a "form" that relates interest-holder to interest described.[127] While the "primary purpose of search is to secure evidence,"[128] and "government has an interest in solving crime,"[129] legislatively created, governmental interests in property serve those ends.[130] By any other name, such legislation commands that the rightful possessor end up with the property.[131]

D. THE SHIFT IN THE PRIMARY FOURTH AMENDMENT REMEDY

1. Repossession: Rule 41(e) and its Antecedents

The Government's interest in lawfully seized property is superior until the conclusion of the trial, or so long as is reasonable. Federal Rule 41(e) states in pertinent part:

> A person aggrieved by an unlawful search and seizure or by the deprivation of property may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property . . . . If the motion is granted, the property shall be returned to the movant, although reasonable conditions may be imposed to protect access and use of the property in subsequent proceedings.[132]

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127 *See also* Reich, *supra* note 109, at 778-79 ("[A]ll property might be described as government largess, given on condition and subject to loss.").

128 McFadyen, *supra* note 40, at 515 (citing Abel v. United States, 362 U.S. 217, 239 (1960)).

129 *Hayden*, 387 U.S. at 306.

130 *Cf.* Reich, *supra* note 109, at 778 ("Personal property is created by law; it owes its origin and continuance to laws supported by the people as a whole. These laws 'give' the property to one who performs certain actions.").

131 *Cf.* In re Marx, 255 F. 344, 345 (N.D. Cal. 1918) (rejecting fiction that illegally seized papers belong to the United States, and holding that court-held papers so seized should be restored "to that possession from which they never should have been taken"). This is not the case, of course, with contraband. *See, e.g.*, United States v. Rykowski, 267 F. 866, 870 (S.D. Ohio 1920) (liquor stills not restored to defendant).

132 FED. R. CRIM. P. 41(e) remains important to search victims, whether or not they are suspects. *See* Zurcher v. Stanford Daily, 436 U.S. 547 (1978) (*Hayden* permits warrant for search of student newspaper for photographs that could help identify demonstrators who had fought with police, so long as there is a nexus between the sought item and a crime). Eleven years after the decision, the amended 41(e) made clear that one need not be the victim of an unlawful search in order to obtain return of evidence lawfully possessed. The victim of a lawful search is an "aggrieved" party within the meaning of the Rule if the Government retains the evidence for an unreasonably long time. Generally, however, an ongoing investigation or prosecution is reason enough. The Advisory Committee expressly rejected "an all or nothing approach whereby the government must either return records and make no copies or keep originals notwithstanding the hardship to their owner." The Committee also declined to make *ex ante* choices between retention, return with conditions that the evidence remain available, and

A trial court's alleged error in denying the motion for return of property is regarded as the denial of a constitutional right, not a property right. As such, the right does not depend on statutory authorization.[133] Still, authorization has existed since the Espionage Act, which permitted the fruits of unreasonable searches to be returned to the search victim.[134] When the Federal Rules and, soon after, Congress, codified the Espionage Act's search warrant provisions, Rule 41(e) became law in the federal district courts.

At first, the repossession remedy was a civil proceeding wholly independent of the criminal action for which the property was being held as evidence.[135] The guilt or innocence of the movant was irrelevant in the repossession proceeding,[136] and was not made part of the record or subject to appellate review of the criminal case. The Supreme Court changed all this through two 1911 decisions[137] and, more noticeably, through its 1914 decision in *Weeks v. United States*.[138] There, the Court held that the denial of Fremont Weeks' application for return of his illegally obtained property could, if challenged by a timely preliminary motion,[139] be included in the ap-

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whether to retain or destroy copies. *See* FED. R. CRIM. P. 41(e) advisory committee's note (1989).

The same amendment to the Rule clarified that repossession and suppression are separate remedies: a successful motion for return of property will not necessarily dictate a successful motion to suppress. *Id.*

133 Atkinson, *supra* note 101, at 759.

134 *Id.* The Volstead Law, 41 Stat. 315 (1915), Congress' attempt to enforce the Eighteenth Amendment, also permitted return of property obtained by illegal search. *Id.*

135 People v. Mayen, 205 P. 435, 441 (Cal. 1922).

136 One commentator surveyed civil and criminal cases where wrongful possessors attempted to rely on the hornbook law that "possession of a chattel, even without claim of title, gives the possessor a superior right to the chattel against everyone but the true owner." Helmholz, *supra* note 85, at 1221. Helmholz contended the moral worth of the possessor seeking to replevy subsequently wrongfully acquired property is always relevant to reviewing courts, despite what the hornbooks say. *Id.* at 1223.

137 BRADFORD P. WILSON, ENFORCING THE FOURTH AMENDMENT: A JURISPRUDENTIAL HISTORY 65 (1986) (citing Wise v. Mills, 220 U.S. 549 (1911) and Wise v. Henkel, 220 U.S. 556 (1911)). "The first reported instance of a motion made before trial asking the court to return papers on the ground that they had been illegally seized was in 1908 in United States v. Wilson, 163 F. 338 (C.C.S.D.N.Y. 1908)." *Id.* at 65 n.93.

138 232 U.S. 383 (1914). Weeks was running an illegal lottery enterprise through the United States mails in violation of 18 U.S.C. § 213 (1913).

139 *Id.* at 398. Courts avoid deciding collateral issues at trial whenever possible, upon the theory that the court's and jury's time and attention should remain with the primary issues. Atkinson, *supra* note 101, at 751. Much to the chagrin of Dean Wigmore, the Court in the *Weeks* case found a way to avoid the difficulty of raising a collateral issue at the trial: by pretrial motion. *See* John H. Wigmore, *Using Evidence Obtained by Illegal Search and Seizure*, 8 A.B.A. J. 479, 481 (1922) (*Weeks* is a "heretical" decision which ignores that "a defendant cannot turn a collateral fact into a material fact by merely making a formal motion before trial, instead of waiting till the offer of evidence.").

pellate review of his criminal conviction.

Although *Weeks* was limited to interference with valid possessory rights,[140] that had slight influence on lower courts subsequently faced with contraband illegally searched for and seized. Some courts admitted the evidence and the government retained it after trial; some courts suppressed the evidence but permitted the government to retain or destroy it; other courts opted for suppression and return.[141] Although at first glance the range of options suggests that the courts were creating property interests, in fact they were interpreting statutes that had stripped possessors of *any* property interest in the thing possessed, but had not stipulated what to do with that evidence after trial.[142]

2. *Repossession versus Suppression*

Cases like *Weeks*, *Silverthorne*, and *Gouled* show that suppression is not ancillary to or derivative of restoration of the property,[143] particularly when the only property right available is the prior illegal possession of contraband or stolen property.[144] Although suppression has eclipsed repossession as the chief remedy sought by criminal defendants, and while neither remedy is dependent on the other, they are complementary.[145] Both protect property and privacy.[146] This conclusion is easy once we recognize that most warrantless interferences with privacy interfere with possession of property, real or personal.

To emphasize suppression over repossession in the hierarchy of Fourth Amendment remedies misstates what property law means to

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140 WILSON, *supra* note 137, at 64.

141 Atkinson, *supra* note 101, at 760-61.

142 *Cf. id.* at 763-64 (Forfeiture laws that purport to eliminate any property rights in contraband are not fatal to repossession, since possession, unlike ownership, "is a fact and cannot be altered by legislative fiat any more than day can be changed into night by the same method.").

143 *Id.* at 760-61, 761 nn.50-51. *See also* William T. Plumb, Jr., *Illegal Enforcement of the Law*, 24 CORNELL L.Q. 337, 365-66 (1939).

144 *See* Helmholz, *supra* note 85, at 1224. Professor Helmholz's survey of the prior-possessor rule indicates that prior possessors who are also wrongdoers fare poorly, not only because civil contests between two wrongdoers are rare, but because the rule's amorality is unattractive to courts faced with parties of starkly unequal moral content.

145 The Federal Rules treat all post-indictment motions for return of property as motions to suppress as well. FED. R. CRIM. P. 41(e).

146 In fact, if the motion for return of property is granted not on the basis of a property right but on an unreasonable infringement of privacy, then the return of contraband, as well as the suppression of the evidence obtained by unconstitutional search, is justified. To do otherwise is to encourage illegal searches and seizures aimed not at prosecution and conviction, but at dispossessing search victims. *See* Atkinson, *supra* note 101, at 760.

the Amendment. A search victim who obtains suppression but not return of the property has obtained a remedy *despite* the government's superior interest in the property.[147] The reason the government cannot use the evidence in such a case is that it went about asserting its interest unlawfully, much as a victim of trespass must pay damages to her intruder if the victim's manner of ejection exceeds those legally prescribed. When government acts unlawfully, one incident of rightful possession—admissibility—is lost. There, the prior wrongful possessor (the search victim) can rely on prior possession to effect exclusion. So too, when government lawfully searches for and seizes evidence in the defendant's possession, it receives the full panoply of rights that a superior, even if temporary, possessory interest confers, including admissibility at trial.

Once a criminal prosecution runs its course, the rightful possessor will end up with the property. When, by statute, the government takes title to seized property regardless of how it was acquired (as with contraband), who ultimately gets the property is irrelevant to the outcome of the trial. When, by statute, the government's interest in the seized property is at first only temporary (as with fruits, instrumentalities, and mere evidence), that interest becomes permanent only after favorable rulings on the lawfulness of the seizure and the issue of guilt.

In sum, law enforcers may take property because a legislature lets them.[148] The legislature, in turn, must conform to the Court's constitutional norms. Thus Brennan's dismissal of property law's role in the Fourth Amendment—both in terms of the distribution of power in our tripartite form of government, and in terms of remedy—is overstated and underappreciative of the resilience of the "primary right" theory.

Once the Court distinguished property constructs from the evidence-gathering and remedial functions of search and seizure law, the recalibration of the Fourth Amendment was nearly complete. It needed only a new foundation, a new primary good; it needed privacy. Part II considers the Court's claim that privacy dethroned

147 *Cf.* Nixon v. Administrator of Gen. Services, 433 U.S. 425, 545 n.1 (1977) (Rehnquist, J., dissenting) ("A dictabelt tape or diary may be 'private' . . . in the sense that the Fourth Amendment would prohibit an unreasonable seizure of it even though in making such a seizure the government agreed to pay for the fair value of the diary so as not to run afoul of the Eminent Domain Clause of the Fifth Amendment.").

148 This is not to say that every action taken by police must have statutory support in order to be constitutional. Much warrantless police conduct occurs without specific authorization, be it legislative or judicial. *See, e.g.*, Wayne R. LaFave, *Improving Police Performance Through the Exclusionary Rule—Part II: Defining the Norms and Training the Police*, 30 Mo. L. Rev. 566 (1965).

property, and argues that the new regime resulted solely from a false dichotomy drawn between compatible values.

II. PRIVACY: A PROTECTED VALUE FROM THE START

Justice Brennan was correct in *Hayden* when he wrote that privacy has long been a Fourth Amendment value. Over 100 years ago in *Boyd* (an appeal from a court order compelling Boyd to produce invoices for imported glass), privacy played a role. To be sure, *Boyd* exalted property rights as "the great end for which men entered into society."[149] But also among Justice Bradley's many references to "private property," "personal security," and "liberty" was his insistence that the Court guard against "all invasions on the part of the government . . . of . . . the privacies of life."[150] Together, these were the "true criteria" of the Amendment.[151]

Boyd's "privacies of life" and equivalent language later appeared in the majority opinions of Harlan the Elder[152] and Justice Day,[153] and throughout Prohibition. Privacy played a part when the Court invalidated the search-by-stealth of Felix Gouled's office,[154] and two overreaching searches incident to arrest for Agnello's cocaine[155] and Lefkowitz's liquor.[156] In between *Agnello* and *Lefkowitz*,

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149 Boyd v. United States, 116 U.S. 616, 626-27 (1886) (quoting Entick v. Carrington, 95 Eng. Rep. 807 (1765)). *See also* Walton H. Hamilton, *Property—According to Locke*, 41 YALE L.J. 864, 873-74 (1932).

150 *Boyd*, 116 U.S. at 630; *see also* Coombs, *supra* note 3, at 1606-07 ("[Although] Fourth Amendment analysis traditionally began by determining whether any property right had been infringed . . . the use of property concepts to mark the boundaries of Fourth Amendment protection did not mean that privacy interests were irrelevant.").

151 *Boyd*, 116 U.S. at 630.

152 Interstate Commerce Comm'n v. Brimson, 154 U.S. 447, 478-79 (1894) ("Neither branch of the legislative department, still less any merely administrative body, established by [C]ongress, possesses, or can be invested with, a general power of making inquiry into the private affairs of the citizen.").

153 Flint v. Stone Tracy Co., 220 U.S. 107, 174-76 (1911). One challenged provision of the Corporation Tax empowered the Secretary of the Treasury, with presidential approval, to promulgate rules and regulations that would make corporate tax returns subject to public and private inspection. In rejecting petitioners' claim that the provision violated the Fourth Amendment, Justice Day stated that the Amendment was "adopted to protect against abuses in judicial procedure . . . , which invade the privacy of persons in their homes, papers, and effects." *Id.* at 174. Three years later, in Weeks v. United States, 232 U.S. 383, 390 (1914), Justice Day again referred to the Amendment's protection against "invasions of the home and privacy of the citizens," and quoted *Boyd*'s concern with protecting " 'the privacies of life.' " *Id.* at 391.

154 Gouled v. United States, 255 U.S. 298, 305-06 (1921) (lack of forcible entry made no difference to Gouled's "security and privacy of [his] home or office . . . .").

155 Agnello v. United States, 269 U.S. 20, 32-33 (1925) ("[G]overnment employees without a warrant shall not invade the homes of the people and violate the privacies of life . . . .").

156 United States v. Lefkowitz, 285 U.S. 452, 464 (1932) ("[T]he Fourth Amendment

fuller explication of privacy as a protected interest appeared in Justice Brandeis's famous dissent in *Olmstead v. United States*.[157]

Olmstead featured nonconsensual wiretaps that yielded a mass of transcripts used in the conspiracy trial of Olmstead, who ran a bootlegging ring from Seattle offices. Because the phones were tapped without entering Olmstead's property, and because he held no property interest in the telephone wires, no search or seizure occurred, even though the wiretaps violated Washington law. This permissive approach became known as the "trespass doctrine," which would survive decades of eavesdropping litigation.

Brandeis's dissent was the culmination of nearly 60 years of work begun by Judge Thomas Cooley—who coined the phrase "the right to be let alone"[158]—later embellished by E.L. Godkin of the New York *Evening Post*,[159] and again in Brandeis and Samuel Warren's article "The Right to Privacy," published in 1890 in the *Harvard Law Review*. There he suggested a right to "an inviolate personality," to "solitude and privacy" against unwanted press "gossip" and the unauthorized publication of private portraits taken by "instantaneous photographs."[160] Applying his theory to Olmstead's case, Brandeis looked to *Boyd*'s protection of the "privacies of life," and warned of government's potential to devise "[s]ubtler and more far-reaching means of invading privacy."[161] Telephone tapping, he wrote, invades the privacy of the target and everyone she calls, violating "the right most valued by civilized men"—"[t]he right to be let alone."[162]

In the 1940s[163] and '50s,[164] the Court spoke often of the Fourth

forbids every search that is unreasonable and is construed liberally to safeguard the right of privacy.").

157 277 U.S. 438, 471 (1928).

158 THOMAS M. COOLEY, COOLEY ON TORTS 29 (2d ed. 1888); ALAN WESTIN, PRIVACY AND FREEDOM 344 (1967).

159 E.L. Godkin, *The Rights of the Citizen to His Reputation*, 8 SCRIBNER'S MAG. 58, 65-67 (1890); WESTIN, *supra* note 158, at 345.

160 Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). *Accord* WESTIN, *supra* note 158, at 345.

161 *Olmstead*, 277 U.S. at 473 (Brandeis, J., dissenting).

162 *Id.* at 478 (Brandeis, J., dissenting).

163 Goldman v. United States, 316 U.S. 129 (1942). In *Goldman*, officers eavesdropped on conversations through the use of a detectaphone that was attached to, but did not penetrate, a common wall between federal agents and their suspects. Justice Murphy, in dissent, relied heavily on Brandeis while describing "the right to privacy" as "[o]ne of the great boons secured to the inhabitants of this country by the Bill of Rights." *Id.* at 136-37 (Murphy, J., dissenting). *See also* Brinegar v. United States, 338 U.S. 160, 176 (1949); Lustig v. United States, 338 U.S. 74, 79 (1949); Wolf v. Colorado, 338 U.S. 25, 27 (1949); United States v. Wallace & Tiernan Co., 336 U.S. 793, 798 (1949); Shapiro v. United States, 335 U.S. 1, 70 (1948) (Frankfurter, J., dissenting); Johnson v. United States, 333 U.S. 10, 14 (1948); Harris v. United States, 331 U.S. 145,

Amendment's protection of a right of privacy. Undoubtedly Justice Douglas was the loudest voice,[165] but not the only one. Mainstays like *Wolf v. Colorado*[166] and *Rochin v. California*[167] used language that would prepare us for the abundant privacy-oriented decisions of the '60s.[168] By 1961, when the Court in *Mapp v. Ohio* declared, "the right to privacy embodied in the Fourth Amendment is enforceable against the States,"[169] the privacy rationale announced in *Katz* could claim nearly a century of support. Just when privacy overtook property, however, may be less important than why it did so.[170]

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150 (1947); Zap v. United States, 328 U.S. 624, 628 (1946); Davis v. United States, 328 U.S. 582, 587 (1946); Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 204 n.30 (1946); Feldman v. United States, 322 U.S. 487, 492 (1944).

164 *See* Henry v. United States, 361 U.S. 98, 102 (1959); Frank v. Maryland, 359 U.S. 360, 365 (1959); Jones v. United States, 357 U.S. 493, 498 (1958); Rea v. United States, 350 U.S. 214, 217-18 (1956); Irvine v. California, 347 U.S. 128, 132-33 (1954); Salsburg v. Maryland, 346 U.S. 545, 554 n.11 (1954); On Lee v. United States, 343 U.S. 747, 754 (1952); Rochin v. California, 342 U.S. 165, 172 (1952); Stefanelli v. Minard, 342 U.S. 117, 119-20 (1951); United States v. Jeffers, 342 U.S. 48, 52 (1951); District of Columbia v. Little, 339 U.S. 1, 7 (1950); United States v. Rabinowitz, 339 U.S. 56, 66 (1950); United States v. Morton Salt Co., 338 U.S. 632, 652 (1950).

165 *E.g.*, McDonald v. United States, 335 U.S. 451, 453 (1948); Draper v. United States, 358 U.S. 307, 318-19 (1959) (Douglas, J., dissenting); Schwartz v. Texas, 344 U.S. 199, 205 (1952) (Douglas, J., dissenting); Public Utilities Comm'n v. Pollak, 343 U.S. 451, 467 (1952) (Douglas, J., dissenting); Beauharnais v. Illinois, 343 U.S. 250, 285 (1952) (Douglas, J., dissenting).

166 338 U.S. 25, 27 (1949) ("The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society.").

167 342 U.S. 165, 172 (1952) ("Illegally breaking into the privacy of the petitioner . . . the forcible extraction of his stomach's contents . . . offend [and] even hardened sensibilities.").

168 *See, e.g.*, Berger v. New York, 388 U.S. 41, 49 (1967); Camara v. Municipal Court of San Francisco, 387 U.S. 523, 528 (1967); Warden v. Hayden, 387 U.S. 294, 304 (1967); Lewis v. United States, 385 U.S. 206, 212 (1966); Osborn v. United States, 385 U.S. 323, 329 n.7 (1966); Schmerber v. California, 384 U.S. 757, 767 (1966); Linkletter v. Walker, 381 U.S. 618, 637 (1965); United States v. Ventresca, 380 U.S. 102, 105 (1965); Stanford v. Texas, 379 U.S. 476, 483 (1965); Bell v. Maryland, 378 U.S. 226, 254 (1964); Ker v. California, 374 U.S. 23, 31 (1963); Lopez v. United States, 373 U.S. 427, 438 (1963) (Douglas, J., concurring); Lombard v. Louisiana, 373 U.S. 267, 274 (1963); Wong Sun v. United States, 371 U.S. 471, 492 (1963); Lanza v. New York, 370 U.S. 139, 143 (1962); Mapp v. Ohio, 367 U.S. 643, 660 (1961); Chapman v. United States, 365 U.S. 610, 615 (1961); Elkins v. United States, 364 U.S. 206, 222 (1960); Ohio *ex rel.* Eaton v. Price, 364 U.S. 263, 272 (1960); Rios v. United States, 364 U.S. 253, 255 (1960); Abel v. United States, 362 U.S. 217, 237 (1960); Jones v. United States, 362 U.S. 257, 261 (1960).

169 *Mapp*, 367 U.S. at 660.

170 Katz, *supra* note 9, at 557-58 (social and economic changes, invention of telephone, microphone, and instantaneous photography chipped away at viability of trespass doctrine); Madeline A. Herdrich, Note, *California v. Greenwood: The Trashing of Privacy*, 38 AM. U. L. REV. 993, 999 (1989) ("The Supreme Court originally interpreted a Fourth Amendment right to privacy predicated on property law concepts."); Cheryl Kettler Corrada, Comment, *Dow Chemical and Ciraolo: For Government Investigators the Sky's No Limit*, 36 CATH. U. L. REV. 667, 671 (1987) ("Initially, the courts defined intrusion as a

The fact that definitions of privacy abound[171] testifies to its elusive meaning.[172] As to its status, we wonder, "[i]s privacy a situation, a right, a claim,[173] a form of control,[174] [or] a value?"[175] As to its characteristics, "is it related to information, to autonomy,[176] to personal identity,[177] [or] to physical access?"[178] Or is privacy a greedy[179] concept that promotes "hypersensitivity or an unjustified wish to manipulate and defraud?"[180] According to Judge Posner, the word originally criticized one's uninvolvement in affairs of state, then later became praise for being a " 'very private person.' "[181] Likewise, he claims, because "[m]ost cultures have functioned tolerably well without either the concept or the reality of privacy in either its seclusion or secrecy senses," it cannot be "a precondition to val-

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physical trespass on private property."). *But see* Tom Bush, Comment, *A Privacy-Based Analysis for Warrantless Aerial Surveillance Cases*, 75 CAL. L. REV. 1767, 1791 (1987) ("[T]he Court never equated fourth amendment rights with property law.").

171 *See, e.g.*, Richard Posner, *Privacy, Secrecy, and Reputation*, 28 BUFF. L. REV. 1, 2 (1979); Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 425-28 (1980); Granston, *supra* note 20, at 1321-22 ("Privacy is an evanescent term that has been used by scholars and courts alike to refer to a plethora of legally cognizable claims").

172 Gavison, *supra* note 171, at 424.

173 Westin, *supra* note 158, at 7 (defining privacy as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others").

174 CHARLES FRIED, AN ANATOMY OF VALUES 140 (1970) (defining privacy as "the control we have over information about ourselves"); Hyman Gross, *The Concept of Privacy*, 42 N.Y.U. L. REV. 34, 35-36 (1967) (defining privacy as control over acquaintance with one's personal affairs.); Edward Shils, *Privacy: Its Constitution and Vicissitudes*, 31 LAW & CONTEMP. PROBS. 281, 282 (1966) ("[P]rivacy exists where the persons whose actions engender or become the objects of information retain possession of that information, and any flow outward of that information from the persons to whom it refers (and who share it where more than one person is involved) occurs on the initiative of its possessors.").

175 Gavison, *supra* note 171, at 471. Sir James Fitzjames Stephen said simply that anything "indecent" violates privacy. J.F. STEPHEN, LIBERTY, EQUALITY, FRATERNITY 160 (R.J. White ed., Cambridge Univ. Press 1967) (1873).

176 Gavison, *supra* note 171, at 423 (privacy promot[es] "liberty, autonomy, selfhood, and human relations"); PRIVACY AND THE LAW, A REPORT BY THE BRITISH SECTION OF THE INTERNATIONAL COMM'N OF JUSTICE ¶ 19 (1970) (Privacy is "that area of a man's life which . . . a reasonable man with an understanding of the legitimate needs of the community would think it wrong to invade.").

177 Warren & Brandeis, *supra* note 160, at 205-07; WESTIN, *supra* note 158, at 345.

178 Gavison, *supra* note 171, at 424; WESTIN, *supra* note 158, at 7 ("privacy is the voluntary and temporary withdrawal of a person from the general society through physical or psychological means").

179 Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 261 (1977) ("[P]rivacy may still look . . . like too greedy a concept to let into the storehouse of legal rules and principles.").

180 Gavison, *supra* note 171, at 422 (*citing* Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 329 & n.22 (1966) (hypersensitivity) and Posner, *supra* note 171, at 1 (manipulation and fraud)).

181 Posner, *supra* note 171, at 3.

ued human qualities such as love and friendship, let alone . . . a prerequisite of sanity."[182] As such, Posner calls privacy "a cultural artifact rather than an innate human need."[183]

It is beyond the aim of this Article to define privacy or even to criticize the definitions of those who have. It also has been beyond the aim of the Supreme Court. Other than having coined the covenient shorthand "reasonable expectation of privacy,"[184] the Court has taught us little about what privacy is. We know that it is a "zone,"[185] related somehow to the "right to be let alone,"[186] "more than the mere aggregation of a number of entitlements to engage in specific behavior,"[187] and not "a discrete commodity possessed absolutely or not at all."[188] Privacy is an "expectation,"[189] protected only if "actual";[190] that is, it must be more than a "hope."[191] The expectation must be "reasonable"[192] and "legitimate"[193] (which are "interchangeable"),[194] and "justifiable,"[195] (which is not),[196] unless it is "inherently"[197] so. Occasionally the justices' struggle with the

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182 *Id.* at 6.

183 *Id.*

184 Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

185 United States v. Miller, 425 U.S. 435, 440 (1976).

186 Bowers v. Hardwick, 478 U.S. 186, 199 (1986).

187 *Id.* at 206 (Blackmun, J., dissenting).

188 Smith v. Maryland, 442 U.S. 735, 749 (1979) (Marshall, J., dissenting); Rakas v. Illinois, 439 U.S. 128, 146 (1978) (privacy is not "absolute").

189 Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

190 *Id.*

191 California v. Rooney, 483 U.S. 307, 321 (1987) (White, J., dissenting from denial of certiorari).

192 Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978).

193 *Id.*

194 Dow Chemical Co. v. United States, 476 U.S. 227, 248 n.9 (1986). *But see* Michael Campbell, Comment, *Defining a Fourth Amendment Search: A Critique of the Supreme Court's Post-Katz Jurisprudence*, 61 WASH. L. REV. 191, 195-96 (1986) (reasonable and legitimate are not interchangeable).

195 Hudson v. Palmer, 468 U.S. 517, 525 (1984).

196 *But cf.* Coombs, *supra* note 3, at 1609 n.65 (after noting that "reasonable" comes from Harlan's concurrence in Katz v. United States, 389 U.S. 347, 360 (1967), "legitimate" from Powell's opinion for the Court in Couch v. United States, 409 U.S. 322, 336 (1973), and "justifiable" from Justice Stewart's majority opinion in *Katz*, 389 U.S. at 353, Coombs groups "reasonableness" with "justifiability" as "definitional stops," whereas " 'legitimacy' implies an assessment not merely of the privacy interest but also of the activity or object sought to be protected"); Tomkovicz, *supra* note 9, at 686-87, 686 nn.167-68, 687 nn.169-70 (tracing "the linguistic evolution of the description of the core interest," including the words "reasonable," "justifiable," and "legitimate"); Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473, 498 (1991) ("[In *Rakas*,] Justice Rehnquist shifted the inquiry from a violation of a reasonable expectation of privacy to a violation of a legitimate expectation of privacy.").

197 United States v. Karo, 468 U.S. 705, 724 (1984).

word is candid ("What are 'private' premises?"),[198] but any meaning it may have for the Court emerges only by cataloging a stack of highly factualized[199] holdings that assess whether a given defendant's expectations were reasonable. Not surprisingly, finding out where privacy lies requires resort to one of the Court's many "balancing" tests.[200]

There have been some powerful critiques of the Court's ubiquitous balancing formulae.[201] Tracing formulaic jurisprudence as far back as Chief Justice Marshall,[202] Professor Robert Nagel asserts that the Court's slew of tests is meant to infuse the law with objectivity, to answer skeptics, convince readers, constrain the Court itself, and make the Court highly fact-responsive.[203] Yet "[d]espite their superficial precision, . . . the formulae are . . . multiple, repetitive, shifting, and sometimes inconsistent demands," which reflect "intellectual embarrassment about the existence of judicial discretion but [are] designed to assure plentiful opportunities for its exercise."[204]

Professor Alexander Aleinikoff notes balancing's "respectable intellectual pedigree," as well as its ability to juggle flexibility and legitimacy while "keep[ing] everyone in the game," which any side could win.[205] This "upbeat, 'can-do' judicial attitude,"[206] he suggests, ostensibly "provides a careful, sensitive, thoughtful way to

198 Rakas v. Illinois, 439 U.S. 128, 146 (1978).

199 Francis Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 ILL. L. REV. 1, 4-5 (1950); Wayne R. LaFave, *The Forgotten Motto of Obsta Principiis in Fourth Amendment Jurisprudence*, 28 ARIZ. L. REV. 291, 310 (1986).

200 Hudson v. Palmer, 468 U.S. 517, 527 (1984); Wilkens, *supra* note 3, at 1081 (Court's determination of when a search occurs turns on location, degree of governmental intrusiveness, and nature of activity intruded upon); *see also* Brown v. Illinois, 422 U.S. 590, 603 (1975) (addressing the manner in which the Court determines the influence that an illegal arrest had on the admissibility of a subsequently obtained confession, the Court declared that "no single fact is dispositive"); Coombs, *supra* note 3, at 1600 n.24 ("[T]he usual mode of Fourth Amendment analysis involves balancing competing interests.").

201 *See, e.g.*, T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 945 (1987) ("By a 'balancing opinion,' I mean a judicial opinion that analyzes a constitutional question by identifying interests implicated by the case and reaches a decision or constructs a rule of constitutional law by explicitly or implicitly assigning values to the identified interests."); Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 180 (1985); Frank I. Michelman, *The Supreme Court, 1985 Term—Traces of Self-Government*, 100 HARV. L. REV. 4, 34 (1986); Mark Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307, 1334-39 (1979).

202 Nagel, *supra* note 201, at 184-88.

203 *Id.* at 180-81.

204 *Id.* at 202.

205 Aleinikoff, *supra* note 201, at 960-61.

206 *Id.* at 963.

dispense justice, to give each his or her due."[207] But, Aleinikoff cautions, some values resist easy comparison and cost-benefit analyses.[208] Judges often depreciate the value of one or more interests at stake,[209] and claim to engage in balancing without actually doing so.[210] These defects, *inter alia*, make balancing more program than method,[211] where the "weighing mechanism remains a mystery, and the result is simply read off the machine."[212] Turning to searches and seizures, Aleinikoff cites nine Fourth Amendment themes that involve balancing tests.[213] These tests create "the illusion that . . . hard constitutional choices can be avoided . . . through the inexorable analytic magic of such equations."[214] Under the guise of "[t]hree pronged tests, two-tier standards, and cost-benefit analyses,"[215] "the Court in fact engages in an unanalyzed exercise of judicial will."[216]

When piled on the uncertain contours of privacy, the Court's discretion-laden balancing approach thus must take some blame for the conflicting search-and-seizure decisions, even though neither privacy nor balancing poses much difficulty in the vast number of encounters that never make it to the Supreme Court. In this sense, my pejorative description of the Court's use of privacy goes too far, if it says we do not know what privacy is, simply because it becomes difficult to identify at the edges—in the borderline cases. Rather, the absence of criteria for the applicability of a concept about whose usage there is general agreement does not challenge our understanding of or invalidate the concept, but invalidates the request for criteria of the proposed kind.[217] We *do* know what privacy is; its

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207 *Id.* at 962.

208 *Id.* at 975 (noting, for example, "the exclusionary rule cases, which 'weigh' the 'likely social benefits of excluding unlawfully seized evidence' against the costs of 'loss of often probative evidence and all of the secondary costs that flow from the less accurate or more cumbersome adjudication that therefore occurs.' ").

209 *Id.*

210 *Id.*

211 *Id.* at 982 (quoting Isay, *The Method of the Jurisprudence of Interests: A Critical Study*, *in* THE JURISPRUDENCE OF INTERESTS 321 (Magdelena Schock ed. 1948)).

212 *Id.* at 993.

213 *Id.* at 964-65 (defining search, reasonableness of a search, reasonableness of a seizure, meaning of probable cause, the level of suspicion required to support stops and detentions, the scope of the exclusionary rule, the necessity of obtaining a warrant, and the legality of pretrial detention of juveniles) (Citations omitted).

214 *Id.* at 992 (quoting Laurence H. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592, 620 (1985)).

215 *Id.*

216 *Id.* at 922 n.273.

217 JOHN R. SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE 10 (1974). Searle elegantly makes this point in his discussion of analyticity—that which makes a statement "true in virtue of its meaning or by definition." For example, "Rec-

meaning blurs only at the borders. But, as we see below, on the issue of privacy, the Court is too easily puzzled, too quick to find a case to be borderline. In this next section, I consider some Fourth Amendment concepts that frequently occupy the Court's attention. Were the Court to rely more heavily on the positive law—once "workable" but "unjust,"[218] now purportedly "clumsy" and "overinclusive"[219]—few of the cases that these concepts have generated would be truly puzzling.

III. THE FALSE DICHOTOMY OF PRIVACY AND PROPERTY

Identifying when a search or seizure occurs, and who may challenge or authorize either are the Fourth Amendment concerns that should hinge on the positive law. With the exception of its doctrine on seizures of property,[220] the Court has refused—at times obsti-

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tangles are four-sided" is analytic, whereas "My son is now eating an apple" is not; the latter statement is not analytic because its truth must be verified. *Id.* at 4-11. Answering a critic who found where the meaning of analyticity becomes unclear, Searle writes:

> The example has its effect precisely because it is a borderline case. We do not feel completely comfortable classifying it either as analytic or non-analytic. But our recognition of it as a puzzling case, far from showing that we do not have any adequate notion of analyticity, tends to show precisely the reverse. *We could not recognize borderline cases of a concept as borderline cases if we did not grasp the concept to begin with.*

Id. at 8 (emphasis added).

218 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 3.2, at 125 (2d ed. 1992).

219 *See* Coombs, *supra* note 3, at 1632.

220 No doubt the Fourth Amendment protects a range of interests unrelated to privacy; *Katz* tells us so. *See Katz*, 389 U.S. at 350 ("The Fourth Amendment . . . protections . . . often have nothing to do with privacy at all."); Coombs, *supra* note 3, at 1610 n.70 ("A seizure is an interference with the right of possession and use of an object and has nothing to do with privacy as such.") (citing United States v. Salvucci, 448 U.S. 83, 91 n.6 (1980)). In 1984, six members of the Court agreed that "a physical trespass" was "only marginally relevant," and "neither necessary nor sufficient" to establish a seizure. United States v. Karo, 468 U.S. 705, 712-13 (1984). The Court so concluded even though the trespass—the transfer of a container with a hidden bug in it unbeknownst to the recipient—might have been a " 'meaningful' " " 'interference' with possessory rights; the right to exclude." *Id.* at 729 (Stevens, J., dissenting in part). *Cf.* Note, *Tying Privacy in Knotts: Beeper Monitoring and Collective Fourth Amendment Rights*, 71 VA. L. REV. 297, 334, 337 n.188, 338 nn.189-92 (1985) (criticizing seizure-based attack on governmental activity for its attempt to strike at monitoring by invalidating installation, which may invade no Fourth Amendment interest). That reasoning lost some ground, however, in Soldal v. Cook County, 113 S. Ct. 538 (1992), where the Court unanimously reversed the Seventh Circuit's holding that carrying away someone's mobile home (without legal process or the homeowner's assent) is not a Fourth Amendment seizure. *See* Soldal v. County of Cook, 942 F.2d 1073 (7th Cir. 1991) (en banc). For the Seventh Circuit, the transportation of the home implicated no privacy interest of the homeowner, thus no Fourth Amendment activity occurred. However "novel" or "interesting and creative" Judge Posner's claim that possessory interests are not protected by the Fourth Amendment may have been, *Soldal*, 113 S. Ct. at 544, 547, the Court reversed the "narrow," "difficult[]," "puzzl[ing]," "fearful," and "exaggerated" decision below without

nately—to "import into the law . . . subtle distinctions, developed and refined by the common law in the evolving body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical."[221] We must reject state law when constructing federal constitutional guarantees, the argument goes, to protect those guarantees from the taint of local constructs that "almost by definition entail governmental protection from third parties," rather than from government itself.[222]

The Court's contempt for the positive law, however, is misguided. Some expressions of local law are highly relevant, even determinative, of the scope of the Fourth Amendment; others are not. Accepting, *arguendo*, that privacy is the core interest protected by the prohibition on unreasonable searches, then at a minimum, the positive law should control when the interests it furthers are coterminous with those of privacy.[223] Whatever privacy means, it surely must include the right to exclude others.[224] Thus, laws governing trespass and abandonment reflect the goals of the Fourth Amendment; so do many landlord-tenant laws, and contracts about property. Because the positive law defines and enforces these expectations, it provides a more fixed boundary than the *Katz* case-by-case grasp for unexpressed expectations of privacy.

Until the positive law catches up with expanding property con-

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dissent. *Id.* at 543, 547-48. It is not so much that property rights are "only marginally relevant," the Court explained. Rather, as *Hayden* and *Katz* recognized that "protection of privacy" is the " 'principal' object of the Amendment," property could no longer be "the sole measure" of protection. But this is not to say, added the Court, that "this shift in emphasis had snuffed out" the propriety of considering property law in a Fourth Amendment context. *Id.* at 544-45.

221 Jones v. United States, 362 U.S. 257, 266 (1960).

222 David P. Currie, *The Constitution and the Supreme Court: 1921-1930*, 1986 DUKE L.J. 65, 75 ("life and liberty" are rights protected from the state, not from third parties).

223 To some extent I agree with Professor White's claim that "government must forego any benefits it acquires by the violation of [one's] property rights," although White holds only property rights in high regard, and is content with nontrespassory surveillance. *See* James B. White, Comment, *Forgotten Points in the "Exclusionary Rule" Debate*, 81 MICH. L. REV. 1273, 1283-84 (1983); William C. Heffernan, *On Justifying Fourth Amendment Exclusion*, 1989 WIS. L. REV. 1193, 1209 n.49 ("White's 'pure theory' offers no protection for privacy interests that cannot be linked to property interests."); *cf.* Katz, *supra* note 9, at 583-84 (personal security is protected only if informational privacy is protected, which is intruded upon when, *inter alia*, government "us[es] means which constitute a violation of substantive criminal or tort law").

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

Reich, *supra* note 109, at 771.

cepts,[225] however, *Katz* remains a necessary supplement to the positive law.[226] But *Katz* currently works too hard for too little, complicating some matters better settled without it. In this sense, Ross Perot was right: there really "are great plans lying all over [which] nobody ever executes."[227]

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225 ALAN RYAN, PROPERTY AND POLITICAL THEORY 122-23 (1984) (Hegel's property focuses on control, not on exclusion of others) (citing G. HEGEL, THE PHILOSOPHY OF HISTORY 17-20 (1956)); Bush, *supra* note 170, at 1792 n.162 ("Property rights are violated whenever government activity unreasonably impairs one's ability to use his possessions."); Coombs, *supra* note 3, at 1615 n.92 ("If property seems too narrow to encompass much of what seems worthy of protection, that perception may reflect a failure of imagination rather than anything inherent in the notion of property. . . . In fact, property notions embedded in such fields as trusts, corporations, and intellectual property are often quite expansive; some contemporary writers conceptualize property as 'an aspect of relations between people.' "); Dutile, *supra* note 121, at 12-13 ("It would . . . be a simple matter to hold that the field or scope of an electronic device trespasses to the same extent as does a wooden pole used to remove articles from within a building by one who does not actually go onto the property."). *But see* Coombs, *supra* at 1615 n.92 ("[A] reconceptualization [of expanded property rights] might leave 'property' as vague as 'expectations of privacy' often is now.").

226 *Cf.* Gerald G. Ashdown, *The Fourth Amendment and the "Legitimate Expectation of Privacy"*, 34 VAND. L. REV. 1289, 1321-29 (1981) (Court's renunciation of property interests flouts plain language of the amendment and Court's own precedents); Eulis Simien, Jr., *The Interrelationship of the Scope of the Fourth Amendment and Standing to Object to Unreasonable Searches*, 41 ARK. L. REV. 487, 509 (1988) ("One of the most troubling points with the *Rakas* progeny is that the Court rewrote the Fourth Amendment and in doing so struck the Amendment's protections of papers and effects right out of the Constitution."); Tomkovicz, *supra* note 9, at 658 n.58 ("Reliance upon property elements does not contravene *Katz*"); Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 268 (1984) ("[T]he Court unquestionably intended [the privacy approach in *Katz*] to expand, not to replace, the Fourth Amendment's traditional coverage"); Bush, *supra* note 170, at 1794 ("[F]ourth amendment privacy rights . . . foster a sense of security and personal freedom by supplementing property law concepts when they prove inadequate."); David W. Cunis, Note, *California v. Greenwood: Discarding the Traditional Approach to the Search and Seizure of Garbage*, 38 CATH. U. L. REV. 543, 567-68 (1989) ("[T]he concept of privacy is often inextricably tied to property interests."); Kent M. Williams, Note, *Property Rights Protection Under Article I, Section 10 of the Minnesota Constitution: A Rationale for Providing Possessory Crimes Defendants with Automatic Standing to Challenge Unreasonable Searches and Seizures*, 75 MINN. L. REV. 1255, 1269 n.57 (1991) (restricting "Fourth Amendment protections to privacy interests is contrary to the historical underpinnings of the amendment."); Gregory S. Fisher, Comment, *Search and Seizure, Third-Party Consent: Rethinking Police Conduct and the Fourth Amendment*, 66 WASH. L. REV. 189, 206 (1991) ("[A]lthough courts speak of privacy rights and have avoided tying the Fourth Amendment to property concepts, property and privacy are difficult to distinguish."). *But see* Mickenberg, *supra* note 9, at 212 (Justice Harlan's " 'privacy' rule was meant to supplant, not supplement the 'trespass' and 'property rights' views of the Fourth Amendment.").

227 During the first presidential debate with then Governor Bill Clinton, independent candidate Perot, in response to ABC news reporter Ann Compton's question about how Perot would "use the powers of the presidency to get more people back into good jobs," made the following statement:

> Step one, . . . we will . . . take all the plans that exist and do something with them. Please understand there are great plans lying all over [which] nobody ever executes.

A. EXPECTATIONS OF PRIVACY OUTSIDE THE FOURTH AMENDMENT

Once freed from the hold of property law, to what did the Court tie our "reasonable expectations?" A decade after *Katz*, the Court recognized that constitutionally protected expectations must lie somewhere outside of Supreme Court holdings. That recognition appeared in *Rakas v. Illinois*,[228] which denied Rakas a privacy expectation in a car in which he was a passenger, ostensibly for his failure to claim a possessory interest in the car or the instruments of a robbery found therein. In his majority opinion, Justice Rehnquist wrote as follows:

> Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. One of the main rights attaching to property is the right to exclude others, . . . and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude. Expectations of privacy . . . need not be based on a common-law interest in real or personal property, . . . [b]ut . . . the Court has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by that Amendment.[229]

Rehnquist later clarified in *Rawlings v. Kentucky*[230] that "in all likelihood" did not mean "in all circumstances." There, the Court rejected Rawlings's claim that his ownership of drugs found in the search of an acquaintance's purse violated his privacy. *Rakas*, Justice Rehnquist reasoned, had made "ownership" "one fact to be considered," but "emphatically rejected the notion that 'arcane' concepts of property law ought to control . . . the Fourth Amendment."[231]

The authors of separate opinions in *Rakas* and *Rawlings* thought the majority had given property law too much[232] or too little[233]

It's like having a blueprint for a house you never built; you don't have anywhere to sleep. Now, our challenge is to take these things, do something with them.

Presidential Debate on the Campus of Washington University, Federal News Service, Oct. 11, 1992, *available in* LEXIS, Campaign Library, Federal News Service File.

228 439 U.S. 128 (1978).

229 *Id.* at 143 n.12.

230 448 U.S. 98 (1980).

231 *Id.* at 104-05. In United States v. Salvucci, 448 U.S. 83 (1980), decided the same day as *Rawlings*, the Court rejected defendants' claim that their having been charged with a possessory offense conferred automatic standing on them to challenge a search conducted under a defective warrant of Salvucci's co-defendant's mother's apartment. "While property ownership is clearly a factor to be considered in determining whether an individual's Fourth Amendment rights have been violated," wrote the Court, "property rights are neither the beginning nor the end of this Court's inquiry." *Id.* at 91.

232 Justice White chastized the *Rakas* majority for tying the Fourth Amendment to property law, when the Amendment's privacy basis traditionally has made ownership and possession unnecessary as a condition to a search victim's right to suppress evi-

credit, even though nothing in Rehnquist's opinions tells us how much weight the "consider[ation]" deserves.[234] Justice Blackmun told us in *Rawlings* that property rights should occupy a position somewhere above that given them by Rehnquist, but below that of the pre-*Katz* era:

> Nor do I read this Court's decisions to hold that property interests cannot be, in some circumstances, at least, weighty factors in establishing the existence of Fourth Amendment rights. Not every concept of ownership or possession is 'arcane.' Not every interest in property exists only in the desiccated atmosphere of ancient maxims and dusty books . . . . In my view, th[e] "right to exclude" often may be a principal determinant in the establishment of a legitimate Fourth Amendment interest.[235]

Despite the "weighty" and "principal" status of property law, Blackmun concluded that Rawlings's ownership of the drugs was insufficient to ground a privacy interest, but more convincing evidence of a bailment contract between the parties (another expectation expressed in the positive law) would have led him to conclude otherwise.[236] Justice Marshall dissented, agreeing with Blackmun's

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dence. *Rakas*, 439 U.S. at 156 (White, J., dissenting). *Cf.* Owen Fiss, *The Supreme Court, 1978 Term*, 93 HARV. L. REV. 60, 178 (1979) ("In the name of developing the *Katz* 'privacy' test, the *Rakas* Court has instead revived the centrality of property and possession by explicitly investing only the owner/possessor with a clear 'legitimate expectation.' "); Tomkovicz, *supra* note 9, at 732 ("the exercise of associational freedom necessarily involves convening with others in various places . . . where we possess no authority or ability to erect special barriers to access, or where exclusion of others is contrary to the purpose of the convocation.").

233 *Rawlings*, 448 U.S. at 111-13 (Blackmun, J., concurring); *id.* at 114-20 (Marshall, J., dissenting). *Cf.* Albert W. Alschuler, *Interpersonal Privacy and the Fourth Amendment*, 4 N. ILL. U. L. REV. 1, 13 (1983) ("[*Rakas*] did not elevate property rights over privacy rights so much as it diminished the value of both.").

234 *Cf.* Mickenberg, *supra* note 9, at 219 ("*Katz* and *Alderman* . . . [held] that the property right is merely one of many factors to consider in deciding Fourth Amendment issues. *Rakas* carried this line of reasoning to its logical conclusion by holding that the *Jones* test . . . was not dispositive, and was but one of many issues to consider."); *id.* at 223 ("[T]he *Rawlings* majority . . . list[ed] numerous factors other than possession of the purse which could have given the defendant a legitimate expectation of privacy."); Coombs, *supra* note 3, at 1609-10 ("In the decades since *Katz*, the relevance of property to Fourth Amendment law has been unclear . . . . Property clearly remains significant in assessing challenges to seizures. Even when inquiry is limited to searches . . ., property may be relevant as an indicium of legitimate expectations of privacy.").

235 *Rawlings*, 448 U.S. at 112 (Blackmun, J., concurring). *But see* Mickenberg, *supra* note 9, at 223 n.128 (suggesting that Blackmun "urges the adoption of such a fixed rule").

236 Professor LaFave properly criticized the Court for its failure to see that a bailment had in fact occurred, and for ignoring the legal consequences of such an arrangement. 4 WAYNE R. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.3(c), at 308-12 (2d ed. 1987). *Cf.* Coombs, *supra* note 3, at 1616-17 n.96 (because bailment contracts rarely declare scope of interests in anticipation of police infringement on shared privacy, the law should "develop a set of presumptions based on the

statement that not all property law is "arcane." But Marshall's endorsement, too, was pitched at too high a level of abstraction to be instructive. "Rejection of those finely drawn distinctions as irrelevant to the concerns of the Fourth Amendment," he wrote, "did not render property rights *wholly outside* its protection."[237]

B. DESERVING CLASSES OF NONTRESPASSERS

Notwithstanding its tentative and fragmented position on the role of property law, the Court repeatedly has recognized that a real property owner in possession, her lessee, or an overnight guest all have protected privacy interests in the premises. In 1960, in *Jones v. United States*,[238] the first of two overnight-guest cases, the Court addressed whether Jones, as Evans's guest, could challenge the search for and seizure of narcotics found in an awning outside Evans's apartment. Jones lived elsewhere and paid no rent, but had a key to the apartment, had a suit and shirt inside, had stayed there "maybe a night," and was friendly with Evans, who had been gone several days.[239]

Only two pages of Justice Frankfurter's opinion for the Court addressed whether Jones could challenge the search and seizure. He rejected an analysis that would turn on whether Jones was a mere guest or invitee as opposed to a lessee or licensee, who "in a 'realistic sense, ha[s] dominion of the apartment' or who [is] 'domiciled' there."[240] "Distinctions such as those between 'lessee,' 'licensee,' 'invitee' and 'guest,'" Frankfurter said, "often only of gossamer strength, ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards."[241] Because Evans had authorized Jones's presence in the apartment, Jones was "legitimately on the premises" and, as such, an "aggrieved party" for Fourth Amendment purposes.[242] To Frankfurter,

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expectations of most people regarding the extent to which . . . commercial bailors should protect the bailee's interests"); *id.* at 1618 ("[C]ourts should recognize that a gratuitous bailment gives rise to expectations of shared privacy even though the bailee has only a minimal legal claim against the bailor."); Alschuler, *supra* note 233, at 19 (one "who entrusts property to a relative, friend or confederate in crime ordinarily has a reasonable expectation of privacy in any private place where the bailee stores this property"); Tomkovicz, *supra* note 9, at 733 n.354 ("It is arguable that people need opportunities to turn their property and information over to others to fully realize the benefits of association.").

237 *Rawlings*, 448 U.S. at 119 (Marshall, J., dissenting) (emphasis added).

238 362 U.S. 257 (1960).

239 *Id.* at 259.

240 *Id.* at 265.

241 *Id.* at 266.

242 *Id.* at 265, 267.

property law thus was important and unimportant at once: distinctions among various lawful entrants onto land were unimportant, but the status of trespasser *vel non* was critical.

Jones's disdain for property law's "subtle distinctions . . . whose validity is largely historical"[243] is to this day a slogan of the Court. Recently putting the slogan to work, the Court in its second overnight-guest case, *Minnesota v. Olson*,[244] insisted that *Jones* stood only for the " 'unremarkable proposition that a person can have a legally sufficient interest in a place other than his own home.' "[245] Jones, noted the *Olson* Court, "was much more than just legitimately on the premises."[246]

The day after Olson had driven the getaway car in the felony-murder of a gas-station attendant, police arrested him while illegally entering a home occupied by two women with whom he was staying.[247] Although Jones had a key and exclusive "dominion and control" over his absent friend's apartment, whereas Olson had neither, the Court held that his status as an overnight guest made Olson a party aggrieved by the unlawful entry.[248]

Justice White's privacy analysis for the 7-2 Court thus looked to a source outside the Fourth Amendment: the customs of overnight guests. Olson's privacy came from "a longstanding social custom" by which "we travel to a strange city, . . . visit . . . relatives out-of-town," seek temporary shelter "when we are in between jobs or homes, or when we house-sit for a friend." Because "[w]e will all be hosts and . . . guests many times in our lives,"[249] houseguests need Fourth Amendment protection. The Court dug deeper into these relationships, referring to the vulnerability that leads guests to seek shelter in private places. Control of the house is not the point, insisted the Court; permission to be there is.[250] Even without actual control, guests usually get their way, particularly when the host is away.[251] In sum, the Court saw the host-guest relationship as mutually deferential.

How does such a sensitive, factualized approach improve a le-

243 *Id.* at 266.
244 495 U.S. 91 (1990).
245 *Id.* at 97-98 (quoting Rakas v. Illinois, 439 U.S. 128, 141-42 (1978)).
246 *Id.*
247 *Id.* at 93-94.
248 *Id.* at 98.
249 *Id.*
250 *Id.* at 99.
251 *Id.* at 99-100. *But see* Lloyd L. Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 60 (1974) ("[I]t would violate our ordinary understanding of their temporary living arrangement if the guest admitted strangers in the absence of his host.").

gitimately-on-the-premises analysis? Why should an illegal search of a car (*Rakas*) and a purse (*Rawlings*) generate seven separate opinions toiling over whose rights police violated? In the Court's view, a doctrine requiring no more than lawful presence at the place searched or a valid possessory interest in the thing seized would make successful challengers out of "mere passenger[s]" like Rakas, bailors like Rawlings who enter into "sudden bailment[s]," "casual visitor[s]" who "happened to be in the kitchen . . . at the time of the search" of another's basement,[252] or Justice Black's dreaded janitor whose boss' premises were illegally searched.[253] Thus a flat ban only on trespassers would protect undeserving classes of lawful entrants whose connections to the searched premises are weaker than those of overnight guests.

The exchange is unprofitable, particularly since janitors and casual visitors *are* related to the illegally searched premises, and typically will appear at suppression hearings as owners or possessors of the thing searched or seized. Nothing is gained by attempting to plot entrants on a continuum whose only two meaningful points—lawfully present or not—sit conspicuously at either end. Before *Rakas*, the Court had often acknowledged a search victim's property interest in the place searched or thing seized as evidence of a constitutionally protected interest.[254] *Rakas* permits the Court to do what it once said it could not—untie the search from the seizure[255]—thus

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252 Rakas v. Illinois, 439 U.S. 128, 142 (1978).

253 Mancusi v. DeForte, 392 U.S. 364, 375-76 (1968) (Black, J., dissenting).

254 United States v. Miller, 425 U.S. 435 (1976) (petitioner lacked privacy expectation in records in possession of bank); Brown v. United States, 411 U.S. 223 (1973) (Brown's challenge unsuccessful for his failure to allege possessory interest in Knuckles' warehouse or goods seized there); Alderman v. United States, 394 U.S. 165 (1969) (absent homeowner could challenge illegally seized conversations to which he was neither a party nor present during); Mancusi v. DeForte, 392 U.S. 364 (1968) (possessory interest—not title—of union official in one-room office shared with others confers standing on official); Simmons v. United States, 390 U.S. 377, 391 (1968) ("The only, or at least the most natural, way in which he could have found standing to object to the admission of the suitcase was to testify that he was its owner."); Stoner v. California, 376 U.S. 483 (1964) (hotel night clerk cannot authorize intrusion of hotel guest's room); Chapman v. United States, 365 U.S. 610 (1961) (lessor could not authorize invasion of absentee lessee's valid possessory interest in leasehold); Jones v. United States, 362 U.S. 257 (1960) (houseguest who was legitimately on premises was person aggrieved for purposes of Fourth Amendment); Abel v. United States, 362 U.S. 217 (1960) (defendant abandoned property interest in rented hotel room and contents of trash can therein by turning in key to hotel manager); United States v. Jeffers, 342 U.S. 48 (1951) (search could not be untied from seizure of Jeffers' goods); McDonald v. United States, 335 U.S. 451, 458 (1948) (Jackson, J., concurring) ("each tenant of a building" has a "constitutionally protected interest in the integrity and security of the building against unlawful breaking and entry"); Olmstead v. United States, 277 U.S. 438 (1928) (conversants have no possessory interest in phone wires).

255 *Jeffers*, 342 U.S. at 52. A warrantless entry into the hotel room of Jeffers' aunts by a

discounting the importance of one's possessory interest in the thing seized.[256] Now, a search victim needs a socially significant relationship with the place searched before she can complain about the thing seized. As a result, rejecting the "no trespassing" principle in *Jones* has produced a new standard, under which courts must measure the extent to which a lawful entrant whose head never touches a pillow participates in "longstanding social custom[s]," is "vulnerabl[e]," and is subject to reciprocity and deference.[257] What once was an assessment of "who is a trespasser," has become one of "who among nontrespassers deserves Fourth Amendment protection?" Thus the critique of property-based analysis has shifted from charges of too stingy to too permissive, and for no good reason. Contrary to the Court's and others' conclusions, it would be much easier, perhaps more just, and would make us no poorer in our zeal to bring criminals to book were we to grant relief to litigants like Rakas and Rawlings.[258]

C. UNLAWFUL VANTAGE POINTS

Even a trespass by law enforcement is irrelevant to whether the government has engaged in a Fourth Amendment search[259] so long

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narcotics agent revealed cocaine and codeine, kept in violation of federal criminal laws. The drugs were found inside a box in the room's closet. Entry was made with the help of hotel employees. The aunts paid for the room, but Jeffers had a key and permission to enter at will. "[T]heir intrusion was conducted surreptitiously and by means denounced as criminal," wrote the Court. *Id.* Without saying that there was no violation of Jeffers' privacy, the Court excluded the evidence because, at the least, the seizure was illegal. *Id.*

256 *Compare* Alschuler, *supra* note 233, at 14-17 (*Rawlings* Court misunderstood difference between search and seizure, the latter of which is clearly property based) *and* William A. Knox, *Some Thoughts on the Scope of the Fourth Amendment and Standing to Challenge Searches and Seizures*, 40 MO. L. REV. 1, 52 (1975) ("[I]f I hid my gun in a neighbor's house without his consent and the police searched his house illegally, I should be able to challenge the seizure of the gun but not the search of the house, because I had no right of privacy in the house.") *with* Weinreb, *supra* note 251, at 66 ("In a situation in which neither privacy of presence nor privacy of place is involved, a person's relationship to a seized item, however incriminating, does not establish any interest in privacy that the Fourth Amendment protects.").

257 Minnesota v. Olson, 495 U.S. 91, 98-99 (1990).

258 *But cf.* Coombs, *supra* note 3, at 1624 ("The test the [*Jones*] Court adopted, however, was broader than necessary to respond to genuine relational concerns and thus vulnerable to the scathing criticism it received in *Rakas v. Illinois*. . . . People may frequently be in a place legitimately without having the sort of intimate relationship with its owner that would justify a derivative Fourth Amendment claim."); *id.* at 1632 (calling *Jones* "overinclusive" and "clumsy"); Letter from Wayne R. LaFave to the author (Mar. 26, 1993) (on file with author) ("[E]xtreme versions of standing, it seems to me, provide unnecessary ammunition for those who seek abolition of the exclusionary rule.").

259 The Court began rejecting expressions of state positive law in much the same way that Congress began authorizing searches and seizures—statute by statute, bit by bit.

as it stays within the interest-holder's "open field."[260] This was Justice Holmes' conclusion in *Hester v. United States*,[261] where revenue agents apparently trespassed onto a suspect's property and seized illegally possessed liquor that the suspects had dropped when fleeing from the officers.[262] Because the officers, who "supposed they

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During Prohibition, the Court refused to exclude evidence based on the tort of trespass *ab initio*, which invalidates lawful entries followed by unlawful assertions of official authority. The first of these cases addressed the admissibility of liquor lawfully obtained by revenue agents in a valid search for evidence of violations of the National Prohibition Act. *See* McGuire v. United States, 273 U.S. 95 (1927). Because the agents unlawfully destroyed the great majority of the liquor seized, argued McGuire, the illegality infected the admissibility of the remaining and lawfully obtained liquor, thus making the officers' otherwise lawful entry unlawful *ab initio*. The Court acknowledged the relevance of the tort to the officers' personal liability for abuse of authority, but not to the question of admissibility. *Id.* at 99-100.

Twenty-five years later, in On Lee v. United States, 343 U.S. 747 (1952), a government informant consensually entered an old acquaintance's business and residence, and secretly transmitted their discussion of the opium trade to a federal agent outside. The Court, through Justice Jackson, dismissed both the tort, "whose origin, history, and purpose do not justify its application where the right of the government to make use of evidence is involved," and the law of fraud, partly because of the absence of an affirmative misrepresentation, and also because of the irrelevance of such "fine-spun doctrines" to the admissibility of evidence. *Id.* at 752. As for the claim that the eavesdropping agent had trespassed by entering in the informant's pocket that held the radio transistor, see *id.* at 765-66 (Burton, J., dissenting), Jackson said it "verges on the frivolous." *Id.* at 752.

Nearly everyone who has ever commented on trespass *ab initio* has attacked it, including Justice Holmes, who made it the object of his famous quip about the "revolting" aspect of precedent that binds courts for "no better reason . . . than that so it was laid down in the time of Henry IV." Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897). For discussions of trespass *ab initio*, see W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 25, at 150-52 (5th ed. 1984); Francis H. Bohlen & Harry Shulman, *Effect of Subsequent Misconduct Upon a Lawful Arrest*, 28 COLUM. L. REV. 841 (1928); Jeremiah Smith, *Surviving Fictions*, 27 YALE L.J. 147 (1918); Glanville L. Williams, *A Strange Offspring of Trespass Ab Initio*, 52 LAW Q. REV. 106 (1936).

260 An "open field" is "any unoccupied or undeveloped area outside of the curtilage," or one which is too far, too exposed, and not intimate enough to be protected like the house. United States v. Dunn, 480 U.S. 294, 300-01 (1987); United States v. Oliver, 466 U.S. 170, 180 n.11 (1984).

261 265 U.S. 57 (1924).

262 *Oliver*, 466 U.S. at 194 (Marshall, J., dissenting) (*Hester* means only that an officer may "enter private land from which the public is not excluded and make observations from that vantage point," although the trial record indicated that "one of the agents crossed a pasture fence" en route to the house); Dutile, *supra* note 121, at 5 ("Perhaps the *Hester* Court was swayed by the fact that the defendant himself did not own the land but lived there with his father, the legal title holder. . . . In any event, the Court indicated that it was not convinced that a trespass actually occurred.").

> The *Hester* Court did not have occasion to decide whether a trespass upon fenced land would have been deemed a violation of the fourth amendment. One cannot know whether the agents initially made their observations from outside or inside the Hester property line. If they were outside, they may have had probable cause to believe that a crime was committed in their presence. The Court does not say whether other people crossed the Hester property as a routine matter, although it is

were on Hester's [father's] land," walked not into the house or its adjacent "curtilage," but only so far as the "open field," Holmes concluded that the officers had not searched Hester.[263]

Although Holmes rested his conclusion on a spurious interpretation of Blackstone,[264] *Hester* is still good law,[265] and is often trotted out as support for officers' rights to violate certain property rights with impunity.[266] Yet, as terms of art, not only are "open field" and "curtilage" difficult to describe,[267] but they themselves are property concepts.[268] We know that an open field "need be neither 'open' nor a 'field,' "[269] but is "unoccupied and undeveloped land," which must be fenced-off or secluded, close enough to

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plain that the officers saw a number of people coming and going from Hester's father's house.

Stephen A. Saltzburg, *Another Victim of Illegal Narcotics: The Fourth Amendment (As Illustrated by the Open Fields Doctrine)*, 48 U. PITT. L. REV. 1, 8 (1986).

263 *Hester*, 265 U.S. at 58-59. So too is the Constitution's lack of contextual recognition of "open fields" thought by many to be meaningless. While the framers did reject James Madison's proposal that "other property" appear where the word "effects" now appears, this was meant not to divide property owners' land into protected and unprotected parcels, but to ensure that personal and not just real property would receive constitutional protection. *See* Currie, *supra* note 222, at 100-01 (the text has not obstructed the Court from holding that "a court order constituted a 'search,' a regulation of land use a 'taking,' and a photograph a 'writing' within the copyright clause").

264 Blackstone distinguished curtilage from open fields to justify treating the former as burglary and the latter as trespass; both were criminal in any event. *See* Saltzburg, *supra* note 262, at 16.

265 Even though the open-fields language may have been invoked only to justify the seizure of abandoned property, not to establish a rule that all trespasses onto open fields are of no concern to the Fourth Amendment, *id.* at 17, the case of United States v. Lee, 274 U.S. 559 (1927), makes the meaning of *Hester* even less clear. There, after Coast Guard officers lawfully seized a vessel suspected of violating the revenue laws, the boatswain's preboarding examination with a searchlight did not constitute a search, despite the descriptive name of the tool used. Justice Brandeis's short opinion for the Court mysteriously cited *Hester*, perhaps because trespass is permissible if it follows lawful observation of a crime. *Id.* at 563.

266 *See, e.g.*, Air Pollution Variance Bd. v. Western Alfalfa Corp., 416 U.S. 861, 865 (1974) (when state health inspector made warrantless entry onto corporation's outdoor premises to test smoke being emitted from the chimneys, he stood somewhere between two stack heights and a quarter mile away from the stack, and was "well within the 'open fields' exception to the Fourth Amendment approved in *Hester*").

267 For a history of "open fields," see Neil C. McCabe, *State Constitutions and the "Open Fields" Doctrine: A Historical-Definitional Analysis of the Scope of Protection Against Warrantless Searches of "Possessions"*, 13 VT. L. REV. 179 (1988).

268 *See* Bush, *supra* note 170, at 1786 ("The Court's willingness to wed the Fourth Amendment to the distinction between curtilage and open fields belies its own admonition that property concepts are not controlling."); Rosemarie Falcone, Note, "California v. Ciraolo": *The Demise of Private Property*, 47 LA. L. REV. 1365, 1375 (1987) ("Just as in *Oliver*, the [*Ciraolo*] Court applied a *per se* rule based upon property concepts which ignored parts of the *Katz* analysis, while implying that a different rule would be applicable to a private residence and its curtilage.").

269 Oliver v. United States, 466 U.S. 170, 180 n.11 (1984).

the house, and the situs of intimate activity before it becomes private, protected curtilage.

Justice Powell, writing for the Court in *Oliver v. United States*,[270] thought the open field/curtilage distinction would be administered easily. In *Oliver*, two Kentucky state police officers drove past a house and a locked gate with a "No Trespassing" sign on it, then walked several hundred yards down a footpath past a barn and a camper, ignoring Oliver, who shouted "no hunting" at them. The Court held that the officers did not search Oliver's land, on which they discovered marijuana plants.[271]

Clarity, Powell stated, will not suffer if constitutional protections turn on the differences between curtilage and open fields.[272] Simply put, "the area around the home to which the activity of home life extends is a familiar one easily understood from our daily experience."[273] This well-known area, wrote Powell, was more pertinent than the law of trespass, which is "but one element in determining whether expectations of privacy are legitimate."[274] Since the influence of property law on the Fourth Amendment "has been discredited," and since "a property interest in premises may not be sufficient to establish a legitimate expectation of privacy," Powell subordinated the law of trespass to the curtilage/open-field distinction:[275]

> [T]he common law of trespass furthers a range of interests that have nothing to do with privacy and that would not be served by applying the strictures of trespass to public officers. Criminal laws against trespass are prophylactic: they protect against intruders who poach, steal livestock, and crops, or vandalize property. And the civil action of trespass . . . authoriz[es] an owner to defeat claims of prescription by asserting his own title.[276]

Trespass laws, he added, "have little or no relevance"[277] to the Fourth Amendment if officers stay within the field. The open field includes "thickly wooded area[s]"[278] and later, barns,[279] which our

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270 466 U.S. at 170.

271 *Id.* at 176-77.

272 *Id.* at 182 n.12.

273 *Id.*

274 *Id.* at 183-84.

275 *Id.* at 183; *see also* Soldal v. Cook County, 113 S. Ct. 538, 544 n.7 (1992) ("In holding that the Fourth Amendment's reach extends to property as such, we are mindful that the Amendment does not protect possessory interests in all kinds of property.") (citing *Oliver*, 466 U.S. at 176-77).

276 *Oliver*, 466 U.S. at 183 n.15.

277 *Id.* at 183-84.

278 *Id.* at 180 n.11.

279 United States v. Dunn, 480 U.S. 294 (1987).

daily experience tells us are suited neither to "lovers' trysts," "worship services,"[280] nor any other of the "privacies of life"[281] associated with the home. Although his standard was naively dependent on experiences which are far from daily, Powell was confident that the open field/curtilage distinction would not need case-by-case study.

Justices Marshall, Brennan, and Stevens dissented from the Court's "startling conclusion" that no search had occurred.[282] Marshall acknowledged that "privacy interests are not coterminous with property rights," but since "property rights reflect society's explicit recognition of a person's authority to act as he wishes in certain areas, [they] should be considered."[283] These were Justice Powell's own words from a past foray into the property thicket.[284] Joining them with Rehnquist's claim that one's right to exclude "in all likelihood" includes a protected privacy interest,[285] Marshall weighted Kentucky's law of trespass more heavily than did the Justices whose words he borrowed. Not only does the positive law recognize Oliver's interest, Marshall wrote, but it also criminalizes the failure to respect that interest.[286] Finally, he stated, police already are charged with enforcing the laws that protect possessors of private land from intruders; as a result, trespass is a concept better known to citizens and police than are privacy, open fields, and curtilage.[287]

After three years to consider the meaning of "open field," the Court decided *United States v. Dunn*,[288] which was identical to *Oliver* in important respects. In *Dunn*, DEA agents traveled a half-mile off a public road over Dunn's fenced-in land, crossed over three more wooden and barbed-wire fences, stepped under the eaves of his

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280 *Oliver*, 466 U.S. at 179 n.10; *id.* at 192 (Marshall, J., dissenting).

281 *Id.* at 180 (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).

282 *Id.* at 185 (Marshall, J., dissenting). *Cf.* Saltzburg, *supra* note 262, at 17 ("[U]ntil *Oliver*, no one would have suspected that the Court would turn its back on the physical invasions that gave birth to the Fourth Amendment and that were the focus of the Court's attention for so many years prior to *Katz*.").

283 *Oliver*, 466 U.S. at 189-90 (Marshall, J., dissenting); *see* Dutile, *supra* note 121, at 9 ("Presumably the civil trespass doctrine itself relates at least partially to the kind of security guaranteed by the Constitution."); Tomkovicz, *supra* note 9, at 719-20.

284 Rakas v. Illinois, 439 U.S. 128, 153 (1978) (Powell, J., concurring).

285 *Id.* at 143 n.12.

286 *Oliver*, 466 U.S. at 189-91 (Marshall, J., dissenting).

287 *Id.* at 195-96; *cf.* McDonald v. United States, 335 U.S. 451, 458-59 (1948) (Jackson, J., concurring) ("In prying up the porch window and climbing into the landlady's bedroom, [the officers] were guilty of breaking and entering—a felony in law and a crime far more serious than the one they were engaged in suppressing.").

288 480 U.S. 294 (1987). For a thorough discussion of *Dunn*, see Clifford S. Fishman, *Police Trespass and the Fourth Amendment: A Wall in Need of Mending*, 22 J. MARSHALL L. REV. 795, 810-23 (1989).

barn, and peered with a flashlight through opaque fishnetting.[289] Disagreeing with the majority's conclusion that no search had occurred, Justice Brennan, joined by Justice Marshall, again dissented,[290] but Stevens was conspicuously absent, given the similarity of the two cases.

Stevens is not the only waffler when it comes to the influence of the positive law on expectations of privacy. Justices Powell and Blackmun have endorsed the positive law as "weighty" and "principal" considerations that "in all likelihood" stand for privacy. An attentive reading of their opinions, however, shows only that both are staunchly opposed to overflight and otherwise uninterested in heavily weighting the positive law in Fourth Amendment cases.

For example, in the context of administrative aerial photography of commercial premises, both the majority and the dissent argued that different aspects of Michigan's positive law played a part in determining the constitutionality of EPA action.[291] For the majority, aerial observation without actual physical entry is constitutional unless extraordinarily aided by technology. Moreover, Michigan's trade secret law was irrelevant against the government, who utilized aerial photography in order to regulate, not compete with, petitioner Dow Chemical Company.[292] For Justice Powell, who dissented, the majority's reliance on the old trespass doctrine was misplaced, but the trade-secret law (also a property concept), even if not violated, was a tell-tale sign of a legitimate privacy interest.[293] Dow, Powell reasoned, had elaborate security measures—including private investigation of all low-flying planes—meant to keep secret its chemical manufacturing process.[294] Accordingly, Powell, whom Blackmun joined, found that Dow's attempt to guard secrets protected by law gave the company a privacy interest in the Fourth Amendment sense.[295]

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289 *Dunn*, 480 U.S. at 319 (Brennan, J., dissenting).

290 *Id.* at 312 n.3 (Brennan, J., dissenting) (" 'Private land marked in a fashion sufficient to render entry thereon a criminal trespass under the law of the State in which the land lies is protected by the Fourth [Amendment]'. By rejecting this rule, 'the Court is willing to sanction the introduction of evidence seized pursuant to a potentially criminal activity (trespassing) in order to convict an individual of a slightly more serious crime.' "). (citation omitted).

291 Dow Chemical Co. v. United States, 476 U.S. 227 (1986).

292 *Id.* at 231-32.

293 *Id.* at 248-49 (Powell, J., dissenting in part); *cf.* Corrada, *supra* note 170, at 690 (noting that Powell's critique of majority for using trespass doctrine as proxy for privacy conflicts with his "attempt to resurrect property concepts in recognizing privacy interests in trade secrets").

294 *Dow*, 476 U.S. at 241-42 (Powell, J., dissenting in part).

295 [T]hose laws constitute society's express determination that commercial entities have a legitimate interest in the privacy of certain kinds of property. Dow has taken

Powell's dissent is superficially an appealing blend of *Katz* and the positive law. Trade secret laws and the Fourth Amendment may diverge in objective and application,[296] but both have a secrecy component[297] and are similar enough that precautions taken in one arena arguably should be respected in the other. However, the EPA sought to regulate, not steal, Dow's secret processes. Thus the already imperfect fit between the trade secret tort and the Fourth Amendment is made worse, and reliance on it misplaced. In other words, Powell was correct to invoke *Katz*, but not a law framed in terms of *theft* of information, which simply did not occur in *Dow Chemical*. For that reason alone, the trade secret tort was useless in that context.

In *California v. Ciraolo*,[298] decided the same day, Powell reiterated the need to trace our expectations to a source outside the Court's holdings. Again joined in dissent by Blackmun, he protested that the majority's approval of naked-eye observations from an airplane over Ciraolo's marijuana plot relied solely on the fact that the Federal Aviation Administration has made the skies into a public highway.[299] One outside source to which Powell would *not* look to was the safety, not privacy-based FAA regulations governing the overflight of private property. After Powell retired, the Court in a similar case, *Florida v. Riley*,[300] upheld helicopter overflight.

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every feasible step to protect information claimed to constitute trade secrets from the public and particularly from its competitors. Accordingly, Dow has a reasonable expectation of privacy in its commercial facility.

Id. at 249 (Powell, J., dissenting in part); *id.* at 249 n.11 (Powell, J., dissenting in part) ("Contrary to the Court's assertion, Dow does not claim that Fourth Amendment protection of its facility is coextensive with the scope of trade secret statutes. . . . Rather, Dow argues that the existence of those statutes provides support for its claim that society recognizes commercial privacy interests as reasonable.").

> Inherent in the law of trespass and, in the very concept of private property as Locke asserts, is the societal recognition that Dow's protection of its property lines is a manifestation of its intent and *right* to exclude others. By asserting its rights as a property owner, Dow . . . gave notice of its intent to reserve its complex for private use, and society, through its trespass laws and general recognition of property rights, implicitly acquiesced in the reasonableness of this expectation.

Bush, *supra* note 170, at 1796.

296 *See* Note, *Trade Secret Misappropriation: A Cost-Benefit Response to the Fourth Amendment Analogy*, 106 HARV. L. REV. 461, 466-72 (1992).

297 *Id.* at 466.

298 476 U.S. 207 (1986).

299 *Id.* at 217 (Powell, J., dissenting). For the majority, observation from an airplane (or a double-decker bus), *id.* at 211, is no more unreasonable a search than one from ground level, so long as the officer occupies "a public vantage point where he has a right to be" as defined by the FAA and "which renders the activities clearly visible." *Id.* at 213. *Cf.* LaFave, *supra* note 199, at 298 ("The Chief Justice's reference to double-decker buses suggests that his travels to London had a profound effect upon his outlook . . . .") (citing Laurence Bodine, *Flood of ABAers in London*, 71 A.B.A. J., Sept. 1985, at 124-27).

300 488 U.S. 445 (1989).

There, Justice Blackmun stayed put, requiring more than an abided-by safety regulation to validate the aerial observation;[301] but Stevens again changed sides, abandoning his permissive view of overflight in *Ciraolo* for a restrictive view of the same.[302]

This equivocating is understandable; the overflight cases are puzzling. If we want to discount the FAA regulations for their safety orientation, and give only privacy-based laws outcome-determinative status, then the overflight cases were wrong. The regulations *do*, however, speak marginally to privacy: one may harbor in one's curtilage 1000 feet of privacy from naked-eye airplane observation.[303] Is "marginally" enough to answer whether a search occurred? Requiring that the positive law in question be primarily privacy-based would not only collapse the positive law into *Katz*, but, even worse, would double-count *Katz*. One would first need to define privacy to determine which positive laws control. Then, if the movant—say, Katz or Riley—insists that the Constitution protects where the positive law does not, privacy must be defined again.

If all positive laws, even those unrelated to privacy, were conclusive of the parties' expectations, then compliance or noncompliance with FAA regulations would decide the case and avoid the task of defining privacy or the extent to which a given positive law is privacy-based. But such a regime would sweep far too broadly, and would invalidate, for example, otherwise lawful overflight simply because the pilot's license had expired or because wing lights of a certain color were not lit on the aircraft.[304] Exclusion there would be inappropriate not so much because the license and colored-light violations concern neither privacy nor property, but because they, unlike the minimum height regulations, are not what enabled law enforcement to obtain the information sought.

As a shorthand rule, I therefore suggest the following: When the search victim can point to no law-based expectation that protects her from the kind of surveillance in question, *Katz* comes into play to place a ratchet-like restraint on quests for evidence.[305] I say "ratchet-like," because the government cannot in my view use the

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301 *Id.* at 467 (Blackmun, J., dissenting).

302 *Id.* at 456-67 (joining Brennan, J., dissenting).

303 Similarly, when police observe activity on property that abuts an interstate highway only by slowing down to under the prescribed minimum of 40 miles per hour, police have invaded the privacy one retains by having a minimum speed limit that shields activity from view that could be discerned only at a slower speed. Letter from Wayne R. LaFave to the author (Mar. 26, 1993) (on file with author).

304 Professor LaFave suggested this hypothetical to me by letter. *See id.*

305 *Cf.* Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966) ("We emphasize that Congress' power under § 5 [of the Fourteenth Amendment] is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to

positive law to foreclose *Katz*, but a search victim can. As in the overflight cases, once established that one lawfully *could* do what the government did, *Katz* reaches into its separate inventory of expectations to answer whether that fact, without more, makes it unreasonable to expect that no one would. Yet there is no good reason for racing to *Katz*. Underprotective positive laws sent Charles Katz to the Supreme Court in the first place and were corrected by Congress promptly afterward.[306] So few after Katz have prevailed that the positive law is a better place to start, both legislatively and judicially, than is reliance on Katz's case, which today makes him seem no more than a chance beneficiary.

D. ABANDONMENT OF CHATTELS

Some state laws tailored to core Fourth Amendment concerns receive no support from any member of the Court. For example, possessors of property who display a present intent to forever relinquish their interest are said under the laws of all 50 states to have abandoned the property.[307] Absent another positive law limiting this construct, it is senseless to deny the law of abandonment a place in the Fourth Amendment.

The issue of abandoned property first arose in *Hester*, but we should not take too seriously the Court's conclusion that Hester's attempted escape from gun-toting, trespassing revenue agents meant he abandoned containers of liquor on his father's property. Decades later, the Court held that a spy abandoned a hollow pencil containing microfilm and a block of wood containing a cipher pad in the wastebasket of a hotel room, the key to which he had turned in prior to the search.[308] There, too, the Court skipped over whether FBI agents coerced or caused the defendant to leave the articles behind, so we have no meaningful discussion of abandonment in the Court's opinions on point.[309]

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restrict, abrogate, or dilute these guarantees."); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-14, at 341-50 (2d ed. 1988).

306 *See* Title III, Omnibus Crime Contol and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2511, 2515-2518, 2520-21.

307 Foulke v. New York Consol. R.R. Co., 127 N.E. 237, 238 (N.Y. 1920) ("The abandonment of property is the relinquishing of all title, possession, or claim to or of it—a virtual intentional throwing away of it. It is not presumed."); *See* CURTIS J. BERGER, LAND OWNERSHIP AND USE 647-49 (3d ed. 1983) (once one relinquishes property, first possessor thereafter is new owner).

308 Abel v. United States, 362 U.S. 217, 240-41 (1960).

309 "So far as the record shows," wrote Justice Frankfurter, Rudolf Ivanovich Abel "had abandoned these articles. He had thrown them away. . . . There can be nothing unlawful in the Government's appropriation of such abandoned property." *Id.* at 241; *cf.* California v. Hodari D., 111 S. Ct. 1547 (1991) (no seizure occurs until fleeing sus-

Already lacking any real support from the Court, the law of abandonment in Fourth Amendment decisionmaking had little chance of surviving *Katz*,[310] which would needlessly mediate the Court's task: "The primary object of the Fourth Amendment is to protect privacy, not property, and the question in this case . . . is not whether [defendant] had abandoned his interest in the property-law sense, but whether he retained a subjective expectation of privacy . . . that society accepts as objectively reasonable."[311] Justice White used these words to describe a gambler's challenge to a search of an apartment building's publicly accessible communal trash bin.[312] Although the Court failed to reach the merits there, it tried to settle the issue soon after in *California v. Greenwood*[313] by rejecting Greenwood's claim that he had a privacy interest in his trash in bags set by the curb for pick-up. Although most of the courts of appeals that had reached the issue resolved it on abandonment grounds, the Court refused to formulate a rule that would make the Amendment depend on the law of the particular state where the search occurred.[314]

Justice Brennan, joined in his dissent by Justice Marshall, agreed with only that part of the majority's opinion,[315] though both earlier had stated otherwise when the law of trespass was at issue.[316] Brennan claimed that "the voluntary relinquishment of possession or control over an effect does not necessarily amount to a relinquishment of a privacy expectation in it."[317] For support, he re-

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pect submits to show of authority, so articles discarded prior to submission are abandoned and not fruits of seizure).

310 *But see, e.g.*, Rios v. United States, 364 U.S. 253 (1960); Smith v. Ohio, 494 U.S. 541 (1990) (suspect did not abandon articles thrown onto hood of car when police apprehended him); *cf.* Coombs, *supra* note 3, at 1606 ("[I]t is black letter law that Fourth Amendment claims can be lost by abandoning the property searched, even inadvertently.").

311 California v. Rooney, 483 U.S. 307, 320 (1987) (White, J., dissenting from dismissal of certiorari as improvidently granted).

312 *Id.*

313 486 U.S. 35 (1988).

314 *Id.* at 43.

315 *Id.* at 51 (Brennan, J., dissenting) ("The Court properly rejects the State's attempt to distinguish trash searches from other searches on the theory that trash is abandoned and therefore not entitled to an expectation of privacy."). *But cf.* Herdrich, *supra* note 170, at 1017 (stating that the Court did utilize abandonment doctrine, "which defies the *Katz* rationale . . . . [and] significantly narrows the concept of Fourth Amendment privacy rights").

316 *See* United States v. Dunn, 480 U.S. 294, 312 n.3 (1987) (Brennan, J., dissenting); Oliver v. United States, 466 U.S. 170, 195-96 (1984) (Marshall, J., dissenting).

317 *Greenwood*, 486 U.S. at 55 (Brennan, J., dissenting); *see* Edward G. Mascolo, *The Role of Abandonment in the Law of Search and Seizure: An Application of Misdirected Emphasis*, 20 BUFF. L. REV. 399, 401 (1971) (abandonment in a property sense is an "initial point of

ferred to a Cheektowaga, New York ordinance prohibiting anyone but city trash workers from snooping in another's garbage,[318] and to an Orange County, California (where Greenwood lived) ordinance prohibiting the burning or burying of refuse.[319]

Of course the Cheektowaga ordinance is irrelevant; but if Orange County had such a law, it should trump the law of abandonment. Otherwise, the locality's attempt to redescribe the property would be made meaningless. On the other hand, the prohibition on burning or burying garbage says much about choice, but little about county residents' expectations once they exercise that choice, however hollow it may be.

Brennan further stated that any other view of garbage would erase our privacy in *mail*, once entrusted to a carrier.[320] He then discounted the relevance of congressional protection of the mails,[321] apparently because the Court also protects mail from warrantless searches.

That in my view gets us nowhere. Because no sender of mail is indifferent to whether it reaches the addressee, Congress and the Court protect mail. Likewise, because "what we are dealing with here *is* trash,"[322] not mail, the absence of a positive law on point reflects our feelings about trash. In light of legislative inaction, a contract could provide privately what Orange County did not. If the refuse company breaches at the behest of the government, then the government should lose the ill-gotten profit. But because there was no such agreement in *Greenwood*, we should be able to live with the outcome that the law of abandonment suggests. Rather than criticize the Court's "veiled abandonment analysis"[323] for such things as its insensitivity to our "behavioral manifestations,"[324] I would look to the reform of the positive law, not tortured readings of *Katz*, for relief from overreaching law enforcers.

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inquiry," a "point of reference" that "is not controlling on the issue of abandonment in the law of search and seizure").

318 *Greenwood*, 486 U.S. at 52 (Brennan, J., dissenting).

319 *Id.* at 54-55 (Brennan, J., dissenting).

320 *Id.* at 55 (Brennan J., dissenting) (emphasis added).

321 *Id.* at 55 n.4 (Brennan, J., dissenting).

322 United States v. Scott, 975 F.2d 927, 928 (1st Cir. 1992) (no Fourth Amendment protection in shredded documents in garbage). With mail, of course, the *addressee* could view and treat the mail as garbage and thereby remove its private characteristics.

323 Jon E. Lemole, Note, *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, 589 (1991).

324 *Id.* at 604.

E. PRIVATELY AUTHORIZED SEARCHES

The final area of the Fourth Amendment where the Court understates the relevance of the positive law is privately authorized or "consent" searches. These searches are reasonable if they are voluntary.[325] Authorization may come from anyone whom, given the facts available at the moment, police reasonably believe has common authority over the place or thing.[326] Here, too, the Court's contextual approach to interests resolves conflicts less effectively than the positive law.

Not until the 1960s did the Court answer whether an inferior interest-holder (e.g., a bailee) could consent to a search absent the consent of the superior interest-holder (e.g., a bailor).[327] Since then, the Court's self-imposed task of assessing authority and risk has been as elusive as its quest for sources of privacy expectations outside its own holdings.[328] As *Chapman v. United States*,[329] decided a year after *Jones*, illustrates, the positive law could improve things somewhat.

Chapman was a tenant whose illegal distillery was discovered by Georgia police after his landlord admitted an officer through the bathroom window of a house Chapman leased. After citing *Jones* for the proposition that property law is irrelevant to the Fourth Amendment, the majority, through Justice Whittaker, invalidated the landlord's consent. Along the way, the Court struggled unsuccessfully to avoid the local property laws that pervaded the separate opinions of Justices Frankfurter and Clark.

Chapman's lease gave the landlord no right to enter or consent to the entry of others. The government, however, argued that a property owner may delegate to officers her common law right to "view waste."[330] Illegal distilleries are wasteful, and the landlord might have "ha[d] solid ground for believing his lessee [was] using the house as an illegal distillery."[331] Moreover, one Georgia statute empowered landlords to forfeit leaseholds used as illegal distilleries,

325 *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

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

327 The question began as "whether it is possible for a wife, in the absence of her husband . . . to waive his constitutional rights," Amos v. United States, 255 U.S. 313, 317 (1921).

328 *Cf.* Dorothy K. Kagehiro & William S. Laufer, *The Assumption of Risk Doctrine and Third-Party Consent Searches*, 26 CRIM. L. BULL. 195, 208 (1990) (unlike in contractual relationships, "[b]ecause the boundaries of social relationships are more diffuse and fluid, anticipation of risks 'inherent' in the relationship will be much more difficult").

329 365 U.S. 610 (1961).

330 *Id.* at 616.

331 *Id.* at 619 (Frankfurter, J., concurring).

and another labeled structures used for the same as nuisances.[332] Whittaker countered all three arguments, not on the ground that property law was irrelevant, but because the landlord did not know how the house was being used (despite the overwhelming odor of whiskey mash emanating from within), and because of his resorting to improper procedure in order to abate a nuisance.

In dissent, Justice Clark put the matter directly: "The 'reasonableness' of the search hinges on the rights of the landlord under Georgia law . . . ."[333] In his view, the entry fell under the landlord's statutory right to terminate the lease, which Chapman had used for illegal purposes. As a result, "[the landlord] was merely repossessing his property, not abating a nuisance."[334]

Since all three opinions addressed the contract for lease and landlord-tenant law, the majority's claim that local law is not the stuff of which the Fourth Amendment is made packs little punch. But *Chapman* remains a rather exotic case. As the Court began to hear more consent cases, the references to state law became fewer. The law of consent would soon have its own relativism.

Three years after *Chapman*, the Court in *Stoner v. California*[335] invalidated a Pomona, California night clerk's consent to a police search of an armed robber's hotel room. After noting the absence of a state law giving hotel managers such authority, Justice Stewart's majority opinion called the right to refuse entry one which "only [Stoner] could waive by word or deed, either directly or through an agent."[336] "[T]he rights protected by the Fourth Amendment," Stewart continued, "are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of 'apparent authority.' "[337] Again, the Court looked to *Jones* as support for this assertion, but the reference was too loose to have even a trace of value. Whether we should apply agency law and apparent authority when they are neither strained nor unrealistic, *Stoner* left a mystery.

After emphasizing in a subsequent case[338] the importance of ownership to the validity of third-party consent, the Court declared in 1969 that the duffel bag of one Frazier—a joint user who kept the

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332 *Id.* at 617.

333 *Id.* at 620 (Clark, J., dissenting).

334 *Id.* at 621 (Clark, J., dissenting).

335 376 U.S. 483 (1964).

336 *Id.* at 488-89.

337 *Id.* at 488. *But cf.* Dutile, *supra* note 121, at 16 ("In third-party consent cases . . . it is precisely the agency and property points which the Court should bear in mind.").

338 Bumper v. North Carolina, 391 U.S. 543, 548 n.11 (1968) (noting that, had consent not been coerced, consenting party's ownership of both the house and chattel searched and seized would have been good as against her grandson who lived with her).

bag at co-joint user Rawls's mother's house—could be searched on Rawls's authority.[339] Even if the division of the bag into compartments eliminated Rawls's actual authority under *Stoner*, the distinction between actual and apparent was a "metaphysical subtlet[y]" lacking legal consequences.[340] Finally, in 1974, the Court defined the common authority that could empower one to consent to invasion of another's interest. There, in *United States v. Matlock*,[341] officers arrested Matlock in the front yard of the house he shared with Gayle Graff. They obtained Graff's consent to search the house without first asking Matlock. In the closet of the couple's bedroom police found the fruits of a bank robbery.[342]

Matlock pronounced that consent was a matter of authority, which property law apparently is too crude to capture:

> Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements . . . but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the coinhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.[343]

The resemblance of this language to *Rakas* is striking. Neither decision wishes to be tied to the positive law nor, it seems, to the other. The upshot is separate inquiries for privacy and authority, which in turn, allows for the ridiculous case in which someone could validly consent to an invasion but lack standing to challenge it.

I admit that property interests may be "mere" and "refined,"[344] but can mutual use and joint access and control be described meaningfully in anything but property terms? Certainly "for most purposes" is itself a term of refinement. When is it reasonable to expect a co-inhabitant to permit inspection? Would a superior interest-holder ever expect her subordinate interest-holder to permit such an invasion?[345] And what are we to make of the words "as-

339 Frazier v. Cupp, 394 U.S. 731 (1969).

340 *Id.* at 740.

341 415 U.S. 164 (1974).

342 *Id.* at 166-67.

343 *Id.* at 171 n.7.

344 *Id.*

345 *Cf.* Coombs, *supra* note 3, at 1599-1600 ("[W]here the intimacy of the relationship between the consenter and the defendant renders betrayal of the defendant's interests unlikely, courts should take care to assure themselves that the consent was uncoerced.").

sumed the risk"?[346] Can co-inhabitants contract away the risk, or does it follow automatically from authority?[347]

Although police should have sought Matlock's consent, Graff's was good simply because she was a co-tenant holding an undivided interest in the leased property, giving her an interest equal to Matlock's. *Frazier* (the duffel-bag case) concededly poses some difficulty because the parties' legal arrangement (either as bailment or co-tenancy)[348] indeed was sketchy enough to call "metaphysical." In that case—clearly a boundary concern—we might resort to Professor Mary Coombs's thicker, storied and more complex approach to discover the contours of the parties' understanding.[349] But in the lion's share of cases the parties' legal arrangement is much more easily assessed. In those disputes, our assessment of the extent of a consenting party's authority, which the Court has made a question

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346 *Cf. id.* at 1597-98 ("In the dynamics of the real world, . . . we all run the risk that those we thought irrevocably committed to us may choose to act against us. On the other hand, the government should not be permitted to intensify this risk in human society."); *id.* at 1650 ("Neither as a matter of description nor prescription does it make sense to treat betrayal by our friends as the norm.").

347 Fisher, *supra* note 226, at 193 n.36 ("Courts have never fully articulated why defendants' assumption of risk should follow from third parties' joint control."); *See* Dorothy K. Kagehiro et al., *Reasonable Expectation of Privacy and Third-Party Consent Searches*, 15 LAW & HUM. BEHAV. 121, 125 (1991) (*Matlock* Court believed its assumption of-risk conclusion "requir[ed] no explanation").

348 A bailment is the "rightful possession of goods by one who is not the true owner," "based on a contract, express or implied." RALPH E. BOYER, SURVEY OF THE LAW OF PROPERTY 689 (3d ed. 1981); *See* 4 BERNARD E. WITKIN, SUMMARY OF CALIFORNIA LAW § 129 (9th ed. 1991) ("A bailment . . . is the deposit of personal property with another, usually for a particular purpose, under an express or implied contract."); LAFAVE & ISRAEL, *supra* note 218, § 3.10, at 243 (referring to Rawls as a "bailee" of Frazier's bag).

349 In her influential article on shared privacy, Professor Coombs advocates what she calls a value-neutral (meaning the state will benefit from her consent theory, and the individual from her standing theory) set of intricate presumptions concerning which relationships are private and which are not. Coombs, *supra* note 3, at 1650-51. "[O]utside the presumptive categories," she writes, litigants who "chose to open their relationship to examination" would present a " 'thick description' of the relevant aspects of their lives together, from which a more sensitive judgment of the relational claim could be made." *Id.* at 1654. The thick, storied approach, Coombs says, emphasizes that "[d]ecisions must grow out of an analysis of the relationships; there is no more justification here than in the standing context for 'a return to property law concepts of title and possessory interests [alone], which are remote from the purposes of the fourth amendment.' " *Id.* at 1661 n.295 (alteration in original) (quoting Weinreb, *supra* note 251, at 63-64). Professor Coombs, and Professor Weinreb before her, *see supra* note 251, are correct: The Court is far too unappreciative of nuanced relationships to accurately reflect either authority or risk. However, suppression hearings might be too crude a forum for heightened fact-sensitivity and understanding. Admissibility decisions need not be highly individualized to be fair. Fine tuning should be directed only at the discovery of the parties' contractual and property interests. Frankly, a story any richer would in most instances contain much that we do not need to know.

of perception and not of fact,[350] currently and needlessly founders for lack of any concrete source outside the Court's holdings to inform that perception.

IV. CONCLUSION

Although the positive law offers no unassailable solution, the current approach simply will not do. When the Court does consider the positive law in fixing expectations, the importance of those laws takes on an accordion-like quality. For Justices Brennan and Marshall, the positive law was a one-way street—when it helped the defendant they liked it; when it helped the government they did not.[351] Justices O'Connor and Scalia, and Chief Justices Burger and Rehnquist also travel a one-way street, only in the opposite direction.[352] Justice White also belongs to this group, although not without exception.[353] Justices Powell and Blackmun tend to view the positive law in the prosecution's favor, except when it comes to overflight. Even more unpredictable are the opinions of Justice Stevens, who takes inconsistent positions without explanation.[354]

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

351 *Compare* United States v. Dunn, 480 U.S. 294, 305 (1987) (Brennan, J., dissenting) (police violation of positive law of trespass constitutes search), United States v. Oliver, 466 U.S. 170, 184 (1984) (Marshall, J., dissenting) (same) *and* Rawlings v. Kentucky, 448 U.S. 98, 114 (1980) (Marshall, J., dissenting) (interest in place searched or property seized invokes fourth amendment protection against unreasonable search and seizure) *with* Florida v. Riley, 488 U.S. 445, 456 (1989) (Brennan, J., dissenting) (compliance with FAA regulations does not necessarily mean no search) *and* California v. Greenwood, 486 U.S. 35, 45 (1988) (Brennan, J., dissenting) (whether garbage is abandoned not necessarily determinative of whether search of it occurred).

352 *Dunn*, 480 U.S. at 305 (Scalia, J., concurring) (accepting that portion of Justice White's opinion that held no search of Dunn's property occurred despite the trespass onto his "open field"); California v. Ciraolo, 476 U.S. 207 (1986) (Burger, C.J.) (police do not search when they are in public navigable airspace); Dow Chemical Co. v. United States, 476 U.S. 227 (1986) (Burger, C.J.) (EPA's noncompetitor status and position in public navigable airspace violated neither Michigan's trade-secret law nor any property interest of Dow); United States v. Karo, 468 U.S. 705, 721 (1984) (O'Connor, J., concurring in part and concurring in the judgment) (successful challenger must show superpossession—a protectible interest both in the place searched and the thing seized); *Rawlings*, 448 U.S. at 98 (Rehnquist, J.) (ownership of drugs insufficient to ground privacy expectation).

353 *Dunn*, 480 U.S. at 294 (trespass onto open fields does not necessarily violate property owner's privacy). *But see, e.g.*, Rakas v. Illinois, 439 U.S. 128, 156 (1978) (White, J., dissenting) (permission to ride in car confers privacy expectation on passenger who lacks property interest in car or its contents).

354 *Compare Greenwood*, 486 U.S. at 35 (no reasonable expectation of privacy in opaque garbage bag left at curbside for pick-up), *Dunn*, 480 U.S. at 294 (officers may view activities in curtilage from vantage point obtained by trespass onto defendant's open field), *Ciraolo*, 476 U.S. at 207 (overflight within FAA regulations is no search), Dow Chemical Co. v. United States, 476 U.S. 227 (1986) (same), *and Kentucky*, 448 U.S. at 98 (ownership of seized drugs not enough to challenge search of purse where they were stored)

No doubt ownership or possession is for every member of the Court *an* indicia of a protected interest.[355] The uncertainty, properly savaged in Aleinikoff's treatment of balancing, is over how to weight the interest.[356] Property law remains "marginally relevant," "weighty," "principal," and not altogether "snuffed out."[357] Despite the vocabulary, property law currently contributes nothing but verbiage to the Court's opinions.

Ready objections to a new reliance on the laws of property, tort, crimes, contracts, or a law enforcement agency's internal guidelines are available.[358] Granted, the argument goes, privacy is indeterminate. But so are possession, use, and control, even in their property law context, let alone on foreign turf.[359] To insinuate the positive

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with Minnesota v. Olson, 495 U.S. 91 (1990) (overnight guest has privacy expectation in premises), *Riley*, 488 U.S. at 456 (joining Brennan, J., dissenting) (reasonable expectation of privacy violated when helicopter did precisely what fixed-wing aircraft had done in *Ciraolo*), *Karo*, 468 U.S. at 728 (Stevens, J., concurring in part and dissenting in part) (nonconsensual installation of transmitter is a seizure), *Oliver*, 466 U.S. at 184 (joining Marshall, J., dissenting) (police searched defendant when they did precisely what they had done in *Dunn*) *and Rakas*, 439 U.S. at 156 (joining White, J., dissenting) (permission to ride in car confers privacy expectation on passenger).

355 *But cf.* Thomas J. Hickey & Rolando del Carmen, *The Evolution of Standing in Search and Seizure Cases*, 27 CRIM. L. BULL. 134, 146 (1991) ("[A] majority of the present Court appears to believe that property interests should have little bearing on a defendant's ability to assert a violation of Fourth Amendment rights.").

356 *See* Aleinikoff, *supra* note 201:

> Recent Supreme Court decisions have indicated that although no one factor is conclusive, a person's possession, ownership, or control of property, as well as the nature of the place it or he is in, and the legitimacy of its or his presence there, are all factors that affect the extent of privacy to be afforded his person.

William A. Schroeder, *Restoring the Status Quo Ante: The Fourth Amendment Exclusionary Rule as a Compensatory Device*, 51 GEO. WASH. L. REV. 633, 641-42 (1983); Tomkovicz, *supra* note 9, at 657-58 ("The Court . . . has neither proffered a comprehensive catalogue of relevant property concerns, nor prescribed the weight particular property interests ought to be accorded."); *id.* at 694-95 ("*Katz* directly repudiated the controlling function of property, . . . [but] later cases reveal so strong a continuing attachment to those formerly dispositive factors that *Olmstead*'s prerequisite of a physically invasive trespass has retained an inordinate effect upon, sometimes dictating, constitutional scope in the post-*Katz* era."); *id.* at 695 (property interests should be "relevant criteria," "two among many factors in the threshold analysis. . . ."); Wilkens, *supra* note 3, at 1116 ("*Katz* now can be understood not as eliminating the relevance of physical intrusion, but rather as shifting the emphasis placed on that analytical element."); Bush, *supra* note 170, at 1792 ("[A] property interest may be evidence of a reasonable expectation of privacy under the Fourth Amendment; it is simply not conclusive evidence."); Corrada, *supra* note 170, at 689 (In *Dow*, "[b]oth [Burger and Powell's] opinions made selective use of property analysis without explaining the appropriate limits of such concepts in Fourth Amendment doctrine.").

357 Soldal v. Cook County, 113 S. Ct. 538, 544-45 (1992).

358 *See generally* Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442 (1990).

359 *See* WILSON, *supra* note 137, at 55 ("[T]he issue of whether a property right exists

law into Fourth Amendment decisionmaking would only redirect reviewing courts to new problems of indeterminacy, not solve the old ones. That claim, however, can be raised to contest any reform; it is less forceful when used to defend language that is indeterminate by design, than when used to contest an approach committed more to clarity than to context.

There are other concerns which make this proposal only tentative. For instance, which positive laws are coextensive with privacy? To force such an inquiry threatens to liberate us not at all from *Katz*. Or is it even necessary that a given law have a privacy component for it to dictate a Fourth Amendment outcome? If not, then which interests expressed in the positive law should control? To this, I suggest that the great majority of property laws are privacy-oriented, as are contracts in which property is a subject or concern. Even those laws that are not, however, should be conclusive of the parties' expectations when the government is acting in the role of lawbreaker or contract-breacher, at least when it is the violation or breach that permits the government to gather the evidence.[360] When the government is behaving lawfully, *Katz* acts as a backstop, as a second look at whether the positive law fairly reflects a given defendant's expectations.

I make these proposals aware of the negative image Lockeian-based theory portrays in a culture where property owners have repeatedly flouted the true needs of those who are in many ways dependent on them.[361] Certainly there is something oily about commodifying Fourth Amendment protection. But property interests need not be bought; ownership is but one form of property interest. Property interests lie in leaseholds and social relationships; literally, anyone "legitimately on the premises" has a property interest deserving of Fourth Amendment respect.

One remaining objection is that a Fourth Amendment which depends on state law would be anything but unitary. Fixed constitu-

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in a particular case is not always easy to determine . . . .") (citing State v. Robbins, 24 N.E. 978, 980 (Ind. 1890)); Ronald J. Bacigal, *Some Observations and Proposals on the Nature of the Fourth Amendment*, 46 GEO. WASH. L. REV. 529, 548 n.133 (1978) ("[T]here is no word more ambiguous in its meaning than Possession." (quoting National Safe Deposit Co. v. Stead, 232 U.S. 58, 67 (1914)).

360 *See supra* notes 304-06 and accompanying text; *cf.* KEETON ET AL., *supra* note 259, § 36, at 220-34 (deviation from reasonable standard of conduct may be conclusively or presumptively demonstrated by defendant's violation of a statute that contemplated the type risk to person in plaintiff's position).

361 *See* Reich, *supra* note 109, at 772 ("During the industrial revolution, when property was liberated from feudal restraints, philosophers hailed property as the basis of liberty . . . . But as private property grew, so did abuses resulting from its use. . . . Property became power over others . . . .").

tional boundaries would yield to the whims of state legislatures, and citizens would be forced to vote with their feet to find a state where the "federal" standard suited them.[362] Given, however, that all states have nearly identical laws of abandonment and trespass,[363] and deal daily with issues of contract and statutory interpretation, the threat of widespread state-by-state discrepancies is chimerical. As for the fear of aggrandizing local law, that never has stopped us before; the Constitution already depends in part on local law in a variety of areas.[364] Insofar as tradition is a legitimating factor, a more powerful objection than these is necessary to dismiss this tentative proposal.

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362 *Cf.* Coombs, *supra* note 3, at 1609 n.62 (suggesting that *Silverman* and *Jeffers* could be seen as "adopting a federal common law of property for Fourth Amendment cases, with a distinct regime of entitlements and greater protection against intrusions.").

363 *See, e.g.*, 1 C.J.S. *Abandonment* § 2 (1985) (compiling cases on the abandonment of property); 87 C.J.S. *Trespass* §§ 1, 144-46 (1954) (compiling statutes and cases on the tort and criminal law of trespass in all 50 states).

364 *See, e.g.*, Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 878-79 (1990) ("We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate."); Wheat v. United States, 486 U.S. 153, 160 (1988) (in addressing the scope of the Sixth Amendment's requirement that criminal defendants receive effective assistance of counsel, the Court has looked to professional codes of ethics and concluded that "[f]ederal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them"); Nix v. Whiteside, 475 U.S. 157 (1986) (noting interplay between professional codes of ethics and Sixth Amendment's guarantee of effective assistance of counsel in case where defense counsel refused to represent a client who intended to commit perjury); Miller v. California, 413 U.S. 15, 24 (1973) ("The basic guidelines for the trier of fact must be . . . whether the 'average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . ."); Board of Regents v. Roth, 408 U.S. 564, 577 (1972) (property interests within the meaning of the Due Process Clause of the Fourteenth Amendment "are created and . . . defined by existing rules or understandings that stem from an independent source such as state law"); United States v. Yazell, 382 U.S. 341, 354-57 (1966) (applying Texas property law in action to obtain judgment on SBA loan, Court noted its willingness to apply state rules as federal law despite the consequent diversity in the rights and obligations of the United States in the various states). *See also* Toni M. Massaro, *The Dignity Value of Face-to-Face Confrontations*, 40 U. FLA. L. REV. 863, 881 (1988) ("The justices now appear ready to abandon the *Green* view of hearsay and confrontation as related, but independent, concepts. They apparently are warming to Wigmore's argument that whenever the hearsay rules, as they evolve, are satisfied, the confrontation clause requirements also are met.").