



PRAGMATISM AND PRIVACY

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Almost daily, we read in the news about cases in which an individual's interest in privacy is pitted against various interests of other individuals, the latter often represented by local, state, or national governments. Some recent examples: Google and the CIA both investing in a start-up company "that monitors the web in real time" and uses the information it gathers to "assemble actual real-time dossiers on people";¹ the proliferation of full-body scanning machines at domestic² and foreign³ airports; the government tracking, via GPS,⁴ or searching the data on,⁵ one's cell phone, without a

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¹ Noah Shachtman, *Exclusive: Google, CIA Invest in 'Future' of Web Monitoring*, WIRED: DANGER ROOM (July 28, 2010, 7:30 PM), <http://www.wired.com/dangerroom/2010/07/exclusive-google-cia>.

² Eileen Sullivan, *New Full-Body Scanners Going to 2 Airports in Next 2 Weeks for Passenger Screening*, ABC NEWS (Feb. 23, 2010), <http://abcnews.go.com/Business/wireStory?id=9924831>.

³ *Paris Airport Starts Using Full-Body Scanner*, BREITBART (Feb. 22, 2010, 1:03 PM), <http://www.breitbart.com/article.php?id=D9E1CE100>.

⁴ Declan McCullagh, *Feds Push for Tracking Cell Phones*, CNET NEWS (Feb. 11, 2010, 4:00 AM), http://news.cnet.com/8301-13578_3-10451518-38.html. See also State v. Sveum, 769 N.W.2d 53 (Wis. Ct. App. 2009) (holding that no Fourth Amendment

warrant; a school district using the camera on the laptops it provides its students, to monitor student conduct at home.⁶ As Chief Judge Alex Kozinski wrote about a case in which police, acting without a warrant, attached a GPS tracking device to the underside of defendant's car, "1984 may have come a bit later than predicted, but it's here at last."⁷

The frequency with which cases like these arise reminds us that legal protection for privacy is anything but clear-cut. And this is not just because advances in technology create new opportunities for those who would wrongfully intrude on another's privacy. Rather, I think, it is because of privacy doctrine itself. In cases like those listed above—cases implicating the Fourth Amendment—legal protection for one's privacy hinges upon whether the invasion of privacy at issue constitutes a "search." Today, a privacy-invading activity is not said to constitute a search "unless the individual manifested a subjective expectation of privacy in the searched object, and society is willing to recognize that the expectation is reasonable."⁸

The malleability of the second prong of this test may be seen by some as a virtue. After all, some might ask, where important interests in airline security, criminal investigation, or schoolchildren's safety are at stake, is it really desirable to provide *absolute* legal protection for an individual's privacy? However, I suspect there are at

search occurs when police attach a GPS device to an individual's car, and use the technology to track the car's movements while it is in public view).

⁵ Declan McCullagh, *Police Push for Warrantless Searches of Cell Phones*, CNET NEWS (Feb. 18, 2010, 4:00 AM), http://news.cnet.com/8301-13578_3-10455611-38.html; see also *Abidor v. Napolitano*: ACLU Challenges Suspicionless Laptop Border Search Policy, ACLU (Sept. 15, 2010), <http://www.aclu.org/free-speech-technology-and-liberty/abidor-v-napolitano>.

⁶ Larry King, Dan Hardy & John Shiffman, *L. Merion Webcam Issue Is New Legal Territory*, PHILADELPHIA INQUIRER, Feb. 21, 2010, at A01; Tony Romm, *Federal Judge Orders School District to Stop Spying on Students*, THE HILL, (Feb. 24, 2010, 11:44 EST), <http://thehill.com/blogs/hillicon-valley/technology/83383-federal-judge-orders-school-to-stop-spying-on-students>.

⁷ *United States v. Pineda-Moreno*, 2010 WL 3169573 (9th Circuit Aug. 12 2010) (Kozinski, C.J., dissenting from the denial of rehearing en banc).

⁸ *Kyllo v. United States*, 533 U.S. 27, 33 (2001) (citing *California v. Ciraolo*, 476 U.S. 207, 211 (1986); *Katz v. United States*, 389 U.S. 347, 361 (1967)).

least as many people who are concerned about the increasing encroachments on their privacy, who wonder how legal protection of their privacy came to depend on whether “society” — i.e., some unspecified group of other individuals — approves of such protection.

I have argued elsewhere⁹ that legal protection for an individual’s privacy should be based on rights to property and contract, not on a distinct legal “right to privacy.” My purpose in this paper is to examine how we got where we are today in terms of legal protection for privacy—how “society” acquired the power to decide whether an individual’s expectation of privacy is “reasonable” and therefore worthy of legal protection. I will try to show that we got here, in large part, due to a particular theory of adjudication influencing the thinking of the right Supreme Court Justices at the right time. The theory, legal pragmatism, is often attributed to Justice Oliver Wendell Holmes,¹⁰ and continues to be applied and defended by respected judges and legal scholars.¹¹

In Part I of this paper, I will discuss pragmatism, both as a school of philosophy, and as a theory of adjudication, in order to prepare the reader for the analysis that follows. In Part II, I will analyze, chronologically, significant Fourth Amendment privacy cases that laid the groundwork for *Katz v. United States*,¹² starting with Justice Brandeis’s dissent in *Olmstead v. United States*,¹³ and finishing with the majority and concurring opinions in *Berger v. New York*.¹⁴ In Part III, I will look at *Katz* itself, focusing not only on evidence of legal pragmatism in the majority opinion and in Harlan’s concurrence, but also on the pragmatic nature of the “reasonable

⁹ Amy L. Peikoff, *Beyond Reductionism: Reconsidering the Right to Privacy*, 3 N.Y.U. J. L. & LIBERTY 1 (2008); see also Amy Peikoff, *No Corn on this Cobb: Why Reductionists Should be All Ears for Pavesich*, 42 BRANDEIS L.J. 751 (2004) (analyzing the original debate giving rise to the legal right to privacy); Amy L. Peikoff, *The Right to Privacy: Contemporary Reductionists and Their Critics*, 13 VA. J. SOC. POL’Y & L. 474 (2006) (analyzing the contemporary reductionist arguments).

¹⁰ RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY, 57–59 (2003).

¹¹ See, e.g., *id.* at 84–86 (listing a number of influential pragmatist judges).

¹² 389 U.S. 347 (1967).

¹³ 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting).

¹⁴ 388 U.S. 41 (1967).

expectation of privacy” test itself. Finally, in Part IV, I will consider whether the Court’s opinion in *Kyllo v. United States*¹⁵ represents a fundamental methodological departure from its earlier cases, such that we will enjoy more robust legal protection for privacy if the Court continues to follow this approach.

I. PRAGMATISM AND LEGAL PRAGMATISM

Providing a clear and concise definition or description of philosophical pragmatism is difficult. This is because, according to William James, one of its most renowned early advocates, pragmatism does not advocate working towards any particular consequences or set of circumstances.¹⁶ It purports to have no particular substantive commitments. Rather, says James, what makes it distinctive is its *method* of approaching philosophical questions.¹⁷ That method consists of “clarifying ideas” by looking at the “practical consequences of accepting one idea or another.”¹⁸ The “meaning” or “truth” of an idea does not depend on grasping a reality that exists independent of human consciousness. For the pragmatist, no such independent reality exists. The world around us, according to pragmatism, is “malleable, waiting to receive its final touches at our hands.”¹⁹ Accordingly, concepts such as the “truth” or “meaning” of an idea are entirely dependent on how people treat ideas, how they act when they hold those ideas, and what they experience as a result of their actions.²⁰ Tara Smith helpfully sums up pragmatism as a “style of thinking marked by four key features”: (1) “[a] short-range perspective”; (2) “[t]he inability (or refusal) to think in principle”; (3) “[t]he denial of definite identity,” or reluctance to “identify[] things by their essential nature” —i.e., in terms of *concepts*; and (4) “[t]he refusal to

¹⁵ 533 U.S. 27 (2001).

¹⁶ Tara Smith, *The Menace of Pragmatism*, 3 THE OBJECTIVE STANDARD 71, 72 (2008).

¹⁷ *Id.*

¹⁸ *Id.* (citing WILLIAM JAMES, PRAGMATISM 31-33 (1981)).

¹⁹ *Id.* (quoting JAMES, *supra* note 18, at 115).

²⁰ *Id.* (citing JAMES, *supra* note 18, *passim*).

rule out possibilities," or, rephrased positively, an "inclination . . . to keep all options open."²¹

If "meaning" and "truth" are based entirely on the "practical consequences" resulting from one's holding an idea and acting on it, how do we know which practical consequences count in favor of an idea, and which against? Given that pragmatism says it has no particular substantive commitments, how is a pragmatist to determine what is *good*? According to pragmatism, the only grounds for saying something is good or bad are the demands made by presently existing human beings. James writes, "*the essence of good is simply to satisfy demand.*"²² Moreover, James does not advocate the satisfaction of some demands over others based on their content—i.e., based on the thing or state of affairs that is demanded. "The demand," he writes, "may be for anything under the sun."²³ So, for example, if I demand a right to intellectual property in the content of my writings, because it was I who actually created them and I believe it is right for me to reap the benefit of my labor, my demand is no "better," no more worthy of satisfaction, according to James, than are the demands of those who wish to "express themselves" by posting my writings (or excerpts thereof) on the Internet. How is a judge, e.g., supposed to decide which demands he should satisfy by means of his ruling in a particular case? This is what James calls the "casuistic question," to which he provides the following answer: "Since everything which is demanded is by that fact a good, must not the guiding principle for ethical philosophy (since all demands conjointly cannot be satisfied in this poor world) be simply to satisfy at all times *as many demands as we can*?"²⁴

Understanding philosophical pragmatism is important, not only as a backdrop against which to understand legal pragmatism, but also because philosophical pragmatism, and the problem-solving

²¹ *Id.* at 73–74.

²² William James, *The Moral Philosopher and Moral Life*, in *THE WILL TO BELIEVE AND OTHER ESSAYS IN POPULAR PHILOSOPHY* 201 (1956).

²³ *Id.*

²⁴ *Id.* at 205.

methodology it advocates, do not change in any fundamental respect when transported to the realm of adjudication. One of the "Principles of Pragmatic Adjudication" presented by self-described legal pragmatist, Richard Posner, is that "The legal pragmatist believes that no general analytic procedure distinguishes legal reasoning from other practical reasoning."²⁵

Posner provides the following brief description of legal pragmatism: "a disposition to ground policy judgments on facts and consequences rather than on conceptualisms and generalities."²⁶ The approach is often contrasted with legal formalism, in which "the judge begins with some rules or principles of law as his premise, applies this premise [deductively] to the facts, and thus arrives at his decision."²⁷

Characterizing his brief description as "incomplete and unspecific," Posner offers a total of twelve "principles" or "generalizations" that help to elucidate the nature of legal pragmatism. I summarize several of these, as follows: First, while the pragmatist judge considers both "case-specific consequences" and "systemic" consequences, only rarely does he "give controlling weight" to the latter.²⁸ Moreover, because the pragmatic judge values "reasonableness" above all, he may sometimes even include "formalist pockets" in his system of adjudication and will often be unable to consider "all the possible consequences of his decisions."²⁹ Second, the legal pragmatist refuses to use "abstract moral and political theory to guide judicial decisionmaking."³⁰ He views such theory, says Posner, as nothing more than "formalist rhetoric."³¹ The legal pragmatist is, however, willing to use theory that will help "guide empirical inquiry."³² Finally, the pragmatic judge is "forward-looking" in the sense that

²⁵ POSNER, *supra* note 10, at 60.

²⁶ *Id.* at 59 (quoting RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 227 (1999)).

²⁷ *Id.* at 19 (quoting JEROME FRANK, *LAW AND THE MODERN MIND* 101 (1930)).

²⁸ *Id.* at 59.

²⁹ *Id.* at 59–60.

³⁰ *Id.* at 60.

³¹ *Id.* at 80.

he does not see himself as hog-tied by precedent; he views adherence to precedent “as a (qualified) necessity rather than as an ethical duty.”³³ However, he does not look *too* far forward—when he is participating in the “early stages of the evolution of a legal doctrine,” he “tends to favor narrow over broad grounds of decision.”³⁴

With legal pragmatism, as with philosophical pragmatism, we see that it is difficult to obtain a clear and concise summary of the approach. Legal pragmatists focus on case-specific consequences . . . for the most part. They reject abstract theory . . . unless it is a certain kind of theory. They tend to look forward towards the future . . . but not too far.

Despite the difficulties inherent in trying to summarize a theory such as pragmatism, and in converting that summary into a list of hallmarks of pragmatism that one can retain in one’s mind and actually use in reading case law for signs of its influence, I believe the following could be described as good working list of such hallmarks: (1) a focus on the *consequences* of deciding the case one way vs. the other, with a preference for short-range consequences over long-range; (2) a disdain for *abstract* moral and political theory, and their associated concepts and principles, combined with a willingness to adopt theories, concepts and principles that can guide empirical inquiry; (3) a willingness to overturn precedent, but a preference for *narrow grounds of decision* as a doctrine is developing (as it will be in the cases we examine here); (4) a preference for holdings and interpretations of Constitutional provisions that are *flexible*—i.e., that tend to “keep options open”³⁵ for future judges; and (5) a tendency to reach decisions and create precedent that will achieve the pragmatist’s goal of satisfying as many *demands* of those in society as possible.³⁶

³² *Id.* at 60.

³³ *Id.*

³⁴ *Id.*

³⁵ See Smith, *supra* note 16, at 73–74.

³⁶ It is important to distinguish pragmatists from utilitarians. Utilitarians will try to maximize the total pleasure experienced by sentient beings as a result of their actions. Pragmatists, by contrast, may or may not end up maximizing pleasure (or anything else). People may or may not demand the thing that brings them (or any-

Now that we understand more precisely what we are looking for, we can proceed with an examination of the cases.

II. THE ROAD TO KATZ: FROM OLMSTEAD TO BERGER

A. *Olmstead v. United States*

The first seeds of the “reasonable expectation of privacy” test were sown by Justice Louis D. Brandeis in his dissent in *Olmstead v. United States*.³⁷ It is not surprising that Brandeis would be the one to introduce the notion of an individual’s “right to be let alone” into the Constitutional realm. The 1890 law review article that he co-authored, “The Right to Privacy,”³⁸ is credited by many with giving rise to the legal right to privacy recognized in tort law.³⁹

In *Olmstead*, the defendants were convicted of a conspiracy to violate the National Prohibition Act.⁴⁰ The government introduced in court against them, evidence obtained when government agents, without a warrant, tapped their phone lines and listened in on their conversations.⁴¹ The Supreme Court, in a majority opinion written by Justice Taft, upheld the convictions, on the ground that the wire-tapping was done “without trespass upon any property of the defendants.”⁴² Taft distinguishes *Ex parte Jackson*,⁴³ in which the court held that Fourth Amendment protections applied to the contents of sealed letters entrusted to the U.S. Postal Service: “The United States takes no such care of telegraph or telephone messages as of

one else) pleasure. See, e.g., POSNER, *supra* note 10, at 65–71 (distinguishing pragmatism from consequentialism in general, and utilitarianism in particular).

³⁷ 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting).

³⁸ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

³⁹ But see Peikoff, *No Corn on This Cobb*, *supra* note 9 (arguing, in part, that given the quality of the argument in the Brandeis article, it should not have been given credit for this development).

⁴⁰ *Olmstead*, 277 U.S. at 455.

⁴¹ *Id.* at 456–57.

⁴² *Id.* at 457. The convictions were upheld over an additional objection discussed in the opinions at some length: the evidence should be excluded because it was obtained via immoral—and more importantly, illegal—conduct. Discussion of the Justices’ treatment of this objection is not germane to this article, however.

mailed sealed letters. 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 sense of hearing and that only. There was no entry of the houses or offices of defendants.”⁴⁴

At the outset of his dissent, Brandeis states what he believes to be the correct approach to Constitutional adjudication, an approach, he argues, that the Court has often taken. First he notes that, although there are clauses of the Constitution that, in general terms, limit the powers of government, the Court had not construed such clauses so as to prevent federal and state government from enacting regulations that “meet[] modern conditions.”⁴⁵ This flexibility, he argues, should also be applied to the Fourth and Fifth Amendments: “Clauses guaranteeing to the individual protection against specific abuses of power, must have a similar capacity of adaptation to a changing world.”⁴⁶ He quotes, approvingly, a passage from *Weems v. United States*,⁴⁷ in which the Supreme Court said, in part, “a principle, to be vital, must be capable of wider application than the mischief which gave it birth,” and adds that this is especially true of the principles contained in the Constitution. If a judge were to interpret the Constitution only in terms of “what has been,” and failed to consider “what may be,” then “[The Constitution’s] general principles would have little value, and be converted by precedent into impotent and lifeless formulas.”⁴⁸ Brandeis’s preference for Constitutional construction that will allow future judges to “adapt[] to a changing world” is consistent with a pragmatist’s tendency to “keep options open” as much as possible.⁴⁹

Brandeis then goes on to argue that the Court had already, to a large extent, construed the Fourth and Fifth Amendments in exactly

⁴³ 96 U.S. 727 (1878).

⁴⁴ *Olmstead*, 277 U.S. at 464.

⁴⁵ *Id.* at 472 (Brandeis, J., dissenting).

⁴⁶ *Id.*

⁴⁷ 217 U.S. 349, 373 (1910).

⁴⁸ *Olmstead*, 277 U.S. at 473 (Brandeis, J., dissenting) (citing *Weems*, 217 U.S. at 373).

⁴⁹ See *supra* text accompanying note 21.

this fashion. He explains that the Court, in *Boyd v. United States*,⁵⁰ avoided an “unduly literal construction” of the Fourth Amendment. “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.”⁵¹ What should be a judge’s guide, then, if it is not the language of the Constitution “in its ordinary meaning”? Brandeis thinks the Court, when interpreting a provision of the Constitution, has looked and should look at the provision’s underlying purpose: “No court which looked at the words of the amendment *rather than at its underlying purpose* would hold, as this court did in *Ex parte Jackson*, [] that its protection extended to letters in the mails.”⁵²

Brandeis explains his interpretation of the underlying purpose of the Fourth Amendment in the oft-quoted passage:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.⁵³

Interpreting the Fourth Amendment in light of its purpose, as opposed to interpreting it according to the “ordinary meaning” of its language, is consistent with the pragmatist methodology. It is consistent with pragmatism’s concern with consequences and its disdain for concepts and principles (which are, of course, represented by

⁵⁰ 116 U.S. 616 (1866).

⁵¹ *Olmstead*, 277 U.S. at 476 (Brandeis, J., dissenting).

⁵² *Id.* (emphasis added).

⁵³ *Id.* at 478. Note that a similar passage appears in Brandeis’s law review article. See Warren & Brandeis, *supra* note 38 at 193.

language).⁵⁴ Further, we can see that Brandeis's interpretation of the Fourth Amendment's purpose is also consistent, in substance, with pragmatism. In general, a pragmatist interpreting the Constitution can see the purpose of one of its clauses as directing judges (and others who interpret and apply the law) to satisfy a demand, a demand so prevalent that the Founding Fathers thought it fit to include in one of our country's founding documents.⁵⁵ Here, Brandeis notes that the "right to be let alone"—i.e., the right to privacy—is "the right most valued by civilized men." In other words, protection for privacy is something that is in high demand—more than anything else that is safeguarded by those legal concepts known as "rights." Surely, then, such demands should be held, by pragmatically minded judges, to outweigh lesser demands, such as those of law enforcement.

But it is not just Brandeis's choice to interpret the Fourth Amendment in light of its purpose, and his characterization of that purpose, that are pragmatic. Brandeis says that, in order to apply the amendment properly, in light of this purpose, "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."⁵⁶ Earlier in his dissent, Brandeis catalogues several Fourth Amendment holdings, showing, in essence, that the Court has held the amendment was violated when a variety of different "papers" were examined, and when those papers were located in a variety of places, and when the taking of the papers was achieved by a variety of means. On the basis of this catalogue, he concludes that the Court should not care *how* a paper—or, by implication, a conversation—comes to be observed or heard by law enforcement: "From these decisions, it follows necessarily that the amendment is violated by the officer's reading the paper without a physical seizure, without his even touching it"⁵⁷ Brandeis is

⁵⁴ See *supra* text accompanying notes 28 and 30.

⁵⁵ See *supra* text accompanying notes 22–24.

⁵⁶ *Olmstead*, 277 U.S. at 478 (emphasis added).

⁵⁷ *Id.* at 477–78. Note the logical error in Brandeis's argument: he says that, merely because the court has held the Amendment was violated in a variety of situations, the specifics of any situation should be irrelevant to a court. He ignores the fact that a

arguing that judges should make no reference to property law doctrine when determining whether a Fourth Amendment “search” has occurred. He is demonstrating a reluctance to identify, in terms of legal concepts, the means by which an invasion of privacy was achieved.⁵⁸ Note that he does not specify on what basis an intrusion should be deemed to be “unjustifiable” — only that such justification should not be based on the right to property.

B. Silverman v. United States

In *Silverman v. United States*,⁵⁹ we see the influence of pragmatism and the fledgling privacy doctrine, in both the concurring and majority opinions. In *Silverman* the police, without a search warrant, obtained permission to occupy a vacant row house adjacent to — and therefore sharing a common, or “party” wall with — that of petitioners. The police then inserted a “spike mike” into that shared wall, until it made contact with petitioners’ heating duct. This “converted their entire heating system,” which extended throughout both floors of petitioners’ home, “into a conductor of sound.”⁶⁰ The issue was whether conversations overheard by these means could be introduced as evidence against petitioners in a criminal proceeding. The Court held that they could not, because to allow this would be to violate the Fourth Amendment.⁶¹

The author of the majority opinion in *Silverman* was Justice Stewart, who later wrote the Court’s majority opinion in *Katz*. Stewart, while taking note of “recent and projected developments in the science of electronics,”⁶² nonetheless opts to confine his holding to the facts of the case before him. He declines the invitation to overrule the Court’s holdings in *Goldman v. United*

variety of situations would qualify as instances governed by a *principle*, here, the principle of private property.

⁵⁸ See *supra* text accompanying note 21.

⁵⁹ 365 U.S. 505 (1961).

⁶⁰ *Id.* at 506–07.

⁶¹ *Id.* at 512.

⁶² *Id.* at 508.

*States*⁶³ and *On Lee v. United States*,⁶⁴ both of which denied Fourth Amendment protection on the grounds that “the eavesdropping in those cases had not been accomplished by means of an unauthorized physical encroachment within a constitutionally protected area.”⁶⁵ He notes that this lack of physical encroachment was also “a vital factor in the Court’s decision in *Olmstead v. United States*.”⁶⁶ In the case before him, by contrast, Stewart finds that “the eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by the petitioners.”⁶⁷ In fact, writes Stewart, the police “usurped” the petitioners’ entire heating duct system “without their knowledge and without their consent.”⁶⁸

Thus far Stewart’s opinion might not seem to be very pragmatic. After all, Stewart seems to be insisting on a doctrinal distinction—the presence or absence of an “unauthorized physical encroachment”—as a litmus test for whether a Fourth Amendment search took place. However, even in seeming to adhere to traditional Fourth Amendment doctrine, Stewart shows his disapproval of at least some of the conceptual apparatus that had comprised that doctrine: “In these circumstances we need not pause to consider whether or not there was a *technical* trespass under the local property law relating to party walls. Inherent Fourth Amendment rights are not inevitably measurable in terms of *ancient niceties of tort or real property law*.”⁶⁹ In writing this, Stewart is not only showing his contempt for abstract traditional legal concepts, he is also echoing Brandeis’s assertion that the Court should determine, without regard to the particular means employed, whether a Fourth Amendment search occurred.

⁶³ 316 U.S. 129 (1942).

⁶⁴ 343 U.S. 747 (1952).

⁶⁵ *Silverman*, 365 U.S. at 510.

⁶⁶ *Id.*

⁶⁷ *Id.* at 509.

⁶⁸ *Id.* at 511.

⁶⁹ *Id.* (emphasis added).

There are two other pragmatic aspects of Stewart's opinion that are worth noting: First, he goes to great lengths—perhaps too great, as Justice Douglas argues in his concurrence⁷⁰—to distinguish the case before him from others that are quite similar to it. Second, he decides not to draw upon the extensive data provided to the Court regarding advances in eavesdropping technology in formulating his holding. Both of these decisions are in line with one of the basic tenets of pragmatic adjudication: deciding cases, particularly in developing areas of the law, on narrow grounds.⁷¹

We see more evidence of pragmatism, and further development of Fourth Amendment privacy doctrine, in Justice Douglas's brief concurrence. There Douglas indicates that he, unlike the majority, would have simply abandoned the trespass doctrine entirely in this case. He writes, "The concept of 'an unauthorized physical penetration into the premises,' on which the present decision rests seems to be to be beside the point."⁷² In other words, he finds the "trespass doctrine" to be mere "formalist rhetoric."⁷³ He, like Stewart, would ignore "technicalities" of local trespass law. But he would also avoid "nice distinctions turning on the kind of electronic equipment employed"—e.g., bug planted outside the office of petitioners in *Goldman*, versus spike mike touching petitioners' heating ducts in *Silverman*. "[O]ur sole concern," Douglas writes, "should be with whether the privacy of the home was invaded."⁷⁴ Identifying the means by which privacy was invaded—e.g., a violation of property rights—is, for Douglas, as it was for Brandeis, irrelevant.⁷⁵

⁷⁰ See *id.* at 512 (Douglas, J., concurring) (accusing majority opinion of "matching cases on irrelevant facts").

⁷¹ See *supra* text accompanying note 34.

⁷² *Silverman*, 365 U.S. at 513.

⁷³ See *supra* note 31 and accompanying text.

⁷⁴ *Silverman*, 365 U.S. at 513.

⁷⁵ See Smith, *supra* note 16, at 73-74.

C. Warden v. Hayden

At issue in *Warden v. Hayden*⁷⁶ was not whether certain government activity amounted to a “search” within the meaning of the Fourth Amendment, as it was with other cases examined in this paper. Instead, the issue was the validity of a distinction between “merely evidentiary materials” and “the instrumentalities and means by which a crime is committed, the fruits of such a crime, weapons,” and contraband. The former, it was argued, may not be seized, even with a valid warrant.

Even though not directly on point, *Warden* is cited in *Katz* as authority for the Court’s rejection of the idea that “property interests control the right of the Government to search and seize.”⁷⁷ The connection between property doctrine and the Fourth Amendment was relevant to the issue in *Warden* because, according to precedent, the rightfulness of the government’s seizure of a defendant’s belongings depended upon the government having a superior property interest in the items seized. If an item was “mere evidence,” the government was said not to have a superior property interest in that item.⁷⁸

In his discussion in support of the statement that would later be quoted in *Katz*, Brennan starts by noting that a search or seizure “may be ‘unreasonable’ within the Fourth Amendment even though the Government asserts a superior property interest at common law.”⁷⁹ The Amendment’s “principal object,” he writes, “is the protection of privacy rather than property”⁸⁰ Accordingly, he says, the Court has “increasingly discarded *fictional* and procedural barriers rested on *property concepts*.”⁸¹ In using the word “fictional” to describe any barriers to search and seizure based on “property concepts,” Brennan is, like Brandeis and Stewart, showing his contempt

⁷⁶ 387 U.S. 294 (1967).

⁷⁷ *Katz v. United States*, 389 U.S. 347, 353 (1967) (quoting *Warden*, 387 U.S. at 304).

⁷⁸ *Warden*, 387 U.S. at 300–03.

⁷⁹ *Id.* at 304.

⁸⁰ *Id.*

⁸¹ *Id.* (emphasis added).

for the abstraction, “property.” Discussing the evolution of the remedial structure in the law of search and seizure, Brennan notes that it “finally escaped the bounds of common law property limitations in *Silverthorne Lumber Co. v United States*,”⁸² again showing contempt for this abstraction.

Brennan also speaks, as a pragmatist might, of the propriety of the remedial structure changing in response to “demand”:

Recognition that the role of the Fourth Amendment was to protect against invasions of privacy demanded a remedy to condemn the seizure in *Silverthorne*, although no possible common law claim existed for the return of the copies made by the Government of the papers it had seized. The remedy of suppression . . . satisfied that demand.⁸³

Finally, he praises the creation of the remedy of exclusion for the “flexibility in rulemaking” that it made possible, as opposed to remedies based on property law.⁸⁴ And he quotes approvingly a passage from *Jones v. United States*,⁸⁵ characterizing the common law of property as a branch of law that “more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical,”⁸⁶ i.e., distinctions that are backward-looking. In preferring remedies that both allow for “flexibility” and are “forward-looking,” Brennan is again showing he has been influenced by pragmatism.

⁸² *Id.* at 304–05 (emphasis added) (citing *Silverthorne v. United States*, 251 U.S. 385 (1920)).

⁸³ *Id.* at 305 (emphasis added). Brennan also refers to “the felt need to protect privacy from unreasonable invasions” as being responsible, in part, for “[t]he development of search and seizure law.”

⁸⁴ *Id.* at 305.

⁸⁵ *Jones v. United States*, 362 U.S. 257 (1960).

⁸⁶ *Warden*, 387 U.S. at 305 (emphasis added) (quoting *Jones*, 362 U.S. at 266).

D. Berger v. State of New York

The majority opinion in *Berger v. New York*⁸⁷ paved the immediate way for *Katz* by holding that the Fourth Amendment's protections against warrantless and unreasonable searches and seizures applied to conversations heard via wiretapping and electronic eavesdropping, and therefore that a New York statute allowing police to listen to such conversations without meeting Fourth Amendment warrant requirements was unconstitutional.⁸⁸ The ruling in *Berger* was consistent with the Court's prior holdings that were based on whether there was a trespass into a constitutionally protected area, because the evidence at issue in *Berger* was obtained via recording devices planted inside two men's offices without their knowledge.⁸⁹ Nonetheless, Justice Douglas, writing in concurrence, interprets the majority's opinion as "overrul[ing] sub silento"⁹⁰ *Olmstead*, even though the majority emphasizes its disagreement with only one part of *Olmstead*: its refusal to count conversations as included among the "persons, houses, papers, and effects" protected by the Fourth Amendment.⁹¹

Clark, in his majority opinion in *Berger*, does not express contempt for abstract formulations the way that Stewart does in *Silverman*. He does, however, base his reasoning on extensive investigation of the facts surrounding the case. First, after cataloguing in great detail the history of and advances in the technology of eavesdropping and wiretapping, as well as state laws addressing the use of such technology, Clark complains, "The law, though jealous of individual privacy, has not kept pace with these advances in scientific knowledge."⁹² Clark also discusses the importance of using electronic eavesdropping for law enforcement, and notes that, while the government insisted that such methods were crucial in fighting

⁸⁷ *Berger v. New York*, 388 U.S. 41 (1967).

⁸⁸ *Id.* at 64.

⁸⁹ *Id.* at 45. See also *id.* at 43 (referring to "trespassory intrusions into private, constitutionally protected premises").

⁹⁰ *Id.* at 64 (Douglas, J., concurring).

⁹¹ *Id.* at 51.

⁹² *Id.* at 49.

organized crime, “[W]e have found no empirical statistics on the use of electronic devices (bugging)” to support this assertion.⁹³ Thus Clark, while perhaps not fully rejecting “conceptualisms and generalities,”⁹⁴ shows not only that he believes law should change to accommodate advances in technology,⁹⁵ but also that he is “dispos[ed] to ground policy judgments on facts and consequences.”⁹⁶

Note that while the facts in *Berger* did not invite the Court to abandon the trespass doctrine, Clark hints at his willingness to do so. He quotes, approvingly, language from the Court’s holding in *Silverman*, noting that, in that case, “the Court held that its decision did ‘not turn upon the technicality of a trespass upon a party wall as a matter of local law. It is based upon the reality of an actual intrusion into a constitutionally protected area.’”⁹⁷ An intrusion, he implies, by whatever means.

III. KATZ V. UNITED STATES

The main question presented in *Katz* is whether the Fourth Amendment was violated when a man’s telephone conversation was “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.”⁹⁸ Petitioner Katz was convicted of “transmitting wagering information by telephone [across state lines] . . . in violation of a federal statute.”⁹⁹ The evidence used to convict him included the telephone conversations that the FBI agents had overheard. The Supreme Court reversed the Court of Appeals, which had affirmed Katz’s conviction. The Court held that the FBI agents’ conduct did constitute a search within the

⁹³ *Id.* at 60.

⁹⁴ POSNER, *supra* note 10, at 59.

⁹⁵ See *supra* text accompanying notes 33, 35.

⁹⁶ POSNER, *supra* note 10, at 59.

⁹⁷ *Berger*, 388 U.S. at 52 (quoting *Silverman v. United States*, 365 U.S. 505, 512 (1961)).

⁹⁸ *Katz v. United States*, 389 U.S. 347, 348 (1967).

⁹⁹ *Id.*

meaning of the Fourth Amendment, and therefore, because the agents did not obtain a warrant prior to conducting their investigation, and their investigation did not fall under any of the exceptions to the warrant requirement, Katz's conviction had to be overturned.¹⁰⁰

Justice Stewart, writing for the majority, starts by rejecting Katz's framing of the issue. Katz argued that a telephone booth was a "constitutionally protected area," and that physical penetration of such an area was not necessary for a Fourth Amendment "search" to occur.¹⁰¹ Stewart writes, "the correct solution of *Fourth Amendment* problems is not necessarily promoted by incantation of the phrase, 'constitutionally protected area.'" ¹⁰² Stewart's use of the word "incantation" here is evidence that he sees the phrase "constitutionally protected area" as little more than "formalist rhetoric."¹⁰³ Later Stewart adds, "this effort to decide whether or not a given 'area,' viewed in the abstract, is 'constitutionally protected' deflects attention from the problem presented by this case."¹⁰⁴ This is more evidence that Stewart finds this abstraction unhelpful. Then, in a footnote, he tellingly warns, "we have never suggested that this concept can serve as a *talismanic* solution to every Fourth Amendment problem."¹⁰⁵ Like his use of the word, "incantation," Stewart's use of the word "talismanic" here reveals his contempt for the abstraction, "constitutionally protected area." And this is not the only abstraction that Stewart rejects. He goes further, quoting approvingly from prior Supreme Court opinions rejecting both "property interests" in general,¹⁰⁶ and the "'trespass' doctrine" in particular,¹⁰⁷ as potential aids in his analysis.

¹⁰⁰ *Id.* at 358-359.

¹⁰¹ *Id.* at 351.

¹⁰² *Id.* at 350 (emphasis in original).

¹⁰³ See *supra* note 31 and accompanying text.

¹⁰⁴ *Katz*, 389 U.S. at 351.

¹⁰⁵ *Id.* at 352 n.9 (emphasis added).

¹⁰⁶ *Id.* at 353 (quoting *Warden v. Hayden*, 387 U.S. 294, 304).

¹⁰⁷ *Id.* (citing *Silverman v. United States*, 365 U.S. 505, 511).

More evidence of the influence of pragmatism can be seen in an oft-quoted statement from Stewart's opinion: "[T]he Fourth Amendment protects people, not places."¹⁰⁸ Stewart argues that people should be protected without having to come under bright-line rules regarding the place where they (or any relevant papers, possessions, etc.) are located, and without regard to exactly how they (or their papers, etc.) came to be observed. He proceeds in a way similar to the way Justice Brandeis did in his *Olmstead* dissent:¹⁰⁹ He catalogues a variety of places where the Court had held an individual could enjoy Fourth Amendment protection: "a business office, . . . a friend's apartment, or . . . a taxicab."¹¹⁰ As he writes later in the opinion, "Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures."¹¹¹ He notes that the Court had already applied the Fourth Amendment to a case in which there was no "technical trespass" (*Silverman*), and concludes: "the reach of [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure."¹¹² Clearly Stewart, like Brandeis and Douglas before him, wants to disengage the notion of a Fourth Amendment "search" from any remnant of the trespass doctrine. He, too, wants to keep as many options open as possible, with respect to what does or does not constitute a search.¹¹³

Stewart also declines petitioner Katz's invitation to hold that a "general constitutional 'right to privacy'" was violated in this case.¹¹⁴ This could be attributed to Stewart's reticence to ground his holding on *any* abstract principle. But it could also indicate something we saw from Stewart in *Silverman*: a preference for reaching a

¹⁰⁸ *Id.* at 351.

¹⁰⁹ See *supra* text accompanying note 57.

¹¹⁰ *Katz*, 389 U.S. at 352.

¹¹¹ *Id.* at 359.

¹¹² *Id.* at 353.

¹¹³ See Smith, *supra* note 16, at 73-74.

¹¹⁴ *Katz*, 389 U.S. at 350.

narrow holding in this developing area of the law.¹¹⁵ A final bit of evidence of pragmatism in Stewart's majority opinion is his focus on the relevant facts and circumstances of the case, as well as the consequences of his holding. He writes that, to reach the opposite holding in this case, would be "to ignore the vital role that the public telephone has come to play in private communication."¹¹⁶

Stewart phrases his conclusion in concrete terms, as follows: "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."¹¹⁷ Again, he phrases the holding narrowly, focusing on the facts of the particular case before him and refraining from formulating a more abstract rule. It is not surprising, therefore, that the test which survives¹¹⁸ from *Katz* is taken from Justice Harlan's concurrence: "My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement [for finding that a Fourth Amendment 'search' has occurred], 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.'"¹¹⁹ This test, phrased as it is in abstract terms, is easier to apply in future cases.

Ironically, however, Harlan intends that his formulation of the test be used only to determine whether a place is, in effect, a "constitutionally protected area:" "As the Court's opinion states, 'the Fourth Amendment protects people, not places.' The question, however, is what protection it affords to those people. Generally, as

¹¹⁵ See *supra* text accompanying note 71.

¹¹⁶ *Katz*, 389 U.S. at 352. See *supra* text accompanying note 28.

¹¹⁷ *Katz*, 389 U.S. at 353.

¹¹⁸ See, e.g., *California v. Ciraolo*, 476 U.S. 207, 211 (1986) ("*Katz* posits a two-part inquiry: first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable?").

¹¹⁹ *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

here, the answer to that question requires reference to a 'place.'¹²⁰ Thus Harlan, who might be said to be retreating a bit from the majority's legal pragmatism—both by formulating a more abstract test than Stewart did, and by trying to tie that test to a traditional concept rejected by the majority—actually enables the more pragmatic approach to survive and flourish because he has made it easier to adopt by future judges.

So long as Harlan's test is separated from the concept of a "constitutionally protected area," which is what has occurred post-*Katz*, the pragmatist should prefer that test to Stewart's. True, Harlan's test sounds much more like a rule inviting formalistic application than does Stewart's holding. But the concepts in Harlan's test can be seen as the type of concepts of which pragmatists approve: "empirical guide[s]," directing future judges to examine relevant facts.¹²¹ Moreover, the concepts in Harlan's test direct judges to examine exactly those facts that the pragmatist would want them to examine: the demands of individuals for privacy protection, and the competing demands of people in society. The first part of the test asks whether the individual in question has made a demand for privacy; the second part of the test asks whether other members of society have made demands that contradict—i.e., cannot be satisfied at the same time as—that individual's demand. Recall that, according to pragmatism, a judge's goal should be "to satisfy at all times as many demands as [he] can."¹²² Thus, if a judge believes that the majority of those who make up "society" would see an individual's expectation of privacy as "unreasonable," and would therefore demand that the individual not be given legal protection, he should rule that, although an individual's expectations may not have been realized—i.e., his demand for privacy in the particular object of the search may not be satisfied—there nonetheless is no Fourth Amendment "search."

¹²⁰ *Id.*

¹²¹ See *supra* text accompanying note 32.

¹²² James, *supra* note 22, at 205.

There is another way in which Harlan's test is preferable to Stewart's, from a pragmatist standpoint. Recall that Stewart, in his majority opinion, concludes only that Katz "justifiably relied" upon the privacy he expected in the telephone booth.¹²³ He leaves open the grounds for that justification. A future court, applying Stewart's formulation, might hold that one's property rights, e.g., are the basis for a justifiable reliance on privacy, again tying Fourth Amendment jurisprudence to property and trespass law. Harlan, by contrast, offers a formulation which allows for the "justification" to be based on no more than an expectation's consistency with the demands of others in society, regardless of the applicability of specific property doctrine.¹²⁴

In addition, given Justice Brandeis's own conception of privacy, I think he would have been pleased to learn that a "justifiable intrusion," about which he spoke in his *Olmstead* dissent, finally, in *Katz*, came to depend on a weighing of competing demands: for privacy, on the one hand, and for knowledge of one's fellow man on the other. In the law review article where he first argues for recognition of a distinct right to privacy under tort law, Brandeis makes clear that the right he is proposing should be limited. "The right to privacy," he writes, "does not prohibit any publication of matter which is of public or general interest."¹²⁵ The difficulty in applying this

¹²³ *Katz*, 389 U.S. at 353.

¹²⁴ Viewing Harlan's test from the pragmatist's standpoint makes it easy to see how one's "reasonable expectation of privacy" could depend on how much government has regulated a particular activity, as it is held to do in the context of "warrantless administrative searches" (sometimes called "inspections"). Government regulation of an activity can be seen as representing the demands of a majority of individuals of society, insofar as regulations are passed by duly elected officials. The demands could be for a variety of things—clean and wholesome food, safe travel, truth in advertising, competent and safe provision of personal services. The pragmatist judge must take those demands into account when deciding what the proper holdings are in the cases that come before him. The "systemic consequences" of holding that one has no reasonable expectation of privacy might, in a particular case, outweigh the demands of the majority for, e.g., wholesome food. However, more often those demands of the majority (simply because they are more numerous) will be held to trump those of the individual.

¹²⁵ Warren & Brandeis, *supra* note 38, at 214.

limitation, of course, is in determining what is of “public interest.” Brandeis does provide some guidance in terms of things which are *not* matters of public interest: “those which concern the private life, habits, acts and relations of an individual, and have no legitimate connection with his fitness for a public office which he seeks or for which he is suggested, or for any public or quasi public position which he seeks or for which he is suggested, and have no legitimate relation to or bearing upon any act done by him in a public or quasi-public capacity.”¹²⁶ These can be seen as cases in which the demands of individuals for privacy would be greater than demands of other individuals to have knowledge about his fellow man. Even having provided this guidance, Brandeis acknowledges that this “public interest” determination is something “which must ultimately in a vast number of cases become a question of individual judgment and opinion,” something for which one cannot provide “a wholly accurate or exhaustive definition.”¹²⁷ As with the determination whether an individual’s subjective expectation of privacy is one that “society is prepared to recognize as reasonable,”¹²⁸ this is a determination that will be left for judges to decide in the individual cases that arise.

I have tried to show that a primary reason—if not *the* reason—we have the “reasonable expectation of privacy” test for determining when a Fourth Amendment “search” takes place, is the pragmatist method of adjudication. If I am right, this raises a couple of questions: Would a fundamentally different method of adjudication, if it had been applied at the times these pivotal cases were decided, prevent the formulation of this test in the *Katz* case? And, perhaps more importantly, could the adoption of such a method in the future lead to overruling *Katz* and to returning to something like the trespass doctrine, properly understood?

¹²⁶ *Id.* at 216.

¹²⁷ *Id.*

¹²⁸ *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

IV. KYLLO V. UNITED STATES

Some¹²⁹ have argued that *Kyllo v. United States*¹³⁰ represents a fundamental departure from precedent based in the *Katz* “reasonable expectation of privacy” test. In this section we will explore the methodology of *Kyllo* and ask whether it brings with it promise of a more stable foundation for privacy protection.

In *Kyllo*, the defendant was charged with violating a federal law prohibiting “manufacturing marijuana.”¹³¹ Federal agents seized evidence from his home, pursuant to a warrant issued on the basis of, among other evidence, data obtained when a thermal-imaging scan was performed on his home.¹³² *Kyllo* moved to suppress the evidence, on the grounds that the scan amounted to a warrantless search. The motion was denied, and so *Kyllo* entered a guilty plea, conditional upon the denial of the motion being upheld.¹³³ Justice Scalia, writing for the majority, phrases the issue presented as: “[W]hether the use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a ‘search’ within the meaning of the Fourth Amendment.”¹³⁴

Scalia adheres to a species of Originalism known as “Textualism.”¹³⁵ Scalia has said of Originalists, “[They] believe that the Constitution should be interpreted to mean exactly what it meant when it was adopted by the American people.”¹³⁶ Scalia has contrasted

¹²⁹ See, e.g., Carrie L. Groskopf, *If It Ain't Broke Don't Fix it: The Supreme Court's Unnecessary Departure from Precedent in Kylo v. United States*, 52 DEPAUL L. REV. 201 (2002-2003).

¹³⁰ 533 U.S. 27 (2001).

¹³¹ *Id.* at 30.

¹³² *Id.* at 29-30.

¹³³ *Id.* at 30.

¹³⁴ *Id.* at 29.

¹³⁵ See Antonin Scalia, *Common Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed., 1977).

¹³⁶ Tara Smith, *Why Originalism Won't Die – Common Mistakes in Competing Theories of Judicial Interpretation*, 2 DUKE J. CONST. L. & PUB. POL'Y 159, 162 (2007) (quoting Scalia in Steven Kreytak, *At A&M, Scalia Rails Against Judicial Reinterpretation*, AUSTIN AM.-STATESMAN, May 6, 2005, at B1).

his Textualist species of Originalism with the “Original Intent” species of Originalism. Both advise the judge to start with the language of the Constitutional provision or other law at issue. According to the Original Intent view, the judge should interpret and apply the provision “according to the principles intended by those who ratified the document.”¹³⁷ Textualism, by contrast, sees a dichotomy between a lawmaker’s intent, and the words the lawmakers actually wrote and ratified, and directs judges to heed only the latter, because only the latter was enacted.¹³⁸

It is not surprising that Scalia begins his analysis in *Kyllo* by quoting the Fourth Amendment, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”¹³⁹ He then focuses on the word, “houses,” quoting from *Silverman* to the effect that “the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion” is “[a]t the very core” of the Amendment.¹⁴⁰ Noting that warrantless searches of a home are usually held to be unconstitutional,¹⁴¹ Scalia turns to the issue of determining whether a Fourth Amendment “search” of a home has occurred in the case before him.

He notes that, while “[t]he permissibility of ordinary visual surveillance of a home” was originally due to Fourth Amendment jurisprudence being based on common-law trespass, this has survived the “decoupling” of the Amendment from the trespass doctrine.¹⁴² He emphasizes that this permissibility was based, not on such visual surveillance being a “search” that was “reasonable,” but rather on it not being a “search” at all.¹⁴³ He then quotes the “reasonable expectation of privacy” test of *Katz* (Harlan’s concurrence)

¹³⁷ *Id.* at 162 (quoting ROBERT H. BORK, *THE TEMPTING OF AMERICA* 143 (1990)).

¹³⁸ *Id.* at 163.

¹³⁹ *Kyllo*, 533 U.S. at 31 (quoting U.S. CONST. amend. IV).

¹⁴⁰ *Id.* (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

¹⁴¹ *Id.*

¹⁴² *Id.* at 31–32 (citations omitted).

and *Ciraolo*, and cites three cases in which the Court, applying this test, held the conduct at issue did not constitute a search, even when the object of observation was either a private home, the area surrounding it, or the phone numbers dialed while in a private home.¹⁴⁴

The Court, Scalia notes, had previously upheld naked eye aerial surveillance of a home as not constituting a search; similarly for enhanced aerial photography of an industrial complex. But, writes Scalia, the Court had not yet decided, “how much technological enhancement of ordinary perception,” from a vantage point across the street from a private home, is permissible without such surveillance amounting to a search.¹⁴⁵ And, while the *Katz* test “has often been criticized as circular, and hence subjective and unpredictable,” there is nonetheless “a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*.”¹⁴⁶ That minimum is an expectation of privacy in anything that could be observed only via “physical ‘intrusion into a constitutionally protected area.’”¹⁴⁷ In order to answer the perception enhancement question in a way that is consistent with this “minimal expectation of privacy,” Scalia reasons, the Court must designate as a “search” any surveillance using sense-enhancing technology (at least where such technology “is not in general public use”) that obtains “information regarding the interior of the home,” where that information could not have been obtained, absent the technology, except via “physical ‘intrusion into a constitutionally protected area.’”¹⁴⁸ Not surprisingly, given his Textualism, Scalia points out that this criterion will “assure[] preservation of that degree of privacy against government that existed when

¹⁴³ *Id.* at 32. Scalia speculates that the Court’s holding ordinary visual surveillance not to be a “search” could be “to preserve somewhat more intact our doctrine that warrantless searches are presumptively unconstitutional.” *Id.*

¹⁴⁴ *Id.* at 33.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 34 (emphasis in original).

¹⁴⁷ *Id.* (quoting *Silverman v. United States*, 365 U.S. 505, 512 (1961)).

¹⁴⁸ *Id.*

the Fourth Amendment was adopted.”¹⁴⁹ It was this degree of privacy, after all, that was meant by the inclusion of the word “houses” in the Fourth Amendment.

In *Kyllo*, then, federal agents conducted a search when they obtained data about the heat emanating from Kyllo’s home, by training a thermal-imaging device on his triplex from a public street. Scalia rejects any distinction between “off-the-wall” and “through-the-wall” observations;¹⁵⁰ he also rejects an argument that surveillance cannot constitute a “search” if the information obtained is unhelpful without a further process of inference.¹⁵¹ Finally, he rejects two different attempts to draw a distinction between types (or even quantities) of information obtained: one between “intimate” and “non-intimate” details;¹⁵² another that purports to base the distinction on whether the surveillance technology at issue provides the “functional equivalent of actual presence in the area being searched.”¹⁵³ These distinctions, Scalia argues, are incorrect in principle¹⁵⁴ and unworkable in practice.¹⁵⁵ “The people in their houses, as well as the police, deserve more precision.”¹⁵⁶ They deserve a line that is “not only firm but also bright—which requires clear specification of those methods of surveillance that require a warrant.”¹⁵⁷

In a footnote, Scalia acknowledges that the part of the Fourth Amendment search criterion based on “whether or not the technology is in general public use” might create some uncertainty. He blames that potential uncertainty, however, on the Court’s holding in *Ciraolo*, which depends, in part, on “private and commercial

¹⁴⁹ *Id.* at 34–35.

¹⁵⁰ *Id.* at 35–36.

¹⁵¹ *Id.* at 36–37.

¹⁵² *Id.* at 37–39.

¹⁵³ *Id.* at 39.

¹⁵⁴ *Id.* at 37 (“The Fourth Amendment’s protection of the home has never been tied to measurement of the quality or quantity of information obtained.”).

¹⁵⁵ *Id.* at 38–39.

¹⁵⁶ *Id.* at 39.

¹⁵⁷ *Id.* at 40.

flight in the public airways [being] *routine*.”¹⁵⁸ He declines in *Kyllo* to “reexamine that factor” because “we can quite confidently say that thermal imaging is not ‘routine.’”¹⁵⁹

Recall the justification Scalia offers for the majority’s “search” criterion: it will “assure[] preservation of that degree of privacy against the government that existed when the Fourth Amendment was adopted.” If this is what Scalia thinks, because of his Textualism, should be the basis of any Fourth Amendment “search” criterion, it follows that, in a proper case, he would hold that protection should not turn on whether a particular technology is “in general use.” After all, when the Fourth Amendment was adopted, few perception-enhancing technologies existed.

Scalia concludes, “Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a ‘search’ and is presumptively unreasonable without a warrant.”¹⁶⁰

Does Scalia’s approach in *Kyllo* represent a fundamental departure from the pragmatism of *Katz* and its “reasonable expectation of privacy” test? Yes and no. Yes, in the sense that Scalia can be seen as proposing an overhaul of Fourth Amendment jurisprudence, one that would define “search” generally in accordance with the goal of “preservation of that degree of privacy against the government that existed when the Fourth Amendment was adopted.” No, in the sense that, in *Kyllo*, Scalia has carved out only a small part of Fourth Amendment jurisprudence—a part in which the results of cases decided by his criterion, and decided according to the *Katz* test, would most likely be the same.¹⁶¹ This basically leaves the Court free to retain the *Katz* test, so long as it uses the criterion of *Kyllo* to determine whether there is a “reasonable expectation of privacy” in

¹⁵⁸ *Id.* at 39 n.6 (quoting *California v. Ciraolo*, 476 U.S. 207, 215 (1986) (emphasis added)).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 40.

¹⁶¹ See *supra* note 147 and accompanying text.

cases that are on point. What *would* be a fundamental revolution is if Scalia used his Textualism to extend the criterion of *Kyllo* to cases involving, “persons, . . . papers, and effects.”

If Scalia, or another like-minded Justice, were to apply the reasoning of *Kyllo* more generally, we could expect rulings based on the “degree of privacy against the government” that our founders enjoyed with respect to “persons, . . . papers, and effects.” Part of the difficulty in predicting what that would entail has to do with the fact that, while our ownership of “houses” remains pretty much the same, we own a lot more stuff than the founding generation did, and we use our “persons” in ways, and communicate in ways, that they might not even have imagined.

How someone like Scalia would tackle this challenge can be better understood if we delve a little further into what Scalia’s Textualism entails. Scalia adheres to what has been called the “authors’ criteria view” of the meaning of concepts contained in the Constitution and laws.¹⁶² According to this view, “the concepts employed in our laws refer to what the law’s authors meant by the concepts in question . . . — *rightly or wrongly*.”¹⁶³ So, for example, Scalia has said that, in interpreting the Eighth Amendment’s prohibition of “cruel” punishments, we should prohibit whatever punishments the Amendment’s authors regarded as cruel. In addition, we may also prohibit punishments that the Amendment’s authors had not had the opportunity to consider, but that would be considered cruel according to criteria that the Amendment’s authors “accepted as determinative of membership” in the class of “cruel” punishments.¹⁶⁴

Take a different example: the First Amendment, says Scalia, has properly been held to protect handwritten letters, which did exist in 1791, as well as many things that were not protected then, such as blogs, podcasts, radio and television.¹⁶⁵ In the Fourth Amendment context, then, we can imagine that, included among a

¹⁶² See Smith, *supra* note 136, at 190.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 188.

person's "effects," could be his cell phone or his iPod, perhaps even his laptop or his eBook reader (although these might be encompassed by "papers" instead). For a Textualist like Scalia, protection of these modern devices would depend on their satisfying the criteria the authors of the Fourth Amendment had in mind when they wrote the words, "papers, and effects."

I think there exist some challenges for the Textualist trying to expand these Fourth Amendment categories properly, in a way that does not collapse into the functional equivalent of the "reasonable expectation of privacy" test. What the Textualist must do, in effect, is ask whether it is "reasonable" to include a particular object of an investigation into one of the Amendment's categories, given the authors' criteria. However, I think a much bigger potential problem exists for this approach. Scalia holds that a Textualist may not "declare something unconstitutional that was considered constitutional" at the time of the writing and ratification of the Amendment.¹⁶⁶

In his dissent in *Katz*, Justice Black argues, based on the meaning of the words in the Fourth Amendment, that the Amendment's authors meant to include in its scope only "tangible things with size, form, and weight, things capable of being searched, seized, or both."¹⁶⁷ This, he is saying, is the "author's criterion." A conversation like the one overheard in *Katz*, he notes, at least "under the normally accepted meanings of the words,"¹⁶⁸ does not meet this criterion. Black reviews legal history and Supreme Court precedent showing that, while wiretapping did not exist in 1791, the Amendment's authors must have been aware of the practice of eavesdropping (then considered a nuisance under common law), and so, if they meant to include it as an activity barred by the Fourth

¹⁶⁶ *Id.* at 189 n.108 (citing Antonin Scalia, *Common Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *MATTER OF INTERPRETATION* 38 (Amy Guttman ed., 1997)).

¹⁶⁷ *Katz v. United States*, 389 U.S. 347, 365 (1965) (Black, J., dissenting).

¹⁶⁸ *Id.*

Amendment, they would have used different language.¹⁶⁹ If Black is right, that eavesdropping would have been held to be Constitutional in 1791, a Textualist interpretation of the Fourth Amendment would be constrained accordingly. Therefore, while Scalia's approach in *Kyllo* seems to offer, for those desiring certainty and objectivity, a refreshing departure from the subjectivity of the *Katz* "reasonable expectation of privacy test," it has problems of its own. It entrenches errors made by the Amendment's authors regarding what qualifies as the object of a "search."

CONCLUSION

Legal pragmatism has played a pivotal role in the development of Fourth Amendment privacy jurisprudence. An examination of the case law, starting with the first appearance of the "right to be let alone" in Justice Brandeis's *Olmstead* dissent, and ending with the majority and concurring opinions in *Katz*, has demonstrated the pervasiveness of the pragmatism in both the reasoning used and the holdings reached. This is particularly true of the *Katz* "reasonable expectation of privacy" test itself, which is flexible enough to accommodate changes in technology, and sensitive to the competing demands of individuals and society. Both of these features of the test bring it in line with what pragmatists would want.

For those who are not comfortable with more subjective standards like the *Katz* test, Justice Scalia's approach in *Kyllo* may, on first glance, seem preferable. However, we saw that the test could be construed as applicable only to cases in which the object of the investigation is the home, or something within it. And, moreover, even if the *Kyllo* approach were extended to Fourth Amendment cases concerning "persons, . . . papers, and effects," Scalia's Textualist approach might preclude protection in an entire category of cases—those concerning wiretapping or other forms of eavesdropping—simply because the Fourth Amendment's Framers did not

¹⁶⁹ *Id.* at 366 ("[I]t strikes me as a charge against [the Framers'] scholarship, their common sense and their candor to give to the Fourth Amendment's language the eavesdropping meaning the Court imputes to it today.").

foresee that one's conversations should also be protected. In fact, a Textualist approach would limit the protection the Fourth Amendment offered, whenever its Framers had erroneously classified some form of conduct as Constitutional.

While a presentation of a proper theory of interpretation is beyond the scope of this paper, I refer the reader to Tara Smith's discussion of what she calls "the objective criteria view," which is based on Ayn Rand's philosophy, Objectivism. On this view, Smith writes, "the concepts employed in our laws refer to anything that meets the actual, objective criteria of what it is to be a thing of the relevant type (to be 'cruel,' 'speech,' 'equal protection,' etc.)."¹⁷⁰ If this view of interpretation were applied in Fourth Amendment cases, the judge's job would be to determine whether the particular invasion at issue in the case before him, was a breach of the security of an individual's "person, house[], papers, or effects." If a judge did this in an eavesdropping or wiretapping case, I think he would employ reasoning similar to that used by Justice Butler, who dissented in *Olmstead*. Recall that, in *Olmstead*, the Court held that no Fourth Amendment "search" occurred, because the telephone lines were tapped outside of defendants' homes, and thus the wiretapping did not violate the security of defendant's "persons, houses, papers, and effects." The concept "effects" is quite abstract; one of its proper referents could indeed be "conversations," regardless of what the Fourth Amendment's Framers might have thought about that. And the security of one's conversations can be protected, as is the security of other "effects," via principles of trespass to property, and freedom of contract. Writes Butler,

The contracts between telephone companies and users contemplate the private use of facilities employed in the service. The communications belong to the parties between whom they pass. During their transmission the exclusive use of the wire belongs to the persons served by it. Wire

¹⁷⁰ Smith, *supra* note 136, at 192. Smith's paper also contains a discussion of Rand's view of concepts as "open-ended," which forms the foundation of this approach. See *id.* pp. 185-86. See also Tara Smith, *Objective Law*, in AYN RAND: A COMPANION TO HER WORKS AND THOUGHT (Allan Gotthelf & Gregory Salmieri eds., forthcoming 2011).

tapping involved interference with the wire while being used. Tapping the wires and listening in by the officers literally constituted a search for evidence.¹⁷¹

If one has contracted with another to securely transmit his effects, he still retains his rights to them, and police must obtain a warrant before searching or seizing them.¹⁷² This approach could also be used in analyzing cases like *Katz*, in which the physical trespass that occurred was minimal. If one's conversations are included in one's "effects," then one retains the right to them and their contents unless he has abandoned them, e.g., by talking so loudly that he can be heard outside the booth by the unaided ear.

It seems, then, that a judge who follows the objective criteria view, and who is able properly to identify those things which are subsumed by the concepts of private property, contract, and trespass, could arrive at the proper holdings in cases like *Olmstead* and *Katz*.¹⁷³ A judge who did this might remove any incentive to abandon the trespass doctrine in favor of the pragmatic "reasonable expectation of privacy" approach. Today, however, the *Katz* approach is alive and well, perhaps with some exceptions existing due to *Kyllo*. So one question that must be answered is to what extent a judge, applying the objective criteria view posited by Smith, must adhere to precedent, even when that precedent is incorrect. A further issue is whether property and contract rights, as they are construed and applied today, are robust enough properly to protect individual privacy. I believe that part of the appeal of "the right to privacy" and its various applications in tort and Constitutional law, is the fact that legal protection for property and contract rights has been steadily declining, starting at around the same time that Brandeis first wrote his seminal article on privacy. Unless and until such protection is restored, we may be left with "demanding" our privacy, and hoping that our demands outweigh those of others in society.

¹⁷¹ *Olmstead v. United States*, 277 U.S. 438, 487 (1928) (Butler, J., dissenting).

¹⁷² I have made similar "reductionist" arguments in the articles cited *supra* note 9.

¹⁷³ This will not always be easy to do and is another reason for the appeal of the *Katz* test.