PRIVACY LOST: THE EFFECT OF *KATZ* ON PERSONAL DATA

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I. INTRODUCTION

You just bought the iPhone 11 with its amazing new camera, and you could not be more thrilled. You go to the Apple Store to pick up the phone, and one of the employees helps you set up the device. In the process, all of your personal information from your old phone syncs to your new phone. But to do so, you are prompted with the Apple Terms & Conditions page. Instead of reading every word of the contract, you scroll—just as virtually everyone does— to the bottom of the page, check the box to say that you agree to the terms, and you move on. Little did you know, the many terms and conditions to which you agreed include a provision that Apple may, at any time, access your personal information and even sell that information to another party or, wait for it, the government.[1]

In buying a cell phone and using it, you have essentially consented to allowing the government to access your personal data, as received by Apple, without a warrant.[2] This data may include location services, who you call and when, and much more. The problem is, you are unable to own and use a cell phone if you do not agree to the terms and conditions. The same is true of many current popular internet-connected services: social media platforms, Amazon's Echo Dot, iRobot's Roomba,[3] Google Home, and many others. In today's world, we constantly share information with third parties that reveals intimate details about our private lives. Nevertheless, from that simple

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[1] Apple Media Services Terms and Conditions, APPLE, INC., https://www.apple.com/legal/internet-services/itunes/us/terms.html [https://perma.cc/5US3-DEHH] (last updated Sept. 16, 2020).

[2] *See id.* ("You agree that Apple has the right . . . to disclose any data and/or information to law enforcement authorities, government officials, and/or a third party, as Apple believes is reasonably necessary or appropriate . . . .").

[3] Maggie Astor, *Your Roomba May Be Mapping Your Home, Collecting Data That Could Be Shared*, N.Y. TIMES (July 25, 2017), https://www.nytimes.com/2017/07/25/technology/roomba-irobot-data-privacy.html [https://perma.cc/Z7VH-XZCX] ("High-end models of Roomba . . . collect data as they clean" that "helps them avoid crashing into your couch, but [the data] also creates a map of your home that iRobot could share with [third parties].").

conveyance of information to a business, for business purposes, should we sacrifice all Fourth Amendment protection in that information? The reality is that we already do. Further, we lose security against unreasonable searches in our personal data regardless of whether we actually know we are conveying the information to a third party or whether access to the services requires that conveyance. In effect, we lose Fourth Amendment protections notwithstanding our *reasonable expectation* that third parties will keep our personal data private.[4]

In 2017, the Supreme Court came to terms with the problem that personal electronic property places on the state of Fourth Amendment jurisprudence in *United States v. Carpenter*.[5] The Court did not address the blatant issue that the "reasonable expectation of privacy" standard provides increasingly less protection from unreasonable searches as societal structures and technological growth cause the dissipation in the amount of privacy that individuals can reasonably expect. Rather, the Court narrowly held that the standard did not "cover these novel circumstances" and that "an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through [Cell-Site Location Information]" (CSLI).[6] Thus, although "the Government can acquire a record of every credit card purchase and phone call a person makes over months or years,"[7] the Court found that, because of the pervasive nature of CSLI, "the location information obtained from the defendant's wireless carriers was the product of a search."[8]

Carpenter is noteworthy for much more than creating a narrow exception to the rule that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties."[9] On the contrary, *Carpenter* represents a moment in Fourth Amendment jurisprudence in which a solid majority of justices[10] recognized that "the progress of science has afforded law enforcement a powerful new tool" that "risks Government encroachment of the sort the Framers . . . drafted the Fourth Amendment to

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[4] *See* Katz v. United States, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring) (joing the majority in holding that the Fourth Amendment applies where individuals have a reasonable expectation of privacy).

[5] Carpenter v. United States, 138 S. Ct. 2206 (2018).

[6] *Id.* at 2217.

[7] *Id.* at 2224 (Kennedy, J., concurring). *See also* United States v. Miller, 425 U.S. 435 (1976) (creating the Third Party Doctrine); Smith v. Maryland, 442 U.S. 735 (1979) (holding that a search does not occur when a person knowingly exposes information to a third party).

[8] *Carpenter*, 138 S. Ct. at 2217.

[9] *Smith*, 442 U.S. at 743–44.

[10] *Carpenter*, 138 S. Ct. at 2235 (Thomas, J., dissenting) ("Because the *Katz* test is a failed experiment, this Court is dutybound to reconsider it.").

prevent."[11] The problem is that few of the Justices agree on the actual method to resolve the issues.

Justice Gorsuch presented the most thought-provoking and informative opinion in the *Carpenter* decision and explained the direction in which Fourth Amendment jurisprudence should trend. In a "dissent [that] reads as if he agrees with the majority's conclusion—it's only at the very end that [Justice] Gorsuch reveals he's casting a vote in favor of the government because the lawyers . . . failed to anticipate the specific way that Gorsuch want[ed] to repeal and replace a half-century of established law."[12] Justice Gorsuch explained that he could not "fault the Court . . . for its implicit but unmistakable conclusion that the rationale of [the Third Party Doctrine] is wrong."[13] "Instead," he continued, "I would look to a more traditional Fourth Amendment approach" that asks whether the government encroached onto the *defendant's property* as articulated by positive law enacted by Congress and state legislatures.[14] Ultimately, Justice Gorsuch laid the foundation for a long-discussed and desperately needed change to a standard in which "[t]he Amendment's protections do not depend on the breach of some abstract 'expectation of privacy' whose contours are left to the judicial imagination,"[15] but to a "[m]uch more concrete[] . . . protect[ion of] your 'person,' and your 'houses, papers, and effects.'"[16]

This Note argues that a broad interpretation of the term "effects," alongside a recognition that a constructive trespass is sufficient to constitute a Fourth Amendment search, will provide more robust protection of personal data than exists today. The lack of protection in personal data exists because the current standards to determine the Fourth Amendment's scope are not linked to the text of the amendment at all. Rather, the Court evaluates privacy interests abstractly when it assesses whether a search occurred. As a result, personal data—information that can reveal intimate details about an individual's daily life—historically has not been protected. To combat the problem, the Court must once again tie the Fourth Amendment analysis to the text of the Constitution and broaden the scope of the Amendment to protect personal data.

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[11] *Id.* at 2223.

[12] Ian Millhiser, *Gorsuch Says He'll Repeal and Replace the Fourth Amendment with Something Terrific*, THINKPROGRESS (June 24, 2018, 11:26 A.M.), https://thinkprogress.org/gorsuch-says-hell-repeal-and-replace-the-fourth-amendment-with-something-terrific-9238f5568313/ [https://perma.cc/A7CE-58S2].

[13] *Carpenter*, 138 S. Ct. at 2272 (Gorsuch, J., dissenting).

[14] *Id.* at 2272 (Gorsuch, J., dissenting) (emphasis added).

[15] *Id.* at 2264 (Gorsuch, J., dissenting).

[16] *Id.* at 2226 (Gorsuch, J., dissenting).

Part I explained the central argument of this Note. Part II describes the Fourth Amendment's origin, the Court's jurisprudence under a property framework, the *Katz* era, and the privacy standard. Part III analyzes the *Katz* ruling's inability to protect personal data. Finally, Part IV applies a new, broad, property-based framework tied to the text of the Constitution.

II. HISTORY

A. Colonial Times: The Evils of General Warrants

The "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," enumerated in the Bill of Rights, is a direct reflection of American Colonial sentiments before and during the American Revolution.[17] The explicit prescription of the right among the founders' list of grievances resulted from colonists' outrage over arbitrary searches and seizures at the hands of the British government.[18] That outrage became one of the primary catalysts for the American Revolution.[19] The use of general warrants incensed colonists for a multitude of reasons, including the British government's lack of concern for the colonists' property; the ability of British officials to substantially intrude, arbitrarily and at any time, on the colonists' goods; and their willingness to trespass without any opportunity for colonial recourse.[20] Underlying each of the concerns was staunch opposition to infringement on personal property, regardless of the actor, state or individual.[21] Ultimately, colonial beliefs in the sacred nature of property and fear of capricious government intrusion informed the construction of the Fourth Amendment and the protection of private property inherent in its purpose.[22]

As written and understood by the Framers, the Fourth Amendment is, in essence, "a prohibition on general search and seizure authorities *and* a

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[17] U.S. CONST. amend. IV; *see* BRUCE A. NEWMAN, AGAINST THAT "POWERFUL ENGINE OF DESPOTISM" 18 (U. Press of America 2007) ("The Founding generation considered general warrants breaches of the natural rights of man, and wanted to make sure that the new federal government did not make use of them.").

[18] *See* NEWMAN, *supra* note 17, at 3.

[19] *Id.* at 1.

[20] *See id.* at 2–3.

[21] *See id.* at 3 ("[W]rits of assistance transgress upon the right of an English subject to be left alone in his home . . . . The home is the individual's castle, his realm; government officials should not enter while he is peaceful. To allow government officials to enter whenever they pleased would destroy the liberty man enjoys in his home. It would no longer be his castle.").

[22] *See id.* at 10 ("Property is a necessary, but not sufficient, condition of liberty. . . . The Founder's doctrine of rights requires limited government: there is a realm of private life that government must respect and stay out of.").

requirement for specific warrants," as a means to combat, in their minds, heinous British colonial policies.[23] The colonists' primary source of frustration toward the Crown had its roots in the British policy of mercantilism, which "produced a body of Laws of Trade and Navigation designed to secure to Great Britain a monopoly of colonial trade."[24] In 1696, the British Parliament passed the Writs of Assistance in the colonies, which allowed general warrants to be "used . . . to enforce revenue and custom laws."[25] General warrants "allowed officers to search *wherever* they wanted and seize whatever they wanted, with few exceptions."[26] Further, "the power granted [to] the official" by the sovereign "was almost unlimited" so, "[f]or the life of the sovereign[,] the writs allowed the official to search wherever he suspected illegal goods were stored."[27] The writs were often used by "customs officers on the lookout for smugglers and articles imported in violation of the custom laws."[28] Under the writs, "suspects were chosen . . . arbitrarily, without adequate supporting evidence of individual wrongdoing and without guidelines limiting officer discretion."[29] As a result, the writs sparked broad opposition among American colonists who became "champions of the specific warrant," which provided protections against "violent British efforts to subjugate them politically . . . ."[30]

The colonists viewed the British government's allowance of general and arbitrary searches of their property as a directly tyrannical act.[31] In response, sixty-three Boston merchants, represented by James Otis, "sued customs officials in an effort to stop the use of such writs."[32] Over five hours, Otis presented an argument that, in the eyes of a young John Adams, sparked the beginning of the American Revolution.[33] Otis vehemently, and somewhat exaggeratedly, asserted that the writs were "instruments of slavery[,] . . . of arbitrary power, and the most destructive of English liberty and the fundamental principles of the constitution that was ever found in an English

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[23] Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1193 (2016) (emphasis in original).

[24] CHARLES R. RITCHESON, BRITISH POLITICS AND THE AMERICAN REVOLUTION viii (U. of Okla. Press 1954).

[25] NEWMAN, *supra* note 17, at 2.

[26] Leonard W. Levy, *Origins of the Fourth Amendment*, 114 POL. SCI. Q., Spring 199, at 79, 82 (emphasis added).

[27] NEWMAN, *supra* note 25, at 2.

[28] Levy, *supra* note 26, at 84 (explaining that search and seizure of smuggled goods constituted a search of tangible property).

[29] ANDREW E. TASLITZ, RESTRUCTURING THE FOURTH AMENDMENT 5 (N.Y.U. Press 2006).

[30] *Id.* at 39.

[31] *Id.*

[32] DARIEN AUBURN MCWHIRTER, SEARCH, SEIZURE, AND PRIVACY 2 (Oryx Press 1994).

[33] Levy, *supra* note 26, at 85.

law book."[34] Otis articulated that the writs were an infringement on the colonists' inalienable right of property and stated: "One of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle."[35] Further, Otis argued, the writs "if [they] should be declared legal, would totally annihilate this privilege."[36]

Adams was awed by Otis's ability. He later reflected that during Otis's presentation, "American Independence was then and there born; the seeds of patriots and heroes were then and there sown."[37] Ultimately, "Paxton's case," which Otis's hearing came to be called, directly objected to the British government's infringement on property. And, most significantly, "Adams' reaction to Otis's speech" represented colonial concern for the protection of property that sparked both the Revolution and a "straight line of progression run[ning] from Otis's argument in 1761 to Adams' framing of Article XIV of the Massachusetts Declaration of Rights of 1780 to Madison's production of the proposal that became the Fourth Amendment."[38] Thus, in 1789, the Constitution solidified the protection of property from arbitrary government search and seizure then and for posterity.[39]

B. The Early Years

Although Fourth Amendment jurisprudence presents a great deal of disagreement among judges and scholars alike—reflected in *Carpenter's* distribution of votes[40]—this was not always the case. During the first century and a half of Fourth Amendment adjudication, the Supreme Court maintained a "deep commitment to the provisions of British common law"[41] and "focus[ed] on the amendment's property-centric language."[42] As a result, and

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[34] Speech by James Otis in the Paxton Case (Feb. 24, 1761), *in* THE WORKS OF JOHN ADAMS 523–25 (Charles Francis Adams ed., 1850), *reprinted in* COLLECTED POLITICAL WRITINGS OF JAMES OTIS 11 (Richard Samuelson ed. 2015) (reconstruction of James Otis's speech by John Adams).

[35] *Id.* at 13.

[36] *Id.*

[37] *Id.* at x (citing Letter from John Adams to William Tudor (March 19, 1817), *in* THE WORKS OF JOHN ADAMS, *supra* note 34).

[38] Levy, *supra* note 26, at 85.

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

[40] *See* United States v. Carpenter, 138 S. Ct. 2206, 2211 (2017) (syllabus). Chief Justice Roberts wrote for the majority, joined by Justices Sotomayor, Ginsburg, Breyer, and Kagan. *Id.* Justice Kennedy wrote a dissenting opinion, to which Justices Alito and Thomas joined. *Id.* Justices Thomas, Alito, and Gorsuch each wrote separate dissents. *Id.*

[41] THOMAS N. MCINNIS, THE EVOLUTION OF THE FOURTH AMENDMENT 21 (Lexington Books 2009).

[42] Trevor Burrus & James Knight, Katz *Nipped and* Katz *Cradled:* Carpenter *and the Evolving Fourth Amendment*, CATO SUP. CT. REV., 2017–2018, at 79, 82.

considering the fact that the Court only heard five Fourth Amendment cases in the nineteenth century, the Court "developed a coherent rule of law . . . for applying the . . . Amendment to the actions of the national government."[43] "[T]he traditional approach asked if a house, paper or effect was *yours* under law."[44] Each of the cases the Court heard during the period—although many did not directly consider the scope of the amendment—reinforced the Court's adherence to the property-based framework.

In 1877, the Court initially defined the scope of the Fourth Amendment when it held that "the constitutional guaranty . . . extends to their papers, thus closed against inspection, wherever they may be."[45] Therefore, "[P]rotections of a person's 'papers' and 'effects' were not limited when kept in the safety of one's home."[46] Although the Court seemed to extend the right beyond the threshold of the home, it continued to adhere to a standard that required ownership of the effect being searched and thus maintained the traditional trespass rule required under common law.

The Court employed this standard again nine years later in *Boyd v. United States* when Justice Bradley stated that the Amendment "appl[ies] to all invasions on the part of the government and its employees of the sanctity of the . . . home and the privacies of life."[47] Significantly, the Court found that the "constitutional provisions . . . were meant to protect the security of persons and property."[48] In early Fourth Amendment jurisprudence, the Court focused on a property-based analysis and asked if the defendant *owned* the item searched.[49] Additionally, in *Weeks v. United States*, the Court articulated that "[i]f letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the [Fourth Amendment] . . . might as well be stricken from the Constitution."[50] Thus, the Court reaffirmed the property framework underlying the Fourth Amendment.

Well into the twentieth century, the Court continued to recognize property considerations as the primary standard to determine the scope of the Amendment. In *Burdeau v. McDowell*, the Court ruled that "the Fourth Amendment only applied to governmental actions" and not private actions.[51]

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[43] MCINNIS, *supra* note 41, at 21.

[44] *Carpenter*, 138 S. Ct. at 2267–68.

[45] Ex parte Jackson, 96 U.S. 727, 733 (1877).

[46] Burrus & Knight, *supra* note 42, at 82.

[47] Boyd v. United States, 116 U.S. 616, 630 (1886).

[48] MCINNIS, *supra* note 41, at 22.

[49] *Carpenter*, 138 S. Ct. at 2235–38 (Thomas, J., dissenting) (arguing that "[t]he *Katz* texts distort the original meaning" and the case "should turn, instead, on *whose* property was searched").

[50] Weeks v. United States, 232 U.S. 383, 393 (1914).

[51] MCINNIS, *supra* note 41, at 223.

In making its ruling, however, the Court expressed that "it was the purpose of the Fourth Amendment to secure the citizen in the right of unmolested occupation of his dwelling and the *possession* of his *property*."[52] Additionally, because *Burdeau* involved "the act of individuals in taking the property of another[,] . . . the petitioner ha[d] an unquestionable right of redress against those who illegally and wrongfully took his private property," but this right was not derived from the Constitution.[53] The Court's recognition of the Fourth Amendment's purpose reveals that, from the time of the founding, the American legal system protects individuals against trespass to their property by anyone, but that the Constitution provides a remedy only when the government committed the intrusion.

Throughout the first half of the twentieth century, the Court continued to apply and justify the trespass doctrine to determine the breadth of the Fourth Amendment, even when external factors caused the Amendment's scope to dwindle. In the early 1920s, advancements in "technology . . . increasingly allow[ed] intrusion into people's lives without physical trespass."[54] The Court specifically dealt with the issue of wiretapping, for example, in *Olmstead v. United States*.[55] Moreover, its answer to whether a search occurred? An emphatic no.[56]

In finding that a search did not occur, the Court staunchly adhered to a narrow interpretation of the trespass doctrine. It "question[ed] whether the use of evidence of private telephone conversations between the defendants and others, intercepted by means of wire tapping, amounted to a violation of the Fourth . . . Amendment[]."[57] To answer the question, Chief Justice Taft first "limited Fourth Amendment protection to those things specifically mentioned in the language of the amendment[:] houses, persons, papers, and effects[,]" referred to by later cases as "constitutionally protected areas."[58] Second, the Court required that "the intrusion involve a physical invasion that was constitutionally impermissible."[59] That translated into the later articulation of the rule that a Fourth Amendment search occurred when the government physically trespassed onto a constitutionally protected area.[60] Ultimately, the Court held that "the wire tapping here disclosed did not

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[52] Burdeau v. McDowell, 256 U.S. 465, 475 (1921) (emphasis added).

[53] *Id.*

[54] MCINNIS, *supra* note 41, at 223.

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

[56] *Id.* at 468.

[57] *Id.* at 455.

[58] MCINNIS, *supra* note 41, at 224.

[59] *Id.*

[60] Silverman v. United States, 365 U.S. 505, 512 (holding that a search occurred because of "the reality of an actual intrusion into a constitutionally protected area").

amount to a seizure within the meaning of the Fourth Amendment"[61] because the technology "did not require a physical trespass onto the property of the person," and thus did not encroach on an individual's person, papers, or effects.[62]

Thus, despite technological advancement allowing new ways for law enforcement to investigate without physical invasion of a constitutionally protected area, the Court continued to employ the trespass rule for nearly thirty years. It was not until the Court obtained a makeup of entirely new members that they expressed a new standard to apply.

C. A New Rule

In the 1960s, in the midst of significant societal change, the Warren Court "reexamined the issue as to whether a physical trespass of a constitutionally protected area was required to trigger the Fourth Amendment."[63] After questioning whether the police bugging a telephone booth constituted an unconstitutional search, the Court delivered its 8-1 decision in *Katz v. United States*.[64] In *Katz*, the Court abandoned the property-based framework dating back to English common law in favor of a privacy-interest analysis. The Court held that:

> [T]he 'trespass' doctrine . . . can no longer be regarded as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment.[65]

Justice Stewart, writing the majority opinion, explained his reasoning by pointing out an inconsistency in Fourth Amendment jurisprudence: the private lives of individuals were not protected while property was staunchly protected.[66] He stated that "what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[67] This was a

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[61] Olmstead v. United States, 277 U.S. 483, 466 (1928).

[62] MCINNIS, *supra* note 41, at 28.

[63] MCINNIS, *supra* note 41, at 28.

[64] Katz v. United States, 389 U.S. 347 (1967).

[65] *Id.* at 353.

[66] *See id.* at 350 ("[The Fourth] Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all.").

[67] *Id.* at 351.

particularly important consideration at the time because, as technology began to advance rapidly, people's personal lives became less and less private, "allow[ing] intrusion into people's lives without physical trespass."[68] Thus, as a necessity, the Court responded to the drawbacks of *Olmstead* and overturned the trespass doctrine to implement a new rule.

Although the Court decided *Katz* by an overwhelming majority, the lasting rule that still applies today comes from Justice Harlan's concurrence. According to Justice Harlan and his personal "understanding of the [new] rule," there are two requirements that must be met to determine that a search occurred.[69] The first requirement is "that a person ha[s] exhibited an actual (subjective) expectation of privacy, and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[70] This rule created a completely new understanding of Fourth Amendment application and extended protections from government intrusion beyond property to private "information and conversations."[71] "Almost immediately, the Harlan two-part test emerged as the doctrinal standard for 'search' issues" and it prevails as the rule today.[72] Although at the time many viewed *Katz* as a victory for civil rights activists and proponents of criminal justice reform, the years following and subsequent opinions prove that *Katz* has "fail[ed] to live up to its promise of objective and evolving decisionmaking."[73]

The *Katz* rule, requiring a reasonable expectation of privacy for the Fourth Amendment to apply, has been used in the fifty years since the decision as "a double-edged sword[,] and its reasoning has allowed later courts to limit the protections of the Fourth Amendment" despite its intent to broaden the scope of the amendment.[74] In the law-and-order era of the 1970s and 1980s, the Supreme Court took a new form, and "[d]ue to their desire to prevent crime through more aggressive police tactics and their dislike of the exclusionary rule, the Burger and Rehnquist Courts relied on the language of the Warren Court to actively narrow the scope of the Fourth Amendment."[75] During that time, "it became clear that there were few privacy expectations that the Court would view as legitimate," which is exemplified by the fact that "[o]ver the course of . . . 17 years . . . , the reasonable expectation of

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[68] MCINNIS, *supra* note 41, at 224.

[69] *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

[70] *Id.*

[71] MCINNIS, *supra* note 41, at 225.

[72] Luke M. Milligan, *The Real Rules of "Search" Interpretations*, 21 WM. & MARY BILL OF RTS. J. 1, 18 (2012) (citing Terry v. Ohio, 392 U.S. 1, 9 (1968) & Mancusi v. DeForte, 392 U.S. 364, 368 (1968)).

[73] *Id.* at 19.

[74] MCINNIS, *supra* note 41, at 225.

[75] *Id.* at 223.

privacy standard would only be used to establish a legitimate expectation of privacy in 10 cases."[76] Thus, *Katz* has been used by the Court merely to advance its political goals rather than to protect the Fourth Amendment interests of individuals.

Today, the *Carpenter* opinion represents an unstable Fourth Amendment. The justices on the Court—especially Justice Gorsuch—seem to recognize the problems with the *Katz* rule and are beginning to present solutions. Justice Gorsuch argues for a return to the property-based framework as a means to protect the interests that the Fourth Amendment explicitly secures. He adamantly opposes continuing to promote a rule that, in his mind, protects a non-concrete right to privacy that can be manipulated depending upon the situation and the desired outcome of five justices on the Court. As technology continues to advance, such cases will ascend to the Court, and Justice Gorsuch's proposed solution to the *Katz* problem will likely come to fruition.[77]

III. ANALYSIS

A. The Effects Issue

The state of Fourth Amendment jurisprudence regarding the scope of privacy protection has been dysfunctional since the *Katz* decision. "Search-and-seizure commentators attribute [its] failure to one of three (overlapping) causes: (1) the vagueness of the *Katz* decision; (2) the inaccessibility of empirical data on 'privacy expectations'; and (3) the justices' individual juridical or policy preferences."[78] However, a fourth failure seems to underlie them all: *Katz* broke the link between the Fourth Amendment's text and the analysis to determine when it applies.

The Court decided *Katz* in 1967, and since the decision, courts have employed a reasonable expectation of privacy standard to determine whether the Fourth Amendment applies in each situation.[79] But "we still don't even know what its 'reasonable expectation of privacy' test is."[80] The confusion regarding the *Katz* test primarily exists for the same reason the Court abolished the property analysis in the first place: the Court is constantly attempting to catch up to rapid changes in technology, rather than applying

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[76] MICHAEL C. GIZZI & R. CRAIG CURTIS, THE FOURTH AMENDMENT IN FLUX 51–52 (U. Press of Ka. 2016).

[77] United States v. Carpenter, 138 S. Ct. 2206, 2261 (2018) (Gorsuch, J., dissenting).

[78] Milligan, *supra* note 72, at 23.

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

[80] *Carpenter*, 138 S. Ct. at 2265 (Gorsuch, J., dissenting).

one broad standard that encompasses the private nature of effects.[81] However, it is important to recognize that *Katz* has not been an issue in many aspects of the search question—when the Court considers whether a search occurred on a person, a house, or a paper.[82] Rather, the issue largely lies with constitutional protections of everything else: a person's effects.[83] Thus, to understand where the Court has gone wrong, this section will first examine the technological issue that arose in the early twentieth century and the Court's response. Next, the Fourth Amendment jurisprudence in the security of the person, the house, and the papers will be considered. This Note will not discuss the Court's interpretation of the Fourth Amendment regarding the person because the person does not involve property. Lastly, and of most importance, this section will analyze the Court's failures when dealing with effects and will work toward a broader definition of the term to ensure the protection of personal data within the scope of the Fourth Amendment.

1. Losing Protection: The Technology Problem

It is first essential to understand why the Supreme Court's 8-1 decision in *Katz* overturned a long history of common law tradition. The simple answer is that the Warren Court members overwhelmingly agreed that a change in the law was necessary.[84] Thus, the Court attempted to solve a problem that technological progress created.[85] The problem occurred because new technologies allowed law enforcement a broader ability to search individuals without committing a trespass.[86] Under the trespass doctrine, the Fourth Amendment did not apply even when law enforcement obtained incriminating information from a constitutionally protected area as long as the government did not physically interfere with that area.[87] As technology advanced, the trespass doctrine began to yield arbitrary outcomes, which planted the seeds for change that came to fruition in 1967.

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[81] Andrew Guthrie Ferguson, *The Interest of Things and the Fourth Amendment of Effects*, 104 CALIF. L. REV. 805, 810–11 (2016).

[82] *See* Maureen E. Brady, *The Lost "Effects" of the Fourth Amendment: Giving Personal Property Due Protection*, 126 YALE L.J. 946, 949 (2016) ("[I]n *Katz v. United States*, as Justice Harlan noted in his concurrence, the Court replaced these property standards with a new test: a person could claim protection from government actions that violated his or her 'reasonable expectations of privacy' in the object of the search or the area from which the item was seized.").

[83] *Id.* at 958.

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

[85] *See id.*

[86] MCINNIS, *supra* note 41, at 223.

[87] *See* Olmstead v. United States, 277 U.S. 438 (1928).

Although the *Olmstead* Court adhered to the trespass doctrine that had been applied since the founding, searches involving electronic surveillance continued to yield arbitrary results that turned, sometimes, on just a couple of inches. For example, in *Goldman v. United States*, the Court held that a search did not occur when law enforcement placed a 'detectaphone' against the common wall in an office building to hear the conversations occurring on the other side of the wall.[88] The Court ruled that the Fourth Amendment was inapplicable because law enforcement did not physically intrude into the other office; rather, the officers merely amplified sound waves to hear the conversation occurring in the office.[89] On the other hand, in *Silverman v. United States*, a search did occur when law enforcement placed a 'spike mike' that cut a few inches into the common wall to hear the conversations on the other side of the wall.[90] The Court ruled as such because placing the 'spike mike' into the wall constituted a physical trespass.[91] Ultimately, despite nearly identical facts, the Court reached different conclusions in those cases because one device used by law enforcement involved a physical intrusion while the other did not. The juxtaposition of the cases is jarringly arbitrary because the distinction between whether a search did or did not occur turned on two inches. These inconsistencies in the trespass doctrine sparked the need for change.

Fourth Amendment rulings in the *Olmstead* era concerned many, including Justice Brandeis, who dissented in the decision. Justice Brandeis argued that the Court was too narrow in its application of the Fourth Amendment as technology advanced because "a principle to be vital must be capable of wider application than the mischief which gave it birth."[92] Further, "[constitutions] are not ephemeral enactments designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, 'designed to approach immortality as nearly as human institutions can approach it.'"[93] Justice Brandeis suggested that because "no prophecy can be made" when laws are enacted, they must be broad enough to encompass the same spirit of the law as "time works changes [and] bring[s] into existence new conditions and purposes."[94]

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[88] Goldman v. United States, 316 U.S. 129, 135 (1942).

[89] *Id.* at 134 ("[W]hat was heard by the use of the detectaphone was not made illegal by trespass or unlawful entry.").

[90] Silverman v. United States, 365 U.S. 505, 511 (1961).

[91] *Id.* (drawing a "distinction between the detectaphone . . . and the spike mike" because the officers had to "usurp part of the petitioners' house or office" to obtain the incriminating information).

[92] *Olmstead*, 277 U.S. at 473.

[93] *Id.*

[94] *Id.*

To Justice Brandeis, technological advancements did not require drastic changes in the law or its interpretation. Rather, the existence of "[s]ubtler and more far-reaching means of invading privacy" continues to allow for the "established rule of construction," under the Fourth Amendment, to prevent the government from obtaining information through wiretapping or other means as new technologies come along.[95] Ultimately, Justice Brandeis believed that the governing trespass principle might remain in spirit and effect, but as technology advanced, Justice Brandeis found that "it is . . . immaterial whether the physical connection with the telephone wires leading into the defendant's premises was made."[96] Rather, the fact that the government obtained the same information that they would have with physical trespass at the time of the Fourth Amendment's construction constituted a trespass for the purposes of a search analysis.

Justice Brandeis's opinion did not prevail, and the trespass doctrine continued to be interpreted narrowly. But after nearly thirty years, the trespass era of Fourth Amendment jurisprudence came to a close. This narrow interpretation ended when the Court obtained an entirely new makeup. Not a single member of the *Olmstead* Court heard *Katz.* The Warren Court, when deciding *Katz,* sought to solve the problem of technological advancement by allowing the Government to circumvent all Fourth Amendment violations by using new search methods. The Court did so by "broaden[ing] the definition of what constituted a violation of the Fourth Amendment bringing more governmental actions into regulation by the amendment."[97] Rather than using Justice Brandeis's interpretive approach, however, the Court crafted an entirely new standard and overturned the trespass doctrine.[98] Unfortunately, due to the shortcomings of both the trespass and reasonable expectation of privacy analyses, Justice Brandeis's critique of the majority opinion in *Olmstead* could also be used to criticize the state of the Fourth Amendment in the *Katz* era today. Justice Brandeis's thoughts should be used to craft a new era of Fourth Amendment analysis that will protect people in their effects, including both their tangible and intangible property.

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[95] *Id.* at 474, 480.

[96] *Id.* at 483.

[97] MCINNIS, *supra* note 41, at 223.

[98] Katz v. United States, 389 U.S. 347, 352 (1967).

2. Protection in Public: The 'Reasonable' Solution

Katz sought to eradicate the arbitrary and inconsistent rulings that electronic surveillance brought into the Fourth Amendment analysis by ruling that "[t]he Fourth Amendment protects people, not places," and abandoning the trespass doctrine.[99] In doing so, however, the Court removed the portion of the Fourth Amendment analysis that was, in Justice Gorsuch's words, "tied to the law"—or the Constitution.[100] While the "traditional approach," true to the words in the Constitution, "asked if a house, paper or effect was *yours* under law," the new approach abandoned any consideration of whether 'constitutionally protected areas' were involved.[101] Instead, the *Katz* rule focused on 'societal' opinions about what areas are private and what areas are not private. The result: a second Fourth Amendment doctrine that yielded arbitrary and inconsistent rulings.

Scholars and judges have criticized the reasonable expectations of privacy test as "circular."[102] "Specifically, if a court strikes down a search, the expectation perforce must have been reasonable; if a court upholds the search, the expectation must have been, for that reason alone, unreasonable."[103] Thus, because judges are the decision-makers regarding where reasonable expectations of privacy exist, determinations about society's privacy expectations often "come to bear 'an uncanny resemblance to those expectations of privacy' shared by Members of th[e] Court."[104] Thus, although the Court sought a well-intentioned goal in *Katz*, its rule gave members of the Court great latitude in defining the areas of life that fulfill societal expectations of privacy. Because *Katz* stripped the Fourth Amendment legal analysis of its textual foundation, the test has produced just as arbitrary and inconsistent rulings as existed when the Court employed the trespass analysis.

The *Katz* Court attempted to account for the rapid advancement of technology and also ensure the protection of defendants' civil liberties by tying a Fourth Amendment search to "objective and evolving standards of privacy," rather than tying searches to the text.[105] Nevertheless, hinging

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[99] *Id.* at 361.

[100] Carpenter v. United States, 138 S. Ct. 2206, 2267 (2018) (Gorsuch, J., dissenting).

[101] *Id.* at 2267–68 (Gorsuch, J., dissenting).

[102] Peter Winn, Katz *and the Origins of the "Reasonable Expectations of Privacy" Test*, 40 MCGEORGE L. REV. 1, 7 (2009).

[103] *Id.*

[104] *Carpenter*, 138 S. Ct. at 2265 (Gorsuch, J., dissenting) (quoting Minnesota v. Carter, 525 U.S. 83, 97 (1988) (Scalia, J., concurring)).

[105] Milligan, *supra* note 72, at 18 (citing Albert W. Alschuler, *Interpersonal Privacy and the Fourth Amendment*, 4 N. ILL. U. L. REV. 1, 6 n.12 (1893)).

Fourth Amendment protections on privacy as it evolves becomes problematic because technological advancement continually interconnects people throughout society and the world, which over time increasingly erodes the level of privacy that individuals enjoy in their daily lives.[106] As a result, the constitutionally protected areas of the person, home, and papers are not as affected because those areas generally do not change as technology changes. But their effects—their tangible and intangible personal property—constantly become less private and more available to third parties as time progresses and technology advances.[107] Ultimately, *Katz* has not presented major issues when dealing with the questions of protecting the home, or the person, or papers, but the Court has struggled and continues to struggle to protect a person in his or her *effects* while adhering to and protecting stare decisis.[108]

B. The Right to be Secure

"As a doctrinal matter, the Fourth Amendment has evolved beyond narrow constitutional definitions," and, even in an era in which judges do not analyze the kind of property infringed, the explicit constitutionally protected areas of the home and papers receive broad protection.[109] Courts have found that "'[h]ouses' now include curtilage, barns, apartments, and commercial spaces" and "'[p]apers' now include digital recordings, writings, business documents, and other communications."[110] However, the Court has not taken such a broad view when dealing with effects, and "[w]hen an individual's personal property is not located inside her home or pocket, current search law provides few metrics establishing whether the property is entitled to Fourth Amendment protection."[111] The porous state of the law in the area of personal property has significant implications—namely the Court's inability to protect personal data.[112] Just as it has done with "houses" and "papers," the Court "can create an updated understanding [of effects] relevant to the digital

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[106] Ferguson, *supra* note 81, at 810–11.

[107] *Id.*

[108] *See* Ferguson, *supra* note 81, at 808. That is not to say that the reasonable expectations of privacy standard has not been criticized in those areas. *See, e.g.*, Brady, *supra* note 82, at 948–49. Rather, defendants seem to maintain broader protection in those areas, the issues seem far less perplexing, and the Court has generally dealt with the issues in ways that yield similar outcomes to the trespass doctrine. *See* Ferguson, *supra* note 81, at 808; Brady, *supra* note 82, at 946.

[109] Ferguson, *supra* note 81, at 808.

[110] *Id.* at 809.

[111] Brady, *supra* note 108, at 948.

[112] *See* United States v. Carpenter, 138 S. Ct. 2206 (2017).

world, but consistent with Fourth Amendment principles."[113] As exemplified in *Carpenter*, the Court is trending toward broadening the Amendment's scope when dealing with data privacy, but it is unclear how it will do so.[114] This section will lay the foundation for discussing effects and data privacy by analyzing the areas in which the Court, even under the *Katz* doctrine, has safeguarded constitutionally protected areas. The Court secures those things, when technology is involved, in one of two ways: (1) using a constructive trespass rule, or (2) focusing on the nature of the thing being searched.

1. In Their Houses: Constructive Trespass

As *Katz* progressed and many doctrines began to define the reasonable expectations of privacy standard, the Court recognized that advances in technology diminished the breadth of those expectations in many areas of life if the individual voluntarily or even knowingly exposed the information to a third party or the world.[115] The Court recognized that, as the scope of privacy decreases, privacy in the home could be threatened.[116] However, despite precedents that would likely yield otherwise, the Court protected the home by articulating a new standard.

In *Kyllo v. United States*, the Court considered whether an illegal search occurred when law enforcement agents used a thermal image scan of the petitioner's home to determine "that petitioner was using halide lights to grow marijuana in his house."[117] Based on the circumstances of the case, neither the former trespass rule nor the reasonable expectations of privacy test would have produced the conclusion that a search occurred.[118] First, under the trespass doctrine, law enforcement's use of the thermal imager would not have been a search because the device allowed the officers to collect information about the inside of Kyllo's house from across the street, without a physical interference.[119] Second, due to the nature of the thermal-imaging device, the Court could not have concluded that a search occurred under *Katz* because a person does not have a reasonable expectation of privacy in the things they knowingly expose to the public.[120] Because a

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[113] Ferguson, *supra* note 81, at 809.

[114] *See Carpenter*, 138 S. Ct. at 2206.

[115] Kyllo v. United States, 533 U.S. 27, 34 (2001).

[116] *Id.*

[117] *Id.* at 30.

[118] *Id.*

[119] *Id.* at 32.

[120] *See* California v. Ciraolo, 476 U.S. 207, 213 (holding that the aerial surveillance of a person's backyard was not a search because anyone flying in the airspace could have seen the marijuana plants); *see also* California v. Greenwood, 486 U.S. 35, 41 (1988) (finding that "defendants could have no

person knowingly exposes the heat from their house to the public, there would be no reasonable expectation of privacy, and law enforcement would not have committed a search.[121] The problems were (1) that the Court could not honestly apply *Katz* and reach the conclusion that a search occurred; and (2) by applying *Katz* the Court would have to hold that the Fourth Amendment did not secure a person in their *house*, which would be antithetical to the text of the Fourth Amendment itself.[122]

The Court resolved the problem by drawing "a bright and firm line" at the home and finding that an unreasonable search occurred.[123] Although Justice Scalia acknowledged *Katz* as the precedent, his holding did not depend on its logic; rather, he used a modern take on Originalist and trespass principles to articulate a new rule taking, in his mind, "the long view, from the original meaning of the Fourth Amendment forward."[124] He also recognized that technology greatly altered Fourth Amendment protections in both the trespass era and the *Katz* era, and no matter what test the Court applies, technology will continue to advance to the point that thermal-imaging devices and other search tools might become commonplace and in general public use sooner rather than later.[125] When that occurs, both *Kyllo* and *Katz* will be powerless to prevent individuals from losing all protection of privacy within their homes.[126] To combat that reality, Justice Scalia ruled that "[w]here, 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."[127] Thus, a constructive trespass of the home is enough to trigger Fourth Amendment protection.[128]

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reasonable expectation of privacy in the inculpatory items they discarded" in the trash on the streets for pickup).

[121] *Kyllo*, 533 U.S. at 43–44 (Stevens, J., dissenting).

[122] *See* U.S. CONST. amend. IV ("The Right of the people to be secure in their . . . houses . . . shall not be violated.").

[123] *Kyllo*, 533 U.S. at 40.

[124] *Id.*

[125] *Id.* at 33.

[126] *See id.* at 33–34 ("It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology.").

[127] *Id.* at 40.

[128] *See id.* at 34, 40. While the rule as described by Justice Scalia applies "at least where (as here) the technology in question is not in general public use," the Court explicitly drew a line at the home that is "not only firm but also bright." *Id.* The Court's explanation that "[t]he Fourth Amendment is to be construed . . . in a manner which will conserve public interests as well as the interests and rights of individual citizens," and its use of the words "at least," leave open the probability that protection of the home will remain even if the technology is also in general public use. *Id.* at 40 (quoting Carroll v. United States, 267 U.S. 132, 149 (1925)).

Ultimately (and surprisingly), using Originalist principles, the Court refused to follow *Katz ad infinitum* to the point of leaving modern homeowners "at the mercy of advancing technology."[129] The Court prevented the Fourth Amendment, under the *Katz* rule, from destroying itself to the point that even the house, which is explicitly protected in the text, would no longer be protected. In doing so, the Court brought back the trespass doctrine but modernized it to be sufficient when a sense-enhancing device obtains information that the natural senses could not obtain without a physical intrusion. Two key points arise from *Kyllo*: (1) the Court has ensured the protection of the explicitly secured area of the home, despite the inability of *Katz* to do so; and (2) the Court formulated a constructive trespass rule that, although only ever used in the context of the home, could broaden the scope of the Fourth Amendment when other constitutionally protected areas are involved.

2. In Their Papers: The Nature of Things

Throughout Fourth Amendment jurisprudence, and under both the trespass and privacy frameworks, the Court has affirmatively protected a person's papers and their technological equivalent. As previously mentioned, in 1877, in its first case determining the scope of the Fourth Amendment, *Ex parte Jackson*, the Court protected letters and papers outside the home.[130] But the Court drew a distinction "between different kinds of mail matter[,]" stating that "[l]etters and sealed packages . . . in the mail are as fully guarded from examination and inspection, except as to their outward form and weight."[131]

Despite a drastic change in the law, the "content/process" distinction remained post-*Katz*, which was the Court's recognition of the importance of content information. Today, the Supreme Court and lower courts continue to protect content information, requiring a warrant to obtain text messages and emails, whereas law enforcement may access email addresses and phone numbers under the Third Party Doctrine without a warrant.[132] In *Riley v. California*, the Court protected the data content stored on a cell phone, requiring a warrant to 'search' the phone and its data contents even when law

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[129] *Id.* at 34.

[130] Ex parte Jackson, 96 U.S. 727, 733 (1877).

[131] *Id.*

[132] *See* Warshak v. United States, 490 F.3d 455, 471 (2007) (finding "a heightened protection for the *content* . . . of e-mails and phone calls"); *see also* Quon v. Arch, 529 F.3d 892, 905 (9th Cir. 2008) (distinguishing between the "information used to 'address' a text message" and the content of a text message).

enforcement obtained the phone incident to an arrest.[133] Ultimately, although "privacy interests" are "diminished by the . . . arrest itself," cell phones "place vast quantities of personal information literally in the hands of individuals" to the point that a person's expectation of privacy in the contents of a phone survives the arrest.[134] Ultimately, despite the lack of consideration for constitutionally protected areas in the *Katz* analysis, the Court continued to protect papers, or their equivalent, under the *Katz* doctrine, just as it did with houses. Although the same cannot be said of the Court's dealings with effects, its recognition of the nature of content information stored on cell phones is a step in the direction toward protecting the metadata that emanates from the devices.

C. Insecure in Their Effects

Although the Court has ensured the security of houses, persons, and papers, it has struggled to define a coherent standard when goods are involved. The problem arises from the fact that the reasonable expectation of privacy standard does not take into account the *kind* of property the government searched because *Katz* removed the constitutionally protected areas question from the analysis altogether. The focus of *Katz* is an "ethereal" privacy rather than protection of "privacy in particular places."[135] But the theory behind *Katz*—that the Fourth Amendment should protect people in public rather than property everywhere—is just that, a theory.[136] Unfortunately, because *Katz* is not grounded in the protection of any specific things at all, but only of general privacy, the reasonable expectations of privacy standard, as applied to moveable things, does not protect people. Thus, *Katz* has done the exact opposite of what the Warren Court meant for it to do and fails to protect personal data as technology continues to advance rapidly.[137] As Justice Gorsuch stated, "we have arrived at this strange place not because the Court has misunderstood *Katz*."[138] "Far from it," he continues, "[w]e have arrived here," in a place with ambiguous rulings

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[133] Riley v. California, 573 U.S. 373 (2014). The Court's primary focus was the "pervasive and insistent" nature of cellphones holding the "privacies of life." *Id.* at 385. The opinion serves as "a sweeping endorsement of digital privacy" when dealing with content information. GIZZI & CURTIS, *supra* note 76, at 98. Process information conveyed to third parties is still not protected. *Id.*

[134] *Riley*, 573 U.S. at 386.

[135] Carpenter v. United States, 138 S. Ct. 2206, 2264 (2018) (Gorsuch, J., dissenting).

[136] Katz v. United States, 389 U.S. 347, 352 (1967).

[137] Brady, *supra* note 108, at 948–50.

[138] *Carpenter*, 138 S. Ct. at 2267 (Gorsuch, J., dissenting).

leading to inconsistency in the realm of effects, "because this is where *Katz* inevitably leads."[139]

This section will proceed in four parts: (1) an analysis of the term "effects" as it is used in the text of the Fourth Amendment; (2) a discussion of the failure of *Katz* to protect people when effects are involved; (3) a consideration of the Court's attempts to mitigate the fallout from *Katz*; and (4) an analysis of the problem that led to *Carpenter* and the Court's response.

1. What Are Effects?

In order to evaluate the Court's application of *Katz* to protect, or not protect, effects, it is important to understand the term. Before and after *Katz*, the Court has offered few guidelines regarding the term and its place in Fourth Amendment analysis.[140] Fourth Amendment jurisprudence altogether seems to take a much too "narrow view of privacy when it comes to personal property," and "[a]s a result, [the Court] has failed to protect the ownership-based interest embodied in the Fourth Amendment's protection for effects."[141] Nevertheless, "Privacy is a broad value, capable of covering these other interests of property ownership—if given meaningful content."[142] When dealing with private electronic property, Justice Gorsuch explained that it is "entirely possible [that] a person's cell-site data could qualify as *his* papers or effects under existing law."[143] Taking a broad view of the term effects, Justice Gorsuch is entirely correct.

Justice Gorsuch, at the very least, recognized that a person has an interest in his or her data conveyed to a third party, which is something that previous Courts have been unwilling to do, as will be discussed later. History reveals, and property law already suggests, that "[t]hose interests" in cell-site location information, of which Justice Gorsuch speaks, "even rise to the level of a property right."[144] Ultimately, the term effects, as used in the text of the Fourth Amendment, includes cell-site locational information and, more

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[139] *Id.* (Gorsuch, J., dissenting).

[140] Brady, *supra* note 108, at 959. "Even in the pre-*Katz* era there was no 'common-law trespassers test' for personal property. Rather the rules for personal property required courts to balance the competing property interests of the individual with the government's interest in them." *Id.* Further, the current guiding principles are that "effects are without protection if abandoned[,] . . . effects in containers might be protected, and the location might or might not factor into the Fourth Amendment analysis of constitutional protection for personal items." Brady, *supra* note 108, at 959.

[141] Brady, *supra* note 108, at 953.

[142] *Id.*

[143] *Carpenter*, 138 S. Ct. at 2272 (Gorsuch, J., dissenting).

[144] *Id.* (Gorsuch, J., dissenting).

broadly, personal data, regardless of whether a third party has access to the information.

a. "Effects" Defined: Then and Now

Dictionaries from the eighteenth century and today both "indicate that 'effects' [are] synonymous with personal property."[145] More specifically, the *Oxford English Dictionary* defines the term as "[g]oods, movable property" and provides a 1776 example asking whether "we are willing to commit our most valuable effects to the custody of one who is unfaithful, and would squander them away?"[146] Clearly, people at the time of the Amendment's construction understood the term to include all movable goods. The current definition is entirely consistent with that view, as *Merriam-Webster's* modern dictionary defines the term as "movable property: goods."[147] Because the definitions of effects, then and now, are nearly identical, the only change seems to be the goods themselves. "The Fourth Amendment, of course, did not envision" the technologies that exist today, but that alone should not preclude the Fourth Amendment from applying to goods and the intangible property that accompanies them.

b. Goods as Tangible and Intangible Property

Despite the fact that goods were tangible at the time of the Fourth Amendment's construction, today "Fourth Amendment effects can include smart objects and related data."[148] The legal understanding of effects dates back to the ratification of the Constitution.[149] James Madison's original draft of the Fourth Amendment "used a different phrase: their persons, their houses, their papers, and *their other property*."[150] However, "the language of 'other property' was replaced with 'effects' by the House Committee of the Eleven charged with revising the draft of the Constitution."[151] Although scholars have concluded that the Committee's change in the term narrowed

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[145] Brady, *supra* note 108, at 986.

[146] *Effect*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/view/Entry/59664?rskey=EQwng8&result=1#eid [https://perma.cc/BNF6-6A26].

[147] *Effect*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/effect [https://perma.cc/H7B3-HKQF].

[148] Ferguson, *supra* note 81, at 807, 809.

[149] *Carpenter*, 138 S. Ct. at 2241 (Thomas, J., dissenting).

[150] *Id.* at 2241 (Thomas, J., dissenting) (citing 1 Annals. of Cong. 452 (1789)).

[151] Ferguson, *supra* note 81, at 827.

the scope of Fourth Amendment protection to only goods stored in houses,[152] "[C]ourts have interpreted Fourth Amendment effects to cover all of an individual's personal property with a general view that 'effects' means goods, moveable objects, or possessions."[153] For example, in *United States v. Chadwick*, the Court explained that luggage, a footlocker, and automobiles are all within the meaning of the term.[154]

The Court's definition of effects should include "not only the physical object" of the phone "but also the smart data and communicating signals emanating from the device"[155] for two reasons: (1) individuals maintain an interest in the data they transmit to wireless carrier companies,[156] and (2) an individual's interest in the good that transmits the data is inherently linked to the data itself.[157] First, dissenting in *Carpenter*, Justice Gorsuch explained that positive law, particularly 47 U.S.C. § 222, "designates a customer's cell-site location information as 'customer proprietary network information' . . . and gives customers certain rights to control use of and access to CPNI about themselves," and "[t]he statute generally forbids a carrier to 'use, disclose, or permit access to individually identifiable' CPNI without the customer's consent, except as needed to provide the customer's telecommunications services."[158] Justice Gorsuch demonstrated that "customers have substantial legal interests in this information, including at least some right to include, exclude, and control its use."[159] Because individuals have such rights in the data, they amount to a property right.[160]

Second, "data and communication signals coming from smart effects should be considered as part of the effect itself."[161] In his argument for Fourth Amendment protection of "data curtilage," Andrew Ferguson explained that

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[152] Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 714 (1999) ("[T]he available linguistic and statutory evidence suggests that 'persons, houses, papers, and effects' was understood to provide clear protection for houses, personal papers, the sorts of domestic and personal items associated with houses, and even commercial products or goods that might be stored in houses—while leaving commercial premises and interests otherwise subject to congressional discretion.").

[153] Ferguson, *supra* note 81, at 828.

[154] United States v. Chadwick, 433 U.S. 1, 12 (1977).

[155] Ferguson, *supra* note 72, at 809.

[156] *See* Carpenter v. United States, 138 S. Ct. 2206, 2272 (2018) (Gorsuch, J., dissenting).

[157] Ferguson, *supra* note 81, at 860.

[158] *Carpenter*, 138 S. Ct. at 2272 (Gorsuch, J., dissenting) (citing 47 U.S.C § 222(c)(1) and (h)(1)(A)).

[159] *Id.* (Gorsuch, J., dissenting).

[160] Kaiser Aetna v. United States, 444 U.S. 164, 179–80 (1979) ("[W]e hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within the category of interests that the Government cannot take without compensation."). If the right to exclude precludes the government from taking under the Fifth Amendment, why would property not be protected under the Fourth? *See id.*

[161] Ferguson, *supra* note 81, at 860. The effect being the cell phone, which is a good. *Id.*

"[t]he data is the valuable part of the ownership interest in the effect."[162] According to Ferguson, personal data, at the very least, should be considered co-owned by the individual who owns the device transmitting the data and the third party collecting the data.[163] Further, "co[-]ownership does not remove the ability to exclude."[164] Thus, "if owned by the user of the smart device, the user should control this information" and "[a]t a minimum, the owner of a device should be able to exclude others from accessing this information."[165] Again, under such a framework, the individual's interest in the data—simply by being the owner of the device—is characteristic of a property right.[166]

Ultimately, because individuals have, at the very least, some property rights in the data that emanates from their goods, the Court should recognize such data as included in "effects" when analyzing the Fourth Amendment. The following discussion explores the problems in the area of effects with which the Court has dealt because of the narrow scope of *Katz*.

2. No Protection in Public: The Third Party Doctrine

Although *Katz* attempted to protect "what [people] seek[] to preserve as private, even in an area accessible to the public," it fails to protect private electronic property because such property constitutes "[w]hat a person knowingly exposes to the public, even in [her] own home " or elsewhere.[167] That principle brought about the Third Party Doctrine, which is where the heart of the issue lies regarding the *Katz* holding's inability to protect private electronic property. Using the Third Party Doctrine, the Court has found that the Fourth Amendment does not apply and government searches are reasonable in cases "when the Court believes that a person has knowingly exposed [his or her] activities to others."[168] Thus, *Katz* does not accomplish its goal to ensure broad Fourth Amendment protections and, by extension, the doctrine allows the government to reasonably search broad areas of individuals' lives in the technological society that exists today. Both of these concerns arise from the fact that by merely asking if a reasonable expectation of privacy was violated, "the *Katz* test . . . reads the words 'persons, places, houses, and effects' out of the text," so the Court does not even consider

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[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *Id.*
[166] *See* Kaiser Aetna v. United States, 444 U.S. 164, 179–80 (1979).
[167] Katz v. United States, 389 U.S. 347, 351 (1967).
[168] MCINNIS, *supra* note 41, at 231.

whether cellular data constitutes a person's effects.[169] Thus, anything that a person "freely discloses" to a third party is available for law enforcement to search without seeking a warrant.[170] The following subsections will discuss how the Third Party Doctrine failed to protect people in public on its own, and then how the Court narrowed the scope of the reasonable expectation of privacy standard using the doctrine.

a. Lofty Goals: Katz *Fails to Keep Its Promise*

While adhering to the principles articulated by the majority in *Katz*, the Third Party Doctrine fails to accomplish in its application the goal of broadening Fourth Amendment protections to combat technological advancement. The rationale for the doctrine lies in an assumption of risk principle that individuals cannot have a reasonable expectation of privacy when they provide information to a third party because the government may exploit the third party to obtain the private information.[171] While the logic is sound, the Third Party Doctrine has the practical effect of abandoning the goals of *Katz*, and often produces that a search did not occur in situations that are hardly distinguishable from the facts of the seminal case.

Just as the trespass doctrine yielded arbitrary results that turned on mere inches, the Third Party Doctrine often produces similarly illogical outcomes dependent on the technological search device's placement. For example, in *United States v. White*, the Court found that a search did not occur when a government informant wore a wire that transmitted information to law enforcement during a conversation with the defendant.[172] The majority in *White* reasoned that a person does not have a reasonable expectation of privacy when speaking to a "trusted accomplice" or unknown "police agent" because "one contemplating illegal activities must realize the risk that his companions may be reporting to the police."[173] The Court distinguished *White* from *Katz* because "*Katz* involved no revelation to the Government by a party to conversations with the defendant" but rather involved actual government intrusion into the defendant's phone call.[174] Simply because a third party served as an intermediary who conveyed the information, the

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[169] Carpenter v. United States, 138 S. Ct. 2206, 2241(2018) (Thomas, J., dissenting).
[170] *Id.* at 2262 (Gorsuch, J., dissenting).
[171] *Id.* at 2263 (citing Smith v. Maryland, 442 U.S. 735, 744 (1979)).
[172] MCINNIS, *supra* note 41, at 231 (citing United States v. White, 401 U.S. 745 (1971)).
[173] *White*, 401 U.S. at 752.
[174] *Id.* at 749.

expectations of privacy—according to the Court—were "constitutionally justifiable" in *Katz* but not in *White*.[175]

Although the Court made a point to explain why, in its eyes, *White* differed from *Katz*, the reasoning seems arbitrary and depends on one small fact: where the government placed the recording device. Just like the distinction between the spike mike in *Silverman* and the detectaphone in *Goldman*, the Court's opinion in *White* turned on the fact that a government informant wore a wire rather than law enforcement placing a recording device in a phone booth. Thus, had law enforcement consulted with the person on the other end of Katz's phone, a search would not have occurred. Justice Harlan, the author of the *Katz* opinion, dissented in *White* because the Warren Court in *Katz* "expressed concern about scientific developments" and "left no doubt that, as a general principle, electronic eavesdropping was an invasion of privacy and that the Fourth Amendment prohibit[s] unsupervised 'bugging'" in any context.[176] The majority's ruling in *White* is directly antithetical to the goal of *Katz* to broadly protect a person's privacy not only in his or her home but in public spaces, and it "imposes 'a heavier responsibility on th[e] Court'" to ensure fair outcomes as technology continues to advance.[177]

Ultimately, the Third Party Doctrine, and its arbitrary results as exemplified by *White*, created a framework in which a person's effects could not be protected if those effects are shared with any third party, regardless of whether people have a choice to share their property.

b. What Protection? Narrowing the Scope of Katz

While *Katz* on its own failed to accomplish its goals, the Court narrowed the Amendment's scope further, using as precedent the anomalous *White* case, to deal with information conveyed to businesses for business purposes. In *United States v. Miller*, the Court again articulated the Third Party Doctrine to "rule[] that people do not have privacy interests in their bank accounts."[178] Justice Powell, writing for the majority, found that bank records "are not respondent's 'private papers,'" and rather, are "the business records of the banks."[179] Thus, "[t]he depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the

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[175] *Id.* at 751.

[176] *Id.* at 779 (Harlan, J., dissenting).

[177] *Id.* (Harlan, J., dissenting) (quoting Berger v. State of New York, 388 U.S. 41, 56 (1967)).

[178] MCINNIS, *supra* note 41, at 232 (citing *White*, 401 U.S. at 745).

[179] United States v. Miller, 425 U.S. 435, 440 (1976).

Government."[180] Just three years later, the Court decided *Smith v. Maryland* and found that the government did not need a warrant to obtain phone records of a defendant in a criminal case because "there is no legitimate expectation of privacy in the telephone numbers that a person dials,"[181] because the "petitioner voluntarily conveyed numerical information to the telephone company" in the ordinary course of business."[182] Additionally, society does not recognize the expectation of privacy as reasonable under the Third Party Doctrine.[183]

Ultimately, the Court reached its conclusions in both *Smith* and *Miller* by ruling that bank records and a pen register are processing information; they are not information about individuals in which the defendants maintained a private and personal interest. Thus, the Court focused on how the government employed its search (exploiting the bank or the phone company) rather than on *what* the government searched (a person's effects) and the *kind* of information obtained (intimate information about an individual's daily life). As a result, individuals lose all privacy interest in any voluntarily conveyed information, no matter how personal the information or how voluntary the conveyance. If the Court continues to merely protect "people not things," then people are not protected at all because their things are not safe from government intrusion. If their things are not secure, then the government has a simple avenue to obtain information about people and their private lives.[184]

The most jarring part of these cases is that the Court ruled that an individual does not even have an interest in the information he or she conveys to a third party, which means that, even under the property framework, the Fourth Amendment could not protect such personal information.[185] Justice Gorsuch, in his *Carpenter* dissent, posed a series of questions to illustrate the absurdity of that principle: "Ever hand a private document to a friend to be returned? Toss your keys to a valet at a restaurant? Ask your neighbor to look after your dog while you travel?"[186] If Justice Gorsuch's questions do not reveal it already, the Third Party Doctrine not only means individuals lose property rights in the things they share with others, it also gives the government nearly unlimited ability to obtain and process information

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[180] *Id.* at 443.

[181] MCINNIS, *supra* note 41, at 232.

[182] Smith v. Maryland, 442 U.S. 735, 744 (1979).

[183] *Id.* at 743.

[184] Katz v. United States, 389 U.S. 347, 352 (1967).

[185] *See Miller*, 425 U.S. at 442 ("All of the documents obtained, including financial statements and deposit slips, contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business.").

[186] Carpenter v. United States, 138 S. Ct. 2206, 2268 (Gorsuch, J., dissenting).

conveyed to third parties, which increasingly becomes a broader amount of personal information.[187] Until the Court recognizes the text as the foundation for the Fourth Amendment analysis to consider "what was searched" rather than the manner and nature of the search, and broadens the term "effects" to include metadata, protections against unreasonable searches will continue to wither away.

3. Combatting *Katz*: The Return of Trespass

After years of the Third Party Doctrine and the continuous advancement of technology, the Court began to recognize that in certain cases, "[A]pply[ing] exclusively *Katz's* reasonable-expectation-of-privacy test" narrows Fourth Amendment protections by "eliminat[ing] rights that previously existed" under the trespass doctrine.[188] The problem manifested itself in rulings in which the Court's narrow interpretation of the Fourth Amendment under the Third Party Doctrine yielded that a person might not have a reasonable expectation of privacy in her movements in public spaces or her possessions if the information is knowingly exposed to the public.[189] Thus, *Katz*, brought to its logical conclusion, does not protect persons, houses, papers, or effects if there is a knowing exposure.[190] In an attempt to solve the problem, the Court resurrected the trespass doctrine.

In *United States v. Jones*, the Court sought to combat the issue that technology and the Third Party Doctrine imposed. It held 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.'"[191] To reach its conclusion in *Jones*, the Court revived the trespass analysis overturned in *Katz*. But rather than overturning *Katz*, the Court merely added the trespass rule to the *Katz* analysis to "provide at a *minimum* the degree of protection [the Fourth Amendment] afforded when it was adopted."[192] Justice Scalia did not even address the reasonable expectation of privacy standard

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[187] Ferguson, *supra* note 81, at 813 ("Experts predict that the worldwide scale of such 'smart,' interconnected objects will continue to grow, reaching more than . . . one trillion by 2025.").

[188] United States v. Jones, 565 U.S. 400, 412 (2012).

[189] *See, e.g.*, United States v. Knotts, 460 U.S. 276, 281–82 (1983) ("When [defendant] traveled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction."); California v. Ciraolo, 476 U.S. 207, 213 (1986) ("That the area is within the curtilage does not itself bar all police observation.").

[190] *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 33 (2001) (explaining that the court has "subsequently applied this principle to hold that a Fourth Amendment search does *not* occur—even when the explicitly protected location of a *house* is concerned" unless the *Katz* standard is met).

[191] *Jones*, 565 U.S. at 404.

[192] *Id.* at 412.

because a defendant's "Fourth Amendment rights do not rise or fall with the *Katz* formulation."[193] Rather, the Court may also determine whether a search occurred by analyzing whether the government physically trespassed onto a constitutionally protected area.[194]

In his opinion, Justice Scalia criticized *Katz* as not recognizing that the Amendment's purpose is to "embody a particular concern for trespass upon the areas ('persons, houses, papers, and effects') it enumerates."[195] Further, he explained that "[t]he text of the Fourth Amendment reflects its close connection to property, since otherwise it would have referred simply to 'the right of the people to be secure against searches and seizures"; the phrase 'in their persons, houses, papers, and effects' would have been superfluous."[196] Finally, for the first time since *Katz*, the Court recognized the importance of the constitutionally protected areas factor in the Fourth Amendment analysis and ruled to protect a defendant from an unreasonable search that may not have constituted a search under the narrowed *Katz* analysis.[197] This was a step in the right direction toward the Court protecting personal data under the Fourth Amendment.

But the Court's holding in *Jones* did not quite solve the problem because (1) the Court did not define the kind of property that constitutes "effects," but merely stated that "[i]t is beyond dispute that a vehicle is an 'effect' as that term is used in the Amendment";[198] and (2) the Court explicitly limited its ruling to physical trespass by explaining: "We do not make trespass the exclusive test. Situations involving merely the transmission of electronic signals without trespass would remain subject to the *Katz* analysis."[199] Ultimately, to protect personal data, the Court will have to deal with both issues by first fitting personal data into the *Jones* holding through a broad definition of effects, and second, extending *Jones* to allow for constructive trespass to violate the amendment when the situation involves transmissions of electronic signals.

4. Breaking Point: *Katz's* Limit

In 2017, the Court confronted a situation in which neither rule, *Katz* nor *Jones*, would produce the result that a search occurred despite blatant

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[193] *Id.* at 406.
[194] *See id.* at 411 (holding that trespass is not the exclusive test).
[195] *Id.* at 406–07.
[196] *Id.* at 405.
[197] *Id.* at 411.
[198] *Id.* at 404.
[199] *Id.* at 411.

violations of privacy. The Court feared broad technological implications in which a typical interpretation of Fourth Amendment rulings would allow law enforcement nearly limitless ability to "access[] historical cell phone records that provide a comprehensive chronicle of the user's past movements."[200] The Court majority, led by Chief Justice Roberts, found that a search occurred, not according to precedent, but rather in an effort "to ensure that [they] do not *embarrass the future.*"[201]

First, an application of the *Katz* analysis the way it had always been applied would yield that Carpenter had no reasonable expectation of privacy. Chief Justice Roberts acknowledged that a person has "no reasonable expectation of privacy in [his or her] movements from one place to another,"[202] and "a person has no legitimate expectation of privacy in information that he voluntarily turns over to third parties."[203] Thus, because Carpenter's case, which was analogous to *Smith* and *Miller*, involved cell-site locational information kept and stored by a telephone company for business purposes, Carpenter did not have an expectation of privacy in the data, and under the Third Party Doctrine, no search occurred. The Court did not rule that way either.

The Court also could not apply the newly revived trespass rule to find that a search occurred for two reasons: first, no physical intrusion occurred; and second, according to the Third Party Doctrine, the conveyed information belongs to the phone company rather than the person who owns the phone and to whom the information pertains.[204] Thus, as the trespass doctrine currently stands, no search occurred. The Court did not rule that way.

In an effort to avoid the logical conclusions of both *Katz* or *Jones* that law enforcement did not engage in a search, the Court majority, in its words, "decline[d] to extend," but actually declined to apply, the Third Party Doctrine in holding that "an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI."[205] The Court distinguished CSLI from other Third Party Doctrine

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[200] Carpenter v. United States, 138 S. Ct. 2206, 2211 (2018).

[201] *Id.* at 2220 (emphasis added).

[202] *Id.* at 2212; *see also* United States v. Knotts, 460 U.S. 276, 281 (1983) ("A person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.").

[203] *Carpenter*, 138 S. Ct. at 2216; *see also* Smith v. Maryland, 442 U.S. 735, 743–44 (1979) ("This Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.").

[204] *Carpenter*, 138 S. Ct. at 2213 ("Given that cell phone users voluntarily convey cell-site data to their carriers as a means of establishing communication, the [district] court concluded that the resulting business records are not entitled to a Fourth Amendment protection.").

[205] *Id.* at 2217.

cases because of the nature of the information conveyed: "modern cell phones generate increasingly vast amounts of increasingly precise" locational information and a cell phone "convey[s] to the wireless carrier not just dialed digits, but a detailed and a comprehensive record of the person's movement."[206] Further, according to Chief Justice Roberts, cell phone data can be distinguished from the data of *Smith* and *Miller* in that the conveyance is not actually voluntary because, in order to use a cell phone, which nearly everyone does, a person must accept that his or her phone will constantly "generate[] a time-stamped record known as cell-site location information," which the "wireless carrier [will] collect and store . . . for their [sic] own business purposes," and the "wireless carriers often sell aggregated location records to data brokers."[207] Ultimately, the Court ruled that CSLI, specifically, could not be searched without law enforcement first obtaining a warrant.[208]

Although the majority attempted to ensure the protection of personal data, it did not do so in a lasting, or even effective, way. Moreover, the "concurrence's insistence on the exclusivity of the *Katz* test" is what "needlessly leads us into 'particularly vexing problems' in the present case[,]" and is what will continue to create such problems if the Court does not begin to apply a broad standard to catch up to the rapid technological advancement.[209] The Court must seek a new path.

IV. RESOLUTION

Now, after *Carpenter*, it seems that the Fourth Amendment is beyond repair, or at least that the justices will attempt to correct the issues on a case by case basis, regardless of the long-term problems that will occur. Justice Gorsuch lent some credence to the options that we have:

> What to do? It seems to me we could respond in at least three ways. The first is to ignore the problem, maintain *Smith* and *Miller*, and live with the consequences. If the confluence of these decisions and modern technology means our Fourth Amendment rights are reduced to nearly nothing, so be it. The second choice is to set *Smith* and *Miller* aside and try again using the *Katz* "reasonable expectation of privacy" jurisprudence that produced them.

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[206] *Id.* at 2212, 2217.

[207] *Id.* at 2211–12.

[208] *See id.* at 2217 n.3. *Carpenter* implies that law enforcement may access CSLI for six days because, supposedly, the seventh day makes the search unreasonable. *Id.*

[209] United States v. Jones, 565 U.S 400, 412 (2012).

> The third is to look for answers elsewhere.[210]

If we ignore the problem, we will deal with many of the same issues, but they will increasingly worsen. As technology advances, the Court will have to deal with even more devices or search means that allow law enforcement to obtain a comprehensive picture of the privacies of an individual's life. Ultimately, five members of the Court will judge whether the search method is too "pervasive and insistent" in daily life.[211] Alternatively, the Court will have to assess whether the kind of technology is in public use at the time, a consideration that is so malleable and so subjective that reasonable people will often disagree.[212] Ultimately, doing nothing to deal with the problem will continue to allow "government to search almost whatever it wants whenever it wants," subject to few delineated exceptions that the Supreme Court creates over time.[213] It would be impossible for that process to keep up with rapid technological advancements, and individuals will forever lose privacy protections at rapid rates.

Doing away with the Third Party Doctrine would not be feasible either. First, "[r]esorting to *Katz* in data privacy cases threatens more of the same."[214] "After all, it was *Katz* that produced *Smith* and *Miller* in the first place."[215] Returning to *Katz* would cause issues because *Katz* was never grounded in the text. As discussed throughout this Note, the lack of foundation in the reasonable expectations of privacy standard has severe consequences that even abandoning the Third Party Doctrine would not solve.

The Court can deal with this without overturning *Katz*. Instead, the Court simply should redefine the analysis that it already has. The overarching standard that should be recognized is:

> People have a reasonable expectation of privacy in the areas of their lives protected by the Constitution—persons, houses, papers, and effects. If the government actually or *constructively* trespasses on those areas, a search

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[210] *Carpenter*, 138 S. Ct. at 2262 (Gorsuch, J., dissenting).

[211] Riley v. California, 573 U.S. 373, 395 (2014).

[212] *See* Kyllo v. United States, 533 U.S. 27, 34 (2001) ("While it may be difficult to refine *Katz* when the search of areas such as telephone booths, automobiles, or even the curtilage and uncovered portions of residences is at issue, in the case of the search of the interior of homes—the prototypical and hence most commonly litigated area of protected privacy—there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that exists, and that is acknowledged to be *reasonable*.").

[213] *Carpenter*, 138 S. Ct. at 2262 (Gorsuch, J., dissenting).

[214] *Id.* at 2266 (Gorsuch, J., dissenting).

[215] *Id.* at 2264 (Gorsuch, J., dissenting).

has occurred.

The overarching standard will split into a two-part analysis to determine whether a search occurred. First, the Court must ask whether a constitutionally protected area was involved. Constitutionally protected areas include and only include a person's person, papers, houses (and curtilage), and effects. As previously discussed, this will encompass electronic property through a broad definition of effects. Thus, cell phone data, and more broadly, personal data that accompanies a good, will be included in the definition of effects, regardless of whether a third party has access to it.[216]

Second, the Court must ask whether the government actually or constructively trespassed onto the constitutionally protected area. While trespass will remain the same analysis as it has always been (physical interference on the property of another), a constructive trespass will be defined by the same standard that Justice Scalia laid out in *Kyllo*: when the government obtains electronically conveyed "information that would previously have been unknowable without physical intrusion," a search has occurred.[217] This part of the analysis is essential because it does away with the issue that sparked *Katz* in the first place and ensures information stored in a constitutionally protected area will not be collected without a warrant.

If the Court answers yes to both questions, a search occurred. This is the best option to ensure Fourth Amendment protection of personal data because, first, the standard adheres to the purpose of the Fourth Amendment because "[b]y securing property, the Fourth Amendment [will] . . . protect privacy as well."[218] In effect, the new rule recognizes that protecting people and protecting things are not mutually exclusive and rather coincide very often. Lastly, the rule provides a concrete definition of permissible government action without a warrant. The broad standard will continue to ensure the protections of civil liberties as time goes on and technology advances.[219]

V. CONCLUSION

According to Justice Brandeis, "[I]n the application of a constitution, our contemplation cannot be only of what has been but of what may be."[220] It is

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[216] This will almost certainly affect *Smith* and *Miller* when dealing with personal data. But this seems to be the trend that members of the court are following, so the Third Party Doctrine is already in a state of decline.

[217] *Kyllo*, 533 U.S. at 34.

[218] *Carpenter*, 138 S. Ct. at 2266 (Thomas, J., dissenting).

[219] *See* Olmstead v. United States, 277 U.S. 438 (1928).

[220] *Id.* at 434.

of most importance to the protection of civil liberties "against specific abuses of power" that we solve constitutional questions by using standards that can "adapt[] to a changing world."[221] As we progress and technologies better our daily lives, it is essential that we carry Justice Brandeis's thoughts forward so that one day, you can go to the Apple Store, buy a phone, agree to the Terms & Conditions, and still be protected under the Fourth Amendment.

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[221] *Id.*