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**Intro to Criminal Investigation [KNPU]**

<< Topic of Study #04 >>

**The U.S. 4th Amendment <★1>**

**=> The “Exclusionary Rule”**

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| --- | --- |
| = Key Concepts = | |
| **The 4th Amendment to the U.S. Constitution,**  **Fruit of the Poisonous Tree, From ‘Judicial Integrity’ to ‘Deterrence’**  **@ (1) Good Faith Exception, (2) Attenuation Doctrine,**  **(3) Independent Source Doctrine, (4) Inevitable Discovery Rule** | |
| < Discussion Questions > | |
| <1> | ***What is the “Good-Faith Exception”***  ***to the Fourth Amendment’s ‘[search] warrant’ requirement?*** |
| <2> | ***How does the U.S. 4th Amendment impact/affect law enforcement?*** |
| <3> | ***The “Exclusionary Rule” vs.***  ***The “Fruit of the Poisonous Tree”*** |

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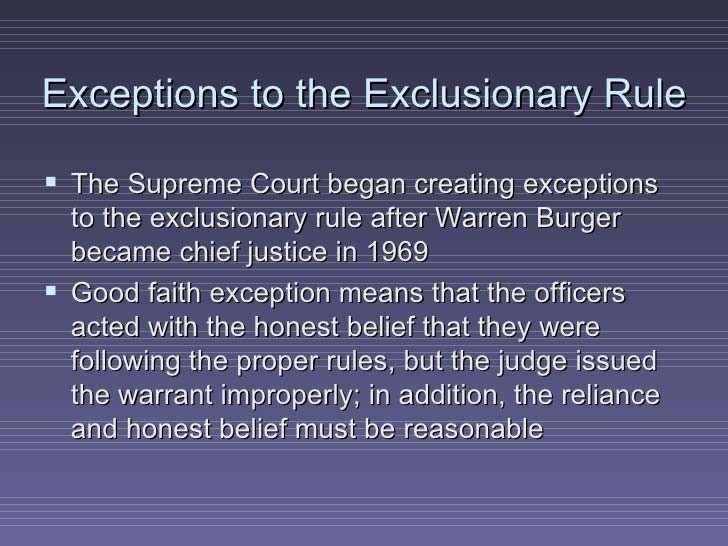


###### Criminal Investigation



***The “Exclusionary Rule”***

***= The 4th Amendment in the [US] Bill of Rights =***



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**EXCLUSIONARY RULE**

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The exclusionary rule prevents the government from presenting evidence in trial which was gathered in violation of the Fourth Amendment’s protection against illegal search and seizure. A doctrine commonly used in American courts, the exclusionary rule discourages police and other law enforcement agents from obtaining evidence illegally. The court will suppress or ban evidence that was gathered in violation of the defendant’s Fourth Amendment right to be protected against unlawful search and seizure.

If evidence is suppressed, it means that the evidence cannot be shown or discussed during the defendant’s trial. This rule applies to any evidence that is the direct product of a constitutional violation. To explore this concept, consider the following exclusionary rule definition.

\* Definition of Exclusionary Rule:

=> Any rule that allows for the exclusion or suppression of evidence.



**Fourth Amendment Rights**

The Fourth Amendment to the U.S. Constitution protects citizens “against unreasonable searches and seizures.” It further states that no warrants shall be issued without probable cause, which means that the privacy of citizens may not be violated without compelling reasons to do so.

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**Fruit of the Poisonous Tree**

The legal doctrine known as “fruit of the poisonous tree” states that evidence derived from an illegal search, seizure, arrest, or interrogation is not admissible in a court of law because the evidence was tainted by fact that the method used to obtain the evidence was illegal. For example, police put a wiretap on a suspected drug dealer’s phone and began listening to and recording conversations without first obtaining a warrant. The suspect reveals that he has drugs stashed away under a dumpster where the buyer could pick them up. The police find the dumpster and seize the drugs before the buyer arrives. The illegally recorded phone calls would not be admissible (the poisonous tree), nor would the drugs found as a result of the illegal wiretap (the fruit).

Exceptions to the Exclusionary Rule

There are many exceptions to the exclusionary rule, which primarily serves to protect the constitutional rights of the accused, though not to the extent that justice cannot be served. Below are the primary exceptions to the exclusionary rule:

Good Faith Exception.

An exception allowing evidence obtained by law enforcement or police officers who rely on a search warrant they believe to be valid to be admitted at trial.

Attenuation Doctrine.

An exception permitting evidence improperly obtained to be admitted at trial if the connection between the evidence and the illegal means by which it was obtained is very remote.

Independent Source Doctrine.

An exception permitting evidence obtained illegally to be admitted at trial if the evidence was later obtained by an independent person through legal activities.

Inevitable Discovery Rule.

An exception permitting improperly obtained evidence to be admitted when it is apparent that the evidence would have eventually been discovered through legal means.

Motion to Suppress Evidence

A motion to suppress evidence is a request that the court exclude certain evidence from the trial proceedings. The defense may argue that the evidence was illegally obtained, or that the evidence is not relevant to the matter at hand. A motion to suppress evidence is typically made before the trial begins. Motions to suppress evidence are often made in Fourth Amendment search and seizure cases where evidence may have been obtained during a search for which there was no warrant. If the motion is granted, and that particular evidence was critical to the prosecution’s case, the case may be dismissed.

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Exclusionary Rule Cases

Courts deal with the issue of evidence gathering each and every day. As a result of the debate over which evidence should or should not be allowed at trial, a number of landmark Supreme Court decisions have been made.

Arizona v. Gant 556 U.S. 332

This exclusionary rule case was an important Supreme Court decision, as it deals with both the exclusionary rule and the good faith exception when it comes to law enforcement officers searching vehicles subsequent to arrest.

Arizona police arrested Rodney Gant for driving with a suspended license. After handcuffing him and placing him in a squad car, the officer conducted a search of Gant’s vehicle, finding a gun and a bag of cocaine. Gant’s attorney filed a motion to suppress the gun and drugs from being used as evidence because they were obtained without a warrant, in violation of Gant’s Fourth Amendment protection against illegal search and seizure. Gant’s motion was denied the court which ruled that the gun and cocaine were found during a legitimate traffic stop, and therefore, Gant’s Fourth Amendment rights were not violated.

Gant appealed the decision to the Arizona Court of Appeals, which reversed the lower court’s decision on the grounds that the warrantless search of the vehicle was, indeed, unconstitutional. The Arizona Supreme Court agreed with the Court of Appeals, leading to a petition to the U.S. Supreme Court by Arizona’s Attorney General. The issue brought to the Supreme Court is whether searches and seizures that the police perform after handcuffing a defendant and securing a crime scene is in violation of an individual’s Fourth Amendment protection to be free from unreasonable searches and seizures.

The Supreme Court ruled that Gant’s Fourth Amendment rights had been violated by the warrantless search of his vehicle. The Court’s reasoning was that, since the suspect and the crime scene had been secured, the police needed to obtain a warrant before conducting a search of the contents of Gant’s vehicle.

United States v. Jones 132 S.Ct. 945 (2012)

Antoine Jones, owner of a nightclub in the District of Columbia, was suspected of drug trafficking, and a great deal of information was gathered in the police investigation. Based on evidence already gathered by police, they were able to obtain a warrant to place a GPS tracking device on a Jeep registered to Jones’s wife, of which Jones was the primary driver. The police were given 10 days to install the device on Jones’s vehicle, and it was required to be installed in the District of Columbia. The police, however, did not install the device until 11 days later, at which time the vehicle was in Maryland. The police proceeded to use the device to track the vehicle for the next 28 days, during which time the device relayed over 2000 pages of data.

Antoine Jones was indicted on conspiracy to distribute, and possession with intent to distribute cocaine and cocaine base. Before trial, Jones’s attorney filed a motion to

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suppress the evidence gained from the GPS device, arguing that the evidence was gathered in violation of his Fourth Amendment right against unlawful search and seizure. The District Court granted the motion to suppress part of the evidence. The suppressed evidence included data gathered while the Jeep was parked in the garage at the Jones residence, as people have a reasonable expectation of privacy while at home, while on public roads, no such principle applies.

The question raised by this case is whether the attachment of a GPS device to a vehicle and the use of that vehicle on public streets constitute a search and seizure under the Fourth Amendment and whether a defendant has a reasonable expectation of privacy while driving on public roads. The court held that the government’s installation of the GPS tracking device does constitute a search. The warrant was not valid in that the conditions of its issuance, relative to the time and location of installation, were not met. As such, the GPS surveillance constituted an unlawful search and the exclusionary rule was applied to all the evidence and data gathered as a result of the GPS device.

**Arizona v. Evans 514 U.S. 1 (1995)**

In 1990, Isaac Evans was stopped by a Phoenix police officer for driving the wrong way down a one-way street. Evans informed the officer that his license had been suspended, and a subsequent warrant check confirmed that the license was suspended, and informed the officer of an outstanding warrant. The officer placed Evans under arrest and searched his car, discovered a bag of marijuana, adding a charge of possession to Evans’ arrest. It turned out that the warrant had been quashed by the court more than two weeks prior to the arrest, and that a clerical error failed to remove it from the system.

Evans’ attorney moved to suppress the marijuana as it was the “fruit of an unlawful arrest.” The trial court granted the motion to suppress, but the decision was reversed when the Arizona Court of Appeals ruled that the purpose of the exclusionary rule was not intended to deter clerical staff, and justice would not be served by excluding evidence in the case.

The matter was brought to the U.S. Supreme Court to decide whether evidence obtained with a warrant, due to a clerical error, is deemed invalid, and is subject to the exclusionary rule. The Supreme Court reversed the Appellate court ruling, holding that the rule does not apply when an error is made by non-law enforcement personnel or clerical staff. In this case, the arresting officer acted on good faith, having a reasonable belief that the computer’s results were valid.

<Related Terms and Issues>

* **Warrant**: A writ issued by a judge directing a law enforcement officer to conduct a search, seizure, or make an arrest.
* **Probable Cause**: The minimum amount of evidence required before a search, seizure or arrest can be properly made.

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**The Roberts Court and the Future of the Exclusionary Rule**

**By Susan A. Bandes April 2009**

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**The Roberts Court and the Future of the Exclusionary Rule**

**Susan A. Bandes\***

1. Introduction

Sixty years ago, the Supreme Court held that the Fourth Amendment places limits not only on the federal government, but on state and local governments as well. The decision was a significant advance toward safeguarding the right of every person to be free from unreasonable searches and seizures. However, the Court's broad expansion of Fourth Amendment protection ignited a heated debate over the proper remedy for violations of the right – a debate that continues to this day. The exclusionary rule, which prohibits the use in court of unconstitutionally acquired evidence, has always been a controversial remedy for the violation of Fourth Amendment rights. Yet over the years it has become apparent that the exclusionary rule is an essential means of ensuring that law enforcement officers respect the limits the Fourth Amendment imposes on their power.

The critics of the exclusionary rule point to its costs, although the costs they refer to are the costs imposed by the Fourth Amendment itself. The exclusionary rule excludes evidence that would never have been acquired if the police had obeyed the Fourth Amendment in the first place.1 Thus the controversial nature of the remedy has much to do with the controversial nature of the underlying right. The Fourth Amendment imposes constraints on law enforcement officials in order to protect individual autonomy and dignity. The debate over the proper balance between the police power and individual privacy is contentious and longstanding.

Justice Cardozo famously lamented that, under the exclusionary rule, “the criminal is to go free because the constable has blundered.”2 In *Mapp v. Ohio,* the Court responded “the criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.”3 The Court reasoned that the government should neither profit from its own illegal activity nor model disrespect for the law through its own actions.

The Reagan-era Justice Department, led by Attorney General Edwin Meese, spearheaded the first frontal attack on the exclusionary rule. Under the current Supreme Court, these efforts may finally come to fruition. Chief Justice John Roberts and Justice Samuel Alito, both of whom served in the Meese Justice Department,4 are now part of a four-member voting block

\* Distinguished Research Professor, DePaul University College of Law.

1 Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1392-93 (1983).

2 People v. Defore, 150 N.E. 585, 587 (N.Y. 1926), *cited in* Mapp v Ohio, 367 U.S. 643, 659 (1961).

3 *Mapp*, 367 U.S. at 659.

4 In 1983, (now) Chief Justice Roberts worked on a memorandum about what he called “the campaign to amend or abolish the exclusionary rule.” In 1985, (now) Justice Alito, in applying for a job in the Reagan Justice Department, wrote that his interest in the law had been motivated in large part by disagreement with Warren Court decisions, particularly in the areas of criminal procedure, religious freedom, and voting rights. Adam Liptak, *Supreme Court Edging Closer To Repeal of Evidence Ruling*, N.Y. TIMES, Jan. 31, 2009.

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(with Justices Antonin Scalia and Clarence Thomas) that, to all appearances, is busily laying the groundwork for abandoning the exclusionary rule. They lack only a reliable fifth vote.

1. The Exclusionary Rule: The Essential Remedy for Fourth Amendment Violations

The objection to the exclusionary rule has never been that it is ineffective at enforcing the Fourth Amendment. The objection has been that it imposes too high a price. When evidence is excluded, criminals may go free. Studies show that very few criminals in fact go free because evidence is excluded, and that criminals accused of violent crime almost never do.5

Nevertheless, the rule does lead to loss of evidence and sometimes to lost convictions, and thus it is deeply unpopular, not only with law enforcement but with the general public. Despite this unpopularity, which has made it a target of heated criticism since its inception, the exclusionary rule has remained the central method of enforcing the Fourth Amendment. It has survived all these years because it has proved essential. Without it, the Fourth Amendment's guarantee

against unreasonable search and seizure is “an empty promise.”6

In 1949, the Supreme Court held that the Fourth Amendment constrains state and local officials as well as federal officials. Although the exclusionary rule then applied in federal cases, the Court was reluctant to foist it on the states. In *Wolf v. Colorado*,7 the Court directed the states to come up with alternative ways to enforce the Fourth Amendment. By the time it decided *Mapp* 12 years later, the Court saw no choice but to impose the exclusionary rule on the states, noting that the trend among the states had been to adopt the rule on their own, and that experience had shown other alternatives to be ineffective.

The reaction to *Mapp* by law enforcement officials is perhaps the best evidence of how urgently the exclusionary rule was needed. As Professor Yale Kamisar recounts, the New York City Police Commissioner said the decision created “tidal waves and earthquakes” in the law enforcement community. It required retraining his entire department “from the very top administrators down to each of the thousands of foot patrolmen and detectives engaged in the daily law enforcement function.” As Kamisar asked, “Why did it necessitate ‘retraining' from top to bottom? What was the *old* search and seizure training like? *Was there any*?” There was reason to think there had been no training at all in search and seizure before the threat of

5 Exactly how many go free is a matter of controversy. One study, described by Professor Wayne LaFave as “the most careful and balanced assessment of all available empirical data,” found that the vast majority of cases in which exclusion of evidence occurred during the period studied were drug cases. Very little evidence was excluded in cases involving violent crimes. Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the “Cost” of the Exclusionary Rule: The NIJ Study and Other Studies of “Lost” Arrests*, 1983 AM. B. FOUND. RES.

J. 611. Another study found an overall suppression rate of slightly less than five percent in warrant-related prosecutions. It also concluded that even in 70% of the cases in which evidence was suppressed, convictions were obtained. Overall, the rule prevented conviction in no more than 1.4% of the cases studied. RICHARD VAN DUIZEND ET AL., NAT'L CTR. FOR STATE COURTS, THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, AND PRACTICES 21 (1984), *cited in* JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE 381 (4th ed. 2006).

6 *Mapp*, 367 U.S at 660.

7 338 U.S. 25 (1949).

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exclusion was imposed.8 Police departments behaved as if the Fourth Amendment had just been adopted – and as if this was very bad news indeed.

Of course it is possible that police departments have changed so much in the nearly 50 years since *Mapp*, or that alternative enforcement mechanisms have become so much more effective, that the exclusionary rule is no longer necessary. Chief Justice Roberts has advanced these very arguments. But before turning to the evidence that the rule is still essential, it will be helpful to consider the changes in the interpretation of the exclusionary rule that have led to its current precarious position.

1. Rationales for the Exclusionary Rule: From Judicial Integrity to Deterrence

Exclusion of unlawfully seized evidence has never been viewed as a personal right of the victim of an unlawful search or seizure. It is a means of achieving broader societal objectives.

Originally, the exclusionary rule was regarded as a way to preserve judicial integrity. The rationale was that the government should not profit from its own wrongdoing, and should not traffic in tainted evidence. As Justice Brandeis famously argued, “Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law.”9

But as early as the *Mapp* decision, the Court adopted an additional rationale: that the purpose of excluding evidence is to deter future police misconduct. Under this rationale, illegally obtained evidence is excluded to increase the likelihood that in the future, law enforcement agents will abide by constitutional rules, thus protecting all of us from unwarranted intrusions into our privacy. “Courts can protect the innocent against such invasions only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty.”10

The judicial integrity rationale was soon entirely supplanted by the deterrence rationale.

When determining the scope of the exclusionary rule, the Court began focusing solely on whether exclusion of evidence is likely to deter future police misconduct. The deterrence analysis became an invitation for the Court to engage in unsupported speculation about police behavior, and specifically, about whether suppressing evidence in various circumstances would provide an incentive for police to obey the law. In case after case, the Court has concluded that even if the evidence was suppressed, the police would be unlikely to change their behavior. In each case, the Court has weighed this “speculative” likelihood of deterrence against the “substantial”11 costs of exclusion, and found that the exclusionary rule should not apply.

*Herring v. United States12* is the latest in the line of cases carving out exceptions to the exclusionary rule. In previous cases, illegal searches or seizures took place because police relied on the illegal actions of third parties, and the Court concluded that since the fault lay with the

8 Yale Kamisar, Mapp v. Ohio*: The First Shot Fired in the Warren Court's Criminal Procedure “Revolution,”* in CRIMINAL PROCEDURE STORIES 76-77 (Carol S. Steiker ed. 2006).

9 Olmstead v. United States, 277 U.S. 438, 485 (1928).

10 Brinegar v. United States, 338 U.S. 160, 181 (1949).

11 *See, e.g.,* United States v. Leon, 468 U.S. 897, 907 (1984); United States v. Calandra, 414 U.S. 338 (1974).

12 129 S. Ct. 695 (2009).

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third parties, excluding the evidence was unlikely to deter the police. In *United States v. Leon,13* the Court assumed that police would not be deterred by exclusion of evidence obtained under an illegal warrant. It reasoned that the illegality was the fault of the magistrate who issued the warrant, and that excluding evidence found in reliance on such a warrant would have no effect on the police, who would simply continue to defer to the magistrate's judgment. (As the dissents pointed out, the Fourth Amendment is directed not just at the police, but at the government as a whole, and excluding the evidence might well create an incentive for both police and magistrates to beef up their compliance with Fourth Amendment law.) Subsequent cases declined to exclude illegal searches based on clerical errors by court employees14 and illegal searches made in reliance on unconstitutional statutes.15

1. The *Herring* Case: Raising the Bar for Exclusion of Illegally Obtained Evidence

Some commentators describe *Herring* as just another case in this line, almost identical to *Arizona v. Evans*, the case involving a clerical error by a court employee.16 But *Herring* is a far more serious assault on the exclusionary rule for two reasons. First, the case involved reliance by police officers on an error, not by a court or a legislature, but by *other police officers*.

Second, the case introduced an entirely new requirement for application of the exclusionary rule: the police mistakes must be the result of “systemic error or reckless disregard of constitutional requirements,”17 rather than of mere negligence. It premised this holding on the unsupported assertion that exclusion of evidence obtained through negligent violation of the Fourth Amendment has a reduced deterrent effect.

Bennie Dean Herring was arrested in Coffee County, Alabama. Investigator Mark Anderson, who “knew Herring from prior interactions,”18 one day spotted Herring at the Sheriff's Department and looked for a way to arrest him.19 Anderson consulted the Coffee County records to see whether there were any warrants outstanding that would allow him to do so. There were not, but he had more luck when he called over to neighboring Dale County. The Dale County database did contain an open arrest warrant for Herring. Unfortunately, the warrant had been recalled five months earlier, but the Dale County database had never been updated to reflect this change. Thus Herring was arrested without probable cause or a valid warrant. He was then subjected to a search incident to arrest, which led to the discovery of contraband and a weapon on his person.20 Because the arrest was illegal, the fruits of the search incident to the arrest would have been suppressed under the law as it stood prior to *Herring*.

13 468 U.S. 897 (1984).

14 Arizona v. Evans, 514 U.S. 1 (1995).

15 Illinois v. Krull, 480 U.S. 340 (1987).

16 *See, e.g.,* Matthew J. Franck, *Hyperventilating About the Exclusionary Rule*, NAT'L REV. ONLINE, Feb. 16, 2009, *available at* [http://bench.nationalreview.com/post/?q=YjNiYjNkMTQ0ZjM4Y2YzOGNlZWY5NDk4M2JmOWEyNjA=.](http://bench.nationalreview.com/post/?q=YjNiYjNkMTQ0ZjM4Y2YzOGNlZWY5NDk4M2JmOWEyNjA%3D)

17 *Herring*, 129 S. Ct. at 704.

18 *Id.* at 705 (Ginsburg, J., dissenting).

19 *Id.* at 709 (Ginsburg, J., dissenting). “Herring had told the district attorney, among others, of his suspicion that Anderson had been involved in the killing of a local teenager, and Anderson had pursued Herring to get him to drop the accusations.” *Id.* at 705 (Ginsburg, J., dissenting).

20 *Id.* at 705-06.

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1. For the First Time, Police Can Use Evidence Illegally Obtained By Other Police

In refusing to exclude the fruits of the illegal search, the Court rejected the notion that cases like *Evans* had been premised on police reliance on the mistakes of *other* branches of government.21 But until *Herring,* the good faith of a police officer engaging in an illegal search was relevant only when the officer conducted an illegal search in reasonable22 good faith reliance on the mistake of an authoritative governmental source *other than* another law enforcement agent. The good faith exception to the exclusionary rule prior to *Herring* was based on two related rationales. The first was that the exclusionary rule is directed at deterring police officers, not judges, court clerks, or legislators, so it provides no grounds for suppressing the fruits of mistakes by government officials other than police officers. The second was that police officers who reasonably believe they are correctly relying on the judgments of authoritative officials are unlikely to be deterred from making the same error again.

In *Herring,* the mistake in question was made by the police themselves – precisely the group the Court claims the exclusionary rule is meant to deter. The *Herring* decision deviates from 50 years of precedent in permitting one unit of law enforcement to benefit from the illegal acts of another. A year before the decision in *Mapp v Ohio*, the Court rejected the “silver platter” doctrine, which allowed federal officers to use evidence illegally obtained by state officers. It found that the doctrine implicitly invited federal officers to tacitly “encourage state [law enforcement] officers in the disregard of constitutionally protected freedom.”23

Now that the Court has excused mistakes by police officers relying on other police officers, the stage is set for much broader incursions into the exclusionary rule. Professor

Richard McAdams observed, “if a police officer can act in good faith on the error of a police clerk, she can likely act in good faith on the error of a fellow detective. Second, if we don't exclude evidence when Detective A relies on a negligent but isolated error by Detective B, then

… why [would we] exclude evidence when Detective B relies on *her own* negligent but isolated error?”24

Moreover, although all the cases in this line concern searches based on invalid warrants (or, in the case of *Krull*, an invalid statute), the same reasoning seems to apply to negligent errors about other Fourth Amendment requirements. In other words, if a police officer wrongly but negligently believes she has both probable cause for a search and exigent circumstances excusing a warrant, the *Herring* reasoning seems applicable: there is no reason to exclude the evidence obtained in that illegal search.

21 It claimed that the cases stood for the proposition that only evidence obtained in flagrant violation of the Constitution should be suppressed.

22 That is, the actual intent of the officer was irrelevant. The question was whether a reasonable officer would have been likely to make the same mistake.

23 Elkins v. United States, 364 U.S. 206, 221-22 (1960).

24 Posting of Richard McAdams, to The University of Chicago Law School Faculty Blog, <http://uchicagolaw.typepad.com/faculty/2008/10/wither-the-excl.html>(Oct. 29, 2008, 17:23 EST).

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1. The Fruits of Illegal Searches and Seizures Are Admissible if the Illegal Conduct was Negligent Rather than Flagrant

The *Herring* majority declined to suppress the fruits of illegal searches and seizures if the police acted negligently rather than flagrantly.25 The Court premised this holding on the assertion that isolated instances of negligent wrongdoing are unlikely to be deterred by

exclusion, an assertion unsupported by even “an iota of supporting analysis or evidence.”26 As Justice Ginsburg observed in dissent, “the suggestion runs counter to a foundational premise of tort law – that liability for negligence … creates an incentive to act with greater care.”27 Suppression of illegally obtained evidence, even where the illegality was the result of police negligence, provides police with “an incentive to err on the side of constitutional behavior.”28 It also “demonstrates that our society attaches serious consequences to violations of constitutional rights.”29

As Professor Wayne LaFave notes, “many more violations of the Fourth Amendment are the result of carelessness than are attributable to deliberate misconduct.”30 Warrant checks like the one at issue in *Herring* are a case in point. Warrant checks are routinely run, not only on those suspected of violating criminal laws, but on drivers and passengers of cars pulled over for minor traffic infractions. Negligent errors in recordkeeping can lead to false arrests and other serious incursions on liberty and privacy. Penalizing these errors creates an effective incentive for law enforcement agencies to maintain accurate records.

Since the exclusionary rule is not meant to punish police, but to encourage them to abide by the law, the deliberateness of their conduct ought to be irrelevant to the question of exclusion, particularly in the absence of any evidence that negligent misconduct is undeterrable. And prior to the *Herring* case, with few exceptions, the applicability of the exclusionary rule did not turn on whether the police conduct was flagrant, deliberate, or intentional – only on whether it was illegal.

25 The Court in its holding states the new rule more narrowly, as permitting the admission of evidence that is the result of isolated negligence “attenuated from” the illegal search or arrest. *Herring*, 129 S. Ct. at 698. The Court fails to explain the attenuation limitation, and commentators have expressed puzzlement over its meaning. For

example, in the *Herring* case, it might refer to the fact that the invalid warrant was five months old (though the fact that an invalid warrant had been left in the database for five months would seem to exacerbate rather than attenuate the wrongdoing) or to the fact that the invalid warrant was in the database of one county and the arresting officer who relied on it was in another (for discussion of this distinction *see* Part V above). For a lengthy analysis of the various possible meanings of the attenuation language, *see* Wayne R. LaFave, *The Smell of* Herring*: A Critique of the Supreme Court's Latest Assault on the Exclusionary Rule*, 99 J. CRIM. L. & CRIMINOLOGY (forthcoming 2009). McAdams predicts that the attenuation requirement will soon be abandoned. McAdams, *supra* note 24.

26 LaFave, *supra* note 25.

27 *Herring*, 129 S. Ct. at 708 (Ginsburg, J., dissenting).

28 LaFave, *supra* note 25 (citing United States v. Johnson, 457 U.S. 537, 561 (1982)).

29 *Id.*

30 *Id.*

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In short, *Herring* is poised to convert the exclusionary rule from the ordinary remedy for Fourth Amendment violations to an extraordinary remedy available only when defendants can somehow prove police conduct was intentional,31 flagrant,32 or recurring.33

1. The *Hudson* Case: Suggesting the Exclusionary Rule is Obsolete

*Herring's* new requirements are justified, according to the Court, by the high costs of the exclusionary rule. The case follows on the heels of another Roberts Court opinion, *Hudson v.*

*Michigan*,*34* which also takes aim at the exclusionary rule, but from another angle. *Hudson* questions whether the rule continues to provide any benefit, and strongly suggests that it has outlived its usefulness.

The narrow question in *Hudson* was whether evidence obtained by police who illegally failed to knock and announce their entry into a suspect's home ought to be suppressed. The Court held that suppression was unnecessary, but the opinion goes much further. Justice Scalia's majority opinion rejects the notion that exclusion is the proper remedy “simply because we found that it was necessary deterrence in different contexts and long ago.”35 It claims two major changes since *Mapp* was decided. First, other effective remedies are available to victims of Fourth Amendment violations. Second, police forces are increasingly professional. Because of

these changes, “resort to the massive remedy of suppressing evidence of guilt is unjustified.”36

In some ways it is easier to sue the police than it was in 1961. Prior to 1961, civil rights suits against individual police officers were nearly impossible to bring.37 Prior to 1971, suits against individual federal officers were unavailable.38 Prior to 1978, police departments could not be sued.39 Even with these changes to the law, high barriers still exist to suit against police officers and police departments, and in many respects, they are becoming higher. *Hudson* cites a widely used police misconduct litigation manual for the proposition that currently “citizens and

31 As Justice Ginsburg notes in dissent, the Court's new focus on intentional police conduct is hard to square with its prior refusal to inquire into subjective police intentions in order to regulate pretextual arrests. *Herring*, 129 S. Ct. at 710 n.7 (Ginsburg, J., dissenting). The Court claims that it is not requiring an inquiry into the subjective mental state of the officer but it is unclear how one would show that police “knowingly made false entries [into a database] to lay the groundwork for future false arrests” without inquiring into their subjective mental states. *Id.* at 703.

32 As an example of flagrant conduct, the Court refers to the treatment of Dollre Mapp, in *Mapp v. Ohio.* The case involved not just the execution of a non-existent warrant, but police conduct that included brandishing the so-called warrant, grabbing it back from Mapp after she demanded to see it, and handcuffing Mapp to her stairway banister before searching her home from top to bottom. *Herring*, 129 S. Ct. at 702 (citing Mapp v. Ohio, 376 U.S. 643, 644- 45 (1961)).

33 The database at issue in *Herring* had a systemic flaw: it did not automatically update to reflect changes such as the withdrawal of arrest warrants. There is some disagreement about whether the clerk who was supposed to update the database manually had erred in other cases as well. But the Court would demand a showing of a “widespread pattern of violations” or a system that “routinely leads to false arrests.” *Herring*, 129 S. Ct. at 704 (citing Hudson v. Michigan, 547 U.S. 586, 604 (2006) (Kennedy, J., concurring)).

34 547 U.S. at 586.

35 *Id.* at 597.

36 *Id.* at 599.

37 *See, e.g.*, Monroe v. Pape, 365 U.S. 167 (1961) (broadening the definition of “under color of state law”).

38 *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) (permitting these suits).

39 *See* Monell v. N.Y. City Dep't of Soc. Servs., 436 U.S. 658 (1978) (permitting these suits).

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lawyers are much more willing to seek relief in the courts for police misconduct.”40 It does not quote what the authors said next: that in some respects, it is now “far more difficult” to challenge police misconduct.41

It has always been challenging to sue individual police officers – it is difficult to find lawyers to bring suit against police, to convince juries to render verdicts against them, and to collect damage awards against officers who are often judgment proof. In *Hudson* itself, which involved the failure of police to knock and announce before entering the suspect's home, the

Court seemed unfazed by the lack of any evidence that victims of such conduct had been able to bring successful civil suits, declaring itself willing simply to assume that “as far as we know,

civil liability is an effective deterrent here.”42

Suit against individual officers is now even more difficult due to the Court's expanding immunity doctrines.43 And the Court has erected increasingly high barriers to bringing suit against police departments for systemic wrongdoing, such as failure to screen, train, or discipline police officers.44 There is no reason to believe that the civil remedies that have for so long been inadequate to replace the exclusionary rule have suddenly become adequate, and the Court offers no evidence to support this assertion. As Justice Breyer observed in dissent, the majority has “simply assumed that as far as it knows, civil liability is an effective deterrent, a support-free assumption….”45

In many ways, police departments are more professional than they were in 1961. In support of its claim that these changes have rendered the exclusionary rule unnecessary, the Court cites the work of criminologist Samuel Walker.46 Walker, in an opinion piece in the *Los Angeles Times* called “Thanks for Nothing, Nino,” took Justice Scalia to task for misrepresenting his work. Walker regarded the positive changes in police work over the years as, in large part, *attributable* to the exclusionary rule, and not as an argument for doing away with the rule.47

Recent scandals in the Chicago, Oakland, and Atlanta police departments, among others, are reminders that even as policing becomes more professionalized, incentives to cut constitutional corners continue to exist – and that illegal police conduct affects the innocent as well as the guilty. In Atlanta, federal prosecutors have charged the Atlanta Police Department with regularly lying to obtain search warrants and fabricating documentation of drug purchases. One such case turned tragic when police raided the home of 92-year-old Kathryn Johnston on a

40 *Hudson*, 547 U.S. at 597-98.

41 *See* David Alan Sklansky, *Is the Exclusionary Rule Obsolete?*, 5 OHIO ST. J. CRIM. L. 567, 572 (2008) (citing MICHAEL AVERY ET AL., POLICE MISCONDUCT LAW AND LITIGATION (3d ed. 2007)). Avery et al. added a footnote

to this text calling Justice Scalia's quotation “highly misleading.” *Id.*

42 *Hudson*, 547 U.S. at 598.

43 Police officers have qualified immunity for their investigative conduct, Anderson v. Creighton, 483 U.S. 635 (1987), and absolute immunity for their in-court conduct, Briscoe v LaHue, 460 U.S. 325 (1983).

44 *See, e.g.,* Bd. of County Comm'rs of Bryan County v. Brown, 520 U.S. 397 (1997) (creating high barriers to suing municipal agencies for failure to screen employees); City of Los Angeles v Lyons, 461 U.S. 95 (1983) (creating high barriers to establishing standing to seek injunctive relief).

45 *Hudson*, 547 U.S. at 611 (Breyer, J., dissenting) (citing Dickerson v. US, 530 U.S. 428, 441-442 (2000)).

46 *Hudson*, 547 U.S. at 599 (citing S. WALKER, TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE 1950-1990 51 (1993)).

47 Samuel Walker, *Thanks for Nothing, Nino*, L.A. TIMES, June 25, 2006, at M5.

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bad tip. Instead of building a case, police obtained a no-knock warrant based on false

information and broke down Johnston's door. Frightened by the unidentified intruders, she fired a single shot, and they responded by killing her in a hail of bullets. They then planted drugs in her home and falsely claimed they had bought cocaine from her. In the ensuing investigation, federal investigators have uncovered a “culture of misconduct.” United States Attorney David Nahmias had this to say about the officers indicted in the death of Johnston:

The officers charged today … are not accused of seeking payoffs or trying to rob drug dealers or trying to protect gang members. Their goal was to arrest drug dealers and seize illegal drugs, and that's what we want our police officers to do for our community. But these officers pursued that goal by corrupting the justice system, because when it was hard to do their job the way the Constitution requires, they let the ends justify the means.48

1. Conclusion

Incentives to violate constitutional protections are heightened in times when safety and security seem precarious, and they lead to tactics that are too often deployed against those with little access to the civil courts. There is no question that the exclusionary rule should be supplemented by better training, better internal discipline, broader access to civil rights suits, and other remedies. But until there is hard evidence that the lessons of the past 60 years are no longer applicable, and that these alternative remedies are truly adequate to enforce the Fourth Amendment, the exclusionary rule remains essential.

The future of the exclusionary rule became precarious when Chief Justice Roberts and Justice Alito were appointed to the Court and joined Justices Thomas and Scalia in targeting the rule for evisceration. The fate of the rule should be a primary consideration when the next candidate for the Supreme Court is under consideration.

48 Shaila Dewan & Brenda Goodman, *Prosecutors Say Corruption in Atlanta Police Department is Widespread*,

N.Y. TIMES, Apr. 27, 2007.

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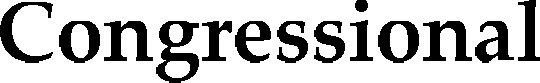
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# Kerring v. United States: Extension of tfle Good-Faitfl Exception to tfle Exclusionary Rule in Fourtfl 9mendment Cases



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Legislative Attorney 0ebruary 2, 2009



##### CRS Report for Congress

*Prepared for Members and Committees of Congress*

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Summary

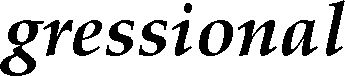
The Fourth Amendment to the U.S. Constitution provides a right against “unreasonable searches and seizures.” To deter the federal and state governments from violating this right, courts have developed an “exclusionary rule,” which requires that evidence obtained as a result of an invalid search or seizure be excluded from use at trial.

The Supreme Court has narrowed the scope of the exclusionary rule in several cases since the late 1970s. In *United States v. Leon*, the Court created the “good-faith” exception to the exclusionary rule. The good-faith exception applies when officers conduct a search or seizure with “objectively reasonable reliance” on, for example, a warrant that is not obviously invalid but that a judicial magistrate should not have signed.

Until a 2006 case, *Hudson v. Michigan*, the Supreme Court had applied the good-faith exception only in cases in which the error creating the constitutional violation was caused by judicial or legislative actors, rather than by the police themselves. In *Hudson*, the Court applied the exception to a case in which police officers had violated the “knock and announce” rule by entering a home without waiting a sufficient period of time.

In *Herring v. United States*, a 2009 decision, the Supreme Court for the first time applied the good-faith exception to bar application of the exclusionary rule in a case involving police error regarding a warrant. A police officer in the case mistakenly identified an arrest warrant for the defendant. The Court held that evidence discovered after the subsequent arrest was admissible at trial because the officer’s error was not “deliberate” and the officers involved were not “culpable.”

In future cases, courts will apply the *Herring* “deliberate and culpable” test to determine whether to admit evidence obtained as a result of a search or seizure which is unconstitutional as a consequence of police error. A second impact of the *Herring* decision is a weaker constitutional footing for the exclusionary rule. Whereas judicially-created remedies have gained “constitutional status” in the context of some other constitutional rights, it appears that the exclusionary rule lacks such a grounding under the Court’s current Fourth Amendment jurisprudence.



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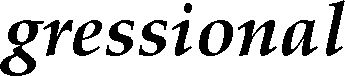
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### Introduction

The U.S. Supreme Court recognized in 1803 that in order to maintain a society governed by laws, a legal remedy should accompany each legal right.1 Toward this end, courts apply various remedies to ensure effective enforcement of constitutional rights. For example, courts sometimes order retrials to remedy violations of defendants’ trial-by-jury or assistance-of-counsel rights.

A remedy that excludes impermissibly obtained evidence from use at a criminal trial – the “exclusionary rule” – similarly protects constitutional rights. The exclusionary rule typically applies in cases involving violations by law enforcement of rights guaranteed by the Fourth or Fifth Amendments to the U.S. Constitution.2 It differs from remedies such as retrial, because in addition to retrospectively redressing injustice, its major aim is prospective deterrence of government misconduct. In theory, although it only actually redresses violations when probative evidence is found, the exclusionary rule also protects innocent people by deterring unwarranted privacy intrusions.

The rule operates to prohibit the introduction at trial of probative evidence that would be admissible if collected in a constitutionally permissible manner. Because the excluded evidence is frequently incriminating, many believe that its application aids criminals in escaping punishment. For this reason, the rule has long been controversial. In past cases, the Supreme Court has defended the rule as a necessary corollary to the constitutional rights it protects.3 More recently, a division has emerged. Some justices adhere to the view of the rule as constitutionally required.

Other justices express concerns about the cost to society of freeing criminals who would likely be convicted if the excluded evidence was admitted.

Over the past several decades, the Supreme Court has narrowed the scope of the exclusionary rule in Fourth Amendment cases – that is, in cases involving illegal searches or seizures. The Court’s 2009 decision in *Herring v. United States* furthers this trend.4 Because *Herring* is the first Supreme Court decision that rejects the exclusionary rule in the context of police error regarding a warrant, the decision has made news headlines and prompted debate about whether the *Herring* decision appropriately limits the exclusionary rule’s reach.5

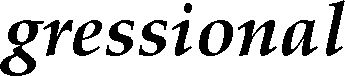
1 *See Marbury v. Madison*, 5 U.S. 137, 163 (1803).

2 The exclusionary rule is sometimes designated as the “Fifth Amendment exclusionary rule” or the “Fourth Amendment exclusionary rule.” This report addresses only the Fourth Amendment context. As applied to the Fifth Amendment, the rule typically bars the prosecution’s use of evidence obtained as a result of coercive interrogation techniques proscribed by the Fifth Amendment’s self-incrimination or due-process clauses.

3 *See, e.g.*, *Mapp v. Ohio*, 367 U.S. 643, 649 (1961).

4 555 U.S. (2009).

5 *See, e.g.*, David Stout, *Justices Say Evidence is Valid Despite Police Error*, NY Times A4 (Jan. 15, 2009); Adam Liptak, *Justices Ease Limits on Evidence*, NY Times A17 (Jan. 15, 2009) (Late Ed. (East Coast)).



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### Overview of the Fourth Amendment and the Exc1usionary Ru1e

The Fourth Amendment to the U.S. Constitution provides a right “of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”6 As a general rule, “reasonableness” requires law enforcement officers to demonstrate “probable cause” and obtain a warrant (unless a recognized warrant exception applies) before conducting searches or seizures.7 For example, under the general rule, a police officer may not arrest a person unless a judicial magistrate has issued a warrant, based on evidence establishing sufficient probable cause, for that person’s arrest. Likewise, a police officer typically may not search a person’s belongings without first obtaining a warrant that describes, with sufficient particularity, the property for which sufficient evidence justifies a search.

The Constitution does not explicitly provide a remedy that applies when governmental actors violate a citizen’s Fourth Amendment right.8 To deter Fourth Amendment violations, courts apply the exclusionary rule, which “is often the only remedy effective to redress a Fourth Amendment violation.”9 In the Fourth Amendment context, the exclusionary rule requires a trial court to forbid the prosecution’s use of evidence obtained as a result of an unconstitutional search or seizure.10 For example, if a police officer arrests a person in violation of constitutionally mandated procedures (i.e., without a warrant or a warrant exception), then the exclusionary rule requires a trial court to suppress any contraband the officer discovered during the search incident to that arrest.

Although the exclusionary rule protects constitutional rights, a question remains regarding its status – i.e., is it constitutionally required in the Fourth Amendment context? In past Fourth Amendment cases, the Supreme Court has stated that the exclusionary rule is “of constitutional origin.”11 In other cases, the Court has characterized the rule as a “judicially created remedy ...

6 U.S. Const. Amend. IV.

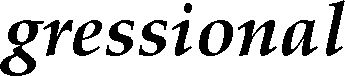
7 *See, e.g.*, *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (recognizing a warrant exception for arrest of an individual who commits a crime in an officer’s presence, as long as the arrest is supported by probable cause). Probable cause is “a fluid concept – turning on the assessment of probabilities in particular factual contexts.” *Illinois v. Gates*, 462 U.S. 213, 232 (1983). For example, for issuance of a search warrant, probable cause requires an issuing magistrate to determine, based on specific evidence, whether there exists a “fair probability” that, for example, an area contains contraband. *Id.* at 238. Exceptions to the warrant requirement include, for example, “exigent circumstances” where people’s lives are at risk or illegal items in “plain view” during a search authorized for other items.

8 In a 1961 case, *Mapp v. Ohio*, 367 U.S. 643 (1961), the Supreme Court held that the due process clause of the Fourteenth Amendment to the U.S. Constitution incorporated the Fourth Amendment to the states. Thus, the Fourth Amendment prohibits unreasonable searches and seizures by state and local, in addition to federal, governments.

9 *Herring*, 555 U.S. , Slip. op. at 6. (Ginsburg, J., dissenting) (citing *Mapp*, 367 U.S. at 652).

10 Although it was not termed the “exclusionary rule” until later, the Supreme Court first clearly articulated a remedy of excluding evidence as a result of Fourth Amendment violations in *Weeks v. United States*. 232 U.S. 383, 393 (1914) (“If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment ... is of no value”). In *Weeks*, the Court implied that the exclusionary rule is grounded in long-standing judicial precedent. *Id*. at 398 (“That papers wrongfully seized should be turned over to the accused has been frequently recognized in the early as well as later decisions of the courts.”) It also suggested that the rule is constitutionally required. *Id*. (stating that the lower court had violated the defendant’s constitutional rights by declining to apply the rule). Although the *Weeks* holding applied only to evidence obtained by federal officers, the Court later applied the rule to the states in *Mapp v. Ohio*. 367 U.S. at 655.

11 *Mapp*, 367 U.S. at 649. In *Mapp*, the Court relied on the exclusionary rule’s constitutional status to hold that the (continued...)



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*rather than* a personal constitutional right.”12 This distinction affects Congress’ authority to alter the exclusionary rule statutorily. Congress may not reduce a constitutionally guaranteed remedy but could potentially alter a rule that lacks constitutional status.

Regardless, the Court has narrowed the exclusionary rule’s reach in Fourth Amendment cases throughout the past several decades. For example, it has barred courts’ use of the rule in civil cases, grand jury proceedings, and parole revocation hearings. Arguably, the most important narrowing trend has been the Court’s development of the good-faith exception.

### The %ood-Faith Exception

The Supreme Court introduced what has come to be known as the good-faith exception in *United States v. Leon*. 13 In *Leon*, the Court held that the exclusionary rule does not apply when police officers act with “objectively reasonable reliance” on a search warrant later found to be invalid.14 Language in the opinion embraced a cautionary “balancing” approach to the exclusionary rule in which the benefits of exclusion (namely any deterrence effect on unconstitutional police action) must outweigh the costs (namely the risk that a guilty person will escape justice because evidence is excluded at trial) before the Court will apply the rule to new factual circumstances.15

Police officers in *Leon*, acting on a tip about drug activity in a particular home, investigated the license plate number and connections of a man who exited the home holding a small paper sack.16 The officers then observed people coming and going from the residences of several people connected to that man, including the home of Leon, the respondent in the case, whom the man had listed as his employer and who had a criminal record.17 Based on these observations, the officers obtained a warrant from a magistrate to search three homes and several automobiles.18 The subsequent search uncovered illegal drugs and other evidence.19

(...continued)

Fourteenth Amendment had incorporated the rule to the states. *Id.* at 655. Although in theory, this application to the states loses its legal foundation if the rule lacks constitutional status, states have generally continued to apply the rule to the extent that the federal courts have required it, despite the Court’s recent suggestions that the remedy is not constitutionally required.

12 *See, e.g.*, *United States v. Calandra*, 414 U.S. 338, 348 (1974) (emphasis added). The Court’s reliance on the rule’s “judicially-created” status in concluding that the Fourth Amendment exclusionary rule lacks constitutional status contrasts with the Court’s approach in other areas of constitutional interpretation. For example, in the Fifth Amendment context, the Court has recognized that the so-called “*Miranda* warnings,” and their exclusionary-rule corollary, are a judicially-created rule aimed to deter police conduct. Nonetheless, in *Dickerson v. United States*, the Court held that the *Miranda* warnings have the status of constitutional interpretation; thus, Congress cannot eliminate the *Miranda* warnings requirement by statute. 530 U.S. 428, 434-435 (2000).

13 468 U.S. 897 (1984).

14 *Id*. at 922.

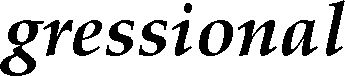
15 *Id*. at 909-13.

16 *Id*. at 901-02.

17 *Id*.

18 *Id*.

19 *Id*. at 902.



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At trial, a federal district court held that the warrant was not supported by probable cause; thus, the search violated the Fourth Amendment.20 Applying the exclusionary rule remedy, the district court suppressed the evidence of drugs found in the homes and cars.21 On appeal, the Supreme Court held that suppression is inappropriate in cases, such as *Leon*, where the violation occurred despite a police officer’s “objectively reasonable reliance” – for example, on a warrant that is actually invalid.22

By creating an exception to the exclusionary rule, the *Leon* court arguably opened the door to permitting evidence in cases involving multiple types of Fourth Amendment violations. However, the *Leon* decision itself addressed only the particular circumstance in which a warrant exists but was invalidly issued based on insufficient probable cause. The *Leon* opinion, including several exceptions to the good-faith exception articulated in the case, evidences a holding that only addresses that particular context.23

To justify its holding, the *Leon* court noted the logical inconsistency between exclusion in cases involving non-police errors and the rule’s traditional deterrence rationale, stating: “Penalizing the officer for the magistrate’s error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.”24 Based on the Court’s reliance on this rationale, one might argue that the Court did not originally anticipate an extension of the good-faith exception to cases involving police error.

The Supreme Court has extended the *Leon* good-faith exception in relatively minor ways over the past several decades. In a 1995 case, *Illinois v. Krull*, the Court applied the exception where police officers had searched an auto dealer’s list of licenses pursuant to a statute that courts later struck down as unconstitutional.25 Several years later, in *Arizona v. Evans*, the Court applied *Leon* to evidence obtained after an arrest based on a facially valid warrant that the clerk of the court had neglected to show had been quashed seventeen days earlier.26

Until recently, these extensions had involved police reliance on errors made by actors – for example, the clerk of the court in *Evans* and the legislative branch in *Krull* – not the police themselves. Furthermore, in a 2004 case, *Groh v. Ramirez*, the Court seemed to draw an explicit line between police errors and errors made by other actors.27 Police officers in *Groh* searched a home where they suspected that the owners had stored illegal weaponry.28 The court of appeals held that the search warrant, which a magistrate had signed but the officers had themselves

20 *Id*. at 903.

21 *Id*. at 903-04.

22 *Id*. at 923. Despite its emphasis on the police officer’s “good faith,” the operative language in *Leon* focuses not on the officer’s subjective integrity, but rather on whether the officer’s reliance on the defective warrant was “objectively reasonable.” *Id*. at 903-04, 923.

23 The *Leon* court articulated four exceptions to its holding, in which this good-faith exception would not apply: (1) no reasonable officer would have relied on the affidavit underlying the warrant; (2) the warrant is defective on its face for failing to state the place to be searched or things to be seized; (3) the warrant was obtained by fraud on the part of a government official; or (4) the magistrate issuing the warrant had “wholly abandoned his judicial role.” *Id*. at 923.

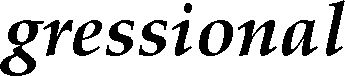
24 *Id*. at 921.

25 480 U.S. 340, 349-50 (1987).

26 514 U.S. 1 (1995).

27 540 U.S. 551 (2004).

28 *Id*. at 554-55.



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prepared, violated the constitutional requirement that property to be searched be described with particularity; thus, the officers’ search violated the homeowners’ Fourth Amendment rights.29 On appeal, the Supreme Court declined to apply the good-faith exception to the exclusionary rule, because it found that the officers’ search pursuant to a warrant that failed to list property to be searched was not a “reasonable” mistake.30 In so holding, the Court stressed that the officer in *Groh* was himself responsible for the Fourth Amendment violation.31

However, only two years after *Groh*, the Court declined to find any distinction between police error and third-party errors. In *Michigan v. Hudson*, it held that police officers’ violation of the “knock and announce” rule did not trigger the exclusionary rule.32 Knock and announce, an “ancient” procedure derived from common-law, constitutional, and statutory sources, protects occupants’ privacy by requiring police officers to wait a short while after knocking and announcing their presence before entering a residence for which they have a warrant.33 The rule is viewed as a less stringent requirement than the warrant or probable cause requirements under the Fourth Amendment, and the *Hudson* court noted that it is “unnecessary” in various circumstances.34 Because the Court limited its opinion in *Hudson* to knock and announce violations, it was unclear after that case whether the Court would extend the good-faith exception to more serious police errors, such as those involving warrants or warrant exceptions.

### Kerring v. United States

In *Herring v. United States*, a 2009 case, the Supreme Court for the first time applied the good- faith exception in a case involving police error regarding a warrant.35 Officers arrested the defendant, Bennie Dean Herring, outside of an impound lot where Herring had come to retrieve an item from his truck.36 An officer at the lot, recognizing Herring, called the county warrant clerk to determine whether an outstanding arrest warrant applied to him.37 The warrant clerk found no such warrant but agreed to inquire about warrants in a neighboring county.38 The clerk then identified as active an arrest warrant in the neighboring county, although it was in fact no longer active.39 After learning about the warrant, two officers followed Herring from the impound

29 *Id*. at 556.

30 *Id*. at 563 (“Given that the particularity requirement is set forth in the text of the Constitution, no reasonable officer could believe that a warrant that plainly did not comply with that requirement was valid.”)

31 *See, e.g.*, *Id*. at 564 (“... because petitioner himself prepared the invalid warrant, he may not argue that he reasonably relied on the Magistrate’s assurance that the warrant contained an adequate description of the things to be seized and was therefore valid.”).

32 547 U.S. 586 (2006). For a more detailed analysis of the *Hudson v. Michigan* decision, see CRS Report RS22475, *Hudson v. Michigan: The Exclusionary Rule’s Applicability to “Knock-and-Announce” Violations*, by Alison M. Smith.

33 *Hudson*, 547 at 589-90.

34 *Id*. at 590. Despite this argument, the decision was not without impact. Dissenting justices in *Hudson* argued that the decision “weakens” and possibly even “destroys” the knock-and-announce rule. *Id*. at 605 (Breyer, J., dissenting).

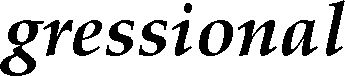
35 555 U.S. .

36 *Id.*, Slip op. at 2.

37 *Id*.

38 *Id*.

39 *Id*.



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lot, arrested him, and performed a search incident to arrest.40 The officers discovered methamphetamine in Herring’s pocket and an illegal pistol in his vehicle.41

Because the arrest warrant was actually invalid, both parties in *Herring* admitted that a Fourth Amendment violation had occurred.42 The disagreement in the case centered on whether the exclusionary rule should apply to suppress the evidence obtained as a result of the violation.43 Extending the good-faith exception, the Court held that the exclusionary rule should not apply.44

The Court also announced a new test for the exception: “To trigger the exclusionary rule,” police conduct must be “sufficiently deliberate” and the police must be “sufficiently culpable.”45 The Court emphasized that this “analysis of deliberateness and culpability” is objective: a court should ascertain not whether the police officer in question acted with good intentions, but rather “‘whether a reasonably well trained officer would have known that the search was illegal’ in light of ‘all the circumstances.’”46

In rejecting the exclusionary rule in *Herring*, the Court appeared to embrace the view that it is not constitutionally required in the Fourth Amendment context. Quoting *Hudson v. Michigan*, the Court emphasized that the exclusionary rule is a “‘last resort’” rather than a “necessary consequence of a Fourth Amendment violation.”47 It then applied a cost-benefit analysis similar to the approach in *Leon*, stating that in order for the exclusionary rule to apply, “the benefits of deterrence must outweigh the costs.”48

In contrast, dissenting justices in *Herring* cited cases in which the Court has viewed the exclusionary rule as “inseparable” from the Fourth Amendment, suggesting that the remedy of exclusion has constitutional status.49 Starting from this different philosophical foundation, the dissenters rejected the cost-benefit approach as inappropriate and would instead have applied the exclusionary rule in all cases where it has “*any power* to discourage” law enforcement misconduct.50 Dissenters also highlighted the substantive distinction between errors made by judicial branch personnel and errors made by police, noting three specific distinctions: (1) the exclusionary rule historically aims to deter police, rather than judicial, misconduct; (2) no evidence suggests that court employees are “inclined to subvert the Fourth Amendment”; and (3) because judicial officers have no stake in the outcome of particular criminal investigations, “there [is] ‘no basis for believing that application of the exclusionary rule ... [would] have a significant

40 *Id*.

41 *Id*.

42 *Herring*, slip op. at 4.

43 *Id*.

44 Slip op. at 9.

45 *Id*.

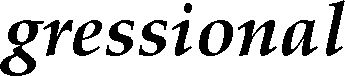
46 Slip op. at 10 (quoting *Leon*, 468 U.S. at 922 n.23).

47 Slip op. at 5 (quoting *Hudson v. Michigan*, 547 U.S. 586, 591 (2006)).

48 Slip op. at 6.

49 Slip op. at 5 (Ginsburg, J., dissenting) (citing, among others, *Whiteley v. Warden, Wyo. State Penitentiary*, 401 U.S. 560, 568-69 (1971)).

50 *See* Slip op. at 1 (Ginsburg, J., dissenting).



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effect on court employees.’”51 For those reasons, the four dissenting justices would not have extended the good-faith exception to situations involving police conduct regarding a warrant.

### Lega1 Imp1ications

Although the *Herring* decision broadens the good-faith exception to the exclusionary rule and has shifted the analysis to one of “deliberateness and culpability,” the scope of its impact remains to be seen. For example, although it is perhaps difficult to imagine recordkeeping errors that would meet the Court’s “deliberate and culpable” test, the *Herring* court suggested that “reckless[ness] in maintaining a warrant system,” such as a recordkeeping system that routinely led to false arrests, could justify application of the exclusionary rule.52 Thus, although most recordkeeping and clerical errors made by police will no doubt fit within the relatively broad parameters of the good-faith exception as interpreted in *Herring*, lower courts will likely decline to apply *Herring* in situations where defendants demonstrate knowledge or ongoing patterns of wrongdoing by law enforcement officers.

In addition to broadening the good-faith exception, the *Herring* decision appears to further the trend toward interpreting the exclusionary rule as lacking constitutional status. One important outcome of this might be greater congressional authority to legislate changes to the Fourth Amendment exclusionary rule. Congress has occasionally considered legislation that would expand or contract the exclusionary rule’s reach.53 Because Congress may always guarantee a greater right than the Constitution demands as a minimum, Congress clearly may expand the remedy of exclusion. In contrast, whether Congress has the authority to restrict the remedy of exclusion depends upon the status of the remedy vis-à-vis the Constitution. If, as *Herring* appears to indicate, the exclusionary rule lacks constitutional status, then legislation restricting the right – for example, legislation expanding the *Herring* holding – is likely constitutionally permissible. If, on the other hand, the exclusionary rule is a constitutionally required remedy in Fourth Amendment cases, as the *Herring* dissenters suggested, then Congress would lack the authority to narrow the scope of the remedy.

##### !uthor Contact Information

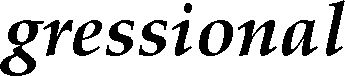
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51 Slip op. at 1 (Breyer, J., dissenting) (quoting *Evans*, 514 U.S. at 15).

52 Slip op. at 11.

53 For example, legislation introduced in 1995 attempted to codify the good-faith exception by removing the remedy of exclusion in federal courts in cases in which police officers had acted in good faith. Exclusionary Rule Reform Act of 1995, H.R. 666, 104th Cong. (1995).



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**Intro to Criminal Investigation [KNPU]**

<< Topic of Study #05 >>

**The U.S. 4th Amendment <★2>**

**=> The “Third-Party Doctrine”**

|  |  |
| --- | --- |
| = Key Concepts & Landmark/Significant U.S. Court Cases = | |
| **※ Katz v. United States, 389 U.S. 347 (1967)**  **※ United States v. Miller, 425 U.S. 435 (1976)**  **※ Smith v. Maryland, 442 U.S. 735 (1979)**  **※ United States v. Jones, 565 U.S. 400 (2012)** | |
| **☆ Reasonable Expectation of Privacy // The ‘Secrecy’ Model of Privacy** | |
| < Discussion Questions > | |
| <1> | ***What are the two prongs of***  ***the “Reasonable Expectation of Privacy” test?*** |
| <2> | ***Why is the “Third-Party Doctrine” important***  ***with regard to criminal investigation?*** |
| <3> | ***What is the “Trespass Theory” of the U.S. 4th Amendment?*** |

For Under-/Post-graduate

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**The Fourth Amendment Third-Party Doctrine**

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**Summary**

In the 1970s, the Supreme Court handed down *Smith v. Maryland* and *United States v. Miller*, two of the most important Fourth Amendment decisions of the 20th century. In these cases, the Court held that people are not entitled to an expectation of privacy in information they voluntarily provide to third parties. This legal proposition, known as the third-party doctrine, permits the government access to, as a matter of Fourth Amendment law, a vast amount of information about individuals, such as the websites they visit; who they have emailed; the phone numbers they dial; and their utility, banking, and education records, just to name a few. Questions have been raised whether this doctrine is still viable in light of the major technological and social changes over the past several decades.

Before there were emails, instant messaging, and other forms of electronic communication, it was much easier for the courts to determine if a government investigation constituted a Fourth Amendment “search.” If the police intruded on your person, house, papers, or effects—tangible property interests listed in the text of the Fourth Amendment—that act was considered a search, which had to be “reasonable” under the circumstances. However, with the advent of intangible forms of communication, like the telephone or the Internet, it became much more difficult for judges to determine when certain surveillance practices intruded upon Fourth Amendment rights. With *Katz v. United States*, the Court supposedly remedied this by declaring that the Fourth Amendment protects not only a person’s tangible things, but additionally, his right to privacy.

*Katz*, however, left unprotected anything a person knowingly exposes to the public. This idea would form the basis of *Smith* and *Miller*. In those cases, the Court held that a customer has no reasonable expectation of privacy in the phone numbers he dials (*Smith*) and in checks and deposit slips he gives to his bank (*Miller*), as he has exposed them to another and assumed the risk they could be handed over to the government.

While the third-party doctrine has been criticized by Members of Congress, various commentators, and others as overly constrictive of Americans’ privacy rights, it appears to fit relatively well with other Fourth Amendment case law. That being said, advancements in data collection, automation, and use have some questioning the continued application of this doctrine in a digital society. Several events have precipitated renewed debates over its continued existence. First was the Supreme Court’s decision in the GPS tracking case, *United States v. Jones*, where two concurring opinions comprising five Justices of the Court called into question various existing Fourth Amendment theories, including the third-party doctrine, at least with respect to long-term government monitoring and advanced surveillance technology. Second was the Edward Snowden leaks relating to the National Security Agency’s telephone metadata program, which has been primarily justified by *Smith* and the third-party doctrine. Various Members of Congress have joined the debate, with some introducing legislation that would require a warrant for access to records held by third-parties, and others introducing more targeted measures that would limit access to information such as geolocation data from third-party companies.

With these legal, social, and technological trends in mind, this report explores the third party- doctrine, including its historical background, its legal and practical underpinnings, and its present and potential future applications. It explores the major third-party doctrine cases and fits them within the larger Fourth Amendment framework. It surveys the various doctrinal and practical arguments for and against its continued application. Lastly, this report describes congressional efforts to supplement legal protection for access to third-party records, as well as suggesting possible future directions in the law.

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## Introduction

In 1967, the Supreme Court pronounced in *Katz v. United States* that “[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”1 This rule “that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties” is known as the “third-party doctrine.”2 While its reach in the pre-digital age was relatively limited, the third-party doctrine has provided the government a powerful investigative tool in a society where people share ever-increasing amounts of information with others. Many have debated whether these technological and social changes require the courts to reconsider this doctrine, or, alternatively, whether Congress should step in and create some form of statutory protection for this information.3

Over the years, the Court has applied the third-party doctrine to two main sets of cases. In one, the Court has held that people do not have a reasonable expectation that a person with whom they are communicating will not later reveal that conversation to the police.4 In the second, the Court extended this doctrine to hold that people are not entitled to Fourth Amendment safeguards for records given to a third-party or data generated as part of a person’s business transactions with a third-party. In two of the most prominent third-party cases, *Smith v. Maryland* and *United States v. Miller*, the Court held that government access to telephone calling records and bank records, respectively, were not Fourth Amendment searches for which warrants were required.5

To be clear, the third-party doctrine does not cover all conceivable information that is transferred through a third party. For instance, the content of a voice or email communication does not fall within its scope.6 The courts have reasoned that the service provider is merely the conduit or intermediary of those communications and not the recipient; thus, the user does not lose privacy protection in those communications. On the other hand, both non-content and content information that is shared directly with a service provider is covered by the third-party doctrine (e.g., the deposit slips or checks shared with a bank and data kept by the bank relating to transactions with it). Additionally, non-content information derived from private interactions with others is subject to the third-party doctrine. This covers data such as telephone numbers dialed, email addresses of those emailed, or websites visited.

1 Katz v. United States, 389 U.S. 347, 351 (1967).

2 Smith v. Maryland, 442 U.S. 735, 743-44 (1979).

3 *See, e.g.*, Orin Kerr and Greg Nojeim, *The Data Question: Should the Third-Party Records Doctrine Be Revisited?*, ABA JOURNAL (Aug. 1, 2012), *available at* <http://www.abajournal.com/magazine/article/> the\_data\_question\_should\_the\_third-party\_records\_doctrine\_be\_revisited/; Orin Kerr, *The Case for the Third Party Doctrine*, 107 MICH. L. REV. 561, 575 (2009); Richard A. Epstein, *Privacy and the Third Hand: Lessons from the Common Law of Reasonable Expectations*, 24 BERKELEY TECH. L. J. 1199 (2009); Erin Murphy, *The Case Against the Case for Third-Party Doctrine: A Response to Epstein and Kerr*, 24 BERKELEY TECH. L. J. 1239 (2009); Stewart Baker, Smith v. Maryland *as a Good First-Order Estimate of Reasonable Privacy Expectations*, VOLOKH CONSPIRACY (May 4, 2014), *available at* <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/05/04/smith-v-maryland-as-a-> good-first-order-estimate-of-reasonable-privacy-expectations/.

4 *See infra* notes 49-66, and accompanying cases.

5 United States v. Miller, 425 U.S. 435 (1976); *Smith*, 442 U.S. 735.

6 *Katz*, 389 U.S. at 352 (voice); United States v. Warshak, 631 F.3d 266, 288 (6th Cir. 2010) (email).

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The third-party doctrine has been heavily criticized for unnecessarily constricting Americans’ privacy rights.7 But whatever one thinks of the rule that citizens are not entitled to Fourth Amendment protection when they share information with one another, the third-party doctrine is largely entrenched in other areas of Fourth Amendment case law. For example, it is not a Fourth Amendment search for the police to dig through one’s trash left on the curb,8 to track a person’s movements on public streets,9 and even to surveil a person in a fenced-in backyard with an aircraft.10 In each of these instances, the Court reasoned that because the person exposed his activities to the public gaze he was no longer entitled to an expectation of privacy.

In addition to the legal attacks on the third-party doctrine, some have questioned its practical implications in a society which shares almost every facet of its life with various entities.11 Both *Smith* and *Miller*, decided in the mid- to late-1970s, came before the mass digital revolution experienced over the last several decades. Since these decisions, there has been a wave of advancement in data generation, collection, automation, and processing.12 Whether these new technologies and shifts in social interaction require courts or lawmakers to revise this review is currently under debate.

Two major events in the past few years typify this ongoing debate. The first is the conversation prompted by several concurrences in the 2012 GPS tracking case *United States v. Jones*.13 In two concurring opinions in that case, five Justices opined that warrantless, pervasive government location monitoring can violate the Fourth Amendment.14 Commentators have speculated that these five votes could have significant consequences for other similar ubiquitous surveillance techniques.15 And at least one member of the Court, Justice Sotomayor, believes that the third-

7 *See, e.g.*, United States v. Miller, 425 U.S. 435, 447 (Brennan, J., dissenting); Stephen E. Henderson, *The Timely Demise of the Fourth Amendment Third Party Doctrine*, 96 IOWA L. REV. BULL. 396 (2011); CHRISTOPHER SLOBOGIN, PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT 140 (2007).

8 California v. Greenwood, 486 U.S. 35, 43-44 (1988).

9 United States v. Knotts, 460 U.S. 276, 285 (1983).

10 Florida v. Riley, 488 U.S. 445, 451-52 (1989).

11 *See* DANIEL J. SOLOVE, THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE 202 (2004) (“The

government’s harvesting of information from the extensive dossiers being assembled with modern computer technology poses one of the most significant threats to privacy of our time.”).

12 Omer Tene and Jules Polonetsky, *Big Data for All: Privacy and User Controls in the Age of Analytics*, 11 NW. J. TECH. & INTELL. PROP. 239, \*1(2013) (“Big data is upon us.” https://a.next.westlaw.com/Document/ I535f4a8bb78611e28578f7ccc38dcbee/View/FullText.html?navigationPath= Search%2Fv3%2Fsearch%2Fresults%2Fnavigation%2Fi0ad6040300000146014bbf3f6cbb1298%3FNav%3DANALY TICAL%26fragmentIdentifier%3DI535f4a8bb78611e28578f7ccc38dcbee%26startIndex%3D1%26contextData%3D% 2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource= 4f65f444bd87ab8451abbca5a750d542&list=ANALYTICAL&rank=10&grading=na&sessionScopeId= bbd4e55d34300e25e857bc0ccd7bbb05&originationContext=Search%20Result&transitionType=SearchItem& contextData=%28sc.Search%29 - co\_footnote\_F3388167494 Over the past few years, the volume of data collected and stored by business and government organizations has exploded. The trend is driven by reduced costs of storing information and moving it around in conjunction with increased capacity to instantly analyze heaps of

unstructured data using modern experimental methods, observational and longitudinal studies, and large scale simulations. Data are generated from online transactions, email, video, images, clickstream, logs, search queries, health records, and social networking interactions; gleaned from increasingly pervasive sensors deployed in infrastructure such as communications networks, electric grids, global positioning satellites, roads and bridges, as well as in homes, clothing, and mobile phones.”).

13 United States v. Jones, 132 S. Ct. 945 (2012).

14 *Id.* at 954 (Sotomayor, J., concurring); *Id.* at 957 (Alito, J., concurring).

15 *See, e.g.,* Priscilla J. Smith, *Much Ado About Mosaics: How Original Principles Apply to Evolving Technology in*

(continued...)

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party doctrine should be seriously rethought as a whole. The second is the litigation surrounding the National Security Agency’s telephone metadata program. Several federal courts, including the Foreign Intelligence Surveillance Court, have applied *Smith* and the third-party doctrine to uphold this comprehensive data collection program.16 One district court judge, however, found *Smith* outdated and the NSA program too invasive for *Smith* to still control this legal question.17

With these shifts in technology and legal thinking in mind, this report explores the history and legal foundations of the third-party doctrine. It will first provide background to the Fourth Amendment and describe in what instances government investigations trigger its protections. It will then analyze the Court’s third-party doctrine cases and provide doctrinal and practical arguments for and against its application. Next, this report will examine how Congress has responded to the third-party doctrine and whether *United States v. Jones* and subsequent cases might alter its future application. Lastly, this report will consider any potential future developments in this fast-moving area of law.

## Fourth Amendment Background

Before the advent of modern communications, government officials could not simply subpoena an Internet Service Provider (ISP), or Amazon, or Google for information relating to a target of investigation, but had to enter the suspect’s home or office, sometimes by force, to retrieve personal information directly themselves.18 During the 18th century, British and colonial officials conducted searches and seizures of people’s homes with little to no suspicion of wrongdoing pursuant to either a general warrant, which was used mainly in England, or a writ of assistance, which was used in the American colonies.19 These indiscriminate government intrusions contributed to the people’s fear of unrestrained government power and led to the eventual passage of the Fourth Amendment.

Take, for instance, the formative English search and seizure case *Entick v. Carrington*, where the government was investigating John Entick and others for alleged publication of seditious articles.20 In that case, government officials broke into Entick’s home with “force and arms,”

(...continued)

United States v. Jones, 14 N.C. J.L. & TECH 557, 571 (2013); 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).

16 ACLU v. Clapper, 959 F. Supp. 2d 724 (S.D.N.Y. 2013); Smith v. Obama, No. 2:13-CV-257 (D. Idaho June 3, 2014); *In re* Application of the Fed. Bureau of Investigation for an Order Requiring the Production of Tangible Things from [Redacted], No. BR 13-109 (FISA Ct. 2013), *available at* <http://www.uscourts.gov/uscourts/courts/fisc/br13-09-> primary-order.pdf.

17 Klayman v. Obama, 957 F. Supp. 2d 1, 36 (D.D.C. 2013).

18 Thomas K. Clancy, *What is a “Search” Within the Meaning of the Fourth Amendment*, 70 ALB. L. REV. 1, 4 (2006) (“The abhorred English and colonial search and seizure practices involved physical invasions of people’s property.

That was not surprising given that physical invasions were the only way authorities could intrude at the time and given the lack of technology and other sophisticated surveillance techniques.”); *see generally* WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND MEANING 602-1791 (2009).

19 *See* Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 501-512 (1995) (discussing early English and American search and seizure case law).

20 Entick v. Carrington, 95 Eng. Rep. 807, 807 (C.P. 1765).

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pried open the locks on his doors, broke open his chests and drawers, and searched his private papers and books for four hours.21 The officers conducted this search under the guise of a general warrant, a legal order which states with a high level of generality the places and things to be searched and seized. In outlawing these practices, Lord Camden of the English bench observed:

[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour’s close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour’s ground, he must justify it by law.22

These same intrusive practices also faced disfavor in the American colonies. British officials often resorted to writs of assistance, a form of general warrant, which permitted house-to-house searches.23 These legal orders generally failed to allege any illegal activity and were not signed off on by a judge.24 In the famous *Paxton’s Case*, leading Boston attorney James Otis attacked these writs as “the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of the constitution, that was ever found in an English law book.”25 John Adams later commented that these indiscriminate intrusions were “the spark in which originated the American Revolution.”26

To prevent the newly established federal government from committing these incursions into their lives, the American people ratified the Fourth Amendment as part of the Bill of Rights in 1791. It reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath of affirmation, and particularly describing the place to be searched, and the person or things to be seized.27

Over the years, the federal courts have struggled to reconcile the first clause of the Amendment, which requires that all searches and seizures be reasonable, with the second clause, which requires that all warrants meet certain minimum requirements such as particularly describing the place to be searched and the things to be seized.28 In any event, the Court must first determine whether the Fourth Amendment’s restrictions apply at all. This is done by asking whether the government has conducted a “search,” a legal term of art that cannot be resolved by mere dictionary definition, but instead requires application of the Supreme Court’s intricate, and at times contradictory, Fourth Amendment case law.

21 *Id.*

22 *Id.* at 817.

23 Cuddihy, *supra* note 18, at 380.

24 *Id.*

25 Brief of James Otis, MASSACHUSETTS SPY, Apr. 29, 1773, at 3.

26 1 JOHN ADAMS & CHARLES FRANCIS ADAMS, THE WORKS OF JOHN ADAMS: SECOND PRESIDENT OF THE UNITED STATES

57 (1856).

27 U.S. CONST. amend. IV.

28 *See* Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383, 383-84 (1988).

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#### Early Definitions of a Fourth Amendment “Search”

Although the Fourth Amendment was ratified in 1791, the Supreme Court’s first in-depth interpretation of what constitutes a Fourth Amendment search did not arise until the 1886 case *United States v. Boyd.*29 In *Boyd*, the government obtained a court order for the Boyds to provide an invoice of goods they imported which the government planned to use against them in court. The Boyds produced the invoice, but protested that its production constituted an unreasonable search and seizure under the Fourth Amendment. Looking to *Entick* and other pre-Revolutionary cases for guidance, the Court found that the production of private papers was so similar to an actual invasion into one’s home that it constituted a Fourth Amendment search.30

Although *Boyd* instructed that the Fourth Amendment should be “liberally construed,”31 the Court narrowed the scope of what constitutes a search in *Olmstead v. United States*.32 In that case, federal agents investigating the bootlegging activities of a criminal syndicate placed a wiretap on several phone lines running from the homes and office of four suspects. At no point did the officers trespass upon the defendants’ property to conduct the tap. The Court held that these wiretaps should not be considered a search as the “Amendment itself shows that the search is to be of material things—the person, house, papers, and effects,” and the intangible voice of the defendants was not covered by its literal terms. The Court further found that the agents did not engage in “an actual physical invasion” of Olmstead’s home for purposes of conducting the wiretap.33 Dissenting in *Olmstead*, Justice Brandeis observed that in the past, most notably in *Boyd*, the Court “refused to place an unduly literal construction” upon the Fourth Amendment.34 Instead, he continued:

The protection guaranteed by the amendment[] is much broader in scope. The makers of our 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. To 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.35

Nonetheless, in the ensuing years, the Court assessed whether there was a search based on whether a physical trespass occurred. For instance, it was not considered a search when police engaged in eavesdropping absent a trespass.36 However, where the police trespassed upon the suspect’s property—even by an inch—the Court held that the Fourth Amendment applied.37 Forty years later the Court would expressly overrule *Olmstead*’s literal, trespass-based interpretation of the Fourth Amendment for a privacy-based test.

29 United States v. Boyd, 116 U.S. 616 (1886).

30 *Id.*

31 *Id.*

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

33 *Id.* at 466.

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

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

36 Goldman v. United States, 316 U.S. 129, 135 (1942).

37 Silverman v. United States, 365 U.S. 505, 511-12 (1961).

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#### Reasonable Expectation of Privacy and the Secrecy Model of Privacy

In 1967, the Court decided *Katz v. United States*, which abandoned the literal interpretation of the Fourth Amendment—one that protected only persons, houses, papers, and effects—to one that also protected intangible interests such as privacy.38 However, while the Court sought to expand what the Fourth Amendment protects, certain passages in *Katz* simultaneously foreclosed protection for anything a person exposes to the public or another person. This would have significant consequences for government access to records and other information held by third parties.

In *Katz*, the FBI was investigating the illegal gambling activities of Mr. Katz. The FBI had attached an electronic eavesdropping device to the outside of the telephone booth in which Katz made calls and offered evidence of these calls against Katz at his prosecution. Quite sensibly, the parties framed the question presented in light of *Olmstead*’s physical trespass theory, the controlling Fourth Amendment theory of the day. They debated whether a telephone booth was a “constitutionally protected area” such that attaching the listening device to its outside would constitute a Fourth Amendment search.39 The Court, speaking through Justice Stewart, looked beyond this traditional inquiry into protected areas, and instead declared that the “Fourth Amendment protects people, not places.”40 He observed that the “Amendment protects individual privacy against certain kinds of governmental intrusion,” but also instructed that it “cannot be translated into a general constitutional ‘right to privacy[.]’” Such a “right to be let alone by other people” is left largely to protection under state law.41 In bypassing *Olmstead* and formulating the scope of the Fourth Amendment in light of privacy principles, it became necessary for the Court to lay down a rule to determine which privacy interests would be protected and which would not. Unfortunately, the majority provided little by way of guidance on the scope of this rule, beyond to say that what a person “seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected” and that the use of the electronic eavesdropping device violated Katz’s privacy, upon which he “justifiably relied.”42 Concurring, Justice Harlan developed a two- part framework for answering this question, which would become *Katz*’s controlling test.43 Under Justice Harlan’s formulation, a court first asks whether the person exhibited an actual or subjective expectation of privacy and second whether society is likely to deem that expectation reasonable.44

Beyond its general assertion that the Fourth Amendment protects people, not places, the majority made an equally far-reaching observation that “[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”45 This rule

38 Katz v. United States, 389 U.S. 347 (1967).

39 *Id.* at 349.

40 *Id.* at 351.

41 *Id.* at 350.

42 *Id.* at 351, 353.

43 *Id.* at 360 (Harlan, J., concurring); *see* Kyllo v. United States, 533 U.S. 27, 32-33 (2001) (“In assessing when a search is not a search, we have applied somewhat in reverse the principle first enunciated in *Katz v. United States* As

Justice Harlan’s oft-quoted concurrence described it, a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable.”).

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

45 *Katz*, 389 U.S. at 351-52.

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adopts what can be called the secrecy model of privacy. Under the secrecy model, once a fact is disclosed to the public in any way, the information is no longer entitled to privacy protection.46 This secrecy model, along with the assumption of the risk theory discussed below, would form the underpinnings of the modern third-party doctrine.

## Third-Party Doctrine Jurisprudence

The idea that what a person knowingly exposes to the public is not entitled to constitutional protection was not an invention of the *Katz* court, but was embedded in Fourth Amendment jurisprudence for quite some time. In one of the first Fourth Amendment cases, *Ex parte Jackson*, the Court held that anything “exposed” on the outside of a parcel of mail is not entitled to Fourth Amendment protection.47 Similarly, under what has come to be known as the “plain view” doctrine, Justice Brandeis noted in the 1927 case *United States v. Lee* that the use of a searchlight to view cases of liquor on the deck of a ship was not a Fourth Amendment search.48 More prominently, the Court decided a series of cases throughout the 20th century holding that people do not have a reasonable expectation that a person with whom they are conversing will not later reveal that conversation to the police. The third-party doctrine would later be extended to documents and transactional data shared with third parties.

#### Undercover Informant Cases

In a series of five cases throughout the 20th century, the Supreme Court assessed the constitutionality of the use of undercover agents or informants under the Fourth Amendment. In *On Lee v. United States*, the government wired an “undercover agent” with a microphone and sent him into On Lee’s laundromat to engage him in incriminating conversation.49 An agent of the Bureau of Narcotics sat outside with a receiving set to hear the conversation. In the course of these conversations, On Lee made incriminating statements, which the agent later testified to at On Lee’s trial. On Lee argued that this evidence was obtained in violation of the Fourth Amendment. In an opinion authored by Justice Jackson, the Court disagreed, noting that On Lee was “talking confidentially and indiscreetly with one he trusted” and that the agent was let into his shop “with the consent, if not implied invitation” of On Lee.50

In a similar case, *Lopez v. United States*, the defendant attempted to bribe an internal revenue agent, who during some of these conversations was wearing a recording device.51 At trial, Lopez moved to suppress evidence of the wire recordings as fruits of an unlawful search. Relying on the *On Lee* decision, the Court rejected this argument on the grounds that the defendant consented to the agent being in his office and “knew full well” that the statements he made to the agent could

46 Solove, *supra* note 11, at 8.

47 *Ex parte* Jackson, 96 U.S. 727, 736 (1877).

48 *See* United States v. Lee, 274 U.S. 559 (1927); *see also* United States v. Martin, 806 F.2d 204, 207 (8th Cir. 1986) (“[I]t was inappropriate to subject the agent’s conduct of looking through the window of the truck to Fourth Amendment scrutiny in the first place. The agent’s mere observation of gun parts left in plain view on the front seat of the truck did not implicate any Fourth Amendment rights.”).

49 On Lee v. United States, 343 U.S. 747, 748 (1952).

50 *Id.* at 751-52.

51 Lopez v. United States, 373 U.S. 427, 430 (1963).

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be used against him.52 Further, the Court noted that the listening device was not used to intercept conversations the agent could not have otherwise heard, but “instead, the device was used only to obtain the most reliable evidence possible of a conversation in which the Government’s own agent was a participant and which that agent was fully entitled to disclose.”53

In *Lewis v. United States*, the government sent an undercover federal narcotics agent to the defendant’s home several times to purchase marijuana.54 Over the defendant’s objections, the agent was permitted to recount the conversations at trial. Upon review, the Supreme Court held that the conversations were not protected under the Fourth Amendment as the defendant had invited the federal agent into his home and that the statements were “willingly” made to the agent.55

Finally, in *Hoffa v. United States*, a government informant relayed to federal law enforcement agents the many conversations he had with Jimmy Hoffa about Hoffa’s attempt to tamper with a jury.56 Because the informant did not enter Hoffa’s hotel room by force, was invited to participate in the conversations by Hoffa, and was not a “surreptitious eavesdropper,” the Court concluded that the Fourth Amendment had not been violated.57

There appear to be two motivating principles underlying these undercover informant cases. In one sense, the Court was applying *Olmstead*’s physical invasion test: because the informants had not trespassed into the defendants’ homes or offices—in the words of pre-*Katz* case law, their “constitutionally protected areas”—there could be no constitutional invasion.58 Rather, in each instance, the informant was invited onto the premises. For example, in *On Lee*, the Court observed that On Lee could not raise the issue of trespass as he had consented, if not invited, the agent to enter his business. A claim of trespass could only be made if the agent had entered by force or by show of authority.59 In another sense, the Court found that voluntarily telling another person something gave him consent to share that information with another person including the government.60 For instance, *Hoffa* instructed that the Fourth Amendment does not protect “a wrongdoer’s misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.”61

Note that these cases came before *Katz* shifted the Fourth Amendment focus from property to privacy. Whether *Katz* would disturb this line of cases was a matter of “considerable

52 *Id.* at 437.

53 *Id.* at 439.

54 Lewis v. United States, 385 U.S. 206 (1966).

55 *Id* at 210, 212.

56 Hoffa v. United States, 385 U.S. 293, 296 (1966).

57 *Id.* at 302.

58 *See Lopez*, 373 U.S. at 439 (“And the device was not planted by means of an unlawful physical invasion of petitioner’s premises under circumstances that would violate the Fourth Amendment.”).

59 *See* On Lee, 343 U.S. at 751-52.

60 *Hoffa*, 385 U.S. at 302 (“[The government agent] was in the suite by invitation, and every conversation which he heard was either directed to him or knowingly carried on in his presence.”); *Lopez*, 373 U.S. at 438 (“The only evidence obtained consisted of statements made by the [defendant] to the [government agent], statements which [the defendant] knew full well could be used against him by [the government agent] if he wished.”).

61 *Hoffa*, 385 U.S. at 302.

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speculation”62 until the Court decided *United States v. White* four years later. In *White*, an undercover informant wearing a radio transmitter engaged the defendant in several incriminating conversations, four of which took place at the informant’s house, and several other conversations took place in the defendant’s home, a restaurant, and in the informant’s car.63 The court of appeals in *White* interpreted *Katz* as implicitly overruling this line of cases as it was based on a trespass doctrine that was “squarely discarded” in *Katz*.64 The Supreme Court disagreed, however, and upheld the surreptitious surveillance. The opinion accepted that the trespass rationale could not survive after *Katz*, but that the undercover informant cases were also supported by a “second and independent ground”—that the informant was not an uninvited eavesdropper, but a party to the conversation who was free to report what he heard to the authorities.65 For the Court, White had assumed the risk that information he shared with the informant could be shared with the police.66

With *White*, the Court combined several ideas in its Fourth Amendment jurisprudence: first, that it is unreasonable for people to expect privacy in information they share with another, and second, that they assume the risk that that information can be handed over to the government.67 With these two theories in mind, the Court resolved two major third-party doctrine cases in the 1970s, *United States v. Miller* and *Smith v. Maryland*.68 These cases would become the cornerstone of the modern third-party doctrine, and have been heavily relied upon by government officials to access various types of transactional data without a search warrant.

***Miller v. United States*—Subpoena for Bank Records**

In 1976, the Court took up its first major third-party doctrine case to deal with transactional documents in *Miller v. United States*. In that case, agents of the Treasury Department’s Alcohol, Tobacco, and Firearms Bureau were investigating Mitch Miller for his participation in an illegal whiskey distillery.69 The agents subpoenaed the presidents of several banks in which Miller had an account to produce all records of accounts including savings, checking accounts, and any loans he may have had. The banks never informed Miller that the subpoenas had been served, but ordered their employees to comply with the subpoenas. At one bank, an agent was shown

62 *See* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 2.2(f) (2004).

63 United States v. White, 401 U.S. 745, 746-47 (1971).

64 United States v. White, 405 F.2d 838 (7th Cir. 1969).

65 *White*, 401 U.S. at 750 (quoting *On Lee*, 343 U.S. at 753-54) (“It would be a dubious service to the genuine liberties protected by the Fourth Amendment to make them bedfellows with spurious liberties improvised by farfetched analogies which would liken eavesdropping on a conversation, with the connivance of one of the parties, to an unreasonable search or seizure.”)).

66 *Id.* at 752 (“Inescapably, one contemplating illegal activities must realize that his companions may be reporting to the police.”). Assumption of the risk is more commonly found in the context of tort law, where a person assumes certain risks that accompany the activities he is engaged in. *See* Murphy v. Steeplechase Amusements Co., 250 N.Y. 479 (1929) (Cardozo, J.) (“Volenti non fit injuria. One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his antagonist or a spectator at a ball game the chance of contact with the ball.”).

67 While primarily concerned with the Fifth Amendment right to self-incrimination, *Couch v. United States* , 409 U.S. 322, 335(1973), observed that “there can be little expectation of privacy where [tax] records are handed to an accountant, knowing that mandatory disclosure of much of the information therein is required in an income tax return.”).

68 United States v. Miller, 425 U.S. 435 (1976); Smith v. Maryland, 442 U.S. 735 (1979).

69 *Miller*, 425 U.S. at 437.

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microfilm of Miller’s account and provided copies of “one deposit slip and one or two checks.”70 At the other bank, the agent was shown similar records and was given copies of “all checks, deposit slips, two financial statements, and three monthly statements.”71 Copies of the checks were later introduced into evidence at Miller’s trial.

The lower court held that the government had unlawfully circumvented the Fourth Amendment by first requiring the banks to maintain the customer’s records for a certain period of time and second by using insufficient legal process to obtain those records from the bank. In a 7-2 ruling, the Supreme Court reversed and held that subpoenaing the bank records without a warrant did not violate the Fourth Amendment. The opinion by Justice Powell discarded the first argument by noting that previous case law held that merely requiring the bank to retain its customers’ records did not constitute a Fourth Amendment search.72 That previous case, however, did not resolve whether a subpoena was sufficient to access those documents.73 Miller argued that the bank kept copies of personal records that he gave to the bank for a limited purpose and in which he retained a reasonable expectation of privacy under *Katz*. The Court, applying language from *Katz*, noted that “[w]hat a person knowingly exposes to the public ... is not a subject of Fourth Amendment protection.”74 The Court concluded that banking documents were not “confidential communications,” but rather negotiable instruments that were required to transact business between the customer and the bank. All of the documents contained information “voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business.”75 As with the undercover agent cases, once documents were shared with the bank, they could then be given to the government without requiring a search warrant. Citing to *White*, Justice Powell instructed that a bank customer “takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the government.”76 Looking to both this assumption of the risk theory and the secrecy model, the Court then included the following sentence which would come to encapsulate the third-party doctrine:

This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.77

Based on this assertion, Miller could have no reasonable expectation of privacy in the bank records and thus the introduction of them at his prosecution did not contravene the Fourth Amendment.

70 *Id.* at 438.

71 *Id*.

72 *Miller*, 425 U.S. at 441 (quoting California Bankers Assn. v. Shultz, 416 U.S. 21, 54 (1974)).

73 *See California Bankers Ass’n*, 416 U.S. at 54 n.24.

74 *Miller*, 425 U.S. at 442 (quoting Katz v. United States, 389 U.S. 347, 351 (1967)).

75 *Id.*

76 *Id.* at 443.

77 *Id.* at 443.

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***Smith v. Maryland*—Subpoena for Telephone Call Records**

Several years later, the Court took up the second major third-party doctrine case, *Smith v. Maryland,*78 which would have major implications for government collection of transactional records, especially those held by third-party companies.

In *Smith*, the police were investigating the robbery of a young woman, who gave the police a description of her assailant and the vehicle seen near the scene of the crime.79 The police later spotted a man matching the victim’s description driving an identical vehicle in her neighborhood, which they traced back to Michael Smith. Upon police request, the telephone company installed a pen register at its central office to record the telephone numbers dialed from Smith’s home. The device was installed without a warrant or court order. Through the pen register, the police learned that a call was placed from Smith’s home to the victim’s phone, which would eventually connect Smith to the robbery. At trial, Smith claimed that any evidence obtained from the pen register violated his Fourth Amendment rights as the police failed to obtain a warrant before installing it. This motion was denied, Smith was later convicted of robbery, and the appeals court affirmed his conviction, holding that the installation of the pen register was not a Fourth Amendment search.80

In line with Justice Harlan’s formulation of the *Katz* privacy test, the Supreme Court asked the following questions: first, whether Smith had a subjective expectation of privacy in the numbers he dialed, and second, whether that expectation was reasonable.81 As to the former, the Court “doubt[ed] that people in general entertain any actual expectation of privacy in the numbers they dial.”82 The Court assumed that people, in the main, know and understand that they must convey the dialed numbers to the company to complete the call; that the company has a process of recording those numbers; and that the company actually does record those numbers for various business reasons. It deduced this partially from the fact that phone books inform consumers that the telephone companies “can frequently help in identifying to authorities the origin of unwelcome and untroublesome calls” and that customers see a list of their calls recorded on their monthly phone bills.83

Even if *Smith* did harbor a subjective expectation of privacy, the Court found that “this expectation is not ‘one society is prepared to recognize as ‘reasonable.’”84 Justice Blackmun cited to *Miller*, *White*, *Hoffa*, and *Lopez* for the proposition that “a person has no legitimate expectation of privacy in information that he voluntarily turns over to third parties.”85 Because Smith “voluntarily conveyed” the telephone numbers to the company in the process of making the call, he had “exposed” that information to the company’s equipment in the “ordinary course of business” and thus could not reasonably expect privacy in that information.86 Moreover, the Court

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

79 *Id.* at 737.

80 Smith v. Maryland, 283 Md. 156, 173 (1978).

81 *Smith*, 442 U.S. at 740.

82 *Id.* at 742.

83 *Id.* at 742-43

84 *Id.* at 743 (quoting *Katz*, 389 U.S. at 361).

85 *Id.* at 743-44.

86 *Id.* at 744.

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found that Smith “assumed the risk” that the telephone company would reveal to the police the numbers he dialed.87

Although *Smith* was the Court’s last significant pronouncement on the parameters of the third- party doctrine, the lower federal courts have applied it in various contexts, with a significant number of these cases dealing with the transfer of electronic information.

#### Other Applications of the Third-Party Doctrine

After *Miller* and *Smith*, the courts have applied the third-party doctrine to a host of various scenarios including metadata connected to Internet communications, cell phone location information, and utility billing records, among others. These cases generally divide along a content/non-content distinction: the content of a communication, such as the body of an email, does not fall within third-party doctrine, and other Fourth Amendment rules apply. Addressing information, such as the to/from line in an email, the outside of a letter, or the telephone numbers dialed, however, are covered by the doctrine. There have been various rationales for this divide, the most compelling being the difference between the recipient of the information and companies that act merely as a conduit or intermediary between two people communicating with each other.

However, over the past several years, a growing number of judges have pushed back against government attempts to circumvent the Fourth Amendment warrant requirement when seeking information about an individual’s cell phone location data. The District Court for the Eastern District of New York, for instance, found that while the third-party doctrine generally covers the type of location information produced by a cell phone call, the “cumulative” collection of 113 days of constant surveillance implicated sufficiently heightened privacy interests to warrant an exception to the third-party doctrine.107 This argument is based on the “mosaic theory” of the Fourth Amendment, which holds that while short-term monitoring may not reveal anything overly private about an individual, the aggregation of this information can be much more revealing.108 In an alternative approach, the Third Circuit Court of Appeals reasoned that a cell phone user does not “voluntarily” share his location with a cell phone provider “in any meaningful way,” prohibiting application of the third-party doctrine, but held that it was left to the discretion of the magistrate judge whether a warrant would be required.109

A more recent legal problem facing the lower courts is determining whether the third-party doctrine should apply to “cell tower dumps.” These are instances in which the government is looking for the cell phone records of *unknown* persons who may have made a cell phone call after

87 *Id.*

107 *In re* Application of the United States of America for an Order Authorizing the Release of Historical Cell-Site Information, 809 F. Supp. 2d 113, 126 (E.D.N.Y. 2011).

108 See *infra* “Implications of *United States v. Jones* on the Third-Party Doctrine,” pp. 21-23.

109 *See In re* Application of the United States of America for an Order Directing a Provider of Electronic Communication Service to Disclose Records to the Government, 620 F.3d 304, 317-18 (3d 2010).

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a reported crime, say, a bank robbery. The government requests all the calls made from the nearest cell tower within a certain period of time.110 The few courts that have addressed the issue have split on whether a warrant is required.111 Thus far, the reasoning in these cases has not been fully developed.

Beyond the specific factors the courts have used to determine whether the third-party doctrine should apply (e.g., content versus non-content, intermediary versus recipient), there have been both doctrinal and practical arguments made for and against its very existence.

## Support for the Third-Party Doctrine

Perhaps the strongest argument in support of the third-party doctrine is its ability to be harmonized with the rest of Fourth Amendment case law. One only has to quickly scan the Supreme Court Reporter to realize that the third-party doctrine is consistent with numerous other cases which hold that acts or things revealed to the public are not entitled to Fourth Amendment protection.

Take, for instance, the garbage collection case, *California v. Greenwood*.112 There, the police requested that a trash collector pick up a suspect’s plastic trash bags left in front of his house so the officer could search it for contraband or other evidence of criminal activity. The Court concluded that the defendant was not entitled to a reasonable expectation of privacy in his trash as he discarded it where it could be accessed by the public.113 Similarly, in *United States v. Knotts*, the Court held that a person does not have a legitimate privacy expectation in his public movements as he voluntarily conveys this information to anyone who wants to look.114 This theory has also been applied to cases where police flew an airplane 1,000 feet and a helicopter 400 feet over private property in search of illegal activity.115 The rationale in those cases was that any member of the public flying in federally regulated airspace could have looked down and seen what the officers saw, vitiating any privacy expectation in that space.116 In *United States v.*

*Jacobsen*, the Court held that it was not a search when police opened a mailed package after its contents had already been viewed by an employee of a private freight carrier.117 There, the Court observed that once the defendant’s privacy expectation had been frustrated by one person, it became public information subject to government investigation.118

110 *See* Brian L. Owsley, *The Fourth Amendment Implications of the Government’s Use of Cell Tower Dumps in Its Electronic Surveillance*, 16 U. PA. J. CONST. L. 1, 1-2 (2013).

111 *Compare In re* Application of the United States of America for an Order Pursuant to 18 U.S.C. § 2703(d), 964 F. Supp. 2d 674, 678 (denying access to cell tower dump records) *with* United States v. Capito, No. 3:10-CR-8050 (D. Ariz Sept 14, 2011) (upholding access to cell tower dump records).

112 California v. Greenwood, 486 U.S. 35, 37 (1988).

113 *Id.* at 42.

114 United States v. Knotts, 460 U.S. 276, 281-82 (1983).

115 California v. Ciraolo, 476 U.S. 207, 213-14 (1986) (airplane); Florida v. Riley, 488 U.S. 445, 455 (1989) (helicopter).

116 *Ciraolo*, 476 U.S. at 213-214; *Riley*, 488 U.S. at 451.

117 United States v. Jacobsen, 466 U.S. 109, 117-18 (1984).

118 *Id.* at 117. Like the Fourth Amendment, under the privacy tort of intrusion upon seclusion, which subjects one to liability for intruding upon the solitude or seclusion of another, there is no liability for observing or taking a person’s photograph in public for his appearance is “open to the public eye.” RESTATEMENT (SECOND) OF TORTS § 652B cmt. b (continued...)

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As a more practical matter, assistance from third parties is utilized by law enforcement in almost every investigation. When investigating a murder, robbery, or any other crime committed in the real world, police officers will usually interview witnesses to obtain facts about the crime. To conduct these interviews, the officers generally need not obtain a warrant, and witnesses who refuse to cooperate can be compelled to testify with a grand jury subpoena.119 It could be argued that this process of fact finding is very similar to requesting documentary evidence held by third parties and the same standard should be applied to each.

In this same vein, Professor Orin Kerr has defended the third-party doctrine on the ground that it maintains the appropriate balance of privacy and security in the face of technological change.120 Without the ability to use third parties such as telephone or Internet companies, Kerr posits, the criminal would traditionally have to go out into the public to commit his crime where the Fourth Amendment offers more limited protection. He argues that a criminal can use the services of these third parties to commit crimes without having to expose these activities to areas open to public surveillance.121 This, he posits, upsets the privacy-security balance that undergirds the Fourth Amendment because it would require police to have probable cause to obtain any evidence of the crime: “The effect would be a Catch-22: The police would need probable cause to observe evidence of the crime, but they would need to observe evidence of the crime first to get probable cause.”122 Kerr contends that the third-party doctrine responds to this imbalance by providing the same amount of protection regardless of whether the defendant commits the crime on his own or through the use of a third-party service.

From an institutional perspective, one might argue that the courts are not the proper branch of the federal government to resolve privacy disputes related to information handed over to third- parties. Once the Supreme Court outlaws, or significantly limits, a certain police practice, it “constitutionalizes” it, and only the Court or a constitutional amendment could overturn this decision. Instead, some argue that when creating rules that pertain to new technologies, Congress, and legislatures generally, might be best fitted to find the appropriate balance between privacy and security, while providing the necessary flexibility to change this rule as technology changes.123

Another argument in support of the third-party doctrine is that the companies which hold a person’s records “own” them, as they are in possession of them and are generally the ones that create them.124 Once possessed by the company, the argument runs, it can transfer these documents to others free from the permission of the subject of the documents. The Court relied on this theory in *Miller*, where it noted that the bank records were not the defendant’s “private

(...continued) (2013).

119 United States v. Dionisio, 410 U.S. 1, 9-10 (1973) (observing the “historically grounded obligation of every person to appear and give his evidence before the grand jury. ‘The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public.’ And while the duty may be ‘onerous’ at times, it is ‘necessary to the administration of justice.’”).

120 *See* Orin Kerr, *The Case for the Third Party Doctrine*, 107 MICH. L. REV. 561, 575 (2009).

121 *Id.*

122 *Id.* at 576.

123 *See* Orin Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 859 (2004).

124 Slobogin, *supra* note 7, at 157 (describing arguments for and against the possessory interest argument).

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papers,” and as such he could “assert neither ownership nor possession.”125 Instead, they were deemed “the business records of the banks.”126 This argument is buttressed by the theory that the First Amendment protects a person’s right to communicate facts to others.127

## Criticism of the Third-Party Doctrine

While the third-party doctrine appears to fit reasonably well with the rest of Fourth Amendment case law, and has other weighty arguments in its favor, it has also had its share of vocal critics both on and off the Court. There have been four major arguments against its application: (1) privacy is not an all-or-nothing proposition that is lost once information is disclosed to another person or company; (2) information sent to third-party companies is not actually “voluntary,” as people need these services to participate in modern society; (3) the judiciary should not impose privacy regimes on the citizenry without engaging in a more comprehensive privacy analysis; and

(4) failing to protect information shared with others has the potential to breed distrust among people or businesses communicating with each other.

The first major argument against the third-party doctrine challenges the notion that once privacy is lost to one person, it is lost to the world. At bottom, this is a challenge to the secrecy model of the Fourth Amendment. The secrecy theory of privacy has been criticized for not taking into consideration that people may not want to engage in “total disclosure” of information they share with others, but instead seek to selectively disclose that information.128 Justice Marshall said as much in dissent in *Smith v. Maryland*,where he argued that “privacy is not a discrete commodity, possessed absolutely or not at all.”129 He continued: “Those who disclose certain facts to a bank or phone company for a limited business purpose need not assume that this information will be released to other persons for other purposes.”130 Several commentators have similarly argued that there is an important distinction between information that is broadcast to the world and that which is disclosed in a controlled environment.131 The first category, they argue, includes instances where the government accesses information that is readily available in the public square, such as information posted on a publicly available website or a loud conversation overheard in an airport.132 Because the person has decided to release this information to the public, he cannot later claim to have an expectation of privacy. The latter category, on the other hand, entails a more limited sharing that is “an integral part of a legitimate transaction” between the individual and the recipient of the information, and is entitled to Fourth Amendment protection.133

125 United States v. Miller, 425 U.S. 435, 440-41 (1976)

126 *Id.*

127 *See* Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1053 (2000).

128 See *Kenneth L. Karst, “The Files”: Legal Controls Over the Accuracy and Accessibility of Stored Personal Data*, 31 LAW & CONTEMP. PROBS. 342, 344 (1966).

129 *Smith*, 442 U.S. at 749 (Marshall, J., dissenting).

130 *Id.*

131 Susan W. Brenner & Leo L. Clarke, *Fourth Amendment for Shared Privacy Rights in Stored Transactional Data*, 14 J.L. & POL’Y 211, 258 (2006).

132 *Id.*

133 *Id.* This idea that a person loses all Fourth Amendment protection in information he shares with another would seem to be undermined by various cases in which shared information or spaces did not lose constitutional protection. For instance, in *Minnesota v. Olson*, the Court held that an overnight guest could have a reasonable expectation of privacy (continued...)

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Along these same lines, some have pointed out the apparent inconsistency in Fourth Amendment protection accorded to various types of information people share with third parties. In *Katz v.*

*United States* and *Berger v. New York*, the Court held that people have an expectation of privacy in the content of their conversations,134 while similar protection was not extended to the telephone numbers dialed in *Smith*.135 Dissenting in *Smith,* Justice Stewart, who authored the *Katz* majority opinion, pointed out this incongruity, noting that like telephone numbers, the voice of a conversation must be transmitted through the telephone company’s equipment and may be overheard or recorded by that company.136 He argued that “what the telephone company does or might do with those numbers is no more relevant to this inquiry than it would be in a case involving the conversation itself.”137 Instead, Justice Stewart would have granted both forms of information protection under *Katz*.138 In a line that would foreshadow more recent arguments against the third-party doctrine, Justice Stewart contended that people are not concerned about revealing a list of their telephone calls because it could be incriminating, but rather because it would “reveal the most intimate details of a person’s life.”139

The second major argument against the third-party doctrine challenges the idea that people “voluntarily” convey information to others when engaging in business transactions. In *Miller*, the Court asserted that the financial statements and deposit slips were “voluntarily conveyed” to the banks in the “ordinary course of business,”140 and in *Smith* the defendant “voluntarily conveyed numerical information to the telephone company.”141 More recently, a federal court of appeals judge made a similar argument regarding cell phone users:

Their use of their phones, moreover, is entirely voluntary. The Government does not require a member of the public to own or carry a phone. As the days of monopoly phone companies are past, the Government does not require him to obtain his cell phone service from a particular service provider that keeps historical cell site records for its subscribers, either. And it does not require him to make a call, let alone to make a call at a specific location.142

There has been significant disagreement, however, about how *voluntary* these transactions really are. Justice Brennan argued in dissent that “for all practical purposes, the disclosure by individuals or business firms of their financial affairs to a bank is not entirely volitional, since it is impossible to participate in the economic life of contemporary society without maintaining a bank account.”143 Similarly, Justice Marshall argued in *Smith* that “unless a person is prepared to forgo

(...continued)

in the home of his host, “a place where he and his possessions will not be disturbed by anyone but his host and those his host allows inside.”133 On the other hand, these cases took place in the context of the home, an area accorded the highest Fourth Amendment protection, and their holdings might not easily extend to other contexts.

134 Katz v. United States, 389 U.S. 347, 353 (1967); Berger v. New York, 388 U.S. 41, 51 (1967).

135 *Smith*, 442 U.S. at 745.

136 *Id,* at 746 (Stewart, J., dissenting).

137 *Id.* at 747 (1979) (Stewart, J., dissenting).

138 *Id.*

139 *Id.* at 748 (Stewart, J., dissenting).

140 United States v. Miller, 425 U.S. 435, 442 (1976).

141 *Smith*, 442 U.S. 442 U.S. 744.

142 *In re* Application of the United States of America for Historical Cell Site Data, 724 F.3d 600, 613 (5th Cir. 2013) (internal citation omitted),

143 United States v. Miller, 425 U.S. 435, 451 (1973) (Brennan, J., dissenting) (quoting Burrows v. Superior Court, 13

Cal. 3d 238, 247 (1974)).

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use” of the telephone, which for “many has become a personal or professional necessity, he cannot help but accept the risk of surveillance. It is idle to speak of ‘assuming’ risks in contexts where, as a practical matter, individuals have no realistic alternative.”144 One commentator has argued that unlike the undercover agent cases, where refusing to talk to a particular individual is a “realistic option,” refusing to get medical treatment or an education would lead to an “unproductive” and “possibly much foreshortened existence.”145

The third central argument against the third-party doctrine challenges the assertion that people “assume the risk” when handing information over to third parties. People do not assume legal risks as a matter of pure deduction, the argument goes, “but assume only those risks of unregulated government intrusion that the courts tell us we have to assume.”146 Dissenting in *White*, Justice Harlan expressed concern about the process by which courts determine how much privacy protection people should expect and will receive. He notes that people’s expectations of privacy and the risks they assume are “reflections” of the laws handed down by courts or legislatures. Because it is the “task of the law to form and project, as well as mirror or reflect,” Justice Harlan instructs, “we should not, as judges, merely recite the expectations and risks without examining the desirability of saddling them upon society.”147 Instead of allowing “the substitution of words for analysis,” courts should assess “the nature of a particular practice and the likely extent of its impact on the individual’s sense of security balanced against the utility of the conduct as a technique of law enforcement.”148 In other words, rather than simply applying the phrase “assumption of the risk” in each new legal context, Justice Harlan suggested that courts should look anew at each surveillance practice and determine its actual impact on the individual’s privacy interests.149 One commentator has suggested a similar approach in that the government should not have “practically unrestricted access” to people’s records, or, on the flipside, that probable cause must be required for every request of documents. Instead, he argues that the level of protection should depend on the nature of the documents requested.150 For example, certain types of records, including public records, may not be entitled to the same protection as others, such as medical or financial records.151

144 *Smith*, 442 U.S. at 750 (Marshall, J., dissenting).

145 Slobogin, *supra* note 7, at 156.

146 *Id.* at 157; *see also* Stephen E. Henderson, *The Timely Demise of the Fourth Amendment Third Party Doctrine*, 96 IOWA L. REV. BULL. 39, 47 (“It is the law that defines what risks we do and do not assume.”) .

147 *White*, 401 U.S. at 786 (Harlan, J., concurring). A similar, and more general, criticism has been posed against the *Katz* ‘s reasonable expectation of privacy test. Some have argued that it in determining which expectations of privacy are reasonable, judges are merely imposing their own views of privacy on society. S*ee* United States v. Jones, 132 S. Ct. 945, 962 (2012) (Alito, J., concurring) (“The *Katz* expectation-of-privacy test ... is not without its own difficulties. It involves a degree of circularity, and judges are apt to confuse their own expectations of privacy with those of the hypothetical reasonable person to which the *Katz* test looks.”); Minnesota v. Carter, 525 U.S. 83, 97 (1998) (Scalia, J., concurring) (“In my view, the only thing the past three decades have established about the *Katz* test ... is that, unsurprisingly, those ‘actual (subjective) expectation[s] of privacy’ ‘that society is prepared to recognize as ‘reasonable,’’ bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable.”).

148 *United States v. White*, 401 U.S. 745, 786 (1971) (Harlan, J., concurring).

149 *See* Catherine Hancock, *Warrants for Wearing a Wire: Fourth Amendment Privacy and Justice Harlan’s Dissent in United States v. White*, 79 MISS. L. J. 35 (2009). Similar to Justice Harlan’s comments, the majority in *Smith v.*

*Maryland* observed that if people’s subjective expectations of privacy becomes conditioned by government practices that were “alien to well-recognized Fourth Amendment freedoms,” that a “normative inquiry would be proper” in determining what constituted a “legitimate expectation of privacy.” *Smith*, 442 U.S. at 740-41 n.5.

150 Slobogin, *supra* note 7, at 157.

151 Slobogin, *supra* note 7, at 157.

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Lastly, many practical arguments have been formulated against application of third-party doctrine. Justice Harlan believed one of the main concerns with the third-party doctrine was its ability to breed distrust in people who are communicating with others. He noted that the practice of third-party bugging “undermine[s] the confidence and sense of security in dealing with one another that is characteristic of individual relationships between citizens in a free society.”152 In Justice Harlan’s view, “words would be measured a good deal more carefully and communication inhibited if one suspected his conversations were being transmitted and transcribed.”153 One only has to look to the recent NSA controversy as a more modern example. Some argue that knowledge that information shared with tech companies like Google, Facebook, and Apple might end up in the hands of the government has the potential to engender distrust and cost American businesses significant revenues both at home and abroad.154

**Implications of *United States v. Jones* on the Third- Party Doctrine**

In addition to the doctrinal and practical arguments made against the third-party doctrine, several concurring opinions in the recent GPS tracking case *United States v. Jones* prompt additional questions about its continued application. Some argue that these opinions foreshadow a shift in the Court’s thinking about the effect of technology on the government’s ability to collect large data sets about American citizens.

In *Jones*, the police attached a GPS tracking device to the underbelly of Jones’s car and tracked it 24 hours a day for 28 days without a warrant.155 Under controlling precedent, a person had no reasonable expectation of privacy when traveling on public streets because he has revealed his movements to the public at large.156 While it appeared that *Jones* required a strict application of this previous case law, the Court ruled 9-0 against the government, and held that the investigative activity there constituted a Fourth Amendment search. The reason why, however, was far from unanimous.

The majority opinion, written by Justice Scalia, and joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Sotomayor, held that the physical attachment of the tracking device on Jones’s car, coupled with the intent to obtain information about his movements, amounted to a Fourth Amendment search.157 When the police attached the device, they physically trespassed onto his vehicle, his “effect,” a constitutionally protected area under the Fourth Amendment’s protection of “persons, houses, papers, and effects.”158 As Justice Scalia’s opinion relied upon a

152 *White*, 401 U.S. at 787 (Harlan, J., dissenting).

153 *Id.*

154 *See* John Naughton, *Edward Snowden’s Not the Story, the Internet Is*, THE GUARDIAN (July 23, 2013), *available at* [http://www.theguardian.com/technology/2013/jul/28/edward-snowden-death-of-internet;](http://www.theguardian.com/technology/2013/jul/28/edward-snowden-death-of-internet%3B) Allan Holmes, *NSA Spying Disclosures Could Cost Companies Billions* (Sept. 10, 2013), *available at* <http://www.salon.com/2013/09/10/> nsa\_spying\_disclosures\_could\_cost\_companies\_billions\_in\_sales\_newscred/.

155 United States v. Jones, 132 S. Ct. 945, 948 (2012). The D.C. Metropolitan police had obtained a warrant, but it had expired the day before the device was installed and was installed in the wrong jurisdiction. *Id.* at n.1.

156 United States v. Knotts, 460 U.S. 276, 281 (1983).

157 *Jones*, 132 S. Ct. at 949.

158 *Id.* at 949; U.S. CONST. amend. IV.

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trespass theory of the Fourth Amendment, it will likely not have major repercussions for the third- party doctrine, unless one accepts that the government trespasses on an individual’s “papers” or “effects” when it accesses records from third-party companies.159

However, two concurring opinions in *Jones* by Justices Sotomayor and Alito might signal the willingness of five Justices to reevaluate future applications of the third-party doctrine, at least with respect to pervasive government monitoring. Justice Sotomayor’s solo concurrence provided the more far-reaching of the two opinions. She directly called into question “the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties.”160 She observed:

This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks. People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and medications they purchase to online retailers I for

one doubt that people would accept without complaint the warrantless disclosure to the Government of a list of every Web site they had visited in the last week, or month, or year. But whatever the societal expectations, they can attain constitutionally protected status only if our Fourth Amendment jurisprudence ceases to treat secrecy as a prerequisite for privacy. I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection.161

It seems that Justice Sotomayor, if not prepared to discard the third-party doctrine in whole, is willing to significantly limit its reach, especially when the government is accessing a wealth of data about an individual. Again, it should be noted that Justice Sotomayor was the only member to articulate this more expansive roll-back of the third-party doctrine.

More generally, both Justices Sotomayor and Alito’s opinions could be interpreted to call into question the continued application of the third-party doctrine insofar as it permits pervasive government monitoring. In his concurrence, Justice Alito, joined by Justices Ginsburg, Breyer, and Kagan, found that while short-term monitoring may be permissible under past precedent, “the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.”162 Justice Sotomayor, who joined the majority but also concurred separately, agreed

159 *See* Smith, *supra* note 15, at 571 (“One possibility is that Scalia’s physical trespass analysis applies to digital trespass. After all, if an agent were to digitally connect with your computer, GPS device, or mobile phone for investigatory purposes, she is appropriating your property for purposes of gathering evidence, just like the agents who placed the tracker on your car.”); Jack Wade Nowlin, *The Warren Court’s House Built on Sand: From Security in Persons, Houses, Papers, and Effects to Mere Reasonableness in Fourth Amendment Doctrine*, 81 MISS. L. J. 1017, 1046-47 (2012) (“On the ‘protected interest’ view, one would retain one’s right to security in the papers against governmental intrusion. The essence of the traditional security in protected interests, grounded in the law of property, is the right to exclude—which, of course, includes the right to selectively include some individuals while excluding others. On this view, one has a right to allow some actors access to one’s home or papers while still excluding others— such as the police. It would thus invade the core of the protected interest for the government to obtain papers through a third party and search through them—without the owner’s permission.”).

160 *Jones*, 132 S. Ct. at 957 (Sotomayor, J., concurring).

161 *Id.*

162 *Jones*, 132 S. Ct. at 964 (Alito, J., concurring).

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with Justice Alito’s approach and would have gone even further to find that short-term monitoring should be prohibited in some instances.163

These five Justices expressed two interrelated concerns. First, they were uneasy about the government’s ability to gather, analyze, and use an extensive volume of information about each person’s comings and goings. Justice Sotomayor observed that “GPS monitoring generates a precise, comprehensive records of a person’s public movements that reflects a wealth of information about her familial, political, professional, religious, and sexual associations.”164 This idea, commonly referred to as the “mosaic theory,” posits that the aggregation of information about a person can reveal a whole lot more about him than each part in isolation. The Justices were not the first to espouse this theory. Before the case reached the Supreme Court, the District of Columbia Court of Appeals below articulated a similar sentiment in finding that the government’s month-long location tracking constituted a Fourth Amendment search:

Prolonged surveillance reveals types of information not revealed by short-term surveillance, such as what a person does repeatedly, what he does not do, and what he does ensemble. These types of information can each reveal more about a person than does any individual trip viewed in isolation. Repeated visits to a church, a gym, a bar, or a bookie tell a story not told by any single visit, as does one’s not visiting any of these places over the course of a month. The sequence of a person’s movements can reveal still more; a single trip to a gynecologist’s office tells little about a woman, but that trip followed a few weeks later by a visit to a baby supply store tells a different story. A person who knows all of another’s travels can deduce whether he is a weekly church goer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical treatment, an associate of particular individuals or political groups—and not just one such fact about a person, but all such facts.165

In addition to this aggregation issue, the Justices expressed concern about the ability of technology to significantly reduce natural barriers such as limited resources and political accountability that in the past would have limited law enforcement overreach in the field of surveillance.166 For Justice Alito, the fact that the government simply could not have tracked a person’s every movement for a month-long period under traditional law enforcement methods led him to conclude that the tracking was overly intrusive.167

While Justice Sotomayor directly criticized the third-party doctrine, one could read Justice Alito’s concurrence as limited solely to monitoring conducted directly by government agents, and not extending to instances where third parties collect data on individuals. That being said, the combination of the *Jones* concurrences has already had an effect in third-party cases in lower federal courts. For example, the District Court for the District of Columbia applied a variation of the mosaic theory to invalidate the NSA’s collection of telephone call records.168 Citing to the *Jones* concurrences, Judge Richard H. Leon acknowledged that the type of information collected

163 *Id.* at 957 (Sotomayor, J., concurring).

164 Jones, 132 S. Ct. at 955.

165 United States v. Maynard, 615 F.3d 544, 562 (D.C. Cir. 2010).

166 *See* Jones 132 S. Ct. at 956 (Sotomayor, J., concurring) (“And because GPS monitoring is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices: ‘limited police resources and community hostility.’”) (quoting Illinois v. Lidster, 540 U.S. 419, 426 (2004)).

167 *Jones*, 132 S. Ct. at 964 (Alito, J., concurring).

168 Klayman v. Obama, 957 F. Supp. 2d 1, 36 (D.D.C. 2013).

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under the NSA’s metadata program was very similar to that upheld in *Smith*, “but the ubiquity of phones has dramatically altered the *quantity* of information that is now available and, *more importantly*, what that information can tell the Government about people’s lives.”169 And, as described above, judges in certain cell phone location monitoring cases have applied *Jones* and the mosaic theory to deem months-long government tracking a Fourth Amendment search.170 In the long run, it may take a more pertinent set of facts for the Justices to advance the arguments enunciated in *Jones*.

## Conclusion

So what does the future have in store for the third-party doctrine and the government’s collection of non-content, transactional data? At this point, there appears to be only one solid vote on the Court in Justice Sotomayor for eliminating or significantly reducing the scope of this doctrine.

Although there are hints in Justice Alito’s *Jones* opinion that he and the three members of his concurrence are ready to reconsider this rule when it comes to pervasive government surveillance, his rationale was left somewhat underdeveloped. It will take future opinions to get a better sense of whether or how far these Justices are willing to go to limit government access to non-content information held in the hands of third parties. In the meantime, the lower federal courts might continue to limit or distinguish the third-party doctrine in specific and narrow instances. For instance, in the NSA telephone metadata case, Judge Leon limited *Smith* to its facts and held that

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it did not apply to this more comprehensive data collection program.193 Likewise, if and when the Supreme Court is asked to reconsider the scope of the third-party doctrine, it is more likely to carve out specific exceptions than to overturn it in its entirety. This approach would permit the courts to engage in a more nuanced, normative approach to analyzing the privacy interests implicated by accessing records derived from transactions between people and other various entities.

Another possibility is for Congress to act. Justice Alito observed in *Jones* that “[i]in circumstances involving dramatic technological change, the best solution to privacy concerns may be legislative” as “a legislative body is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way.”194 This argument that Congress is best suited to address the nuanced policy questions that privacy and security entails has been expressed by commentators as well.195 Like the courts, it appears unlikely that Congress would be willing to completely eliminate the third-party doctrine. On the other hand, Congress may be more inclined to engage in a subject-by-subject approach, in which Congress limits the third-party doctrine in certain areas. Congress provided statutory protection for telephone toll records in the pen register/trap and trace statute; for Internet metadata in the Stored Communications Act; and for video customer records in the Video Privacy Protection Act. It could enact similar protection for other subject areas where non-content information is shared with companies as a necessary part of doing business.

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193 *Klayman*, 957 F. Supp. 2d at 37 (“[T]he *Smith* pen register and the ongoing NSA Bulk Telephony Metadata Program have so many significant distinctions between them that I cannot possibly navigate these uncharted Fourth Amendment waters using as my North Star a case that predates the rise of cell phones.”).

194 *Jones*, 132 S. Ct. at 964.

195 Kerr, *supra* note 123, at 857.

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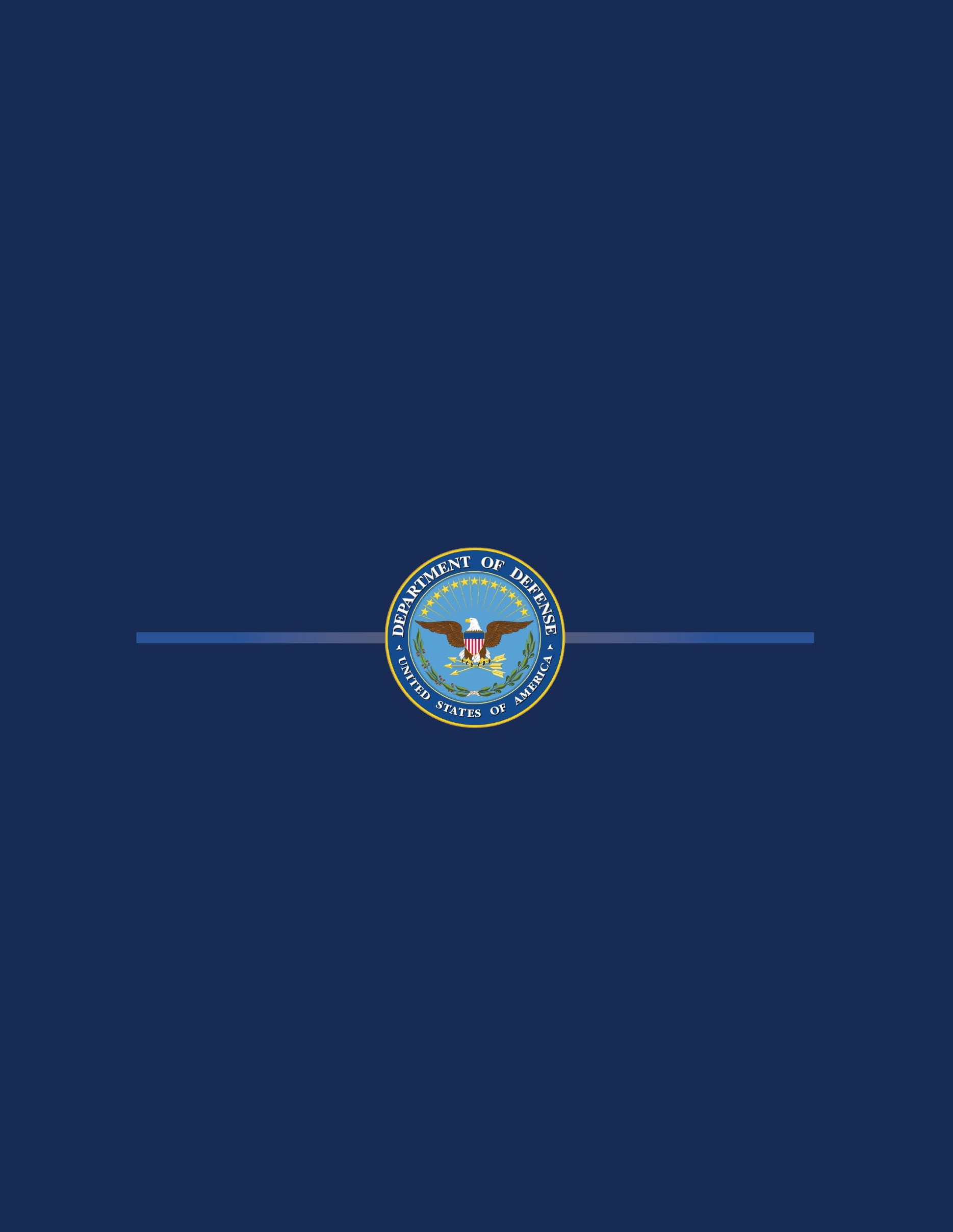
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