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ARTICLE

THE POSITIVE LAW MODEL  
OF THE FOURTH AMENDMENT

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ARTICLE

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*William Baude & James Y. Stern\**

*For fifty years, courts have used a “reasonable expectation of privacy” standard to define “searches” under the Fourth Amendment. As others have recognized, that doctrine is subjective, unpredictable, and conceptually confused, but viable alternatives have been slow to emerge. This Article supplies one.*

*We argue that Fourth Amendment protection should be anchored in background positive law. The touchstone of the search-and-seizure analysis should be whether government officials have done something forbidden to private parties. It is those actions that should be subjected to Fourth Amendment reasonableness review and the presumptive requirement to obtain a warrant. In short, Fourth Amendment protection should depend on property law, privacy torts, consumer laws, eavesdropping and wiretapping legislation, anti-stalking statutes, and other provisions of law generally applicable to private actors, rather than a freestanding doctrine of privacy fashioned by courts on the fly.*

*This approach rests on multiple grounds. It is consistent with the history of the Fourth Amendment and with the structure of protection in the closely related area of constitutional property. It draws upon fundamental principles of liberal constitutionalism, namely a concern about abuse of official power. And it is superior to current privacy-based doctrine in many practical ways: it is clearer, more predictable, more accommodating of variation in different times and places, and more sensitive to the institutional strengths of legislative bodies, particularly when it comes to issues presented by new technologies.*

*It also has significant doctrinal implications. Of most immediate importance, it provides a framework to analyze third-party problems — situations in which information about one person is obtained from another — that is more coherent and more attractive than the modern third-party doctrine. It also provides a new framework for many other contested Fourth Amendment questions, from abandoned property and DNA to the use of drones.*

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## INTRODUCTION

“The touchstone of Fourth Amendment analysis,” the Supreme Court has told us, “is whether a person has a ‘constitutionally protected reasonable expectation of privacy.’”<sup>1</sup> Such statements must be taken with a few grains of salt. The Fourth Amendment protects against searches *and seizures*, but reasonable expectations of privacy have almost nothing to do with what qualifies as a seizure.<sup>2</sup> Even for searches, the Court’s declaration is more than a little misleading. It is, frankly, a truism that privacy is at stake when it comes to deciding what actions count as Fourth Amendment “searches”: to restrict the ability of government agents to act in ways likely to reveal information is necessarily to increase privacy. The real issue isn’t whether some piece of information or place is in fact private but whether it *should be*. Privacy is the answer to be given, not the question to be asked; the effect, not the cause.

In practice, therefore, the fulcrum of the “reasonable expectation of privacy” doctrine ends up being “reasonable,” not “privacy.” And reasonableness reduces either to a difficult empirical question about intuitions and social norms (those expectations “society is prepared to recognize as ‘reasonable’”<sup>3</sup>) or to a largely open-ended policy judgment (those expectations a court deems “legitimate”<sup>4</sup>). In determining whether an expectation of privacy is reasonable, courts appear to ask themselves if the act at issue is the sort that government officials should be prohibited from taking without offering additional justification or obtaining a warrant.<sup>5</sup> At its core, in other words, the inquiry is little more than a restatement of the Fourth Amendment itself. The reasonable expectation of privacy doctrine could more accurately be described as the reasonable expectation of Fourth Amendment protection doctrine. Privacy is the MacGuffin of Fourth Amendment law. It is the knob we twist because it looks “as if it could be used to turn on

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<sup>1</sup> *California v. Ciraolo*, 476 U.S. 207, 211 (1986) (quoting *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)); *accord* *Oliver v. United States*, 466 U.S. 170, 177 (1984); *see also* *Davis v. United States*, 328 U.S. 582, 587 (1946) (describing the Fourth Amendment’s purpose as “protection of the privacy of the individual, his right to be let alone”). *But see* *United States v. Jones*, 132 S. Ct. 945 (2012) (discussed imminently and again in section I.B, *infra* pp. 1834–36).

<sup>2</sup> *See* *Soldal v. Cook County*, 506 U.S. 56, 61–64 (1992); *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

<sup>3</sup> *E.g.*, *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (quoting *Katz*, 389 U.S. at 361 (Harlan, J., concurring)); *Rakas v. Illinois*, 439 U.S. 128, 151 (1978) (Powell, J., concurring) (same); *see also* *Bond v. United States*, 529 U.S. 334, 338 (2000) (quoting *Smith*, 442 U.S. at 740).

<sup>4</sup> *E.g.*, *United States v. Knotts*, 460 U.S. 276, 280 (1983); *Rakas*, 439 U.S. at 143–44.

<sup>5</sup> *See* ROBERT M. BLOOM, SEARCHES, SEIZURES, AND WARRANTS 46 (2003).

some part of the machine,” but it is in reality “a mere ornament, not connected with the mechanism at all.”<sup>6</sup>

The reasonable expectation of privacy concept has other serious defects, including its ambiguous meaning, its subjective analysis, its unpredictable application, its unsuitability for judicial administration, and its potential circularity. We are happy to repeat these criticisms but we are hardly the first to raise them. They have been exhaustively developed in Fourth Amendment scholarship over the last half-century.<sup>7</sup> Despite these notorious defects, however, the doctrine hangs on, seemingly impervious to outside criticism. We suspect the reason largely arises from a sense that the connection between privacy and the Fourth Amendment is simply self-evident. The test has its difficulties, the thinking seems to be, but the inescapable truth is that privacy is the Fourth Amendment’s polestar. How could things be otherwise?

But they could be. This Article challenges the foundations of the privacy-centered understanding, offering an alternative vision of the Fourth Amendment and a replacement for the reasonable expectation of privacy doctrine. In bits and pieces, the approach we advocate has been kicking around in Fourth Amendment case law for some time, though it is also the subject of periodic judicial denunciations, emphatic in tone if eventually disregarded. It is a “positive law” model of the Fourth Amendment.<sup>8</sup>

The mechanics of our proposal are easy to state. Instead of making Fourth Amendment protection hinge on whether it is “reasonable” to expect privacy in a given situation, a court should ask whether government officials have engaged in an investigative act that would be unlawful for a similarly situated private actor to perform. That is, stripped of official authority, has the government actor done something that would be tortious, criminal, or otherwise a violation of some legal duty? Fourth Amendment protection, in other words, is warranted

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<sup>6</sup> LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 270, at 94–95 (G.E.M. Anscombe trans., 3d ed. 1958) (1953).

<sup>7</sup> See, e.g., Ronald J. Allen & Ross M. Rosenberg, *The Fourth Amendment and the Limits of Theory: Local Versus General Theoretical Knowledge*, 72 ST. JOHN’S L. REV. 1149, 1149 (1998); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 384 (1974); Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1468 (1985); Sherry F. Colb, *What Is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 STAN. L. REV. 119, 121 (2002); Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 479 (2011); Donald R.C. Pongrace, *Stereotypification of the Fourth Amendment’s Public/Private Distinction: An Opportunity for Clarity*, 34 AM. U. L. REV. 1191, 1208 (1985); Richard A. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 188–89; Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 103 (2008); Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 28–29 (1988).

<sup>8</sup> Our term is taken from Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 516–19 (2007).

when government officials either violate generally applicable law or avail themselves of a governmental exemption from it.

To see what this would mean, consider *Katz v. United States*,<sup>9</sup> the landmark decision in which the reasonable expectation of privacy test was born. The case concerned the bugging of a telephone booth<sup>10</sup> used by a gambler named Charles Katz, accomplished by placing a microphone atop the roof of the booth. The government argued, among other things, that no search occurred because the microphones did not penetrate the inside of the phone booth.<sup>11</sup> But the Supreme Court considered this irrelevant; the physical penetration argument assumed that the Fourth Amendment was tied to rules of property law, the Court reasoned, and such a property-based view should be rejected.<sup>12</sup> Instead, what mattered to the Court was whether the government had “violated the privacy upon which [Katz] justifiably relied.”<sup>13</sup> Or as Justice Harlan put it in a concurrence that has come to control, the question was whether someone in Katz’s position had an expectation not to be overheard that “society is prepared to recognize as ‘reasonable.’”<sup>14</sup> As we have suggested, the question is deeply fraught.

On our approach, the Court should instead have asked whether it was unlawful for an ordinary private actor to do what the government’s agents did: install a listening device on the exterior of a privately owned telephone booth and monitor conversations within. The answer to that question would have been: *yes*. California law made it a criminal offense to “eavesdrop[] upon or record[] a confidential communication” “by means of any electronic amplifying or recording device.”<sup>15</sup> That alone should have made the bugging a search. And this was only the most obvious prohibition that the agents’ conduct violated. Notwithstanding the Court’s apparent sense that property law wasn’t up to the task, bugging the telephone booth — even from the outside — also very likely constituted a trespass under California law.<sup>16</sup> Those legal prohibitions, rather than the reasonableness of any

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<sup>9</sup> 389 U.S. 347 (1967).

<sup>10</sup> Actually, two booths. See *Katz v. United States*, 369 F.2d 130, 131 (9th Cir. 1966).

<sup>11</sup> *Katz*, 389 U.S. at 352.

<sup>12</sup> *Id.* at 353.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 361 (Harlan, J., concurring).

<sup>15</sup> An Act to Add 653j to the Penal Code, Relating to the Overhearing and Recording of Communications, 1963 Cal. Stat. 3871. Section 653j, the provision applicable at the time of *Katz*, was augmented in 1967, shortly before the decision in the case was announced. Incidentally, we note that while the 1963 statute exempted “law enforcement officers . . . doing that which they are otherwise authorized by law to do,” *id.* at 3872, under our approach such government-specific exemptions trigger the government-specific machinery of the Fourth Amendment.

<sup>16</sup> See RESTATEMENT OF TORTS § 159 cmt. c (AM. LAW INST. 1934) (stating that it is a trespass to attach an electric wire to another’s house); *La Com v. Pac. Gas & Elec. Co.*, 281 P.2d

claim to privacy, should have been the decisive considerations in determining whether the government agents' actions were regulated by the Fourth Amendment.

In some scattered cases before and after *Katz*, the Court has recoiled from reliance on positive law. It has, for example, insisted that the scope of Fourth Amendment protection is independent from “fine-spun doctrines” of property and “the niceties of tort law.”<sup>17</sup> It has likewise declared that “concepts of privacy under the laws of each State” do not “determine the reach of the Fourth Amendment.”<sup>18</sup> It has said that trespass law cannot be the lodestar of Fourth Amendment protection because it “furthers a range of interests that have nothing to do with privacy.”<sup>19</sup> The Court has never really confronted the possibilities of positive law, however, because a comprehensive model of the Fourth Amendment grounded in positive law has never been set forth, much less defended.

And despite its protestations, the Court cannot fully resist positive law's allure. In many cases it ends up looking to positive law considerations after all, when ruling that the police can fly over one's home, for instance, or when defining a “seizure” instead of a “search.”<sup>20</sup> And in several recent opinions, Justice Scalia — twice speaking for the Court — tried to supplement the “reasonable expectation of privacy” doctrine with a test based on property rights.<sup>21</sup> These opinions contain fragments of the positive law model, but they are undertheorized and incomplete.<sup>22</sup> This Article provides a coherent framework to under-

894, 895 (Cal. Dist. Ct. App. 1955) (applying § 159); see also *People v. Miller*, 213 P.2d 534, 536 (Cal. Dist. Ct. App. 1950) (defining phone booth as a building for purposes of burglary).

<sup>17</sup> On *Lee v. United States*, 343 U.S. 747, 752 (1952); see also *Silverman v. United States*, 365 U.S. 505, 511 (1961) (“Inherent Fourth Amendment rights are not inevitably measurable in terms of ancient niceties of tort or real property law.”); *Jones v. United States*, 362 U.S. 257, 266 (1960) (“[I]t is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical.”).

<sup>18</sup> *California v. Greenwood*, 486 U.S. 35, 44 (1988); see also *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 392 (1971).

<sup>19</sup> *Oliver v. United States*, 466 U.S. 170, 183 n.15 (1984). The Court has occasionally made similar comments in cases dealing with the reasonableness requirement, see, e.g., *Virginia v. Moore*, 553 U.S. 164, 168–70 (2008), which is largely beyond our venture. But see *infra* notes 189, 194, 196, and accompanying text (discussing *Moore*).

<sup>20</sup> See *infra* sections III.A, pp. 1867–69, III.C.3, pp. 1884–86.

<sup>21</sup> See *Fernandez v. California*, 134 S. Ct. 1126, 1137–38 (2014) (Scalia, J., concurring); *Florida v. Jardines*, 133 S. Ct. 1409, 1417 (2013); *United States v. Jones*, 132 S. Ct. 945, 951 (2012); *Georgia v. Randolph*, 547 U.S. 103, 143 (2006) (Scalia, J., dissenting). For the difference between his theory and ours, see *infra* section I.B, pp. 1834–36.

<sup>22</sup> For criticism of the Court's use of the trespass test, see Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2013 SUP. CT. REV. 67, 90–93 (2012); see also Laurent Sacharoff, *Constitutional Trespass*, 81 TENN. L. REV. 877, 890–92 (2014) (noting uncertainty and inconsistencies in the Court's formulation); Brian Sawers, *Original Misunderstandings: The Implications*

stand these positive law instincts, one that is consistent with the history and structure of the Constitution and that makes a great deal of sense as a matter of both first principles and practical realities.

But what about privacy?<sup>23</sup> Surely search-and-seizure law cannot really proceed without the concept of privacy to guide it? We have two basic responses. The first is that the Fourth Amendment is not primarily about privacy in the typical sense. The great evil toward which it is directed is abuse of government power, not primarily the disclosure of personal secrets. And the ideals that guide it are legality, the rule of law, and the public trust, not the notion of an irreducible sphere of confidential dealings.<sup>24</sup> Second, however, while privacy is not the Fourth Amendment's guiding light, the approach we outline nevertheless gives substantial protection to privacy interests because positive law itself does so. Indeed, we believe the positive law model would prove a truer guardian of privacy than the Justices' own opinions about which expectations "society is prepared to recognize as reasonable."

This is the heart of our position, but the positive law approach is supported from many directions. It is consistent with the treatment of similar issues of constitutional property under the Fifth Amendment and with historical practices regarding searches and seizures. It reunites the law of searches with the law of seizures. It protects the full range of interests and aims that positive law itself seeks to promote and shield, rather than privacy alone. It is easier to administer, clearer, and more predictable. It entails a form of analysis more appropriate to the institutional capabilities of courts. It harnesses the various strengths of legislatures and the benefits of federalism. It provides for flexibility, adaptation, and experimentation, and establishes a better

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of *Misreading History in Jones*, 31 GA. ST. U. L. REV. 471, 474–82 (2015); David Steinberg, *Florida v. Jardines: Privacy, Trespass, and the Fourth Amendment*, 23 TEMP. POL. & C.R. L. REV. 91, 109–10 (2013).

<sup>23</sup> See, e.g., *Oliver*, 466 U.S. at 183; CHRISTOPHER SLOBOGIN, *PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT* 23–26 (2007); Sherry F. Colb, Correspondence, *A World Without Privacy: Why Property Does Not Define the Limits of the Right Against Unreasonable Searches and Seizures*, 102 MICH. L. REV. 889, 903 (2004); David Alan Sklansky, *Too Much Information: How Not to Think About Privacy and the Fourth Amendment*, 102 CALIF. L. REV. 1069, 1074 (2014).

<sup>24</sup> We are not alone in questioning the centrality of privacy to Fourth Amendment analysis. See, e.g., Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307, 309 (1998); Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 295 (1993); Paul Ohm, *The Fourth Amendment in a World Without Privacy*, 81 MISS. L.J. 1309, 1312 (2012); Rubinfeld, *supra* note 7, at 117–18; William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 446 (1995). But our solution is distinct. See *infra* section II.E, pp. 1855–58 (discussing Ohm and Rubinfeld).

framework to analyze Fourth Amendment problems involving novel technologies.

The time to consider the positive law model is now. Dissatisfaction with the reasonable expectation of privacy formulation and the Court's exposition of it has been particularly acute in recent cases involving the third-party doctrine. Can it really be that the government can search any data that has hit a server or a cell tower, without ever triggering Fourth Amendment scrutiny, as current third-party doctrine seems to suggest? If not, how can judges tell which of the many different permutations of electronic transactions are covered by a "reasonable expectation of privacy"? Something must replace the third-party doctrine. This is it.

Our discussion proceeds as follows. In Part I, we give a more complete picture of the positive law model and of the ways it differs from what many, including the Supreme Court, associate with a property-based view of the Fourth Amendment. In Part II, we lay out what we consider the overlapping justifications for the positive law model and attempt to anticipate some objections. In Part III, we explore the implications for current law, with a particular focus on the third-party doctrine.

## I. THE POSITIVE LAW MODEL

### A. *Mechanics*

The first clause of the Fourth Amendment declares inviolable "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."<sup>25</sup> A two-step legal doctrine has grown from this guarantee. A government agent must commit an act that can be characterized as either a search or a seizure.<sup>26</sup> If, but only if, this threshold requirement is met, the act is evaluated for its reasonableness — which in a wide set of cases requires that a warrant satisfying various constitutional criteria be obtained beforehand. The search/seizure question therefore operates as the gateway to scrutiny of the government's behavior, "defin[ing] the line between unregulated investigative steps that can be used at any time from special investigative steps that must be used only sparingly and in specific circumstances."<sup>27</sup>

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<sup>25</sup> U.S. CONST. amend. IV.

<sup>26</sup> Kerr, *supra* note 8, at 528.

<sup>27</sup> *Id.* at 508. The amendment's ambit is not limited to investigative steps, however, as is particularly obvious when it comes to protection against unreasonable seizures. *Cf. id.* at 528 n.123.

Both the *Katz* test and our positive law test are concerned with this first stage of the Fourth Amendment analysis,<sup>28</sup> the definition of “search” and “seizure.” Like *Katz*, our primary focus is on the meaning of searches, because that is the focus of current controversy and confusion.<sup>29</sup> But unlike *Katz*, our model is equally applicable to both searches and seizures — a feature we consider an important strength — and we note that the law of seizures already resembles the positive law model, albeit imperfectly.<sup>30</sup> Our approach can almost be seen as extending the analytical technique that governs seizures to searches.

Textually, a search suggests an effort to glean information, though it isn’t hard to imagine a search whose purpose and effect is to harass or intimidate rather than to discover some unknown fact. In any event, the range of investigatory acts that could conceivably fall within this concept is wide and the actual limits on the scope of the Fourth Amendment are uncertain. Is it a search to eavesdrop on a conversation with a long-range microphone?<sup>31</sup> Tap a phone line?<sup>32</sup> Trick someone into revealing information?<sup>33</sup> Examine the contents of a garbage bag left on the street for pickup?<sup>34</sup> Monitor the heat emitted from a person’s house from the street with a thermal-imaging device?<sup>35</sup> Observe the activities in a person’s backyard from a helicopter<sup>36</sup> or airplane?<sup>37</sup> Surreptitiously follow a car around in public?<sup>38</sup> Install a GPS tracking device on a car to monitor its movements?<sup>39</sup> Test the chemical composition of a substance?<sup>40</sup> Use a trained dog to sniff out whether there are illegal drugs inside a suitcase,<sup>41</sup> a car,<sup>42</sup> or a house?<sup>43</sup>

<sup>28</sup> We thus disagree with the proposal to use “state standards of private law” as a test for warrantless searches at the second stage, articulated in Note, *The Fourth Amendment’s Third Way*, 120 HARV. L. REV. 1627, 1633 (2007).

<sup>29</sup> See 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.1(a), at 563 (5th ed. 2012) (“The word ‘seizures’ in the Fourth Amendment has, in the main, not been a source of difficulty.”).

<sup>30</sup> See *infra* section III.C.3, pp. 1884–86.

<sup>31</sup> See, e.g., *Berger v. New York*, 388 U.S. 41, 47 (1967).

<sup>32</sup> See, e.g., *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297 (1972).

<sup>33</sup> See, e.g., *Lopez v. United States*, 373 U.S. 427, 429–30, 437 (1963).

<sup>34</sup> See, e.g., *California v. Greenwood*, 486 U.S. 35 (1988).

<sup>35</sup> See, e.g., *Kyllo v. United States*, 533 U.S. 27 (2001).

<sup>36</sup> See, e.g., *Florida v. Riley*, 488 U.S. 445 (1989).

<sup>37</sup> See, e.g., *California v. Ciraolo*, 476 U.S. 207 (1986).

<sup>38</sup> See, e.g., *United States v. Knotts*, 460 U.S. 276, 281 (1983).

<sup>39</sup> See, e.g., *United States v. Jones*, 132 S. Ct. 945 (2012).

<sup>40</sup> See, e.g., *United States v. Jacobsen*, 466 U.S. 109 (1984).

<sup>41</sup> See, e.g., *United States v. Place*, 462 U.S. 696, 706–07 (1983).

<sup>42</sup> See, e.g., *Illinois v. Caballes*, 543 U.S. 405 (2005).

<sup>43</sup> See, e.g., *Florida v. Jardines*, 133 S. Ct. 1409 (2013).

*Katz* instructs a court to resolve such questions by asking whether “society is prepared to recognize as ‘reasonable’” a person’s expectation to be free from such acts.<sup>44</sup> That question, however, is ambiguous in critical respects and, if taken at face value, daunting to answer.<sup>45</sup> Consider thermal imaging. Does the expectation of privacy at issue refer to the facts that are likely to be revealed (the goings-on inside a private home) or the manner in which they are discovered (by someone standing in a public space)? And regardless of such framing, what *does* society think about heat-detecting cameras? Does it matter that what they ultimately reveal requires an inferential step, from heat to growing marijuana? Does it matter that the information revealed is relatively limited? Does it matter that such cameras are not in widespread use? Whether society is prepared to accept as reasonable a person’s demand to be free of such monitoring is anybody’s guess.<sup>46</sup>

Rather than this abstract exploration of sensibilities about the privacy of places or information, the positive law model focuses squarely on the government actors and their actions. The question is: *has a government actor done something that would be unlawful for a similarly situated nongovernment actor to do?* Stated differently, the Fourth Amendment is triggered if the officer — stripped of official authority — could not lawfully act as he or she did. Whether the Fourth Amendment applies to detectives using a thermal-imaging camera to learn about what goes on inside a house, for example, would depend on whether an ordinary citizen would breach any sort of legal duty by attempting to do the same thing in the same circumstances.

The positive law model is therefore triggered in two related situations: (1) those where a government actor has violated a law that applies to both government officials and private actors; and (2) those where a government official has taken advantage of an exception for government officials. Though these paradigms are not precisely the same, both rely on positive law as the baseline for triggering Fourth Amendment scrutiny. Treating them alike for Fourth Amendment purposes is consistent with the underlying theory of the positive law

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<sup>44</sup> *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

<sup>45</sup> See Kerr, *supra* note 8 (noting the many tools courts use to answer this question); see also Orin S. Kerr, *Katz Has Only One Step: The Irrelevance of Subjective Expectations*, 82 U. CHI. L. REV. 113, 115 (2015) (arguing that “the scope of *Katz* is a normative question rather than a descriptive claim about what people actually expect”).

<sup>46</sup> We note the impressive efforts of one team to start answering such questions empirically through public opinion data. See Matthew B. Kugler & Lior Jacob Strahilevitz, *Surveillance Duration Doesn’t Affect Privacy Expectations: An Empirical Test of the Mosaic Theory*, 2016 SUP. CT. REV. (forthcoming), <http://ssrn.com/abstract=2629373> [<http://perma.cc/RHV6-ZBSR>]. However, the project has not yet scaled up to match the country’s Fourth Amendment docket, though that may be the authors’ ultimate ambition. See *id.* (manuscript at 27 n.136); see also *infra* notes 154–155 and accompanying text.

model, as well as the simple reality that a distinction between immunity and lawbreaking may be academic when it is “law enforcement” that has broken the law.

As we’ve said, the positive law model is a test only for the first step of the Fourth Amendment inquiry. Once the Fourth Amendment is triggered, the search must still be “reasonable,” which under current law generally means that the government must obtain a warrant. There is a lively debate about the role of warrants under this second step. Some scholars insist that the Fourth Amendment actually disfavors warrants in most cases rather than requiring or preferring them,<sup>47</sup> while others defend current doctrine or argue that warrants should have an even greater constitutional role.<sup>48</sup> Our model is agnostic about this debate. We assume only that *some* form of serious, judicial scrutiny is required under the second step — whether it is a warrant, a revisionist reasonableness requirement, or something else.<sup>49</sup>

Although the positive law model is generally quite straightforward, there are a few points to clarify. First, when asking whether a private person could legally do what the government has done, we also include laws that force people to submit to the officer or take away rights of resistance or self-help without doing the same for private actors. Hence, it is a search if the government uses a special legal power to compel someone to disclose electronic documents stored on a cellphone or email account, even if the documents could have been disclosed consensually.<sup>50</sup> The key is that the government is employing special legal powers beyond those conferred under generally applicable background law.

Second, while positive law is the fulcrum of the search/seizure inquiry, it is not the only part. A police officer who cheats on his income taxes does not thereby violate the Fourth Amendment. As a textual matter, both the term “search” and the term “seizure” seem to imply a further limitation — otherwise there would be no difference between

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<sup>47</sup> TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 41 (1969); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 771 (1994).

<sup>48</sup> BARRY FRIEDMAN, *UNWARRANTED* (forthcoming 2017) (manuscript at 201–05) (on file with the Harvard Law School Library); Laura K. Donohue, *The Original Fourth Amendment*, U. CHI. L. REV. (forthcoming 2016) (manuscript at 9), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2726148](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2726148) [<http://perma.cc/Z2ND-M9T6>]; see also Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 571–90 (1999) (criticizing Amar, *supra* note 47, and TAYLOR, *supra* note 47).

<sup>49</sup> Throughout this Article we thus take existing reasonableness doctrine for granted without passing judgment on this question. And because the question of remedy is subsequent to reasonableness, we take existing remedies for granted as well.

<sup>50</sup> See *infra* note 267–269 and accompanying text.

them. A search requires an action generally likely to obtain information,<sup>51</sup> while a seizure requires an assertion of physical control.<sup>52</sup>

Third, by “law,” we mean any prohibitory legal provisions, whether legislative, judicial, or administrative in origin, and whether classified as criminal or civil in nature. We also incorporate all ordinary positive law rules of preemption, displacement, repeal, and so on. And while we do think the law has to be violated *in the course* of the search or seizure (hence the income tax example above) we do *not* limit ourselves to laws on any particular subject matter or legal interest. Laws about trash that are designed to profit a waste-hauling monopoly are just as much a part of our model as laws about drones that are designed to protect property or privacy rights.<sup>53</sup>

Finally, we are inclined to accept the current assumption that searches and seizures include only intentional (and perhaps also reckless) acts.<sup>54</sup> A police officer who accidentally collides with another car on the road would not commit a seizure, even if the accident would ordinarily constitute a tort.<sup>55</sup> Intentionally running people off the road, on the other hand, would continue to be governed by the Fourth Amendment.<sup>56</sup>

### B. Distinguishing the Trespass Theory

Although the positive law model would reorient Fourth Amendment law in fundamental ways, it does find support in aspects of current doctrine. Positive law has sometimes, if erratically, been invoked

<sup>51</sup> Cf. *United States v. Jones*, 132 S. Ct. 945, 952–53, 953 n.8 (2012) (emphasizing “information-gathering” trespasses); *id.* at 958 (Alito, J., concurring in the judgment) (arguing that mere installation of a GPS tracking device on a car could not constitute a search if the device did not transmit any data); *Hale v. Henkel*, 201 U.S. 43, 76 (1906) (“[A] search ordinarily implies a quest by an officer of the law.”).

To be clear, a search does not require either that information actually be revealed or that the action be intended to uncover information, so long as the general character of the action is such that it would generally be likely to make public what had not been before. It is still a search to open a legally protected filing cabinet even if the cabinet is bare.

<sup>52</sup> These limits might seem to recall the underlying principles of privacy, liberty, and property that have been said to underlie the amendment under current doctrine. See *Soldal v. Cook County*, 506 U.S. 56, 62–66 (1992).

<sup>53</sup> See *infra* sections III.C.1–2, pp. 1881–84, for these examples.

<sup>54</sup> See *Brower v. County of Inyo*, 489 U.S. 593, 596–97 (1989); *Daniels v. Williams*, 474 U.S. 327, 333 (1986). This is consistent with the interpretation of most constitutional rights, with previous Fourth Amendment decisions, with the general meaning of the words “search” and “seize,” and with the historical roots of search-and-seizure protection in the intentional torts of battery, trespass, and false imprisonment. In the case of a search, this does not mean that a government agent necessarily acts with the intention of obtaining information, only that she intends to act in a way that has a search-like character.

<sup>55</sup> Cf. *Brower*, 489 U.S. at 596 (“[I]f a parked and unoccupied police car slips its brake and pins a passerby against a wall, it is likely that a tort has occurred, but not a violation of the Fourth Amendment.”).

<sup>56</sup> See *Scott v. Harris*, 550 U.S. 372 (2007).

in judicial determinations about what does and does not count as a search.<sup>57</sup> Most significantly, several recent Supreme Court decisions have suggested something of a property renaissance in Fourth Amendment law, holding that even if property is not the touchstone of constitutional searches, it can still operate as a supplement to *Katz*. It might seem that the positive law model we advocate is another way of describing this property-centered view of Fourth Amendment law. In important ways, however, the reasoning in these property cases differs from what we advocate. Understanding how helps illuminate the positive law model and suggests a better way to apply the Court's core insights in the property cases.

The first example of the Court's strong proprietary turn is *United States v. Jones*, which held that the surreptitious installation of a GPS tracking device on a car was a search.<sup>58</sup> Justice Scalia's opinion for the Court concluded that the Fourth Amendment protects against trespass-like acts, that a physical intrusion was a trespass-like act, and that affixing the GPS device to the car was a physical intrusion.<sup>59</sup> In the second property-ish case, *Florida v. Jardines*,<sup>60</sup> the Court, again through the pen of Justice Scalia, concluded that a search occurred when a police officer entered the front porch of a Florida house with a drug-sniffing dog, Franky,<sup>61</sup> and used the dog to detect drugs within.<sup>62</sup> This was so even though precedent already provided that police can generally walk up to one's front door<sup>63</sup> and that dog sniffs are not searches within the meaning of the Fourth Amendment.<sup>64</sup> According to the Court, the key was the physical intrusion onto the homeowner's property without permission: while the public may generally have an "implied license" to come onto one's porch for neighborly purposes, the license did not extend to poking around with a dog.<sup>65</sup>

While we applaud Justice Scalia's enthusiasm for the role of property, and we think this line of cases might one day blossom into the positive law model, we would refine his approach in several key respects. First, Justice Scalia implicitly limited his analysis to property law concepts, rather than positive law more generally. Including positive law may well grant additional protection against invasions of

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<sup>57</sup> See *infra* section III.A, pp. 1867–71; Kerr, *supra* note 8, at 516–19.

<sup>58</sup> 132 S. Ct. 945 (2012).

<sup>59</sup> *Id.* at 949–53.

<sup>60</sup> 133 S. Ct. 1409 (2013).

<sup>61</sup> *Id.* at 1420 (Alito, J., dissenting).

<sup>62</sup> *Id.* at 1413 (majority opinion).

<sup>63</sup> *Kentucky v. King*, 131 S. Ct. 1849, 1862 (2011).

<sup>64</sup> *Illinois v. Caballes*, 543 U.S. 405, 409–10 (2005).

<sup>65</sup> *Jardines*, 133 S. Ct. at 1415–17.

privacy, as well as protection against stalking, harassment, and so on.<sup>66</sup> This was important in *Jones* because, as Justice Alito noted in a separate concurrence, it wasn't simply the installation of the tracking device but also the use of the information received from it that was challenged,<sup>67</sup> and the tort of trespass might not be as well suited as other bodies of law to address questions involving the use of information. Similarly, in *Jardines*, the majority enmeshed itself in hypotheses about the scope of implied consent to enter property that anyone may ordinarily enter.<sup>68</sup> Again, other bodies of positive law might be better suited to address whether strangers can come on to your porch to try to find out what you're doing inside.<sup>69</sup>

Second, Justice Scalia wasn't interested in property law as actual *law* but rather as a source of analogies. His opinions treated the Fourth Amendment as borrowing the general look and feel of trespassory actions, not as formally incorporating the background law of property. In *Jones*, he conceptualized trespass law in a sort of idealized form rather than in terms of the positive law of a specific jurisdiction, with all its particularities.<sup>70</sup> At no point did he cite any statutes or judicial decisions from Maryland, the place where the GPS device was installed. Justice Scalia also appeared to conceive of that law as it was manifest at the time the Fourth Amendment was adopted, rather than as it operates today.<sup>71</sup> This tendency was even more pronounced in *Jardines*, which avoided using the term "trespass" altogether and instead spoke only of "physical intrusion," putting further distance

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<sup>66</sup> See, e.g., *Pemberton v. Bethlehem Steel Corp.*, 502 A.2d 1101, 1115 (Md. Ct. Spec. App. 1986).

<sup>67</sup> *United States v. Jones*, 132 S. Ct. 945, 958 (2012) (Alito, J., concurring in the judgment).

<sup>68</sup> *Jardines*, 133 S. Ct. at 1416–17; cf. *J. Ray Arnold Lumber Co. v. Carter*, 108 So. 815, 819 (Fla. 1926) (discussing implied licenses under Florida law).

<sup>69</sup> See *Agency for Health Care Admin. v. Associated Indus. of Fla., Inc.*, 678 So. 2d 1239, 1252 n.20 (Fla. 1996) (invasion of privacy); *Goosen v. Walker*, 714 So. 2d 1149, 1149–50 (Fla. Dist. Ct. App. 1998) (stalking).

<sup>70</sup> *Jones*, 132 S. Ct. at 949–50; see also Sacharoff, *supra* note 22, at 891 (praising this idealized approach).

<sup>71</sup> There is some ambiguity on this point. Justice Scalia objected to the charge that he relied on "18th-century tort law," but he did so by arguing that the Fourth Amendment "must provide at a minimum the degree of protection it afforded when it was adopted," *Jones*, 132 S. Ct. at 953, and elsewhere the Court said that "[w]e have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted," *id.* at 949. Still, some have read the opinion as relying on something more like what we propose. See Sacharoff, *supra* note 22, at 891 ("*Jones* seems to envision a trespass test based upon contemporary state law trespass principles."). In his dissent in *Georgia v. Randolph*, 547 U.S. 103 (2006), Justice Scalia may have come closer to the mark, arguing that "if the matter *did* depend solely on property rights, a latter-day alteration of property rights would also produce a latter-day alteration of the Fourth Amendment outcome — without altering the Fourth Amendment itself." *Id.* at 143 (Scalia, J., dissenting).

between the property-ish analogy and actual positive law.<sup>72</sup> As in *Jones*, the *Jardines* Court did not consult local law (here, Florida) on implied licenses, instead reasoning in the abstract about an assumed set of rules on the subject that “does not require fine-grained legal knowledge.”<sup>73</sup> By contrast, the positive law approach we advocate would have required the Court to look at the law of Maryland as of the time the GPS device was installed and used and the law of Florida as of the time that Franky sniffed around the porch. The critical question is whether the officials in question were doing something that ordinary people would have gotten into legal trouble for doing in like circumstances.

Ultimately, the view of Fourth Amendment law described in cases like *Jones* and *Jardines* seems — at least so far — to treat property concepts as a useful proxy for the privacy interests identified in *Katz*. For that reason, it operates as a sidecar to *Katz*, enlarging the scope of protection or, perhaps, merely simplifying the *Katz* inquiry in certain cases by means of a per se rule. The positive law model, however, is not primarily a supplement or a shortcut to the *Katzian* expectation of privacy.<sup>74</sup> To be sure, the positive law model does ultimately result in a significant measure of individual privacy. But it does not look to positive law because doing so fosters privacy; it fosters privacy because privacy protection is a consequence of looking to positive law.

## II. THE CASES FOR THE POSITIVE LAW MODEL

Using positive law to trigger Fourth Amendment protection has deep roots in several different ways of thinking about the Fourth Amendment. We won't spend much time on the text itself, which seems to us susceptible of quite a few constructions. The ordinary meanings of “searches” and “seizures” do not seem to refer to positive law, but then again, in everyday usage, they do not naturally extend to, say, wiretapping or to shooting someone. As they are used in the Fourth Amendment, the words function as terms of art, with a particularly legal flavor.<sup>75</sup> This isn't in the least unusual. Whether prop-

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<sup>72</sup> *Jardines*, 133 S. Ct. at 1415, 1417; see also Kiel Brennan-Marquez & Andrew Tutt, *Offensive Searches*, HARV. C.R.-C.L. L. REV. (forthcoming 2016) (manuscript at 2–3), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2739453](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2739453) [<http://perma.cc/6TBE-56H6>] (arguing that “intrusions” in *Jardines* and *Jones* should not be understood as violations of positive law but rather as “government action that would be highly offensive or degrading to a reasonable person,” *id.* (manuscript at 1)).

<sup>73</sup> *Jardines*, 133 S. Ct. at 1415; see *id.* at 1415–17.

<sup>74</sup> But see Kerr, *supra* note 8, at 532–34 (describing the positive law model as a proxy for privacy); Daniel B. Yeager, *Search, Seizure and the Positive Law: Expectations of Privacy Outside the Fourth Amendment*, 84 J. CRIM. L. & CRIMINOLOGY 249, 283–85, 298–99 (1993) (same).

<sup>75</sup> THOMAS K. CLANCY, *THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION* § 1.2.1.1.1, at 4 (2d ed. 2014); *id.* § 1.2.1.1.2, at 5–7 (defining seizures of per-

erty is “taken” within the meaning of the Fifth Amendment, for instance, depends on whether there has been a curtailment of a property holder’s legal rights, not whether anything has physically changed hands.<sup>76</sup> In important respects, moreover, this interpretation is consistent with the history of the Fourth Amendment.

We will therefore begin with the theoretical basis for the positive law model as a matter of history, constitutional structure, and a general normative commitment to an ideal of legality. We will then turn to its more practical advantages, before responding to potential objections.

### A. History

The positive law model finds strong support in the historical background of the Fourth Amendment, which emphasized both property and positive law more generally. The story is oft-told so we will recount the key points only briefly.

One key incident was colonial rebellion against the abuses of customs officials in the colonies. Officials were at first known “to enter buildings forcibly by the mere authority of their commissions as officers.”<sup>77</sup> Later, this privilege was reinforced by a “writ of assistance,” which gave “a continuous license and authority” to break and enter “wherever they suspected uncustomed goods to be.”<sup>78</sup> While they took various legal forms, writs of assistance gave customs officials a sweeping legal privilege.<sup>79</sup>

That privilege was, to say the least, controversial. The legitimacy and legality of the writs were attacked most famously in Massachusetts court by James Otis, who argued that the “writ, if it should be declared legal, would totally annihilate” the “freedom of one’s own house.”<sup>80</sup> Otis later presented an official complaint on behalf of the inhabitants of Boston that amplified the egregiousness of the privilege: “These Officers may under color of Law and the cloak of a general warrant, break through the sacred Rights of the *Domicil*, ransack

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sons and property). Professor Thomas Clancy also suggests an alternate textual basis for the first-stage search/seizure inquiry, namely “The Right to Be ‘Secure.’” *Id.* § 3, at 78–159.

<sup>76</sup> Of course, where physical movement entails a curtailment of property rights akin to taking “full title,” takings protection is triggered. *See* *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2428 (2015) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 431 (1982)); *see also id.* (treating personal property “held ‘for the account’ of the Government” as equivalent to personal property physically transferred to it (quoting 7 C.F.R. § 989.66(a) (2015))).

<sup>77</sup> NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 55 (Da Capo Press 1970) (1937).

<sup>78</sup> *Id.* at 54.

<sup>79</sup> Writs of assistance were variously authorized by both executive and legislative action. *See* CLANCY, *supra* note 75, § 2.2.3, at 47–48, 51.

<sup>80</sup> Speech of James Otis, *in* 2 *THE WORKS OF JOHN ADAMS*, app. A, 523, 524 (Boston, Little, Brown & Co. 1850).

Mens Houses, destroy their Securities, carry off their Property, and with little Danger to themselves commit the most horrid Murders.”<sup>81</sup>

Otis’s arguments were widely repeated throughout the colonies.<sup>82</sup> And they indirectly inspired the Fourth Amendment: They made a particularly strong impression on a young John Adams,<sup>83</sup> who went on to draft the Massachusetts Constitution.<sup>84</sup> Massachusetts’s search-and-seizure provision was in turn copied into the federal Constitution’s Fourth Amendment.<sup>85</sup>

The other key sources used to understand the Fourth Amendment are the English cases of *Wilkes v. Wood*<sup>86</sup> and *Entick v. Carrington*.<sup>87</sup> In those cases, the English government sent messengers, under authority of a warrant, to enter Wilkes’s and Entick’s homes looking for evidence of sedition and ultimately arrest them and confiscate their papers. Each of them sued and prevailed before the English courts. Chief Justice Pratt condemned the Wilkes search as “totally subversive of the liberty of the subject” and likely to “affect the person and property of every man in this kingdom.”<sup>88</sup> His condemnation of the Entick search was similarly emphatic. This power to search would “destroy all the comforts of society; for papers are often the dearest property a man can have.”<sup>89</sup> Both incidents were discussed in America and are widely thought to have played a pivotal role in the drafting of the Fourth Amendment.<sup>90</sup>

Each of these incidents points to a positive law baseline for the Fourth Amendment. Put aside the *reasons* that these searches and seizures were ultimately thought illegal, which go to the question of reasonableness — the second step of the Fourth Amendment analysis. When we look at the nature of the harm or intrusion, the first-step question, each event stresses property. Otis pointed to “the privilege of House” and invoked the maxim that “[a] man’s house is his castle.”<sup>91</sup>

<sup>81</sup> Report of the Committee of Boston on Rights of Colonists (1772), as published by Order of the Town, 15–17, reprinted in JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY, BETWEEN 1761 AND 1772, app. 1, at 466–67 (Boston, Little, Brown & Co. 1865); see also *id.* at 466 (noting that this argument is “so curiously like *Otis*’s argument upon the Writs of Assistance in 1761”).

<sup>82</sup> See WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING 602–1791, at 396 (2009).

<sup>83</sup> LASSON, *supra* note 77, at 60–61.

<sup>84</sup> CLANCY, *supra* note 75, § 2.2.3.3, at 57 & n.101.

<sup>85</sup> *Id.* § 2.4, at 70–71 (noting that while the federal Constitution’s warrant requirements differed from Massachusetts’s, the scope of protection was “copied almost verbatim,” *id.* at 70).

<sup>86</sup> (1763) 98 Eng. Rep. 489 (K.B.).

<sup>87</sup> (1765) 95 Eng. Rep. 807 (K.B.).

<sup>88</sup> *Wilkes*, 98 Eng. Rep. at 498.

<sup>89</sup> *Entick*, 95 Eng. Rep. at 817–18.

<sup>90</sup> See CLANCY, *supra* note 75, § 2.2.3.2, at 51–52, 55.

<sup>91</sup> Speech of James Otis, *supra* note 80, at 522, 524.

The opinion in *Wilkes* defended “the person and property of every man.”<sup>92</sup> And *Entick* intoned that “[t]he great end, for which men entered into society, was to secure their property,” and specifically emphasized that to justify a search required one to justify “a trespass” by looking to “positive law.”<sup>93</sup> Indeed, these episodes have contributed to a longstanding conventional wisdom that until the mid-twentieth century, trespass was the central test for a Fourth Amendment search.<sup>94</sup>

The positive law model does not stop at the law of property, however, and neither did this history, though this part of the story is frequently overlooked. *Wilkes* (and the printers arrested along with him) had sued not just for a property violation but also for false imprisonment.<sup>95</sup> Other suits similarly challenged searches and seizures as false imprisonment or other violations of what would today be thought of as torts relating to personal security.<sup>96</sup> Of course we do not know exactly how far this went, or more accurately, would have gone.<sup>97</sup> We cannot say for sure whether the same Founding-era principles would apply to a suit for, say, “intrusion upon seclusion” because no such right of action was then recognized.<sup>98</sup> But the history is at least suggestive, and the most straightforward extrapolation is that the search-and-seizure principle — the idea that some actions by government officials raised questions demanding judicial scrutiny — was marked by violations of

<sup>92</sup> *Wilkes*, 98 Eng. Rep. at 498.

<sup>93</sup> These passages come from the longer report of *Entick* in *Entick v. Carrington*, 19 Howell’s State Trials 1029, 1066 (C.P. 1765), which may have been less widely available before ratification of the Fourth Amendment. See Davies, *supra* note 48, at 566 n.25. A briefer and less florid version appears in the English Reports, *Entick*, 95 Eng. Rep. at 817–18.

<sup>94</sup> Cf. Kerr, *supra* note 22, at 67–68 (attempting to debunk this conventional wisdom). We explain our own quibbles with this “trespass” test *supra* section I.B, pp. 1833–36.

<sup>95</sup> *Money v. Leach*, (1765) 97 Eng. Rep. 1075, 1075 (K.B.) (printer’s suit for “imprisoning him”); *Huckle v. Money*, (1763) 95 Eng. Rep. 768, 768 (K.B.) (journeyman printer’s suit for “imprisonment”). How much of *Wilkes*’s verdict turned on false imprisonment is a little less clear. Compare CLANCY, *supra* note 75, § 2.2.3.2, at 52 (claiming that *Wilkes* separately sued “for false imprisonment”), with CUDDIHY, *supra* note 82, at 447 (noting that, unlike *Leach* and *Huckle*, the “damnation of general warrants” in *Wilkes* “emphasized their search, not their arrest, side”).

<sup>96</sup> See, e.g., CUDDIHY, *supra* note 82, at 593 (English cases); TAYLOR, *supra* note 47, at 188 n.71 (nineteenth-century American cases, which were “[c]ommonly . . . trespass suits,” *id.* at 44); see also *Ex parte Watkins* 28 U.S. (3 Pet.) 193, 203 (1830) (Marshall, C.J.) (remarking that if someone is imprisoned under a judgment that proves to “be a nullity, the officer who obeys it is guilty of false imprisonment”); cf. *Huckle*, 95 Eng. Rep. at 768 (“[T]orts or injuries which may be done by one man to another are infinite[.] . . . cases of criminal conversation, battery, imprisonment, slander, malicious prosecutions . . .”).

<sup>97</sup> Kerr, *supra* note 22, at 72–73 (noting that “home entries and rummaging around inside were understood as the paradigmatic examples of ‘searches’” but arguing that “[e]xamples alone cannot identify how far beyond their facts the principle should extend”).

<sup>98</sup> William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960), dates the tort’s origins to *De May v. Roberts*, 9 N.W. 146 (Mich. 1881). Cf. Lior Jacob Strahilevitz, *Reunifying Privacy Law*, 98 CALIF. L. REV. 2007, 2040 (2010) (“[A]s a historical matter the Fourth Amendment’s enactment preceded the Warren and Brandeis privacy revolution.”).

positive law, and moreover, by violations extending beyond the law of property.

The positive law connection is further illustrated by the original remedial structure of the Fourth Amendment. At the time it was ratified, the only way to enforce rights against unlawful searches and seizures was through private law remedies, such as the trespass and false imprisonment actions noted above. Modern remedies like the exclusion of evidence and the § 1983 or *Bivens* lawsuit did not exist.<sup>99</sup> Instead, the process of vindicating Fourth Amendment rights began by alleging that a government official had violated a legal duty arising out of general law. The official would then attempt to invoke official immunity as a defense, and this could then be challenged on grounds that the officer had acted unreasonably.<sup>100</sup>

We note three key features of this remedial structure. First, the positive law inquiry operated at a threshold level, by providing the cause of action. It may not have been necessary to specifically label that positive law inquiry a question of “search” or “seizure” because the positive law claim was a necessary and sufficient condition for hauling an officer into court and forcing him to invoke an official defense.<sup>101</sup> Analogously, under our model, the positive law violation is the threshold question that triggers the reasonableness requirement. (As we discuss later, we don’t think the positive law model has to stick to positive law *causes of action* in particular,<sup>102</sup> but the structure of the inquiry matches our vision.)

Second, we note the absence of any known historical instance of people complaining about a Fourth Amendment violation that was not also a positive law violation. For instance, although the enforcement of Fourth Amendment rights depended on positive law suits — again, the modern remedies were not yet available — there was none of today’s angst about the poverty of remedies for Fourth Amendment

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<sup>99</sup> See *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 843–44 (Story, Circuit Justice, C.C.D. Mass. 1822) (No. 15,551); see also Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1919–20 (2014).

<sup>100</sup> See BRADFORD P. WILSON, ENFORCING THE FOURTH AMENDMENT 33 (1986); Amar, *supra* note 47, at 785–86; Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1132 (1969).

<sup>101</sup> Cf. Re, *supra* note 99, at 1920 (“[T]he original trespass-oriented remedial scheme was intuitive given the eighteenth-century premise that officers should be treated as private parties. Originally, the Fourth Amendment did not impose special constraints on government agents as such. Rather, it ensured that ‘unreasonable’ federal officials would be treated just like private common law trespassers.” (footnote omitted)).

<sup>102</sup> See *infra* section III.B.3, pp. 1880–81.

violations.<sup>103</sup> That is suggestive, though far from conclusive, that the positive law was a threshold test under the Fourth Amendment itself.

Finally, the original contours of search-and-seizure protection may be even easier to see when we recall that until Reconstruction, the Fourth Amendment applied only to federal action. Meanwhile, most of the relevant positive law rights and remedies needed to enforce search-and-seizure protection were created by state law. This structure enabled states to define positive law entitlements broadly in order to guard against abuses of their citizens by federal agents. Without the Fourth Amendment, however, the Supremacy Clause would normally have allowed the federal government to authorize federal agents to ignore state law.<sup>104</sup> By constraining such authorizations, the Fourth Amendment preserved a central role for states in defining the ambit of protection against abuses by federal officials. The positive law model thus fulfilled James Madison's promise that "[t]he different governments will control each other"<sup>105</sup> through a federalist structure of rights enforcement.<sup>106</sup>

Again, we don't claim that the positive law model was ever articulated in exactly these terms at the time. It may not have been necessary to articulate it, since the role of positive law remedies could be taken for granted. But after a century of failed experimentation with other models, the time has come to consider just what it would mean and whether it is compatible with the history leading up to the Fourth Amendment's adoption.

### B. Structure

It is somehow often forgotten that the Fourth Amendment governs both searches *and* seizures, and the two are often treated quite differently. The positive law model unifies the treatment of searches and seizures and helps to explain why the Fourth Amendment lumps them

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<sup>103</sup> See WILSON, *supra* note 100, at 16 ("For the Fourth Amendment to be law in the full sense, it must be understood as requiring an available remedy for violation of the asserted right. The framers assumed that this demand was met by the remedial aspect of the common law . . .").

<sup>104</sup> At least if combined with a capacious understanding of the Necessary and Proper Clause. See 1 ANNALS OF CONG. 438 (1789) (Joseph Gales ed., 1834) (statement of Rep. Madison). The citation is to the second printing, headed "Gales & Seaton's History of Debates in Congress." See William Baude & Jud Campbell, *Early American Constitutional History: A Source Guide* 10–11 (Feb. 29, 2016) (unpublished manuscript), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2718777](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2718777) [<http://perma.cc/F327-X6YT>] (describing the confusion over different paginations of the Annals).

<sup>105</sup> THE FEDERALIST NO. 51, at 320 (James Madison) (Clinton Rossiter ed., 2003).

<sup>106</sup> See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1493–95, 1506–09 (1987); see also William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1823 (2013). See generally Michael J. Zydney Mannheimer, *The Contingent Fourth Amendment*, 64 EMORY L.J. 1229, 1263–87 (2015) (arguing that state law was originally understood to be integral to the Bill of Rights).

together.<sup>107</sup> This too is more consistent with the historical background of the Fourth Amendment, which tended to view searches and seizures as more closely linked phenomena. While modern Fourth Amendment law primarily deals with searches and, to a lesser extent, seizures of persons, much of the concern at the time of its ratification centered on seizures of goods, with searches coming into play because of their role in facilitating seizures. The paradigmatic Fourth Amendment actor at the time of ratification was the customs collector, not the police detective. Indeed, the modern, professional police force was unknown at the time of the Founding, and even after its establishment, investigative searches subject to the Fourth Amendment were restricted by the so-called mere evidence rule, which categorically circumscribed the power to search.<sup>108</sup> *Katz*'s vision of the Fourth Amendment not only shifts the spotlight to searches but treats them as phenomena unrelated to seizures, governed by an entirely separate doctrine. The positive law model realigns these twin pillars of the Fourth Amendment, bringing theoretical coherence to Fourth Amendment law as a whole.

The positive law model also has a strong connection to the approach used to protect property under the neighboring Fifth Amendment,<sup>109</sup> which prohibits deprivations of property without due process of law and the taking of property without just compensation.<sup>110</sup> While the Fourth Amendment does not talk about property in so many words, some of its language ("houses," "effects," and especially "their") obviously evokes property, and we do not think it is a coincidence that it has a long history of focusing on property. In any event, at least three major features of constitutional property doctrines parallel the positive law approach to the Fourth Amendment.

First, and most tellingly, the property rights protected by the Fifth Amendment are defined by extrinsic sources of positive law, typically state law, rather than by the Constitution itself.<sup>111</sup> Constitutional

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<sup>107</sup> Cf. Sacharoff, *supra* note 22, at 894–95 ("[T]he trespass concept can help unify searches and seizures to remind us that many of the harms the Fourth Amendment protects against apply equally to both types of conduct.").

<sup>108</sup> See *Gouled v. United States*, 255 U.S. 298, 309 (1921); see also CLANCY, *supra* note 75, § 3.2.1, at 85.

<sup>109</sup> And while we almost hate to mention it at the risk of being thought to joke, the other neighboring amendment, the Third, shares similar themes. It prohibits the wartime quartering of soldiers "in any house" other than "in a manner to be prescribed by law," as well as the quartering in times of peace in any manner unless the consent of the owner is obtained. U.S. CONST. amend. III. It both piggybacks on property and stresses the importance of legality more generally.

<sup>110</sup> U.S. CONST. amend. V.

<sup>111</sup> James Y. Stern, *Property's Constitution*, 101 CALIF. L. REV. 277, 286 (2013) ("[I]t is black letter law that 'the Constitution protects rather than creates property interests,' and that whether a person has a property right protected by the Constitution 'is determined by reference to existing rules or understandings that stem from an independent source such as state law.'" (quoting *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998))).

property clauses could generate their own law of property, recognizing rights against government interference broader than the background law of property. They could, in other words, do what *Katz* does in creating a separate law of privacy applicable to government officials, distinct from the privacy rules governing everyone else. But they do not. Neither, we add, is the property protected by the Due Process and Takings Clauses defined by the property law of the Founding era<sup>112</sup> but rather by modern law, which recognizes property in intangibles like trade secrets,<sup>113</sup> bank accounts,<sup>114</sup> and even welfare benefits.<sup>115</sup> These doctrines show that it is possible to bottom constitutional rights on ordinary positive law, and that this is indeed the chosen approach when it comes to other related areas of constitutional law.

A second parallel feature of constitutional property doctrines is the generous view of what counts as “property.” When looking to background positive law, what matters is the structure of the right, not the label that positive law affixes to it. In other words, it doesn’t matter whether background law uses the word “property” to describe the right — if it looks like a property right, smells like a property right, and acts like a property right, it is constitutional property, even if the state or federal law establishing it uses a different word.<sup>116</sup> This makes conceptual sense: as one of us has argued, all legal rights can be thought of as “things” that are owned by their holders.<sup>117</sup> It is also consistent with the views of the Founders such as James Madison, who drafted the original text of the Fourth Amendment (and originally included in it an explicit reference to property<sup>118</sup>). Madison wrote that in its “larger and juster meaning,” property “embraces every thing to

<sup>112</sup> *But cf.* *United States v. Jones*, 132 S. Ct. 945, 953 (2012) (“What we apply [when interpreting the Fourth Amendment] is an 18th-century guarantee against unreasonable searches, which we believe must provide *at a minimum* the degree of protection it afforded when it was adopted.”).

<sup>113</sup> *See, e.g.*, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

<sup>114</sup> *See, e.g.*, *Phillips*, 524 U.S. at 164–71; *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160–61 (1980).

<sup>115</sup> *E.g.*, *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970); *accord* Stern, *supra* note 111, at 323–25.

<sup>116</sup> Stern, *supra* note 111, at 286–87; *see also* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 952–54 (2000).

<sup>117</sup> *See* Stern, *supra* note 111, at 303–04; *see also* JOEL FEINBERG, *SOCIAL PHILOSOPHY* 75 (1973) (“Rights are themselves *property*, things we own . . .”); H.L.A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175, 182 (1955) (“Rights are typically conceived of as *possessed or owned by or belonging to* individuals, and these expressions reflect the conception of moral rules as not only prescribing conduct but as forming a kind of moral property of individuals to which they are as individuals entitled . . .”). We note that if we thought Justice Scalia had used property in this capacious sense in *Jones* and *Jardines*, we would have one fewer quarrel with him.

<sup>118</sup> James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789), in JAMES MADISON: WRITINGS 437, 443 (Jack N. Rakove ed., 1999) (“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 . . .” (emphasis added)).

which a man may attach a value and have a right; and which leaves to every one else the like advantage.”<sup>119</sup> Thus, “as a man is said to have a right to his property, he may be equally said to have a property in his rights.”<sup>120</sup> In short, even if we think of the Fourth Amendment as originally concerned with property rights, those rights may generalize to include modern positive law, such as those designed to protect interests in personal privacy.

The third point of similarity lies in the general constitutional vision the property clauses reflect and the way they enforce it. The Takings and Due Process Clauses both recognize that public officials will have special legal powers private parties lack, but seek to tame and discipline the exercise of those powers in ways that reduce the gap between government and governed. The Takings Clause requires compensation where positive law rights of property are abrogated.<sup>121</sup> The Due Process Clause requires that government act according to law,<sup>122</sup> follow appropriately particularized procedures,<sup>123</sup> and, at least since *Carolene Products*, supply adequate reasons for its policies and actions.<sup>124</sup>

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<sup>119</sup> James Madison, *Property*, NAT’L GAZETTE, Mar. 29, 1792, reprinted in MADISON, *supra* note 118, at 515, 515 (emphasis omitted).

<sup>120</sup> *Id.*

<sup>121</sup> See Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 346 (2000). Although compensation suggests undoing the harm of a taking and restoring owners to their “rightful position,” see DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES* 16 (3d ed. 2002), the compensation norm isn’t as stringently applied in the context of takings as it might be. See, e.g., Patrick Luff, *The Market Value Rule of Damages and the Death of Irreparable Injury*, 59 CLEV. ST. L. REV. 361, 367–68 (2011).

In addition to just compensation, the Takings Clause has also been held to require a “public use,” which can be seen as another requirement of reason-giving. Cf. William Baude, *Takings Clause*, in THE HERITAGE GUIDE TO THE CONSTITUTION 444, 446 (David F. Forte & Matthew Spalding eds., 2d ed. 2014) (“As a purely textual matter, the clause is ambiguous about such a requirement. It is possible to read the clause as simply *describing* the conditions under which property will be taken. . . . The conventional reading of the Takings Clause, however, infers an independent public use requirement.”).

<sup>122</sup> See Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 95–98; John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1453 (1992); Kermit Roosevelt III, *Forget the Fundamentals: Fixing Substantive Due Process*, 8 U. PA. J. CONST. L. 983, 985 (2006); James Y. Stern, Note, *Choice of Law, the Constitution, and Lochner*, 94 VA. L. REV. 1509, 1536 (2008); see also Donald A. Dripps, *The Constitutional Status of the Reasonable Doubt Rule*, 75 CALIF. L. REV. 1665, 1680–81 (1987).

<sup>123</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976); *Londoner v. City & County of Denver*, 210 U.S. 373, 385–86 (1908); see also Nathan S. Chapman & Michael W. McConnell, Essay, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1773–77 (2012).

<sup>124</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) (“[A] statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis.”). In the mine-run of cases, this last requirement is weak-to-nonexistent. See *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 487–88 (1955). Something similar may be true for the public use doctrine under the Takings Clause. See *Kelo v. City of New London*, 545 U.S. 469, 490–91 (2005) (Kennedy, J., concurring).

These provisions employ rules of legality, process, and reason-giving to curb the exercise of the government's extraordinary powers. The Fourth Amendment's own second stage operates similarly and responds to the same underlying concern about the government's special power to step outside the law.

### C. Legality and Government Power

It is a basic and inevitable fact about government that it has special legal powers that private parties do not. Those powers pose risks. And those risks are why our constitutional system subjects the government to restrictions that it does not impose on private parties. That is the reason the Fourth Amendment is especially concerned with the areas where the government claims the special authority to transcend the law. In the rather stirring words of Justice Brandeis:

Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. . . . To declare that in the administration of the criminal law the end justifies the means — to declare that the Government may commit crimes in order to secure the conviction of a private criminal — would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.<sup>125</sup>

The basic premise of our constitutional order is that government presents special dangers because it wields special powers, in particular the ability to use physical force to coerce action. Concern about the dangers associated with this special power is a pervasive theme in the Constitution, and understandably so for “[t]he power of the state is an awesome thing.”<sup>126</sup> The ability to use force is not only the ability to harm in the most direct and palpable sense but also the ability to coerce behavior by threatening harm. For this reason, the Constitution imposes numerous restrictions on actions by government that it does not impose on private actors, a principle reflected in the so-called state action doctrine.<sup>127</sup>

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<sup>125</sup> *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting); see also NICCOLÒ MACHIAVELLI, DISCOURSES ON THE FIRST TEN BOOKS OF TITUS LIVIUS 229 (Christian E. Detmold trans.), reprinted in THE PRINCE AND THE DISCOURSES (Random House, Inc. 1950) (1513) (“[T]here can be no worse example in a republic than to make a law and not to observe it; the more so when it is disregarded by the very parties who made it.”).

<sup>126</sup> Lillian R. BeVier, *Law, Economics, and the Power of the State*, 21 HARV. J.L. & PUB. POL'Y 5, 6 (1997).

<sup>127</sup> See Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 507 (1985) (“It is firmly established that the Constitution applies only to governmental conduct, usually referred to as ‘state action.’”); see also Frank I. Michelman, *W(h)ither the Constitution?*, 21 CARDOZO L. REV. 1063, 1076–77 (2000) (arguing that the “state action doctrine reflects a normative political theory that our judges attribute to the Constitution,” which reflects perceptions that, among other things, “the state’s monopoly of lawful force, its unique powers of lawful, direct coercion of per-

Granting an entity with the power of coercive force privileges exempting it from ordinary law is therefore a cause for serious apprehension. Beyond the specific history of the Constitution itself, a wide range of theorists — including Locke and Hayek — have argued that subjecting government officials to the laws they enact is essential to curbing abuses of governmental power.<sup>128</sup> For one thing, exemptions from law can encourage a more general sense of privilege in government officials, making them “licentious by Impunity,” in Locke’s phrase, and unwilling to obey whatever other constraints supposedly bind them.<sup>129</sup> For another, exemptions enable officials to impose burdens on others without experiencing the effect of those burdens on themselves and can therefore make officials more willing to impose onerous and unjustified constraints. James Madison argued that the Constitution implicitly proscribed general exemptions from the law for government officials, declaring such a limitation “one of the strongest bonds by which human policy can connect the rulers and the people together.”<sup>130</sup> Thomas Jefferson imagined that the narrow scope of legislative privilege granted Congress by the Constitution reflected the Framers’ view of the “encroaching character of privilege” and their “care to provide that the laws shall bind equally on all, and especially that those who make them shall not exempt themselves from their operation.”<sup>131</sup>

More generally, exemptions from general law stand in tension with liberal notions of political equality and ordered liberty, opening the door to government characterized by ruling-class privilege and unbounded sovereign will. Justice Brandeis went so far as to declare that “the principle which denies to government officials an exceptional position before the law and which subjects them to the same rules of conduct that are commands to the citizen” lies “[a]t the foundation of

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sons, make it (most definitely) a power-source to be feared” and that “incumbent state officials are exposed to a constant temptation to direct their special powers toward establishing and maintaining their own dominance”).

<sup>128</sup> See, e.g., F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 155 (Henry Regnery Co. 1972) (1960) (“The chief safeguard is that the rules must apply to those who lay them down and those who apply them — that is, to the government as well as the governed — and that nobody has the power to grant exceptions.”); JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 326–28 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690); see also Jeremy Waldron, *One Law for All? The Logic of Cultural Accommodation*, 59 WASH. & LEE L. REV. 3, 3 (2002) (“We value this generality not least as a bulwark against oppression. We figure that we are less likely to get oppressive laws when the lawmakers are bound by the same rules they lay down for everyone else.”).

<sup>129</sup> LOCKE, *supra* note 128, at 328.

<sup>130</sup> THE FEDERALIST NO. 57, at 350 (James Madison) (Clinton Rossiter ed., 2003).

<sup>131</sup> THOMAS JEFFERSON, *A Manual of Parliamentary Practice: For the Use of the Senate of the United States*, in JEFFERSON’S PARLIAMENTARY WRITINGS 359 (Wilbur Samuel Howell ed., 1988) (2d ed. 1812).

our civil liberty.”<sup>132</sup> Indeed, the very term “rule of law” was coined by A.V. Dicey to capture the idea of a political system in which “no man is above the law,”<sup>133</sup> meaning in particular that it “excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens.”<sup>134</sup> To place officials above the law would be to subvert this fundamental principle of political liberty.

These are all ways in which any sort of exemption from law might be associated with abuse of power by government officials. But there is an even more basic connection between exemptions from the law and the government’s coercive powers. The government’s coercive powers are themselves the central manifestation of immunity from general law. The government’s operational *monopoly* on the legitimate use of force arises precisely because the government is not constrained by laws that govern everyone else.<sup>135</sup> The two phenomena aren’t merely related; in the most important cases, they are identical.<sup>136</sup> The government’s basic coercive powers consist of the authority to perform acts that otherwise make up the everyday stuff of criminal and tort law: trespass, robbery, battery, kidnapping, false imprisonment, murder, extortion, and assault.<sup>137</sup> In the Constitution’s theoretical framework, the reason the government is a source of particular dangers is precisely because of the special powers that result from its exemption from general law. Exemptions are what define the state, exemptions are what justify the state, and exemptions are what make the state dangerous.

<sup>132</sup> *Burdeau v. McDowell*, 256 U.S. 465, 477 (1921) (Brandeis, J., dissenting).

<sup>133</sup> A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 189 (6th ed. 1902).

<sup>134</sup> *Id.* at 198.

<sup>135</sup> In this sense, we refer not to the government’s power to *determine* when force may be used, which might allow it to permit the use of force by others so long as that use is on the government’s terms, but to the functional monopoly characteristic of modern states wherein only its agents are permitted to use force.

<sup>136</sup> In a thorough and sensitive examination of issues involving private security services, Professor David Sklansky suggests the differences between members of public police forces and others are a matter less of formal powers and more of social understanding and the remedies that attach to misconduct. David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165 (1999). He acknowledges, however, that “[t]he public police obviously have some well-defined powers that private security personnel lack,” which “is particularly true with regard to searches.” *Id.* at 1187. We think he may understate the effect of these formal distinctions. At the same time, we are not necessarily averse to including some measure of what might be considered “de facto law” in the Fourth Amendment analysis, though for reasons of administrative complexity, we are unsure about proceeding in this direction. *Cf.* *Perry v. Sindermann*, 408 U.S. 593, 601–03 (1972) (finding that informal understandings may create legal entitlements constituting property for due process purposes); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 162–69 (1970) (allowing a constitutional suit under 42 U.S.C. § 1983 for state-enforced “custom having the force of law,” *id.* at 169).

<sup>137</sup> *See* LAWRENCE KRADER, FORMATION OF THE STATE 21 (1968).

No less close is the connection between governmental exemptions and search-and-seizure protections. The paradigmatic examples of searches and seizures concern the very immunities and powers that constitute the government's monopoly on the use of coercive force. As Professors Lillian BeVier and John Harrison write:

Under the sub-constitutional law that protects private property, people are not free to enter another's home, or physically seize another's person, without permission. As a result, it is much easier for people to keep secrets from one another than it otherwise would be. But governments routinely authorize their agents to search for evidence of wrongdoing in ways that would be unlawful for a private person. Search warrants are a classic example; they empower officers to use physical force, if necessary, to enter private property without the owner's permission. Warrants, and other sources of special authority to search, thus present a threat to rights-holders that the private law does not deal with because it does not apply to the government as it does to others. The Fourth Amendment adds an additional layer of rules that the ordinary legislative process may not alter — rules designed specifically for the special search and seizure powers of officials. It does permit searches that a private person could never undertake, but requires that they be reasonable. It does allow the special exception to private rights created by warrants but regulates their issuance and content.<sup>138</sup>

In other words, the government presents special concerns, because it need not follow the same restrictions applicable to everyone else, and in particular, because it may probe, restrain, and carry off people and resources in ways that would be illegal for others. An understanding of the Fourth Amendment centered on exemptions from general law captures the cases in which the government's *monopoly* on the legitimate use of force comes into play.<sup>139</sup> In other words, it targets the hallmark attribute of the state's "stateness" and the source of the particular dangers it poses.<sup>140</sup> It focuses the Fourth Amendment on what is distinctive about the government and what is distinctly dangerous about it.

The significance of governmental exemptions in rendering the state dangerous and necessitating constitutional controls upon it can be seen in other constitutional contexts too. Scrutiny of government action

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<sup>138</sup> Lillian BeVier & John Harrison, *The State Action Principle and Its Critics*, 96 VA. L. REV. 1767, 1790 (2010).

<sup>139</sup> The notion of the state's monopoly on the use of coercive force includes not only acts of physical violence but also physical detention and interference with property, as with imprisonment, fines, and forfeitures. See KRADER, *supra* note 137, at 21; see also Issachar Rosen-Zvi & Talia Fisher, *Overcoming Procedural Boundaries*, 94 VA. L. REV. 79, 92 (2008) (discussing coercive powers associated with the state's ability to search private property).

<sup>140</sup> The Fourth Amendment's "origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies." *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921).

diminishes when the government does not directly rely upon its special powers.<sup>141</sup> Thus dormant commerce clause rules restricting protectionist policies by states are relaxed when a state acts as a “market participant,” rather than as a regulator.<sup>142</sup> Restrictions on speech that would be obviously unconstitutional if they were general prohibitions may be upheld when the government is acting in its capacity as a property owner or an employer.<sup>143</sup> In those roles, the government does not act as a monopolist and does not interfere with a private citizen’s physical person or property. The more analogous the government’s position is to that of an ordinary private actor, the less its behavior generates constitutional concern.

These principles are implicit in the basic structure of the Fourth Amendment, which does not categorically proscribe such exemptions, instead only forbidding their “unreasonable” exercise. More precisely, it requires that the government demonstrate that its actions are justified in the individual case when it seeks to avoid the general constraints of positive law. Whatever else may be said about the meaning of reasonableness, it seems to require the existence of *reasons*. A search is unreasonable if there is not the right kind of reason for it.<sup>144</sup> Similarly, the Warrant Clause is about warrants; a warrant is a kind of justification.<sup>145</sup> Thus the historic writ of *quo warranto* was one by

<sup>141</sup> As Professor Edward Rubin puts it, “when the government is subject to the same rules as it imposes on its citizens, it is acting as a property owner; when it uses its monopoly of legitimate force, it is acting in its public capacity.” Edward L. Rubin, *The Illusion of Property as a Right and Its Reality as an Imperfect Alternative*, 2013 WIS. L. REV. 573, 577 n.13 (citation omitted).

<sup>142</sup> See, e.g., *Reeves, Inc. v. Stake*, 447 U.S. 429, 439 (1980) (“Evenhandedness suggests that, when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause.”).

<sup>143</sup> See, e.g., *U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 129–30 (1981) (“[T]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.” (quoting *Greer v. Spock*, 424 U.S. 828, 836 (1976))); see also *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) (“[T]he government as employer indeed has far broader powers than does the government as sovereign.” (alteration in original) (quoting *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion))).

<sup>144</sup> See NOAH WEBSTER, 2 AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 824 (1828) (defining “unreasonable” to mean “1. Not agreeable to reason. 2. Exceeding the bounds of reason; claiming or insisting on more than is fit; as an unreasonable demand. 3. Immoderate; exorbitant; as an unreasonable love of life or of money. 4. Irrational.”); cf. Eric F. Citron, Note, *Right and Responsibility in Fourth Amendment Jurisprudence: The Problem with Pretext*, 116 YALE L.J. 1072, 1101 (2007) (“To call an action such as a search or seizure ‘unreasonable’ seems to contemplate that the action was inappropriate in light of the officer’s *reasons* for taking it.”). This is so even if, as Professor Thomas Davies argues, the use of “unreasonable” in the Fourth Amendment had a narrower and more specialized meaning, reflecting opposition only to searches and seizures conducted on the basis of unfounded warrants and general warrants. See Davies, *supra* note 48, at 686–93.

<sup>145</sup> See WEBSTER, *supra* note 144, at 876–77 (defining warrant in verb form as, inter alia, “[t]o authorize” and “[t]o justify,” and in noun form as “[a]uthority; power that authorizes or justifies any act” and “[r]ight; legality”); see also WILLIAM BURKITT, EXPOSITORY NOTES WITH

which a person could demand that a particular person demonstrate the authority by which they purported to act. It offered a way of testing the agency law basis for a person's action.<sup>146</sup> In demanding a justification for official action, *quo warranto* bears a certain resemblance to another of the prerogative writs, habeas corpus, which requires the person to whom it is issued to provide a justification for detaining someone in his custody. In his seminal work on the British constitution, Dicey celebrated habeas corpus precisely because it placed government under law.<sup>147</sup> The Fourth Amendment is of a piece, also addressing problems of legality and abuse of power, and demanding the right kind of legal justification. Requiring an adequate justification serves to prevent abuse of power both directly, by ensuring the propriety of any particular exercise of government's special authority, as well as indirectly, by reinforcing the idea that the government's coercive powers are exceptional, constrained by law, and justified only in reference to the public good.

#### D. Practical Advantages

In addition to the strong theoretical basis for the positive law model, the model has a number of practical advantages.

1. *Clarity.* — A signal advantage of the positive law model is that it is clearer, more predictable, and more determinate than the *Katz* test, or indeed than any plausible alternative we know of. To be sure, it is only as predictable as the underlying positive law, but that is often quite predictable nonetheless. While there are plenty of cases at the margins, the positive law handles problems like mail theft, garbage sifting, computer hacking, and surreptitious tailing relatively well. The clarity supplied by the positive law model places freedoms on a surer footing, gives better guidance to government officials, and makes it much easier to evaluate the correctness of a given Fourth Amendment ruling.

The doctrine of qualified immunity vividly illustrates the need for such clarity. Qualified immunity means that a government officer cannot be held personally liable for violating someone's constitutional right unless the right was "clearly established."<sup>148</sup> Given the endemic

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PRACTICAL OBSERVATIONS ON THE NEW TESTAMENT OF OUR LORD AND SAVIOUR JESUS CHRIST 279 (17th ed. 1772) ("[G]ood intentions are no warrant for irregular actions.").

<sup>146</sup> See 3 WILLIAM BLACKSTONE, COMMENTARIES \*262 ("A writ of *quo warranto* is in the nature of a writ of right for the king, against him who claims or usurps any office, franchise, or liberty, to inquire by what authority he supports his claim, in order to determine the right.").

<sup>147</sup> See DICEY, *supra* note 133, at 206–09; cf. WILLIAM F. SWINDLER, MAGNA CARTA: LEGEND AND LEGACY 172 (1965) (giving account of Coke's declaration to James I that "[t]he King ought to be under no man, but under God and the law").

<sup>148</sup> *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

unpredictability of *Katz*, that condition is often unmet. Fourth Amendment cases account for a large portion of qualified immunity decisions, and it is worth asking whether the doctrine would exist in anything like its current form were it not for the sense that personal liability for police officers cannot be combined with the muddle of *Katz*. At any rate, we count at least three times in the past twenty years that the Supreme Court has awarded qualified immunity because of unclear expectations of privacy that the positive law model could have clarified,<sup>149</sup> and we are sure we could find more such cases in the courts of appeals.<sup>150</sup> The “good faith” doctrine operates to similarly eliminate the other principal remedy for Fourth Amendment violations — the exclusionary rule.<sup>151</sup> Federal appeals courts split over Fourth Amendment protection for cell-site data, for instance, but even in those circuits that found Fourth Amendment protection, the good faith doctrine meant that the exclusionary rule was unavailable.<sup>152</sup> In general, we expect positive law to be less uncertain than the *Katz* standard, and also to supply many more cases for the articulation of the law.

2. *Adaptability*. — But perhaps more important than providing well-settled answers is that the positive law model provides a well-settled *method* for resolving the many new Fourth Amendment scenarios that arise every decade. While past applications of the reasonable expectations of privacy test may sometimes be well settled, simply as a matter of judicial fiat,<sup>153</sup> it is tougher to figure out how to apply it to new situations. A normative test based on reasonable expectations of privacy poses serious challenges for judges or lawyers trying to find common ground. And while there is no shortage of proposals to resolve the uncertainty, that overabundance of proposals is precisely the problem.

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<sup>149</sup> They are *Pearson v. Callahan*, 555 U.S. 223 (2009), *Hanlon v. Berger*, 526 U.S. 808 (1999), and *Wilson v. Layne*, 526 U.S. 603 (1999).

<sup>150</sup> See, e.g., *Coffin v. Brandau*, 642 F.3d 999, 1017 (11th Cir. 2011) (en banc) (granting qualified immunity when deputy sheriffs unconstitutionally entered garage while the owner tried to close the door on them); *Rehberg v. Paulk*, 611 F.3d 828, 847 (11th Cir. 2010) (granting qualified immunity because privacy rights in email were not clearly established), *aff'd on unrelated issue*, 132 S. Ct. 1497 (2012); see also *Moore v. Pederson*, 806 F.3d 1036, 1048–49 (11th Cir. 2015); *Fortson v. City of Elberton*, 592 F. App'x 819, 823 (11th Cir. 2014); *Doe v. Heck*, 327 F.3d 492, 515–16 (7th Cir. 2003); *Tarantino v. Baker*, 825 F.2d 772, 777–78 (4th Cir. 1987).

<sup>151</sup> See *Davis v. United States*, 131 S. Ct. 2419 (2011); *Herring v. United States*, 555 U.S. 135 (2009).

<sup>152</sup> See, e.g., *United States v. Graham*, 796 F.3d 332, 361 (4th Cir. 2015), *reh'g en banc granted*, No. 12-4659, 2015 WL 6531272 (4th Cir. Oct. 28, 2015). For other cases applying the good faith exception because of unclear expectations of privacy, see *United States v. Cannon*, 703 F.3d 407, 412 (8th Cir. 2013); *United States v. Flores*, 640 F.3d 638, 642 (5th Cir. 2011); and *United States v. Taylor*, 119 F.3d 625, 630 (8th Cir. 1997).

<sup>153</sup> See *Kerr*, *supra* note 22, at 94–97.

An empirical test based on surveying actual members of the public is a possible solution.<sup>154</sup> But even if one puts aside the standard objections based on the circularity of the enterprise, it is hard to scale. To run the surveys well is nontrivially expensive,<sup>155</sup> and to match the pace of the courts would require a whole lot of surveys. Moreover, even seemingly minor changes in factual contexts could require new surveys if it turns out that judges are bad at predicting which factual changes are in fact dispositive to the public. Indeed, one of the first such Fourth Amendment surveys has shown that most people do not care about the duration of warrantless GPS surveillance, even though four Supreme Court Justices thought the duration a crucial factor to “reasonable expectations of privacy.”<sup>156</sup> Perhaps criminal prosecutions could be remade to turn on expert evidence about the habits and tastes of the general public, like trademark or antitrust suits, but the courts have shown no desire to move in such a direction.

By contrast, the positive law model has the capacity to resolve Fourth Amendment cases in practice because of its reliance on the traditional tools of legal reasoning and the existing materials of positive law. Rather than divining social understandings or fashioning wise policies of investigative procedure, the positive law model calls for the bread and butter of the legal profession — doctrinal analysis. It is a task that is both more appropriate to judges’ roles and more suited to their capabilities.

3. *Institutions.* — Finally, the positive law model harnesses the capabilities of government institutions to engage in principled legal change. The positive law model carves out significant room for legislative participation in the Fourth Amendment context. While positive law isn’t limited to statutory enactments, it certainly includes them. From the standpoint of constitutional theory, a strong argument can be made that legislatures are better positioned to make up rules than courts, while courts are better at providing procedural constraints on the legislative process than they are at devising and updating rules themselves. That view, at any rate, is consistent with the general insight of John Hart Ely, who argued that “judicial review under the Constitution’s open-ended provisions . . . can appropriately concern itself only with questions of participation, and not with the substantive

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<sup>154</sup> See Kugler & Strahilevitz, *supra* note 46; see also SLOBOGIN, *supra* note 23, at 108–14 (describing a study on attitudes toward closed-camera surveillance).

<sup>155</sup> Kugler and Strahilevitz report that, not including their own time, their survey on the mosaic theory cost \$4550, which they call “cheap.” Kugler & Strahilevitz, *supra* note 46, at 25–26 & 26 n.124.

<sup>156</sup> *Id.* at 34; see also Matthew Tokson, Knowledge and Fourth Amendment Privacy 26–32 (Dec. 30, 2015) (unpublished draft) (on file with the Harvard Law School Library) (suggesting that judicial intuitions about popular knowledge of surveillance are not very accurate).

merits of the political choice under attack.”<sup>157</sup> This “representation-reinforcing”<sup>158</sup> theory, though by no means uncontroversial, has proven remarkably influential and is in many ways the starting point of normative constitutional thinking today. In the realm of privacy, it suggests that courts shouldn’t construct a freestanding law of privacy — rather, they should leave contested choices of substance to legislatures while ensuring that the processes protect political equality.<sup>159</sup> The positive law model of the Fourth Amendment conforms to that insight by harnessing the adaptive lawmaking power of legislatures, while tethering their police power to popular rights.<sup>160</sup>

Prominent judges have called for legislative definition of privacy rights in the use of new technology. Judge Sutton argues that because courts will be “unable to take the lead” in responding to “the challenges posed by new technology,” that job “will *necessarily* fall in part to the legislative branch.”<sup>161</sup> Justice Alito has repeatedly called for legislative guidance, saying: “In circumstances involving dramatic technological change, the best solution to privacy concerns may be legislative. A legislative body is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way.”<sup>162</sup> Similar statements from other judges are legion.<sup>163</sup>

<sup>157</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST* 181 (1980).

<sup>158</sup> *Id.* at 87.

<sup>159</sup> For similar insights, see John Rappaport, *Second-Order Regulation of Law Enforcement*, 103 CALIF. L. REV. 205, 232–36, 267–68 (2015).

<sup>160</sup> This isn’t to say that Ely would necessarily share our substantive prescriptions. See ELY, *supra* note 157, at 172–73 (discussing only second step); see also Wasserstrom & Seidman, *supra* note 7, at 92–103 (explaining Ely’s representative reinforcement theory, *id.* at 92–93, and applying it to the “reasonable expectation of privacy” analysis, *id.* at 97). But we don’t think it was a coincidence that Ely grasped that “the notion of ‘privacy’ proves inadequate as an explanation” for the Fourth Amendment and that it was heavily concerned with “a fear of official discretion” and “avoiding indefensible inequities in treatment.” ELY, *supra* note 157, at 96–97.

<sup>161</sup> Jeffrey S. Sutton, *Courts, Rights, and New Technology: Judging in an Ever-Changing World*, 8 N.Y.U. J.L. & LIBERTY 261, 278–79 (2014).

<sup>162</sup> *United States v. Jones*, 132 S. Ct. 945, 964 (2012) (Alito, J., concurring in the judgment) (citation omitted); see also *Riley v. California*, 134 S. Ct. 2473, 2497–98 (2014) (Alito, J., concurring in part and concurring in the judgment) (“Legislatures, elected by the people, are in a better position than we are to assess and respond to the changes that have already occurred and those that almost certainly will take place in the future.”).

<sup>163</sup> See, e.g., *United States v. Davis*, 785 F.3d 498, 520 (11th Cir. 2015) (Pryor, J., concurring) (“If the rapid development of technology has any implications for our interpretation of the Fourth Amendment, it militates in favor of judicial caution, because Congress, not the judiciary, has the institutional competence to evaluate complex and evolving technologies.”); *In re Askin*, 47 F.3d 100, 105–06 (4th Cir. 1995) (Wilkinson, J., for the court) (“In the fast-developing area of communications technology, courts should be cautious not to wield the amorphous ‘reasonable expectation of privacy’ standard in a manner that nullifies the balance between privacy rights and law enforcement needs struck by Congress in Title III.” (citation omitted)).

This legislative approach has obvious benefits. Where judicial decisions interpreting the Fourth Amendment create precedents that can be altered only in accordance with the doctrine of stare decisis, the positive law model enables change to occur as quickly as a legislature is willing to make it. By including legislative bodies, the positive law model draws upon their institutional advantages when it comes to factfinding, awareness of popular sentiment, and the ability to strike compromises by drawing arbitrary lines, rather than arguing from principle.

The positive law model can also draw on the advantages of decentralization within a federal system. Different jurisdictions can experiment with different approaches to individual issues, learning from one another or fashioning the legal practices best suited for their particular conditions.

But without the Ely-like assistance that the positive law model offers, a legislative approach has problems of self-dealing and under-protection.<sup>164</sup> Law enforcement authorities are part of the government and apt to receive special treatment when the government writes the rules. One might hope that democratic processes will check such special treatment, but criminal defendants are famously unpopular in the legislative process.<sup>165</sup> As Professor Erin Murphy reports, “law enforcement is the sole interest consistently exempted from general [privacy] provisions,” and “law enforcement regularly offers its perspective on, and plays a critical role in shaping, not just those exemptions but the terms of the statutes themselves.”<sup>166</sup> That is what rings hollow about the Fifth Circuit’s suggestion that those who want greater privacy protection for cell phone records should be “lobbying elected representatives to enact statutory protections.”<sup>167</sup> And of course the very point of constitutionally guaranteeing rights is to give them special protection from the ordinary legislative process.

The positive law model accomplishes this by subjecting legislative solutions to the constraint of nonexceptionalism.<sup>168</sup> The government

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<sup>164</sup> See, e.g., Donald A. Dripps, *Responding to the Challenges of Contextual Change and Legal Dynamism in Interpreting the Fourth Amendment*, 81 MISS. L.J. 1085, 1125–26 (2012).

<sup>165</sup> See Erin Murphy, *The Politics of Privacy in the Criminal Justice System: Information Disclosure, the Fourth Amendment, and Statutory Law Enforcement Exemptions*, 111 MICH. L. REV. 485, 503–07 (2013); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 783–84 (2006). See generally Donald A. Dripps, Essay, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079 (1993).

<sup>166</sup> Murphy, *supra* note 165, at 503; see also David Alan Sklansky, *Two More Ways Not to Think About Privacy and the Fourth Amendment*, 82 U. CHI. L. REV. 223, 227 (2015).

<sup>167</sup> *In re Application of the U.S. for Historical Cell Site Data*, 724 F.3d 600, 615 (5th Cir. 2013), discussed *infra* note 258. The court did also mention market solutions, *id.*, though those are not facilitated by the current legal regime.

<sup>168</sup> See Note, *supra* note 28, at 1647–48.

generally has a free hand to decide what interests will or won't be protected by law in the first instance. Maybe we want a world where each of us can freely traipse through one another's backyards or freely soar above them; maybe we don't. Maybe we want a world that allows promiscuous sharing of electronic messages and information; maybe we don't. The positive law model frees us to make any of those choices, so long as we make them generally.<sup>169</sup> Special exemptions for the government, by contrast, have to satisfy the Fourth Amendment's reasonableness requirement.<sup>170</sup>

The positive law model thus ties the neglected interests of those who face government investigation to the much broader interests of society at large. By ensuring judicial scrutiny whenever government invades general positive law rights, it can be said to give potential criminal defendants a form of virtual representation in the legislative process. It thus allows judges to get assistance in adapting the law without abdicating their constitutional role in maintaining an equilibrium between law enforcement needs and privacy concerns.

### *E. Privacy and Beyond*

Some Fourth Amendment scholars criticize the reasonable expectations of privacy construct by asking us to imagine a world without social or legal privacy. Professor Paul Ohm paints "a nation without privacy, one in which powerful companies watched the moves of every citizen, with the full awareness and consent of the watched," and then handed this information to the police upon request.<sup>171</sup> Similarly, Professor Jed Rubenfeld asks us to:

Imagine a society in which undercover police officers are ubiquitous. Nearly every workplace has at least one, as does nearly every public park, every store and restaurant, every train and plane, every university classroom, and so on. These undercover agents wear hidden microphones and video cameras, recording and transmitting everything they hear or see. Your colleagues, coworkers, or closest friends may be spies. Perhaps there is one in your own family.

Existing Fourth Amendment law would find nothing wrong with this picture.<sup>172</sup>

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<sup>169</sup> The positive law also fills in the gaps in legislation with the common law, so that there are still legal rules when legislatures have not acted, which Sklansky reminds us is common. See Sklansky, *supra* note 166, at 229–30.

<sup>170</sup> Some have argued that Americans in fact favor restricting government invasions of privacy more than private invasions. See, e.g., James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1161–62, 1219 (2004). If true, nothing in the positive law model stops, or even discourages, them from doing so. For more on the differences between government and private actors, see *infra* section II.F.3, pp. 1864–66.

<sup>171</sup> Ohm, *supra* note 24, at 1310.

<sup>172</sup> Rubenfeld, *supra* note 7, at 104.

It seems unthinkable that such a society would be constitutionally permitted, these scholars say, and hence there must be something wrong with the reasonable expectations of privacy construct. We agree, of course, that there is something wrong with the reasonable expectations of privacy construct; but we think that these scholars take the wrong lesson from the imagined future scenarios. In a sense they are still too fixated on privacy.

We do think that the positive law model makes such scenarios much less likely to arise. For instance, under the positive law model there are substantial constraints on the ability of police to obtain information from private parties — in contrast to the situation under the *Katz*-derived “third-party doctrine” that currently governs such questions.<sup>173</sup> And more generally, it would be categorically lawful to have such an undercover officer in every workplace, classroom, and business only if surreptitious video and voice recording were made categorically legal for everyone.<sup>174</sup>

But at the same time, we think these hypotheticals also miss the point. If some kind of public panopticon arises in a lawful and general way — one in which jilted lovers, muckraking bloggers, and police officers are all free to traffic in our online data or surreptitiously record everything they see — the positive law model suggests that the Fourth Amendment has nothing bad to say about those choices. If we are right that the Fourth Amendment is about uniquely governmental power, this makes perfect sense. What might trouble contemporary readers about those regimes is just that they have different norms of property or privacy than we might prefer, not that the government has any special privilege vis-à-vis the security of the people.

What is the point of such positivism? For one thing, this model allows privacy to float. Any given generation might well have a coherent theory — or at least a general attitude — of the proper sphere of privacy.<sup>175</sup> But that sphere can change over time, and in ways any given generation may find hard to anticipate or even to understand.<sup>176</sup>

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<sup>173</sup> See *infra* section III.B, pp. 1871–81, for citations and discussion.

<sup>174</sup> See 2 JAMES G. CARR, PATRICIA L. BELLIA & EVAN A. CREUTZ, LAW OF ELECTRONIC SURVEILLANCE § 8:43, Westlaw (database updated Mar. 2016) (cataloging possible legal bars).

<sup>175</sup> See Matthew B. Kugler, Affinities in Privacy Attitudes: A Psychological Approach to Unifying Informational and Decisional Privacy 3 (July 21, 2014) (unpublished manuscript), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2469562](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2469562) [<http://perma.cc/YL4N-G78N>] (presenting data suggesting an “internal coherence to privacy attitudes” across different dimensions).

<sup>176</sup> Compare Whitman, *supra* note 170, at 1154 (“Anyone who wants a vivid example can visit the ruins of Ephesus, where the modern tourist can set himself down on one of numerous ancient toilet seats in a public hall where well-to-do Ephesians gathered to commune, two thousand years ago, as they collectively emptied their bowels.”), with *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1229 (7th Cir. 1993) (Posner, J.) (“Although it is well known that every human being defecates, no adult human being in our society wants a newspaper to show a picture of him defecating.”).

For instance, almost a century ago a law review published the skeptical comment that “[s]ome social writers claim that the home means far less than in the past,” and if true, “we ought to give less importance to the privacy of the home, and more to the safety deposit vault or the other places to which the instincts of privacy have been attached in this modern age.”<sup>177</sup>

Indeed, what is notable about privacy is that it is also not obvious that it is an unalloyed good. And indeed sometimes it is affirmatively bad. One person’s right to be let alone frequently runs into another’s right to know or right to speak — demonstrated dramatically by recent disputes about the right to be “forgotten” by Google’s search engine<sup>178</sup> or the right to record the activities of the police.<sup>179</sup> Indeed, the concept of “privacy” is used to cover a disparate set of ideas ranging from seclusion to informational secrecy to autonomy.<sup>180</sup> Privacy has been defined so pluralistically that in many circumstances “privacy also clashes with itself.”<sup>181</sup> The positive law model abjures the ultimate answers to these questions by saying instead that *whatever* privacy is in a given legal regime is what must be respected.<sup>182</sup>

This brings us to an additional advantage of the positive law model, which is that it is able to respond to the full range of interests that positive law itself protects. As we’ve discussed, that surely *includes* privacy. But it does not stop there. Rather, the positive law model protects the wider set of values and aims that positive law seeks to advance. These include personal security and autonomy;<sup>183</sup> freedom from harassment;<sup>184</sup> dignity, as in the case of a strip search;<sup>185</sup> protec-

<sup>177</sup> Thomas E. Atkinson, Note and Comment, *What Is an Unreasonable Search?*, 24 MICH. L. REV. 277, 281 (1926).

<sup>178</sup> Andrew Tutt, *The Revisability Principle*, 66 HASTINGS L.J. 1113, 1117–19 (2015).

<sup>179</sup> Wesley J. Campbell, *Speech-Facilitating Conduct*, 68 STAN. L. REV. 1, 59–60 (2016).

<sup>180</sup> Martha C. Nussbaum, *Sex Equality, Liberty, and Privacy: A Comparative Approach to the Feminist Critique*, in INDIA’S LIVING CONSTITUTION 242, 247–53 (Zoya Hasan, E. Sridharan & R. Sudarshan eds., 2002); Judith Jarvis Thomson, *The Right to Privacy*, 4 PHIL. & PUB. AFF. 295 (1975).

<sup>181</sup> David E. Pozen, *Privacy-Privacy Tradeoffs*, 83 U. CHI. L. REV. (forthcoming 2016) (manuscript at 2), <http://ssrn.com/abstract=2624281> [<http://perma.cc/6VXR-RB6N>].

<sup>182</sup> Thomson, *supra* note 180, at 313.

<sup>183</sup> See JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 43 (3d ed. 2008). Compare Rubenfeld, *supra* note 7, at 119–22 (discussing importance of “security” in the Fourth Amendment), with Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 739 (1964) (discussing function of property law in providing security).

<sup>184</sup> Cf. *Hudson v. Palmer*, 468 U.S. 517, 529–30 (1984) (noting prisoner’s argument that “he is constitutionally entitled not to be subjected to searches conducted only to harass,” *id.* at 529).

<sup>185</sup> Sklansky, *supra* note 23, at 1102–06. Sklansky would label this dignity a kind of privacy, a semantic point to which we have no objection.

tion of economic investments<sup>186</sup> and of incentives to cultivate resources; political freedom; and emotional attachment to the things that one owns.<sup>187</sup> Moreover, the positive law delineates the extent of this protection in ways that may also embed compromises not susceptible to the often-reductive terminology of legislative interests.

The Supreme Court once remarked that property law “furthers a range of interests that have nothing to do with privacy,” and concluded that property should not therefore automatically trigger Fourth Amendment protection.<sup>188</sup> The Court was correct about the open-endedness of property and, we would add, of positive law more generally, but it drew the wrong conclusion from its observation. That the law advances other interests besides privacy is *just the point*: to restrict Fourth Amendment protection to privacy is to leave other important interests unprotected from government abuse.

### F. Objections

In the course of laying out the affirmative case for the positive law model, we have implicitly responded to what we take to be the most sweeping argument against it — that the positive law model ignores the purpose of Fourth Amendment law by directing attention away from ideas about privacy. We can imagine several other objections to what we have proposed, however, and offer a few words by way of response under three general categories — objections based on mutability, on administrability, and on an argument that we have the wrong baseline.

1. *Mutability*. — One form of objection to the positive law model is that constitutional meaning cannot or should not change over time or from place to place. The Supreme Court, for instance, has at times scoffed at the idea that Fourth Amendment protections would “vary from place to place and from time to time.”<sup>189</sup> We do understand the impulse. Sustaining important civil liberties against strong countervailing pressures seems more plausible with a relatively fixed sense of what those liberties entail.

First consider time. We generally think the purpose of a constitutional principle is to freeze something in time.<sup>190</sup> The use of positive

<sup>186</sup> See William Alden, *F.B.I. Raid Was Blamed for the Demise of Two Hedge Funds*, N.Y. TIMES, Dec. 11, 2014, at B2.

<sup>187</sup> Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 960 (1982).

<sup>188</sup> *Oliver v. United States*, 466 U.S. 170, 183 n.15 (1984).

<sup>189</sup> *Virginia v. Moore*, 553 U.S. 164, 176 (2008) (quoting *Whren v. United States*, 517 U.S. 806, 815 (1996)).

<sup>190</sup> See generally Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1 (2015). To be sure, the “something” could well be at a high level of abstraction. See generally David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739 (2000).

law, however, *is* itself a firm principle, as is the principle of governmental exceptionalism. In other words, the Fourth Amendment's meaning is indeed fixed, but what is fixed is precisely a principle of government nondiscrimination where personal security is concerned. In that way it operates like countless other constitutional principles whose *application* may change even as the core *principle* remains constant.<sup>191</sup> Indeed, the Court has recognized this distinction in the Fourth Amendment context specifically. In *Kyllo*, the Court held that the use of a thermal imager was a search because the technology was not "in general public use."<sup>192</sup> That fact, of course, could change and arguably has changed in the past decade.<sup>193</sup> Hence the application of the Fourth Amendment to thermal imagers might well vary "from time to time."<sup>194</sup> Yet the Court quite correctly did not think such variance undermined the fixity of the constitutional text or the "preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted."<sup>195</sup>

Now for place. Even conceding that constitutional applications vary over time, one might have a specific suspicion of letting constitutional protections depend on state law and hence vary "from place to place."<sup>196</sup> But once again, we think such variance is in fact constitutionally unexceptional. We have already stressed the advantages of a constitutional model that can capitalize on the institutional strengths of legislatures and on the benefits of federalist constitutional structure. And the premise that constitutional rights must operate without reference to background positive law to be effective simply is not right, as we have shown by pointing to constitutional property doctrines.

But in fact, at a deeper level, *many* constitutional entitlements depend in part on background positive law.<sup>197</sup> Consider antidiscrimination rules. Suppose the State of Oklahoma makes a particular tax

<sup>191</sup> See JACK M. BALKIN, *LIVING ORIGINALISM* (2011) for examples of the ubiquity of such reasoning. See also William Baude, *State Regulation and the Necessary and Proper Clause*, 65 CASE W. RES. L. REV. 513, 520–23 (2015).

<sup>192</sup> *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

<sup>193</sup> See Orin Kerr, *Can the Police Now Use Thermal Imaging Devices Without a Warrant? A Reexamination of Kyllo in Light of the Widespread Use of Infrared Temperature Sensors*, VOLOKH CONSPIRACY (Jan. 4, 2010, 12:33 PM), <http://volokh.com/2010/01/04/can-the-police-now-use-thermal-imaging-devices-without-a-warrant-a-reexamination-of-kyllo-in-light-of-the-widespread-use-of-infrared-temperature-sensors> [<http://perma.cc/PS39-8T24>].

<sup>194</sup> *Moore*, 553 U.S. at 176 (quoting *Whren*, 517 U.S. at 815).

<sup>195</sup> *Kyllo*, 533 U.S. at 34; see also David A. Sklansky, *Back to the Future: Kyllo, Katz, and Common Law*, 72 MISS. L.J. 143, 147, 187–90 (2002) (praising *Kyllo*'s less wooden approach to constitutional history).

<sup>196</sup> *Moore*, 553 U.S. at 176 (quoting *Whren*, 517 U.S. at 815); see also Sacharoff, *supra* note 22, at 913–17. But see Baude, *supra* note 191, at 523 (responding to this suspicion).

<sup>197</sup> For examples of this point specifically in criminal procedure, see Wayne A. Logan, *Contingent Constitutionalism: State and Local Criminal Laws and the Applicability of Federal Constitutional Rights*, 51 WM. & MARY L. REV. 143 (2009).

credit available to male taxpayers, while the State of Nebraska does not. The Equal Protection Clause will require that the tax credit be given to women in Oklahoma, but it will not in Nebraska.<sup>198</sup> Similarly, if one state has all-white public schools, and another state has no public schools, the Equal Protection Clause gives nonwhite children a right to public school in one state but not the other. These results are unremarkable; no one would object that the Equal Protection Clause means different things in one state than in another.

A skeptic might respond that our analogy misses the point, because the Equal Protection Clause is an antidiscrimination provision. But under the positive law model, the Fourth Amendment is *also* a kind of antidiscrimination provision: it calls for heightened scrutiny of legal rules that discriminate in favor of government officials.<sup>199</sup> And it would not be the only part of the Bill of Rights to have an antidiscrimination component. Think of the First Amendment, which has at its core a requirement of content neutrality,<sup>200</sup> and therefore can have different consequences depending on the generally applicable law. Levying a four percent tax on printing presses would be unremarkable in a state that imposed such a tax on all industrial or commercial equipment, but it would run into constitutional trouble in a state where it was imposed on printing equipment alone.<sup>201</sup>

2. *Administrability.* — Another argument that might be made is that positive law itself is not terribly clear in many instances, and, moreover, often calls for the same kind of analysis that *Katz* requires. Consequently, this argument goes, the positive law model merely shifts the drama offstage, adding complexity without lessening confusion in Fourth Amendment cases. We certainly would not dispute that positive law may be unclear or unsettled on some questions, but we are confident the positive law model would still clarify matters substantially. Positive law can hardly do *worse* than *Katz*, and it often does better. One reason is that positive law includes statutes, and while statutes can be and sometimes are vague or indeterminate on particular questions, they can also speak with a precision that is harder for

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<sup>198</sup> See Evan H. Caminker, *A Norm-Based Remedial Model for Underinclusive Statutes*, 95 YALE L.J. 1185, 1186–87 (1986).

<sup>199</sup> One might object that antidiscrimination concepts don't apply to unequal laws that *privilege* a select group, but that's not true of laws that privilege one kind of speech, *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015); it's not true of laws that specifically privilege the white race above others, *Loving v. Virginia*, 388 U.S. 1, 11 (1967); and of course it's not true of laws that privilege a particular religion, *Larson v. Valente*, 456 U.S. 228, 252–54 (1982); *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968).

<sup>200</sup> See *Reed*, 135 S. Ct. at 2226. See generally Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987).

<sup>201</sup> See *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575 (1983).

common law decisions to achieve.<sup>202</sup> We also suspect the positive law model itself will contribute to greater definition of positive law in a way that is more likely to have sticking power across time. A decision that, say, using a thermal-imaging camera is or is not proscribed by a state's privacy statute is likely to elicit some response from the state if it is off-base because that misreading may have wider implications.

One might instead run this argument from the point of view of the police officer. Should we really expect police officers to familiarize themselves with the technicalities of trespass law, with FAA regulations and municipal garbage ordinances — indeed, with virtually all of the law in their jurisdiction?<sup>203</sup> We find something ironic about this objection. After all, the private people whose conduct police officers investigate are *all* held accountable for knowing the law, subject to the maxim that ignorance of the law is no excuse.<sup>204</sup> It does not strike us as too much to ask officials to know the content of the law that they are subject to in their days off.

One might say that our response is unfair to the police. After all, unlike most ordinary citizens, a police officer's job is to interact with unusual legal situations on a day-to-day basis. Most of us don't have to worry about the technicalities of trespass law because we have little reason to go snooping up to the limit of our neighbor's rights. But we think this objection also fades when one thinks about how the positive law model would likely work for police in practice.

Most of the activities of ordinary police work — dealing with people on the beat, ordinary questioning, and searches of homes and cars and businesses — will be handled in a pretty obvious and straightforward way. Arresting people or coming into their house will remain a seizure and a search much like it is now. The big changes worked by the positive law model are most likely to happen precisely when the police are knowingly doing something innovative or unusual — using drones or GPS devices or clever tricks to get around the traditional limits of their investigative powers. These kinds of innovative investigative practices are ones where police departments might have to do a little legal research, and that strikes us as exactly right. When police are intentionally pushing the limits of their power is precisely when we can ask them to check whether they are pushing too far.

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<sup>202</sup> See Kent Greenawalt, *How Law Can Be Determinate*, 38 UCLA L. REV. 1, 62–65 (1990).

<sup>203</sup> Cf. Jennifer E. Laurin, *Heien* and Paradigms of Reasonableness in Fourth Amendment Law 22–24 (unpublished manuscript) (on file with the Harvard Law School Library) (describing “Reasonableness as Blamelessness” as a form of empathy for police mistakes, *id.* at 22).

<sup>204</sup> Cf. Richard H. McAdams, *Close Enough for Government Work? Heien's Less-than-Reasonable Mistake of the Rule of Law*, 2016 SUP. CT. REV. (forthcoming) (discussing this maxim and its symmetric application to the police).

A different version of the administrability argument would key off of the practical difficulty of *nonuniformity*. Even if it is theoretically acceptable to have a Fourth Amendment whose content varies from jurisdiction to jurisdiction, it will simply be practically cumbersome, particularly for federal officials whose operations span multiple states.

The force of this argument is likewise doubtful. For starters, we think the degree of nonuniformity that would result under the positive law model is easy to overstate. Although it might theoretically be possible for every state to have its own entirely distinctive rules of property law, for instance, there is considerable consistency across all of the states, and it must be remembered that the point of comparison is *Katz's* highly uncertain reasonable expectation of privacy standard. States can also take steps to bring about greater uniformity by coordinating with one another through devices like model and uniform laws, and, moreover, the federal government can encourage states to undertake such steps through a variety of means including lobbying, conditional spending, and threatened preemption. But in the final analysis, it is true that diversity of laws is a possibility. That is the price, but also the benefit, of federalism.

But this objection does point to a deeper consequence of the positive law model, though we are not sure it can be classified as an objection. It is possible that the positive law model would result in some institutional changes to the litigation of Fourth Amendment questions. Federal courts already resolve state law questions in criminal cases — as illustrated by the many cases in which federal courts parse state traffic law to decide the legality of a traffic stop.<sup>205</sup> But the positive law model would no doubt increase the number of cases where state law issues are relevant, and in many cases, the state courts would generate precedent that the federal courts would simply follow under *Erie*.<sup>206</sup> Still, in other cases, the state law question might be unsettled, which would heighten the relevance of the technical machinery of federal procedure like the “*Erie* guess” — “predicting how the relevant state’s highest court would [rule] if it were given the opportunity”<sup>207</sup> —

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<sup>205</sup> See, e.g., *United States v. (Henry) Martinez*, 518 F.3d 763, 767 (10th Cir. 2008) (interpreting Kansas law); *United States v. (Jorge) Martinez*, 512 F.3d 1268, 1273 (10th Cir. 2008) (interpreting California law); *United States v. Ledesma*, 447 F.3d 1307, 1313 (10th Cir. 2006) (interpreting Kansas law); *United States v. DeGasso*, 369 F.3d 1139, 1145 (10th Cir. 2004) (interpreting Oklahoma law). See generally Wayne A. Logan, *Erie and Federal Criminal Courts*, 63 VAND. L. REV. 1243 (2010) (noting the prevalence of such cases).

<sup>206</sup> *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

<sup>207</sup> Ryan D. Doerfler, *Mead As (Mostly) Moot: Predictive Interpretation in Administrative Law*, 36 CARDOZO L. REV. 499, 522 & n.119 (2014); see also Logan, *supra* note 205, at 1286 (describing this prediction as “the second-best option to certification” in criminal cases).

or certification to state courts.<sup>208</sup> At first the use of these tools in criminal cases might seem unfamiliar,<sup>209</sup> but we suspect that they would not be hard to master, especially since most federal judges are generalists with both civil and criminal dockets. If for some reason the existing tools were inadequate, a new federal rule of criminal procedure could be considered too. State courts, on the other hand, would likely find it relatively easy to handle any state law materials relevant to the positive law model. Indeed, the positive law model might furnish a useful occasion for remembering that the vast majority of criminal cases, and hence the vast majority of Fourth Amendment questions, are litigated in state rather than federal court.<sup>210</sup>

Similarly, the positive law model may raise the salience of choice of law problems in federal law. What law (besides federal positive law) applies if a government agency in Washington accesses a server in California to view the data of an individual in Massachusetts? But while the question may seem hard, the doctrinal resources for answering it — the field of conflict of laws — are rich.

For instance, one of us has already argued that federal rules that depend on state law raise special choice of law problems, but they are problems that can be resolved through careful analysis.<sup>211</sup> The other of us has pointed to the importance of uniformity in choice of law rules, especially when dealing with property.<sup>212</sup> We hesitate to offer premature guesses to the choice of law problems here, precisely because we think they merit more extended treatment, but we are confident that conflict of laws scholars have the resources to resolve them.

Our larger observation here is simply this: It is indeed possible, even likely, that the positive law model would lead to some changes in the structure of litigation of Fourth Amendment questions. Some of those changes might be quite modest, and some might turn out to be more profound. But those changes also help us to see that objections on the basis of unworkability should be looked at in a broader per-

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<sup>208</sup> On the “significant appeal” of certification in criminal cases, see Logan, *supra* note 205, at 1280–82. On certification more generally, see RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1116–19 (7th ed. 2015).

<sup>209</sup> See, e.g., Logan, *supra* note 205, at 1261–65 (describing federal courts’ “dismissiveness” of the obligation to apply “state interpretive preferences,” *id.* at 1261); see also *DeGasso*, 369 F.3d at 1155 (Baldock, J., dissenting) (complaining that “attempt[ing] to predict what the state’s highest court would do” is appropriate in civil but not criminal cases (quoting *id.* at 1145 (majority opinion))).

<sup>210</sup> We also note that the positive law model could have real intuitive appeal to state supreme courts and become a part of state constitutional doctrine, even if it does not take root in Fourth Amendment doctrine.

<sup>211</sup> See generally William Baude, *Beyond DOMA: Choice of State Law in Federal Statutes*, 64 STAN. L. REV. 1371 (2012).

<sup>212</sup> See James Y. Stern, *Property, Exclusivity, and Jurisdiction*, 100 VA. L. REV. 111, 117 (2014).

spective. The important role played by nonconstitutional law is one of the promises of the positive law model, not one of its perils.

3. *Baselines.* — Some may instead argue that background positive “law” is the wrong baseline against which to compare government action because the government has unique power that “law” doesn’t capture. One form of this argument might be to assert that the positive law background has artificial holes in its coverage to the extent there are certain acts that only the government is likely to wish to perform. What seems like neutral treatment of government officials in fact privileges them, but the privilege is effectively invisible to formal law. Suppose, for instance, that the only people interested in using thermal-imaging devices or drug-sniffing dogs are police departments. Maybe these investigative tools would be regulated if they were in widespread use, but because they are not widely used, they are not widely regulated.

There is force to this objection, but we suspect that the scenarios are exaggerated. For one thing, governmental investigatory tools are not as unique as one might think. You can buy a thermal-imaging device on Amazon that plugs into your phone for less than \$300,<sup>213</sup> and you can get the same data without the image for less than one-eighth the price by ordering a Black & Decker thermal leak detector, a “#1 Best Seller.”<sup>214</sup> You can hire private drug detection dogs too,<sup>215</sup> and apparently people do.<sup>216</sup> It is not as if private snooping and private investigation are unknown, or even rare. And of course sometimes positive law will operate at a higher level of generality than a very specific technology or technique. The discussion of implied licenses in *Jardines*,<sup>217</sup> for example, probably could have been resolved by the positive law without finding a case specifically about dogs. None of this means there will always be a legal regulation. After all, lawmakers may simply conclude they do not object to such behavior by private parties. But it does offer reason to be less concerned about the prospect of “holes” in the background canvas of positive law, if indeed we consider the divergence between actual law and the hypothetical law in some alternate state of affairs to be a hole.

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<sup>213</sup> *Seek Compact Thermal Imager for Android*, AMAZON, <http://www.amazon.com/Seek-UW-AAA-Thermal-Imaging-Connector/dp/B00NYWAHHM> [<http://perma.cc/RGK5-HHYP>].

<sup>214</sup> *Black & Decker TLD100 Thermal Leak Detector*, AMAZON, <http://www.amazon.com/dp/B001LMTW2S> [<http://perma.cc/BW2W-VCUN>].

<sup>215</sup> *See, e.g.*, DETECTION CANINE SERVICES, <http://detectioncanineservices.com> [<http://perma.cc/2JHU-HCMD>].

<sup>216</sup> *All Things Considered: Drug-Sniffing Dogs Ease Parents' Minds — Or Confirm Their Fears*, NPR (July 14, 2014, 12:16 PM), <http://www.npr.org/2014/07/15/331362828/drug-sniffing-dogs-ease-parents-minds-or-confirm-their-fears> [<http://perma.cc/L95D-G6JV>].

<sup>217</sup> *See supra* p. 1835.

It might also be said that it is artificial to liken the government to a private party on the basis of their formal similarity because the government can exert coercive force in ways whose uniqueness is not easily detected by the law. For instance, anybody can pay someone else to waive their rights. Yet when the government does it, the money it uses come from involuntary tax payments rather than market transactions. In a sense, the government forces A to pay B to waive B's rights.<sup>218</sup> The government can also obtain a waiver through implicit threat. When a police officer asks if he can search your car, he doesn't have to say out loud what he is threatening to do instead. When the Department of Justice asks a regulated industry for their business records, they don't have to say "antitrust scrutiny" for the company to get the gist.

Ultimately we see these questions of waiver and implicit threat as versions of the unconstitutional conditions problem, which is in no way unique to the Fourth Amendment context, and to which we volunteer no special solution.<sup>219</sup> While it is true that background positive law often turns on issues of consent, and thus the positive law model makes consent important, consent doctrines are ubiquitous in Fourth Amendment law as it stands, and very few theories seem prepared to erase them. What the positive law model does help to do, however, is identify the root of these unconstitutional conditions issues, which lies in the government's unique *sovereign* powers.<sup>220</sup> A doctrine sensitive to the varying dangers presented by the government's demands for the waiver of rights will center on assessing how much the government's ability to make such demands depends upon powers the legal system grants the government specially.

Ultimately we can imagine a slightly less formalistic refinement of the positive law model that might respond to some of these concerns in a different way. But we think it important to emphasize what such a refinement would and wouldn't entail. One might want to look especially hard to see whether laws that are formally neutral with respect to the government in fact smuggle in some kind of hidden legal privi-

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<sup>218</sup> Assuming B is also a taxpayer, the government can also be said to take B's money unless B agrees to waive his rights.

<sup>219</sup> Important proposals include RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* (1993); Einer Elhauge, *Contrived Threats v. Uncontrived Warnings: A General Solution to the Puzzles of Contractual Duress, Unconstitutional Conditions, and Blackmail*, 83 U. CHI. L. REV. (forthcoming 2016), <http://ssrn.com/abstract=2566053> [<http://perma.cc/4BGR-SLAZ>]; Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989 (1991); and Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989).

<sup>220</sup> See Stephen F. Williams, *Liberty and Property: The Problem of Government Benefits*, 12 J. LEGAL STUD. 3, 22 (1983). We might say the same about some questions about the use of government property.

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lege for government behavior.<sup>221</sup> But don't misunderstand this concession. The point is to make sure that the doctrine in fact responds to the core concerns of government exceptionalism and legality. But it would be a mistake, we think, to fret about whether any individual case reaches the "reasonable" outcome. The force of the positive law model is that it abjures a per se view about what outcomes are "right," which is part of what makes it positivist. If people want to live in fishbowls, the Fourth Amendment should not be what stops them, so long as the government swims alongside them. And, conversely, if people want to live in a world with robust limits on the ability to obtain certain information about one another, the Fourth Amendment should keep pace.

4. *Endogeneity*. — Finally, we expect some may object that it is a mistake to write as if positive law were wholly independent and will always shape Fourth Amendment needs, rather than the other way around. As we've emphasized, the positive law can and does change to meet the needs of society. One can imagine that under the positive law model, courts or legislatures will pick private rules of conduct with the goal of authorizing a tactic of police investigation. This might seem to rob the positive law of its constraining force, and injure private interests in the bargain.

First of all, we are skeptical that this will happen regularly. Fourth Amendment doctrine already allows government officials to do things that private parties can't, so long as they obtain a warrant or otherwise satisfy a judicial determination of reasonableness. To imagine that lawmakers would be eager to ratchet down otherwise-desired private protections because they want to aid the police would require us to imagine not just that enabling the police or other officials is an overwhelming priority, but also that the practices couldn't be sustained under the Fourth Amendment's second step. We submit that such circumstances will be relatively rare. Moreover, we note that nothing comparable seems to have happened in the law of property. Even though positive law rights establish the baseline for the Fifth Amendment, we aren't aware of widespread attempts by lawmakers or common law courts to dilute property rights in private law so as to facilitate government regulation.

But even if we assume that the positive law will sometimes be shaped by looming Fourth Amendment concerns, we do not think this a devastating problem. By its nature, this will be most likely to take place when the private concerns are unimportant relative to the gov-

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<sup>221</sup> The problem might arise, for instance, in privacy torts, where one factor is the presence of a "paramount public policy interest," as Professor Lior Strahilevitz advocates. Strahilevitz, *supra* note 98, at 2032.

ernment program. This suggests that any endogeneity will happen on the occasions when it is the most justified. And ultimately, the possibility that lawmakers might decide to “level down” instead of “leveling up” is an inevitable characteristic of any antidiscrimination rule, which, as we’ve said, the positive law model resembles. This possibility is simply a price we pay for the model’s democratic restraints on abuse of government power.

### III. THE POSITIVE LAW MODEL IN ACTION

The positive law model undeniably transforms both the aims of Fourth Amendment law and the mode of analysis used to resolve Fourth Amendment problems. At the same time, it responds to some strongly held intuitions that appear to have guided the development of search-and-seizure law, perhaps only unconsciously. The result is that in some areas, the positive law model helps account for existing doctrine and places it on a strong conceptual footing. In other areas, however, the model suggests different answers, or at least a clearer and noticeably different mode of reaching them.

#### A. *Explaining Current Law*

First, let’s see how the Court sometimes ends up using the positive law model, explicitly or implicitly, even aside from *Jones* and *Jardines*. We don’t mean to overstate the extent to which current law conforms to the model, but we do wish to suggest that *Katz*’s privacy-based model doesn’t actually accomplish the work it purports to. And meanwhile, the logic of the positive law model is such that even a Court that claims to reject it can’t help but rely on its logic over and over again.

For example, in *California v. Ciraolo*, the Court concluded that police surveillance of a home was not a search when it was conducted from an airplane “traveling in the public airways” and limited to “observ[ing] what is visible to the naked eye.”<sup>222</sup> The opinion’s reference to “an aircraft lawfully operating” seems to directly invoke the positive law, and it is otherwise replete with references to “public thoroughfares,” “a public vantage point,” “public airways,” and “navigable airspace,” which seem to at least hint at the positive law model by emphasizing places where the general public can lawfully be.<sup>223</sup>

In *Florida v. Riley*, the Court doubled down on *Ciraolo* and a plurality gave an even greater role to positive law.<sup>224</sup> In *Riley*, the surveillance was conducted from a helicopter operating at a mere 400

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<sup>222</sup> See 476 U.S. 207, 215 (1986).

<sup>223</sup> See *id.* at 213–15.

<sup>224</sup> 488 U.S. 445 (1989).

feet.<sup>225</sup> The lower court had thought *Ciraolo* distinguishable on practical grounds, because the “circling and hovering helicopter” could see things that couldn’t be seen “by any person casually flying over the area in a fixed-wing aircraft.”<sup>226</sup>

But the Supreme Court disagreed in a split opinion that concluded there was no search. Of “obvious importance” to the plurality was the fact that the helicopter had not violated FAA altitude restrictions, which prohibited flights at altitudes less than 500 feet by airplanes but not by helicopters.<sup>227</sup> In other words, what the plane in *Ciraolo* and the helicopter in *Riley* had in common was not the amount of information they could gather — the lower, slower helicopter could gather much more — but their compliance with positive law.

We don’t mean to cast *Riley* as a full-throated endorsement of the positive law model. The plurality still dutifully stipulated that it was *not* saying “that an inspection of the curtilage of a house from an aircraft will always pass muster under the Fourth Amendment simply because the plane is within the navigable airspace specified by law.”<sup>228</sup> And Justice O’Connor concurred in the judgment to insist that “the relevant inquiry after *Ciraolo* is not whether the helicopter was where it had a right to be under FAA regulations,” but rather required a parsing of *Katz* and heavy reliance on the burden of proof borne by the defendant.<sup>229</sup>

But we still think the positive law, rather than privacy, best explains the intuition that the FAA regulations are relevant. The FAA regulations at issue in *Riley*, for instance, aimed to ensure aviation safety, not to protect against unwanted surveillance.<sup>230</sup> Sure, one

<sup>225</sup> *Id.* at 448 (plurality opinion).

<sup>226</sup> *Riley v. State*, 511 So. 2d 282, 288 (Fla. 1987) (Barkett, J.).

<sup>227</sup> *Riley*, 488 U.S. at 451 & n.3 (citing 14 C.F.R. § 91.79 (1988)).

<sup>228</sup> *Id.* at 451. But was it saying that it would not?

<sup>229</sup> *Id.* at 454–55 (O’Connor, J., concurring in the judgment). Though we doubt it is what Justice O’Connor had in mind, we should mention that by our lights *Riley*’s positive law analysis was incomplete. Establishing that the helicopter was complying with an FAA regulation for minimum safe altitudes does not tell us whether any positive law forbids *spying on people* from those flight altitudes. Now maybe Florida law doesn’t forbid such spying. *But c.f.* *E.I. DuPont de Nemours & Co. v. Christopher*, 431 F.2d 1012 (5th Cir. 1970) (holding that aerial surveillance is regulated by Texas trade secrets law). Or maybe any such prohibition is in turn preempted by federal law. *But see* Letter from Clark H. Onstad, Chief Counsel, Fed. Aviation Admin., to Representative Clair W. Burgener (Sept. 10, 1980), 1980 WL 570352, at \*1 (“If a nuisance is caused or damages result from aircraft overflights, the injured party may have a basis for pursuing relief in state court. The remedies which may be available depend on state law . . .”). Either way, the positive law model would have prompted those questions.

<sup>230</sup> *See Riley*, 488 U.S. at 452 (O’Connor, J., concurring in the judgment); *see also* Kerr, *supra* note 8, at 533 (criticizing the *Riley* Court’s use of FAA regulations for this reason); Yeager, *supra* note 74, at 298–99 (same).

might think that positive law shapes social expectations,<sup>231</sup> but it is hard to believe that “shared social expectations” really take on the kind of particularity that would distinguish between an airplane flight at 500 feet and one at 400 feet. Indeed, this view supposes that in a case like *Riley*, prevailing social sensibilities would understand a low-flying airplane to represent a greater invasion of privacy than an equally low-flying helicopter, despite the fact that a plane must keep moving forward at considerable speed while a helicopter can hover in place.<sup>232</sup>

The positive law model we have outlined explains why the Court sometimes looks to law rather than expectations. When the *Riley* plurality argued that “[t]he police officer did no more” than what “[a]ny member of the public could legally” have done, for instance, the crucial consideration is that the officer was not doing anything *illegal* that would thus set him apart from a private actor, even if it was unusual, unexpected, and quite undesired.<sup>233</sup> This reading is consistent with positions the Court has taken in other contexts. The Court has said, for example, that a police officer without a warrant may approach a home and knock on the front door without bringing the Fourth Amendment into play “precisely because that is ‘no more than any private citizen might do.’”<sup>234</sup> Similarly, it is no search for the police to note that someone is growing marijuana in his front yard, for “the police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public.”<sup>235</sup> These statements can be explained as reflecting the sense that the Fourth Amendment’s core concerns aren’t brought into play in situations where the police stand in a position of equality with private citizens.

To be sure, the reasonable expectation of privacy test can explain these rules too, though a bit more clumsily.<sup>236</sup> Things get trickier,

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<sup>231</sup> See *Florida v. Jardines*, 133 S. Ct. 1409, 1419 (2013) (Kagan, J., concurring) (positing that property law “‘naturally enough influence[s]’ our ‘shared social expectations’” (alteration in original) (quoting *Georgia v. Randolph*, 547 U.S. 103, 111 (2006))).

<sup>232</sup> Accord *Riley v. State*, 511 So. 2d 282, 288 (Fla. 1987); cf. *Riley*, 488 U.S. at 462 (Brennan, J., dissenting) (postulating, prophetically, “a helicopter capable of hovering just above an enclosed courtyard or patio without generating any noise, wind, or dust at all”).

<sup>233</sup> *Riley*, 488 U.S. at 451 (plurality opinion).

<sup>234</sup> *Jardines*, 133 S. Ct. at 1416 (quoting *Kentucky v. King*, 131 S. Ct. 1849, 1862 (2011)). The plain view doctrine, discussed *infra* in notes 235–239 and in the accompanying text, can be seen as a specialized application of this principle, as can rules about containers. See *United States v. Ross*, 456 U.S. 798 (1982).

<sup>235</sup> *California v. Greenwood*, 486 U.S. 35, 41 (1988).

<sup>236</sup> Society does not consider an expectation of privacy to be legitimate when it implicates matters that “a person knowingly exposes to the public.” *Katz v. United States*, 389 U.S. 347, 351 (1967); see also *id.* at 361 (Harlan, J., concurring) (“[C]onversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.”). This is more in the way of conclusion than explanation, however.

however, when information is revealed lawfully but unforeseeably. For example, the police normally need individualized suspicion to open the trunk of an automobile, and hence drivers expect things they put in the trunk to be somewhat private. Yet if the car is in an accident that damages the trunk, rendering its contents visible, the police may observe the contents without committing a search.<sup>237</sup> Similarly, if a house catches fire and firefighters enter and observe signs of illegal conduct within, their additional observation does not trigger the Fourth Amendment.<sup>238</sup> This is easy to explain on the positive law model but harder to explain in terms of reasonable expectations of privacy — the driver and the homeowner did not reasonably expect the accident or the fire, and hence expected privacy.

One could gerrymander the reasonable expectation of privacy test to be highly contingent — *one has a reasonable expectation of privacy in one's home . . . except for all of the unexpected things that might take it away*. But the twists involved render the privacy test very malleable and suggest that something else is going on. The positive law model avoids these contortions, offering a straightforward explanation grounded in the government's special powers. And that, we think, may be why the "plain view" doctrine often speaks of whether the officer is "where he has a *right* to be," not just where he is expected to be.<sup>239</sup>

To consider another example, it is generally not a search for the government to review its own records.<sup>240</sup> The reasonable expectations test struggles here too. One might well have an expectation of privacy in government records, when, for instance, the government develops new and secret databases and search capabilities. The positive law model, however, supplies both an explanation and a limiting principle for the proposition. The explanation is that it is no search because a private party may generally examine its own records as it sees fit. The limiting principle is twofold. First, to the extent the owner of records is limited by law in its ability to access, use, or disclose information in its possession, an exception from such restrictions applicable to government officials would indeed bring the Fourth Amendment into play. Second, insofar as the records are obtained by governmental coercion,

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<sup>237</sup> See, e.g., *United States v. Jimenez*, 864 F.2d 686, 689 (10th Cir. 1988) (concluding that the plain view doctrine applied and no search occurred after an accident where "the trunk lid was damaged so that [an officer] could look into the trunk and he flashed his light into it and saw the shotgun").

<sup>238</sup> *Michigan v. Tyler*, 436 U.S. 499, 509 (1978) (concluding that after entering "a burning structure to put out the blaze . . . firefighters may seize evidence of arson that is in plain view").

<sup>239</sup> *California v. Ciraolo*, 476 U.S. 207, 213 (1986) (emphasis added); *accord* *Washington v. Chrisman*, 455 U.S. 1, 5–6 (1982) (same); *Harris v. United States*, 390 U.S. 234, 236 (1968) (same).

<sup>240</sup> Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311, 331–32 (2012).

it may be appropriate to limit the use of those records to the purposes justifying the coercion.

Finally, the positive law model helps explain why the threshold search/seizure inquiry exists in the first place. After all, if what mattered were reasonableness, we could easily say that looking at a house from the outside is a search but one that isn't unreasonable. Why treat some cases as categorically exempt from Fourth Amendment reasonableness scrutiny?<sup>241</sup> The structure of the doctrine is especially puzzling in the *Katz* regime, which creates a separate reasonableness analysis at the first step of the Fourth Amendment framework, prior to evaluating the reasonableness of the government's conduct at the second step.<sup>242</sup> (Not surprisingly, courts sometimes elide the question of whether the government has acted contrary to a reasonable expectation of privacy with the question of whether such action is reasonable.<sup>243</sup>) The two-stage inquiry makes perfect sense under the positive law model. The Fourth Amendment's second step, reasonableness, is a special scrutiny for special government power. Its first step, the deviation from general law, determines when that scrutiny is needed. Additional scrutiny and justification are called for only when the government seeks to deviate from the baseline established by generally applicable laws and cloaks itself in the special authority of the state.<sup>244</sup>

### B. *Sorting Out Three-Body Problems*

In many other areas, however, the positive law model will change law more than it will explain it. We start with one of the most important such areas — the interaction of multiple parties and the police.

1. *Third-Party Doctrine*. — It is black-letter law under *Katz* that people don't have any Fourth Amendment protection for information given to a third party. In the paradigmatic case, A gives information to B and the government then obtains the information from B. The third-party doctrine holds that A has no reasonable expectation of privacy in any information voluntarily provided to B, the third party,

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<sup>241</sup> See Amar, *supra* note 47, at 769 (“These word games are unconvincing and unworthy. A search is a search, whether with Raybans or x-rays. The difference between these two searches is that one may be much more reasonable than another.” (citation omitted)); see also 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, 48–49 (2015) (“The wrong approach to these issues is to deny searches when they in fact occur . . . . [T]he proper question was whether there was reasonable suspicion . . . .”); *id.* at 38.

<sup>242</sup> Amar, *supra* note 47, at 769 (“[I]n the landmark *Katz* case, the Court, perhaps unconsciously, smuggled reasonableness into the very definition of the Amendment's trigger . . . .”).

<sup>243</sup> Compare *Minnesota v. Carter*, 525 U.S. 83, 91 (1998) (discussing whether expectation of privacy was reasonable), with *Illinois v. Rodriguez*, 497 U.S. 177, 183 (1990) (discussing whether government search was reasonable).

<sup>244</sup> See Note, *supra* note 28, at 1632–33.

“even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.”<sup>245</sup>

In practice this means, for instance, that the Fourth Amendment does not restrict the government’s receipt of records about a person from their bank<sup>246</sup> or telephone company.<sup>247</sup> It likewise means that the government may obtain information from a person’s employer, spouse, lawyer, or neighbor without triggering the Fourth Amendment,<sup>248</sup> though of course other protections and privileges may apply in some of these situations. The doctrine also categorically licenses the use of confidential informants. Together, these cases illustrate that in no circumstances where a person has voluntarily given information to someone else can the government ever violate that person’s Fourth Amendment rights by extracting the information from the recipient. To be sure, the third party may have Fourth Amendment rights of their own to assert, but that protection is at best indirect and incomplete from the point of view of the first party.

This rule has been roundly criticized by commentators.<sup>249</sup> As an empirical statement about subjective expectations of privacy, it seems quite dubious.<sup>250</sup> As a normative assessment of when a person ought to be able to expect confidentiality (never), it is antisocial at best. Yet the reasonable expectation of privacy test makes it difficult to ever say any particular result is clearly wrong. In some sense, A does “assume the risk” that B will disclose information to someone else when A voluntarily gives it to B — as a factual matter because B cannot disclose what B does not know and as a normative matter because the Court forces people to assume it.<sup>251</sup> Yet it is hard to imagine abandoning the third-party doctrine altogether. It would be very strange if a decision by someone’s co-conspirator to rat them out, unprompted by the government, would nevertheless subject the government to reasonableness scrutiny, and presumptively require it to get a warrant.<sup>252</sup>

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<sup>245</sup> *United States v. Miller*, 425 U.S. 435, 443 (1976).

<sup>246</sup> *Id.*

<sup>247</sup> *Smith v. Maryland*, 442 U.S. 735, 744 (1979).

<sup>248</sup> *See Hoffa v. United States*, 385 U.S. 293, 302 (1966).

<sup>249</sup> Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 563–64 (2009) (“The third-party doctrine is the Fourth Amendment rule scholars love to hate. . . . The verdict among commentators has been frequent and apparently unanimous: The third-party doctrine is not only wrong, but horribly wrong.” (citations omitted)).

<sup>250</sup> *See Kugler & Strahilevitz, supra note 46* (manuscript at 6).

<sup>251</sup> Kerr, *supra* note 249, at 564 (quoting *Smith*, 442 U.S. at 744); *see also Williamson v. United States*, 405 U.S. 1026, 1029 (1972) (Douglas, J., dissenting from denial of certiorari) (“Obviously, citizens must bear only those threats to privacy which we decide to impose.”).

<sup>252</sup> *See Hoffa*, 385 U.S. at 302 (“Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer’s misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.”).

The growing importance of electronic communications has put extra pressure on the third-party doctrine. Some scholars have argued that the existing third-party precedents should not be extended to electronic communications.<sup>253</sup> In a similar spirit, Justice Sotomayor has written that the third-party doctrine “is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks.”<sup>254</sup> The Court has announced that it wishes to proceed with caution in the whole area,<sup>255</sup> and some have suggested that the Court has signaled to lower courts that prior third-party precedents are not fully applicable.<sup>256</sup> At least one federal judge has taken the bait, concluding: “[P]resent-day circumstances — the evolutions in the Government’s surveillance capabilities, citizens’ phone habits, and the relationship between the NSA and telecom companies — [are] so thoroughly unlike those considered by the Supreme Court thirty-four years ago that a precedent like *Smith* simply does not apply.”<sup>257</sup>

Three courts of appeals have disagreed on whether the third-party doctrine precludes a reasonable expectation of privacy in cell-site records,<sup>258</sup> and some version of the question is sure to be on the Supreme Court’s docket sooner or later. Yet if electronic communications are freed from preexisting precedents under the third-party doctrine, it is hard to see what replaces them. Freestanding reasonable expectations of privacy do not offer much in the way of clarity or predictability.

The positive law model can help, though it would mean substantial revision to the third-party doctrine in its current categorical form. From the standpoint of positive law, the decisive question is whether the government has broken the law or relied on a governmental exemption from the law in obtaining information. That will frequently

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<sup>253</sup> See, e.g., Patricia L. Bellia, *Surveillance Law Through Cyberlaw’s Lens*, 72 GEO. WASH. L. REV. 1375, 1403–06 (2004); Deirdre K. Mulligan, *Reasonable Expectations in Electronic Communications: A Critical Perspective on the Electronic Communications Privacy Act*, 72 GEO. WASH. L. REV. 1557, 1579–82 (2004).

<sup>254</sup> *United States v. Jones*, 132 S. Ct. 945, 957 (2012) (Sotomayor, J., concurring).

<sup>255</sup> See *City of Ontario v. Quon*, 560 U.S. 746, 759–60 (2010) (“The Court must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer.” *Id.* at 759.).

<sup>256</sup> See Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. (forthcoming 2016) (manuscript at 43), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2699607](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2699607) [<http://perma.cc/ZL9K-A6DX>] (discussing *Riley v. California*, 134 S. Ct. 2473 (2014)).

<sup>257</sup> *Klayman v. Obama*, 957 F. Supp. 2d 1, 31 (D.D.C. 2013), *vacated and remanded on other grounds*, 800 F.3d 559 (D.C. Cir. 2015).

<sup>258</sup> Compare *United States v. Davis*, 785 F.3d 498, 511 (11th Cir. 2015) (en banc) (no reasonable expectation of privacy), and *In re Application of the United States for Historical Cell Site Data*, 724 F.3d 600, 615 (5th Cir. 2013) (same), with *United States v. Graham*, 796 F.3d 332, 345 (4th Cir. 2015) (yes there is), *reh’g en banc granted*, No. 12-4659, 2015 WL 6531272 (4th Cir. Oct. 28, 2015).

turn on the legal relationship between A and B and the legal obligations others have to honor that relationship.<sup>259</sup>

If, for instance, A gives information to B, and B is under no legal duty to maintain confidentiality, B's voluntary disclosure to the government does not violate the Fourth Amendment. If, on the other hand, A gives information to B, B agrees to a valid contract obligating him not to disclose the information to anyone else, and a government agent then bribes B to provide the information, the Fourth Amendment may be triggered, assuming such bribery amounts to tortious interference with contract. Likewise, if A gives information to B, and the government compels B to disclose the information or go to jail, or if the government somehow obtains the information from B in circumstances where an ordinary person would owe a duty to A not to receive, possess, or use the information — think of trade secrets and industrial espionage — the Fourth Amendment would be triggered.

As we've already indicated, application of the positive law model will frequently be context-specific and even jurisdiction-specific, so generalizations are perilous. But to generalize nonetheless, it will often be helpful to divide the third-party cases into those where the government *compels* the third party to reveal the information, and those where the government *induces* the third party to do so. Compulsion is highly likely to trigger the Fourth Amendment's protections, because there are few positive law contexts where private interlopers have the power to compel a third party to disclose information.<sup>260</sup> Inducement, on the other hand, is something that private parties can often, but by no means always, legally do.

Finally, we note that the positive law model does happen to capture the intuition that electronic communications merit special treatment. The Wiretap Act and The Stored Communications Act, amended and enacted as part of the Electronic Communications Privacy Act,<sup>261</sup> both provide generally applicable privacy protections for electronic communications.<sup>262</sup> The Acts provide a special process, less than a warrant, for the government to demand information.<sup>263</sup> But the positive law

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<sup>259</sup> For an attempt to ground a similar analysis in the privacy framework of *Katz* itself, see Randy Barnett, *Why the NSA Data Seizures Are Unconstitutional*, 38 HARV. J.L. & PUB. POL'Y 3, 13 (2015) (“[B]y availing themselves of the law of property and contract, people create their own zones of privacy. In short, *first comes property and contract, then comes privacy.*”).

<sup>260</sup> Cf. *Forsham v. Harris*, 445 U.S. 169, 178–82 (1980) (finding that private grantees generally are not subject to FOIA).

<sup>261</sup> Pub. L. No. 99-508, 100 Stat. 1848 (1986) (codified as amended in scattered sections of 18 U.S.C.).

<sup>262</sup> 18 U.S.C. §§ 2510–2521, 2701–2711 (2012). For much more detail, see generally Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 GEO. WASH. L. REV. 1208 (2004).

<sup>263</sup> 18 U.S.C. § 2703.

model requires Fourth Amendment scrutiny for such government exceptions. Such an exemption from the generally applicable positive law of privacy must be pursuant to a warrant or otherwise survive Fourth Amendment reasonableness scrutiny.<sup>264</sup>

This provides the starting framework for answering pending questions about the reasonable expectation of privacy in various electronic communications. One such controversy is over the reasonable expectation of privacy in historical cell-site data.<sup>265</sup> Such data is a “record or other information pertaining to a subscriber . . . or customer” that does not include “the contents of communications.”<sup>266</sup> Service providers can voluntarily choose to provide this noncontent information to the public at large (to anybody other than a “governmental entity”).<sup>267</sup> This means that it is not a Fourth Amendment search or seizure for the government to ask for and receive this information voluntarily.<sup>268</sup>

By contrast, private parties cannot compel this information to be turned over, so government compulsion of such information *would* trigger Fourth Amendment scrutiny. This suggests that the Fourth Circuit panel opinion in *Graham* was correct to recognize that the compelled disclosure of cell-site data triggers Fourth Amendment scrutiny.<sup>269</sup> However the court’s statement that “the government conducts a search under the Fourth Amendment when it obtains and inspects a cell phone user’s historical [cell-site data] for an extended period of time”<sup>270</sup> is a little too broad under the positive law model, because it does not distinguish voluntary from compelled disclosures. And it is also a little too narrow, because it relies on the duration of the inspection, not the character of the disclosure.

Electronic *content* information receives still more protection under the positive law model. Providers cannot disclose it to the general public even voluntarily.<sup>271</sup> Outside of a few narrow exceptions,<sup>272</sup>

<sup>264</sup> It’s also possible, for example, that existing Terms of Service agreements between users and their providers could contain provisions that satisfy the “consent” requirement of positive law. For discussion in the positive law context, see, for example, *In re Google Inc. Gmail Litigation*, No. 13-MD-02430, 2013 WL 5423918, at \*12–15 (N.D. Cal. Sept. 26, 2013), and for discussion in the Fourth Amendment context, see *United States v. Warshak*, 631 F.3d 266, 286–88 (6th Cir. 2010) and *Warshak v. United States*, 532 F.3d 521, 526–27 (6th Cir. 2008) (en banc).

<sup>265</sup> See cases cited *supra* note 258.

<sup>266</sup> 18 U.S.C. § 2702(c).

<sup>267</sup> *Id.* § 2702(a)(3), (c)(6).

<sup>268</sup> It is true that the Stored Communications Act requires governments, unlike anybody else, to go through certain procedures to access noncontent records. But these procedures do not change the positive law baseline under our theory. See *supra* p. 1832.

<sup>269</sup> See *United States v. Graham*, 796 F.3d 332, 344–45 (4th Cir. 2015), *reh’g en banc granted*, No. 12-4659, 2015 WL 6531272 (4th Cir. Oct. 28, 2015).

<sup>270</sup> *Id.*

<sup>271</sup> 18 U.S.C. §§ 2511(c), 2702(a).

<sup>272</sup> *E.g., id.* §§ 2511(2)(a)(i), 2702(b)(5).

providers need the consent of one of the communicating parties to disclose it.<sup>273</sup> This means that the contents of email should generally retain Fourth Amendment protection under the positive law model, contrary to what the most exuberant applications of the third-party doctrine would suggest.<sup>274</sup>

This analysis is just illustrative. The relevant statutes are complicated, and their coverage is incomplete.<sup>275</sup> But we think it shows that the positive law model can and should replace the third-party doctrine — and gives some sense of how the model would handle the special and urgent problem of privacy in digital information.

2. *First- and Third-Party Consent.* — The importance of inducement also raises a related three-body problem, which is the scope of consent. (Indeed, we note that one of the leading defenders of the third-party doctrine supports it on the ground that “the third-party doctrine is better understood as a form of consent rather than as an application of *Katz*.”<sup>276</sup>) And consent problems frequently arise in other contexts as well.

How does the positive law model handle such problems? In general, whatever waives a positive law right should also waive Fourth Amendment protection, since the latter is premised on the former. Hence the Supreme Court cases that categorically license the use of undercover informants are a little too, well, *categorical*. *On Lee v. United States*, for instance, rejected a Fourth Amendment challenge to the use of the defendant’s friend as a “stool pigeon . . . wired for sound” who entered On Lee’s business and chatted him up about criminal activities.<sup>277</sup> On Lee had let the informant in (he was a friend), but he nonetheless argued that this was a “trespass ab initio” under the common law because of the informant’s fraud and subsequent conduct. The Court wasn’t willing to concede that the informant had violated the common law, but it decided that it didn’t care. The Court called it “doubtful that the niceties of tort law . . . are of much aid in determining rights under the Fourth Amendment” and rejected “such fine-spun doctrines for exclusion of evidence.”<sup>278</sup> In subsequent cases

<sup>273</sup> *Id.* §§ 2511(2)(c–d), (3)(b)(ii), 2702(b)(3).

<sup>274</sup> For such overexuberance, see, for example, *Rehberg v. Paulk*, 598 F.3d 1268, 1281–82 (11th Cir. 2010), *rev’d in part on reh’g*, 611 F.3d 828 (11th Cir. 2010).

<sup>275</sup> Kerr, *supra* note 262, at 1214 (“The [Stored Communications Act] is not a catch-all statute designed to protect the privacy of stored Internet communications . . .”).

<sup>276</sup> Kerr, *supra* note 249, at 588.

<sup>277</sup> 343 U.S. 747, 749 (1952).

<sup>278</sup> *Id.* at 752. The Court also relied upon *McGuire v. United States*, which made similar noises but seems ultimately to have been an exclusionary rule case. 273 U.S. 95, 99 (1927) (“A criminal prosecution is more than a game in which the Government may be checkmated and the game lost merely because its officers have not played according to rule. The use by prosecuting officers of evidence illegally acquired by others does not necessarily violate the Constitution nor affect its admissibility.”).

the Court reaffirmed the irrelevance of fraudulently obtained consent.<sup>279</sup>

Under the positive law model, however, those niceties and fine-spun doctrines are exactly what matter. In some circumstances, consent to enter private property will be valid even if somewhat fraudulent.<sup>280</sup> For example, a restaurant critic who conceals his identity, a shopper who feigns interest in a purchase, a bad friend who one oughtn't invite to dinner, and an investigative journalist secretly videotaping a fraud have all been said not to be trespassers.<sup>281</sup> On the other hand, sometimes fraud *has* been held relevant to a trespass or an invasion of privacy.<sup>282</sup> This developed body of law handles the question of fraudulent entries better than the Court's categorical refusal to engage.<sup>283</sup>

A slightly more complicated question arises in situations where one person attempts to give permission to government officials to search or seize items belonging, at least in part, to someone else. Under the positive law model, a court resolves these questions by looking to underlying rules of property and agency law. Thus, whether B has the right to authorize a police officer to enter a house that A and B jointly own depends on whether B has the right to authorize others to do so, and on whether others violate the law by acting on B's purported authorization if that authorization is invalid. The problem is structurally akin to that presented by the third-party doctrine. After an individual has given control over something — a house, information — to someone else, does it follow that the government may obtain that thing from the other person, so long as the other person consents, without any Fourth

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<sup>279</sup> See, e.g., *United States v. White*, 401 U.S. 745, 752 (1971); *Hoffa v. United States*, 385 U.S. 293, 302–03 (1966); *Lewis v. United States*, 385 U.S. 206, 210–11 (1966); *Lopez v. United States*, 373 U.S. 427, 437–38 (1963). The one exception seemingly preserved by the cases, *Gouled v. United States*, involved an agent who tricked his way into an office and then stole some documents when the owner wasn't looking. 255 U.S. 298, 304 (1921). But *Gouled* effectively applies only to searches that exceed the scope of the fraudulently obtained consent, not the validity of that consent in the first place. *Hoffa*, 385 U.S. at 303; *Lewis*, 385 U.S. at 211; *Lopez*, 373 U.S. at 438.

<sup>280</sup> See generally Laurent Sacharoff, *Trespass and Deception*, 2015 BYU L. REV. 359, 375–86 (attempting to synthesize the cases).

<sup>281</sup> *Desnick v. Am. Broad. Cos.*, 44 F.3d 1345, 1351 (7th Cir. 1995) (Posner, J.) (so holding as to the investigative journalists and suggesting the other examples); *id.* at 1352 (collecting many more examples across positive law).

<sup>282</sup> See, e.g., *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 518–19 (4th Cir. 1999); *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971). *Contra* Kerr, *supra* note 249, at 588 (“The fact that a person turns out to be an undercover agent should be irrelevant to whether the consent is valid, as that representation is merely fraud in the inducement rather than fraud in the factum.”); Sacharoff, *supra* note 280, at 396–98 (critiquing *Food Lion*).

<sup>283</sup> Sacharoff says that the “civil trespass by deception cases themselves are largely a mess,” *supra* note 280, at 363, though he then disentangles several of them with admirable clarity. In any event, for informants who use electronic recording, there is also the extensive statutory law of surreptitious recording. See CARR, *supra* note 174, for a survey.

Amendment limitation? Under the positive law model, the question is whether the government violates any generally applicable legal duty by obtaining the information from the person to whom it was entrusted, which itself turns on the person's authority to grant access under background law.

Hence, the positive law model would modify some of the Court's cases about who may consent to the search of a house and when. In *United States v. Matlock*, the Court held that consent to search a piece of property can be given by anybody who "possessed common authority over or other sufficient relationship to the premises or effects."<sup>284</sup> In deciding who possessed "common authority," the Court rejected "the law of property, with its attendant historical and legal refinements,"<sup>285</sup> though positive law may well come out to the same effect most of the time, because under positive law a lone cotenant can generally give visitors the right to enter.<sup>286</sup>

However in a later case, *Georgia v. Randolph*, the rejection of the positive law model appeared to be more conclusive.<sup>287</sup> *Randolph* held that a cotenant's power to admit the police to search vanished when another cotenant was also at the door and objecting, a distinction that generally makes no difference to the positive law.<sup>288</sup> Despite half-heartedly claiming some support in "domestic property law,"<sup>289</sup> the Court admitted that the reason it could distinguish *Matlock* was its reliance on "customary social understanding" rather than "the private law of property."<sup>290</sup> Meanwhile, in dissent, Justice Scalia explicitly invoked positive law principles, noting that historically "someone who had power to license the search of a house by a private party could authorize a police search," and that this power did indeed "turn[] on 'historical and legal refinements' of property law."<sup>291</sup> And in a later case that narrowed *Randolph*, Justice Scalia again chimed in to assert that "traditional property-based understanding[s] of the Fourth Amend-

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<sup>284</sup> 415 U.S. 164, 171 (1974).

<sup>285</sup> *Id.* at 171 n.7.

<sup>286</sup> 86 C.J.S. *Tenancy in Common* § 144 (2006); see, e.g., *Dinsmore v. Renfroe*, 225 P. 886, 888–89 (Cal. Dist. Ct. App. 1924); *Buchanan v. Jencks*, 96 A. 307, 309 (R.I. 1916); *Williams v. Bruton*, 113 S.E. 319, 325 (S.C. 1922); see also *State v. Shack*, 277 A.2d 369, 374 (N.J. 1971).

<sup>287</sup> 547 U.S. 103 (2006).

<sup>288</sup> *Id.* at 106.

<sup>289</sup> *Id.* at 114.

<sup>290</sup> *Id.* at 120–21. Of course some positive property law might incorporate customs, but the Court did not take that tack either.

<sup>291</sup> *Id.* at 143 (Scalia, J., dissenting) (quoting *United States v. Matlock*, 415 U.S. 164, 171 n.7 (1974)). Justice Scalia also argued that "[t]here is nothing new or surprising in the proposition that our unchanging Constitution refers to other bodies of law that might themselves change," by reference to constitutional property. *Id.* at 144.

ment” remained a viable supplement to *Katz*.<sup>292</sup> The positive law model would have indeed pursued a variation of Justice Scalia’s inquiry, asking whether a private person could, on the basis of such conflicting assertions of authority, lawfully enter a dwelling in Georgia and California respectively.

The positive law model also might modify the rules for mistaken consent, where the police believe they have received consent from someone who it turns out has no authority to grant it. Current doctrine asks whether the mistake was reasonable, as it would of a factual mistake about the address of a house.<sup>293</sup> The positive law model would start by asking whether entry based on mistaken consent violated positive law, which generally turns on questions of “apparent authority,” allowing entry in a somewhat narrower range of reasonable mistakes.<sup>294</sup> This doesn’t rule out the possibility that a search without apparent authority could be found to be “reasonable,”<sup>295</sup> but it would force us to ask the waiver question at an earlier stage, and in a different way.

Finally, we must note that the unconstitutional conditions problem we noted previously can be especially tricky in these situations, insofar as what is treated as consensual disclosure by third parties is really obtained by virtue of subtle coercive pressures brought to bear upon them. Thus, for instance, it is possible that a telephone company will disclose information about its subscribers to government agencies without being formally required to do so because it fears that the government will be less favorably inclined toward the company in the exercise of its other regulatory powers — an FCC licensing decision, for instance.<sup>296</sup> If the government forces a telecom provider to breach a contractual obligation to its subscriber, a Fourth Amendment search plainly occurs. But that pressure may not operate in the open and may be harder to trace. We admit that finding such hidden coercion may be one of the hardest applications of the positive law model,

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<sup>292</sup> *Fernandez v. California*, 134 S. Ct. 1126, 1137 (2014) (Scalia, J., concurring) (quoting *Florida v. Jardines*, 133 S. Ct. 1409, 1417 (2013) (Scalia, J.) (majority opinion)).

<sup>293</sup> See *Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990).

<sup>294</sup> See, e.g., *Lugue v. Hercules, Inc.*, 12 F. Supp. 2d 1351, 1360 (S.D. Ga. 1997); *Dickinson v. Charter Oaks Tree & Landscaping Co.*, No. 02AP-981, 2003 WL 1924638, at \*4 (Ohio Ct. App. Apr. 24, 2003); *Corral-Lerma v. Border Demolition & Env'tl. Inc.*, 467 S.W.3d 109, 121–22 (Tex. App. 2015); *Munns v. State*, 412 S.W.3d 95, 100 (Tex. App. 2013).

<sup>295</sup> *Rodriguez* can be read as focusing solely on reasonableness, assuming that there is a search. See 497 U.S. at 187.

<sup>296</sup> See, e.g., Andrea Peterson, *A CEO Who Resisted NSA Spying Is Out of Prison. And He Feels “Vindicated” by Snowden Leaks*, WASH. POST: THE SWITCH (Sept. 30, 2013), <https://www.washingtonpost.com/news/the-switch/wp/2013/09/30/a-ceo-who-resisted-nsa-spying-is-out-of-prison-and-he-feels-vindicated-by-snowden-leaks> [http://perma.cc/82V5-5QGK] (alleging retaliation for failure to cooperate with surveillance program).

though once again,<sup>297</sup> we are not convinced that the difficulty is a fatal flaw of our model.

3. *Additional “Standing” Requirements?* — Finally, we wish to flag, though not to fully resolve, the possibility of additional requirements, sometimes referred to as Fourth Amendment “standing,” that arise where the government has violated the Fourth Amendment rights of B but arguably not those of A. We accept the proposition that one person generally may not invoke the constitutional rights of another,<sup>298</sup> but the hard question is *whose* rights have been violated in any given positive law scenario.

It might be tempting at this point to say that the positive law model implies that A has a Fourth Amendment “right” only if A personally would have a remedy under positive law.<sup>299</sup> But that approach doesn’t make much sense even on positive law terms, for it is altogether possible that a person holds a positive law right without being able to bring a lawsuit in the event the right is violated. The right might be protected entirely by criminal law, for instance.<sup>300</sup> Conversely, a person might hold the right to sue but only to vindicate someone else’s primary right. We might think, for example, of a trustee, a receiver, an executor, or a guardian ad litem.<sup>301</sup>

So one might instead be tempted to limit Fourth Amendment protection to those whose positive law primary rights have been infringed — that is, to say that the violation of a positive law duty violates A’s Fourth Amendment rights only when the positive law duty is owed to A. We agree with that formulation as a *minimum*, but as a complete approach to the “standing” question this approach also falters on positive law terms. Positive law often concerns itself more clearly with legal duties than with who, if anyone, holds an individual right that the duty be obeyed. Indeed, one of the great debates among legal theorists is over how to determine whether and upon whom a legal duty confers a legal right.<sup>302</sup> To make Fourth Amendment right-holding depend on positive law right-holding would essentially require taking a position on a debate the positive law itself has not yet resolved.

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<sup>297</sup> See *supra* notes 219–221 and accompanying text.

<sup>298</sup> See *Rakas v. Illinois*, 439 U.S. 128, 133–34 (1978).

<sup>299</sup> Note, *supra* note 28, at 1640.

<sup>300</sup> E.g., 1 FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, *THE LAW OF TORTS* 337–38 (2d ed. 1986). Some rights may also be protected only by a suit for nominal damages. Sacharoff, *supra* note 280, at 366, 392–93.

<sup>301</sup> See *FED. R. CIV. P. 17(a)(1); Sprint Commc’ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 287–88 (2008).

<sup>302</sup> See, for example, the disputing essays in MATTHEW H. KRAMER, N.E. SIMMONDS & HILLEL STEINER, *A DEBATE OVER RIGHTS* (1998); and Alon Harel, *Theories of Rights*, in *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY* 191, 194–97 (Martin P. Golding & William A. Edmundson eds., 2005).

This isn't to say positive law has no effect on the question of Fourth Amendment "standing." If B, the owner of a house, consents to have it searched by the police, there can be no violation of A's Fourth Amendment rights because B's power to consent ensures that the police do not violate positive law. Likewise, if positive law makes it tortious to do a particular act only if it injures B, then A suffers no Fourth Amendment violation when the government does that act without injuring B, even if A suffers harm in the process.<sup>303</sup>

So we think it makes the most sense simply to ask whether the government action has violated the positive law in a way that injures the person invoking the Fourth Amendment. While we can imagine those who would advocate for additional "standing" limits on top of those, we doubt there is any practical need for them in light of the positive law rules for third parties and waiver. But to fully resolve that question we'd have to get into ancillary issues like the scope of particular remedies — such as the exclusionary rule or § 1983 — and maybe also the meaning of the word "their" in the Fourth Amendment.<sup>304</sup> What we can say is that the positive law understanding of searches and seizures itself does not demand additional limits.

### C. *Revising Current Law*

While we believe that these three-body problems are some of the most immediately useful applications of the positive law model, there are plenty more. Indeed, part of the power of the model is its transsubstantive breadth.

1. *Abandonment.* — Police regularly find information about people by sifting through their trash. This practice was given the green light by the Supreme Court in *California v. Greenwood*, which held that there was no expectation of privacy under *Katz* in trash sitting on the curb for collection.<sup>305</sup> Even though the defendants had placed their trash "in opaque plastic bags, which the garbage collector was expected to pick up," and expected it to remain private, the Court concluded that "society [was not] prepared to accept that expectation as objectively reasonable" because it had been "exposed" to the public by being left on the street.<sup>306</sup>

Once again, the positive law model presents a more nuanced picture. In *Greenwood* the Court specifically rejected an argument based

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<sup>303</sup> See, e.g., *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

<sup>304</sup> See *Minnesota v. Carter*, 525 U.S. 83, 92–96 (1998) (Scalia, J., concurring). One might also add the word "secure," which has been argued to support a "collective rights" approach to the Fourth Amendment. See [Richard H. McAdams], Note, *Tying Privacy in Knotts: Beeper Monitoring and Collective Fourth Amendment Rights*, 71 VA. L. REV. 297, 318–19 (1985).

<sup>305</sup> 486 U.S. 35, 37 (1988).

<sup>306</sup> *Id.* at 39–40.

on state law — that because the California state constitution prohibited the search at issue (albeit without an exclusionary rule), it should also be considered a search under federal constitutional law.<sup>307</sup> Because the state constitutional provision applied *only* to government activity, it alone would not necessarily trigger the Fourth Amendment under the positive law model.

But there was a second positive law regulation of garbage in California. As explained in a prior California case, “many municipalities have enacted ordinances which restrict the right to collect and haul away trash to licensed collectors” and “prohibit unauthorized persons from tampering with trash containers.”<sup>308</sup> Where such municipal protections apply, they should bring with them the protection of the Fourth Amendment.<sup>309</sup>

The importance of a nuanced approach to these kinds of abandonment issues has been heightened by new controversies over the collection and testing of genetic material. Those who have been arrested for serious crimes can have their DNA collected against their will by a cheek swab,<sup>310</sup> but for other targets, police instead must resort to subterfuge. Police have therefore collected DNA off of cigarettes, coffee cups, and even an envelope flap.<sup>311</sup> In a very recent case the police collected DNA off of the chair a suspect used during a voluntary interview with the police.<sup>312</sup> Courts have generally found no reasonable expectation of privacy with respect to abandoned DNA, though commentators have questioned whether existing doctrine can handle the question well.<sup>313</sup>

Once again, positive law provides a framework. At least ten states explicitly prohibit obtaining and testing a person’s genetic information

<sup>307</sup> *Id.* at 43.

<sup>308</sup> *People v. Krivda*, 486 P.2d 1262, 1268 (Cal. 1971) (citing L.A. COUNTY, CAL., ORDINANCES NO. 5860, ch. IX, §§ 1611–1622, 1681–1691, 1710). For examples of similar ordinances elsewhere in California and in other states, see POMONA, CAL., CODE § 62-593 (2015); COLUMBIA COUNTY, FLA., CODE § 90-192 (2014); HOLYOKE, MASS., CODE § 74-2(m) (2013); S. HOUS., TEX., CODE § 10.75 (2011); and NEWPORT NEWS, VA., CODE § 19-90(a)(47) (2015).

<sup>309</sup> In *Greenwood* the Court also halfheartedly invoked the third-party doctrine, noting that “the trash collector . . . might himself have sorted through respondents’ trash or permitted others, such as the police, to do so.” 486 U.S. at 40. But as we’ve discussed, *supra* section III.B.1, pp. 1871–76, the possibility that the trash collector could lawfully have turned the trash over does not mean that the police can steal the trash before he gets it.

<sup>310</sup> *Maryland v. King*, 133 S. Ct. 1958, 1980 (2013).

<sup>311</sup> See Elizabeth E. Joh, Essay, *Reclaiming “Abandoned” DNA: The Fourth Amendment and Genetic Privacy*, 100 NW. U. L. REV. 857, 860–62 (2006); see also SHELDON KRIMSKY & TANIA SIMONCELLI, *GENETIC JUSTICE* 108–22 (2011).

<sup>312</sup> *Raynor v. State*, 99 A.3d 753, 754 (Md. 2014), *cert. denied*, 135 S. Ct. 1509 (2015).

<sup>313</sup> Joh, *supra* note 311, at 868–69.

without their consent.<sup>314</sup> It is also possible, albeit “unlikely,” that the collection of genetic material could be construed as common law larceny in states without such a statute.<sup>315</sup> In those states, officers who surreptitiously collect and test DNA are using the special power of the state to investigate crime and ought to be subject to the reasonableness requirement. The remaining states have so far made the judgment that DNA testing of one’s discarded skin cells does not warrant legal prohibition, though there is some evidence that more states may extend such protection.<sup>316</sup> The positive law model will follow these changes where they go, rather than adopt the categorical antipathy of the current doctrine.

2. *Drones.* — The positive law model also leaps to assist courts in resolving controversies about the use and regulation of drones — unmanned aircraft that can be used for surveillance, among other things. Many state and federal law enforcement agencies are working to incorporate drones into their police practices,<sup>317</sup> but current Fourth Amendment doctrine focused on reasonable expectations of privacy will be slow to catch up.<sup>318</sup> Will aerial surveillance, even of homes, be categorically exempt from Fourth Amendment scrutiny, or will it demonstrate the limits of the Court’s prior holdings in *Riley* and *Ciraolo*? The positive law has answers.

As a matter of common law, “[f]light by aircraft in the air space above the land of another is a trespass if, but only if, (a) it enters into the immediate reaches of the air space next to the land, and (b) it interferes substantially with the other’s use and enjoyment of his land.”<sup>319</sup> This would impose some direct constraints on the use of drones over private property — based on the proximity and consequences of the flight.

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<sup>314</sup> See, e.g., ALASKA STAT. § 18.13.010(a) (2004); N.M. STAT. ANN. § 24-21-3(A) (2015); see also PRESIDENTIAL COMM’N FOR THE STUDY OF BIOETHICAL ISSUES, PRIVACY AND PROGRESS IN WHOLE GENOME SEQUENCING 121–24 (2012), <http://bioethics.gov/sites/default/files/PrivacyProgress508.pdf> [<http://perma.cc/AL8S-BHGG>]; Elizabeth E. Joh, *DNA Theft: Recognizing the Crime of Nonconsensual Genetic Collection and Testing*, 91 B.U. L. REV. 665, 686–87 & n.136 (2011).

<sup>315</sup> Joh, *supra* note 314, at 688.

<sup>316</sup> See, e.g., Jessica Shugart, *California Bill Would Prevent Genetic-Testing Firms from Using Surreptitiously Obtained DNA*, SAN JOSE MERCURY NEWS (May 23, 2013, 5:38 AM), [http://www.mercurynews.com/ci\\_23303351/california-bill-would-prevent-genetic-testing-firms-from](http://www.mercurynews.com/ci_23303351/california-bill-would-prevent-genetic-testing-firms-from) [<http://perma.cc/KYV5-LCDZ>].

<sup>317</sup> Hillary B. Farber, *Eyes in the Sky: Constitutional and Regulatory Approaches to Domestic Drone Deployment*, 64 SYRACUSE L. REV. 1, 2–3 (2014).

<sup>318</sup> See *id.* at 18–27. See generally Robert Molko, *The Drones Are Coming! Will the Fourth Amendment Stop Their Threat to Our Privacy?*, 78 BROOK. L. REV. 1279 (2013).

<sup>319</sup> RESTATEMENT (SECOND) OF TORTS § 159(2) (AM. LAW INST. 1965).

And there is more. For those who think that drones require more specific regulation,<sup>320</sup> legislation seems to be coming. A new statute gives Oregon property owners a right to sue those who repeatedly fly a drone over their property “at a height of less than 400 feet.”<sup>321</sup>

Other states have legislation that specifically targets private drones: North Dakota forbids “any private person to conduct surveillance on any other private person” via “unmanned aircraft” without consent, giving broader powers to the police.<sup>322</sup> Texas and Tennessee similarly forbid the use of drones to capture images of people or privately owned property without consent, but with a series of modest exceptions for law enforcement.<sup>323</sup> These sorts of government exceptions illustrate the importance of the positive law model. Under our model these statutes all clarify that government use of a drone to gather information is a search (a conclusion that, we reiterate, might well have been true under the common law anyway).<sup>324</sup>

Congress has also ordered the FAA to integrate drones into the regulations governing national airspace.<sup>325</sup> And in February 2015, the FAA proposed regulations governing drones.<sup>326</sup> These rules will likely bring still further uniformity and clarity to the positive law rules governing drones, and hence drone surveillance.<sup>327</sup>

3. *Seizures.* — As we’ve noted already, most of the attention in Fourth Amendment commentary seems to go to searches, but its protection is equally applicable to seizures. And the law of seizures is already governed by something fairly close to the positive law model, so we would simply iron out a few wrinkles.

Under current doctrine a seizure of things — houses, papers, effects — happens “when there is some meaningful interference with an individual’s possessory interests in that property.”<sup>328</sup> The references to “possessory interests” already invoke property law, and indeed most

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<sup>320</sup> See, e.g., Troy A. Rule, *Airspace in an Age of Drones*, 95 B.U. L. REV. 155, 187 (2015).

<sup>321</sup> OR. REV. STAT. § 837.380 (2013). Other provisions of the statute criminalize the use of drones to shoot bullets and point lasers at airplanes, *id.* § 837.995(1), and specifically regulate the use of drones by law enforcement and other public bodies, *id.* § 837.360.

<sup>322</sup> N.D. CENT. CODE § 29.29.4-05(2) (2015).

<sup>323</sup> TENN. CODE ANN. §§ 31-13-901 to 905 (2015); TEX. GOV’T CODE ANN. §§ 423.002–.003 (2015).

<sup>324</sup> See, e.g., *Peterson v. United States*, 673 F.2d 237, 240–41 (8th Cir. 1982); *United Power Ass’n v. Heley*, 277 N.W.2d 262, 267 (N.D. 1979).

<sup>325</sup> FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 332, 126 Stat. 11, 73–75.

<sup>326</sup> Operation and Certification of Small Unmanned Aircraft Systems, 80 Fed. Reg. 9544 (proposed Feb. 23, 2015) (to be codified at scattered parts of 14 C.F.R.).

<sup>327</sup> See generally Henry H. Perritt, Jr., & Eliot O. Sprague, *Law Abiding Drones*, 16 COLUM. SCI. & TECH. L. REV. 385 (2015).

<sup>328</sup> *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

seizures of property are simply applications of positive law *tout court* — either conversion<sup>329</sup> or trespass to chattels.<sup>330</sup>

To be sure, in a few cases the positive law model might refine this test a little bit. For instance, the requirement that the interference be “meaningful” has been said to limit Fourth Amendment seizures to “the government’s *conversion* of an individual’s private property, as opposed to the mere technical *trespass* to an individual’s private property.”<sup>331</sup> That would change under the positive law model. Another change is that some claimants might be able to challenge a seizure on the basis of a nonpossessory positive law interest, such as a future interest.<sup>332</sup> But the differences seem technical and minor, even to us.

The test for seizures of persons is pretty close to positive law too, though less explicitly so. Some cases have defined “seizure of the person” in reliance on common law,<sup>333</sup> and while that’s not exactly the same as the positive law model, it’s very close. A seizure of a person is “meaningful interference, however brief, with an individual’s freedom of movement,”<sup>334</sup> whether by physical contact<sup>335</sup> or some threat or assertion of authority that limits one’s “freedom to walk away.”<sup>336</sup> The tort of false imprisonment largely tracks this inquiry by rendering tortious the intentional confinement of another person within fixed boundaries, including by threat of physical force prompting submission.<sup>337</sup>

Once again, the positive law model would work some modest alterations to seizure doctrine. Both false imprisonment and Fourth Amendment seizures generally require an *intent* to restrain or con-

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<sup>329</sup> *E.g.*, *In re Wal-Mart Wage & Hour Emp’t Practices Litig.*, 490 F. Supp. 2d 1091, 1101 (D. Nev. 2007) (defining conversion under Delaware law as “wrongful exercise of dominion over the property of another, in denial of his right, or inconsistent with it” (quoting *Res. Ventures, Inc. v. Res. Mgmt. Int’l, Inc.*, 42 F. Supp. 2d 423, 439 (D. Del. 1999))).

<sup>330</sup> RESTATEMENT (SECOND) OF TORTS § 217 (AM. LAW INST. 1965) (defining trespass to chattels as “intentionally (a) dispossessing another of the chattel, or (b) using or intermeddling with a chattel in the possession of another”).

<sup>331</sup> *United States v. Va Lerie*, 424 F.3d 694, 702 (8th Cir. 2005) (emphasis added).

<sup>332</sup> *See, e.g.*, *Mathis v. County of Lyon*, 633 F.3d 877 (9th Cir. 2011); *United States v. 11290 Wilco Highway, No. 3:11-cv-00640-MA*, 2013 WL 1412865, at \*3 (D. Or. Apr. 5, 2013). *But see* *United States v. \$90,000 in U.S. Currency*, 56 F. Supp. 3d 744, 747–48 (D. Md. 2014).

<sup>333</sup> *See, e.g.*, *California v. Hodari D.*, 499 U.S. 621, 626–27 & n.3 (1991); *see also* Thomas K. Clancy, *What Constitutes an “Arrest” Within the Meaning of the Fourth Amendment?*, 48 VILL. L. REV. 129, 141–42 (2003) (“The common law definition of arrest is exactly the same as the Supreme Court’s current definition of a seizure within the meaning of the Fourth Amendment.”).

<sup>334</sup> *United States v. Jacobsen*, 466 U.S. 109, 113 n.5 (1984).

<sup>335</sup> *See Hodari D.*, 499 U.S. at 624 (finding sufficient “the mere grasping or application of physical force with lawful authority, whether or not it succeeded in subduing the arrestee”).

<sup>336</sup> *Terry v. Ohio*, 392 U.S. 1, 16 (1968); *see also Arizona v. Johnson*, 555 U.S. 323, 333 n.1 (2009).

<sup>337</sup> *See* RESTATEMENT (SECOND) OF TORTS §§ 35–41 (AM. LAW INST. 1965).

fine,<sup>338</sup> but that intent requirement may be subtly different in ambiguous cases.<sup>339</sup> Additionally, the means of restraint might not be exactly the same under current Fourth Amendment doctrine and other private law.<sup>340</sup> Under current doctrine, any physical contact by a police officer effects a seizure if the individual submits to it. Such slight physical contact is not always enough to create a tort.

4. *Open Fields Reconsidered.* — In 1924, in *Hester v. United States*, the Court held that “the special protection accorded by the Fourth Amendment to the people in their ‘persons, houses, papers, and effects,’ is not extended to the open fields,” meaning any place beyond the area immediately surrounding the home, referred to as the curtilage.<sup>341</sup> After *Katz*, the decision could have been rejected as outmoded, a reflection of the kind of literalism the *Katz* Court disparaged. But that was not to be. Instead, in 1984, in *Oliver v. United States*, the Court reaffirmed the open fields doctrine by supplying a new rationale: “no expectation of privacy legitimately attaches to open fields.”<sup>342</sup>

At a minimum, the positive law model eliminates the modern rationale for the open fields doctrine. If the reasonable expectation of privacy no longer defines a search, the absence of such an expectation in open fields is no longer relevant. What should matter instead is whether an ordinary person would be free to enter a privately owned but open field in the course of snooping around or grabbing something. We rather doubt it, and the Court seems to doubt it too,<sup>343</sup> but as ever the answer depends on the details.

On the other hand, the positive law model of the Fourth Amendment does not directly address the original justification for the open fields restriction given in *Hester*, though we are not sure whether its limited reading of “effects” is consistent with the general tenor of the positive law model or is otherwise interpretively sound.<sup>344</sup> But under

<sup>338</sup> See *Brower v. County of Inyo*, 489 U.S. 593, 596–97 (1989) (seizure); *Fermino v. Fedco, Inc.*, 872 P.2d 559, 567 (Cal. 1994) (false imprisonment).

<sup>339</sup> Compare *Brendlin v. California*, 551 U.S. 249, 255 (2007) (finding a seizure even “[w]hen the actions of the police do not show an unambiguous intent to restrain . . . if in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave” (internal quotation marks omitted)), with *Fermino*, 872 P.2d at 567 (requiring intent to restrain).

<sup>340</sup> Compare *Hodari D.*, 499 U.S. at 624, with *Scofield v. Critical Air Med., Inc.*, 52 Cal. Rptr. 2d 915, 920 (1996).

<sup>341</sup> 265 U.S. 57, 59 (1924).

<sup>342</sup> 466 U.S. 170, 180 (1984).

<sup>343</sup> *Id.* at 179. But see *Sawers*, *supra* note 22, at 490–97 (arguing that American law, unlike British law, frequently countenances traffic through open fields).

<sup>344</sup> Madison’s original proposal for what became the Fourth Amendment referred not to “effects” but to “other property.” Madison, *supra* note 118, at 443. It is unclear whether the term “effects” was substituted because it was thought to be broader, narrower, or simply stylistically

the positive law model, that may indeed be the question, as the Court seemed to recognize in its property-based opinion in *Jones*, where it returned to stressing that an “information-gathering intrusion on an ‘open field’ did not constitute a Fourth Amendment search even though it was a trespass at common law,” because “an open field . . . is not one of those protected areas enumerated in the Fourth Amendment.”<sup>345</sup>

#### D. Implementing the Positive Law Model

As we conceive it, the positive law model is about the Fourth Amendment’s first step: the threshold determination of whether a search or seizure has taken place, not the consequences that follow from the conclusion that one has occurred. At the second step, the Constitution asks whether the search or seizure is “unreasonable,” but it remains debated what the necessary reasonableness entails, and especially what the implications of the presence or absence of a warrant are for the reasonableness analysis. In our view, the positive law model does not answer those questions, and so we are inclined to leave the reasonableness debate to existing doctrine and existing critics.<sup>346</sup>

That said, in explicating the first of these two steps of the Fourth Amendment we are not wholly committed to the labels that the two steps have acquired — search and seizure, followed by reasonableness. We have simply been accepting the long-used terminology. But we could also imagine, for instance, a world where the word “search” does very little work<sup>347</sup> and where both steps take place under the reasonableness label instead. So long as the model in that world had the same structure — a range of searches subject to no scrutiny because they are on the same legal terms as private activity, and a range of

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more appealing. The *Oliver* Court thought the “term ‘effects’ to be limited to personal, rather than real, property,” 466 U.S. at 177 n.7, and in another context the antebellum Supreme Court agreed that “effects,” standing alone, “means all kinds of personal estate,” *Planters’ Bank v. Sharp*, 47 U.S. (6 How.) 301, 321 (1848). But modern cases extend Fourth Amendment protection to real property other than “houses,” for example, *Los Angeles v. Patel*, 135 S. Ct. 2443 (2015); *Mancusi v. DeForte*, 392 U.S. 364, 367 (1968), and many open fields searches are about the discovery of other things that could themselves be effects.

<sup>345</sup> *United States v. Jones*, 132 S. Ct. 945, 953 (2012) (citing *Oliver*, 466 U.S. at 183, 176–77); see also *id.* at 953 n.8 (“The Fourth Amendment protects against trespassory searches only with regard to those items (‘persons, houses, papers, and effects’) that it enumerates. The trespass that occurred in *Oliver* may properly be understood as a ‘search,’ but not one ‘in the constitutional sense.’” (quoting *Oliver*, 466 U.S. at 183)).

<sup>346</sup> Unlike Note, *supra* note 28, at 1632–33, and Mannheimer, *supra* note 106, at 1284, we doubt that the positive law model is the right way to decide when warrants are required, because the second step of our Fourth Amendment inquiry is *already* limited to cases where the government is transgressing positive law. Using the positive law model at the second step would make sense only if we thought the second clause amounts to a warrant requirement.

<sup>347</sup> See sources cited *supra* note 241.

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searches subject to special scrutiny because of the government's special legal powers — it would generally work the same way as our model.

We can also imagine, though we do not wholly endorse, other ways to implement some of the insights of the positive law model. For instance, some might use the positive law model as a floor, but not a ceiling, of what should constitute a search or seizure (or the other way around). Others might use the positive law model to define reasonable expectations of privacy under *Katz* rather than to replace them.<sup>348</sup> While we have proposed something more categorical here, we hope the model can provide useful insights even to those who would prefer to implement it in somewhat different ways.

#### IV. CONCLUSION

For half a century, Fourth Amendment law has marched ahead under the banner of the reasonable expectation of privacy, seemingly oblivious to overwhelming force arrayed against it. The test is ambiguous, ahistorical, unpredictable, and fundamentally un-legal. Its survival is surely a function of one of its greatest defects: the highly contextual and subjective analysis it entails makes it difficult to identify clear errors. On the rare occasions where it has been used to establish clear rules, the results have been howlers (think again of the third-party doctrine).

The positive law model offers much more. It is conceptually clear, theoretically sound, less subjective, more legal, and responsive both to social fact and technological change. As we have said, the positive law model provides considerable protection to interests in privacy, but it does so indirectly, reflecting the conviction that the Fourth Amendment has a bigger aim at heart: protection from abuse of official power. Governmental supersession of general law presents a more fundamental threat to individual freedom and autonomy than invasions of privacy alone, though the two often overlap, as famous dystopian novels remind us. We therefore urge a greater recognition of the principle at the core of the Fourth Amendment.

The argument we have made draws upon constitutional history while creating a flexible legal model capable of adapting to new technologies and present needs. So much of constitutional law is consumed by methodological debates, but it is a happy accident that the positive law model does not create the usual disconnect between originalist interpretation and an approach to constitutional law centered on contemporary sensibilities. There is no need to modify the fundamental doctrine embodied in the Fourth Amendment and update it for modern life. The same rule — that actions by government offi-

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<sup>348</sup> *But see supra* p. 1836.

cial in derogation of general law require special scrutiny — is as readily applied today as at the time the Fourth (and Fourteenth) Amendment was adopted. The content of positive law has surely changed in many ways, but the overarching constitutional principle has not.<sup>349</sup> On the threshold of a revolution in Fourth Amendment law eight decades ago, Felix Frankfurter wrote that “[o]ur own days furnish solemn reminders that police and prosecutors and occasionally even judges will, if allowed, employ illegality and yield to passion, with the same justification of furthering the public weal as their predecessors relied upon for the brutalities of the seventeenth and eighteenth centuries.”<sup>350</sup> The observation that the Fourth Amendment should confront police “illegality” is timeless. The time to take it seriously is now.

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<sup>349</sup> Cf. Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1820 (2012).

<sup>350</sup> Felix Frankfurter, *Mr. Justice Brandeis and the Constitution*, 45 HARV. L. REV. 33, 95 (1931).