LOOKING BACK TO LOOK FORWARD: REEXAMINING THE APPLICATION OF THE THIRD-PARTY DOCTRINE TO CONVEYED PAPERS

The third-party doctrine maintains that individuals lose Fourth Amendment protection for information knowingly revealed to third parties. Applying this rule, courts have held that individuals lack Fourth Amendment protection for, among other things, numbers dialed on a phone[1] and trash left in a sealed bag on their curb.[2] Many scholars criticize this doctrine, describing it as "contrary to the purposes underlying the Fourth Amendment"[3] and "one of the most serious threats to privacy in the digital age."[4] In January of 2012, Justice Sotomayor wrote, "it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. This approach is ill suited to the digital age . . . ."[5]

The Supreme Court's recent opinion in *United States v. Jones*[6] provides fresh grounds for reconsideration of the third-party doctrine as applied to papers and their digital equivalents. In *Jones*, the Court clarified the scope of the inquiry demanded by the Fourth Amendment. The majority repudiated the notion that Fourth Amendment protections "rise or fall" under the reasonable expectation of privacy formulation first articulated in the 1967 case of *Katz v. United States*.[7] Instead, the Court held that the *Katz* line of reasonable expectation cases supplemented, rather than supplanted, the exclusively property-based approach of early Fourth Amendment cases.[8] The *Jones* majority thus found that a search involving trespass would be unlawful,

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1. Smith v. Maryland, 442 U.S. 735, 745–46 (1979).

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

3. WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.7(c), at 747 (4th ed. 2004).

4. Daniel J. Solove, *Fourth Amendment Codification and Professor Kerr's Misguided Call for Judicial Deference*, 74 FORDHAM L. REV. 747, 753 (2005).

5. United States v. Jones, 132 S. Ct. 945, 957 (2012) (Sotomayor, J., concurring) (citations omitted).

6. 132 S. Ct. 945 (2012).

7. *See id.* at 950; *Katz*, 389 U.S. 347 (1967).

8. *Jones*, 132 S. Ct. at 950.

even if an individual had no reasonable expectation of privacy in the information. In reaching this holding, the *Jones* Court reaffirmed its duty to "'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'"[9] The Court emphasized that a Fourth Amendment analysis is incomplete without examination of early search and seizure precedent.[10]

Jones's emphasis on preserving the historic scope of Fourth Amendment protection stands in tension with the Court's practice of applying the third-party doctrine to papers and their digital equivalents. This Note explores the roots of this practice and highlights how this application represents a break from early Fourth Amendment precedent. This Note then presents a line of cases that suggests individuals do not necessarily surrender Fourth Amendment protection when they convey papers to third parties. This Note concludes with the argument that, pursuant to *Jones*, the Court must honor early Fourth Amendment precedents and provide protection for conveyed papers and their digital equivalents.

I. CONFLICTING PRINCIPLES: THE PROPERTY-BASED AND EXPECTATIONS-BASED LINES OF FOURTH AMENDMENT JURISPRUDENCE

The Fourth Amendment of the United States Constitution reads, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."[11] The Drafters included this amendment in the Bill of Rights in response to British general warrants and the colonial writs of assistance that empowered revenue officers to search at will for smuggled goods.[12] In February 1761, James Otis, the Attorney General in the colony of Massachusetts,[13] described writs of assistance as "the worst instrument[s] of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was

9. *Id.* (alteration in original) (quoting Kyllo v. United States, 533 U.S. 27, 34 (2001)).

10. *Id.* at 953.

11. U.S. CONST. amend. IV.

12. Boyd v. United States, 116 U.S. 616, 624–625 (1886).

13. Osmond K. Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361, 364 (1921).

found in an English law-book" because the writs placed "the liberty of every man in the hands of every petty officer."[14] The Fourth Amendment of the United States Constitution mirrors the language of the Massachusetts Declaration of Rights of 1765 and the same state's Constitution of 1780.[15]

Following the enactment of the Bill of Rights, courts developed two divergent lines of Fourth Amendment jurisprudence.[16] The first—reflecting a property-based conception of Fourth Amendment rights—dominated the Court's understanding until the latter half of the twentieth century.[17] Cases in this line reflect the significance of property rights and invoke the language of trespass.[18] Chief Justice Taft's majority opinion in *Olmstead v. United States*[19] provides a vivid illustration. According to the *Olmstead* majority, the connection between the Fourth Amendment and property concepts was so strong that the law dictated a finding that no Fourth Amendment violation occurred "unless there has been an official search and seizure of [the defendant's] person, or . . . a seizure of his papers or his tangible material effects, or an actual physical invasion of his house 'or curtilage' for the purpose of making a seizure."[20] The *Olmstead* majority thus held that a wiretap did not violate the Fourth Amendment because the insertions were made "in the streets near the houses" and involved no "trespass upon any property of the defendants."[21] In the subsequent case of *Goldman v. United States*,[22] the Court similarly determined that no search took place when federal agents attached a "detectophone" to the outer wall of the defendant's office.[23]

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14. 2 JOHN ADAMS, THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 523–24 (Charles Francis Adams ed., 1865).

15. Fraenkel, *supra* note 13, at 362 (citing MASS. CONST. pt. 1, art. XIV; FREDERIC JESUP STIMSON, THE LAW OF THE FEDERAL AND STATE CONSTITUTIONS OF THE UNITED STATES 45, 46, 87 (1908)).

16. United States v. Jones, 132 S. Ct. 945, 949–50 (2012).

17. *See id.*

18. Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 816 (2004).

19. 277 U.S. 438 (1928).

20. *Id.* at 466.

21. *See id.* at 457, 466.

22. 316 U.S. 129 (1942).

23. *Id.* at 135.

This trespass-based conception of Fourth Amendment protection faded in 1967 when the Court seemingly abandoned the approach in favor of a framework based on the defendant's reasonable expectations of privacy. In *Katz v. United States*, the Court held that a Fourth Amendment violation took place when agents surreptitiously overheard and recorded the defendant's conversation, even though no trespass to property occurred.[24] In what appeared to be a rejection of the property framework, Justice Stewart explained the majority's belief that "the Fourth Amendment protects people, not places."[25] The Court held, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."[26] Likewise, "what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[27] Justice Harlan's concurrence provided the test used to explore this new, non-property-based privacy conception: "[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[28]

II. REPLACED OR REFINED? DETERMINING THE IMPACT OF *KATZ* ON THE SCOPE OF FOURTH AMENDMENT PROTECTION

In the years following *Katz*, courts struggled to comprehend the relationship between the expectations-based and property-based lines of Fourth Amendment precedent. A note in the July 1968 issue of the *Texas Law Review* posited that the *Katz* decision "swept aside [the] last remnant of *Olmstead*" and rejected the physical intrusion test in favor of a "different standard."[29] Even the Supreme Court's rhetoric suggested that *Katz* replaced, rather than supplemented, the property-based test. Writing for a five member majority in the 1978 case of *Rakas v. Illinois*,[30] then-Justice Rehnquist wrote, "the Court in *Katz* held

24. 389 U.S. 347, 358–59 (1967).
25. *Id.* at 351.
26. *Id.*
27. *Id.* at 351–52.
28. *Id.* at 361 (Harlan, J., concurring) .
29. Rod Surratt, Note, 46 TEX. L. REV. 973, 975 (1968).
30. 439 U.S. 128 (1978).

that capacity to claim the protection of the Fourth Amendment *depends not upon a property right* in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place."[31] Similarly, in *United States v. Karo*,[32] the majority held: "The existence of a physical trespass is only marginally relevant to the question of whether the Fourth Amendment has been violated, however, for an actual trespass is *neither necessary nor sufficient* to establish a constitutional violation."[33] Finally, in a dissent from a 1987 denial of certiorari, Justice White wrote for three Justices:

> The primary object of the Fourth Amendment is to protect privacy, not property, and the question in this case, as the Court of Appeal recognized, is not whether Rooney had abandoned his interest in the property-law sense, but whether he retained a subjective expectation of privacy in his trash bag that society accepts as objectively reasonable.[34]

In the 2012 case of *United States v. Jones*, Justice Scalia, writing for five members of the Court, rejected this understanding and explained that the two lines of precedent operate not in opposition but in tandem. Although Justice Scalia noted that the *Katz* line "deviated from that exclusively property-based approach,"[35] he rejected the idea that the *Katz* reasonable expectations inquiry had replaced the trespass standard altogether. He wrote, "for most of our history the Fourth Amendment was understood to embody a particular concern for government *trespass* upon the areas ('persons, houses, papers, and effects') it enumerates. *Katz* did not repudiate that understanding."[36] Thus, in *Jones*, the majority held that an unconstitutional search took place when police collected data from a Global Positioning System (GPS) device surreptitiously placed on the defendant's vehicle—a trespass to a chattel—even though the device revealed infor-

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31. *Id.* at 143 (emphasis added).

32. 468 U.S. 705 (1984).

33. *Id.* at 712–13 (emphasis added).

34. California v. Rooney, 483 U.S. 307, 320 (1987) (White, J., dissenting). Notably, Justice Powell, the author of *United States v. Miller*, 425 U.S. 435 (1976), joined Justice White's dissent. *Rooney*, 483 U.S. at 320.

35. United States v. Jones, 132 S. Ct. 945, 950 (2012).

36. *Id.* (emphasis added).

mation about movement on public streets, data for which an individual has no reasonable privacy expectation.[37]

III. ROOTS OF THE THIRD-PARTY DOCTRINE'S APPLICATION TO PRIVATE PAPERS

In light of Justice Scalia's clarification of the relationship between the property-based and expectations-based lines of precedent, one doctrine is particularly ripe for reconsideration—the third-party doctrine for conveyed papers announced in *United States v. Miller*.[38] In *Miller*, the defendants asserted a Fourth Amendment interest in microfilm records, financial statements, monthly statements, and copies of deposit slips and checks maintained by the bank after an agent from the Bureau of Alcohol, Tobacco, and Firearms obtained these records without judicial approval.[39] The Court rejected the defendant's motion to suppress these records, citing both property-based and expectations-based grounds. First, the Court held that the defendant possessed no property interest in the bank's copies of the documents because he could assert neither ownership nor possession.[40] Second, the Court turned to its newly announced *Katz* analysis to reject the defendant's claim of Fourth Amendment protection based on reasonable expectations of privacy.[41] Justice Powell wrote, "[t]he checks are not confidential communications but negotiable instruments to be used in commercial transactions."[42] The Court went on, "[a]ll of the documents . . . contain only information *voluntarily conveyed* to the banks and exposed to their employees in the ordinary course of business."[43] Thus, in revealing these documents to a third party, "[t]he depositor takes the risk . . . that the information will be conveyed by that person to the Government."[44]

Following *Miller*, the third-party doctrine became a cornerstone of Fourth Amendment jurisprudence. In the 1979 case of

37. *Id.* at 948, 953–54.
38. 425 U.S. 435 (1976).
39. *Id.* at 437–38.
40. *Id.* at 440.
41. *Id.* at 442.
42. *Id.*
43. *Id.* (emphasis added).
44. *Id.* at 443.

Smith v. Maryland, the Court applied the doctrine's conveyance-ends-privacy rationale to hold that the Fourth Amendment did not protect the numbers a defendant dialed on a telephone.[45] The Court reasoned that callers typically knew that they must "convey" numbers to a telephone company to place a call.[46] Accordingly, the caller assumed the risk that the telephone company would pass this information on to police.[47] In *California v. Greenwood*, the Court similarly relied on the third-party doctrine to hold that warrantless search of a defendant's trash did not violate the Fourth Amendment because the "respondents placed their refuse at the curb for the express purpose of conveying it to a third party, the trash collector, who might himself have sorted through respondents' trash or permitted others, such as the police, to do so."[48] The modern third-party doctrine applies to any information contained in papers and effects that are conveyed to a third party. The Court reasons that by sharing this information, an individual necessarily loses the reasonable-expectation protection of the Fourth Amendment and places himself at the mercy of his audience.[49]

IV. THE FLAWED FOUNDATION OF THE THIRD-PARTY DOCTRINE'S APPLICATION TO PRIVATE PAPERS

The historically-based analysis performed by the majority in *Jones* presents a stark contrast to the unorthodox methods adopted by the Court in *Miller*. In crafting his *Miller* majority opinion, Justice Powell took two significant liberties. First, Justice Powell relied on inapposite precedent to support his contention that the Court traditionally recognized an assumption of risk exception to the reasonable expectation of privacy test. Second, he denied Fourth Amendment protection under the property-based conception solely because the defendant could assert neither "ownership nor possession"—criteria that had never before been used in the Court's Fourth Amendment

45. 442 U.S. 735, 745–46 (1979).

46. *Id.* at 742–44.

47. *Id.*

48. 486 U.S. 35, 40 (1988).

49. *See Smith*, 442 U.S. at 744 ("Because the depositor [in *Miller*] 'assumed the risk' of disclosure, the Court held that it would be unreasonable for him to expect his financial records to remain private.").

analysis. These errors led to the creation of an unwieldy doctrine. In the wake of *Jones* and the Court's renewed concern for adherence to early Fourth Amendment conceptions, lower courts must address *Miller*'s failings if they are to harness this clumsy doctrine and discern a workable standard for papers and their digital equivalents.

A. Inapposite Precedent and Conflation of Standards

In crafting the *Miller* opinion, Justice Powell relied on three cases to support a sweeping proclamation:

> This Court has held *repeatedly* that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.[50]

The three cases cited for this proposition—*Lopez v. United States*,[51] *Hoffa v. United States*,[52] and *United States v. White*[53]—fail to buttress properly this point for two reasons. First, the Court looked to these recent holdings, announced in 1963, 1966, and 1971, respectively, instead of conducting a thorough historical examination as demanded by the Court in *Jones*. Justice Powell performed no further analysis to compare the recent holdings to the principles outlined in early Fourth Amendment jurisprudence. Second, in each of the cases Justice Powell cited, the spoken nature of the communication played a significant role in the Court's holding. In relying on these cases, Justice Powell equated conveyance of spoken words—entities that lie beyond the text of the Fourth Amendment[54]—with conveyance of "papers and effects"—items enumerated in the amendment's text. Although papers receive protection under the property-based conception of the Fourth Amendment, words do not. Arguments for protection of words rest solely on an expectations-based conception.

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50. United States v. Miller, 425 U.S. 435, 443 (1976) (emphasis added).

51. 373 U.S. 427 (1963).

52. 385 U.S. 293 (1966).

53. 401 U.S. 745 (1971).

54. Because of the text of the Amendment, words were not given protection in the pre-*Katz* era.

The specific facts of each case cited by Justice Powell display the significance of the spoken communication. In *Lopez*, an agent recorded his conversation with the defendant and turned tapes over to police. Justice Harlan, writing for the majority, stressed that no physical taking occurred when the informant gave incriminating statements to the police. He stated:

> [The informant] was in the office with petitioner's consent, and while there he did not violate the privacy of the office by seizing something surreptitiously without petitioner's knowledge. The only evidence obtained consisted of statements made by Lopez to Davis, statements which Lopez knew full well could be used against him by Davis if he wished.[55]

Similarly, in *Hoffa*, Justice Stewart wrote for the Court, "The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we *speak*."[56] Finally, in *White*, the only case in the trio decided after *Katz*, Justice White explained that permitting informants to wear wires only minimally extended the Court's informant precedent: "If the law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent, neither should it protect him when that same agent has recorded or transmitted the conversations which are later offered in evidence . . . ."[57] The *White* Court buttressed its conclusion with a practical rationale: "In terms of what his course will be, what he will or will not do or say, we are unpersuaded that [the wrongdoer contemplating illegal activities] would distinguish between probable informers on the one hand and probable informers with transmitters on the other."[58]

By characterizing these three cases as providing sufficient precedential support for a broad assumption of risk exception to Fourth Amendment protection, Justice Powell performed the subtle legal gymnastics of equating an answer to the expectations-based test with a justification for denying Fourth Amendment protection to goods covered by the traditional

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55. 373 U.S. at 438 (citations omitted).

56. 385 U.S. at 303 (emphasis added) (quoting *Lopez*, 373 U.S. at 465 (Brennan, J., dissenting)).

57. 401 U.S. at 752.

58. *Id.*

property-based conception. In making this strategic move, Justice Powell conflated the two lines of precedent and relied on denial of the former as a mechanism for chipping away at the strength of the latter. In *Jones*, Justice Scalia quoted the 1969 case of *Alderman v. United States*[59] cautioning courts against this error: "[W]e [do not] believe that *Katz*, by holding that the Fourth Amendment protects persons and their private conversations, was intended to withdraw any of the protection which the Amendment extends . . . ."[60] Instead, according to Justice Scalia, traditional conceptions of property influence the extent of society's reasonable expectations.[61]

B. Miller*'s Novel Criteria for Property-Based Protection*

In *Miller*'s majority opinion, Justice Powell provided only a cursory review of the Court's history of jealously guarding the privacy of a man's papers, and he distinguished prior cases embracing this tradition by inventing novel criteria for Fourth Amendment protection. To eschew Fourth Amendment protection for the papers at issue in *Miller*, Justice Powell rejected the applicability of a significant early papers case: *Boyd v. United States*.[62] In *Boyd*, the Court held unconstitutional a statute authorizing prosecuting attorneys to compel production of private papers to establish a criminal violation of revenue laws. The Court held: "[C]ompulsory production of a man's private papers to establish a criminal charge against him . . . is within the scope of the Fourth Amendment to the Constitution . . . because it is a material ingredient, and effects the sole object and purpose of search and seizure."[63] Although the Court later abrogated *Boyd*'s holding on Fifth Amendment grounds, finding that compulsory production of papers was constitutionally permissible if the warrant was otherwise val-

59. 394 U.S. 165 (1969).

60. United States v. Jones, 132 S. Ct. 945, 951 (2012) (alteration in original) (quoting *Alderman*, 394 U.S. at 180).

61. *Id.* ("We have embodied that preservation of past rights in our very definition of 'reasonable expectation of privacy' which we have said to be an expectation 'that has a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.'" (quoting Minnesota v. Carter, 525 U.S. 83, 88 (1998))).

62. 116 U.S. 616 (1886).

63. *Id.* at 622.

id,[64] *Boyd*'s Fourth Amendment holding prohibiting *warrantless* search of papers remained intact at the time of *Miller*.[65] The papers at issue in *Boyd*, like the papers in *Miller*, included business books, invoices, and papers related to commercial transactions. Yet, Justice Powell rejected *Boyd*'s binding application by distinguishing the case: "[T]he documents subpoenaed here are not respondent's 'private papers.' Unlike the claimant in *Boyd*, respondent can assert neither ownership nor possession."[66]

Justice Powell's emphasis on "ownership" and "possession", though suggestive of a property-based approach, grates against traditional Fourth Amendment jurisprudence.[67] In 1877, the Supreme Court extended protection to conveyed papers—papers addressed to another individual and placed in the custody of a third party—in what is often recognized as the first significant treatment of the Fourth Amendment:[68] *Ex Parte Jackson*.[69] Although the controversy in the case centered on Congress's power to regulate the contents of the mail, the Court took the opportunity to explore the boundaries of Fourth Amendment rights for senders of a specific category of conveyed papers: the mail. Writing for the Court, Justice Field explained: "Letters and sealed packages . . . in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles."[70] Regarding warrants, Justice Field explained: "Whilst in the mail, they can only be opened and examined under . . . warrant, issued upon similar oath or affirmation, particularly describing the thing to be

64. *See* Warden v. Hayden, 387 U.S. 294, 301–07 (1967).

65. *See* Craig M. Bradley, *Constitutional Protection for Private Papers*, 16 HARV. C.R.-C.L. L. REV. 461, 482 (1981); Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945, 946 (1977) ("Only the warrant clause regulations of the fourth amendment governing applications for subpoenas and search warrants will in the future affect the government's ability to obtain such evidence . . . .").

66. United States v. Miller, 425 U.S. 435, 440 (1976).

67. *See* Susan Freiwald & Patricia L. Bellia, *The Fourth Amendment Status of Stored E-mail: The Law Professors' Brief in* Warshak v. United States, 41 U.S.F. L. REV. 559, 575 (2007).

68. *See* Orin S. Kerr, *Applying the Fourth Amendment to the Internet: A General Approach*, 62 STAN. L. REV. 1005, 1022 (2010); Anuj C. Desai, *Wiretapping Before the Wires: The Post Office and the Birth of Communications Privacy*, 60 STAN. L. REV. 553, 556 (2007).

69. 96 U.S. 727 (1877).

70. *Id.* at 733.

seized, as is required when papers are subjected to search in one's own household."[71] Highlighting the reach of Fourth Amendment protection over conveyed papers, he noted: "The 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*."[72] For Justice Field, the conveyance did not terminate the protection.

Justice Powell's reliance on the "ownership" and "possession" criteria to distinguish *Boyd* can be reconciled with this early guidance only if *Ex Parte Jackson* is read as a narrow holding establishing protection for letters in the mail. Such a confined reading, however, ignores the Court's treatment of *Ex Parte Jackson* in subsequent cases. In the era preceding *Katz*, the Supreme Court described *Jackson* as an example of the Court's "jealous[] insist[ence]" upon the principle of protection afforded by the Fourth Amendment.[73] The text of *Olmstead v. United States*[74] suggests that *Jackson* weighed heavily on the mind of Chief Justice Taft as he composed the Court's opinion in this wiretapping controversy. Writing for the majority, Chief Justice Taft devoted significant energy to distinguishing the letters protected in *Jackson* from the unprotected words overheard through the wiretapping at issue: "The Amendment does not forbid what was done here. . . . The evidence was secured by the use of the *sense of hearing* and that only."[75] He compared these words to the papers in *Jackson*: "It is plainly within the words of the Amendment to say that the unlawful rifling by a government agent of a sealed letter is a search and seizure of the sender's *papers or effects*."[76] For Chief Justice Taft, the *Jackson* holding established more than a narrow protection for mail, it represented the principle that an individual did not abandon his property interest in papers or effects even when they were placed in the custody of another.

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71. *Id.*

72. *Id.* (emphasis added).

73. Weeks v. United States, 232 U.S. 383, 390–91 (1914), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

74 277 U.S. 438 (1928).

75. *Id.* at 464 (emphasis added).

76. *Id.* (emphasis added); *see also* Wayne P. Sturdivant, Comment, Lee v. United States, *343 U.S. 747 (1952)*, 31 TEX. L. REV. 900, 900–01 (1953) (asserting that government search of letters conveyed to the post office constitutes an illegal taking of a material object amounting to a trespass).

He concluded that "the Fourth Amendment [is] to be liberally construed to effect the purpose of the framers of the Constitution in the interest of liberty."[77]

A 1988 dissent from Justice Brennan provides additional support for the reach of *Jackson*'s logic beyond letters in the mail. In *Jones*, Justice Scalia intimated that Justice Brennan's understanding carries special weight on the issue of Fourth Amendment protection because Justice Brennan previously articulated that *Katz* did not override the historic scope of the Fourth Amendment.[78] In his dissent in *California v. Greenwood*, Justice Brennan relied on *Jackson* to support his conclusion that sealed trash bags on the defendant's curb maintained their Fourth Amendment protection. He cited *Jackson* for the principle that conveyance does not entail abandonment of rights:

> Were it otherwise, a letter or package would lose all Fourth Amendment protection when placed in a mailbox or other depository with the express purpose of entrusting it to the postal officer or a private carrier; those bailees are just as likely as trash collectors . . . to sort through the personal effects entrusted to them, or permit others . . . to do so. Yet, it has been clear for at least 110 years that the possibility of such an intrusion does not justify a warrantless search by police in the first instance.[79]

Finally, Supreme Court cases from the 1960s echo the sentiment that Fourth Amendment protection is not limited by "ownership" or "possession."[80] In *Chapman v. United States*,[81] the Court held unconstitutional the warrantless search of a

77. 277 U.S. at 465. Chief Justice Taft was careful to note, however, that liberal construction did not justify enlargement of the language employed "beyond the possible practical meaning of houses, persons, papers, and effects . . . ." *Id.*

78. United States v. Jones, 132 S. Ct. 945, 951 (2012) (quoting United States v. Knotts, 460 U.S. 276, 286 (1983) (Brennan, J., concurring)) ("'[W]hen the Government *does* engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment.'"). For an opinion penned by Justice Brennan expressing a very different view of property and privacy, see Warden v. Hayden, 387 U.S. 294, 304 (1967) ("We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts.").

79. California v. Greenwood, 486 U.S. 35, 55 (1988) (internal punctuation omitted).

80. *See* Brief for Professors of Electronic Privacy Law and Internet Law as Amici Curiae Supporting the Appellee and Urging Affirmance at 13–14, Warshak v. United States, 532 F.3d 521 (6th Cir. 2008) (No. 06-4092).

81. 365 U.S. 610 (1961).

house owned by a consenting landlord but occupied by a non-consenting tenant.[82] Similarly, in *Stoner v. California*,[83] the Court determined that a warrantless search of an individual's rented hotel room violated the Fourth Amendment.[84] In light of these decisions, Justice Powell's insistence on ownership or possession seems ill founded.

V. A NEED FOR CLEARER GUIDANCE

In the absence of a clear framework clarifying the extent to which a party maintains Fourth Amendment rights in papers and their digital equivalents following conveyance, lower courts have struggled to reconcile the third-party doctrine with the holding of *Ex Parte Jackson* and its progeny. In 2010, the Sixth Circuit decided *United States v. Warshak*,[85] a case exploring the issue of Fourth Amendment protection for email.[86] The parties argued by analogy, focusing on whether emails were more like bank records or traditional mail. The Sixth Circuit acknowledged that the emails at issue, like the bank records in *Miller*, were possessed by a third party—here, the internet service provider (ISP)—for more than 180 days.[87] Despite this similarity, the defendant and his amici contended that the emails were the modern equivalent of traditional letters—personal communications given Fourth Amendment protection in early precedent.[88]

Ultimately, the Sixth Circuit rejected the conveyance-destroys-protection argument rooted in *Miller* and characterized the email question as a minor expansion of *Jackson*'s holding. Given the fundamental similarities between email and traditional forms of communication, it would defy common sense to afford emails lesser Fourth Amendment protection."[89] The court distinguished

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82. *Id.* at 610, 618.

83. 376 U.S. 483 (1964).

84. *Id.* at 484, 498.

85. 631 F.3d 266 (6th Cir. 2010) (en banc).

86. *Id.* at 274.

87. *Id.* at 283, 286–87.

88. *See* Brief of Appellants at 26–27, *Warshak*, 631 F.3d 266 (Nos. 08-3997, 08-4085, 08-4087, 08-4212, 08-4429, 09-3176); Brief for Professors of Electronic Privacy Law and Internet Law as Amici Curiae Supporting the Appellee and Urging Affirmance, *supra* note 80, at 13–14.

89. 631 F.3d at 285–86 (internal citations omitted); *cf.* United States v. Maxwell, 45 M.J. 406, 419 (C.A.A.F. 1996) (holding that an author loses his expectation of

Miller on two grounds: (1) *Miller* involved "simple business records, as opposed to the potentially unlimited variety of 'confidential communications' at issue"[90] and (2) the depositor in *Miller* conveyed information the "bank could put . . . to use 'in the ordinary course of business.'"[91] The court did not cite precedent to justify its reliance on either factor, nor did the court mention that *Boyd* provided protections for business records of a similar variety. As a final justification, the Sixth Circuit buttressed its conclusion with a practical justification:

> Over the last decade, email has become 'so pervasive that some persons may consider [it] to be [an] essential means or necessary instrument[] for self-expression, even self-identification.' It follows that email requires strong protection under the Fourth Amendment; otherwise, the Fourth Amendment would prove an ineffective guardian of private communication . . . .[92]

Without clear guidelines regarding the extent of property-based Fourth Amendment protection remaining post-conveyance, courts are forced to continually draw artificial lines separating conveyed papers more like mail from those more like bank records. Some fact patterns present easy cases because they closely mirror those of decided cases: In the 1980 case of *Walter v. United States*,[93] the Supreme Court, adhering to the principles of *Jackson*, held that packages transported via private carrier maintained Fourth Amendment protection even after the carrier mistakenly delivered them to an unintended recipient who opened them before ceding them to police.[94] Other, more modern, fact patterns are less clear. In the 2007 case of *United States v. D'Andrea*,[95] the District Court for the District of Massachusetts refused to extend Fourth Amendment protection to a defendant's password-protected website because he shared access information with a third party.[96] Simi-

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privacy in the content of electronic messages sent in a chat room or in an "e-mail that is 'forwarded' from correspondent to correspondent").

90. 631 F.3d at 288 (quoting United States v. Miller, 425 U.S. 435, 443 (1976)).

91. *Id.* (quoting *Miller*, 425 U.S. at 443).

92. *Id.* at 286 (citation omitted) (quoting City of Ontario v. Quon, 130 S. Ct. 2619, 2630 (2010)).

93. 447 U.S. 649 (1980).

94. *Id.* at 651–52.

95. 497 F. Supp. 2d 117 (D. Mass. 2007), *vacated*, 648 F.3d 1 (1st Cir. 2011).

96. *Id.* at 123.

larly, in the 2012 case of *United States v. Graham*[97] the District Court for the District of Maryland denied Fourth Amendment protection for historical cell site location records.[98] Finally, in *State v. Hinton*,[99] a Washington state court held that the defendant had no Fourth Amendment interest in the text messages police received from him on a confiscated phone.[100]

Polls suggest that Americans desire enhanced protection; according to a 1998 survey published in *Business Week*, fifty percent of internet users opined that Congress should pass laws to regulate how personal data is collected and used on the internet.[101] As ambient technology "effectively eradicate[s] the distinction between 'public' and 'private' spaces," which once provided boundaries for Fourth Amendment protection, new guidelines are needed to establish boundaries for the courts and to serve the interest of the electronically-laden people.[102] Courts need not invent a categorical protection out of thin air to keep pace with technology. Instead, simple adherence to early precedent, as advocated in *Jones*, answers this concern.

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97. 846 F. Supp. 2d 384 (D. Md. 2012).

98. *Id.* at 389. *See also* In re Application of the United States for Historical Cell Site Data, 724 F.3d 600 (5th Cir. 2013).

99. 280 P.3d 476 (Wash. Ct. App. 2012), *review granted,* 291 P.3d 253 (Wash. 2012).

100. *Id.* at 484.

101. Heather Green et al., *A Little Net Privacy, Please*, BUS. WEEK, Mar. 16, 1998, http://www.businessweek.com/1998/11/b3569104.htm.

102. Susan W. Brenner & Leo L. Clarke, *Fourth Amendment Protection for Shared Privacy Rights in Stored Transactional Data*, 14 J.L. & POL'Y 211, 224 (2006). Though American courts have hesitated to create categorical protection for conveyed papers and digital equivalents, courts in other nations have adopted this approach. The European Union adopted such a categorical rule in 1995, openly embracing the idea of residual rights in conveyed information. Under Directive 95/46/EC of the European Parliament and Council, a data collector may not transfer the information to an outside party without first obtaining the subject's consent. Directive 95/46/EC of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data 1995 O.J. 95 (L281) art. 25(1). *See also* Ryan Moshell, *. . . and Then There Was One: The Outlook for A Self-Regulatory United States Amidst A Global Trend Toward Comprehensive Data Protection*, 37 TEX. TECH L. REV. 357, 368 (2005). As of 1999, Sweden, Italy, Greece, Portugal, and the United Kingdom enacted national laws implementing this directive. Fred H. Cate, *The Changing Face of Privacy Protection in the European Union and the United States*, 33 IND. L. REV. 173, 191 (1999).

VI. WHY THE COURT MUST REVISIT THE DOCTRINE

The modern third-party doctrine creates an expansive exception to the law's general insistence on warrants. Fourth Amendment scholar Orin Kerr acknowledges the rule's general infamy in the academic world: "The Third-Party doctrine is the Fourth Amendment rule scholars love to hate. It is the *Lochner* of search and seizure law, widely criticized as profoundly misguided."[103] At the time the Supreme Court decided *United States v. Miller*, courts did not share the understanding of the relationship between the property-based and expectations-based lines of protection articulated by the majority in *Jones*. Accordingly, the *Miller* Court failed to carry out the requisite inquiry involving examination of the Court's early property-based protection for conveyed papers. As Justice Sotomayor recognized in her *Jones* concurrence, the third-party doctrine is "ill suited" to the modern era.[104] History reveals it is equally ill suited to the Court's call for consideration of early conceptions of Fourth Amendment protections. Under the trespass-based conception of search, the application of the third-party rule to papers and their digital equivalents demands another look. Perhaps with reexamination, the Court will finally end the reign of this modern *Lochner*, and the American people will be able to convey papers and digital data confident in the protections of the Fourth Amendment.

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103. Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 563 (2009) (citing Lochner v. New York, 198 U.S. 45 (1905)). Even the courts disagree over the wisdom of the rule. As of 2006, the highest court in eleven states directly rejected the federal third-party doctrine under their respective state constitution analogs to the Fourth Amendment. *See* Stephen E. Henderson, *Learning from All Fifty States: How to Apply the Fourth Amendment and Its State Analogs to Protect Third Party Information from Unreasonable Search*, 55 CATH. U. L. REV. 373, 395 (2006).

104. United States v. Jones, 132 S. Ct. 945, 957 (2012) (Sotomayor, J., concurring).