THE TWO TESTS OF SEARCH LAW: WHAT IS THE *JONES* TEST, AND WHAT DOES THAT SAY ABOUT *KATZ*?

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ABSTRACT

Fourth Amendment law has two "search" tests: The Katz *privacy test and the* Jones *property test. Lower courts are not sure what the difference is between them, however, or whether the* Jones *test is based on trespass law or the mechanics of physical intrusion. The result is a remarkable conceptual uncertainty in Fourth Amendment law. Every lower court recites that there are two search tests, but no one knows what one test means or how it relates to the other.*

This Article argues that the Jones *test hinges on physical intrusion, not trespass law.* Jones *claimed to restore a pre-*Katz *search test, and a close look at litigation both before* Katz *and after* Jones *shows an unbroken line adopting an intrusion standard and (where it has arisen) rejecting a trespass standard. This understanding of* Jones *is not only historically correct, but also normatively important. How we understand* Jones *tells us how to understand* Katz*. The intrusion approach offers an accurate interpretation of both tests that shows the continuing importance of* Katz.

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TABLE OF CONTENTS

INTRODUCTION

What is a Fourth Amendment search?[1] From the 1970s until 2012, the Supreme Court had one answer to that question. A search occurs, the Court explained, when government action violates a reasonable expectation of privacy.[2] This privacy test is often known as the *Katz* test, as it was first articulated in Justice Harlan's concurring opinion in *Katz v. United States*.[3]

In 2012, however, the Supreme Court changed direction. *United States v. Jones*[4] announced that there are two search tests, not one. The second test, referred to as the trespass or intrusion test, provides a separate ground for identifying a search.[5] The existence of two search tests—the *Katz* test and

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

2. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 33 (2001).

3. 389 U.S. 347 (1967). Courts sometimes express the *Katz* test as a two-part test. However, as I have explained, in practice the test operates as (and is often expressed as) just a one-part inquiry. *See* Orin S. Kerr, Katz *Has Only One Step: The Irrelevance of Subjective Expectations*, 82 U. Chi. L. Rev. 113 (2015).

4. 565 U.S. 400 (2012).

5. *See id.* at 406 ("But we need not address the Government's contentions, because Jones's Fourth Amendment rights do not rise or fall with the *Katz* formulation.").

the *Jones* test—is now blackletter law. The two tests are dutifully recited in routine Fourth Amendment decisions.[6] They are taught in every criminal procedure class.[7] They are recited in treatises.[8] And they are taught for the bar exam.[9]

But here's the puzzle: Courts cannot agree on what kind of test *Jones* announced, or what relationship it has to the *Katz* test.[10] Lower court opinions fall roughly into two groups. For the first group, *Jones* calls for an application of civil tort and property doctrine—primarily, although perhaps not exclusively, trespass law. Different courts use different standards. Some courts use trespass law in 1791, when the Fourth Amendment was ratified.[11] Others use trespass principles from 1868, when the Fourteenth Amendment was ratified.[12] Some use the First Restatement of Torts,[13] and many use the Second Restatement of Torts.[14] Some mix and match.[15] Some courts limit trespass to entry to land, while other courts look more metaphorically at trespass and include electronic trespasses by analogy to trespass to chattels.[16] Regardless of the particular test, the shared idea is that *Jones* calls for a legal analysis, rooted in property and tort doctrines, to answer what is a search.[17]

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6. *See, e.g.*, United States v. Weaver, 9 F.4th 129, 141 (2d Cir. 2021) (en banc) ("The Supreme Court has articulated two tests for determining whether a police officer's conduct constitutes a 'search' for purposes of the Fourth Amendment: whether the police officer '*physically intrud[es]* on a constitutionally protected area' and, if not, whether the officer violates a person's 'reasonable expectation of privacy.'" (quoting *Jones*, 565 U.S. at 406 & n.3)).

7. It's hard to go inside every class, of course. Every criminal procedure casebook I am aware of, however, presents the law in this way. *See, e.g.*, NANCY J. KING, ORIN S. KERR & EVE BRENSIKE PRIMUS, CRIMINAL PROCEDURE: INVESTIGATION 213 (16th ed. 2023) ("The blackletter law answer is that there are two tests for what is a search.")

8. *See e.g.*, 2 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 3.2(a) (4th ed. 2024).

9. *See, e.g.*, BARBRI, CRIMINAL PROCEDURE OUTLINE 2.

10. See *infra* notes 11–21.

11. *See, e.g.*, United States v. Richmond, 915 F.3d 352, 358 (5th Cir. 2019).

12. *See, e.g.*, State v. Dorff, 526 P.3d 988, 993–99 (Idaho 2023) (looking to government intentionally used or otherwise intermeddled with chattel, a standard based state trespass doctrine in 1868 when the Fourteenth Amendment was adopted).

13. *See, e.g.*, *id.* at 996 (relying on the First Restatement in the context of determining whether a dog entry into a car is a search).

14. *See, e.g.*, Taylor v. City of Saginaw, 922 F.3d 328, 332–33 (6th Cir. 2019) (ruling that chalking a car was a trespass search); Schmidt v. Stassi, 250 F. Supp. 3d 99, 104 (E.D. La. 2017) (ruling that swabbing a car handle was a trespass search).

15. United States v. Sweeney, 821 F.3d 893, 899 (7th Cir. 2016) (concluding that the test is based on the scope of trespass at common law, but that the Second Restatement of Torts provides "a good starting point").

16. For a discussion of both sides of these cases, *see infra* Section II.E.

17. *See* Carpenter v. United States, 585 U.S. 296, 397–98 (2018) (Gorsuch, J., dissenting) (contending that pre-*Katz* search doctrine was "tied to the law," such as "positive law or analogies to items protected by the enacted Constitution").

Courts in the second group offer a different approach. In their view, the *Jones* test is simply physical intrusion into a textually specified item—"persons, houses, papers, and effects."[18] For these courts, the *Jones* standard is largely mechanical: Did the government insert a physical thing into or onto a space that the Fourth Amendment protects?[19] Although this can overlap with the trespass approach in some cases, it can also be very different. Consider whether it is a search under *Jones* for the government to collect a suspect's email from an Internet provider. No search occurs under the physical intrusion approach, as the emails are gathered electronically. But the same facts can amount to a search if you adopt the trespass approach on virtual trespass-to-chattels theory.[20] The choice between trespass and physical intrusion might determine the outcome.[21]

This Article argues that the physical intrusion standard is the correct understanding of *Jones*. The difference between *Jones* and *Katz* is a straightforward line of mechanics. The *Jones* test is physical, asking whether a government-controlled physical object crossed into or contacted the physical plane of a constitutionally protected space without permission. In contrast, *Katz* goes beyond physical intrusions, adding in their modern technological equivalents that collect information without physical connection or invasion. Applying the *Jones* test is usually easy. It's the *Katz* test that is complicated, as it requires a broader theory—some principle, or some set of analogies—of what counts as a search equivalent in the absence of physical intrusion.

This is the best way to understand *Jones*, and its relationship to *Katz,* for two reasons. The first reason is historical. A close reading of the underlying materials establishes that the pre-*Katz* test that *Jones* restored was physical

18. U.S. CONST. amend. IV.

19. *See, e.g.*, United States v. Dixon, 984 F.3d 814, 820 (9th Cir. 2020) (physical intrusion of a key into a lock is a search); Patel v. City of Montclair, 798 F.3d 895, 898–99 (9th Cir. 2015) (concluding that the *Jones* inquiry is based on physical intrusion, not trespass); United States v. Alabi, 943 F. Supp. 2d 1201, 1265 (D.N.M. 2013) (concluding that scanning properly possessed credit and debit cards to read digital data is not a search based on physical intrusion).

20. *See, e.g.*, United States v. Ackerman, 831 F.3d 1292 (10th Cir. 2016) (Gorsuch, J.) (concluding that government access to email stored on a server is a virtual trespass to chattels and therefore a search under the *Jones* trespass theory); Jones v. United States, 168 A.3d 703 (D.C. 2017) (considering but ultimately not ruling on that theory in the context of a cell site simulator).

21. To what extent the two approaches differ depends in large part on the unsettled question of what theory of trespass or positive law one takes as the alternative to *Katz*. On this point, there is a growing literature offering a range of approaches. *See, e.g.*, Danielle D'Onfro & Daniel Epps, *The Fourth Amendment and General Law*, 132 YALE L.J. 910 (2023) (articulating a broad theory of general law to give meaning to *Jones*); Michael C. Pollack & Matthew Tokson, *Decentering Property in Fourth Amendment Law*, 92 U. CHI. L. REV. 705 (2025); Nicholas A. Kahn-Fogel, *The Benefits of the Fourth Amendment's Property-Rights Baseline*, 70 VILLANOVA L. REV. 219 (2025); Laurent Sacharoff, *Constitutional Trespass*, 81 TENN. L. REV. 877 (2014) (arguing that the starting point for applying *Jones* should be the contemporary majority trespass rule from the states).

intrusion, not trespass. Before *Katz*, the Supreme Court had rejected a technical trespass test and instead adopted physical intrusion as the constitutional floor.[22] The issue raised in *Katz* was whether to recognize the possibility of searches even without physical intrusion—which *Katz* of course did. Later, in restoring the pre-*Katz* standard in *Jones,* the Court simply restored the earlier physical intrusion test.

In short, Fourth Amendment history provides a clear answer. Studying the origins of the two tests reveals an unbroken line of caselaw, starting before *Katz* and concluding after *Jones*, clearly articulating a physical intrusion standard rather than a trespass standard.[23] Revisiting long-overlooked materials establishes the principle with surprising certainty. *Jones* is a physical intrusion test, and *Katz* extends the Fourth Amendment search test beyond physical intrusion.

The historical explanation provides sufficient reason for lower courts to interpret *Jones* and *Katz* in this way. But the division also has normative importance. Under the physical intrusion standard of *Jones*—the standard that I show is historically correct—both *Jones* and *Katz* rest on firm and uncontroversial ground. Most if not all judges will agree that unlicensed physical intrusion into a person, house, paper, or effect should be a search. And most if not all judges will agree that there needs to be some doctrine to recognize searches without physical intrusion aided by new technology. Those are the core functions, respectively, of *Jones* and *Katz*. The distinction between *Jones* and *Katz* recognizes that both physical intrusion and its modern technological equivalents should be searches—a view that most if not all judges will share.

A different picture emerges if courts view *Jones* as a technical trespass test. If *Jones* is a trespass test, then *Katz* is naturally understood as a privacy test. But that framing wrongly forces Fourth Amendment search doctrine onto unstable and ideologically charged terrain. When it comes to constitutional law, terms like "trespass" and "privacy" come with a lot of baggage. Reliance on property standards such as trespass turns out to be surprisingly quirky and unpredictable. And a privacy standard sounds to many Justices like a modern invention that echoes *Roe v. Wade*.[24] This framing leaves the future of Fourth Amendment search doctrine uncertain, as it inclines some Justices to take an expansive view of *Katz* and leads other Justices to advocate its overturning outright.[25]

22. *See infra* Section I.A.
23. *See infra* Part I.
24. 410 U.S. 113 (1973).
25. *See infra* Section II.C.

Recognizing *Jones* as a physical intrusion standard reveals that this divisive framing is both unnecessary and historically incorrect. What is a "search" of "persons, houses, papers, and effects" should not depend on whether you look to ancient doctrines or to modern concepts. There is no intrinsic reason that the constitutional question should have any ideological valence. Reconciling *Jones* and *Katz* using the line of physical versus non-physical intrusion points to a plausible consensus view of the Fourth Amendment search test. It shows why Justices from varying perspectives share a surprising amount in common when it comes to what should be a Fourth Amendment "search."

This Article has two parts. Part I explains how the history of Fourth Amendment doctrine settles the specific relationship between *Jones* and *Katz*. Part II explains the advantages of maintaining that historical relationship.

I. THE TWO TESTS OF FOURTH AMENDMENT SEARCH LAW

Katz and *Jones* did not spring forth from the cosmic void. Both tests came at a particular time in Fourth Amendment history. Both arrived in response to a particular puzzle that the Supreme Court was trying to solve. Going back to that history provides a clear answer to the role of *Katz* and *Jones*. Before *Katz v. United States*, the Supreme Court had carved out a simple and low-technology kind of search for Fourth Amendment protection. That simple test was physical intrusion into a constitutionally protected area, not the technical scope of trespass doctrine. The question in *Katz* was whether Fourth Amendment protection extended beyond physical intrusion, and the significance of *Katz* was its extension of search doctrine beyond that point.

When you understand the development of the intrusion test, from its time before *Katz* to its recognition after *Jones*, a clear picture emerges of exactly what test *Jones* restored. *Jones* is a physical intrusion test, not a trespass test. *Katz* is the test that goes beyond physical intrusion.

A. The Court Adopts a Physical Intrusion Test in Silverman v. United States

Understanding the two tests of Fourth Amendment search law requires starting a few years before *Katz*. The key ruling is the Supreme Court's 1961 opinion in *Silverman v. United States*.[26] *Silverman* is rarely studied today. It is ordinarily mentioned only in passing as a case from the bad old days

26. 365 U.S. 505 (1961).

before *Katz*.[27] But *Silverman* should play a crucial role in understanding the relationship between *Katz* and *Jones*. *Silverman* adopted a physical intrusion test as a minimum standard for Fourth Amendment searches, leaving for another day whether something beyond physical intrusion could also be a search. A close look at *Silverman* will be richly rewarded.

Silverman involved a 1958 investigation of a gambling ring operating from an urban row house in Washington, D.C.[28] The local police learned that the adjoining row house was vacant. With the permission of the vacant house's owner, the police entered and planned to listen to the gambling ring through the wall.[29] Specifically, the police planned to listen in using an audio microphone with a long metal rod on the end, known as a "spike mike."[30] A spike mike's rod acts as an antenna, amplifying sound signals. When the rod at the end of a spike mike is pressed up against a physical object, it amplifies and transfers sounds from the tip of the rod down through the microphone to an person listening with headphones nearby.[31] In *Silverman*, the officers found a crack in the wall between the two houses and inserted a spike mike rod through the crack.[32] This all happened without a warrant.

The key to understanding *Silverman* was that the tip of the microphone happened to have been inserted a tiny bit more than half of the way into the common wall. The record in the case included unusually precise calculations. The shared wall between the two houses was 13 or 14 inches thick, consisting of 8 inches of masonry in the center with plaster and molding on each side.[33] Exactly how far the spike mike was inserted was the subject of considerable dispute.[34] But the courts seemed to agree that the end of the rod of the spike mike was inserted 7 and 1/8th inches into the wall.[35] If you assume the target property started at the exact midpoint of the

27. *See, e.g.*, Daniel J. Solove, *Fourth Amendment Pragmatism*, 51 B.C. L. Rev. 1511, 1518 n.27 (2010).

28. *See Silverman*, 365 U.S. at 506. Although the opinion does not describe the home as an urban row house, it does give the address: 408 21st Street, N.W. in Washington, D.C. *See id*. In 1958, this appears to have been a row house in Washington, D.C. It was soon after demolished, and the area is now occupied by the State Department.

29. *See id*.

30. *See id.*

31. *See id.*

32. *Id.*

33. *See* Brief for the United States at 5 n.4, Silverman v. United States, 365 U.S. 505 (1961) (No. 66), 1960 WL 98688.

34. *See id.* at 6 n.5.

35. *See* Silverman v. United States, 275 F.2d 173, 178 (D.C. Cir. 1960) ("The record indicates that Judge Holtzoff and Judge Jackson might well have concluded that there was no physical trespass upon appellants' 'half' of the party wall, since the wall itself was some thirteen to fourteen inches in thickness.").

wall, then the spike mike wire crossed anywhere from 1/8th of an inch to 5/16th of an inch into the property.[36]

But this was enough to work. The officers had lucked out. At the end of the crack in the wall, there was a 9-inch-wide space in the wall where the solid masonry was missing.[37] At that point, just a fraction of an inch into the target property, a heating duct had been carved into the shared wall that could be touched by the tip of the spike mike.[38] The space in the wall allowed the government to insert the rod of the spike mike straight through and up against the heating duct.[39] As the Supreme Court later put it, pressing the end of the rod against the heating duct "acted as a very good sounding board, . . . thus converting their entire heating system into a conductor of sound."[40] Officers listening in could hear conversations inside the home as its occupants received and placed bets. The officers listened over a few days, and the evidence they overheard was used to get a warrant to search the house.[41] The gambling ring was busted, and charges followed.

The Silverman prosecution hinged on a legal question: Was use of the spike mike a Fourth Amendment search? The district court and the court of appeals agreed that it was not. According to the trial judge, the Supreme Court's precedents required "physical invasion" to find a search.[42] This was the lesson to be drawn from the Supreme Court's 1928 ruling in *Olmstead v. United States*,[43] which had held that wiretapping phones lines outside the suspect's home and office was not a search. If "there is no entry into the house or office of the defendant," the trial court reasoned based on *Olmstead*, there is no unlawful search and seizure.[44] That rule was also applied in a 1942 case, *Goldman v. United States*,[45] where the government attached a listening device to the wall from an adjoining apartment.[46] Again, no physical invasion into the space meant no search.

But wait, you may be thinking: Didn't the spike mike in *Silverman* intrude into the suspect's house? Indeed, technically, it did. To the lower courts, however, the entry into the target home was too small to count. The

36. *See id.* ("We are asked to say that the spike might have penetrated 7 1/8 inches through the wall so that a 'trespass' occurred by as much as 5/16ths of an inch.").
37. Brief for the United States, *supra* note 33, at 24 n.11.
38. *See* Brief for Petitioners at 8, Silverman v. United States, 365 U.S. 505 (1961) (No. 66), 1960 WL 99145.
39. *See id.*
40. *See Silverman*, 365 U.S. at 506–07.
41. *See id.* at 507 n.1.
42. United States v. Silverman, 166 F. Supp. 838, 840 (D.D.C. 1958).
43. 277 U.S. 438 (1928).
44. *Silverman*, 166 F. Supp. at 840.
45. 316 U.S. 129 (1942).
46. *See id.* at 131.

principle of *de minimis non curat lex* applied—the law does not concern itself with trifles.[47] It would be "almost ludicrous," the district judge concluded, "to draw a line of distinction between legality and illegality on such minute circumstances"[48] as the rod crossing the property line ever so slightly. The D.C. Circuit majority agreed that no search had occurred because the spike mike had not been inserted far enough into the target home.[49] Although the line had technically been crossed, constitutional protections could not rest on mere "fractions of inches."[50]

Before the Supreme Court, Silverman's counsel, legendary defense attorney Edward Bennett Williams,[51] took a different tack. Williams theorized that Fourth Amendment protections should be all about privacy, not physical invasion. Even if fractions of inches didn't matter, use of the spike mike was a major invasion of privacy. "Any electronic eavesdropping device which destroys privacy is unconstitutional," Williams argued, "regardless of where it is located or how it is installed."[52] In light of scientific progress, Williams proclaimed, resting the constitutional line "upon the purely adventitious factor of location"[53] was an "absurdity."[54]

To bolster this claim, Williams detailed how a range of new surveillance tools could invade privacy without physical intrusion. Devices such as parabolic microphones "will make it possible to overhear everything said in a room without ever entering it or even going near it."[55] Thanks to new technology, the Fourth Amendment "becomes a mockery," Williams added, if constitutional rights are "meted out by the inch—or, in this case, by eighths of an inch."[56] For that reason, physical invasion was not relevant. The privacy invasion alone rendered use of the spike mike a search, even if it required overturning precedents that limited searches to physical invasions.[57] Williams, ever the showman, even brought in the spike mike from the case to the oral argument and displayed it to the Justices—making concrete how new technology threatened traditional notions of privacy.[58]

47. *Silverman*, 166 F. Supp. at 841.
48. *See id.* at 841.
49. Silverman v. United States, 275 F.2d 173, 178 (D.C. Cir. 1960).
50. *Id.*
51. Edward Bennett Williams was the founder and name partner of the law firm of Williams & Connolly. His colorful life is detailed in EVAN THOMAS, THE MAN TO SEE (1991).
52. Brief for Petitioners, *supra* note 38, at 11.
53. *Id.* at 21.
54. *Id.*
55. *Id.* at 22.
56. *Id.* at 23–24.
57. *See id.*
58. I infer this from the audio and associated transcript of the argument, in which Williams appears to be holding up the spike mike and the Justices ask him questions about it. *See* Oral Argument,

The Supreme Court agreed with Williams that a search occurred, but it did so under a limited rationale that just covered the facts before it. Writing for the Court, Justice Stewart detailed how defense counsel had "painted with a broad brush"[59] in urging the overruling of past cases on surveillance in light of how "the vaunted marvels of an electronic age" might require a rethinking of Fourth Amendment protection.[60] Such "large questions" would be left for another day, Justice Stewart explained, because the case before the Court featured a crucially different set of facts: "the eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by the petitioners."[61]

The *Silverman* majority opinion is short. But it restates the key concept —that any unauthorized physical penetration, however slight, is a search— a half dozen times in slightly different language. That the eavesdropping was "accomplished by means of such a *physical intrusion*" was critical, the Court concludes.[62] In those precedents that had found no search with wiretapping and bugging, the surveillance "had not been accomplished by means of an unauthorized *physical encroachment* within a constitutionally protected area."[63] Rather, there was an "absence of a *physical invasion* of the petitioner's premises" in those cases.[64] Surveillance using the spike mike was different because it occurred "only by *usurping part of the petitioners' house or office*,"[65] a "*usurpation* that was effected without their knowledge and without their consent."[66] The officers had "*physically entrench[ed]*" into the target home.[67] Under the bright-line rule adopted by the Court in *Silverman*, the lower courts' *de minimis* exception had no place. A tiny entrance into the house, less than half an inch, was still an entrance.

Silverman effectively imposed a bookend on *Olmstead* and *Goldman*. Under *Olmstead* and *Goldman*, no search occurred without physical invasion into a protected area. Under *Silverman*, such a physical intrusion caused a search. Physical intrusion was not just necessary, but also sufficient. Although the Court was not going to use *Silverman* to revisit

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Silverman v. United States, 365 U.S. 505 (1961) (No. 66), https://www.oyez.org/cases/1960/66 [https://perma.cc/C4BL-Y2MQ]. After Williams refers to "this electronic eavesdropping device which is known as a spike microphone," Justice Harlan asks, "This is the device?" Williams replies, "This is precisely the device, Your Honor." *Id.* at 00:01:45.

59. Silverman v. United States, 365 U.S. 505, 508 (1961).
60. *See id.*
61. *Id.* at 509.
62. *Id.* (emphasis added).
63. *Id.* at 510 (emphasis added).
64. *Id.* (emphasis added).
65. *Id.* at 511 (emphasis added).
66. *Id.* (emphasis added).
67. *Id.* at 512 (emphasis added).

Olmstead and *Goldman*, it was also not going "to go beyond" their line "by even a fraction of an inch."[68]

B. Silverman *Rejects a Trespass Law Standard*

Crucially, *Silverman* made clear that its standard was *not* trespass law. "[W]e need not pause to consider," the majority stated, "whether or not there was a technical trespass under the local property law relating to party walls. Inherent Fourth Amendment rights are not inevitably measurable in terms of ancient niceties of tort or real property law."[69] As we will see later in this Article, by the time of *Silverman,* this was not a novel concept. There was an important line of caselaw before *Silverman* that rejected technical property law doctrines in Fourth Amendment cases.[70] But *Silverman* followed this approach expressly in the context of what was a search.

It's useful to delve into why the Court rejected a technical trespass standard. What were the "ancient niceties" that the Court had in mind? *Silverman* here dropped a footnote to *Fowler v. Koehler*,[71] a 1915 ruling by the Supreme Court for the District of Columbia on property rights in common walls, known as party walls,[72] between connected houses on adjoining properties. A close look at *Fowler* helps to explain the problem *Silverman* encountered. In all likelihood, *Silverman* was quick to reject a search test that relied on the "ancient niceties of tort or real property law" because the application of those doctrines to the party wall in *Silverman* demonstrated the exceptional challenges of a property approach.

Plaintiff Koehler built a town house in Washington, DC, on a residential lot in the neighborhood known as Columbia Heights.[73] When Koehler built the house, he placed a common wall partially on his lot and partially on the then-vacant adjoining lot.[74] The common wall would be expected to someday be used for a house on the adjoining lot. Koehler sold the property, however, before a house on the adjoining property had been built. The sales

68. *Id.*
69. *Id.* at 511.
70. *See infra* Part II.
71. 43 App. D.C. 349 (1915). The Supreme Court of the District of Columbia became the U.S. District Court for the District of Columbia in 1936. The footnote citation appears in *Silverman*, 365 U.S. at 511 n.3.
72. *See Party Wall*, MERRIAM-WEBSTER.COM DICTIONARY, https://www.merriam-webster.com/dictionary/party%20wall [https://perma.cc/988F-D6HR] (defining a party wall as "a wall which divides two adjoining properties and in which each of the owners shares the rights").
73. *See Fowler*, 43 App. D.C. at 351.
74. *See id.* at 352.

agreement on Koehler's property reserved to him a property interest in "the free use" of the party wall he had built.[75]

Defendant Fowler later purchased the adjoining lot, and she used the existing party wall as one supporting wall of her new house.[76] Koehler then sued Fowler, claiming that he was entitled to compensation for Fowler's use of the party wall he had built. According to Koehler, Fowler's use of the party wall for her house infringed upon Koehler's interest in the party wall that he had reserved when he sold the original lot.

The challenge in *Fowler* was determining who had what interest in which parts of the party wall. Was the wall shared between whoever owned the two lots? Did each side own half of the wall? Did each side own whatever parts of the wall were technically on its property? And if each side had rights in its part of the way, did they also have some rights over the other half?

This turned out to be a complicated question. In England, at common law, party walls had been shared by adjoining owners as tenants in common.[77] *Fowler* instead adopted the more popular rule in the United States, that adjoining owners were sole owners of the part of the wall on their land, "subject to the easement of his neighbor for its support and the equal use thereof."[78] *Fowler*'s first step did not resolve the major question, however. Did Fowler owe Koehler anything for using the party wall Koehler had built on Fowler's property before Fowler bought it? The widespread rule, the court acknowledged, was that the owner gained the benefit of the wall and did not have to pay for it.[79] Under that rule, Fowler owed Koehler nothing.

Fowler adopted a different rule, however, relying on a quirk of local history that had created a custom in the local property market. In 1791, the original parcels of land ceded from Maryland to form the City of Washington were subject to a regulation by President George Washington that the builder of a party wall "shall [be] reimburse[d] one moeity [half] of the charge" of its construction.[80] The lots in *Fowler v. Koehler* were not technically governed by George Washington's 1791 regulation, as the area that became Columbia Heights was part of the rural County of Washington,

75. *See id.* at 351–52.
76. *See id.* at 352.
77. *See id.* at 357.
78. *Id.*
79. *See id.*
80. *Id.* at 356–57 (quoting Miller v. Elliot, 17 F. Cas. 315, 316 (C.C.D.C. 1839) (No. 9,568)) (characterizing President Washington's building regulations).

not the urban City of Washington.[81] They were different legal entities at the time, and the latter was not subject to the regulation on party walls.[82]

Nonetheless, the court reasoned, Washington's 1791 rule for the City of Washington had created a custom throughout the entire District of Columbia that "where the owner of a lot upon which a party wall has been constructed connects his building to it he should pay his neighbor the value of the portion of the wall used."[83] Adopting that custom as a property rule, the court ruled that Fowler had to pay Koehler.[84] Fowler had bought the lot knowing the party wall had been built, and without the customary payment. She therefore had to pay Koehler for the rights to the party wall that Koehler had reserved.[85]

Now come back to *Silverman* and the spike mike. In parts of their briefs filed in the Supreme Court, counsel for both parties duked it out over how local and more general property law applied—citing *Fowler* and other cases. Although Silverman's counsel, Edward Bennett Williams, had focused his brief on privacy, he added a fallback property position based on the common law property rule that party walls are shared as tenants in common.[86] Because each party had rights in the full wall, Williams argued, any insertion of the spike mike into the wall by the government, however minor, was a trespass into the rights of Silverman and his co-conspirators.[87] If the Court did not rule for Silverman on a privacy ground, Williams argued, it should rule for him under a technical trespass standard.[88]

The prosecution construed property law differently. According to the United States, *Fowler* made the agents free to use the half of the wall on their side of the property line.[89] The government then contended that uses of the wall that intruded onto the other side were permitted as part of the

81. *See id.*

82. The modern reality that there is just one "Washington, DC" is the result of the Organic Act of 1871, ch. 62, 16 Stat. 419. Before then, there were several different entities in the District of Columbia. The Maryland side consisted of the City of Washington, Georgetown, and the largely rural county of Washington. The Virginia side, later ceded back to Virginia, consisted of the City of Alexandria and the rural county of Alexandria.

83. *Fowler*, 42 App. D.C at 360.

84. *See id.* at 362 ("The mere exercise of the legal right to place one half of the wall on the adjoining land created no title in it. It created in the builder of the wall a right to compensation for one half of its cost when the owner of the adjoining lot should elect to use it.").

85. *See id*. at 361–62.

86. *See* Brief for Petitioners, *supra* note 38, at 25–26. Oddly, Williams cited *Fowler* for this position even though *Fowler* had expressly rejected the tenancy-in-common standard. *See Fowler*, 42 App. D.C at 360. The prosecution noted the mismatch in a footnote. *See* Brief for United States, *supra* note 33, at 26 n.12 ("We do not understand upon what basis petitioners cite *Fowler v. Koehler* as supporting their theory that a party wall is held by tenancy in common in the District of Columbia.").

87. *See* Brief for Petitioners, *supra* note 38, at 25–26.

88. *See id.*

89. *See* Brief for the United States, *supra* note 33, at 25–26.

easement as long as they did not interfere with the use of the building.[90] Inserting the spike mike a fraction of an inch into the other side of the wall had not weakened the structure of the wall, the United States argued, and therefore inserting the microphone was permitted under general principles of trespass law.[91]

You can now appreciate the likely reasons why *Silverman* rejected a test based on the "niceties" of trespass law. To answer the trespass question, the Court likely would have to answer whether the English common law standard or the more popular American rule applied. If it adopted the latter approach, it would have to delve into the nature of the easement for support and equal use. It might have to consider who owned the right: Did merely leasing or borrowing property transfer the full property interest? The Court might also have to adopt a special rule for the District of Columbia, with its unique approach to property rights in party walls under George Washington's 1791 regulation. And it might have to rule on whether the special approach applied only to the original City of Washington, or if it extended to the rest of the District of Columbia.

Whatever the correct answers to these very technical questions might be, it was presumably not clear to the Justices in *Silverman* why the answers should govern the constitutional answer to whether a "search" of the "house" had occurred. *Silverman* bypassed all of these issues by adopting a physical intrusion rule and rejecting the technical trespass standard. The application of the rule became far simpler: The house started at the center of the wall, and the spike mike crossed into it. There was a physical intrusion without license, and that was enough to identify a search. *Silverman* expressly put aside the "large questions" of how search doctrine might apply to "the vaunted marvels of an electronic age" that enabled invasions of privacy without physical intrusion.[92] Those questions returned six years later when the Court decided *Katz v. United States*.[93]

C. Katz *Goes Beyond Physical Intrusion*

The Supreme Court agreed to hear *Katz v. United States* to answer if there was a basis for Fourth Amendment searches beyond *Silverman*'s physical intrusion standard—and if so, what it was. The petition for

90. *See id.* at 27–28.

91. *See id.*

92. Silverman, 365 U.S. 505, 509 (1961) ("The facts of the present case, however, do not require us to consider the large questions which have been argued. We need not here contemplate the Fourth Amendment implications of these and other frightening paraphernalia which the vaunted marvels of an electronic age may visit upon human society.").

93. 389 U.S. 347 (1967).

certiorari in *Katz* presented the question squarely: "Whether physical penetration of a constitutionally protected area is necessary before a search and seizure can be said to be violative of the Fourth Amendment to the United States Constitution."[94] Famously, the Court's answer was no.[95]

The facts of *Katz* were like an exam question to test the rule of *Silverman*. Charles Katz was a bookie who regularly placed bets from a public pay phone.[96] The FBI wanted to listen in, so they taped a microphone to the outside of the phone booth Katz used and turned on the microphone to listen when Katz entered the booth and placed his calls.[97] The Ninth Circuit treated the *Silverman* principle as a limit rather than as a starting point. Because the microphone was taped to the *outside* of the booth, "[t]here was no physical entrance into the area occupied by appellant."[98] The Ninth Circuit ruled that there was no search because there was no "physical penetration inside of the booths."[99]

In reversing the Ninth Circuit, the Supreme Court emphatically rejected physical intrusion as a requirement for a search. The key passage from *Katz* is worth quoting at some length:

> The Government contends . . . that the activities of its agents in this case should not be tested by Fourth Amendment requirements, for the surveillance technique they employed involved no physical penetration of the telephone booth from which the petitioner placed his calls. It is true that the absence of such penetration was at one time thought to foreclose further Fourth Amendment inquiry, . . . for that Amendment was thought to limit only searches and seizures of tangible property. . . . [W]e have since departed from the narrow view on which that decision rested. Indeed, we have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements overheard without any "technical trespass under . . . local property law." *Silverman v. United States*. Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people—and not simply "areas"—against unreasonable searches and seizures it becomes clear that the reach of that Amendment cannot turn upon

94. *Id.* at 350 (quoting the petition for certiorari).

95. *See id.* at 353 ("The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.").

96. These facts are more clearly told in the Ninth Circuit's opinion. *See* Katz v. United States, 369 F.2d 130, 131–33 (9th Cir. 1966).

97. *See id.*

98. *Id.* at 134.

99. *Id.* at 131.

> the presence or absence of a physical intrusion into any given enclosure.
>
> . . . The fact that the electronic device . . . did not happen to penetrate the wall of the booth can have no constitutional significance.[100]

As this passage shows, the significance of *Katz* lies in its departure from physicality. "[P]hysical penetration" into a "given enclosure" was no longer the relevant standard.[101] Whereas *Silverman* had adopted a bright line rule that physical penetration triggered a search, *Katz* adopted a new standard by which physical penetration "can have no constitutional significance."[102]

Granted, *Katz*'s citation to *Silverman* was rather curious. Recall that *Silverman* had distinguished a physical intrusion standard (which it expressly adopted) from a property law standard (which it expressly rejected). *Katz* weirdly suggested that they were the same test, such that *Silverman*'s rejection of technical trespass somehow undermined the physical intrusion standard. That made no sense, as anyone familiar with *Silverman* would know. But despite this misuse of *Silverman*, *Katz* was clear on the key shift: The prior standard of "physical penetration" no longer governed.

Justice Harlan's famous *Katz* concurrence was explicit on the point. Harlan read the majority opinion "to hold . . . that electronic as well as physical intrusion into a place that is in this sense private may constitute a violation of the Fourth Amendment[.]"[103] Rejecting the physical penetration test was wise, Justice Harlan contended. "[I]n the present day," he argued, a physical penetration test was "bad physics as well as bad law, for reasonable expectations of privacy may be defeated by electronic as well as physical invasion."[104]

Most discussions of *Katz v. United States* focus on what new standard *Katz* introduced.[105] My focus here is different. Whatever new line *Katz* drew, I ask, how did it differ conceptually from the *Silverman* line before it? Again, the doctrinal materials are clear. In 1961, *Silverman* adopted a physical penetration test as a constitutional minimum. Under *Silverman*, a tangible object physically entering the constitutionally protected area—even if only by a fraction of an inch—was a search. In 1967, *Katz* adopted a new line that recognized searches in the absence of physical penetration.

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100. *Katz*, 389 U.S. at 352–53 (some citations omitted).
101. *Id.*
102. *Id.* at 353.
103. *Id.* at 360–61 (Harlan, J., concurring).
104. *Id.* at 362.
105. *See, e.g.*, 2 LAFAVE et al., *supra* note 8, at § 3.2(a) (exploring the *Katz* test).

D. After Katz*: Two Tests at First, and Then Only One*

Katz left the Fourth Amendment search test in an uncertain state in an important respect. *Katz* had brought the law beyond physical intrusion, but it remained unclear what new line replaced it. Justice Harlan had tried to clarify the standard in his concurring opinion, but that was only a solo concurrence. In the wake of *Katz*, the Court's opinions went through a period of uncertainty before settling on *Katz* as the one search test.

At first, the Court suggested there were two tests: A privacy test under *Katz*, and an intrusion test under *Silverman*. This was the gist of *Alderman v. United States*,[106] a standing case decided two years after *Katz*. *Alderman* consolidated several cases in which the government bugged homes and businesses without a warrant, recording one end of the phone calls made there. The question was who had standing to challenge this illegal surveillance. Under *Katz*, a person whose voice was picked up by the microphone clearly had standing. But what about the person who owned the physical place, even though their calls were not recorded?

In an opinion by Justice White, *Alderman* ruled that the *Silverman* doctrine survived *Katz* and that the person whose private premises were intruded upon to place the bugging device also had standing to challenge the surveillance. "It was noted in *Silverman*," *Alderman* reasoned, that the Court (quoting *Silverman*) "has never held that a federal officer may without warrant and without consent physically entrench into a man's office or home, there secretly observe or listen, and relate at the man's subsequent criminal trial what was seen or heard."[107] *Silverman* had "proceeded to hold quite the contrary," *Alderman* added, and the Court would "take the same course here."[108]

The *Alderman* dual-test approach did not last, however. Within a decade, the Court was treating *Katz* as the only game in town. It was the "lodestar" of the search inquiry, as the Court called it.[109] To be sure, a physical intrusion was very likely to amount to a *Katz* search. As the Court explained in 1978, "[o]ne of the main rights attaching to property is the right to exclude others," and "one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude."[110] But by the late 1970s, the property right was merely a

106. 394 U.S. 165 (1969).
107. *Id.* at 190 (quoting Silverman, 365 U. S. 505, 511–512 (1961)).
108. *Id.*
109. Smith v. Maryland, 442 U.S. 735, 739 (1979).
110. Byrd v. United States, 584 U.S. 395, 395 (2018).

reason to have privacy rights under *Katz*. As a matter of blackletter law, the *Katz* test was the only test for what was a search.

One slight challenge to this orthodoxy was a concurrence to a 1983 ruling, *United States v. Knotts*.[111] In *Knotts*, the government had installed a radio beeper in a vat of chemicals that were then sold to a man in the meth trade. The government used the beeper's signal to track the vat's location in the car over public roads as it was driven to a rural cabin. The owner of the cabin later challenged the surveillance, but he did so only in a limited way. He challenged the tracking of the car, but he declined to challenge the installation of the beeper in the vat of chemicals—apparently because he did not believe he had standing to make that challenge.[112] Because the defendant did not challenge the installation of the beeper, the Court declined to rule on that question.

Knotts is relevant to our story because of speculation in a concurring opinion by Justice Brennan, joined by Justice Marshall, that such a challenge might have been successful. This was true, Brennan argued, because the pre-*Katz* physical intrusion test survived *Katz*.[113] Under cases "such as *Silverman v. United States*," Justice Brennan reasoned, "physical intrusion of a constitutionally protected area in order to obtain information" could be a search even if the *Katz* test was not implicated.[114] No other Justice raised the issue or responded, however, making Justice Brennan's opinion a curious outlier in an otherwise consensus view during the period that *Katz* provided the only search test.

*E. The Return of the Pre-*Katz *Test in* Jones *and* Jardines

Now we arrive, finally, at more recent developments. The era of the *Katz*-only test ended in 2012. It arrived with a one-two punch by Justice Scalia: *United States v. Jones*,[115] followed quickly by *Florida v. Jardines*.[116] Although authored by the same Justice, the two opinions speak in very different voices. *Jones* offers a smorgasbord of different ways to frame the non-*Katz* test. We get some intrusion, but we also get some common-law trespass. Neither is explained. Then, in *Jardines*, Justice Scalia switches voice and speaks only of physical intrusion. Scalia's majority opinion in

111. 460 U.S. 276 (1983).

112. *See id.* at 279 n.* ("Respondent does not challenge the warrantless installation of the beeper in the chloroform container, suggesting in oral argument that he did not believe he had standing to make such a challenge.").

113. *See id.* at 286 (Brennan, J., concurring).

114. *Id.*

115. 565 U.S. 400 (2012).

116. 569 U.S. 1 (2013).

Jardines never once utters the word "trespass."[117] But he also never acknowledges the switch, either. To make sense of these cases, we need to look closely at each.

In *Jones*, the government attached a GPS device to the underbody of a car Antoine Jones drove and tracked him for twenty-eight days.[118] The D.C. Circuit relied on a *Katz* rationale to hold that the tracking of the car had started to be a search at some point over the course of the twenty-eight days.[119] In a dissent from denial of rehearing, however, then-Judge Brett Kavanaugh expressed concern with the panel's "novel aggregation approach" under *Katz*.[120] Kavanaugh suggested a simpler rationale: Perhaps installation of the GPS device was a physical intrusion under *Silverman*. This wasn't obvious, Judge Kavanaugh contended. He read the record to suggest that the government's conduct had been "mere touching or manipulating of the outside" of Jones's car.[121] It was not clear that this counted as a physical intrusion under the *Silverman* test. But this was an "important and close question" that should have been addressed *en banc*, Kavanaugh argued.[122]

When the Supreme Court agreed to hear the case, the defendant's merits brief, filed by Walter Dellinger, combined privacy arguments with an additional argument based on the *Silverman* intrusion test.[123] The latter argument was simple: "*Silverman* is controlling here."[124] According to Dellinger, installing the GPS device was an "unauthorized physical intrusion that made it possible for the GPS device to generate data about Jones's every stop and move."[125]

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117. I noted this the day *Jardines* came down. *See* Orin Kerr, *Supreme Court Hands Down Florida v. Jardines*, VOLOKH CONSPIRACY (Mar. 26, 2013 10:38 AM), http://www.volokh.com/2013/03/26/supreme-court-hands-down-florida-v-jardines/ [https://perma.cc/89KX-TZKH] ("In light of my Supreme Court Review article on how there was no 'trespass test' before *Katz*, I was particularly interested to see that the majority's application of *Jones* does not use the word 'trespass.' Instead, the Court refers to the *Jones* test as a test of 'physical intrusion.'").

118. *See Jones*, 565 U.S. at 403.

119. *See* United States v. Maynard, 615 F.3d 544 (D.C. Cir. 2010). The D.C. Circuit's panel opinion addressed the claims of co-defendants Maynard and Jones together, leading to Maynard's name being attached to the decision. Further proceedings involved only Jones, so they appeared only in his name.

120. United States v. Jones, 625 F.3d 766, 770 (D.C. Cir. 2010) (Kavanaugh, J., dissenting from the denial of rehearing en banc).

121. *Id.* at 771.

122. *Id.*

123. *See* Brief for Respondent, United States v. Jones, 565 U.S. 400 (2012) (No. 10–1259), 2011 WL 4479076.

124. *Id.* at 19.

125. *Id.*

The Supreme Court ruled for Jones, following the path suggested by then-Judge Kavanaugh below.[126] Justice Scalia began his majority opinion by describing the case as about physical intrusion:

> It is important to be clear about what occurred in this case: The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a "search" within the meaning of the Fourth Amendment when it was adopted.[127]

So far, we're on familiar *Silverman* ground. But here's when things got more complicated. Over the course of the *Jones* opinion, Justice Scalia repeatedly mixed references. He referred—apparently interchangeably—to standard being intrusion, entry, trespass, and common-law trespass. For example, shortly after the passage above, he wrote that, "at least until the latter half of the twentieth century," the Court's "Fourth Amendment jurisprudence was tied to common-law trespass[.]"[128] In the very next sentence, however, he provided support for that claim by referring to a physical entry standard: "Thus, in *Olmstead v. United States*, . . . we held that wiretaps attached to telephone wires on the public streets did not constitute a Fourth Amendment search because 'there was no entry of the houses or offices of the defendants[.]'"[129]

Justice Scalia made a similar switch-up in a footnote replying to Justice Alito's concurrence.[130] Justice Alito had objected to the originalist framing of the majority opinion by positing that there was no eighteenth century analog to placing a GPS device on a car.[131] Scalia offered two rejoinders. First, Justice Scalia said that a "constable's concealing himself in the target's coach in order to track its movements" was such a "trespassory activity" that was "not far afield" from an eighteenth century equivalent.[132] But then Scalia decried that no historical equivalent need exist because such action would have been considered a search when the Fourth Amendment was enacted: "Where, as here, the Government obtains information by

126. United States v. Jones, 565 U.S. 400 (2012).
127. *Id.* at 404–05.
128. *Id.* at 405.
129. *Id.*
130. *See id.* at 406 n.3.
131. *See id.* at 420 (Alito, J., concurring in the judgment) ("But it is almost impossible to think of late-18th-century situations that are analogous to what took place in this case. (Is it possible to imagine a case in which a constable secreted himself somewhere in a coach and remained there for a period of time in order to monitor the movements of the coach's owner?)").
132. *See id.* at 406 n.3 (majority opinion).

physically intruding on a constitutionally protected area, such a search has undoubtedly occurred."[133]

One is left to wonder: Did Scalia see "common law trespass" as just a shorthand for physical entry? Was the test here *Silverman*, or was it something else? The challenge of interpreting *Jones* is compounded by the opinion's lack of analysis. After labeling the pre-*Katz* test as "the common-law trespassory test,"[134] Justice Scalia never applied to the facts any particular common-law trespass doctrines. He did not expressly apply the *Silverman* intrusion doctrine, either, which you will recall then-Judge Kavanaugh below had acknowledged raised difficult questions.[135] Instead, Justice Scalia simply announced a result: The facts of *Jones* are deemed to involve "a classic trespassory search."[136] Why that is true, unfortunately, was never explained. For a ruling making such major doctrinal moves, Justice Scalia's decision in *Jones* is unfortunately spare. In its entirely, it spans less than 12 pages of the *United States Reports*.[137]

In the immediate wake of *Jones*, it was understandable to be puzzled as to what non-*Katz* test the Court had in mind. Indeed, my own writing reflected that puzzlement. In a *Supreme Court Review* article trying to make sense of *Jones*, published shortly after it was handed down, I noted that pre-*Katz* law had adopted a physical intrusion standard rather than a trespass standard.[138] To the extent the Court was now embracing a trespass standard, I contended, courts were going to have to make choices about which kind of new trespass standard Fourth Amendment law was going to adopt.[139]

All of which makes the rhetorical shift a year later, in *Florida v. Jardines*,[140] particularly striking. In *Jardines*, officers walked a narcotics-detection dog on to the porch and up to the front door of a house to sniff for drugs inside.[141] The Court reasoned that the porch area was curtilage, space around the outside of a home that is traditionally treated as the inside of a home for Fourth Amendment purposes.[142] Legally speaking, then, the

133. *See id.* at 406–07 n.3.

134. *Id.* at 409.

135. United States v. Jones, 625 F.3d 766, 771 (D.C. Cir. 2010) (Kavanaugh, J., dissenting from the denial of rehearing en banc) (stating that whether the attachment of the GPS device in *Jones* was a search under the *Silverman* principle is a "close question" that requires "full briefing and argument" to answer).

136. *Jones*, 565 U.S. at 412.

137. The opinion begins at page 402, and ends at page 413, of Volume 565 of the United States Reports.

138. *See* Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67.

139. *See id.* at 90–97 (asking the question, "what trespass test did *Jones* introduce?").

140. 569 U.S. 1 (2013).

141. *See id.* at 3–4.

142. *See id.* at 7–12.

officer had physically entered the home by entering the porch area. This gave the Court a natural opportunity to explain the test from *Jones*. Was it physical intrusion or trespass? If it was trespass, what kind of trespass test was it?

The telling aspect of *Jardines* is that the majority opinion—again, from Justice Scalia—never uttered the word *trespass*.[143] There's not even a variation on the term, like *trespassing* or *trespassory*. Instead, *Jardines* framed the test as entirely about physical intrusion under *Silverman*. The Fourth Amendment, Justice Scalia explained,

> establishes a simple baseline, one that for much of our history formed the exclusive basis for its protections: When "the Government obtains information by physically intruding" on persons, houses, papers, or effects, "a 'search' within the original meaning of the Fourth Amendment" has "undoubtedly occurred." *United States v. Jones*, 565 U.S. 400, 406–407, n.3 (2012). By reason of our decision in *Katz v. United States*, 389 U.S. 347 (1967), property rights "are not the sole measure of Fourth Amendment violations," *Soldal v. Cook County*, 506 U.S. 56, 64 (1992)—but though *Katz* may add to the baseline, it does not subtract anything from the Amendment's protections "when the Government does engage in a physical intrusion of [a] constitutionally protected area," *United States v. Knotts*, 460 U. S. 276, 286 (1983) (Brennan, J., concurring in the judgment).[144]

This passage is the *Silverman* physical-penetration rule through-and-though. Indeed, the quotation from Justice Brennan from *Knotts* was simply Justice Brennan's summary of the holding of "[c]ases such as *Silverman v. United States*."[145] And Justice Scalia repeated the physical intrusion language throughout the opinion, referring to the non-*Katz* test as "unlicensed physical intrusion" and citing *Silverman*.[146] Again, the word "trespass" never appears in the *Jardines* majority opinion.

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143. This was sufficiently striking that I focused on it the day *Jardines* was handed down. *See* Kerr, *supra* note 117 ("I was particularly interested to see that the majority's application of Jones does not use the word 'trespass.' Instead, the Court refers to the Jones test as a test of 'physical intrusion.'").

144. *Jardines*, 569 U.S. at 5.

145. United States v. Knotts, 460 U. S. 276, 286 (1983) (Brennan, J., concurring) ("Cases such as *Silverman v. United States*, 365 U.S. 505, 509–512 (1961), however, hold that, when the government *does* engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment even if the same information could have been obtained by other means.").

146. *Jardines*, 569 U.S. at 7 ("Since the officers' investigation took place in a constitutionally protected area, we turn to the question of whether it was accomplished through an unlicensed physical intrusion.").

Notably, Justice Scalia's reliance on physical intrusion in *Jardines* even extends to his discussion of *Jones* itself. You'll recall that, in *Jones*, Justice Scalia had stated that *Katz* added a new test to the preexisting "common law trespassory test." From that phrase alone, it might be easy to think that the *Jones* test is rooted in trespass liability as judged by common-law-era precedents. But look closely at how Scalia described *Jones* a year later in *Jardines*. Scalia changed the language from common law trespass to physical intrusion. Here's how Justice Scalia summarizes his *Jones* opinion:

> [B]ecause the GPS receiver [in *Jones*] had been physically mounted on the defendant's automobile (thus intruding on his "effects"), we held that tracking the vehicle's movements was a search: A person's "Fourth Amendment rights do not rise or fall with the *Katz* formulation." . . . The *Katz* reasonable-expectations test "has been *added to, not substituted for*," the traditional property-based understanding of the Fourth Amendment, and so is unnecessary to consider when the government gains evidence by physically intruding on constitutionally protected areas.[147]

In both sentences in this passage, the key words from *Silverman* yet again appear. The test is physical intrusion, not trespass. True, Justice Scalia referred to a "property-based" test. But it seems clear in *Jardines* that he is equating a property-based test with simple physical intrusion. The preexisting test is a "simple baseline"[148] that looks simply to whether the government was "physically intruding on constitutionally protected areas."[149] That simple baseline, in other words, was *Silverman*.

F. Grady *Cements the Physical Intrusion Standard*

If there is any uncertainty as to what the *Jones* test means after *Jardines*, it is answered by the Supreme Court's only case on the issue in the years since: the generally forgotten per curiam ruling in *Grady v. North Carolina*.[150] Once again, the Court discussed and applied the *Jones* test as a physical intrusion test instead of a trespass test.

Grady considered whether a search occurred when the government required a convicted sex offender to wear an ankle bracelet containing a

147. *See id.* at 6. "At the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Id.* (quoting Silverman v. United States, 365 U.S. 505, 511 (1961).

148. *Id.* at 5.

149. *Id.* at 11.

150. 575 U.S. 306 (2015) (per curiam).

GPS tracking device.[151] North Carolina state courts had rejected Fourth Amendment challenges to such monitoring on the ground that no search occurred. The U.S. Supreme Court summarily reversed *Grady* without a recorded dissent, ruling that a search had occurred under *Jones* and *Jardines*.[152] Because the state's monitoring program obtains information "by physically intruding on a subject's body," *Grady* reasoned, "it effects a Fourth Amendment search."[153]

The Supreme Court typically reserves summary reversals for obvious errors below. In *Grady*, the Court reasoned, the error was clear from both *Jones* and *Jardines*. In *Jones*, *Grady* summarized, a search occurred when "the Government obtains information by physically intruding on a constitutionally protected area."[154] And in *Jardines*, a search occurred because the government gathered information by "physically entering and occupying the [curtilage of the house] to engage in conduct not explicitly or implicitly permitted by the homeowner."[155] Under these two cases, a search necessarily occurs when the government "attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements."[156]

Although the Court ordinarily sticks with previously established legal principles in per curiam opinions, *Grady* establishes—or at least clarifies—new ground. It does so in two ways. First, it settles that mere attachment to the outside of property is a "physical intrusion on" it. To be sure, this was a plausible reading of *Jones*, and it was suggested by how *Jones* was summarized in *Jardines*.[157] The record in *Jones* was arguably too vague to establish the point on its own, however. The GPS was attached to "the undercarriage"[158] of the car Jones drove, and the government had argued at trial that the device was attached "on the exterior" of the car.[159] This left unclear where exactly the device was attached, which *Silverman* indicated was the crucial question under a physical intrusion standard. We don't know if the GPS in *Jones* was attached to an external part of the underbody (like the microphone attached to the outside of the phone booth in *Katz*) or

151. *See id.* at 307.

152. *See id.* at 309 ("In light of [*Jones* and *Jardines*], it follows that a State also conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements.").

153. *Id.* at 310.

154. *Id.* at 309 (quoting United States v. Jones, 565 U.S. 400, 406–07, n.3 (2012)).

155. *Id.* (quoting Florida v. Jardines, 569 U.S. 1, 5–6 (2013)).

156. *Id.*

157. *See supra* note 147 and accompanying text.

158. *Jones*, 565 U.S. at 403.

159. *See* Brief and Record Material for Appellee at 42, United States v. Maynard, 615 F.3d 544 (D.C. Cir. 2010), (Nos. 08-3030, 08-3034).

whether it was physically inserted into the space occupied by the car (like the spike mike in *Silverman*). As then-Judge Kavanaugh pointed out in the D.C. Circuit, on the way to the Supreme Court's *Jones* ruling, it was not clear how the physical intrusion test applied to such facts.[160]

Grady settles this edge-case question. Physical attachment to the surface of one's person, house, paper, or effects is enough to count as physical intrusion. Indeed, it appears that, under *Grady*, even Charles Katz himself might have been able win his case from the phone booth on the physical intrusion theory. Back in 1967, the Supreme Court in *Katz* had emphasized that there was "no physical entrance into the area occupied by" Katz in the phone booth, and that the listening device was only "attached . . . to the outside" of the booth.[161] After *Grady*, however, that might today be enough to trigger a physical intrusion search without resort to *Katz*: Attachment *to* property is a physical intrusion *on* the property, *Grady* teaches, even if it was not physical entrance *into* it. The only challenge today would be showing that Katz's temporary paid use of the booth gave him rights in the booth as a whole, an issue not raised in the *Katz* case but entirely plausible under both pre-*Katz* and later caselaw.[162]

Second, and more importantly, *Grady* cements the notion from *Jardines* that the *Jones* test is about physical intrusion, not common-law trespass. Just like in *Jardines*, *Grady* speaks exclusively and repeatedly about physical intrusion. Requiring the installation of the bracelet was a search because it was "physically intruding on a subject's body," *Grady* says.[163] There is no analysis of trespass torts. There is no discussion of the common law. There is no citation to Blackstone's Commentaries on trespass or to the Restatement of Torts on trespass. Just like in *Jardines*, the word "trespass" never appears.

G. The Jones *Test Is Physical Intrusion, Not Trespass Law*

What should we make of this history? In examining the evolution from before *Katz* to the present, we see an unbroken line of Supreme Court cases adopting a physical intrusion test instead of a technical trespass test. In

160. United States v. Jones, 625 F.3d 766, 770 (D.C. Cir. 2010) (Kavanaugh, J., dissenting from the denial of rehearing en banc).

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

162. This was particularly plausible under *Rios v. United States*, 364 U.S. 253 (1960), which indicated that a passenger of a taxicab had Fourth Amendment rights in the insides of the cab. *See id.* at 262 n.6 ("An occupied taxicab is not to be compared to an open field or a vacated hotel room." (citations omitted)).

163. Grady v. North Carolina, 575 U.S. 306, 310 (2015) (per curiam) ("The State's program is plainly designed to obtain information. And since it does so by physically intruding on a subject's body, it effects a Fourth Amendment search.").

Silverman, the physical intrusion test was a bare minimum, with the Court rejecting a trespass standard and leaving open what, if anything, extended beyond physical penetration. The Court answered that in *Katz*, moving beyond physical intrusion. But when *Jones* established that there are two tests, the pre-*Katz* test restored by *Jones* was the *Silverman* physical intrusion test, not some sort of trespass tort test. The follow-up cases of *Jardines* and *Grady* made this clear, both expressing an intrusion test and describing *Jones* as an intrusion case—and never once using the word "trespass."

How, then, have a number of courts and commentators concluded that *Jones* imposes a tort-law based trespass test? They focused myopically on *Jones*. If you treat *Jones* as the Rosetta stone of the non-*Katz* test, it's possible to imagine *Jones* opening up a new world of search doctrine in which some sort of new property theory test was in play. *Jones* used a series of different terms to describe the non-*Katz* test, and in isolation that could support several different answers for what the search test had become.

The Supreme Court's rulings before and after *Katz* are best read as foreclosing that reading. *Silverman* rejected a trespass test and embraced physical intrusion. *Katz* extended the test beyond physical intrusion, and *Jones* clarified that the pre-*Katz* test survived *Katz*. *Jardines* and *Grady* drive home the point. By relying exclusively on a physical intrusion standard, and by never using the term "trespass," *Jardines* and *Grady* make clear that the *Jones* test is the *Silverman* physical penetration rule.

II. THE VALUE OF THE INTRUSION APPROACH

Part I of this Article offered a close reading of cases. Part II now considers why that reading might matter. Lower courts have divided on the specific relationship between *Katz* and *Jones*. Some have adopted the technical trespass understanding of *Jones*, and others have adopted the intrusion understanding. It's fair to ask, though, what are the stakes? To some, the difference between trespass and intrusion approaches might seem so small as to not matter.

My main interest in writing this Article has been just to set the record straight. In my view, getting the history right is intrinsically valuable. But for those who want more of a normative take, I think there is one. Understanding the *Jones*/*Katz* relationship as about physical versus non-physical intrusion—what I will call the "intrusion understanding"—can advance a significant normative goal. The choice to interpret *Jones* as about trespass or about physical intrusion presents a choice between two competing frames for both *Jones* and *Katz*. How to interpret *Jones* is not

just about how to interpret *Jones*; it also sets up a dichotomy that frames how we understand *Katz*. If we understand *Jones* as a property test rooted in technical trespass and other legal doctrines, then we naturally understand *Katz* as a contrasting privacy test. And if we understand *Jones* as a physical intrusion test, then we naturally understand *Katz* as an opposing test about non-physical intrusion.

Viewed in this light, the intrusion understanding is better than the property understanding for two reasons. Most importantly, the intrusion approach more accurately captures the constitutional question. What is a "search" of "persons, houses, papers, and effects" raises two conceptually distinct issues. First, how does that text apply to the physical intrusions that animated the enactment of the Fourth Amendment in 1791? And second, how should a concept of searches from physical intrusions extend to newer technologies that gather information without physical intrusion? The intrusion understanding accurately maps these two crucial questions. In contrast, the property understanding facilitates the unmooring of search doctrine from constitutional text and history. By replacing the textual inquiry with outside doctrines and theories, the property understanding leads courts astray by forcing them to apply either endlessly malleable concepts or else to rely on highly technical doctrines from a very different doctrinal and historical context.

In addition, the intrusion approach can help prevent an unnecessary splintering of Fourth Amendment search doctrine going forward. Framing the search tests as about property and privacy invites a deep jurisprudential division. For today's Republican appointees, employing a constitutional test based on "privacy" is akin to waving a red flag waved in front of a bull. It naturally invites comparisons to *Roe v. Wade*,[164] and therefore a view that *Katz* is an illegitimate judicially-invented doctrine that is a prime candidate for overruling—a view that two sitting Justices have already embraced.[165] If courts take that path, *Katz* may be on the chopping block. What might replace it is unknown.

In contrast, the intrusion understanding of search doctrine suggests a consensus view of how to interpret the Fourth Amendment. It suggests a view of *Katz* that all Justices today would find appealing: Not as a free-standing inquiry into the nature of privacy, but as a way to extend Fourth

164. 410 U.S. 113 (1973).

165. In Carpenter v. United States, this view was endorsed in dissents by Justice Thomas and Justice Gorsuch. *See* 585 U.S. 296, 343 (2018) (Thomas, J., dissenting) (arguing that Katz should be overturned because it "has no basis in the text or history of the Fourth Amendment" and it "invites courts to make judgments about policy, not law"); *id.* at 392 (Gorsuch, J., dissenting) ("Even taken on its own terms, Katz has never been sufficiently justified.").

Amendment protection beyond physical intrusion in a world of technological change.

Today's critics of *Katz* might restate the terminology of the *Katz* test. The phrase "reasonable expectation of privacy" could be replaced by a suitable substitute, such as "modern equivalents of physical intrusion." But that is about terminology, not substance. *Katz*'s basic move was to apply the Fourth Amendment beyond physical intrusion to prevent the decaying of constitutional protections based on technological change. The intrusion understanding not only focuses courts on the right questions, it also helps Justices from a wide range of views see how much they have in common when it comes to the answers.

This Part starts by showing how the intrusion understanding focuses courts on the right questions, while the property/privacy framework focuses them on the wrong ones. It then considers how the intrusion understanding help reveal the surprising degree to which Justices from all ideological perspectives can share the same answers to what is a search.

A. The Conceptual Physical vs. Non-Physical Divide in Search Law

The first benefit of the intrusion understanding is that it accurately reflects an important conceptual distinction that Fourth Amendment law must address. In answering what is a search of persons, houses, papers, and effects, there are two basic questions: First, how to interpret that text with the basic facts of traditional physical searches; and second, how to interpret that text in light of technological change. The intrusion understanding recognizes these two questions and treats them, properly, as both important. It recognizes both the historical problem addressed by the constitutional text and the need for some theory to address modern technological analogues to it.

Some background may be helpful. Until the late 1920s, Fourth Amendment search cases were primarily concerned with physical surveillance. Physical surveillance was human surveillance, so the main question in Fourth Amendment search doctrine was whether government actors were allowed to go and what physical spaces they could open. Wherever officers go, they can use their natural senses. They can see what their eyes show them, hear what is within earshot, and smell what their noses pick up. The most basic question in Fourth Amendment search doctrine is determining from what vantage point such officers can see, hear, and smell.

The disputes that inspired the enactment of the Fourth Amendment reflected this kind of physical search. When the agents broke into John

Entick's home in *Entick v. Carrington*,[166] they rifled through his home and opened his boxes and closets. This search was a physical search—entering into the property, and physically opening items closed inside it, so officers could see what it contained.[167] This dynamic was true with the other general warrant cases that inspired the Fourth Amendment's enactment: The warrants were claimed to justify physical entries and physical openings, mostly in private homes.[168] This fits the Fourth Amendment text, regulating "searches" of "homes" and then "seizures" of "paper and affects" inside them.

The same focus carried to many early Fourth Amendment rulings. For example, *Ex parte Jackson*[169] concerned the rules for when the government could open postal letters. The court treated sealed letters in the mail like homes: "Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles."[170] The search, again, was a physical opening of an enumerated: "searches" of "papers." The regulated act was the act of a person with the letter in his hands, opening the envelope or otherwise cutting open a package.

This focus on human physical surveillance can also be seen in *Hester v. United States*, the case that introduced the "open fields" doctrine.[171] Federal agents suspected Hester of concealing moonshine without paying taxes on it, made illegal under the federal revenue laws. From an observation post 50 to 100 yards away, agents watched Hester leave his dad's house with a bottle, which he then handed to another man, Henderson. When Hester and Henderson realized they were being observed, they grabbed a gallon jug from a car and ran. While running, Henderson dropped the jug and threw away the bottle. Agents picked up both and found whiskey inside.

Hester ruled that the entry on to Hester's family land was not a Fourth Amendment search: "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law."[172] Although *Hester* is written in the minimalist style of Justice Holmes, the idea seems to be that an open field

166. [1765] 95 Eng. Rep. 807.
167. *See id.*
168. *See, e.g.*, Wilkes v. Wood [1763] 98 Eng. Rep. 489; Money v. Leach [1765] 97 Eng. Rep. 1075.
169. 96 U.S. 727 (1878).
170. *Id.* at 733.
171. 265 U.S. 57 (1924).
172. *Id.* at 59 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *223, *225–26).

is not a person, house, paper, or effect that a person can "search" in the Fourth Amendment sense. As elaborated in later caselaw, an entry into the home does not occur until the space immediately around the home, known as the curtilage, is crossed. Again, the concept is physical. The search doctrine regulates where government agents can go to regulate what they see and hear.

The upshot of these cases is that early Fourth Amendment doctrine was largely concerned with physical searches by human beings with their human senses.[173] Physical searches were about where government agents could go and what they could see, hear, and smell. People can only see so far, and can hear quiet sounds only nearby, and can smell odors only in the area. The Supreme Court developed Fourth Amendment rules focused on the surveillance tool of the human being, directing where human beings were allowed to go to use the powers of their senses.

Then came new technology, which altered the surveillance tool that the Fourth Amendment regulates. Technology disassociated the *where* question (where monitoring occurred) from the *what* question (what information was collected). Technological tools were no longer place-based, limited to the places where the surveillance tool of human beings were located. This raised the question of how to address surveillance that no longer involved physical intrusion into protected spaces. Unlike with physical surveillance, the new technology called for some kind of new theory—some principle, or some analogy, or some idea—for how to apply the old principle without the physical intrusion of old-style searches.

Some of the new technologies used by governments are sense-enhancing tools—tools that add to the human senses. Some tools expand what the eye can see, like searchlights that could illuminate at night, first addressed by the Supreme Court in 1927;[174] high-resolution cameras that could see details normal eyesight could not, considered by the Court in 1986;[175] and thermal-imaging devices that could see heat, which reached the Court in 2001.[176] Other devices aid the ear, such as the spike mike from *Silverman* or the microphone taped to the top of the phone booth in *Katz*. Still others aid the human nose, like the narcotics detection dogs who used their extraordinary canine sense of smell in cases like *United States v. Place*,[177] *Illinois v.*

173. The main exception was Boyd v. United States, 116 U.S. 616 (1886), which addressed how to evaluate an order to compel a document. The Court treated the order to compel a document as the equivalent of physical entry to search a place to find and seize the document.

174. United States v. Lee, 274 U.S. 559 (1927).

175. Dow Chem. Co. v. United States, 476 U.S. 227 (1986).

176. Kyllo v. United States, 533 U.S. 27 (2001).

177. 462 U.S. 696 (1983).

Caballes,[178] and *Jardines*. All of these situations involve the government using tools to expand what government agents can see, hear, and smell. They let the government see from far away what it couldn't before see, hear what it couldn't before hear, and smell what it couldn't before smell.

Other technological advancements altered what information exists and how it is collected. The most obvious examples are from telecommunications networks like the traditional phone network and the modern cell phone system. Wiretapping, which first reached the Supreme Court in 1928, permitted the government to listen in on phone calls that were carried by wires out in public.[179] Cell site location records, which reached the Court in 2018, were generated by cell phones people were carrying and created a massive database of accurate location records that could later be accessed to track people in the past.[180] These technologies were not tools specifically used by governments; rather, they were communications technologies broadly used by the public. But they meant that there was new information for the government to collect that it could collect without the traditional means of government agents using their senses to physically invade people, houses, papers, or effects.

Technological change triggers a new set of questions for Fourth Amendment search doctrine. When technology disassociates the where of surveillance from the what of surveillance, courts face a choice. They can either stick with the old physical rules based on where the surveillance occurs, or else they can develop a new theory of what surveillance can occur that does not hinge on that question. The former option is clear, but it leads to a gutting of constitutional protection over time. The latter choice preserves the role of the Fourth Amendment over time, but it requires articulating some new theory of what surveillance to allow to add to or replace the prior inquiry into where the surveillance occurs. Identifying which theory is the right one is a complicated question. My point here is narrower: Some theory is needed.

This is not some novel idea. It is not a Warren Court innovation from the late 1960s. It goes back at least to *Boyd v. United States*[181] in 1886, when the Court considered how the Fourth Amendment applies when the government compels individuals to disclose private records to the government rather than allows the government to conduct a direct search for them. This was just as much a search as a direct search, Justice Bradley wrote for the full court, because "[i]t is not the breaking of his doors, and

178. 543 U.S. 405 (2005).
179. Olmstead v. United States, 277 U.S. 438 (1928).
180. *See* Carpenter v. United States, 585 U.S. 296, 296 (2018).
181. 116 U.S. 616 (1886).

the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property[.]"[182] Note the switch from physicality ("the breaking of his doors") to a higher level of abstraction, an underlying theory of why conduct beyond physical intrusion matters, too ("the invasion of his indefeasible right of personal security, personal liberty and private property").

Justice Brandeis picked up the same theme in 1928 in his dissent in *Olmstead v. United States*,[183] the wiretapping case. When the Fourth Amendment was adopted, Brandeis wrote, governments "could secure possession of his papers and other articles incident to [a person's] private life—a seizure effected, if need be, by breaking and entry."[184] But technology had changed: "Subtler and more far-reaching means of invading privacy have become available to the Government."[185] And the future made physical focus particularly troubling: "Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home."[186] Under Brandeis's approach, it was "immaterial where the physical connection with the telephone wires leading into the defendants' premises was made."[187]

Of course, Justice Brandeis's view did not prevail in 1928. And the *Boyd* regime did not last long, being undercut in later decades by cases that treated orders to compel differently than had *Boyd*.[188] By the middle of the 20th century, however, the problem with limiting the Fourth Amendment to physical intrusion had become more readily apparent. Just recall Edward Bennett Williams's argument in *Silverman*, the spike mike case, made six years before *Katz*. Williams made all the same kinds of privacy and technology arguments that later animated *Katz*.[189] The *Silverman* majority opted to rule narrowly, focusing on the technical (if *de minimis*) physical intrusion that happened to occur into the wall in that case. But the basic problem of needing to go beyond physical intrusion in light of new technology was plain long before Charlie Katz happened to step into his phone booth and place his bets.

182. *Id.* at 630.
183. 277 U.S. 438 (1928).
184. *Id.* at 473 (Brandeis, J., dissenting).
185. *Id.*
186. *Id.* at 474.
187. *Id.* at 479.
188. For a discussion, see William J. Stuntz, Commentary, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 858–59 (2001).
189. *See supra* notes 51–58, 86–88.

The takeaway from this history is that there is a certain inevitability to the questions asked under the intrusion framing of the search test. With the notable exception of Justice Black, every other Justice since the post-World War II era has expressed a commitment to maintaining the role of the Fourth Amendment as technology changes.[190] The intrusion framing accommodates this shared commitment as it seeks to extend the Fourth Amendment search test beyond physical intrusion. There are two distinct problems, and those two problems can helpfully be answered with two tests.

B. The Problem with Property

A different picture emerges under the property understanding, which treats *Jones* as a property test based on technical legal doctrines such as trespass and sets up *Katz* as a contrasting privacy test. This framework looks to outside doctrines and concepts to fill in what is a search. But neither property doctrine nor concepts of privacy accurately capture the constitutional question of what is a "search" of "persons, houses, papers, and effects."

Let's start with property, and the challenges of adopting a technical property doctrine approach to what is a search. In a recent article, *Decentering Property in Fourth Amendment Law*,[191] Michael Pollack and Matthew Tokson detail the poor fit between the technicalities of property law and the Fourth Amendment search inquiry. According to Pollack and Tokson, property rights are too uncertain and varied to establish clear Fourth Amendment rules.[192] Property rights are divided into different interests, and those interests can be further divided and transferred under a range of circumstances. Who has exactly what rights can be unclear, and the answers under different forms of property law are open-ended and potentially subject to legislative manipulation.[193] These historical doctrines are therefore ill-suited to the needs of Fourth Amendment law, they argue.

I generally agree with Pollack and Tokson's conclusions. But I would add that their conclusion is not entirely new. It was shared by Justices of the United States Supreme Court during the mid-20th century. By the time of *Katz*, the Supreme Court had grappled with the role of technical property doctrine and concluded that those doctrines were ill-suited to answer the constitutional questions the text of the Fourth Amendment poses. Common

190. *See* Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment,* 125 HARV. L. REV. 476, 532–33 (2011) (discussing the general approach, as well as Justice Black's disagreement with it).

191. Pollack & Tokson, *supra* note 21.

192. *See id.*

193. *See id.*

law doctrines of property and tort evolved for historical reasons in a very different setting, the Court had concluded; they do not translate well to the text and history of the Fourth Amendment.

Silverman, the spike mike case from 1961 detailed in Part I, is perhaps the poster child for this dynamic. Recall that, in holding that the officers inserting the spike mike just a fraction of an inch into the adjoining house was a search, *Silverman* stated that "we need not pause to consider whether or not there was a technical trespass under the local property law relating to party walls. Inherent Fourth Amendment rights are not inevitably measurable in terms of ancient niceties of tort or real property law."[194] This was presumably so, as elaborated upon earlier, because the byzantine law of party walls seemed to hinge on history and local traditions with no obvious connection to Fourth Amendment concerns.[195]

Silverman was not the first Supreme Court case to reject property distinctions in Fourth Amendment law, however. An early example is *McGuire v United States*,[196] from 1927. Armed with a warrant to seize liquor, agents broke into McGuire's home. After entering, the agents seized some of the booze and destroyed the rest. McGuire argued that destroying the booze rendered the initial entrance a trespass under the common law doctrine of trespass ab initio.[197] The legal fiction of this trespass doctrine is that a person who enters a place with permission, but then abuses his authority once inside, is deemed to have entered the place without permission "ab initio"—that is, from the beginning.[198] Ah ha, said McGuire: Destroying some of the booze went beyond the warrant, which rendered the entrance and seizure of the booze not destroyed unlawful and subject to suppression for violating the Fourth Amendment.

The Supreme Court in *McGuire* disagreed. Justice Stone, writing for the Court, noted that whether the officers could be civilly liable for trespass was different from whether the Fourth Amendment was violated. The common law doctrine of trespass ab initio was "a fiction whose origin, history, and purpose do not justify its application where the right of the government to make use of evidence is involved."[199] The legal fiction of civil trespass law might make the entry unlawful for tort purposes, tainting everything that followed for tort purposes. But these technicalities of trespass law did not change the reality of what the government had done. The liquor that was

194. Silverman v. United States, 365 U.S. 505, 511 (1961).
195. *See supra* Part I.
196. 273 U.S. 95 (1927).
197. *See id.* at 96–97.
198. *See, e.g.*, Wilson v. Ellis, 28 Pa. 238, 239–49 (1857) (discussing and applying the doctrine).
199. *McGuire*, 273 U.S. at 100.

seized but not destroyed was in fact seized pursuant to the warrant, and therefore could be admitted under the Fourth Amendment.[200]

A Fourth Amendment standing case from 1960, *Jones v. United States*,[201] is also illuminating. The question in the case was how much connection to a house a person needed to have Fourth Amendment standing to challenge its unlawful search. Cecil Jones was staying at a friend's apartment with the permission of his friend Evans, who lived there. Evans gave Jones a key, and Jones kept a few clothes there, but he rarely if ever spent the night there.[202] The D.C. Circuit rejected Jones's claim to standing on the ground that he was merely a guest or invitee, and he therefore lacked a property interest in the apartment searched needed to challenge it.[203]

In an opinion by Justice Frankfurter, the Supreme Court rejected property law as the Fourth Amendment guide: "Distinctions such as those between 'lessee,' 'licensee,' 'invitee' and 'guest,' often only of gossamer strength, ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards."[204] The "subtle distinctions" of common law property had "been shaped by distinctions whose validity is largely historical," Frankfurter explained, and it was "unnecessary and ill-advised to import" them into Fourth Amendment law with its focus on the "fair administration of the criminal law."[205] What mattered, Justice Frankfurter explained, was whether the person was "legitimately on premises" and could "invoke the privacy of the premises searched," or else had a "wrongful presence" and could not.[206]

In short, the problems with the technicalities of property law as a Fourth Amendment guide were recognized by the Supreme Court decades ago. Modern courts need only recall the experience of the Supreme Court in the 20th century to recognize the poor fit between those technicalities and the Fourth Amendment. Physical intrusion provides a sound sufficient condition for a search. But physical intrusion and trespass are different, and the Supreme Court should embrace the former standard instead of the latter.

C. The Problem with Privacy

Adopting a property-based understanding of *Jones* is also problematic for what it says about *Katz*. The pairing comes naturally: If you see *Jones*

200. *Id.* at 97–100.
201. 362 U.S. 257 (1960).
202. *Id.* at 259.
203. Jones v. United States, 262 F.2d 234, 236 (D.C. Cir. 1958).
204. *Jones*, 362 U.S. at 266.
205. *Id.*
206. *Id.* at 267.

as hinging on property doctrine, you will tend to see *Katz* as hinging on concepts of privacy. But understanding *Katz* as some kind of free-standing privacy test runs into even greater problems than treating *Jones* as a technical property test. The problem goes beyond the basic difficulty, developed by many scholars previously, that there is no particular agreement as to the meaning of privacy.[207] A more pressing problem is the suspect nature of a privacy test in the eyes of many members of today's federal judiciary—including, possibly, a majority of the current Supreme Court.

To explain this problem, let me paint with a broad brush. Generally speaking, to judges and legal theorists on the political left, the idea of a privacy test for searches seems intuitively plausible if not obvious.[208] Property is a way to protect privacy in traditional objects, the thinking runs. The right to exclude is the law's commitment to privacy in owned objects. Extending the search inquiry to a privacy test seems to generalize Fourth Amendment protections outside property.[209] A privacy test seems to capture the same value that a property test captures, but for all contexts rather than just contexts about interference with property rights. No wonder, then, that liberal Justices on the Supreme Court have generally supported the *Katz* test.[210]

A very different picture emerges among judges and legal theorists on the political right. To them, a search test based on privacy seems entirely made up. Consider the views of Justice Scalia, who saw the *Katz* test as a freestanding privacy inquiry that was wholly illegitimate. In Scalia's colorful language, the reasonable expectation of privacy test was a "self-indulgent test" that was simply the policy views of the Justices. It bears an "uncanny resemblance to those expectations of privacy that this Court considers reasonable," Scalia proclaimed, and "it has no plausible foundation in the text of the Fourth Amendment."[211] The Fourth Amendment "did not guarantee some generalized 'right of privacy' and leave it to this Court to determine which particular manifestations of the value of privacy 'society is prepared to recognize as reasonable,'" Scalia wrote.[212] The constitutional text enumerated four things that the Fourth

207. *See generally* Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477 (2006) (detailing the different ways in which privacy has been understood).

208. *See, e.g.*, Florida v. Jardines, 569 U.S. 1, 13 (2013) (Kagan, J., concurring) ("The Court today treats this case under a property rubric; I write separately to note that I could just as happily have decided it by looking to Jardines' privacy interests.").

209. *See id.*

210. *See id.*

211. Minnesota v. Carter, 525 U.S. 83, 97 (1998).

212. *Id.*

Amendment protects—persons, houses, papers, and effects— and "further expansion" of the Fourth Amendment was up to "the good judgment, not of this Court, but of the people through their representatives in the legislature."[213]

If you hear echoes of debates over *Roe v. Wade* in this passage, your ear is not leading you astray. Employing a constitutional test based on the word "privacy"—a test adopted by the Supreme Court just about the time the Court handed down *Roe*—is like waving a red flag in front of a bull. To many conservative judges, a "privacy" test is what the Supreme Court of the 1960s and 1970s would declare when it wanted to adopt an expansive right and it had no constitutional text to get there. If all else fails, you just turn your feelings into a new "right of privacy" and strike down what offends you. To many conservative judges, identifying a "reasonable expectation of privacy" appears derived from the same lineage—and to suffer, in their view, from the same illegitimacy.[214] Just as *Roe* invented a right to privacy to create an abortion right, so *Katz* invented a right of privacy to expand the Fourth Amendment.

Indeed, it should be no surprise that of the five Justices that formed the majority to overturn *Roe* and *Casey* outright in *Dobbs v. Jackson Women's Health Organization*,[215] two of the three Justices that were on the Court when the Supreme Court last decided a case on *Katz* wrote dissenting opinions urging that *Katz* be overturned. To Justice Gorsuch, *Katz* is about "some abstract 'expectation of privacy' whose contours are left to the judicial imagination."[216] This is illegitimate, Justice Gorsuch argues, because it "often calls for a pure policy choice, many times between incommensurable goods—between the value of privacy in a particular setting and society's interest in combating crime."[217] The Court should overturn *Katz*, Justice Gorsuch argued, and return to the pre-*Katz* test that, Gorsuch asserts, was "tied to the law."[218] Justice Thomas also urged that *Katz* be overturned, echoing the criticisms that Justice Scalia had made earlier.[219]

It is too early to know, if one adopts a privacy-based view of *Katz*, if there will be a majority to overturn the decision. Justices Barrett and Kavanaugh arrived at the Supreme Court after *Carpenter* in 2018, and the

213. *Id.* at 97–98.

214. *See* Orin S. Kerr, Katz *as Originalism*, 71 DUKE L.J. 1047, 1059 (2022) (developing this argument).

215. 597 U.S. 215 (2022).

216. Carpenter v. United States, 585 U.S. 296, 391 (2018) (Gorsuch, J., dissenting).

217. *Id.* at 393.

218. *Id.* at 397.

219. *Id.* at 342–52 (Thomas, J., dissenting).

Court has not heard a Fourth Amendment case on what is a "search" since that time. But the property/privacy understanding of *Jones* and *Katz* invites this divisive understanding of the *Katz* test. It arrives at today's Supreme Court with a feel of illegitimacy, tempting at least two and perhaps a future majority of Justices to do to *Katz* what *Dobbs* did to *Roe*—namely, to overturn it.

D. Avoiding a Splintering of Fourth Amendment Search Doctrine

All of this is avoidable under the intrusion standard. The reason is straightforward: Although several conservative Justices have expressed a wish to overturn *Katz*, it turns out that the same Justices readily embrace the idea that the Fourth Amendment should extend beyond physical invasion.[220] The division is over whether to have a privacy test, not on whether to adopt a beyond-physical-intrusion standard. From this perspective, the core disagreement over *Katz* seems to be more a matter of form than substance. Adopting an intrusion standard reflects the broad agreement among today's Justices as to that substance. Recognizing that *Jones* is about intrusion may prevent the overturning of *Katz* by encouraging the express adoption of a more consensus-based understanding of *Katz* as a test that looks to analogues to physical intrusion for new technological facts.

Consider Justice Scalia's majority opinion in *Kyllo v. United States*,[221] which ruled that it was a search to use a thermal imaging device to reveal the temperature profile of a home. *Kyllo* starts by echoing Scalia's prior criticisms of *Katz*, all of which are based on the assumption that *Katz* is some sort of freestanding privacy test.[222] But then *Kyllo* declares that, despite all of these problems, use of the thermal imaging device must be a search:

220. See, for example, the opinions of Justices Thomas and Gorsuch in *Carpenter*, *id.* at 342–61, 386–406, as well as Justice Scalia's majority opinion in *Kyllo v. United States*, 533 U.S. 27 (2001), holding that use of a thermal imaging device directed at a home from a public place is a search.

221. 533 U.S. 27 (2001).

222. See, most prominently, his concurrence in *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 (which has come to mean the test enunciated by Justice Harlan's separate concurrence in Katz) 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.'" (citations omitted)).

> [T]here is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*. To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment. We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical "intrusion into a constitutionally protected area," *Silverman*, 365 U.S. at 512, constitutes a search—at least where (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.[223]

This passage from Justice Scalia is pure *Katz,* at least under the intrusion understanding of *Katz*. It's exactly what *Katz* was designed to do under the intrusion standard. It extends the Fourth Amendment search test beyond physical penetration, recognizing that technology has permitted a functional equivalent of physical intrusion without its mechanics. If Justice Scalia had realized in *Kyllo* that the pre-*Katz* line was just physical intrusion (a question not briefed in *Kyllo*) it's possible that he might have recognized his fundamental agreement with *Katz*. Despite Scalia's strong rejection of *Katz*'s language, he was entirely on board with its historical function: extending the Fourth Amendment search test beyond *Silverman*'s line of physical intrusion in light of how technology can now achieve the effects of intrusion without the physically intrusive act.[224]

Justice Gorsuch marks out similar territory in his dissent in the cell-site location records case, *Carpenter v. United States*.[225] The main issue in Carpenter was whether the government triggered a search when it compelled customer cell-site location records from a cell phone company. After rejecting the *Katz* test as unmoored and made-up, and urging that the search inquiry should instead be "tied to the law,"[226] Justice Gorsuch offers a series of guideposts, rooted mostly in analogies to property law, that he suggests should be applied to apply the Fourth Amendment beyond physical intrusion. For example, according to Justice Gorsuch, handing your property to someone else does not necessarily eliminate privacy in it, which is a

223. *Kyllo*, 533 U.S. at 34.

224. To be sure, Justice Scalia disagreed slightly with Justice Stevens over whether an actual equivalent need be established, but as Justice Scalia notes, the differences are methodological rather than conceptual. *See id.* at 39.

225. 585 U.S. 296 (2018).

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

"truth" that he recognizes "Fourth Amendment jurisprudence already reflects."[227] Second, "complete ownership or exclusive control of property" is not required to establish Fourth Amendment rights in the property.[228] Justice Gorsuch says that "the text of the Amendment and the common law rule support that conclusion,"[229] but of course it is also the doctrinal rule today. Gorsuch's guideposts, in short, are pure *Katz*. Mirroring the caselaw under *Katz*—and often citing that caselaw—Justice Gorsuch's guideposts aim to extend the concepts of intrusive acts beyond actual physical intrusion.

Whatever one thinks of these principles, they are entirely consistent with the intrusion understanding of *Katz*. Under the intrusion approach, *Katz* is not policymaking free from constitutional constraint. Instead, it merely recognizes the need to ensure that constitutional rights are not at the mercy of technological change—a need recognized as much by *Katz*'s harshest critics as by its defenders.

E. Digital-Only Searches Should Be Resolved by Katz*, Not* Jones

At this point the reader may be wondering: How does this cash out? What practical difference does it make? The clearest difference involves Fourth Amendment rights involving new technologies such as computers and the Internet. Lower courts are currently working through novel questions about how to apply the Fourth Amendment in the digital environment.[230] In that context, courts confront the question: Is the Fourth Amendment search test in the digital world just a question of *Katz*, or is it also an issue of *Jones*? And if *Jones* is in play, is there a broad digital-equivalence version of *Jones* that might apply to limit digital evidence collection?

Lower courts are unsure of the answers. The leading example of using *Jones* in the digital realm is *United States v. Ackerman*,[231] a 2016 Tenth Circuit ruling by then-Judge Neil Gorsuch. The relevant part of *Ackerman* contended that *Jones* would create an alternative rationale for holding that government access to a person's emails is a search. Such access involved the "warrantless opening and examination of (presumptively) private correspondence," Justice Gorsuch reasoned, which "seems pretty clearly to qualify as exactly the type of trespass to chattels that the framers sought to prevent when they adopted the Fourth Amendment."[232] Indeed, "a more

227. *Id.* at 399–400.
228. *Id*. at 401.
229. *Id.*
230. *See generally* ORIN KERR, THE DIGITAL FOURTH AMENDMENT (2025).
231. 831 F.3d 1292 (10th Cir. 2016).
232. *Id.* at 1307.

obvious analogy from principle to new technology is hard to imagine[.]"[233] This meant, according to Justice Gorsuch, that "the traditional trespass test suggested by *Jones*" therefore "yield[ed] the same (and pretty intuitive) result" that the government opening email was a search.[234]

Justice Gorsuch's approach in *Ackerman* is consistent with his later dissent in *Carpenter*. Justice Gorsuch treats the two basic questions of search doctrine (physical vs. non-physical intrusions) as *both* within the realm of *Jones*. In Gorsuch's view, *Jones* is rooted in common law principles such as trespass that encompass both physical trespasses and their non-physical virtual equivalents. Because the two questions of search doctrine are addressed entirely within *Jones*, Justice Gorsuch can present *Katz* as an illegitimate interloper into Fourth Amendment doctrine that should be overturned because it is based on judicial policymaking and not "the law."[235]

Lower courts have been unsure of whether to adopt Justice Gorsuch's view that *Jones* can include purely digital searches. In the many cases involving undercover investigations over peer-to-peer networks, in which a government agent remotely access files stored in a suspect's personal computer shared folder, courts have rejected the notion of a *Jones* digital trespass.[236] Invoking the sentence from *Jones* that "[s]ituations involving merely the transmission of electronic signals without trespass would remain subject to *Katz* analysis[,]"[237] those courts have tended to see "trespass" from *Jones* as implicitly limited to physical intrusion and excluding digital

233. *Id.* at 1308.

234. *Id.*

235. Carpenter v. United States, 585 U.S. 296, 397 (2018) (Gorsuch, J., dissenting).

236. For a representative passage, see, for example, *United States v. Brashear*:

> Several courts have rejected the application of Jones to the investigation of file sharing programs. *See Russell v. United States*, Civ. A. No. 11–1104, 2013 WL 5651358 at *8 (E.D. Mo. Oct. 16, 2013); *United States v. Nolan*, Crim. A. No. 11–82, 2012 WL 1192183 at *10–11 (E.D. Mo. Mar. 6, 2012); *United States v. Brooks*, Crim. A. No. 12–166, 2012 WL 6562947 at *5 (E.D.N.Y. Dec.17, 2012); *State v. Lemasters*, Crim. A. No. 2012–12–028, 2013 WL 3463219 at *3–5 (Ohio App. July 8, 2013). The court concurs with the rationale of these decisions. The investigation of a file sharing program does not involve any physical trespass onto a constitutionally protected area.

No. 11-CR-0062, 2013 WL 6065326, at *3 (M.D. Pa. Nov. 18, 2013) (cleaned up).

237. Jones v. United States, 565 U.S. 400, 411 (2012). The passage reads:

> The concurrence faults our approach for "present[ing] particularly vexing problems" in cases that do not involve physical contact, such as those that involve the transmission of electronic signals. . . . We entirely fail to understand that point. For unlike the concurrence, which would make *Katz* the *exclusive* test, we do not make trespass the exclusive test. Situations involving merely the transmission of electronic signals without trespass would *remain* subject to *Katz* analysis.

Id. Although the passage is somewhat unclear, it is subject to the reading, that some lower courts have followed, that cases involving merely the transmission of electronic signals are covered only by *Katz*.

trespass.[238] But other courts have been unsure, often pausing to note the possibility that *Jones* includes electronic trespasses but resolving search cases on other grounds without reaching the question.[239]

Under the intrusion approach this Article recommends, the Fourth Amendment implications of digital trespass should be answered under *Katz* rather than *Jones*. Indeed, this is the point of *Katz*. Because the *Silverman* standard re-applied by *Jones* only covers physical intrusion, it is up to *Katz* to address when a search might be recognized in its absence. This does not mean that all computer searches must be *Katz*-only. For example, some courts have ruled that the physical act of typing into a physical keyboard is a *Jones* physical intrusion into the computer in addition to a more obvious *Katz* electronic access of its data.[240] Whether that is right or wrong in the case of a stand-alone computer—a matter on which I express no opinion here—electronic-only access over remote computer networks should be addressed exclusively under *Katz*. The hunt for apt virtual analogies to physical intrusion is a crucially important question, but it is the raison d'être of *Katz*, not a matter of theorizing under *Jones*.

CONCLUSION

Disputes in constitutional law often mask deep divides over substance. But there are also debates over form, in which forms take on deep ideological significance even absent substantive disagreement. The future of Fourth Amendment search doctrine is an example of the latter, not the former. Moving beyond categories of "property" and "privacy" is not just historically more accurate—although it is that. It also puts Fourth Amendment doctrine on more stable ground. There is broad agreement that unlicensed physical intrusion into a person, house, paper, or effect is a search. And there is equally broad agreement that there must be some doctrine to recognize the modern technological equivalents of physical intrusions enabled by technological change. Fourth Amendment doctrine should cover both categories. The question is, how?

As this Article has shown, the history of Fourth Amendment development provides a clear answer. Studying the forgotten period before *Katz* reveals that physical intrusion was the fault line. Pre-*Katz* law had

238. *See, e.g.*, *Brashear*, 2013 WL 6065326.

239. *See, e.g.*, Jones v. United States, 168 A.3d 703, 716 n.27 (D.C. Cir. 2017) (describing the question as "vexing," and not answering it, in a case on whether use of a cell-site simulator is a search); United States v. Clark, 673 F. Supp. 3d 1245 (D. Kan. 2023).

240. *See, e.g.*, United States v. Sam, CR19-0115, 2020 WL 2705415, at *1–2 (W.D. Wash. May 18, 2020) (concluding that powering on a cell phone was a *Jones* search, as doing so "physically intruded on" the defendant's "personal effect").

embraced physical intrusion as one test while leaving open whether search doctrine also extended beyond that point. *Katz* then added searches beyond physical intrusion, largely in response to how new technologies and social practices allowed for new kinds of access to private information without physical intrusion. This close study of overlooked materials shed fresh light on *Jones*'s return to the pre-*Katz* standard. The modern conception of a "trespass" theory and a "privacy" theory of the Fourth Amendment is largely a post-*Roe* development. *Jones* rests on the mechanics of physical intrusion, not the legal doctrines of trespass.