

A DEFENSE OF PRIVACY AS THE CENTRAL VALUE PROTECTED BY THE FOURTH AMENDMENT’S PROHIBITION ON UNREASONABLE SEARCHES

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I. INTRODUCTION

What interests does the Fourth Amendment’s prohibition against unreasonable searches protect? Since the Supreme Court’s decision in *Katz v. United States*, the answer in the courts has been, first and foremost, “privacy.”¹ Yet numerous scholars, as well as members of the Court itself, have maligned that position, complaining that it is inconsistent with precedent, too amorphous or expansive, not expansive enough, or inadequate at capturing what the Fourth Amendment is really about.² This Article argues, to the contrary, that the Court’s reliance on the privacy concept, both in defining the Fourth Amendment’s threshold and in analyzing whether a search is reasonable, is not only defensible but is also the optimal rubric for analyzing the jurisprudence of searches.³ After describing and rebutting the most prominent criticisms of *Katz*, I advance the positive case for what I will alternatively call the “privacy standard” or the *Katz* test.⁴

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1. *Katz v. United States*, 389 U.S. 347, 351–53 (1967); *see infra* text accompanying notes 6–8.

2. *See infra* Part V.

3. *See infra* Part VI.

4. *See infra* Parts V–VI.

II. CRITICISMS OF THE PRIVACY STANDARD

The idea that privacy should be the linchpin of Fourth Amendment analysis was attacked from the moment it was first explicitly adopted in *Katz*, as an explanation of why the Court believed that warrantless bugging of a phone booth was unconstitutional.⁵ Justice Stewart's majority opinion in that case stated that "[t]he Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment."⁶ More famously, Justice Harlan's concurring opinion stated, in language oft-repeated by the Court,⁷ that the Fourth Amendment protects "expectation[s] of privacy . . . that society is prepared to recognize as 'reasonable.'"⁸ But, in his dissent, Justice Black would have none of it.⁹ Correctly noting that "[t]he Fourth Amendment was aimed directly at the abhorred practice of breaking in, ransacking and searching homes and other buildings and seizing people's personal belongings without warrants issued by magistrates," Black argued that "[t]he Fourth Amendment protects privacy only to the extent that it prohibits unreasonable searches and seizures of 'persons, houses, papers, and effects,'" language that is not implicated by simply surreptitiously listening to a conversation.¹⁰ He also contended that all of the Court's previous opinions involving electronic surveillance focused on whether there was some sort of physical intrusion into the home,¹¹ and he inveighed against "us[ing] the 'broad, abstract and ambiguous concept' of 'privacy' as a 'comprehensive substitute for the Fourth Amendment's guarantee against 'unreasonable searches and seizures.'"¹²

While Justice Black's main criticism—stemming from his concern that the Court was ignoring the Fourth Amendment's language and history—was that coupling privacy and the Fourth Amendment unconstitutionally enhanced the Court's power to regulate police conduct, many scholars have been more concerned about the possibility that the privacy standard can *diminish* the Fourth Amendment's potential for restricting the police. These expressions of concern come in many guises, but can be boiled down to two.

5. *Katz*, 389 U.S. at 351–53.

6. *Id.* at 353.

7. *See, e.g.*, *Minnesota v. Olson*, 495 U.S. 91, 95–96 (1990) ("Since the decision in *Katz v. United States*, it has been the law that 'capacity to claim the protection of the Fourth Amendment depends . . . upon . . . a legitimate expectation of privacy . . . ' [i.e.,] 'one that society is prepared to recognize as 'reasonable.'"⁸ (citation omitted) (quoting *Rakas v. Illinois*, 439 U.S. 128, 143 & n.12 (1978))).

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

9. *See id.* at 364–74 (Black, J., dissenting).

10. *Id.* at 367, 374.

11. *Id.* at 369–72 (arguing the Court's "new interpretation of the Fourth Amendment," which "amounts to a rewriting of the language," ignores previous cases that focused on "*physical*" or "actual intrusion" and dealt with seizures of "tangible[]" items).

12. *Id.* at 374 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 509 (1965) (Black, J., dissenting)).

The first is based on the empirical assertion that, as a result of technology, changing mores, and its intentional manipulation by the private sector and government, privacy is a fleeting phenomenon and thus an extremely shaky foundation for constitutional doctrine.¹³ The second is the normative contention that privacy provides an incomplete account of the values protected by the Fourth Amendment, and that some other interest—such as property, individual dignity, personal intimacy, security from government overreaching, or freedom from coercion—should be paramount.¹⁴

So judges and scholars have advanced three, somewhat overlapping criticisms of the privacy standard, to wit: that neither the Fourth Amendment’s drafters nor precedent prior to *Katz* contemplated the privacy standard, that the privacy standard is endlessly malleable (and therefore dangerous, meaningless, or both), and that other concepts are better at expressing the core of the Fourth Amendment. Below I rebut all three criticisms.

III. PRIVACY AND FOURTH AMENDMENT LANGUAGE AND PRECEDENT

Justice Black’s opinion in *Katz* insisted that “[n]o general right is created by the [Fourth] Amendment so as to give this Court the unlimited power to hold unconstitutional everything which affects privacy.”¹⁵ This sentiment was echoed by Justice Scalia in 1998 when he stated, “the only thing the past three decades have established about the *Katz* test . . . is that, unsurprisingly, those ‘actual (subjective) expectation[s] of privacy’ ‘that society is prepared to recognize as reasonable’ bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable.”¹⁶ He and other Justices have more than once intimated that *Katz* was insufficiently attentive to the Amendment’s plain meaning and the motivation behind it.¹⁷

Of course, the Fourth Amendment does not refer to a right to privacy. But neither does the Amendment’s language refer to any of the proposed alternatives to the privacy standard; even property is not mentioned in so many words.¹⁸ Furthermore, the Amendment does use the word *search*, which, as Justice Scalia himself has pointed out, suggests that any police

13. See *infra* Part IV; see also Amitai Etzioni, *Eight Nails into Katz’s Coffin*, 65 CASE WEST. RES. L. REV. 413, 415–16, 421–23 (2014) (citing numerous scholars to the effect that the *Katz* test is manipulable by institutions and diminished by technology).

14. See *infra* Part V.

15. *Katz*, 389 U.S. at 374.

16. *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring) (quoting *Katz*, 389 U.S. at 360–61 (Harlan, J., concurring)).

17. See *id.* (calling the *Katz* test, in an opinion joined by Justice Thomas, “self-indulgent,” with “no plausible foundation in the text of the Fourth Amendment”); *United States v. Jones*, 132 S. Ct. 945, 950 (2012) (stating, in an opinion joined by Chief Justice Roberts, Justice Kennedy, and Justice Thomas, that *Katz* “deviated from [the] exclusively property-based approach” of previous cases).

18. U.S. CONST. amend. IV.

attempt to watch, examine, or pry into a house, person, paper, or effect triggers the Fourth Amendment.¹⁹ Although there is much to be said for adopting that definition as the threshold for the Amendment (and adjusting the reasonableness inquiry accordingly),²⁰ the Court is not likely to go down that path. Even so, the breadth of the word *search*, and its clear association with privacy concerns, counters Justice Black's assertion that *Katz* arbitrarily expands the Amendment's scope; read literally, the Amendment is quite voluminous.

The historical record is also mostly silent about the precise interests the Founders thought were most closely aligned with the Fourth Amendment's language.²¹ While British intrusions into property were clearly a concern of the colonists, the searches of houses, persons, papers, and effects that so exercised them clearly impinged on privacy as well, as Justice Black recognized in *Katz*.²² Justice Scalia too, while apparently more enamored of property than privacy as the linchpin of Fourth Amendment analysis, is not willing to say that history definitively settles the matter.²³ As he stated in *Kyllo v. United States*, "to withdraw protection [from the interior of the home] . . . would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment."²⁴ Even when reintroducing a property-based focus for the Fourth Amendment in *United States v. Jones*, Justice Scalia hedged his bets by repeating his statement in *Kyllo* that "we

19. *Kyllo v. United States*, 533 U.S. 27, 32 n.1 (2001) ("When the Fourth Amendment was adopted, as now, to 'search' meant '[t]o look over or through for the purpose of finding something; to explore; to examine by inspection; as, to search the house for a book; to search the wood for a thief.'" (quoting N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 66 (1828) (reprinted 6th ed. 1989))); see also Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 396 (1974) ("The plain meaning of the English language would surely not be affronted if every police activity that involves seeking out crime or evidence of crime were held to be a search.").

20. This is the tack I took in Christopher Slobogin, *Is the Fourth Amendment Relevant in a Technological Age?*, in CONSTITUTION 3.0: FREEDOM AND TECHNOLOGICAL CHANGE 11, 23–24 (Jeffrey Rosen & Benjamin Wittes eds., 2011).

21. See Thomas K. Clancy, *The Role of History*, 7 OHIO ST. J. CRIM. L. 811, 824–25 (2010) (reviewing WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS & ORIGINAL MEANING (Oxford University Press 2009)) (surveying the scholarship on the history of the Fourth Amendment, and finding that "there appears to be no tiebreaker" as to whether the Amendment focused on regulating law enforcement or instead on protecting citizens "from overreaching governmental intrusions"). Nonetheless, some historians have concluded that privacy was the central interest at stake. See JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 43 (1966) ("The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated"—recognized as already existing a right to freedom from arbitrary governmental invasion of privacy . . .").

22. See *supra* text accompanying note 10.

23. See *United States v. Jones*, 132 S. Ct. 945, 950 (2012), in which Justice Scalia's majority opinion for the Court relied on trespass doctrine to hold that planting a GPS on a car to track its travels is a Fourth Amendment search. See *id.* ("[F]or most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ('persons, houses, papers, and effects') it enumerates.").

24. *Kyllo*, 533 U.S. at 34.

must ‘assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.’²⁵

That caution is wise. Orin Kerr has shown, for instance, that the widely accepted notion that the law of trespass drove Fourth Amendment decisions prior to *Katz* is not correct.²⁶ Not only does history not tell us much one way or the other about whether property was considered the central value underlying the Fourth Amendment, but Kerr avers that the Court’s decisions through the early twentieth century “referred to privacy as much as property.”²⁷ Although Kerr starts his review with *Boyd v. United States*,²⁸ at least one earlier case also supports that proposition. In the 1877 decision of *Ex parte Jackson*, the Court stated that “[n]o law of Congress can place in the hands of officials . . . any authority to invade the secrecy of letters . . . [but rather] must be in subordination to the great principle embodied in the [F]ourth [A]mendment,” language that resonates with privacy.²⁹ Even after the 1928 decision in *Olmstead v. United States* moved the inquiry toward whether the government’s investigation involved physical penetration of property, the Court did not always adhere to that focus.³⁰ For instance, in *McDonald v. United States*, handed down twenty years after *Olmstead* but well before *Katz*, the Court rejected the argument that, because it did not involve a trespass, peering into the defendant’s apartment from the hallway through a transom over his door was not governed by the Fourth Amendment.³¹ If, as the Court has stated, “the eye cannot . . . be guilty of a trespass,”³² the *McDonald* Court could not have been applying a trespass standard.

Even the majority opinion in *Jones*, widely characterized as a decision that rejuvenated the property orientation of the Fourth Amendment,³³ had to rely on privacy, or something akin to it, to achieve its result. This is not the point made above about Justice Scalia referencing privacy in *Jones* when he described why the trespass doctrine was still relevant to Fourth Amendment analysis.³⁴ Rather, it is the little-noticed fact that the trespass in that case—

25. *Jones*, 132 S. Ct. at 950 (quoting *Kyllo*, 533 U.S. at 34).

26. Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67, 68 (“[N]o trespass test was used in the pre-*Katz* era.”).

27. *Id.* at 77.

28. *Id.*; see *Boyd v. United States*, 116 U.S. 616, 622 (1886).

29. *Ex parte Jackson*, 96 U.S. 727, 733 (1877).

30. *Olmstead v. United States*, 277 U.S. 438, 457 (1928) (noting that with respect to the wires used to conduct the eavesdropping in that case that “[t]he insertions were made without trespass upon any property of the defendants”), *overruled in part by Katz v. United States*, 389 U.S. 347 (1967).

31. *McDonald v. United States*, 335 U.S. 451, 454 (1948) (stating that, even if the Government’s statement about the absence of trespass were correct, “we reject the result” of that reasoning).

32. *Boyd*, 116 U.S. at 628 (quoting *Entick v. Carrington*, 19 How. St. Tr. 1029 (K.B.1765)).

33. See, e.g., Jace C. Gatewood, *It’s Raining Katz and Jones: The Implications of United States v. Jones—A Case of Sound and Fury*, 33 PACE L. REV. 683, 692 (2013) (“The five-Justice majority [in *Jones*] opted to return to the property-driven concept, the trespass doctrine, first articulated in *Olmstead*.”).

34. See *supra* note 25 and accompanying text.

occasioned by planting a GPS device on the defendant's car—was not enough by itself to make the government's action a search.³⁵ In fact, the precise holding of *Jones* was that “the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a ‘search.’”³⁶ Something besides, or in addition to, interference with property was the real trigger of Fourth Amendment protection in that case, and that trigger appeared to be freedom from unjustified government monitoring even while in public spaces—or, in a phrase, invasion of Jones's reasonable privacy expectations.

IV. THE ELASTICITY OF PRIVACY

As Anthony Amsterdam pointed out years ago, neither text nor history provides much guidance as to what the Fourth Amendment means.³⁷ Thus, scholarly and judicial interpreters of that Amendment usually resort to other methods of discerning its meaning. One such method has been to focus on whether the value said to underlie the Fourth Amendment is susceptible to principled application.

The argument that privacy doesn't meet that test was summarized by Justice Scalia in *Kyllo*, where he stated that the *Katz* reasonable expectation of privacy formulation “has often been criticized as circular, and hence subjective and unpredictable.”³⁸ It must be admitted that, as applied by the Court, the test *is* both circular and subjective. An expectation of privacy is reasonable only when the Court tells us it is, and until recently that assessment has only occasionally been tied to an objective referent outside of the Court's own intuitions about how much privacy people expect.³⁹

This state of affairs bothers not only judicial conservatives like Justice Scalia. It is also troublesome to liberal scholars because, despite its circularity and subjectivity in the Court's hands, the *Katz* test has hardly been unpredictable. Rather, contrary to Justice Scalia's assertion, the Court's stance on reasonable privacy expectations was, until very recently, always hostile to an expansive Fourth Amendment. More specifically, until well

35. See *United States v. Jones*, 132 S. Ct. 945, 948 (2012).

36. *Id.* at 949 (emphasis added). The argument could be made that the italicized language is merely describing the injury caused by the trespass, which modern trespass law requires to make the trespass actionable. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON LAW OF TORTS 87 (5th ed. 1984) (stating that there must be “some actual damage to the chattel before the action can be maintained”); see also Shyamkrishna Balganesh, *Common Law Property Metaphors on the Internet: The Real Problem with the Doctrine of Cybertrespass*, 12 MICH. TELECOMM. & TECH. L. REV. 265, 275–78 (2006) (discussing the scope of actionable trespass and the uncertainty regarding cybertrespass). But neither the planting of the GPS device nor its monitoring did any damage to the chattel, here Jones's car; the only “damage” was to Jones's privacy interest. See *Jones*, 132 S. Ct. at 950–52.

37. Amsterdam, *supra* note 19, at 395 (noting that, in interpreting the Fourth Amendment, “[i]ts language is no help and neither is its history”).

38. *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

39. See *infra* text accompanying notes 40–56.

after *Kyllo*, the Court's cases all stood for the proposition that we cannot expect privacy vis-à-vis the government when we do not expect (or at least when the *Court* doesn't think we *should* expect) privacy vis-à-vis our fellow citizens.

The Court has thus refused to apply the Fourth Amendment when police monitor travel in the absence of a trespass,⁴⁰ enter private property distinct from the curtilage,⁴¹ fly over private property that includes the curtilage,⁴² go through garbage,⁴³ and (in dictum) spy on homes from a lawful vantage point with either the naked eye or technology in general public use.⁴⁴ The Court has also decided that information handed over to a third party is not protected by the Fourth Amendment because we assume the risk that the third party will disclose the information to the government.⁴⁵ Even when the Court determines that a police action is a search, it has been willing to relax Fourth Amendment protections when it perceives that a lesser expectation of privacy is implicated.⁴⁶ Given this state of affairs, critics worry that as more technology comes into general use and enhances the government's ability to view our activities and to access data given to third parties, the Fourth Amendment will all but disappear.⁴⁷

These critics are right to be concerned. But the problem is not the *Katz* test. It is the way the Court has interpreted that test. Despite Justice Scalia's

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

41. See *Oliver v. United States*, 466 U.S. 170, 180–81 (1984).

42. See *Florida v. Riley*, 488 U.S. 445, 449–52 (1989).

43. See *California v. Greenwood*, 486 U.S. 35, 39–42 (1988).

44. *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (“Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a ‘search’ and is presumptively unreasonable without a warrant.”).

45. *Smith v. Maryland*, 442 U.S. 735, 735–36 (1979) (“When petitioner . . . voluntarily conveyed numerical information to the telephone company and ‘exposed’ that information to its equipment in the normal course of business . . . [he] assumed the risk that the company would reveal to the police the numbers he dialed.”); *United States v. Miller*, 425 U.S. 435, 443 (1976) (“[T]he Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, 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.”).

46. See, e.g., *Maryland v. King*, 133 S. Ct. 1958, 1969 (2013) (stating, in the course of holding that a DNA swab may be taken from an arrestee in the absence of individualized suspicion, that “[t]he fact [that] an intrusion is negligible is of central relevance to determining reasonableness, although it is still a search as the law defines that term”); *Samson v. California*, 547 U.S. 843, 852 (2006) (stating, in the course of holding that a probationer may be subject to suspicionless searches, that “petitioner did not have an expectation of privacy that society would recognize as legitimate”).

47. See, e.g., Etzioni, *supra* note 13, at 421 (arguing that *Katz* is “undermined by recent technological developments”); Russell L. Weaver, *Privacy in an Age of Advancing Technology*, 82 *MISS. L.J.* 975, 983 (2013) (“*Katz* did not provide the Court with a sound basis for dealing with police use of new forms of technology.”). Sabrina A. Lochner, Note, *Saving Face: Regulating Law Enforcement’s Use of Mobile Facial Recognition Technology & Iris Scans*, 55 *ARIZ. L. REV.* 201, 217 (2013) (“The *Katz* test lets technology lessen reasonable expectations of privacy as gadgets become more common and less intrusive.”). See generally DAVID BRIN, *THE TRANSPARENT SOCIETY: WILL TECHNOLOGY FORCE US TO CHOOSE BETWEEN PRIVACY AND FREEDOM?* (1998) (arguing that there can be little privacy in an age of high technology).

characterization, the test is not supposed to be subjective; it protects all “reasonable” expectations of privacy. As it does in other areas of the law,⁴⁸ the word *reasonable* calls for a normative perspective, in this case one that considers how much protection people actually receive or legitimately should expect from an arbitrary police investigation,⁴⁹ not one that resorts, as the Court has done, to implausible calibrations of whether a particular activity or piece of datum could *ever* be viewed by *anyone*.⁵⁰ The Court has only recently begun to realize—in cases involving police use of thermal imagers,⁵¹ drug-sniffing dogs,⁵² tracking devices,⁵³ police perusal of medical information,⁵⁴ and data on cellphones⁵⁵—how damaging to and unreflective of societal norms its interpretation of the Fourth Amendment is. Ironically, this realization is probably partly due to the very fact that liberals’ fear will spell the end of the Fourth Amendment: the advent of surveillance technology. While that development has enabled easier invasions of privacy, it has had that effect on *everyone’s* privacy, including that of the Justices and their kin, and the Court has begun to respond accordingly.⁵⁶

We will have to wait to see how far the Court’s retrenchment goes. In the meantime, it is naïve to think that linking the Fourth Amendment with some other value would have somehow produced a different jurisprudence.

48. See, e.g., Gerald K. Freund, Note, *Look Up in the Sky, It’s a Bird, It’s a Plane . . . It’s Reasonableness*, 20 SW. U. L. REV. 195, 195 (1991) (“‘Reasonableness’ has played and continues to play a major role in the development of the law. . . . Reasonableness has . . . been used to set standards for behavior and individual decision-making.”).

49. See *King*, 133 S. Ct. at 1980–89 (Scalia, J., dissenting). The reasonableness inquiry can encompass both an inquiry into what the average person thinks and what the average person should think. Cf. Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 505 (2008) (arguing that, in criminal law, reasonableness connotes both “typicality” and “the ‘should’ question”). I argue later in this Article that the two issues conflate when privacy is involved. See *infra* text accompanying notes 101–06.

50. See Wayne R. LaFave, *The Present and Future Fourth Amendment*, 1995 U. ILL. L. REV. 111, 112 (criticizing the Court’s typical application of *Katz* on the ground that the Court “often found a lack of the requisite justified privacy expectation because of risks to privacy [from the general public,] which are virtually or totally nonexistent”).

51. See *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (holding that use of a thermal imager to discover the interior of the home is a search).

52. See *Florida v. Jardines*, 133 S. Ct. 1409, 1414–18 (2013) (holding that use of a drug-sniffing dog to determine the contents of a home from the curtilage is a search).

53. See *United States v. Jones*, 132 S. Ct. 945, 948–54 (2012) (holding that planting a GPS device on a car to track its movements is a search).

54. See *Ferguson v. City of Charleston*, 532 U.S. 67, 76–86 (2001) (holding that pregnant women do not assume the risk that drug usage discovered during a medical examination will be transmitted to law enforcement).

55. See *Riley v. California*, 134 S. Ct. 2473, 2482–95 (2014) (holding that the search of a cell phone may not occur incident to arrest, but instead requires a warrant except in exigent circumstances).

56. See Linda Greenhouse, Opinion, *The Supreme Court Justices Have Cellphones, Too*, N.Y. TIMES (June 25, 2014), http://www.nytimes.com/2014/06/26/opinion/linda-greenhouse-the-supreme-court-justices-have-cellphones-too.html?_r=0 (stating that during oral argument in *United States v. Jones* (the GPS tracking case), “the [J]ustices seemed taken aback by the government’s concession—inherent in its legal theory—that they themselves could be subjected to such an intrusion [via GPS tracking] on their privacy,” and noting that Chief Justice Roberts asked, “You could tomorrow decide that you put a GPS device on every one of our cars, follow us for a month, no problem under the Constitution?”).

The Court would have manipulated any stand-in for privacy just as easily. Probably the most concrete and most commonly proposed substitute for the *Katz* test is one based on property.⁵⁷ Yet in the hands of the post-Warren Court, a property-oriented Fourth Amendment could have easily justified all of the Court's post-*Katz* decisions that most bother *Katz* critics. For instance, under a property regime, the Court could have said that private fields beyond the curtilage are not sufficiently connected to the home (indeed it had already said so in a pre-*Katz* opinion),⁵⁸ that flying over curtilage or looking into homes from a lawful vantage point is not a trespass,⁵⁹ that garbage is abandoned to the public at large,⁶⁰ and that records and information held by third parties belong to the third parties.⁶¹ Other tests that might be proposed (a number of which are discussed below) are just as manipulable. The problem, if there is one, is with the Court, not the test.

V. PRIVACY'S INADEQUACY

The most frequent criticism of the privacy standard among academics is that it does not adequately capture what the Fourth Amendment is all about. Because of its singular focus on privacy, it is argued, the *Katz* test misses out on what the Fourth Amendment is meant to accomplish. Rather, according to the various authors whose views are discussed further below, the interest protected by the Fourth Amendment that privacy fails to protect is best framed as the right to dignity, liberty, property, or information-control; or the right to avoid unjustified state coercion or power; or the right to expect security or trust from government intervention.

While all of these suggested refinements of *Katz* are plausible, they all have their own problems. First, of course, adoption of any one of these frames—say, property—as a replacement for *Katz* would mean that, according to the progenitors of the other frames, it too fails to capture the true scope of the Fourth Amendment. Second, as suggested by the conclusion

57. Erica Goldberg, *How United States v. Jones Can Restore Our Faith in the Fourth Amendment*, 110 MICH. L. REV. FIRST IMPRESSIONS 62, 68 (2011) (concluding that *Jones*'s "resurrection of the link between searches and property . . . is a substantial step toward" making the Fourth Amendment "more concrete"). But even trespass law could give the courts quite a bit of leeway; under the common law, for instance, the concept could be quite elastic. See *infra* note 106 (although, as explained *supra* text accompanying note 36, still not elastic enough to explain the entire holding in *Jones*).

58. *Hester v. United States*, 265 U.S. 57, 59 (1924) ("The distinction between the [open fields] and the house is as old as the common law.").

59. *Cf. Kyllo v. United States*, 533 U.S. 27, 34 (2001) (stating, in dictum, that looking into a house from a lawful vantage point with either the naked eye or technology in general public use is not a search); *California v. Ciraolo*, 476 U.S. 207, 223 (1986) (Powell, J., dissenting) (arguing that the Court's focus on whether a flyover physically intruded onto a backyard reinstated the pre-*Katz* physical trespass test).

60. *Cf. California v. Greenwood*, 486 U.S. 35, 40 (1988) ("[R]espondents placed their refuse at the curb for the express purpose of conveying it to a third party, the trash collector . . .").

61. *Cf. Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 54 (1974) (holding that depositors have no cognizable Fourth Amendment interest in records maintained by banks about the depositors' transactions).

above that even the relatively concrete concept of property is eminently manipulable, none of these terms is any easier to define. Third, some of the proposed replacements for *Katz* are so broad that they fail to distinguish how the Fourth Amendment is different from any other constitutional guarantee.

At bottom, precisely because of its ambiguity, privacy is a capacious enough concept to accommodate virtually all of the values commentators have said it does not encompass. To the extent privacy doesn't do the trick, the other significant component of the Fourth Amendment—its ban on unreasonable seizures—can pick up the slack. Many of those who criticize the privacy standard on the ground that it is an insufficient description of the Fourth Amendment's core seem to forget about this second aspect of the Amendment. Outside of the technological surveillance context, searches almost always are both preceded by and end with a physical seizure that requires separate justification.⁶² The ban on unreasonable seizures is not principally concerned with protecting privacy, but rather with protecting other values, including those like liberty and property, which scholars have associated with the ban on searches.

These various points can be illustrated by looking in more detail at *Katz*'s competitors. Take dignity first. John Castiglione, the principal and most persuasive proponent of that concept as a means of supplementing Fourth Amendment jurisprudence, admits that dignity is at least as hard to describe as privacy and that the concepts of privacy and dignity overlap considerably—both as used by the Court and as a conceptual matter.⁶³ He also notes that preservation of dignity is a fundamental value underlying many other constitutional provisions, including the Fourteenth Amendment, and thus can be protected by those guarantees as well.⁶⁴ Finally, he concedes that the results in the Supreme Court's cases would probably not be different were dignity to be given more prominence.⁶⁵ In the one lower court case Castiglione uses to distinguish privacy from dignity—a warrantless daytime search that involved reaching inside the suspect's underwear—a heightened

62. As to pre-search seizures, see, for example, *Chimel v. California*, 395 U.S. 752, 762–63 (1969) (holding that a search incident to arrest must be preceded by an arrest based on probable cause); *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (discussing frisks that are subsequent to a stop, which must be based on reasonable suspicion). As to seizures of property found during searches, see *Minnesota v. Dickerson*, 508 U.S. 366, 376–79 (1993) (“[T]he Fourth Amendment’s requirement that the officer have probable cause to believe that the item is contraband before seizing it ensures against excessively speculative seizures.”).

63. John D. Castiglione, *Human Dignity Under the Fourth Amendment*, 2008 WIS. L. REV. 655, 702 (noting “the ethereal nature of dignity under any definition”); *id.* at 688 (noting the Court’s “arguable conflation of the concepts”); *id.* at 689–90 (noting that, at least to some theorists, privacy is conceived of “as a ‘unified and coherent concept protecting against conduct that is ‘demeaning to individuality,’ ‘an affront to personal dignity,’ or an ‘assault on human personality’” (quoting Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087, 1116 (2002))).

64. *Id.* at 698 (noting that the Fifth and Fourteenth Amendments protect against government behavior that “shock[s] the conscience”); *id.* at 680 (noting that the First Amendment might protect dignity as well).

65. *Id.* at 708 (“It is of course true that, in actual practice, including dignity as a formal element in cases . . . may not change a significant number of outcomes . . .”).

privacy interest was clearly present, and to the extent a separate dignity interest was infringed, the Fourth Amendment's restriction on unreasonable seizures (of both the person and of evidence) would seem applicable.⁶⁶ Because it involved the search of a probationer's apartment, privacy interests are also clearly implicated in the first of the two Supreme Court cases Castiglione uses as exemplars of dignity concerns.⁶⁷ And in the only other Court case Castiglione highlights as an illustration of the dignity principle at work, the most obvious insult to that interest occurred in connection with a seizure—specifically, holding the search targets at gunpoint.⁶⁸

The same type of analysis applies to three other competitors with the privacy standard: liberty, property, and coercion. Using the liberty interest described in *Lawrence v. Texas*⁶⁹ as his springboard, Thomas Crocker makes a persuasive argument that intimate relationships should be free from unjustified government intrusion even though intimate relationships clearly involve surrendering privacy to another.⁷⁰ But that argument does not require a separate Fourth Amendment paradigm; certainly one could encompass intimate relationships within the expectations of privacy society is prepared to recognize as reasonable.⁷¹

Similarly, the Court itself has long recognized the close relationship between property and privacy interests; if one has a property interest in a place, one usually has a privacy claim as well.⁷² At the same time, the arguments of Morgan Cloud and others notwithstanding, property seems a particularly inauspicious focal point for those who want a more expansive Fourth Amendment, especially as technology increases government power.⁷³ As I have noted elsewhere:

Scholars attempting to bring . . . surveillance under the property rubric have had to resort to . . . exotic arguments. Interception of phone or computer

66. *Id.* at 685 (citing *United States v. Williams*, 477 F.3d 974, 975 (8th Cir. 2007)).

67. *Samson v. California*, 547 U.S. 843, 846 (2006).

68. *Los Angeles County v. Rettele*, 550 U.S. 609, 611 (2007).

69. *Lawrence v. Texas*, 539 U.S. 558, 593 (2003).

70. See Thomas P. Crocker, *From Privacy to Liberty: The Fourth Amendment After Lawrence*, 57 *UCLA L. REV.* 1, 56 (2009) (“In keeping relationships free from the dominating presence of government intrusion, *Lawrence v. Texas*’s conception of liberty applies to government searches no less than to criminal statutes.”).

71. Crocker admits as much. See *id.* at 47 (“Privacy’s role in ordinary social practice is fluid and relational.”).

72. See *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978) (“Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.”); cf. *Florida v. Jardines*, 133 S. Ct. 1409, 1419 (2013) (Kagan, J., concurring) (“The law of property ‘naturally enough influence[s]’ our ‘shared social expectations’ of what places should be free from governmental incursions.” (quoting *Georgia v. Randolph*, 547 U.S. 103, 111 (2006))).

73. Morgan Cloud, *A Liberal House Divided: How the Warren Court Dismantled the Fourth Amendment*, 3 *OHIO ST. J. CRIM. L.* 33, 72 (2005) (arguing for a Fourth Amendment “rooted in property theories”); Goldberg, *supra* note 57, at 68–69.

communications, and tracking using the signals from cell phones, are said to be “trespasses” on the electronic particles sent by these devices. Aerial surveillance purportedly violates the common law doctrine of *ad coelum*, which grants property rights directly above one’s home (but, unfortunately for those who would like to regulate satellite and drone surveillance, nowhere else). And perhaps most creative of all is the assertion that people have a property interest in records created and maintained by third parties.⁷⁴

William Stuntz’s argument that coercion ought to be viewed as the dominant protection afforded by the prohibition on searches suffers from the same type of problem because covert surveillance—or even overt surveillance for that matter—is not coercive in the physical sense that Stuntz used that term.⁷⁵ More significantly, this criticism of *Katz* is the most blatant in its disregard of the fact that the Fourth Amendment regulates seizures as well as searches, and thus prohibits, or at least should prohibit,⁷⁶ unjustified coercion or violence against the person or unjustified destruction of or violence against property.⁷⁷

Another awkward alternative’s take on the Fourth Amendment attempts to distinguish between government intrusions into privacy on the one hand and government attempts to obtain information about its citizens on the other. For instance, Daniel Solove has argued that *Katz* should be abandoned and that “[t]he Fourth Amendment should regulate government information gathering whenever it causes problems of reasonable significance” that affect “people’s ability to exercise autonomy, engage in free speech, communicate with others, associate in groups, participate in political activities, pursue

74. Christopher Slobogin, *Making the Most of United States v. Jones in a Surveillance Society: A Statutory Implementation of Mosaic Theory*, 8 DUKE J. CONST. L. & PUB. POL’Y 1, 12–13 (2012).

75. William J. Stuntz, *Privacy’s Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1020 (1995) (“Were the law of criminal procedure to focus more on force and coercion and less on information gathering . . . it would square better with other constitutional law and better protect the interests most people value most highly.”).

76. *See id.* at 1068. As evidence of how privacy is inadequate to the task of regulating the police, Stuntz discusses *Anderson v. Creighton*, 483 U.S. 635, 641 (1987), in which the Supreme Court held that, because they had probable cause, officers did not violate the Fourth Amendment when, in the course of looking for a fugitive, they confronted occupants of a house with a shotgun, punched one male occupant, and hit another (young female) occupant. Stuntz, *supra* note 75, at 1067–68. But *Creighton* is a highly questionable decision, and in any event is as much a seizure case as a search case. *See Frunz v. City of Tacoma*, 476 F.3d 661, 661 (9th Cir. 2007) (describing as “frivolous” a state claim that responding to an intruder call by slamming the innocent occupant of the house to the ground and handcuffing her for an hour was a reasonable seizure).

77. *See, e.g., Maryland v. Wilson*, 519 U.S. 408, 412–14 (1997) (discussing driver and passenger liberty interests when a police officer orders them out of a lawfully stopped car); *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 618 (1989) (indicating that the detention of an individual for drug or alcohol testing could be a meaningful interference with the individual’s freedom of movement); *Hudson v. Palmer*, 468 U.S. 517, 528 n.8 (1984) (discussing when the destruction of personal property constitutes an unreasonable seizure). There is also Michael Seidman’s point that, by protecting the privacy infringed through searches, the Fourth Amendment also protects against the “collateral” damage to dignity and property interests that can be associated with seizures. Louis Michael Seidman, *The Problems with Privacy’s Problem*, 93 MICH. L. REV. 1079, 1086–92 (1995).

self-development, and formulate their own ideas, beliefs, and values.”⁷⁸ This language is no more elucidating than the privacy standard and sounds much more explicitly in the First Amendment than the Fourth Amendment,⁷⁹ creating confusion about what independent purpose the Fourth Amendment serves. At the same time, the concepts Solove describes are easily encompassed within the privacy rubric, as Neil Richards, Solove’s sometime co-author, has demonstrated with his work on “intellectual privacy.”⁸⁰

The assertion, made by Raymond Shih Ku and Paul Ohm, that “[t]he Fourth Amendment protects power not privacy” is flawed in a different way.⁸¹ There is no doubt that the Fourth Amendment is meant to restrict government power. But so is every other guarantee in the Bill of Rights. The question should be: what specific exercise of government power is the Fourth Amendment meant to restrict? Ku answers that question by stating that “the amendment is best understood as a means of preserving the people’s authority over government—the people’s sovereign right to determine how and when government may intrude into the lives and influence the behavior of its citizens.”⁸² The goal of limiting government power to “intrude” into our lives resonates with privacy more than any of the other values discussed so far—an assertion bolstered by the fact that the Supreme Court itself uses “intrusiveness” or “invasiveness” as the synonym for analyzing the privacy interest at stake in Fourth Amendment cases in well over 200 of its decisions.⁸³

A similar riposte can be directed at Scott Sundby’s assertion that the Fourth Amendment is meant to maximize government–citizen trust by preventing unjustified government intrusions,⁸⁴ and Thomas Clancy’s and Jed Rubenfeld’s contention (independently arrived at) that the Fourth Amendment is about ensuring security from such intrusions.⁸⁵ These are all

78. DANIEL J. SOLOVE, NOTHING TO HIDE: THE FALSE TRADEOFF BETWEEN PRIVACY AND SECURITY 118–19 (2011).

79. Compare U.S. CONST. amend. I (providing the rights of free speech and peaceable assembly), with U.S. CONST. amend. IV (guaranteeing freedom from unreasonable searches).

80. See generally Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387 (2008) (demonstrating how First Amendment concepts are encompassed by the privacy rubric).

81. Raymond Shih Ray Ku, *The Founders’ Privacy: The Fourth Amendment and the Power of Technological Surveillance*, 86 MINN. L. REV. 1325, 1326 (2002) (“The Fourth Amendment protects power not privacy.”); Paul Ohm, *The Fourth Amendment in a World Without Privacy*, 81 MISS. L.J. 1309, 1355 (2012) (same).

82. Ku, *supra* note 81.

83. See Christopher Slobogin, *Proportionality, Privacy, and Public Opinion: A Reply to Kerr and Swire*, 94 MINN. L. REV. 1588, 1595 (2010).

84. Scott E. Sundby, *“Everyman”’s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751, 1754–63 (1994) (“[T]he animating principle which has been ignored in the current Fourth Amendment debate is the idea of reciprocal government–citizen trust.”).

85. Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?* 33 WAKE FOREST L. REV. 307, 307–08 (1998) (“Only by understanding the meaning of the term ‘secure’ is it possible to determine the scope of the Fourth Amendment’s protections for individuals and, correlatively, the amount of unregulated governmental power the amendment allows.”); Jed Rubenfeld,

powerful arguments, the second particularly so, since it is based on the first eight words of the Fourth Amendment. But, again, the devil lies in defining the terms. When one mines the analysis, Sundby ends up characterizing the optimal means of legitimizing government as an implementation of “the right to be let alone” in a way that ensures that the government respects its citizens.⁸⁶ In explicating the right to security, Clancy equates it with the right to exclude,⁸⁷ and Rubenfeld describes it as “a justified belief that if we do not break the law, our personal lives will remain our own.”⁸⁸ All of these tropes sound remarkably like proxies for privacy. In fairness, all three authors, and particularly Sundby and Rubenfeld, argue that their frame differs from the right to privacy because it is also meant to ensure security from government oppression that does not infringe personal space, such as, for instance, pervasive surveillance of public areas or routine searches of garbage.⁸⁹ But, of course, *Katz* can be construed in the same way: It is not a misuse of language to say that the government invades our privacy when it monitors our public activity or our refuse.⁹⁰

My own preference, reinforced significantly by the fact that *Katz* has been precedent now for almost fifty years, is to continue with the *Katz* test in defining searches, and also to rely on the privacy rubric when discussing the individual interests at stake in analyzing the reasonableness of a search. Most of the considerations that others believe trigger Fourth Amendment protection—dignity, intimacy, property, information control, and security from government intrusion—are best deployed as a means of operationalizing privacy, not replacing it. To the extent that is not so, conceptualizing the ban on unreasonable seizures as a means of enhancing dignity, autonomy, and property interests and of minimizing coercion should handle the rest. One can then use the *right to be secure* as an umbrella term defining the

The End of Privacy, 61 STAN. L. REV. 101, 104 (2008) (“The Fourth Amendment does not guarantee a right of privacy. It guarantees—if its actual words mean anything—a right of *security*.”).

86. See Sundby, *supra* note 84, at 1754, 1780–83, 1812 (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

87. Clancy, *supra* note 85, at 307 (“[T]he Fourth Amendment right to be ‘secure’ is equivalent to the right to exclude.”).

88. Rubenfeld, *supra* note 85, at 129.

89. See, e.g., *id.* at 127 (arguing that the core of the Fourth Amendment is to prevent the “stifling apprehension and oppression that people would justifiably experience if forced to live their personal lives in fear of appearing ‘suspicious’ in the eyes of the state”); Sundby, *supra* note 84, at 1792 (arguing that *California v. Greenwood* was incorrectly decided “because of what is revealed about the government–citizen relationship where the government has the power to engage in an intrusion like the searching of one’s garbage without any need to justify its actions”).

90. Rubenfeld himself has said that privacy is “a means of ensuring individuals are free to define themselves” without government interference, as well as a means of reducing government’s ability to “standardize[] lifestyles.” See Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 762, 784 (1989). With respect to trash, as Justice Brennan said in his dissent in *Greenwood*, “[i]t cannot be doubted that a sealed trash bag harbors telling evidence of the ‘intimate activity associated with the ‘sanctity of a man’s home and the privacies of life,’” which the Fourth Amendment is designed to protect.” *California v. Greenwood*, 486 U.S. 35, 50 (1988) (Brennan, J., dissenting) (quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984)).

values that both the ban on unreasonable searches and the prohibition on unreasonable seizures are meant to implement. But the privacy standard should remain the linchpin of search analysis.

VI. THE POSITIVE CASE FOR PRIVACY

Even if one accepts privacy as the focal point of the Fourth Amendment, the work contesting its dominance remains important. As Daniel Solove has rightly argued, privacy is a highly contextual, multifaceted concept.⁹¹ While Solove believes that this fact means the *Katz* test should be jettisoned, I instead conclude that all of the scholarship, including Solove's, that aims at identifying the various interests affected by government investigations are better viewed as a means of fleshing out what the privacy standard might mean in the Fourth Amendment context. Although I could try my hand at summarizing these various insights, I could do no better than David Sklansky did in a recent piece defending the *Katz* test, which he sees as a means of reinforcing a sense of refuge:

[W]e can provisionally define privacy as respect for a personal sphere shielded, but not completely immune, from public inspection and regulation. We can agree with Justice Blackmun that this sphere is defined partly by places (especially the home and the body) and partly by activities (especially those that relate to intimacy and self-definition). We can say that privacy is not so much a thing or quantity that someone has, but rather that it resides in the respect that others, including governmental officers, show for an individual's sphere of personal sovereignty. Violations of that respect are important not just as a matter of principle but because of the tangible effects they can have both on the victim's sense of security and peace of mind and, perhaps more importantly, on the habits and ways of thinking of the individuals and organizations responsible for the violations. Privacy violations can train violators to depersonalize and dehumanize the individuals with whom they deal, and those are particularly dangerous habits and ways of thinking for governmental officers and agencies, because of the tools of coercion and violence they can lawfully employ. Finally, we can take note of a tension in this conception of privacy: the personal sphere draws its significance in part from the interpersonal interactions it protects, but those interactions can take forms that are abusive and that the public has a strong interest in detecting, interrupting, and punishing.⁹²

With this explication of Fourth Amendment privacy in mind, several benefits to a privacy-oriented Fourth Amendment should be apparent. First,

91. See Solove, *supra* note 63, at 1092 (arguing that privacy can be categorized within the following six headings: the right to be let alone; limited access to oneself; secrecy; control over personal information; personhood, as in control of one's personality; and intimacy).

92. David Alan Sklansky, *Too Much Information: How Not to Think About Privacy and the Fourth Amendment*, 102 CAL. L. REV. 1069, 1113 (2014).

as I have already noted, privacy can be a capacious concept.⁹³ Sklansky's comments make clear that privacy is important for collective as well as individual reasons: Protecting privacy can protect dignity, intimacy, property, *and* security vis-à-vis the government.⁹⁴ Further, as Alan Westin recognized years ago, privacy can also encompass solitude, intimacy, anonymity, and reserve and, thus, can exist "in public" as well as "in private."⁹⁵ Different types of searches might emphasize one of these concerns over others, but they can all fit under the privacy umbrella.

A second benefit of the privacy concept is that it is alienable, either explicitly or implicitly. It can be given up explicitly through consent.⁹⁶ It can be given up implicitly when one shares personal space with another, a fact recognized by the Supreme Court's third-party consent cases.⁹⁷ In contrast, surrendering the right to be treated with dignity or the right to be treated in a non-oppressive or non-coercive manner is incoherent, because these rights are inalienable.⁹⁸

Some commentators have found this aspect of the privacy rubric problematic because, given the fact that privacy can be shared, it allows third parties to waive another's Fourth Amendment rights.⁹⁹ But these commentators give short shrift to the autonomy interest of the third-party consentor. Third-party consent can and should be justified not on the ground that sharing privacy with another diminishes it vis-à-vis the government, but on the ground that the third party—at least a human third party—has an equally significant interest in choosing who is permitted entry.¹⁰⁰ That entitlement to waive one's own privacy interest is a feature of privacy's alienability.

93. *See supra* Part V.

94. *See* Sklansky, *supra* note 92, at 1106.

95. ALAN F. WESTIN, *PRIVACY AND FREEDOM* 7, 31 (1967) (arguing that a "state of privacy . . . occurs when the individual is in public places or performing public acts but still seeks, and finds, freedom from identification and surveillance").

96. *See* *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973) (holding that "a search conducted pursuant to a valid consent is constitutionally permissible").

97. *See* *United States v. Matlock*, 415 U.S. 164, 171 (1974) (holding valid voluntary consent "from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected").

98. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (classifying as "unalienable Rights," "Life, Liberty and the pursuit of Happiness"); Castiglione, *supra* note 63, at 703 ("Dignity is an immutable value, held in equal measure at all times by all people, a quality privacy does not share.")

99. Crocker, *supra* note 70, at 66 (arguing that "[w]here there is an interpersonal relationship, not a fleeting co-occupation of physical space," third-party consent should not be valid).

100. *See* Mary I. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 CAL. L. REV. 1593, 1643 (1987) (arguing that people in possession of information about others, even information that is private and obtained through an intimate relationship, have "an autonomy-based right to choose to cooperate with the authorities"). Under this theory, however, parties that do not actually share the searched space would not have authority to search. *Cf.* *Illinois v. Rodriguez*, 497 U.S. 177, 187–88 (1990) (holding that a third party with "apparent authority" over a space may consent to its search). Nor would impersonal entities that have no autonomy be able to give such consent. *Cf.* *United States v. Miller*, 425 U.S. 435, 443 (1976) (holding that one assumes the risk that a bank will reveal one's financial transactions to the government). *See generally* CHRISTOPHER SLOBOGIN, *PRIVACY AT RISK: THE NEW*

A third benefit of *Katz*, Justice Scalia's statement in *Kyllo* to the contrary notwithstanding, is that expectations of privacy can be objectified.¹⁰¹ The original formulation of the *Katz* test found in Justice Harlan's opinion—referring to expectations of privacy that *society* is prepared to recognize as reasonable¹⁰²—justifiably cries out for an assessment of societal privacy norms as they interact with governmental power.¹⁰³ As Matthew Kugler and Lior Strahilevitz recently argued—bolstering claims that I have made for years¹⁰⁴—empirically derived assessments of societal views about privacy are relatively easy to obtain in a scientifically valid manner, tend to produce consistent results across a wide swath of scenarios, and are preferable to reliance on the intuitions of judges who are often out of touch with modal societal norms.¹⁰⁵ While data about lay views on expectations of privacy require careful analysis, they provide far more content than is likely to be obtained through efforts to operationalize concepts like dignity, intimacy, coercion, or security, and may even be more objective than anything the property standard might produce.¹⁰⁶

A fourth benefit of the privacy standard is that it is scalar. As Justice Alito recognized in *United States v. Jones*, not every government action

GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT 159–60 (Univ. of Chi. Press ed., 2007) (outlining why the third-party doctrine should apply only when third parties have autonomy rights, and why record-keeping institutions do not have such rights).

101. See *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

102. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (emphasis added).

103. See also Robert C. Post, *Three Concepts of Privacy*, 89 GEO. L.J. 2087, 2092–94 (2001) (arguing that privacy equates to the “social forms of respect that we owe each other as members of a common community” and that “there can ultimately be no other measure of privacy than the social norms that actually exist in our civilization”).

104. See, e.g., Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at “Understandings Recognized and Permitted by Society”*, 42 DUKE L.J. 727, 732 (1991) (arguing that “how (innocent) U.S. citizens gauge the impact of police investigative techniques on their privacy and autonomy is highly relevant to current Fourth Amendment jurisprudence”).

105. 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) (arguing that “[a] chief virtue of drawing on popular opinion is that it lends itself to quantifiable results,” that “[t]he price of gathering and analyzing survey results from a representative sample of Americans is declining toward zero,” and that “such data can and should be one critical tool for resolving questions under the *Katz* Court's reasonable expectation of privacy test”); see also Henry F. Fradella et al., *Quantifying Katz: Empirically Measuring “Reasonable Expectations of Privacy” in the Fourth Amendment Context*, 38 AM. J. CRIM. L. 289, 294 (2011) (noting that survey data provides “a far richer and more accurate” basis for determining whether an expectation of privacy is “objectively reasonable”); Slobogin, *supra* note 83, at 1596–1611 (responding to criticisms claiming that studies that ask citizens about the “intrusiveness” of various police actions do not effectively query about the expectation of privacy issue, are subject to methodological flaws, and are likely to produce results that are not relevant to Fourth Amendment analysis).

106. Compare, e.g., *United States v. Jones*, 132 S. Ct. 945, 949 (2012) (majority opinion) (holding that a trespass occurred), *with id.* at 961–62 (Alito, J., concurring) (noting variations in how the law of trespass would treat the situation in *Jones*). Even traditional definitions of trespass are quite broad. See 2 WILLIAM BLACKSTONE, COMMENTARIES 208 (“[A]ny misfeasance or act of one man whereby another is injuriously treated or damnified is a transgression or trespass in its largest sense . . .”).

invades privacy to the same extent.¹⁰⁷ Along the same lines, commentators have argued that the courts should recognize a (privacy-related) right to anonymity or obscurity in public, but that the strength of this interest depends on the length of the public monitoring, the degree to which the police take steps to record public activities, and so on.¹⁰⁸ Based on this type of analysis, courts could decide that short-term tracking is not as invasive as long-term tracking and that acquiring metadata about one phone call is not as intrusive as obtaining monthly phone or internet service provider logs.¹⁰⁹ Constructs like property, mutual government–citizen trust, and the right to exclude are less amenable to this type of dimensional analysis because they are not as easily divided into strong and weak varieties.¹¹⁰

Some commentators are worried that this “mosaic theory”¹¹¹ will unjustifiably expand or contract the Fourth Amendment’s protections.¹¹² Assuming, however, that implementation concerns can be overcome (which I think is possible),¹¹³ the scalar quality of privacy as applied in the Fourth Amendment setting has at least two advantages. First, it allows the courts to recognize the strong intuition—an intuition that is bolstered by empirical evidence on society’s views—that certain government actions are far more intrusive than others, by permitting them to create different cause requirements for different types of searches depending on the degree to which

107. *Jones*, 132 S. Ct. at 954 (Alito, J., concurring) (differentiating between “short-term” and “prolonged” tracking).

108. See generally Jeffrey M. Skopek, *Reasonable Expectations of Anonymity*, 101 VA. L. REV. 691 (2015) (arguing that the more information the government gathers about individuals, the less anonymous they become, which undermines the right to anonymity); Woodrow Hartzog, Assoc. Professor, Samford Sch. of Law, Speech at Washington & Lee Law School (Jan. 23, 2015) (same).

109. See Skopek, *supra* note 108, at 745–50.

110. For instance, although the Court has said that “[t]he distinction between [open fields] and the house is as old as the common law,” the support for that proposition comes from Blackstone’s definition of burglary, not from the law of property. *Hester v. United States*, 265 U.S. 57, 58 (1924); see S. Bryan Lawrence III, Comment, *Curtilage or Open Fields?: Oliver v. United States Gives Renewed Significance to the Concept of Curtilage in Fourth Amendment Analysis*, 46 U. PITT. L. REV. 795, 798–99 (1985). Relief in trespass cases tends to be based on the precise damage that is incurred, not on whether the trespass is of the home, the curtilage, or other property. See Frona M. Powell, *Trespass, Nuisance, and the Evolution of Common Law in Modern Pollution Cases*, 21 REAL EST. L.J. 182, 185–92 (1992).

111. See *United States v. Maynard*, 615 F.3d 544, 562 (D.C. Cir. 2010) (using this phrase to describe the fact that “[p]rolonged surveillance reveals types of information not revealed by short-term surveillance, such as what a person does repeatedly, what he does not do, and what he does ensemble”).

112. Compare Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311, 315 (2012) (arguing that “as a normative matter, courts should reject the mosaic theory”), with David Gray & Danielle Keats Citron, *A Shattered Looking Glass: The Pitfalls and Potential of the Mosaic Theory of Fourth Amendment Privacy*, 14 N.C. J.L. & TECH. 381, 402–11 (2013) (outlining doctrinal and conceptual objections to mosaic theory, including a concern that it would leave unregulated government activities that should be regulated).

113. See Slobogin, *supra* note 74, at 17–32 (setting out a statutory implementation of mosaic theory); see also Monu Bedi, *Social Networks, Government Surveillance, and the Fourth Amendment Mosaic Theory*, 94 B.U. L. REV. 1809, 1876–80 (2014) (“sketching out the basic parameters” of mosaic theory as applied to social networks).

privacy is invaded.¹¹⁴ Just as a frisk can occur on reasonable suspicion short of the probable cause required for a full search of the person incident to arrest, GPS tracking for only a day or two or accessing a single phone call or credit card purchase can be justifiable on less suspicion than is required for long-term tracking or acquisition of a month's worth of metadata.¹¹⁵ Second, if fully realized, a sliding scale approach to privacy protection would also make the Justices less reluctant to declare a government action a search in the first instance, because they would know that doing so would not automatically require probable cause for preliminary investigative techniques, such as short-term tracking or limited data searches, that are designed to *obtain* probable cause.¹¹⁶

A final benefit of the privacy standard is that it is particularly useful in explaining why technological surveillance, or what I have called virtual searches, should be governed by the Fourth Amendment.¹¹⁷ For reasons already suggested, some of the proposed alternative Fourth Amendment values—in particular, property and coercion—are particularly ill-suited for this task, and others—for instance, freedom from oppression, liberty, and dignity—are not as good as privacy at capturing why government endeavors, such as the NSA's metadata program, fusion centers, and drone surveillance, are so troubling to so many people.¹¹⁸ One of Sklansky's goals in arguing for privacy-as-refuge is to nudge us away from what he sees as the prevalent view that the Fourth Amendment is mostly about protecting informational privacy.¹¹⁹ I have no problem with that goal. But in minimizing the idea that privacy-as-information-protection should be a dominant aspect of Fourth Amendment jurisprudence, Sklansky intimates that intrusions into

114. My research consistently supports the proportionality idea. *See, e.g.*, SLOBOGIN, *supra* note 100, at 108–16, 181–96 (reporting and analyzing results about physical surveillance and about transaction surveillance). Kugler and Strahilevitz claim that their subjects did not make a distinction between short- and long-term surveillance, but in fact their results show only that their subjects thought that both short- and long-term surveillance infringed expectations of privacy. Kugler & Strahilevitz, *supra* note 105. Their methodology did not directly test the proposition that longer tracking is viewed as more intrusive than short-term tracking. *See id.* (noting that subjects were merely asked to indicate, on a scale of one to five, whether they believed short-term, intermediate, and long-term tracking infringed reasonable expectations of privacy).

115. *See Terry v. Ohio*, 392 U.S. 1, 26 (1968) (stating, in justifying a protective frisk on reasonable suspicion, that “[i]t does not follow that because an officer may lawfully arrest a person only when he is apprised of facts sufficient to warrant a belief that the person has committed or is committing a crime, the officer is equally unjustified, absent that kind of evidence, in making any intrusions short of an arrest”); Slobogin, *supra* note 74, at 24–30 (arguing that only reasonable suspicion is required for short-term surveillance).

116. *See* Christopher Slobogin, *The Liberal Assault on the Fourth Amendment*, 4 OHIO ST. J. CRIM. L. 603, 607–08 (2007) (“[T]he consequence of the Court’s rigid adherence to the probable cause standard for searches has been judicial reluctance to apply the latter term even to government actions that clearly involve looking for evidence of crime.”).

117. Slobogin, *supra* note 20, at 12.

118. *See supra* text accompanying notes 73–74.

119. Sklansky, *supra* note 92, at 1074 (describing an “understanding of privacy[] rooted in respect for a zone of personal refuge”).

informational privacy have few real-world impacts.¹²⁰ That assertion is off-base. Widespread technological surveillance clearly has stultifying effects, effects that are best described as a consequence of feeling that one has no privacy or anonymity.¹²¹

At the same time, contrary to the suggestions of some, technology-based assaults on privacy should not be viewed as different in kind from non-technological intrusions. David Gray and Danielle Citron have argued that, while sophisticated technological investigations that smack of a “surveillance state” should be subject to Fourth Amendment regulation, visual observation of public activities and non-computerized records access should remain unregulated.¹²² I agree that surveillance states should be regulated. But as anyone who has lived in our densest urban areas can attest, such states can easily exist in the complete absence of technology.¹²³ Whatever might be the case with its competing rubrics, the privacy standard concentrates not on the mechanism of intrusion but on whether, and the extent to which, an intrusion occurs.

120. *Id.* at 1097 (“[I]t is striking how little empirical support has been marshaled for the stultification thesis. It amounts to an article of faith.”).

121. See GLENN GREENWALD, *NO PLACE TO HIDE: EDWARD SNOWDEN, THE NSA, AND THE U.S. SURVEILLANCE STATE* 178–86 (2014) (describing social science research from the U.S., the U.K., and Finland, and the experience of journalists and Muslims post-9/11, suggesting that “the effect of being watched is to severely constrain individual choice”); PEN AM. CTR., *CHILLING EFFECTS: NSA SURVEILLANCE DRIVES U.S. WRITERS TO SELF-CENSOR* 6 (2013), http://www.pen.org/sites/default/files/Chilling%20Effects_PEN%20american.pdf (describing a 2013 survey of journalists and other writers finding that, in the wake of Edward Snowden’s disclosures, “24% have deliberately avoided certain topics in phone or email conversations”); Amna Akbar, *National Security’s Broken Windows*, 62 *UCLA L. REV.* 834, 881 (2015) (cataloguing ways in which increased surveillance of Muslims post-9/11 has changed their behavior, including avoiding comments critical of the United States); Carl Botan, *Communication Work and Electronic Surveillance: A Model for Predicting Panoptic Effects*, 63 *COMM. MONOGRAPHS* 293, 308–09 (1996) (“Employees who are surveilled . . . experience . . . a reduced sense of privacy, increased uncertainty [as to job security], and reduced communication.”); Linda M. Merola & Cynthia Lum, *Privacy and the Emergence of License Plate Recognition (LPR) Technology*, 96 *JUDICATURE* 119, 125 (2012) (stating 20.2% of respondents are likely to refrain from legal activities because of LPR use); Alex Marthews & Catherine Tucker, *Government Surveillance and Internet Search Behavior* (Apr. 29, 2015), <http://ssrn.com/abstract=2412564> (finding, in the wake of Edward Snowden’s revelations, a statistically significant reduction in use of search terms that might appear suspicious to the U.S. government); Beatrice Edwards, *The Government-Corporate Complex: Surveillance for the Money*, *TRUTHOUT* (May 27, 2014, 1:39 PM), <http://www.truth-out.org/news/item/23969> (describing how in the wake of Snowden’s revelations, the author and her colleagues at “a small nonprofit organization law firm in Washington, DC, that defends whistleblowers . . . have to talk face to face as if we were subversives”).

122. David Gray & Danielle Citron, *The Right to Quantitative Privacy*, 98 *MINN. L. REV.* 62, 71–72 (2013) (“In our view, the threshold Fourth Amendment question should be whether a technology has the capacity to facilitate broad and indiscriminate surveillance that intrudes upon reasonable expectations of quantitative privacy by raising the specter of a surveillance state if deployment and use of that technology is left to the unfettered discretion of law enforcement officers or other government agents.”).

123. Tom Tyler & Lindsay Rankin, *The Mystique of Instrumentalism*, in *IDEOLOGY, PSYCHOLOGY, AND LAW* 537, 542 (Jon Hanson ed., Oxford Univ. Press 2012) (stating, based on research findings, that physical “surveillance leads to a loss of cooperation between communities and law enforcement . . . [and] an adversarial relationship between legal authorities and members of the communities they serve, especially with respect to racial and ethnic minority group members”).

VII. CONCLUSION

Katz and the accompanying turn to privacy as the lodestar of Fourth Amendment analysis have been the target of heavy criticism. But the proposed alternatives to the privacy standard all have their own flaws, and in any event, can comfortably fit within the privacy rubric or be implemented through the Fourth Amendment's ban on unreasonable seizures. Privacy's capaciousness, together with its alienability, its potential for objectification, and its scalar nature, can maximize the Fourth Amendment's flexibility in dealing with the regulatory challenges posed by both traditional and modern law enforcement practices.

