



ALBANY LAW SCHOOL

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**From Investigations to
Incarceration:
How Science and Technology
Impact the Different Stages of the
Criminal Justice System**

November 8, 2018

80 NEW SCOTLAND AVENUE
ALBANY, NEW YORK 12208-3494
TEL: 518-472-5888 FAX: 518-445-2303
WWW.ALBANYLAW.EDU/CLE

**From Investigations to Incarceration: How Science and Technology
Impact the Different Stages of the Criminal Justice System**

November 8, 2018

Agenda

**3:00pm – 3:30pm
Registration**

3:30pm – 4:45pm Investigation & Litigation *How agencies' use of surveillance technologies, including wire-tapping, impact current criminal investigation and how the use of DNA has propelled the criminal justice system into the 21st century but privacy concerns are on the rise*

Moderator:

Prof. Melissa Breger
Albany Law School

Panelists:

Jennifer M. Assini, Esq., Assistant District Attorney
Schenectady County District Attorney's Office

Michael Deyo, Esq., Deputy Counsel
New York State Police

Eric Galarneau, Esq., Bureau Chief of Financial Crimes
Albany County District Attorney's Office

Stephen P. Hogan, Esq.
New York State Police

Kimberley F. Wallace, Esq.
Carter Conboy

4:45pm – 5:00pm Break

5:00pm – 5:45pm Keynote Speaker:
Joseph Giarratano

5:45pm – 6:00pm Break

6:00pm – 7:00pm Incarceration *Exploring the psychological effects of long term confinement and how technology has impacted the current conditions of our prisons*

Moderator:

Prof. Vincent M. Bonventre
Albany Law School

Panelists:

Sheriff Craig Apple
Office of the Albany County Sheriff

Kevin Cahill, Ph.D. Vice President of Treatment
Soldier On

Jonathan Gradess, Esq., Former Executive Director
New York State Public Defenders Association

Victor Pate
New York Campaign for Alternatives to Isolated Confinement (NY-CAIC)

Dr. Ray Wickenheiser DPS, Director
NYSP Crime Laboratory System, New York State Police

7:00pm Reception – East Foyer

From Investigations to Incarceration: How Science and Technology Impact the Different Stages of the Criminal Justice System

November 8, 2018

SPEAKER BIOGRAPHIES

SHERIFF CRAIG D. APPLE SR., Craig D. Apple, Sr. became Sheriff of Albany County in 2011. He has served in the Albany County Sheriff's Office since 1987. His career began as a Correction Officer and he became a Deputy Sheriff in 1989, an Investigator in 1991, a Sergeant in 1993 and Lieutenant in 1995 when he was supervisor of the Criminal Investigations Unit. During his years of public service, as Sheriff of Albany County, he has implemented numerous programs at the Albany County Correctional Facility, which include: (SHARP) Sheriff's Heroin Addiction Recovery Program, Soldier On and the Inmate Work Force which provides free labor to not for profits, while teaching inmates to be productive members of society. Sheriff Apple tours the region educating the public of the dangers associated with the heroin epidemic. He also began the practice of signing up eligible inmates for the Affordable Healthcare Program, at a savings of half a million dollars annually. The Rape Aggression Defense Classes teach women to thwart off an attacker by building their confidence. Our office also offers the Yellow Dot Program and Project Lifesaver to keep persons with Autism and Alzheimer's safe. The Sheriff ran for his second unopposed term in 2015.

JENNIFER MARINDIN ASSINI, ESQ. has been an Assistant District Attorney in the Schenectady County District Attorney's Office since 1991. She currently is the Bureau Chief for Intelligence and Investigations, and supervises the CARP Program and the County's Public Surveillance Camera System. Additionally, since 2011, as a member of the FBI-led Safe Streets Gang Task Force, she is cross-designated as a Special Assistant U.S. Attorney in the Northern District of NY, working with the task force to combat violent actors and street groups or gangs. During her tenure in Schenectady County, she has prosecuted all types of criminal activity; held the positions of Child Abuse and Sex Crimes prosecutor, and Financial Crimes prosecutor; handles the eavesdropping applications and warrants for the office; she created and ran the forfeiture unit; and specifically prosecutes environmental crime, corporate crime, homicide, gambling cases, and coordinates investigations with all levels of state and federal law enforcement. She is a designated GIVE prosecutor, focusing on the overall reduction of gun violence in the community through Focused Deterrence. Prior to joining the DA's Office, Mrs. Assini practiced civil litigation at the Albany law firm of Shanley, Sweeney, Reilly & Allen, and at the law firm of Hartman and Crain in Annapolis, Maryland. She graduated from Vermont Law School in 1987 and from Bucknell University in 1984 (Biology, Political Science). She is married, has two great children and a sweet Labrador retriever.

PROF. MELISSA BREGER has been teaching at the law school level for 19 years, first at The University of Michigan Law School and then at Albany Law School since 2002. Prior to teaching, Professor Breger dedicated her career to children, women and families, with her formative years practicing in New York City in a number of capacities.

She is the recipient of several teaching and service awards, both on a local level and on a national level, including the Shanara C. Gilbert Award in Recognition of Her Excellence in Teaching and Contributions to the Advancement of Social Justice from the American Association of Law Schools, the L. Hart Wright Excellence in Law Teaching Award from The University of Michigan Law School, and the 2016 Faculty Award for Excellence in Teaching and the 2018 Faculty Award for Excellence in Service from Albany Law School. Professor Breger also received the Albany County Family Court Children's Center Award "In Recognition Of Her Outstanding And Tireless Work Assisting Children And Families In Need And For Her Dedication To Ensure That Law Students Obtain The Skills Necessary To Provide High Quality And Compassionate Legal Services To Family Court Litigants" in May 2008. Professor Breger teaches a variety of courses at Albany Law School, including Evidence, Family Law, Criminal Procedure: Investigation (4th, 5th, 6th A), Gender & the Law, Children, Juveniles & the Law (hybrid online), Domestic Violence Seminar, and Children & the Law. She was the Director of the Family Violence Litigation Clinic from 2002 to 2010. Professor Breger is the co-author of NEW YORK LAW OF DOMESTIC VIOLENCE, a two-volume treatise published by Reuters-Thomson-West, as well as the author of numerous law review articles regarding issues of family law, gender, and justice. Her scholarly interests include the rights of children and families, gender and racial equality, procedural justice in the courtroom, juvenile justice, the increasing epidemic of child sexual trafficking, implicit bias, law and culture, and the intersections between psychology and the law. Prof. Breger received her B.S. from the University of Illinois and her J.D. from the University of Michigan Law School.

PROF. VINCENT MARTIN BONVENTRE is the Justice Robert H. Jackson Distinguished Professor at Albany Law School. He received his PhD in Government, specializing in public law, at University of Virginia; a JD from Brooklyn Law School; and a BS from Union College. Dr. Bonventre teaches, comments and advises on courts, judges, and various areas of public law. Those areas include the judicial process, the Supreme Court and the New York Court of Appeals, criminal law, and civil liberties. He has authored numerous works on those subjects. Prior to joining the Albany Law School faculty in 1990, he was a law clerk to Judges Matthew J. Jasen and Stewart F. Hancock, Jr. of New York's highest court, the Court of Appeals. Between those clerkships, he was selected by Chief Justice Warren Burger to serve as a Supreme Court Judicial Fellow. Previously, he served two tours in the U.S. Army—one in military intelligence and one as trial counsel in the JAG Corps. Dr. Bonventre is the author of *New York Court Watcher*, a blog devoted to research and commentary on the U.S. Supreme Court and the New York Court of Appeals. He is also the founder and Editor of *State Constitutional Commentary*, an annual publication of the Albany Law Review devoted to American state constitutional law, and he is the founder and Director of the *Center for Judicial Process*.

KEVIN CAHILL is the Vice President responsible for treatment at Soldier On Inc., where he has worked for 10 years. It is in that capacity that he does counseling to veteran inmates at the Albany County Correctional Facility. Soldier On Inc. is a non-profit agency that provides case management and other services to veterans, who are homeless, in danger of losing their housing, or incarcerated. It has programs in 5 states. Prior to that,

Kevin Cahill was the Clinical Director of Meridian Associates for 30 years. Meridian Associates is an Agency in western Massachusetts which provides various services to individuals with severe mental illness. Kevin is a psychologist and completed his graduate work at the University of Massachusetts, University College Dublin, and Trinity College, Dublin.

MICHAEL W. DEYO, ESQ., Michael Deyo is Deputy Counsel for the New York State Police. In this role Mr. Deyo provides a broad range of general legal counsel services, with particular emphasis on legislative drafting and guidance; electronic surveillance laws; novel legal questions pertaining to electronic evidence; federal and state laws related to criminal and counterterrorism intelligence functions; and the investigation of crimes facilitated by the use of electronic devices. Prior to joining the State Police, Mr. Deyo was in private practice with an Albany-based law firm for several years, focusing on corporate investigations, regulatory compliance, complex litigation, forensic investigations, and privacy laws. Before that, Mr. Deyo led the information security, electronic discovery, and computer forensics practices for a private consulting firm. Mr. Deyo has worked on a wide variety of computer crime, information assurance, privacy, and data security investigations over a span of more than 15 years. Mr. Deyo received a B.S. in Criminal Justice—Economic Crime Investigation from Utica College of Syracuse University in 2000, and his J.D. from Albany Law School in 2007.

ERIC GALARNEAU, ESQ.

JOSEPH GIARRATANO was found guilty of the killing and rape of a daughter and the killing of her mother, and was sentenced to death in 1979. He spent 38 years incarcerated - 12 of which he spent on death row. Because of Virginia's "twenty-one-day rule" saying no new evidence can be admitted more than three weeks after a verdict is rendered, the court was not able to hear crucial evidence that was not originally presented including: the driver's license of another man found at the scene, along with bloody bootprints, hair, and fingerprints that did not match Giarratano. Fortunately for Giarranto, Virginia Governor L. Douglas Wilder granted Giarratano a commutation based on the DNA and forensic evidence and changed his sentence from death to life - making him eligible for parole after serving 25 years. Joseph Giarranto was finally paroled from prison in November 2017. In prison, the uneducated Giarratano taught himself the law and advocated for fellow prisoners by securing representation for Earl Washington Jr., another death row inmate, who was eventually exonerated by DNA evidence. He participated in his own litigation and at the United States Supreme Court in the case *Murray v. Giarrratano*, 492 U.S. 1 (1989), where the Court held there is no Constitutional right to appointed counsel in habeas proceedings for capital defendants. Giarratano has become noted as a legal scholar, published in the Yale Law Journal, and has worked to improve conditions in Virginia prisons.

JONATHAN E. GRADESS was the Executive Director of the New York State Defenders Association from 1978 until June 30, 2017. He has worked as a criminal defense lawyer, a private investigator, and a law school professor. He is the recipient of numerous awards, including the New York State Association of Criminal

Defense Lawyers 2017 Lifetime Achievement Award; Capital Region Chapter of the New York Civil Liberties Union 2016 Carol S. Knox Award; National Legal Aid and Defender Association 2016 Reginald Heber Smith Award; New York Nonprofit Media's Cause Awards, 2016 Overall Sector Support; Capital Punishment Committee of the New York City Bar Association 2016 Norman J. Redlich Award for Capital Defense Distinguished Service; New York State Association of Criminal Defense Lawyers 2002 *Gideon Award*; and New York State Bar Association Criminal Justice Section 1991 award for *Outstanding Contribution to the Delivery of Defense Services*. The New York State Assembly honored him with a resolution in June 2017. He serves on the Restorative Justice Commission of the Roman Catholic Diocese of Albany and the Board of Directors of Equal Justice USA. He was also the Executive Director of the New York State Defenders Justice Fund and managed its Campaign for an Independent Public Defense Commission. His career began as a paralegal, thereafter graduating *cum laude* in 1973 from Hofstra Law School's charter class.

STEPHEN HOGAN, ESQ., serves as an attorney for the New York State Police. His office provides a broad range of legal services including advice and assistance to State Police employees who work in the uniform force, the Bureau of Criminal Investigation and the New York State Police Crime Laboratory System Crime Laboratory System. The focus of his work includes domestic violence and guns, U & T Visas, forensic DNA testing (and the New York State DNA Databank). He serves as the representative of the State Police on the New York State Domestic Violence Advisory Council. Steve also works with state and federal prosecutors on matters related to admissibility of scientific evidence. Before joining the New York State Police, he prosecuted sex crimes and domestic violence cases as an Assistant District Attorney in Rensselaer County. He is a member of the faculty of the National College of District Attorneys and the New York Prosecutors Training Institute. Steve has served as Adjunct Professor of Biological Sciences and an Adjunct Professor of Criminal Justice at the University at Albany since 2002. He received teaching awards from the National District Attorney's Association (the Stephen R. Von Reisen Award), the New York State Police Academy (the George M. Searle Award) and the University at Albany (President's Excellence in Teaching Award). Mr. Hogan holds a J.D. from the University of Notre Dame Law School, an M.A. in International Affairs from American University and a B.A. from the Rockefeller College of Government and Public Affairs and Policy at the University at Albany.

VICTOR PATE is a NY CAIC Campaign Organizer who brings years of organizing experience into his role as NY Statewide CAIC Campaign Organizer. Victor is a formerly incarcerated individual who was released from prison in 1995 and successfully completed parole in 1999. His academic achievements include obtaining his G.E.D., Legal Research Certificate, Associate degree in Para-Legal Studies and Certification as a Legal Assistant. Victor became involved in the criminal justice reform arena after experiencing and overcoming the many obstacles faced by the formerly incarcerated coming home and striving to regain a foothold on life. Victor is engaged in social and criminal justice issues on various fronts, including serving as a chairperson of the nation Action Network NYC Chapter's Second Change Program to assist formerly incarcerated men and women as

they navigate to reenter society. Victor also serves as an active member of the Challenging Incarceration Coalition, New York State Prisoner Justice Network Steering committee, and Incarcerated Nation.

KIMBERLEY F. WALLACE, ESQ. is an Associate at Carter Conboy. She represents individuals and businesses in white collar and corporate governance matters and investigations, as well as members of law enforcement in matters involving discipline, critical incidents, criminal defense, and civil litigation defense of constitutional and civil rights issues. Additionally, Kimberley defends various transportation companies, commercial carriers, manufacturers, and professionals in State and Federal Courts throughout New York, as well as before administrative agencies and in mediation and arbitration matters. Before joining Carter Conboy, Kimberley was an Assistant Public Defender and Assistant District Attorney in Albany and Dutchess counties, where she managed misdemeanor and felony criminal cases from inception through trial. Ms. Wallace received her B.S. from Sage College of Albany, Law and Society, Oxford University (2012) and her J.D. from Florida State University College of Law (2012). She is a member of the New York State Bar Association, the Capital District Women's Bar Association, Capital District Black and Hispanic bar Association, the Albany County Bar Association and Sage College of Albany Alumni Association Board of Directors (2001-19). She was admitted to practice in New York State in 2015.

DR. RAY WICKENHEISER BSc is currently the Director for the New York State Police Crime Lab System, headquartered in Albany, New York. He is also a member of the American Society of Crime Laboratory Directors (ASCLD) Board of Directors and is currently the Past President. Ray has over 18 years of experience as a Crime Lab Director and Quality Manager in local and State Crime Laboratories and 35 years in forensic science, including 17 years with the Royal Canadian Mounted Police. His areas of expertise include crime lab administration, quality management, forensic DNA, serology, hair and fiber trace evidence, physical matching and comparison, glass fracture analysis, and forensic grain comparison. In New York, Ray is the Co-Chair of the New York Crime Lab Advisory Committee (NYCLAC) and the Chair of the Technical Working Group on Backlog Reduction (TWGBack). He was a member of the Department of Justice: National Institute of Justice Sexual Assault Forensic Evidence Reporting (SAFER) Working Group publishing the "National Best Practices for Sexual Assault Kit: A Multidisciplinary Approach". Ray has served as a peer-reviewer for a number of journals and advisor to several university forensic programs. Ray is a qualified ISO Auditor, conducting audits in 10 states as an auditor and DNA lead auditor. Ray is a member of the Forensic Science Standards Board (FSSB) for the Organization of Scientific Area Committees (OSAC) for Forensic Science, a fellow in the American Academy of Forensic Science (AAFS), and has been an invited guest to the Scientific Working Group on DNA Analysis Methods (SWGDM) since 2013. He has testified as an expert witness over 90 times, published numerous scientific articles, a book chapter, and is a frequent presenter at workshops and conferences. Ray has also served as an adjunct professor, teaching criminalistics at Montgomery College, Maryland. Ray holds a Bachelor of Science Honours degree from the University of Regina, Canada, a Master of Business Administration degree from the University of

Louisiana at Lafayette, Louisiana and a Doctorate of Professional Studies in Bioethics, Health Ethics and Policy from Albany Medical College.

Investigation & Litigation

Moderator:

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Michael Deyo, Esq.

Eric Galarneau, Esq.

Stephen P. Hogan, Esq.

Kimberley F. Wallace, Esq.

Impact In the Criminal Justice System

Re: Public Surveillance Camera System/Investigations

Practices

- Variety based on capacities**
- Wireless**
- Fiber**
- Personnel**

Items

- Privacy**
- Storage**
- Timely requests**
- Testimony**
- Justice**

Issues

- Funding**
- Secrecy**
- Appropriate Use**
- FOIL**

Technologies developing off of this technology

- Needs**
- Reality**

CSI Effect

Around the US

<https://www.nytimes.com/2018/06/09/nyregion/newark-surveillance-cameras-police.html>

***Jennifer M. Assini, ADA, SAUSA
Bureau Chief, Investigations & Intelligence
Schenectady County DA's Office
612 State Street
Schenectady, NY 12305
(518) 388-4364***

Investigations

(JMA 3/10/17; 10/26/18)

Consider the following:

1. Protect the life and safety of victims, civilians, officers and paramedics
2. Detain suspects on scene; relay descriptions of fleeing suspects & likely escape routes; relay any risk factors (i.e., armed). Look for camera coverage for same information to relay. Ask W if color blind.
3. Detain and identify all possible witnesses, including bystanders: name, DOB, license or other identifying document, address, cell phone # & service provider, employment, means of transportation to scene, any companions at scene, language spoken, barriers needing translator
4. Preserve crime scene; maintain decorum; be sensitive to situation and surroundings; document all statements of suspects (CPL §710.30).
5. Photograph/document scene before paramedics make changes or remove victim, if this can be done without interfering with medical assistance: e.g., take cell phone photos, do chalk outline, document any movement that they needed to make.
6. Crime Scene Sign-In Log. Accurate times of entry and exit from crime scene by all persons.
7. For indoor crime scenes, document initial conditions of possible means of entrance and exit before they were altered by 1st responders. As to each door & window: was it open or closed, locked or unlocked, damaged or disturbed, obstructed or not, dusty or smudged, etc.
8. Document any changes to crime scene and the reasons for making them. E.g., 1st responders pried open locked door to apartment building, pushed open unlocked door to Apt #3, switched on overhead light in living room, cut off victim's t-shirt and sweatshirt, moved bloody knife away from floor near victim's body, and removed victim to ambulance, before 1st evidence photos were taken. Obtain statements of paramedics and first officers, describing the scene as they first saw it, any changes they made, who made them, and the reason for such changes.
9. Blood Samples: As soon as feasible, obtain blood sample from all suspects, if there is any chance that the suspect's possible use of alcohol or drugs, legal or illegal, could become an issue in the case. E.g., intoxication defense, ability to form intent, purchase or theft of drugs, etc. This evidence disappears quickly.
10. Canvass neighborhood. Document all addresses checked & residents interviewed. Document unchecked addresses and unresponsive residents for later re-canvassing. Follow up, follow up, follow up. Seek all surveillance camera video that may exist from private camera systems.
11. Document license plates and vehicles parked near crime scene.

12. Document and preserve all surveillance cameras in area, including private (residential and business) cameras. Document locations and obtain consent or search warrants to obtain recordings. If probable cause exists, seize equipment or recordings if necessary to prevent destruction while promptly applying for warrant. Possibly warn owners that their surveillance equipment is believed to have captured material evidence, and intentionally erasing or altering any such recordings would constitute a crime.

13. Consider additional or alternative crime scenes: Did the victim walk or drive to location after being injured elsewhere? Was the body moved to the location? Could there be a second victim at a different location? Could this be one in a series of connected crimes?

14. Cell Phone Evidence:

a. Document all cell phone #s, periods of usage, types of contracts, service providers, passwords, and physical descriptions of phones used by victim, suspects, and key witnesses.

b. Immediately send preservation letters to service providers, preserving text messages, GPS data, call records, etc. Some critical records, such as text messages, are retained by service providers for very short periods of time, such as 5 days or less.

c. By consent and/or search warrant, obtain, preserve and download contents of cell phones possessed by victim, suspects, and key witnesses. If you are relying upon consent, download the phone immediately, before consent is revoked.

15. Street Cameras: Identify all street cameras in area of crime scene(s), as well as routes of approach to and escape from crime scene(s). Preserve video footage, and supply reviewer with suspected chronology of events and descriptions of suspects, victims, key witnesses, vehicles, or other relevant circumstances that may have been recorded. Privately owned camera systems should be sought and video obtained (residences and businesses). Other static camera systems such as weather and traffic cameras from TV stations may have evidence.

16. Call Notes: Print out call notes of primary call and any related incident(s) calls.

17. 9-1-1 Recordings: Preserve and print out all 9-1-1 calls.

18. In Car Videos: Preserve and copy in car videos of all cars responding to primary incident and any related incidents. Promptly review ICVs of responding cars for signs of fleeing suspects or witnesses. * Body cameras as police department begin to utilize will be another source to preserve and copy.

19. Field Notes: Copy field notes of all officers and detectives; include in investigative file.

20. DNA Samples: Obtain DNA buccal samples from all participants in incident, all suspects, and all persons who may have had contact with evidence items being tested for DNA. People who are cooperative today may be hostile tomorrow.

21. Photographs of physical condition: Photograph the physical appearance of any suspect, victim, possible participant or witness whose physical condition could become an issue. E.g., if

the person may have been in an altercation; if the suspect may claim self-defense; if a prior assault may have provided a retaliation motive. Injuries have ages, bruising changes with time.

22. Send preservation letters out to telephone and social media outlets.

WHAT CAN YOU DO? ALWAYS BE GATHERING MORE INFORMATION, IT CONTINUES THROUGH TO THE END OF THE CASE, VIA PLEA OR VERDICT

People:

- Name
- Alias/Street names
- Gang/Group Affiliation
- Friends/Associates
- Enemies
- Co-Defendants
- Contact Person
- Visitors
- Mail Contacts
- Telephone Contacts
- Commissary Contributors
- Spouse/Significant Other(s)
- Bail source
- Cell tower dumps/preservation letters
- License Plate Reader information

Info:

- DOB
- Height
- Weight
- Race
- Skin Tone
- Hair color/Style
- Eye Color
- Color blind
- Tattoos
- Scars
- Dominant Hand
- Medical Conditions/Disabilities
- Drug/Alcohol Use
- Weapon(s)
- Residences
- Automobiles
- Telephones
- Employment
- Family tree

Guns:

- If recovered, when, where, by whom?
- Ammunition, live rounds, brand, caliber
- Spent shell casings, brand, caliber
- Projectiles, brand, jacketing, caliber
- Where gotten, purchased, community stash location, stockpiles
- Sources

Official reports:

- Shots fired
- Firearm used
- Robberies
- Assaults
- Menacings
- Arrest in possession
- Arrest for use
- Vehicles involved

Unofficial reports

- Persons in possession of guns (dated info)
- Persons using guns
- Persons selling guns
- Persons possessing ammunition

Jail

- Visitors
- Mail contacts
- Telephone contacts
- Gang/group affiliation/threat levels
- Tattoos/Scars PHOTOS
- Contact persons
- Enemies
- Disciplinary actions
- Medical conditions/disabilities

Probation/Parole/Fed. Probation

- Employment
- Family members
- Residences
- Medical conditions/disabilities
- Drug/alcohol use
- Gang/group affiliation
- Co-defendants
- Employment

Police

- Weapons
- Automobiles
- Field Interview Cards
- Records Management System review
- Case audits

Crime Analysis Center Analysts

- Work-ups
- Social Media
- Facial Recognition
- Regional, State and National database access
- Crime Data

Investigative techniques to exhaust or to document not possible to utilize to support request for Eavesdropping Warrant; those used will be continued in conjunction with EW

- Interviews
- Arrests
- Grand Jury
- Search Warrants
- Subpoenas – telephones, financials
- Trash Grabs
- Mail Cover
- Pole camera
- Tracking devices
- Surveillance
- Under covers
- Confidential Informants
- BOLOs
- Field Interview Cards

Proof



Evidence

- Direct Evidence
 - Eyewitness identification
- Circumstantial Evidence

Challenges



Evidence

- Direct Evidence

– Eyewitness

Wrongly convicted man freed

By: Theodor Kohersky/TEC
Litho: Sauerland

The New Being that Protestantism asked workers for when its supporters the West Main, Wisconsin, Prison for the first 23-year-old workers for him, members was to be put in a cell with two others.

He had had North's prison, about 100,000 prisoners and about 100,000 inmates by counting them with pencils and shaking them with compressed air machines.

Fortunately, workers learned in the plant and he was locked up with a group of uneducated inmates.

Locked up with group of reformed prisoners

[illegible]

"That day I left the one half out of my life," he says.

His relationship with Arnold was rocky to say the least. During his trial, he was accused of conspiracy with the mob. Just after two years he was found guilty of (but not convicted, since he opposed all sentences up to life, partly in prison).

"Can you imagine someone who was convicted, never in jail, but a convict, when he's out?"

And then...

Man jailed 13 years ruled innocent

LA tests prove wasn't capital

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BRIDGE, Ohio. — It wasn't after late World war that a husband of a prison inmate told the judge to believe in innocence of the 1940 rape and late husband facts. On Feb. 1 judge agreed.

Wanda, 32, was released more than 12 years in prison authorities said at a court ing. last month. DNA tests of 8 more jail evidence ruled her a suspect.

Suburban, Prisoner Gold, Prisoner Mr. Wanda, 36, said to be the same woman on the - of the Cleveland County House.

3. While criticized and blamed for at least a year, "We've gone through some rough times," Mrs. White said, "but here were good times. We've come to this a better



Thomas Wahl embraces his wife, Cynthia, Friday in Harlem. One day, they met when she sang with a gospel-society program.

[illegible]

100

1982

[illegible]

DNA...

...the ...



NEW AT
6:00PM

Solutions

- Direct Evidence
 - Eyewitness identification
- Circumstantial Evidence

Technology and Evidence

- DNA / Fingerprints
- Electronic Evidence
 - Emails, text messages
 - Eavesdropping Warrants
- Cell Phone Communications
- GPS evidence

People v. Murray and Palmer

- No eyewitnesses
- Wiretap
- Video
- Shell Casings
- Recovered weapons
- Cell Phones

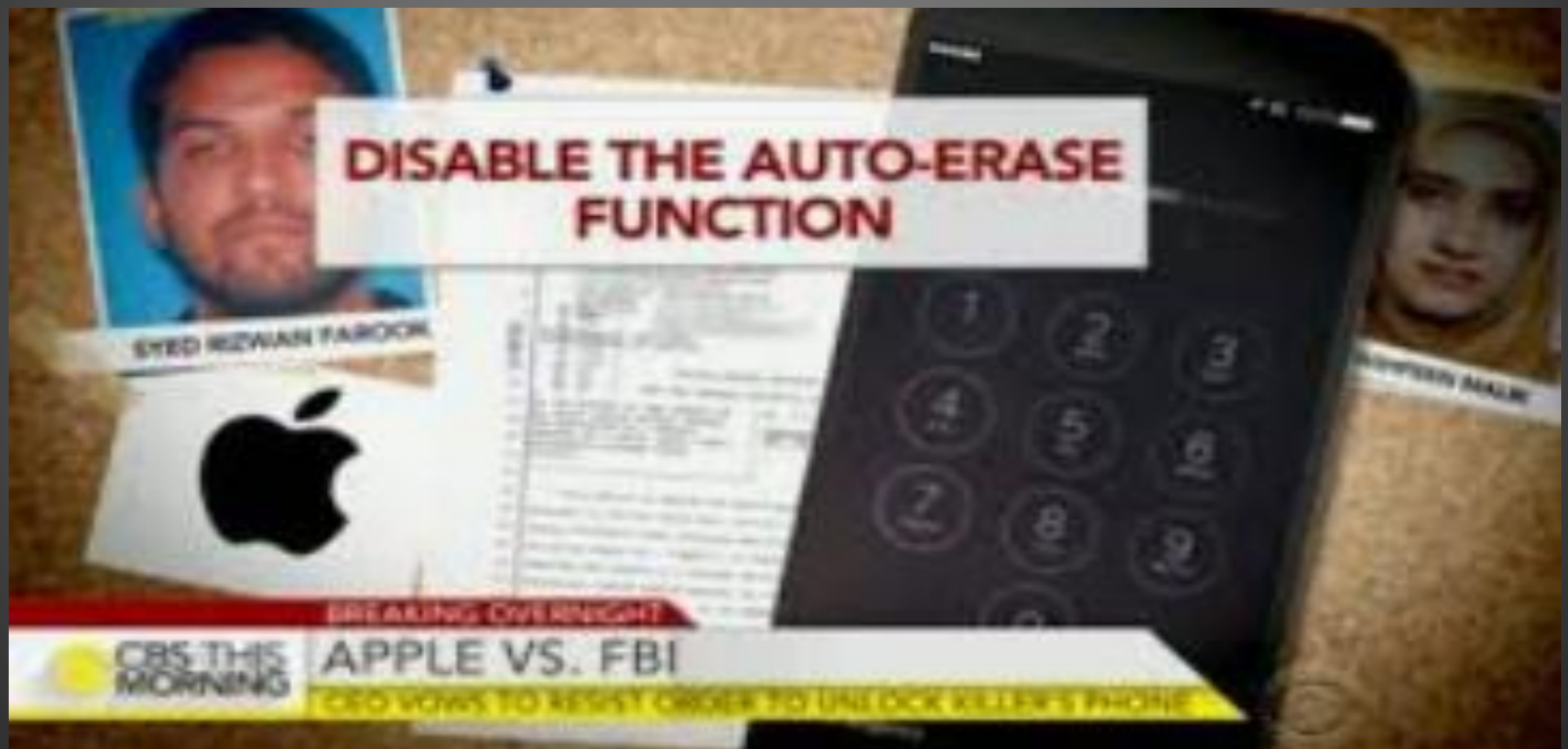


People v. Murray and Palmer

- No evidence
- Wiretapping
- Video surveillance
- Shell company
- Recorded conversations
- Cell phone records



San Bernardino



Facebook Messenger

FBI vs. Facebook Messenger: What's at stake?

Op-ed: Secret rulings should not force tech companies to build backdoors.

GREG NOJEIM, ERIC WENGER, AND MARC ZWILLINGER - 10/2/2018, 12:30 PM



[Enlarge](#)

Future of cases like Murray and Palmer?



Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

CARPENTER *v.* UNITED STATESCERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

No. 16–402. Argued November 29, 2017—Decided June 22, 2018

Cell phones perform their wide and growing variety of functions by continuously connecting to a set of radio antennas called “cell sites.” Each time a phone connects to a cell site, it generates a time-stamped record known as cell-site location information (CSLI). Wireless carriers collect and store this information for their own business purposes. Here, after the FBI identified the cell phone numbers of several robbery suspects, prosecutors were granted court orders to obtain the suspects’ cell phone records under the Stored Communications Act. Wireless carriers produced CSLI for petitioner Timothy Carpenter’s phone, and the Government was able to obtain 12,898 location points cataloging Carpenter’s movements over 127 days—an average of 101 data points per day. Carpenter moved to suppress the data, arguing that the Government’s seizure of the records without obtaining a warrant supported by probable cause violated the Fourth Amendment. The District Court denied the motion, and prosecutors used the records at trial to show that Carpenter’s phone was near four of the robbery locations at the time those robberies occurred. Carpenter was convicted. The Sixth Circuit affirmed, holding that Carpenter lacked a reasonable expectation of privacy in the location information collected by the FBI because he had shared that information with his wireless carriers.

Held:

1. The Government’s acquisition of Carpenter’s cell-site records was a Fourth Amendment search. Pp. 4–18.

(a) The Fourth Amendment protects not only property interests but certain expectations of privacy as well. *Katz v. United States*, 389 U. S. 347, 351. Thus, when an individual “seeks to preserve something as private,” and his expectation of privacy is “one that society is

Syllabus

prepared to recognize as reasonable,” official intrusion into that sphere generally qualifies as a search and requires a warrant supported by probable cause. *Smith v. Maryland*, 442 U. S. 735, 740 (internal quotation marks and alterations omitted). The analysis regarding which expectations of privacy are entitled to protection is informed by historical understandings “of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted.” *Carroll v. United States*, 267 U. S. 132, 149. These Founding-era understandings continue to inform this Court when applying the Fourth Amendment to innovations in surveillance tools. See, e.g., *Kyllo v. United States*, 533 U. S. 27. Pp. 4–7.

(b) The digital data at issue—personal location information maintained by a third party—does not fit neatly under existing precedents but lies at the intersection of two lines of cases. One set addresses a person’s expectation of privacy in his physical location and movements. See, e.g., *United States v. Jones*, 565 U. S. 400 (five Justices concluding that privacy concerns would be raised by GPS tracking). The other addresses a person’s expectation of privacy in information voluntarily turned over to third parties. See *United States v. Miller*, 425 U. S. 435 (no expectation of privacy in financial records held by a bank), and *Smith*, 442 U. S. 735 (no expectation of privacy in records of dialed telephone numbers conveyed to telephone company). Pp. 7–10.

(c) Tracking a person’s past movements through CSLI partakes of many of the qualities of GPS monitoring considered in *Jones*—it is detailed, encyclopedic, and effortlessly compiled. At the same time, however, the fact that the individual continuously reveals his location to his wireless carrier implicates the third-party principle of *Smith* and *Miller*. Given the unique nature of cell-site records, this Court declines to extend *Smith* and *Miller* to cover them. Pp. 10–18.

(1) A majority of the Court has already recognized that individuals have a reasonable expectation of privacy in the whole of their physical movements. Allowing government access to cell-site records—which “hold for many Americans the ‘privacies of life,’” *Riley v. California*, 573 U. S. ___, ___—contravenes that expectation. In fact, historical cell-site records present even greater privacy concerns than the GPS monitoring considered in *Jones*: They give the Government near perfect surveillance and allow it to travel back in time to retrace a person’s whereabouts, subject only to the five-year retention policies of most wireless carriers. The Government contends that CSLI data is less precise than GPS information, but it thought the data accurate enough here to highlight it during closing argument in Carpenter’s trial. At any rate, the rule the Court adopts “must take account of more sophisticated systems that are already in use or in

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development,” *Kyllo*, 533 U. S., at 36, and the accuracy of CSLI is rapidly approaching GPS-level precision. Pp. 12–15.

(2) The Government contends that the third-party doctrine governs this case, because cell-site records, like the records in *Smith* and *Miller*, are “business records,” created and maintained by wireless carriers. But there is a world of difference between the limited types of personal information addressed in *Smith* and *Miller* and the exhaustive chronicle of location information casually collected by wireless carriers.

The third-party doctrine partly stems from the notion that an individual has a reduced expectation of privacy in information knowingly shared with another. *Smith* and *Miller*, however, did not rely solely on the act of sharing. They also considered “the nature of the particular documents sought” and limitations on any “legitimate ‘expectation of privacy’ concerning their contents.” *Miller*, 425 U. S., at 442. In mechanically applying the third-party doctrine to this case the Government fails to appreciate the lack of comparable limitations on the revealing nature of CSLI.

Nor does the second rationale for the third-party doctrine—voluntary exposure—hold up when it comes to CSLI. Cell phone location information is not truly “shared” as the term is normally understood. First, cell phones and the services they provide are “such a pervasive and insistent part of daily life” that carrying one is indispensable to participation in modern society. *Riley*, 573 U. S., at _____. Second, a cell phone logs a cell-site record by dint of its operation, without any affirmative act on the user’s part beyond powering up. Pp. 15–17.

(d) This decision is narrow. It does not express a view on matters not before the Court; does not disturb the application of *Smith* and *Miller* or call into question conventional surveillance techniques and tools, such as security cameras; does not address other business records that might incidentally reveal location information; and does not consider other collection techniques involving foreign affairs or national security. Pp. 17–18.

2. The Government did not obtain a warrant supported by probable cause before acquiring Carpenter’s cell-site records. It acquired those records pursuant to a court order under the Stored Communications Act, which required the Government to show “reasonable grounds” for believing that the records were “relevant and material to an ongoing investigation.” 18 U. S. C. §2703(d). That showing falls well short of the probable cause required for a warrant. Consequently, an order issued under §2703(d) is not a permissible mechanism for accessing historical cell-site records. Not all orders compelling the production of documents will require a showing of probable cause. A

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warrant is required only in the rare case where the suspect has a legitimate privacy interest in records held by a third party. And even though the Government will generally need a warrant to access CSLI, case-specific exceptions—*e.g.*, exigent circumstances—may support a warrantless search. Pp. 18–22.

819 F. 3d 880, reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. KENNEDY, J., filed a dissenting opinion, in which THOMAS and ALITO, JJ., joined. THOMAS, J., filed a dissenting opinion. ALITO, J., filed a dissenting opinion, in which THOMAS, J., joined. GORSUCH, J., filed a dissenting opinion.

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NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 16–402

**TIMOTHY IVORY CARPENTER, PETITIONER *v.*
UNITED STATES**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT**

[June 22, 2018]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

This case presents the question whether the Government conducts a search under the Fourth Amendment when it accesses historical cell phone records that provide a comprehensive chronicle of the user’s past movements.

I
A

There are 396 million cell phone service accounts in the United States—for a Nation of 326 million people. Cell phones perform their wide and growing variety of functions by connecting to a set of radio antennas called “cell sites.” Although cell sites are usually mounted on a tower, they can also be found on light posts, flagpoles, church steeples, or the sides of buildings. Cell sites typically have several directional antennas that divide the covered area into sectors.

Cell phones continuously scan their environment looking for the best signal, which generally comes from the closest cell site. Most modern devices, such as smartphones, tap into the wireless network several times

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a minute whenever their signal is on, even if the owner is not using one of the phone's features. Each time the phone connects to a cell site, it generates a time-stamped record known as cell-site location information (CSLI). The precision of this information depends on the size of the geographic area covered by the cell site. The greater the concentration of cell sites, the smaller the coverage area. As data usage from cell phones has increased, wireless carriers have installed more cell sites to handle the traffic. That has led to increasingly compact coverage areas, especially in urban areas.

Wireless carriers collect and store CSLI for their own business purposes, including finding weak spots in their network and applying "roaming" charges when another carrier routes data through their cell sites. In addition, wireless carriers often sell aggregated location records to data brokers, without individual identifying information of the sort at issue here. While carriers have long retained CSLI for the start and end of incoming calls, in recent years phone companies have also collected location information from the transmission of text messages and routine data connections. Accordingly, modern cell phones generate increasingly vast amounts of increasingly precise CSLI.

B

In 2011, police officers arrested four men suspected of robbing a series of Radio Shack and (ironically enough) T-Mobile stores in Detroit. One of the men confessed that, over the previous four months, the group (along with a rotating cast of getaway drivers and lookouts) had robbed nine different stores in Michigan and Ohio. The suspect identified 15 accomplices who had participated in the heists and gave the FBI some of their cell phone numbers; the FBI then reviewed his call records to identify additional numbers that he had called around the time of the

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robberies.

Based on that information, the prosecutors applied for court orders under the Stored Communications Act to obtain cell phone records for petitioner Timothy Carpenter and several other suspects. That statute, as amended in 1994, permits the Government to compel the disclosure of certain telecommunications records when it “offers specific and articulable facts showing that there are reasonable grounds to believe” that the records sought “are relevant and material to an ongoing criminal investigation.” 18 U. S. C. §2703(d). Federal Magistrate Judges issued two orders directing Carpenter’s wireless carriers—MetroPCS and Sprint—to disclose “cell/site sector [information] for [Carpenter’s] telephone[] at call origination and at call termination for incoming and outgoing calls” during the four-month period when the string of robberies occurred. App. to Pet. for Cert. 60a, 72a. The first order sought 152 days of cell-site records from MetroPCS, which produced records spanning 127 days. The second order requested seven days of CSLI from Sprint, which produced two days of records covering the period when Carpenter’s phone was “roaming” in northeastern Ohio. Altogether the Government obtained 12,898 location points cataloging Carpenter’s movements—an average of 101 data points per day.

Carpenter was charged with six counts of robbery and an additional six counts of carrying a firearm during a federal crime of violence. See 18 U. S. C. §§924(c), 1951(a). Prior to trial, Carpenter moved to suppress the cell-site data provided by the wireless carriers. He argued that the Government’s seizure of the records violated the Fourth Amendment because they had been obtained without a warrant supported by probable cause. The District Court denied the motion. App. to Pet. for Cert. 38a–39a.

At trial, seven of Carpenter’s confederates pegged him as the leader of the operation. In addition, FBI agent Christopher Hess offered expert testimony about the cell-

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site data. Hess explained that each time a cell phone taps into the wireless network, the carrier logs a time-stamped record of the cell site and particular sector that were used. With this information, Hess produced maps that placed Carpenter’s phone near four of the charged robberies. In the Government’s view, the location records clinched the case: They confirmed that Carpenter was “right where the . . . robbery was at the exact time of the robbery.” App. 131 (closing argument). Carpenter was convicted on all but one of the firearm counts and sentenced to more than 100 years in prison.

The Court of Appeals for the Sixth Circuit affirmed. 819 F. 3d 880 (2016). The court held that Carpenter lacked a reasonable expectation of privacy in the location information collected by the FBI because he had shared that information with his wireless carriers. Given that cell phone users voluntarily convey cell-site data to their carriers as “a means of establishing communication,” the court concluded that the resulting business records are not entitled to Fourth Amendment protection. *Id.*, at 888 (quoting *Smith v. Maryland*, 442 U. S. 735, 741 (1979)).

We granted certiorari. 582 U. S. ____ (2017).

II

A

The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” The “basic purpose of this Amendment,” our cases have recognized, “is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.” *Camara v. Municipal Court of City and County of San Francisco*, 387 U. S. 523, 528 (1967). The Founding generation crafted the Fourth Amendment as a “response to the reviled ‘general warrants’ and ‘writs of assistance’ of the colonial era, which allowed British officers to rum-

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mage through homes in an unrestrained search for evidence of criminal activity.” *Riley v. California*, 573 U. S. ___, ___ (2014) (slip op., at 27). In fact, as John Adams recalled, the patriot James Otis’s 1761 speech condemning writs of assistance was “the first act of opposition to the arbitrary claims of Great Britain” and helped spark the Revolution itself. *Id.*, at ___–___ (slip op., at 27–28) (quoting 10 Works of John Adams 248 (C. Adams ed. 1856)).

For much of our history, Fourth Amendment search doctrine was “tied to common-law trespass” and focused on whether the Government “obtains information by physically intruding on a constitutionally protected area.” *United States v. Jones*, 565 U. S. 400, 405, 406, n. 3 (2012). More recently, the Court has recognized that “property rights are not the sole measure of Fourth Amendment violations.” *Soldal v. Cook County*, 506 U. S. 56, 64 (1992). In *Katz v. United States*, 389 U. S. 347, 351 (1967), we established that “the Fourth Amendment protects people, not places,” and expanded our conception of the Amendment to protect certain expectations of privacy as well. When an individual “seeks to preserve something as private,” and his expectation of privacy is “one that society is prepared to recognize as reasonable,” we have held that official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause. *Smith*, 442 U. S., at 740 (internal quotation marks and alterations omitted).

Although no single rubric definitively resolves which expectations of privacy are entitled to protection,¹ the

¹JUSTICE KENNEDY believes that there is such a rubric—the “property-based concepts” that *Katz* purported to move beyond. *Post*, at 3 (dissenting opinion). But while property rights are often informative, our cases by no means suggest that such an interest is “fundamental” or “dispositive” in determining which expectations of privacy are legitimate. *Post*, at 8–9. JUSTICE THOMAS (and to a large extent JUSTICE GORSUCH) would have us abandon *Katz* and return to an

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analysis is informed by historical understandings “of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted.” *Carroll v. United States*, 267 U. S. 132, 149 (1925). On this score, our cases have recognized some basic guideposts. First, that the Amendment seeks to secure “the privacies of life” against “arbitrary power.” *Boyd v. United States*, 116 U. S. 616, 630 (1886). Second, and relatedly, that a central aim of the Framers was “to place obstacles in the way of a too permeating police surveillance.” *United States v. Di Re*, 332 U. S. 581, 595 (1948).

We have kept this attention to Founding-era understandings in mind when applying the Fourth Amendment to innovations in surveillance tools. As technology has enhanced the Government’s capacity to encroach upon areas normally guarded from inquisitive eyes, this Court has sought to “assure[] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.” *Kyllo v. United States*, 533 U. S. 27, 34 (2001). For that reason, we rejected in *Kyllo* a “mechanical interpretation” of the Fourth Amendment and held that use of a thermal imager to detect heat radiating from the side of the defendant’s home was a search. *Id.*, at 35. Because any other conclusion would leave homeowners “at the mercy of advancing technology,” we determined that the Government—absent a warrant—could not capitalize on such new sense-enhancing technology to explore

exclusively property-based approach. *Post*, at 1–2, 17–21 (THOMAS J., dissenting); *post*, at 6–9 (GORSUCH, J., dissenting). *Katz* of course “discredited” the “premise that property interests control,” 389 U. S., at 353, and we have repeatedly emphasized that privacy interests do not rise or fall with property rights, see, e.g., *United States v. Jones*, 565 U. S. 400, 411 (2012) (refusing to “make trespass the exclusive test”); *Kyllo v. United States*, 533 U. S. 27, 32 (2001) (“We have since decoupled violation of a person’s Fourth Amendment rights from trespassory violation of his property.”). Neither party has asked the Court to reconsider *Katz* in this case.

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what was happening within the home. *Ibid.*

Likewise in *Riley*, the Court recognized the “immense storage capacity” of modern cell phones in holding that police officers must generally obtain a warrant before searching the contents of a phone. 573 U. S., at ____ (slip op., at 17). We explained that while the general rule allowing warrantless searches incident to arrest “strikes the appropriate balance in the context of physical objects, neither of its rationales has much force with respect to” the vast store of sensitive information on a cell phone. *Id.*, at ____ (slip op., at 9).

B

The case before us involves the Government’s acquisition of wireless carrier cell-site records revealing the location of Carpenter’s cell phone whenever it made or received calls. This sort of digital data—personal location information maintained by a third party—does not fit neatly under existing precedents. Instead, requests for cell-site records lie at the intersection of two lines of cases, both of which inform our understanding of the privacy interests at stake.

The first set of cases addresses a person’s expectation of privacy in his physical location and movements. In *United States v. Knotts*, 460 U. S. 276 (1983), we considered the Government’s use of a “beeper” to aid in tracking a vehicle through traffic. Police officers in that case planted a beeper in a container of chloroform before it was purchased by one of Knotts’s co-conspirators. The officers (with intermittent aerial assistance) then followed the automobile carrying the container from Minneapolis to Knotts’s cabin in Wisconsin, relying on the beeper’s signal to help keep the vehicle in view. The Court concluded that the “augment[ed]” visual surveillance did not constitute a search because “[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of

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privacy in his movements from one place to another.” *Id.*, at 281, 282. Since the movements of the vehicle and its final destination had been “voluntarily conveyed to anyone who wanted to look,” Knotts could not assert a privacy interest in the information obtained. *Id.*, at 281.

This Court in *Knotts*, however, was careful to distinguish between the rudimentary tracking facilitated by the beeper and more sweeping modes of surveillance. The Court emphasized the “limited use which the government made of the signals from this particular beeper” during a discrete “automotive journey.” *Id.*, at 284, 285. Significantly, the Court reserved the question whether “different constitutional principles may be applicable” if “twenty-four hour surveillance of any citizen of this country [were] possible.” *Id.*, at 283–284.

Three decades later, the Court considered more sophisticated surveillance of the sort envisioned in *Knotts* and found that different principles did indeed apply. In *United States v. Jones*, FBI agents installed a GPS tracking device on Jones’s vehicle and remotely monitored the vehicle’s movements for 28 days. The Court decided the case based on the Government’s physical trespass of the vehicle. 565 U. S., at 404–405. At the same time, five Justices agreed that related privacy concerns would be raised by, for example, “surreptitiously activating a stolen vehicle detection system” in Jones’s car to track Jones himself, or conducting GPS tracking of his cell phone. *Id.*, at 426, 428 (ALITO, J., concurring in judgment); *id.*, at 415 (SOTOMAYOR, J., concurring). Since GPS monitoring of a vehicle tracks “every movement” a person makes in that vehicle, the concurring Justices concluded that “longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy”—regardless whether those movements were disclosed to the public at large. *Id.*, at 430 (opinion of ALITO, J.); *id.*, at 415 (opinion of

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SOTOMAYOR, J.).²

In a second set of decisions, the Court has drawn a line between what a person keeps to himself and what he shares with others. We have previously held that “a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.” *Smith*, 442 U. S., at 743–744. That remains true “even if the information is revealed on the assumption that it will be used only for a limited purpose.” *United States v. Miller*, 425 U. S. 435, 443 (1976). As a result, the Government is typically free to obtain such information from the recipient without triggering Fourth Amendment protections.

This third-party doctrine largely traces its roots to *Miller*. While investigating Miller for tax evasion, the Government subpoenaed his banks, seeking several months of canceled checks, deposit slips, and monthly statements. The Court rejected a Fourth Amendment challenge to the records collection. For one, Miller could “assert neither ownership nor possession” of the documents; they were “business records of the banks.” *Id.*, at 440. For another, the nature of those records confirmed Miller’s limited expectation of privacy, because the checks were “not confidential communications but negotiable instruments to be used in commercial transactions,” and the bank statements contained information “exposed to

²JUSTICE KENNEDY argues that this case is in a different category from *Jones* and the dragnet-type practices posited in *Knotts* because the disclosure of the cell-site records was subject to “judicial authorization.” *Post*, at 14–16. That line of argument conflates the threshold question whether a “search” has occurred with the separate matter of whether the search was reasonable. The subpoena process set forth in the Stored Communications Act does not determine a target’s expectation of privacy. And in any event, neither *Jones* nor *Knotts* purported to resolve the question of what authorization may be required to conduct such electronic surveillance techniques. But see *Jones*, 565 U. S., at 430 (ALITO, J., concurring in judgment) (indicating that longer term GPS tracking may require a warrant).

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[bank] employees in the ordinary course of business.” *Id.*, at 442. The Court thus concluded that Miller had “take[n] the risk, in revealing his affairs to another, that the information [would] be conveyed by that person to the Government.” *Id.*, at 443.

Three years later, *Smith* applied the same principles in the context of information conveyed to a telephone company. The Court ruled that the Government’s use of a pen register—a device that recorded the outgoing phone numbers dialed on a landline telephone—was not a search. Noting the pen register’s “limited capabilities,” the Court “doubt[ed] that people in general entertain any actual expectation of privacy in the numbers they dial.” 442 U. S., at 742. Telephone subscribers know, after all, that the numbers are used by the telephone company “for a variety of legitimate business purposes,” including routing calls. *Id.*, at 743. And at any rate, the Court explained, such an expectation “is not one that society is prepared to recognize as reasonable.” *Ibid.* (internal quotation marks omitted). When Smith placed a call, he “voluntarily conveyed” the dialed numbers to the phone company by “expos[ing] that information to its equipment in the ordinary course of business.” *Id.*, at 744 (internal quotation marks omitted). Once again, we held that the defendant “assumed the risk” that the company’s records “would be divulged to police.” *Id.*, at 745.

III

The question we confront today is how to apply the Fourth Amendment to a new phenomenon: the ability to chronicle a person’s past movements through the record of his cell phone signals. Such tracking partakes of many of the qualities of the GPS monitoring we considered in *Jones*. Much like GPS tracking of a vehicle, cell phone location information is detailed, encyclopedic, and effortlessly compiled.

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At the same time, the fact that the individual continuously reveals his location to his wireless carrier implicates the third-party principle of *Smith* and *Miller*. But while the third-party doctrine applies to telephone numbers and bank records, it is not clear whether its logic extends to the qualitatively different category of cell-site records. After all, when *Smith* was decided in 1979, few could have imagined a society in which a phone goes wherever its owner goes, conveying to the wireless carrier not just dialed digits, but a detailed and comprehensive record of the person's movements.

We decline to extend *Smith* and *Miller* to cover these novel circumstances. Given the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection. Whether the Government employs its own surveillance technology as in *Jones* or leverages the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI. The location information obtained from Carpenter's wireless carriers was the product of a search.³

³The parties suggest as an alternative to their primary submissions that the acquisition of CSLI becomes a search only if it extends beyond a limited period. See Reply Brief 12 (proposing a 24-hour cutoff); Brief for United States 55–56 (suggesting a seven-day cutoff). As part of its argument, the Government treats the seven days of CSLI requested from Sprint as the pertinent period, even though Sprint produced only two days of records. Brief for United States 56. Contrary to JUSTICE KENNEDY's assertion, *post*, at 19, we need not decide whether there is a limited period for which the Government may obtain an individual's historical CSLI free from Fourth Amendment scrutiny, and if so, how long that period might be. It is sufficient for our purposes today to hold that accessing seven days of CSLI constitutes a Fourth Amendment search.

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A

A person does not surrender all Fourth Amendment protection by venturing into the public sphere. To the contrary, “what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.” *Katz*, 389 U. S., at 351–352. A majority of this Court has already recognized that individuals have a reasonable expectation of privacy in the whole of their physical movements. *Jones*, 565 U. S., at 430 (ALITO, J., concurring in judgment); *id.*, at 415 (SOTOMAYOR, J., concurring). Prior to the digital age, law enforcement might have pursued a suspect for a brief stretch, but doing so “for any extended period of time was difficult and costly and therefore rarely undertaken.” *Id.*, at 429 (opinion of ALITO, J.). For that reason, “society’s expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual’s car for a very long period.” *Id.*, at 430.

Allowing government access to cell-site records contravenes that expectation. Although such records are generated for commercial purposes, that distinction does not negate Carpenter’s anticipation of privacy in his physical location. Mapping a cell phone’s location over the course of 127 days provides an all-encompassing record of the holder’s whereabouts. As with GPS information, the time-stamped data provides an intimate window into a person’s life, revealing not only his particular movements, but through them his “familial, political, professional, religious, and sexual associations.” *Id.*, at 415 (opinion of SOTOMAYOR, J.). These location records “hold for many Americans the ‘privacies of life.’” *Riley*, 573 U. S., at ____ (slip op., at 28) (quoting *Boyd*, 116 U. S., at 630). And like GPS monitoring, cell phone tracking is remarkably easy, cheap, and efficient compared to traditional investigative tools. With just the click of a button, the Government can

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access each carrier’s deep repository of historical location information at practically no expense.

In fact, historical cell-site records present even greater privacy concerns than the GPS monitoring of a vehicle we considered in *Jones*. Unlike the bugged container in *Knotts* or the car in *Jones*, a cell phone—almost a “feature of human anatomy,” *Riley*, 573 U. S., at ____ (slip op., at 9)—tracks nearly exactly the movements of its owner. While individuals regularly leave their vehicles, they compulsively carry cell phones with them all the time. A cell phone faithfully follows its owner beyond public thoroughfares and into private residences, doctor’s offices, political headquarters, and other potentially revealing locales. See *id.*, at ____ (slip op., at 19) (noting that “nearly three-quarters of smart phone users report being within five feet of their phones most of the time, with 12% admitting that they even use their phones in the shower”); contrast *Cardwell v. Lewis*, 417 U. S. 583, 590 (1974) (plurality opinion) (“A car has little capacity for escaping public scrutiny.”). Accordingly, when the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone’s user.

Moreover, the retrospective quality of the data here gives police access to a category of information otherwise unknowable. In the past, attempts to reconstruct a person’s movements were limited by a dearth of records and the frailties of recollection. With access to CSLI, the Government can now travel back in time to retrace a person’s whereabouts, subject only to the retention policies of the wireless carriers, which currently maintain records for up to five years. Critically, because location information is continually logged for all of the 400 million devices in the United States—not just those belonging to persons who might happen to come under investigation—this newfound tracking capacity runs against everyone.

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Unlike with the GPS device in *Jones*, police need not even know in advance whether they want to follow a particular individual, or when.

Whoever the suspect turns out to be, he has effectively been tailed every moment of every day for five years, and the police may—in the Government’s view—call upon the results of that surveillance without regard to the constraints of the Fourth Amendment. Only the few without cell phones could escape this tireless and absolute surveillance.

The Government and JUSTICE KENNEDY contend, however, that the collection of CSLI should be permitted because the data is less precise than GPS information. Not to worry, they maintain, because the location records did “not on their own suffice to place [Carpenter] at the crime scene”; they placed him within a wedge-shaped sector ranging from one-eighth to four square miles. Brief for United States 24; see *post*, at 18–19. Yet the Court has already rejected the proposition that “inference insulates a search.” *Kyllo*, 533 U. S., at 36. From the 127 days of location data it received, the Government could, in combination with other information, deduce a detailed log of Carpenter’s movements, including when he was at the site of the robberies. And the Government thought the CSLI accurate enough to highlight it during the closing argument of his trial. App. 131.

At any rate, the rule the Court adopts “must take account of more sophisticated systems that are already in use or in development.” *Kyllo*, 533 U. S., at 36. While the records in this case reflect the state of technology at the start of the decade, the accuracy of CSLI is rapidly approaching GPS-level precision. As the number of cell sites has proliferated, the geographic area covered by each cell sector has shrunk, particularly in urban areas. In addition, with new technology measuring the time and angle of signals hitting their towers, wireless carriers already have

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the capability to pinpoint a phone’s location within 50 meters. Brief for Electronic Frontier Foundation et al. as *Amici Curiae* 12 (describing triangulation methods that estimate a device’s location inside a given cell sector).

Accordingly, when the Government accessed CSLI from the wireless carriers, it invaded Carpenter’s reasonable expectation of privacy in the whole of his physical movements.

B

The Government’s primary contention to the contrary is that the third-party doctrine governs this case. In its view, cell-site records are fair game because they are “business records” created and maintained by the wireless carriers. The Government (along with JUSTICE KENNEDY) recognizes that this case features new technology, but asserts that the legal question nonetheless turns on a garden-variety request for information from a third-party witness. Brief for United States 32–34; *post*, at 12–14.

The Government’s position fails to contend with the seismic shifts in digital technology that made possible the tracking of not only Carpenter’s location but also everyone else’s, not for a short period but for years and years. Sprint Corporation and its competitors are not your typical witnesses. Unlike the nosy neighbor who keeps an eye on comings and goings, they are ever alert, and their memory is nearly infallible. There is a world of difference between the limited types of personal information addressed in *Smith* and *Miller* and the exhaustive chronicle of location information casually collected by wireless carriers today. The Government thus is not asking for a straightforward application of the third-party doctrine, but instead a significant extension of it to a distinct category of information.

The third-party doctrine partly stems from the notion that an individual has a reduced expectation of privacy in

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information knowingly shared with another. But the fact of “diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely.” *Riley*, 573 U. S., at ____ (slip op., at 16). *Smith* and *Miller*, after all, did not rely solely on the act of sharing. Instead, they considered “the nature of the particular documents sought” to determine whether “there is a legitimate ‘expectation of privacy’ concerning their contents.” *Miller*, 425 U. S., at 442. *Smith* pointed out the limited capabilities of a pen register; as explained in *Riley*, telephone call logs reveal little in the way of “identifying information.” *Smith*, 442 U. S., at 742; *Riley*, 573 U. S., at ____ (slip op., at 24). *Miller* likewise noted that checks were “not confidential communications but negotiable instruments to be used in commercial transactions.” 425 U. S., at 442. In mechanically applying the third-party doctrine to this case, the Government fails to appreciate that there are no comparable limitations on the revealing nature of CSLI.

The Court has in fact already shown special solicitude for location information in the third-party context. In *Knotts*, the Court relied on *Smith* to hold that an individual has no reasonable expectation of privacy in public movements that he “voluntarily conveyed to anyone who wanted to look.” *Knotts*, 460 U. S., at 281; see *id.*, at 283 (discussing *Smith*). But when confronted with more pervasive tracking, five Justices agreed that longer term GPS monitoring of even a vehicle traveling on public streets constitutes a search. *Jones*, 565 U. S., at 430 (ALITO, J., concurring in judgment); *id.*, at 415 (SOTOMAYOR, J., concurring). JUSTICE GORSUCH wonders why “someone’s location when using a phone” is sensitive, *post*, at 3, and JUSTICE KENNEDY assumes that a person’s discrete movements “are not particularly private,” *post*, at 17. Yet this case is not about “using a phone” or a person’s movement at a particular time. It is about a detailed chronicle of a person’s physical presence compiled every day, every

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moment, over several years. Such a chronicle implicates privacy concerns far beyond those considered in *Smith* and *Miller*.

Neither does the second rationale underlying the third-party doctrine—voluntary exposure—hold up when it comes to CSLI. Cell phone location information is not truly “shared” as one normally understands the term. In the first place, cell phones and the services they provide are “such a pervasive and insistent part of daily life” that carrying one is indispensable to participation in modern society. *Riley*, 573 U. S., at ____ (slip op., at 9). Second, a cell phone logs a cell-site record by dint of its operation, without any affirmative act on the part of the user beyond powering up. Virtually any activity on the phone generates CSLI, including incoming calls, texts, or e-mails and countless other data connections that a phone automatically makes when checking for news, weather, or social media updates. Apart from disconnecting the phone from the network, there is no way to avoid leaving behind a trail of location data. As a result, in no meaningful sense does the user voluntarily “assume[] the risk” of turning over a comprehensive dossier of his physical movements. *Smith*, 442 U. S., at 745.

We therefore decline to extend *Smith* and *Miller* to the collection of CSLI. Given the unique nature of cell phone location information, the fact that the Government obtained the information from a third party does not overcome Carpenter’s claim to Fourth Amendment protection. The Government’s acquisition of the cell-site records was a search within the meaning of the Fourth Amendment.

* * *

Our decision today is a narrow one. We do not express a view on matters not before us: real-time CSLI or “tower dumps” (a download of information on all the devices that connected to a particular cell site during a particular

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interval). We do not disturb the application of *Smith* and *Miller* or call into question conventional surveillance techniques and tools, such as security cameras. Nor do we address other business records that might incidentally reveal location information. Further, our opinion does not consider other collection techniques involving foreign affairs or national security. As Justice Frankfurter noted when considering new innovations in airplanes and radios, the Court must tread carefully in such cases, to ensure that we do not “embarrass the future.” *Northwest Airlines, Inc. v. Minnesota*, 322 U. S. 292, 300 (1944).⁴

IV

Having found that the acquisition of Carpenter’s CSLI was a search, we also conclude that the Government must generally obtain a warrant supported by probable cause before acquiring such records. Although the “ultimate measure of the constitutionality of a governmental search is ‘reasonableness,’” our cases establish that warrantless searches are typically unreasonable where “a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing.” *Vernonia School Dist. 47J v. Acton*, 515 U. S. 646, 652–653 (1995). Thus, “[i]n the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement.” *Riley*, 573 U. S., at ___ (slip op., at 5).

The Government acquired the cell-site records pursuant to a court order issued under the Stored Communications Act, which required the Government to show “reasonable grounds” for believing that the records were “relevant and

⁴JUSTICE GORSUCH faults us for not promulgating a complete code addressing the manifold situations that may be presented by this new technology—under a constitutional provision turning on what is “reasonable,” no less. *Post*, at 10–12. Like JUSTICE GORSUCH, we “do not begin to claim all the answers today,” *post*, at 13, and therefore decide no more than the case before us.

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material to an ongoing investigation.” 18 U. S. C. §2703(d). That showing falls well short of the probable cause required for a warrant. The Court usually requires “some quantum of individualized suspicion” before a search or seizure may take place. *United States v. Martinez-Fuerte*, 428 U. S. 543, 560–561 (1976). Under the standard in the Stored Communications Act, however, law enforcement need only show that the cell-site evidence might be pertinent to an ongoing investigation—a “gigantic” departure from the probable cause rule, as the Government explained below. App. 34. Consequently, an order issued under Section 2703(d) of the Act is not a permissible mechanism for accessing historical cell-site records. Before compelling a wireless carrier to turn over a subscriber’s CSLI, the Government’s obligation is a familiar one—get a warrant.

JUSTICE ALITO contends that the warrant requirement simply does not apply when the Government acquires records using compulsory process. Unlike an actual search, he says, subpoenas for documents do not involve the direct taking of evidence; they are at most a “constructive search” conducted by the target of the subpoena. *Post*, at 12. Given this lesser intrusion on personal privacy, JUSTICE ALITO argues that the compulsory production of records is not held to the same probable cause standard. In his view, this Court’s precedents set forth a categorical rule—separate and distinct from the third-party doctrine—subjecting subpoenas to lenient scrutiny without regard to the suspect’s expectation of privacy in the records. *Post*, at 8–19.

But this Court has never held that the Government may subpoena third parties for records in which the suspect has a reasonable expectation of privacy. Almost all of the examples JUSTICE ALITO cites, see *post*, at 14–15, contemplated requests for evidence implicating diminished pri-

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vacy interests or for a corporation’s own books.⁵ The lone exception, of course, is *Miller*, where the Court’s analysis of the third-party subpoena merged with the application of the third-party doctrine. 425 U. S., at 444 (concluding that *Miller* lacked the necessary privacy interest to contest the issuance of a subpoena to his bank).

JUSTICE ALITO overlooks the critical issue. At some point, the dissent should recognize that CSLI is an entirely different species of business record—something that implicates basic Fourth Amendment concerns about arbitrary government power much more directly than corporate tax or payroll ledgers. When confronting new concerns wrought by digital technology, this Court has been careful not to uncritically extend existing precedents. See *Riley*, 573 U. S., at ____ (slip op., at 10) (“A search of the information on a cell phone bears little resemblance to the type of brief physical search considered [in prior precedents].”).

If the choice to proceed by subpoena provided a categorical limitation on Fourth Amendment protection, no type of record would ever be protected by the warrant requirement. Under JUSTICE ALITO’s view, private letters, digital contents of a cell phone—any personal information reduced to document form, in fact—may be collected by

⁵See *United States v. Dionisio*, 410 U. S. 1, 14 (1973) (“No person can have a reasonable expectation that others will not know the sound of his voice”); *Donovan v. Lone Steer, Inc.*, 464 U. S. 408, 411, 415 (1984) (payroll and sales records); *California Bankers Assn. v. Shultz*, 416 U. S. 21, 67 (1974) (Bank Secrecy Act reporting requirements); *See v. Seattle*, 387 U. S. 541, 544 (1967) (financial books and records); *United States v. Powell*, 379 U. S. 48, 49, 57 (1964) (corporate tax records); *McPhaul v. United States*, 364 U. S. 372, 374, 382 (1960) (books and records of an organization); *United States v. Morton Salt Co.*, 338 U. S. 632, 634, 651–653 (1950) (Federal Trade Commission reporting requirement); *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186, 189, 204–208 (1946) (payroll records); *Hale v. Henkel*, 201 U. S. 43, 45, 75 (1906) (corporate books and papers).

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subpoena for no reason other than “official curiosity.” *United States v. Morton Salt Co.*, 338 U. S. 632, 652 (1950). JUSTICE KENNEDY declines to adopt the radical implications of this theory, leaving open the question whether the warrant requirement applies “when the Government obtains the modern-day equivalents of an individual’s own ‘papers’ or ‘effects,’ even when those papers or effects are held by a third party.” *Post*, at 13 (citing *United States v. Warshak*, 631 F. 3d 266, 283–288 (CA6 2010)). That would be a sensible exception, because it would prevent the subpoena doctrine from overcoming any reasonable expectation of privacy. If the third-party doctrine does not apply to the “modern-day equivalents of an individual’s own ‘papers’ or ‘effects,’” then the clear implication is that the documents should receive full Fourth Amendment protection. We simply think that such protection should extend as well to a detailed log of a person’s movements over several years.

This is certainly not to say that all orders compelling the production of documents will require a showing of probable cause. The Government will be able to use subpoenas to acquire records in the overwhelming majority of investigations. We hold only that a warrant is required in the rare case where the suspect has a legitimate privacy interest in records held by a third party.

Further, even though the Government will generally need a warrant to access CSLI, case-specific exceptions may support a warrantless search of an individual’s cell-site records under certain circumstances. “One well-recognized exception applies when “the exigencies of the situation” make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.” *Kentucky v. King*, 563 U. S. 452, 460 (2011) (quoting *Mincey v. Arizona*, 437 U. S. 385, 394 (1978)). Such exigencies include the need to pursue a fleeing suspect, protect individuals who are

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threatened with imminent harm, or prevent the imminent destruction of evidence. 563 U. S., at 460, and n. 3.

As a result, if law enforcement is confronted with an urgent situation, such fact-specific threats will likely justify the warrantless collection of CSLI. Lower courts, for instance, have approved warrantless searches related to bomb threats, active shootings, and child abductions. Our decision today does not call into doubt warrantless access to CSLI in such circumstances. While police must get a warrant when collecting CSLI to assist in the mine-run criminal investigation, the rule we set forth does not limit their ability to respond to an ongoing emergency.

* * *

As Justice Brandeis explained in his famous dissent, the Court is obligated—as “[s]ubtler and more far-reaching means of invading privacy have become available to the Government”—to ensure that the “progress of science” does not erode Fourth Amendment protections. *Olmstead v. United States*, 277 U. S. 438, 473–474 (1928). Here the progress of science has afforded law enforcement a powerful new tool to carry out its important responsibilities. At the same time, this tool risks Government encroachment of the sort the Framers, “after consulting the lessons of history,” drafted the Fourth Amendment to prevent. *Di Re*, 332 U. S., at 595.

We decline to grant the state unrestricted access to a wireless carrier’s database of physical location information. In light of the deeply revealing nature of CSLI, its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection, the fact that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection. The Government’s acquisition of the cell-site records here was a search under that Amendment.

The judgment of the Court of Appeals is reversed, and

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the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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SUPREME COURT OF THE UNITED STATES

No. 16–402

TIMOTHY IVORY CARPENTER, PETITIONER *v.*
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

[June 22, 2018]

JUSTICE KENNEDY, with whom JUSTICE THOMAS and JUSTICE ALITO join, dissenting.

This case involves new technology, but the Court’s stark departure from relevant Fourth Amendment precedents and principles is, in my submission, unnecessary and incorrect, requiring this respectful dissent.

The new rule the Court seems to formulate puts needed, reasonable, accepted, lawful, and congressionally authorized criminal investigations at serious risk in serious cases, often when law enforcement seeks to prevent the threat of violent crimes. And it places undue restrictions on the lawful and necessary enforcement powers exercised not only by the Federal Government, but also by law enforcement in every State and locality throughout the Nation. Adherence to this Court’s longstanding precedents and analytic framework would have been the proper and prudent way to resolve this case.

The Court has twice held that individuals have no Fourth Amendment interests in business records which are possessed, owned, and controlled by a third party. *United States v. Miller*, 425 U. S. 435 (1976); *Smith v. Maryland*, 442 U. S. 735 (1979). This is true even when the records contain personal and sensitive information. So when the Government uses a subpoena to obtain, for example, bank records, telephone records, and credit card

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statements from the businesses that create and keep these records, the Government does not engage in a search of the business's customers within the meaning of the Fourth Amendment.

In this case petitioner challenges the Government's right to use compulsory process to obtain a now-common kind of business record: cell-site records held by cell phone service providers. The Government acquired the records through an investigative process enacted by Congress. Upon approval by a neutral magistrate, and based on the Government's duty to show reasonable necessity, it authorizes the disclosure of records and information that are under the control and ownership of the cell phone service provider, not its customer. Petitioner acknowledges that the Government may obtain a wide variety of business records using compulsory process, and he does not ask the Court to revisit its precedents. Yet he argues that, under those same precedents, the Government searched his records when it used court-approved compulsory process to obtain the cell-site information at issue here.

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

The Court today disagrees. It holds for the first time that by using compulsory process to obtain records of a business entity, the Government has not just engaged in an impermissible action, but has conducted a search of the business's customer. The Court further concludes that the search in this case was unreasonable and the Government needed to get a warrant to obtain more than six days of cell-site records.

In concluding that the Government engaged in a search,

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the Court unhinges Fourth Amendment doctrine from the property-based concepts that have long grounded the analytic framework that pertains in these cases. In doing so it draws an unprincipled and unworkable line between cell-site records on the one hand and financial and telephonic records on the other. According to today's majority opinion, the Government can acquire a record of every credit card purchase and phone call a person makes over months or years without upsetting a legitimate expectation of privacy. But, in the Court's view, the Government crosses a constitutional line when it obtains a court's approval to issue a subpoena for more than six days of cell-site records in order to determine whether a person was within several hundred city blocks of a crime scene. That distinction is illogical and will frustrate principled application of the Fourth Amendment in many routine yet vital law enforcement operations.

It is true that the Cyber Age has vast potential both to expand and restrict individual freedoms in dimensions not contemplated in earlier times. See *Packingham v. North Carolina*, 582 U. S. ___, ___–___ (2017) (slip op., at 4–6). For the reasons that follow, however, there is simply no basis here for concluding that the Government interfered with information that the cell phone customer, either from a legal or commonsense standpoint, should have thought the law would deem owned or controlled by him.

I

Before evaluating the question presented it is helpful to understand the nature of cell-site records, how they are commonly used by cell phone service providers, and their proper use by law enforcement.

When a cell phone user makes a call, sends a text message or e-mail, or gains access to the Internet, the cell phone establishes a radio connection to an antenna at a nearby cell site. The typical cell site covers a more-or-less

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circular geographic area around the site. It has three (or sometimes six) separate antennas pointing in different directions. Each provides cell service for a different 120-degree (or 60-degree) sector of the cell site's circular coverage area. So a cell phone activated on the north side of a cell site will connect to a different antenna than a cell phone on the south side.

Cell phone service providers create records each time a cell phone connects to an antenna at a cell site. For a phone call, for example, the provider records the date, time, and duration of the call; the phone numbers making and receiving the call; and, most relevant here, the cell site used to make the call, as well as the specific antenna that made the connection. The cell-site and antenna data points, together with the date and time of connection, are known as cell-site location information, or cell-site records. By linking an individual's cell phone to a particular 120- or 60-degree sector of a cell site's coverage area at a particular time, cell-site records reveal the general location of the cell phone user.

The location information revealed by cell-site records is imprecise, because an individual cell-site sector usually covers a large geographic area. The FBI agent who offered expert testimony about the cell-site records at issue here testified that a cell site in a city reaches between a half mile and two miles in all directions. That means a 60-degree sector covers between approximately one-eighth and two square miles (and a 120-degree sector twice that area). To put that in perspective, in urban areas cell-site records often would reveal the location of a cell phone user within an area covering between around a dozen and several hundred city blocks. In rural areas cell-site records can be up to 40 times more imprecise. By contrast, a Global Positioning System (GPS) can reveal an individual's location within around 15 feet.

Major cell phone service providers keep cell-site records

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for long periods of time. There is no law requiring them to do so. Instead, providers contract with their customers to collect and keep these records because they are valuable to the providers. Among other things, providers aggregate the records and sell them to third parties along with other information gleaned from cell phone usage. This data can be used, for example, to help a department store determine which of various prospective store locations is likely to get more foot traffic from middle-aged women who live in affluent zip codes. The market for cell phone data is now estimated to be in the billions of dollars. See Brief for Technology Experts as *Amici Curiae* 23.

Cell-site records also can serve an important investigative function, as the facts of this case demonstrate. Petitioner, Timothy Carpenter, along with a rotating group of accomplices, robbed at least six RadioShack and T-Mobile stores at gunpoint over a 2-year period. Five of those robberies occurred in the Detroit area, each crime at least four miles from the last. The sixth took place in Warren, Ohio, over 200 miles from Detroit.

The Government, of course, did not know all of these details in 2011 when it began investigating Carpenter. In April of that year police arrested four of Carpenter's co-conspirators. One of them confessed to committing nine robberies in Michigan and Ohio between December 2010 and March 2011. He identified 15 accomplices who had participated in at least one of those robberies; named Carpenter as one of the accomplices; and provided Carpenter's cell phone number to the authorities. The suspect also warned that the other members of the conspiracy planned to commit more armed robberies in the immediate future.

The Government at this point faced a daunting task. Even if it could identify and apprehend the suspects, still it had to link each suspect in this changing criminal gang to specific robberies in order to bring charges and convict.

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And, of course, it was urgent that the Government take all necessary steps to stop the ongoing and dangerous crime spree.

Cell-site records were uniquely suited to this task. The geographic dispersion of the robberies meant that, if Carpenter’s cell phone were within even a dozen to several hundred city blocks of one or more of the stores when the different robberies occurred, there would be powerful circumstantial evidence of his participation; and this would be especially so if his cell phone usually was not located in the sectors near the stores except during the robbery times.

To obtain these records, the Government applied to federal magistrate judges for disclosure orders pursuant to §2703(d) of the Stored Communications Act. That Act authorizes a magistrate judge to issue an order requiring disclosure of cell-site records if the Government demonstrates “specific and articulable facts showing that there are reasonable grounds to believe” the records “are relevant and material to an ongoing criminal investigation.” 18 U. S. C. §§2703(d), 2711(3). The full statutory provision is set out in the Appendix, *infra*.

From Carpenter’s primary service provider, MetroPCS, the Government obtained records from between December 2010 and April 2011, based on its understanding that nine robberies had occurred in that timeframe. The Government also requested seven days of cell-site records from Sprint, spanning the time around the robbery in Warren, Ohio. It obtained two days of records.

These records confirmed that Carpenter’s cell phone was in the general vicinity of four of the nine robberies, including the one in Ohio, at the times those robberies occurred.

II

The first Clause of the Fourth Amendment provides that “the right of the people to be secure in their persons, houses,

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papers, and effects, against unreasonable searches and seizures, shall not be violated.” The customary beginning point in any Fourth Amendment search case is whether the Government’s actions constitute a “search” of the defendant’s person, house, papers, or effects, within the meaning of the constitutional provision. If so, the next question is whether that search was reasonable.

Here the only question necessary to decide is whether the Government searched anything of Carpenter’s when it used compulsory process to obtain cell-site records from Carpenter’s cell phone service providers. This Court’s decisions in *Miller* and *Smith* dictate that the answer is no, as every Court of Appeals to have considered the question has recognized. See *United States v. Thompson*, 866 F. 3d 1149 (CA10 2017); *United States v. Graham*, 824 F. 3d 421 (CA4 2016) (en banc); *Carpenter v. United States*, 819 F. 3d 880 (CA6 2016); *United States v. Davis*, 785 F. 3d 498 (CA11 2015) (en banc); *In re Application of U. S. for Historical Cell Site Data*, 724 F. 3d 600 (CA5 2013).

A

Miller and *Smith* hold that individuals lack any protected Fourth Amendment interests in records that are possessed, owned, and controlled only by a third party. In *Miller* federal law enforcement officers obtained four months of the defendant’s banking records. 425 U. S., at 437–438. And in *Smith* state police obtained records of the phone numbers dialed from the defendant’s home phone. 442 U. S., at 737. The Court held in both cases that the officers did not search anything belonging to the defendants within the meaning of the Fourth Amendment. The defendants could “assert neither ownership nor possession” of the records because the records were created, owned, and controlled by the companies. *Miller, supra*, at 440; see *Smith, supra*, at 741. And the defendants had no

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reasonable expectation of privacy in information they “voluntarily conveyed to the [companies] and exposed to their employees in the ordinary course of business.” *Miller*, *supra*, at 442; see *Smith*, 442 U. S., at 744. Rather, the defendants “assumed the risk that the information would be divulged to police.” *Id.*, at 745.

Miller and *Smith* have been criticized as being based on too narrow a view of reasonable expectations of privacy. See, e.g., Ashdown, The Fourth Amendment and the “Legitimate Expectation of Privacy,” 34 Vand. L. Rev. 1289, 1313–1316 (1981). Those criticisms, however, are unwarranted. The principle established in *Miller* and *Smith* is correct for two reasons, the first relating to a defendant’s attenuated interest in property owned by another, and the second relating to the safeguards inherent in the use of compulsory process.

First, *Miller* and *Smith* placed necessary limits on the ability of individuals to assert Fourth Amendment interests in property to which they lack a “requisite connection.” *Minnesota v. Carter*, 525 U. S. 83, 99 (1998) (KENNEDY, J., concurring). Fourth Amendment rights, after all, are personal. The Amendment protects “[t]he right of the people to be secure in *their* . . . persons, houses, papers, and effects”—not the persons, houses, papers, and effects of others. (Emphasis added.)

The concept of reasonable expectations of privacy, first announced in *Katz v. United States*, 389 U. S. 347 (1967), sought to look beyond the “arcane distinctions developed in property and tort law” in evaluating whether a person has a sufficient connection to the thing or place searched to assert Fourth Amendment interests in it. *Rakas v. Illinois*, 439 U. S. 128, 143 (1978). Yet “property concepts” are, nonetheless, fundamental “in determining the presence or absence of the privacy interests protected by that Amendment.” *Id.*, at 143–144, n. 12. This is so for at least two reasons. First, as a matter of settled expectations

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from the law of property, individuals often have greater expectations of privacy in things and places that belong to them, not to others. And second, the Fourth Amendment’s protections must remain tethered to the text of that Amendment, which, again, protects only a person’s own “persons, houses, papers, and effects.”

Katz did not abandon reliance on property-based concepts. The Court in *Katz* analogized the phone booth used in that case to a friend’s apartment, a taxicab, and a hotel room. 389 U. S., at 352, 359. So when the defendant “shu[t] the door behind him” and “pa[id] the toll,” *id.*, at 352, he had a temporary interest in the space and a legitimate expectation that others would not intrude, much like the interest a hotel guest has in a hotel room, *Stoner v. California*, 376 U. S. 483 (1964), or an overnight guest has in a host’s home, *Minnesota v. Olson*, 495 U. S. 91 (1990). The Government intruded on that space when it attached a listening device to the phone booth. *Katz*, 389 U. S., at 348. (And even so, the Court made it clear that the Government’s search could have been reasonable had there been judicial approval on a case-specific basis, which, of course, did occur here. *Id.*, at 357–359.)

Miller and *Smith* set forth an important and necessary limitation on the *Katz* framework. They rest upon the commonsense principle that the absence of property law analogues can be dispositive of privacy expectations. The defendants in those cases could expect that the third-party businesses could use the records the companies collected, stored, and classified as their own for any number of business and commercial purposes. The businesses were not bailees or custodians of the records, with a duty to hold the records for the defendants’ use. The defendants could make no argument that the records were their own papers or effects. See *Miller*, *supra*, at 440 (“the documents subpoenaed here are not respondent’s ‘private papers’”); *Smith*, *supra*, at 741 (“petitioner obviously

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cannot claim that his ‘property’ was invaded”). The records were the business entities’ records, plain and simple. The defendants had no reason to believe the records were owned or controlled by them and so could not assert a reasonable expectation of privacy in the records.

The second principle supporting *Miller* and *Smith* is the longstanding rule that the Government may use compulsory process to compel persons to disclose documents and other evidence within their possession and control. See *United States v. Nixon*, 418 U. S. 683, 709 (1974) (it is an “ancient proposition of law” that “the public has a right to every man’s evidence” (internal quotation marks and alterations omitted)). A subpoena is different from a warrant in its force and intrusive power. While a warrant allows the Government to enter and seize and make the examination itself, a subpoena simply requires the person to whom it is directed to make the disclosure. A subpoena, moreover, provides the recipient the “opportunity to present objections” before complying, which further mitigates the intrusion. *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186, 195 (1946).

For those reasons this Court has held that a subpoena for records, although a “constructive” search subject to Fourth Amendment constraints, need not comply with the procedures applicable to warrants—even when challenged by the person to whom the records belong. *Id.*, at 202, 208. Rather, a subpoena complies with the Fourth Amendment’s reasonableness requirement so long as it is “‘sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.’” *Donovan v. Lone Steer, Inc.*, 464 U. S. 408, 415 (1984). Persons with no meaningful interests in the records sought by a subpoena, like the defendants in *Miller* and *Smith*, have no rights to object to the records’ disclosure—much less to assert that the Government must obtain a warrant to compel disclosure of the

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records. See *Miller*, 425 U. S., at 444–446; *SEC v. Jerry T. O’Brien, Inc.*, 467 U. S. 735, 742–743 (1984).

Based on *Miller* and *Smith* and the principles underlying those cases, it is well established that subpoenas may be used to obtain a wide variety of records held by businesses, even when the records contain private information. See 2 W. LaFare, *Search and Seizure* §4.13 (5th ed. 2012). Credit cards are a prime example. State and federal law enforcement, for instance, often subpoena credit card statements to develop probable cause to prosecute crimes ranging from drug trafficking and distribution to healthcare fraud to tax evasion. See *United States v. Phibbs*, 999 F.2d 1053 (CA6 1993) (drug distribution); *McCune v. DOJ*, 592 Fed. Appx. 287 (CA5 2014) (healthcare fraud); *United States v. Green*, 305 F.3d 422 (CA6 2002) (drug trafficking and tax evasion); see also 12 U. S. C. §§3402(4), 3407 (allowing the Government to subpoena financial records if “there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry”). Subpoenas also may be used to obtain vehicle registration records, hotel records, employment records, and records of utility usage, to name just a few other examples. See 1 LaFare, *supra*, §2.7(c).

And law enforcement officers are not alone in their reliance on subpoenas to obtain business records for legitimate investigations. Subpoenas also are used for investigatory purposes by state and federal grand juries, see *United States v. Dionisio*, 410 U. S. 1 (1973), state and federal administrative agencies, see *Oklahoma Press, supra*, and state and federal legislative bodies, see *McPhaul v. United States*, 364 U. S. 372 (1960).

B

Carpenter does not question these traditional investigative practices. And he does not ask the Court to reconsider *Miller* and *Smith*. Carpenter argues only that, under

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Miller and *Smith*, the Government may not use compulsory process to acquire cell-site records from cell phone service providers.

There is no merit in this argument. Cell-site records, like all the examples just discussed, are created, kept, classified, owned, and controlled by cell phone service providers, which aggregate and sell this information to third parties. As in *Miller*, Carpenter can “assert neither ownership nor possession” of the records and has no control over them. 425 U. S., at 440.

Carpenter argues that he has Fourth Amendment interests in the cell-site records because they are in essence his personal papers by operation of 47 U. S. C. §222. That statute imposes certain restrictions on how providers may use “customer proprietary network information”—a term that encompasses cell-site records. §§222(c), (h)(1)(A). The statute in general prohibits providers from disclosing personally identifiable cell-site records to private third parties. §222(c)(1). And it allows customers to request cell-site records from the provider. §222(c)(2).

Carpenter’s argument is unpersuasive, however, for §222 does not grant cell phone customers any meaningful interest in cell-site records. The statute’s confidentiality protections may be overridden by the interests of the providers or the Government. The providers may disclose the records “to protect the[ir] rights or property” or to “initiate, render, bill, and collect for telecommunications services.” §§222(d)(1), (2). They also may disclose the records “as required by law”—which, of course, is how they were disclosed in this case. §222(c)(1). Nor does the statute provide customers any practical control over the records. Customers do not create the records; they have no say in whether or for how long the records are stored; and they cannot require the records to be modified or destroyed. Even their right to request access to the records is limited, for the statute “does not preclude a carrier from

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being reimbursed by the customers . . . for the costs associated with making such disclosures.” H. R. Rep. No. 104–204, pt. 1, p. 90 (1995). So in every legal and practical sense the “network information” regulated by §222 is, under that statute, “proprietary” to the service providers, not Carpenter. The Court does not argue otherwise.

Because Carpenter lacks a requisite connection to the cell-site records, he also may not claim a reasonable expectation of privacy in them. He could expect that a third party—the cell phone service provider—could use the information it collected, stored, and classified as its own for a variety of business and commercial purposes.

All this is not to say that *Miller* and *Smith* are without limits. *Miller* and *Smith* may not apply when the Government obtains the modern-day equivalents of an individual’s own “papers” or “effects,” even when those papers or effects are held by a third party. See *Ex parte Jackson*, 96 U. S. 727, 733 (1878) (letters held by mail carrier); *United States v. Warshak*, 631 F. 3d 266, 283–288 (CA6 2010) (e-mails held by Internet service provider). As already discussed, however, this case does not involve property or a bailment of that sort. Here the Government’s acquisition of cell-site records falls within the heartland of *Miller* and *Smith*.

In fact, Carpenter’s Fourth Amendment objection is even weaker than those of the defendants in *Miller* and *Smith*. Here the Government did not use a mere subpoena to obtain the cell-site records. It acquired the records only after it proved to a Magistrate Judge reasonable grounds to believe that the records were relevant and material to an ongoing criminal investigation. See 18 U. S. C. §2703(d). So even if §222 gave Carpenter some attenuated interest in the records, the Government’s conduct here would be reasonable under the standards governing subpoenas. See *Donovan*, 464 U. S., at 415.

Under *Miller* and *Smith*, then, a search of the sort that

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requires a warrant simply did not occur when the Government used court-approved compulsory process, based on a finding of reasonable necessity, to compel a cell phone service provider, as owner, to disclose cell-site records.

III

The Court rejects a straightforward application of *Miller* and *Smith*. It concludes instead that applying those cases to cell-site records would work a “significant extension” of the principles underlying them, *ante*, at 15, and holds that the acquisition of more than six days of cell-site records constitutes a search, *ante*, at 11, n. 3.

In my respectful view the majority opinion misreads this Court’s precedents, old and recent, and transforms *Miller* and *Smith* into an unprincipled and unworkable doctrine. The Court’s newly conceived constitutional standard will cause confusion; will undermine traditional and important law enforcement practices; and will allow the cell phone to become a protected medium that dangerous persons will use to commit serious crimes.

A

The Court errs at the outset by attempting to sidestep *Miller* and *Smith*. The Court frames this case as following instead from *United States v. Knotts*, 460 U. S. 276 (1983), and *United States v. Jones*, 565 U. S. 400 (2012). Those cases, the Court suggests, establish that “individuals have a reasonable expectation of privacy in the whole of their physical movements.” *Ante*, at 7–9, 12.

Knotts held just the opposite: “A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.” 460 U. S., at 281. True, the Court in *Knotts* also suggested that “different constitutional principles may be applicable” to “dragnet-type law enforcement practices.” *Id.*, at 284. But by dragnet practices the Court was refer-

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ring to “twenty-four hour surveillance of any citizen of this country . . . without judicial knowledge or supervision.” *Id.*, at 283.

Those “different constitutional principles” mentioned in *Knotts*, whatever they may be, do not apply in this case. Here the Stored Communications Act requires a neutral judicial officer to confirm in each case that the Government has “reasonable grounds to believe” the cell-site records “are relevant and material to an ongoing criminal investigation.” 18 U. S. C. §2703(d). This judicial check mitigates the Court’s concerns about “a too permeating police surveillance.” *Ante*, at 6 (quoting *United States v. Di Re*, 332 U. S. 581, 595 (1948)). Here, even more so than in *Knotts*, “reality hardly suggests abuse.” 460 U. S., at 284.

The Court’s reliance on *Jones* fares no better. In *Jones* the Government installed a GPS tracking device on the defendant’s automobile. The Court held the Government searched the automobile because it “physically occupied private property [of the defendant] for the purpose of obtaining information.” 565 U. S., at 404. So in *Jones* it was “not necessary to inquire about the target’s expectation of privacy in his vehicle’s movements.” *Grady v. North Carolina*, 575 U. S. ___, ___ (2015) (*per curiam*) (slip op., at 3).

Despite that clear delineation of the Court’s holding in *Jones*, the Court today declares that *Jones* applied the “different constitutional principles” alluded to in *Knotts* to establish that an individual has an expectation of privacy in the sum of his whereabouts. *Ante*, at 8, 12. For that proposition the majority relies on the two concurring opinions in *Jones*, one of which stated that “longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.” 565 U. S., at 430 (ALITO, J., concurring). But *Jones* involved direct governmental surveillance of a defendant’s automobile without judicial

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authorization—specifically, GPS surveillance accurate within 50 to 100 feet. *Id.*, at 402–403. Even assuming that the different constitutional principles mentioned in *Knotts* would apply in a case like *Jones*—a proposition the Court was careful not to announce in *Jones, supra*, at 412–413—those principles are inapplicable here. Cases like this one, where the Government uses court-approved compulsory process to obtain records owned and controlled by a third party, are governed by the two majority opinions in *Miller* and *Smith*.

B

The Court continues its analysis by misinterpreting *Miller* and *Smith*, and then it reaches the wrong outcome on these facts even under its flawed standard.

The Court appears, in my respectful view, to read *Miller* and *Smith* to establish a balancing test. For each “qualitatively different category” of information, the Court suggests, the privacy interests at stake must be weighed against the fact that the information has been disclosed to a third party. See *ante*, at 11, 15–17. When the privacy interests are weighty enough to “overcome” the third-party disclosure, the Fourth Amendment’s protections apply. See *ante*, at 17.

That is an untenable reading of *Miller* and *Smith*. As already discussed, the fact that information was relinquished to a third party was the entire basis for concluding that the defendants in those cases lacked a reasonable expectation of privacy. *Miller* and *Smith* do not establish the kind of category-by-category balancing the Court today prescribes.

But suppose the Court were correct to say that *Miller* and *Smith* rest on so imprecise a foundation. Still the Court errs, in my submission, when it concludes that cell-site records implicate greater privacy interests—and thus deserve greater Fourth Amendment protection—than

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financial records and telephone records.

Indeed, the opposite is true. A person's movements are not particularly private. As the Court recognized in *Knotts*, when the defendant there "traveled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination." 460 U. S., at 281–282. Today expectations of privacy in one's location are, if anything, even less reasonable than when the Court decided *Knotts* over 30 years ago. Millions of Americans choose to share their location on a daily basis, whether by using a variety of location-based services on their phones, or by sharing their location with friends and the public at large via social media.

And cell-site records, as already discussed, disclose a person's location only in a general area. The records at issue here, for example, revealed Carpenter's location within an area covering between around a dozen and several hundred city blocks. "Areas of this scale might encompass bridal stores and Bass Pro Shops, gay bars and straight ones, a Methodist church and the local mosque." 819 F. 3d 880, 889 (CA6 2016). These records could not reveal where Carpenter lives and works, much less his "familial, political, professional, religious, and sexual associations." *Ante*, at 12 (quoting *Jones, supra*, at 415 (SOTOMAYOR, J., concurring)).

By contrast, financial records and telephone records do "revea[l] . . . personal affairs, opinions, habits and associations." *Miller*, 425 U. S., at 451 (Brennan, J., dissenting); see *Smith*, 442 U. S., at 751 (Marshall, J., dissenting). What persons purchase and to whom they talk might disclose how much money they make; the political and religious organizations to which they donate; whether they have visited a psychiatrist, plastic surgeon, abortion clinic, or AIDS treatment center; whether they go to gay bars or

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straight ones; and who are their closest friends and family members. The troves of intimate information the Government can and does obtain using financial records and telephone records dwarfs what can be gathered from cell-site records.

Still, the Court maintains, cell-site records are “unique” because they are “comprehensive” in their reach; allow for retrospective collection; are “easy, cheap, and efficient compared to traditional investigative tools”; and are not exposed to cell phone service providers in a meaningfully voluntary manner. *Ante*, at 11–13, 17, 22. But many other kinds of business records can be so described. Financial records are of vast scope. Banks and credit card companies keep a comprehensive account of almost every transaction an individual makes on a daily basis. “With just the click of a button, the Government can access each [company’s] deep repository of historical [financial] information at practically no expense.” *Ante*, at 12–13. And the decision whether to transact with banks and credit card companies is no more or less voluntary than the decision whether to use a cell phone. Today, just as when *Miller* was decided, “it is impossible to participate in the economic life of contemporary society without maintaining a bank account.” 425 U. S., at 451 (Brennan, J., dissenting). But this Court, nevertheless, has held that individuals do not have a reasonable expectation of privacy in financial records.

Perhaps recognizing the difficulty of drawing the constitutional line between cell-site records and financial and telephonic records, the Court posits that the accuracy of cell-site records “is rapidly approaching GPS-level precision.” *Ante*, at 14. That is certainly plausible in the era of cyber technology, yet the privacy interests associated with location information, which is often disclosed to the public at large, still would not outweigh the privacy interests implicated by financial and telephonic records.

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Perhaps more important, those future developments are no basis upon which to resolve this case. In general, the Court “risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear.” *Ontario v. Quon*, 560 U. S. 746, 759 (2010). That judicial caution, prudent in most cases, is imperative in this one.

Technological changes involving cell phones have complex effects on crime and law enforcement. Cell phones make crimes easier to coordinate and conceal, while also providing the Government with new investigative tools that may have the potential to upset traditional privacy expectations. See Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 Harv. L. Rev 476, 512–517 (2011). How those competing effects balance against each other, and how property norms and expectations of privacy form around new technology, often will be difficult to determine during periods of rapid technological change. In those instances, and where the governing legal standard is one of reasonableness, it is wise to defer to legislative judgments like the one embodied in §2703(d) of the Stored Communications Act. See *Jones*, 565 U. S., at 430 (ALITO, J., concurring). In §2703(d) Congress weighed the privacy interests at stake and imposed a judicial check to prevent executive overreach. The Court should be wary of upsetting that legislative balance and erecting constitutional barriers that foreclose further legislative instructions. See *Quon*, *supra*, at 759. The last thing the Court should do is incorporate an arbitrary and outside limit—in this case six days’ worth of cell-site records—and use it as the foundation for a new constitutional framework. The Court’s decision runs roughshod over the mechanism Congress put in place to govern the acquisition of cell-site records and closes off further legislative debate on these issues.

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C

The Court says its decision is a “narrow one.” *Ante*, at 17. But its reinterpretation of *Miller* and *Smith* will have dramatic consequences for law enforcement, courts, and society as a whole.

Most immediately, the Court’s holding that the Government must get a warrant to obtain more than six days of cell-site records limits the effectiveness of an important investigative tool for solving serious crimes. As this case demonstrates, cell-site records are uniquely suited to help the Government develop probable cause to apprehend some of the Nation’s most dangerous criminals: serial killers, rapists, arsonists, robbers, and so forth. See also, e.g., *Davis*, 785 F. 3d, at 500–501 (armed robbers); Brief for Alabama et al. as *Amici Curiae* 21–22 (serial killer). These records often are indispensable at the initial stages of investigations when the Government lacks the evidence necessary to obtain a warrant. See *United States v. Pembroke*, 876 F. 3d 812, 816–819 (CA6 2017). And the long-term nature of many serious crimes, including serial crimes and terrorism offenses, can necessitate the use of significantly more than six days of cell-site records. The Court’s arbitrary 6-day cutoff has the perverse effect of nullifying Congress’ reasonable framework for obtaining cell-site records in some of the most serious criminal investigations.

The Court’s decision also will have ramifications that extend beyond cell-site records to other kinds of information held by third parties, yet the Court fails “to provide clear guidance to law enforcement” and courts on key issues raised by its reinterpretation of *Miller* and *Smith*. *Riley v. California*, 573 U. S. ___, ___ (2014) (slip op., at 22).

First, the Court’s holding is premised on cell-site records being a “distinct category of information” from other busi-

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ness records. *Ante*, at 15. But the Court does not explain what makes something a distinct category of information. Whether credit card records are distinct from bank records; whether payment records from digital wallet applications are distinct from either; whether the electronic bank records available today are distinct from the paper and microfilm records at issue in *Miller*; or whether cell-phone call records are distinct from the home-phone call records at issue in *Smith*, are just a few of the difficult questions that require answers under the Court’s novel conception of *Miller* and *Smith*.

Second, the majority opinion gives courts and law enforcement officers no indication how to determine whether any particular category of information falls on the financial-records side or the cell-site-records side of its newly conceived constitutional line. The Court’s multifactor analysis—considering intimacy, comprehensiveness, expense, retrospectivity, and voluntariness—puts the law on a new and unstable foundation.

Third, even if a distinct category of information is deemed to be more like cell-site records than financial records, courts and law enforcement officers will have to guess how much of that information can be requested before a warrant is required. The Court suggests that less than seven days of location information may not require a warrant. See *ante*, at 11, n. 3; see also *ante*, at 17–18 (expressing no opinion on “real-time CSLI,” tower dumps, and security-camera footage). But the Court does not explain why that is so, and nothing in its opinion even alludes to the considerations that should determine whether greater or lesser thresholds should apply to information like IP addresses or website browsing history.

Fourth, by invalidating the Government’s use of court-approved compulsory process in this case, the Court calls into question the subpoena practices of federal and state grand juries, legislatures, and other investigative bodies,

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as JUSTICE ALITO’s opinion explains. See *post*, at 2–19 (dissenting opinion). Yet the Court fails even to mention the serious consequences this will have for the proper administration of justice.

In short, the Court’s new and uncharted course will inhibit law enforcement and “keep defendants and judges guessing for years to come.” *Riley*, 573 U. S., at ____ (slip op., at 25) (internal quotation marks omitted).

* * *

This case should be resolved by interpreting accepted property principles as the baseline for reasonable expectations of privacy. Here the Government did not search anything over which Carpenter could assert ownership or control. Instead, it issued a court-authorized subpoena to a third party to disclose information it alone owned and controlled. That should suffice to resolve this case.

Having concluded, however, that the Government searched Carpenter when it obtained cell-site records from his cell phone service providers, the proper resolution of this case should have been to remand for the Court of Appeals to determine in the first instance whether the search was reasonable. Most courts of appeals, believing themselves bound by *Miller* and *Smith*, have not grappled with this question. And the Court’s reflexive imposition of the warrant requirement obscures important and difficult issues, such as the scope of Congress’ power to authorize the Government to collect new forms of information using processes that deviate from traditional warrant procedures, and how the Fourth Amendment’s reasonableness requirement should apply when the Government uses compulsory process instead of engaging in an actual, physical search.

These reasons all lead to this respectful dissent.

Appendix to opinion of KENNEDY, J.

APPENDIX

“§2703. Required disclosure of customer communications or records

“(d) REQUIREMENTS FOR COURT ORDER.—A court order for disclosure under subsection (b) or (c) may be issued by any court that is a court of competent jurisdiction and shall issue only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation. In the case of a State governmental authority, such a court order shall not issue if prohibited by the law of such State. A court issuing an order pursuant to this section, on a motion made promptly by the service provider, may quash or modify such order, if the information or records requested are unusually voluminous in nature or compliance with such order otherwise would cause an undue burden on such provider.”

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SUPREME COURT OF THE UNITED STATES

No. 16–402

TIMOTHY IVORY CARPENTER, PETITIONER *v.*
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

[June 22, 2018]

JUSTICE THOMAS, dissenting.

This case should not turn on “whether” a search occurred. *Ante*, at 1. It should turn, instead, on *whose* property was searched. The Fourth Amendment guarantees individuals the right to be secure from unreasonable searches of “*their* persons, houses, papers, and effects.” (Emphasis added.) In other words, “*each* person has the right to be secure against unreasonable searches . . . in *his own* person, house, papers, and effects.” *Minnesota v. Carter*, 525 U. S. 83, 92 (1998) (Scalia, J., concurring). By obtaining the cell-site records of MetroPCS and Sprint, the Government did not search Carpenter’s property. He did not create the records, he does not maintain them, he cannot control them, and he cannot destroy them. Neither the terms of his contracts nor any provision of law makes the records his. The records belong to MetroPCS and Sprint.

The Court concludes that, although the records are not Carpenter’s, the Government must get a warrant because Carpenter had a reasonable “expectation of privacy” in the location information that they reveal. *Ante*, at 11. I agree with JUSTICE KENNEDY, JUSTICE ALITO, JUSTICE GORSUCH, and every Court of Appeals to consider the question that this is not the best reading of our precedents.

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The more fundamental problem with the Court’s opinion, however, is its use of the “reasonable expectation of privacy” test, which was first articulated by Justice Harlan in *Katz v. United States*, 389 U. S. 347, 360–361 (1967) (concurring opinion). The *Katz* test has no basis in the text or history of the Fourth Amendment. And, it invites courts to make judgments about policy, not law. Until we confront the problems with this test, *Katz* will continue to distort Fourth Amendment jurisprudence. I respectfully dissent.

I

Katz was the culmination of a series of decisions applying the Fourth Amendment to electronic eavesdropping. The first such decision was *Olmstead v. United States*, 277 U. S. 438 (1928), where federal officers had intercepted the defendants’ conversations by tapping telephone lines near their homes. *Id.*, at 456–457. In an opinion by Chief Justice Taft, the Court concluded that this wiretap did not violate the Fourth Amendment. No “search” occurred, according to the Court, because the officers did not physically enter the defendants’ homes. *Id.*, at 464–466. And neither the telephone lines nor the defendants’ intangible conversations qualified as “persons, houses, papers, [or] effects” within the meaning of the Fourth Amendment. *Ibid.*¹ In the ensuing decades, this Court adhered to

¹Justice Brandeis authored the principal dissent in *Olmstead*. He consulted the “underlying purpose,” rather than “the words of the [Fourth] Amendment,” to conclude that the wiretap was a search. 277 U. S., at 476. In Justice Brandeis’ view, the Framers “recognized the significance of man’s spiritual nature, of his feelings and of his intellect” and “sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.” *Id.*, at 478. Thus, “every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed,” should constitute an unreasonable search under the Fourth Amendment. *Ibid.*

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Olmstead and rejected Fourth Amendment challenges to various methods of electronic surveillance. See *On Lee v. United States*, 343 U. S. 747, 749–753 (1952) (use of microphone to overhear conversations with confidential informant); *Goldman v. United States*, 316 U. S. 129, 131–132, 135–136 (1942) (use of detectaphone to hear conversations in office next door).

In the 1960’s, however, the Court began to retreat from *Olmstead*. In *Silverman v. United States*, 365 U. S. 505 (1961), for example, federal officers had eavesdropped on the defendants by driving a “spike mike” several inches into the house they were occupying. *Id.*, at 506–507. This was a “search,” the Court held, because the “unauthorized physical penetration into the premises” was an “actual intrusion into a constitutionally protected area.” *Id.*, at 509, 512. The Court did not mention *Olmstead*’s other holding that intangible conversations are not “persons, houses, papers, [or] effects.” That omission was significant. The Court confirmed two years later that “[i]t follows from [*Silverman*] that the Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of ‘papers and effects.’” *Wong Sun v. United States*, 371 U. S. 471, 485 (1963); accord, *Berger v. New York*, 388 U. S. 41, 51 (1967).

In *Katz*, the Court rejected *Olmstead*’s remaining holding—that eavesdropping is not a search absent a physical intrusion into a constitutionally protected area. The federal officers in *Katz* had intercepted the defendant’s conversations by attaching an electronic device to the outside of a public telephone booth. 389 U. S., at 348. The Court concluded that this was a “search” because the officers “violated the privacy upon which [the defendant] justifiably relied while using the telephone booth.” *Id.*, at 353. Although the device did not physically penetrate the booth, the Court overruled *Olmstead* and held that “the reach of [the Fourth] Amendment cannot turn upon the

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presence or absence of a physical intrusion.” 389 U. S., at 353. The Court did not explain what should replace *Olmstead*’s physical-intrusion requirement. It simply asserted that “the Fourth Amendment protects people, not places” and “what [a person] seeks to preserve as private . . . may be constitutionally protected.” 389 U. S., at 351.

Justice Harlan’s concurrence in *Katz* attempted to articulate the standard that was missing from the majority opinion. While Justice Harlan agreed that “the Fourth Amendment protects people, not places,” he stressed that “[t]he question . . . is what protection it affords to those people,” and “the answer . . . requires reference to a ‘place.’” *Id.*, at 361. Justice Harlan identified a “twofold requirement” to determine when the protections of the Fourth Amendment apply: “first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’” *Ibid.*

Justice Harlan did not cite anything for this “expectation of privacy” test, and the parties did not discuss it in their briefs. The test appears to have been presented for the first time at oral argument by one of the defendant’s lawyers. See Winn, *Katz* and the Origins of the “Reasonable Expectation of Privacy” Test, 40 McGeorge L. Rev. 1, 9–10 (2009). The lawyer, a recent law-school graduate, apparently had an “[e]piphany” while preparing for oral argument. Schneider, *Katz v. United States: The Untold Story*, 40 McGeorge L. Rev. 13, 18 (2009). He conjectured that, like the “reasonable person” test from his Torts class, the Fourth Amendment should turn on “whether a reasonable person . . . could have expected his communication to be private.” *Id.*, at 19. The lawyer presented his new theory to the Court at oral argument. See, e.g., Tr. of Oral Arg. in *Katz v. United States*, O. T. 1967, No. 35, p. 5 (proposing a test of “whether or not, objectively speaking, the communication was intended to be private”); *id.*, at 11

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(“We propose a test using a way that’s not too dissimilar from the tort ‘reasonable man’ test”). After some questioning from the Justices, the lawyer conceded that his test should also require individuals to subjectively expect privacy. See *id.*, at 12. With that modification, Justice Harlan seemed to accept the lawyer’s test almost verbatim in his concurrence.

Although the majority opinion in *Katz* had little practical significance after Congress enacted the Omnibus Crime Control and Safe Streets Act of 1968, Justice Harlan’s concurrence profoundly changed our Fourth Amendment jurisprudence. It took only one year for the full Court to adopt his two-pronged test. See *Terry v. Ohio*, 392 U. S. 1, 10 (1968). And by 1979, the Court was describing Justice Harlan’s test as the “lodestar” for determining whether a “search” had occurred. *Smith v. Maryland*, 442 U. S. 735, 739 (1979). Over time, the Court minimized the subjective prong of Justice Harlan’s test. See Kerr, *Katz* Has Only One Step: The Irrelevance of Subjective Expectations, 82 U. Chi. L. Rev. 113 (2015). That left the objective prong—the “reasonable expectation of privacy” test that the Court still applies today. See *ante*, at 5; *United States v. Jones*, 565 U. S. 400, 406 (2012).

II

Under the *Katz* test, a “search” occurs whenever “government officers violate a person’s ‘reasonable expectation of privacy.’” *Jones, supra*, at 406. The most glaring problem with this test is that it has “no plausible foundation in the text of the Fourth Amendment.” *Carter*, 525 U. S., at 97 (opinion of Scalia, J.). The Fourth Amendment, as relevant here, protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches.” By defining “search” to mean “any violation of a reasonable expectation of pri-

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vacy,” the *Katz* test misconstrues virtually every one of these words.

A

The *Katz* test distorts the original meaning of “searc[h]”—the word in the Fourth Amendment that it purports to define, see *ante*, at 5; *Smith, supra*. Under the *Katz* test, the government conducts a search anytime it violates someone’s “reasonable expectation of privacy.” That is not a normal definition of the word “search.”

At the founding, “search” did not mean a violation of someone’s reasonable expectation of privacy. The word was probably not a term of art, as it does not appear in legal dictionaries from the era. And its ordinary meaning was the same as it is today: “[t]o look over or through for the purpose of finding something; to explore; to examine by inspection; as, to *search* the house for a book; to *search* the wood for a thief.” *Kyllo v. United States*, 533 U. S. 27, 32, n. 1 (2001) (quoting N. Webster, *An American Dictionary of the English Language* 66 (1828) (reprint 6th ed. 1989)); accord, 2 S. Johnson, *A Dictionary of the English Language* (5th ed. 1773) (“Inquiry by looking into every suspected place”); N. Bailey, *An Universal Etymological English Dictionary* (22d ed. 1770) (“a seeking after, a looking for, &c.”); 2 J. Ash, *The New and Complete Dictionary of the English Language* (2d ed. 1795) (“An enquiry, an examination, the act of seeking, an enquiry by looking into every suspected place; a quest; a pursuit”); T. Sheridan, *A Complete Dictionary of the English Language* (6th ed. 1796) (similar). The word “search” was not associated with “reasonable expectation of privacy” until Justice Harlan coined that phrase in 1967. The phrase “expectation(s) of privacy” does not appear in the pre-*Katz* federal or state case reporters, the papers of prominent

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Founders,² early congressional documents and debates,³ collections of early American English texts,⁴ or early American newspapers.⁵

B

The *Katz* test strays even further from the text by focusing on the concept of “privacy.” The word “privacy” does not appear in the Fourth Amendment (or anywhere else in the Constitution for that matter). Instead, the Fourth Amendment references “[t]he right of the people to be secure.” It then qualifies that right by limiting it to “persons” and three specific types of property: “houses, papers, and effects.” By connecting the right to be secure to these four specific objects, “[t]he text of the Fourth Amendment reflects its close connection to property.” *Jones, supra*, at 405. “[P]rivacy,” by contrast, “was not part of the political vocabulary of the [founding]. Instead, liberty and privacy rights were understood largely in terms of property rights.” Cloud, *Property Is Privacy: Locke and Brandeis in the Twenty-First Century*, 55 Am. Crim. L. Rev. 37, 42 (2018).

Those who ratified the Fourth Amendment were quite familiar with the notion of security in property. Security in property was a prominent concept in English law. See, e.g., 3 W. Blackstone, *Commentaries on the Laws of Eng-*

²National Archives, Library of Congress, Founders Online, <https://founders.archives.gov> (all Internet materials as last visited June 18, 2018).

³A Century of Lawmaking For A New Nation, U. S. Congressional Documents and Debates, 1774–1875 (May 1, 2003), <https://memory.loc.gov/ammem/amlaw/lawhome.html>.

⁴Corpus of Historical American English, <https://corpus.byu.edu/coha>; Google Books (American), <https://googlebooks.byu.edu/x.asp>; Corpus of Founding Era American English, <https://lawncf.byu.edu/cofea>.

⁵Readex, *America’s Historical Newspapers* (2018), <https://www.readex.com/content/americas-historical-newspapers>.

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land 288 (1768) (“[E]very man’s house is looked upon by the law to be his castle”); 3 E. Coke, *Institutes of Laws of England* 162 (6th ed. 1680) (“[F]or a man[']s house is his Castle, & domus sua cuique est tutissimum refugium [each man’s home is his safest refuge]”). The political philosophy of John Locke, moreover, “permeated the 18th-century political scene in America.” *Obergefell v. Hodges*, 576 U. S. ___, ___ (2015) (THOMAS, J., dissenting) (slip op., at 8). For Locke, every individual had a property right “in his own person” and in anything he “removed from the common state [of] Nature” and “mixed his labour with.” *Second Treatise of Civil Government* §27 (1690). Because property is “very insecure” in the state of nature, §123, individuals form governments to obtain “a secure enjoyment of their properties.” §95. Once a government is formed, however, it cannot be given “a power to destroy that which every one designs to secure”; it cannot legitimately “endeavour to take away, and destroy the property of the people,” or exercise “an absolute power over [their] lives, liberties, and estates.” §222.

The concept of security in property recognized by Locke and the English legal tradition appeared throughout the materials that inspired the Fourth Amendment. In *Entick v. Carrington*, 19 How. St. Tr. 1029 (C. P. 1765)—a heralded decision that the founding generation considered “the true and ultimate expression of constitutional law,” *Boyd v. United States*, 116 U. S. 616, 626 (1886)—Lord Camden explained that “[t]he great end, for which men entered into society, was to secure their property.” 19 How. St. Tr., at 1066. The American colonists echoed this reasoning in their “widespread hostility” to the Crown’s writs of assistance⁶—a practice that inspired the Revolu-

⁶Writs of assistance were “general warrants” that gave “customs officials blanket authority to search where they pleased for goods

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tion and became “[t]he driving force behind the adoption of the [Fourth] Amendment.” *United States v. Verdugo-Urquidez*, 494 U. S. 259, 266 (1990). Prominent colonists decried the writs as destroying “‘domestic security’” by permitting broad searches of homes. M. Smith, *The Writs of Assistance Case 475* (1978) (quoting a 1772 Boston town meeting); see also *id.*, at 562 (complaining that “‘every householder in this province, will necessarily become *less secure* than he was before this writ’” (quoting a 1762 article in the *Boston Gazette*)); *id.*, at 493 (complaining that the writs were “‘expressly contrary to the common law, which ever regarded a man’s *house* as his castle, or a place of perfect security’” (quoting a 1768 letter from John Dickinson)). John Otis, who argued the famous Writs of Assistance case, contended that the writs violated “‘the fundamental Principl[e] of Law” that “[a] Man who is quiet, is as secure in his House, as a Prince in his Castle.” *Id.*, at 339 (quoting John Adam’s notes). John Adams attended Otis’ argument and later drafted Article XIV of the Massachusetts Constitution,⁷ which served as a model for the Fourth Amendment. See Clancy, *The Framers’ Intent: John Adams, His Era, and the Fourth Amendment*, 86 *Ind. L. J.* 979, 982 (2011); Donahue, *The Original Fourth Amendment*, 83 *U. Chi. L. Rev.* 1181, 1269 (2016)

imported in violation of the British tax laws.” *Stanford v. Texas*, 379 U. S. 476, 481 (1965).

⁷“Every subject has a right to be secure from all unreasonable searches and seizures of his person, his house, his papers, and all his possessions. All warrants, therefore, are contrary to right, if the cause or foundation of them be not previously supported by oath or affirmation, and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the person or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.” *Mass. Const.*, pt. I, Art. XIV (1780).

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(Donahue). Adams agreed that “[p]roperty must be secured, or liberty cannot exist.” Discourse on Davila, in 6 *The Works of John Adams* 280 (C. Adams ed. 1851).

Of course, the founding generation understood that, by securing their property, the Fourth Amendment would often protect their privacy as well. See, e.g., *Boyd, supra*, at 630 (explaining that searches of houses invade “the privacies of life”); *Wilkes v. Wood*, 19 How. St. Tr. 1153, 1154 (C. P. 1763) (argument of counsel contending that seizures of papers implicate “our most private concerns”). But the Fourth Amendment’s attendant protection of privacy does not justify *Katz*’s elevation of privacy as the *sine qua non* of the Amendment. See T. Clancy, *The Fourth Amendment: Its History and Interpretation* §3.4.4, p. 78 (2008) (“[The *Katz* test] confuse[s] the reasons for exercising the protected right with the right itself. A purpose of exercising one’s Fourth Amendment rights might be the desire for privacy, but the individual’s motivation is not the right protected”); cf. *United States v. Gonzalez-Lopez*, 548 U. S. 140, 145 (2006) (rejecting “a line of reasoning that ‘abstracts from the right to its purposes, and then eliminates the right’”). As the majority opinion in *Katz* recognized, the Fourth Amendment “cannot be translated into a general constitutional ‘right to privacy,’” as its protections “often have nothing to do with privacy at all.” 389 U. S., at 350. Justice Harlan’s focus on privacy in his concurrence—an opinion that was issued between *Griswold v. Connecticut*, 381 U. S. 479 (1965), and *Roe v. Wade*, 410 U. S. 113 (1973)—reflects privacy’s status as the organizing constitutional idea of the 1960’s and 1970’s. The organizing constitutional idea of the founding era, by contrast, was property.

C

In shifting the focus of the Fourth Amendment from property to privacy, the *Katz* test also reads the words

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“persons, houses, papers, and effects” out of the text. At its broadest formulation, the *Katz* test would find a search “*wherever* an individual may harbor a reasonable ‘expectation of privacy.’” *Terry*, 392 U. S., at 9 (emphasis added). The Court today, for example, does not ask whether cell-site location records are “persons, houses, papers, [or] effects” within the meaning of the Fourth Amendment.⁸ Yet “persons, houses, papers, and effects” cannot mean “anywhere” or “anything.” *Katz*’s catchphrase that “the Fourth Amendment protects people, not places,” is not a serious attempt to reconcile the constitutional text. See *Carter*, 525 U. S., at 98, n. 3 (opinion of Scalia, J.). The Fourth Amendment obviously protects people; “[t]he question . . . is what protection it affords to those people.” *Katz*, 389 U. S., at 361 (Harlan, J., concurring). The Founders decided to protect the people from unreasonable searches and seizures of four specific things—persons, houses, papers, and effects. They identified those four categories as “the objects of privacy protection to which the *Constitution* would extend, leaving further expansion to the good judgment . . . of the people through their representatives in the legislature.” *Carter*, *supra*, at 97–98 (opinion of Scalia, J.).

This limiting language was important to the founders. Madison’s first draft of the Fourth Amendment used a different phrase: “their persons, their houses, their papers, and their *other property*.” 1 Annals of Cong. 452 (1789)

⁸The answer to that question is not obvious. Cell-site location records are business records that mechanically collect the interactions between a person’s cell phone and the company’s towers; they are not private papers and do not reveal the contents of any communications. Cf. Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 Va. L. Rev. 869, 923–924 (1985) (explaining that business records that do not reveal “personal or speech-related confidences” might not satisfy the original meaning of “papers”).

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(emphasis added). In one of the few changes made to Madison’s draft, the House Committee of Eleven changed “other property” to “effects.” See House Committee of Eleven Report (July 28, 1789), in N. Cogan, *The Complete Bill of Rights* 334 (2d ed. 2015). This change might have narrowed the Fourth Amendment by clarifying that it does not protect real property (other than houses). See *Oliver v. United States*, 466 U. S. 170, 177, and n. 7 (1984); Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 709–714 (1999) (Davies). Or the change might have broadened the Fourth Amendment by clarifying that it protects commercial goods, not just personal possessions. See Donahue 1301. Or it might have done both. Whatever its ultimate effect, the change reveals that the Founders understood the phrase “persons, houses, papers, and effects” to be an important measure of the Fourth Amendment’s overall scope. See Davies 710. The *Katz* test, however, displaces and renders that phrase entirely “superfluous.” *Jones*, 565 U. S., at 405.

D

“[P]ersons, houses, papers, and effects” are not the only words that the *Katz* test reads out of the Fourth Amendment. The Fourth Amendment specifies that the people have a right to be secure from unreasonable searches of “their” persons, houses, papers, and effects. Although phrased in the plural, “[t]he obvious meaning of [‘their’] is that *each* person has the right to be secure against unreasonable searches and seizures in *his own* person, house, papers, and effects.” *Carter, supra*, at 92 (opinion of Scalia, J.); see also *District of Columbia v. Heller*, 554 U. S. 570, 579 (2008) (explaining that the Constitution uses the plural phrase “the people” to “refer to individual rights, not ‘collective’ rights”). Stated differently, the word “their” means, at the very least, that individuals do not have Fourth Amendment rights in *someone else’s* property. See

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Carter, supra, at 92–94 (opinion of Scalia, J.). Yet, under the *Katz* test, individuals can have a reasonable expectation of privacy in another person’s property. See, e.g., *Carter*, 525 U. S., at 89 (majority opinion) (“[A] person may have a legitimate expectation of privacy in the house of someone else”). Until today, our precedents have not acknowledged that individuals can claim a reasonable expectation of privacy in someone else’s business records. See *ante*, at 2 (KENNEDY, J., dissenting). But the Court erases that line in this case, at least for cell-site location records. In doing so, it confirms that the *Katz* test does not necessarily require an individual to prove that the government searched *his* person, house, paper, or effect.

Carpenter attempts to argue that the cell-site records are, in fact, his “papers,” see Brief for Petitioner 32–35; Reply Brief 14–15, but his arguments are unpersuasive, see *ante*, at 12–13 (opinion of KENNEDY, J.); *post*, at 20–23 (ALITO, J., dissenting). Carpenter stipulated below that the cell-site records are the business records of Sprint and MetroPCS. See App. 51. He cites no property law in his briefs to this Court, and he does not explain how he has a property right in the companies’ records under the law of any jurisdiction at any point in American history. If someone stole these records from Sprint or MetroPCS, Carpenter does not argue that he could recover in a traditional tort action. Nor do his contracts with Sprint and MetroPCS make the records his, even though such provisions could exist in the marketplace. Cf., e.g., Google Terms of Service, <https://policies.google.com/terms> (“Some of our Services allow you to upload, submit, store, send or receive content. You retain ownership of any intellectual property rights that you hold in that content. In short, what belongs to you stays yours”).

Instead of property, tort, or contract law, Carpenter relies on the federal Telecommunications Act of 1996 to demonstrate that the cell site records are his papers. The

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Telecommunications Act generally bars cell-phone companies from disclosing customers' cell site location information to the public. See 47 U.S.C. §222(c). This is sufficient to make the records *his*, Carpenter argues, because the Fourth Amendment merely requires him to identify a source of "positive law" that "protects against access by the public without consent." Brief for Petitioner 32–33 (citing Baude & Stern, *The Positive Law Model of the Fourth Amendment*, 129 Harv. L. Rev. 1821, 1825–1826 (2016); emphasis deleted).

Carpenter is mistaken. To come within the text of the Fourth Amendment, Carpenter must prove that the cell-site records are *his*; positive law is potentially relevant only insofar as it answers that question. The text of the Fourth Amendment cannot plausibly be read to mean "any violation of positive law" any more than it can plausibly be read to mean "any violation of a reasonable expectation of privacy."

Thus, the Telecommunications Act is insufficient because it does not give Carpenter a property right in the cell-site records. Section 222, titled "Privacy of customer information," protects customers' privacy by preventing cell-phone companies from disclosing sensitive information about them. The statute creates a "duty to protect the confidentiality" of information relating to customers, §222(a), and creates "[p]rivacy requirements" that limit the disclosure of that information, §222(c)(1). Nothing in the text pre-empts state property law or gives customers a property interest in the companies' business records (assuming Congress even has that authority).⁹ Although

⁹Carpenter relies on an order from the Federal Communications Commission (FCC), which weakly states that "[t]o the extent [a customer's location information] is property, . . . it is better understood as belonging to the customer, not the carrier." Brief for Petitioner 34, and n. 23 (quoting 13 FCC Rcd. 8061, 8093 ¶43 (1998); emphasis added).

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§222 “protects the interests of individuals against wrongful uses or disclosures of personal data, the rationale for these legal protections has not historically been grounded on a perception that people have property rights in personal data as such.” Samuelson, *Privacy as Intellectual Property?* 52 *Stan. L. Rev.* 1125, 1130–1131 (2000) (footnote omitted). Any property rights remain with the companies.

E

The *Katz* test comes closer to the text of the Fourth Amendment when it asks whether an expectation of privacy is “reasonable,” but it ultimately distorts that term as well. The Fourth Amendment forbids “unreasonable searches.” In other words, reasonableness determines the legality of a search, not “whether a search . . . within the meaning of the Constitution has *occurred*.” *Carter*, 525 U. S., at 97 (opinion of Scalia, J.) (internal quotation marks omitted).

Moreover, the *Katz* test invokes the concept of reasonableness in a way that would be foreign to the ratifiers of the Fourth Amendment. Originally, the word “unreasonable” in the Fourth Amendment likely meant “against reason”—as in “against the reason of the common law.” See *Donahue* 1270–1275; *Davies* 686–693; *California v. Acevedo*, 500 U. S. 565, 583 (1991) (Scalia, J., concurring in judgment). At the founding, searches and seizures were

But this order was vacated by the Court of Appeals for the Tenth Circuit. *U. S. West, Inc. v. FCC*, 182 F. 3d 1224, 1240 (1999). Notably, the carrier in that case argued that the FCC’s regulation of customer information was a taking of *its* property. See *id.*, at 1230. Although the panel majority had no occasion to address this argument, see *id.*, at 1239, n. 14, the dissent concluded that the carrier had failed to prove the information was “property” at all, see *id.*, at 1247–1248 (opinion of Briscoe, J.).

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regulated by a robust body of common-law rules. See generally W. Cuddihy, *The Fourth Amendment: Origins and Original Meaning* 602–1791 (2009); *e.g.*, *Wilson v. Arkansas*, 514 U. S. 927, 931–936 (1995) (discussing the common-law knock-and-announce rule). The search-and-seizure practices that the Founders feared most—such as general warrants—were already illegal under the common law, and jurists such as Lord Coke described violations of the common law as “against reason.” See *Donahue* 1270–1271, and n. 513. Locke, Blackstone, Adams, and other influential figures shortened the phrase “against reason” to “unreasonable.” See *id.*, at 1270–1275. Thus, by prohibiting “unreasonable” searches and seizures in the Fourth Amendment, the Founders ensured that the newly created Congress could not use legislation to abolish the established common-law rules of search and seizure. See T. Cooley, *Constitutional Limitations* *303 (2d ed. 1871); 3 J. Story, *Commentaries on the Constitution of the United States* §1895, p. 748 (1833).

Although the Court today maintains that its decision is based on “Founding-era understandings,” *ante*, at 6, the Founders would be puzzled by the Court’s conclusion as well as its reasoning. The Court holds that the Government unreasonably searched Carpenter by subpoenaing the cell-site records of Sprint and MetroPCS without a warrant. But the Founders would not recognize the Court’s “warrant requirement.” *Ante*, at 21. The common law required warrants for some types of searches and seizures, but not for many others. The relevant rule depended on context. See *Acevedo, supra*, at 583–584 (opinion of Scalia, J.); Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 763–770 (1994); Davies 738–739. In cases like this one, a subpoena for third-party documents was not a “search” to begin with, and the common law did not limit the government’s authority to subpoena third parties. See *post*, at 2–12 (ALITO, J., dissent-

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ing). Suffice it to say, the Founders would be confused by this Court’s transformation of their common-law protection of property into a “warrant requirement” and a vague inquiry into “reasonable expectations of privacy.”

III

That the *Katz* test departs so far from the text of the Fourth Amendment is reason enough to reject it. But the *Katz* test also has proved unworkable in practice. Jurists and commentators tasked with deciphering our jurisprudence have described the *Katz* regime as “an unpredictable jumble,” “a mass of contradictions and obscurities,” “all over the map,” “riddled with inconsistency and incoherence,” “a series of inconsistent and bizarre results that [the Court] has left entirely undefended,” “unstable,” “chameleon-like,” “notoriously unhelpful,” “a conclusion rather than a starting point for analysis,” “distressingly unmanageable,” “a dismal failure,” “flawed to the core,” “unadorned fiat,” and “inspired by the kind of logic that produced Rube Goldberg’s bizarre contraptions.”¹⁰ Even

¹⁰Kugler & Strahilevitz, Actual Expectations of Privacy, Fourth Amendment Doctrine, and the Mosaic Theory, 2015 S. Ct. Rev. 205, 261; Bradley, Two Models of the Fourth Amendment, 83 Mich. L. Rev. 1468 (1985); Kerr, Four Models of Fourth Amendment Protection, 60 Stan. L. Rev. 503, 505 (2007); Solove, Fourth Amendment Pragmatism, 51 Boston College L. Rev. 1511 (2010); Wasserstom & Seidman, The Fourth Amendment as Constitutional Theory, 77 Geo. L. J. 19, 29 (1988); Colb, What Is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy, 55 Stan. L. Rev. 119, 122 (2002); Clancy, The Fourth Amendment: Its History and Interpretation §3.3.4, p. 65 (2008); *Minnesota v. Carter*, 525 U. S. 83, 97 (1998) (Scalia, J., dissenting); *State v. Campbell*, 306 Ore. 157, 164, 759 P. 2d 1040, 1044 (1988); Wilkins, Defining the “Reasonable Expectation of Privacy”: an Emerging Tripartite Analysis, 40 Vand. L. Rev. 1077, 1107 (1987); Yeager, Search, Seizure and the Positive Law: Expectations of Privacy Outside the Fourth Amendment, 84 J. Crim. L. & C. 249, 251 (1993); Thomas, Time Travel, Hovercrafts, and the Framers:

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Justice Harlan, four years after penning his concurrence in *Katz*, confessed that the test encouraged “the substitution of words for analysis.” *United States v. White*, 401 U. S. 745, 786 (1971) (dissenting opinion).

After 50 years, it is still unclear what question the *Katz* test is even asking. This Court has steadfastly declined to elaborate the relevant considerations or identify any meaningful constraints. See, e.g., *ante*, at 5 (“[N]o single rubric definitively resolves which expectations of privacy are entitled to protection”); *O’Connor v. Ortega*, 480 U. S. 709, 715 (1987) (plurality opinion) (“We have no talisman that determines in all cases those privacy expectations that society is prepared to accept as reasonable”); *Oliver*, 466 U. S., at 177 (“No single factor determines whether an individual legitimately may claim under the Fourth Amendment that a place should be free of government intrusion”).

Justice Harlan’s original formulation of the *Katz* test appears to ask a descriptive question: Whether a given expectation of privacy is “one that society is prepared to recognize as ‘reasonable.’” 389 U. S., at 361. As written, the *Katz* test turns on society’s actual, current views about the reasonableness of various expectations of privacy.

But this descriptive understanding presents several problems. For starters, it is easily circumvented. If, for example, “the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry,” individuals could not realistically expect privacy in their homes. *Smith*, 442 U. S., at 740, n. 5; see also Chemerinsky, *Rediscovering Brandeis’s*

James Madison Sees the Future and Rewrites the Fourth Amendment, 80 Notre Dame L. Rev. 1451, 1500 (2005); *Rakas v. Illinois*, 439 U. S. 128, 165 (1978) (White, J., dissenting); Cloud, *Rube Goldberg Meets the Constitution: The Supreme Court, Technology, and the Fourth Amendment*, 72 Miss. L. J. 5, 7 (2002).

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Right to Privacy, 45 Brandeis L. J. 643, 650 (2007) (“[Under *Katz*, t]he government seemingly can deny privacy just by letting people know in advance not to expect any”). A purely descriptive understanding of the *Katz* test also risks “circular[ity].” *Kyllo*, 533 U. S., at 34. While this Court is supposed to base its decisions on society’s expectations of privacy, society’s expectations of privacy are, in turn, shaped by this Court’s decisions. See Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 S. Ct. Rev. 173, 188 (“[W]hether [a person] will or will not have [a reasonable] expectation [of privacy] will depend on what the legal rule is”).

To address this circularity problem, the Court has insisted that expectations of privacy must come from outside its Fourth Amendment precedents, “either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.” *Rakas v. Illinois*, 439 U. S. 128, 144, n. 12 (1978). But the Court’s supposed reliance on “real or personal property law” rings hollow. The whole point of *Katz* was to “discredi[t]” the relationship between the Fourth Amendment and property law, 389 U. S., at 353, and this Court has repeatedly downplayed the importance of property law under the *Katz* test, see, e.g., *United States v. Salvucci*, 448 U. S. 83, 91 (1980) (“[P]roperty rights are neither the beginning nor the end of this Court’s inquiry [under *Katz*]”); *Rawlings v. Kentucky*, 448 U. S. 98, 105 (1980) (“[This Court has] emphatically rejected the notion that ‘arcane’ concepts of property law ought to control the ability to claim the protections of the Fourth Amendment”). Today, for example, the Court makes no mention of property law, except to reject its relevance. See *ante*, at 5, and n. 1.

As for “understandings that are recognized or permitted in society,” this Court has never answered even the most basic questions about what this means. See Kerr, *Four*

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Models of Fourth Amendment Protection, 60 Stan. L. Rev. 503, 504–505 (2007). For example, our precedents do not explain who is included in “society,” how we know what they “recogniz[e] or permi[t],” and how much of society must agree before something constitutes an “understanding.”

Here, for example, society might prefer a balanced regime that prohibits the Government from obtaining cell-site location information unless it can persuade a neutral magistrate that the information bears on an ongoing criminal investigation. That is precisely the regime Congress created under the Stored Communications Act and Telecommunications Act. See 47 U. S. C. §222(c)(1); 18 U. S. C. §§2703(c)(1)(B), (d). With no sense of irony, the Court invalidates this regime today—the one that society actually created “in the form of its elected representatives in Congress.” 819 F. 3d 880, 890 (2016).

Truth be told, this Court does not treat the *Katz* test as a descriptive inquiry. Although the *Katz* test is phrased in descriptive terms about society’s views, this Court treats it like a normative question—whether a particular practice *should* be considered a search under the Fourth Amendment. Justice Harlan thought this was the best way to understand his test. See *White*, 401 U. S., at 786 (dissenting opinion) (explaining that courts must assess the “desirability” of privacy expectations and ask whether courts “should” recognize them by “balanc[ing]” the “impact on the individual’s sense of security . . . against the utility of the conduct as a technique of law enforcement”). And a normative understanding is the only way to make sense of this Court’s precedents, which bear the hallmarks of subjective policymaking instead of neutral legal decisionmaking. “[T]he only thing the past three decades have established about the *Katz* test” is that society’s expectations of privacy “bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable.”

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Carter, 525 U. S., at 97 (opinion of Scalia, J.). Yet, “[t]hough we know ourselves to be eminently reasonable, self-awareness of eminent reasonableness is not really a substitute for democratic election.” *Sosa v. Alvarez-Machain*, 542 U. S. 692, 750 (2004) (Scalia, J., concurring in part and concurring in judgment).

* * *

In several recent decisions, this Court has declined to apply the *Katz* test because it threatened to narrow the original scope of the Fourth Amendment. See *Grady v. North Carolina*, 575 U. S. ___, ___ (2015) (*per curiam*) (slip op., at 3); *Florida v. Jardines*, 569 U. S. 1, 5 (2013); *Jones*, 565 U. S., at 406–407. But as today’s decision demonstrates, *Katz* can also be invoked to expand the Fourth Amendment beyond its original scope. This Court should not tolerate errors in either direction. “The People, through ratification, have already weighed the policy tradeoffs that constitutional rights entail.” *Luis v. United States*, 578 U. S. ___, ___ (2016) (THOMAS, J., concurring in judgment) (slip op., at 10). Whether the rights they ratified are too broad or too narrow by modern lights, this Court has no authority to unilaterally alter the document they approved.

Because the *Katz* test is a failed experiment, this Court is dutybound to reconsider it. Until it does, I agree with my dissenting colleagues’ reading of our precedents. Accordingly, I respectfully dissent.

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SUPREME COURT OF THE UNITED STATES

No. 16–402

TIMOTHY IVORY CARPENTER, PETITIONER *v.*
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

[June 22, 2018]

JUSTICE ALITO, with whom JUSTICE THOMAS joins,
dissenting.

I share the Court’s concern about the effect of new technology on personal privacy, but I fear that today’s decision will do far more harm than good. The Court’s reasoning fractures two fundamental pillars of Fourth Amendment law, and in doing so, it guarantees a blizzard of litigation while threatening many legitimate and valuable investigative practices upon which law enforcement has rightfully come to rely.

First, the Court ignores the basic distinction between an actual search (dispatching law enforcement officers to enter private premises and root through private papers and effects) and an order merely requiring a party to look through its own records and produce specified documents. The former, which intrudes on personal privacy far more deeply, requires probable cause; the latter does not. Treating an order to produce like an actual search, as today’s decision does, is revolutionary. It violates both the original understanding of the Fourth Amendment and more than a century of Supreme Court precedent. Unless it is somehow restricted to the particular situation in the present case, the Court’s move will cause upheaval. Must every grand jury subpoena *duces tecum* be supported by probable cause? If so, investigations of terrorism, political

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corruption, white-collar crime, and many other offenses will be stymied. And what about subpoenas and other document-production orders issued by administrative agencies? See, *e.g.*, 15 U. S. C. §57b–1(c) (Federal Trade Commission); §§77s(c), 78u(a)–(b) (Securities and Exchange Commission); 29 U. S. C. §657(b) (Occupational Safety and Health Administration); 29 CFR §1601.16(a)(2) (2017) (Equal Employment Opportunity Commission).

Second, the Court allows a defendant to object to the search of a third party’s property. This also is revolutionary. The Fourth Amendment protects “[t]he right of the people to be secure in *their* persons, houses, papers, and effects” (emphasis added), not the persons, houses, papers, and effects of others. Until today, we have been careful to heed this fundamental feature of the Amendment’s text. This was true when the Fourth Amendment was tied to property law, and it remained true after *Katz v. United States*, 389 U. S. 347 (1967), broadened the Amendment’s reach.

By departing dramatically from these fundamental principles, the Court destabilizes long-established Fourth Amendment doctrine. We will be making repairs—or picking up the pieces—for a long time to come.

I

Today the majority holds that a court order requiring the production of cell-site records may be issued only after the Government demonstrates probable cause. See *ante*, at 18. That is a serious and consequential mistake. The Court’s holding is based on the premise that the order issued in this case was an actual “search” within the meaning of the Fourth Amendment, but that premise is inconsistent with the original meaning of the Fourth Amendment and with more than a century of precedent.

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A

The order in this case was the functional equivalent of a subpoena for documents, and there is no evidence that these writs were regarded as “searches” at the time of the founding. Subpoenas *duces tecum* and other forms of compulsory document production were well known to the founding generation. Blackstone dated the first writ of subpoena to the reign of King Richard II in the late 14th century, and by the end of the 15th century, the use of such writs had “become the daily practice of the [Chancery] court.” 3 W. Blackstone, *Commentaries on the Laws of England* 53 (G. Tucker ed. 1803) (Blackstone). Over the next 200 years, subpoenas would grow in prominence and power in tandem with the Court of Chancery, and by the end of Charles II’s reign in 1685, two important innovations had occurred.

First, the Court of Chancery developed a new species of subpoena. Until this point, subpoenas had been used largely to compel attendance and oral testimony from witnesses; these subpoenas correspond to today’s subpoenas *ad testificandum*. But the Court of Chancery also improvised a new version of the writ that tacked onto a regular subpoena an order compelling the witness to bring certain items with him. By issuing these so-called subpoenas *duces tecum*, the Court of Chancery could compel the production of papers, books, and other forms of physical evidence, whether from the parties to the case or from third parties. Such subpoenas were sufficiently commonplace by 1623 that a leading treatise on the practice of law could refer in passing to the fee for a “*Sub pæna of Ducas tecum*” (seven shillings and two pence) without needing to elaborate further. T. Powell, *The Attourneys Academy* 79 (1623). Subpoenas *duces tecum* would swell in use over the next century as the rules for their application became ever more developed and definite. See, e.g., 1 G. Jacob, *The Compleat Chancery-Practiser* 290 (1730) (“The *Sub-*

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poena duces tecum is awarded when the Defendant has confessed by his Answer that he hath such Writings in his Hands as are prayed by the Bill to be discovered or brought into Court”).

Second, although this new species of subpoena had its origins in the Court of Chancery, it soon made an appearance in the work of the common-law courts as well. One court later reported that “[t]he Courts of Common law . . . employed the same or similar means . . . from the time of Charles the Second at least.” *Amey v. Long*, 9 East. 473, 484, 103 Eng. Rep. 653, 658 (K. B. 1808).

By the time Blackstone published his Commentaries on the Laws of England in the 1760’s, the use of subpoenas *duces tecum* had bled over substantially from the courts of equity to the common-law courts. Admittedly, the transition was still incomplete: In the context of jury trials, for example, Blackstone complained about “the want of a compulsive power for the production of books and papers belonging to the parties.” Blackstone 381; see also, *e.g.*, *Entick v. Carrington*, 19 State Trials 1029, 1073 (K. B. 1765) (“I wish some cases had been shewn, where the law forceth evidence out of the owner’s custody by process. [But] where the adversary has by force or fraud got possession of your own proper evidence, there is no way to get it back but by action”). But Blackstone found some comfort in the fact that at least those documents “[i]n the hands of third persons . . . can generally be obtained by rule of court, or by adding a clause of requisition to the writ of *subpoena*, which is then called a *subpoena duces tecum*.” Blackstone 381; see also, *e.g.*, *Leeds v. Cook*, 4 Esp. 256, 257, 170 Eng. Rep. 711 (N. P. 1803) (third-party subpoena *duces tecum*); *Rex v. Babb*, 3 T. R. 579, 580, 100 Eng. Rep. 743, 744 (K. B. 1790) (third-party document production). One of the primary questions outstanding, then, was whether common-law courts would remedy the “defect[s]” identified by the Commentaries, and allow

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parties to use subpoenas *duces tecum* not only with respect to third parties but also with respect to each other. Blackstone 381.

That question soon found an affirmative answer on both sides of the Atlantic. In the United States, the First Congress established the federal court system in the Judiciary Act of 1789. As part of that Act, Congress authorized “all the said courts of the United States . . . in the trial of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery.” §15, 1 Stat. 82. From that point forward, federal courts in the United States could compel the production of documents regardless of whether those documents were held by parties to the case or by third parties.

In Great Britain, too, it was soon definitively established that common-law courts, like their counterparts in equity, could subpoena documents held either by parties to the case or by third parties. After proceeding in fits and starts, the King’s Bench eventually held in *Amey v. Long* that the “writ of subpoena duces tecum [is] a writ of compulsory obligation and effect in the law.” 9 East., at 486, 103 Eng. Rep., at 658. Writing for a unanimous court, Lord Chief Justice Ellenborough explained that “[t]he right to resort to means competent to compel the production of written, as well as oral, testimony seems essential to the very existence and constitution of a Court of Common Law.” *Id.*, at 484, 103 Eng. Rep., at 658. Without the power to issue subpoenas *duces tecum*, the Lord Chief Justice observed, common-law courts “could not possibly proceed with due effect.” *Ibid.*

The prevalence of subpoenas *duces tecum* at the time of the founding was not limited to the civil context. In crim-

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inal cases, courts and prosecutors were also using the writ to compel the production of necessary documents. In *Rex v. Dixon*, 3 Burr. 1687, 97 Eng. Rep. 1047 (K. B. 1765), for example, the King’s Bench considered the propriety of a subpoena *duces tecum* served on an attorney named Samuel Dixon. Dixon had been called “to give evidence before the grand jury of the county of Northampton” and specifically “to produce three vouchers . . . in order to found a prosecution by way of indictment against [his client] Peach . . . for forgery.” *Id.*, at 1687, 97 Eng. Rep., at 1047–1048. Although the court ultimately held that Dixon had not needed to produce the vouchers on account of attorney-client privilege, none of the justices expressed the slightest doubt about the general propriety of subpoenas *duces tecum* in the criminal context. See *id.*, at 1688, 97 Eng. Rep., at 1048. As Lord Chief Justice Ellenborough later explained, “[i]n that case no objection was taken to the writ, but to the special circumstances under which the party possessed the papers; so that the Court may be considered as recognizing the general obligation to obey writs of that description in other cases.” *Amey, supra*, at 485, 103 Eng. Rep., at 658; see also 4 J. Chitty, *Practical Treatise on the Criminal Law* 185 (1816) (template for criminal subpoena *duces tecum*).

As *Dixon* shows, subpoenas *duces tecum* were routine in part because of their close association with grand juries. Early American colonists imported the grand jury, like so many other common-law traditions, and they quickly flourished. See *United States v. Calandra*, 414 U. S. 338, 342–343 (1974). Grand juries were empaneled by the federal courts almost as soon as the latter were established, and both they and their state counterparts actively exercised their wide-ranging common-law authority. See R. Younger, *The People’s Panel* 47–55 (1963). Indeed, “the Founders thought the grand jury so essential . . . that they provided in the Fifth Amendment that federal prosecution

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for serious crimes can only be instituted by ‘a presentment or indictment of a Grand Jury.’” *Calandra, supra*, at 343.

Given the popularity and prevalence of grand juries at the time, the Founders must have been intimately familiar with the tools they used—including compulsory process—to accomplish their work. As a matter of tradition, grand juries were “accorded wide latitude to inquire into violations of criminal law,” including the power to “compel the production of evidence or the testimony of witnesses as [they] conside[r] appropriate.” *Ibid.* Long before national independence was achieved, grand juries were already using their broad inquisitorial powers not only to present and indict criminal suspects but also to inspect public buildings, to levy taxes, to supervise the administration of the laws, to advance municipal reforms such as street repair and bridge maintenance, and in some cases even to propose legislation. Younger, *supra*, at 5–26. Of course, such work depended entirely on grand juries’ ability to access any relevant documents.

Grand juries continued to exercise these broad inquisitorial powers up through the time of the founding. See *Blair v. United States*, 250 U. S. 273, 280 (1919) (“At the foundation of our Federal Government the inquisitorial function of the grand jury and the compulsion of witnesses were recognized as incidents of the judicial power”). In a series of lectures delivered in the early 1790’s, Justice James Wilson crowed that grand juries were “the peculiar boast of the common law” thanks in part to their wide-ranging authority: “All the operations of government, and of its ministers and officers, are within the compass of their view and research.” 2 J. Wilson, *The Works of James Wilson* 534, 537 (R. McCloskey ed. 1967). That reflected the broader insight that “[t]he grand jury’s investigative power must be broad if its public responsibility is adequately to be discharged.” *Calandra, supra*, at 344.

Compulsory process was also familiar to the founding

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generation in part because it reflected “the ancient proposition of law” that ““the public . . . has a right to every man’s evidence.”” *United States v. Nixon*, 418 U. S. 683, 709 (1974); see also *ante*, at 10 (KENNEDY, J., dissenting). As early as 1612, “Lord Bacon is reported to have declared that ‘all subjects, without distinction of degrees, owe to the King tribute and service, not only of their deed and hand, but of their knowledge and discovery.’” *Blair, supra*, at 279–280. That duty could be “onerous at times,” yet the Founders considered it “necessary to the administration of justice according to the forms and modes established in our system of government.” *Id.*, at 281; see also *Calandra, supra*, at 345.

B

Talk of kings and common-law writs may seem out of place in a case about cell-site records and the protections afforded by the Fourth Amendment in the modern age. But this history matters, not least because it tells us what was on the minds of those who ratified the Fourth Amendment and how they understood its scope. That history makes it abundantly clear that the Fourth Amendment, as originally understood, did not apply to the compulsory production of documents at all.

The Fourth Amendment does not regulate all methods by which the Government obtains documents. Rather, it prohibits only those “searches and seizures” of “persons, houses, papers, and effects” that are “unreasonable.” Consistent with that language, “at least until the latter half of the 20th century” “our Fourth Amendment jurisprudence was tied to common-law trespass.” *United States v. Jones*, 565 U. S. 400, 405 (2012). So by its terms, the Fourth Amendment does not apply to the compulsory production of documents, a practice that involves neither any physical intrusion into private space nor any taking of property by agents of the state. Even Justice Brandeis—a

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stalwart proponent of construing the Fourth Amendment liberally—acknowledged that “under any ordinary construction of language,” “there is no ‘search’ or ‘seizure’ when a defendant is required to produce a document in the orderly process of a court’s procedure.” *Olmstead v. United States*, 277 U. S. 438, 476 (1928) (dissenting opinion).¹

Nor is there any reason to believe that the Founders intended the Fourth Amendment to regulate courts’ use of compulsory process. American colonists rebelled against the Crown’s physical invasions of their persons and their property, not against its acquisition of information by any and all means. As Justice Black once put it, “[t]he Fourth Amendment was aimed directly at the abhorred practice of breaking in, ransacking and searching homes and other buildings and seizing people’s personal belongings without warrants issued by magistrates.” *Katz*, 389 U. S., at 367 (dissenting opinion). More recently, we have acknowledged that “the Fourth Amendment was the founding generation’s response to the reviled ‘general warrants’ and ‘writs of assistance’ of the colonial era, which allowed

¹ Any other interpretation of the Fourth Amendment’s text would run into insuperable problems because it would apply not only to subpoenas *duces tecum* but to all other forms of compulsory process as well. If the Fourth Amendment applies to the compelled production of documents, then it must also apply to the compelled production of testimony—an outcome that we have repeatedly rejected and which, if accepted, would send much of the field of criminal procedure into a tailspin. See, e.g., *United States v. Dionisio*, 410 U. S. 1, 9 (1973) (“It is clear that a subpoena to appear before a grand jury is not a ‘seizure’ in the Fourth Amendment sense, even though that summons may be inconvenient or burdensome”); *United States v. Calandra*, 414 U. S. 338, 354 (1974) (“Grand jury questions . . . involve no independent governmental invasion of one’s person, house, papers, or effects”). As a matter of original understanding, a subpoena *duces tecum* no more effects a “search” or “seizure” of papers within the meaning of the Fourth Amendment than a subpoena *ad testificandum* effects a “search” or “seizure” of a person.

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British officers to rummage through homes in an unrestrained search for evidence of criminal activity.” *Riley v. California*, 573 U. S. ___, ___ (2014) (slip op., at 27).

General warrants and writs of assistance were noxious not because they allowed the Government to acquire evidence in criminal investigations, but because of the *means* by which they permitted the Government to acquire that evidence. Then, as today, searches could be quite invasive. Searches generally begin with officers “mak[ing] nonconsensual entries into areas not open to the public.” *Donovan v. Lone Steer, Inc.*, 464 U. S. 408, 414 (1984). Once there, officers are necessarily in a position to observe private spaces generally shielded from the public and discernible only with the owner’s consent. Private area after private area becomes exposed to the officers’ eyes as they rummage through the owner’s property in their hunt for the object or objects of the search. If they are searching for documents, officers may additionally have to rifle through many other papers—potentially filled with the most intimate details of a person’s thoughts and life—before they find the specific information they are seeking. See *Andresen v. Maryland*, 427 U. S. 463, 482, n. 11 (1976). If anything sufficiently incriminating comes into view, officers seize it. *Horton v. California*, 496 U. S. 128, 136–137 (1990). Physical destruction always lurks as an underlying possibility; “officers executing search warrants on occasion must damage property in order to perform their duty.” *Dalia v. United States*, 441 U. S. 238, 258 (1979); see, e.g., *United States v. Ramirez*, 523 U. S. 65, 71–72 (1998) (breaking garage window); *United States v. Ross*, 456 U. S. 798, 817–818 (1982) (ripping open car upholstery); *Brown v. Battle Creek Police Dept.*, 844 F. 3d 556, 572 (CA6 2016) (shooting and killing two pet dogs); *Lawmaster v. Ward*, 125 F. 3d 1341, 1350, n. 3 (CA10 1997) (breaking locks).

Compliance with a subpoena *duces tecum* requires none

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of that. A subpoena *duces tecum* permits a subpoenaed individual to conduct the search for the relevant documents himself, without law enforcement officers entering his home or rooting through his papers and effects. As a result, subpoenas avoid the many incidental invasions of privacy that necessarily accompany any actual search. And it was *those* invasions of privacy—which, although incidental, could often be extremely intrusive and damaging—that led to the adoption of the Fourth Amendment.

Neither this Court nor any of the parties have offered the slightest bit of historical evidence to support the idea that the Fourth Amendment originally applied to subpoenas *duces tecum* and other forms of compulsory process. That is telling, for as I have explained, these forms of compulsory process were a feature of criminal (and civil) procedure well known to the Founders. The Founders would thus have understood that holding the compulsory production of documents to the same standard as actual searches and seizures would cripple the work of courts in civil and criminal cases alike. It would be remarkable to think that, despite that knowledge, the Founders would have gone ahead and sought to impose such a requirement. It would be even more incredible to believe that the Founders would have imposed that requirement through the inapt vehicle of an amendment directed at different concerns. But it would blink reality entirely to argue that this entire process happened without anyone saying *the least thing about it*—not during the drafting of the Bill of Rights, not during any of the subsequent ratification debates, and not for most of the century that followed. If the Founders thought the Fourth Amendment applied to the compulsory production of documents, one would imagine that there would be *some* founding-era evidence of the Fourth Amendment being applied to the compulsory production of documents. Cf. *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U. S. 477, 505

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(2010); *Printz v. United States*, 521 U. S. 898, 905 (1997). Yet none has been brought to our attention.

C

Of course, our jurisprudence has not stood still since 1791. We now evaluate subpoenas *duces tecum* and other forms of compulsory document production under the Fourth Amendment, although we employ a reasonableness standard that is less demanding than the requirements for a warrant. But the road to that doctrinal destination was anything but smooth, and our initial missteps—and the subsequent struggle to extricate ourselves from their consequences—should provide an object lesson for today’s majority about the dangers of holding compulsory process to the same standard as actual searches and seizures.

For almost a century after the Fourth Amendment was enacted, this Court said and did nothing to indicate that it might regulate the compulsory production of documents. But that changed temporarily when the Court decided *Boyd v. United States*, 116 U. S. 616 (1886), the first—and, until today, the only—case in which this Court has ever held the compulsory production of documents to the same standard as actual searches and seizures.

The *Boyd* Court held that a court order compelling a company to produce potentially incriminating business records violated both the Fourth and the Fifth Amendments. The Court acknowledged that “certain aggravating incidents of actual search and seizure, such as forcible entry into a man’s house and searching amongst his papers, are wanting” when the Government relies on compulsory process. *Id.*, at 622. But it nevertheless asserted that the Fourth Amendment ought to “be liberally construed,” *id.*, at 635, and further reasoned that compulsory process “effects the sole object and purpose of search and seizure” by “forcing from a party evidence against himself,” *id.*, at 622. “In this regard,” the Court concluded,

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“the Fourth and Fifth Amendments run almost into each other.” *Id.*, at 630. Having equated compulsory process with actual searches and seizures and having melded the Fourth Amendment with the Fifth, the Court then found the order at issue unconstitutional because it compelled the production of property to which the Government did not have superior title. See *id.*, at 622–630.

In a concurrence joined by Chief Justice Waite, Justice Miller agreed that the order violated the Fifth Amendment, *id.*, at 639, but he strongly protested the majority’s invocation of the Fourth Amendment. He explained: “[T]here is no reason why this court should assume that the action of the court below, in requiring a party to produce certain papers . . . , authorizes an unreasonable search or seizure of the house, papers, or effects of that party. There is in fact no search and no seizure.” *Ibid.* “If the mere service of a notice to produce a paper . . . is a search,” Justice Miller concluded, “then a change has taken place in the meaning of words, which has not come within my reading, and which I think was unknown at the time the Constitution was made.” *Id.*, at 641.

Although *Boyd* was replete with stirring rhetoric, its reasoning was confused from start to finish in a way that ultimately made the decision unworkable. See 3 W. LaFare, J. Israel, N. King, & O. Kerr, *Criminal Procedure* §8.7(a) (4th ed. 2015). Over the next 50 years, the Court would gradually roll back *Boyd*’s erroneous conflation of compulsory process with actual searches and seizures.

That effort took its first significant stride in *Hale v. Henkel*, 201 U. S. 43 (1906), where the Court found it “quite clear” and “conclusive” that “the search and seizure clause of the Fourth Amendment was not intended to interfere with the power of courts to compel, through a *subpœna duces tecum*, the production, upon a trial in court, of documentary evidence.” *Id.*, at 73. Without that writ, the Court recognized, “it would be ‘utterly impossible

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to carry on the administration of justice.” *Ibid.*

Hale, however, did not entirely liberate subpoenas *duces tecum* from Fourth Amendment constraints. While refusing to treat such subpoenas as the equivalent of actual searches, *Hale* concluded that they must not be unreasonable. And it held that the subpoena *duces tecum* at issue was “far too sweeping in its terms to be regarded as reasonable.” *Id.*, at 76. The *Hale* Court thus left two critical questions unanswered: Under the Fourth Amendment, what makes the compulsory production of documents “reasonable,” and how does that standard differ from the one that governs actual searches and seizures?

The Court answered both of those questions definitively in *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186 (1946), where we held that the Fourth Amendment regulates the compelled production of documents, but less stringently than it does full-blown searches and seizures. *Oklahoma Press* began by admitting that the Court’s opinions on the subject had “perhaps too often . . . been generative of heat rather than light,” “mov[ing] with variant direction” and sometimes having “highly contrasting” “emphasis and tone.” *Id.*, at 202. “The primary source of misconception concerning the Fourth Amendment’s function” in this context, the Court explained, “lies perhaps in the identification of cases involving so-called ‘figurative’ or ‘constructive’ search with cases of actual search and seizure.” *Ibid.* But the Court held that “the basic distinction” between the compulsory production of documents on the one hand, and actual searches and seizures on the other, meant that two different standards had to be applied. *Id.*, at 204.

Having reversed *Boyd*’s conflation of the compelled production of documents with actual searches and seizures, the Court then set forth the relevant Fourth Amendment standard for the former. When it comes to “the production of corporate or other business records,” the

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Court held that the Fourth Amendment “at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be ‘particularly described,’ if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant.” *Oklahoma Press, supra*, at 208. Notably, the Court held that a showing of probable cause was not necessary so long as “the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry.” *Id.*, at 209.

Since *Oklahoma Press*, we have consistently hewed to that standard. See, e.g., *Lone Steer, Inc.*, 464 U. S., at 414–415; *United States v. Miller*, 425 U. S. 435, 445–446 (1976); *California Bankers Assn. v. Shultz*, 416 U. S. 21, 67 (1974); *United States v. Dionisio*, 410 U. S. 1, 11–12 (1973); *See v. Seattle*, 387 U. S. 541, 544 (1967); *United States v. Powell*, 379 U. S. 48, 57–58 (1964); *McPhaul v. United States*, 364 U. S. 372, 382–383 (1960); *United States v. Morton Salt Co.*, 338 U. S. 632, 652–653 (1950); cf. *McLane Co. v. EEOC*, 581 U. S. ___, ___ (2017) (slip op., at 11). By applying *Oklahoma Press* and thereby respecting “the traditional distinction between a search warrant and a subpoena,” *Miller, supra*, at 446, this Court has reinforced “the basic compromise” between “the public interest” in every man’s evidence and the private interest “of men to be free from officious meddling.” *Oklahoma Press, supra*, at 213.

D

Today, however, the majority inexplicably ignores the settled rule of *Oklahoma Press* in favor of a resurrected version of *Boyd*. That is mystifying. This should have been an easy case regardless of whether the Court looked to the original understanding of the Fourth Amendment or to our modern doctrine.

As a matter of original understanding, the Fourth

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Amendment does not regulate the compelled production of documents at all. Here the Government received the relevant cell-site records pursuant to a court order compelling Carpenter’s cell service provider to turn them over. That process is thus immune from challenge under the original understanding of the Fourth Amendment.

As a matter of modern doctrine, this case is equally straightforward. As JUSTICE KENNEDY explains, no search or seizure of Carpenter or his property occurred in this case. *Ante*, at 6–22; see also Part II, *infra*. But even if the majority were right that the Government “searched” Carpenter, it would at most be a “figurative or constructive search” governed by the *Oklahoma Press* standard, not an “actual search” controlled by the Fourth Amendment’s warrant requirement.

And there is no doubt that the Government met the *Oklahoma Press* standard here. Under *Oklahoma Press*, a court order must “be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.” *Lone Steer, Inc.*, *supra*, at 415. Here, the type of order obtained by the Government almost necessarily satisfies that standard. The Stored Communications Act allows a court to issue the relevant type of order “only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that . . . the records . . . sought[t] are relevant and material to an ongoing criminal investigation.” 18 U. S. C. §2703(d). And the court “may quash or modify such order” if the provider objects that the “records requested are unusually voluminous in nature or compliance with such order otherwise would cause an undue burden on such provider.” *Ibid*. No such objection was made in this case, and Carpenter does not suggest that the orders contravened the *Oklahoma Press* standard in any other way.

That is what makes the majority’s opinion so puzzling.

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It decides that a “search” of Carpenter occurred within the meaning of the Fourth Amendment, but then it leaps straight to imposing requirements that—until this point—have governed only *actual* searches and seizures. See *ante*, at 18–19. Lost in its race to the finish is any real recognition of the century’s worth of precedent it jeopardizes. For the majority, this case is apparently no different from one in which Government agents raided Carpenter’s home and removed records associated with his cell phone.

Against centuries of precedent and practice, all that the Court can muster is the observation that “this Court has never held that the Government may subpoena third parties for records in which the suspect has a reasonable expectation of privacy.” *Ante*, at 19. Frankly, I cannot imagine a concession more damning to the Court’s argument than that. As the Court well knows, the reason that we have never seen such a case is because—until today—defendants categorically had no “reasonable expectation of privacy” and no property interest in records belonging to third parties. See Part II, *infra*. By implying otherwise, the Court tries the nice trick of seeking shelter under the cover of precedents that it simultaneously perforates.

Not only that, but even if the Fourth Amendment permitted someone to object to the subpoena of a third party’s records, the Court cannot explain why that individual should be entitled to *greater* Fourth Amendment protection than the party actually being subpoenaed. When parties are subpoenaed to turn over their records, after all, they will at most receive the protection afforded by *Oklahoma Press* even though they will own and have a reasonable expectation of privacy in the records at issue. Under the Court’s decision, however, the Fourth Amendment will extend greater protections to someone else who is not being subpoenaed and does not own the records. That outcome makes no sense, and the Court does not even attempt to defend it.

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We have set forth the relevant Fourth Amendment standard for subpoenaing business records many times over. Out of those dozens of cases, the majority cannot find even one that so much as suggests an exception to the *Oklahoma Press* standard for sufficiently personal information. Instead, we have always “described the constitutional requirements” for compulsory process as being “settled” and as applying categorically to all “subpoenas [of] corporate books or records.” *Lone Steer, Inc.*, 464 U. S., at 415 (internal quotation marks omitted). That standard, we have held, is “*the most*” protection the Fourth Amendment gives “to the production of corporate records and papers.” *Oklahoma Press*, 327 U. S., at 208 (emphasis added).²

Although the majority announces its holding in the context of the Stored Communications Act, nothing stops its logic from sweeping much further. The Court has offered no meaningful limiting principle, and none is apparent. Cf. Tr. of Oral Arg. 31 (Carpenter’s counsel admitting that “a grand jury subpoena . . . would be held to the same standard as any other subpoena or subpoena-like request for [cell-site] records”).

Holding that subpoenas must meet the same standard as conventional searches will seriously damage, if not destroy, their utility. Even more so than at the founding, today the Government regularly uses subpoenas *duces tecum* and other forms of compulsory process to carry out its essential functions. See, e.g., *Dionisio*, 410 U. S., at 11–12 (grand jury subpoenas); *McPhaul*, 364 U. S., at 382–383 (legislative subpoenas); *Oklahoma Press*, *supra*, at 208–209 (administrative subpoenas). Grand juries, for

²All that the Court can say in response is that we have “been careful not to uncritically extend existing precedents” when confronting new technologies. *Ante*, at 20. But applying a categorical rule categorically does not “extend” precedent, so the Court’s statement ends up sounding a lot like a tacit admission that it is overruling our precedents.

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example, have long “compel[led] the production of evidence” in order to determine “*whether* there is probable cause to believe a crime has been committed.” *Calandra*, 414 U. S., at 343 (emphasis added). Almost by definition, then, grand juries will be unable at first to demonstrate “the probable cause required for a warrant.” *Ante*, at 19 (majority opinion); see also *Oklahoma Press, supra*, at 213. If they are required to do so, the effects are as predictable as they are alarming: Many investigations will sputter out at the start, and a host of criminals will be able to evade law enforcement’s reach.

“To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence.” *Nixon*, 418 U. S., at 709. For over a hundred years, we have understood that holding subpoenas to the same standard as actual searches and seizures “would stop much if not all of investigation in the public interest at the threshold of inquiry.” *Oklahoma Press, supra*, at 213. Today a skeptical majority decides to put that understanding to the test.

II

Compounding its initial error, the Court also holds that a defendant has the right under the Fourth Amendment to object to the search of a third party’s property. This holding flouts the clear text of the Fourth Amendment, and it cannot be defended under either a property-based interpretation of that Amendment or our decisions applying the reasonable-expectations-of-privacy test adopted in *Katz*, 389 U. S. 347. By allowing Carpenter to object to the search of a third party’s property, the Court threatens to revolutionize a second and independent line of Fourth Amendment doctrine.

A

It bears repeating that the Fourth Amendment guaran-

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tees “[t]he right of the people to be secure in *their* persons, houses, papers, and effects.” (Emphasis added.) The Fourth Amendment does not confer rights with respect to the persons, houses, papers, and effects of others. Its language makes clear that “Fourth Amendment rights are personal,” *Rakas v. Illinois*, 439 U. S. 128, 140 (1978), and as a result, this Court has long insisted that they “may not be asserted vicariously,” *id.*, at 133. It follows that a “person who is aggrieved . . . only through the introduction of damaging evidence secured by a search of a third person’s premises or property has not had any of his Fourth Amendment rights infringed.” *Id.*, at 134.

In this case, as JUSTICE KENNEDY cogently explains, the cell-site records obtained by the Government belong to Carpenter’s cell service providers, not to Carpenter. See *ante*, at 12–13. Carpenter did not create the cell-site records. Nor did he have possession of them; at all relevant times, they were kept by the providers. Once Carpenter subscribed to his provider’s service, he had no right to prevent the company from creating or keeping the information in its records. Carpenter also had no right to demand that the providers destroy the records, no right to prevent the providers from destroying the records, and, indeed, no right to modify the records in any way whatsoever (or to prevent the providers from modifying the records). Carpenter, in short, has no meaningful control over the cell-site records, which are created, maintained, altered, used, and eventually destroyed by his cell service providers.

Carpenter responds by pointing to a provision of the Telecommunications Act that requires a provider to disclose cell-site records when a customer so requests. See 47 U. S. C. §222(c)(2). But a statutory disclosure requirement is hardly sufficient to give someone an ownership interest in the documents that must be copied and disclosed. Many statutes confer a right to obtain copies of documents

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without creating any property right.³

Carpenter’s argument is particularly hard to swallow because nothing in the Telecommunications Act precludes cell service providers from charging customers a fee for accessing cell-site records. See *ante*, at 12–13 (KENNEDY, J., dissenting). It would be very strange if the owner of records were required to pay in order to inspect his own

³See, e.g., Freedom of Information Act, 5 U. S. C. §552(a) (“Each agency shall make available to the public information as follows . . .”); Privacy Act, 5 U. S. C. §552a(d)(1) (“Each agency that maintains a system of records shall . . . upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof . . .”); Fair Credit Reporting Act, 15 U. S. C. §1681j(a)(1)(A) (“All consumer reporting agencies . . . shall make all disclosures pursuant to section 1681g of this title once during any 12-month period upon request of the consumer and without charge to the consumer”); Right to Financial Privacy Act of 1978, 12 U. S. C. §3404(c) (“The customer has the right . . . to obtain a copy of the record which the financial institution shall keep of all instances in which the customer’s record is disclosed to a Government authority pursuant to this section, including the identity of the Government authority to which such disclosure is made”); Government in the Sunshine Act, 5 U. S. C. §552b(f)(2) (“Copies of such transcript, or minutes, or a transcription of such recording disclosing the identity of each speaker, shall be furnished to any person at the actual cost of duplication or transcription”); Cable Act, 47 U. S. C. §551(d) (“A cable subscriber shall be provided access to all personally identifiable information regarding that subscriber which is collected and maintained by a cable operator”); Family Educational Rights and Privacy Act of 1974, 20 U. S. C. §1232g(a)(1)(A) (“No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children. . . . Each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made”).

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property.

Nor does the Telecommunications Act give Carpenter a property right in the cell-site records simply because they are subject to confidentiality restrictions. See 47 U. S. C. §222(c)(1) (without a customer’s permission, a cell service provider may generally “use, disclose, or permit access to individually identifiable [cell-site records]” only with respect to “its provision” of telecommunications services). Many federal statutes impose similar restrictions on private entities’ use or dissemination of information in their own records without conferring a property right on third parties.⁴

⁴See, *e.g.*, Family Educational Rights and Privacy Act, 20 U. S. C. §1232g(b)(1) (“No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information . . .) of students without the written consent of their parents to any individual, agency, or organization . . .”); Video Privacy Protection Act, 18 U. S. C. §2710(b)(1) (“A video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider shall be liable to the aggrieved person for the relief provided in subsection (d)”); Driver Privacy Protection Act, 18 U. S. C. §2721(a)(1) (“A State department of motor vehicles, and any officer, employee, or contractor thereof, shall not knowingly disclose or otherwise make available to any person or entity . . . personal information . . .”); Fair Credit Reporting Act, 15 U. S. C. §1681b(a) (“[A]ny consumer reporting agency may furnish a consumer report under the following circumstances and no other . . .”); Right to Financial Privacy Act, 12 U. S. C. §3403(a) (“No financial institution, or officer, employees, or agent of a financial institution, may provide to any Government authority access to or copies of, or the information contained in, the financial records of any customer except in accordance with the provisions of this chapter”); Patient Safety and Quality Improvement Act, 42 U. S. C. §299b–22(b) (“Notwithstanding any other provision of Federal, State, or local law, and subject to subsection (c) of this section, patient safety work product shall be confidential and shall not be disclosed”); Cable Act, 47 U. S. C. §551(c)(1) (“[A] cable operator shall not disclose personally identifiable information concerning any subscriber without the prior written or electronic consent of the sub-

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It would be especially strange to hold that the Telecommunication Act’s confidentiality provision confers a property right when the Act creates an express exception for any disclosure of records that is “required by law.” 47 U. S. C. §222(c)(1). So not only does Carpenter lack “the most essential and beneficial” of the “‘constituent elements’” of property, *Dickman v. Commissioner*, 465 U. S. 330, 336 (1984)—*i.e.*, the right to use the property to the exclusion of others—but he cannot even exclude the party he would most like to keep out, namely, the Government.⁵

For all these reasons, there is no plausible ground for maintaining that the information at issue here represents Carpenter’s “papers” or “effects.”⁶

scriber concerned and shall take such actions as are necessary to prevent unauthorized access to such information by a person other than the subscriber or cable operator”).

⁵ Carpenter also cannot argue that he owns the cell-site records merely because they fall into the category of records referred to as “customer proprietary network information.” 47 U. S. C. §222(c). Even assuming labels alone can confer property rights, nothing in this particular label indicates whether the “information” is “proprietary” to the “customer” or to the provider of the “network.” At best, the phrase “customer proprietary network information” is ambiguous, and context makes clear that it refers to the *provider’s* information. The Telecommunications Act defines the term to include all “information that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship.” 47 U. S. C. §222(h)(1)(A). For Carpenter to be right, he must own not only the cell-site records in this case, but also records relating to, for example, the “technical configuration” of his subscribed service—records that presumably include such intensely personal and private information as transmission wavelengths, transport protocols, and link layer system configurations.

⁶ Thus, this is not a case in which someone has entrusted papers that he or she owns to the safekeeping of another, and it does not involve a bailment. Cf. *post*, at 14 (GORSUCH, J., dissenting).

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B

In the days when this Court followed an exclusively property-based approach to the Fourth Amendment, the distinction between an individual's Fourth Amendment rights and those of a third party was clear cut. We first asked whether the object of the search—say, a house, papers, or effects—belonged to the defendant, and, if it did, whether the Government had committed a “trespass” in acquiring the evidence at issue. *Jones*, 565 U. S., at 411, n. 8.

When the Court held in *Katz* that “property rights are not the sole measure of Fourth Amendment violations,” *Soldal v. Cook County*, 506 U. S. 56, 64 (1992), the sharp boundary between personal and third-party rights was tested. Under *Katz*, a party may invoke the Fourth Amendment whenever law enforcement officers violate the party's “justifiable” or “reasonable” expectation of privacy. See 389 U. S., at 353; see also *id.*, at 361 (Harlan, J., concurring) (applying the Fourth Amendment where “a person [has] exhibited an actual (subjective) expectation of privacy” and where that “expectation [is] one that society is prepared to recognize as ‘reasonable’”). Thus freed from the limitations imposed by property law, parties began to argue that they had a reasonable expectation of privacy in items owned by others. After all, if a trusted third party took care not to disclose information about the person in question, that person might well have a reasonable expectation that the information would not be revealed.

Efforts to claim Fourth Amendment protection against searches of the papers and effects of others came to a head in *Miller*, 425 U. S. 435, where the defendant sought the suppression of two banks' microfilm copies of his checks, deposit slips, and other records. The defendant did not claim that he owned these documents, but he nonetheless argued that “analysis of ownership, property rights and possessory interests in the determination of Fourth

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Amendment rights ha[d] been severely impeached” by *Katz* and other recent cases. See Brief for Respondent in *United States v. Miller*, O. T. 1975, No. 74–1179, p. 6. Turning to *Katz*, he then argued that he had a reasonable expectation of privacy in the banks’ records regarding his accounts. Brief for Respondent in No. 74–1179, at 6; see also *Miller, supra*, at 442–443.

Acceptance of this argument would have flown in the face of the Fourth Amendment’s text, and the Court rejected that development. Because Miller gave up “dominion and control” of the relevant information to his bank, *Rakas*, 439 U. S., at 149, the Court ruled that he lost any protected Fourth Amendment interest in that information. See *Miller, supra*, at 442–443. Later, in *Smith v. Maryland*, 442 U. S. 735, 745 (1979), the Court reached a similar conclusion regarding a telephone company’s records of a customer’s calls. As JUSTICE KENNEDY concludes, *Miller* and *Smith* are thus best understood as placing “necessary limits on the ability of individuals to assert Fourth Amendment interests in property to which they lack a ‘requisite connection.’” *Ante*, at 8.

The same is true here, where Carpenter indisputably lacks any meaningful property-based connection to the cell-site records owned by his provider. Because the records are not Carpenter’s in any sense, Carpenter may not seek to use the Fourth Amendment to exclude them.

By holding otherwise, the Court effectively allows Carpenter to object to the “search” of a third party’s property, not recognizing the revolutionary nature of this change. The Court seems to think that *Miller* and *Smith* invented a new “doctrine”—“the third-party doctrine”—and the Court refuses to “extend” this product of the 1970’s to a new age of digital communications. *Ante*, at 11, 17. But the Court fundamentally misunderstands the role of *Miller* and *Smith*. Those decisions did not forge a new doctrine; instead, they rejected an argument that would have

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disregarded the clear text of the Fourth Amendment and a formidable body of precedent.

In the end, the Court never explains how its decision can be squared with the fact that the Fourth Amendment protects only “[t]he right of the people to be secure in *their* persons, houses, papers, and effects.” (Emphasis added.)

* * *

Although the majority professes a desire not to “embarrass the future,” *ante*, at 18, we can guess where today’s decision will lead.

One possibility is that the broad principles that the Court seems to embrace will be applied across the board. All subpoenas *duces tecum* and all other orders compelling the production of documents will require a demonstration of probable cause, and individuals will be able to claim a protected Fourth Amendment interest in any sensitive personal information about them that is collected and owned by third parties. Those would be revolutionary developments indeed.

The other possibility is that this Court will face the embarrassment of explaining in case after case that the principles on which today’s decision rests are subject to all sorts of qualifications and limitations that have not yet been discovered. If we take this latter course, we will inevitably end up “mak[ing] a crazy quilt of the Fourth Amendment.” *Smith, supra*, at 745.

All of this is unnecessary. In the Stored Communications Act, Congress addressed the specific problem at issue in this case. The Act restricts the misuse of cell-site records by cell service providers, something that the Fourth Amendment cannot do. The Act also goes beyond current Fourth Amendment case law in restricting access by law enforcement. It permits law enforcement officers to acquire cell-site records only if they meet a heightened standard and obtain a court order. If the American people

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now think that the Act is inadequate or needs updating, they can turn to their elected representatives to adopt more protective provisions. Because the collection and storage of cell-site records affects nearly every American, it is unlikely that the question whether the current law requires strengthening will escape Congress's notice.

Legislation is much preferable to the development of an entirely new body of Fourth Amendment caselaw for many reasons, including the enormous complexity of the subject, the need to respond to rapidly changing technology, and the Fourth Amendment's limited scope. The Fourth Amendment restricts the conduct of the Federal Government and the States; it does not apply to private actors. But today, some of the greatest threats to individual privacy may come from powerful private companies that collect and sometimes misuse vast quantities of data about the lives of ordinary Americans. If today's decision encourages the public to think that this Court can protect them from this looming threat to their privacy, the decision will mislead as well as disrupt. And if holding a provision of the Stored Communications Act to be unconstitutional dissuades Congress from further legislation in this field, the goal of protecting privacy will be greatly disserved.

The desire to make a statement about privacy in the digital age does not justify the consequences that today's decision is likely to produce.

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SUPREME COURT OF THE UNITED STATES

No. 16–402

TIMOTHY IVORY CARPENTER, PETITIONER *v.*
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

[June 22, 2018]

JUSTICE GORSUCH, dissenting.

In the late 1960s this Court suggested for the first time that a search triggering the Fourth Amendment occurs when the government violates an “expectation of privacy” that “society is prepared to recognize as ‘reasonable.’” *Katz v. United States*, 389 U. S. 347, 361 (1967) (Harlan, J., concurring). Then, in a pair of decisions in the 1970s applying the *Katz* test, the Court held that a “reasonable expectation of privacy” *doesn’t* attach to information shared with “third parties.” See *Smith v. Maryland*, 442 U. S. 735, 743–744 (1979); *United States v. Miller*, 425 U. S. 435, 443 (1976). By these steps, the Court came to conclude, the Constitution does nothing to limit investigators from searching records you’ve entrusted to your bank, accountant, and maybe even your doctor.

What’s left of the Fourth Amendment? Today we use the Internet to do most everything. Smartphones make it easy to keep a calendar, correspond with friends, make calls, conduct banking, and even watch the game. Countless Internet companies maintain records about us and, increasingly, *for* us. Even our most private documents—those that, in other eras, we would have locked safely in a desk drawer or destroyed—now reside on third party servers. *Smith* and *Miller* teach that the police can review all of this material, on the theory that no one reasonably

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expects any of it will be kept private. But no one believes that, if they ever did.

What to do? It seems to me we could respond in at least three ways. The first is to ignore the problem, maintain *Smith* and *Miller*, and live with the consequences. If the confluence of these decisions and modern technology means our Fourth Amendment rights are reduced to nearly nothing, so be it. The second choice is to set *Smith* and *Miller* aside and try again using the *Katz* “reasonable expectation of privacy” jurisprudence that produced them. The third is to look for answers elsewhere.

*

Start with the first option. *Smith* held that the government’s use of a pen register to record the numbers people dial on their phones doesn’t infringe a reasonable expectation of privacy because that information is freely disclosed to the third party phone company. 442 U. S., at 743–744. *Miller* held that a bank account holder enjoys no reasonable expectation of privacy in the bank’s records of his account activity. That’s true, the Court reasoned, “even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.” 425 U. S., at 443. Today the Court suggests that *Smith* and *Miller* distinguish between *kinds* of information disclosed to third parties and require courts to decide whether to “extend” those decisions to particular classes of information, depending on their sensitivity. See *ante*, at 10–18. But as the Sixth Circuit recognized and JUSTICE KENNEDY explains, no balancing test of this kind can be found in *Smith* and *Miller*. See *ante*, at 16 (dissenting opinion). Those cases announced a categorical rule: Once you disclose information to third parties, you forfeit any reasonable expectation of privacy you might have had in it. And even if *Smith* and *Miller* did permit courts to conduct a

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balancing contest of the kind the Court now suggests, it's still hard to see how that would help the petitioner in this case. Why is someone's location when using a phone so much more sensitive than who he was talking to (*Smith*) or what financial transactions he engaged in (*Miller*)? I do not know and the Court does not say.

The problem isn't with the Sixth Circuit's application of *Smith* and *Miller* but with the cases themselves. Can the government demand a copy of all your e-mails from Google or Microsoft without implicating your Fourth Amendment rights? Can it secure your DNA from 23andMe without a warrant or probable cause? *Smith* and *Miller* say yes it can—at least without running afoul of *Katz*. But that result strikes most lawyers and judges today—me included—as pretty unlikely. In the years since its adoption, countless scholars, too, have come to conclude that the “third-party doctrine is not only wrong, but horribly wrong.” Kerr, *The Case for the Third-Party Doctrine*, 107 Mich. L. Rev. 561, 563, n. 5, 564 (2009) (collecting criticisms but defending the doctrine (footnotes omitted)). The reasons are obvious. “As an empirical statement about subjective expectations of privacy,” the doctrine is “quite dubious.” Baude & Stern, *The Positive Law Model of the Fourth Amendment*, 129 Harv. L. Rev. 1821, 1872 (2016). People often *do* reasonably expect that information they entrust to third parties, especially information subject to confidentiality agreements, will be kept private. Meanwhile, if the third party doctrine is supposed to represent a normative assessment of when a person should expect privacy, the notion that the answer might be “never” seems a pretty unattractive societal prescription. *Ibid.*

What, then, is the explanation for our third party doctrine? The truth is, the Court has never offered a persuasive justification. The Court has said that by conveying information to a third party you “assum[e] the risk” it will be revealed to the police and therefore lack a reason-

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able expectation of privacy in it. *Smith, supra*, at 744. But assumption of risk doctrine developed in tort law. It generally applies when “by contract or otherwise [one] expressly agrees to accept a risk of harm” or impliedly does so by “manifest[ing] his willingness to accept” that risk and thereby “take[s] his chances as to harm which may result from it.” Restatement (Second) of Torts §§496B, 496C(1), and Comment *b* (1965); see also 1 D. Dobbs, P. Hayden, & E. Bublick, *Law of Torts* §§235–236, pp. 841–850 (2d ed. 2017). That rationale has little play in this context. Suppose I entrust a friend with a letter and he promises to keep it secret until he delivers it to an intended recipient. In what sense have I agreed to bear the risk that he will turn around, break his promise, and spill its contents to someone else? More confusing still, what have I done to “manifest my willingness to accept” the risk that the government will pry the document from my friend and read it *without* his consent?

One possible answer concerns knowledge. I know that my friend *might* break his promise, or that the government *might* have some reason to search the papers in his possession. But knowing about a risk doesn’t mean you assume responsibility for it. Whenever you walk down the sidewalk you know a car may negligently or recklessly veer off and hit you, but that hardly means you accept the consequences and absolve the driver of any damage he may do to you. Epstein, *Privacy and the Third Hand: Lessons From the Common Law of Reasonable Expectations*, 24 *Berkeley Tech. L. J.* 1199, 1204 (2009); see W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser & Keeton on Law of Torts* 490 (5th ed. 1984).

Some have suggested the third party doctrine is better understood to rest on consent than assumption of risk. “So long as a person knows that they are disclosing information to a third party,” the argument goes, “their choice to do so is voluntary and the consent valid.” Kerr, *supra*,

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at 588. I confess I still don't see it. Consenting to give a third party access to private papers that remain my property is not the same thing as consenting to a *search of those papers by the government*. Perhaps there are exceptions, like when the third party is an undercover government agent. See Murphy, The Case Against the Case Against the Third-Party Doctrine: A Response to Epstein and Kerr, 24 Berkeley Tech. L. J. 1239, 1252 (2009); cf. *Hoffa v. United States*, 385 U. S. 293 (1966). But otherwise this conception of consent appears to be just assumption of risk relabeled—you've "consented" to whatever risks are foreseeable.

Another justification sometimes offered for third party doctrine is clarity. You (and the police) know exactly how much protection you have in information confided to others: none. As rules go, "the king always wins" is admirably clear. But the opposite rule would be clear too: Third party disclosures *never* diminish Fourth Amendment protection (call it "the king always loses"). So clarity alone cannot justify the third party doctrine.

In the end, what do *Smith* and *Miller* add up to? A doubtful application of *Katz* that lets the government search almost whatever it wants whenever it wants. The Sixth Circuit had to follow that rule and faithfully did just that, but it's not clear why we should.

*

There's a second option. What if we dropped *Smith* and *Miller*'s third party doctrine and retreated to the root *Katz* question whether there is a "reasonable expectation of privacy" in data held by third parties? Rather than solve the problem with the third party doctrine, I worry this option only risks returning us to its source: After all, it was *Katz* that produced *Smith* and *Miller* in the first place.

Katz's problems start with the text and original under-

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standing of the Fourth Amendment, as JUSTICE THOMAS thoughtfully explains today. *Ante*, at 5–17 (dissenting opinion). The Amendment’s protections do not depend on the breach of some abstract “expectation of privacy” whose contours are left to the judicial imagination. Much more concretely, it protects your “person,” and your “houses, papers, and effects.” Nor does your right to bring a Fourth Amendment claim depend on whether a judge happens to agree that your subjective expectation to privacy is a “reasonable” one. Under its plain terms, the Amendment grants you the right to invoke its guarantees whenever one of your protected things (your person, your house, your papers, or your effects) is unreasonably searched or seized. Period.

History too holds problems for *Katz*. Little like it can be found in the law that led to the adoption of the Fourth Amendment or in this Court’s jurisprudence until the late 1960s. The Fourth Amendment came about in response to a trio of 18th century cases “well known to the men who wrote and ratified the Bill of Rights, [and] famous throughout the colonial population.” Stuntz, *The Substantive Origins of Criminal Procedure*, 105 Yale L. J. 393, 397 (1995). The first two were English cases invalidating the Crown’s use of general warrants to enter homes and search papers. *Entick v. Carrington*, 19 How. St. Tr. 1029 (K. B. 1765); *Wilkes v. Wood*, 19 How. St. Tr. 1153 (K. B. 1763); see W. Cuddihy, *The Fourth Amendment: Origins and Original Meaning* 439–487 (2009); *Boyd v. United States*, 116 U. S. 616, 625–630 (1886). The third was American: the Boston Writs of Assistance Case, which sparked colonial outrage at the use of writs permitting government agents to enter houses and business, breaking open doors and chests along the way, to conduct searches and seizures—and to force third parties to help them. Stuntz, *supra*, at 404–409; M. Smith, *The Writs of Assistance Case* (1978). No doubt the colonial outrage engen-

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dered by these cases rested in part on the government's intrusion upon privacy. But the framers chose not to protect privacy in some ethereal way dependent on judicial intuitions. They chose instead to protect privacy in particular places and things—"persons, houses, papers, and effects"—and against particular threats—"unreasonable" governmental "searches and seizures." See *Entick, supra*, at 1066 ("Papers are the owner's goods and chattels; they are his dearest property; and so far from enduring a seizure, that they will hardly bear an inspection"); see also *ante*, at 1–21 (THOMAS, J., dissenting).

Even taken on its own terms, *Katz* has never been sufficiently justified. In fact, we still don't even know what its "reasonable expectation of privacy" test *is*. Is it supposed to pose an empirical question (what privacy expectations do people *actually* have) or a normative one (what expectations *should* they have)? Either way brings problems. If the test is supposed to be an empirical one, it's unclear why judges rather than legislators should conduct it. Legislators are responsive to their constituents and have institutional resources designed to help them discern and enact majoritarian preferences. Politically insulated judges come armed with only the attorneys' briefs, a few law clerks, and their own idiosyncratic experiences. They are hardly the representative group you'd expect (or want) to be making empirical judgments for hundreds of millions of people. Unsurprisingly, too, judicial judgments often fail to reflect public views. See Slobogin & Schumacher, Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society," 42 Duke L. J. 727, 732, 740–742 (1993). Consider just one example. Our cases insist that the seriousness of the offense being investigated does *not* reduce Fourth Amendment protection. *Mincey v. Arizona*, 437 U. S. 385, 393–394 (1978). Yet scholars suggest that most people *are* more tolerant of

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police intrusions when they investigate more serious crimes. See Blumenthal, Adya, & Mogle, The Multiple Dimensions of Privacy: Testing Lay “Expectations of Privacy,” 11 U. Pa. J. Const. L. 331, 352–353 (2009). And I very much doubt that this Court would be willing to adjust its *Katz* cases to reflect these findings even if it believed them.

Maybe, then, the *Katz* test should be conceived as a normative question. But if that’s the case, why (again) do judges, rather than legislators, get to determine whether society *should be* prepared to recognize an expectation of privacy as legitimate? Deciding what privacy interests *should be* recognized 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. Answering questions like that calls for the exercise of raw political will belonging to legislatures, not the legal judgment proper to courts. See The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton). When judges abandon legal judgment for political will we not only risk decisions where “reasonable expectations of privacy” come to bear “an uncanny resemblance to those expectations of privacy” shared by Members of this Court. *Minnesota v. Carter*, 525 U. S. 83, 97 (1998) (Scalia, J., concurring). We also risk undermining public confidence in the courts themselves.

My concerns about *Katz* come with a caveat. *Sometimes*, I accept, judges may be able to discern and describe existing societal norms. See, e.g., *Florida v. Jardines*, 569 U. S. 1, 8 (2013) (inferring a license to enter on private property from the “habits of the country” (quoting *McKee v. Gratz*, 260 U. S. 127, 136 (1922))); Sachs, Finding Law, 107 Cal. L. Rev. (forthcoming 2019), online at <https://ssrn.com/abstract=3064443> (as last visited June 19, 2018). That is particularly true when the judge looks to positive law rather than intuition for guidance on social norms. See

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Byrd v. United States, 584 U. S. ___, ___–___ (2018) (slip op., at 7–9) (“general property-based concept[s] guid[e] the resolution of this case”). So there may be *some* occasions where *Katz* is capable of principled application—though it may simply wind up approximating the more traditional option I will discuss in a moment. Sometimes it may also be possible to apply *Katz* by analogizing from precedent when the line between an existing case and a new fact pattern is short and direct. But so far this Court has declined to tie itself to any significant restraints like these. See *ante*, at 5, n. 1 (“[W]hile property rights are often informative, our cases by no means suggest that such an interest is ‘fundamental’ or ‘dispositive’ in determining which expectations of privacy are legitimate”).

As a result, *Katz* has yielded an often unpredictable—and sometimes unbelievable—jurisprudence. *Smith* and *Miller* are only two examples; there are many others. Take *Florida v. Riley*, 488 U. S. 445 (1989), which says that a police helicopter hovering 400 feet above a person’s property invades no reasonable expectation of privacy. Try that one out on your neighbors. Or *California v. Greenwood*, 486 U. S. 35 (1988), which holds that a person has no reasonable expectation of privacy in the garbage he puts out for collection. In that case, the Court said that the homeowners forfeited their privacy interests because “[i]t is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public.” *Id.*, at 40 (footnotes omitted). But the habits of raccoons don’t prove much about the habits of the country. I doubt, too, that most people spotting a neighbor rummaging through their garbage would think they lacked reasonable grounds to confront the rummager. Making the decision all the stranger, California state law expressly *protected* a homeowner’s property rights in discarded trash. *Id.*, at 43. Yet rather than defer to that

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as evidence of the people’s habits and reasonable expectations of privacy, the Court substituted its own curious judgment.

Resorting to *Katz* in data privacy cases threatens more of the same. Just consider. The Court today says that judges should use *Katz*’s reasonable expectation of privacy test to decide what Fourth Amendment rights people have in cell-site location information, explaining that “no single rubric definitively resolves which expectations of privacy are entitled to protection.” *Ante*, at 5. But then it offers a twist. Lower courts should be sure to add two special principles to their *Katz* calculus: the need to avoid “arbitrary power” and the importance of “plac[ing] obstacles in the way of a too permeating police surveillance.” *Ante*, at 6 (internal quotation marks omitted). While surely laudable, these principles don’t offer lower courts much guidance. The Court does not tell us, for example, how far to carry either principle or how to weigh them against the legitimate needs of law enforcement. At what point does access to electronic data amount to “arbitrary” authority? When does police surveillance become “too permeating”? And what sort of “obstacles” should judges “place” in law enforcement’s path when it does? We simply do not know.

The Court’s application of these principles supplies little more direction. The Court declines to say whether there is any sufficiently limited period of time “for which the Government may obtain an individual’s historical [location information] free from Fourth Amendment scrutiny.” *Ante*, at 11, n. 3; see *ante*, at 11–15. But then it tells us that access to seven days’ worth of information *does* trigger Fourth Amendment scrutiny—even though here the carrier “produced only two days of records.” *Ante*, at 11, n. 3. Why is the relevant fact the seven days of information the government *asked for* instead of the two days of information the government *actually saw*? Why seven days instead of ten or three or one? And in what possible sense

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did the government “search” five days’ worth of location information it was never even sent? We do not know.

Later still, the Court adds that it can’t say whether the Fourth Amendment is triggered when the government collects “real-time CSLI or ‘tower dumps’ (a download of information on all the devices that connected to a particular cell site during a particular interval).” *Ante*, at 17–18. But what distinguishes historical data from real-time data, or seven days of a single person’s data from a download of *everyone’s* data over some indefinite period of time? Why isn’t a tower dump the *paradigmatic* example of “too permeating police surveillance” and a dangerous tool of “arbitrary” authority—the touchstones of the majority’s modified *Katz* analysis? On what possible basis could such mass data collection survive the Court’s test while collecting a single person’s data does not? Here again we are left to guess. At the same time, though, the Court offers some firm assurances. It tells us its decision does *not* “call into question conventional surveillance techniques and tools, such as security cameras.” *Ibid.* That, however, just raises more questions for lower courts to sort out about what techniques qualify as “conventional” and why those techniques would be okay *even if* they lead to “permeating police surveillance” or “arbitrary police power.”

Nor is this the end of it. After finding a reasonable expectation of privacy, the Court says there’s still more work to do. Courts must determine whether to “extend” *Smith* and *Miller* to the circumstances before them. *Ante*, at 11, 15–17. So apparently *Smith* and *Miller* aren’t quite left for dead; they just no longer have the clear reach they once did. How do we measure their new reach? The Court says courts now must conduct a *second Katz*-like balancing inquiry, asking whether the fact of disclosure to a third party outweighs privacy interests in the “category of information” so disclosed. *Ante*, at 13, 15–16. But how are lower courts supposed to weigh these radically different

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interests? Or assign values to different categories of information? All we know is that historical cell-site location information (for seven days, anyway) escapes *Smith* and *Miller*'s shorn grasp, while a lifetime of bank or phone records does not. As to any other kind of information, lower courts will have to stay tuned.

In the end, our lower court colleagues are left with two amorphous balancing tests, a series of weighty and incommensurable principles to consider in them, and a few illustrative examples that seem little more than the product of judicial intuition. In the Court's defense, though, we have arrived at this strange place not because the Court has misunderstood *Katz*. Far from it. We have arrived here because this is where *Katz* inevitably leads.

*

There is another way. From the founding until the 1960s, the right to assert a Fourth Amendment claim didn't depend on your ability to appeal to a judge's personal sensibilities about the "reasonableness" of your expectations or privacy. It was tied to the law. *Jardines*, 569 U. S., at 11; *United States v. Jones*, 565 U. S. 400, 405 (2012). The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." True to those words and their original understanding, the traditional approach asked if a house, paper or effect was *yours* under law. No more was needed to trigger the Fourth Amendment. Though now often lost in *Katz*'s shadow, this traditional understanding persists. *Katz* only "supplements, rather than displaces the traditional property-based understanding of the Fourth Amendment." *Byrd*, 584 U. S., at ___ (slip op., at 7) (internal quotation marks omitted); *Jardines*, *supra*, at 11 (same); *Soldal v. Cook County*, 506 U. S. 56, 64 (1992) (*Katz* did not "snuff[f] out the previously recognized protection for property under

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the Fourth Amendment”).

Beyond its provenance in the text and original understanding of the Amendment, this traditional approach comes with other advantages. Judges are supposed to decide cases based on “democratically legitimate sources of law”—like positive law or analogies to items protected by the enacted Constitution—rather than “their own biases or personal policy preferences.” Pettys, *Judicial Discretion in Constitutional Cases*, 26 J. L. & Pol. 123, 127 (2011). A Fourth Amendment model based on positive legal rights “carves out significant room for legislative participation in the Fourth Amendment context,” too, by asking judges to consult what the people’s representatives have to say about their rights. Baude & Stern, 129 Harv. L. Rev., at 1852. Nor is this approach hobbled by *Smith* and *Miller*, for those cases are just *limitations* on *Katz*, addressing only the question whether individuals have a reasonable expectation of privacy in materials they share with third parties. Under this more traditional approach, Fourth Amendment protections for your papers and effects do not automatically disappear just because you share them with third parties.

Given the prominence *Katz* has claimed in our doctrine, American courts are pretty rusty at applying the traditional approach to the Fourth Amendment. We know that if a house, paper, or effect is yours, you have a Fourth Amendment interest in its protection. But what kind of legal interest is sufficient to make something *yours*? And what source of law determines that? Current positive law? The common law at 1791, extended by analogy to modern times? Both? See *Byrd, supra*, at ____–____ (slip op., at 1–2) (THOMAS, J., concurring); cf. Re, *The Positive Law Floor*, 129 Harv. L. Rev. Forum 313 (2016). Much work is needed to revitalize this area and answer these questions. I do not begin to claim all the answers today, but (unlike with *Katz*) at least I have a pretty good idea

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what the questions *are*. And it seems to me a few things can be said.

First, the fact that a third party has access to or possession of your papers and effects does not necessarily eliminate your interest in them. Ever hand a private document to a friend to be returned? Toss your keys to a valet at a restaurant? Ask your neighbor to look after your dog while you travel? You would not expect the friend to share the document with others; the valet to lend your car to his buddy; or the neighbor to put Fido up for adoption. Entrusting your stuff to others is a *bailment*. A bailment is the “delivery of personal property by one person (the *bailor*) to another (the *bailee*) who holds the property for a certain purpose.” Black’s Law Dictionary 169 (10th ed. 2014); J. Story, Commentaries on the Law of Bailments §2, p. 2 (1832) (“a bailment is a delivery of a thing in trust for some special object or purpose, and upon a contract, expressed or implied, to conform to the object or purpose of the trust”). A bailee normally owes a legal duty to keep the item safe, according to the terms of the parties’ contract if they have one, and according to the “implication[s] from their conduct” if they don’t. 8 C. J. S., Bailments §36, pp. 468–469 (2017). A bailee who uses the item in a different way than he’s supposed to, or against the bailor’s instructions, is liable for conversion. *Id.*, §43, at 481; see *Goad v. Harris*, 207 Ala. 357, 92 So. 546, (1922); *Knight v. Seney*, 290 Ill. 11, 17, 124 N. E. 813, 815–816 (1919); *Baxter v. Woodward*, 191 Mich. 379, 385, 158 N. W. 137, 139 (1916). This approach is quite different from *Smith* and *Miller*’s (counter)-intuitive approach to reasonable expectations of privacy; where those cases extinguish Fourth Amendment interests once records are given to a third party, property law may preserve them.

Our Fourth Amendment jurisprudence already reflects this truth. In *Ex parte Jackson*, 96 U. S. 727 (1878), this Court held that sealed letters placed in the mail are “as

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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.” *Id.*, at 733. The reason, drawn from the Fourth Amendment’s text, was that “[t]he constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to *their papers*, thus closed against inspection, *wherever they may be*.” *Ibid.* (emphasis added). It did not matter that letters were bailed to a third party (the government, no less). The sender enjoyed the same Fourth Amendment protection as he does “when papers are subjected to search in one’s own household.” *Ibid.*

These ancient principles may help us address modern data cases too. Just because you entrust your data—in some cases, your modern-day papers and effects—to a third party may not mean you lose any Fourth Amendment interest in its contents. Whatever may be left of *Smith* and *Miller*, few doubt that e-mail should be treated much like the traditional mail it has largely supplanted—as a bailment in which the owner retains a vital and protected legal interest. See *ante*, at 13 (KENNEDY, J., dissenting) (noting that enhanced Fourth Amendment protection may apply when the “modern-day equivalents of an individual’s own ‘papers’ or ‘effects’ . . . are held by a third party” through “bailment”); *ante*, at 23, n. 6 (ALITO, J., dissenting) (reserving the question whether Fourth Amendment protection may apply in the case of “bailment” or when “someone has entrusted papers he or she owns . . . to the safekeeping of another”); *United States v. Warshak*, 631 F. 3d 266, 285–286 (CA6 2010) (relying on an analogy to *Jackson* to extend Fourth Amendment protection to e-mail held by a third party service provider).

Second, I doubt that complete ownership or exclusive control of property is always a necessary condition to the assertion of a Fourth Amendment right. Where houses

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are concerned, for example, individuals can enjoy Fourth Amendment protection without fee simple title. Both the text of the Amendment and the common law rule support that conclusion. “People call a house ‘their’ home when legal title is in the bank, when they rent it, and even when they merely occupy it rent free.” *Carter*, 525 U. S., at 95–96 (Scalia, J., concurring). That rule derives from the common law. *Oystead v. Shed*, 13 Mass. 520, 523 (1816) (explaining, citing “[t]he very learned judges, *Foster*, *Hale*, and *Coke*,” that the law “would be as much disturbed by a forcible entry to arrest a boarder or a servant, who had acquired, by contract, express or implied, a right to enter the house at all times, and to remain in it as long as they please, as if the object were to arrest the master of the house or his children”). That is why tenants and resident family members—though they have no legal title—have standing to complain about searches of the houses in which they live. *Chapman v. United States*, 365 U. S. 610, 616–617 (1961), *Bumper v. North Carolina*, 391 U. S. 543, 548, n. 11 (1968).

Another point seems equally true: just because you *have* to entrust a third party with your data doesn’t necessarily mean you should lose all Fourth Amendment protections in it. Not infrequently one person comes into possession of someone else’s property without the owner’s consent. Think of the finder of lost goods or the policeman who impounds a car. The law recognizes that the goods and the car still belong to their true owners, for “where a person comes into lawful possession of the personal property of another, even though there is no formal agreement between the property’s owner and its possessor, the possessor will become a constructive bailee when justice so requires.” *Christensen v. Hoover*, 643 P. 2d 525, 529 (Colo. 1982) (en banc); Laidlaw, *Principles of Bailment*, 16 Cornell L. Q. 286 (1931). At least some of this Court’s decisions have already suggested that use of technology is

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functionally compelled by the demands of modern life, and in that way the fact that we store data with third parties may amount to a sort of involuntary bailment too. See *ante*, at 12–13 (majority opinion); *Riley v. California*, 573 U. S. ___, ___ (2014) (slip op., at 9).

Third, positive law may help provide detailed guidance on evolving technologies without resort to judicial intuition. State (or sometimes federal) law often creates rights in both tangible and intangible things. See *Ruckelshaus v. Monsanto Co.*, 467 U. S. 986, 1001 (1984). In the context of the Takings Clause we often ask whether those state-created rights are sufficient to make something someone’s property for constitutional purposes. See *id.*, at 1001–1003; *Louisville Joint Stock Land Bank v. Radford*, 295 U. S. 555, 590–595 (1935). A similar inquiry may be appropriate for the Fourth Amendment. Both the States and federal government are actively legislating in the area of third party data storage and the rights users enjoy. See, e.g., Stored Communications Act, 18 U. S. C. §2701 *et seq.*; Tex. Prop. Code Ann. §111.004(12) (West 2017) (defining “[p]roperty” to include “property held in any digital or electronic medium”). State courts are busy expounding common law property principles in this area as well. *E.g.*, *Ajemian v. Yahoo!, Inc.*, 478 Mass. 169, 170, 84 N. E. 3d 766, 768 (2017) (e-mail account is a “form of property often referred to as a ‘digital asset’”); *Eysoldt v. ProScan Imaging*, 194 Ohio App. 3d 630, 638, 2011–Ohio–2359, 957 N. E. 2d 780, 786 (2011) (permitting action for conversion of web account as intangible property). If state legislators or state courts say that a digital record has the attributes that normally make something property, that may supply a sounder basis for judicial decisionmaking than judicial guesswork about societal expectations.

Fourth, while positive law may help establish a person’s Fourth Amendment interest there may be some circumstances where positive law cannot be used to defeat it.

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Ex parte Jackson reflects that understanding. There this Court said that “[n]o law of Congress” could authorize letter carriers “to invade the secrecy of letters.” 96 U. S., at 733. So the post office couldn’t impose a regulation dictating that those mailing letters surrender all legal interests in them once they’re deposited in a mailbox. If that is right, *Jackson* suggests the existence of a constitutional floor below which Fourth Amendment rights may not descend. Legislatures cannot pass laws declaring your house or papers to be your property except to the extent the police wish to search them without cause. As the Court has previously explained, “we must ‘assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.’” *Jones*, 565 U. S., at 406 (quoting *Kyllo v. United States*, 533 U. S. 27, 34 (2001)). Nor does this mean protecting only the specific rights known at the founding; it means protecting their modern analogues too. So, for example, while thermal imaging was unknown in 1791, this Court has recognized that using that technology to look inside a home constitutes a Fourth Amendment “search” of that “home” no less than a physical inspection might. *Id.*, at 40.

Fifth, this constitutional floor may, in some instances, bar efforts to circumvent the Fourth Amendment’s protection through the use of subpoenas. No one thinks the government can evade *Jackson*’s prohibition on opening sealed letters without a warrant simply by issuing a subpoena to a postmaster for “all letters sent by John Smith” or, worse, “all letters sent by John Smith concerning a particular transaction.” So the question courts will confront will be this: What other kinds of records are sufficiently similar to letters in the mail that the same rule should apply?

It may be that, as an original matter, a subpoena requiring the recipient to produce records wasn’t thought of as a

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“search or seizure” by the government implicating the Fourth Amendment, see *ante*, at 2–12 (opinion of ALITO, J.), but instead as an act of compelled self-incrimination implicating the Fifth Amendment, see *United States v. Hubbell*, 530 U. S. 27, 49–55 (2000) (THOMAS, J., dissenting); Nagareda, Compulsion “To Be a Witness” and the Resurrection of *Boyd*, 74 N. Y. U. L. Rev. 1575, 1619, and n. 172 (1999). But the common law of searches and seizures does not appear to have confronted a case where private documents equivalent to a mailed letter were entrusted to a bailee and then subpoenaed. As a result, “[t]he common-law rule regarding subpoenas for documents held by third parties entrusted with information from the target is . . . unknown and perhaps unknowable.” Dripps, Perspectives on The Fourth Amendment Forty Years Later: Toward the Realization of an Inclusive Regulatory Model, 100 Minn. L. Rev. 1885, 1922 (2016). Given that (perhaps insoluble) uncertainty, I am content to adhere to *Jackson* and its implications for now.

To be sure, we must be wary of returning to the doctrine of *Boyd v. United States*, 116 U. S. 616. *Boyd* invoked the Fourth Amendment to restrict the use of subpoenas even for ordinary business records and, as JUSTICE ALITO notes, eventually proved unworkable. See *ante*, at 13 (dissenting opinion); 3 W. LaFare, J. Israel, N. King, & O. Kerr, Criminal Procedure §8.7(a), pp. 185–187 (4th ed. 2015). But if we were to overthrow *Jackson* too and deny Fourth Amendment protection to *any* subpoenaed materials, we would do well to reconsider the scope of the Fifth Amendment while we’re at it. Our precedents treat the right against self-incrimination as applicable only to testimony, not the production of incriminating evidence. See *Fisher v. United States*, 425 U. S. 391, 401 (1976). But there is substantial evidence that the privilege against self-incrimination was also originally understood to protect a person from being forced to turn over potentially incrimi-

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nating evidence. Nagareda, *supra*, at 1605–1623; *Rex v. Purnell*, 96 Eng. Rep. 20 (K. B. 1748); Slobogin, *Privacy at Risk* 145 (2007).

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What does all this mean for the case before us? To start, I cannot fault the Sixth Circuit for holding that *Smith* and *Miller* extinguish any *Katz*-based Fourth Amendment interest in third party cell-site data. That is the plain effect of their categorical holdings. Nor can I fault the Court today for its implicit but unmistakable conclusion that the rationale of *Smith* and *Miller* is wrong; indeed, I agree with that. The Sixth Circuit was powerless to say so, but this Court can and should. At the same time, I do not agree with the Court’s decision today to keep *Smith* and *Miller* on life support and supplement them with a new and multilayered inquiry that seems to be only *Katz*-squared. Returning there, I worry, promises more trouble than help. Instead, I would look to a more traditional Fourth Amendment approach. Even if *Katz* may still supply one way to prove a Fourth Amendment interest, it has never been the only way. Neglecting more traditional approaches may mean failing to vindicate the full protections of the Fourth Amendment.

Our case offers a cautionary example. It seems to me entirely possible a person’s cell-site data could qualify as *his* papers or effects under existing law. Yes, the telephone carrier holds the information. But 47 U. S. C. §222 designates a customer’s cell-site location information as “customer proprietary network information” (CPNI), §222(h)(1)(A), and gives customers certain rights to control use of and access to CPNI about themselves. The statute generally forbids a carrier to “use, disclose, or permit access to individually identifiable” CPNI without the customer’s consent, except as needed to provide the customer’s telecommunications services. §222(c)(1). It also

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requires the carrier to disclose CPNI “upon affirmative written request by the customer, to any person designated by the customer.” §222(c)(2). Congress even afforded customers a private cause of action for damages against carriers who violate the Act’s terms. §207. Plainly, customers have substantial legal interests in this information, including at least some right to include, exclude, and control its use. Those interests might even rise to the level of a property right.

The problem is that we do not know anything more. Before the district court and court of appeals, Mr. Carpenter pursued only a *Katz* “reasonable expectations” argument. He did not invoke the law of property or any analogies to the common law, either there or in his petition for certiorari. Even in his merits brief before this Court, Mr. Carpenter’s discussion of his positive law rights in cell-site data was cursory. He offered no analysis, for example, of what rights state law might provide him in addition to those supplied by §222. In these circumstances, I cannot help but conclude—reluctantly—that Mr. Carpenter forfeited perhaps his most promising line of argument.

Unfortunately, too, this case marks the second time this Term that individuals have forfeited Fourth Amendment arguments based on positive law by failing to preserve them. See *Byrd*, 584 U. S., at ____ (slip op., at 7). Litigants have had fair notice since at least *United States v. Jones* (2012) and *Florida v. Jardines* (2013) that arguments like these may vindicate Fourth Amendment interests even where *Katz* arguments do not. Yet the arguments have gone unmade, leaving courts to the usual *Katz* hand-waving. These omissions do not serve the development of a sound or fully protective Fourth Amendment jurisprudence.

Incarceration

Moderator:

Prof. Vincent M. Bonventre

Panelists:

Sheriff Craig Apple

Kevin Cahill, Ph.D.

Jonathan Gradess, Esq.

Victor Pate

Dr. Ray Wickenheiser, DPS

PRISON NATIONS: PROTECTING HUMAN RIGHTS IN THE AGE OF MASS INCARCERATION

**The Issue of Imprisonment in Comparative Perspective:
A Question of Human Rights**

**Albany Law School, Albany, NY
October 24, 2014**

Jonathan E. Gradess
Executive Director
New York State Defenders Assoc.
194 Washington Avenue, Suite 500
Albany, NY 12210
(518) 465-3524
jgradess@nysda.org

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The Issue of Imprisonment in Comparative Perspective: A Question of Human Rights

OVERVIEW: HUMAN RIGHTS AND PRISONS

1. One must begin from the simple proposition that prisons as we know them in the United States are incompatible with human rights, cannot be made compatible, and are the antithesis of what we mean when we use the words “human rights.”
2. Human rights principles emerge from four streams of thought and political activity:
1) domestic constitutional and statutory principles; 2) international treaties;
3) international custom; and 4) moral principles. These four streams and their resultant language often in the form of declarative pronouncements merge easily with one another and overlap. When put to the test of interpretation, usually in courtrooms, distinctions between and among the principles can often be excruciatingly difficult to parse.
3. Customary international law (“the law of nations”) recognized throughout US history and routinely applied in the United States Supreme Court has been defined as an international rule of law that “results from a general and consistent practice of states followed by them from a sense of legal obligation.” RESTATEMENT OF THE LAW THIRD: THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987) § 102(2) [hereinafter Restatement Third]. *See also* Statute of the International Court of Justice, 59 Stat. 1055, 3 Bevans 1179, Article 38(b) (1945) [sources of international law include “international custom, as evidence of a general practice accepted as law.”]
4. There is an evolving general consensus that the Universal Declaration of Human Rights represents customary international law. *See* Nan D. Miller “International Protection of the Rights of Prisoners: Is Solitary Confinement in the United States a Violation of International Standards?” 26 Cal W. Int’l L.J. 139, 141 (1995) [citing at note 11 inter alia Louis Sohn, “The New International Law: Protection of the Rights of Individuals Rather Than States,” [32 Am. U.L. Rev. 1, 17](#) (declaration has become part of customary international law, binding on all states)]. Drafted over a two-year period by a committee chaired by Eleanor Roosevelt, the non-binding Universal Declaration of Human Rights was agreed to by the United States when it passed in the United Nations in 1948. It is viewed as a foundational international human rights document. Its simply stated and principled 30 articles have been expanded upon and cited by international treaties, other human rights instruments and domestic laws. It

was explicitly adopted to define the meaning of the words “fundamental freedoms” and “human rights” contained in the United Nations Charter which under Article 2 of the Charter binds the United States to “ fulfill in good faith the obligations assumed ...in accordance with the ... Charter. Hernán Santa Cruz of Chile, member of the drafting sub-Committee for the Declaration, wrote:

“I perceived clearly that I was participating in a truly significant historic event in which a consensus had been reached as to **the supreme value of the human person**, a value that did not originate in the decision of a worldly power, but rather in the fact of existing—which gave rise to the inalienable right to live free from want and oppression and to fully develop one’s personality. In the Great Hall...there was an atmosphere of genuine solidarity and brotherhood among men and women from all latitudes, the like of which I have not seen again in any international setting.” (Emphasis supplied.) See, <http://www.un.org/en/documents/udhr/history.shtml>.

5. Human dignity is at the heart of both the Universal Declaration of Human Rights and its progeny.
6. There are many other principled human rights bases for measuring human rights in our prisons. See, e.g., <http://www1.umn.edu/humanrts/instree/ainstls2.htm>. [“Rights of Prisoners and Detainees” and “Human Rights in the Administration of Justice” which provide access to the text of every relevant international instrument (but NOT treaties) on this topic.]
7. **Measured by the Universal Declaration of Human Rights, “a common standard of achievement for all peoples and all nations,” prisons are an abject failure.**
8. When we measure imprisonment and prisons by reference to the principles which form the core of our understanding of *human rights* they are a failed institution.
9. This is true for the *nature of prison confinement* in what, at its core, confinement alone does to people and *the manner in which prison confinement is presently carried out and applied to people*. (*What Prisons Do To People*, NYSDA, May 1985.)

WHAT DO PRISONS DO TO THE HUMAN RIGHTS PRINCIPLES ENUNCIATED IN THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND OTHER ORGANIC INTERNATIONAL LAW DOCUMENTS?

As institutions of state control,

- **Prisons debase people, causing anger and trauma, where corrective measures are envisioned by human rights principles and statutory law.** [See generally, UN Standard Minimum Rules for the Treatment of Prisoners (1955, amended 1977).]

- **Prisons are specifically designed to allow for slavery in violation of many human rights principles** (See US Constitution Amendment XIII: “Neither slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction.”).

Under Article 4 the United Nations Universal Declaration of Human Rights [hereinafter UDHR], “No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.” *See also*, “Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926” (Slavery Convention of 1926), 60 L.N.T.S. 253, *entered into force* March 9, 1927. [Article 1 §1 definition of slavery includes “the status or condition of a person over whom *any or all* of the powers attaching to the right of ownership are exercised.”]

- **Prisons interfere with freedom of speech, freedom of belief, and freedom from fear.** For a lengthy list of restrictions on First Amendment rights in New York prisons and the procedural mechanism whereby institutional discretion could be exercised to override such rights, see DOCCS Directive # 4572, “Media Review.”

In *Knuckles v. Prasse*, 435 F2d 1255, 1256 (CA3 1970) the court reflected upon prisons citing the District Court and stating, “...a prison is not a private dwelling and a cell row is not a public highway. Thus plaintiffs’ freedoms and rights must be analyzed in the realistic context of the prison situation where plaintiffs desire to exercise them.”

For a catalog of how prison life legally interferes with freedom of belief see Chapter 7 [Religion in Prison] of Palmer, *Constitutional Rights of Prisoners* (9th Edition, 2010).

The Religious Land Use and Institutionalized Persons Act (RLUIPA), Pub.L. 106-274 codified as 42 USC § 2000cc et. seq prohibits prisons from imposing burdens on the free exercise of religion unless it can demonstrate a compelling state interest for the burden and that the interference is the least restrictive necessary. Even with this protection, DOCCS Directive #4202 [Religious Programs and Practices] demonstrates how difficult it is for even an “enlightened” prison system to draft policies that don’t interfere with free exercise.

Despite the broad consensus among American prisons (42 out of the 53 US prison jurisdictions) which allow religious or general exemptions to restrictive grooming policies, Arkansas argued in the US Supreme Court on October 7, 2014 in *Holt v. Hobbs* (No. 13-6827) that shaving the beard of a Muslim seeking to maintain it for religious reasons was necessary for safety and law enforcement concerns. Despite some of their own policies supporting the practice 17 states filed an amicus brief in support of Arkansas.

- **Prisons threaten to remove people from the rule of law and incite discrimination to equal protection of the law** in violation of UDHR Article 7. They also interfere with “the right to an effective remedy by the competent national tribunals for acts violating the

fundamental rights granted ... by the constitution or by law” in violation of UDHR Article 8.

There has been a long and bumpy road securing access for incarcerated people to the courts. Things seemed brighter in the 1970’s after the Attica rebellion inspired reforms like Prisoners’ Legal Services of New York. The Supreme Court’s decision in *Bounds v. Smith* 430 US 817 (1977) was widely viewed as requiring law libraries *and* legal services programs for inmates. This principled position was directly undermined by the Supreme Court’s decision in *Lewis v. Casey*, 518 US 343 (1996) [to show a *Bounds* violation, “actual injury” arising from shortcomings in the prison library or legal assistance program must be demonstrated] and by legislative, politicized over-reading.

The decision has led to a mantra in New York, not fully justified by the decision itself, that we need only provide lawyers *or* libraries but not both.

This restrictive reading, which has undermined adequate funding for Prisoners’ Legal Services, overlooks the reality of New York, with restricted libraries, and high numbers of foreign nationals, and Spanish speaking and illiterate people in our prisons. It overlooks the fact that these same individuals, along with fully literate but ill-equipped prisoners, are facing the impact and labyrinthine maze of the Prison Litigation Reform Act of 1995 Pub. Law No 104-134, §§ 801-810, 110 Stat. 1321-66, (1996) [PLRA], the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) [AEDPA], and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub.L.104-208, 110 Stat.3009-546 (1996) [IIRIRA]. This telescoped view of access also overlooks the absence of a right to counsel for New York State defendants in need of post-conviction relief under CPL Art. 440 [Post-Judgment Motions]. All these issues ought to legally be viewed as distinguishing New York under *Lewis* and providing support for its traditional practice of providing an adequately funded free standing, pre-*Bounds*, not for profit providing legal services to prisoners.

Other access constraints exist as well. Inmates “out to court” are not paid after the instant pay cycle is over. *See* DOCCS Directive # 4802.

The New York State Library Prisoner Services Project referred to in DOCCS Directive #4483(IV) ceased operation on June 30, 2014. It had for the preceding forty years handled some 35,000 requests per year from incarcerated people. On July 1, 2014, the Department of Corrections and Community Supervision (DOCCS) assumed responsibility for filling inmate requests for legal materials. *See* <http://www.nysl.nysed.gov/libdev/outreach/corr.htm> and Memorandum dated June 4, 2014 from the State Library entitled, “New Procedures for Handling State Correctional Facility Inmate Requests for Legal Materials beginning July 1, 2014,” <http://www.nysl.nysed.gov/libdev/outreach/faq-corr.pdf>.

- **Prisons undermine efforts** “to act towards one another in a spirit of brotherhood” (in violation of UDHR Article 1).

Is a citation of authority actually necessary for this, and, if not, doesn't that say a lot about why prisons routinely fail to prevent recidivism, eliminate violence, and prepare people for meaningful reentry?

- **Prison interferes with “liberty and the security of the person”** in violation of UDHR Article 3. Ibid.
- **Prisons subject incarcerated people to torture *and* cruel, degrading treatment** in violation of UDHR Article 5.

See US Const. Amendment VIII [“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted”] and Article 7 of the International Covenant on Civil and Political Rights [“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation”].

In August 2011, Juan Mendez, the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, concluded that even 15 days in solitary confinement constitutes torture or cruel, inhuman or degrading treatment or punishment, and 15 days is the limit after which irreversible harmful psychological effects can occur.

From 2007 to 2011, New York issued over 68,000 sentences to extreme isolation as punishment for violating prison rules. On any given day, approximately 4,500 people – about 8 percent of the entire New York State prison population – were locked down for 23 hours a day in isolation cells. A lawsuit filed over those conditions *Peoples v. Fischer* in February resulted in an Interim Stipulation with the New York Civil Liberties Union which requires DOCCS, contingent on receiving necessary funding, to make numerous changes over the next two years regarding the way in which disciplinary solitary confinement is imposed on prisoners. The stipulation is detailed in Vol. 24 No. 2 *Pro Se* (PLS 2014) at <http://plsny.org/assets/Pro-Se-Vol.-24-No.-2-FINAL.pdf>.

Significantly, in his first address to the Human Rights Council in Geneva, Mr. Mendez, speaking of prolonged solitary confinement and other cruel, inhuman, and degrading punishments announced that he would be addressing them “through the prism of the progressive development of human rights standards.” *See* Statement of Mr. Juan E. Mendez Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 16th session of the Human Rights Council Agenda Item 3 7 March 2010, Geneva.http://www.ohchr.org/Documents/Issues/SRTorture/StatementHRC16SRTORTURE_March2011.pdf.

- **Prisons arbitrarily interfere with privacy, family, home, and correspondence, as well as attacks on honor and reputation and undermine the special care and assistance mother and child are entitled to** in violation of UDHR Articles 12 and 25.

See testimony of Jonathan E. Gradess, “Effect of Incarceration on the Families of Inmates, Testimony Before The New York State Assembly Standing Committees On Children and Families, Correction and Codes” (June 2, 2000, New York, NY) reporting findings from a hearing conducted with prison family members: “In The Matter of Fact Finding Hearing Held by The New York State Defenders Association and The League of Women Voters of The State of New York Concerning The Effect of Incarceration on Families of Inmates,” (April 25, 2000).

Excerpts:

- *There is a constant sadness and a constant waiting*
- *for phone calls,*
- *letters,*
- *visiting days,*
- *parole board decisions,*
- *and money to visit,*
- *a real feeling of powerlessness about even everyday issues, but especially related to the process of visiting.* [T-64]

In response to the terrible visitation problems for family members which have existed for years and years (traveling long distances only to be turned away because it is the *wrong* visiting day, or arriving at the *wrong* time, or carrying the *wrong* ID, or wearing the *wrong* clothing, or not having had sufficient previous visits for a family field day program, etc.), effective November 11, 2014, NY Correction Law § 138-A – Notification of Visitation Policies becomes effective:

THE COMMISSIONER OF THE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION SHALL ESTABLISH AND MAINTAIN ON ITS PUBLIC WEBSITE INFORMATION CONCERNING SPECIFIC VISITATION RULES, REGULATIONS, POLICIES AND PROCEDURES FOR EACH CORRECTIONAL FACILITY. SUCH INFORMATION SHALL INCLUDE, BUT NOT BE LIMITED TO, VISITING DAYS AND HOURS, LENGTH AND NUMBER OF ALLOWABLE VISITS, MAXIMUM NUMBER OF PEOPLE PER VISIT, DRESS CODE, GUIDELINES FOR PEOPLE WITH MEDICAL AND OTHER SPECIAL NEEDS INCLUDING PHYSICAL ACCESS AND RESTRICTIONS ON MEDICATIONS WHILE IN THE FACILITY, INFANT CARE, AND ITEMS WHICH ARE RESTRICTED OR PROHIBITED BY VISITORS. THE COMMISSIONER SHALL REGULARLY UPDATE THE INFORMATION PROVIDED ON THE WEBSITE PURSUANT TO THIS SECTION IN ORDER TO ENSURE THAT SUCH INFORMATION IS ACCURATE AND THAT VISITORS ARE NOTIFIED OF ANY NEW OR CHANGED RULES, REGULATIONS, POLICIES AND PROCEDURES. IN ADDITION, THE COMMISSIONER SHALL DESIGNATE A TELEPHONE NUMBER OR NUMBERS THAT PERSONS MAY CALL FOR INFORMATION ABOUT THE VISITING RULES, REGULATIONS, POLICIES AND PROCEDURES AT THE VARIOUS FACILITIES. SUCH TELEPHONE NUMBER OR NUMBERS SHALL ALSO BE POSTED ON THE WEBSITE.

- **Prisons arbitrarily deprive incarcerated people of their property** in violation of UDHR Article 17.

- **Prisons and the status of incarceration/previous incarceration interfere with the right to take part in the government of the country through freely chosen representatives** in violation of UDHR Article 21.

See materials on disenfranchisement arrayed at the Sentencing Project
http://sentencingproject.org/detail/news.cfm?news_id=1877&id=167:

“As the 2014 midterm elections approach, an estimated 5.85 million Americans will be unable to exercise their voting rights due to a current or previous felony conviction. Of the total disenfranchised population, 2.6 million have completed their sentences, yet are disenfranchised in the 12 states with the most restrictive policies. Overall, 75% of disenfranchised individuals are living in the community, either under probation or parole supervision, or having completed their sentences. Disenfranchisement policies have potentially affected the outcomes of previous US elections, particularly as disenfranchisement laws disproportionately impact communities of color, leaving one in every 13 black adults voiceless in the electoral process.”

See Article 25 of the International Covenant on Political and Civil Rights which states, “Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(b) **To vote** and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.” (Emphasis supplied.)

Significantly, twenty-one (21) nation states permit voting while imprisoned [Austria, Canada, Croatia, Czech Republic, Denmark, Finland, Germany, Iceland, Ireland, Israel, Latvia, Lithuania, Macedonia, Norway, Serbia, Slovenia, Spain, South Africa, Sweden, Switzerland, and Ukraine].

Vermont and Maine comply with these human rights principles.

New York does not. But, *see* DOCCS Directive #9205 [Notice of Right to Vote Upon Maximum Expiration of Discharge of Sentence] which at least provides information on when and how such disenfranchisement can be lifted and provides bi-lingual voter registration information.

- **Prisons deprive people of equal pay for equal work, the right to just and favorable remuneration and to form and join trade unions** in violation of UDHR Article 23.

American prisons generally deprive incarcerated people of the minimum wage, workers compensation, and the right to unionize often while working for as little as \$.25 per hour.

From a model which used work first as punishment, then as skill building, the current era is characterized by joint ventures which might in another time and place have been viewed as akin to peonage. For a presentation designed to present this in a positive light, *see* Sexton, *Work in American Prisons: Joint Ventures with the Private Sector* (National Institute of Justice, 1995). For an argument that inmate labor force participation would increase the gross domestic product and reduce recidivism, *see* Petersik, “The Economics of Inmate Labor Force Participation” (Community Resource Services, 2000).

As of 2011, New York paid its incarcerated men and women between 7.5¢ - 38¢ per hour for a 30-hour week.

- **Imprisonment undermines the human right to the protection of “the moral and material interests resulting from ...literary [and] artistic productions they may author** in violation of UDHR Article 27.

See e.g. NY Executive Law §632-a [Son of Sam Law].

- **Prisons deprive people** of the social order in which the rights and freedoms set forth in the Universal Declaration of Human Rights can be fully realized in violation of UDHR Article 28.

Reflecting upon these deprivations, Article 30 of the UDHR states, “Nothing in this Declaration may be interpreted as implying for any State, group or person *any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.*” (Emphasis supplied.)

Yet prisons do just that, in each state of the United States, in the federal system, and in New York State.

DOMESTIC AND INTERNATIONAL RULES OF RESTRAINT

- UDHR Article(2) “In the exercise of ... rights and freedoms, everyone *shall be subject only to such limitations* as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”
- ABA STANDARDS FOR SENTENCING
 - **Standard 18-3.13 Compliance programs for individuals**
Programs should not be unduly restrictive of an offender’s liberty or autonomy. Where *fundamental rights* are concerned, special care should be taken to avoid overbroad restraints that are so vague or ambiguous as to fail to give real guidance. (Emphasis supplied.)

- **Standard 18-3.11 Authorization of sanctions**

(c) The legislature should not mandate the use of the sanction of total confinement for an offense *unless the legislature can contemplate no mitigating circumstance that would justify a less restrictive sanction.* (Emphasis supplied.)

DOMESTIC AND INTERNATIONAL RULES OF PURPOSE

Deterrent cruelty of prison is not a New York State penal purpose associated with imprisonment but rather with sanctions “authorized.” Sentences themselves are supposed to be rehabilitative and re-integrative.

See NY Penal Law Purposes § 1.05(6).

To insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences *authorized*, the rehabilitation of those convicted, the promotion of their successful and productive reentry and reintegration into society, and their confinement when required in the interests of public protection. (Emphasis supplied.)

See also Basic Principles for the Treatment of Prisoners, G.A. res. 45/111, annex, 45 U.N. GAOR Supp. (No. 49A) at 200, U.N. Doc. A/45/49 (1990).

Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.

See also Standard Minimum Rules for the Treatment of Prisoners, adopted August 30, 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977).

A. PRISONERS UNDER SENTENCE

Guiding principles

56. The guiding principles hereafter are intended to show the spirit in which penal institutions should be administered and the purposes at which they should aim....

57. Imprisonment and other measures which result in cutting off an offender from the outside world are afflictive by the very fact of taking from the person the right of self-determination by depriving him of his liberty. Therefore the prison system shall not, except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in such a situation.

58. The purpose and justification of a sentence of imprisonment or a similar measure deprivative of liberty is ultimately to protect society against crime. This end can only be achieved if the period of imprisonment is used to ensure, so far as possible, that upon his return to society the offender is not only willing but able to lead a law-abiding and self-supporting life.

59. To this end, the institution should utilize all the remedial, educational, moral, spiritual and other forces and forms of assistance which are appropriate and available, and should seek to apply them according to the individual treatment needs of the prisoners.

60.

(1) The regime of the institution should seek to minimize any differences between prison life and life at liberty which tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings.

(2) Before the completion of the sentence, it is desirable that the necessary steps be taken to ensure for the prisoner a gradual return to life in society. This aim may be achieved, depending on the case, by a pre-release regime organized in the same institution or in another appropriate institution, or by release on trial under some kind of supervision which must not be entrusted to the police but should be combined with effective social aid.

WHAT PRISONS DO TO PEOPLE

1. "If we are to break the cycle of violence and vengeance that grips our society, we will have to explore prisons and what they do to people." (*What Prisons Do To People*, NYSDA, May 1985.)
2. The essential inquiry regarding human rights is:
Do the length of sentences and the nature of maximum security imprisonment combine to damage the personalities of prisoners to such an extent that their capacity to function as autonomous and independent individuals in society after release is placed in serious jeopardy in violation of human rights norms?

3. **THE PRISON** [in New York] is a fortress-like structure, designed with minimum populations in mind, and composed of concrete and steel in varying states of disrepair and overutilization. It is usually located in a remote place in the country where urban resident families of prisoners cannot visit without full day excursions and mostly rural dwelling white employees can be recruited to supervise formerly urban dwelling prisoners of principally black and Hispanic race and ethnic groups.
4. **PRISONERS** are treated as non-competent, dependent people every minute of every day.
5. **PRISON** is an artificial environment.
 - Threats upon entry
 - i. To designate the nature of the new power relationship
 - ii. To delineate the impact of future failure to remember who is in charge
 - iii. Racial and religious bullying
 - Humiliation rites
 - i. Hair shorn
 - ii. Clothes taken
 - iii. Public nakedness/bodily invasion
 - iv. Uniform substituted
 - v. Picture taken
 - vi. Number assigned
 - vii. Residence designated
 - Abnormal living space which is directly at odds with free world life and obligations
 - i. Cadre of employees:
 1. Serving meals
 2. Delivering “health” services
 3. Providing heat, a bed, and very few activities
 - Unreal decision-making
 - Lack of autonomy
 - Destructive effect of the adaptive behaviors for in-prison survival are maladaptive upon release
 1. Subcultural set of values
 2. Subcultural norms
 3. Subcultural behaviors
6. **PRISONERS** are controlled completely by guards
 - Thoughtless regulation
 - Bureaucratic rigidity
 - Absence of meaningful recourse for inequity or iniquity
 - Unequal power relationship
 - Jointly traumatic encounters
 - The danger of wrongly interpreted nuance in normal verbal exchanges

7. **PRISONERS** are severely limited in their personal control
 - Outcome control
 - Choice
 - Predictability of future events
 - i. See Goodstein, et. al. "Personal Control and Inmate Adjustment to Prison," *Criminology* (August 1984) at pp 343-369
 - EFFECT: learned helplessness, lack of feelings of self-efficacy, and a life style of reaction and reticence, all feelings frequently attributed to people who recidivate
8. **PRISON** violence
 - By depriving persons of relationships and activities that foster self-esteem and forcing them to live in dehumanizing conditions, prison diminishes self-worth and intensifies an individual's sense of powerlessness.
 - These conditions tend to foster violent behavior as an expression of personal power to counter feelings of being worthless in normal human society.
 - Prison crowding exacerbates these elements, triggering even more violent behavior.
9. The contradictory goals in **PRISON**
 - Formerly incarcerated people are expected to leave prison with the capacity for reintegration.
 - In-prison regime that builds patterns of helplessness, dependency, and apathy that serves no one except the institutional administration.
 - i. Lack of fair process
 - ii. Suppressed wages
 - iii. No capacity for saving and budgeting
 - iv. Middle class values with training in lower class skills
 - v. Deprivation from the digital world and everyday devices
 - vi. Deprivation of the Internet
10. Mental deterioration of **PRISONERS**
 - Mental illness in prison
 - Suicidal behavior
 - Self-mutilation
 - Associated Physical Deterioration
11. Deprivation of Freedom of Association in **PRISON**
 - Isolation from others (*the non-sharing of personhood*)
 - Rare to have warm connections to another prisoner regarding discussions of the most intimate kind (regarding stress, fear, depression, etc.)
 - Guard/inmate connections are frowned upon
 - Danger from demonstrating vulnerability and weakness
 - Outside relationships limited to
 - i. Highly regulated personal visits, see DOCCS Directive #4403
 - ii. Overheard conversations

- iii. Inspected personal mail [see DOCCS Directive #4422, III (G) (1) (b) and III (G) (5) (c), (6)]
- iv. Gradual loss of external relationships
- v. Socialization and prison values
- vi. Stressful or nonexistent visitation

See in this regard Gradess Testimony cited above at p5:

Excerpts:

- *waiting in line to sign in,*
- *waiting to be allowed to enter,*
- *waiting to be processed,*
- *waiting to leave a package,*
- *what can be sent in a package,*
- *waiting to be searched, and*
- *what I am allowed to wear,*
- *waiting to leave money,*
- *waiting for him to be allowed into the visiting room,*
- *all along that process I frequently come in contact with surly correction officers who openly demonstrate their disdain of myself as a visitor, my loved one as an inmate and both of us being of different races. (T64-65)*

12. Deprivation of Freedom from Corporal Punishment in **PRISON**

13. Deprivation of Privacy in **PRISON**

- i. Crowding
- ii. Health and privacy deprivation

14. **PRISONERS'** Deprivation of Normal Sex

15. Deprivation of the Right to Normal Experience in **PRISON**

- **Deprivation of freedom, coping strategies, and rehabilitative and assimilation prospects**

CONCLUSION: ANOTHER WAY FORWARD

Prisons are ancient outdated trauma-inducing relics of a bygone age. They violate human rights principles because they violate the dignity of the human person.

Economic and political/electoral interests undergird their rotting foundation.

In the United States, prisons are uncompromisingly ineffective institutions that serve no one and have no impact on the reduction, control, or elimination of crime. In New York the \$3.6 billion dollar cost of our prison system (*see* "The Price of Prisons: New York – What Incarceration

Costs Taxpayers,” Vera Institute of Justice, 2012) drains resources from other areas which could more productively make whole both those harmed by crime and those causing harm.

There are now 250,000 people under criminal justice control in New York. Fifty-six thousand (56,000) of them are incarcerated because our culture has created an invisible presumption of incarceration concerning which we teach and channel our people from childhood. A wrong requires punishment and regardless of efficacy we carry out the process: ‘trail ‘em, nail ‘em, and jail ‘em,’ whatever the cost to victims [Cf. Herman, “Parallel Justice for Victims of Crime” (2010)], whatever the cost to incarcerated people and their innocent families, and whatever the price.

Prisoners and guards should both be liberated from these dysfunctional places. A substantial reduction in prison population could be accomplished tomorrow without danger if we redeployed our resources to the community and treated people humanely. Since 2009 we have closed 24 facilities, eliminating 7,685 beds in minimum and medium facilities. More is needed and maximum prison beds should be targeted in conjunction with other reforms designed to cure our addiction to punishment and mass incarceration.

Oddly, prison guard unions, which ought to be voices for retraining their members for more productive and satisfying work, are part of the prison industrial complex that calls for more concrete and steel, more building, less cell space reduction, and maintenance of the status quo. Despite the stressors – effect on lifespan, sleep disorders, poor eating habits, and psychological distress caused by prison work for guards, who like inmates suffer from post-traumatic stress disorder and substance abuse, depression, and anxiety – our guard unions and politicians continue to seek prison expansion or maintenance. The life expectancy of a correctional officer is 16 years lower than other occupations (Cheek, F. E. [1984] “Stress Management for Correctional Officers and Their Families,” Alexandria, VA, American Correctional Association) while their suicide rates is 39% higher than the general working population (Stack & Tsoudis [1997] “Suicide Risk among Correctional Officers: A Logistic Regression Analysis” *Archives of Suicide Research*, 3(3), 183-186)

Guard unions should seek more productive work for their members.

Political leaders should seek to bring our prison system downward to scale.

The Governor and Legislature should eliminate all mandatory sentencing, returning us to and surpassing the recommendations of the Temporary Commission on Revision of the Penal Law and Criminal Code (Albany, New York, March 1965) [“Bartlett Commission” report permitted non-incarcerative sentence for all offenses except homicide and kidnapping].

Sentences should be radically shorter for all offenses. We have long known that there is little or no evidence that long prison terms offer more protection to the public than shorter terms (Zimring, “Perspective On Deterrence,” Rockville, MD, National Institute of Mental Health, Center for Studies on Crime and Delinquency [1971]). Few prisoners in Europe at the time of that research served prison terms of over 5 years. (Goldman, “Impressions of Correctional Trends in Europe,” 60 *ABA Journal* 1974, at 947.) In 1978, 90 percent of the sentences imposed

in Denmark were one year or less (Hansgrammeltoft, et. al. *The Danish Law: General Survey*, G.E.C. Gads Publishing House [1982]). We now recognize that there is little correlation between time spent in prison and recidivism rates. (Song and Liebe, “Recidivism: The Effect of Incarceration and Length of Time Served,” Olympia, WA, Washington State Institute for Public Policy [1993]). In Australia, the average non-life sentence is 36 months and in Germany it is between one and two years. In the United States it is 63 months. Our prison problem however lies not with averages but with lengthy draconian sentences from which the average is in part derived. We would do well to cap most sentences at 5 years, reduce prison populations to those who truly need to be there, and then spend the resources to transform those people to productive lives.

We should demand that we realign our resources to foster community based pre- and post-conviction treatment, services, education, and employment in the context of meaningful and far-reaching restorative and parallel justice practices.

For the small percentage that must remain incarcerated, we should look to Norway.

The Norwegian recidivism rate is 20%. New York’s rate is twice that. A study of 30 American states revealed a recidivism rate of 76.6% after 5 years (*see* Kim, DOCCS 2009 Releases, “Three Year Post Release Follow-up” [2013]; *see also* Durose, et. al. “Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005-2010” Bureau of Justice Statistics, US DOJ [2014]).

Although Norway has some other less Utopian institutions, *Time* magazine examined three of Norway’s rehabilitative prisons in 2010 (*see* “Inside the World’s Most Humane Prison,” http://content.time.com/time/photogallery/0,29307,1989083_2137368,00.html), focusing particularly on Halden Prison.

Halden, the flagship of the Norwegian prison system stresses two ideas. First, repressive prisons don’t work. Second, treating incarcerated people humanely increases their chances of re-integrating into society.

Halden is high security and holds people convicted of murder and rape. Those incarcerated learn skills that will prepare them for careers as caterers, chefs, and waiters. Halden conducts drawing classes, woodworking, nutrition, and cooking. People in Halden live in dorm-like space. There are no bars on windows and roughly \$1 million was spent on painting, photography, and light installations.

Doctors, nurses, dentists, and librarians work in the local municipality which prevents subpar standards in health care and culture from developing.

Sentences are shorter, the maximum for murder being 21 years. The prison resembles the outside world to facilitate reentry. Security guards organize activity 12 hours a day. Halden boasts a recording studio with a professional mixing board, and in-house music teachers teach piano, guitar, bongos, and more to the pupils housed there. The prison yard at Halden is designed with 75 acres of high trees to minimize the institutional feel of the place and to obscure its twenty-foot high wall. Eighteen (18) different colors were used by an interior decorator to stimulate mood

and provide variety. Half of the guards at Halden are female and all guards undergo two years of academy training. Their job description requires them to motivate those incarcerated “so that [the] sentence is as meaningful, enlightening, and rehabilitating as possible.”

The governor of Halden, Are Høidal, says “we don’t think about revenge in the Norwegian prison system; we have much more focus on rehabilitation.” Gentleman, *The Guardian*, “Inside Halden, the most humane prison in the world” (May 18, 2012), <http://www.theguardian.com/society/2012/may/18/halden-most-humane-prison-in-world>.

Universal Declaration of Human Rights

Preamble

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, therefore,

The General Assembly,

Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by

teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article I

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3

Everyone has the right to life, liberty and security of person.

Article 4

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 5

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6

Everyone has the right to recognition everywhere as a person before the law.

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11

1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier

penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 12

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13

1. Everyone has the right to freedom of movement and residence within the borders of each State.
2. Everyone has the right to leave any country, including his own, and to return to his country.

Article 14

1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.
2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15

1. Everyone has the right to a nationality.
2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
2. Marriage shall be entered into only with the free and full consent of the intending spouses.
3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17

1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of his property.

Article 18

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20

1. Everyone has the right to freedom of peaceful assembly and association.
2. No one may be compelled to belong to an association.

Article 21

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right to equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 22

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 23

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
2. Everyone, without any discrimination, has the right to equal pay for equal work.
3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
4. Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
3. Parents have a prior right to choose the kind of education that shall be given to their children.

Article 27

1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 28

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article 29

1. Everyone has duties to the community in which alone the free and full development of his personality is possible.
2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

**United Nations Office of the High Commissioner for Human Rights
International Standards for Human Rights Resource List**

Convention on the Rights of the Child

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>

Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 49

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>

Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 entry into force 26 June 1987, in accordance with article 27 (1)

Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OP-CAT)

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx>

Adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199 entered into force on 22 June 2006

International Covenant on Civil and Political Rights

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49

Standard Minimum Rules for the Treatment of Prisoners

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/TreatmentOfPrisoners.aspx>

Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977

Basic Principles for the Treatment of Prisoners

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/BasicPrinciplesTreatmentOfPrisoners.aspx>

Adopted and proclaimed by General Assembly resolution 45/111 of 14 December 1990

Declaration on the Elimination of Violence against Women

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/ViolenceAgainstWomen.aspx>

Proclaimed by General Assembly resolution 48/104 of 20 December 1993

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/DetentionOrImprisonment.aspx>

Adopted by General Assembly resolution 43/173 of 9 December 1988

Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/EffectiveInvestigationAndDocumentationOfTorture.aspx>

Recommended by General Assembly resolution 55/89 of 4 December 2000

Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/MedicalEthics.aspx>

Adopted by General Assembly resolution 37/194 of 18 December 1982

Code of Conduct for Law Enforcement Officials

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/LawEnforcementOfficials.aspx>

Adopted by General Assembly resolution 34/169 of 17 December 1979

Basic Principles on the Use of Force and Firearms by Law Enforcement Officials

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/UseOfForceAndFirearms.aspx>

Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990

United Nations Rules for the Protection of Juveniles Deprived of the Liberty

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/JuvenilesDeprivedOfLiberty.aspx>

Adopted by General Assembly resolution 45/113 of 14 December 1990

United Nations Standard Minimum Rules for the Administration of Juvenile Justice

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/BeijingRules.aspx>

Adopted by General Assembly resolution 40/33 of 29 November 1985

Principles relating to the status of national institutions (The Paris Principles)

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>

Adopted by General Assembly resolution 48/134 of 20 December 1993

Solitary Confinement in New York State: The Facts

Solitary and Other Forms of Isolated Confinement Are Inhumane, Counterproductive, and Unsafe.

- People in isolated confinement in NY State spend **22 to 24 hours a day locked in a cell** the size of an elevator, alone or with one other person. They may be permitted 1-2 hours to exercise alone in a cage; they do not receive any meaningful programs or therapy, and often cannot make phone calls.
- The sensory deprivation, lack of normal human interaction, and extreme idleness can lead to intense suffering and severe psychological damage. Isolated confinement fails to address the underlying causes of problematic behavior, and often exacerbates that behavior as people deteriorate psychologically, physically, and socially. **Over 30% of all suicides in NY prisons from 2014-2016 took place in solitary**, though only 6% to 8% of all people in prison are in solitary.
- Many hundreds of people are released directly from extreme isolation to the outside community each year in NY; very few receive any educational, rehabilitative programming, or transitional services to help them prepare for their return to society, increasing rates of recidivism.
- Isolated confinement serves no legitimate purpose; states that reduced their use of isolation in prisons by up to 75% saw significant decreases in prison violence.

People are Regularly Held in Isolation in NYS for Periods of Time that Amount to Torture.

- Most people sent to isolation in NY prisons spend **months or years** there; some individuals have been in solitary confinement in New York's prisons for **more than two decades (upwards of 30 years)**.
- The **entire United Nations General Assembly has denounced solitary exceeding 15 days**. In 2015, the US government voted for, and the entire United Nations adopted, the Mandela Rules, which prohibit any person from being held in solitary beyond 15 days. **Colorado has implemented a 15-day limit on solitary and reduced the number of people in solitary from 1,500 to 18. New York currently places no limit on the total time a person can spend in isolated confinement.**

There Are Far Too Many People in Isolation, Disproportionately People of Color.

- On any given day, **thousands of people are in isolated confinement in NYS prisons** and hundreds more in local jails. While NY prisons have made some reductions, the numbers have plateaued and still 5.64% of people in prison are in SHU and 2% more in keep lock each day –higher than the national average of 4.4%, and much higher than the 1-2% reported in states like Colorado and Washington. The majority of sentences that result in isolated confinement in NYS are for non-violent conduct.
- **Black people** represent about 13% of all people in NYS, but represent 50% of those incarcerated in NYS, and **60% of people** held in long-term solitary confinement units in NY.

Even Particularly Vulnerable People are Held in Isolated Confinement.

- Young people and people with mental illness are disproportionately likely to be put in isolation. **More than 800 people on the Office of Mental Health caseload remain in solitary confinement** each day. Pregnant women, new mothers, elderly people, and people with severe physical disabilities are held in isolation in NYS; members of the LGBTI community are often placed in solitary purportedly for their own protection and have suffered additional staff abuse while in isolation.

Processes Are Arbitrary and Unfair, with Insufficiently Trained Staff, and Little Accountability.

- Corrections officers are not sufficiently trained to address people's needs or problematic behavior; as a result, the default response is to write a disciplinary ticket for any alleged rule violation.
- Hearings by DOCCS employees to adjudicate disciplinary tickets that result in isolated confinement are arbitrary and unfair: 95% of people charged with these rule violations are found guilty. These processes occur within the closed prison system, with little public reporting by DOCCS.

Summary of the Humane Alternatives to Long-Term (HALT) Solitary Confinement Act, A. 3080B / S. 4784A (24 Sponsors in the Senate)



HALT's Key Mechanisms for Challenging Isolated Confinement:

- **Creates More Humane & Effective Alternatives to Isolated Confinement:** Any person separated from general population for more than 15 consecutive days must be in a separate secure Residential Rehabilitation Unit (RRU) – a rehabilitative & therapeutic unit providing programs, therapy, and support to address underlying needs and causes of behavior, with 6 hours per day of out-of-cell programming plus one hour of out-of-cell recreation.
- **Ends Long-Term Isolated Confinement:** No person may be held in isolated confinement more than 15 consecutive days nor 20 days total in any 60 day period. At these limits, a person must be released or diverted to the alternative RRU with more out-of-cell time, programs, and therapy.
- **Restricts Criteria for Placement in Isolated Confinement or RRUs:** A person can only be placed in segregated confinement for more than 3 days and up to 15 days, or be placed in an RRU, if the person is found to have engaged in more serious acts of physical injury, forced sexual acts, extortion, coercion, inciting serious disturbance, procuring deadly weapons or dangerous contraband, or escape.
- **Bans Special Populations from Isolated Confinement:** The department can never place in isolated confinement any person: 21 years or younger; 55 years or older; with a physical, mental, or medical disability; who is pregnant; or Who is a new mother or caring for a child while inside.

Key Procedural and Other Protections:

- **Enhances Due Process Protections Before Placement In Isolated Confinement or RRUs:** For example, a person may have access to legal representation by pro bono attorneys, law students, or approved paralegals at hearings that could result in isolated confinement.
- **Creates Mechanisms for Release from RRUs:** H.A.L.T. requires meaningful review at least every 60 days to determine if a person shall be released from a residential rehabilitation unit. Also, a person must be released if their disciplinary sentence runs out; and, a person must be released after one year if they have not already been released, unless there are specified exceptional circumstances and approval by the corrections commissioner.
- **Covers all Categories of People Who Currently Face Isolated Confinement:** The bill applies to disciplinary confinement, administrative segregation, and protective custody, while excluding medical/mental health isolation. It covers people in Special Housing Units (SHU), S-block, Keeplock, and/or any isolation beyond 17 hours per day. It also applies to all state prisons and county jails in New York State.
- **Other Protections:** Staff working on isolated confinement units or RRUs, and hearing officers, must receive substantial relevant training. Departments of corrections must provide public reports on the number/categories of people in isolation and RRUs, and lengths of stay. Moreover, the Justice Center & State Commission of Correction provide outside oversight in order to assess implementation of the law.

Find your legislators here: http://openstates.org/find_your_legislator/, and call/write to urge them to sign on as co-sponsors of HALT. For more information, see: www.nycaic.org

KEY TALKING POINTS

HUMANE ALTERNATIVES TO LONG TERM (HALT) SOLITARY CONFINEMENT ACT

BILL NO: A. 3080B / S. 4784A IN THE NEW YORK STATE LEGISLATURE

CURRENTLY WITH 28 CO-SPONSORS IN THE SENATE

The Problem: The Torture of Solitary Confinement

- People in solitary are subjected to **inhumane and counterproductive treatment** known to cause devastating psychological damage: 22-24 hours a day in a cell the size of an elevator with no meaningful human contact or programs & recreation alone in a cage. We have heard too much about people taking their own lives while in solitary or after they have come home. President Obama, the Pope, and Supreme Court Justices have all denounced solitary.
- There are **thousands of people in solitary** in NY prisons and jails, disproportionately people of color, and often for minor rule violations – like disobeying an order from an officer or even raising complaints or after being beaten by staff.
- Although the entire United Nations General Assembly – with backing by the US government – passed the Mandela Rules prohibiting any person from spending more than *15 days* in solitary, people **regularly spend months and years** in isolated confinement in New York, and sometimes decades (upwards of 30 years).
- **Even people particularly vulnerable** to either the effects of isolation itself or additional abuse while in isolation are held in solitary – young, elderly, pregnant women, new mothers, people with medical or mental health disabilities, members of the LGBTI community
- **The processes** leading to isolation are arbitrary and unfair (without representation and 95% guilty rates), involve insufficiently trained staff, and have little transparency or accountability

HALT's Solution: End the Torture of Solitary Confinement

- **Create alternative** Residential Rehabilitation Units to fundamentally transform the response to people's needs & behaviors from isolation & deprivation to rehabilitation & treatment. If someone must be separated from general population, the separate, secure RRUs would have at least 7 hours out-of-cell with meaningful human interaction and congregate programming
- **Restrict the criteria** that can result in separation to the most egregious conduct in need of an intensive therapeutic and rehabilitative intervention
- **End long term isolation** beyond 15 days, in line with what has been called for by the United Nations Special Rapporteur on Torture and the UN Mandela Rules
- **Ban particularly vulnerable groups** from any length of time of isolated confinement
- **Better equip staff** to work with incarcerated people (via training), **make the processes resulting in separation fairer** (including via legal representation), **more transparent** (via mandatory reporting), and with **more accountability** (via outside oversight).



Dr. Ray Wickenheiser

New York State Police Crime Lab System Director

Wrongful Convictions and the Forensic Process

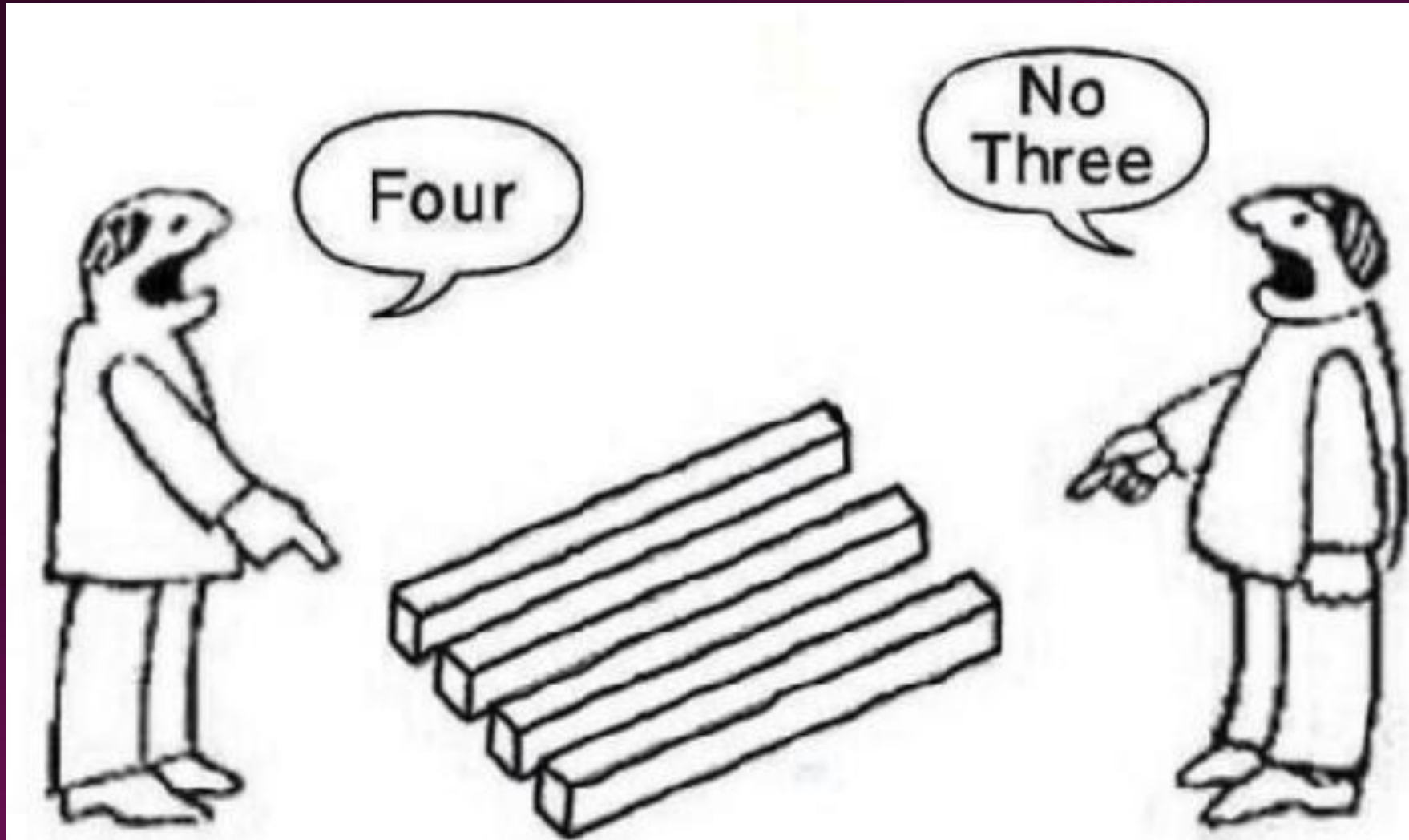
Outline

- Background of NY State Police Crime Lab System
- Role of the Crime Laboratory
- Case of two Marks
- Case of Roy Brown
- Thoughts and recommendations

NY State Police Crime Laboratory System Operations

- Serving all 62 counties of New York State (Primary forensic provider in more than 50)
- 579 agencies (state, local and federal) submit evidence samples to the FIC (per 2016 data)
- 13,374 cases with 107,305 item of evidence received annually
- Full service accredited crime laboratory system conducting Biology (DNA), Drugs, Firearms, Latent Prints, Toxicology and Trace Evidence examinations
- Forensic Investigation Center, 3 Satellite Labs (Western in Olean, Southern in Port Crane and Mid-Hudson in Newburgh)

Interest versus position: justice in the Justice System



Seeking the truth

- Allegations and different viewpoints
- “Me, too” campaign and important of supporting survivors
- Need for corroboration of statements with objective evidence
- Respect both rights of the accuser and the accused
- Mix of overlapping interests (note the situation with justice and politics)
- Highlights the need for objective, unbiased support for hypotheses and conclusions

Role of the Forensic Laboratory

- Use sound scientific principles to maximize the value of evidence left behind at the crime scene
- Independent neutral scientists using accredited techniques to provide data to the finder of fact
- Only conduct analyses on what is submitted to the crime laboratory
- The “they” is “us”, and we could make a lot more money elsewhere, we care deeply about getting it right

The Case of the “Two Marks”



Not Guilty



Guilty

Saratoga, NY 1995

Case of the Two Marks

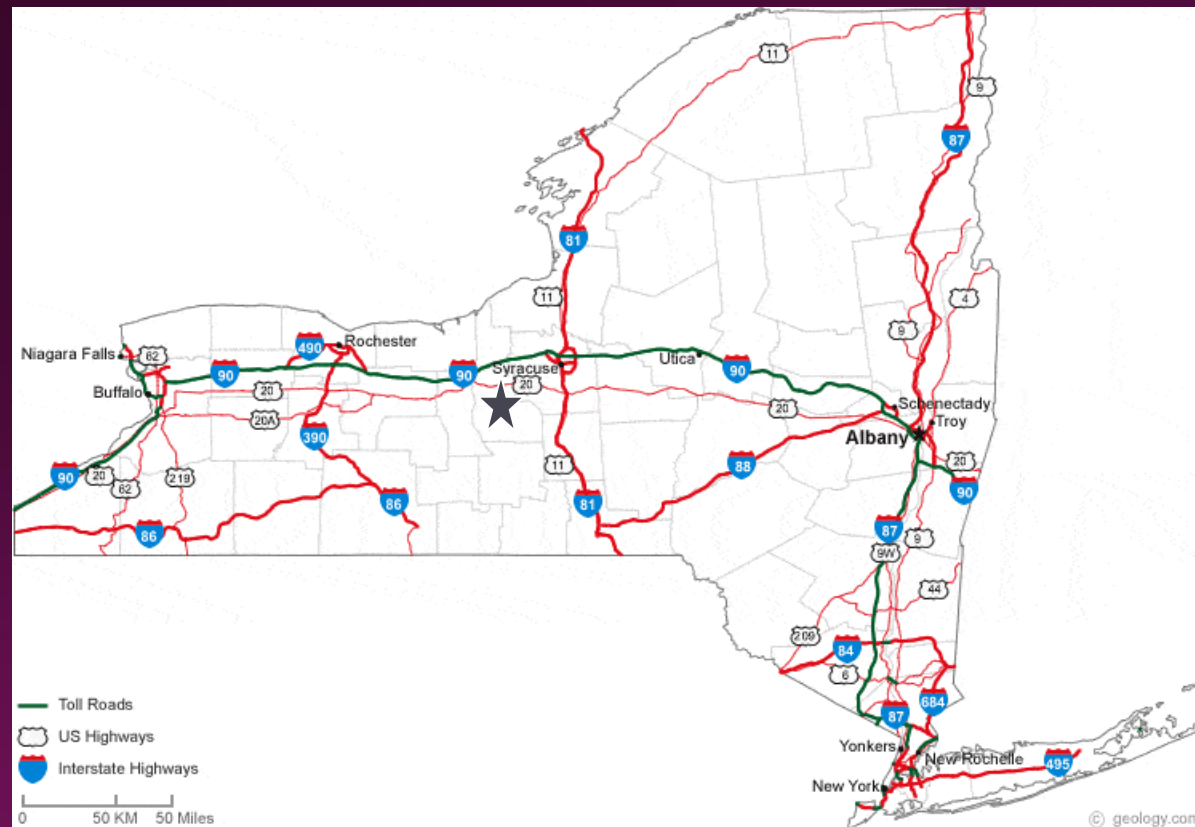
- Illustrates shortcomings of eyewitness testimony
- Where would Mark #1 be without forensic analysis?
- Miscarriage of justice
- Actual assailant Mark #2 left to recommit new offenses on new victims (public safety issue)
- How would you feel if you were the victim?
- Victim identifies assailant in good faith, but makes an honest mistake
- It is a huge implication on victims to go through forensic examination and court process including testimony. We need to support them. Only 1-2% of forensic cases go to trial.

Positive news

- Technology is increasing by leaps and bounds
- Sensitivity increases has expanded the number of cases and sample type that can be successfully analyzed
- Forensic science has been responsible for the release of many wrongfully convicted individuals
- Goal should be to get it right the first time so a person is not wrongfully convicted
- Should every case have forensic analysis?

The Exoneration of Roy Brown

- May 23, 1991 – Sabina Kulakowski was found murdered in Aurelius, NY



November 1, 2007

Case Background

- The Suspect – Roy Brown
 - Recently released from jail for threatening county social workers
- January 23, 1992 – Roy Brown was convicted of murder and sentenced to 25 years to life
 - Based on circumstantial evidence, as well as some physical evidence

Case Background

- Brown maintained his innocence and began the appeal process
- December 24, 2003 – Roy Brown wrote a letter to Barry Bench asking him to confess
 - “DNA is GOD’S Creation and GOD makes no mistakes.” (Roy Brown in letter to Barry Bench)
- December 29, 2003 – Barry Bench committed suicide
- 2005 post conviction testing was requested (Innocence Project)

DNA Testing

- April 27, 2006 – Judge ordered testing of bite mark swabs
 - No DNA profiles obtained
- September 8, 2006 – Judge ordered additional DNA testing
 - Vaginal smear slides
 - Fingernail clippings
 - Red t-shirt

DNA Testing

- Numerous samples from fingernails, sexual assault kit, hairs and blood stains did not produce profiles other than that of the victim
- Red T-shirt worn by victim was examined using a Crimescope™ to identify other stained areas
- 8 additional stains detected

DNA Testing – Red T-Shirt

- One fluorescent stain – consistent with unknown male, “John Doe”
 - Corresponded with an area tested by previous examiner
- Three additional fluorescent stains – mixture profiles consistent with DNA from “John Doe”
- One fluorescent stain – mixture with Sabina Kulakowski being the major contributor, “John Doe” cannot be excluded
- Who is “John Doe”?

Who is “John Doe”?

- December 2006 - Innocence Project retrieved a DNA sample from the daughter of Barry Bench
 - The sample was sent to a private paternity lab to perform a paternity test on the sample using the “John Doe” profile as the father.
- The paternity test showed that “John Doe” was the father and therefore “John Doe” was Barry Bench

Who is “John Doe”?

- Judge ruled that the information was not sufficient to free Roy Brown
 - Ordered exhumation of Barry Bench
- STR-DNA analysis on the femur of Barry Bench and developed DNA profiles
- The “John Doe” profile matched the DNA profile from Barry Bench

Who was Barry Bench?

- New information
 - Brother of Sabina Kulakowski's ex-boyfriend
 - Black sheep of the family
 - Alcoholic that abused and bit his wife
 - Drunk at a bar on night of murder, conflicting reports as to when he left
 - Gaps in his location on night of murder

'Innocent man walking'

The Post Standard (www.syracuse.com)

- Roy Brown was released from prison
- Acknowledge work of Tim Goble



Reality

- Many cases lack forensic evidence
 - Gloves, masks, hidden or covered up (people don't like to get caught)
 - Time and environment (degradation)
 - Bad luck
 - Not recognized or discarded
 - Trampled by first responders
- Objectivity: we can only work with what we have – it is what it is
- Forensic scientists believe deeply in their jobs and want to get it right (note there has been some malfeasance)

Conclusion

- Forensic analysis is objective
- Forensic analysis excludes as well as it includes
- Preserve evidence and conduct retrospective analyses (post conviction testing)
- Understand not all cases will have sufficient forensic evidence to exonerate
- Ideal scenario is to conduct all probative analysis up front to prevent wrongful conviction

Questions?

Thank-you for your kind attention

Dr. Ray Wickenheiser

Ray.Wickenheiser@Troopers.NY.gov

(518) 457-1208

Murray v. Giarratano, 492 U.S. 1 (1989)

109 S.Ct. 2765, 106 L.Ed.2d 1, 57 USLW 4889

109 S.Ct. 2765

Supreme Court of the United States

Edward W. MURRAY, Director, Virginia
Department of Corrections, et al., Petitioners

v.

Joseph M. GIARRATANO, Johnny
Watkins, Jr., and Richard T. Boggs, et al.

No. 88–411.

|
Argued March 22, 1989.

|
Decided June 23, 1989.

Synopsis

Indigent death row inmates brought class action alleging entitlement to appointed counsel for state postconviction proceedings. The United States District Court for the Eastern District of Virginia, Robert R. Merhige, Jr., Senior District Judge, 668 F.Supp. 511, ordered partial relief, and appeal was taken. The Fourth Circuit Court of Appeals, 836 F.2d 1421, affirmed in part and reversed in part. Upon reconsideration en banc, the Court of Appeals, 847 F.2d 1118, affirmed. On certiorari review, the Supreme Court, Chief Justice Rehnquist, held that neither Eighth Amendment nor due process clause requires states to appoint counsel for indigent death row inmates seeking state postconviction relief.

Reversed and remanded.

Justice O'Connor concurred and filed opinion.

Justice Kennedy concurred in judgment and filed opinion in which Justice O'Connor joined.

Justice Stevens dissented and filed opinion in which Justices Brennan, Marshall and Blackmun joined.

****2765** *1 *Syllabus* *

Respondents, a class of indigent Virginia death row inmates who do not have counsel to pursue postconviction

proceedings, brought a suit under 42 U.S.C. § 1983 in the District Court against various state officials, alleging that the Constitution required that they be provided with counsel at the State's expense for the purpose of pursuing collateral proceedings related to their convictions and sentences. The District Court concluded that respondents should receive greater assistance than that outlined in ****2766** *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72—which held that a prisoner's “right of access” to the courts required a State to furnish access to adequate law libraries or other legal aid so the prisoners might prepare petitions for judicial relief—since death row inmates have a limited amount of time to prepare petitions, since their cases are unusually complex, and since the shadow of impending execution interferes with their ability to do legal work. It found that Virginia's efforts—access to a law library or lawbooks, the availability of “unit attorneys,” and appointment of counsel after a petition is filed—did not afford prisoners meaningful access to the courts because they did not guarantee the prisoners continuous assistance of counsel. Thus, it ordered Virginia to develop a program for the appointment of counsel, upon request, to indigent death row inmates wishing to pursue habeas corpus in state court, but, in light of *Ross v. Moffitt*, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341, not in federal court. The Court of Appeals affirmed. It viewed the lower court's special “considerations” *2 relating to death row inmates as findings of fact which were not clearly erroneous. It reasoned that the case was not controlled by *Pennsylvania v. Finley*, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539—which held that neither the Due Process Clause of the Fourteenth Amendment nor the equal protection guarantee of “meaningful access” required the State to appoint counsel for indigent prisoners seeking postconviction relief—since *Finley* was not a “meaningful access” case, since it did not address the rule enunciated in *Bounds*, and since it did not involve the death penalty.

Held: The judgment is reversed, and the case is remanded.

847 F.2d 1118 (CA4 1988), reversed and remanded.

THE CHIEF JUSTICE, joined by Justice WHITE, Justice O'CONNOR, and Justice SCALIA, concluded that neither the Eighth Amendment nor the Due Process Clause requires States to appoint counsel for indigent

Murray v. Giarratano, 492 U.S. 1 (1989)

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death row inmates seeking state postconviction relief. Pp. 2768–2772.

(a) This Court's decisions require the conclusion that the rule of *Pennsylvania v. Finley* should apply no differently in capital cases than in noncapital cases. See, e.g., *Smith v. Murray*, 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 434. State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceeding and serve a different and more limited purpose than either the trial or appeal. Eighth Amendment safeguards imposed at the trial stage—where the court and jury hear testimony, receive evidence, and decide the question of guilt and punishment—are sufficient to assure the reliability of the process by which the death penalty is imposed. Pp. 2768–2770.

(b) There is no inconsistency whatever between the holdings in *Bounds* and *Finley*. The right of access at issue in *Bounds* rests on a constitutional theory considered in *Finley*. Extending *Bounds* would partially overrule the subsequently decided *Finley* and would reject a categorical rule—the usual tack taken in right to counsel cases—for the adoption of a case-by-case determination based on “factual” findings, which, under a “clearly-erroneous” standard, could result in different constitutional rules being applied in different States. Pp. 2770–2772.

Justice KENNEDY, joined by Justice O'CONNOR, concluded that Virginia's scheme for securing representation for indigent death row inmates does not violate the Constitution. Although Virginia's procedures are not as far reaching and effective as those available in other States, no Virginia death row inmates have been unable to obtain counsel to represent them in postconviction proceedings, and Virginia's prison system is staffed by institutional lawyers to assist inmates in such matters. *Bounds*' meaningful-access requirement can be satisfied in various ways, and state legislatures and prison administrators must be *3 given “wide discretion” to select appropriate solutions from a range of complex options. Pp. 2772–2773.

****2767** REHNQUIST, C.J., announced the judgment of the Court and delivered an opinion, in which WHITE, O'CONNOR, and SCALIA, JJ., joined. O'CONNOR, J., filed a concurring opinion, *post*, p. 2772. KENNEDY,

J., filed an opinion concurring in the judgment, in which O'CONNOR, J., joined, *post*, p. 2772. STEVENS, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 2773.

Attorneys and Law Firms

Robert Q. Harris, Assistant Attorney General of Virginia, argued the cause for petitioners. With him on the briefs were *Mary Sue Terry*, Attorney General, *H. Lane Kneedler*, Chief Deputy Attorney General, *Stephen D. Rosenthal*, Deputy Attorney General, and *Francis S. Ferguson*, Assistant Attorney General.

Gerald T. Zerkin argued the cause for respondent. With him on the brief were *Jonathan D. Sasser* and *Martha A. Geer*.*

* Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Elizabeth Alexander*, *Alvin J. Bronstein*, *Steven R. Shapiro*, and *John A. Powell*; for the Maryland State Bar Association et al. by *John H. Blume*; and for the National Legal Aid & Defender Association et al. by *Ephraim Margolin* and *Steven M. Pesner*.

Robert D. Raven, *Ronald J. Tabak*, *George H. Kendall*, and *Clifford D. Stromberg* filed a brief for the American Bar Association as *amicus curiae*.

Opinion

Chief Justice REHNQUIST announced the judgment of the Court and delivered an opinion, in which Justice WHITE, Justice O'CONNOR, and Justice SCALIA join.

Virginia death row inmates brought a civil rights suit against various officials of the Commonwealth of Virginia. The prisoners claimed, based on several theories, that the Constitution required that they be provided with counsel at the Commonwealth's expense for the purpose of pursuing collateral proceedings related to their convictions and sentences. The courts below ruled that appointment of counsel upon request was necessary for the prisoners to enjoy their *4 constitutional right to access to the courts in pursuit of state habeas corpus relief. We think this holding is inconsistent with our decision

Murray v. Giarratano, 492 U.S. 1 (1989)

109 S.Ct. 2765, 106 L.Ed.2d 1, 57 USLW 4889
two Terms ago in *Pennsylvania v. Finley*, 481 U.S. 551,
107 S.Ct. 1990, 95 L.Ed.2d 539 (1987), and rests on a
misreading of our decision in *Bounds v. Smith*, 430 U.S.
817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977).

Joseph M. Giarratano is a Virginia prisoner under a sentence of death. He initiated this action under 42 U.S.C. § 1983, by *pro se* complaint in Federal District Court, against various state officials including Edward W. Murray who is the Director of the Virginia Department of Corrections. Some months later, the District Court certified a class comprising all current and future Virginia inmates awaiting execution who do not have and cannot afford counsel to pursue postconviction proceedings.¹ The inmates asserted a number of constitutional theories for an entitlement to appointed counsel and the case was tried to the court.

After the evidence, post-trial briefs, and other memoranda, the District Court expressed “serious doubts as to the viability of many of th[e] theories.” 668 F.Supp. 511, 512 (E.D.Va.1986). It was, however, “satisfied that the United States Supreme Court’s decision in *Bounds* dictates that the plaintiffs here be granted some form of relief.” *Ibid.* The District Court noted three special “considerations” relating to death row inmates that it believed required that these inmates receive greater assistance than *Bounds* had outlined. It found that death row inmates had a limited amount of time to prepare their petitions, that their cases were unusually complex, and that the shadow of impending execution would interfere with their ability to do legal work. These “considerations”

*5 led the court to believe that the “plaintiffs are incapable of effectively using lawbooks to raise their claims.” As a result, it found that Virginia’s policy of either allowing death row inmates time in the prison law library or permitting them to have lawbooks sent to their cells did “little to satisfy Virginia’s obligation.”² 668 F.Supp., at 513. “Virginia must fulfill its duty by providing **2768 these inmates trained legal assistance.” *Ibid.*

The District Court then evaluated the avenues by which inmates convicted of capital crimes could obtain the aid of counsel in Virginia. It found inadequate the availability of “unit attorneys” appointed by Virginia to the various penal institutions to assist inmates in incarceration-related

litigation. *Id.*, at 514. Further, it found that “[e]ven if Virginia appointed additional institutional attorneys to service death row inmates, its duty under *Bounds* would not be fulfilled” because, acting “only as legal advisors,” “[t]he scope of assistance these attorneys provide is simply too limited.” *Ibid.* Along the same lines, the District Court concluded that Virginia’s provisions for appointment of counsel after a petition is filed did not cure the problem.³ This was primarily because “the *6 timing of the appointment is a fatal defect” as the inmate “would not receive the attorney’s assistance in the critical stages of developing his claims.” *Id.*, at 515.

Even together, Virginia’s efforts did not afford prisoners a meaningful right of access to the courts, in the opinion of the District Court, because they did not guarantee them “the continuous assistance of counsel.” *Ibid.* With what the District Court feared was the imminent depletion of the pool of volunteer attorneys willing to help Virginia death row inmates attack their convictions and sentences, the court felt that “[t]he stakes are simply too high for this Court not to grant, at least in part, some relief.” It therefore ordered Virginia to develop a program for the appointment of counsel, upon request, to indigent death row inmates wishing to pursue habeas corpus in state court. *Id.*, at 517. It decided, however, that the decision in *Ross v. Moffitt*, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974), indicated that Virginia had no similar constitutional obligation to appoint counsel for the pursuit of habeas corpus in federal court. 668 F.Supp., at 516–517.

On appeal to the United States Court of Appeals for the Fourth Circuit, a divided panel reversed the District Court’s judgment that the Commonwealth was constitutionally required to provide personal attorneys to represent death row inmates in state collateral proceedings. 836 F.2d 1421 (1988). But that court, en banc, subsequently reheard the case and affirmed the District Court. 847 F.2d 1118 (1988). The en banc court viewed as findings of fact the special “considerations” relating to death row inmates which had led the District Court to conclude that Virginia was not in compliance with the constitutional rights of access. It accepted these findings as not clearly erroneous and so affirmed the District Court’s remedial order. The en banc court did

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not believe the case to be controlled by *Pennsylvania v. *7 Finley*, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987), which held that the Constitution did not require States to provide counsel in postconviction proceedings. “*Finley* was not a meaningful access case, nor did it address the rule enunciated in *Bounds v. Smith*.” 847 F.2d, at 1122. “Most significantly,” thought the Fourth Circuit, “*Finley* did not involve the death penalty.” *Ibid*. Four judges dissented. We granted certiorari, 488 U.S. 923, 109 S.Ct. 303, 102 L.Ed.2d 322 (1988), and now reverse.

In *Finley* we ruled that neither the Due Process Clause of the Fourteenth Amendment ****2769** nor the equal protection guarantee of “meaningful access” required the State to appoint counsel for indigent prisoners seeking state postconviction relief. The Sixth and Fourteenth Amendments to the Constitution assure the right of an indigent defendant to counsel at the trial stage of a criminal proceeding, *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), and an indigent defendant is similarly entitled as a matter of right to counsel for an initial appeal from the judgment and sentence of the trial court. *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956). But we held in *Ross v. Moffitt*, *supra*, 417 U.S., at 610, 94 S.Ct., at 2443, that the right to counsel at these earlier stages of a criminal procedure did not carry over to a discretionary appeal provided by North Carolina law from the intermediate appellate court to the Supreme Court of North Carolina. We contrasted the trial stage of a criminal proceeding, where the State by presenting witnesses and arguing to a jury attempts to strip from the defendant the presumption of innocence and convict him of a crime, with the appellate stage of such a proceeding, where the defendant needs an attorney “not as a shield to protect him against being ‘haled into court’ by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt.” 417 U.S., at 610–611, 94 S.Ct., at 2443–2444.

We held in *Finley* that the logic of *Ross v. Moffitt* required the conclusion that there was no federal constitutional right ***8** to counsel for indigent prisoners seeking state postconviction relief:

“Postconviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature. See *Fay v. Noia*, 372 U.S. 391, 423–424 [83 S.Ct. 822, 840–841, 9 L.Ed.2d 837] (1963).... States have no obligation to provide this avenue of relief, cf. *United States v. MacCollom*, 426 U.S. 317, 323 [96 S.Ct. 2086, 2090, 48 L.Ed.2d 666] (1976) (plurality opinion), and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the state supply a lawyer as well.” 481 U.S., at 556–557, 107 S.Ct., at 1994.

Respondents, like the courts below, believe that *Finley* does not dispose of respondents' constitutional claim to appointed counsel in habeas proceedings because *Finley* did not involve the death penalty.⁴ They argue that, under the Eighth Amendment, “evolving standards of decency” do not permit a death sentence to be carried out while a prisoner is unrepresented. Brief for Respondents 47. In the same vein, they contend that due process requires appointed counsel in postconviction proceedings, because of the nature of the punishment and the need for accuracy. *Id.*, at 48–49.

We have recognized on more than one occasion that the Constitution places special constraints on the procedures used to convict an accused of a capital offense and sentence him to death. See, e.g., *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) (trial judge must give jury the option to convict of a lesser offense); *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (jury must be allowed to consider all of a capital defendant's mitigating character evidence); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) (same). The finality of the death penalty requires ***9** “a greater degree of reliability” when it is imposed. *Lockett*, *supra*, 438 U.S., at 604, 98 S.Ct., at 2964.

These holdings, however, have dealt with the trial stage of capital offense adjudication, where the court and jury hear testimony, ****2770** receive evidence, and decide the questions of guilt and punishment. In *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984), we declined to hold that the Eighth Amendment required

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appellate courts to perform proportionality review of death sentences. And in *Satterwhite v. Texas*, 486 U.S. 249, 256, 108 S.Ct. 1792, 1797, 100 L.Ed.2d 284 (1988), we applied the traditional appellate standard of harmless-error review set out in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), when reviewing a claim of constitutional error in a capital case.

We have similarly refused to hold that the fact that a death sentence has been imposed requires a different standard of review on federal habeas corpus. In *Smith v. Murray*, 477 U.S. 527, 538, 106 S.Ct. 2661, 2668, 91 L.Ed.2d 434 (1986), a case involving federal habeas corpus, this Court unequivocally rejected “the suggestion that the principles [governing procedural fault] of *Wainwright v. Sykes*[], 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977),] apply differently depending on the nature of the penalty a State imposes for the violation of its criminal laws” and similarly discarded the idea that “there is anything ‘fundamentally unfair’ about enforcing procedural default rules....” *Id.*, 477 U.S., at 538–539, 106 S.Ct., at 2668. And, in *Barefoot v. Estelle*, 463 U.S. 880, 887, 103 S.Ct. 3383, 3391, 77 L.Ed.2d 1090 (1983), we observed that “direct appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception.”

Finally, in *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986), we held that the Eighth Amendment prohibited the State from executing a validly convicted and sentenced prisoner who was insane at the time of his scheduled execution. Five Justices of this Court, however, rejected the proposition that “the ascertainment of a prisoner’s sanity as a predicate to lawful execution calls for no less stringent standards than those demanded in any other aspect of a capital proceeding.” *Id.*, at 411–412, 106 S.Ct., at 2603. Justice Powell recognized that the prisoner’s *10 sanity at the time of execution was “not comparable to the antecedent question of whether the petitioner should be executed at all.” *Id.*, at 425, 106 S.Ct., at 2610. “It follows that this Court’s decisions imposing heightened procedural requirements on capital trials and sentencing proceedings do not apply in this context.” *Ibid.* (citations omitted); *id.*, at 429, 106 S.Ct., at 2612 (O’CONNOR, J., joined by WHITE, J., dissenting in part and concurring in result in part) (due process requirements minimal); *id.*, at 434, 106

S.Ct., at 2614 (REHNQUIST, J., joined by Burger, C.J., dissenting) (wholly executive procedures sufficient).

We think that these cases require the conclusion that the rule of *Pennsylvania v. Finley* should apply no differently in capital cases than in noncapital cases. State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal.⁵ The additional safeguards imposed by the Eighth Amendment at the trial stage of a capital case are, we think, sufficient to assure the reliability of the process by which the death penalty is imposed. We therefore decline to read either **2771 the Eighth Amendment or the Due Process Clause to require yet another distinction between the rights of capital case defendants and those in noncapital cases.

*11 The dissent opines that the rule that it would constitutionally mandate “would result in a net benefit to Virginia.” *Post*, at 2781. But this “mother knows best” approach should play no part in traditional constitutional adjudication. Even as a matter of policy, the correctness of the dissent’s view is by no means self-evident. If, as we said in *Barefoot v. Estelle*, *supra*, direct appeal is the primary avenue for review of capital cases as well as other sentences, Virginia may quite sensibly decide to concentrate the resources it devotes to providing attorneys for capital defendants at the trial and appellate stages of a capital proceeding. Capable lawyering there would mean fewer colorable claims of ineffective assistance of counsel to be litigated on collateral attack.

The Court of Appeals, as an additional basis for its holding, relied on what it perceived as a tension between the rule in *Finley* and the implication of our decision in *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977); we find no such tension. Whether the right of access at issue in *Bounds* is primarily one of due process or equal protection,⁶ in either case it rests on a constitutional theory considered in *Finley*. The Court held in *Bounds* that a prisoner’s “right of access” to the courts required a State to furnish access to adequate law libraries in order that the prisoners might prepare petitions for judicial relief. *Bounds*, *supra*, 430 U.S., at 828, 97 S.Ct., at 1498. But it would be a strange jurisprudence that permitted

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the extension of that holding to partially overrule a subsequently decided case such as *Finley* which held that prisoners seeking judicial relief from their sentence in state proceedings were not entitled to counsel.

It would be an even stranger jurisprudence to allow, as the dissent would, the “right of access” involved in *Bounds v. Smith*, *supra*, to partially overrule *Pennsylvania v. Finley*, *12 based on “factual” findings of a particular district court regarding matters such as the perceived difficulty of capital sentencing law and the general psychology of death row inmates. Treating such matters as “factual findings,” presumably subject only to review under the “clearly-erroneous” standard, would permit a different constitutional rule to apply in a different State if the district judge hearing that claim reached different conclusions. Our cases involving the right to counsel have never taken this tack; they have been categorical holdings as to what the Constitution requires with respect to a particular stage of a criminal proceeding in general. See *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956); *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); *Ross v. Moffitt*, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974); *Pennsylvania v. Finley*, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). Indeed, as the dissent itself points out, *post*, at 2774, it was the Court's dissatisfaction with the case-by-case approach of *Betts v. Brady*, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942), that led to the adoption of the categorical rule requiring appointed counsel for indigent felony defendants in *Gideon*.

There is no inconsistency whatever between the holding of *Bounds* and the holding in *Finley*; the holding of neither case squarely decides the question presented in this case. For the reasons previously stated in this opinion, we now hold that *Finley* applies to those inmates under sentence of death as well as to other inmates, and that **2772 holding necessarily imposes limits on *Bounds*.⁷

*13 Petitioners and respondents disagree as to the practices currently in effect in Virginia state prisons with respect to death row prisoners. Respondents contend that these prisoners are denied adequate and timely access to

a law library during the final weeks before the date set for their execution. If respondents are correct, the District Court on remand may remedy this situation without any need to enlarge the holding of *Bounds*.

The judgment of the Court of Appeals is

Reversed.

Justice O'CONNOR concurring.

I join in THE CHIEF JUSTICE's opinion. As his opinion demonstrates, there is nothing in the Constitution or the precedents of this Court that requires that a State provide counsel in postconviction proceedings. A postconviction proceeding is not part of the criminal process itself, but is instead a civil action designed to overturn a presumptively valid criminal judgment. Nothing in the Constitution requires the States to provide such proceedings, see *Pennsylvania v. Finley*, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987), nor does it seem to me that the Constitution requires the States to follow any particular federal model in those proceedings. I also join in Justice KENNEDY's opinion concurring in the judgment, since I do not view it as inconsistent with the principles expressed above. As Justice KENNEDY observes, our decision in *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977), allows the States considerable discretion in assuring that those imprisoned in their jails obtain meaningful access to the judicial process. Beyond the requirements of *Bounds*, the matter is one of legislative choice based on difficult policy considerations and the allocation of scarce legal resources. Our decision today rightly leaves these issues to resolution by Congress and the state legislatures.

*14 Justice KENNEDY, with whom Justice O'CONNOR joins, concurring in the judgment.

It cannot be denied that collateral relief proceedings are a central part of the review process for prisoners sentenced to death. As Justice STEVENS observes, a substantial proportion of these prisoners succeed in having their death sentences vacated in habeas corpus proceedings. *Post*, at 2777–2778, and n. 13. The complexity of our jurisprudence in this area, moreover, makes it unlikely that capital

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defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law.

The requirement of meaningful access can be satisfied in various ways, however. This was made explicit in our decision in *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977). The intricacies and range of options are of sufficient complexity that state legislatures and prison administrators must be given “wide discretion” to select appropriate solutions. *Id.*, at 833, 97 S.Ct., at 1500. Indeed, judicial imposition of a categorical remedy such as that adopted by the court below might pretermit other responsible solutions being considered in Congress and state legislatures. Assessments of the difficulties presented by collateral litigation in capital cases are now being conducted by committees of the American Bar Association and the Judicial Conference of the United States, and Congress has stated its intention to give the matter serious consideration. **2773 See 134 Cong. Rec. 33237 (1988) (providing for expedited consideration of proposals of the Judicial Conference committee).

Unlike Congress, this Court lacks the capacity to undertake the searching and comprehensive review called for in this area, for we can decide only the case before us. While Virginia has not adopted procedures for securing representation that are as far reaching and effective as those available in other States, no prisoner on death row in Virginia has been unable to obtain counsel to represent him in postconviction proceedings, and Virginia's prison system is staffed with institutional *15 lawyers to assist in preparing petitions for postconviction relief. I am not prepared to say that this scheme violates the Constitution.

On the facts and record of this case, I concur in the judgment of the Court.

Justice STEVENS, with whom Justice BRENNAN, Justice MARSHALL, and Justice BLACKMUN join, dissenting.

Two Terms ago this Court reaffirmed that the Fourteenth Amendment to the Federal Constitution obligates a State “to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of

the State's appellate process.’ ” *Pennsylvania v. Finley*, 481 U.S. 551, 556, 107 S.Ct. 1990, 1994, 95 L.Ed.2d 539 (1987) (quoting *Ross v. Moffitt*, 417 U.S. 600, 616, 94 S.Ct. 2437, 2446, 41 L.Ed.2d 341 (1974)). The narrow question presented is whether that obligation includes appointment of counsel for indigent death row inmates who wish to pursue state postconviction relief. Viewing the facts in light of our precedents, we should answer that question in the affirmative.

I

The parties before us, like the Court of Appeals en banc and the District Court below, have accorded controlling importance to our decision in *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977).¹ In that case, inmates had alleged that North Carolina *16 violated the Fourteenth Amendment by failing to provide research facilities to help them prepare habeas corpus petitions and federal civil rights complaints. Stressing “meaningful” access to the courts as a “touchstone,” *id.*, at 823, 97 S.Ct., at 1495, we held:

“[T]he fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.” *Id.*, at 828, 97 S.Ct., at 1498.

Far from creating a discrete constitutional right, *Bounds* constitutes one part of a jurisprudence that encompasses “right-to-counsel” as well as “access-to-courts” cases. Although each case is shaped by its facts, all share a concern, based upon the Fourteenth Amendment, that accused and convicted persons be permitted to seek legal remedies without arbitrary governmental interference.

At the fountainhead of this body of law is *Powell v. Alabama*, 287 U.S. 45, 69, 53 S.Ct. 55, 64, 77 L.Ed. 158 (1932), which recognized that “[e]ven the intelligent and educated layman ... requires the guiding hand of counsel at every step in the proceedings **2774 against him.” The Court reversed the convictions and death sentences of seven black men, charged with the rape of two white

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women, because the state court failed to designate counsel until the morning of trial. Reasoning that the “notice and hearing” guaranteed by the Due Process Clause “would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel,” *id.*, at 68–69, 53 S.Ct., at 63–64, the Court held:

“[I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether *17 requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.” *Id.*, at 71, 53 S.Ct., at 65.

Particular circumstances thus defined the degree to which the Fourteenth Amendment protected petitioners in *Powell* against arbitrary criminal prosecution or punishment. Similarly, in *Griffin v. Illinois*, 351 U.S. 12, 18–19, 76 S.Ct. 585, 590–591, 100 L.Ed. 891 (1956), the Court focused on “[s]tatistics show[ing] that a substantial proportion of criminal convictions are reversed by state appellate courts” in concluding that once a State allows appeals of convictions, it cannot administer its appellate process in a discriminatory fashion. Finding no rational basis for requiring appellants to pay for trial transcripts, “effectively den[ying] the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance,” the Court held that the Fourteenth Amendment required States to furnish transcripts to indigents. *Id.*, at 18, 76 S.Ct., at 590. Accord, *Burns v. Ohio*, 360 U.S. 252, 79 S.Ct. 1164, 3 L.Ed.2d 1209 (1959) (\$20 fee to file appeal). The principles articulated in *Griffin* soon were applied to invalidate similar restraints on state postconviction review. *Lane v. Brown*, 372 U.S. 477, 83 S.Ct. 768, 9 L.Ed.2d 892 (1963) (transcript); *Smith v. Bennett*, 365 U.S. 708, 81 S.Ct. 895, 6 L.Ed.2d 39 (1961) (filing fee).

On the same day in 1963, the Court held that the Fourteenth Amendment guaranteed indigent defendants assistance of counsel both at trial, *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, and on their first appeal as of right, *Douglas v. California*, 372 U.S. 353, 83 S.Ct.

814. Applying the Sixth Amendment's express right of counsel to the States, the Court in *Gideon* departed from the special circumstances analysis in favor of a categorical approach.² But because of the absence *18 of a constitutional right to appeal, see *McKane v. Durston*, 153 U.S. 684, 14 S.Ct. 913, 38 L.Ed. 867 (1894), the Court decided *Douglas* by assessing the facts in light of the Fourteenth Amendment.³ The Court's reasons for invalidating California's appellate procedure—by which the appellate court undertook an *ex parte* examination of **2775 “the barren record” to determine whether an appeal merited appointment of counsel, 372 U.S., at 356, 83 S.Ct., at 816—echoed its earlier statements in *Griffin*:

“When an indigent is forced to run this gantlet of a preliminary showing of merit, the right to appeal does not comport with fair procedure.... [T]he discrimination is not between ‘possibly good and obviously bad cases,’ but between cases where the rich man can require the court to listen to argument of counsel before deciding on the merits, but a poor man cannot.... The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal.” *Douglas*, 372 U.S., at 357–358, 83 S.Ct., at 816–817.

In two subsequent opinions the Court rejected inmates' attempts to secure legal assistance. In *Ross v. Moffitt*, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974), the Court held there was no right to appointment of counsel for discretionary state appeals or certiorari petitions to this Court. It later announced for the first *19 time that a State has no obligation to provide defendants with any collateral review of their convictions, and that if it does, “the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well.” *Pennsylvania v. Finley*, 481 U.S., at 557, 107 S.Ct., at 1994. Although one might distinguish these opinions as having a different legal basis than the present case,⁴ it is preferable to consider them, like *Powell*, *Griffin*, *Douglas*, and *Bounds*, as applications of the Fourteenth Amendment's guarantees to particular situations. Indeed the Court reaffirmed in *Ross*:

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“The Fourteenth Amendment ... does require that the state appellate system be ‘free of unreasoned distinctions,’ *Rinaldi v. Yeager*, 384 U.S. 305, 310 [86 S.Ct. 1497, 1500, 16 L.Ed.2d 577] (1966), and that indigents have an adequate opportunity to present their claims fairly within the adversary system. *Griffin v. Illinois*, *supra*; *Draper v. Washington*, 372 U.S. 487, 83 S.Ct. 774, 9 L.Ed.2d 899 (1963). The State cannot adopt procedures which leave an indigent defendant ‘entirely cut off from any appeal at all,’ by virtue of his indigency, *Lane v. Brown*, 372 U.S., at 481, 83 S.Ct., at 771, or extend to such indigents merely a ‘meaningless ritual’ while others in better economic circumstances have a ‘meaningful appeal.’ *Douglas v. California*, *supra*, 372 U.S., at 358, 83 S.Ct., at 817. The question is not one of absolutes, but one of degrees.” 417 U.S., at 612, 94 S.Ct., at 2445.

II

These precedents demonstrate that the appropriate question in this case is not whether there is an absolute “right to counsel” in collateral proceedings, but whether due process requires that these respondents be appointed counsel in order to pursue legal remedies. Three critical differences between *Finley* and this case demonstrate that even if it is *20 permissible to leave an ordinary prisoner to his own resources in collateral proceedings, it is fundamentally unfair to require an indigent death row inmate to initiate collateral review without counsel’s guiding hand. I shall address each of these differences in turn.

First. These respondents, like petitioners in *Powell* but unlike respondent in *Finley*, have been condemned to die. Legislatures conferred greater access to counsel on capital defendants than on persons facing lesser punishment even in colonial times.⁵ Our First Congress required assignment **2776 of up to two attorneys to a capital defendant at the same time it initiated capital punishment;⁶ nearly a century passed before Congress provided for appointment of counsel in other contexts. See *Mallard v. United States District Court*, 490 U.S. 296, 109 S.Ct. 1814, 104 L.Ed.2d 318 (1989) (interpreting Act of July 20, 1892, ch. 209, § 1, 27 Stat. 252, now codified at

28 U.S.C. § 1915(d)). Similarly, Congress at first limited the federal right of appeal to capital cases. See *Evitts v. Lucey*, 469 U.S. 387, 409, 105 S.Ct. 830, 843, 83 L.Ed.2d 821 (1985) (REHNQUIST, J., dissenting). Just last year, it enacted a statute requiring provision of counsel for state and federal prisoners seeking federal postconviction relief—but only if they are under sentence of death.⁷

*21 This Court also expanded capital defendants’ ability to secure counsel and other legal assistance long before bestowing similar privileges on persons accused of less serious crimes.⁸ Both before and after *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), established that the Constitution requires channeling of the death-sentencing decision, various Members of this Court have recognized that “the penalty of death is qualitatively different from a sentence of imprisonment, however long.” *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (plurality opinion).⁹

*22 **2777 The unique nature of the death penalty not only necessitates additional protections during pretrial, guilt, and sentencing phases,¹⁰ but also enhances the importance of the appellate process. Generally there is no constitutional right to *23 appeal a conviction. See, e.g., *McKane v. Durston*, 153 U.S. 684, 14 S.Ct. 913, 38 L.Ed. 867 (1894). “[M]eaningful appellate review” in capital cases, however, “serves as a check against the random or arbitrary imposition of the death penalty.” *Gregg v. Georgia*, 428 U.S. 153, 195, 206, 96 S.Ct. 2909, 2935, 2940, 49 L.Ed.2d 859 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.). It is therefore an integral component of a State’s “constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty.” *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S.Ct. 1759, 1764, 64 L.Ed.2d 398 (1980).¹¹

Ideally, “direct appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception. When the process of direct review ... comes to an end, a presumption of finality and legality attaches to the conviction and sentence.” *Barefoot v. Estelle*, 463 U.S. 880, 887, 103 S.Ct. 3383, 3391, 77 L.Ed.2d 1090 (1983).

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There is, however, significant evidence that in capital cases what is ordinarily considered direct review does not sufficiently safeguard against miscarriages of justice to warrant this presumption of **2778 finality.¹² Federal habeas *24 courts granted relief in only 0.25% to 7% of noncapital cases in recent years; in striking contrast, the success rate in capital cases ranged from 60% to 70%.¹³ Such a high incidence of uncorrected error demonstrates that the meaningful appellate review necessary in a capital case extends beyond the direct appellate process.

Second. In contrast to the collateral process discussed in *Finley*, Virginia law contemplates that some claims ordinarily heard on direct review will be relegated to postconviction proceedings. Claims that trial or appellate counsel provided constitutionally ineffective assistance, for instance, usually cannot be raised until this stage. See *Frye v. Commonwealth*, 231 Va. 370, 345 S.E.2d 267 (1986). Furthermore, some irregularities, such as prosecutorial misconduct, may not surface until after the direct review is complete. *E.g.*, *Amadeo v. Zant*, 486 U.S. 214, 108 S.Ct. 1771, 100 L.Ed.2d 249 (1988) (prosecutor deliberately underrepresented black people and women in jury pools); *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Occasionally, new evidence even may suggest that the defendant is innocent. *E.g.*, *Ex parte Adams*, 768 S.W.2d 281 (Tex.Cr.App., 1989); *25 *McDowell v. Dixon*, 858 F.2d 945 (C.A.4 1988), cert. denied, 489 U.S. 1033, 109 S.Ct. 1172, 103 L.Ed.2d 230 (1989). Given the irreversibility of capital punishment, such information deserves searching, adversarial scrutiny even if it is discovered after the close of direct review.

The postconviction procedure in Virginia may present the first opportunity for an attorney detached from past proceedings to examine the defense and to raise claims that were barred on direct review by prior counsel's ineffective assistance. A fresh look may reveal, for example, that a prior conviction used to enhance the defendant's sentence was invalid, *e.g.*, *Johnson v. Mississippi*, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988); or that the defendant's mental illness, lack of a prior record, or abusive childhood should have been introduced as evidence in mitigation at his sentencing hearing, *e.g.*, *Curry v. Zant*, 258 Ga. 527, 371 S.E.2d 647 (1988). Defense counsel's failure to object to or

assert such claims precludes direct appellate review of them.¹⁴ The postconviction proceeding **2779 gives inmates another chance to rectify defaults.¹⁵ In Virginia, *26 therefore, postconviction proceedings are key to meaningful appellate review of capital cases.

State postconviction proceedings also are the cornerstone for all subsequent attempts to obtain collateral relief. Once a Virginia court determines that a claim is procedurally barred, a federal court may not review it unless the defendant can make one of two difficult showings: that there was both cause for the default and resultant prejudice, or that failure to review will cause a fundamental miscarriage of justice. *Murray v. Carrier*, 477 U.S. 478, 485, 495, 106 S.Ct. 2639, 2644, 2649, 91 L.Ed.2d 397 (1986); *Wainwright v. Sykes*, 433 U.S. 72, 87, 97 S.Ct. 2497, 2506, 53 L.Ed.2d 594 (1977). If an asserted claim is tested in an evidentiary hearing, the state postconviction court's factual findings may control the scope of a federal court's review of a subsequent petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.¹⁶

Nor may a defendant circumvent the state postconviction process by filing a federal habeas petition. In *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982), this Court held that in order to comply with the exhaustion provision of 28 U.S.C. § 2254(c), federal courts should dismiss petitions containing claims that have not been "fairly presented to the state courts," *Picard v. Connor*, 404 U.S. 270, 275, 92 S.Ct. 509, 512, 30 L.Ed.2d 438 (1971), for both direct and postconviction review, *Castille v. Peoples*, 489 U.S. 346, 109 S.Ct. 1056, 103 L.Ed.2d 380 (1989). Given the stringency with which this Court adheres to procedural default rules,¹⁷ it is of great importance to the prisoner *27 that all his substantial claims be presented fully and professionally in his first state collateral proceeding.¹⁸

Third. As the District Court's findings reflect, the plight of the death row inmate constrains his ability to wage collateral attacks far more than does the lot of the **2780 ordinary inmate considered in *Finley*.¹⁹ The District Court found that the death row inmate has an extremely limited period to prepare and present his postconviction petition and any necessary applications for

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stays of execution. 668 F.Supp. 511, 513 (E.D.Va.1986).
Unlike the ordinary inmate, who presumably has ample
time to use and reuse the prison library and to seek
guidance from other prisoners experienced in preparing
pro se petitions, cf. *Johnson v. Avery*, 393 U.S. 483, 89 S.Ct.
747, 21 L.Ed.2d 718 (1969), a grim deadline imposes a
finite limit on the condemned person's capacity for useful
research.²⁰

Capital litigation, the District Court observed, is
extremely complex. 668 F.Supp., at 513. Without
regard to the special characteristics of Virginia's
statutory procedures, *28²¹ this Court's death penalty
jurisprudence unquestionably is difficult even for a trained
lawyer to master.²² A judgment that it is not unfair to
require an ordinary inmate to rely on his own resources to
prepare a petition for postconviction relief, see *Finley*, 481
U.S., at 557, 107 S.Ct., at 1994, does not justify the same
conclusion for the death row inmate who must acquire
an understanding of this specialized area of the law and
prepare an application for stay of execution as well as a
petition for collateral relief.²³ This is especially true, the
District Court concluded, because the "evidence gives rise
to a fair inference that an inmate preparing himself and
his family for impending death is incapable of performing
the mental functions necessary to adequately pursue his
claims."²⁴ 668 F.Supp., at 513.

*29 **2781 These three critical factors demonstrate
that there is a profound difference between capital
postconviction litigation and ordinary postconviction
litigation in Virginia. The District Court's findings
unequivocally support the conclusion that to obtain an
adequate opportunity to present their postconviction
claims fairly, death row inmates need greater assistance
of counsel than Virginia affords them. Cf. *id.*, at 514–515.
Meaningful access, and meaningful judicial review, would
be effected in this case only if counsel were appointed,
on request, in time to enable examination of the case
record, factual investigation, and preparation of a petition
containing all meritorious claims, which the same attorney
then could litigate to its conclusion.

III

Although in some circumstances governmental interests
may justify infringements on Fourteenth Amendment
rights, cf. *Mathews v. Eldridge*, 424 U.S. 319, 334–
335, 96 S.Ct. 893, 902–903, 47 L.Ed.2d 18 (1976),
Virginia has failed to assert any interest that outweighs
respondents' right to legal assistance. The State already
appoints counsel to death row inmates who succeed
in filing postconviction petitions asserting at least one
nonfrivolous claim; therefore, the additional cost of
providing its 32 death row inmates competent counsel
to prepare such petitions should be minimal. See 668
F.Supp., at 512, 515. Furthermore, multiple filings delay
the conclusion of capital litigation and exacerbate the
already serious burden these cases impose *30 on
the State's judicial system and the legal department. It
seems obvious that professional preparation of the first
postconviction petition, by reducing successive petitions,
would result in a net benefit to Virginia.²⁵

Of the 37 States authorizing capital punishment, at
least 18 automatically provide their indigent death row
inmates counsel to help them initiate state collateral
proceedings.²⁶ Thirteen of the 37 States have created
governmentally funded resource *31 centers to assist
counsel in litigating capital cases.²⁷ Virginia is among
as few as five **2782 States that fall into neither group
and have no system for appointing counsel for condemned
prisoners before a postconviction petition is filed.²⁸
In *Griffin*, the Court proscribed Illinois' discriminatory
barrier to appellate review in part because many other
States already had rejected such a barrier. 351 U.S., at
19, 76 S.Ct., at 590; cf. *Gideon*, 372 U.S., at 345, 83
S.Ct., at 798 (noting that 22 States supported right to trial
counsel). Similarly, the trend in most States to expand
legal assistance for their death row inmates further *32
dilutes Virginia's weak justifications for refusing to do so,
and "lends convincing support to the conclusion" of the
courts below that these respondents have a fundamental
right to the relief they seek. See *Powell*, 287 U.S., at 73, 53
S.Ct., at 67.

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IV

The basic question in this case is whether Virginia's procedure for collateral review of capital convictions and sentences assures its indigent death row inmates an adequate opportunity to present their claims fairly. The District Court and Court of Appeals en banc found that it did not, and neither the State nor this Court's majority provides any reasoned basis for disagreeing with their

conclusion. Simple fairness requires that this judgment be affirmed.

I respectfully dissent.

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Footnotes

- * The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.
- 1 In precise terms, the class was defined as
“all persons, now and in the future, sentenced to death in Virginia, whose sentences have been or are subsequently affirmed by the Virginia Supreme Court and who either (1) cannot afford to retain and do not have attorneys to represent them in connection with their post-conviction proceedings, or (2) could not afford to retain and did not have attorneys to represent them in connection with a particular post-conviction proceeding.” App. 32.
- 2 Virginia houses its death row inmates at the Mecklenberg Correctional Center, the Virginia State Penitentiary, and the Powhatan Correctional Center. Each of these three centers maintain law libraries. Inmates at Mecklenberg are allowed two library periods per week; inmates at the other facilities may borrow materials from the prison library for use in their cells.
- 3 At the time the District Court decided the case, Virginia courts were authorized to appoint counsel to individual inmates as follows:
“Any person, who has been a resident of this State for a continuous period of six months, who on account of his poverty is unable to pay fees or costs may be allowed by a court to sue or defend a suit therein, without paying fees or costs; whereupon he shall have, from any counsel whom the court may assign him, and from all officers, all needful services and process, without any fees to them therefore, except what may be included in the costs recovered from the opposite party.” Va.Code § 14.1–183 (1950).
The Virginia Code was amended in 1987 to delete the 6-month residency requirement. Va.Code § 14.1–183 (Supp.1988). It is unclear whether, in review of capital cases, counsel will be appointed under this statute or otherwise prior to filing and unless the petition presents a nonfrivolous claim. See *Darnell v. Peyton*, 208 Va. 675, 160 S.E.2d 749 (1968).
- 4 Respondents offer this theory—that the Constitution requires postconviction cases involving the death penalty to be treated differently from other postconviction cases—as a basis for affirmance in addition to their reliance on *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977), discussed later.
- 5 The dissent offers surveys to show that Virginia is one of a handful of States without a “system for appointing counsel for condemned prisoners before a postconviction petition is filed.” *Post*, at 2782. But even these surveys indicate that only 18 of the 37 States make such appointment automatic. *Post*, at 2781. These 18 States overlap to a significant extent with the 13 States that have created “resource centers to assist counsel in litigating capital cases,” *post*, at 2781–2782, which, in any event, is not the same thing as requiring automatic appointment of counsel before the filing of a petition. Consequently, a substantial balance of States do not accord the right that the dissent would require Virginia to grant as a matter of constitutional law. Virginia courts presently have the authority to appoint counsel to represent any inmate in state habeas proceedings, Va.Code § 14.1–183 (Supp.1988), and the attorney general represents that such appointments have been made, upon request, before the filing of any petition. Brief for Petitioners 6–7.
- 6 The prisoner's right of access has been described as a consequence of the right to due process of law, see *Procunier v. Martinez*, 416 U.S. 396, 419, 94 S.Ct. 1800, 1814, 40 L.Ed.2d 224 (1974), and as an aspect of equal protection, see *Pennsylvania v. Finley*, 481 U.S. 551, 557, 107 S.Ct. 1990, 1994, 95 L.Ed.2d 539 (1987).

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7 Many States automatically provide counsel to death row inmates in state habeas corpus proceedings, as a matter of state law. See, e.g., *Ariz.Rule Crim.Proc.* 32.5(b); *Conn.Gen.Stat.* § 51–296(a) (1985); *Okla.Stat.*, Tit. 22, § 1089 (Supp.1988); *Ore.Rev.Stat.* § 138.590(3) (1987). Under the Anti-Drug Abuse Act of 1988, attorneys will be appointed in federal habeas corpus actions involving a challenge to a death sentence. See § 7001(b), *Pub.L.* 100–690, 102 Stat. 4393, 21 U.S.C. § 848(q)(4)(B) (1988 ed.). Respondents suggest that appointment of counsel might even benefit Virginia by speeding, or at least clarifying, the Virginia postconviction process. The situation of death row inmates may well be the basis for state policy to provide them extra legal assistance or more lenient standards of *pro se* pleading.

1 Compare Brief for Petitioners 23 (“The notion that the access right is to be measured against the assistance that might be provided an inmate by a personal lawyer has no support in *Bounds*. Indeed, the idea is entirely inconsistent with the limited nature of the right”) with Brief for Respondents 25 (“The district court’s findings, conclusion, and remedy all comprise a conventional application of *Bounds* in an extraordinary context”).

Although the Court of Appeals en banc and the District Court placed singular reliance on *Bounds*, both indicated that they would have reached the same result on the other legal theories as well. 847 F.2d 1118, 1122, n. 8 (CA4 1988) (“Because of the peculiar nature of the death penalty, we find it difficult to envision any situation in which appointed counsel would not be required in state post-conviction proceedings when a prisoner under the sentence of death could not afford an attorney”); 668 F.Supp. 511, 516, n. 4 (E.D.Va.1986) (“[C]hanging the theory under which relief is sought would not alter the analysis”).

2 See *Gideon*, 372 U.S., at 342–344, 83 S.Ct., at 795–797. Justice Harlan made explicit *Gideon*’s abandonment of the special circumstances rule in the context of the right to counsel in serious criminal prosecutions. *Id.*, at 350–351, 83 S.Ct., at 800–801 (concurring opinion). But see *id.*, at 348, n. 2, 83 S.Ct., at 799, n. 2 (Clark, J., concurring in result) (linking *Gideon* to *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956), and *Ferguson v. Georgia*, 365 U.S. 570, 81 S.Ct. 756, 5 L.Ed.2d 783 (1961), also a Fourteenth Amendment case).

3 The Court consistently has adhered to Justice Sutherland’s observation in *Powell v. Alabama*, 287 U.S. 45, 53, 71, 53 S.Ct. 55, 58, 65, 77 L.Ed. 158 (1932), that when assistance of counsel is required, that assistance must be “effective” rather than *pro forma*. See *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985); *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Wainwright v. Torna*, 455 U.S. 586, 102 S.Ct. 1300, 71 L.Ed.2d 475 (1982) (*per curiam*). Cf. *Penson v. Ohio*, 488 U.S. 75, 85, 109 S.Ct. 346, 352, 102 L.Ed.2d 300 (1988) (“The need for forceful advocacy does not come to an abrupt halt as the legal proceeding moves from the trial to appellate stage. Both stages of the prosecution, although perhaps involving unique legal skills, require careful advocacy to ensure that rights are not forgone and that substantial legal and factual arguments are not inadvertently passed over”).

4 The en banc majority below, for instance, distinguished *Pennsylvania v. Finley*, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987), in part on the ground that it “was not a meaningful access case, nor did it address the rule enunciated in *Bounds v. Smith*.” 847 F.2d, at 1122.

5 The Colonies of Pennsylvania, South Carolina, and Virginia made counsel more available to capital defendants than to persons accused of other offenses. See *Powell*, 287 U.S., at 61–63, 65, 53 S.Ct., at 61–62, 63.

6 Act of Apr. 30, 1790, ch. 9, §§ 1, 3, 8–10, 14, 1 Stat. 112–115 (authorizing death sentence for willful murder, treason, and other crimes); *id.*, § 29, 1 Stat. 118, as amended, 18 U.S.C. § 3005 (requiring appointment of counsel for capital defendants).

7 The Anti-Drug Abuse Act of 1988, § 7001(b), *Pub.L.* 100–690, 102 Stat. 4393–4394, codified at 21 U.S.C. §§ 848(q)(4) (B), (q)(8) (1988 ed.) provides in pertinent part:

“(B) In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraph[h] ... (8)....

“(8) Unless replaced by similarly qualified counsel upon the attorney’s own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications, for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications

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for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.”

8 *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55 (1932), for instance, established a right to appointment of counsel for capital defendants three decades before that right was extended to felony defendants facing imprisonment. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), overruling *Betts v. Brady*, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942). See *Hamilton v. Alabama*, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961) (reversing State's denial of postconviction relief for petitioner who was not represented by counsel at arraignment on capital charge). In *Bute v. Illinois*, 333 U.S. 640, 674, 68 S.Ct. 763, 780, 92 L.Ed. 986 (1948), the Court held that a state court was not required to query a defendant in a noncapital case regarding his desire for counsel. “On the other hand,” Justice Burton pointed out in the majority opinion, “this Court repeatedly has held that failure to appoint counsel to assist a defendant or to give a fair opportunity to the defendant's counsel to assist him in his defense where charged with a capital crime is a violation of due process of law under the Fourteenth Amendment.” *Id.*, at 676, 68 S.Ct., at 781 (citing cases).

9 Among those making this point before *Furman* were Justice Frankfurter in *Andres v. United States*, 333 U.S. 740, 753, 68 S.Ct. 880, 886, 92 L.Ed. 1055 (1948) (concurring opinion) (“The statute reflects the movement, active during the nineteenth century, against the death sentence. The movement was impelled both by ethical and humanitarian arguments against capital punishment, as well as by the practical consideration that jurors were reluctant to bring in verdicts which inevitably called for its infliction”), and again in *Leland v. Oregon*, 343 U.S. 790, 803, 72 S.Ct. 1002, 1009, 96 L.Ed. 1302 (1952) (dissenting opinion) (“Even though a person be the immediate occasion of another's death, he is not a deodand to be forfeited like a thing in the medieval law”), and Justice Reed in *Andres, supra*, 333 U.S., at 752, 68 S.Ct., at 886 (opinion of the Court) (“In death cases doubts such as those presented here should be resolved in favor of the accused”).

In 1983, 11 years after *Furman* had been decided, Justice O'CONNOR observed in a majority opinion that the “Court, as well as the separate opinions of a majority of the individual Justices, has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.” *California v. Ramos*, 463 U.S. 992, 998–999, 103 S.Ct. 3446, 3451–3452, 77 L.Ed.2d 1171; see *id.*, at 999, n. 9, 103 S.Ct., at 3452, n. 9 (citing cases). See also, e.g., *Ford v. Wainwright*, 477 U.S. 399, 411, 106 S.Ct. 2595, 2602, 91 L.Ed.2d 335 (1986) (MARSHALL, J., plurality opinion) (“In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability.... This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different”); *Ake v. Oklahoma*, 470 U.S. 68, 87, 105 S.Ct. 1087, 1098, 84 L.Ed.2d 53 (1985) (Burger, C.J., concurring in judgment) (“In capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases”); *Gardner v. Florida*, 430 U.S. 349, 357–358, 97 S.Ct. 1197, 1204–1205, 51 L.Ed.2d 393 (1977) (STEVENS, J., plurality opinion) (“From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion”).

10 E.g., *Satterwhite v. Texas*, 486 U.S. 249, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988); *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987); *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985); *Spaziano v. Florida*, 468 U.S. 447, 456, 104 S.Ct. 3154, 3160, 82 L.Ed.2d 340 (1984); *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed. 392 (1980); *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion). Accord, *ante*, at 2769–2770.

11 Accord, *Woodson v. North Carolina*, 428 U.S. 280, 303, 96 S.Ct. 2978, 2990, 49 L.Ed.2d 944 (1976) (plurality opinion); *Proffitt v. Florida*, 428 U.S. 242, 251, 253, 258–259, 96 S.Ct. 2960, 2966, 2967, 2969–2970, 49 L.Ed.2d 913 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.); *Jurek v. Texas*, 428 U.S. 262, 276, 96 S.Ct. 2950, 2958, 49 L.Ed.2d 929 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.); *Gregg v. Georgia*, 428 U.S. 153, 188, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.). Cf. *Ramos*, 463 U.S., at 999, 103 S.Ct., at 3452; *Zant v. Stephens*, 462 U.S. 862, 876, 103 S.Ct. 2733, 2742, 77 L.Ed.2d 235 (1983); *Griffin*, 351 U.S., at 21, 76 S.Ct., at 591 (Frankfurter, J., concurring in judgment) (“Since capital offenses are *sui generis*, a State may take account of the irrevocability of death by allowing appeals in capital cases and not in others”).

12 Nor can we overlook our experience that capital litigation proceeds apace after affirmance of a conviction. With the vigorous opposition of state legal departments, capital defendants seek not only review of state and federal judicial

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decisions, but also relief from state governors and parole boards. See Powell, [Capital Punishment](#), 102 Harv.L.Rev. 1035, 1038–1041 (1989). Thus the conviction and sentence in a capital case will not be “final,” or undisturbed, until the sentence either is executed or set aside. Cf. [Barefoot v. Estelle](#), 463 U.S. 880, 888, 103 S.Ct. 3383, 3392, 77 L.Ed.2d 1090 (1983). With the cases of over half the Nation's more than 2,100 inmates yet to move into collateral proceedings, Wilson & Spangenberg, [State Post-Conviction Representation of Defendants Sentenced to Death](#), 72 Judicature 331, 332 (1989), the need for an orderly sequence of review is pellucid. As THE CHIEF JUSTICE has remarked: “ ‘We judges have no right to insist that matters such as these proceed at a leisurely pace, or even at an ordinary pace, but I think we do have a claim to have explored the possibility of imposing some reasonable regulations in a situation which is disjointed and chaotic.’ ” Remarks before the National Conference of Chief Justices (Jan. 27, 1988), quoted in Powell, *supra*, at 1040.

13 Mello, [Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row](#), 37 Am.U.L.Rev. 513, 520–521 (1988). The former Chief Judge of the Eleventh Circuit, which has the greatest volume of capital litigation, recently estimated that in his Circuit capital defendants' success rate in collateral proceedings may be as high as one-third to one-half of all such cases. Godbold, *Pro Bono Representation of Death Sentenced Inmates*, 42 Record of N.Y.C.B.A. 859, 873 (1987). Cf. [Barefoot](#), 463 U.S., at 915, 103 S.Ct., at 3406 (MARSHALL, J., dissenting).

14 The Virginia Supreme Court requires contemporaneous objection before it will consider any asserted trial error on direct review. [Va.Sup.Ct. Rule 5:21](#). Likewise, it does not review the entire case record, but only questions clearly assigned as errors on appeal. See *ibid.*; Va.Code § 17–110.1 (1988). See also [Quintana v. Commonwealth](#), 224 Va. 127, 295 S.E.2d 643 (1982), cert. denied, 460 U.S. 1029, 103 S.Ct. 1280, 75 L.Ed.2d 501 (1983).

This Court abides by States' applications of rules precluding direct review of procedurally defaulted claims, see [Caldwell](#), 472 U.S., at 327, 105 S.Ct., at 2638, sometimes in confidence that an obvious error will be corrected on collateral review. *E.g.*, [Watkins v. Virginia](#), 475 U.S. 1099, 1100, 106 S.Ct. 1503, 1504, 89 L.Ed.2d 903 (1986) (opinion of STEVENS, J., respecting the denial of petition for certiorari in 229 Va. 469, 331 S.E.2d 422 (1985)).

15 The Virginia Supreme Court will consider previously defaulted claims on postconviction review if the petitioner shows that counsel was ineffective in failing to assert a claim or object to an error. See [Slayton v. Parrigan](#), 215 Va. 27, 205 S.E.2d 680 (1974), cert. denied, 419 U.S. 1108, 95 S.Ct. 780, 42 L.Ed.2d 804 (1975). Failure to do so may forever bar review, for Virginia does not allow a claim that could have been raised in the first postconviction petition to be asserted in a successive petition. [Va.Code § 8.01–654\(B\)\(2\)](#) (1984). See 847 F.2d, at 1120, n. 4; [Whitley v. Bair](#), 802 F.2d 1487 (CA4 1986), cert. denied, 480 U.S. 951, 107 S.Ct. 1618, 94 L.Ed.2d 802 (1987).

16 Indeed, if the petitioner is represented by counsel at the hearing, the court's factual findings attain a presumption of correctness that may bar further factual review by the federal court. 28 U.S.C. § 2254(d)(5). See [Sumner v. Mata](#), 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981).

17 See, *e.g.*, [Dugger v. Adams](#), 489 U.S. 401, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989) (declining to review claim that jury was instructed inaccurately regarding its role in the capital sentencing process); [Teague v. Lane](#), 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (holding procedurally barred claim, asserted by petitioner serving life term for murder, that jury was selected in a biased manner in violation of [Swain v. Alabama](#), 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965)). See also n. 14, *supra*.

18 The availability of appointed counsel on federal habeas, see n. 7, *supra*, thus presents the specter of a petitioner filing for federal habeas corpus and attaining counsel, only to have the petition dismissed as unexhausted and remanded to state court. Such a haphazard procedure scarcely would serve any interest in finality. It further would raise questions regarding the obligations not only of the appointed counsel to effect exhaustion at the state level, but also of the Federal Treasury to pay for those efforts. Cf. *Ex parte Hull*, 312 U.S. 546, 549, 61 S.Ct. 640, 641, 85 L.Ed. 1034 (1941) (“[T]he state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus”).

19 I am at a loss as to why the plurality today prefers to label the District Court findings of fact, based upon trial testimony and post-trial submissions, “ ‘considerations.’ ” See *ante*, at 2767, 2768.

20 An execution may be scheduled for any time 30 days after the date of sentencing. [Va.Code § 53.1–232](#) (1988); see 668 F.Supp., at 513. A 1988 study commissioned by the American Bar Association found that attorneys spent an average of 992 hours and \$3,686 on each capital postconviction proceeding in Virginia. Brief for American Bar Association as *Amicus Curiae* 34 (hereinafter ABA Brief).

21 The District Court commented:

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"In Virginia, the capital trial is bifurcated, entailing separate proceedings to determine guilt and to set the appropriate punishment. Aside from analyzing the voluminous transcript of the guilt determination phase which not infrequently lasts several days, a great deal of time must be devoted to analyzing the issues of mitigation and aggravation characteristic of the sentencing phase of a capital case." 668 F.Supp., at 513.

22 In apparent recognition of this fact, Congress has required that when a court appoints counsel in capital postconviction proceedings, at least one attorney must have been a member of the bar for at least five years and have at least three years felony litigation experience. § 7001(b) of the Anti-Drug Abuse Act of 1988, Pub.L. 100-690, 102 Stat. 4394, codified at 21 U.S.C. §§ 828(q)(5), (q)(6) (1988 ed.).

23 Compounding matters is the typically low educational attainment of prisoners. In 1982 more than half of Florida's general inmate population was found to be functionally illiterate, while in 1979 the State's death row inmates possessed a ninth-grade mean educational level. ABA Brief 26-27. Virginia's death row inmates apparently have similar educational backgrounds. See Brief for American Civil Liberties Union et al. as *Amici Curiae* 20-21, n. 7. See also Brief for Maryland State Bar Association et al. as *Amici Curiae* 16-17 (State Bar Brief) (citing similar statistics for other States' inmate populations).

24 For example, one lawyer testified:

"I have had lots of clients in those last 60 day time periods, and what they are forced to do is to prepare themselves mentally and spiritually and emotionally to deal with their family and their children, all of whom see them as about to die. And that is a full time job.

"And very few of them, I think, even have the emotional resources to talk with you meaningfully at that point about their case. Much less to take it over." App. 66.

Cf. *In re Medley*, 134 U.S. 160, 172, 10 S.Ct. 384, 389, 33 L.Ed. 835 (1890) ("[W]hen a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it, which may exist for the period of four weeks, as to the precise time when his execution shall take place").

25 A representative of the Virginia attorney general's office testified regarding the office's policy not to oppose a death row inmate's motion for appointment of postconviction counsel as follows:

"Well, basically we want to see the inmate have an attorney at State Habeas for reasons of economy and efficiency.

"When you have a death case, we recognize that it is going to be prolonged litigation and we want to see all matters that the inmate or the petitioner wants to raise be raised at one proceeding, and we can deal more efficiently with an attorney. And we prefer that from an economy standpoint we don't have to have more than one proceeding." App. 272.

Cf. *Powell*, 102 Harv.L.Rev., at 1040 (attributing delay in carrying out capital punishment in part to lack of counsel on collateral review).

26 *Ariz.Rule Crim.Proc.* 32.5(b); Cal.Govt.Code Ann. § 15421(c) (West 1980), *Cal.Penal Code Ann.* § 1240 (West 1982); Conn.Super.Ct.Rules, Criminal Cases § 959, *Conn.Gen.Stat.* § 51-296(a) (1989); *Fla.Stat.* § 27.702 (1987); *Idaho Code* § 19-4904 (1987); Ind.Rule Proc. for Post-Conviction Remedies 1, § 9; *Md.Ann.Code*, Art. 27, § 645A(f) (Supp.1988); *Mo.Rules Crim.Proc.* 24.035(e), 29.15(e); N.J.Rules Governing Criminal Practice 3:22-6, 3:27-1, *N.J.Stat.Ann.* § 2A:158A-5 (West Supp.1989-1990); *N.C.Gen.Stat.* §§ 15A-1421 (1988), 7A-451(a)(2) (Supp.1988), 7A-486.3 (1986); *Okla.Stat.*, Tit. 22, § 1089 (Supp.1988); *Ore.Rev.Stat.* § 138.590(3) (1987); *Pa.Rule Crim.Proc.* 1503; *S.D.Codified Laws* § 21-27-4 (1987); Tenn.Sup.Ct.Rule 13, § 1; *Utah Rule Civ.Proc.* 65B(i)(5); *Vt.Stat.Ann.*, Tit. 13, §§ 5231-5233, 7131 (1974), as interpreted in *In re Morse*, 138 Vt. 327, 415 A.2d 232 (1980); Wash.Super.Ct.Crim.Rule 3.1(b)(2).

In addition to these 18 States, 3—Montana, Nevada, and Wyoming—have no definitive case or statutory law on this point but are listed in a 1988 study commissioned by the American Bar Association as having a practice of mandatory appointment of counsel on request. Wilson & Spangenberg, 72 *Judicature*, at 334 (Table 1).

27 They are Alabama, Arizona, California, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, and Texas. State Bar Brief 34. See *Mello*, 37 *Am.U.L.Rev.*, at 593-606 (discussing development of Florida's resource center); cf. Godbold, 42 Record of N.Y.C.B.A., at 868-871 (state and federal efforts to provide legal assistance). As a result of several studies it has commissioned concerning the significance of providing counsel in capital postconviction proceedings, the American Bar Association "has recognized that the only feasible way to provide death row inmates with meaningful access to the courts is the implementation in each state which imposes

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capital punishment of a governmentally-funded system under which qualified, compensated attorneys represent death row inmates in state post-conviction proceedings.” ABA Brief 4–5.

28 Of 27 States that responded to a 1988 survey, only Virginia, Nebraska, Pennsylvania, and Nevada were reported to have no system “to monitor and assure that counsel will be provided prior to the filing of a post-conviction petition.” Wilson & Spangenberg, *supra*, at 335. Of those, only Virginia and Nevada have executed prisoners since this Court decided *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). NAACP Legal Defense and Education Fund, Inc., *Death Row*, U.S.A. 3 (March 1, 1989) (*Death Row*). Pennsylvania, and perhaps Nevada, appoint counsel automatically upon request. See n. 26, *supra*. Of the 10 States that have death penalty statutes but were not part of the survey, only Arkansas, Colorado, and New Hampshire have neither rules for automatic appointment of counsel nor resource centers. None of these States has conducted a post-*Furman* execution; New Hampshire, in fact, has no prisoner under sentence of death, and Colorado has none whose case has reached the state postconviction stage. *Death Row*, *supra*, at 1; Wilson & Spangenberg, *supra*, at 334.

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