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The Fourth Amendment and General Law

ABSTRACT. For decades, Fourth Amendment protections have turned on “reasonable expectations of privacy.” But a new era may be dawning. There is growing interest among judges and scholars in turning away from privacy toward property or positive law as the touchstone for Fourth Amendment protections. Yet many questions remain about how that approach should work, such as where judges should look for positive law and precisely what role positive law should play in Fourth Amendment analysis.

This Article answers those questions, and in so doing lays forth a new, comprehensive theory of the Fourth Amendment. We argue that courts should interpret the Fourth Amendment’s protections by looking to “general law”—the common law under the control of no particular sovereign. Courts looking to general law would draw on ancient property concepts such as trespass, license, and bailments in determining the scope of protections. But they would also draw on custom, social practices, and modern legal developments to identify and flesh out common-law rules unknown at the Founding.

The general-law approach has numerous advantages over competitor theories. It makes better sense of the Fourth Amendment’s text and has deeper roots in its history. It is surprisingly easy to reconcile with a great deal of Fourth Amendment doctrine, while also suggesting important refinements in various areas. And it gives courts the flexibility to protect Fourth Amendment values in a changing world while also structuring and guiding the judicial task more than an untethered inquiry into privacy expectations. Private law, then, holds the key to understanding the Fourth Amendment’s limits on public power.

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INTRODUCTION

The modern era of Fourth Amendment jurisprudence began in 1967 with *Katz v. United States*.¹ That case, and especially Justice Harlan's concurrence,² heralded a new approach in which the Amendment's protections turned on "reasonable expectations of privacy."³ In the decades since, the Supreme Court has used this approach to build a grand edifice of Fourth Amendment doctrine. But now, just over half a century later, the *Katz* era could be nearing its end. Recent cases have revealed interest among some originalist Justices in restoring a supposed pre-*Katz* regime under which Fourth Amendment protections turn on concepts of property and trespass rather than amorphous notions of privacy.⁴ Aided by scholarly efforts,⁵ and perhaps by recent changes in the Court's membership, some kind of "positive law" approach might be poised to flourish.

Yet, Justices drawn to a positive-law approach must still resolve fundamental questions about what exactly that approach would entail. The leading scholarly proponents of a positive-law approach, William Baude and James Y. Stern, argue that in determining questions of the Fourth Amendment's scope, courts should ask whether "the government actor [has] done something that would be tortious, criminal, or otherwise a violation of some legal duty" under positive law if

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1. 389 U.S. 347 (1967); see, e.g., Kiel Brennan-Marquez, *Outsourced Law Enforcement*, 18 U. PA. J. CONST. L. 797, 801 (2016) (noting that *Katz* "ushered in the modern era of Fourth Amendment law").
 2. See *Katz*, 389 U.S. at 360-62 (Harlan, J., concurring).
 3. *Id.* at 362.
 4. See, e.g., *United States v. Jones*, 565 U.S. 400, 406-08 (2012); *Florida v. Jardines*, 569 U.S. 1, 6-7 (2013); *Carpenter v. United States*, 138 S. Ct. 2206, 2267-68 (2018) (Gorsuch, J., dissenting); see also *Carpenter*, 138 S. Ct. at 2224 (Kennedy, J., dissenting) ("[T]he Court unhinges Fourth Amendment doctrine from the property-based concepts that have long grounded the analytic framework that pertains in these cases.>").
 5. See generally William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1825 (2016) (arguing that courts should resolve questions about Fourth Amendment searches by asking "whether government officials have engaged in an investigative act that would be unlawful for a similarly situated private actor to perform"). See also Note, *The Fourth Amendment's Third Way*, 120 HARV. L. REV. 1627, 1627 (2007) (arguing that the Fourth Amendment "should be interpreted as dynamically incorporating state law"); Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 532-34 (2007) (discussing the benefits and drawbacks of looking to positive law in Fourth Amendment analysis); Richard M. Re, *The Positive Law Floor*, 129 HARV. L. REV. F. 313, 314 (2016) (arguing that courts should "view privacy-related measures applicable to private parties as presumptively triggering the Fourth Amendment's prohibition on unreasonable searches"); Daniel B. Yeager, *Search, Seizure and the Positive Law: Expectations of Privacy Outside the Fourth Amendment*, 84 J. CRIM. L. & CRIMINOLOGY 249, 251 (1993) (arguing that for courts interpreting the Fourth Amendment, "the positive law [may] provide a concrete inventory of expectations drawn from local property, tort, contract, and criminal laws").

performed by a private person.⁶ But the Justices who are receptive to positive-law arguments have not yet endorsed Baude and Stern's theory, which we might call the "pure" positive-law model. Notably, in his dissent in *Carpenter v. United States*,⁷ Justice Gorsuch stressed his uncertainty about several matters:

[I]f a house, paper, or effect is yours, you have a Fourth Amendment interest in its protection. But what kind of legal interest is sufficient to make something *yours*? And what source of law determines that? Current positive law? The common law at 1791, extended by analogy to modern times? Both?⁸

To Justice Gorsuch's last question, this Article offers a different answer: *neither*. The Fourth Amendment should not be read as freezing specific common-law rules from the Founding Era in constitutional amber.⁹ Nor should it be understood as making Fourth Amendment protections wholly dependent on today's positive law — that is, on whether the relevant jurisdiction in which a search or seizure occurs prohibits the conduct at issue for private parties. Instead, courts should interpret the Fourth Amendment by turning to *general law*. The general law, in Caleb Nelson's words, is a set of "rules that are not under the control of any single jurisdiction, but instead reflect principles or practices common to many different jurisdictions."¹⁰ In other words, this approach would ask courts to resolve Fourth Amendment questions not by looking to the common law of 1791, but instead by using the tools of the common law to determine the general law of the country *today*.

What would this approach look like in practice? A court would begin by verifying whether the government conduct at issue was a "search" or a "seizure." Under some approaches, this threshold question is complex. For example, under *Katz*, government conduct is only a "search" if a court concludes that it violates someone's reasonable expectations of privacy. Similarly, under Baude and Stern's model, government only "searches" or "seizes" when it violates the positive law. Under the general-law approach, by contrast, "search" and "seizure" are read in a broader and more commonsense way.¹¹ The general-law reading accords with the plain meaning of those words themselves and clarifies how the Amendment's clauses interact.

6. Baude & Stern, *supra* note 5, at 1825.

7. *Carpenter*, 138 S. Ct. at 2206.

8. *Id.* at 2268 (Gorsuch, J., dissenting).

9. See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 818 (1994).

10. Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 505 (2006).

11. See *infra* Section II.C.1.

Assuming that the government conduct qualified as a search or seizure, a court would then inquire whether it intruded on someone’s “person[], house[], papers, or effects.”¹² In many cases, this inquiry is easy: when police barge into someone’s home or physically restrain someone, there is little doubt that the Amendment’s protections apply. But other questions are harder: can an overnight guest be said to be in *her own* “house” if the home is searched while she is staying there? Is a digital copy of an email that resides on a cloud-storage company’s servers the “papers” of a suspect?¹³ Is a homeowner’s trash left at the curb that person’s “effects”?¹⁴ Courts would answer these questions by looking to well-established general-law property concepts.

If the search or seizure did intrude on one of the Fourth Amendment’s protected categories, a court would then determine whether it was “unreasonable” by asking whether it would violate the general law. In this analysis, courts would no longer make untethered and speculative inquiries into “reasonable expectations of privacy,” as the *Katz* test requires (though it confusingly does so at the threshold step of determining whether a “search” occurred). But neither would courts ask whether common-law jurists in 1791 would have seen the government conduct as unlawful. Instead, they would use the *tools* of the common law, particularly the private law, to aid in determining how the general law would resolve the question today. To be sure, musty property-law concepts like licenses, bailments, and abandonment can help to resolve many hard Fourth Amendment questions. But in determining what searches were “unreasonable,” courts would not be limited to the specific common-law rules, or even to the broader common-law categories, known when the Fourth Amendment was ratified. Instead, judges would look to how common-law rules have evolved since the Founding. And, in so doing, judges would also contribute to that continued evolution.

Unlike the pure positive-law model, the general-law approach would not treat any one jurisdiction’s law governing private parties as controlling. Instead, in trying to identify the country’s general law, courts would look to the laws and practices of different jurisdictions as relevant data points—persuasive precedent—not as dispositive authorities. That is, the inquiry would be distinct from the way that federal courts approach questions of state common law governed by *Erie Railroad Co. v. Tompkins*, under which a particular state’s law dictates the rule of decision for a federal court.¹⁵ This is because questions of the Fourth

12. U.S. CONST. amend. IV.

13. See generally Danielle D’Onfro, *The New Bailments*, 97 WASH. L. REV. 97 (2022) (arguing that cloud storage could create a bailment relationship).

14. See, e.g., *California v. Greenwood*, 486 U.S. 35, 37 (1988).

15. 304 U.S. 64, 78 (1938).

Amendment's scope and protections are best understood as matters of general law rather than "local common law."¹⁶

In fleshing out the general law, courts would apply the common-law method to new scenarios, just as early twentieth-century courts did in recognizing new privacy-based torts for the modern commercial era. If a court identified a right recognized by the general law that the government might have infringed, it would ask what protections the general law would extend to that right. For example, if an overnight guest is a *licensee* under general law,¹⁷ are such licensees protected against nonconsensual intrusions?¹⁸ If a cloud-storage company is best understood as a *bailee* of a person's data,¹⁹ then what protections should the law of bailment provide the bailor to guarantee her security over her belongings? And under the *ad coelum* doctrine,²⁰ should a homeowner have the right to exclude others from flying a drone forty feet above her backyard?²¹

Sometimes existing common-law case law will reveal a well-developed consensus about whether a particular right exists and what protections it deserves. At other times, especially in situations involving emerging technologies, a court will have much less to draw on. But a court in such a position is no worse off than any common-law court (or, for that matter, a court applying the *Katz* framework) confronting a novel factual scenario. Just as common-law courts have applied the common-law framework to new fact patterns for centuries, so would courts interpreting the Fourth Amendment using a general-law approach.

If a court concluded that a search or seizure did violate a claimant's rights under the general law, the search will be presumptively unlawful if government actors did not obtain a warrant in advance. Current doctrine speaks of a warrant "requirement" and its "exceptions."²² But the better way to read the Fourth Amendment's text — one more consistent with its historical background — is that

16. See Anthony J. Bellia, Jr. & Bradford R. Clark, *General Law in Federal Court*, 54 WM. & MARY L. REV. 655, 662 (2013).

17. See *Cordula v. Dietrich*, 101 N.W.2d 126, 127 (Wis. 1960) (noting that social guests are licensees, not invitees); RESTATEMENT (SECOND) OF TORTS § 330 (AM. L. INST. 1965) ("A licensee is a person who is privileged to enter or remain on land only by virtue of the possessor's consent.").

18. See *Minnesota v. Olson*, 495 U.S. 91, 93 (1990); see also *Minnesota v. Carter*, 525 U.S. 83, 96-97 (1998) (Scalia, J., concurring) (questioning the Court's decision in *Olson* to extend Fourth Amendment protections to "a mere overnight guest").

19. See D'Onfro, *supra* note 13, at 126-34.

20. See *infra* Section III.A.1.

21. See, e.g., Matthew R. Koerner, Note, *Drones and the Fourth Amendment: Redefining Expectations of Privacy*, 64 DUKE L.J. 1129, 1129 (2015); Andrew B. Talai, *Drones and Jones: The Fourth Amendment and Police Discretion in the Digital Age*, 102 CALIF. L. REV. 729, 729-30 (2014).

22. See, e.g., *Kentucky v. King*, 563 U.S. 452, 459 (2011) ("[T]he warrant requirement is subject to certain reasonable exceptions.").

a proper warrant immunizes otherwise unlawful conduct. In most contexts where current doctrine sees an “exception” to the supposed warrant requirement, the better understanding is that the government conduct simply *does not violate the general law in the first place*—and thus is not “unreasonable”—for reasons rooted in traditional general-law principles.

The general-law approach has many advantages over its competitors. Some are pragmatic: it is more straightforward to apply and produces more attractive results. Moreover, unlike the dominant *Katz* approach, it also gives courts a firmer foundation upon which to build doctrine than judges’ own intuitions about privacy expectations.

But it is also superior to previously recognized positive-law-based approaches. Unlike Baude and Stern’s pure positive-law model, the general-law approach leads to more uniform rules, avoids results that seem arbitrary or strange, and neither permits nor encourages legislatures to eradicate protections by rewriting rules that govern private parties.²³ It also enables courts to answer questions that the pure positive-law model struggles to resolve. As civil-procedure scholars have observed, the rise of mandatory arbitration is rendering swaths of substantive law invisible, even meaningless.²⁴ A court exercising its judgment over general law could protect Fourth Amendment values even when the positive law of a particular jurisdiction provided no explicit basis for doing so.

The other leading positive-law approach reads the Fourth Amendment as freezing 1791 common-law rules in place.²⁵ But this approach suffers from its own defects. As David A. Sklansky has persuasively argued, 1791 rules were “hazier and less comprehensive” than originalists often claim—and even where those rules do provide clear guidance, it is often “guidance we should hesitate to follow.”²⁶

The general-law approach avoids these pitfalls. It recognizes that the common law evolves and that divining common-law rules is no scientific inquiry. Trying to map novel factual situations onto 1791 common-law rules is often an indeterminate inquiry that may simply conceal hard value judgments. The general-law approach would create space for judges to acknowledge those judgments when the general law provides no definitive answers. It also gives judges

23. See *infra* Section II.C.3.

24. See J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 *YALE L.J.* 3052, 3052 (2015); Ryan Martins, Shannon Price & John Fabian Witt, *Contract’s Revenge: The Waiver Society and the Death of Tort*, 41 *CARDOZO L. REV.* 1265, 1300 (2020).

25. See *infra* Section II.C.1.

26. David A. Sklansky, *The Fourth Amendment and Common Law*, 100 *COLUM. L. REV.* 1739, 1744 (2000).

the flexibility to recognize when old rules no longer make sense in light of modern conditions. But it does so while providing enough structure and constraint to prevent the inquiry from becoming a discretionary free-for-all.²⁷

These pragmatic benefits are not the general-law approach's only selling point. Compared with other approaches, it is also easier to square the general-law approach with the originalist methodology endorsed by Supreme Court Justices attracted to a positive-law model. Given that the Founding Generation understood the common law as an evolving, almost-organic entity,²⁸ there is little reason to believe that the Fourth Amendment's ratifiers would have understood it as simply locking the state of the common law in place for all time. There is also little evidence that they would have understood the Amendment as making protections subservient to any particular jurisdiction's positive law. Indeed, the proponents of a pure positive-law model appear to be accidentally infusing the Fourth Amendment with decidedly *modern* legal values. More specifically, that approach seems to take for granted the idea underlying *Erie* that "the" common law does not exist—that common law is nothing more than what the relevant jurisdiction says it is. Instead, the most plausible conclusion consistent with originalism is that courts should determine what counts as an "unreasonable" search and seizure using the traditional methods of the common law. And that means an inquiry into *general law*, not unbending deference to any one sovereign.

Finally, the general-law approach is surprisingly easy to reconcile with a great deal of extant Fourth Amendment case law, and indeed provides a better explanation of some recent cases than alternative theories. In the recent cases in which the Court seemingly turned toward positive law, the Justices did not search for answers in 1791 common law or in the positive law of a particular jurisdiction. Instead, the Court applied traditional common-law *concepts*, such as trespass and license, to new facts. The best way to understand what the Court did in those cases is that it made an inquiry into general law.

But the general-law approach finds support in precedent going far beyond the recent positive-law turn. The general law has the tools to resolve questions about customs, practices, and expectations of privacy. Indeed, common-law courts have been grappling with such questions for over a century, first recognizing several new common-law causes of action protecting privacy rights at the turn of the twentieth century. Because a general-law approach could look to this rich body of common-law decisions, a good deal of the Court's *Katz* jurispru-

27. The general law is as constrained as the common-law method more generally. See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 465-69 (1897) (rooting the common law in tradition).

28. See *infra* Section II.C.1.

dence can be justified under the general-law approach. That is, even if *Katz* conceptualized the relevant inquiry imprecisely – as one into social expectations, rather than into general law as demonstrated by customs and practices – the results that approach has produced may be largely, though not perfectly, consistent with a general-law approach. This means that the Court could put Fourth Amendment jurisprudence on a firmer conceptual foundation without tearing down much of the edifice of existing doctrine.

We make the case for the general-law approach as follows. In Part I, we set the stage by describing the current state of Fourth Amendment jurisprudence. We explain how *Katz* arose and how doctrine applying *Katz* developed. We then explore the recent rise of a positive-law approach and lay out the unresolved questions for those drawn to that model.

Part II lays out our general-law approach. We begin by discussing recent scholarship on the general law and how general law differs from the positivist, sovereign-focused conception of common law embraced in *Erie* and its progeny. Although *Erie* claimed that “there is no federal general common law,”²⁹ scholars have increasingly argued that this claim is incorrect both as a descriptive matter and as a normative claim about the role of common law in the constitutional system. We then apply these insights to the Fourth Amendment. We contend that “unreasonable” in the Fourth Amendment is best understood as meaning inconsistent with the general law. Rather than freezing in place what the common law would have treated as unreasonable in 1791, however, the Fourth Amendment is best understood as requiring courts to engage in the general-law mode of analysis, developing rules to govern new factual situations while building on old common-law concepts and tools developed over the centuries. Next, we describe how a general-law method would work in practice and what questions it would require courts to ask: how courts would identify rights triggering Fourth Amendment protections and how they would look to determine whether government conduct impinges on those rights. Finally, we lay out the normative case for the general-law approach, explaining its superiority over other approaches on textual, historical, doctrinal, and pragmatic grounds.

Part III shows the general-law approach’s great promise by applying it to a wide range of factual scenarios. As we show, the general-law approach provides compelling answers to many perplexing Fourth Amendment questions. In many cases, those answers are consistent with existing doctrine. But elsewhere, the general-law approach suggests a different path. Our analysis proceeds by looking to several concepts recognized in the private law and showing how they can map onto Fourth Amendment fact patterns in a useful and illuminating way. For example, we consider how bailment doctrine and rules about abandonment

29. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938).

could inform Fourth Amendment questions about digital privacy; how trespass doctrine can help inform questions about drones; and how privacy torts recognized in the early twentieth century might shed light on twenty-first century questions about digital surveillance. We also reconcile case law governing seizures of the person as well as the Fourth Amendment's warrant "requirement" with our theory. And we briefly consider how our theory might approach the problem of racialized policing.

We close by noting several additional ways the general-law approach might be generative. It could inform the debate on the proper remedies for Fourth Amendment violations. It could provide solutions to hard questions in other areas of constitutional law. And it could be beneficial to the private law, as it would enable federal courts to develop the general law in ways that state courts could find helpful in other contexts.

I. THE ASCENT OF POSITIVE LAW

This Part sets the stage by recounting the recent interest in a positive-law approach to the Fourth Amendment. Section I.A provides a brief overview of *Katz* and later doctrinal developments. Section I.B discusses the recent emergence of a property-based or positive-law approach as an alternative to *Katz*. Section I.C discusses unanswered questions about a positive-law approach.

A. *The Katz Era*

Though ratified in 1791, the Fourth Amendment was relatively unimportant for nearly the first century of its existence.³⁰ Indeed, the Supreme Court did not authoritatively interpret it until 1886, in *Boyd v. United States*.³¹ By the twentieth century, however, the Court was increasingly called upon to interpret the Fourth

30. In part, this is because state governments were responsible for most law-enforcement activity while the Amendment originally applied only to the federal government. See David E. Steinberg, *An Original Misunderstanding: Akhil Amar and Fourth Amendment History*, 42 SAN DIEGO L. REV. 227, 247 (2005). Moreover, even in cases involving federal officials and federal prosecutions, the Supreme Court did not recognize the exclusionary rule until the twentieth century. See *infra* note 32.

31. 116 U.S. 616 (1886).

Amendment. The Court began requiring the exclusion of evidence obtained illegally in federal criminal trials,³² and thereby generated a steady stream of cases presenting Fourth Amendment issues.³³

Our story begins with *Olmstead v. United States*.³⁴ In that case, the police had, without a warrant, wiretapped the phone lines of several suspected bootleggers. The Court found no Fourth Amendment violation, stressing that “[t]here was no entry of the houses or offices of the defendants.”³⁵ Justice Brandeis dissented, arguing against the majority’s “unduly literal construction” of the Fourth Amendment³⁶ and in favor of a broad reading that would prohibit “every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed.”³⁷ Notwithstanding Brandeis’s forceful dissent, the Court continued to adhere to *Olmstead* in later cases involving electronic surveillance, including *Goldman v. United States*³⁸ and *On Lee v. United States*.³⁹

But in 1961 the Court departed from this line of cases. In *Silverman v. United States*,⁴⁰ it found that officers’ use of a “spike mike” that made contact with a heating duct inside a house occupied by the defendants violated the Fourth Amendment.⁴¹ The Court distinguished *Olmstead* on the ground that the “eavesdropping was accomplished by means of an unauthorized physical penetration” into the house.⁴² Later that year, *Mapp v. Ohio* made the Fourth Amendment exclusionary rule enforceable in state courts.⁴³

32. See *Weeks v. United States*, 232 U.S. 383, 398 (1914) (holding that evidence obtained from a private residence through unreasonable searches or seizures by federal agents was inadmissible in federal court); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) (extending the exclusion remedy to the indirect use of illegally seized evidence).

33. See, e.g., *Gouled v. United States*, 255 U.S. 298 (1921); *Amos v. United States*, 255 U.S. 313 (1921); *Agnello v. United States*, 269 U.S. 20 (1925).

34. 277 U.S. 438 (1928).

35. *Id.* at 464.

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

37. *Id.* at 478.

38. 316 U.S. 129, 135-36 (1942) (holding that there was no constitutional violation when government agents used a “detectaphone” that enabled them to hear through a wall into a suspect’s office).

39. 343 U.S. 747, 752-55 (1952) (holding that the use of an informant wearing a hidden wireless microphone was not a Fourth Amendment violation and rejecting the argument that the informant was a trespasser).

40. 365 U.S. 505 (1961).

41. *Id.* at 511-12.

42. *Id.* at 509.

43. 367 U.S. 643, 659-60 (1961).

Then, in 1967, the Supreme Court laid out the framework that would govern the Fourth Amendment for decades to come in *Katz v. United States*.⁴⁴ There, the Court held that the police violated the Fourth Amendment when placing a microphone on the outside of a telephone booth to eavesdrop on the defendant's conversations. The Court expressly rejected *Olmstead*, holding that Fourth Amendment protections "cannot turn upon the presence or absence of a physical intrusion into any given enclosure."⁴⁵ In an influential concurrence, Justice Harlan suggested a two-part test: "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"⁴⁶

In the decades to come, the Court applied Justice Harlan's reasonable-expectation-of-privacy test to an endless array of fact patterns, such as secret recording by government informants,⁴⁷ overnight guests,⁴⁸ surreptitious trash collection,⁴⁹ tracking devices,⁵⁰ and aerial surveillance.⁵¹ More than fifty years later, the Court continues to apply the *Katz* test to new fact patterns.⁵²

B. *The Rise of a Positive-Law Approach*

As Fourth Amendment doctrine applying *Katz* proliferated, so did criticism of the Court's work. Indeed, even summarizing the many critiques of *Katz* might at this point be cliché.⁵³ For our purposes, though, one set of criticisms advanced

44. 389 U.S. 347 (1967).

45. *Id.* at 353.

46. *Id.* at 361 (Harlan, J., concurring).

47. See *United States v. White*, 401 U.S. 745, 749-54 (1971) (plurality opinion).

48. See *Minnesota v. Olson*, 495 U.S. 91, 95-100 (1990).

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

50. See *United States v. Knotts*, 460 U.S. 276, 280-85 (1983); *United States v. Karo*, 468 U.S. 705, 711-13 (1984).

51. See *California v. Ciraolo*, 476 U.S. 207, 211-15 (1986); *Florida v. Riley*, 488 U.S. 445, 449-52 (1989).

52. See, e.g., *Carpenter v. United States*, 138 S. Ct. 2206, 2216-19 (2018) (holding that obtaining cell-site location information (CSLI) from a cellphone-service provider to track the suspect for an extended period constituted a search); see also *id.* at 2217 n.3 ("[W]e need not decide whether there is a limited period for which the Government may obtain an individual's historical CSLI free from Fourth Amendment scrutiny It is sufficient for our purposes today to hold that accessing seven days of CSLI constitutes a Fourth Amendment search.").

53. See, e.g., Baude & Stern, *supra* note 5, at 1825 ("[Criticisms of *Katz*] have been exhaustively developed in Fourth Amendment scholarship over the last half-century."); see also, e.g., David Alan Sklansky, "One Train May Hide Another": *Katz*, *Stonewall*, and the Secret Subtext of *Criminal Procedure*, 41 U.C. DAVIS L. REV. 875, 883 (2008) ("Among scholars *Katz* is widely viewed as something of a failure.").

by Justice Scalia is particularly important. Scalia observed that the *Katz* test “has often been criticized as circular, and hence subjective and unpredictable,”⁵⁴ that it has “no plausible foundation in the text of the Fourth Amendment,”⁵⁵ and that it gave judges too much discretion to recognize protections based on their own policy preferences.⁵⁶ He saw *Katz* as a recent deviation from a more traditional approach that looked to property rights, rather than to expectations of privacy.⁵⁷

Justice Scalia was surely correct that *Katz* rejected the notion that private-law rights controlled Fourth Amendment protections. In *Katz* itself, the Court said it was rejecting “the ‘trespass’ doctrine” laid out in *Olmstead*.⁵⁸ In later cases, the Court reiterated this understanding of pre-*Katz* law,⁵⁹ while also making clear that Fourth Amendment protections did not depend on private-law property rights.⁶⁰ Whether pre-*Katz* case law really did treat trespass law as dispositive is disputed.⁶¹ In our view, the pre-*Katz* case law is best understood as asking questions about property and trespass through the rubric of general law. But for the

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

55. *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring).

56. *See id.*

57. *See, e.g., Kyllo*, 533 U.S. at 31 (“[W]ell into the 20th century, our Fourth Amendment jurisprudence was tied to common-law trespass.”); *Georgia v. Randolph*, 547 U.S. 103, 143 (2006) (Scalia, J., dissenting) (“From the date of its ratification until well into the 20th century, violation of the [Fourth] Amendment was tied to common-law trespass.”).

58. *Katz v. United States*, 389 U.S. 347, 353 (1967).

59. *See, e.g., United States v. U.S. Dist. Ct.*, 407 U.S. 297, 313 (1972) (“Our decision in *Katz* refused to lock the Fourth Amendment into instances of actual physical trespass.”); *Soldal v. Cook Cnty.*, 506 U.S. 56, 64 (1992) (“*Katz* . . . effectively ended any lingering notions that the protection of privacy depended on trespass into a protected area.”); *see also Dow Chem. Co. v. United States*, 476 U.S. 227, 248 (1986) (Powell, J., concurring in part and dissenting in part) (“[P]hysical trespass no longer functions as a reliable proxy for intrusion on privacy.”); *California v. Ciraolo*, 476 U.S. 207, 219 (1986) (Powell, J., dissenting) (“[T]he Court in *Katz* abandoned its inquiry into whether police had committed a physical trespass.”).

60. *See, e.g., Oliver v. United States*, 466 U.S. 170, 183 (1984) (“The existence of a property right is but one element in determining whether expectations of privacy are legitimate.”); *United States v. Karo*, 468 U.S. 705, 712-13 (1984) (“The existence of a physical trespass is only marginally relevant to the question of whether the Fourth Amendment has been violated, . . . for an actual trespass is neither necessary nor sufficient to establish a constitutional violation.”); *see also Warden v. Hayden*, 387 U.S. 294, 305 (1967) (asserting, prior to *Katz*, that “an actual trespass under local property law is unnecessary to support a remediable violation of the Fourth Amendment”).

61. In dissent in *Katz* itself, Justice Black argued that *Olmstead* and *Goldman* “were decided on the basis of the inapplicability of the wording of the Fourth Amendment to eavesdropping, and not on any trespass basis.” *Katz*, 389 U.S. at 369 (Black, J., dissenting). More recently, Orin S. Kerr has argued that “[n]o historical trespass era existed” before *Katz*, meaning “there is no trespass test to restore.” Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67, 69.

moment, our goal is merely to describe the arguments by proponents of property-based views.

Although he had criticized *Katz* for some time, Justice Scalia made his first steps toward an alternative approach in his dissent in *Georgia v. Randolph*.⁶² The majority held that police could not enter a home with the consent of one occupant if the other occupant was present and objected to the entry. In his separate opinion, Scalia suggested that Fourth Amendment protections might turn on evolving property rights, for “changes in the law of property to which the Fourth Amendment referred would not alter the Amendment’s meaning.”⁶³

Several years later, in *United States v. Jones*,⁶⁴ Justice Scalia’s majority opinion applied a trespass-based test. The question was whether police use of a GPS tracking device on a suspect’s vehicle constituted a search or seizure. The Court concluded that installation of a GPS device was a “search” because it involved a trespass: “The Government physically occupied private property for the purpose of obtaining information.”⁶⁵

Justice Scalia again looked to property rights in his majority opinion in *Florida v. Jardines*,⁶⁶ which addressed whether police using a drug-sniffing dog on the porch of a home constituted a Fourth Amendment “search.” Relying on *Jones*, he reasoned that because the officers were gathering information “by physically entering and occupying the [home’s curtilage] to engage in conduct not explicitly or implicitly permitted by the homeowner,” they were engaged in a “search.”⁶⁷ In reaching the conclusion that the officers’ conduct was *not* permitted, Scalia looked to the homeowners’ property rights and concluded that there was no “implicit license” allowing members of the public to enter the curtilage of a home with a drug-sniffing dog.⁶⁸

Justice Gorsuch – who succeeded Justice Scalia on the Supreme Court – has carried on his predecessor’s defense of a property- or positive-law-based approach. In *Carpenter v. United States*,⁶⁹ the Court relied on *Katz* to hold “that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through [cell-site location information].”⁷⁰ In dissent, Gorsuch argued that instead of turning on privacy expectations, Fourth

62. 547 U.S. at 142-45 (Scalia, J., dissenting).

63. *Id.* at 143.

64. 565 U.S. 400 (2012).

65. *Id.* at 404, 410.

66. 569 U.S. 1 (2013).

67. *Id.* at 6, 11-12.

68. *Id.* at 8-9.

69. 138 S. Ct. 2206 (2018).

70. *Id.* at 2217.

Amendment protections should be “tied to the law.”⁷¹ Under what he saw as “the traditional approach,” the question was whether “a house, paper or effect was yours under law. No more was needed to trigger the Fourth Amendment.”⁷² Although Gorsuch did not “begin to claim all the answers today,” he thought that his approach offered “a pretty good idea [of] what the questions *are*.”⁷³

Scholars have encouraged the turn toward positive law. A prominent approach is Baude and Stern’s “positive law model.”⁷⁴ They argue that a court confronted with a Fourth Amendment issue “should ask whether government officials have engaged in an investigative act that would be unlawful for a similarly situated private actor to perform. That is, stripped of official authority, has the government actor done something that would be tortious, criminal, or otherwise a violation of some legal duty?”⁷⁵ Along somewhat similar lines, Michael J. Zydney Mannheimer argues for an interpretation of the Fourth Amendment that recognizes it “as being contingent on state law.”⁷⁶ A precursor to these positive-law approaches came in an unsigned 2007 student note, which argued that the Fourth Amendment “should be interpreted as dynamically incorporating state law.”⁷⁷ Perhaps the first scholar to address the question, however, was Daniel B. Yeager, who argued in 1993 that courts should look to “local property, tort, contract, and criminal laws” to determine whether the government had intruded on a protected interest while using the *Katz* test as a backstop.⁷⁸

A positive-law approach has certainly not overtaken *Katz*, but its influence might be growing. Recently, for example, the Iowa Supreme Court endorsed a positive-law approach. Criticizing the Supreme Court’s *Katz* jurisprudence as inconsistent with the Fourth Amendment’s text and original meaning, the court ruled that the Iowa Constitution’s bar on unreasonable searches and seizures was “tied to common law trespass.”⁷⁹ The court applied this approach to hold that a police officer violated the state constitution when searching trash bags left for

71. *Id.* at 2267 (Gorsuch, J., dissenting).

72. *Id.* at 2267-68 (emphasis omitted).

73. *Id.* at 2268.

74. See Baude & Stern, *supra* note 5. Baude and Stern’s work is one of the many that Justice Gorsuch cited in his dissenting opinion in *Carpenter*. See *Carpenter*, 138 S. Ct. at 2268 (Gorsuch, J., dissenting) (citing Baude & Stern, *supra* note 5, at 1852). The phrase “positive law model” originates with Kerr. See Kerr, *supra* note 5, at 516-19.

75. Baude & Stern, *supra* note 5, at 1825.

76. Michael J. Zydney Mannheimer, *The Contingent Fourth Amendment*, 64 EMORY L.J. 1229, 1233 (2015).

77. Note, *supra* note 5, at 1627.

78. Yeager, *supra* note 5, at 251-52.

79. *State v. Wright*, 961 N.W.2d 396, 412 (Iowa 2021).

pickup⁸⁰ – activity that the U.S. Supreme Court has found permissible under the Fourth Amendment.⁸¹ The Iowa court reached its conclusion by looking to the doctrine of abandonment under property law as well as to municipal regulations governing trash removal.⁸²

Judge Thapar on the Sixth Circuit has also expressed interest in a property-based approach, arguing that it is “closer to the ordinary and original meaning than *Katz*.”⁸³ And the approach could soon play a larger role at the U.S. Supreme Court. It appears attractive to originalists and, since *Carpenter*, the Court has only become friendlier to originalism with the addition of self-described adherents Justice Kavanaugh and Justice Barrett.⁸⁴

C. Unanswered Questions

Despite growing interest in a positive-law approach to the Fourth Amendment, there remain many questions about how exactly it would work in practice:

- *What* is the role of the positive law? One possibility is that the Fourth Amendment directly incorporates the positive law governing the jurisdiction where search and seizure occurs.⁸⁵ Alternatively, positive law could be merely “a source of analogies,” an approach which Baude and Stern fault the Court for using.⁸⁶
- *Whose* positive law controls? *Jones* and *Jardines* made no inquiry into state positive law. Instead, they asked more general

80. See *id.* at 412-20.

81. See *California v. Greenwood*, 486 U.S. 35, 37 (1988).

82. See *Wright*, 961 N.W.2d at 415-16.

83. See *Morgan v. Fairfield Cnty.*, 903 F.3d 553, 571 (6th Cir. 2018) (Thapar, J., concurring in part and dissenting in part). Judge Thapar rejected Baude and Stern’s approach, under which positive law determines whether a “search” has occurred at all. See *id.* at 571-72. Instead, he argued that this threshold question should be interpreted broadly per original public meaning, while suggesting that positive law might come into play later in the analysis. See *id.* at 575. As we will see, our theory takes a similar approach.

84. See Randy E. Barnett, *Kavanaugh Testimony, Part 1: On Originalism*, VOLOKH CONSPIRACY (Sept. 14, 2018, 5:00 PM), <https://reason.com/volokh/2018/09/14/kavanaugh-testimony-part-1-on-originalism> [<https://perma.cc/WA8R-3SAV>]; Brian Naylor, *Barrett, an Originalist, Says Meaning of Constitution ‘Doesn’t Change Over Time,’* NPR (Oct. 13, 2020, 10:08 AM ET), <https://www.npr.org/sections/live-amy-coney-barrett-supreme-court-confirmation/2020/10/13/923215778/barrett-an-originalist-says-meaning-of-constitution-doesn-t-change-over-time> [<https://perma.cc/YD27-RAPU>].

85. See Baude & Stern, *supra* note 5, at 1832-33; Note, *supra* note 5, at 1632-33.

86. Baude & Stern, *supra* note 5, at 1835-36.

questions about trespass and license.⁸⁷ Was the Court recognizing some form of federal common law? Or was it simply being sloppy with citations? Should courts instead defer to the positive law of a particular jurisdiction?

- *Which* sources of positive law should matter? Property law? Common law more generally? Or all sources of positive law, such as municipal ordinances and administrative regulations?
- *When* should courts look as they determine the relevant positive law? Should they look to the law at the time of the ratification of the Fourth Amendment? At the time of the ratification of the Fourteenth Amendment, which incorporated the Fourth Amendment against the states? Or should they look at positive law governing today?
- *How much* does positive law matter? Does it provide only a floor, guaranteeing a certain level of protection, as Richard M. Re argues?⁸⁸ Or is it both the floor and the ceiling, as Baude and Stern contend?⁸⁹
- Most fundamentally, *why* should positive law matter for the interpretation of the Fourth Amendment?

In the next Part, we lay out our theory, which offers answers to all these questions.

II. THE GENERAL-LAW APPROACH

This Part lays out and defends the general-law approach to the Fourth Amendment. Section II.A explains the concept of general law. Section II.B lays out the general-law approach and explains how courts would operationalize it in practice. Section II.C explains why our approach is the best theory of the Fourth Amendment.

A. *Understanding General Law*

What exactly is the general law and how can courts identify it? As defined by Nelson, “general law” refers to “rules that are not under the control of any single

87. See *id.* (arguing that, in *Jones*, Justice Scalia “conceptualized trespass law in a sort of idealized form rather than in terms of the positive law of a specific jurisdiction”).

88. See Re, *supra* note 5, at 332.

89. See Baude & Stern, *supra* note 5, at 1831-33.

jurisdiction, but instead reflect principles or practices common to many different jurisdictions.”⁹⁰ That is, general law is a source of law, but one not under the control of any particular sovereign.

To modern readers, the notion of such law might seem strange, even absurd. Since the dawn of legal realism, there has been consensus that law is not some “brooding omnipresence in the sky,” as Justice Holmes derisively put it, but instead is “the articulate voice of some sovereign . . . that can be identified.”⁹¹ This view culminated in *Erie Railroad Co. v. Tompkins*,⁹² which overturned *Swift v. Tyson*⁹³ and held that federal courts sitting in diversity jurisdiction must apply the common-law rules articulated by courts of the state whose law governed the dispute, not their own view of the “general commercial law.” In the near century since *Erie*, the case’s emphatic declaration that “[t]here is no federal general common law”⁹⁴ has become an axiom of our constitutional system.

Scholars have increasingly begun to question *Erie*’s jurisprudential foundations. They argue that, in several areas, courts continue to draw on and develop general law. Nelson has shown that, “[w]ithin the interstices of written federal law, courts often articulate federal rules of decision that again draw their substance from state law,” without looking to the precise law of any state.⁹⁵ Instead, these courts look to a substantive law that reflects consensus in state law “*in general*.”⁹⁶

Though Nelson offers many examples, a few suffice to demonstrate that the general law is alive and well. First, when the federal government is a party to a contract, federal common law controls.⁹⁷ This general common law grows out of the same common-law principles animating the state common law of contract, but no single state’s law can govern the federal government’s contractual obligations.⁹⁸ State law is merely relevant, persuasive authority as to the content of the

90. Nelson, *supra* note 10, at 505.

91. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

92. 304 U.S. 64 (1938).

93. 41 U.S. (16 Pet.) 1 (1842).

94. *Erie*, 304 U.S. at 78.

95. Nelson, *supra* note 10, at 503-04.

96. *Id.* at 504.

97. *Id.* at 509.

98. See *United States v. Nat’l Steel Corp.*, 75 F.3d 1146, 1150 (7th Cir. 1996) (Posner, J.) (“For the sake of simplicity, the starting point in the formulation of a federal common law of contracts should normally be the standard principles of contract law – more precisely, the core principles of the common law of contract that are in force in most states.”).

general law.⁹⁹ Similarly, Nelson observes that the Constitution makes federal law the law of the high seas.¹⁰⁰ Yet, many disputes occurring on the high seas sound in the traditional subjects of common law: tort and contract.¹⁰¹ Indeed, there are well-established common-law doctrines, like general average contribution,¹⁰² that might occur primarily on the high seas. Federal common law necessarily governs these cases.

While it might seem harder to conclude that federal common law governs maritime cases occurring in territorial waters where a particular state's law could govern,¹⁰³ there is ample case law doing just that. Although statutes and courts have applied state law to territorial waters in some contexts, the Supreme Court has held that maritime law is general law.¹⁰⁴ The need for uniformity means that no state has the final word over the rules governing ships at sea. Thus, federal courts have reiterated the maritime preemption doctrine: general maritime law preempts state statutory law where it “works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations.”¹⁰⁵ And courts have upheld the application of general maritime law for many maritime

99. For example, the Ninth Circuit has observed that “[t]he Uniform Commercial Code is a source of federal common law and may be relied upon in interpreting a contract to which the federal government is a party.” *O’Neill v. United States*, 50 F.3d 677, 684 (9th Cir. 1995). This is not the same thing as saying that the Uniform Commercial Code directly governs contracts to which the federal government is a party.

100. Nelson, *supra* note 10, at 514.

101. See, e.g., *Wells v. Liddy*, 186 F.3d 505, 524 (4th Cir. 1999) (“[T]he governing law [on the high seas] is not the common[]law of any single state, but rather is the general maritime law as interpreted and applied by the courts of the United States.”); *Atl. Sounding Co. v. Townsend*, 557 U.S. 404, 414-15 (2009) (explaining that the general maritime law includes traditional common-law doctrine, including punitive damages, and that the general maritime law governs claims at sea except where Congress has passed statutes preempting it).

102. See *Dabney v. New England Mut. Marine Ins. Co.*, 96 Mass. (14 Allen) 300, 306 (1867).

103. Nelson, *supra* note 10, at 515.

104. See, e.g., *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 489 (2008); *The Gen. Smith*, 17 U.S. (4 Wheat.) 438, 443 (1819); *New England Ins. Co. v. The Brig Sarah Ann*, 38 U.S. (13 Pet.) 387, 400 (1839); see also, e.g., *Morgan v. Ins. Co. of N. Am.*, 4 Dall. 455, 458 (Pa. 1806) (“These ordinances, and the commentaries on them, have been received with great respect, in the Courts both of *England* and the *United States*; not as containing any authority in themselves, but as evidence of the general marine law.”); *The Rapid Transit*, 11 F. 322, 334 (W.D. Tenn. 1882) (“Beyond the domain of the general maritime law, and where it furnishes no rule, and within that of the local law where it furnishes a rule, the statute may be looked to; but it cannot control to make equal that which the general law prefers.”).

105. *In re Air Crash at Belle Harbor*, MDL No. 1448, 2006 U.S. Dist. LEXIS 27387, at *40 (S.D.N.Y. May 9, 2006) (quoting *S. Pac. Co. v. Jensen*, 244 U.S. 205, 216 (1917)).

torts, such as negligence claims arising from boating accidents on inland waters.¹⁰⁶

Another example comes from the law of evidence. The Federal Rules of Evidence provide that “[t]he common law – as interpreted by United States courts in the light of reason and experience” governs the scope of evidentiary privilege.¹⁰⁷ Applying this command, federal courts do not defer to state law; instead, they engage in their own independent reasoning and examine the general practices of courts around the country to divine and develop the governing common law. For example, the Court in *Jaffee v. Redmond*¹⁰⁸ relied on this Rule to recognize a psychotherapist privilege. In doing so, it emphasized that the Rule “did not freeze the law governing the privileges of witnesses in federal trials at a particular point in our history”¹⁰⁹ and that “the policy decisions of the States bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing one.”¹¹⁰

In these examples, courts look for law that exists outside any one state’s understanding of common law, but their analysis remains fundamentally grounded in the common law. *Erie* notwithstanding, courts can and do look to general law to decide cases.

Advocates of the general law go beyond the merely descriptive claim that courts sometimes do recognize general law. They also argue that courts *should* – and in some cases are *required* to – look to general law. As Michael Steven Green argues, state courts at the time of *Swift* generally adhered to a “*Swiftian* conception of the common law,” under which state common law was not understood as merely the command of a particular state’s courts.¹¹¹ If such courts “entertained a common-law action arising in a sister state, they came to their own conclusions about what the common law in the sister state was, without deferring to the sister state’s courts.”¹¹² When practiced by federal courts, this approach was not an aggrandizement of federal power. As Anthony J. Bellia, Jr. and Bradford R. Clark argue, under the regime of *Swift*, federal courts sitting in diversity that looked to general law “did not displace state law, but rather acted in accord with a state’s choice.”¹¹³

106. See, e.g., *Evans v. Nantucket Cmty. Sailing, Inc.*, 582 F. Supp. 2d 121, 136 (D. Mass. 2008).

107. FED. R. EVID. 501.

108. 518 U.S. 1 (1996).

109. *Id.* at 9.

110. *Id.* at 12-13.

111. Michael Steven Green, *Erie’s Suppressed Premise*, 95 MINN. L. REV. 1111, 1113 (2011).

112. *Id.*

113. Bellia & Clark, *supra* note 16, at 658.

In fact, Green notes that Georgia courts *still* take such a view of the common law: they willingly apply the statutory law of other states, but do not look to other states' courts' pronouncements of the common law, even where their own choice-of-law rules mandate that they apply another state's common law.¹¹⁴ In Green's view, this doctrine means that federal courts under *Erie* should not defer to the Georgia courts' determinations as to the content of the common law, because applying Georgia law faithfully actually requires a federal court to make an independent judgment as to the content of the general common law.¹¹⁵

Of course, modern readers might find the notion of some kind of "general" law, existing beyond the lawmaking power of any particular sovereign, naive—even delusional. But the idea is not so farfetched as it seems. Asking courts to look to the general law need not mean giving courts free rein to make up whatever answer they wish. In many cases, the content of the general law can be determined by reviewing the generally prevailing positive law of the states. With a few possible exceptions, states started in more or less the same place when legislatures passed reception statutes importing the common law of England.¹¹⁶ Although each jurisdiction has its own path, a largely coherent core of common law persists. This statement is as obvious as it is scandalous. If there were no identifiable core, multijurisdictional projects like the American Law Institute's restatements or the Uniform Bar Examination would be impossible.

Even where positive law provides no clear answers, courts applying the general law are not totally at sea. In many contexts, the general law is an inquiry into custom, tradition, and social facts—much like the common law before it.¹¹⁷ Thus, a judge applying the general commercial law would refer to "shared commercial customs and practices among nations."¹¹⁸ This is not formally a legal question but is instead "a question of fact, concerning which federal courts can come to their own judgment."¹¹⁹

Stephen E. Sachs has offered a helpful set of analogies that make the notion of general law existing outside the control of any one lawmaker easier to grasp:

114. Green, *supra* note 111, at 1126–27.

115. *See id.* at 1127.

116. Ford W. Hall, *The Common Law: An Account of its Reception in the United States*, 4 VAND. L. REV. 791, 797–805 (1951); Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 492 n.4 (1954).

117. *See* KENNETH S. ABRAHAM & G. EDWARD WHITE, TORT LAW AND THE CONSTRUCTION OF CHANGE: STUDIES IN THE INEVITABILITY OF HISTORY 4 (2022) (explaining that tort law is "a creature of its time").

118. Bellia & Clark, *supra* note 16, at 658.

119. Green, *supra* note 111, at 1128.

People routinely conform their conduct to familiar norms of fashion, etiquette, or natural language. These norms are addressed to society as a whole, and they're generally perceived as binding, without anyone in authority having formally enacted them or laid them down. Just like legal norms, these social norms can sometimes be contested, changeable, controversial, political, or morally fraught. Yet in any given society, and at any given time, they can also have determinate content, offer broad guidance for the future, and stand apart from the style manuals or Miss Manners columns in which they're expressed.¹²⁰

Thus, one could believe that though “[p]ositive law depends on social facts, . . . the social facts are ‘out there’ for diligent jurists to find.”¹²¹ The strong claim that courts can truly “find” law, however, is not essential for our argument. For present purposes, it suffices to recognize that courts can, and sometimes do, look for answers in the common law without treating as binding any one sovereign’s understanding of the common law.

B. The General-Law Approach and How It Works

Having explained the concept of the general law, this Section describes its relevance to the Fourth Amendment. Start with the text:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹²²

Our approach reads the Amendment thus: an “unreasonable” search or seizure is one involving a government intrusion on someone’s “person[], house[], papers,” or “effects” that would violate that person’s rights under the general law if performed by an ordinary citizen. We interpret those terms broadly, as general law recognizes various kinds of relative property interests extending beyond fee simple that should suffice for triggering Fourth Amendment protections. An intrusion onto one of the protected categories is presumptively unlawful, but a

120. Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527, 531 (2019). A simpler analogy is spelling. Although American English lacks an authority that determines the correct spelling of words, most words have one or two correct spellings. RICHARD L. VENEZKY, *THE AMERICAN WAY OF SPELLING: THE STRUCTURE AND ORIGINS OF AMERICAN ENGLISH ORTHOGRAPHY* 6 (1999).

121. Sachs, *supra* note 120, at 531.

122. U.S. CONST. amend. IV.

warrant may authorize the government to engage in the conduct, and there are also limited circumstances in which a warrant is unnecessary. Because a warrant can render an otherwise-unreasonable search permissible, the Amendment's second clause, which carefully limits the circumstances under which a warrant may issue, is a necessary limit on government power.

In practical terms, courts analyzing searches and seizures would follow four steps. First, the court would determine whether the government's conduct could plausibly be defined as a "search" or a "seizure." This step would not be particularly demanding, and in most instances it likely can be resolved through the ordinary meaning of those phrases. Jeffrey Bellin's definition of a "search" as any "examination of an object or space to uncover information"¹²³ could be a good starting point, though, as will become clear, the definition must be capacious enough to cover various kinds of electronic surveillance and government attempts to access digital files and data. As for "seizures," there would still be occasional hard cases—such as when a seizure of a fleeing suspect begins¹²⁴—but the general-law approach need not meaningfully change how current precedent resolves that issue.¹²⁵ This would be a deviation from how current law resolves the question of whether a "search" has occurred. Under *Katz*, the analysis is all at that step—no "search" occurs if the government conduct does not intrude on a reasonable expectation of privacy. Under the general-law approach, by contrast, the action mostly turns on whether the search or seizure was "unreasonable."

Second, the court would identify whether the government conduct at issue implicated the rights of the person claiming a violation. Put differently, the court would ask whether the government had intruded upon the claimant's *own* person, house, papers, or effects. This is the inquiry sometimes called Fourth Amendment "standing."¹²⁶ Some cases would be easy: if police have entered a homeowner's house, Fourth Amendment protections would undoubtedly be triggered. But other cases are harder: is an overnight guest protected by the Fourth Amendment from government intrusions into her temporary place of lodging?¹²⁷ Can the driver of a rental car object to a car search even if he is not

123. Jeffrey Bellin, *Fourth Amendment Textualism*, 118 MICH. L. REV. 233, 238 (2019).

124. See *California v. Hodari D.*, 499 U.S. 621 (1991); *Torres v. Madrid*, 141 S. Ct. 989 (2021).

125. "A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). And a seizure of the person means either "the mere grasping or application of physical force with lawful authority, whether or not it succeeded in subduing the arrestee" or "*submission* to the assertion of authority." *Hodari D.*, 499 U.S. at 626.

126. See, e.g., *Byrd v. United States*, 138 S. Ct. 1518, 1530 (2018).

127. See *Minnesota v. Olson*, 495 U.S. 91 (1990).

an authorized driver on the rental agreement?¹²⁸ Here, the general law will be helpful in identifying rights. The general law will reveal, for example, that overnight guests are *licensees*.¹²⁹ Or it will show that drivers of rental cars are *bail-ees*.¹³⁰ Although current law seeks such answers in the *Katz* test, the general law can provide more predictable guidance than judicial intuitions about society's expectations of privacy.

Third, after identifying what rights held by the claimants were implicated by the search or seizure, a court would apply the general law to determine whether the search or seizure *violated* the claimant's right. For example, if the police had brought a drug-sniffing dog to a homeowner's front door without the owner's consent, the court would first determine that the police violated the sanctity of the home and its immediate surroundings,¹³¹ an area which has come to be

128. See *Byrd*, 138 S. Ct. at 1527.

129. See, e.g., DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *THE LAW OF TORTS* § 274 (2d ed. 2011) (“The traditional definition of licensees has the effect of saying that even social guests are licensees, not invitees, because, although the owner’s invitation is a consent to their presence, they are not potentially engaged in direct economic transactions with the owner.”); *RESTATEMENT (SECOND) OF TORTS* § 330 (AM. L. INST. 1965) (“A licensee is a person who is privileged to enter or remain on land only by virtue of the possessor’s consent.”); see also *RESTATEMENT (SECOND) OF TORTS* § 330 cmt. h.3 (AM. L. INST. 1965) (“Some confusion has resulted from the fact that, although a social guest normally is invited, and even urged to come, he is not an ‘invitee,’ within the legal meaning of that term . . .”).

130. See *infra* Section III.C.

131. The area close to a home has historically received greater protection from intrusion. For example, breaking into outbuildings that are close to a house might be burglary, whereas breaking into distant outbuildings might not be. See *State v. Twitty*, 2 N.C. (1 Hayw.) 102, 103 (1794); 4 WILLIAM BLACKSTONE, *COMMENTARIES* *225; see also *Commonwealth v. Barney*, 64 Mass. (10 Cush.) 480, 481 (1852) (determining degree of punishment in an arson case based on whether a barn was within the curtilage). Similarly, customary rights of the public to access private property preserve a protective buffer around homes which the public may not enter. See, e.g., *McConico v. Singleton*, 9 S.C.L. (2 Mill) 244, 244 (1818) (recognizing a customary right to hunt on unenclosed land at a distance from dwellings). Andrew Guthrie Ferguson has persuasively argued that the area immediately surrounding a home should also receive protection from technology that allows law enforcement to intrude upon that space without physically entering it. See Andrew Guthrie Ferguson, *Personal Curtilage: Fourth Amendment Security in Public*, 55 WM. & MARY L. REV. 1283, 1291 (2014) [hereinafter Ferguson, *Personal Curtilage*]. He has also argued that modern technology necessitates recognition of the concept of “digital curtilage,” meaning private data that is connected to the home that the internet now allows to escape the home. See Andrew Guthrie Ferguson, *The Internet of Things and the Fourth Amendment of Effects*, 104 CALIF. L. REV. 805, 866–67 (2016) [hereinafter Ferguson, *Internet of Things and Fourth Amendment of Effects*]. A general-law approach would give courts the flexibility to apply concepts like curtilage to modern conditions, though it would not necessarily require courts to do so.

known as the “curtilage” in Fourth Amendment case law.¹³² Then, the court would ask whether such an intrusion onto the curtilage would be impermissible under general common-law principles – not the 1791 common law, but the general law as it exists today. If there is no violation of the claimant’s rights according to the general law, the analysis stops here.

If a court does find a violation in step three, the search would be presumptively unreasonable unless the police secured a warrant satisfying the demands of the Warrant Clause prior to engaging in the conduct. Step four, then, is determining whether an exception to the warrant requirement applies – though, as we will explain, “exceptions” to the “warrant requirement” are better understood as situations where a search or seizure does not violate the general law, and thus is not “unreasonable.”

In looking to the general law, the court would not give controlling weight to the positive law of the jurisdiction in which the search occurs. This means that there could appear to be conflicts between the general law and positive law of the relevant jurisdiction. For example, the positive law might give landowners permission to clear encampments of unhoused persons on the owners’ land, but the general law might recognize an unhoused person’s property interests in the items kept in their tent.¹³³

This is not to say that positive law has no role in the analysis. It is relevant, but only as persuasive evidence of what the general law might be. In this inquiry, courts could look to the positive law of the jurisdiction where the search occurs, but also to the positive law governing in other jurisdictions. Federal, state, and local statutes, ordinances, and common-law court decisions could all constitute evidence of the general law; so, too, could societal norms and practices not codified as positive law. Where all those sources point in the same direction, the inquiry might prove easy. But where they conflict, courts will have to make harder choices. Our approach offers no mechanical algorithm for resolving those

132. See *Oliver v. United States*, 466 U.S. 170, 180 (1984) (explaining how the concept of “curtilage” comes from the common law). Chad Flanders convincingly argues that modern Fourth Amendment doctrine misuses the word “curtilage” to include the land surrounding a home while its traditional definition included only outbuildings that were to be considered part of the home itself. See Chad Flanders, *Collins and the Invention of “Curtilage,”* 22 U. PA. J. CONST. L. 755, 755 (2020). But even if current doctrine misuses the term “curtilage,” there is nonetheless strong historical support for the special protections long accorded to the land immediately around a home. See Ferguson, *Personal Curtilage*, *supra* note 131, at 1314-16. Moreover, “curtilage” has long been used to describe the land essential to support nonmortgage liens against property. See, e.g., *Derrickson v. Edwards*, 29 N.J.L. 468, 474 (1861) (“A curtilage is a piece of ground within the common enclosure belonging to a dwelling-house, and enjoyed with it, for its more convenient occupation.”). While perhaps less precise than it could be, the term remains a convenient shorthand for the land immediately surrounding a home that the home’s occupants might use as part of the home itself.

133. See *infra* Section III.A.

conflicts. It instead trusts courts to rely on the age-old tools of common-law reasoning.

Because positive law is evidence of the general law, the latter will often track the former, especially where clear majority rules exist. Still, it is possible that a court might find a majority rule ill advised and choose to chart a different path. Indeed, jurisdictions might adopt a minority position because they determine that the general law is out of sync with their approach. But such conflicts pose no problem for our theory, as the general law and positive law have nonoverlapping roles. In the context of the Fourth Amendment, the general law helps to elucidate the meaning of a federal constitutional command even as a jurisdiction's positive law would continue to govern in purely local disputes.

Thus, the general law does not change the allocation of property rights that the positive law of a particular sovereign has otherwise determined. This is consistent even with *Swift*, which exempted “the rights and titles to real estate” and “things having a permanent locality” from independent determination by federal courts.¹³⁴ The general law applies only to the scope of the federal right. For example, a court applying our approach might need to look to general law to determine the boundaries of the curtilage around a home for Fourth Amendment purposes and whether the entry was unreasonable. But a Fourth Amendment ruling of this kind would have no bearing on title to the home, which would remain a question of state law. Similarly, the general law might look to concepts like licenses to determine who has the power to consent to a search. But if the owner of the searched property separately sought civil damages against the would-be licensee for trespass in state court, then state law would govern. Such matters are properly considered “local” law,¹³⁵ while the scope of Fourth Amendment protections must be treated as part of the general law. The Fourth Amendment is a federal constitutional guarantee that binds law enforcement across the entire country. In explicating its protections, courts should draw on the laws, customs, and expectations that prevail in the country as a whole.

C. *Justifying the General-Law Approach*

This Section lays out the justifications for looking to general law. The general-law model is broadly consistent with the Fourth Amendment's text, original meaning, and historical background. It is also surprisingly compatible with Fourth Amendment precedent and more normatively attractive than competing approaches.

134. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842).

135. See generally *Bellia & Clark*, *supra* note 16 (discussing the difference between local and general law in the context of *Swift* and *Erie*).

1. *Text, Original Meaning, and History*

Return to the text of the Fourth Amendment. The meaning of its first clause is opaque: What counts as a “search” or a “seizure”? Which searches and seizures qualify as “unreasonable”? And what is the relationship between the Amendment’s two clauses? Under our reading, as explained above,¹³⁶ (1) “searches” and “seizures” are defined broadly, using their commonsense meanings; (2) “persons, houses, papers, and effects” are interpreted by reference to general-law property concepts; (3) whether a search or seizure is “unreasonable” is determined by looking at general law; and (4) a proper warrant can immunize an otherwise-unlawful search or seizure. To explain and defend this approach, we compare it with dominant readings of the Fourth Amendment.

One view is that the ban on “unreasonable searches and seizures” is meant to reinforce only the second clause, which forbids general warrants, and carries no additional prescriptive force.¹³⁷ Another possibility is that, by forbidding “unreasonable searches and seizures,” the Fourth Amendment grants more open-ended discretion to judges (or perhaps juries) to determine reasonableness. And another is that the Fourth Amendment is meant to prohibit specific search-and-seizure practices that were considered unlawful under traditional common law at the time of ratification.

Our reading differs from each of these approaches, though we think it combines the best parts of each theory. Start with the theory that the Fourth Amendment is intended only to prohibit general warrants. Thomas Y. Davies argues that the Framers “simply did not perceive the problem of search and seizure the same way that we do.”¹³⁸ He argues that, at the time of the framing, officers who conducted searches and seizures had a much less discretionary authority than modern police, and that any wrongdoing by an officer that was not authorized by a warrant was perceived as a *private* wrong, punishable as a trespass, and not government action. For this reason, he argues, the Framers would have seen forbidding general warrants as a sufficient guard against abusive practices.

Davies’s research is exhaustive. Yet, as Davies himself recognizes, it would be quite difficult to apply his reading to the Fourth Amendment today.¹³⁹ Given the massive expansion of discretionary power granted to police officers, a reading that prohibits only general warrants would leave a great deal of troubling governmental conduct unregulated by the Constitution. That result seems deeply

¹³⁶. See *supra* Section II.B.

¹³⁷. See Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 723-24 (1999).

¹³⁸. *Id.* at 724.

¹³⁹. *Id.* at 724-33.

inconsistent with the values the Fourth Amendment is thought to protect. Moreover, Davies himself reads “unreasonable” as incorporating the common law;¹⁴⁰ he merely disagrees about which specific common-law rules the Amendment incorporates. As we will discuss, the general-law approach provides the most sensible reading of the text in light of the changed circumstances that Davies recognizes as problematic.

Next, consider the argument that the “unreasonable searches and seizures” clause protects against not just general warrants, but all searches and seizures forbidden by the common law more generally. Laura K. Donohue has argued that, in historical context, “unreasonable” is best understood to mean “against reason, or against the reason of the common law.”¹⁴¹ “[T]he basic idea,” she argues, “was that the principles inherent in common law had legal force. That which was consistent with the common law was reasonable and, therefore, legal. That which was inconsistent was unreasonable and illegal.”¹⁴² Other scholars agree that the Fourth Amendment should be read as incorporating common law, at least in some way.¹⁴³

Donohue’s research provides support for Joseph Story’s much earlier assertion that the Fourth Amendment was “little more than the affirmance of a great constitutional doctrine of the common law.”¹⁴⁴ Indeed, there is plentiful evidence that the common law was understood to be closely connected with various concepts of “reason” in the Founding Era.¹⁴⁵ Sir Edward Coke argued that “reason is the life of the Law, nay the Common Law itselfe [sic] is nothing else but reason.”¹⁴⁶ William Blackstone sought to justify English lawyers’ praise for “the reason of the common law” and their claims that “the law is the perfection of reason.”¹⁴⁷ Moreover, John Adams, the key figure in the drafting of the Fourth Amendment, wrote an abstract of James Otis’s argument in the *Writs of Assistance Case*, where he summarized Otis as arguing that the “[r]eason of the Common

140. *See id.* at 693.

141. Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1270 (2016).

142. *Id.* at 1270-71.

143. *See* WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING* 602-1791, at 771-72 (2009); George C. Thomas III, *The Common Law Endures in the Fourth Amendment*, 27 WM. & MARY BILL RTS. J. 85, 85 (2018) (arguing that deviations from common law in Fourth Amendment jurisprudence have “result[ed]” in “an erratic doctrine”).

144. 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 748 (Fred B. Rothman & Co. 1991) (1833); *see also* *Wakely v. Hart*, 6 Binn. 316, 319 (Pa. 1814) (stating that the Fourth Amendment “was nothing more than an affirmance of the common law”).

145. *See* Davies, *supra* note 137, at 688.

146. 1 EDWARD COKE, *INSTITUTES OF THE LAWS OF ENGLAND; OR, A COMMENTARY UPON LITTLETON* § 138 (London, Societie of Stationers 1628).

147. 1 WILLIAM BLACKSTONE, *COMMENTARIES* *70.

Law” could “control an Act of Parliament” that authorized general warrants.¹⁴⁸ To be sure, some scholars, most notably Sklansky,¹⁴⁹ dispute the notion that “unreasonable” should invoke the common law. But even if the case is not conclusive, there are strong arguments in favor of a reading of “unreasonable” that looks to common law in some way.

But even if one reads “unreasonable” as “against the reason of the common law,” the question would remain: *which* common law? The dominant answer among those who favor this reading seems to be that the Fourth Amendment incorporates the common-law rules that existed in 1791. Another question is exactly how broadly the Fourth Amendment should be read to incorporate the common law. Does it forbid only the common law’s prohibitions on certain *search and seizure* practices, or does it more broadly constitutionalize common-law protections for property and persons?

In Supreme Court precedent, there is apparent consensus that the Fourth Amendment incorporates some common-law rules specific to search and seizure. In *Wilson v. Arkansas*, for example, a unanimous Court agreed (1) that the common law required law-enforcement officers entering a dwelling to knock and announce their presence and (2) that this rule was incorporated into Fourth Amendment reasonableness.¹⁵⁰ At other times, though, the Court seems to have looked to common law more generally to determine whether a search is permissible. In *Jones*, the Court determined that the installation of a GPS tracker was a “search” because it constituted a trespass under common-law principles (though the Court was far from clear about exactly which source of trespass law it was drawing on).¹⁵¹

Whether limited to search-and-seizure practice or not, there are deep problems with reading the Fourth Amendment as freezing in place the common-law rules of 1791. For one, as Sklansky has argued, common law at that time was “far more fragmentary and far less consistent than might be imagined.”¹⁵² Conse-

148. John Adams, Minutes of the Argument, in 2 LEGAL PAPERS OF JOHN ADAMS 124, 125-28 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965). Looking to these sources, Davies argues that “unreasonable searches and seizures’ simply meant searches and seizures that were inherently illegal at common law.” Davies, *supra* note 137, at 693.

149. See generally Sklansky, *supra* note 26, at 1810 (arguing that the Framers did not intend “unreasonable” under the Fourth Amendment to be a codification of the common law).

150. 514 U.S. 927, 929 (1995). Justice Gorsuch endorsed this view while sitting on the Tenth Circuit. *United States v. Krueger*, 809 F.3d 1109, 1123 (10th Cir. 2015) (opinion of Gorsuch, J.) (“[T]he Fourth Amendment embraces the protections against unreasonable searches and seizures that existed at common law at the time of its adoption.”).

151. *United States v. Jones*, 565 U.S. 400, 404-05 (2012).

152. Sklansky, *supra* note 26, at 1806.

quently, a theory that depends on the assumption that such law can be consistently divined with any certainty today might be unrealistic. And even where 1791 rules are sufficiently clear, they provide insufficient guidance for modern Fourth Amendment disputes. As George C. Thomas III argues, “the common law transplanted literally to today would create a radically incomplete Fourth Amendment.”¹⁵³ At best, as Maureen E. Brady puts it in analyzing how to identify “effects” under the Fourth Amendment, this approach would “lead to bizarre historical and definitional line drawing” as courts attempt to shove modern facts into old fact patterns.¹⁵⁴ Along these lines, Justice Alito mocked the *Jones* majority for deciding the case “based on 18th-century tort law,”¹⁵⁵ remarking that an intrusion analogous to GPS tracking in 1791 “would have required either a gigantic coach, a very tiny constable, or both.”¹⁵⁶

But the strongest argument against reading the Fourth Amendment as freezing in place common-law rules is that it is—oddly—deeply *ahistorical*. Jurists and lawyers in 1791 would not have understood the common law as perfectly static.¹⁵⁷ Blackstone, who believed there to be a preexisting common law born of custom, did not view existing case law as the final word on the law; precedent was merely evidence of the law. Judges also had to use reason to uncover the law in each case. He viewed this uncovered law as fully binding on future cases, yet acknowledged that judges have the power to “vindicate” the law from misinterpretation by “absurd or unjust” precedent.¹⁵⁸ Moreover, the custom which underlaid the common law was itself subject to change. Michael W. McConnell has explained how Blackstone’s predecessor, Sir Matthew Hale, “understood and embraced the idea that the common law was continually changing and adapting” as custom changed.¹⁵⁹ This “conception of the common law was adopted as orthodoxy by American lawyers of the founding period.”¹⁶⁰ As to the Fourth

153. Thomas, *supra* note 143, at 86.

154. Maureen E. Brady, *The Lost “Effects” of the Fourth Amendment: Giving Personal Property Due Protection*, 125 YALE L.J. 946, 1000 (2016).

155. *Jones*, 565 U.S. at 418 (Alito, J., concurring in the judgment).

156. *Id.* at 420 n.3.

157. Indeed, the malleability of the common law was one of would-be reformer Jeremy Bentham’s critiques of it. In 1811, Bentham famously wrote to Madison offering to “arrange” the substance of the common law into a code for the new nation to give it what he viewed to be a more stable body of law. Letter from Jeremy Bentham to James Madison (Oct. 30, 1811), in 3 THE PAPERS OF JAMES MADISON, PRESIDENTIAL SERIES 505 (J.C.A. Stagg, Jeanne Kerr Cross & Susan Holbrook Perdue eds., 1996).

158. 1 WILLIAM BLACKSTONE, COMMENTARIES *70.

159. Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173, 186.

160. *Id.* at 188.

Amendment in particular, Mannheimer argues that a number of its framers and ratifiers saw the common law as fluid and evolving.¹⁶¹ For these reasons, “any interpretive approach that seeks to arrest the development of the common law and freeze it at a single point in time clashes with the fluid and evolutionary nature of common law.”¹⁶²

For some combination of these reasons, many scholars reject the notion that the Fourth Amendment simply freezes in place 1791 common law.¹⁶³ Many argue that the better alternative is to read the Fourth Amendment as calling for open-ended, discretionary judgments by judges or juries. Sklansky argues: “Fourth Amendment law, like constitutional law more generally, should continue to take from common law not a set of substantive rules, but rather a method for reasoned, step-by-step elaboration of what the Constitution commands”¹⁶⁴ Carol S. Steiker contends that the word “‘unreasonable’ . . . positively invites constructions that change with changing circumstances.”¹⁶⁵ Akhil Reed Amar asserts that “[r]easonableness’ is . . . an honest and sensible textual formula to organize candid jury deliberations and fair jury decisions.”¹⁶⁶ Richard M. Re claims that the Fourth Amendment “calls for new moral reasoning” and that courts should look to modern contractualist moral philosophy to flesh out search-and-seizure protections.¹⁶⁷

Yet, treating the ban on “unreasonable searches and seizures” as a concept to which judges or juries must give content raises new problems. In theory, the *Katz* approach calls on judges to inquire into social expectations; in practice, it seems

161. See Mannheimer, *supra* note 76, at 1268-74.

162. M. Blane Michael, *Reading the Fourth Amendment: Guidance from the Mischief that Gave It Birth*, 85 N.Y.U. L. REV. 905, 914 (2010); see also, e.g., Andrew E. Taslitz, *Search and Seizure History as Conversation: A Reply to Bruce P. Smith*, 6 OHIO ST. J. CRIM. L. 765, 795 n.107 (2009) (arguing that reading the Fourth Amendment to prohibit only those searches prohibited in 1791 “misunderstands the common law as a fixed set of doctrines when it is really an approach to careful, flexible, and reasoned evolution of the law to meet changing circumstances”).

163. See, e.g., Amar, *supra* note 9, at 818 (“‘Reasonableness’ is not some set of specific rules, frozen in 1791 or 1868 amber”); Richard M. Re, *Fourth Amendment Fairness*, 116 MICH. L. REV. 1409, 1416-17 (2018) (“In referring to unreasonable searches and seizures, the Fourth Amendment invoked the principles and aspirations that underlay the common law—not the established common law rules that happened to exist at that time.”); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 823-24 (1994) (“[A]lmost no one . . . believes that we should be bound for all time by the specific intentions or expectations of the Framers about, say, precisely what kinds of searches are ‘reasonable’ ones”).

164. Sklansky, *supra* note 26, at 1745.

165. Steiker, *supra* note 163, at 824.

166. Amar, *supra* note 9, at 818.

167. Re, *supra* note 163, at 1414-15.

to let them determine protections based on their own views about reasonableness.¹⁶⁸ This problem extends beyond *Katz* to all open-ended reasonableness inquiries. Justice Scalia, a particularly vocal critic of *Katz*'s tendency to let judges enact personal preferences, nonetheless endorsed the notion that the Fourth Amendment called for judicial determinations of reasonableness to determine the scope of search-and-seizure protections.¹⁶⁹ It is hardly clear that Scalia's approach would be any less discretionary than *Katz*.

Another problem is that all-things-considered reasonableness tests find limited support in original understandings. Some reasonableness approaches, like *Katz*, are not framed as attempts to follow original meaning.¹⁷⁰ To be sure, Amar, building on the work of Telford Taylor,¹⁷¹ attempts to ground his generalized reasonableness approach in history.¹⁷² But other historically inclined scholars have strongly disputed some of the historical foundations of Taylor's and Amar's claims.¹⁷³ For example, Nikolaus Williams has argued that "there is no evidence that any Framing-era judge or jury decided the legality of a search or seizure by asking whether it was reasonable, by applying a balancing test, or by invoking any other version of the modern reasonableness interpretation."¹⁷⁴ Instead, during the Founding Era, claims of wrongful search and seizure were resolved under the "categorical rules" of the common law.¹⁷⁵

A different option is the pure positive-law approach laid out by Baude and Stern. Their approach, somewhat like the *Katz* test, is primarily focused on the threshold question of whether government conduct is a "search" or "seizure."¹⁷⁶

168. As Justice Scalia put it:

In my view, the only thing the past three decades have established about the *Katz* test . . . is that, unsurprisingly, those "actual (subjective) expectation[s] of privacy" "that society is prepared to recognize as 'reasonable,'" bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable.

Minnesota v. Carter, 525 U.S. 83, 97 (1998) (Scalia, J., concurring) (citation omitted) (quoting *Katz v. United States*, 389 U.S. 347, 361 (1967)).

169. See, e.g., *Illinois v. Rodriguez*, 497 U.S. 177, 185-86 (1990).

170. See generally Orin S. Kerr, *Katz as Originalism*, 71 DUKE L.J. 1047 (2022) (attempting to reconcile *Katz* with originalism).

171. See TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 41 (1969).

172. See, e.g., Amar, *supra* note 9, at 774; Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 SUFFOLK U. L. REV. 53, 60-61 (1996).

173. See Davies, *supra* note 137, at 575-90; CUDDIHY, *supra* note 143, at 773-77.

174. Nikolaus Williams, *The Supreme Court's Ahistorical Reasonableness Approach to the Fourth Amendment*, 89 N.Y.U. L. REV. 1522, 1536 (2014).

175. *Id.* at 1537.

176. See Baude & Stern, *supra* note 5, at 1871.

As they see it, a court should ask whether government conduct was “unreasonable” — that is, whether there is a sufficient justification for the conduct in question — only if it violates the relevant jurisdiction’s positive law.¹⁷⁷ That the words “search[]” and “seizure[]” incorporate by reference all positive law in a given jurisdiction is hard to defend as a textual matter, even before considering original meaning. Under our approach, by contrast, the general law helps to determine whether the government conduct has impinged on someone’s own person, house, papers, or effects, and whether that intrusion was unreasonable. That is, most hard questions involve the reasonableness inquiry, not the threshold question of whether something qualifies as a “search” or “seizure.” This is a far more plausible reading of the text.

Baude and Stern’s approach stands on even shakier ground when it comes to originalism. Orin S. Kerr contends that Baude and Stern’s theory “is unrelated to text, divorced from history, and has no plausible connection to the original meaning of the Fourth Amendment.”¹⁷⁸ To Kerr’s critiques, we add one more: the pure positive-law model turns on a jurisprudential theory unknown at the Founding. In *Erie*, the Supreme Court endorsed a view that Justice Holmes had advocated a generation earlier when he stated that the common law is “the articulate voice of some sovereign or quasi-sovereign that can be identified.”¹⁷⁹ But this purely positivist understanding of the common law is not how lawyers at the time of the Fourth Amendment’s ratification would have seen things. As McConnell argues, the legal tradition known to the Founding Generation did not see unwritten constitutional rights as mere commands by a sovereign:

If it could be shown that the law had a determinate origin in the sovereign will of the King, however long ago, then the successor to that King must have the power to revoke it today. On the other hand, if no man granted us our liberties, no man could take them away. . . . If rights have their source and authority in long-standing practice, they are not vulnerable to the will of the sovereign.¹⁸⁰

Given this background, it is difficult to explain why the Fourth Amendment should be read as silently incorporating post-*Erie* legal theory under which protections turn entirely on what rights a particular sovereign has decided to recognize. If the Fourth Amendment was originally understood as protecting the people’s fundamental rights from interference by the sovereign, the scope of those rights must find a source that preexists the sovereign’s positive law. That source

177. *Id.* at 1823.

178. Kerr, *supra* note 170, at 1097.

179. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

180. McConnell, *supra* note 159, at 185.

is general law, rooted in national customs and practices. For these reasons, our reading is more defensible as a matter of original meaning, especially given the evidence that “unreasonable” was meant to invoke or draw on the common law.

The general-law approach is also most consistent with the manner in which search-and-seizure protections originally operated. At the time of the Founding, the exclusionary rule was unheard of. Instead, the traditional remedy for an unreasonable search or seizure was a civil suit, such as a trespass action, against those who conducted it. Indeed, the paradigmatic cases that are seen as motivating the Fourth Amendment’s creation were *civil* suits, not criminal prosecutions.¹⁸¹ In such an action, an aggrieved person would seek a remedy under common law, typically through suits “framed as trespass or false imprisonment cases.”¹⁸² In such actions, however, a valid warrant would preclude the suit and deprive the aggrieved person of a remedy.¹⁸³

The general-law approach seeks continuity with this historical background. Just as a citizen might have sought to establish that a search violated the common law in 1791, our approach looks to the continued development of the common law to determine whether a search is “unreasonable.” Just as a warrant could have defeated civil liability, in our theory a valid warrant can make an otherwise unreasonable search or seizure permissible.

But one might ask: how would a court under the traditional approach determine whether the defendant had violated the common law? We do not claim that courts dealing with trespass suits consistently applied a *uniform* body of general law in such cases. As Mannheimer and others have observed, there was apparently variation in the specific search-and-seizure rules applied in different jurisdictions at the Founding.¹⁸⁴ Mannheimer argues that search-and-seizure law should thus be considered *local*, not general, law, meaning that courts should defer to state law in Fourth Amendment cases rather than looking to the general law. That understanding would also provide stronger grounding for Baude and Stern’s positive-law model.

181. See, e.g., Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 52 (“[T]he English cases that inspired the Fourth Amendment were not criminal cases . . . they were tort cases . . .”).

182. Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925, 932 (1997).

183. See, e.g., Donald A. Dripps, *Responding to the Challenges of Contextual Change and Legal Dynamism in Interpreting the Fourth Amendment*, 81 MISS. L.J. 1085, 1104 (2012) (“A valid warrant defeated a trespass suit.”); Amar, *supra* note 9, at 772 (noting that a warrant “preclud[ed] any common law trespass suit the aggrieved target might try to bring before a local jury after the search or seizure occurred”); Maclin, *supra* note 182, at 932 (“[T]he possession of a warrant could afford an officer immunity from after-the-fact tort suits.”).

184. See, e.g., Mannheimer, *supra* note 76, at 1245–62.

We are skeptical that Fourth Amendment protections should be exclusively a matter of local law. To be sure, the distinction between general and local law was understood even in the pre-*Erie* era. As noted above, *Swift v. Tyson*, which famously upheld the use of general law by federal courts, nonetheless recognized that some matters such as title to real property were questions of purely local law.¹⁸⁵ But that state courts varied in how they decided search-and-seizure questions does not show that those questions are matters of local law. What should matter is what courts *understood* themselves to be doing—were they merely explicating sovereign-specific local rules, or were they instead offering their best reading of the common law, even if other courts disagreed about the contours of its protections? Some suggestive evidence is found in the work of Ann Woolhandler. She documents how federal courts in the nineteenth century looked to general, not local, law in resolving trespass cases against state government officials that arose under federal diversity jurisdiction.¹⁸⁶ But we cannot conclusively resolve this question here, and as our argument is not primarily an originalist one, we do not feel obliged to do so.

We also recognize that there were various obstacles to suit in pre-Founding search-and-seizure litigation and that the content of the common law was not perfectly coterminous with the likely outcomes of civil suits. Moreover, there are many disanalogies between pre-1791 search-and-seizure litigation and how the general-law approach would work in twenty-first-century criminal cases. For these reasons, we do not contend that the general-law approach is identical to the approach that courts would take to these questions in 1791. Here, we need not outrun the bear; we believe that our theory offers *more* continuity with the Founding Era than the available alternatives. But, ultimately, our approach does not require certainty on that point. The text and historical record are sufficiently ambiguous that our reading is at least plausible. And there are a number of jurisprudential and practical reasons why interpreters should prefer the general-law approach, even if one also finds alternative theories plausible.

2. *Precedent*

Although the general-law approach might first look like a dramatic change to Fourth Amendment precedent, it actually offers a coherent explanation for much of the Court's existing doctrine. In recent cases where the Court made a positive-law turn, the Court's analysis looks like an inquiry into general law.

¹⁸⁵. See *supra* notes 134-135 and accompanying text.

¹⁸⁶. See Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 *YALE L.J.* 77, 122-24 (1997).

Consider *Florida v. Jardines*,¹⁸⁷ where the Court was asked to determine whether police may approach the front door of a home and use a drug-sniffing dog without a warrant. Justice Scalia's majority opinion answered that question by beginning with common law and, in particular, with the "ancient and durable" concept of the curtilage.¹⁸⁸

But the opinion did not rest on whether such a practice would have violated the common law in 1791. Nor did it scour Florida property and tort law to determine how Florida courts and the Florida legislature had addressed the scope of the license that homeowners extend to visitors. Instead, relying on an opinion by Justice Holmes, the Court inquired into whether a license for such an intrusion onto the curtilage could be "implied from the habits of the country."¹⁸⁹ Doing so, the Court concluded that home dwellers extended an implied license permitting visitors "to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave."¹⁹⁰ That license did not, however, permit visitors to "introduc[e] a trained police dog to explore the area around the home in hopes of discovering incriminating evidence,"¹⁹¹ because "the background social norms that invite a visitor to the front door do not invite him there to conduct a search."¹⁹²

In defending a pure positive-law model, Baude and Stern criticize this decision for looking to property law not "as actual *law* but rather as a source of analogies."¹⁹³ But this critique misunderstands what Justice Scalia was doing in *Jardines*. His opinion *was* asking legal questions; it merely was asking questions about *general law*, not the positive law of Florida. Indeed, an inquiry into the "habits of the country" and "background social norms" is essentially an inquiry into the country's *custom*, which at least in theory underlies general law.¹⁹⁴

In the same vein, consider *Jones*, which held that police installation of a GPS device was a Fourth Amendment "search."¹⁹⁵ The majority did so not by applying the *Katz* test but instead by looking to "common-law trespass"¹⁹⁶ and by concluding that "[t]he Government physically occupied private property for the

187. 569 U.S. 1 (2013).

188. *Id.* at 6.

189. *Id.* at 8 (quoting *McKee v. Gratz*, 260 U.S. 127, 136 (1922)).

190. *Id.*

191. *Id.* at 9.

192. *Id.*

193. Baude & Stern, *supra* note 5, at 1835.

194. See Bellia & Clark, *supra* note 16, at 658.

195. *United States v. Jones*, 565 U.S. 400, 404 (2012).

196. *Id.* at 405.

purpose of obtaining information.”¹⁹⁷ The Court could be read as endorsing a frozen-in-amber reading of the Fourth Amendment, given its assertion that “such a physical intrusion would have been considered a ‘search’ within the meaning of the Fourth Amendment when it was adopted.”¹⁹⁸ But the opinion did not engage any eighteenth-century trespass cases (let alone any twenty-first-century ones); instead, it applied a much more general concept of “trespass” that looks like an inquiry into general law. Moreover, Justice Scalia’s opinion bristled at Justice Alito’s argument that the majority was applying “18th-century tort law,”¹⁹⁹ by responding that “[w]hat we apply is an 18th-century guarantee against unreasonable searches, which we believe must provide *at a minimum* the degree of protection it afforded when it was adopted.”²⁰⁰

That Justice Scalia saw the Fourth Amendment as incorporating modern developments in the law is especially clear when one considers his dissent in *Georgia v. Randolph*,²⁰¹ discussed above. In concurrence, Justice Stevens argued that “original understanding” should not control whether a co-occupant’s objection rendered a search impermissible, because under the sexist assumptions of eighteenth-century law “only the consent of the husband would matter.”²⁰² Scalia countered that this objection “confuses the original import of the Fourth Amendment with the background sources of law to which the Amendment, on its original meaning, referred.”²⁰³ In his view,

As property law developed, individuals who previously could not authorize a search might become able to do so, and those who once could grant such consent might no longer have that power. But changes in the law of property to which the Fourth Amendment referred would not alter the Amendment’s meaning²⁰⁴

Justice Scalia’s dissent did not make clear what he saw as the sources of law from which the Fourth Amendment should draw. But his understanding is essentially the premise of the general-law approach. It treats the basic protections of the Fourth Amendment as fixed while recognizing that how the Amendment applies to new circumstances can change as the general law changes.

197. *Id.* at 404.

198. *Id.* at 404-05.

199. *Id.* at 418 (Alito, J., concurring in the judgment).

200. *Id.* at 411 (majority opinion).

201. See 547 U.S. 103, 143-45 (2006) (Scalia, J., dissenting).

202. *Id.* at 124 (Stevens, J., concurring).

203. *Id.* at 143 (Scalia, J., dissenting).

204. *Id.*

Unlike the pure positive-law model, the general-law approach also is easy to reconcile with the method (though perhaps not the results) in cases predating *Katz*. In *Olmstead*, for example, the Court stressed that the government had not “trespass[ed] upon any property of the defendants” by wiretapping their telephone lines.²⁰⁵ In reaching that conclusion, the Court did not examine the positive property law of the state of Washington, where the wiretapping occurred. In fact, when considering whether the evidence might be inadmissible because Washington law made such wiretapping a misdemeanor, the Court emphatically rejected the notion that state positive law should control.²⁰⁶ Under the pure positive-law theory, the Court should have concluded that the government conduct was an impermissible search.

Along similar lines, consider *On Lee v. United States*,²⁰⁷ another pre-*Katz* wiretapping case. There, an undercover agent working on behalf of the government wore a concealed microphone and radio transmitter while speaking with the defendant inside his business; a law-enforcement agent listened in on the conversation and subsequently testified about it.²⁰⁸ The Court found no Fourth Amendment violation because “no trespass was committed” given that the undercover agent “entered a place of business with the consent, if not by the implied invitation,” of the defendant.²⁰⁹ The Court reached this conclusion without consulting any jurisdiction’s positive law. The Court also rejected the argument that the agent’s “subsequent ‘unlawful conduct’ vitiated the consent and rendered his entry a trespass *ab initio*,”²¹⁰ and in doing so expressed skepticism that “the niceties of tort law initiated almost two and a half centuries ago . . . are of much aid in determining rights under the Fourth Amendment.”²¹¹ In *On Lee*, then, the Court seemed to draw on its own sense of what the common law required in general.

Perhaps most surprising, however, is what the general-law approach says about the Court’s *Katz* jurisprudence. At first glance, the theory might seem to call for reconsidering the last half-century of Fourth Amendment case law. But the general-law approach in fact can be reconciled with much (though not all) of the Court’s *Katz* jurisprudence. This is so for two reasons.

205. *Olmstead v. United States*, 277 U.S. 438, 457 (1928).

206. *See id.* at 468-69.

207. 343 U.S. 747 (1952).

208. *See id.* at 749-50.

209. *Id.* at 751-52.

210. *Id.* at 752.

211. *Id.*; *see also* *Silverman v. United States*, 365 U.S. 505, 512 (1961) (rejecting the argument that Fourth Amendment protections “turn upon the technicality of a trespass upon a party wall as a matter of local law”).

First, the questions that courts ask under *Katz* often end up looking similar to those for which the general-law approach calls (even if it asks those questions at a different conceptual stage of the analysis).²¹² Consider Justice Kagan's concurrence in *Jardines*. Although she joined the majority opinion and its property-based analysis, she wrote separately to stress that she "could just as happily have decided it by looking to Jardines' privacy interests."²¹³ Property and privacy considerations often converge, she noted, because property-law entitlements can *influence* the societal expectations to which *Katz* looks.²¹⁴ And, as we shall discuss, there is a great deal of such convergence when one begins to apply the general-law approach to familiar fact patterns.²¹⁵ Kerr has lambasted Justice Gorsuch's gestures toward a positive-law approach as simply *Katz* reborn because many of the answers that property law provide seem to line up with *Katz* jurisprudence.²¹⁶ But that the two approaches may reach similar results directly follows from the questions each approach asks. That consistency is a virtue, not a vice, of the general-law approach.

The second reason that the general-law approach can be reconciled with much of *Katz* jurisprudence is that the general law provides tools that can explicitly ask questions about privacy. As we discuss below, the evolving common law recognized privacy protections more than a century ago – and the general-law approach is prepared to draw on that rich source of protections in applying the Fourth Amendment to fact patterns that the Founders could not have envisioned.²¹⁷ Indeed, the *Katz* test has roots in that common-law background. *Katz* eventually repudiated *Olmstead*; in Justice Brandeis's influential dissent in *Olmstead*, he argued that "every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment."²¹⁸ Nearly four decades before penning that dissent, Samuel D. Warren and Louis D. Brandeis published their famous *The Right to Privacy*, in which they argued that the common law protects privacy interests.²¹⁹ Although *Katz* denied that the Fourth Amendment created a "general

212. Under our approach, hard questions concern whether a search was "unreasonable," whereas prevailing doctrine emphasizes the threshold question of whether a "search" or "seizure" occurred in the first place. See *supra* Section II.B. In practice, though, the two approaches can reach the same destination even if they ask the key questions at different points along the conceptual route.

213. *Florida v. Jardines*, 569 U.S. 1, 13 (2013) (Kagan, J., concurring).

214. See *id.*

215. See *infra* Part III.

216. Kerr, *supra* note 170, at 1091-94.

217. See *infra* Section III.D.

218. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

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

constitutional ‘right to privacy,’²²⁰ one can nonetheless see *Katz*’s focus on privacy expectations as drawing on Brandeis’s ideas.²²¹

3. *The Normative Case*

The general-law approach is also preferable to other approaches on normative grounds. It better captures the values that the Fourth Amendment should protect. And it is flexible enough to allow doctrine to account for unforeseen challenges without asking judges to make up the rules on the fly.

a. *Fourth Amendment Values*

As Baude and Stern put it, “the purpose of a constitutional principle is to freeze something in time.”²²² The hard question for Fourth Amendment theorists is what that “something” is. On our reading, the Fourth Amendment guarantees that the American people can rely on the security provided by the evolving common law in the face of threats from government conduct.

This understanding is normatively superior to the alternatives on offer. First, whereas *Katz* makes privacy the Fourth Amendment’s *sine qua non*, the general law protects a broader set of interests. Maintaining one’s privacy is a reason to fear government searches and seizures, but it is not the only one. Having one’s “effects” seized by government agents can undermine one’s sense of security tremendously even if there is nothing *private* about those personal effects. The Fourth Amendment’s guarantee of the “right to be secure” should properly protect against non-privacy-related harms, and the general law’s concepts and rules provide security for property rather than privacy alone. Moreover, as described below, the general-law approach gives courts the tools they need to provide protections against new threats to privacy and personal security.

The *Katz* test, by contrast, asks the wrong question. It is framed as an inquiry into societal expectations, but it is not obvious why social expectations about privacy alone should control protections from government action. How government behaves shapes those expectations. The common law does not make rights depend entirely on social expectations. This is not to say that such expectations are irrelevant; the common law draws on custom, which is the product of shared social expectations and practices. As one court put it, common-law “rules arise

220. *Katz v. United States*, 389 U.S. 347, 350 & n.6 (1967) (citing Warren & Brandeis, *supra* note 219).

221. See, e.g., Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1357-74 (tracing the connections between Brandeis and Warren’s work and the *Katz* test).

222. Baude & Stern, *supra* note 5, at 1858.

from the application of reason to the changing conditions of society . . . and, while decisions are looked to as evidence of the rules, they are not to be construed as limitations upon the growth of the law but as landmarks evidencing its development.”²²³ The hallmark of the common law is its predictable incrementalism.²²⁴ It is responsive to societal changes, but at a level of generality high enough to capture big, durable changes without being captured by fleeting trends.

By enshrining common-law protections, the Fourth Amendment places faith in the basic substantive framework of rights recognized at and in common law. But it also places *institutional* confidence in the judiciary to adapt and develop common-law rules in response to modern conditions. While we make no claim that common-law rules are ideal in all cases, we think that, over the long run, common-law courts have done well to balance law’s need for stability and continuity with the need for evolution and change.²²⁵

The general-law approach is also more attractive than other theories. Consider readings that understand the Fourth Amendment as freezing in place the rules of 1791.²²⁶ The problem with these readings, beyond those already discussed, is that there is no obvious reason why constitutionalizing the specific rules prevailing more than two centuries ago is desirable. Those rules were made to govern a world much different than the one we live in today and might be too strict or insufficiently protective in our changed society. Additionally, it is unlikely that 1791 rules provide ideal solutions to the problems posed by modern technologies and conditions. If they do, it would be entirely coincidental.

Other options fare no better. Under Kerr’s “equilibrium adjustment” theory, the Fourth Amendment guarantees a particular “balance between security and privacy.”²²⁷ Paul Ohm offers his own version of equilibrium adjustment in which the Fourth Amendment preserves a “level playing field” between police and criminals.²²⁸ But as Sklansky has observed, “[t]here is scant reason to think that the Fourth Amendment was intended or originally understood to be a coded instruction to preserve eighteenth-century levels of privacy, or – even less plausibly – the eighteenth-century balance of power between criminals and the forces

223. *Barnes Coal Corp. v. Retail Coal Merchs. Ass’n*, 128 F.2d 645, 648 (4th Cir. 1942).

224. See Holmes, *supra* note 27, at 465 (articulating the common law’s reliance on custom and tradition).

225. See, e.g., ABRAHAM & WHITE, *supra* note 117, at 4-5 (opining about how social change, especially around racial and gender bias, will change tort liability).

226. See *supra* Section II.C.1.

227. Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 485 (2011).

228. Paul Ohm, *The Fourth Amendment in a World Without Privacy*, 81 MISS. L.J. 1309, 1347 (2012).

of the state.”²²⁹ Indeed, why should we believe that the 1791 balance of privacy and government power—or even the balance of advantage between cops and robbers—was somehow ideal and in need of preservation? Moreover, this theory assumes that the degree of privacy that existed at the Founding is fixed and ascertainable; in truth, it is “wildly indeterminate,” because “privacy is neither unidimensional nor evenly distributed.”²³⁰

What about Baude and Stern’s “principle of government nondiscrimination,” under which the Fourth Amendment guarantees that law enforcement cannot, without a warrant, violate rules governing private parties?²³¹ At a high level of generality, our approach has much in common with Baude and Stern’s. We agree that the special danger posed by state law enforcement is precisely its power to act above the law—to use its authority as the state to act in ways that ordinary people cannot (e.g., using force and imprisoning people).²³² And, for this reason, we agree that the Fourth Amendment should be concerned with scrutinizing and limiting the situations where the state claims the authority to act in ways not permitted to private citizens.

But our disagreement concerns where judges should look for the rules governing private parties. By asking judges to look only at positive law, Baude and Stern’s approach is both too broad and too narrow. Too broad because it makes Fourth Amendment protections turn on legal rules that have little to do with the values that the Fourth Amendment seeks to protect. For example, Baude and Stern would have Fourth Amendment protections in trash left curbside for pickup turn on “irrelevant details” such as the existence of local regulations restricting garbage collection to licensed companies²³³—rules which might be aimed at guaranteeing those with city contracts a monopoly and “that have nothing to do with citizens’ privacy, security, or freedom from government intrusion.”²³⁴

Their approach is also too narrow: it deprives judges of the tools they need to protect Fourth Amendment values in contexts where state legislatures and courts have not spoken. Moreover, under the pure positive-law approach, the Fourth Amendment’s protections would vary, perhaps wildly, from jurisdiction to jurisdiction. This would create a confusing morass for multijurisdictional law-

229. David Alan Sklansky, *Two More Ways Not to Think About Privacy and the Fourth Amendment*, 82 U. CHI. L. REV. 223, 237 (2015).

230. *Id.*

231. See Baude & Stern, *supra* note 5, at 1859.

232. *Id.* at 1845-50.

233. *Id.* at 1882.

234. Matthew Tokson, *The Normative Fourth Amendment*, 104 MINN. L. REV. 741, 796 (2019).

enforcement efforts and for courts trying to resolve Fourth Amendment questions. The general-law approach, by contrast, generates *national* rules that would bind law enforcement across the nation and the federal, state, and local levels.

b. Flexibility and Constraint

Many see the *Katz* test as problematic because it gives judges a great deal of discretion to shape Fourth Amendment protections based on their own intuitions about reasonableness—and likely their own preferences.²³⁵ At the same time, the alternatives tend to be too rigid. Strict adherence to 1791 common law leaves judges ill equipped to resolve hard Fourth Amendment questions about fact patterns that bear little resemblance to those that eighteenth-century tort law had to confront. The general-law approach steers between these two extremes. It is flexible enough to allow courts to shape rules to protect against unforeseen challenges to the values the Fourth Amendment enshrines. But because it seeks continuity with the past and looks to a large body of legal decisions as a source of guidance, it gives courts greater constraints and more wisdom to draw on than does an open-ended invitation to opine on societal privacy expectations.²³⁶

Under our approach, courts would, as Brady argues in the context of defining “effects,” “look[] to the Founding-era meaning and fill[] it with modern content.”²³⁷ One starts with the common-law concepts that would have been known in 1791. But that is only a starting point. One would also look to the development of the common law since 1791. And one would apply and adapt traditional common-law concepts to entirely new contexts. Indeed, this is essentially what courts interpreting general law already do in areas such as federal contracting and maritime law. This approach provides sufficient flexibility to allow the Fourth Amendment to sensibly regulate new types of searches and new technologies. And it recognizes that identifying common-law rules is far from a scientific inquiry. But it is a more structured process than the *Katz* test.

And it can even answer the kinds of questions that *Katz* asks better than the *Katz* test itself. As an early advocate of a positive-law approach argued,

[T]he common law system is rationalized in large part on its ability to afford judges the flexibility they need to adapt the law to new situations

235. See *supra* Section I.B.

236. The general law may even constrain *more* than hidebound approaches that look to 1791 common law. See DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 36 (2010) (arguing that “the common law has, for centuries, restrained judges; in fact, it restrains judges more effectively than originalism does”).

237. Brady, *supra* note 154, at 1000.

and changes in society. The role of the common law judge is to do just that—implement shifting social expectations. The common law method, which often includes careful examination (and even incorporation) of custom, is well-suited to meet that challenge. As a result, the common law ultimately reflects society’s expectations more accurately than any *Katz*-like test.²³⁸

The general-law approach is also better positioned to address technological innovations than the pure positive-law model. State courts must delicately balance their common-law power against deference to legislatures and piecemeal codification. Because of this dynamic, state case law will often offer no authoritative answers to hard questions about the scope of protected rights. State legislation is often incomplete, too, if not silent on the issues that underlie hard Fourth Amendment questions. A court applying the pure positive-law model might find that no positive law applies, which would mean that law enforcement can act without Fourth Amendment constraint. Courts employing the general law would have the ability to recognize protections even when state law has not spoken to the matter. This is perfectly legitimate, because these courts would be engaged in the process of constitutional interpretation, over which state law cannot take primacy.

The general-law approach could thus address Justice Alito’s concerns that a Fourth Amendment rooted in trespass would be riddled with anomalies when confronted with high-tech surveillance.²³⁹ While it is true that state trespass law has largely been codified to “require[] a physical touching of the property,”²⁴⁰ that is not the only doctrine that might apply. Consider that the upcoming *Restatement (Fourth) of Property* will likely grapple with the promise and perils of aerial drones.²⁴¹ Such innovations might require more fluid notions of trespass or more robust common-law protection of privacy rights.²⁴²

238. Note, *supra* note 5, at 1643 (footnotes omitted).

239. *United States vs. Jones*, 565 U.S. 400, 425-26 (2012) (Alito, J., concurring in the judgment).

240. *Id.* at 426.

241. See *Torts of the Future: Drones*, U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM 11 (Jan. 5, 2022) [hereinafter *Torts of the Future: Drones*], https://institutelegalreform.com/wp-content/uploads/2022/01/1323_ILR_Drones_Report_V7_Pages_Digital.pdf [https://perma.cc/MT2L-2CSC] (“The ALI is currently in the process of developing the Fourth Restatement of Property, which will likely address the topic of aerial property rights, specifically in the context of drones.”).

242. The Supreme Court has called “flexibility and capacity for growth and adaptation . . . the peculiar boast and excellence of the common law.” *Hurtado v. California*, 110 U.S. 516, 530 (1884).

This is not to say that developing common-law rules for new technologies is easy or mechanical. Developing new rules for new contexts may require creativity. But common-law courts have confronted the challenge of shaping doctrine to deal with new problems for centuries.²⁴³ And there is no reason to think they are not up to the task going forward.²⁴⁴ Indeed, but for codification, common-law courts might have already developed solutions to many difficult fact patterns posed by new technology.

In short, the general law offers courts a deep and rich set of precedent on which courts can draw, as well as a set of powerful tools they can use to answer hard questions when precedent provides no clear resolution. And the general-law approach can produce answers that protect important Fourth Amendment values.

III. APPLYING THE GENERAL-LAW APPROACH

This Part applies the general-law approach to some discrete Fourth Amendment fact patterns. As it shows, the tools of the general law can provide useful guidance to recurring, sometimes difficult, questions of the Fourth Amendment's applicability. In some cases, the general-law approach leads to answers that accord with current doctrine. In others, the general-law approach suggests changes to existing rules. Our conclusions are tentative; we do not "claim all the answers today."²⁴⁵ But we hope to show that the general-law approach provides "a pretty good idea what the questions *are*."²⁴⁶

This Part considers fact patterns falling into four common-law categories. These categories are by no means the only common-law concepts that can guide Fourth Amendment law, but they are particularly useful in explaining parts of the doctrine and showing how the general-law approach works. Section III.A considers trespass; Section III.B examines abandonment; Section III.C explores bailments; and Section III.D looks to modern privacy torts. Finally, Section III.E

243. See, e.g., Jonathan P. Graham, Note, *Privacy, Computers, and the Commercial Dissemination of Personal Information*, 65 TEX. L. REV. 1395, 1425 (1987) ("Historically, courts have served as catalysts in the growth of the law by fashioning new common-law remedies to meet the needs created by evolving societal conditions and technological advances.").

244. See, e.g., Suzanna Sherry, *Haste Makes Waste: Congress and the Common Law in Cyberspace*, 55 VAND. L. REV. 309, 317 (2002) (arguing that common-law courts are well equipped to develop rules regulating the internet); Jonathan G. Rohr, *Smart Contracts in Traditional Contract Law, or: The Law of the Vending Machine*, 67 CLEV. ST. L. REV. 67, 76-81 (2019) (arguing that common-law courts have ably developed rules governing contract law applied to new technologies).

245. *Carpenter v. United States*, 138 S. Ct. 2206, 2268 (2018) (Gorsuch, J., dissenting).

246. *Id.*

briefly addresses how the general-law approach treats seizures of the person, how it understands the role of warrants, and how it might approach the issue of racialized policing.

A. *Trespass*

Trespass—unlawful interference with another’s right to possession—is the original common-law touchstone for the Fourth Amendment. Trespass to real property elucidates when a search interferes with a house, while trespass to chattels helps to explain when a search interferes with papers or effects. Many searches implicate both forms of trespass. The paradigmatic cases that inspired the Fourth Amendment, *Entick v. Carrington*²⁴⁷ and *Wilkes v. Wood*,²⁴⁸ were actions in trespass brought by property owners against the officers who entered their property to conduct a search. While *Katz* pushed trespass to the wayside, *Jones* and *Jardines* returned to trespass as an analytical starting point.²⁴⁹

But the Court’s dabbling in property concepts has made doctrine more complicated than it needs to be. Current Fourth Amendment doctrine divides physical spaces into two categories: indoors and curtilage, which receive the most protection, and outdoors, which receives less protection.²⁵⁰ It then layers privacy expectations onto these categories. While this analysis works with traditional dwellings, it is ill suited for the complex living arrangements in which many Americans find themselves. It works even less well in the context of technological intrusions. This Section builds on *Jones* and *Jardines* to flesh out how the general law of trespass would work in Fourth Amendment analysis.

Trespass is the tort that protects the right to exclude—that is, the power to choose whether, and under what conditions, to allow others to have access to property. Both the Court and commentators have described the right to exclude as a “fundamental element”²⁵¹ of property or even its “sine qua non.”²⁵² Indeed,

247. (1765) 95 Eng. Rep. 807 (KB); 2 Wils. K.B. 275. For a discussion of how a newly uncovered manuscript report of *Entick* might have implications for prevailing assumptions about the case, see T.T. Arvind & Christian R. Bursat, *A New Report of Entick v. Carrington (1765)*, 110 KY. L.J. 265 (2021).

248. (1763) 98 Eng. Rep. 489 (C.P.).

249. See *supra* Section I.B.

250. See Orin S. Kerr, *Applying the Fourth Amendment to the Internet: A General Approach*, 62 STAN. L. REV. 1005, 1009–10 (2010).

251. *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979).

252. Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998); see also *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072–73 (2021) (emphasizing the centrality to property rights of the right to exclude).

the right to exclude may be the right that protects other rights. Thus, early English cases repeat the maxim that every man's house is his castle.²⁵³ William Pitt the Elder declared:

The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!²⁵⁴

In this framing, the right to exclude is freedom from governmental overreach, at least within the confines of one's home. It creates a sphere of greater autonomy and self-determination—a refuge from the watchful eye and heavy hand of the state. Although governmental searches may serve important public-safety functions, the right to exclude is only meaningful if it protects against both searches and other interferences by the state. Illegal searches of private property are trespasses upon that property.

Even in the context of searches, trespass is a straightforward concept. A trespass is entry onto land “without a privilege to do so created by the possessor's consent or otherwise.”²⁵⁵ Courts applying trespass would ask whether the subject had the right to exclude and whether that right had been violated by an alleged intrusion.

1. *The Scope of the Right to Exclude*

To apply the concept of trespass, courts would first determine the scope of a subject's right to exclude others from a property.²⁵⁶ Familiar property concepts like “ownership” will do much of the work in this inquiry, but courts must still analyze the facts of the case. Consider overnight guests. As licensees, the guests have permission to occupy the homeowners' property because the homeowners have waived their right to exclude them.²⁵⁷ Although they are not on their own

253. See, e.g., *Semayne's Case* (1604) 77 Eng. Rep. 194, 195 (K.B.); 5 Co. Rep. 91 a, 93 a (noting that “the house of every one is to him as his castle” (footnote omitted)).

254. *Miller v. United States*, 357 U.S. 301, 307 n.7 (1958) (quoting THE OXFORD DICTIONARY OF QUOTATIONS 379 (2d ed. 1953) (tracing the quotation to a 1763 speech given by William Pitt in the House of Commons)).

255. RESTATEMENT (SECOND) OF TORTS § 329 (AM. L. INST. 1965).

256. Focusing on the right to exclude is consistent with the Court's approach in *Byrd v. United States*, where the Court explained that reasonable expectations of privacy needed a source external to the Fourth Amendment and identified the right to exclude as one such guiding principle. 138 S. Ct. 1518, 1527 (2018) (citing *Rakas v. Illinois*, 439 U.S. 128, 144 n.12 (1978)).

257. See RESTATEMENT (SECOND) OF TORTS § 330 (AM. L. INST. 1965).

property, the guests still have various property rights. They retain ownership over any chattels they may have brought with them. They might even have the right to exclude others from their licensed space. For example, overnight guests would be within their rights to block trespassing strangers from entering their guest room even if they would have no property-based right to block the *home-owner* from checking on the room. Social norms might prevent the hosts from poking around their guests' space or allowing others to do so, but property law would allow them to do so.²⁵⁸ Under a general-law approach, the guests would be protected against warrantless searches of their space, though the hosts could consent to law-enforcement entry.

Although mostly stable over time, there are some situations in which the right to exclude has evolved. Early commentators talked about *cuius est solum, eius est usque ad coelum et ad inferos* – whoever owns the earth owns up to Heaven and down to Hell.²⁵⁹ However useful the idea of *ad coelum* might have been in the development of early American property law, the advent of air travel quickly revealed its flaws, leading courts to reject it as applied to aviation.²⁶⁰ By 1947, the Supreme Court declared that *ad coelum* “has no place in the modern world.”²⁶¹ That might be true in the absolute, but the intuition behind *ad coelum* remains intact. An intrusion can still be a trespass even if it does not touch the surface of the property. The scope of the right to exclude may well bend to newer technologies such as drones, or it may become an essential barricade against further technological intrusion into private spaces. Which way it goes will depend on the decisions of common-law judges, legislators, and perhaps federal agencies. Unlike the pure positive-law model, the general-law approach would empower federal courts to engage in the kind of analysis more commonly associated with state common-law courts. They would begin with long-standing common-law doctrine but would be free to mold it to the needs of modern society, just as courts did when air travel caused them to abandon *ad coelum*.

Giving courts the freedom to analyze the right to exclude with respect to new technologies like drones distinguishes the general-law approach from the pure positive-law model. As Baude and Stern note, drones are increasingly important

258. If the guest later became a tenant, property doctrine might give her the right to exclude the landlord. See Michelle Maese, *Rethinking Host and Guest Relations in the Advent of Airbnb and the Sharing Economy*, 2 TEX. A&M J. PROP. L. 481, 504-05 (2015).

259. Although likely a more ancient concept, Lord Coke famously used *ad coelum* to justify his decision in *Bury v. Pope* (1587) Cro. Eliz. 118, 375. See also 2 WILLIAM BLACKSTONE, *COMMENTARIES* *18 (“Land hath also, in its legal signification, an indefinite extent, upwards as well as downwards. *Cujus est solum, ejus est usque ad cælum*, is the maxim of the law.”).

260. See, e.g., *Hinman v. Pac. Air Transp.*, 84 F.2d 755, 757 (9th Cir. 1936).

261. *United States v. Causby*, 328 U.S. 256, 261 (1946).

to law-enforcement operations, “but current Fourth Amendment doctrine focused on reasonable expectations of privacy will be slow to catch up.”²⁶² They argue that “[t]he positive law has answers” to the problem posed by drones, but then cite the *Restatement (Second) of Torts* as evidence of the common law and the patchwork of state statutory law governing drones.²⁶³ In their framework, law enforcement could use drones wherever the public was not barred from using drones under the common law or state statutory law.

The problem with this approach is that the positive law in this space is limited and still nascent.²⁶⁴ In fact, given the difficulty of determining ownership over a trespassing drone as it whizzes overhead, questions about where drones are allowed to fly might arise in the search-and-seizure context more often than in private litigation. More than evidence of the positive law, the restatements are evidence of (though certainly not the definitive word on²⁶⁵) the general law. They are, in other words, a gloss on existing sources of law that ostensibly seek internal consistency while maintaining relevance to modern problems. This is especially true where the restatements opine about doctrine that courts have yet to consider fully.

Drones highlight many of the benefits of a general-law approach. First and foremost, the approach gives the power to promulgate drone trespass doctrine for searches to the courts most likely to hear well-litigated disputes on the topic. Second, it eliminates the extreme inconsistencies that would occur under a positive-law model. A single drone can simultaneously surveil property in several jurisdictions. Whether the drone acted permissibly as a matter of state tort law might vary by jurisdiction, causing a single photograph or other data capture to be subject to different rules if the landowners sue in tort. But it makes little sense to say that federal constitutional rights are subject to the same level of variation. Finally, the general-law approach would be more consistent and less speculative than a test predicated upon defendants’ reasonable expectations of privacy. In a world of pervasive aerial surveillance from law enforcement and private companies alike, a reasonable expectation of privacy is a shifting fiction at best. A general-law approach would have courts ask whether the drone trespassed, violating the defendant’s right to exclude. The answer might depend on the altitude of the drone or other factors. And even if courts find no trespass, the general-law approach would provide other protections for defendants’ seclusion on their own

262. Baude & Stern, *supra* note 5, at 1883.

263. *Id.* at 1883-84.

264. See *Torts of the Future: Drones*, *supra* note 241; see also UNIF. TORT L. RELATING TO DRONES ACT (UNIF. L. COMM’N 2019) (providing a uniform state tort law related to drones).

265. For an argument that courts too often defer to the Restatements as if they were binding law, see Shyamkrishna Balganesh, *Relying on Restatements*, 122 COLUM. L. REV. 2119 (2022).

property. In some cases, for example, defendants will need to look to privacy torts for sources of Fourth Amendment protection from surveillance.²⁶⁶

Similar benefits abound in a general-law approach to curtilage and open fields. Current Fourth Amendment doctrine roughly tracks historical immunity to trespass: there is little, if any, protection for open fields²⁶⁷ and significant protections for the curtilage. In many states, there was historically a customary right to hunt or cross open fields so long as one kept clear of dwellings.²⁶⁸ Today, many states have statutorily ended that right or amended their enclosure laws to facilitate the enclosure of ever-larger areas of land.

For example, North Dakota law generally immunizes from trespass hunting on unenclosed private land, but a recent law facilitates enclosure by allowing landowners to post digital no-trespassing signs on a state website.²⁶⁹ In other words, North Dakota now recognizes digital enclosures of real property. This is but one example of the significant variation across jurisdictions in the rules governing whether the public has a right to access unenclosed private lands. There is also variation in which natural features on private property are potentially open to the public: state law provides for immunity from trespass for natural features such as “great ponds” in Massachusetts²⁷⁰ and beaches in Oregon.²⁷¹ This level of specificity and variation is perfectly appropriate for the positive law

266. See *infra* Section III.D.

267. See *Oliver v. United States*, 466 U.S. 170, 180 (1984) (explaining that “no expectation of privacy legitimately attaches to open fields”). This is consistent with pre-*Katz* doctrine as well. See *Hester v. United States*, 265 U.S. 57, 59 (1924) (“[T]he special protection accorded by the Fourth Amendment to the people in their ‘persons, houses, papers, and effects,’ is not extended to the open fields.”).

268. See, e.g., *McConico v. Singleton*, 9 S.C.L. (2 Mill) 244, 245 (1818) (“[T]he several acts of the Legislature on the subject; particularly the act of 1769 . . . which restrains the right to hunt within seven miles of residence of the hunter. Now if the right to hunt beyond that, did not before exist, this act was nugatory.”); *Payne v. Gould*, 52 A. 421, 421 (Vt. 1902) (interpreting the Vermont constitution’s provision guaranteeing Vermonters “the liberty in seasonable times to hunt and fowl on the lands they hold, and on other lands not inclosed [sic]” as permitting hunting on private unenclosed land (quoting VT. CONST. ch. II, § 67)). See generally Stephen P. Halbrook, *The Constitutional Right to Hunt: New Recognition of an Old Liberty in Virginia*, 19 WM. & MARY BILL RTS. J. 197 (2010) (explaining the Virginia constitutional right to hunt).

269. S.B. 2144, 67th Leg. Assemb., Reg. Sess. (N.D. 2021). See Traci Eatherton, *Electronic Posting: New Law Allows North Dakota Landowners to Post ‘No Hunting’ Using State Site*, TRI-STATE LIVESTOCK NEWS (July 9, 2021), <https://www.tsln.com/news/electronic-posting-new-law-allows-north-dakota-landowners-to-post-no-hunting-using-state-site> [https://perma.cc/XM5Y-CVDU].

270. See *United States v. Grabler*, 907 F. Supp. 499, 503 (D. Mass. 1995) (tracing the right of the public to access so-called “great ponds” to Colony Ordinances of 1641-47).

271. See *State ex rel. Thornton v. Hay*, 462 P.2d 671, 676-77 (Or. 1969).

of trespass and, as has historically been true, deserves deference on questions about rights and interests in real property.²⁷² Nevertheless, this level of variation makes little sense for the scope of federal constitutional rights.²⁷³ Under the general-law framework, courts would first determine whether the searched property can be understood as a “house” (or, perhaps, if police somehow intruded on a person’s “effects”²⁷⁴). Then, to determine the scope of the owner’s right to exclude, they would look broadly at categories of land (for example, enclosed/unenclosed and improved/unimproved) and, critically, curtilage. In determining the owner’s right to exclude under the general law, courts would also set the scope of her Fourth Amendment protections.

These property-based categories are more coherent than current doctrinal attempts to justify warrantless searches of open fields. In *Oliver v. United States*, the Court held that police entry onto a field located a mile from the defendant’s home was not an impermissible “search” because “an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home.”²⁷⁵ The Court further reasoned that “open fields do not provide the setting for those intimate activities that the Amendment is intended to shelter.”²⁷⁶ It did not matter that the defendant had posted “no trespassing” signs because “[i]t is not generally true that fences or ‘No Trespassing’ signs effectively bar the public from viewing open fields in rural areas.”²⁷⁷ Under this reasoning, a property owner’s expectations of privacy turn not only on whether he attempted to avoid prying eyes, but on whether he succeeded. If taken to its logical end, this line of reasoning would all but end Fourth Amendment protections in a world of pervasive high-tech surveillance against which individuals are virtually defenseless.

In *Jones*, the Supreme Court put *Oliver* on slightly sounder footing, explaining that the search in *Oliver* was not a violation of the Fourth Amendment because “an open field, unlike the curtilage of a home, is not one of those protected

272. See Maureen E. Brady, *Property Convergence in Takings Law*, 46 PEPP. L. REV. 695, 700-04 (2019).

273. *But see* Baude & Stern, *supra* note 5, at 1886-87 (applying the positive-law model to open fields).

274. Chad Flanders has noted the possibility that “effects” might be read to extend to real property, and not merely personal property. See Flanders, *supra* note 132, at 769. *But see* Brady, *supra* note 154, at 985 (suggesting that the original meaning of “effects” is restricted to personal property); Ferguson, *Internet of Things and Fourth Amendment of Effects*, *supra* note 131, at 826-27 (arguing that while English juries might have understood “effects” as encompassing real property, the Framers understood it only to include personal property).

275. 466 U.S. 170, 178 (1984).

276. *Id.* at 179.

277. *Id.*

areas enumerated in the Fourth Amendment.”²⁷⁸ This reasoning makes sense as far as it goes, but what counts as a “house” for Fourth Amendment purposes is not always obvious. Courts might need to interpret that phrase broadly to give effect to Fourth Amendment protections in the context of extreme abundance and deprivation. If they fail to do so, courts risk linking Fourth Amendment protections to social class and the ability to afford a home that looks like a bourgeois house.²⁷⁹

A general-law approach would ask whether the defendant would have the right to exclude a member of the public from the searched place or thing and, if so, require law enforcement to get a warrant before conducting the search. This approach mirrors what Brady calls a “contextual-privacy approach,” under which courts look at the social cues surrounding property to determine whether someone is attempting to assert ownership over the property.²⁸⁰

For example, in *Pottinger v. City of Miami*, the city of Miami was sued for, among other things, a policy of clearing and destroying homeless encampments. The court found that “by its appearance, the property belonging to homeless persons is reasonably distinguishable from truly abandoned property” and “a homeless person’s personal property is generally all he owns; therefore, while it may look like ‘junk’ to some people, its value should not be discounted.”²⁸¹ While the court found the city’s policy to be a “meaningful interference with [an individual’s] possessory interests in that property” – and therefore subject to the Fourth Amendment according to the Supreme Court’s decision in *Jacobsen* – the court saw “[t]he more difficult question” as “whether an individual has a legitimate privacy interest in property that is seized in a public area.”²⁸² The court ultimately found that the unhoused had a reasonable expectation of privacy in items like bedrolls and bags based in part on “society’s high degree of deference to expectations of privacy in closed containers,” noting that “[o]ur notions of custom and civility, and our code of values, would include some measure of respect for that shred of privacy, and would recognize it as reasonable under the circumstances of this case.”²⁸³ The general-law approach would alleviate the need to ask whether someone sought privacy in unconventional circumstances and

278. *United States v. Jones*, 565 U.S. 400, 411 (2012) (citation omitted).

279. See William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1270 (1999) (explaining how class impacts access to the kinds of places that current Fourth Amendment doctrine protects). See generally Brady, *supra* note 154, at 974-75 (arguing that the current doctrinal focus on houses as opposed to “effects” underprotects groups such as the unhoused).

280. Brady, *supra* note 154, at 974.

281. 810 F. Supp. 1551, 1559 (S.D. Fla. 1992).

282. *Id.* at 1571 (citing *United States v. Jacobsen*, 466 U.S. 109, 125 (1984)).

283. *Id.* at 1572 (citing *State v. Mooney*, 588 A.2d 145, 161 (Conn. 1991)).

instead ask whether they had a right to exclude. This analysis would often be as simple as asking whether the property has been abandoned.²⁸⁴

In the context of the unhoused and trespass to chattel against their belongings, the general-law approach may yield very different results than a pure positive-law approach. In municipalities that have laws attempting to outlaw vagrancy and authorizing aggressive clearance of encampments, the positive law might authorize warrantless seizures of unhoused people's belongings. But the general-law approach would still recognize and protect the property interests that people have despite being unhoused.

2. *Delegating the Right to Exclude*

As foreshadowed by the problem of informal dwellings on others' real property, tough questions arise when property targeted for a search is on or within the property of another. In such cases, courts must analyze who holds the right to exclude and who can wield it against whom. While the right to exclude is most often associated with ownership, it can also be delegated to lesser interests in the property. For example, residential tenants have the right to exclude everyone, including their landlord, from their apartment. Similarly, parties may share the right to exclude or allocate it to meet their needs. So, a lease may generally allow tenants to exclude a landlord but specify circumstances under which the tenant cannot exclude the landlord or even under which the landlord can exclude the tenant. The ability to customize the right to exclude applies to real property and chattels alike. The owners of a piano may bar everyone from mashing its keys, may selectively dole out permission to do so, or may delegate the power to choose who uses the piano to another party. In other words, a party can waive and delegate her right to exclude in some contexts but not in others.

The ability to waive and delegate the right to exclude means that establishing who owns property is not sufficient for determining who has the right to object to a search and who has the right to consent to one. Justice Scalia explained as much in his concurrence in *Minnesota v. Carter*:

Of course this is not to say that the Fourth Amendment protects only the Lord of the Manor who holds his estate in fee simple. People call a house “their” home when legal title is in the bank, when they rent it, and even when they merely occupy it rent free — *so long as they actually live there*.²⁸⁵

At common law, owners and those with possessory interests in property have always been able to waive their right to exclude with respect to some people but

²⁸⁴. See *infra* Section III.B.

²⁸⁵. 525 U.S. 83, 96 (1998) (Scalia, J., concurring).

not others: this is the doctrine of invitees and licensees. At their core, invitations and licenses are immunities from liability for trespass. Absent special circumstances, this immunity is temporary and revocable.²⁸⁶ While the Supreme Court has maligned these details, the core doctrine is at least coherent and predictable, which is more than can be said for the Court's efforts to find a replacement for property analysis in Fourth Amendment doctrine. In *Rakas v. Illinois*, when the Court asserted that "arcane distinctions developed in property and tort law between guests, licensees, invitees, and the like, ought not to control" Fourth Amendment analysis,²⁸⁷ the Court seemed to misunderstand how the distinctions between licensees (which includes guests),²⁸⁸ invitees, and trespassers worked before most state courts abolished them: the distinctions determined the duty of care landowners owed to others on their property. The scope of permission for licensees and invitees is the same, meaning that the distinction would not matter for Fourth Amendment purposes.

A general-law approach would look at the scope of the license or invitation to determine whether an outsider is excluded from a space and, if so, to what extent. The license extended to an overnight guest may, for example, give the guest the right to exclude others from her room—thus letting her assert Fourth Amendment rights with respect to what constitutes her "house" (the room). Licensee status would also not preclude individuals from asserting their right to exclude with respect to their *own* property. For example, in many situations, a host would trespass against an overnight houseguest's suitcase by picking its lock. Likewise, one dinner guest has no right to rummage through the purse of another. This approach is consistent with *Minnesota v. Olson*, where the Court found that search of an overnight guest's property violated that guest's Fourth Amendment rights, but it avoids the mushier expectation of privacy analysis on which the Court rested its opinion.²⁸⁹

The scope of any license or invitation would also determine who has the power to consent to a search. For example, a tenant's dinner guests might be licensees to a particular apartment, but whether the guests could consent to a search of the apartment would depend on the scope of the license. They also could become trespassers elsewhere in an apartment complex, another issue which would require careful attention to the license's scope.²⁹⁰ To be sure, this

286. See *Wood v. Leadbitter* (1845) 153 Eng. Rep. 351, 352.

287. 439 U.S. 128, 143 (1978) (citing *Jones v. United States*, 362 U.S. 257, 266 (1960)).

288. See RESTATEMENT (SECOND) OF TORTS § 330 cmt. h.3 (AM. L. INST. 1965).

289. 495 U.S. 91, 91 (1990).

290. See, e.g., *Handy v. Nejam*, 111 So. 3d 610, 614 (Miss. 2013) (holding that an apartment tenant's guests were trespassers in a pool area and that the landlord did not breach the duty of care owed to trespassers).

analysis is layered, but it also reflects common sense. The average dinner guest has no authority to invite strangers to dinner without first obtaining the consent of the host. It follows that such a licensee cannot invite in law enforcement by consenting to a search. Overnight guests, especially those staying for longer periods, may have slightly different rights, but the question remains the same: is this licensee allowed to invite in others?

B. Abandonment

This Section considers how the common-law property concept of abandonment can inform Fourth Amendment law. Abandoned property “is that to which the owner has voluntarily and intentionally relinquished his or her interests without vesting ownership in any other person and with the intention of not reclaiming it or reassuming its ownership or enjoyment.”²⁹¹ This concept can illuminate whether individuals have an interest in a particular piece of property such that government intrusion on or interference with that property constitutes an unreasonable search or seizure.

1. Chattels

Courts applying the *Katz* framework have held that individuals can have no reasonable expectation of privacy in property that they abandon.²⁹² This abandonment framework “is not abandonment in the strict property-right sense” but rather a question of whether the person complaining about the search has “voluntarily abandoned his privacy interest” in the property.²⁹³ The test for abandonment of one’s privacy interest is supposed to be objective, looking at “words

²⁹¹. 1 AM. JUR. 2D *Abandoned, Lost, and Unclaimed Property* § 4 (2022).

²⁹². See *United States v. Ferebee*, 957 F.3d 406, 412-13 (4th Cir. 2020) (“[O]ne who abandons property would have no subjective expectation that the property would remain private, nor would society recognize any such expectation as reasonable.”); *United States v. Zapata*, 18 F.3d 971, 978 (1st Cir. 1994) (“One who abandons ownership forfeits any entitlement to rights of privacy in the abandoned property, and one who disclaims ownership is likely to be found to have abandoned ownership . . .” (citations omitted)); see also *Texas v. Brown*, 460 U.S. 730, 748 (1983) (“Since seizure of such an object threatens only the interest in possession, circumstances diminishing that interest may justify exceptions to the Fourth Amendment’s usual requirements.”). This framework predates *Katz*. See *Abel v. United States*, 362 U.S. 217, 241 (1960) (finding that personal property left in the wastepaper basket of a vacated hotel room were “*bona vacantia*” and therefore subject to seizure without a warrant).

²⁹³. *Commonwealth v. Shaffer*, 177 A.3d 241, 244, 245 (Pa. Super. Ct. 2017) (quoting *Commonwealth v. Sodomsky*, 939 A.2d 363, 366, 367 (Pa. Super. Ct. 2007)); see also *United States v. Lewis*, 921 F.2d 1294, 1302 (D.C. Cir. 1990) (“Abandonment for purposes of the Fourth

spoken, acts done, and other objective facts.”²⁹⁴ The paradigmatic case here is trash deposited at the curb for pickup, which the Court has held police may inspect without a warrant or probable cause.²⁹⁵ Purses and satchels that suspects stashed to recover later pose more difficult cases. Even when a suspect manifests an intent to return to his property, if the “ability to recover the satchel depended entirely upon fate and the absence of inquisitive (and acquisitive) passers-by,”²⁹⁶ courts will find that the suspect has abandoned their expectation of privacy.

Although abandonment is a useful concept, courts using *Katz* have understood it too simply. The common law provides a more nuanced understanding that would better comport with Fourth Amendment values and societal understandings. A general-law approach to the Fourth Amendment would eschew the question of whether defendants had abandoned their *privacy interest* in property. Instead, it would ask whether they had abandoned the property under traditional *property* principles. As noted, at common law, owners abandon property when they “voluntarily relinquish[] all right, title, claim and possession with the intention of terminating [their] ownership, but without vesting it in any other person and with the intention of not reclaiming further possession or resuming ownership, possession or enjoyment.”²⁹⁷ Dumpster-diving might violate municipal codes, but it is not stealing from people who, in throwing their property in the dumpster, voluntarily manifested an intent to relinquish title. Similarly, warrantless searches of garbage put out for collection would pose no new problems under a general-law approach to the Fourth Amendment: police can search abandoned property without a warrant.²⁹⁸

Amendment differs from abandonment in property law; here, the analysis examines the individual’s reasonable expectation of privacy, not his property interest in the item.”); *United States v. Tsarnaev*, 53 F. Supp. 3d 450, 456 (D. Mass. 2014) (holding that leaving an apartment without the intention of returning alive is not an “unambiguous abandonment” of an expectation of privacy in the apartment and its contents).

294. *United States v. Jones*, 707 F.2d 1169, 1172 (10th Cir. 1983) (citations omitted).

295. *California v. Greenwood*, 486 U.S. 35, 40-41 (1988).

296. *Jones*, 707 F.2d at 1172-73; cf. *United States v. Burnette*, 698 F.2d 1038, 1047-48 (9th Cir. 1983) (finding that the defendant had not objectively manifested an intent to abandon her privacy interest in a purse where she referred to it as “my purse” and attempted to shield its contents from officers).

297. *Commonwealth v. Wetmore*, 447 A.2d 1012, 1014 (Pa. Super. Ct. 1982) (citation omitted).

298. The Fourth Amendment is less protective than some state constitutions on this front. For example, in *State v. Wright*, the Iowa Supreme Court relied on a positive-law test to hold that officers violated a defendant’s rights when they searched opaque trash bags placed out for collection. 961 N.W.2d 396, 415-16 (Iowa 2021); see also Tanner M. Russo, Note, *Garbage Pulls Under the Physical Trespass Test*, 105 VA. L. REV. 1217, 1243 (2019) (explaining that curbside garbage could be considered “abandoned” because the former owners have “relinquish[ed] any interest in the refuse by leaving it on the curb”).

Under this framework, individuals who want to dispose of property without subjecting it to the possibility of search need to exercise their right to destroy the property before they abandon it. For example, they might need to incinerate or hire a secure shredding service, like those employed by many law firms and courts, to ensure the destruction of the property prior to it entering municipal refuse streams. At this point, the property would be abandoned and subject to search,²⁹⁹ but the destruction of the property would hinder investigative efforts.³⁰⁰ Alternatively, individuals could attempt to avoid abandoning their property by turning it over to landfill-like, long-term storage that is contractually structured as a bailment.³⁰¹ Both of these alternatives are more expensive than simple abandonment, but maintaining property interests often involves costs. The harder question under a general-law approach is whether contractual efforts to avoid abandonment would be effective. State enforcement of these contracts would be evidence of the general law, but not dispositive. Still, in the case of most trash, the general-law approach reaches the same result as existing doctrine does through different reasoning.

But in other contexts, the general-law approach would require changes to current law. Fourth Amendment doctrine tends to categorize lost or mislaid property as abandoned, thereby allowing police to conduct warrantless searches of that property.³⁰² Yet, at common law, lost and mislaid property is *not* abandoned, even if left exposed to the public, and the owner retains a claim to possession of the property superior to claims by anyone else who may find it.³⁰³ In a general-law framework, officers finding an apparently lost or mislaid purse would have an obligation not to appropriate it for government use. Instead, the

299. *United States v. Scott*, 975 F.2d 927, 928–30 (1st Cir. 1992) (holding that shredding documents does not create a privacy interest that persists when shreds are later placed in the public trash, thereby abandoning any property interest).

300. *But see id.* at 930 (“Appellee here thought that reducing the documents to 5/32 inch pieces made them undecipherable. It turned out he was wrong.”).

301. *See infra* Section III.C.

302. See, for example, *United States v. Quashie*, 162 F. Supp. 3d 135, 141 (E.D.N.Y. 2016), which holds that if a suspect accidentally drops her phone at the scene of a robbery, the phone is “abandoned” and subjectable to a warrantless search. *Quashie* is a particularly grating example of the abandonment framework because the suspects returned to the property to attempt to retrieve the phone – an act that in the property context would be an objective manifestation of an intent *not* to abandon the property – but because they were unsuccessful, the court held the phone to be abandoned. *See id.*

303. *Hamaker v. Blanchard*, 90 Pa. 377, 379 (1879) (“[F]inder of a lost article is entitled to it as against all persons, except the real owner”); *Weeks v. Hackett*, 71 A. 858, 860 (Me. 1908) (“[W]ith respect to both lost goods, properly so termed, and treasure-trove . . . the title to such property belongs to the finder as against all the world except the true owner and that ordinarily the place where it is found is immaterial.”).

officers would be bailees holding the property for the true owner. Law enforcement would no longer be able to rely on legal fictions about abandonment to justify warrantless searches.

2. *Real Property*

The most significant doctrinal changes would arise in searches of so-called abandoned real property.³⁰⁴ At common law, owners in fee simple cannot abandon their interests in real property, regardless of how badly they want to discharge their legal obligations in a parcel of land.³⁰⁵ This makes sense from both a doctrinal and a policy perspective. There is nowhere to abandon a fee-simple interest, absent some greater interest capable of absorbing it. More importantly, ownership creates certain positive obligations on owners – property taxes, environmental liability, even basic maintenance – and allowing owners to abandon real property would allow them to shift these obligations onto the public fisc. Interests smaller than fee simple – leaseholds, easements, and the like – can be abandoned, but they merge into the fee.³⁰⁶ Thus, real property always has at least one owner who cannot abandon the property. Simply put, there is no such thing as abandoned real property at common law. Yet current Fourth Amendment doctrine treats abandoned real property as a relevant category. Courts have held that “a person can lose his reasonable expectation of privacy in his real property if he abandons it” by manifesting an intent to abandon it, notwithstanding the “sacrosanct place” that the home occupies in Fourth Amendment jurisprudence.³⁰⁷

Current Fourth Amendment doctrine attempts to balance the sanctity of the home against the practicalities of allowing police into vacant property without a warrant. Thus, in *United States v. Harrison*, the Third Circuit explained that “[b]efore the government may cross the threshold of a home without a warrant, there must be clear, unequivocal and unmistakable evidence that the property has been abandoned. Only then will such a search be permitted.”³⁰⁸ Similarly, police may not declare an apartment abandoned and conduct a warrantless search because a tenant was absent from it and had fallen behind on rent for

304. See *United States v. Harrison*, 689 F.3d 301, 307 (3d Cir. 2012) (“[T]he fact that for common law purposes real property cannot be abandoned is not dispositive.” (citations omitted)).

305. See, e.g., *Pocono Springs Civic Ass’n v. MacKenzie*, 667 A.2d 233, 236 (Pa. Super. Ct. 1995).

306. See *Aldrich v. Olson*, 531 P.2d 825, 828 (Wash. Ct. App. 1975) (explaining that abandonment is an intention to surrender the leasehold to the landlord).

307. *Harrison*, 689 F.3d at 307; see also *United States v. Stevenson*, 396 F.3d 538, 542 (4th Cir. 2005) (allowing admission of evidence gained during a warrantless search of an apartment where the defendant had “no intention of returning to his apartment” and “no longer considered himself a resident of the apartment”).

308. 689 F.3d at 309.

“over a month.”³⁰⁹ But courts have found that homes can lose both their character as a “residence” and as a “privately occupied structure” if they are “open to the public, vandalized, uninhabitable, and from appearances virtually abandoned.”³¹⁰

An inquiry concluding that a person forfeits an expectation of privacy by leaving a property undermines the notion that “every man’s house is his castle.” For example, in *United States v. Levasseur*,³¹¹ the Second Circuit upheld a warrantless search of a footlocker after finding the home where police found it to be abandoned. The court’s basis for finding abandonment was that the owners had “settled” in a different city after learning of police activity near their home and determining that it was “too risky” to return to the house and pack up.³¹² This reasoning finds no support in common law. But under current doctrine, Fourth Amendment protection apparently diminishes if owners fear law-enforcement intrusions into their home.

Fourth Amendment abandonment doctrine also contains troublesome class overtones that common-law property doctrine largely avoids. In Fourth Amendment cases, courts often talk about “indicia of abandonment,” which include the presence of “refuse, including mattresses, tires, and beer bottles,”³¹³ broken locks, broken windows, and discontinued electrical service, among other things.³¹⁴ Taken together, these attributes may indicate nothing more than poverty.³¹⁵ A bright-line rule that fee-simple interests cannot be abandoned would avoid many such inquiries. For leased property, an approach that harmonized the Fourth Amendment and the common law would permit warrantless searches

309. *United States v. Robinson*, 430 F.2d 1141, 1143-44 (6th Cir. 1970).

310. *Mann v. Cannon*, 731 F.2d 54, 59 (1st Cir. 1984).

311. 816 F.2d 37 (2d Cir. 1987).

312. *Id.* at 44.

313. *State v. Linton*, 812 A.2d 382, 383 (N.J. Super. Ct. App. Div. 2002).

314. *Id.*; see also, e.g., *People v. Taylor*, 655 N.W.2d 291, 297 (Mich. Ct. App. 2002) (considering “(1) the outward appearance, (2) the overall condition, (3) the state of the vegetation on the premises, (4) barriers erected and securely fastened in all openings, (5) indications that the home is not being independently serviced with gas or electricity, (6) the lack of appliances, furniture, or other furnishings typically found in a dwelling house, (7) the length of time that it takes for temporary barriers to be replaced with functional doors and windows, (8) the history surrounding the premises and prior use, and (9) complaints of illicit activity occurring in the structure”).

315. See Stuntz, *supra* note 279, at 1270 (explaining how Fourth Amendment protections map onto class).

only where (1) indicia of abandonment by the leaseholder would give a landlord a right of entry and (2) the landlord in fact authorized the entry by police.³¹⁶

3. *Intangibles*

No subject makes a better case for a general-law approach than intangible possessions like email. Congress has made various efforts to define the relationship between technology users, technology-service providers, and the government. But legislative solutions are imperfect, often because technological innovation proceeds much more quickly than does statutory innovation. Nowhere is this disconnect between technology and the positive law more apparent than in how the Electronic Communications Privacy Act (ECPA)³¹⁷ handles email.³¹⁸ Under the ECPA, email left on a third-party server for more than six months is considered abandoned and therefore subject to search without a warrant.³¹⁹ While this framework may have made sense in the early days of email before cloud storage enabled users to store massive amounts of data with their email-service providers, it contradicts the expectations of modern users.³²⁰ Under this framework, the government would need no warrant to access emails that were more than six months old, even if the user saved them to the cloud specifically to preserve access to and control over those files for the indefinite future—that is, even if the user had not abandoned the files under common-law definitions of abandonment.³²¹

Despite this statutory regime, some courts have ruled that the Fourth Amendment protects materials held in cloud storage. In *United States v. Warshak*, the Sixth Circuit observed that, “[g]iven the fundamental similarities between email and traditional forms of communication, it would defy common sense to

316. Cf. *United States v. Wilson*, 472 F.2d 901, 903 (9th Cir. 1972) (upholding a warrantless search when the landlord called police after entering leased property through an open front door and seeing explosives).

317. Pub. L. No. 99-508, 100 Stat. 1848 (1986).

318. See David Kravets, *Aging ‘Privacy’ Law Leaves Cloud E-Mail Open to Cops*, WIRED (Oct. 21, 2011, 6:30 AM), <https://www.wired.com/2011/10/ecpa-turns-twenty-five> [<https://perma.cc/GU6C-6GAR>]; Miguel Helft & Claire Cain Miller, *1986 Privacy Law Is Outrun by the Web*, N.Y. TIMES (Jan. 9, 2011), <https://www.nytimes.com/2011/01/10/technology/10privacy.html> [<https://perma.cc/WW5H-HBRB>].

319. 18 U.S.C. § 2703(a) (2018).

320. See Kravets, *supra* note 318 (explaining that when Congress passed the Electronic Communications Privacy Act (ECPA) email users typically kept their email on their local hard drives).

321. See *United States v. Barr*, 605 F. Supp. 114, 116 n.1 (S.D.N.Y. 1985) (explaining that not picking up physical mail for six weeks does not by itself manifest an intent to abandon the mail); Eduardo M. Peñalver, *The Illusory Right to Abandon*, 109 MICH. L. REV. 191, 197 (2010) (discussing the role of intent in common-law abandonment).

afford emails lesser Fourth Amendment protection.”³²² The court further explained that

the [internet service provider] is the functional equivalent of a post office or a telephone company [T]he police may not storm the post office and intercept a letter, and they are likewise forbidden from using the phone system to make a clandestine recording of a telephone call – unless they get a warrant.³²³

In other words, email users have a reasonable expectation of privacy in the contents of their email.

The general-law approach would yield the same result as *Warshak*, but through property concepts rather than privacy. Property would be a more predictable foundation because it avoids the most difficult ambiguities of privacy analysis. Property asks whether the defendants had a right to exclude others from their digitally stored files and, if so, whether that right was violated. Thus, it would treat digital files on a server the same way that it treats files hanging in an office drawer and protect them from warrantless searches. And if the desired digital files are on a third party’s cloud server, courts could look to the law of bailment just as they would if the files were stored in a commercial warehouse.

C. Bailments

Bailment is another area in which the general-law approach to the Fourth Amendment would potentially depart from existing doctrine. The general law would use bailment to determine when law enforcement needs a warrant to search a defendant’s property held by a third party. This approach would center on who had the right to exclude whom, largely eschewing the maligned “third-party doctrine,” under which a person forfeits her expectation of privacy in information held by a third party.³²⁴

322. 631 F.3d 266, 285-86 (6th Cir. 2010); see also Patricia L. Bellia & Susan Freiwald, *Fourth Amendment Protection for Stored E-mail*, 2008 U. CHI. LEGAL F. 121, 138 (“Because we expect privacy in these more traditional forms of communication, we should be entitled to expect privacy in e-mail as well . . .”).

323. *Warshak*, 631 F.3d at 286.

324. See, e.g., Laura K. Donohue, *Functional Equivalence and Residual Rights Post-Carpenter: Framing a Test Consistent with Precedent and Original Meaning*, 2018 SUP. CT. REV. 347, 351 (“Intellectually diverse scholars have roundly denounced third-party doctrine.”). But see generally Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561 (2009) (offering an overview and defense of the Fourth Amendment’s third-party doctrine).

1. *Tangibles*

At common law, bailment covered any transactions in which one party temporarily delivered property to another with the expectation that the property be returned at a later time.³²⁵ Bailments thus included a range of transactions, from the paradigmatic case of entrusting a horse to an innkeeper,³²⁶ to parking a car in a secure garage,³²⁷ shipping,³²⁸ warehousing,³²⁹ renting a truck,³³⁰ pawning property,³³¹ or walking a friend's dog.³³² Courts have even extended the doctrine to cover found property.³³³ In each case, the bailor is the owner of the property and the bailee is the party temporarily in possession of it. A bailee owes the bailor a duty to return the property in the agreed-upon condition and is liable if she does not.³³⁴

Bailment's relationship to Fourth Amendment rights went mostly unexplored until Justice Gorsuch raised it in his dissent in *Carpenter* as a counter to the third-party doctrine.³³⁵ He explained that "the fact that a third party has access to or possession of your papers and effects does not necessarily eliminate your interest in them."³³⁶ Indeed, as he observed, even bailing one's papers to the government by depositing them in the mail does not grant the government the

325. JOHN H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 389 (4th ed. 2007); JOSEPH STORY, COMMENTARIES ON THE LAW OF BAILMENTS WITH ILLUSTRATIONS FROM THE CIVIL AND THE FOREIGN LAW 1-2 (Cambridge, Hilliard & Brown 1832).

326. BAKER, *supra* note 325, at 311.

327. Paul J. McGeady, *Liability of Garage Keepers and Parking Lot Owners*, 1952 INS. L.J. 89, 90-94.

328. Paper Magic Grp., Inc. v. J.B. Hunt Transp., Inc., 318 F.3d 458, 461 (3d Cir. 2003).

329. U.C.C. § 7-204(a) (AM. L. INST. & UNIF. L. COMM'N 2022).

330. Fletcher v. U-Haul Co. of Ariz., No. 07-cv-01193, 2009 U.S. Dist. LEXIS 135008, at *5 (D. Ariz. Mar. 5, 2009).

331. Huddleston v. United States, 415 U.S. 814, 819 (1974).

332. *Carpenter v. United States*, 138 S. Ct. 2206, 2268 (2018) (Gorsuch, J., dissenting).

333. Burns v. State, 128 N.W. 987, 990 (Wis. 1910); STORY, *supra* note 325, at 62-66.

334. D'Onfro, *supra* note 13, at 108-09; Richard H. Helmholtz, *Bailment Theories and the Liability of Bailees: The Elusive Uniform Standard of Reasonable Care*, 41 KAN. L. REV. 97, 98 (1992).

335. Justice Gorsuch's discussion of bailment has inspired many student notes. *E.g.*, Jeremy M. Hall, Comment, *Bailment Law as Part of a Property-Based Fourth Amendment Framework*, 28 GEO. MASON L. REV. 481 (2020); Aaron J. Gold, Note, *Obscured by Clouds: The Fourth Amendment and Searching Cloud Storage Accounts Through Locally Installed Software*, 56 WM. & MARY L. REV. 2321 (2015); Eric Johnson, Note, *Lost in the Cloud: Cloud Storage, Privacy, and Suggestions for Protecting Users' Data*, 69 STAN. L. REV. 867 (2017). For additional commentary, see Ian Samuel, *Carpenter and the Property Vocabulary*, HARV. L. REV. BLOG (Dec. 8, 2017), <https://blog.harvardlawreview.org/carpenter-and-the-property-vocabulary> [https://perma.cc/ZX68-FMHY].

336. *Carpenter*, 138 S. Ct. at 2268.

right to search the letters “except as to their outward form and weight.”³³⁷ Notwithstanding the bailment to the Postal Service, the Fourth Amendment protects the letters “as if they were retained by the parties forwarding them in their own domiciles.”³³⁸

That bailment would not expose a bailor to governmental search is consistent with the common law’s treatment of bailees who “break bulk” – open bailed packages – without permission of the bailor. At common law, breaking bulk was required for a bailee to be guilty of larceny. Blackstone explained that failure to deliver goods is not larceny; larceny only occurs “if the carrier opens a bale, or pack of goods, or pierces a vessel of wine, and takes away a part thereof.”³³⁹ The significance is that common-law bailees had no inherent right to unpack goods entrusted to them. The bailor retained a limited right to exclude the bailee, despite the bailee otherwise having possession of the goods.

The bailee being in possession of the goods yet potentially still subject to the bailor’s right to exclude has important implications for analyzing Fourth Amendment searches under a general-law approach. As a baseline rule, because the bailee has the right to exclude – and often a duty to exclude – third parties from the bailed goods,³⁴⁰ police may not search the goods absent a warrant. That is, the right of the police freely to search the goods terminates where the public’s right to do the same ends. Police would need no warrant to view a painting that an heiress has bailed to a museum for public exhibition, but they would need a warrant to view the same painting bailed to a secured storage facility. Rather than focusing on the right to exclude, current third-party doctrine has courts examining whether the bailor expected privacy notwithstanding the bailment.³⁴¹ Under current doctrine, courts have found that bailing clothing to a dry cleaner effectively exposes it to the public, therefore ending its Fourth Amendment protection.³⁴² By contrast, police do need a warrant to search goods bailed in sealed

337. *Id.* at 2269 (citing *Ex parte Jackson*, 96 U.S. 727, 733 (1877)).

338. *Id.*

339. 4 WILLIAM BLACKSTONE, COMMENTARIES *230. In the late nineteenth century, states began amending their laws to eliminate the element of breaking bulk and to hold bailees liable for any conversion for personal use. See *Burns v. State*, 128 N.W. 987, 991 (Wis. 1910); *In re Adoption of the 2005 Revisions to the Okla. Unif. Jury Instructions*, 119 P.3d 753, 762 (Okla. Crim. App. 2005) (mem.). Before these revisions, bailees were only guilty of embezzlement (if anything) when they appropriated the whole of the bailment without breaking bulk.

340. See, e.g., *United States v. Perea*, 986 F.2d 633, 640 (2d Cir. 1993) (“A bailee has the right – and often the duty – to exclude others from possession of the property entrusted to him.”).

341. 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 8.6(a) (6th ed. 2021); *Rawlings v. Kentucky*, 448 U.S. 98, 106 (1980) (explaining that with respect to property held by a bailee, the relevant inquiry is “whether governmental officials violated any legitimate expectation of privacy held by [the bailor]”).

342. E.g., *Clarke v. Neil*, 427 F.2d 1322, 1325 (6th Cir. 1970).

containers because the seal manifests the owner's intent to keep the goods private.³⁴³ Likewise, bailment of a bag to a store clerk mandated by store policy does not terminate the bag owner's Fourth Amendment protection against warrantless searches of the bag.³⁴⁴

Under doctrine from the middle of the twentieth century, the bailee's right to search the bailed property—to break bulk or to use the property generally—determines whether the bailee can consent to a search on behalf of the bailor.³⁴⁵ Thus, in *Corngold v. United States*, an en banc Ninth Circuit overruled its own precedent to hold that an airline could not consent to the search of a parcel when the owner had only consented to examination by the carrier itself.³⁴⁶ Other circuits found that a bailee who has general use and control of property may consent to a search,³⁴⁷ at least to the extent that the search is coterminous with the bailee's authorized use.³⁴⁸ In the context of postal inspections, the Supreme Court distinguished “what is open to inspection, such as newspapers, magazines, pamphlets, and other printed matter, purposely left in a condition to be examined,” from “letters, and sealed packages,” the latter being subject to search only under a warrant.³⁴⁹ The Court reasoned that “[t]he constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be.”³⁵⁰ In other words, although the papers had been delivered to a branch of the government, the government was not entitled to search

343. See, e.g., *Corngold v. United States*, 367 F.2d 1, 7 (9th Cir. 1966) (holding that a bailee cannot consent to the search of packages bailed to an airline); *United States v. James*, 353 F.3d 606, 614 (8th Cir. 2003) (holding that a bailee cannot consent to the search of sealed envelopes marked “confidential” and “private”); see also *United States v. Wright*, 838 F.3d 880, 886 (7th Cir. 2016) (“Like a lock on a briefcase or storage trunk, password protection on a computer demonstrates the owner’s affirmative intent to limit access to its contents.”).

344. *United States v. Most*, 876 F.2d 191, 199 (D.C. Cir. 1989).

345. 4 LAFAVE, *supra* note 341, § 8.6(a).

346. 367 F.2d 1, 7–8 (9th Cir. 1966). *But see* *United States v. Diggs*, 544 F.2d 116, 120 (3d Cir. 1976) (holding that innocent bailees who have been made unwilling accomplices in illegal activity may consent to a search); *United States v. Botsch*, 364 F.2d 542, 548 (2d Cir. 1966) (same).

347. *United States v. Eldridge*, 302 F.2d 463, 465–66 (4th Cir. 1962) (holding that someone who borrowed a friend’s car may consent to a search).

348. *Id.* at 466 (“Had the police done more than look with [the bailee’s] consent into the trunk and observe what was readily visible and not covered over or concealed in package or wrapper—if, for example, they had explored under the floor carpeting or behind the upholstery—we might have a different case.”).

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

350. *Id.*; see also *United States v. Rose*, 3 F.4th 722, 728 (4th Cir. 2021) (“Both senders and recipients of letters and other sealed packages ordinarily have a legitimate expectation of privacy in those

the papers because the sender had excluded the government from the contents of the papers.

After *Katz*, the Court strayed from the doctrine's connection to common law, focusing only on whether the search violated the defendant's reasonable expectation of privacy.³⁵¹ Thus, in *Rawlings v. Kentucky*, the Supreme Court held that police did not violate a defendant's Fourth Amendment rights when they searched his companion's purse, in which he had stashed drugs, because the defendant had no reasonable expectation of privacy in the purse.³⁵² To reach this conclusion, the Court reiterated *Rakas*'s pronouncement that "arcane distinctions developed in property and tort law . . . ought not to control" Fourth Amendment analysis.³⁵³ But there are no clear benefits to replacing property's ancient, bright-line rules with privacy analysis, especially given the Fourth Amendment's preoccupation with *security* in various forms of property.

A general-law approach to a fact pattern like *Rawlings* would ask whether the defendant retained his right to exclude others from the drugs even though they were stashed in the friend's purse. Bailing the property to a friend neither made the property available to the public nor empowered the friend to do anything with the property other than keep and return it to the defendant upon request. The friend could consent to a search of her purse, but this consent would not extend to the defendant's property in her purse. Consequently, officers would be free to find any drugs that the defendant stored loose in the purse, but they could not open any container belonging to the defendant that the friend did not have permission to open.

Bailment doctrine also simplifies the question of who can consent to a search. Modern courts talk about whether the bailee had "actual" or "apparent" authority over the item searched.³⁵⁴ Thus, where a defendant left some of his clothing mixed with his cousin's clothing in a duffel bag at the cousin's house, the cousin

items even after they have been placed in the mail."); *United States v. Van Leeuwen*, 397 U.S. 249, 251 (1970) ("It has long been held that first-class mail such as letters and sealed packages . . . is free from inspection by postal authorities, except in the manner provided by the Fourth Amendment.").

351. See *Rawlings v. Kentucky*, 448 U.S. 98, 104-06 (1980); see also, e.g., *Oliver v. United States*, 466 U.S. 170, 183 (1984) ("The law of trespass . . . forbids intrusions upon land that the Fourth Amendment would not proscribe . . . [because] trespass law extends to instances where the exercise of the right to exclude vindicates no legitimate privacy interest.").

352. 448 U.S. at 104-06.

353. *Rakas v. Illinois*, 439 U.S. 128, 143 (1978).

354. E.g., *United States v. Chavez Loya*, 528 F.3d 546, 554 (8th Cir. 2008); *United States v. Andrus*, 483 F.3d 711, 716 (10th Cir. 2007).

could consent to a search of the duffel bag and therefore of the defendant's clothing.³⁵⁵ Similarly, courts have allowed the driver of a borrowed car to consent to a search because the driver has "immediate possession of and control over the vehicle."³⁵⁶ This control gives the driver actual authority over the vehicle and the bailor is said to have assumed the risk that the bailee may consent to a search.³⁵⁷ This assumption-of-risk analysis is analytically consistent with case law turning on a defendant's reasonable expectation of privacy.

But some contemporary case law still turns on traditional property-law bailment concepts rather than the reasonable-expectation-of-privacy test. Although the cases are few and far between, it appears that where the bailee has a right to exclude the bailor, the bailor cannot consent to a search.³⁵⁸ Thus, bailors cannot begin tracking bailees after the bailment begins, but they may condition the bailment on allowing tracking. For example, in *United States v. Cheshire*, the Fifth Circuit found that a tracker installed by an airplane owner before renting out the airplane was within the third-party consent exception to the warrant requirement.³⁵⁹ Although courts regularly express skepticism of the minutia of property doctrine, cases like *Cheshire* use analysis that tracks property concepts. Similarly, in *Hardy v. Commonwealth*, the Virginia Court of Appeals held that a search did not violate a defendant's rights where the bailee of a car declined to consent to a search but the bailor did consent.³⁶⁰ The court reasoned that the owner-bailor had standing to consent to the search because, under the terms of the bailment, he was "entitled to possession" at that moment.³⁶¹

Under the general-law approach, much of the doctrine about when bailees and bailors could consent to a search would functionally remain the same, although it would rest more firmly on the details of the bailors' right to exclude rather than their expectations of privacy. It would, in other words, turn on those

355. *Frazier v. Cupp*, 394 U.S. 731, 740 (1969); *see also* *United States v. Matlock*, 415 U.S. 164, 169-71 (1974) (holding that "the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared").

356. *United States v. Eldridge*, 984 F.2d 943, 948 (8th Cir. 1993); *see also* *Byrd v. United States*, 138 S. Ct. 1518, 1527-28 (2018) (explaining that the party lawfully in possession of a vehicle controls the right to exclude others from the vehicle).

357. *Frazier*, 394 U.S. at 740; 4 LAFAVE, *supra* note 341, § 8.6(a).

358. 4 LAFAVE, *supra* note 341, § 8.6(b). Outside the employment context, there are few cases involving a bailor's consent to search property in a bailee's possession, but an analogous situation between landlords and tenants arises frequently. *See* *Chapman v. United States*, 365 U.S. 610, 616-18 (1961) (holding that a landlord cannot consent to the warrantless search of a tenant's home).

359. 569 F.2d 887, 889 (5th Cir. 1978).

360. 440 S.E.2d 434, 437 (Va. Ct. App. 1994).

361. *Id.* (quoting *Anderson v. United States*, 399 F.2d 753, 756-57 (10th Cir. 1968)).

“arcane distinctions” that *Rawlings* and *Rakas* rejected. The general-law framework would tend to be more protective than existing doctrine insofar as it would eliminate the possibility that, under the third-party doctrine, merely bailing the property strips it of Fourth Amendment protections. It would also be more protective than a positive-law approach, in that statutes authorizing landlords and bailors to search property would not necessarily authorize warrantless searches. Instead, the analysis would turn on how the general law allocated the right to exclude among potential rights holders.

2. *Intangibles*

Applying bailment doctrine through the general law would also clarify when the Fourth Amendment requires law enforcement to secure a warrant before searching files stored in the cloud. Interpreting cloud storage as a bailment is consistent with Justice Gorsuch’s dissent in *Carpenter*, where he argued that the “ancient principles” of bailment—especially its protection of letters bailed to the government—“may help us address modern data cases too.”³⁶²

Although intangible, digital files should be understood as goods that can be delivered to and accepted by a bailee for safekeeping.³⁶³ To be sure, the service agreement between the two parties might attempt to disclaim the responsibilities traditionally born by bailees, but at common law such provisions have no impact on whether a relationship creates a bailment.³⁶⁴ If files have the same status in the law as tangible goods, contract may determine the contours of the bailor-bailee relationship but not waive liability for negligence created by the duties that lie at the core of the bailment relationship.³⁶⁵ Because the bailee has an obligation to exclude the public from viewing the file, and, in the case of encrypted storage, may themselves be excluded from viewing the file, the general-law framework would protect the contents of files in cloud storage from warrantless searches.³⁶⁶

362. *Carpenter v. United States*, 138 S. Ct. 2206, 2269 (2018) (Gorsuch, J., dissenting).

363. See D’Onfro, *supra* note 13, at 120-22; see also Donohue, *supra* note 324, at 396-400 (arguing digital records can be regarded as a “bailment upon consideration”).

364. See generally D’Onfro, *supra* note 13, at 134-39 (discussing the duties of bailees and bailees’ limited ability to disclaim those duties and their liability).

365. See *Griffin v. Nationwide Moving & Storage Co.*, 446 A.2d 799, 804-05 (Conn. 1982) (finding that parties cannot disclaim the bailment relationship by contract); *Saribekyan v. Bank of Am., N.A.*, No. B285607, 2020 Cal. App. Unpub. LEXIS 25, at *6, *24-25 (Cal. Ct. App. Jan. 3, 2020) (same); *Am. Nursery Prods., Inc. v. Indian Wells Orchards*, 797 P.2d 477, 485 (Wash. 1990) (finding the same for professional bailments).

366. Cf. *Kerr*, *supra* note 250, at 1029-31 (arguing that Fourth Amendment protections should extend to the contents of digital communications).

If cloud storage creates a bailment for general-law purposes, then law enforcement would generally need a warrant to obtain and search such files. At present, the third-party doctrine threatens to deny such files Fourth Amendment protection because they have been “disclosed” to the cloud-storage companies. This disclosure is irrelevant under a general-law framework. Instead, the analysis would look to whether the files’ owners had waived or abandoned their right to exclude the public from the files. For example, if law enforcement wanted to search a suspect’s Gmail account to find information about a crime, they would need a warrant to do so even though the emails exist on servers that Google maintains. This result would not radically alter the state of the law, as many courts recognize that email users have a reasonable expectation of privacy in the contents of their emails.³⁶⁷ Applying bailment via the general law produces the same outcome but simplifies the analysis: courts only need to know that there is a bailment and can skip thornier questions about how much privacy the email-service user expected.

Bailment doctrine would also clarify whether, say, Google could consent to the search of a suspect’s Gmail account. The general law would have two questions to decide. The first would be whether a bailment relationship was waivable by contract. While the common law tends to treat bailment status as mandatory with respect to *tangibles*, courts applying the general law to intangibles would need to determine whether the same rule should apply. If a bailment relationship existed, the second question would be whether the bailee has authority to consent to law-enforcement access to the bailor’s data. A court applying the general law could conclude that cloud-storage companies lack authority to consent to a search of the files without the bailor’s permission to do so. Allowing the cloud-storage company to search the files for its own purposes need not be understood as creating consent for searches related to law enforcement.³⁶⁸

By applying bailment and other private-law doctrines to intangibles, federal courts using a general-law approach would make law in an area with little state-court precedent to reference. To be sure, state law would control any questions of civil liability between bailor and bailee. Today, state courts have few, if any, opportunities to consider these questions because the contracts between bailors and bailees keep disputes out of court. But under the general-law approach, federal courts need not wait for state-court precedent. Nor must they follow it if they determine that state courts are out of sync with the general law. Indeed, if federal courts are the only courts drawing well-litigated cases on highly technical

367. *E.g.*, *United States v. Warshak*, 631 F.3d 266, 288 (6th Cir. 2010); *United States v. Ali*, 870 F. Supp. 2d 10, 39 n.39 (D.D.C. 2012) (quoting *United States v. Lucas*, 640 F.3d 168, 178 (6th Cir. 2011)); *United States v. Bode*, No. 12-158, 2013 U.S. Dist. LEXIS 118627, at *51-53 (D. Md. Aug. 21, 2013).

368. *See Corngold v. United States*, 367 F.2d 1, 7-8 (9th Cir. 1966).

issues, the federal courts might be particularly well situated to announce the general law without reference to state-court precedent.

D. Privacy Torts

Privacy torts also provide fertile ground for the general-law approach.³⁶⁹ Although privacy rights in the United States are dispersed among federal statutes protecting children on the internet,³⁷⁰ students,³⁷¹ certain medical records,³⁷² and some financial data,³⁷³ along with a patchwork of state laws, there is an underappreciated common law of privacy that is more than a century old.³⁷⁴ To be sure, the common law of privacy is stunted: it emerged just as common-law courts became more likely to wait for state legislatures to respond to emerging technologies. Arbitration, liability waivers, and federal diversity jurisdiction severely limit the number of privacy-related cases that state common-law courts decide.³⁷⁵ Unsurprisingly, the United States lacks a dominant theory of privacy.³⁷⁶ Most privacy laws instead trace their origins to other doctrines such as civil rights,³⁷⁷ consumer protection,³⁷⁸ and property.³⁷⁹ Still, there is some content in the common law of privacy, and when combined with existing privacy statutes, there is ample evidence from which courts can find a general law of privacy.

That law should be understood as an expansion of the general law of trespass—that is, law guarding the right to exclude, especially the right to exclude

369. See Note, *supra* note 5, at 1641 (explaining how the Fourth Amendment could draw on privacy torts).

370. Children’s Online Privacy Protection Act (COPPA), 15 U.S.C. §§ 6501-6506 (2018).

371. Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. § 1232g (2018).

372. Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule, 45 C.F.R. pts. 160, 164(A), 164(E) (2021).

373. Bank Secrecy Act (BSA), Pub. L. No. 91-508, 84 Stat. 1114 (1970) (codified in scattered sections of 12 U.S.C. and 31 U.S.C.).

374. Warren & Brandeis, *supra* note 219, at 198-99.

375. See generally Martins et al., *supra* note 24 (explaining how these factors are thwarting the development of the common law).

376. See Pamela Samuelson, *Privacy as Intellectual Property*, 52 STAN. L. REV. 1125, 1127-28 (2000).

377. E.g., Massachusetts Civil Rights Act, MASS. GEN. LAWS ch. 12, §§ 11H-11I (2022).

378. CAL. CIV. CODE § 1798.100 (West 2022) (effective Jan. 1, 2023).

379. See, e.g., Right of Privacy, MASS. GEN. LAWS ch. 214, § 1B (2022); *Bignami v. Serrano*, No. 18 Misc. 000323, 2020 WL 2257312, at *14 (Mass. Land Ct. May 7, 2020) (interpreting violations of the Massachusetts privacy statute as a violation of property rights); see also JENNIFER E. ROTHMAN, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD* 48 (2018) (explaining the property origins of privacy and right-of-publicity claims).

from houses, papers, and effects. Since 1890, the common law of torts has slowly recognized “the right to be let alone” in many jurisdictions.³⁸⁰ Although these privacy rights are no less part of the common law than traditional actions in trespass, courts have neglected them in shaping Fourth Amendment doctrine. This is a mistake. Common-law-type privacy actions are, as Warren and Brandeis recognized, an essential complement to trespass made necessary by the evolving economy.³⁸¹ The same changes that inspired the emergence of these actions in the positive law make them necessary in the Fourth Amendment.

A general-law approach would empower courts to dig deep into the private law to create bright-line rules around privacy rights for Fourth Amendment purposes. Unlike modern, semicodified private law, the general law is not burdened by the silos of property, tort, or privacy, but is its own cohesive whole. And where a state common-law court might wait to update doctrine for changing technology out of deference to the legislature, a court applying general law faces fewer such limitations.

The *Restatement (Second) of Torts* divides invasions of the right of privacy into “four distinct wrongs”³⁸²: intrusion upon seclusion,³⁸³ appropriation of name or likeness,³⁸⁴ publicity given to private life,³⁸⁵ and publicity placing a person in false light.³⁸⁶ As even the Restatement acknowledges, however, these categories sometimes overlap.³⁸⁷

1. *Intrusion on Seclusion*

The first category, intrusion on seclusion, is particularly useful here because it often involves a straightforward violation of the right to exclude. Under the *Restatement*, “one who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.”³⁸⁸ The comments clarify that the intrusion “may also be by the use of the defendant’s senses, with or without mechanical aids, to oversee or overhear the plaintiff’s private affairs, as by looking into his

380. RESTATEMENT (SECOND) OF TORTS § 652A cmt. a (AM. L. INST. 1977).

381. Warren & Brandeis, *supra* note 219, at 193-97.

382. RESTATEMENT (SECOND) OF TORTS § 652A cmt. b (AM. L. INST. 1977).

383. *Id.* § 652B.

384. *Id.* § 652C.

385. *Id.* § 652D.

386. *Id.* § 652E.

387. *Id.* § 652A cmt. d.

388. *Id.* § 652B.

upstairs windows with binoculars or tapping his telephone wires.”³⁸⁹ As in traditional actions in trespass, liability stems from the intrusion itself, not injury caused by the intrusion.³⁹⁰ One state court has explained that “[t]he right of privacy is embraced within the absolute rights of personal security and personal liberty,” with “personal liberty” including “not only freedom from physical restraint, but also the right ‘to be let alone’; to determine one’s mode of life, whether it shall be a life of publicity or of privacy.”³⁹¹

Under this view, a violation of the right to privacy could be seen as a threat to the security of the “person” for Fourth Amendment purposes. It thus could support *Katz*’s holding that the Fourth Amendment protects against wiretapping, notwithstanding the lack of any physical intrusion.³⁹² But another way to view wiretapping is as an invasion of a person’s “papers.” The telephone and later technologies are successors of the letter—the quintessential paper that receives a high level of Fourth Amendment protection. Through the process of constitutional “translation,”³⁹³ courts could conclude that “papers” (or “effects”) should be construed to extend to various forms of electronic communication. The general-law approach could take either view.

Bugs,³⁹⁴ video cameras, heat sensors,³⁹⁵ and other wall-penetrating technology can easily be understood as intrusions into “houses.” Courts have found that systemically spying through the windows of another’s home is an intrusion on seclusion, even if the viewer has a right to be investigating the inhabitants of the

389. *Id.* at cmt. b.

390. *See id.*; *see also* *Hamberger v. Eastman*, 206 A.2d 239, 242 (N.H. 1964) (permitting a suit for invasion of privacy where there was no allegation that the information learned from bugging the plaintiff’s bedroom was published).

391. *McDaniel v. Atlanta Coca-Cola Bottling Co.*, 2 S.E.2d 810, 816 (Ga. Ct. App. 1939) (quoting *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 69 (Ga. 1905)).

392. *See Katz v. United States*, 389 U.S. 347, 353 (1967).

393. *See generally* Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1166-81 (1993) (arguing that interpretive fidelity requires tracking changes in text, as well as “changes in the background context, justifying changed readings as necessary translations to preserve constitutional meaning in different interpretive contexts”).

394. *Roach v. Harper*, 105 S.E.2d 564, 568 (W. Va. 1958) (holding that landlords violate their tenants’ privacy when they bug their apartments).

395. Under this analysis, *Kyllo v. United States*, which emphasized the fact that thermal-imaging devices were not in general public use, would remain good law. 533 U.S. 27, 34, 40 (2001). However, under a general-law framework, a court would perhaps broaden the holding by focusing more on the intrusion itself, though general public use could be relevant to social customs.

house in other ways.³⁹⁶ Recent case law from Massachusetts is illustrative. In *Bignami v. Serrano*, two homes in the tony suburb of Brookline, Massachusetts, shared a driveway, each having an easement to use it.³⁹⁷ After the neighbors' disagreements about use of the driveway grew into a white-hot dispute, one set of homeowners set up video cameras to constantly record the shared driveway. The court found that, whatever right the homeowners might have to record their own property, their recording of their neighbors' easement interfered with the neighbors' use and enjoyment of the property.³⁹⁸ Recording children in the driveway raised additional privacy concerns.³⁹⁹ In Massachusetts, video surveillance on otherwise inaccessible private property is an "intrusion on solitude" and a "violation of a person's interest in being left alone."⁴⁰⁰

Similarly, in *Polay v. McMahon*, the Massachusetts Supreme Judicial Court upheld a judgment against a defendant who pointed cameras to record the interior of his neighbors' home.⁴⁰¹ The court balanced the alleged need for the intrusion against its harms, recognizing that some observation by one's neighbors is inevitable in modern society. Nevertheless, the court found the systematic recording impermissible because "even where an individual's conduct is observable by the public, the individual still may possess a reasonable expectation of privacy against the use of electronic surveillance that monitors and records such conduct for a continuous and extended duration."⁴⁰²

The question of when recordings of publicly visible spaces become impermissible searches is unsettled under current Fourth Amendment doctrine. Lower courts have recently faced a spate of cases requiring them to decide whether cameras mounted on utility poles conduct a "search" when they are intentionally

396. See, e.g., *Souder v. Pendleton Detectives, Inc.*, 88 So.2d 716, 717-18 (La. Ct. App. 1956); see also *Florida v. Jardines*, 569 U.S. 1, 12-16 (2013) (Kagan, J., concurring) (noting that police officers must obtain a warrant to bring a drug-sniffing dog to a homeowner's door, even though police officers are free to approach the same door by themselves).

397. No. 18 Misc. 000323, 2020 WL 2257312, at *1 (Mass. Land Ct. May 7, 2020).

398. *Id.* at *14.

399. *Id.*

400. *Id.* at *15. The court reasoned that it had the authority to look to the common law and statutory law broadly to fill in the details of the otherwise very broad Massachusetts privacy statute "on a case-by-case basis, by balancing relevant factors . . . and by considering prevailing societal values." *Id.* (quoting *Schlesinger v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 567 N.E.2d 912, 915 (Mass. 1991)).

401. 10 N.E.3d 1122, 1131-32 (Mass. 2014).

402. *Id.* at 1127.

mounted to record the activity on private property, often over an extended period.⁴⁰³ Normally, law enforcement does not “search” when they observe things in public view.⁴⁰⁴ In these cases, technological advances have expanded officers’ capacity to observe their targets, both in duration and in vantage point.⁴⁰⁵ If this expanded capacity is a problem, courts need to determine when recording from public property onto private property becomes impermissible. As Kerr explains, “you could say that their use is always a search, [b]ut then you have to figure out what the constitutional definition of ‘pole camera’ is and what makes it different from other cameras.”⁴⁰⁶ Rather than grapple with that question, some federal courts of appeals have held that pole cameras pose no Fourth Amendment problems.⁴⁰⁷

For example, in *United States v. Houston*, the Sixth Circuit held that ten weeks of recording from a pole camera “did not violate [the resident of a farm’s] reasonable expectations of privacy because the camera recorded the same view of the farm as that enjoyed by passersby on public roads.”⁴⁰⁸ The length of the surveillance was irrelevant “because the Fourth Amendment does not punish law enforcement for using technology to more efficiently conduct their investigations.”⁴⁰⁹ The Sixth Circuit relied on *California v. Ciraolo*, which held that aerial observations of a defendant’s curtilage required no warrant because the Fourth Amendment does not “preclude an officer’s observations from a public vantage

403. Compare *United States v. Tuggle*, 4 F.4th 505, 513 (7th Cir. 2021) (holding that pole cameras do not constitute a “search” for Fourth Amendment purposes), and *United States v. Bucci*, 582 F.3d 108, 116 (1st Cir. 2009) (holding that there was no Fourth Amendment violation because the plaintiff “failed to establish either a subjective or an objective expectation of privacy in the front of his home, as viewed by the camera”), with *United States v. Cuevas-Sanchez*, 821 F.2d 248, 251 (5th Cir. 1987) (holding that the “government’s actions . . . qualify as a search” under the Fourth Amendment).

404. See *Arizona v. Hicks*, 480 U.S. 321, 326 (1987).

405. See Recent Case, *United States v. Tuggle*, 4 F.4th 505 (7th Cir. 2021), 135 HARV. L. REV. 928, 928 (2022); Dana Khabbaz, *Unmanned Stakeouts: Pole-Camera Surveillance and Privacy After the Tuggle Cert Denial*, 132 YALE L.J.F. 105, 107 (2022); Aparna Bhattacharya, *The Impact of Carpenter v. United States on Digital Age Technologies*, 29 S. CAL. INTERDISC. L.J. 489, 502 (2020).

406. @OrinKerr, TWITTER (Feb. 7, 2022, 4:22 PM ET), <https://twitter.com/OrinKerr/status/1490798204087666435?s=20&t=7nsOF5dCbuvGiD4qs3a48w> [<https://perma.cc/7Y9T-E8QK>].

407. See, e.g., *Bucci*, 582 F.3d at 116. When the en banc First Circuit was confronted with the question of whether to reconsider *Bucci*, it split evenly. See *United States v. Moore-Bush*, 36 F.4th 320, 321 (1st Cir. 2022) (en banc) (Barron, C.J., Thompson & Kayatta, JJ., concurring) (arguing that *Bucci* should be overruled); *id.* at 364 (Lynch, Howard & Gelpí, JJ., concurring) (arguing that *Bucci* should be retained).

408. 813 F.3d 282, 285 (6th Cir. 2016).

409. *Id.* at 288.

point where he has a right to be and which renders the activities clearly visible.”⁴¹⁰ The *Ciraolo* Court deployed this language to support its conclusion that the defendant’s efforts to conceal his space were unavailing.⁴¹¹

Ciraolo’s logic is maddening. Without looking to property doctrine, how do we know that the police have a right to conduct aerial surveillance? Property doctrine tells people where they are allowed to be. The *Ciraolo* Court argued that “[i]n an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet.”⁴¹² Clearly, altitude matters. That low overflights are much more intrusive than commercial flights has prompted the American Law Institute to direct the drafters of the forthcoming *Restatement (Third) of Property* to grapple with the question of when drones commit trespass.⁴¹³ Moreover, it would be downright silly to have a doctrine that prohibits police entering the curtilage to peer over a fence but authorizes them to launch a drone over that same fence.⁴¹⁴ There are several doctrinal strands here that desperately need to be untangled.

A general-law approach would do just that. On facts such as those in *Ciraolo* or *Houston*, a court would first look to see if there was a traditional trespass against the defendant’s right to exclude. Finding no physical invasion, the court could then ask whether an intrusion on seclusion nevertheless occurred. This analysis would look like that in *Polay* and *Bignami*, which held that systemically recording one’s neighbors is an invasion of their privacy even if the neighbors’ activities are viewable from beyond the property line.

2. *Public Disclosure of Private Facts*

The tort of public disclosure of private facts can also illuminate the Fourth Amendment. According to the Restatement,

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.⁴¹⁵

410. *Id.* (quoting *California v. Ciraolo*, 476 U.S. 207, 213 (1986)).

411. *California v. Ciraolo*, 476 U.S. 207, 213 (1986).

412. *Id.* at 215.

413. *See Torts of the Future: Drones*, *supra* note 241, at 25.

414. *Cf. United States v. Cuevas-Sanchez*, 821 F.2d 248, 251 (5th Cir. 1987) (holding that the use of a camera to peer over a fence is a search).

415. RESTATEMENT (SECOND) OF TORTS § 652D (AM. L. INST. 1977).

Courts proceed cautiously in this space because there is a First Amendment right to publish publicly available information.⁴¹⁶ Still, parties who disclose facts that are not publicly available may be liable for invasion of privacy alongside other statutory violations.⁴¹⁷

Here, statutory law, insofar as it highlights particularly sensitive topics (for example, health information), might constitute evidence of the general law. And if, for example, disclosure of genetic information is a violation of the general law, a general-law approach would conclude that law enforcement would need a warrant to obtain and use such information. This could be used as an argument against *Maryland v. King*, where the Court held that obtaining a suspect's cheek swab for DNA during booking procedures was not a violation of his Fourth Amendment rights.⁴¹⁸

Because *King* involved a physical intrusion, more traditional common-law principles could support a ruling for the defendant. But privacy concepts would be necessary in situations involving improper usage and disclosure of genetic information. For example, a San Francisco woman was recently prosecuted because crime-scene DNA matched DNA that the government had previously collected from her rape kit when she was a victim of sexual assault.⁴¹⁹ While she arguably consented to the collection of her DNA in the context of finding and prosecuting her rapist, it is doubtful that that consent extended to indefinite use and disclosure for other purposes.

The general law of public disclosure of private facts might also suggest reconsidering *United States v. Miller*.⁴²⁰ There, the Court held that defendants have no reasonable expectation of privacy in their bank records.⁴²¹ Today, however, positive law largely prohibits the disclosure of such financial information. And at common law, nonnewsworthy disclosure of financial information has been understood to violate the right to privacy.⁴²² Moreover, *Miller*, we would posit,

416. See *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 494-95 (1975).

417. See, e.g., *Trammell v. Citizens News Co.*, 148 S.W.2d 708, 708, 710 (Ky. 1941) (finding that the plaintiff stated a cause of action for invasion of privacy where a newspaper published the plaintiff's outstanding grocery debt without the debt being a matter of public concern).

418. 569 U.S. 435, 460-61 (2013).

419. Azi Paybarah, *Victim's Rape Kit Was Used to Identify Her as a Suspect in Another Case*, N.Y. TIMES (Feb. 15, 2022), <https://www.nytimes.com/2022/02/15/us/san-francisco-police-rape-kit-dna.html> [<https://perma.cc/3RXX-A3VJ>].

420. 425 U.S. 435 (1976).

421. *Id.* at 441-43.

422. See, e.g., *Trammell*, 148 S.W.2d at 710.

strongly contravenes most people's actual expectations about privacy.⁴²³ A court applying the general law could consider all these data points as evidence that the disclosure of banking information without a warrant violates general law today. This example shows the general-law approach's superiority to *Katz* even when considering the very interest that *Katz* itself sought to protect—privacy expectations.

The general-law approach need not question the result in *Carpenter*, but it would suggest different reasoning. A court could treat the government's acquisition of cell-site location information as an intrusion into the security in one's "person," or one could see it as an intrusion into one's "effects" (to wit, one's cellphone). The court would then ask whether publicly disclosing cell-site location data, thereby revealing the whereabouts of a person's cellphone at all times, would be highly offensive to a reasonable person. Here, the answer would almost certainly be yes: it is not our social custom to broadcast our location, and many people do in fact try to keep their addresses private. The next inquiry would be whether that information was somehow newsworthy, thus justifying its disclosure. Again, the answer would generally be no. Given a strong argument that public disclosure of private information about a person's movements obtained from their cellphone violates general law, a court applying our test should find that law enforcement has no right to access that information without a warrant.

It might be tempting for law enforcement to claim that they do not need a warrant for information such as cell-site location data on the theory that individuals have already waived their right of privacy in their contracts with their service provider. After all, the terms to which most consumers must consent as a condition for cellular and internet service permits service providers to use their data, including location and browsing data, for commercial purposes. But disclosure of information for a particular purpose, even a commercial one, is not the same as waiving all privacy interests in that information. The tort of public disclosure of private facts hinges on giving publicity to private information, not on whether that information was completely secret. For this reason, the privacy waivers in service contracts should not necessarily defeat the warrant requirement without some greater showing that the information sought was already public.

423. See, e.g., Tracey Maclin, *Justice Thurgood Marshall: Taking the Fourth Amendment Seriously*, 77 CORNELL L. REV. 723, 740-41 (1992) (noting "the outrage and indignation most people would feel" if their bank records were disclosed).

3. *Breach of Confidentiality*

The relatively new tort of breach of confidentiality could also provide useful guidance. Beginning in the 1980s, commentators noted that courts were increasingly recognizing “an adequate common law remedy for unconsented disclosures of personal information in breach of confidence,” separate from invasion of privacy.⁴²⁴ Many of these cases involved violations of professional duties of confidence such as those held by doctors, lawyers, and banks.⁴²⁵ The purposes of such confidentiality obligations include fostering candor,⁴²⁶ protecting the intimacy of the family,⁴²⁷ and guarding against embarrassment. These values align with those the Fourth Amendment seeks to protect.

Confidentiality, then, might provide an additional basis on which a court applying a general-law approach might reach a different result in a case like *Miller*. If general law recognizes that a bank has an obligation to keep information confidential, a government demand that the bank violate those constitutionality obligations would constitute an unreasonable search or seizure. A similar analysis would apply to information held by doctors, lawyers, and other professionals generally bound by confidentiality obligations as fiduciaries.

The common law of confidentiality is concededly nascent outside of the fiduciary context, so it is unclear how much guidance the general law here would provide in situations without a fiduciary relationship. The general-law approach would, however, empower courts to explicate and develop the law of confidentiality and, in so doing, they could protect privacy in ways that current doctrine does not.

E. Additional Issues

1. *Seizures of the Person*

A significant question is how our approach would deal with seizures of the person such as arrests or *Terry* stops. This issue is challenging. Although there is

424. See Alan B. Vickery, *Breach of Confidence: An Emerging Tort*, 82 COLUM. L. REV. 1426, 1426 (1982); G. Michael Harvey, *Confidentiality: A Measured Response to the Failure of Privacy*, 140 U. PA. L. REV. 2385, 2399 (1992).

425. See Harvey, *supra* note 424, at 2400; Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 GEO. L.J. 123, 157-58 (2007). The Supreme Court in *Florida Star v. B.J.F.* made the offhand suggestion that the government perhaps should compensate individuals when it wrongfully discloses information that those individuals “provided in confidence.” 491 U.S. 524, 538 (1989).

426. See Vickery, *supra* note 424, at 1427.

427. See Richards & Solove, *supra* note 425, at 134.

a rich common-law background governing the permissibility of arrests that pre-dates the Fourth Amendment, it is somewhat rare for courts to explicate the general law of seizures in recent times. That is because the rise of professionalized law enforcement means that “citizen’s arrests” by private actors are much less common than they were in a pre-1791 world, though such arrests are still legally authorized across the country.⁴²⁸

Why is this a problem for the general-law approach? The risk is that, in explicating the general law of seizures, a court would not look to the customs, practices, and expectations of society generally; it would merely make rules that in practice exclusively govern law enforcement. And that could lead to rules that are insufficiently protective of Fourth Amendment values. Part of the appeal of the general-law approach is that it asks courts to ground Fourth Amendment reasonableness in a source of law that governs society generally, rather than a set of ad hoc rules to govern policing.

This problem is not entirely unavoidable, although it deserves longer treatment than we are able to provide here. Nonetheless, we have some tentative thoughts on how to minimize the difficulty. First, there is a long-standing core of common-law rules governing arrests and seizures; that core should (as it currently does) serve as the foundation for the general-law rules governing seizures. And given limited guidance elsewhere in the law and in social practices, courts should change those rules only when they can provide strong reasons in support of their conclusion that conditions have changed, such that the general law has also changed. That is, in the contexts where there has been no opportunity for the general law to evolve since the Founding, the general-law approach may in practice turn on the content of 1791 common law more than it does elsewhere.

The Court’s approach in seizure cases, which often stress traditional common-law rules, is largely consistent with this suggested approach. *Atwater v. City of Lago Vista*,⁴²⁹ for example, refused to limit police power to make warrantless misdemeanor arrests. The Court stressed that its reading of the history suggested that the common law did not restrict the misdemeanor-arrest power. And it also looked at postratification evidence, such as state laws and the views of commentators.⁴³⁰ An inquiry that starts with historical background and looks for evidence of change is the essence of the general-law approach.

428. Some commentators see the persistence of citizen’s arrest laws as deeply concerning. See generally Chad Flanders, Raina Brooks, Jack Compton & Lyz Riley, *The Puzzling Persistence of Citizen’s Arrest Laws and the Need to Revisit Them*, 64 HOW. L.J. 161 (2020) (providing an overview of citizen’s arrest laws, critiquing them as having been hijacked in the name of white supremacy, and proposing some reforms).

429. 532 U.S. 318 (2001).

430. See *id.* at 343-45.

Terry v. Ohio,⁴³¹ which permits police to detain individuals for questioning based on “reasonable suspicion” rather than probable cause, might be seen as an exception. The Court certainly made no effort to justify its holding under common-law rules—a point that Justice Douglas stressed in his heated dissent.⁴³² Nonetheless, there *was* potential support to be found: as the Court has recognized elsewhere, the common law recognized the “rights of private persons to ‘arrest any suspicious night-walker, and detain him till he give a good account of himself.’”⁴³³ That rule might have been used to ground *Terry* in general law. But it might also suggest that *Terry* went too far: in his concurrence in *Minnesota v. Dickerson*, Justice Scalia suggested that this common-law background may justify *Terry* stops, but perhaps not *Terry* frisks.⁴³⁴

None of this is to say that *Atwater*, *Terry*, and other seizure cases are clearly correct. Instead, our modest claim is only that the general-law approach might provide guidance in such cases. Further development of the implications of the general-law approach for seizure cases must await future work.

2. *The Role of Warrants*

Having explained how the general-law approach would apply to various questions of the Fourth Amendment’s scope, we must also explain how warrants fit into our analysis. Under current doctrine, there is a general “warrant requirement” but also a number of “exceptions” where a warrant that would otherwise be necessary is not required.⁴³⁵ As noted earlier, the general-law approach understands the Warrant Clause differently. Rather than requiring warrants, it merely limits their use, as the effect of a warrant is to immunize an otherwise “unreasonable” search or seizure.

How does this make sense of existing doctrine, which permits police to search and seize without a warrant under various exceptions? As we see it, several so-called exceptions to the warrant requirement can be understood as situations where government conduct *does not violate the general law* in the first place. That is, such searches or conduct are not “unreasonable,” meaning there is no need for a warrant to immunize them. Consider the following examples.

431. 392 U.S. 1 (1968).

432. *See id.* at 37-39 (Douglas, J., dissenting).

433. *Hiibel v. Sixth Jud. Dist. Ct. of Nev., Humboldt Cnty.*, 542 U.S. 177, 183 (2004) (quoting 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN, § 6, at 130 (6th ed. 1787)).

434. 508 U.S. 366, 381 (1993) (Scalia, J., concurring). Sklansky questions Justice Scalia’s reading of the history. *See* Sklansky, *supra* note 26, at 1804-05.

435. *See Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2534 (2019).

First, the consent-search doctrine. The Court has held that an otherwise unreasonable, warrantless search may be permissible where someone with authority over the place or thing in question consents to the search.⁴³⁶ As described above, this doctrine is best understood within the boundaries of common law. Consent is a defense to trespass, which means that a consensual entry does not violate the general law. The trespass understanding also supports a controversial aspect of consent doctrine – namely, that police may rely on the consent of someone apparently authorized to give it, even if that person does not actually possess that authority (because, for example, she does not actually reside at the property).⁴³⁷ Under common-law rules of agency, third parties are generally entitled to rely on people acting with *apparent* – rather than *actual* – authority, suggesting that an apparent agent could consent to an entry by the would-be trespasser.⁴³⁸ The general law thus should be understood to permit consent searches.

Next, consider the exigent-circumstances doctrine. Police may invade an otherwise protected space if “exigencies of the situation” – such as the need to pursue a fleeing felon, to protect the public, or to prevent destruction of evidence – require it.⁴³⁹ Here, again, common-law principles provide strong support for such rules – for example, the familiar principle that necessity can justify entry that would otherwise be a trespass.⁴⁴⁰

Now consider the plain-view doctrine. When police have permission to be in a place, they may seize an item without a warrant if they have probable cause to believe it is evidence or contraband.⁴⁴¹ Here, too, this rule has strong general-law roots. For example, while it is normally trespass to enter the property of another without permission, there is a privilege to enter to retrieve one’s own property.⁴⁴² This privilege is nevertheless limited by the policy against self-help.⁴⁴³ In

436. See *United States v. Matlock*, 415 U.S. 164, 169–71 (1974).

437. See *Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990).

438. See RESTATEMENT (SECOND) OF AGENCY § 27 (1958) (explaining that third parties are entitled to rely on the actions of individuals with apparent authority).

439. *Mincey v. Arizona*, 437 U.S. 385, 394 (1978) (quoting *McDonald v. United States*, 335 U.S. 451, 456 (1948)).

440. See, e.g., *Ploof v. Putnam*, 75 A. 277, 278 (Vt. 1910).

441. See, e.g., *Arizona v. Hicks*, 480 U.S. 321, 327 (1987).

442. See, e.g., *Bliss v. Bos. Clear Water Co.*, No. 17 Misc. 000522, 2020 WL 1934397, at *12 (Mass. Land Ct. Apr. 21, 2020) (permitting retrieval of a lost dog).

443. See *State v. Yelovich*, 426 P.3d 723, 733 (Wash. 2018) (Wiggins, J., concurring) (“[T]he trend of modern law . . . has been to limit the circumstances in which individuals may engage in violent self-help . . .”).

situations where police seize property they have probable cause to believe is stolen, they can be seen as acting on behalf of the true owner, negating a trespass.⁴⁴⁴ The plain-view seizure of contraband can also be grounded in common-law property concepts.⁴⁴⁵

The search-incident-to-arrest exception, too, might find support in general law. *United States v. Robinson* pointed to poststratification historical sources to establish a tradition of permitting such searches, though it conceded that the record was “sketchy.”⁴⁴⁶ Along similar lines, consider the automobile exception, under which police may search a vehicle and its contents without a warrant so long as they have probable cause to believe it contains evidence of crime. In first recognizing this exception, the Court stressed a historical tradition in which customs officials were permitted to search boats and vehicles without a warrant for smuggled goods.⁴⁴⁷ The Court later sought to ground the exception in the “pervasive regulation of vehicles capable of traveling on the public highways.”⁴⁴⁸ Though the Court stressed this fact as relevant to drivers’ expectations of privacy, it could also bear on the customs and social understandings to which the general-law approach looks.

3. *Racialized Policing*

One of the most powerful critiques of contemporary Fourth Amendment doctrine is its utter failure to grapple with the reality of racialized policing, in which police often rely on racial profiling in determining investigatory targets.⁴⁴⁹ The Court in *Whren v. United States*,⁴⁵⁰ for example, held that a pretextual traffic stop does not violate the Fourth Amendment, regardless of the officer’s subjec-

444. See *Warden v. Hayden*, 387 U.S. 294, 306 n.11 (1967) (“At common law the Government did assert a superior property interest when it searched lawfully for stolen property . . .”).

445. See *id.* at 311 (Fortas, J., concurring).

446. 414 U.S. 218, 232 (1973).

447. See *Carroll v. United States*, 267 U.S. 132, 151 (1925).

448. *California v. Carney*, 471 U.S. 386, 392 (1985) (citing *Cady v. Dombrowski*, 413 U.S. 433, 440-41 (1973)).

449. See generally Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999) (addressing the constitutional and policy implications of racially motivated searches and seizures). See also Daniel S. Harawa, *Whitewashing the Fourth Amendment*, GEO. L.J. (forthcoming 2023) (on file with author).

450. 517 U.S. 806, 809-13 (1996).

tive motivations. Despite the opprobrium it has generated, *Whren* was surprisingly uncontroversial for the Court as it produced a 9-0 decision (although it has since been criticized by Justice Sotomayor in a dissent⁴⁵¹).

Given prevailing doctrinal approaches, the outcome in *Whren* is perhaps unsurprising. Devotees of *Katz* might struggle to justify a rule against pretextual searches and seizures. How does an officer's motivation bear on a person's expectations of privacy? Those who believe that the Fourth Amendment crystallizes 1791 law, too, might rest on the notion that there was no such antidiscrimination norm found in search-and-seizure law two centuries ago.

Can the general-law approach do better? Perhaps. In determining reasonableness, our approach permits courts to look to modern developments and conditions. Our approach also permits them to consider a wider range of considerations than a narrow focus on privacy. In determining whether there was an emerging general-law norm against discriminatory searches and seizures, a court could look to developing statutory law, norms, and social practices forbidding various forms of discrimination, racial and otherwise, by private parties. We do not attempt here to resolve whether the general-law approach would lead to a different result in *Whren*. But our approach at least provides courts with better tools for addressing the issue than do competing theories.

CONCLUSION

The general-law approach provides the best way to make sense of the Fourth Amendment. It offers an ideal balance between flexibility and constraint, giving judges the tools they need to resolve new questions without letting them shape law to their own whims. It has great promise in helping courts resolve many hard cases. With time, scholars and—we hope—courts can more fully work out the theory's implications for many Fourth Amendment questions. For example, to the extent the general law informs not merely the scope of substantive rights but also the proper *remedies* for violations of those rights, our theory could inform debates about the exclusionary rule and qualified immunity.

The general-law approach's benefits extend beyond the Fourth Amendment. Other areas of constitutional law might find a general-law approach helpful. Takings Clause doctrine, for example, might be understood as sometimes drawing on general-law property concepts to ensure that states cannot deprive individuals of rights by manipulating positive law. The private law, too, stands to

451. See *Utah v. Strieff*, 579 U.S. 232, 252 (2016) (Sotomayor, J., dissenting) (“Although many Americans have been stopped for speeding or jaywalking, few may realize how degrading a stop can be when the officer is looking for more. This Court has allowed an officer to stop you for whatever reason he wants—so long as he can point to a pretextual justification after the fact.” (citing *Whren*, 517 U.S. at 813)).

gain. Although state courts are the highest authority on questions of common law, they rarely hear certain common-law claims due to persistent access-to-justice problems, arbitration, and waiver.⁴⁵² Courts applying the general-law approach in Fourth Amendment cases could produce a rich font of new ideas waiting to be adopted—or, just as meaningfully, rejected—by state common-law courts.

In their seminal article, Warren and Brandeis argued that, for a man defending his privacy, “the common law provides him with [a weapon], forged in the slow fire of the centuries, and to-day fitly tempered to his hand.”⁴⁵³ More than a century later, that weapon is no less powerful. Wielded properly, it offers the best safeguard for the important values the Fourth Amendment seeks to protect.

452. See Samuel Issacharoff & Florencia Marotta-Wurgler, *The Hollowed Out Common Law*, 67 *UCLA L. REV.* 600, 621 (2020).

453. Warren & Brandeis, *supra* note 219, at 220.