EAVESDROPPING, THE FOURTH AMENDMENT, AND THE COMMON LAW (OF EAVESDROPPING)

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INTRODUCTION

This Article addresses two of the most momentous and controversial issues raised by the Fourth Amendment. These issues are closely related but distinct. First, is eavesdropping a "search" subject to the Fourth Amendment? Second, are Fourth

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Amendment "searches" limited to the interests against physical intrusion protected by the common-law torts of trespass and false arrest?

Supreme Court justices have debated these issues for nearly a century. *Olmstead v. United States* held that wiretapping "did not amount to a search or seizure within the meaning of the Fourth Amendment."[1] Chief Justice Taft argued that the "well known historical purpose of the Fourth Amendment, directed against general warrants and writs of assistance, was to prevent the use of governmental force to search a man's house, his person, his papers and his effects; and to prevent their seizure against his will."[2] General warrants immunized government agents from liability for trespass or false arrest, and the Anti-Federalists feared that Congress might resort to them unless restrained by a bill of rights.[3]

On the other hand, jurists and scholars have long argued that Founding-era general searches exemplify, but do not exhaust, the practices the Amendment forbids.[4]

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[1] 277 U.S. 438, 466 (1928), *overruled by* Katz v. United States, 389 U.S. 347 (1967), *and* Berger v. New York, 388 U.S. 41 (1967).

[2] *Id.* at 463.

[3] *See, e.g.*, Letter from a Maryland Farmer I (Feb. 15, 1788), *in Anti-Federalist Papers*, INFOPLEASE (Sept. 23, 2019) [hereinafter Letter from a Maryland Farmer], https://www.infoplease.com/primary-sources/government/anti-federalist-papers/maryland-farmer-i [https://perma.cc/BL6M-A68E]. The author of the letter, probably John Francis Mercer, reflected on general warrants with the following hypothetical:

> [S]uppose for instance, that an officer of the United States should force the house, the asylum of a citizen, by virtue of a general warrant, I would ask, are general warrants illegal by the constitution of the United States? . . . That an officer of the customs should break open the dwelling, and violate the sanctuary of a freeman, in search for smuggled goods—impost and revenue laws are and from necessity must be in their nature oppressive—in their execution they may and will become intolerable to a free people, no remedy has been yet found equal to the task of detering [sic] and curbing the insolence of office, but a jury—It has become an invariable maxim of English juries, to give ruinous damages whenever an officer has deviated from the rigid letter of the law, or been guilty of an unnecessary act of insolence or oppression—It is true these damages to the individual, are frequently paid by government, upon a certificate of the judge that there was probable cause of suspicion—But the same reasons that would induce an English judge to give this certificate, would probably lead an American judge, who will be judge and jury too, to spare the public purse, if not favour a brother officer.

Id.

[4] *See Olmstead*, 277 U.S. at 472 (Brandeis, J., dissenting) ("Clauses guaranteeing to the individual protection against specific abuses of power, must have a similar capacity of adaptation to a changing world."); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 399 (1974) ("To suppose [the Founders] meant to preserve to their posterity by guarantees of liberty written with the broadest latitude nothing more than hedges

A home can be searched without physical invasion, and intangible "things" like conversations can be seized.

So said the celebrated dissenters in *Olmstead* and so has the Court said since *Katz* ushered in the "reasonable expectation of privacy" test.[5] The debate continued in the landmark *Carpenter v. United States* decision.[6] Chief Justice Roberts, writing for a five-justice majority, declined to reconsider *Katz*.[7] Justice Thomas would return to *Olmstead*'s physical intrusion test,[8] and Justice Gorsuch would discard *Katz* in favor of some approach based on a broad understanding of property in information.[9]

Remarkably, the debate about the Fourth Amendment, the common law, and eavesdropping has almost completely ignored the common law *of eavesdropping*. This Article is the first to consider the Fourth Amendment in light of an in-depth examination of the common law's prohibition of eavesdropping as a public nuisance.[10] The evidence presented here shows that the prohibition of eavesdropping

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against the recurrence of particular forms of evils suffered at the hands of a monarchy beyond the seas seems to me implausible in the extreme."); Orin S. Kerr, Katz *as Originalism*, 71 DUKE L.J. 1047, 1081 (2022) ("Given that society uses new technologies in new ways, what kinds of surveillance techniques are the current-day equivalents of physical entry into houses, persons, papers, and effects, that should be treated as searches to maintain the role of the Fourth Amendment as technology changes?").

[5] *See infra* Sections II.B, II.C.

[6] *See generally* 138 S. Ct. 2206, 2209 (2018).

[7] *Id.* at 2214 n.1.

[8] *Id.* at 2241 (Thomas, J., dissenting) ("In shifting the focus of the Fourth Amendment from property to privacy, the *Katz* test also reads the words 'persons, houses, papers, and effects' out of the text.").

[9] *See id.* at 2270 (Gorsuch, J., dissenting) ("[P]ositive law may help provide detailed guidance on evolving technologies without resort to judicial intuition.").

[10] There is virtually no discussion of the common law of eavesdropping in either the jurisprudence or the commentary. Such mentions as there are typically do no more than cite Blackstone as saying that eavesdropping was an indictable nuisance, without connecting the common law of eavesdropping to the Fourth Amendment. The two notable exceptions point in opposite directions. Justice Black argued "that the Framers were aware of this practice, and, if they had desired to outlaw or restrict the use of evidence obtained by eavesdropping, I believe that they would have used the appropriate language to do so in the Fourth Amendment." Katz v. United States, 389 U.S. 347, 367 (1967) (Black, J., dissenting). Professor Epstein argued that "the no-trespass-no-injury position was tenuous even at the time that *Entick* was decided, given Blackstone's recognition of eavesdropping as a potential source of mischief." Richard A. Epstein, Entick v Carrington *and* Boyd v United States: *Keeping the Fourth and Fifth Amendments on Track*, 82 U. CHI. L. REV. 27, 35 (2015). Even Black and Epstein go no further than Blackstone. Thus, this Article is the first to survey the common law of eavesdropping as it relates to the Fourth Amendment. After this Article was circulated to journals, I just (September 14, 2023) saw a forthcoming article by Julia Keller that reviews the history of the common law of eavesdropping as it might inform the modern law of torts. Julia Keller, *Eavesdropping: The Forgotten Public Nuisance*, VAND. L. REV. (forthcoming 2023) (manuscript at 104), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4344384 [https://perma

was an integral part of the common law's protections *for the security of the home*. Insofar as the Fourth Amendment incorporates Founding-era common-law protections for the security of the home, those protections were not limited to physical invasions.

Part I summarizes the debate. Part II engages the competing arguments based on constitutional text. As a matter of standard English usage, "searches" can be made without physical intrusions on private premises. The First Congress deliberately chose to protect the security of the home generally rather than solely against general warrants. The right to be secure against unreasonable searches originally meant that the new federal government could not, by statute, override the common law's protections for "persons, houses, papers and effects."

Hitherto these common-law securities for the home have been understood as limited to tort suits for trespass. Part III delivers this Article's value added, by pointing out that Founding-era common-law protections for the security of the home were not limited to home invasions actionable in tort. This richer history reveals an important connection between the Fourth Amendment and common-law eavesdropping. The prohibition of eavesdropping was part and parcel of the common law's protection for the security of the home. That connection, however, has far reaching implications for current Fourth Amendment doctrine.

We can focus those implications by recalling the famous distinction Anthony Amsterdam drew between "regulatory" and "atomistic" perspectives on the Fourth Amendment, asking:

> Should the Fourth Amendment be viewed as a collection of protections of atomistic spheres of interest of individual citizens or as a regulation of governmental conduct. Does it safeguard my person and your house and her papers and his effects against unreasonable searches and seizures; or is it essentially a regulatory canon requiring government to order its law enforcement procedures in a fashion that keeps us collectively secure in our persons, houses, papers and effects, against unreasonable searches and seizures?[11]

.cc/DA3W-5S37]. On the main features of the common law, Keller and I have worked from many of the same sources and have reached consonant conclusions. We focus on very different concerns, the private law of torts and the constitutional law of search-and-seizure, respectively. Some differences in emphasis follow. I emphasize the historical characterization of eavesdropping law as protecting the sanctity of the home, and I am more interested in the evolution of the policing and prosecuting functions than in the evolution of the invasion-of-privacy tort action. In particular, I emphasize the distinction between the common law indictment procedure and the summary punishment of eavesdroppers as "persons of ill fame" under statutes originating with 34 Edward III c. 1. *See infra* Section IV.A. Our historical accounts, however, are generally congruent. *See infra* Section IV.B.

[11] Amsterdam, *supra* note 4, at 367.

The focus on trespass, e.g., by Chief Justice Taft, Justice Black, and Justice Thomas, reflects the belief that text and history require the "atomistic perspective." A focus on the public nuisance action for eavesdropping links the regulatory perspective not just with the Fourth Amendment's broader purposes, but also with a specific doctrine of Founding-era common law.

The common law protected the home against eavesdropping in a very different way than tort actions protected the home against physical invasion. The common law punished eavesdropping as *a practice* that violated the security of all the homes in the community. It was not just *collecting* information by skulking under the eaves, but *disclosing* the information that constituted the offense. The primary remedy was *preventive*, not compensatory or punitive.

A jurisprudence based on those principles would protect privacy against nontrespassory invasions, offer standing to those at risk from the practice at issue, and recognize how remedies other than tort suits have genuine roots in the common law. The focus on trespass is not inevitable, even by narrowly historical criteria. The neglect of eavesdropping has impoverished both our understanding of the past and the jurisprudence that must deal with the realities of surveillance in our digital world.

I. THE GREAT DEBATE: "UNREASONABLE SEARCHES" IN THE SUPREME COURT FROM *BOYD* TO *CARPENTER*

Many Supreme Court cases have turned on the meaning of "unreasonable searches," but the fundamental arguments were advanced in *Boyd v. United States*,[12] *Olmstead v. United States*,[13] *Katz v. United States*,[14] *Kyllo v. United States*,[15] *Florida v. Jardines*,[16] and most recently, *Carpenter v. United States*.[17] The illustrious names in the scorecard that follows attest to the brilliance of the debate.

A. Round One: Bradley versus Miller

In *Boyd*, the government seized as contraband a shipment of glass.[18] The importers, the Boyd brothers, claimed the property.[19] The government took advantage

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[12] 116 U.S. 616, 641 (1886) (Miller, J., concurring).

[13] 277 U.S. 438, 451–54 (1928), *overruled by* Katz v. United States, 389 U.S. 347 (1967), *and* Berger v. New York, 388 U.S. 41 (1967).

[14] 389 U.S. at 353.

[15] 533 U.S. 27, 29 (2001).

[16] 569 U.S. 1, 3 (2013).

[17] 138 S. Ct. 2206 (2018).

[18] Boyd v. United States, 116 U.S. 616, 617–18 (1886). For background on *Boyd*, see Donald A. Dripps, *"Dearest Property": Digital Evidence and the History of Private "Papers" as Special Objects of Search and Seizure*, 103 J. CRIM. L. & CRIMINOLOGY 49, 83–102 (2013).

[19] *Boyd*, 116 U.S. at 617–18.

of a statutory procedure which forced the claimant to choose between bringing business records sought by the government to the trial for inspection, or having the court rule the failure to produce as confession of the facts alleged by the government—in effect, a default judgment.[20]

The majority, per Justice Bradley, readily agreed that the Fourth Amendment was inspired by "grievous abuses" prominently including general warrants "for searching private houses for the discovery and seizure of books and papers that might be used to convict their owner of the charge of libel."[21] The English cases—most prominently, *Entick v. Carrington*—held that general warrants did not defend against trespass suits but were "welcomed and applauded by the lovers of liberty in the colonies[,] as well as in the mother country."[22]

The procedure at issue in *Boyd*, however, did not involve forced entry of private premises.[23] Justice Miller, joined by Chief Justice Waite, agreed that general warrants inspired the Fourth Amendment, but would have limited "unreasonable searches" to physical intrusions.[24] "While the framers of the Constitution had their attention drawn, no doubt, to the abuses of this power of searching private houses and seizing private papers, as practiced in England, it is obvious that they only intended to restrain the abuse, while they did not abolish the power."[25]

Miller pointed to two phrases in the text to support his narrower view. The first was the reference to "houses, papers and effects."[26] Miller saw no reason for the majority to "assume that . . . requiring a party to produce certain papers as evidence on the trial authorizes an unreasonable search or seizure of the house, papers or effects of that party."[27] "Nor [was] there any seizure, because the party [was] not required at any time to part with the custody of the papers."[28]

Justice Bradley responded by claiming that the Fourth Amendment incorporates a principle broader than the immediate abuse of general warrants.

> The principles laid down in [Entick] . . . reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life. . . . Breaking into a house and opening

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[20] *Id.* at 631, 639–40.
[21] *Id.* at 625–26.
[22] *Id.* at 626.
[23] *Id.* at 617, 622.
[24] *Id.* at 640–41 (Miller, J., concurring in part and dissenting in part).
[25] *Id.* at 641.
[26] *Id.* at 639–40.
[27] *Id.* at 639.
[28] *Id.* at 640.

> boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of that judgment. In this regard, the Fourth and Fifth Amendments run almost into each other.[29]

The opinions in *Boyd* drew the battle lines, but the battle was just beginning.

B. Round Two: Taft versus Brandeis

Olmstead challenged his conviction for violating the federal Prohibition Act as obtained in violation of the Fourth Amendment because key evidence against him came from testimony by federal agents who had tapped the defendant's telephone line.[30] Justice Miller's textual argument reappeared, but this time in the majority opinion by Chief Justice Taft. Taft agreed with Bradley that the "well known historical purpose of the Fourth Amendment, directed against general warrants and writs of assistance, was to prevent the use of governmental force to search a man's house, his person, his papers and his effects; and to prevent their seizure against his will."[31]

Taft, however, denied that the Amendment went further[32]:

> The Amendment itself shows that the search is to be of material things—the person, the house, his papers or his effects. The description of the warrant necessary to make the proceeding lawful,

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[29] *Id.* at 630 (majority opinion).

[30] For background on *Olmstead*, see generally WALTER F. MURPHY, WIRETAPPING ON TRIAL: A CASE STUDY IN THE JUDICIAL PROCESS (1965).

[31] Olmstead v. United States, 277 U.S. 438, 463 (1928).

[32] Professor Kerr argues that if Taft meant to require trespass as an element of "unreasonable searches" the opinion would have disavowed *Boyd* more openly. Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67, 82 (2013). I read *Olmstead*'s treatment of *Boyd* somewhat differently. To be sure, Taft did not describe the required physical intrusion and taking of tangible objects as a "trespass test." Nonetheless, the physical intrusions and seizure of chattels Taft had in mind would all but invariably be trespassory. Taft made the point of saying that where the agents trespassed only over the open fields, "[w]hile there was a trespass, there was no search of person, house, papers or effects." *Olmstead*, 277 U.S. at 465. This seems to say that while not all trespasses are searches, all searches are trespasses. Taft retained *Boyd* as an unusual case in which the seizure proceeded the search, i.e., the forced production of the tangible invoice was followed by physically inspecting the contents. *See id.* at 459–60 ("The statute provided an official demand for the production of a paper or document by the defendant for official search and use as evidence on penalty that, by refusal, he should be conclusively held to admit the incriminating character of the document as charged.").

> is that it must specify the place to be searched and the person or things to be seized.[33]

"There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants."[34] The only physical intrusion victimized the telephone company, not the defendant.[35]

In a famous dissenting opinion, Justice Brandeis echoed Bradley's arguments in *Boyd*. Brandeis conceded Taft's textual argument, but hearkened back to the argument from purpose Bradley had made in *Boyd*:

> Time and again, this Court in giving effect to the principle underlying the Fourth Amendment, has refused to place an unduly literal construction upon it. This was notably illustrated in the Boyd case itself. Taking language in its ordinary meaning, there is no "search" or "seizure" when a defendant is required to produce a document in the orderly process of a court's procedure.[36]

Brandeis also quotes *Weems v. United States* to emphasize that: "Time works changes, bring into existence new conditions and purposes. Therefore[,] a principle[,] to be vital[,] must be capable of wider application than the mischief which gave it birth."[37] Brandeis described the principle of the Fourth and Fifth Amendments in sweeping terms:

> The protection guaranteed by the Amendments is much broader in scope. The makers of our Constitution . . . conferred, as against the Government, the right to be let alone—the most comprehensive of rights[,] and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.[38]

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[33] *Olmstead*, 277 U.S. at 464.

[34] *Id.*

[35] *Id.* at 465 ("The intervening wires are not part of his house or office any more than are the highways along which they are stretched.").

[36] *Id.* at 476 (Brandeis, J., dissenting).

[37] *Id.* at 472–73 (quoting Weems v. United States, 217 U.S. 349, 373 (1910)).

[38] *Id.* at 478–79.

No majority of the Court has gone so far, but a majority of the Court did come around to Brandeis's view of wiretapping.[39]

C. Round Three: Stewart and Harlan versus Black

Katz was convicted of making interstate wagers via telephone.[40] "At trial, the Government was permitted, over the petitioner's objection, to introduce evidence of the petitioner's end of telephone conversations, overheard by FBI agents who had attached an electronic listening and recording device to the outside of the public telephone booth from which he had placed his calls."[41] The Court overruled *Olmstead* and the rest is history.

The most striking thing about *Katz* is how small a role the constitutional text played in either Justice Potter Stewart's majority opinion or in Justice Harlan's concurrence, which became the fountainhead of modern Fourth Amendment law. Both Justice Stewart and Justice Harlan reasoned primarily from precedents.[42] To understand *Katz* in context we must at least briefly survey those precedents.

The decisions covered three different types of cases, *viz.*: (1) using instruments to overhear conversations inside private premises by agents outside; (2) equipping informants with hidden microphones; and (3) applying the exclusionary rule to intangible statements and mere evidence. In the first type of case, the Court reaffirmed *Olmstead* in *Goldman v. United States*, ruling that agents did not need a warrant to eavesdrop on defendant's office conversations by placing a "detectaphone" against the wall of the adjoining office.[43] Retreat was sounded in *Silverman v. United States*,[44] in which the Court held that even a *de minimis* penetration of defendant's property by use of a spike microphone called for a warrant under *Olmstead* and *Goldman*.[45] *Silverman*, however, cast doubt on tying the Fourth Amendment to the common-law trespass action by stating that "decision here does not turn upon the technicality of a trespass upon a party wall as a matter of local law."[46]

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[39] *Olmstead* was overruled by *Katz v. United States*, 389 U.S. 347, 347 (1967).

[40] *Katz*, 389 at 348.

[41] *Id.*

[42] *Id.* at 353 ("We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling."); *id.* at 362 n.* (White, J., concurring) ("I also think that the course of development evinced by *Silverman*, *Wong Sun*, *Berger*, and today's decision must be recognized as overruling *Olmstead v. United States*, which essentially rested on the ground that conversations were not subject to the protection of the Fourth Amendment.").

[43] Goldman v. United States, 316 U.S. 129, 134–35 (1942), *overruled by* Katz v. United States, 389 U.S. 347 (1967).

[44] 365 U.S. 505, 509–11 (1961).

[45] *Id.* at 509–10 ("Eavesdropping accomplished by means of such a physical intrusion is beyond the pale of even [*Olmstead* and *Goldman*].").

[46] *Id.* at 512.

In *On Lee v. United States*, the Court rejected a Fourth Amendment challenge to the use of a hidden transmitter by an undercover agent inside defendant's business premises.[47] *Lopez v. United States* held that, on facts similar to *On Lee*, recording an undercover agent's conversations with defendant in defendant's business premises did not violate the Fourth Amendment.[48]

Six months before *Katz*, the Court drew the line in *Berger v. New York*, holding that when the agents secretly broke into defendant's office to plant the hidden microphone, without even consent obtained by deception, the Fourth Amendment required a particularized warrant.[49] *Berger* relied on the then-recent decisions about the scope of the exclusionary rule, *Wong Sun v. United States*,[50] holding that testimony about verbal statements is subject to the exclusionary rule when the statements were the fruit of a warrantless entry to defendant's home.[51] In *Berger,* Justice Douglas argued that conversations secretly monitored by police were just such "mere evidence" that even a warrant could not reach.[52] The majority rebuffed Douglas's argument as foreclosed by *Warden*, *Maryland Penitentiary v. Hayden*,[53] holding that police may seize for use as evidence tangible property belonging to the defendant but not itself subject to confiscation.[54]

Berger made a passing reference to Blackstone's discussion of eavesdropping as a public nuisance, but only as the first step in the argument that electronic surveillance presented dramatically greater threats to privacy.[55] Justice Clark cited only Blackstone,[56] indicating that he was concerned more with modern surveillance technology than with the normative judgements of the common law.

In *Katz*, Justices Stewart and Harlan both read *Silverman* as fundamentally concerned with what the spike mic permitted the agents to overhear; whether the microphone violated Silverman's property rights was a trivial incident of the eavesdropping.[57] Justice Stewart's majority opinion memorably declared that "the Fourth

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[47] 343 U.S. 747, 749–51, 754 (1952).

[48] 373 U.S. 427, 438–39 (1963).

[49] 388 U.S. 41, 58–60 (1967).

[50] 371 U.S. 471, 484–88 (1963).

[51] *Berger*, 388 U.S. at 52 (quoting *Wong Sun*, 371 U.S. at 485) ("It follows from our holding in *Silverman v. United States* that the Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of 'papers and effects.'").

[52] *Id.* at 64 (Douglas, J., concurring).

[53] *Id.* at 44 n.2.

[54] Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 301–02 (1967).

[55] *Berger*, 388 U.S. at 45 ("The awkwardness and undignified manner of [listening under eaves], as well as its susceptibility to abuse[,] was immediately recognized. Electricity, however, provided a better vehicle . . . .").

[56] *Id.* (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *168).

[57] Katz v. United States, 389 U.S. 347, 353 (1967) (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)) ("[*Silverman*] held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements, overheard without any 'technical trespass under . . . local property law.'"); *see id.* at 362 & n.*

Amendment protects people, not places,"[58] so that "the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure."[59] After repudiating *Olmstead*'s focus on physical intrusion, the remaining issue was what doctrine to put in its place.[60]

Readers must glean the majority's embrace of a reasonable-expectations-of-privacy test from scattered comments. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."[61] By contrast, "the Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment."[62]

Justice Harlan expressed the same general doctrine more systematically. "My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[63] Justice Harlan's test soon came to guide the Court's Fourth Amendment jurisprudence.[64]

Justice Black dissented, largely echoing the arguments made by Taft in *Olmstead*.[65] Justice Black, however, citing *Berger*'s earlier reference to Blackstone

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(Harlan, J., concurring) (noting that the decisions since *Silverman* "and today's decision must be recognized as overruling *Olmstead v. United States*, which essentially rested on the ground that conversations were not subject to the protection of the Fourth Amendment.").

[58] *Id.* at 351 (majority opinion).

[59] *Id.* at 353.

[60] *Id.* at 534.

[61] *Id.* at 351.

[62] *Id.* at 353.

[63] *Id.* at 361 (Harlan, J., concurring).

[64] *See* Carpenter v. United States, 138 S. Ct. 2206, 2237–38 (2018) (Thomas, J., dissenting) ("It took only one year for the full Court to adopt his two-pronged test. . . . And by 1979, the Court was describing Justice Harlan's test as the 'lodestar' for determining whether a 'search' had occurred.").

[65] *Katz*, 389 U.S. at 365 (Black, J., dissenting). Reflecting on the text of the Amendment, Justice Black noted that:

> The first clause protects "persons, houses, papers, and effects, against unreasonable searches and seizures. . . ." These words connote the idea of tangible things with size, form, and weight, things capable of being searched, seized, or both. The second clause of the Amendment still further establishes its Framers' purpose to limit its protection to tangible things by providing that no warrants shall issue but those "particularly describing the place to be searched, and the persons or things to be seized." A conversation overheard by eavesdropping, whether by plain snooping or wiretapping, is not tangible and, under the normally accepted meanings of the words, can neither be searched nor seized.

Id.

on eavesdropping, argued that "the Framers were aware of this practice, and if they had desired to outlaw or restrict the use of evidence obtained by eavesdropping, I believe that they would have used the appropriate language to do so in the Fourth Amendment."[66]

D. Round Four: Scalia versus Scalia

In a fascinating series of opinions, Justice Scalia appeared to take both sides in the debate. Shortly after his appointment, he joined the majority in *California v. Greenwood*.[67] *Greenwood* held that police need neither probable cause nor a warrant to seize and inspect garbage bagged and left for collection outside the home.[68] Both Justice White's majority opinion and Justice Brennan's dissent took the *Katz* framework as their points of departure.[69]

Ten years later, in *Minnesota v. Carter*,[70] Justice Scalia launched a new assault on *Katz*. In *Carter*, an informant, and then a police officer, observed the defendants packaging drugs for sale "through a gap in the closed blind."[71] The police obtained a warrant based on these observations, and defendants challenged the warrant as the fruit of the warrantless peeping.[72] The majority held that the defendants, who were visiting the apartment briefly for the purpose of closing a drug deal, had no reasonable expectation of privacy in the apartment—even if the peeping qualified as a search.[73]

Justice Scalia, joined by Justice Thomas, took the occasion to urge the overruling of *Katz*.[74] Justice Scalia rejected the defendants' claim to standing based on text and Founding-era history. The Fourth Amendment's text,

> did not guarantee some generalized "right of privacy" and leave it to this Court to determine which particular manifestations of the value of privacy "society is prepared to recognize as 'reasonable.'"

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[66] *Id.* at 366.

[67] *See generally* 486 U.S. 35 (1988).

[68] *Id.* at 39–43.

[69] *See id.* at 39–40 (reciting *Katz* test); *id.* at 46 (Brennan, J., dissenting) ("A container which can support a reasonable expectation of privacy may not be searched, even on probable cause, without a warrant." (quoting United States v. Jacobsen, 466 U.S. 109, 120 n.17 (1984))).

[70] *See generally* 525 U.S. 83 (1998).

[71] *Id.* at 85.

[72] *Id.* at 85–86.

[73] *Id.* at 91 ("Because we conclude that respondents had no legitimate expectation of privacy in the apartment, we need not decide whether the police officer's observation constituted a 'search.'").

[74] *Id.* at 91–92, 97–98 (Scalia, J., concurring).

> Rather, it enumerated ("persons, houses, papers, and effects") the objects of privacy protection to which the Constitution would extend, leaving further expansion to the good judgment, not of this Court, but of the people through their representatives in the legislature.[75]

Even if the text were equivocal, Justice Scalia found reinforcement in the Founding-era common law "of arrest and trespass that underlay the Fourth Amendment."[76] He further condemned the *Katz* test as "self-indulgent" inasmuch as reasonable expectations of privacy "bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable."[77] No reader of Justice Scalia's opinion in *Carter* could have predicted his subsequent opinion for the Court in *Kyllo v. United States*.[78]

Federal agents obtained a warrant to search Kyllo's triplex for an indoor marijuana grow.[79] The application for the warrant included evidence obtained by scanning the home from the outside by use of a thermal imager, a device that detected infrared radiation emanating from inside the home.[80] The imager showed an intense heat source inside the home, heat that might be explained by, *inter alia*, grow lights.[81] The officers had no warrant for the use of the imager, so if using the imager counted as a "search" the later warrant search of the home would be fruit of the poisonous tree.[82]

Given his critique of *Katz* in *Carter*, Justice Scalia might have concluded that using the imager was not a "search" because it did not physically intrude on Kyllo's home. Indeed, as Justice Stevens argued in dissent, the device did not even send an electronic pulse "through the wall" but rather read radiation emanating "off the wall."[83] Justice Scalia for the majority concluded that a "search" indeed occurred.[84]

This conclusion followed from combining *Katz* with originalism. With respect to the home,

> obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical "intrusion into a constitutionally

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[75] *Id.* at 97–98.
[76] *Id.* at 94.
[77] *Id.* at 97.
[78] *See generally* 533 U.S. 27 (2001).
[79] *Id.* at 30.
[80] *Id.* at 29–30.
[81] *Id.* at 30.
[82] *Id.* at 40.
[83] *Id.* at 41 (Stevens, J., dissenting).
[84] *Id.* at 34–35 (majority opinion).

> protected area," constitutes a search—at least where (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.[85]

The *Kyllo* test protects *informational privacy* at least with respect to information that *at the Founding* government agents could learn only *by physical entry.* It bears a far closer resemblance to Justice Bradley's opinion in *Boyd* than to Chief Justice Taft's opinion in *Olmstead*.[86]

If indeed *Kyllo* signaled Justice Scalia's conversion to something like *Katz*, he turned back to the trespass test in *United States v. Jones*[87] and *Florida v. Jardines*.[88] In *Jones*, federal agents acting outside the scope of a warrant attached a location monitoring transmitter to the underside of Jones's vehicle.[89] "By means of signals from multiple satellites, the device established the vehicle's location within 50 to 100 feet, and communicated that location by cellular phone to a Government computer. It relayed more than 2,000 pages of data over the 4-week period."[90]

For Justice Scalia, the critical fact was that "the Government physically occupied private property for the purpose of obtaining information."[91] This was a search, not because of *Katz*, but because of *Kyllo*'s principle that the Court must preserve "that degree of privacy against government that existed when the Fourth Amendment was adopted."[92] Planting the tracking device was a search because the physical intrusion on Jones's vehicle "would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted."[93]

In *Jardines*, the Court held that government "use of trained police dogs to investigate the home and its immediate surroundings is a 'search' within the meaning of the Fourth Amendment."[94] The dog approached the front porch and signaled the scent of illegal drugs by sitting at "the base of the front door."[95] This use of the

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[85] *Id.* at 34.

[86] *See* Boyd v. United States, 116 U.S. 616, 630 ("The principles laid down in [*Entick*] . . . reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its [employees] of the sanctity of a man's home and the privacies of life."); Olmstead v. United States, 277 U.S. 438, 464 (1928) ("There was no entry of the houses or offices of the defendants."), *overruled by* Katz v. United States, 389 U.S. 347 (1967), *and* Berger v. New York, 388 U.S. 41 (1967).

[87] *See generally* United States v. Jones, 565 U.S. 400 (2012).

[88] *See generally* Florida v. Jardines, 569 U.S. 1 (2013).

[89] *See Jones*, 565 U.S. at 402–03.

[90] *Id.* at 403.

[91] *Id.* at 404.

[92] *Id.* at 406 (quoting Kyllo v. United States, 533 U.S. 27, 34 (2001)).

[93] *Id.* at 404–05.

[94] Florida v. Jardines, 569 U.S. 1, 11–12 (2013).

[95] *Id.* at 4.

dog inside the curtilage of the home exceeded the customary license enjoyed by the general public, since spotting a "visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to—well, call the police."[96]

Justice Scalia's focus on the placement of the tracking device in *Jones*, and the entry to the curtilage in *Jardines,* spared him decision of difficult issues under *Katz*. In *Jones*, it was not clear that individuals have reasonable expectations of privacy in their location in public space, even when that location data is aggregated by technology far beyond the capacities of any casual observer.[97] In *Jardines*, the Court's focus on the entry avoided deciding whether the principle that the dog sniff is no "search" because the dog can only signal the presence or absence of contraband applies to dog sniffs of *homes* as well as of vehicles.[98]

This seems to put Scalia on both sides of the *Boyd/Olmstead/Katz* debate. Trespasses to collect information count as searches, so trespasses that do not invade informational privacy are not searches. If, on the other hand, we take *Kyllo* as controlling, no physical intrusion is necessary today, provided a physical intrusion would have been necessary to obtain the same information from inside the home in the eighteenth century. Either way it seems that informational privacy is driving Justice Scalia's test.

In *Kyllo*, *Jones*, and *Jardines*, Justice Scalia accepted *Katz* as a backup plan or supplement to the physical intrusion test. He did not renew the critique of *Katz* he presented in *Carter*.[99] That critique, of course, might still be right. Justice Thomas and Justice Gorsuch certainly think so.

E. Round Five: Roberts versus Thomas and Gorsuch

Carpenter v. United States[100] provided the latest occasion for renewing the debate. The case, famous from the day it came down,[101] held that investigators who

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[96] *Id.* at 9.

[97] *See Jones*, 565 U.S. at 412–13 (noting difficulties of *Katz* analysis of aggregated location data, stating "there is no reason for rushing forward to resolve them here").

[98] Justice Kagan, concurring, and Justice Alito, dissenting, disputed the distinction between vehicles and homes. *Jardines*, 569 U.S. at 14 n.1 (Kagan, J., concurring); *id.* at 23–24 (Alito, J., dissenting).

[99] *See* Kyllo v. United States, 533 U.S. 27, 35 (2001) (observing that reversing the *Katz* approach "would leave the homeowner at the mercy of advancing technology."); *Jones*, 569 U.S. at 409 ("[T]he *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test."); *Jardines*, 569 U.S. at 5 ("[T]hough *Katz* may add to the baseline, it does not subtract anything from the Amendment's protections" under the physical intrusion test.).

[100] *See generally* 138 S. Ct. 2206 (2018).

[101] *See, e.g.*, Paul Ohm, *The Many Revolutions of* Carpenter, 32 HARV. J.L. & TECH. 357, 360 (2019) ("From now on, we will be talking about what the Fourth Amendment means in

obtain seven days of location data from the suspect's cell phone carrier engage in a Fourth Amendment "search" that is "unreasonable" without a warrant satisfying the probable cause and particularity requirements.[102] Justices Kennedy, Alito, Thomas, and Gorsuch each filed dissenting opinions.[103]

Justice Kennedy focused his dissent on the so-called third-party doctrine.[104] Prior to *Carpenter*, the Court had held that customers of banks and telephone companies had no reasonable expectation of privacy in the corporate records of information shared by the customer.[105] Justice Kennedy's dissent, joined by Justices Thomas and Alito, argued that "the Government did not search anything over which Carpenter could assert ownership or control."[106]

Justice Alito echoed Justice Kennedy's objection to allowing "a defendant to object to the search of a third party's property."[107] The Alito dissent (which only Justice Thomas joined) concentrated on the difference between discovery orders and search warrants, rather than on the third-party doctrine.[108] Justice Alito did not impugn *Katz* overtly, but rather argued that the third-party cases correctly applied the *Katz* test to customer information contained in business records.[109]

Justices Thomas and Gorsuch both challenged *Katz* but drew very different pictures of a post-*Katz* future. Justice Thomas reiterated the textual arguments made by Justices Taft and Black.[110] The *Katz* test "reads the words 'persons, houses, papers and effects' out of the text."[111] Justice Gorsuch agreed with Justice Thomas's originalist critique of *Katz*.[112]

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pre-*Carpenter* and post-*Carpenter* terms. It will be considered as important as *Olmstead* and *Katz* in the overall arc of technological privacy.").

[102] *Carpenter*, 138 S. Ct. at 2217 ("The location information obtained from Carpenter's wireless carriers was the product of a search.") (footnote omitted). The omitted footnote left open the possibility that "there is a limited period for which the Government may obtain an individual's historical CSLI free from Fourth Amendment scrutiny, and if so, how long that period might be. It is sufficient for our purposes today to hold that accessing seven days of CSLI constitutes a Fourth Amendment search." *Id.* at 2217 n.3.

[103] *Id.* at 2223 (Kennedy, J., dissenting); *id.* at 2235 (Thomas, J., dissenting); *id.* at 2246 (Alito, J., dissenting); *id.* at 2261 (Gorsuch, J., dissenting).

[104] *Id.* at 2223–24 (Kennedy, J., dissenting) (citing United States v. Miller, 425 U.S. 435 (1976)).

[105] *Id.*

[106] *Id.* at 2235.

[107] *Id.* at 2247 (Alito, J., dissenting).

[108] *Id.* ("The order in this case was the functional equivalent of a subpoena for documents, and there is no evidence that these writs were regarded as 'searches' at the time of the founding.").

[109] *Id.* at 2259–60.

[110] *Id.* at 2236 (Thomas, J., dissenting).

[111] *Id.* at 2241.

[112] *Id.* at 2264 (Gorsuch, J., dissenting) ("*Katz*'s problems start with the text and original understanding of the Fourth Amendment, as Justice Thomas thoughtfully explains today.").

Justice Thomas, however, appeared to favor a simple return to the *Olmstead* physical intrusion test. He lamented the Court's "retreat from *Olmstead*"[113] and the subsequent shift "from property to privacy . . . [which] reads the words 'persons, houses, papers and effects' out of the text."[114] Justice Thomas described *Katz* as rejecting *Olmstead*'s "remaining holding—that eavesdropping is not a search absent a physical intrusion into a constitutionally protected area."[115] It seems to follow that when he concludes that *Katz* is "a failed experiment" which the Court is "duty-bound to reconsider," Justice Thomas imagines not just a departure from *Katz* but a return to *Olmstead*.[116]

Justice Gorsuch by contrast envisions a return to a "traditional approach" "tied to the law" but not limited to physical intrusions.[117] "Under this more traditional approach, Fourth Amendment protections for your papers and effects do not automatically disappear just because you share them with third parties."[118] Justice Gorsuch conceded that this approach raises difficult questions. "[W]hat kind of legal interest is sufficient to make something *yours*? And what source of law determines that? Current positive law? The common law at 1791, extended by analogy to modern times? Both?"[119] Given Carpenter's exclusive reliance on *Katz*, Justice Gorsuch "reluctantly" left answers to these questions for another day.[120]

In footnote one of the majority opinion, Chief Justice Roberts adhered to *Katz* without endorsing *Katz* in principle.[121] After referring to the dissents of Justices Kennedy, Thomas, and Gorsuch, the Chief Justice made two replies.[122] First, "*Katz* of course 'discredited' the 'premise that property interests control,' and we have repeatedly emphasized that privacy interests do not rise or fall with property rights, *see, e.g.*, [*Jones* and *Kyllo*]."[123] Second, "[n]either party has asked the Court to reconsider *Katz* in this case."[124]

F. Round Six: TBD versus TBD

There is going to be a sixth round. The evolution of surveillance technology calls upon the courts to decide whether each new technique is—or is not—a "search" subject to Fourth Amendment standards of reasonableness. Examples include geofence

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[113] *Id.* at 2236 (Thomas, J., dissenting).
[114] *Id.* at 2241 (quoting U.S. CONST. amend. IV).
[115] *Id.* at 2237.
[116] *Id.* at 2246.
[117] *Id.* at 2267–68 (Gorsuch, J., dissenting).
[118] *Id.* at 2268.
[119] *Id.*
[120] *Id.* at 2272 ("I cannot help but conclude—reluctantly—that Mr. Carpenter forfeited perhaps his most promising line of argument.").
[121] *Id.* at 2214 n.1 (majority opinion).
[122] *Id.*
[123] *Id.*
[124] *Id.*

warrants for third-party location data;[125] police-created data banks holding millions of automatically generated license plate GPS and time locations;[126] and high-resolution, continuous aerial surveillance of entire cities.[127]

When the prosecution, either federal or state, asks "the Court to reconsider *Katz*" or when some defendant asks the Court to recognize a property right in data subject to private-law limits on disclosure, the debate will be renewed. Without endorsing *Katz,* the rest of this Article explains why text and history counsel against any return to *Olmstead*'s physical intrusion test.

II. THE TEXTUAL ARGUMENTS

A. "Searches"

Limiting "searches" to cases of forcible entry is alien to the ordinary meaning of "searches." In ordinary usage, you can trespass without searching, such as by driving a golf ball through the neighbor's window.[128] You can search without trespassing, such as by searching your attic for your high school yearbook. Federal agents can "search" a national park for a fugitive.[129] Parents can themselves ask whether to "search" their teenager's bedroom.[130]

There is nothing new in this non-technical understanding of "searches." Doctor Johnson gave four definitions of "search" as a noun in his 1755 Dictionary.[131] First, "[i]nquiry by looking into every suspected place."[132] The example is from *Paradise Lost*, where Satan overflies Earth "with narrow search, and with inspection deep."[133]

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[125] *See, e.g.*, Note, *Geofence Warrants and the Fourth Amendment*, 134 HARV. L. REV. 2508 (2021).

[126] *See, e.g.*, ELAINE M. HOWLE, AUTOMATED LICENSE PLATE READERS, CAL. STATE AUDITOR REPORT 2019-118 (Feb. 2020), https://www.auditor.ca.gov/pdfs/reports/2019-118.pdf [https://perma.cc/7BJ3-K52R].

[127] *See generally* Leaders of a Beautiful Struggle v. Balt. Police Dep't, 2 F.4th 330 (4th Cir. 2021) (en banc).

[128] *See* Fenton v. Quaboag Country Club, Inc., 233 N.E.2d 216, 219 (Mass. 1968) (affirming order enjoining defendant from operating course as to "cause golf balls to be cast upon or propelled upon or against the property of the Plaintiffs," stating "[t]he plaintiffs are clearly entitled to an abatement of the trespasses.").

[129] *Lake Mead Park Rangers Looking for Fugitive*, NAT'L PARK SERV. (Sept. 30, 2011), https://www.nps.gov/lake/learn/news/2011-44.htm [https://perma.cc/ST4Z-XYWS] ("The search for the fugitive was called off after four hours.").

[130] *See* James Lehman, *Teens and Privacy: Should I Spy on My Child?*, EMPOWERING PARENTS, https://www.empoweringparents.com/article/teens-parents-privacy/ [https://perma.cc/JV6T-YBFF] (last visited Mar. 4, 2024).

[131] *Search*, SAMUEL JOHNSON'S DICTIONARY [hereinafter SAMUEL JOHNSON'S DICTIONARY], https://johnsonsdictionaryonline.com/views/search.php?term=search [https://perma.cc/XS5G-FM7G] (last visited Mar. 4, 2024).

[132] *Id.*

[133] *Id.*

At this point in *Paradise Lost*, there are only two people on Earth, and they do not have clothes, let alone houses.[134]

The second and third definitions are "examination" and "[i]nquiry; act of seeking," respectively.[135] Johnson gives several illustrations here, among them: "The parents, after a long *search* for the boy, gave him up for drowned in a canal."[136] This aligns well with Noah Webster's illustration, quoted in *Kyllo*: "Search the wood for a thief."[137] Whether *searching* for a lost child or a fugitive, the searchers would be in public space, listening as well as looking.

Fourth, Johnson equates "search" with "[q]uest; pursuit."[138] Johnson again gives several illustrations, leading with one from Shakespeare's *King John*: "If zealous love should go in *search* of virtue/Where should he find it purer than in Blanch?"[139]

Johnson's related entries on "search" as a verb likewise show no connection with trespass. As an active verb, Johnson's first definition is "[t]o examine; to try; to explore; to look through."[140] These illustrations follow:

> Help to search my house this one time: if I find not what I seek,
> let me for ever be your table sport.
> Shakespeare.
>
> They returned from searching of the land.
> Num. xiii. 25.
>
> Through the void immense
> To search with wand'ring quest a place foretold.
> Milton.[141]

Then as now, you can "search" your own property, or "search" public space, for a missing person or item. Webster gave "to search"[142] and Johnson[143] "to search out" as a definition of "investigate."

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[134] *See generally* JOHN MILTON, PARADISE LOST (London, Peter Parker 1667).

[135] *Search*, SAMUEL JOHNSON'S DICTIONARY, *supra* note 131.

[136] *Id.* (emphasis added).

[137] Kyllo v. United States, 533 U.S. 27, 32 n.1 (2001).

[138] *Search*, SAMUEL JOHNSON'S DICTIONARY, *supra* note 131.

[139] *Id.* (citing WILLIAM SHAKESPEARE, THE LIFE AND DEATH OF KING JOHN, act 2, sc. 1, ll. 445–46).

[140] *Id.* (first quoting WILLIAM SHAKESPEARE, THE MERRY WIVES OF WINDSOR, act 4, sc. 2, ll. 160–62; then quoting *Numbers* 13:25; and then quoting JOHN MILTON, PARADISE LOST bk. II, 830 (1667)).

[141] *Id.*

[142] NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (New York, S. Converse ed., 1828) [hereinafter AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE], https://webstersdictionary1828.com/Dictionary/investigate [https://perma.cc/8R9X-N282].

[143] *To Search*, SAMUEL JOHNSON'S DICTIONARY, *supra* note 131.

To these standard authorities we may add a little-known *New Spelling Dictionary*, first published in 1765, by the Reverend John Entick.[144] Yes, *that* John Entick.[145] Three years after the King's Messengers raided his house, Entick defined "search" as "inquiry, quest, act of seeking."[146] Entick had good reason indeed to define "ransack" as "to plunder, search narrowly."[147] Surely, however, while ransacking involves searching, just as clearly not all searching involves ransacking. Entick defined "investigate" as "to search out."[148] All these lexicographers gave quite distinct definitions of "trespass" as unlawful entry on another's land or more generally as an offense or transgression.[149]

Now if "unreasonable searches" were a term of art, cribbed from the common law, an artificial understanding might be correct. As Justice Thomas acknowledged in his *Carpenter* dissent, "searches" "was probably not a term of art, as it does not appear in legal dictionaries from the era."[150] There was an international law doctrine of "visitation and search" by belligerent navies enforcing blockades on the high seas.[151] Otherwise there seems not to have been any technical understanding different from ordinary usage.

This implies that when the Court excludes from the Fourth Amendment's scope police activity that plainly fits the ordinary meaning of "searches," it is not the

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[144] *See* THE NEW SPELLING DICTIONARY (London, Edward & Charles Dilly 1765) [hereinafter ENTICK'S DICTIONARY], https://books.google.com/books?id=GS6yL6UlREYC&newbks=1&newbks_redir=0&printsec=frontcover&hl=en#v=onepage&q&f=false [https://perma.cc/9TJC-R94D]. Entick's Dictionary is not paginated, but on Google Books, the reader can term search to find particular entries. *E.g.*, *Search*, *supra*, https://www.google.com/books/edition/The_New_Spelling_Dictionary_Teaching_to/GS6yL6UlREYC?hl=en&gbpv=1&bsq=search [https://perma.cc/U5ML-QDJZ].

[145] *See, e.g.*, Boyd v. United States, 116 U.S. 616, 626–27 (1886) (celebrating *Entick v. Carrington* as familiar to "every American statesman, during our revolutionary and formative period as a nation . . . and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the Fourth Amendment."); *see also ENTICK V. CARRINGTON*: 250 YEARS OF THE RULE OF LAW (Adam Tomkins & Paul Scott eds., 2015); Christian Burset & T.T. Arvind, *A New Report of* Entick v. Carrington *(1765)*, 110 KY. L.J. 265 (2021–2022).

[146] *See Search*, ENTICK'S DICTIONARY, *supra* note 144.

[147] *Id.* at entry for "ransack."

[148] *Id.* at entry for "investigate."

[149] *E.g.*, *id.* at entry for "trespass"; *Trespass*, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 142, https://webstersdictionary1828.com/Dictionary/trespass [https://perma.cc/U6A4-CU54].

[150] Carpenter v. United States, 138 S. Ct. 2206, 2238 (2018) (Thomas, J., dissenting); *see also Searchers*, GILES JACOB, A NEW LAW DICTIONARY (8th ed. London, H. Woodfall & W. Strahan 1762) (unpaginated but organized alphabetically) (entry on "searchers" referring to "officers of the customs" and "divers other cases" with power to search, but giving no entry for "search" itself); 2 RICHARD BURN & JOHN BURN, A NEW LAW DICTIONARY 320–24 (London, A. Strahan & W. Woodfall 1792) (giving no definition for search, searcher, or seize).

[151] *See, e.g.*, The Marianna Flora, 24 U.S. 1, 42 (1825) (discussing the rights of visitation and search).

linguistic meaning of "searches" that is doing the work. Under the Court's open-fields doctrine, Webster's example—searching a wood for a thief—would not be a search for purposes of the Fourth Amendment. In *Hester v. United States*, federal agents saw Hester pass a bottle of contraband liquor to a buyer just outside Hester's residence.[152] The moonshiners discarded two bottles in flight.[153] Hester asked the trial court to suppress the jugs as the fruit of an illegal search, inasmuch as the agents were on the property without consent or a warrant.[154]

Justice Holmes for a unanimous court wrote:

> It is obvious that, even if there had been a trespass, the above testimony was not obtained by an illegal search or seizure. . . . the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects' is not extended to the open fields. The distinction between the latter and the house is as old as the common law. 4 Bl. Comm. 223, 225, 226.[155]

This remarkable passage seems at odds with both common usage and common law.

What were the agents doing that night, if not *searching* for illegal liquor and those trafficking in the same? As for the common law, Holmes references Blackstone's treatment *of burglary*, not of trespass.[156] In Blackstone's time, burglary was capital and given an accordingly strict construction.[157] Per Blackstone, there could be no burglary of commercial premises as distinct from residential premises.[158] Holmes does not refer to Blackstone's treatment of trespass; Blackstone says the action will lie even if the only damage was "the treading down and bruising" of the plaintiff's "herbage."[159] Yet Holmes saw ransacking commercial premises as very much a search, even though Blackstone says that only dwellings can be burgled.[160]

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[152] 265 U.S. 57, 58 (1924).

[153] *Id.*

[154] *Id.* at 57–58.

[155] *Id.* at 58–59 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *223, *225–26).

[156] *Id.*

[157] *Id.*

[158] 4 WILLIAM BLACKSTONE, COMMENTARIES *225–26 ("But if I hire a shop, parcel of another man's house, and work or trade in it, but never lie there; it is no dwellinghouse, nor can burglary be committed therein: for by the lease it is severed from the rest of the house, and therefore is not the dwellinghouse of him who occupies the other part; neither can I be said to dwell therein, when I never lie there.").

[159] 3 WILLIAM BLACKSTONE, COMMENTARIES *210–11.

[160] In *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920), federal agents "without a shadow of authority, went to the office of the[ ] company and made a clean sweep of all the books, papers and documents found there." *Id.* at 390. After the documents were returned, the government sought to obtain them for use as evidence by a *subpoena duces*

This characterization of investigative methods as searches in ordinary language but not searches under the Fourth Amendment continues under the *Katz* test. For example, in *Hudson v. Palmer*,[161] the Court rejected a Fourth Amendment challenge to the "shakedown" search of a prisoner's cell:

> Notwithstanding our caution in approaching claims that the Fourth Amendment is inapplicable in a given context, we hold that society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell.[162]

Hudson went on to reject the prisoner's narrower claim that (like inventory searches of impounded vehicles) random shakedown searches violate the Fourth Amendment unless undertaken pursuant to an established general policy.[163] In rejecting this claim, the Court used this language:

> A requirement that even random searches be conducted pursuant to an established plan would seriously undermine the effectiveness of this weapon. It is simply naïve to believe that prisoners would not eventually decipher any plan officials might devise for "planned random searches," and thus be able routinely to anticipate searches.[164]

Having just held that under *Katz* there could be no "search" of a prisoner's cell, the Court turns about and discusses the difficulties of regulating these same "searches."[165]

The *pièce de résistance* in the catalogue of searches-that-aren't-searches is *United States v. Lee*, in which Justice Brandeis (of all people!) said that the use of a searchlight was not a search at all.[166] Of course it would be fair to say that a search

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tecum. The Court, per Holmes, held the subpoena unenforceable, even though the defendant, being a corporation, had no Fifth Amendment rights. *Id.* at 392 ("[T]he rights of a corporation against unlawful search and seizure are to be protected even if the same result might have been achieved in a lawful way.").

[161] *See generally* 468 U.S. 517 (1984).

[162] *Id.* at 525–26.

[163] *Id.* at 528.

[164] *Id.* at 529.

[165] *Id.*

[166] 274 U.S. 559, 563 (1927) ("But no search on the high seas is shown. The testimony of the boatswain shows that he used a searchlight. It is not shown that there was any exploration below decks or under hatches.").

of the open fields, or of a prison cell, or of the open deck of a ship at sea, is not an *unreasonable* search. To say that searches are not searches is different and untenable.

B. Subjects and Objects of Searches

The textual argument for limiting "unreasonable searches" to physical intrusions for tangible evidence gets zero support from the ordinary meaning of "searches." Proponents of the physical intrusion test argue that the global term "searches" is qualified by the textual references to the "persons, houses, papers and effects" protected by the Declaratory Clause and to the "things to be seized" under the Warrant Clause.[167]

In the Fourth Amendment, "searches" follows the enumeration of "persons, houses, papers and effects," and is in turn followed by the reference to "persons or things" to be seized.[168] Justice Miller, concurring in *Boyd*,[169] Chief Justice Taft, for the majority in *Olmstead*,[170] and Justice Black, dissenting in *Katz*,[171] all took the view that without physical intrusion there could be no "search" of "houses, papers and effects." Justice Thomas recently reinforced this view with his formidable *Carpenter* dissent.[172]

Chief Justice Taft and Justice Black also argued that the reference to "things to be seized" in the Warrant Clause excluded eavesdropping from the category of "searches." "The description of the warrant necessary to make the proceeding lawful, is that it must specify the place to be searched and the person or *things* to be seized."[173] "A conversation overheard by eavesdropping, whether by plain snooping

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[167] U.S. CONST. amend. IV.

[168] *Id.*

[169] Boyd v. United States, 116 U.S. 616, 641 (1886) (Miller, J., concurring) ("I cannot conceive how a statute aptly framed to require the production of evidence in a suit by mere service of notice on the party who has that evidence in his possession can be held to authorize an unreasonable search or seizure when no seizure is authorized or permitted by the statute.").

[170] Olmstead v. United States, 277 U.S. 438, 464 (1928) ("The Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing, and that only. There was no entry of the houses or offices of the defendants.").

[171] Katz v. United States, 389 U.S. 347, 373 (Black, J., dissenting) ("By clever word juggling, the Court finds it plausible to argue that language aimed specifically at searches and seizures of things that can be searched and seized may, to protect privacy, be applied to eavesdropped evidence of conversations that can neither be searched nor seized.").

[172] Carpenter v. United States, 138 S. Ct. 2206, 2241 (2018) (Thomas, J., dissenting) ("The Founders decided to protect the people from unreasonable searches and seizures of four specific things—persons, houses, papers, and effects.").

[173] *Olmstead*, 277 U.S. at 464.

or wiretapping, is not tangible and, under the normally accepted meanings of the words, can neither be searched nor seized."[174]

C. The Arguments from Purpose

Opponents of the physical intrusion test argue that provisions in the Bill of Rights should be interpreted liberally to achieve their purposes. "Time and again, this Court in giving effect to the principle underlying the Fourth Amendment, has refused to place an unduly literal construction upon it."[175] Those words belong to Justice Brandeis, but they express the views of the *Boyd* and *Katz* majorities.

The weakness of the argument from purpose is its liability to the charge of indeterminacy. Brandeis drew a "comprehensive" "right to be let alone" out of the Fourth and Fifth Amendments.[176] Where does the process of expanding the text to achieve its purposes stop?

Even Justice Holmes, dissenting in *Olmstead*, went no further than agreeing with the portion of the Brandeis dissent that relied on the violation of state law by federal agents.[177] Justice Holmes was "not prepared to say that the penumbra of the Fourth and Fifth Amendments covers the defendant, although [he] fully agree[d] that Courts are apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them."[178]

Justice Thomas conceded that "the founding generation understood that, by securing their property, the Fourth Amendment would often protect their privacy as well."[179] In words that Taft or Miller would have approved, Thomas then rejected this line of reasoning-from-purpose because it "abstracts from the right its purposes, and [then] eliminates the right."[180] This clash, between the immediate reference of a legal term and a wider sense the term might have, is a familiar one in legal rhetoric. It remains familiar because after centuries of lawyers arguing both sides of it on many different issues, no standard resolution has emerged. *Ejusdem generis* can always be countered with *expressio unius*—and vice versa.

Defenders of the physical intrusion test, however, have themselves gone beyond the strict confines of the text. For them, "houses" does not mean "houses" or even "homes." It means "private premises," including rented rooms and business offices.[181] Without a broad reading of "houses," the Amendment would not achieve

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[174] *Katz*, 389 U.S. at 365 (Black, J., dissenting).

[175] *Olmstead*, 277 U.S. at 476 (Brandeis, J., dissenting).

[176] *Id.* at 478.

[177] *Id.* at 469 (Holmes, J., dissenting).

[178] *Id.*

[179] Carpenter v. United States, 138 S. Ct. 2206, 2240 (2018) (Thomas, J., dissenting).

[180] *Id.* (quoting United States v. Gonzales-Lopez, 548 U.S. 140, 145 (2006)).

[181] Before *Katz*, so still under the physical intrusion rubric, Justice Black joined Justice Stewart's majority opinion in *Hoffa v. United States*, 385 U.S. 293 (1966), which summed up the caselaw to that point by saying that "[w]hat the Fourth Amendment protects is the security a man relies upon when he places himself or his property within a constitutionally

its purposes. There is no apparent criterion that distinguishes purpose arguments about "house" from purpose arguments about "searches." The debate is at an impasse (and may have been at an impasse since *Olmstead* or even since *Boyd*).

D. The Textual Arguments Reconsidered

1. The Argument from "Things to Be Seized"

Begin with arguments from the *objects* of search, the "things to be seized" under the Warrant Clause. As stated by Chief Justice Taft, "[t]he Amendment itself shows that the search is to be of material things—the person, the house, his papers or his effects[],' so "things to be seized" means "tangible material effects."[182]

For once, here is an argument that really does carry its refutation on its face. Taft's phrase—"material things"—admits that the modifier "material" is necessary to qualify "things." But the Fourth Amendment does not say "material things" or "tangible effects."[183] It says "things to be seized."[184]

In common usage, both at the Founding and today, "thing" is a capacious word indeed. Noah Webster gave "event" as a synonym.[185] Johnson's definition was even more expansive: "Whatever is; not a person. A general word."[186]

Few members of the Founding generation would have failed to recognize Hebrews 11:1, rendered in the King James Version as: "Now faith is the substance of things hoped for, the evidence of things not seen."[187] In the other leading Founding-era Bible, the Geneva Bible, the verse is translated as: "Now faith is the grounds of things which are hoped for, and the evidence of things which are not seen."[188] If the

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protected area, be it his home or his office, his hotel room or his automobile." *Id.* at 301; *see also* Stoner v. California, 376 U.S. 483, 489 (1964) ("[I]t was the petitioner's constitutional right which was at stake here, and not the night clerk's nor the hotel's."); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (applying the Fourth Amendment to a corporate office although the corporation had no self-incrimination privilege; "[b]ut the rights of a corporation against unlawful search and seizure are to be protected even if the same result might have been achieved in a lawful way.").

[182] *Olmstead*, 277 U.S. at 464, 466.

[183] U.S. CONST. amend. IV.

[184] *Id.*

[185] *Thing*, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 142, https://webstersdictionary1828.com/Dictionary/thing [https://perma.cc/3GQ5-DPUC] (last visited Mar. 4, 2024).

[186] *Thing*, 2 A DICTIONARY OF THE ENGLISH LANGUAGE [hereinafter A DICTIONARY OF THE ENGLISH LANGUAGE], https://johnsonsdictionaryonline.com/views/search.php?term=thing [https://perma.cc/98YU-3WAZ] (last visited Mar. 4, 2024).

[187] *Hebrews 11* (King James), BIBLE GATEWAY, https://www.biblegateway.com/passage/?search=Hebrews%2011&version=KJV [https://perma.cc/K527-VDZN] (last visited Mar. 4, 2024).

[188] *Hebrews 11* (1599 Geneva), BIBLE GATEWAY, https://www.biblegateway.com/passage/?search=Hebrews%2011&version=GNV [https://perma.cc/5JCC-UGLH] (last visited Mar. 4, 2024).

Founders could believe in "things" that could not be seen, they could easily have believed that anything that could actually be heard qualifies as a "thing."

Johnson and Webster defined "seizure" as "the act of seizing," primarily meant to refer to the seizure of tangible objects.[189] This included, but was not limited to, the seizure of goods under legal process.[190] The examples the lexicographers gave, however, made clear that seizures could both be made by, and of, intangible entities.

Johnson's second definition is "[t]o take forcible possession of by law."[191] His first, however, is "[t]o take possession of; to grasp; to lay hold on; to fasten on."[192] The only illustration he gives is a quotation from Pope later used by Webster: "In her sad breast the prince's fortunes rowl,/And hope and doubt alternate *seize* her soul."[193] Webster's third definition was "[t]o invade suddenly; to take hold of; to come upon suddenly; as, a fever *seizes* a patient."[194] If fevers can seize, and if souls can be seized, the concept was not limited to tangible objects.

The tangible artifacts argument neglects the distinction between the *places* targeted for search and the objective of the search—the distinction between searches *of* houses and searching *for* "persons or things." A warrantless search of a house that discovers no evidence to seize is still a search *of* the house. Thus, even if conversations, being intangible, cannot be seized, it would still be possible *to search the house* for conversations.[195] Nothing in the text limits "searches" to "searches [with tangible objectives]."

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[189] *Seizure*, 2 A DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 186, https://johnsonsdictionaryonline.com/views/search.php?term=seizure [https://perma.cc/PZK7-8FYL] (last visited Mar. 4, 2024); *Seizure*, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 142, https://webstersdictionary1828.com/Dictionary/seizure [https://perma.cc/4NCR-QYWE] (last visited Mar. 4, 2024).

[190] JACOB, *supra* note 150 (giving a definition of "seizure of goods for offences" which describes the forfeiture of a felon's goods to the Crown). There is no entry for the seizure of smuggled or stolen goods.

[191] *Seize*, 2 A DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 186, https://johnsonsdictionaryonline.com/views/search.php?term=seize [https://perma.cc/3CGA-BBLJ] (last visited Mar. 4, 2024).

[192] *Id.*

[193] *Id.*

[194] *Seize*, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 142, https://webstersdictionary1828.com/Dictionary/seize [https://perma.cc/ELL5-UHZX] (last visited Mar. 4, 2024).

[195] Distinguished judges took this view long before *Katz*. *See* Nueslein v. District of Columbia, 115 F.2d 690, 693 (D.C. Cir. 1940) (Vinson, J.) ("But how did the officers find themselves in position to see and hear the defendant? The officers, in the pursuance of a general investigation, entered the home under no color of right."); United States v. On Lee, 193 F.2d 306, 315 (2d Cir. 1951) (Frank, J., dissenting) ("The microphone, however, was brought into On Lee's establishment without his permission. It was just as if the agent had overheard the conversation after he had sneaked in when On Lee's back was turned and had then hidden himself in a closet.").

So much for the argument based on the objects of search described as "things to be seized" in the Warrant Clause. There remains the more substantial argument that the Declaratory Clause limits Fourth Amendment rights to physical invasions of "persons, houses, papers and effects."

2. "The Right to Be Secure"

Recent scholarship by Thomas Clancy[196] and by Luke Milligan[197] points out that the constitutional text does not guarantee the right to be free from, but rather the right to be secure against, unreasonable searches and seizures. They are right, on both textual and historical grounds.

Textually, the Amendment does not say "the right of the people to be *free from* unreasonable searches and seizures shall not be violated." It says that the right of the people *to be secure against* unreasonable searches and seizures shall not be violated.[198] That difference is not an accident.

The pre-ratification state constitutions included search-and-seizure provisions that varied in important details. The earliest ones—adopted under the duress of wartime in 1776—simply abjured general warrants, without declaring any broader right against unreasonable searches and seizures.[199] Section Ten of the Bill of Rights in the Virginia Constitution is illustrative:

> That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.[200]

The Vermont Constitution of 1777 made a change in phraseology:

> That the people have a right to hold themselves, their houses, papers and possessions free from search or seizure; and therefore

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[196] THOMAS K. CLANCY, THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION 78–83 (2d ed. 2014).

[197] *See generally* Luke M. Milligan, *The Forgotten Right to Be Secure*, 65 HASTINGS L.J. 713 (2014).

[198] U.S. CONST. amend. IV (emphasis added).

[199] *See* NEIL H. COGAN, THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 234–35 (1997) (first quoting DEL. CONST. (1776); then quoting MD. CONST. (1776); then quoting N.C. CONST. (1776); then quoting PA. CONST. (1776); and then quoting VA. CONST. (1776)).

[200] VA. CONST. ch. I, § X (1777).

> warrants without oaths or affirmations first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his, her or their property, not particularly described, are contrary to that right, and ought not to be granted.[201]

The Vermont language reads very much the way Taft, Black, and Thomas interpret the Fourth Amendment.

The Massachusetts Constitution of 1780, however, went beyond the Vermont provision—and became the model for the Fourth Amendment. That provision, written by John Adams, provided:

> Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued, but in cases, and with the formalities, prescribed by the laws.[202]

In Adams's formulation, general warrants are contrary to a more general "right to be secure from all unreasonable searches, and seizures."[203]

If the sole concern of the Fourth Amendment was preserving the common law's tort remedies, a simple ban on general warrants would have sufficed. Between gaining independence and ratifying the Constitution, some states, such as Virginia, indeed adopted rifle shot bans of general warrants.[204] Other states, such as Massachusetts, adopted provisions protecting a broader right to be secure and stigmatizing general warrants as but one example of how this right might be violated.[205]

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[201] VT. CONST. ch. I, § XI (1777).

[202] MASS. CONST. art. XIV (1780).

[203] *Id.*

[204] VA. DECLARATION OF RTS. § 10 (1776) ("That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive and ought not to be granted.").

[205] *See* MASS. CONST. art. XIV; VT. CONST. ch. I, § XI (became § XII, without change, in VT. CONST. (1786)); PA. CONST. ch. 1, art. X (1776); N.H. CONST. ch. 1, art. XIV (1783).

If the Fourth Amendment had followed the Virginia or Vermont model, the argument for the physical intrusion test would be very strong. Suppose the constitutional text read as follows:

> The right of the people to be secure in their persons, houses, papers and effects, shall not be violated by warrants issuing, without probable cause supported by oath or affirmation, and not particularly describing the places to be searched, and the persons or things to be seized.

The hypothetical text does not declare a general right to be secure against unreasonable searches and seizures. Rather, it limits the right protected to being against being "violated by" general warrants. Now that formula would, indeed, support the trespass test.

The alternative text, however, is not hypothetical. It is the text proposed by the Select Committee (also known as the Committee of Eleven) to the House of Representatives on July 28, 1789.[206] The committee proposal resembled Madison's initial draft but omitted the "against unreasonable searches and seizures" language. Madison's draft, however, also included the critical "by warrants" language.[207] The committee's draft, like Madison's, limits the scope of the declaratory clause to violations "by" general warrants.

The House, however, voted to table the committee report.[208] At debate on the proposed amendments on August 17, the Committee accepted Gerry's proposal to restore Madison's language, i.e., "the right of the people to be secure in their persons, houses, papers, and effects, *against unreasonable seizures and searches*."[209] Benson then proposed replacing the "by warrants issuing" with "and no warrant shall issue."[210] But the *Annals of Congress* records this motion as losing "by a considerable majority."[211]

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[206] EDWARD DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 211 (1957) (quoting *Amendments Reported by the Select Committee* (July 28, 1789)).

[207] Here's Madison's proposal:

> The rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated *by* warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.

1 ANNALS OF CONG. 434–35 (1789) (Joseph Gales ed., Washington, Gales & Seaton, 1834) (emphasis added).

[208] *Id.* at 672 (July 28, 1789).

[209] *Id.* at 754 (emphasis added).

[210] *Id.*

[211] *Id.*

On August 24, however, Benson reported from a committee on style the amendments that were to be sent to the Senate.[212] Appearing then as either the Sixth or Seventh Article is the Fourth Amendment as it reads today.[213] How the "by" was changed to "and no" remains a mystery.[214]

What is clear is that Congress ultimately adopted a declaratory clause broader than a right to sue in tort. The Select Committee's draft would have limited the amendment to protecting common-law tort actions by condemning only violations of the right to be secure against unreasonable search "*by*" general warrants.

Congress instead went further. As Judge (later Chief Justice) Vinson recognized:

> The IVth Amendment connects the right of security with the provision against general warrants by "and" rather than by "therefore." This argues against the possible contention that the right of security was declared only for the purpose of condemning general warrants. This choice of words plus the fact that the three state resolutions and the IVth Amendment as written followed the Massachusetts Constitution, which established a right of security, rather than the Virginia Declaration of Rights, which merely condemned general warrants, point to the conclusion that a principle was being developed instead of a particular abuse being remedied.[215]

Given that general warrants functioned as trumps on common law tort actions, the choice of the broader "shall not be violated, and"[216] formula suggests that the Amendment goes beyond simply instantiating the common law of torts.

How far beyond the common law of torts? Despite the fresh and welcome focus of both Clancy and Milligan on the premise that the right declared is the right to be secure, they disagree about whether the right to be secure includes more than the right to exclude. Professor Clancy connects the right to be secure to the common law's castle metaphor, a metaphor he understands to condemn the physical invasions characteristic of searches under general warrants or writs of assistance.[217] Locating

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[212] CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 9 (Helen E. Veit et al. eds., 1991).

[213] *See id.* at 3–4, 39; *Congress of the United States*, NAT'L GAZETTE, Oct. 3, 1789, at 199. The *Gazette* reproduced the congressional proposals for ratification by the states, as signed by House Speaker Muhlenberg and Adams as President of the Senate. The document printed by the *Gazette* is undated.

[214] *See, e.g.*, WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING 602–1791, at 731–32 (2009) (discussing drafting history); DUMBAULD, *supra* note 206, at 40 n.25 (speculating that Benson may have changed the wording later in committee).

[215] Nueslein v. District of Columbia, 115 F.2d 690, 693 n.5 (D.C. Cir. 1940).

[216] U.S. CONST. amend. IV.

[217] CLANCY, *supra* note 196, at 80–82.

the right to be secure in this framework, Clancy concluded that the "Framers valued security and intimately associated it with the ability to exclude the government."[218]

Professor Milligan points out that linguistically, the right to be secure might mean more than the right to exclude.[219] The first definition in Johnson's entry for "secure"[220] is "[f]ree from fear; exempt from terrour; easy; assured." The second is "[c]areless; wanting caution; wanting vigilance."[221] Third is "[f]ree from danger; safe."[222] Webster[223] puts "[f]ree from danger" first and second, but third is "[f]ree from fear or apprehension of danger; not alarmed; not disturbed by fear, confident of safety; hence, careless of the means of defense." Webster's fourth definition is "[c]onfident; not distrustful; with *of*."[224]

Professor Milligan concludes that the best understanding of what the Framers meant by "secure" is "'protected' or 'free from fear.'"[225] The difference between the two interpretations is stark. On the view that the right to be secure means only the right to exclude government agents from physically entering private premises, both *Katz* and *Kyllo* were wrongly decided.[226] On the view that the right to be secure includes freedom from fear of surveillance, clandestine monitoring of life inside the home is just as much a search as a physical invasion.

3. The Minimum Content of the Right to Be Secure

The difference between Professors Clancy and Milligan suggests that the turn to the right to be secure has done no more than to steer a new course for the old debate pitting the specific abuses inspiring the Fourth Amendment and its more general purposes. I argue here "right to be secure" has a more precise meaning than "free from fear" or the "right to exclude." If that argument is right, we can find a faithful reading of the text by which even a narrow focus on the immediate reference points includes a right to be secure against eavesdropping.[227]

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[218] *Id.* at 83.

[219] Milligan, *supra* note 197, at 738–41.

[220] *Secure*, 2 A DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 186.

[221] *Id.*

[222] *Id.*

[223] *Secure*, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 142.

[224] *Id.*

[225] Milligan, *supra* note 197, at 746.

[226] Professor Clancy approves of *Kyllo*. *See, e.g.*, CLANCY, *supra* note 196, at 396. But I see no basis in *Kyllo* for the right to exclude. Government agents neither entered Kyllo's home nor directed an infrared, sonic, or electromagnetic pulse into it.

[227] This is not to suggest that the Fourth Amendment should be limited to preserving the legal remedies against general searches established in the 18th century. I have elsewhere argued against any limitation to Founding-era specific practices. *See generally* Donald A. Dripps, *Responding to the Challenges of Contextual Change and Legal Dynamism in Interpreting the Fourth Amendment*, 81 MISS. L.J. 1085 (2012). My point here is that when even a narrow focus on Founding-era practices accounts for the common law of eavesdropping, confining Fourth Amendment rights to physical intrusions is untenable.

Suppose we read the "right to be secure" as the right to the security of the common law. On this reading, the right to freedom from arbitrary search of persons, houses, papers, and effects is a natural right. But that would mean little without practical remedies provided by the law. At least two important sources suggest this reading.

First, early in the *Commentaries*, Blackstone declares the "absolute rights" of English subjects to be "personal security, personal liberty, and private property."[228] "But in vain would these rights be declared, ascertained, and protected by the dead letter of the laws, if the constitution had provided no other method to secure their actual enjoyment."[229] Blackstone then catalogues the "auxiliary subordinate rights of the subject, which serve principally as outworks or barriers to protect and maintain inviolate the three great and primary rights."[230] After limits on the royal prerogative and the supremacy of Parliament, Blackstone says the third such auxiliary right "is that of applying to the courts of justice for redress of injuries."[231]

Second, the Declaration of Independence adopts the same sense of man-made laws securing natural rights. The Declaration recognizes God-given "unalienable rights" including but not limited to "life, liberty and the pursuit of happiness."[232] Governments are instituted "to secure these rights."[233] When "government becomes destructive of these ends," it is the right and duty of the people "to throw off such government, and to provide new guards for their future security."[234]

If the "right to be secure" in the Fourth Amendment means what Jefferson and Blackstone said it meant—the protection provided by positive law for natural rights—we can make clearer sense of the relationship between the Fourth Amendment and the common law. Eighteenth-century lawyers understood the common law as a menu of actions—not just trespass and false imprisonment, but many others, each with technical pleading requirements and different remedies.[235] Since Bentham, Austin, and Hart, Anglo-American lawyers have thought of law as rules of primary conduct enforced by secondary rules of procedures and remedies.[236] In the eighteenth century, however, the right/remedy distinction operated the other way around, i.e., descriptions of abstract rights were derived from consulting the menu of available actions.[237] As S.F.C. Milsom puts it, "[t]here was no substantive law to which

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[228] 1 WILLIAM BLACKSTONE, COMMENTARIES *136.

[229] *Id.*

[230] *Id.*

[231] *Id.* at *137.

[232] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[233] *Id.*

[234] *Id.*

[235] *See, e.g.*, F.W. MAITLAND, *Lecture I*, *in* EQUITY AND THE FORMS OF ACTION AT COMMON LAW 295, 295–98 (A.H. Chaytor & W.J. Whittaker eds., 1926).

[236] *See id.* at 300. *See generally* Thomas C. Grey, *Accidental Torts*, 54 VAND. L. REV. 1225 (2001).

[237] As noted by Grey:

pleading was adjective. These were the terms in which the law existed and in which lawyers thought."[238]

To be illegal was to be actionable. In *Marbury*, John Marshall quotes Blackstone: "[I]t is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress."[239] To modern ears, this sounds utopian. It makes perfect sense, totally without irony, if what Blackstone and Marshall meant was that "where there is no remedy there is no wrong."[240]

When the Fourth Amendment declares the right to be secure against unreasonable searches, the "right . . . to be secure" can be understood to mean "the right to the common law's menu of actions for protecting the security of persons, houses, papers and effects."[241] The right to be secure in the home was no guarantee that were would be no home invasions. The guarantee was that the law would provide means of redress against home invasions when they happened.

This understanding fits with the famous castle metaphor set out in 1763 by the elder William Pitt in parliamentary debate on the enforcement of the cider tax by general warrants.[242] There is no known text of Pitt's entire speech; however, a single passage of the speech remains:

> The poorest man, exclaimed Mr. Pitt, "may in his cottage bid defiance to all the forces of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter the rain may enter—but the King of England can not enter!—all his forces dare not cross the threshold of the ruined tenement![243]

> Bentham had insisted that law should be analyzed on the basis of a firm distinction between substantive law and procedure. This new conceptual distinction helped Bentham and Austin make the case that English law remained intellectually and practically incoherent because substantive legal rights and duties were learned and classified for practice under the jumbled array of procedural forms that had grown up over the centuries to enforce them. This had it backwards, Bentham insisted; procedure should be designed functionally to serve as the handmaiden of substance.

Grey, *supra* note 236, at 1240.

[238] S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 59 (2d ed. 1981).

[239] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 BLACKSTONE, *supra* note 159, at *190).

[240] MAITLAND, *supra* note 235, at 299.

[241] For support of this statement, see U.S. CONST. amend. IV; Grey, *supra* note 236, at 1240; MAITLAND, *supra* note 235, at 300.

[242] For context, see 2 HENRY LORD BROUGHAM, HISTORICAL SKETCHES OF STATESMEN WHO FLOURISHED IN THE TIME OF GEORGE III, at 18–19 (Philadelphia, Lea & Blanchard 1839).

[243] DAVID A. HARSHA, THE MOST EMINENT ORATORS AND STATESMEN OF ANCIENT AND MODERN TIMES 120 (New York, Charles Scribner 1855).

Note how the "castle" is not physically secured against the elements. It is secured by the common law, which could not guarantee freedom from home invasion, only that home invasion would be subject to legal redress even against the King's Messengers—just as it was in the Wilkesite cases.

The Fourth Amendment, Joseph Story wrote, is "little more than the affirmance of a great constitutional doctrine of the common law."[244] Story referred to the common law of torts, citing *Money v. Leach* as establishing the illegality of general warrants.[245] *Money* "was an action of trespass brought . . . by Dryden Leach, against three King's messengers, John Money, James Watson, and Robert Blackmore, for breaking and entering the plaintiff's house, and imprisoning him, without any lawful or probable cause; to the plaintiff's damage of 2000£."[246] Like the general warrants condemned by *Money*, the writs of assistance James Otis argued unsuccessfully against in Paxton's Case effectively immunized royal officers from trespass liability.[247]

The action for trespass, however, was not the only security the common law provided for the sanctity of the home. To paint a fuller picture of the common law's protections for the security of the home, we need to look beyond the common law of torts to the common law of crimes.

III. THE COMMON LAW OF EAVESDROPPING

In the eighteenth century, crime was prosecuted by private persons (tax and state security offenses excepted).[248] Anyone could ask the grand jury to indict an

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[244] 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 748 (Boston, Hilliard, Gray & Co. 1833).

[245] *See id.* at 749 & n.1 (stating that in 1763, the legality of general warrants "was brought before the King's Bench for solemn decision; and they were adjudged to be illegal, and void for uncertainty" (citing Money v. Leach (1765) 97 Eng. Rep. 1075, 1075; 3 Burr. 1741, 1743)).

[246] Money v. Leach (1765) 97 Eng. Rep. 1075, 1075; 3 Burr 1741, 1742. Like *Money*, *Entick v. Carrington* (1765) 95 Eng. Rep. 807; 2 Wils. K.B. 275, was a trespass suit.

[247] *See, e.g.*, Letter from a Maryland Farmer, *supra* note 3.

[248] On the English practice of private prosecutions, which continued in that country until late in the nineteenth century, see 1 SIR JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 493–99 (London, Macmillan & Co. 1883); Norma Landau, *Indictment for Fun and Profit: A Prosecutor's Reward at Eighteenth-Century Quarter Sessions*, 17 LAW & HIST. REV. 507, 507 (1999); Paul Rock, *Victims, Prosecutors and the State in Nineteenth Century England and Wales*, 4 CRIM. JUST. 331, 333 (2004). Private prosecution continued in colonial America, and public prosecutors in the states did not gain a monopoly on prosecution until the middle third of the nineteenth century. *See generally, e.g.*, ALLEN STEINBERG, THE TRANSFORMATION OF CRIMINAL JUSTICE (1989) (tracing the persistence of private prosecution in Philadelphia into the late second half of the nineteenth century); Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1325–26 (2002) ("The idea that public prosecution had become firmly established as the American system by 1789 does not bear scrutiny.").

eavesdropper, not just individuals overheard.[249] Liability turned not just on surreptitious listening, but also on subsequent disclosure.[250] The remedy was not damages, but fine and jail unless sureties posted bond for the eavesdropper's future good conduct.[251] Just as a focus on trespass implies an "atomistic perspective" on Fourth Amendment issues, a focus on the public nuisance doctrine implies a "regulatory perspective."[252]

A. Eavesdropping Was an Indictable Public Nuisance in England

The common law treated eavesdropping as a petty crime.[253] In fact, eavesdroppers were liable to two types of prosecution. An ancient statute directed the justices of the peace (JPs) "to take of all them that be not of good Fame, where they shall be found, sufficient Surety and Mainprise of their good Behaviour towards the King and his People."[254] Blackstone described how under such statutes the JPs could impose summary convictions, without the intervention of a jury, whether grand or petty.[255] Although no statute specifically mentioned eavesdropping, it was well-established that eavesdroppers were persons of ill fame.[256]

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[249] To obtain an injunction commanding abatement of a public nuisance, private parties were required to show special injury distinct from injury to the public at large. *See, e.g.*, Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 701–02 (2004). Criminal prosecutions were different, although they could be initiated by private persons. *See, e.g.*, SEYMOUR F. HARRIS, PRINCIPLES OF THE CRIMINAL LAW 118 (3d ed. Cincinnati, Robert Clarke & Co. 1885) ("Common nuisances are indictable as misdemeanors. They do not give rise to civil action by every one who is subjected to the common annoyance.").

[250] *See* MARJORIE KENISTON MCINTOSH, CONTROLLING MISBEHAVIOR IN ENGLAND, 1370–1600, at 65–67 (1998).

[251] *See* Mary B. Spector, *Crossing the Threshold: Examining the Abatement of Public Nuisances Within the Home*, 31 CONN. L. REV. 547, 551 (1999); HARRIS, *supra* note 249, at 117–20.

[252] *See* Amsterdam, *supra* note 4.

[253] *See* 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW 616–17 (4th ed. Boston, Little Brown & Co. 1868).

[254] Justices of the Peace Act 1361, 34 Edw. III c.1.

[255] 4 BLACKSTONE, *supra* note 158, at *278 ("Another branch of summary proceedings is that before *justices of the peace*, in order to inflict divers petty pecuniary mulcts, and corporal penalties, denounced by act of parliament for many disorderly offences . . . .").

[256] *See* MICHAEL DALTON, THE COUNTREY JUSTICE: CONTAINING THE PRACTICE OF THE JUSTICES OF THE PEACE OUT OF THEIR SESSIONS 166 (London, The Company of Stationers 1661) (describing how the night watchmen "are also to apprehend all Rogues and Vagabonds, Nightwalkers, Eavesdroppers, Scouts and such like . . ."). The ill fame of eavesdroppers existed in the colonies as well:

> [A] man may be bound to his good behaviour for causes of scandal *against good morals*, as well as *against the peace* . . . nightwalkers;

The other type of prosecution was the one described by Blackstone and noted by Justice Black in *Katz*. Before they fell into disuse, the manorial courts in England punished petty offenses.[257] These "court-leets" consisted of a Steward (the presiding judge appointed by the lord of the manor) and a jury that seems to have combined the functions of both accusation and trial.[258] The jury would consult about offenses known to them, and, if the jurors were unanimous,[259] "present" the offender to the Steward, who would determine the penalty.

Eavesdropping was one of the offenses the Steward instructed the jury to present.[260] An example comes from Manchester in 1573: "The Jurie dothe presente John Skilliescorne plumer [plumber] to be a com[m]on Easinge dropper, A naughtie pson, suche a on[e] as doth Abounde in all mysorders, Therefore wee desire that he maye be avoyded the Towne And have suche punishmet as unto such dothe

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> eaves-droppers; such as keep suspicious company . . . and other persons whose misbehaviour may reasonably bring them within the general words of the statute, as persons not of good fame . . . .

WILLIAM WALLER HENING, THE NEW VIRGINIA JUSTICE 581 (2d ed. Richmond, Johnson & Warner 1810). William Hawkins even noted that while no rules may exist against eavesdroppers, their ill fame meant they were likely subject to the discretionary power of magistrates:

> I cannot find any certain precise rules for the direction of the magistrate in this respect, and therefore am inclined to think, that he has a discretionary power to take such surety of all those whom he shall have just cause to suspect to be dangerous, quarrelsome, or scandalous, as of those who sleep in the day, and go abroad in the night, and of such as keep suspicious company, and of such as are generally suspected to robbers, &c. and of eve-droppers . . . .

WILLIAM HAWKINS, 1 A TREATISE OF THE PLEAS OF THE CROWN 262 (Thomas Leach ed., 6th ed. London, Thomas Whieldon 1787).

[257] *See* Walter J. King, *Leet Jurors and the Search for Law and Order in Seventeenth-Century England: "Galling Persecution" or Reasonable Justice?*, 13 SOC. HIST. 305, 305 (1980) ("At medieval and early modern English courts leet the presentment jury acted, in modern parlance, as prosecutor, defence counsel, and jury."). For treatises on the court-leet, see generally WILLIAM SHEPPARD, THE COURT-KEEPER'S GUIDE FOR THE KEEPING OF COURTS-LEET AND COURTS-BARON (6th ed. London, G. Sawbridge et al. 1667); JOSEPH RITSON, THE JURISDICTION OF THE COURT LEET (2d ed. London, W. Clarke & Sons 1809).

[258] *See* RITSON, *supra* note 257, at 42–59.

[259] *Id.* at 57 ("If any of the jury give their verdict to the court before they are all agreed of their verdict, they may be fined.").

[260] *See* JOHN WILKINSON, A TREATISE COLLECTED OUT OF THE STATUTES OF THIS KINGDOME 120 (London, Assignes of John More 1638). On eavesdroppers, the collected statutes say:

> Also you shall inquiry of Eves-droppers, and those are such as by night stand or lye harkening under walles or windowes of other mens, to heare what is said in another mans house, to the end to set debate and dissention betweene neighbors, which a very ill office, therefore if you know any such present them.

Id.

apperteyne."[261] Professor McIntosh summarized the court-leet records as follows: "Eavesdropping, never the topic of legislation, was usually described [in court-leet presentments] in minimal language. If any justification was given for the presentment, it was said to cause social harm, either violating privacy or disturbing peaceful relations between neighbors."[262]

By the 1760s, when Blackstone committed his *Commentaries*, the manorial courts had fallen into disuse.[263] Eavesdropping remained a crime; private prosecutors could seek an indictment for public nuisance at the sessions courts (courts comprised of justices of the peace).[264] Upon conviction by the petty jury, the penalty remained what it had been in the manorial courts, a fine and commitment until the eavesdropper could find sureties for good behavior, who were willing to post a bond with the court.[265]

B. The Common Law of Eavesdropping in America

Eavesdropping continued to be recognized as a common law crime in America. Hening's early JP manual for Virginia recognized summary convictions of eavesdroppers under the rubric of persons of ill fame.[266] In 1812, when Congress passed a statute providing for the government of Washington, the act conferred on the city Corporation authority to:

> [C]ause all vagrants, idle or disorderly persons, all persons of evil life or ill fame, . . . all eves-droppers and night walkers, . . . to give security for their good behaviour for a reasonable time, and to indemnify the City against any charge for their support, and in case of their refusal or inability to give such security, to cause them to be confined to labour for a limited time, not exceeding one year at a time, unless such security should be sooner given.[267]

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[261] 1 THE COURT LEET RECORDS OF THE MANOR OF MANCHESTER 155 (J.P. Earwaker ed., Manchester, Henry Blacklock & Co. 1884).

[262] *See* MCINTOSH, *supra* note 250, at 65.

[263] 4 BLACKSTONE, *supra* note 158, at *278 ("[D]isorderly offences . . . used to be formerly punished by the verdict of a jury in the court-leet.").

[264] Blackstone wrote:

> Eaves-droppers, or such as listen under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance and presentable at the court-leet: or are indictable at the sessions, and punishable by fine and finding sureties for the good behaviour.

See id. at *169.

[265] *See id.*

[266] *See* HENING, *supra* note 256.

[267] *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 284–85 (1821) (reproducing the statute).

The American states also continued to recognize eavesdropping as a public nuisance subject to prosecution by indictment. St. George Tucker's American edition of Blackstone's *Commentaries* appeared in 1803.[268] St. George Tucker meticulously added footnotes when federal or Virginia law varied from the law declared by Blackstone.[269] He reiterated, without comment, Blackstone's description of the eavesdropping offense verbatim.[270]

There were a few prosecutions. In 1808, a Tennessee defendant moved to quash an indictment for eavesdropping as not authorized by statute, and because the statute receiving English law excepted English law not "consistent with our mode of living."[271] The court rejected the defendant's arguments and recognized the reception of the common-law crime of eavesdropping.[272]

In 1818, Thomas Leonard's trial in Pennsylvania for common-law eavesdropping drew a crowd of spectators and made national news.[273] The jury convicted on two of four counts, and the judge sentenced Leonard to "pay a fine of 20 dollars to the commonwealth—give security to the amount of 100 dollars for his good behavior for one year, and pay the costs of prosecution."[274] In 1859, the Supreme Court of Tennessee followed *Williams* and denied a motion to quash an indictment for eavesdropping on the proceedings inside a grand jury room.[275]

In a subsequent Pennsylvania case, a man named Lovett was indicted and tried in the Bucks County Quarter Sessions court on "an indictment for eaves-dropping."[276] The report describes the prosecutrix as a "married woman."[277] Judge Fox instructed the jury that indictment charged "a serious kind of offence," but also charged the

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[268] 5 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA (Augustus M. Kelley 1969 (1803)).

[269] For example, *id.* at 122 n.9, adds to Blackstone's discussion of sedition a concise but precise review of the U.S. Sedition Act, its apparent conflict with the First Amendment, and the expiration of the Act in 1801.

[270] *Id.* at 168.

[271] State v. Williams, 2 Tenn. (2 Overt.) 108, 108 (Super. Ct. 1808).

[272] *Id.* ("Agreeably to the common law, such an indictment well lies, and nothing can be seen in this part of it which is inconsistent with our situation, or in fact the situation of any society whatever.").

[273] *Novel Law Case*, *in* 5 THE NATIONAL REGISTER 190 (Washington, The Proprietor 1818) [hereinafter THE NAT'L REG.] ("The novelty of the case drew to the court-house many spectators . . . .").

[274] *Id.*

[275] *See generally* State v. Pennington, 40 Tenn. 299 (1859).

[276] Commonwealth v. Lovett, 6 PA. L.J. REPORTS 226, 226 (Pa. Ct. Quarter Sess. Bucks Cnty. 1831); *cf.* Jonathan L. Hafetz, *"A Man's Home is His Castle?": Reflections on the Home, the Family, and Privacy During the Late Nineteenth and Early Twentieth Centuries*, 8 WM. & MARY J. WOMEN & L. 175 (2002) (examining how the interplay of social factors such as gender, class, and race have helped shape legal doctrines affecting the home).

[277] *Lovett*, 6 PA. L.J. REPORTS at 226.

jury that if the husband had given Lovett "authority to watch his wife, I do not know how he can be prosecuted."[278] The report does not indicate the verdict.[279]

In 1905, the Supreme Court of North Carolina quashed an indictment for common-law eavesdropping. The court acknowledged that "eavesdropping is a criminal offense at common law," but held that to state the offense the indictment must allege habitual offending and that the accused repeated what was overheard to other persons.[280]

Why were prosecutions rare? We can only speculate. Perhaps eavesdropping in the sense of the offense—spying on your neighbors—is (one hopes!) uncommon in the first place. However much or little of it there was, most eavesdropping would have gone undetected. Successful prosecutors did not recover damages, so there was little but vengeance to motivate prosecution. For those inclined to revenge, a thorough drubbing might have been more attractive than resort to the law.[281] Women—who most needed the law's protection from snoops and stalkers—faced financial and legal barriers to successful prosecutions.[282] Perhaps, as policing and prosecuting became professionalized, police arrested eavesdroppers for sweep offenses such as loitering or disorderly conduct.[283] Those statutes, like the ancient authority to arrest eavesdroppers as persons of ill-fame, included classic eavesdropping conduct, without requiring proof of habitual offending or the intent to divulge.

Near the end of the nineteenth century, Francis Wharton and Joel Prentiss Bishop, two great nineteenth century criminal law scholars, recognized eavesdropping as an indictable public nuisance.[284] They described the offense in very similar terms. According to Wharton: *"Eavesdropping* may . . . be indictable as a nuisance. It should, however, to be indictable at common law, be habitual, and combine the lurking about dwelling-houses, and other places where persons meet for private intercourse, secretly listening to what is aid, and then tattling it abroad."[285] According to Bishop:

> Eavesdropping is an offence at the common law. It has been recognized as such in this country. It is the nuisance of hanging

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[278] *Id.* at 226–27.

[279] *See id.*

[280] State v. Davis, 51 S.E. 897, 897 (1905).

[281] *See* DAVID H. FLAHERTY, PRIVACY IN COLONIAL NEW ENGLAND 89 (1967) ("Such offenders were not often prosecuted, since the matter could be handled in a more practical and perhaps more satisfying manner by the person who discovered the culprit."). Round-the-clock paramilitary police forces were not established in the United States until the 1830s. Eric H. Monkkonen, *History of Urban Police*, 15 CRIME & JUST. 547, 549–53 (1992).

[282] *See* Hafetz, *supra* note 276, at 186–95.

[283] The ordinance struck down in *Papachristou v. City of Jacksonville*, 405 U.S. 156, 156 n.1 (1972) is illustrative.

[284] 2 FRANCIS WHARTON, A TREATISE ON CRIMINAL LAW 290 (10th ed. Philadelphia, Kay & Brother 1896); BISHOP, *supra* note 253.

[285] WHARTON, *supra* note 284, at 290 (adding that it "is a good defence that the act was authorized by the husband of the prosecutrix").

> about the dwelling-house of another, hearing tattle, and repeating it to the disturbance of the neighborhood. Our books contain nothing on this subject more definite or full than the short exposition given by Blackstone . . . .[286]

Other writers agreed with the accounts given by Wharton and Bishop.[287]

Even when states marginalized the common law of crimes by adopting general penal codes, these could include a prohibition on eavesdropping. In 1881 New York adopted a penal code based on David Dudley Field's draft of 1865.[288] The New York Code followed the common law by classifying eavesdropping as a public nuisance.[289] Section 471 specified eavesdropping as one such public nuisance, providing: "Every person guilty of secretly loitering about any building, with intent to overhear discourse therein, and to repeat or publish the same to vex or annoy or injury others, is guilty of a misdemeanor."[290]

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[286] BISHOP, *supra* note 253, at 616 (footnotes omitted).

[287] See JOHN WILDER MAY, THE LAW OF CRIMES 105 (Boston, Little Brown & Co. 1881), who stated:

> Eavesdropping is a kind of nuisance which was punishable at common law, and was defined to be a listening under the eaves or windows of a house, for the purposes of hearing what may be said, and thereupon to form slanderous and mischievous tales, to the common nuisance. The offense is no doubt one at common law in this country.

Id. See also H.G. WOOD, A PRACTICAL TREATISE ON THE LAW OF NUISANCES IN THEIR VARIOUS FORMS 64 (Albany, John D. Parsons, Jr. 1875) ("Eavesdroppers, or persons who go about secretly listening at doors or windows, or elsewhere, to the discourse of others for the purpose of framing tattle, are common nuisances at common law and punishable by fine, and were generally held to bail for good behavior." (footnotes omitted)).

[288] For the Field draft, see DAVID DUDLEY FIELD ET AL., THE PENAL CODE OF THE STATE OF NEW YORK (Albany, Weed, Parsons & Co. 1865) [hereinafter FIELD]. For the Code eventually adopted, see THE PENAL CODE OF THE STATE OF NEW YORK 179 (Lewis R. Parker ed., 1901).

[289] THE PENAL CODE OF THE STATE OF NEW YORK, *supra* note 288, § 385 defined public nuisance:

> A public nuisance is a crime against the order and economy of the state, and consists in unlawfully doing an act, or omitting to perform any duty, which act or omission:
> 1. Annoys, injures or endangers the comfort, repose, health or safety of any considerable number of persons; or,
> 2. Offends public decency; or,
> 3. Unlawfully interferes with . . . a navigable river . . . or a public park, square, street or highway; or
> 4. In any way renders any considerable number of persons insecure in life, or the use of property.

[290] FIELD, *supra* note 288, at 173–74, § 471. A note to the section points out that the statutory offense expands the common law by covering all buildings, not just dwellings. The

Bishop summarized the relationship between codification and the common law of eavesdropping: "The offence of eavesdropping is one of those old English common-law crimes which have practically faded out of the jurisprudence of the common law, both in England and in this country. At the same time, no treatise of the common criminal-law would be complete, omitting this offence."[291] Prosecutions might be rare, but until superseded by statute, eavesdropping was an indictable public nuisance—a crime.

IV. EAVESDROPPING AND THE FOURTH AMENDMENT

A. Indictments for Eavesdropping Were Understood to Protect the Security of the Home

Like trespass actions, eavesdropping indictments provided part of the common law's protection for the security *of the home.* Richard Burn's leading JP manual discussed eavesdropping under the heading for "[h]ouses" in these terms: "And so tender is the law in respect of the immunity of a man's house, that it will never suffer it to be violated with impunity. Hence in part arises the animadversions of the law upon eaves-droppers, nusances, and incendiaries . . . ."[292]

In discussing the protection of the home against burglary and arson, Blackstone uses virtually identical language—in the same chapter cited by Holmes in *Hester*:

> And the law of England has so particular and tender a regard to the immunity of a man's house, that it stiles it his castle, and will never suffer it to be violated with impunity . . . . Hence also in part arises the animadversion of the law upon eaves-droppers, nusancers, and incendiaries . . . .[293]

Burn and Blackstone leave readers in doubt about who "borrowed" what from whom.

They leave no doubt that eavesdropping was part of the common law of crimes that protected the security of the home. In these passages from Burn and Blackstone, "immunity" is synonymous with "security." Eavesdropping, they say, "violated" the security of the home.

This understanding of eavesdropping as an offense against the security of the home continued in America. St. George Tucker's American edition of Blackstone

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enacted Code defined the eavesdropping offense in identical language. *See* THE PENAL CODE OF THE STATE OF NEW YORK, *supra* note 288, § 436.

[291] BISHOP, *supra* note 253, at 655.

[292] 2 RICHARD BURN, THE JUSTICE OF THE PEACE AND PARISH OFFICER 615 (18th ed. London, T. Strahen & Z. Woodfall 1810).

[293] 4 BLACKSTONE, *supra* note 158, at *223.

reproduces this passage without alteration or comment.[294] Judge Fox began the jury charge in *Lovett* by emphasizing the sanctity of the home. "I consider this as a serious kind of offence. Every man's house is his castle, where no man has a right to intrude for any purpose whatever. No man has a right to pry into your secrecy in your own house.[295]

Liability was limited to listening secretly from outside on conversations inside homes. Those who overheard conversations in public space, or by other members of the household indoors, were not liable to prosecutions for eavesdropping.[296] Eavesdropping was a crime against the security of the home, albeit one not consummated without sharing what was overheard.

The offense also was limited to listening as distinct from peeping. "Although originally unknown at common law, the act of window peeping—the unsophisticated precursor of video voyeurism—historically was prosecuted under the crimes of disorderly conduct or breach of the peace."[297] Even before full-time police began enforcing sweep offenses, peeping Toms risked arrest as persons of ill fame generally and nightwalkers in particular.[298] So while there may have been no common law crime of peeping, statutes ancient and modern left no reason for the recognition of a distinct common law offense.

There is also an important distinction between peeping and eavesdropping. Peeping is easier to guard against because lines of sight run in both directions. The homeowner can take precautions against visual surveillance, but those increase vulnerability to eavesdropping, as curtains and shutters occlude the eavesdropper without insulating conversation from the sense of hearing. The peeper risks immediate detection while the eavesdropper keeps that risk to a minimum.

B. The Common Law of Eavesdropping Was Understood to Protect the Community's Security Against Future Violations

The technical details of an indictment for eavesdropping would make this plain even if great common law authorities had not declared it *en clair.* The offense was

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[294] TUCKER, *supra* note 268, at 168.

[295] Commonwealth v. Lovett, 6 PA. L.J. REPORTS 226, 226 (Pa. Ct. Quarter Sess. Bucks Cnty. 1831).

[296] *See* Lance E. Rothenberg, *Re-Thinking Privacy: Peeping Toms, Video Voyeurs, and the Failure of the Criminal Law to Recognize a Reasonable Expectation of Privacy in the Public Space*, 49 AM. U. L. REV. 1127, 1142 n.67 (2000).

[297] *Id.* at 1141. It is not absolutely clear that so long as courts could recognize unprecedented offenses, peeping would have been declared a common law crime in a proper case. *See* Jim Thompson, *The Role of Common Law Concepts in Modern Criminal Jurisprudence (A Symposium)*, 49 J. CRIM. L. & CRIMINOLOGY & POLICE SCI. 350, 350 n.3 (1959).

[298] *See, e.g.*, 1 J. CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 19 (London, A.J. Valpy 1816) ("[I]t has been said, that a private person may legally in the night-time arrest a suspicious night-walker, though he subsequently prove his innocence.").

against the community, not a particular household spied upon by the eavesdropper.[299] Providing for prosecution rather than a damage action is one manifestation that a public, rather than a private, right was being protected.

Another indicator is the general description of public nuisances as offenses against the community. During the nineteenth century, courts required plaintiffs seeking an injunction against a defendant for a public nuisance to demonstrate "special injury."[300] No such standing requirement limited the number of people who might prefer a bill of indictment to the grand jury. The theory of public nuisance as a crime was that when injury is widespread, a multiplicity of tort suits would be hard to defend, when there was no reason to award any particular individual compensatory damages.

The elements of the eavesdropping offense are illuminating. A good indictment alleged both habitual offending ("common eavesdropper") and publication ("repetition to divers persons" or "tattle").[301] The only known conviction in the U.S. is

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[299] *See, e.g.*, WOOD, *supra* note 287, at 22 ("Public nuisances, strictly, are such as result from the violation of public rights, and producing no special injury to one more than another of the people, may be said to have a common effect, and to produce a common damage."); HARRIS, *supra* note 249, at 120 ("A vast number of other acts, etc., have been declared public nuisances; for example, . . . eaves-dropping . . . and, in general, any thing which is an appreciable grievance to the public at large."); Keller, *supra* note 10 (manuscript at 135) (describing the "traditional model of the public harm of eavesdropping: when information is repeated, or at risk of being repeated, it harms not just the direct eavesdropping victim but also the community at large" and discussing an "alternative model of the public harm of eavesdropping" that focuses on how eavesdropping, "whether information gained is spread or not, causes people to feel insecure in their surroundings and chills social interactions.").

[300] *See* Woolhandler & Nelson, *supra* note 249, at 702 n.59, 703.

[301] 1 JOEL PRENTISS BISHOP, BISHOP ON CRIMINAL LAW 827 (9th ed. 1923); 2 WHARTON, *supra* note 284, at 290. Keller, *supra* note 10 (manuscript at 115–16), relying on LOCKE, *infra* note 317, at 129, who in turn relies on MCINTOSH, *supra* note 250, at 65, notes cases where the court records do not recite publication ("tattle"). McIntosh's records, however, were of presentment juries, whose reports were in the nature of a conclusory judgment rather than a detailed indictment. MCINTOSH, *supra* note 250, at 54. We should not read much into the precise locution of those reports. Moreover, as distinct from the summary punishment of an eavesdropper caught *in flagrante*, it is hard to see how a presentment jury could know about eavesdropping absent "tattle." Keller, *supra* note 10 (manuscript at 116 & nn.105–06), also states that the 1705 edition of Dalton's *Countrey Justice* "identified eavesdroppers as breakers of the peace along with loiterers, 'drunkards, and night-walkers suspected to be pilferers.'" The 1705 edition is available online here: https://books.google.com/books?id=K16DR_VJuX0C&printsec=frontcover&dq=michael+dalton+the+country+justice&hl=en&newbks=1&newbks_redir=0&sa=X&ved=2ahUKEwilxYbsxa-BAxVzJ0QIHYzBAsQ6AF6BAgIEAI#v=onepage&q&f=false [https://perma.cc/629M-JYVF]. Dalton was advising JPs about the summary arrest-and-conviction procedure under the persons-of-ill-fame statute, not about the indictment procedure. Understandably enough, when the eavesdropper was caught *in flagrante*, publication was not required. MICHAEL DALTON, THE COUNTREY JUSTICE: CONTAINING THE PRACTICE OF THE JUSTICES OF THE PEACE OUT OF THEIR SESSIONS

Leonard's in Pennsylvania in 1818.[302] While details are sketchy, the report says that Leonard was convicted on two counts of a four-count indictment.[303] That makes sense, given the habitual offender element. If you were not habitual until a third offense, proof of four would yield two convictions.

But if the offense was to the household spied upon, why require habitual offending—or subsequent publication? Because only habitual offenders who disclosed what they learned threatened the security of all the homes in the neighborhood. If an enemy of your neighbor skulked about the neighbor's house, *you* need feel no insecurity in your own. The *practice* of eavesdropping disturbed the security of everyone's home. It was this, and not the private rights of any individual homeowner, that the indictment for eavesdropping protected.

The sanction imposed upon conviction aimed primarily to prevent future offenses rather than to exact retribution or to compensate those victimized.[304] The offender did not post actual cash, but instead recruited friends or family to guarantee the amount to be forfeited upon a fresh offense.[305] The sureties were, from the community's

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293 (1705). As Keller, *supra* note 10 (manuscript at 117), indicates, eavesdroppers "might understandably cause residents to fear that what they say in the privacy of their own homes would be spread throughout town, or simply to fear that their private interactions would be overheard by an unwelcome listener." The summary procedure might have reflected a distinct concern with clandestine invasions of privacy, or it might have reflected a presumption that the eavesdropper intended publication, or both. Whether the statutory procedure reflected an independent concern about collecting information, the common law indictment procedure required publication, reflecting an independent concern with the dissemination of information.

[302] *See* THE NAT'L REG., *supra* note 273.

[303] *See id.*

[304] 4 BLACKSTONE, *supra* note 158, at *251. Blackstone stated:

> This preventive justice consists in obliging those persons, whom there is a probable ground to suspect of future misbehaviour, to stipulate with and to give full assurance to the public, that such offence as is apprehended shall not happen; by finding pledges or securities for keeping the peace, or for their good behaviour.

Id.

[305] *See, e.g.*, Paul Lermack, *Peace Bonds and Criminal Justice in Colonial Philadelphia*, 100 PA. MAG. HIST. & BIOGRAPHY 173, 179 (1976). Lermack wrote that:

> Sureties, who agreed to guarantee behavior, were common in colonial jurisprudence. . . . [T]he promise to pay on demand, rather than the posting of cash in advance, let the individual keep his capital working during the period of the bond. In addition, sureties were expected to exercise some supervision over the bonded person, and they possessed the power to render him up for incarceration if they felt he was becoming untrustworthy.

Id. (footnote omitted). Lermack focuses on sureties of the peace as distinct from sureties of good behavior, but both types of sureties functioned the same way. *Compare* DALTON, *supra* note 256, at 204, 212 (noting that "such as by night shall evesdrop mens houses" could be bound to good behavior), *with id.* at 28 (discussing forfeiture of bonds for good behavior and referring the reader back to his prior discussion of bonds to keep the peace).

perspective, cost-effective monitors. The modern counterpart of the surety system is release on probation.[306]

Indictable eavesdropping might involve a trespass to land,[307] but the public nuisance action protected quite different interests with quite different remedies. Trespass protected the private interest in the physical security of one's property. Indictments for eavesdropping protected the public interest in informational security—privacy shared by every household in the community. One trespass triggered liability in tort, even if nothing was overheard or publicized.[308] Only habitual offending and spreading of information triggered criminal liability for eavesdropping.[309] Only the possessor could sue in trespass.[310] Anyone could seek an indictment for eavesdropping.[311]

The limitations of the indictment procedure reflect its essentially public nature. In colloquial speech, nosy servants, jealous spouses, and mischievous children can all eavesdrop. In law, however, eavesdropping could only be done from outside the house. Members of the household itself could not be guilty of the offense. The judge's charge in *Lovett,* although reflecting now antique legal ideas about the rights of spouses, was premised on the idea that a man could not eavesdrop on his own house.[312]

The common law did not leave the homeowner without means to control domestic eavesdropping. Into the nineteenth century, a "husband could use force 'within reasonable bounds' against his wife, just as a father traditionally could 'correct his apprentices or children.'"[313] Hired servants could be dismissed,[314] although

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[306] *See* Frank W. Grinnell, *The Common Law History of Probation: An Illustration of the "Equitable" Growth of Criminal Law*, 32 J. CRIM. L. & CRIMINOLOGY 15, 19–20 (1941).

[307] George C. Thomas III, *The Common Law Endures in the Fourth Amendment*, 27 WM. & MARY BILL RTS. J. 85, 86–87 (2018) ("[T]he common law eavesdropper who wanted to overhear conversations in a dwelling had to be a trespasser, at least on the curtilage if not inside the dwelling . . . ."). Damages for "bruising [the] herbage" might be nominal or minimal; to guard against spite suits, plaintiffs could not recover costs in excess of damages when the jury awarded less than forty shillings. *See* 3 BLACKSTONE, *supra* note 159, at *210, *214.

[308] *See* 3 BLACKSTONE, *supra* note 159, at *209 ("Every unwarrantable entry on another's soil the law entitles a trespass by breaking his close.").

[309] *See supra* note 301 and accompanying text.

[310] *See* 3 BLACKSTONE, *supra* note 159, at *210 ("One must have a property (either absolute or temporary) in the soil, and actual possession by entry, to be able to maintain an action of trespass; or, at least, it is requisite that the party have a lease and possession of the vesture and herbage of the land." (footnote omitted)).

[311] *See* Letter from a Maryland Farmer, *supra* note 3.

[312] *See* Commonwealth v. Lovett, 6 PA. L.J. REPORTS 226, 227 (Pa. Ct. Quarter Sess. Bucks Cnty. 1831).

[313] *See* Hafetz, *supra* note 276, at 187 (footnote omitted); Lea VanderVelde, *The Last Legally Beaten Servant in America: From Compulsion to Coercion in the American Workplace*, 39 SEATTLE U. L. REV. 727, 736–37 (2016) (concluding that the legal right of employers to beat employees was repudiated in the United States in the 1840s).

[314] DAVID VINCENT, PRIVACY: A SHORT HISTORY 39 (2016) ("Dismissal would follow the discovery that they had been gossiping out of doors about their employer's affairs.").

the efficacy of this sanction depended on the labor market.[315] Indiscreet slaves could be whipped.[316] That the elite resorted to technological safeguards such as the dumb waiter and the keyhole escutcheon suggests that the threat of punishment was not enough to dispel the fear of domestic eavesdropping.[317] The common law, however, protected the home only against violations from outside.

Informers (informants in modern jargon) played an essential role in early American law enforcement. The First Congress provided for rewards to informers in several statutes.[318] These were not limited solely to revenue acts.[319] While these rewards might have encouraged eavesdropping, there was never any suggestion that eavesdropping by informants would be any more legal than, say, burglary. Indeed, while eavesdroppers generally were difficult to identify, testifying publicly about what one heard while eavesdropping would have been one sure way to invite an indictment.

In England, even when private parties managed most prosecutions, public prosecutors had the power to *nolle prosequi* any criminal indictment.[320] As a limit on law enforcement, the indictment procedure faced this obstacle, which became more formidable as public prosecutors monopolized the prosecution function. In the United States, however, well into the nineteenth century, prosecutors were paid fees for filing indictments and trying cases.[321] Where fees followed the return of every indictment, prosecutors had an incentive to press any case a private citizen initiated.[322] Where fees were paid only on convictions, prosecutors had strong incentives to screen cases and concentrate their efforts on likely winners.[323]

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[315] *See id.* (noting "[t]he sheer mobility of servants in what was generally an employee's market" and that "once they had moved on and taken their archive to what might be a neighbouring household, all control was lost.").

[316] *See, e.g.*, 1 JAMES L. ROARK ET AL., THE AMERICAN PROMISE: A HISTORY OF THE UNITED STATES 406 (5th ed. 2012).

[317] *See* JOHN L. LOCKE, EAVESDROPPING: AN INTIMATE HISTORY 186–88 (2010).

[318] *See, e.g.*, An Act to Regulate the Collection of the Duties Imposed by Law on the Tonnage of Ships or Vessels, and on Goods, Wares and Merchandises Imported into the United States, ch. 5, § 38, 1 Stat. 29, 48 (1789) (repealed 1790) (providing that when an informer's information led to a seizure, one half of the moiety due to the revenue collectors would go to the informer).

[319] *See, e.g.*, An Act for the Punishment of Certain Crimes Against the United States, ch. 9, § 16, 2 Stat. 112, 116 (1790) (providing that following conviction for larceny, half the fine be paid to "the informer and prosecutor.").

[320] The monarch's Attorney General had the power to terminate prosecutions after indictment by the writ of nolle prosequi, a procedure dating at least to the sixteenth century. *See* J. LL. J. EDWARDS, THE LAW OFFICERS OF THE CROWN 227–37 (1964).

[321] *See* NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940, at 255 (2013) ("Through much of the nineteenth century and sometimes into the twentieth, American public prosecutors made their income from fees, usually based on the number of cases they brought or the number of convictions they won, depending on the jurisdiction.").

[322] *See id.* at 255–56.

[323] *See id.* at 256 ("Instead of taking all comers, the officer had an incentive to scrutinize

During the Founding era, libel and revenue cases were the exception, not the norm. Most law enforcement was done by private persons or by amateurs holding temporary offices as watchmen, JPs, sheriffs, or constables.[324] If, say, members of the watch had taken to passing their shift by splitting up into eavesdropping parties and then reassembling to share their tales, they could not have counted on any special protection by way of *nolle prosequi* or pardon.[325]

C. Engaging Justice Black's Argument from Silence

If the ban on eavesdropping was so well-established, why didn't the Founders explicitly mention it? The King's Messengers and royal tax collectors used general warrants, rather than eavesdropping.[326] Eavesdropping was both unnecessary and inefficient for their purposes. The general warrants meant they did not need preliminary information of the sort eavesdropping might provide.[327]

Before electronic transmitters, eavesdropping needed luck to succeed at all, and easy precautions could make success even less likely. Before electronic recording technology, even if officers overheard a criminal conversation, those overheard could plausibly deny it later. So, it should not surprise us that the Founders' immediate focus was on general warrants rather than eavesdropping. But it seems a long reach indeed to infer from silence, when eavesdropping was not terribly dangerous, a specific purpose to permit eavesdropping when technology came to make it dangerous.

The common law provided a menu of actions to protect the security of the home. It does not specifically mention the writ of replevin, or the tort of conversion, which provide the remedy for the return of seized property or for the value of the property between its seizure and return.[328] It does not specifically mention trespass or false

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private accusations, concentrate his efforts on cases that he judged to be winners, and shut the door to the accusers whose cases looked like losers.").

[324] *See, e.g.*, JOEL SAMAHA, CRIMINAL JUSTICE 139 (7th ed. 2006); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 620, 629 n.216 (1999).

[325] *See* Davies, *supra* note 324, at 622, 625–27.

[326] *See id.* at 669 n.327.

[327] *See id.* at 558.

[328] *See* 3 HERBERT BROOM & EDWARD A. HADLEY, COMMENTARIES ON THE LAWS OF ENGLAND 146–47 (London, William Maxwell & Son et al. 1869); Amos S. Deinard & Benedict S. Deinard, *Election of Remedies*, 1922 MINN. L. REV. 480, 486 (1922) ("Thus trespass, trover and replevin all proceed upon the ground of continued ownership in the plaintiff, and may be brought for the same wrong. . . . But when action is once pursued to satisfaction in one form of action, the plaintiff cannot avail himself of suit by any other remedy."); J.E. COBBEY, A PRACTICAL TREATISE ON THE LAW OF REPLEVIN § 17, at 9 (Nebraska, J.E. Cobbey 1890). Cobbey wrote that:

> To maintain trespass it was essential to aver and prove that there was a wrongful act vi et armis, or a taking de bonis asportatis; in trover for a conversion, the taking may have been lawful, as by finding or by

arrest, for that matter. It does declare the right to be secure in the home. The indictment for eavesdropping was just as much a form of action for the protection of that security as the action for trespass.

Today the procedure for returning property illegally seized by federal agents is the motion for return under Federal Rule of Criminal Procedure 41(g).[329] Could Congress repeal Rule 41(g) and leave the aggrieved citizen no way to obtain the return of the citizen's property? Remember, the Fourth Amendment does not mention the writ of replevin or the tort of conversion. Justice Black seemed to single out the common law of eavesdropping as the *only* common law proceeding the Fourth Amendment excluded by silence. He gave no reason for editing the common law's menu of actions in that way.

Justice Black thought that silence meant that protections for the citizens were to be left to Congress. The Bill of Rights in general, and the Fourth Amendment in particular, meant to constrain Congress because Congress could not be trusted about the scope of search powers incident to its revenue powers.[330] Against that background, we should not read silence about eavesdropping as conferring power on Congress to abolish common-law remedies.[331] Even more implausible is Justice

> consent of the plaintiff, the gist of the action being for the unlawful conversion; the action of replevin was a form of action to recover the possession of specific chattels wrongfully taken from the plaintiff.

COBBEY, *supra*, at 9.

[329] FED. R. CRIM. P. 41(g).

[330] *See, e.g.*, Letter from a Maryland Farmer, *supra* note 3. New York made known that:

> [E]very Freeman has a right to be secure from all unreasonable searches and seizures of his person his papers or his property, and therefore, that all Warrants to search suspected places or seize any Freeman his papers or property, without information upon Oath or Affirmation of sufficient cause, are grievous and oppressive.

Ratification of the Constitution by the State of New York (July 26, 1788), AVALON PROJECT, https://avalon.law.yale.edu/18th_century/ratny.asp [https://perma.cc/4Z7W-QMBT]. *See also Ratification of the Constitution by the State of North Carolina* (Nov. 21, 1789), AVALON PROJECT, https://avalon.law.yale.edu/18th_century/ratnc.asp [https://perma.cc/T8WU-SG5J] ("That every freeman has a right to be secure from all unreasonable searches, and seizures of his person, his papers, and property."); *Ratification of the Constitution by the State of Virginia* (June 26, 1788), AVALON PROJECT, https://avalon.law.yale.edu/18th_century/ratva.asp [https://perma.cc/H5ZM-HE9E] ("That every freeman has a right to be secure from all unreasonable searches and seizures of his person, his papers and his property."); *Ratification of the Constitution by the State of Rhode Island* (May 29, 1790), AVALON PROJECT, https://avalon.law.yale.edu/18th_century/ratri.asp [https://perma.cc/KA4E-Q9R2] ("That every person has a right to be secure from all unreasonable searches and seizures of his person, his papers or his property.").

[331] This is not to say that Founding-era procedures are unchangeable. The common law was itself dynamic. *See* Dripps, *supra* note 227, at 1129–30 (arguing that "a statute that overturns a [F]ounding-era rule should be held constitutional when the conditions exist that would justify judicial overruling of the [F]ounding-era practice."). The Founders themselves

Black's suggestion that the Fourth Amendment authorized *the courts* to abolish the common law's protections against eavesdropping and thereby burden Congress with restoring them.

CONCLUSION

Even on a narrow reading of the right to be secure as preservation of common law protections for the home, the common law protected the home not just by the tort action for trespass, but by indictments of eavesdroppers as public nuisances. The elements of a good indictment call into question important assumptions that have followed from the focus on the trespass remedy. Three of these seem especially significant.

First, Fourth Amendment "searches" include the collection of information by means other than physical intrusion into constitutionally protected areas. The eavesdropper never entered. How far that principle extends beyond the home is an open question;[332] whether *Katz* best answers that question is another. But wherever Fourth Amendment law goes next, there is no trespass-only past to which it might return.

The second implication is that the public had an enforceable interest in the practice of eavesdropping. The practice threatened all the households in the community, so the appropriate redress was the public action by way of indictment. Anyone could bring that action, not just those with the special injury required for an injunction. The Court's Fourth Amendment standing doctrine follows logically from an exclusive focus on trespass actions, but only very doubtfully from deterring the threat to the community going forward. If the exclusive focus on trespass actions is wrong, history calls for reconsidering standing doctrine.

Third, the elements of a good indictment for eavesdropping point to separate concerns with both the collection and the dissemination of information. The eavesdropper caught in the act might be punished for prowling, first as a person of ill fame in the eighteenth century and later for loitering, disorderly conduct, or the like. These summary prosecutions punished the clandestine collection of the information.

The indictment for eavesdropping addressed the dissemination of the information. Conviction depended on proof of both clandestine listening and subsequent publication. That principle suggests an important option for regulating automatically

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adopted statutory procedures that made reasoned modifications of common law procedures in suits against government officers. *See id.* at 1124–26.

[332] The text protects the right to be secure in "effects," but I leave for another day the constitutional meaning of "effects." *Compare* Kerr, *supra* note 4, at 1054 (arguing that *Katz* correctly held that "an enclosed telephone booth was one of the places the Fourth Amendment protected—a temporary virtual 'house' or, possibly, an 'effect'"), *with* Jeffrey Bellin, *Fourth Amendment Textualism*, 118 MICH. L. REV. 233, 265 n.213 (2019) (equating "effects" with moveable property, thus excluding the phone booth in *Katz* but stating, "[p]hone booths and barns would more properly be considered under the term 'house.'").

generated location databases, whether operated by private service providers or by law enforcement agencies themselves. Either way, eavesdropping suggests that sharing information already collected is an independent concern of the right to be secure.

Be that as it may, location data collected in public space necessarily conveys information about activity within the home. If the government knows that your car was on the freeway at 3:35 p.m. last Saturday, the government knows that you were very probably not at home then. If the government knows your e-commerce history from sites like Amazon, the government knows in great detail some of the things that are going into your house. Information about when you are at home and what you are bringing into it seems at least as significant as the heat signature that calls for a warrant under *Kyllo*.

Debate should—and certainly will—continue. But the debate should not be about going back to a physical intrusion test based on Founding-era common law. Debate should focus now on whether the Court can improve on *Katz*, not on whether it should return to *Olmstead*.