

THE FOURTH AMENDMENT CATEGORICAL IMPERATIVE

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INTRODUCTION

The vast majority of current Fourth Amendment doctrine is unfounded, incoherent, and dangerous. The culprit is the Supreme Court's 1967 decision in *Katz v. United States*, which defines "search" as government conduct that violates subjectively manifested expectations of privacy "that society is prepared to recognize as 'reasonable.'"¹ This is pure applesauce.² Nowhere will you find a standard dictionary that defines "search" in these terms.³ Neither will you hear a native speaker of the English language use "search" in this sense unless her mind has been polluted by a semester of studying criminal procedure. The Court created this definition of "search" out of whole cloth with disastrous consequences for "the right of the people to be secure . . . against unreasonable searches and seizures."⁴ This Essay explains why and

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1. 389 U.S. 347, 361 (1967).

2. This Essay seeks to promote and advance an originalist interpretation of the Fourth Amendment. Given his influence as an originalist, and as an homage to his colorful prose, this Essay incorporates some language found in Justice Antonin Scalia's opinions. In this case, *King v. Burwell*, 135 S. Ct. 2480, 2501 (2015) (Scalia, J., dissenting).

3. For example, *Merriam-Webster* defines "search" as

to look into or over carefully or thoroughly in an effort to find or discover something . . .

to carefully look for someone or something; to try to find someone or something;

to carefully look for someone or something in (something);

to carefully look through the clothing of (someone) for something that may be hidden . . .

Search, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/search> [<https://perma.cc/G5Q7-BUDK>].

4. U.S. CONST. amend. IV.

offers an alternative that takes seriously the original public meaning of the text.⁵

I. THE DANGERS OF SEMANTIC ADVENTURISM.

The Court's semantic offense in *Katz* was surely well intentioned. For the previous forty years it had been struggling to heal from another wound self-inflicted in *Olmstead v. United States*.⁶ Decided in 1928, *Olmstead* refused to recognize as a "search" conduct that did not entail a physical intrusion of a person, house, paper, or effect.⁷ By 1967, a host of emerging technologies, including "electronic ears," wiretaps, and other eavesdropping devices, allowed government agents to, well, *search* without need for physical intrusion.⁸ Perhaps out of fear that the Fourth Amendment might become little more than a dead letter in an age of these new technologies,⁹ the *Katz* Court created a new definition of "search" based on its assessments of reasonable expectations of privacy.¹⁰ That choice has proven to be unwise.

There are many reasons to dislike the *Katz* definition of "search." It has no footing in the text or history of the Fourth Amendment.¹¹ But even for those who regard adherence to text as a sign of a simple intellect, there are the practical results to worry about. The reasonable expectation of privacy test has granted government agents unfettered discretion to engage in a wide variety of search activities completely free of Fourth Amendment regulation. They can search through your trash.¹² They can conduct visual searches of your backyard and look into your house through open windows.¹³ They can search your bank records.¹⁴ They can search your telephone call records.¹⁵ They can search high and low for you as long as they do not enter a constitu-

5. See generally DAVID GRAY, THE FOURTH AMENDMENT IN AN AGE OF SURVEILLANCE (2017) [hereinafter GRAY, THE FOURTH AMENDMENT]; David Gray, *Fourth Amendment Remedies as Rights: The Warrant Requirement*, 96 B.U. L. REV. 425 (2016) [hereinafter Gray, *Fourth Amendment Remedies*].

6. 277 U.S. 438 (1928).

7. *Id.* at 464.

8. See *Berger v. New York*, 388 U.S. 41, 46–47 (1967) (describing wiretapping and bugging technologies).

9. See *id.* at 49 ("The law, though jealous of individual privacy, has not kept pace with these advances in scientific knowledge."); see also *Katz v. United States*, 389 U.S. 347, 351, 353 (1967) (rejecting view that the Fourth Amendment cannot reach eavesdropping technologies).

10. *Katz*, 389 U.S. at 353; *id.* at 360 (Harlan, J., concurring).

11. See *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring); GRAY, THE FOURTH AMENDMENT, *supra* note 5, at 427.

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

13. See *Florida v. Riley*, 488 U.S. 445 (1989); *California v. Ciraolo*, 476 U.S. 207 (1986).

14. See *Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21 (1974).

15. See *Smith v. Maryland*, 442 U.S. 735 (1979).

tionally protected space.¹⁶ They can hide tracking devices in consumer goods and then use them to look for purchasers and their effects.¹⁷ Strangely, government agents can even trespass upon private land to look for people or things so long as the property in question is deemed an “open field.”¹⁸ All of these activities constitute “searches” by any common definition,¹⁹ yet they are not “*searches*” for purposes of the Fourth Amendment. This is because, in the Court’s view at least, they do not violate reasonable expectations of privacy.

The consequences of the Court’s semantic misstep in *Katz* have become particularly troubling as of late. Recently, we have seen an explosion of technologies that allow government agents to conduct all manner of searches more efficiently than ever before and on an almost unimaginable scale.²⁰ They can look for cellphone users anytime using cell-site location information.²¹ They can search for users of smartphones, cars, computers, and personal fitness trackers using GPS technologies embedded in these devices.²² They can gather and look through the records of everyone’s phone calls and internet activities.²³ They can conduct constant, blanket searches of public spaces using networked surveillance cameras, license-plate readers, and

16. See *United States v. Karo*, 468 U.S. 705 (1984); *United States v. Knotts*, 460 U.S. 276 (1983).

17. *Karo*, 468 U.S. at 711–12; GRAY, *THE FOURTH AMENDMENT*, *supra* note 5, at 27–28, 82.

18. See *United States v. Jones*, 565 U.S. 400, 411 (2012); *United States v. Dunn*, 480 U.S. 294 (1987).

19. See *supra* note 3.

20. See GRAY, *THE FOURTH AMENDMENT*, *supra* note 5, at 23–48 (detailing and discussing contemporary search technologies including GPS tracking, cellphone tracking, RFID tracking, and Big Data).

21. *United States v. Graham*, 824 F.3d 421, 425–27 (4th Cir. 2016) (en banc); *United States v. Carpenter*, 819 F.3d 880, 887–89 (6th Cir. 2016), *cert. granted*, 137 S. Ct. 2211 (2017); *United States v. Davis*, 785 F.3d 498, 511–13 (11th Cir. 2015) (en banc); *In re Application of U.S. for Historical Cell Site Data*, 724 F.3d 600, 615 (5th Cir. 2013); *In re Application of U.S. for an Order Directing a Provider of Elec. Comm’n Serv. to Disclose Records to Gov’t*, 620 F.3d 304, 313, 317 (3d Cir. 2010); Stephanie K. Pell, *Location Tracking*, in *THE CAMBRIDGE HANDBOOK OF SURVEILLANCE LAW* 44, 47–50 (David Gray & Stephen Henderson eds., 2017).

22. *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring); *id.* at 428 (Alito, J., concurring); GRAY, *THE FOURTH AMENDMENT*, *supra* note 5, at 23–26; Pell, *supra* note 21, at 46–47, 50.

23. See GRAY, *THE FOURTH AMENDMENT*, *supra* note 5, at 42–48; Rachel Levinson-Waldman, *NSA Surveillance in the War on Terror*, in *THE CAMBRIDGE HANDBOOK OF SURVEILLANCE LAW*, *supra* note 21, at 7, 8–12; David Medine & Esteban Marin, *The Privacy and Civil Liberties Oversight Board*, in *THE CAMBRIDGE HANDBOOK OF SURVEILLANCE LAW*, *supra* note 21, at 677, 688–90. See generally PRIVACY & CIVIL LIBERTIES OVERSIGHT BD., *REPORT ON THE SURVEILLANCE PROGRAM OPERATED PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT* (2014); PRIVACY & CIVIL LIBERTIES OVERSIGHT BD., *REPORT ON THE TELEPHONE RECORDS PROGRAM CONDUCTED UNDER SECTION 215 OF THE USA PATRIOT ACT AND THE OPERATIONS OF FOREIGN INTELLIGENCE SURVEILLANCE COURT* (2014).

drones.²⁴ Using these same tools and technologies, they can focus on a particular individual, following her everywhere she goes and spying on her through open windows or skylights.²⁵ They can search back in time, finding out not only where you are, but where you have been.²⁶ They can search, store, and then mine data associated with your commercial transactions, internet searches, email messages, and social-networking posts.²⁷ Thanks to *Katz*, government agents can do all of this searching free from Fourth Amendment constraints because none of these activities violates reasonable expectations of privacy.²⁸ Madison and Adams must be weeping from the heavens.

In 2012 Justice Sotomayor suggested it may be time to rethink this mess.²⁹ But neither she nor her fellow justices have said much more—though that may change during the October 2017 Term when the Court hears argument in *Carpenter v. United States*.³⁰ It is easy to understand why they are so cautious. What, after all, are their options? Should they conjure mosaics or construct some new edifice on top of or beside the reasonable expectation of privacy test?³¹ Should they simply erase fifty years' worth of doctrine and return to a test based on "18th-century tort law"?³² Or should they abandon the field altogether, leaving the project of regulating modern surveillance

24. GRAY, THE FOURTH AMENDMENT, *supra* note 5, at 39–41.

25. See *Florida v. Riley*, 488 U.S. 445, 450 (1989) ("Because the sides and roof of his greenhouse were left partially open, however, what was growing in the greenhouse was subject to viewing from the air."); *California v. Ciraolo*, 476 U.S. 207, 213 (1986) ("The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible.").

26. See generally Stephen E. Henderson, *Fourth Amendment Time Machines (And What They Might Say About Police Body Cameras)*, 18 U. PA. J. CONST. L. 933 (2016).

27. GRAY, THE FOURTH AMENDMENT, *supra* note 5, at 38–48.

28. *Id.* at 84–92.

29. *United States v. Jones*, 565 U.S. 400, 417 (2012) (Sotomayor, J., concurring) ("More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties.").

30. See *Carpenter v. United States*, 137 S. Ct. 2211 (2017) (mem.).

31. The "mosaic theory" traces to a decision written by Judge William Ginsburg of the United States Court of Appeals for the District of Columbia Circuit in *United States v. Maynard*, 615 F.3d 544, 562 (D.C. Cir. 2010), *aff'd in part sub nom. Jones*, 565 U.S. 400. For discussions of the mosaic theory, see GRAY, THE FOURTH AMENDMENT, *supra* note 5, at 109–16; ; David Gray & Danielle Keats Citron, *A Shattered Looking Glass: The Pitfalls and Potential of the Mosaic Theory of Fourth Amendment Privacy*, 14 N.C. J.L. & TECH. 381 (2013); David Gray & Danielle Keats Citron, *The Right to Quantitative Privacy*, 98 MINN. L. REV. 62 (2013) [hereinafter Gray & Citron, *Quantitative Privacy*]; Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311 (2012); and Christopher Slobogin, *Making the Most of United States v. Jones in a Surveillance Society: A Statutory Implementation of Mosaic Theory*, 8 DUKE J. CONST. L. & PUB. POL'Y 1 (2012).

32. *Jones*, 565 U.S. at 418 (Alito, J., concurring).

methods—or not—to legislatures and executives?³³ So far at least, the Court seems paralyzed by the prospect of action even as government agents enjoy nearly unfettered discretion to exploit our phones as surveillance devices and to monitor our doings to the smallest detail by collecting and examining our “digital exhaust.”³⁴

II. THE WAY FORWARD.

The answer to the Court’s current dilemma is in the legacies of the recently deceased Justice Antonin Scalia and the long-dead Immanuel Kant. Justice Scalia provides methodological guidance. Kant offers conceptual insight.

For thirty years, Justice Scalia was a leading Fourth Amendment progressive.³⁵ He achieved that status by remaining faithful to an interpretive method called public-meaning originalism.³⁶ Originalists like Justice Scalia seek, as best they can, to understand the public meaning of legal texts when they were adopted.³⁷ They then apply that understanding to contemporary problems and challenges.³⁸ By taking seriously the text and history of the Fourth Amendment, Justice Scalia championed the right of the people to be secure against threats of unreasonable searches posed by means both high-

33. *Id.* at 429–30 (citing Orin Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 805–06 (2004)).

34. See cases cited *supra* note 21. I take this phrase from General Michael Hayden. See National Public Radio, *Michael Hayden: America Is Safer with End-to-End Encryption*, NAT’L PUB. RADIO: ON POINT (Mar. 1, 2016), <http://www.wbur.org/onpoint/2016/03/01/michael-hayden-nsa-encryption> [<https://perma.cc/8VLZ-NVME>].

35. See, e.g., Jonathan Blanks, *Justice Scalia: Underappreciated Fourth Amendment Defender*, CATO INST.: CATO AT LIBERTY (Feb. 15, 2016, 10:24 AM), <https://www.cato.org/blog/justice-scalia-underappreciated-fourth-amendment-defender> [<https://perma.cc/T6F3-E2TA>]; Jeffrey Rosen, *What Made Antonin Scalia Great*, ATLANTIC (Feb. 15, 2016), <https://www.theatlantic.com/politics/archive/2016/02/what-made-antonin-scalia-great/462837/> [<https://perma.cc/LG6V-U4N2>]; Robert J. Smith, *Antonin Scalia’s Other Legacy*, SLATE (Feb. 15, 2016, 7:28 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/02/antonin_scalia_was_often_a_friend_of_criminal_defendants.html [<https://perma.cc/2WRJ-6ZEQ>].

36. There are many brands of originalism. Justice Scalia describes his trying to determine what the Constitution “was understood by the society to mean when it was adopted.” Antonin Scalia & Stephen Breyer, Assoc. Justices, U.S. Supreme Court, *Debate at American University: Constitutional Relevance of Foreign Court Decisions* (Jan. 13, 2005), <http://www.freerepublic.com/focus/f-news/1352357/posts> [<https://perma.cc/C2QT-U24Q>].

37. Justice Scalia provides a concise defense of public-meaning originalism in Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3 (Amy Gutmann ed., 1997).

38. *Id.* at 37–47.

tech³⁹ and low.⁴⁰ Although his death left that project unfinished, Justices Clarence Thomas and Neil Gorsuch remain as committed methodological torchbearers. As the Court confronts the current crisis in Fourth Amendment law, it would be well advised to follow their lighted path. Doing so would immediately clarify the meaning, scope, and import of the Fourth Amendment by defining “search” as it would have been understood by eighteenth-century readers, as examining, trying to find, exploring, looking through, seeking, or inquiring.⁴¹

If we adopt a more familiar definition of “search” in Fourth Amendment cases, then we can focus our attention where it belongs: on the kinds of practices and policies that threaten the right of the people to be secure against *unreasonable* searches and seizures. Here, the work of Immanuel Kant provides a helpful conceptual frame. Kant is perhaps most famous for his categorical imperative,⁴² which holds that we should act only upon those maxims that can be made universal law.⁴³ In essence, the categorical imperative is a test of generalization. It asks what would happen if a proposition, rule, or norm was adopted as a universal rule of practice.⁴⁴ If doing so would result in a logical or practical contradiction, then we ought not act on that proposition, rule, or norm.⁴⁵

As we shall see, the Fourth Amendment invites a similar operation by asking whether leaving a means or method of search or seizure to the unfettered discretion of government agents would threaten the right of the people

39. See, e.g., *United States v. Jones*, 565 U.S. 400 (2012) (holding that the installation and use of GPS-enabled tracking devices is a Fourth Amendment “search”); *Kyllo v. United States*, 533 U.S. 27 (2001) (holding that the use of heat-detection devices to search the interior of homes requires a warrant).

40. See, e.g., *Arizona v. Hicks*, 480 U.S. 321 (1987) (holding that physical movements of effects for purposes of inspection is a Fourth Amendment “search”).

41. See *infra* note 51 and accompanying text.

42. See IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 105 (Mary Gregor ed. & trans., 1996) (1785).

43. IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* 14 (James W. Ellington trans., 1983) (1785).

44. For a concise introduction to this part of Kant’s work, see David Gray, *Punishment as Suffering*, 63 *VAND. L. REV.* 1619, 1660–63 (2010).

45. *Id.* For those of us who live with very young people, this basic operation is a routine part of our everyday lives. For example:

Me: “Please don’t litter.”

Very young person: “Why?”

Me: “Because if everyone littered then we would live amongst piles of trash inhabited by all manner of vermin that would spread zoonotic diseases resulting in the destruction of humanity.”

Very young person: “Oh. Can I have a treat?”

to be secure against unreasonable searches and seizures.⁴⁶ If a means or method of search or seizure violates this Fourth Amendment categorical imperative, then it must be subject to constitutional regulation. Although the Fourth Amendment does not mandate a particular form of regulation,⁴⁷ the Warrant Clause provides a source of useful guidance.⁴⁸ Specifically, it highlights the critical value, well-understood by the founding generation, of limiting executive discretion to search and seize by, (1) requiring ex ante reason giving, (2) allowing searches and seizures only where executive agents can demonstrate good and sufficient reasons to a neutral arbiter, (3) setting specific limits on where agents can search and what they can seize, and (4) providing a means of post hoc accountability.⁴⁹ These regulative tactics are just as effective today as they were in 1791 and provide a substantial toolbox for addressing threats to the right of the people to be secure against unreasonable searches posed by new and emerging search technologies.⁵⁰

III. WHAT IS A SEARCH?

Katz has made determining whether government action constitutes a search overly complicated, nonsensical, and antitextual. By contrast, taking the text seriously makes this determination entirely straightforward.

Samuel Johnson's 1792 *Dictionary of the English Language* defines "search" as "[t]o examine; to try; to explore; to look through" and "[t]o make inquiry" or "[t]o seek; to try to find."⁵¹ That is pretty much how most English speakers would define "search" today,⁵² and certainly much more straight-

46. GRAY, THE FOURTH AMENDMENT, *supra* note 5, at 251; Gray & Citron, *Quantitative Privacy*, *supra* note 31, at 101.

47. *California v. Acevedo*, 500 U.S. 565, 581 (1991) (Scalia, J., concurring) ("The Fourth Amendment does not by its terms require a prior warrant for searches and seizures; it merely prohibits searches and seizures that are 'unreasonable.'"); TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 21, 23 (1969) (arguing that warrants do not make a search valid or invalid, and that the contrary view "is in dissonance with the teaching of history, and has led to an inflation of the warrant out of all proportion to its real importance in practical terms"); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 761 (1994) ("The words of the Fourth Amendment really do mean what they say. They do not require warrants, even presumptively, for searches and seizures."); *see also* Transcript of Oral Argument at 43, *United States v. Wurie*, 134 S. Ct. 2473 (2014) (No. 13-212) ("[T]he question is whether it's an unreasonable search, and the warrant clause follows much later.").

48. GRAY, THE FOURTH AMENDMENT, *supra* note 5, at 139-44, 171-72, 202-05.

49. *Id.* at 140-41.

50. *Id.* at 249-87.

51. SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, J.F. & C. Rivington et al. 10th ed. 1792) (unpaginated) (definition of "search"). Justice Scalia has identified Johnson as an "authoritative" source for the meaning of words in the Constitution. *See* ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 419 (2012); *see also* *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008) (citing and relying on Johnson).

52. *See Search*, *supra* note 3.

forward than violating a “(subjective) expectation of privacy . . . that society is prepared to recognize as ‘reasonable.’”⁵³

This common parlance, nontechnical definition of “search” is also far more sensible than the *Katz* approach, particularly in light of the text. After all, the Fourth Amendment does not protect against the threat of searches or seizures; it protects against the threat of *unreasonable* searches and seizures.⁵⁴ That phrase seems to assume, as most people would, that some searches are reasonable while others are not. By contrast, defining “search” as a violation of reasonable expectations of privacy creates a muddle by prematurely introducing assessments of reasonableness into the definition of search.⁵⁵

So, what sorts of government activities would qualify as searches on a standard definition of “search”? Entering a home “to examine” what is inside or to “try to find” something or someone certainly would.⁵⁶ So too would looking through or examining documents or other “papers,” including business records.⁵⁷ Examining the contents of a garbage can is clearly a search. It would also be perfectly natural and appropriate to say that a police officer who is “making inquiry” or “trying to find” someone is “searching” for that person,⁵⁸ whether in a home, at a shopping mall, or on a downtown street.⁵⁹

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

54. U.S. CONST. amend. IV.

55. See *Minnesota v. Carter*, 525 U.S. 83, 91-92 (Scalia, J., concurring) (questioning application of the “fuzzy standard of ‘legitimate expectation of privacy’” to the “threshold question whether a search or seizure covered by the Fourth Amendment *has occurred*”).

56. *United States v. Jones*, 565 U.S. 400, 404-05 (2012) (“We have no doubt that such a physical intrusion would have been considered a ‘search’ within the meaning of the Fourth Amendment when it was adopted.”); see also *Entick v. Carrington* (1765) 95 Eng. Rep. 807; 2 Wils. K.B. 275 (treating physical intrusions into a home to look for persons and papers as a “search”); *Wilkes v. Wood* (1763) 98 Eng. Rep. 489 (K.B.) (concluding the same).

57. See *Boyd v. United States*, 116 U.S. 616 (1886) (holding that the compelled disclosure of business documents is a Fourth Amendment “search”). There is also ample evidence in the drafting history of the Fourth Amendment that “effects” would have been understood to include business property. See, e.g., Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1301 n.690 (2016); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 708 n.461 (1999).

58. In their respective concurring opinions in *Jones*, Justices Sotomayor and Alito seem to have assumed that looking for a person in public could constitute a Fourth Amendment “search,” and for good reason. Eighteenth-century sources make clear that looking for persons was regarded as a “search.” See *THE CONDUCTOR GENERALIS: OR, THE OFFICE, DUTY AND AUTHORITY OF JUSTICES OF THE PEACE, HIGH-SHERIFFS, UNDER-SHERIFFS, CORONERS, CONSTABLES, GAOLERS, JURY-MEN, AND OVERSEERS OF THE POOR* 187 (Philadelphia, Robert Campbell 1792) [hereinafter *THE CONDUCTOR GENERALIS*] (referring to the authority of constables and sheriffs to “search in his town for suspected persons,” and suggesting that “it is a good course to have the warrant of a justice of the peace, when time will permit, in order to prevent causeless hue and cry” even though “it is by no means necessary, nor is it always convenient; for the felon may escape before the warrant be obtained: and hue and cry was part of the law, before justices of the peace first instituted”); *WILLIAM SHEPPARD, THE OFFICES OF CONSTABLES, CHURCH WARDENS, OVERSEERS OF THE POOR, SUPRAVISORS OF THE HIGHWAYES, TREASURERS OF THE COUNTY-STOCK; AND SOME LESSER COUNTRY OFFICERS*, at ch. 8,

As Theodor Seuss Geisel might have put it, “A search is a search, no matter where.”

Adopting a common parlance, nontechnical definition of “search” might seem to broaden the scope of the Fourth Amendment’s regulatory reach.⁶⁰ These worries raise a baseline problem. Broader than what? Applying the text according to its original meaning might encompass a broader range of government actions than are captured by defining a “search” as a “trespass” or a transgression of “reasonable expectations of privacy.” But that just means that these alternatives are denying us the full force of our constitutional birthright. It is hard to argue against restoring for ourselves and our posterity full Fourth Amendment protections.⁶¹ The alternative is judicial putsch.⁶² And then, there is the important work of understanding what constitutes “unreasonable searches and seizures” and how “the right of the people to be secure . . . against unreasonable searches and seizures” might and

§ 2 (London 1658) (“That the Constable in this case, of his own authority, without Warrant from a Justice of Peace, may search for the Goods and the Fellow; and if he finde the Goods, seize them; and if he finde the Fellow apprehend him; yet for the most part the Constable not knowing his authority, or the danger, is so fearfull and remiss herein, that he doth nothing until he have a Warrant of a Justice of Peace to provoke and enable him so to doe. And if such a Warrant be sent to him from a Justice of Peace, to search after Goods [stolen] and the party that is suspected to steal them; the Constable may, and must execute this Warrant accordingly.”).

59. See WILLIAM CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING*, 602–1791, at 322 (2009) (discussing early eighteenth-century cases of searches for “Rogues, Vagabonds, sturdy Beggars, and disorderly Persons apprehended by virtue of search Warrants in Night Houses and other disorderly Houses or such as infest the Streets in the Night-time”); see also *THE CONDUCTOR GENERALIS*, *supra* note 58, at 187–88 (providing that “upon hue and cry levied against any person, or where any hue and cry comes to a constable, whether the person be certain or uncertain, the constable may search suspected places within his vill[age] for the apprehending of the felons”); SHEPPARD, *supra* note 58, ch. 8, § 2 (“An Action of Trespass was brought by a man for an Assault and Battery of his Servant, whereby he did lose his service three dayes, and the Defendant pleaded that A was robbed at midnight of Goods to the value of two pounds, whereupon the said A came to the Constable, and prayed him to search for the suspicious persons, and to apprehend and arrest them; and accordingly he did search, and found the same servant walking suspiciously in the street in the night . . .”); *id.* (“And this Officer receiving a *Hue and Cry* after a Fellow, must, with all speed, make diligent pursuit, with Horse and Foot, after the offenders from Town to Town the way it is sent, and make diligent search in his own Town . . .”).

60. *Cf. Jones*, 565 U.S. at 412–13 (expressing concerns about the implications of adopting a durational approach to defining “search” under the Fourth Amendment); Kerr, *supra* note 31, at 335 (worrying about the implications of the mosaic theory for investigative means that have not traditionally been regarded as “searches” under the Fourth Amendment).

61. See *Jones*, 565 U.S. at 405–07 (pointing out that *Katz* and its progeny cannot take away rights guaranteed by “the Fourth Amendment when it was adopted”); *id.* at 414 (Sotomayor, J., concurring) (“*Katz*’s reasonable-expectation-of-privacy test augmented, but did not displace or diminish, the common-law trespassory test that preceded it.”).

62. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2629 (2015) (Scalia, J., dissenting); see *supra* note 2.

might not be threatened by government action, both of which limit the regulatory scope of the Fourth Amendment.⁶³ At any rate, if the point is to interpret the text of the Fourth Amendment according to its original public meaning, then that is what we should do. To do otherwise is jiggery-pokery.⁶⁴

IV. WHEN IS A SEARCH UNREASONABLE?

Eighteenth-century readers would have understood “unreasonable” similarly to how we understand it today:⁶⁵ as “[n]ot agreeable to reason,”⁶⁶ “[e]xorbitant; claiming or insisting on more than is fit,” or “[g]reater than is fit; immoderate.”⁶⁷ “Unreasonable” in the Fourth Amendment would also have been read in light of the common law’s rejection of general warrants and expressed preference for independent review of executive action.⁶⁸ “Unreasonable searches” would therefore have been understood as some form of (1) looking into or trying to find not justified by good and sufficient reasons, (2) ungrounded by a process of disciplined reason giving, (3) that went further than was justified by good and sufficient reasons, (4) that was immune from review in court, or (5) that was otherwise “against the reason of the common law.”⁶⁹ That’s it. Anything more is just argle-bargle.⁷⁰

This reading is reinforced later in the text where we are told that “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.”⁷¹ After all, what is the requirement to show “probable cause” but a demand for good and sufficient reasons? Why require an “Oath or affirmation” if not to submit those reasons to formal, independent evaluation? And why require particularity if not to limit the discretion of government agents when conducting searches and seizures? The exegetic⁷² imbrica-

63. U.S. CONST. amend. IV; *see infra* notes 65–122 and accompanying text.

64. *King v. Burwell*, 135 S. Ct. 2480, 2500 (2015) (Scalia, J., dissenting); *see supra* note 2.

65. For example, *Merriam-Webster* defines “unreasonable” as “not governed by or acting according to reason,” “not conformable to reason,” or “exceeding the bounds of reason or moderation.” *Unreasonable*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/unreasonable> [https://perma.cc/4XXV-54EE].

66. JOHNSON, *supra* note 51 (definition of “unreasonable”). Johnson defined “reason” as “[t]he power by which man deduces one proposition from another, or proceeds from premises to consequences,” “[r]ight; justice,” or “[m]oderation.” *Id.*

67. *Id.*

68. *See* GRAY, THE FOURTH AMENDMENT, *supra* note 5, at 160–65; Amar, *supra* note 47, at 776–81; Donohue, *supra* note 57, at 1270–71.

69. Donohue, *supra* note 57, at 1270–71.

70. *United States v. Windsor*, 133 S. Ct. 2675, 2709 (2013) (Scalia, J., dissenting); *see supra* note 2.

71. U.S. CONST. amend. IV.

72. *Rapanos v. United States*, 547 U.S. 715, 755 (2006); *see supra* note 2.

tion of concepts is stunning. By comparison, “reasonable expectations of privacy” are wisps in the ether, an invitation to judicial adventurism.

V. WHAT THREATENS THE RIGHT OF THE PEOPLE TO BE SECURE?

The Fourth Amendment does not ban searches and seizures. It does not even prohibit all unreasonable searches and seizures. It instead guarantees “the right of the people to be secure . . . against unreasonable searches and seizures.”⁷³ To make sense of how this would have been understood in 1791, we must have some idea of what struck fear of unreasonable searches and seizures into the hearts of eighteenth century Americans.

The Fourth Amendment guarantees a right to be “secure.” Then, as now, that would have been read as a right to live “free from fear” or “danger.”⁷⁴ And who is guaranteed the right to live free from fear that their “persons, houses, papers, and effects” are at risk of unreasonable searches and seizures?⁷⁵ According to the text, it is “the people” (not “persons”).⁷⁶ Readers at the time would have read this as a reference to the same “people” acting in the Preamble to form a more perfect union and whose rights are protected by the First, Second,⁷⁷ Ninth, and Tenth Amendments—namely “the People of the United States.”⁷⁸ This means that they would have read the Fourth Amendment as guaranteeing a right that had important collective dimen-

73. U.S. CONST. amend. IV.

74. JOHNSON, *supra* note 51; *see also* GRAY, THE FOURTH AMENDMENT, *supra* note 5, at 157–58; Luke M. Milligan, *The Forgotten Right to be Secure*, 65 HASTINGS L.J. 713, 740, 749–50 (2014). Merriam-Webster defines “secure” as “free from danger.” *Secure*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/secure> [<https://perma.cc/57ML-9X74>].

75. U.S. CONST. amend. IV.

76. *Id.* This marked a departure from parallel protections against unreasonable search and seizure in state constitutions. For example, both the Massachusetts and New Hampshire constitutions guaranteed the right of “every subject” to be secure against unreasonable searches and seizures. N.H. CONST. pt. 1, art. XIX (amended 1792); MASS. CONST. pt. 1, art. XIV. Eighteenth-century readers could not have missed the significance of this choice, particularly in light of the important role of John Adams and the Massachusetts Declaration of Rights on the Fourth Amendment. *See* GRAY, THE FOURTH AMENDMENT, *supra* note 5, at 147–56 (discussing significance of “the people” as compared to “every subject”); CUDDIHY, *supra* note 59, at 729 (identifying the Pennsylvania Constitution as the origin of the phrase “the right of the people” in the Fourth Amendment).

77. In a bit of dicta, the Court suggested in *District of Columbia v. Heller* that “the people” in the Fourth Amendment refers to “citizens” rather than “the people collectively.” 554 U.S. 570, 580 n.6 (2008). At least with respect to the Fourth Amendment, that view is not well founded. *See* David Gray, *Dangerous Dicta*, 72 WASH. & LEE L. REV. 1181 (2015). It is also not clear that the *Heller* Court meant to suggest that “the people” refers to individuals. *See Heller*, 554 U.S. at 580 (explaining that where “the people” is used the Constitution, “the term unambiguously refers to all members of the political community, not an unspecified subset”).

78. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265–66 (1990) (contrasting “the people” with “the words ‘person’ and ‘accused’ used in the Fifth and Sixth Amendments regulating procedures in criminal cases”); *see also supra* notes 76–77.

sions; it targeted government activities capable of generating general threats against the security of “the people” as a whole rather than just individual persons.⁷⁹ This may seem a bit elusive to contemporary readers, but it would have made perfect sense to eighteenth-century readers given their experiences with general warrants and writs of assistance.⁸⁰

General warrants and writs of assistance were not particular as to the person to be arrested or the property to be seized.⁸¹ They could also be issued by executive agents, circumventing judicial review.⁸² As a result, they provided government agents with virtually unlimited authority to search wherever they pleased without need of justifying their conduct by good and sufficient reasons.⁸³ In fact, general warrants licensed searches conducted for *bad* reasons⁸⁴ while providing immunity from judicial review.⁸⁵

In a series of eighteenth-century cases—often referred to as the “general warrants cases”—English courts held that searches conducted pursuant to

79. See GRAY, *THE FOURTH AMENDMENT*, *supra* note 5, at 144–56; Gray, *Fourth Amendment Remedies*, *supra* note 5, at 444–56; Gray, *supra* note 77, at 1184–1203; Richard H. McAdams, *Tying Privacy in Knotts: Beeper Monitoring and Collective Fourth Amendment Rights*, 71 VA. L. REV. 297, 318 (1985).

80. See *Riley v. California*, 134 S. Ct. 2473, 2494 (2014) (discussing how the Fourth Amendment “was the founding generation’s response to the reviled ‘general warrants’ and ‘writs of assistance’ of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity”).

81. See *Huckle v. Money* (1763) 95 Eng. Rep. 768; 2 Wils. K.B. 205; *Wilkes v. Wood* (1763) 98 Eng. Rep. 489, 498–99; Lofft. 1, 18–19.

82. See Amar, *supra* note 47, at 772–73.

83. See *Huckle*, 95 Eng. Rep. at 768 (holding general warrants license searches “without any information or charge”); see also JAMES OTIS, *IN OPPOSITION TO WRITS OF ASSISTANCE* 27 (William Jennings Bryan ed., 1906) (1761) (discussing how general warrants justify searches and seizures on nothing more than “[b]are suspicion without oath” allowing “[e]very one with this writ may be a tyrant. . . accountable to no person for his doings” and “[e]very man [to] reign secure in his petty tyranny”). Soon after the founding, the United States Supreme Court pointed out the centrality of these concerns in the Fourth Amendment itself, holding that a warrant issued for “want of stating some good cause certain, supported by oath” is unconstitutional. *Ex parte Burford*, 7 U.S. (3 Cranch) 448, 453 (1806) (emphasis omitted). Under eighteenth-century common law, anyone conducting a search or seizure could be haled into court by the target of that search or seizure where he would be required to justify himself by providing good and sufficient reasons for his actions. *Entick v. Carrington* (1765) 95 Eng. Rep. 807, 817; 2 Wils. K.B. 275, 291. Warrants, including general warrants, provided immunity against suits in trespass, effectively excusing bearers the duty of justifying their conduct after the fact. Amar, *supra* note 47, at 774–78. General warrants and writs of assistance also did not provide for procedural review such as requiring agents to keep an inventory of papers or property they seized. *Wilkes*, 98 Eng. Rep. at 498–99.

84. See Otis, *supra* note 83, at 32 (noting that “[e]very man prompted by revenge, ill humor, or wantonness, to inspect the inside of his neighbor’s house, may get a writ of assistance”). A later commentator similarly warned that “if magistrates had a power of arresting men . . . merely upon their own suspicions, or pretended suspicions, they might cause any person, how innocent soever, to be thrown into prison whenever they thought fit.” 2 FRANCIS MASERES, *THE CANADIAN FREEHOLDER: IN THREE DIALOGUES BETWEEN AN ENGLISHMAN AND A FRENCHMAN, SETTLED IN CANADA* 246 (London, B. White 1779).

85. Amar, *supra* note 47, at 774–78.

general warrants are unreasonable.⁸⁶ Why? Well, by definition, general warrants do not specify the places to be searched or the items to be seized.⁸⁷ They therefore leave the decision to search to the unfettered discretion of executive agents unmediated by any process of reason giving or judicial review.⁸⁸ This not only constitutes a grant of unchecked power to the executive, it also opens the door to abuse,⁸⁹ leaving the people to live in a state of insecurity against the threat of unreasonable searches.⁹⁰ The facts in the general warrants cases provide evidence that these fears were well founded. Agents in those cases were using the power to search and seize as a tool to target and suppress political dissent.⁹¹

Although general warrants effectively had been banned in England by the late eighteenth century,⁹² Englishmen in the colonies did not enjoy the

86. See, e.g., *Money v. Leach* (1765) 97 Eng. Rep. 1075, 1088 (K.B.) (“[A]n uncertain warrant [is] void: and there is no case or book to the contrary.”); *Huckle*, 95 Eng. Rep. at 769 (concluding the same); *Wilkes*, 98 Eng. Rep. at 498–99 (concluding the same).

87. See *Huckle*, 95 Eng. Rep. at 768; *Wilkes*, 98 Eng. Rep. at 498–99.

88. *Wilkes*, 98 Eng. Rep. at 498–99 (holding general warrants constituted “a discretionary power given to messengers to search wherever their suspicions may chance to fall”); *Entick*, 95 Eng. Rep. at 817 (holding a general warrant “left to the discretion of these defendants” the decision to search); *Money*, 97 Eng. Rep. at 1088 (“It is not fit, that the receiving or judging of the information should be left to the discretion of the officer.”); see also Opinion of Attorney General De Grey upon Writs of Assistance, 7 Geo. 3, c. 46 (Eng.) (“[I]t will be unconstitutional to lodge such Writ in the Hands of the Officer, as it will give him a discretionary Power to act under it in such Manner as he shall think necessary.”); 4 WILLIAM BLACKSTONE, COMMENTARIES *288 (“[I]t is the duty of the magistrate, and ought not to be left to the officer, to judge of the ground of suspicion.”).

89. *Otis*, *supra* note 83, at 30–32 (“Every one with this writ may be a tyrant,” and “may reign secure in [their] petty tyranny, and spread terror and desolation around [them], until the trump of the archangel shall excite different emotions in [their] soul[s]... and whether they break through malice or revenge, no man, no court can inquire.”); see also *id.* (“Every man prompted by revenge, ill humor, or wantonness, to inspect the inside of his neighbor’s house, may get a writ of assistance. Others will ask it from self-defense; one arbitrary exertion will provoke another, until society be involved in tumult and in blood.”).

90. See *Donohue*, *supra* note 57, at 1270, 1319 (discussing how general warrants granted arbitrary powers that were “unreasonable” to the Framers, being “against the reason of the common law,” and had oppressive impact on the people as a whole); *Milligan*, *supra* note 74, at 738–50 (2014) (discussing how the Fourth Amendment conferred on the people a right to be “free from fear” of unreasonable searches). In *Wilkes*, the court condemned this kind of general power to search as “totally subversive of the liberty of the subject.” 98 Eng. Rep. at 498. James Otis famously denounced writs of assistance as “the worst instrument of arbitrary power,” placing “the liberty of every man in the hands of every petty officer.” *Otis*, *supra* note 83, at 28–29.

91. See *Cuddihy*, *supra* note 59, at 122–23; *Donohue*, *supra* note 57, at 1208–10; *Milligan*, *supra* note 74, at 749.

92. See BLACKSTONE, *supra* note 88, at *288 (“A general warrant to apprehend all persons suspected, without naming or particularly describing any person in special, is illegal and void for its uncertainty; for it is the duty of the magistrate, and ought not to be left to the officer, to judge of the ground of suspicion.”).

same security against unreasonable searches and seizures. That is because colonial officials asserted authority to issue writs of assistance, a form of general warrant.⁹³ A group of Massachusetts businessmen represented by James Otis challenged the legality of these writs in *Paxton's Case*.⁹⁴ Otis's impassioned oral argument in that case was later lauded as "the first scene of the first act of opposition to the arbitrary claims of Great Britain."⁹⁵ There, Otis highlighted many of the same concerns cited by courts in the general warrants cases, including the broad discretion afforded executive agents,⁹⁶ the absence of judicial review,⁹⁷ and the potential for abuse.⁹⁸

Given this history, it is no surprise that concerns about general warrants and writs of assistance were a central feature of the American constitutional movement.⁹⁹ Courts condemned them.¹⁰⁰ State constitutions banned them.¹⁰¹

93. CUDDIHY, *supra* note 59, at 378; GRAY, THE FOURTH AMENDMENT, *supra* note 5, at 70.

94. CUDDIHY, *supra* note 59, at 377–95; GRAY, THE FOURTH AMENDMENT IN AN AGE OF SURVEILLANCE, *supra* note 5, at 70.

95. *Riley v. California*, 134 S. Ct. 2473, 2494 (2014) (quoting Letter from John Adams to William Tudor (Mar. 29, 1817), in 10 JOHN ADAMS, THE WORKS OF JOHN ADAMS 244, 248 (Charles Francis Adams ed., Boston, Little, Brown & Co. 1856)).

96. *See* Otis, *supra* note 83 (assailing general warrants for granting license to "imprison, or murder any one within the realm" whom government agents might choose as a target); *see also* Mark Graber, *Seeing, Seizing, and Searching Like a State: Constitutional Developments from the Seventeenth Century to the End of the Nineteenth Century* ("Americans believed that government by administrators was arbitrary government inconsistent with the constitutional principles of rule by law. General warrants and excise searches were intimate parts of this conspiracy against republican government that Americans eventually concluded justified separation from Great Britain."), in THE CAMBRIDGE HANDBOOK OF SURVEILLANCE LAW, *supra* note 21, at 395, 406.

97. Otis, *supra* note 82 (complaining that general warrants put "the liberty of every man in the hands of every petty officer," by allowing officers to "enter our houses when they please," exercising unchecked "arbitrary power"); *see also* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (condemning King George III for "erect[ing] a multitude of New Offices, and sen[d]ing hither swarms of Officers to harass our people, and eat out their substance").

98. *See supra* note 89.

99. *See* Graber, *supra* note 96, at 407 ("This concern with the discretionary power of officials not directly accountable to the people inspired the constitutional bans on general warrants in state constitutions and the Constitution of the United States.").

100. *See, e.g.,* *Frisbie v. Butler*, 1 Kirby 213 (Conn. 1787); *see also* *Grumon v. Raymond*, 1 Conn. 40, 42–44 (Conn. 1814) (condemning "a warrant to search all suspected places, stores, shops and barns in [town]" because the discretion granted the officers "would open a door for the gratification of the most malignant passions"). As Mark Graber reports, "While the phrasing may seem obscure to the twenty-first century mind, eighteenth-century colonists understood that general warrants were the instrument 'swarms of Officers' used 'to harass our people'" that were cited in the Declaration of Independence. Graber, *supra* note 96, at 405–06; *see also* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 117 (1967) ("Unconstitutional taxing, the invasion of placemen, the weakening of the judiciary, plural officeholding, Wilkes, standing armies—these were major evidences of a deliberate assault of power upon liberty. Lesser testimonies were also accumulating at the same time: small episodes in themselves, they took on a large significance in the context in which they were received. Writs of assistance in support of customs officials were working their expected evil . . .").

States also cited the absence of a federal ban on general warrants as grounds for reservation during the ratification debates.¹⁰² In response to these concerns, James Madison submitted to the First Congress a draft of what would become the Fourth Amendment guaranteeing that “[t]he rights of the people to be secured in their persons, their houses, their papers, and their other property from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.”¹⁰³

The final draft of the Fourth Amendment took a broader view, guaranteeing that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”¹⁰⁴ But it also effectively banned general warrants¹⁰⁵ by providing that “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.”¹⁰⁶

All that is well and good, one might say, but how would experiences with general warrants and writs of assistance help eighteenth-century readers understand the idea of a general threat against the right *of the people* to be secure against unreasonable searches and seizures? After all, few individuals were actually subjected to searches under the authority of general war-

101. See, e.g., MASS. CONST. of 1780, pt. 1, art. XIV (“Every subject has a right to be secure from all unreasonable searches, and seizures of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities, prescribed by the laws.”). Similar provisions can be found in the Delaware, Maryland, New Hampshire, North Carolina, Pennsylvania, Vermont, and Virginia constitutions. See DE. DEC. OF RTS. of 1776, art. XVII (1776); MD. CONST. of 1776, art. XXIII; N.H. CONST. of 1784, pt. 1, art. XIX; N.C. CONST. of 1776, pt. 1, art. XI; PA. CONST. of 1776, ch. 1, art. X; VT. CONST. of 1786, ch. 1, art. XI; VA. CONST. of 1776, art. X.

102. See, e.g., RATIFICATION OF THE FEDERAL CONSTITUTION BY THE STATE OF NEW YORK (1788), reprinted in 2 DEP’T OF STATE, DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 174, 193 (Washington, Dep’t of State 1894) [hereinafter DOCUMENTARY HISTORY] (“That every Freeman has a right to be secure from all unreasonable searches and seizures of his person his papers or his property, and therefore, that all Warrants to search suspected places or seize any Freeman his papers or property, without information upon Oath or Affirmation of sufficient cause, are grievous and oppressive; and that all general Warrants (or such in which the place or person suspected are not particularly designated) are dangerous and ought not to be granted.”). North Carolina and Virginia filed similar reservations. See *id.* at 268–69, 379–80.

103. CUDDIHY, *supra* note 59, at 692 (quoting 1 Annals of Congress 452 (1789)).

104. U.S. CONST. amend. IV.

105. See Graber, *supra* note 96, at 407.

106. US CONST. amend. IV.

rants and writs of assistance.¹⁰⁷ The answer lies in the grants of broad authority and unfettered discretion that defined general warrants and writs of assistance.

In the views of eighteenth-century courts and commentators, the mere existence of general warrants and writs of assistance posed an existential threat to the people, leaving everyone¹⁰⁸ to live in fear that they might at any moment be the victim of unlimited executive power.¹⁰⁹ For example, in one of the general-warrants cases the court worried that granting “discretionary power . . . to messengers to search wherever their suspicions may chance to fall . . . certainly may affect the person and property of every man in this kingdom.”¹¹⁰ In another, the court warned that allowing general warrants “would destroy all the comforts of society.”¹¹¹ In a third, the court criticized agents of the crown for “exercising arbitrary power, violating Magna Charta, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this general warrant.”¹¹²

On this side of the Atlantic, James Otis condemned general warrants as “the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book.”¹¹³ Another founding-era critic railed against general warrants as “a detestable instrument of arbitrary power” that licensed “capricious house searches by insolent officers of the new central government.”¹¹⁴ Another pamphleteer complained that general warrants allowed “our bed

107. See CUDDIHY, *supra* note 59, at 490 (“When the British tried to extend the use of writs of assistance beyond Massachusetts, the legitimacy of not only those writs but of the promiscuous searches and seizures that they permitted diminished rapidly in America. Courts throughout the colonies opposed the issuance of the writs as general warrants and, in many cases, advocated specific warrants in their place.”).

108. See, e.g., 1 THE DEBATES OF THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 387 (Jonathan Elliot ed., J.B. Lippincott Co. 2d ed. 1937) (1836) [hereinafter ELLIOT] (quoting Luther Martin as warning against general warrants’ allowing government officials to “examine into your private concerns”).

109. See *Frisbie v. Butler*, 1 Kirby 213 (Conn. 1787); see also Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 366 (1974) (“[T]he primary abuse thought to characterize the general warrants and the writs of assistance was their indiscriminate quality, the license that they gave to search Everyman without particularized cause, the fact that they were—as Wilkes proclaimed Lord Halifax’s warrant for the authors and publishers of No. 45 of the North Briton—‘a ridiculous warrant against the whole English nation.’” (quoting 2 THOMAS ERSKINE MAY, THE CONSTITUTIONAL HISTORY OF ENGLAND SINCE THE ACCESSION OF GEORGE THIRD 247 (1864))).

110. *Wilkes v. Wood* (1763) 98 Eng. Rep. 489, 498; Lofft. 1, 18.

111. *Entick v. Carrington* (1765) 95 Eng. Rep. 807, 817; 2 Wils. K.B. 275, 291.

112. *Huckle v. Money* (1763) 95 Eng. Rep. 768, 769; 2 Wils. K.B. 205, 207.

113. Otis, *supra* note 82.

114. ELBRIDGE GERRY, OBSERVATIONS ON THE NEW CONSTITUTION, AND ON THE FEDERAL AND STATE CONVENTIONS (Boston, n. pub. 1788), reprinted in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 1, 13 (Paul Leicester Ford ed., Brooklyn, n. pub. 1888); see also CUDDIHY, *supra* note 59, at 677.

chambers . . . to be searched by brutal tools of power”¹¹⁵ Patrick Henry condemned general warrants as licenses to search “in the most arbitrary manner, without any evidence or reason” leaving “the most sacred” to be “ransacked by the strong hand of power.”¹¹⁶ Courts continued to cite concerns about the general threats posed by general warrants in the early years after ratification.¹¹⁷ For example, Chief Judge Reeve of the Connecticut Court of Errors opined in 1814 that allowing general warrants would leave “every citizen of the United States within the jurisdiction . . . liable to be arrested and carried before the justice for trial.”¹¹⁸

So, eighteenth-century readers would have understood general warrants and writs of assistance as threats against the general security of the people precisely because they granted executive agents broad and unfettered discretion to search and seize. Those grants of discretion were viewed as violating the rights of those actually searched while also threatening the security of everyone. It should therefore come as no surprise that the founding generation—the people—demanded a broad guarantee of their right to be secure against unreasonable searches and seizures.

This has some important consequences for our understanding of the Fourth Amendment. For example, the Amendment is not particularly concerned with individual searches and seizures considered in isolation. It is instead concerned with laws and policies that leave the people insecure against threats of unreasonable searches and seizures by granting broad, unfettered discretion for government agents to search wherever they please and to seize whatever they like.¹¹⁹ This makes good sense. After all, individual searches and seizures, whether unreasonable or not, do not really pose a general threat to the people. Threats to the security of the people arise instead from the possibility that anyone could be subjected to an unreasonable search or seizure at any time. Eighteenth-century jurists and critics therefore criticized general warrants and writs of assistance because their very existence threat-

115. *A Son of Liberty*, N.Y.J., Nov. 8, 1787, reprinted in 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 481, 481 (John P. Kaminski & Gaspare J. Saladino eds., 1981).

116. 1 ELLIOT, *supra* note 108, at 588.

117. *Boyd v. United States*, 116 U.S. 616, 630 (1886) (striking down a broad legislative grant of search powers and noting that “[t]he struggles against arbitrary power in which [the Founders] had been engaged for more than twenty years, would have been too deeply engraved in their memories to have allowed them to approve of such insidious disguises of the old grievance which they had so deeply abhorred”).

118. *Grummon v. Raymond*, 1 Conn. 40, 42 (Conn. 1814); see also *Rice v. Ames*, 180 U.S. 371, 374–75 (1901).

119. *Milligan*, *supra* note 74, at 738–50; *Davies*, *supra* note 57, at 552.

ened the “person and property of every man,”¹²⁰ the “liberty of every man,”¹²¹ and the security of “society”¹²² as a whole.

This is not to suggest that the Fourth Amendment is uninterested in particular searches and seizures. Rather, the point is that the Fourth Amendment is interested in the features of particular searches and seizures that present a more general threat. But how can we make sense of that? Here is where Kant’s categorical imperative can be helpful.

VI. THE FOURTH AMENDMENT CATEGORICAL IMPERATIVE.

Although Immanuel Kant was a prominent player in late eighteenth-century philosophical circles, there is very little evidence that the Constitution, inclusive of the Bill of Rights, was influenced by his work. To the extent the writings of a particular philosopher informed common understandings of the Constitution in the founding era, it was the work of John Locke.¹²³ In this regard, Chief Justice John Roberts had a point when he famously derided the value of legal scholarship engaging Kant.¹²⁴ The great Prussian had his moments, however, and is rightly famous for his categorical imperative.¹²⁵ Although there is no reason to think that founding-era readers would have looked at the text of the Fourth Amendment and thought “Oh, that’s all about Kant,” the basic logic of the categorical imperative is helpful as a conceptual matter because it utilizes a test also at the heart of the Fourth Amendment: generalization.

The categorical imperative commands that “I should never act except in such a way that I can also will that my maxim should become a universal law.”¹²⁶ The concept of a maxim is a bit complex,¹²⁷ but can be understood as the logical description of an action stripped bare of external contingencies or instrumental goals.¹²⁸ So, the maxim of theft is something like “I take that which is not mine,” without regard to circumstances or what the thief hopes

120. *Wilkes v. Wood* (1763) 98 Eng. Rep. 489, 498; Lofft. 1, 18.

121. *Otis*, *supra* note 82.

122. *Entick v. Carrington* (1765) 95 Eng. Rep. 807, 817; 2 Wils. K.B. 275, 291.

123. See Donald L. Doernberg, “We the People”: *John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CALIF. L. REV. 52, 57–68 (1985).

124. See *A Conversation with Chief Justice Roberts*, C-SPAN 30:30 (June 25, 2011) <https://www.c-span.org/video/?300203-1/conversation-chief-justice-roberts> [<https://perma.cc/S9R5-LHXR>] (“Pick up a copy of any law review that you see and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in eighteenth-century Bulgaria, or something, which I’m sure was of great interest to the academic that wrote it, but isn’t of much help to the bar.”). For the definitive treatment of Kant’s influence on eighteenth-century Bulgarian evidence law, see Orin S. Kerr, *The Influence of Immanuel Kant on Evidentiary Approaches in 18th-Century Bulgaria*, 18 GREEN BAG 2D 251 (2015).

125. See KANT, *supra* note 43, at 14.

126. *Id.*

127. Kant defines a maxim as “[a] rule that the agent himself makes his principle [of action] on subjective grounds . . .” KANT, *supra* note 42, at 51 (alteration in original).

128. See Gray, *supra* note 44, at 1660–61.

to accomplish by his act. The categorical imperative asks whether we can allow everyone discretion to act on a particular maxim without giving rise to a contradiction.¹²⁹ If we want to know whether people should be free to steal then we ask what would happen if everyone acted on the maxim “I take that which is not mine.”¹³⁰ Of course, if everyone acted on this maxim, then the whole concept of mine and thine upon which the maxim of theft is predicated would cease to exist.¹³¹ It follows that we cannot allow everyone unfettered discretion to take that which is not theirs. Whether and when one may take the property of another must instead be regulated by the moral law and, consequently, juridical law.¹³²

The same basic conceptual move is at work in the Fourth Amendment. By guaranteeing a right of the people to be secure against unreasonable searches and seizures, it invites us to imagine what the world would look like if we granted government agents unfettered discretion to engage in some form of search or seizure. Would it leave each of us and all of us to live in fear of such a search or seizure, thereby threatening the “liberty of every man”?¹³³ If so, then the conduct in question must be subject to some form of constitutional restraint.¹³⁴

Although the Court has never adopted this approach, it has endorsed the logic of generalization in Fourth Amendment cases.¹³⁵ Take as a recent example *United States v. Jones*.¹³⁶ *Jones* dealt with the installation and use of GPS-enabled tracking devices.¹³⁷ Although the justices framed the question in terms of whether such installation and monitoring qualifies as a “search,”¹³⁸ some of their reasoning suggests that their real concerns bore on the question raised by the Fourth Amendment categorical imperative: whether government agents should enjoy unfettered discretion to install tracking devices on our effects for the purpose of searching for our persons or effects. As evidence, consider a telling colloquy between Chief Justice Roberts and Deputy Solicitor General Michael Dreeben during oral argument:

129. *Id.* at 1661–62.

130. *Id.* at 1662.

131. *Id.*

132. *Id.*

133. Otis, *supra* note 82.

134. See GRAY, THE FOURTH AMENDMENT, *supra* note 5, at 251.

135. As applied by the Court, the *Katz* test is grounded in questions of generalizability. For example, the public observation and third-party doctrines ask whether society has *in fact* accepted a maxim of government action as universal law by looking to whether the conduct in question violates reasonable expectations of privacy.

136. 565 U.S. 400 (2012).

137. *Jones*, 565 U.S. at 402.

138. *Id.*

CHIEF JUSTICE ROBERTS: You think there would also not be a search if you put a GPS device on all of our cars, monitored our movements for a month? You think you're entitled to do that under your theory?

MR. DREEBEN: The Justices of this Court?

CHIEF JUSTICE ROBERTS: Yes.

(Laughter.)

MR. DREEBEN: Under our theory and under this Court's cases, the Justices of this Court when driving on public roadways have no greater expectation of—

CHIEF JUSTICE ROBERTS: So, your answer is yes, you could tomorrow decide that you put a GPS device on every one of our cars, follow us for a month; no problem under the Constitution?¹³⁹

In this exchange, Chief Justice Roberts is using generalizability as a test, asking whether the Fourth Amendment can bear granting government agents unlimited discretion to deploy and use GPS-enabled tracking devices or, alternatively, whether doing so would threaten the security of the people—here represented by the justices themselves—against unreasonable searches and seizures.

Justice Sonia Sotomayor applied the same basic logic in her *Jones* concurrence, worrying about how granting “unfettered discretion” to deploy and use GPS-enabled tracking technologies would “alter the relationship between citizen and government in a way that is inimical to democratic society.”¹⁴⁰ So too did Justice Samuel Alito, who, writing for himself and Justices Ruth Bader Ginsburg, Stephen Breyer, and Elena Kagan in *Jones*, pointed out that, as compared to traditional ways to search for people—such as human surveillance—granting unlimited access to cheap, scalable technologies like GPS-tracking implicates everyone's privacy.¹⁴¹

So, while the Court may not have explicitly embraced the Fourth Amendment categorical imperative, the basic logical move is not foreign. In fact, it seems to be where the justices go as a matter of instinct when asked whether allowing government agents an unlimited license to engage in some

139. Transcript of Oral Argument at 9–10, *Jones*, 565 U.S. 400 (No. 10–1259).

140. *Jones*, 565 U.S. at 416 (Sotomayor, J., concurring) (quoting *United States v. Cuevas-Perez*, 640 F.3d 272, 285 (7th Cir. 2011) (Flaum, J., concurring)). On this point Justice Sotomayor seems to have been channeling James Otis, who, in his writs of assistance speech, worried that if searches under the authority of general warrants were allowed then “[e]very man prompted by revenge, ill humor, or wantonness, to inspect the inside of his neighbor's house, may get a writ of assistance.” Otis, *supra* note 82.

141. *Jones*, 565 U.S. at 429–30 (Alito, J., concurring).

form of searching or seizing threatens the right of the people to be secure against unreasonable searches and seizures.¹⁴²

VII. APPLYING THE FOURTH AMENDMENT CATEGORICAL IMPERATIVE.

How would this approach work in action? Let us consider cell-site location information (CSLI).¹⁴³

Whenever our cellular phones are turned on they are in contact with service-provider networks through transceiver base stations.¹⁴⁴ In the normal courses of their business, and to remain in compliance with Federal Communications Commission regulations, service providers routinely record the locations of their users' phones, often storing that information for months or years.¹⁴⁵ This means that using "real-time CSLI,"¹⁴⁶ your cellular-phone provider can find your phone, and therefore you, just about any time. Using "historical CSLI," your provider also knows where you and your phone have been going back months or years.¹⁴⁷

Using CSLI records to find where you were, whether a second ago or a month ago, probably does not qualify as a "search" under *Katz*. That is because the Court has held that we have no reasonable expectations of privacy as against third parties' handing over to the government any information we have voluntarily shared.¹⁴⁸ As of August 2017, all the federal circuit courts of appeals to address the question have relied on this third-party doctrine to hold that looking through CSLI records to try and find phones and their users is not a "search" for purposes of the Fourth Amendment.¹⁴⁹

This is nonsense, of course. Looking through CSLI records, using CSLI to look for an effect, and using CSLI to make inquiry or look for a person are

142. To be sure, Justices Sotomayor and Alito were trying to pack their concerns into the *Katz* framework. But that just proves the point.

143. In June 2017, the Supreme Court granted certiorari to take up the Fourth Amendment status of historical CSLI. See *United States v. Carpenter*, 137 S. Ct. 2211 (2017).

144. See GRAY, *THE FOURTH AMENDMENT*, *supra* note 5, at 26–27.

145. See Travis LeBlanc & Lindsay DeFrancesco, *The Federal Communications Commission as Privacy Regulator*, in *THE CAMBRIDGE HANDBOOK OF SURVEILLANCE LAW*, *supra* note 21, at 727, 748–49.

146. Of course, there is no such thing as "real-time CSLI." All CSLI is "historical" in the sense that it reports where a subscriber's phone was in the past, whether a second or a month. Any Fourth Amendment rule that distinguished between real-time and historical CSLI would therefore fall victim to application challenges similar to those highlighted by Justice Scalia in *Jones*. See *Jones*, 565 U.S. at 412–13 (majority opinion) (pointing out that a durational approach to governing the use of GPS-tracking technologies invites intractable line-drawing problems).

147. Pell, *supra* note 21, at 47–50.

148. See *Smith v. Maryland*, 442 U.S. 735, 741–42 (1979) (looking through telephone call records is not a "search"); *Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 54 (1974) (looking through banking records is not a "search").

149. See *supra* note 21.

all searches by any ordinary definition.¹⁵⁰ But the fact that these searches are “searches” does not, by itself, mean that the Fourth Amendment limits government access to CSLI. That question is determined by whether granting government agents unfettered access to CSLI and unfettered discretion to conduct searches using CSLI would threaten the security of the people against unreasonable searches. Here it is worth considering the nature of the technology.

In his concurring opinion in *Jones*, Justice Alito observes that “[i]n the pre-computer age, the greatest protections of privacy were neither constitutional nor statutory, but practical.”¹⁵¹ “Traditional surveillance for any extended period of time,” he continues, “was difficult and costly and therefore rarely undertaken.”¹⁵² This is important for two reasons. First, it means that law enforcement is very unlikely to engage in these kinds of searches absent good and sufficient, nay extraordinary, reasons.¹⁵³ Thus, the threat of *unreasonable* searches conducted by human surveillance is low. Second, even if government agents sometimes undertake these costs for bad or insufficient reasons, the high cost and large commitment of resources means that any risk of unreasonable searches does not rise to the level of generality necessary to threaten the security of the people. Thus, applying our test of generalization, courts can afford to let government agencies govern themselves—at least in the first instance—when it comes to traditional means of surveillance, including the use of technologies like radio-beeper tracking,¹⁵⁴ because those grants of discretion do not threaten the security of the people.¹⁵⁵

As the Fourth Amendment categorical imperative reveals, new and emerging tracking and surveillance technologies like CSLI are entirely different in terms of the threats they pose to the security of the people against unreasonable searches and seizures. That is because these technologies are powerful, scalable, and cheap.¹⁵⁶

CSLI is an extremely powerful search tool that allows searches for persons and their effects anytime, even into the past.¹⁵⁷ True, “the accuracy of the location information depends on the density of the tower network[s],”¹⁵⁸

150. GRAY, THE FOURTH AMENDMENT, *supra* note 5, at 251.

151. *Jones*, 565 U.S. at 429 (Alito, J., concurring).

152. *Id.*

153. *Id.* at 429 (“The surveillance at issue in this case—constant monitoring of the location of a vehicle for four weeks—would have required a large team of agents, multiple vehicles, and perhaps aerial assistance. Only an investigation of unusual importance could have justified such an expenditure of law enforcement resources.”).

154. See *United States v. Knotts*, 460 U.S. 276, 283–84 (1983) (reasoning that beeper-tracking technologies do not present a threat of “dragnet-type law enforcement practices” and allowing that “different constitutional principles may be applicable” should such threats arise).

155. See Gray & Citron, *Quantitative Privacy*, *supra* note 31, at 131–33.

156. *Id.*

157. See Henderson, *supra* note 26 (describing contemporary surveillance technologies as “time machines” looking into the past).

158. *Jones*, 565 U.S. at 428 (Alito, J., concurring).

but those networks continue to grow, service providers are under a mandate from the Federal Communications Commission to improve location accuracy in order to facilitate the 911 emergency-response system,¹⁵⁹ and newer location technologies embedded in phones and networks will continue to improve accuracy.¹⁶⁰ This is important because the Court has made clear that Fourth Amendment law “must take account” not only of existing technology, but also “more sophisticated systems . . . in development.”¹⁶¹ CSLI is also highly scalable. In fact, in light of the fact that personal wireless devices are so ubiquitous,¹⁶² CSLI can facilitate wide-scale, simultaneous searches. Finally, CSLI is inexpensive.¹⁶³ Or, at the very least, it is a sunk cost already incurred by service providers.

Combined, these features of CSLI mean that it has the immediate capacity to facilitate broad and indiscriminate surveillance. Granting unfettered discretion for government agents to access and use CSLI therefore poses an obvious and immediate threat to the right of the people to be secure in their persons and effects against unreasonable searches and seizures. This is precisely the kind of threat to the “liberty of every man”¹⁶⁴ that so concerned the founding generation, leaving each of us and all of us to live in constant fear that government agents are looking for us or looking into or for our effects free from judicial review and without needing to justify themselves by good and sufficient reasons. Although nobody living in eighteenth-century America could have foreseen the source of the threat, the nature of the insecurity generated by unfettered access to CSLI would have been all too familiar as precisely the kind of threat targeted by the Fourth Amendment.

Of course, there is a good argument to be made that government agents do not have unfettered access to CSLI. Specifically, access to CSLI may be limited by 18 U.S.C. § 2703(c) and (d), which govern government access to records of electronic communications. Under these sections, government agents must secure at least a court order based on “specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation.”¹⁶⁵

159. Leblanc & DeFrancesco, *supra* note 145, at 748.

160. *Jones*, 565 U.S. at 428–29 (Alito, J., concurring).

161. *United States v. Kyllo*, 533 U.S. 27, 36 (2001).

162. *Riley v. California*, 134 S. Ct. 2473, 2484 (2014) (noting cell phones “are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy”).

163. See Andy Greenberg, *These Are the Prices AT&T, Verizon and Sprint Charge for Cellphone Wiretaps*, FORBES (Apr. 3, 2012, 3:01 PM), <https://www.forbes.com/sites/andygreenberg/2012/04/03/these-are-the-prices-att-verizon-and-sprint-charge-for-cellphone-wiretaps/#1c593ba14dcb> [<https://perma.cc/B7BB-YZW5>].

164. Otis, *supra* note 82.

165. 18 U.S.C. § 2703(d) (2012).

Although these sections were not written with CSLI specifically in mind, some courts and law enforcement agencies have adopted this framework when government agents seek CSLI from service providers.¹⁶⁶ One might therefore wonder whether requiring 2703(d) orders for CSLI searches sufficiently guarantee the security of the people against unreasonable searches. That is an important question to be sure, but the critical point revealed by the Fourth Amendment categorical imperative is that it is a question of *constitutional dimension*.

CONCLUSION

The Fourth Amendment right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures is absolute. As the text tells us, that right “shall not be violated.”¹⁶⁷ The Fourth Amendment is not passive. It is an imperative call to action. In particular, it commands constitutional actors, whether executive, legislative, or judicial, to guarantee that each of us and all of us can go about our lives free from fear of being subjected to unreasonable searches and seizures.¹⁶⁸

During the twentieth century, the Court relied heavily on the warrant process to achieve this security, going so far as to impose a warrant requirement purporting to regulate most searches.¹⁶⁹ Although the Warrant Clause provides a useful framework for the kinds of regulatory approaches that can guarantee the security of the people against unreasonable searches and seizures, it is important to note that the text of the Amendment does not impose a warrant requirement. There is also good evidence in the historical record that eighteenth-century readers would have thought the idea of a warrant requirement very odd.¹⁷⁰ In short, while the Fourth Amendment’s guarantee of security is absolute, it is flexible as to how that security might be achieved. And that is where we should be having Fourth Amendment debates.

Unfortunately, *Katz* puts the center of Fourth Amendment gravity on what constitutes a “search.” As this Essay has shown, that approach is supported neither by the text nor history of the Fourth Amendment. If we take that text and history seriously, then we will instead adopt a more commonsense definition of search, foregoing discussions of privacy—which appears nowhere in the text—and focusing on limiting searches and seizures as instruments of government power. In this way, we can guarantee our Fourth

166. See, e.g., *United States v. Carpenter*, 819 F.3d 880, 886 (6th Cir. 2016), *cert. granted*, 137 S. Ct. 2211 (2017) (noting that law enforcement officers retained historical cell site location information under 18 U.S.C. § 2703(d)).

167. U.S. CONST. amend. IV.

168. GRAY, *THE FOURTH AMENDMENT*, *supra* note 5, at 190–91.

169. *Id.* at 205–06.

170. See Amar, *supra* note 47, at 774–78. *But see* Donohue, *supra* note 57, at 1325 (concluding that the founding generation was skeptical of searches conducted outside the authority of specific warrants); Davies, *supra* note 57, at 642–55 (concluding the same).

Amendment right to live free from fear of abusive or overreaching government action.