IN DEFENSE OF *KATZ*: IN MEMORY OF PROFESSOR SHERRY COLB

Erwin Chemerinsky†

Professor Colb addressed issues of privacy and the Fourth Amendment in many of her articles. A key aspect of her scholarship focused on the appropriate test for determining what is a search under the Fourth Amendment. Her article—A World Without Privacy: Why Property Does Not Define the Limits of the Right Against Unreasonable Searches and Seizures—is particularly important now because of a possible shift in the Court away from a focus on privacy in determining what is a search.

In Carpenter v. United States, the Court, in a 5-4 decision, found that the police acquiring large amount of cellular location information is a search within the meaning of the Fourth Amendment. The Court applied the test from Katz v. United States and found an infringement of the reasonable expectation of privacy. Justice Thomas, in a dissenting opinion, wrote a scathing attack on Katz and called for it to be replaced by a focus solely on whether there is an invasion of property rights. Justice Gorsuch, too, called for use of a property-based approach.

The change in the composition of the Court since then, notably the replacement of Justice Ginsburg (who was in the majority) with Justice Barrett, raises the real possibility that Carpenter would come out differently today. That, in itself, is troubling in terms of protection of privacy from new technology. Even more disturbing is the likelihood that Justice Barrett, like the other originalist Justices, Thomas and Gorsuch, would adopt an approach to the Fourth Amendment that focuses just on whether there is an infringement of property rights.

Building on Professor Colb's analysis from several of her articles, I argue that the Court's approach in Katz is desirable and is the proper framework for Fourth Amendment analysis.

---

† Dean and Jesse H. Choper Distinguished Professor of Law, University of California, Berkeley School of Law. I want to thank Danhong Cao, Josh Cayetano, and Haleigh Cotton for their excellent research assistance. I was honored to be part of the symposium in memory of Sherry Colb at Rutgers Law School on September 29, 2023, and am grateful to the participants for the questions and suggestions.

The criticism of Katz, and the advocacy of a property approach, is based on an originalist and formalist approach to the Fourth Amendment that would be highly undesirable.

A focus on the reasonable expectation of privacy, as Professor Colb argued in What is a Search: Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy, would lead to a more robust Fourth Amendment and provide a desirable resolution of many issues that continue to arise.

INTRODUCTION

In the Fall of 1990, I received a call from Ninth Circuit Judge Stephen Reinhardt. He explained that he had a law clerk about to begin, Michael Dorf, whose partner was going to be a visiting student at the University of Southern California Law School where I was a professor. Reinhardt said that the problem was that Dorf's partner, Sherry Colb, grew up in New York and did not know how to drive. Reinhardt asked if I could give her a ride home some days. And so, for most school days that year, Mike would drive Sherry to the law school and I would give Sherry a ride home, which was sort of on my way home. Those car rides in Los Angeles gave us the chance for long conversations about law and life. Sherry was a student in my Federal Courts class that Fall and was brilliant, both in class discussions and on her exam.

This began a friendship that lasted for decades. The greatest joy in being a professor is seeing the success of my former students and I was thrilled to see Sherry's tremendous successes. Over twenty-five years ago, the Practising Law Institute in New York City asked me to put together and co-chair a Supreme Court review program each summer. I immediately asked Sherry and Mike to be part of it and every year

Sherry reviewed the criminal procedure cases. She was terrific: eloquent, incisive in her analysis, funny.

Sherry and I shared an interest in criminal procedure, a topic we both taught and wrote about. I therefore thought it appropriate to write this essay in her memory about a significant issue of the Fourth Amendment which Sherry addressed extensively in her scholarship: the standard for determining whether there is a search. A consistent theme in her scholarship was the importance of interpreting the Fourth Amendment to protect privacy. Indeed, she was prescient in seeing the need to defend the standard articulated by the Supreme Court in 1967 in *Katz v. United States*: there is a search if there is an invasion of the reasonable expectation of privacy.[1]

A relatively recent Supreme Court case—*United States v. Carpenter*[2]—reflects the importance of this approach to the Fourth Amendment. Timothy Carpenter was suspected of committing a series of armed robberies. The FBI went to his cell phone companies and got the cell phone tower records—the cell site location information—that revealed his location and his movements for 127 days. The FBI received this information without a warrant from a judge, though they had obtained a court order pursuant to the federal Stored Communications Act. The key difference is that probable cause, which is required for a warrant, is not needed under the Stored Communications Act. The cell tower information was crucial evidence used to convict him and sentence him to 116 years in prison.

Every time we use our cell phone—to send and receive calls or texts or emails or access the internet—it connects to cell towers and generates a record. The records—generated hundreds of times per day—include the precise GPS coordinates of each tower as well as the day and time the phone tried to connect to it. It is possible to determine our location at almost any point in time and track our movements through this information. The police constantly use this technology: in 2016, Verizon alone received over 265,000 requests for such cellular information from law enforcement agencies.[3]

The federal district court denied Carpenter's suppression motion and allowed the cellular location records to be used

---

1 389 U.S. 347, 347 (1967).

2 585 U.S. 296 (2018).

3 *See* VERIZON, TRANSPARENCY REPORT 2H 2016 2 (2016), https://www.verizon.com/about/sites/default/files/US-Transparency-Report-2H-2016.pdf [https://perma.cc/DH95-FULU].

as evidence against Carpenter.[4] The United States Court of Appeals for the Sixth Circuit affirmed.[5] The issue before the Supreme Court in *Carpenter v. United States* was whether the Fourth Amendment, which prohibits unreasonable searches and arrests, requires that the police obtain a warrant in order to access this information. The Court, in a 5-4 decision, reversed the lower courts and ruled in favor of Carpenter.[6] Chief Justice Roberts wrote the opinion for the Court, which was joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan. Each of the four dissenting justices—Kennedy, Thomas, Alito, and Gorsuch—wrote a separate opinion.

Chief Justice Roberts' opinion stressed the intrusion on privacy from accessing a person's cellular location information for a long period of time. He wrote:

> Mapping a cell phone's location over the course of 127 days provides an all-encompassing record of the holder's whereabouts. As with GPS information, the time-stamped data provides an intimate window into a person's life, revealing not only his particular movements, but through them his "familial, political, professional, religious, and sexual associations." These location records "hold for many Americans the 'privacies of life.'"[7]

The Court analogized this to its holding a few years earlier in *Riley v. California*,[8] which held that police cannot look at the content of a person's cell phone as part of a search incident to arrest unless there is a warrant or emergency circumstances that justify a warrantless search. In *Riley*, in an opinion also by Chief Justice Roberts, the Court stressed the privacy interests that people have in the content of their cell phones. Virtually everyone has a cell phone and on it we store deeply personal information.[9]

The government's primary argument to the Supreme Court—and why the federal district court and the Sixth Circuit ruled against Carpenter—was that he had no reasonable expectation of privacy because he had voluntarily shared this information

---

4 *Carpenter*, 585 U.S. at 302.

5 *Id.* at 303.

6 *Id.*

7 *Id.* at 311 (quoting United States v. Jones, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring) and Riley v. California, 573 U.S. 373, 403 (2014)).

8 573 U.S. 373 (2014).

9 *Id.* at 395.

with a third party.[10] The "third-party doctrine" provides that we have no privacy interest in information that we share with a third party, such as a phone company. For example, in *Smith v. Maryland*,[11] the Court held that police do not need a warrant to obtain from the phone company a record of the numbers that we dial or receive calls from because we should not be able to expect that the third party, the phone company, will keep the information secret. The Court has used the third-party doctrine to hold that the police can obtain our banking information, such as records of our deposits and withdrawals, without a warrant because a third party (the bank) has the information.[12]

The Court in *Carpenter* said that it was not reconsidering the third-party doctrine, but nor was it applying the doctrine to stored cellular location information. Chief Justice Roberts wrote: "We decline to extend *Smith* and *Miller* to cover these novel circumstances. Given the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection."[13] The Court stressed the extensive information that could be learned from stored cellular location information as compared with the earlier cases and declared:

> There is a world of difference between the limited types of personal information addressed in *Smith* and *Miller* and the exhaustive chronicle of location information casually collected by wireless carriers today. The Government thus is not asking for a straightforward application of the third-party doctrine, but instead a significant extension of it to a distinct category of information.[14]

The Court thus concluded that because obtaining the information is a search, it requires a warrant based on probable cause unless there are emergency circumstances.

Each of the four dissenters objected on different grounds. Justice Kennedy stressed the third-party doctrine and the traditional power of the government to obtain information by compulsory process, rather than needing a warrant based on probable cause. He emphasized:

---

10 *Carpenter*, 585 U.S. at 296.

11 442 U.S. 735, 735 (1979).

12 United States v. Miller, 425 U.S. 435, 443 (1976).

13 *Carpenter*, 585 U.S. at 309.

14 *Id.* at 314.

> Cell-site records, however, are no different from the many other kinds of business records the Government has a lawful right to obtain by compulsory process. Customers like petitioner do not own, possess, control, or use the records, and for that reason have no reasonable expectation that they cannot be disclosed pursuant to lawful compulsory process.[15]

Justice Thomas, by contrast, expressed his view that the scope of the Fourth Amendment is determined by property rights. He strongly objected to approaching the Fourth Amendment based on protection of the "reasonable expectation of privacy," which has been the law since *Katz v. United States* in 1967.[16] Justice Thomas described *Katz* as "a failed experiment" and does not see the Fourth Amendment as protecting privacy, including Carpenter's privacy.[17] For Thomas, there is a search under the Fourth Amendment only if there is an intrusion on to constitutionally protected property interests.

Justice Alito emphasized that the Court's decision threatens to change the law in the myriad of situations where the government obtains information, even very private information, through court orders and subpoenas. He said these are not searches and should not be governed by the Fourth Amendment. He concluded his dissent by declaring: "The desire to make a statement about privacy in the digital age does not justify the consequences that today's decision is likely to produce."[18]

Finally, Justice Gorsuch, like Justice Thomas, saw the Fourth Amendment as protecting property interests and was very critical of the *Katz* test and the focus on the reasonable expectation of privacy. He criticized Carpenter for failing to present a claim based on intrusion into his property rights.[19]

I believe that the Court got it exactly right in *Carpenter*: the police obtaining 127 days of cellular location information is an invasion of the reasonable expectation of privacy and should require a warrant. But I doubt that *Carpenter* would be decided the same way today. As indicated above, *Carpenter* was a 5-4 decision, which included Justice Ginsburg in the majority. She was replaced by Justice Amy Coney Barrett, a

---

15 *Id.* at 322 (Kennedy, J., dissenting).

16 *Id.* at 343 (citing Katz v. United States, 389 U.S. 347, 360–61 (1967)).

17 *Carpenter*, 585 U.S. at 361 (Thomas, J., dissenting).

18 *Id.* at 386 (Alito, J., dissenting).

19 *Id.* at 397–98 (Gorsuch, J., dissenting).

self-avowed originalist, who seems much more likely to follow the originalist approach of the originalist dissenters, Thomas and Gorsuch. Based on the ideological split in *Carpenter*, the likelihood is that Justice Brett Kavanaugh would have been with the dissenters, as was the justice he replaced, Anthony Kennedy, while Justice Ketanji Brown Jackson would have been with the majority as was the justice she replaced, Stephen Breyer. Of course, there is the possibility that this prediction is wrong and one of the new conservative justices would have agreed with the more liberal majority. But my instinct is that if the case were decided today, it would be a majority of Thomas, Alito, Gorsuch, Kavanaugh, and Barrett to rule against *Carpenter* and find no violation of the Fourth Amendment.

The Roberts Court has shown a willingness to reconsider and overrule precedent.[20] Perhaps it will reconsider *Carpenter*. Or more dramatically, perhaps it will follow the urging of Justice Thomas' dissent in *Carpenter* and reconsider *Katz* and the focus on the reasonable expectation of privacy in determining when there is a search.

Professor Sherry Colb, in her Fourth Amendment scholarship, forcefully defended the Court's approach in *Katz*.[21] In this essay, in her memory, I wish to do just that: defend *Katz* and the reasonable expectation of privacy approach to the Fourth Amendment. I divide the paper into four parts. Part I looks at the historic evolution of the Fourth Amendment, from property to privacy to reemergence of calls for a return to a property approach. Part II presents the flaws in the *Katz* approach. Part III explains why *Katz* got it right, drawing heavily from Professor Colb's scholarship. And finally, Part IV looks at some of the implications of following Professor Colb's approach to the Fourth Amendment.

---

20 *See, e.g.*, Students for Fair Admissions, Inc. v. President and Fellows of Harv. Coll., 600 U.S. 181 (2023) (effectively overruling prior decisions on affirmative action in higher education); Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (overruling *Roe v. Wade*); Janus v. Am. Fed'n of State, Cnty., and Mun. Emps. Council 31, 585 U.S. 878 (2018) (overruling *Abood v. Detroit Board of Education*).

21 *See, e.g.*, Sherry F. Colb, *A World Without Privacy: Why Property Does Not Define the Limits of the Right Against Unreasonable Searches and Seizures*, 102 MICH. L. REV. 889, 893–95 (2004) [hereinafter Colb, *A World Without Privacy*]; Sherry F. Colb, *What is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 STAN. L. REV. 119, 173 (2002) [hereinafter Colb, *What is a Search?*]; Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment "Reasonableness"*, 98 COLUM. L. REV. 1642, 1644 (1998) [hereinafter Colb, *The Qualitative Dimension*].

I
The Historic Evolution of the Fourth Amendment: From Property to Privacy to a Reemergence of Calls for a Return to a Property Approach

From when the Constitution was first adopted in 1787, and until well into the twentieth century, there were few Supreme Court decisions dealing with issues of policing.[22] The first case to define the meaning of the Fourth Amendment was not until 1866 in *Boyd v. United States*.[23] The case involved whether a seizure by customs officials violated the Fourth Amendment. The Court said that the meaning of the Fourth Amendment should be understood by looking at English history. From the Court's perspective, the Fourth Amendment was entirely about preventing physical intrusions on to a person's property without a warrant and probable cause. As the Court later explained in describing the holding of *Boyd*, the historical purpose of the Fourth Amendment was directed against general warrants and "was to prevent the use of governmental force to search a man's house, his person, his papers, and his effects; and to prevent their seizure against his will."[24]

Boyd meant that there was not a search—and no warrant or probable cause were required—so long as there was no trespass. This was exactly the approach the Court took in 1928 in *Olmstead v. United States* in defining what is a search for purposes of the Fourth Amendment.[25] *Olmstead* arose out of Prohibition. The defendants were prosecuted for being part of a major conspiracy—seventy-two individuals were indicted—to violate the National Prohibition Act by unlawfully possessing, transporting, importing and selling "intoxicating liquors."[26] Roy Olmstead was the general manager of the business.

The key evidence against him was gained by wiretapping telephones. Wires were put on telephone wires outside the houses of four individuals and those leading to their main office.[27] The Court stressed that "[t]he insertions were made without trespass upon any property of the defendants. They were made in the basement of the large office building. The taps

---

22 I describe the reasons for this in Erwin Chemerinsky, Presumed Guilty: How the Supreme Court Empowered the Police and Subverted Civil Rights 58–79 (2021).

23 116 U.S. 616 (1886).

24 Olmstead v. United States, 277 U.S. 438, 463 (1928).

25 *Id.*

26 *Id.* at 455.

27 *Id.* at 456–57.

from house lines were made in the streets near the houses."[28] For many months, the police listened to the conversations through these wiretaps, and this was the crucial evidence against Olmstead and the other defendants when they were tried for violating the Prohibition Act.

The question presented to the Court was whether this police wiretapping was a search and thus a violation of the Fourth Amendment because no warrant had been obtained. The Court, in a 5-4 decision, ruled that it was not a search, and no warrant was needed, because the wiretapping had not involved a physical trespass on the property.

Chief Justice William Howard Taft wrote the opinion for the Court in *Olmstead*. He wrote: "The Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants."[29] The Court explained that the Fourth Amendment does not apply since the police eavesdropped by tapping into wires outside the home. Chief Justice Taft said: "The intervening wires are not part of his house or office any more than are the highways along which they are stretched."[30]

Justice Louis Brandeis wrote an eloquent and forceful dissenting opinion. Brandeis stressed the need for the Constitution to be adapted to changing circumstances and new technology. He said the fact that the Framers of the Fourth Amendment did not contemplate telephones or wiretapping should not prevent constitutional limits from being applied. Justice Brandeis wrote powerfully of the importance of protecting privacy from government intrusion: "The Framers of the Constitution] sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."[31] He thus said that "[t]o protect that right, 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."[32]

---

28 *Id.* at 457.

29 *Id.* at 464.

30 *Id.* at 465.

31 *Id.* at 478 (Brandeis, J., dissenting).

32 *Id.*

No one disputed that requiring the police to get a warrant before wiretapping would limit law enforcement and could hinder police investigations. But Justice Brandeis directly answered this concern: "It is, of course, immaterial where the physical connection with the telephone wires leading into the defendants' premises was made. And it is also immaterial that the intrusion was in aid of law enforcement."[33] Continuing in one of the most eloquent opinions even written and one that is an important reminder for all times: Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.[34]

Olmstead was the law for almost four decades. During this time, police could engage in wiretapping or other forms of eavesdropping without needing a warrant or probable cause so long as they did not enter a person's property.

The Court shifted from this property approach to one focusing on privacy in *Katz v. United States*.[35] Charles Katz was a preeminent college basketball handicapper and also bet extensively on the sport.[36] The FBI suspected him of being part of a multicity gambling operation. He was suspected of using phone booths on Sunset Boulevard, near his home, for his gambling operation. There were three booths there and one was marked out of order. The agents affixed an electronic listening and recording device on top of and between the two remaining booths. The agents then could hear Katz's conversations regardless of which of the two remaining booths he used.

This tactic worked for the FBI. The FBI overheard and recorded Katz's conversations. Katz was arrested for violating federal gambling law. Katz's lawyer moved to suppress the evidence as having been gained in violation of the Fourth Amendment. The federal district court, following clear Supreme Court precedent, found that there was no search because there had been no trespass on Katz's property. Katz

---

33 *Id.* at 479.

34 *Id.*

35 389 U.S. 347.

36 Harvey A. Schneider, *Katz v. United States: The Untold Story*, 40 McGeorge L. Rev. 13, 13 (2009). Schneider argued the case for Katz in the Supreme Court.

was convicted and appealed. The federal court of appeals agreed.

But the Supreme Court reversed and overturned the earlier precedents which held that a search requires a physical invasion of a person's property. In an opinion by Justice Potter Stewart, the Court said that the earlier decisions "have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling."[37] The Court said that the government's listening to and recording Katz's words violated his privacy and "[t]he fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance."[38]

The Court stressed that the Fourth Amendment protects people, not property. A person's Fourth Amendment rights do not depend on where he or she is at the time of the government intrusion, nor does it depend on whether there is a physical trespass. The Court concluded its opinion by stating: "These considerations do not vanish when the search in question is transferred from the setting of a home, an office, or a hotel room to that of a telephone booth. Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures."[39]

The Court, though, did not elaborate on how to determine whether there is a search under this standard. Justice John Marshall Harlan did this in a concurring opinion and it is this opinion that has been the controlling standard for the Fourth Amendment ever since. Harlan said that to be protected by the Fourth Amendment, there "is a twofold requirement, 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.'"[40]

Since 1967, the Supreme Court has followed this approach. The Court's decision in *Carpenter*, discussed earlier, applies the *Katz* reasonable expectation of privacy approach.[41] But now it is coming under substantial attack. In his dissent in *Carpenter*, Justice Thomas makes clear that he would return to a property approach to the Fourth Amendment and overrule *Katz* and its focus on the reasonable expectation of privacy. He wrote:

---

37 *Katz*, 389 U.S. at 353.

38 *Id.*

39 *Id.* at 359.

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

41 *See* text accompanying notes 2–12, *supra*.

> This case should not turn on "whether" a search occurred. It should turn, instead, on *whose* property was searched. . . . By obtaining the cell-site records of MetroPCS and Sprint, the Government did not search Carpenter's property. He did not create the records, he does not maintain them, he cannot control them, and he cannot destroy them. Neither the terms of his contracts nor any provision of law makes the records his. The records belong to MetroPCS and Sprint. . . . The more fundamental problem with the Court's opinion, however, is its use of the "reasonable expectation of privacy" test, which was first articulated by Justice Harlan in [*Katz v. United States*]. The *Katz* test has no basis in the text or history of the Fourth Amendment. And, it invites courts to make judgments about policy, not law. Until we confront the problems with this test, *Katz* will continue to distort Fourth Amendment jurisprudence.[42]

Similarly, Justice Gorsuch in his dissent sharply criticized *Katz* and argued that the focus under the Fourth Amendment should be on whether there is an invasion of property. He said: "There is another way. From the founding until the 1960s, the right to assert a Fourth Amendment claim didn't depend on your ability to appeal to a judge's personal sensibilities about the "reasonableness" of your expectations or privacy. It was tied to the law."[43] Justice Gorsuch was clear that "tied to the law" meant a focus on property invasion, not privacy.

I do not go so far as to predict that there is a majority on the Court to overrule *Katz* and shift back to the *Olmstead* approach. But there are at least two justices who have explicitly said that they want to do this and given their originalist focus, I expect Justice Barrett would join them. We also have seen in recent years the willingness of the other conservatives to join staunchly originalist approaches to the Constitution, such as in *New York State Rifle and Pistol Association v. Bruen*, where the Court said that the Second Amendment should be interpreted entirely based on history and tradition.[44] In light of this development, it is important to reconsider *Katz* and whether its approach is desirable. It is here that Professor Colb's scholarship is particularly important.

---

42 Carpenter v. United States, 585 U.S. 296, 342–43 (Thomas, J., dissenting).

43 *Id.* at 397 (Gorsuch, J., dissenting).

44 597 U.S. 1, 17–20 (2022).

II
THE FLAWS IN *KATZ*

At the outset, it must be acknowledged that many have identified problems with the *Katz* approach. One set of criticisms focuses on *Katz* not being based on the text of the Fourth Amendment since it does not mention "privacy." For example, Professor Jeffrey Bellin argues that the *Katz* majority "made no effort to connect [its] new analysis to the constitutional text" and says that post-*Katz* jurisprudence has only exacerbated this "textual drift."[45] He says that there is a "simple alternative to the Supreme Court's Fourth Amendment 'search' jurisprudence: a return to the constitutional text."[46] The term "search," Professor Bellin says, has an "intuitive meaning with a clear historical imperative": a "search is an examination of an object or space to uncover information."[47]

The difficulty with this approach is that it assumes that the meaning of a constitutional provision should be determined solely from the words of the text.[48] The Court has (thankfully) not taken a literal approach to other constitutional amendments. The First Amendment does not apply just to Congress and "no law" never has been taken literally to mean that there can be no law restricting speech or religion or privacy or assembly.

Obviously, the word privacy does not appear in the Fourth Amendment, but there also is no doubt that privacy is what it is about. Professor Orin Kerr, in an article titled, *Katz as Originalism*, explains that even if "reasonable expectation of privacy" language is not in the text of Fourth Amendment itself, the concept is contained within it.[49] He notes the concept of privacy is not a recent invention: Kerr points out that historically, privacy has been "used to describe the scope of Fourth Amendment protection for about as long as courts have been interpreting the Fourth Amendment."[50]

As explained in Part III, the problem with a literal, or originalist approach that focuses on property invasions, to the Fourth Amendment is that it would provide no protection from

---

45 Jeffrey Bellin, *Fourth Amendment Textualism*, 118 MICH. L. REV. 233, 249, 251 (2019).

46 *Id.* at 237.

47 *Id.* at 238.

48 I develop a critique of originalism in ERWIN CHEMERINSKY, WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM (2021).

49 Orin S. Kerr, *Katz as Originalism*, 71 DUKE L.J. 1047, 1055 (2022).

50 *Id.* at 1062.

invasions of privacy so long as there was not a physical intrusion. The police could wiretap without constitutional limits so long as they did not trespass.

A second, I think more powerful, critique of *Katz* is based on the circularity of focusing on the reasonable expectation of privacy. Could the government eliminate privacy rights just by saying: "you have no expectation of privacy here?" Many scholars have made this point. Professor Anthony Amsterdam observed that the government could diminish each person's subjective expectation of privacy merely by announcing the intent to surveil that person.[51] Judge Richard Posner similarly said that "it is circular to say that there is no invasion of privacy unless the individual whose privacy is invaded had a reasonable expectation of privacy; whether he will or will not have such an expectation will depend on what the legal rule is."[52] Indeed, I, too, made that point in an earlier article: "Moreover, the Fourth Amendment approach to protecting privacy based on whether there is a 'reasonable expectation of privacy' also poses serious problems. The government seemingly can deny privacy just by letting people know in advance not to expect any."[53]

But it is interesting to note that the assumption of this argument is that changes in the law alter the reasonable expectation of privacy. Empirical research actually suggests that this is less a problem than critics assumed. Professors Matthew B. Kluger and Lior Jacob Strahilevitz did an empirical study and found that popular expectation of privacy remains stable over time even after the Supreme Court has changed its Fourth Amendment jurisprudence.[54] They conclude from this

---

51 Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 384 (1974).

52 Richard A. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 S. CT. REV. 173, 188 (1979).

53 Erwin Chemerinsky, *Rediscovering Brandeis's Right to Privacy*, 45 BRANDEIS L.J. 643, 650 (2007). Many other scholars also have said this. *See, e.g.*, Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 132–33 (2008) ("[T]he circularity problem [] afflicts expectations-of-privacy analysis. An announcement that all telephone calls will henceforth be monitored deprives people of their reasonable expectations of privacy in such calls."); Daniel J. Solove, *Fourth Amendment Pragmatism*, 51 B.C. L. REV. 1511, 1524 (2010) (arguing that "judicial decisions about reasonable expectations of privacy would have a bootstrapping effect[,]" such that a Supreme Court "pronouncement would affect people's future expectations").

54 *See* Matthew B. Kluger & Lior Jacob Strahilevitz, *The Myth of Fourth Amendment Circularity*, 84 U. CHI. L. REV. 1747 (2017).

that any "circularity that exists in Fourth Amendment law is short lived and limited[.]"[55]

A third critique of *Katz* focuses on the difficulty of determining what is a "reasonable expectation of privacy." Is this an empirical question based on what people expect and, if so, how is that to be known? Professors Baude and Stern argue that *Katz*'s reasonableness inquiry "reduces either to a difficult empirical question about intuitions and social norms (those expectations 'society is prepared to recognize as "reasonable"') or to a largely open-ended policy judgment (those expectations a court deems 'legitimate')."[56] Likewise, Professor Robert Bloom observed "How do we know what society is prepared to accept as reasonable? Because there is no straightforward answer to this question, 'reasonable' has largely come to mean what a majority of the Supreme Court Justices says is reasonable[.]"[57]

While these critics focus on the first prong of the *Katz* test, and how to determine whether there is a reasonable expectation of privacy, Professor Orin Kerr argues against the second prong, which looks at whether there is a subjective expectation of privacy.[58] He says that courts have rightly abandoned the second prong, which he argues does not lend itself to a meaningful judicial inquiry.

Justice Thomas in his dissent in *Carpenter* pulled together the many critiques of *Katz* and left no doubt as to his desire to overrule it. He wrote:

> That the *Katz* test departs so far from the text of the Fourth Amendment is reason enough to reject it. But the *Katz* test also has proved unworkable in practice. Jurists and commentators tasked with deciphering our jurisprudence have described the *Katz* regime as "an unpredictable jumble," "a mass of contradictions and obscurities," "all over the map," "riddled with inconsistency and incoherence," "a series of inconsistent and bizarre results that [the Court] has left entirely undefended," "unstable," "chameleon-like," "'notoriously unhelpful,'" "a conclusion rather than a starting point for analysis," "distressingly unmanageable," "a dismal failure," "flawed to the core," "unadorned fiat," and "inspired

---

55 *Id.* at 1794.

56 William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1824 (2016).

57 ROBERT M. BLOOM, SEARCHES, SEIZURES, AND WARRANTS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 46 (2003).

58 Orin S. Kerr, *Katz Has Only One Step: The Irrelevance of Subjective Expectations*, 82 U. CHI. L. REV. 113, 113 (2015).

by the kind of logic that produced Rube Goldberg's bizarre contraptions."[59]

III
WHY *KATZ* GOT IT RIGHT: THE WISDOM OF PROFESSOR COLB

Although these criticisms of the *Katz* focus on privacy are important, the question still remains whether it is better than alternative approaches. Here, Professor Colb's scholarship is powerful and important in her defense of *Katz*.[60]

Ultimately, what Professor Colb argued—and I strongly agree—is that the focus of the Fourth Amendment ultimately is about protecting privacy and that this is reflected in the Court's approach in *Katz*. Professor Colb explained that the Fourth Amendment protects privacy independent of property, even on originalist grounds.[61] She stated that it would have been unnecessary for the framers and ratifiers to create a separate amendment for privacy because privacy is encompassed in the "houses, persons, papers, and effects" language of the Fourth Amendment.[62] Colb acknowledged that "privacy [has] historically received protection primarily through the exercise of property rights," but said that the Fourth Amendment protects privacy even when government invasions accomplished through new technology do not directly implicate property rights.[63] As explained earlier, Professor Orin Kerr, almost 20 years after Professor Colb, made similar arguments and came to the same conclusion that a focus on privacy under the Fourth Amendment is justified from an originalist perspective.[64]

Most importantly, from a normative perspective, it is desirable to interpret the Fourth Amendment to protect privacy. This was Professor Colb's point: "Nonetheless, privacy is important and valued, whether within or outside of the property context."[65] This is not a new or novel conception of the Fourth Amendment. It is exactly what Justice Brandeis eloquently said in *Olmstead* nearly a century ago, when he spoke powerfully of the "right to be let alone" and said that "every

---

59 Carpenter v. United States, 585 U.S. 296, 357 (Thomas, J., dissenting) (citations omitted).

60 *See, e.g.*, articles by Professor Colb, *supra* note 21.

61 Colb, *A World Without Privacy*, *supra* note 21, at 895.

62 *Id.* at 895–96.

63 *Id.* at 895.

64 Kerr, *supra* note 58.

65 Colb, *A World Without Privacy*, *supra* note 21, at 896.

unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment."[66] But this conception has become ever more important as technology has developed and police increasingly have the ability to gather information about people without a physical trespass or an invasion of property rights whether through cellular location technology, cellular tower dumps, geofences, drones, low flying planes, satellites, or countless other means. It is hard to believe that Justices Thomas and Gorsuch really want to return to the *Olmstead* approach and have no Fourth Amendment limits on wiretapping or other electronic surveillance when there is no physical invasion of property.

Professor Colb defended the need for a focus on both the objective and the subjective expectations of privacy.[67] Professor Colb acknowledged the potential circularity of the *Katz* test, but she offered a solution: she said that the focus should be on whether the police behavior involved transgression of norms of appropriate police behavior. In this way, she had the Fourth Amendment reasonableness requirement having "both substantive and procedural safeguards."[68]

Colb believed that, under *Katz*, the inquiry to determine whether a search occurred is "whether the activities in which [the police] were engaged were of the sort and in a context that an individual would hope, reasonably and legitimately, to preserve as private from the uninvited eye and ear."[69] Thus, to adhere to the doctrinal foundations of *Katz*, Colb argued for a test that asks "whether police have acted in a manner that exposes what would have remained hidden absent transgression of a legal or social norm."[70] If the police have acted in such a manner, a search has occurred. In other words, if the police "must do something that would violate social and legal norms to gain access to another's personal life," the police are "searching."[71]

Of course, this would require that the Supreme Court articulate norms for appropriate police behavior under the Fourth Amendment. But that is the core role of the judiciary, whether it is under a restrictive approach to defining searches

---

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

67 Colb, *The Qualitative Dimension*, *supra* note 21, at 1644.

68 *Id.*

69 Colb, *What is a Search?*, *supra* note 21, at 173.

70 *Id.* at 123.

71 *Id.* at 179.

as just about invasion of property rights or a broader conception that includes privacy. Other scholars, too, have developed this approach to the Fourth Amendment. For example, Professor Matthew Torkson says that three inquiries should be central in deciding whether there is a search: the intimacy of the place or thing targeted, the amount of information sought, and the cost of the investigation.[72]

The conclusion that emerges from Professor Colb's writings is that *Katz* was right in focusing on the reasonable expectation of privacy and in looking to both objectively whether the expectation of privacy is reasonable and subjectively whether the person expected privacy in that situation. She says that courts can be guided by developing norms of appropriate policing and focusing on whether police transgressed them.

IV

The Implications of Following Professor Colb's Approach

As Professor Colb explained, the *Katz* test's focus on privacy is crucial to limiting the government's use of new and emerging technology. I think another crucial aspect to her Fourth Amendment writings is a call for a reconsideration of the third-party doctrine. The Supreme Court held that there is no reasonable expectation of privacy, and therefore no Fourth Amendment protection, for the information that a person shares with a third party. The key initial case was *United States v. Miller*[73] in 1976. It is important to note that the third-party doctrine was developed by the Burger Court as it was cutting back on Warren Court decisions protecting criminal suspects and defendants, including under the Fourth Amendment.

Based on an informant's tip, on December 18, 1972, a deputy sheriff from Houston County, Georgia, stopped a van-type truck. The truck contained distillery apparatus and raw material for distilling alcohol. On January 9, 1973, a fire broke out in a Kathleen, Georgia, warehouse rented to Mitchell Miller. During the blaze, firemen and sheriff department officials discovered a 7,500-gallon-capacity distillery, 175 gallons of nontax-paid whiskey, and related paraphernalia. The informant's tip, the discovery of the distillery apparatus in the truck, and the findings at the fire

---

72 Matthew Tokson, *The Emerging Principles of Fourth Amendment Privacy*, 88 Geo. Wash. L. Rev. 1, 13 (2020).

73 425 U.S. 435 (1976).

led the police to conclude that there was an illegal business in making and selling whiskey.

Two weeks later, agents from the Treasury Department's Alcohol, Tobacco and Firearms Bureau presented grand jury subpoenas, that had been issued in blank by the clerk of the district court, to the presidents of two banks where Miller maintained his accounts. The subpoenas required the two bank presidents to appear in court on January 24, 1973, and to produce "all records of accounts, i.e., savings, checking, loan or otherwise, in the name of Mr. Mitch Miller . . . or Mitch Miller Associates[.]"[74]

The bank presidents ordered their employees to make the records immediately available and to provide copies of any documents the agents desired. The agents were given detailed copies of Miller's bank records. These included all checks, deposit slips, two financial statements, and three monthly statements. The bank presidents were then told that it would not be necessary to appear in person before the grand jury. Miller never was told that all of his financial documents had been provided to the federal agents.

Miller was indicted and moved to suppress the evidence gained from the banks. The district court denied this motion, but the United States Court of Appeals for the Fifth Circuit reversed and concluded that the Fourth Amendment had been violated. No warrant had been issued for these records. The court was understandably concerned that people regard their financial records as private and believed that a judge should have to approve a warrant before they can be obtained.

The United States Supreme Court, in a 7-2 decision, reversed the Court of Appeals and ruled against Miller. The Court quoted *Katz* that "what a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection."[75] The Court said that Miller had shared the financial information with the bank in making his financial transactions and thus he could claim no reasonable expectation of privacy and no protection under the Fourth Amendment. Justice Lewis Powell, writing for the Court, declared: "[T]he Fourth Amendment does not prohibit the obtaining of information revealed to a third party . . . even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed."[76]

---

74 *Id.* at 437.

75 *Id.* at 442 (quoting Katz v. United States, 389 U.S. 347, 351 (1967)).

76 *Id.* at 443.

The implications of *Miller* are vast in expanding police power to gather information about an individual without needing to comply with the requirements of the Fourth Amendment. *Miller* says that it is not a search when the police obtain information that a person has shared with a third party. Therefore, the requirements for probable cause and a warrant—the key protections of privacy under the Fourth Amendment—do not apply or need to be met. Justice Brennan expressed this in his dissenting opinion in lamenting that

> [t]o permit a police officer access to these records merely upon his request, without any judicial control as to relevancy or other traditional requirements of legal process, and to allow the evidence to be used in any subsequent criminal prosecution against a defendant, opens the door to a vast and unlimited range of very real abuses of police power.[77]

Any information we share with a third party, no matter how private—what we tell a doctor, or a suicide prevention hotline, or an accountant—is not protected by the Fourth Amendment and can be obtained by the police without needing a warrant based on probable cause.

The Court took this a step further, when three years later in *Smith v. Maryland*, the Court held that police can obtain a list of phone numbers a person calls or receives calls from without needing to get a warrant or have probable case.[78] The Court said that people know that they are sharing the information with the phone company, which records it and uses it in calculating phone bills (or at least it did at that time when there were additional charges for toll and long distance calls). The Court was skeptical that "people in general entertain any actual expectation of privacy in the numbers they dial."[79] The Court said that "[a]lthough subjective expectations cannot be scientifically gauged, it is too much to believe" that telephone users have a subjective expectation of privacy for the numbers they call or receive calls from.[80] The United States Court of Appeals for the Ninth Circuit later applied this to say that the government can monitor the email addresses a person sends to or receives from, or a list of the websites a person visits, without needing a warrant or probable cause.[81]

---

77 *Id.* at 451 (Brennan, J., dissenting).

78 Smith v. Maryland, 442 U.S. 735 (1979).

79 *Id.* at 742.

80 *Id.* at 743.

81 United States v. Forrester, 512 F.3d 500 (9th Cir. 2008).

The courts seriously underestimate how much can be learned from these addresses, whether phone numbers or email addresses or websites. Knowing that a person calls a suicide hotline is revealing something private, as would be the phone records of a couple having an affair, or of a confidential source in communication with a journalist. An enormous amount can be learned about a person from the websites a person visits. Today, a web search is likely the first thing most people do when having unusual symptoms or receiving a medical diagnosis. Sometimes much can be learned about a person's sexual orientation from knowing what websites are visited.

Professor Colb sharply and persuasively criticized the third-party doctrine. Professor Colb explained that the Court made two undesirable moves in creating the third-party doctrine: (1) "[treating] the risk of exposure through third-party wrongdoing as tantamount to an invitation for that exposure ('Move One'); and (2) [treating] exposure to a limited audience as morally equivalent to exposure to the whole world ('Move Two')."[82] She explained that Move One is wrong because it "excuses (and even justifies) what would otherwise be wrongful conduct by third parties, including the police."[83] She also disapproved of Move Two because it "fail[s] to recognize degrees of privacy in the Fourth Amendment context[,]" given that an individual may "choose to forfeit some of her freedom from exposure without thereby forfeiting all of it."[84]

Colb found that through Move One and Move Two, the Court

> has assumed that a person knowingly exposes herself to the following: trespassers onto private land; stalkers who watch her wherever she goes (outside of her home); snoops who tear through her opaque garbage bags; helicopters that hover over her curtilage; planes that fly over her land; and 'friends' who deceive their way into her confidence and trust with the specific goal of betrayal.[85]

Thus, the Court imposes strict criminal liability for "knowing exposure" in the Fourth Amendment context.

Colb also argued that the Court should treat "knowing exposure" the same as "consent" to a search.[86] In her view, "knowing exposure" occurs only when there has been "explicit

---

82 Colb, *What is a Search?*, *supra* note 21, at 122.

83 *Id.*

84 *Id.* at 122–23.

85 *Id.* at 146.

86 *Id.* at 123.

or tacit consent to public observation."[87] Risking exposure or exposing yourself to a limited audience do not qualify as "knowing exposure."[88]

Professor Colb, of course, is not alone in criticizing the third-party doctrine. Professor Wayne LaFave, a preeminent expert on the Fourth Amendment, said it is "dead wrong,"[89] and Justice Sotomayor has said it makes no sense in our digital world.[90] Yet, it remains the law to this day that the police can obtain our financial records or our phone records or an enormous amount of other information without needing a warrant because of the Burger Court. In *Carpenter*, the Court did not apply, but also did not overrule the Fourth Amendment. I fear that the current Court is more likely to contract Fourth Amendment protections than expand them, but I hope that there will be a point where the Court will follow Professor Colb's analysis and discard the third-party doctrine.

But an article in memory of Professor Colb would not be complete without some disagreement with her positions. She always enjoyed spirited discussions about issues, including disagreements with views. I recall fondly many of these conversations, starting with our car rides in 1990. In one of her major articles on the Fourth Amendment, Professor Colb argued that courts should substantively balance the interests served by types of searches and seizures against the costs of these searches and seizures for the individual's sense of security and privacy.[91] She said that the Court should engage in this balancing test, even in cases where the government must have probable cause and a warrant before searching or seizing.[92]

Thus, Professor Colb recommended that "an 'unreasonable search' in violation of the Fourth Amendment occurs whenever the intrusiveness of the search outweighs the gravity of the offense being investigated."[93] Under this approach, although the government may have sufficient evidence suggesting that the search or seizure would uncover illegality, the search may still be

---

87 *Id.*

88 *Id.*

89 WAYNE LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT at 747 (4th ed. 2004).

90 United States v. Jones, 565 U.S. 400, 413 (2012). For a defense of the third-party doctrine, see generally Orin S. Kerr, *The Case for the Third Party Doctrine*, 107 MICH. L. REV. 561 (2007).

91 Colb, *The Qualitative Dimension*, supra note 21, at 1645.

92 *Id.*

93 *Id.*

disproportionate and unreasonable due to the cost for the individual.

I disagree that the scope of the Fourth Amendment's protection depends on the "gravity of the offense being investigated." This balancing would mean that for the most heinous crimes there would be little Fourth Amendment protection. This would eviscerate the Fourth Amendment for many crimes and tremendously empower the police to invade privacy. Also, such case-by-case balancing of the "intrusiveness of the search" compared to "the gravity of the offense being investigated" would give little guidance to police as to what they could or could not do. The Supreme Court has held that the exclusionary rule applies only to intentional or reckless violations of the Fourth Amendment, and not to negligent or good faith violations.[94] Absent clear rules, it is hard to see how the Fourth Amendment ever would be enforced.

Conclusion

Professor Colb was a marvelous scholar in many areas of law. One of the areas where she wrote was the Fourth Amendment. Hers was a powerful voice as to why the appropriate focus should be on the reasonable expectation of privacy. She rejected the approach of conservatives that the Fourth Amendment should be limited to just protecting property rights. In fact, she titled one of her articles, "A World Without Privacy: Why Property Does Not Define the Limits of the Right Against Unreasonable Searches and Seizures."[95]

As there now are justices, as well as scholars, urging a return to a focus just on property rights for determining the meaning of the Fourth Amendment, Professor Colb's writings are vitally important.

---

94 Herring v. United States, 555 U.S. 135 (2008).

95 Colb, *A World Without Privacy*, *supra* note 21.