Decentralizing Fourth Amendment Search Doctrine

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In examining the threshold question for Fourth Amendment analysis—what constitutes a search?—both courts and commentators have generally premised their analysis on a sharp dichotomy between an approach based on trespass to real or personal property, on the one hand, and one grounded in non-property-based expectations of privacy, on the other. The trespass-based regime seemed to have given way in 1967 to the “reasonable expectation of privacy” standard. But the resurgence of a trespass-based approach in recent Supreme Court cases has served to highlight the supposed distinction between the two methodologies.

When subjected to close scrutiny, the dichotomy between the two approaches becomes highly questionable. Whether analyzed in terms of trespass or reasonable expectations of privacy, the question in close cases concerning whether government conduct constitutes a Fourth Amendment search comes down to the same essential touchstone: social norms governing security in one’s person and property from intrusion by others. Those social norms inform both when a particular expectation of privacy should be deemed reasonable and when an incursion on property should be deemed a trespass. This social-norm-based analysis of whether a Fourth Amendment search has occurred should not be surprising. The common law governing rights to security in one’s person and property stems from longstanding custom, which is inextricably linked with social norms: the practices of a people become their social norms, which harden into custom, and custom in turn evolves into enforceable rights and interests that sometimes, though not always, find expression in positive law. Thus, expectations of privacy and trespass constitute, not two distinct tests, but rather two points on the same evolutionary scale. Our notions of trespass have as their touchstone the

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1 Professor of Law, Salmon P. Chase College of Law, Northern Kentucky University. I thank the following for their helpful comments on earlier iterations of this Article: Will Baude, Will Berry, Russell Christopher, Brenner Fissell, Steve Henderson, Craig Konnoth, James Stern, Matt Tokson, and participants of the 2016 CrimFest! Conference, the 2017 Federalist Society Annual Faculty Conference, and workshops at the University of Kentucky College of Law and the Salmon P. Chase College of Law, Northern Kentucky University.
very same social norms that form the backbone of the reasonable expectation of privacy test.

One can articulate a uniform meaning of "search," irrespective of whether we are operating under a "trespass" or a "reasonable expectation of privacy" model. A Fourth Amendment search occurs when, for the purpose of gathering information, government agents act contrary to law, broadly conceived—that is, law in whatever stage of evolutionary development—providing us with security vis-à-vis private actors in our "persons, houses, papers, and effects." A violation of positive law that fits this definition is sufficient but not necessary to constitute a Fourth Amendment search; a violation of social norms that fits this definition, even where the norms have not yet gelled into positive law, should also be considered a search. But because law, in all its manifestations, often differs by jurisdiction, the question whether a Fourth Amendment search has occurred might be answered differently in different parts of the country, and perhaps even in different parts of the same State.
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According to the conventional wisdom, the doctrine on the threshold question of Fourth Amendment inquiry—what is a "search?"—has wavered back and forth between a property-based "trespass" approach and a privacy-based "expectations" approach. On this view, prior to the U.S. Supreme Court decision in *Katz v. United States* in 1967, courts determined whether a Fourth Amendment search had occurred with reference to common-law notions of trespass: a search had occurred if, but only if, government agents committed a physical intrusion into one of the four interests enumerated in the Amendment—persons, houses, papers, or effects.\(^2\)

In *Katz*, the Court reversed course, seemingly burying the trespass approach and creating an altogether new methodology, the "reasonable expectation of privacy" test.\(^3\) Under this approach, a Fourth Amendment search occurs if, but only if, government agents infringed upon a person's expectation of privacy, and if society is prepared to consider that expectation a reasonable one.\(^4\) In *United States v. Jones*, in 2012, the Court revived the trespass test, so that a Fourth Amendment search occurs as long as either test is satisfied.\(^5\)

This is the conventional wisdom. As a historical matter, the conventional wisdom is questionable.\(^6\) But more importantly, this sharp dichotomy between the two approaches is conceptually flawed. The common law, upon which the trespass approach is based, is itself only the end product of centuries of accumulation of custom which has created enforceable rights and interests, even before those rights and interests are expressed in statutory or decisional form as positive law. Custom, in turn, is simply a hardening of social norms that reflect the repeated practices of a people forced to navigate the complex relationships between individual and community. And it is those very same social norms that form the backbone of the reasonable expectation of privacy test.

Thus, questions about both reasonable expectations of privacy and unwanted physical intrusions have at their root social conventions governing how individuals interact with one another and the extent to which we ought to respect each other's interest in security against intrusions on our persons and property. Sometimes these social conventions have ripened into positive law and sometimes they have not. When they have, they are expressed in the common law of trespass (among other areas), on which the Court's physical intrusion approach hinges. When they have not, these social conventions may remain at the level of social norms, which are at the heart of the reasonable expectation of privacy approach. And there is a vast, blurry middle ground, where social norms have evolved into enforceable rights and

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\(^3\)See *id.* at 360 (Harlan, J. concurring). Although the standard stems from Justice Harlan’s concurrence in *Katz*, the Court quickly adopted it. See *Terry v. Ohio*, 392 U.S. 1, 9 (1968).
\(^4\)*Katz*, 389 U.S. at 361 (Harlan, J., concurring).
\(^6\)*See generally* Orin S. Kerr, The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67 (arguing that no trespass test was actually used in the pre-*Katz* era, thus making its "revival" in *Jones* questionable).
interests—have become law—although they have not been expressed as such by any legislature or court.

This Article argues that the “reasonable expectation of privacy” test derived from *Katz* and the “physical intrusion” test developed prior to *Katz* and used most recently in *Jones* and *Florida v. Jardines* are not distinct tests at all but are instead two different manifestations of the same essential touchstone: social norms governing security against intrusions on our persons and property. The Article proposes a unified test for whether a Fourth Amendment search has occurred: a Fourth Amendment search occurs when, for the purpose of gathering information, government agents act contrary to law, broadly conceived—that is, law in whatever stage of evolutionary development—protecting us from intrusion by private actors in our persons, houses, papers, and effects. But a mere violation of social norms is insufficient to make out a search. To provide some much-needed clarity to Fourth Amendment law, those norms must have evolved to the point of providing legally enforceable rights in order for a search to have occurred. Like all law, this determination will sometimes differ from state to state, and, at least in close cases, juries will have to make the determination of whether norms have hardened into enforceable law. Thus, this Article also proposes that Fourth Amendment search doctrine be decentralized.

This Article is partly descriptive and partly prescriptive. By providing a new way of looking at the two different articulations of the Fourth Amendment search inquiry, it shows what the Court has already done. And after laying bare the common denominator of these two approaches, social norms that form the basis of law, it argues for changes to the way we determine whether a Fourth Amendment search has occurred, in order to make that determination more consistent with this underlying premise of Fourth Amendment law.

The Article proceeds in three parts. Part I reviews the history of Fourth Amendment search doctrine, from the supposed reliance on trespass principles, to *Katz*’s articulation of a “reasonable expectation of privacy” test, to the more recent reintroduction of trespass principles into the doctrine. Part II offers a synthesis of the two different approaches by demonstrating that these two approaches are actually two manifestations of the same touchstone: social norms governing security against private intrusions on our persons and our property. The Fourth Amendment was understood at the time of its adoption as imposing common-law rules on governmental agents in searching and seizing. But those common-law rules spring from social custom and usage that evince widely shared social norms. This evolution from practice to norm to custom to positive law is not merely of historical importance. Modern scholarship on social norms demonstrates that these norms can be as powerful a force as positive law in guiding and restraining behavior. Moreover, on occasion these norms still evolve into enforceable legal rights and interests that have not yet solidified into statutory or decisional law. Part III raises two implications of using as the touchstone of a Fourth Amendment “search” social norms regarding security against private intrusions on persons and

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7 569 U.S. 1 (2013).
property. First, that government action violates positive law in an effort to access information is sufficient, but not necessary, to make out a Fourth Amendment search. Second, given the granularity of social norms, the custom and usage that these norms generate, and the positive law that ultimately springs from custom and usage, a decentralized rather than monolithic approach to Fourth Amendment search doctrine is called for.

I. FOURTH AMENDMENT SEARCH DOCTRINE(S)

Conventionally understood, Fourth Amendment search doctrine has developed in three distinct stages. First, the Court tied the concept of a Fourth Amendment search to the common-law concept of trespass: a trespass, but only a trespass, could constitute a search for Fourth Amendment purposes. Next, the Court decoupled the trespass basis for search doctrine, replacing it with the touchstone of the "reasonable expectation of privacy," such that a technical common-law trespass was neither necessary nor sufficient to constitute a Fourth Amendment search. Finally, and most recently, the Court has added back in the notion that a trespass can constitute a search, so that a search occurs where there is an unlicensed physical intrusion or an infringement of one's reasonable expectation of privacy.

It is important to keep in mind that these approaches are used to determine only whether a search has occurred, not whether the search is reasonable. Where police do only what other private citizens may do, they have not implicated the Fourth Amendment. When they go beyond what private citizens may do, they may still be in the right, but they need some special dispensation to do so, typically in the form of a specific warrant or warrant-substitute. Thus, it makes sense that under both approaches, the line separating searches from non-searches is the behavior we expect from other private citizens regarding our security in our persons and property.

A. FROM OLMSTEAD TO KATZ

Most conventional expositions of Fourth Amendment search doctrine begin with Olmstead v. United States.8 There, a number of people were convicted of conspiring to violate the National Prohibition Act in Washington State.9 The government had gathered information about the conspiracy by tapping the phone lines of the homes of four of its members and the office where they plied their illegal trade, and listening in on telephone conversations.10 The taps were made in the basement of the building where the office was located and "in the streets near the houses."11 The taps were conducted, the Court took pains to tell us, "without trespass upon any property of the defendants."12 The Court held that the Fourth

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8 277 U.S. 438 (1928).
9 Id. at 455.
10 Id. at 456–57.
11 Id. at 457.
12 Id.
Amendment was not implicated because there was no search or seizure, given that "[t]here was no entry of the houses or offices of the defendants." The wiretapping was a criminal offense in Washington was of no moment. As the Court put it, "clearly a [state] statute . . . can not affect the rules of evidence applicable in courts of the United States."

Subsequent cases seemed to hinge, in large part, on whether government agents had committed a trespass in investigating crime. Take, for example, the classic dyad of Goldman v. United States and Silverman v. United States. In Goldman, federal agents lawfully present in an office building, pressed up against the wall to an adjoining office a "detectaphone," which could pick up soundwaves from the other office, and listened in to conversations taking place there. Although the agents had also installed a listening apparatus within a wall between the two offices, that apparatus failed to work. The Court held that there was no Fourth Amendment violation. Rejecting the defendants' argument that one who speaks in an office does not assume the risk that his voice will be picked up by a delicate listening instrument in an adjoining office, the Court reasoned opaquely that "the distinction is too nice for practical application of the Constitutional guarantee," and that Olmstead was essentially indistinguishable. The Court also held that, to the extent there was a trespass into the office to plant the within-the-wall device, there was an insufficient connection between such a trespass and the eventual gathering of evidence, given that that device did not work.

By contrast, in Silverman, which also involved the gathering of evidence by use of a listening device, the Court found a Fourth Amendment violation. The device there was a "spike mike," a microphone attached to a foot-long spike. It was inserted into a wall separating a vacant row house, where the officers were legally present, from its neighbor, occupied by the defendants, and touching "a heating duct serving the [latter] house." In that way, officers were able to listen in on conversations taking place in that house. The Fourth Amendment was offended because "the eavesdropping was accomplished by means of an unauthorized physical penetration into the premises," transforming the heating duct into "a giant microphone." The case was unlike Olmstead and Goldman because, in those

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13 Id. at 464.
14 Id. at 468–69.
15 Id. at 469.
16 316 U.S. 129 (1942).
18 Goldman, 316 U.S. at 131–32.
19 Id. at 131.
20 Id. at 135.
21 Id.
22 See id. at 134–35.
24 Id. at 506.
25 Id. at 506–07.
26 Id. at 507.
27 Id. at 509.
28 Id. (quoting Silverman v. United States, 275 F.2d 173, 179 (D.C. Cir. 1960)).
cases, the eavesdropping had taken place without "an unauthorized physical encroachment within a constitutionally protected area." In Silverman, by contrast, the police had essentially converted for their own use—"usurp[ed]," as the Court put it—the heating system, "an integral part of the premises" without the occupants' consent.

The extent to which these earlier cases relied on notions of trespass, however, has been vastly overstated. Goldman, for example, did not mention trespass at all, except in putting to one side the earlier, ancillary intrusion into one defendant's office which did not lead to the gathering of any evidence. Even Silverman, which seems most clearly to equate physical intrusion with a Fourth Amendment search, went out of its way to distance the constitutional inquiry from one focusing on "whether or not there was a technical trespass under the local property law." Further, it cautioned that the Fourth Amendment search question was "not inevitably measurable in terms of ancient niceties of tort or real property law." The decision distinguished between "the technicality of a trespass ... as a matter of local law" and "the reality of an actual intrusion into a constitutionally protected area."

That the Fourth Amendment search question did not precisely track the common law of trespass is most clearly seen in the pre-Katz spy cases. In a series of cases, the Supreme Court confronted the question whether the Fourth Amendment was implicated when government agents, by means of deception, seek information from a confidante of the target. In Hoffa v. United States, the government relied on testimony by a government informant, who had befriended the defendants, about statements the defendants had made to him while in a hotel suite occupied by one of them. In Lewis v. United States, the government similarly offered testimony of an undercover narcotics agent who, posing as a drug buyer, was twice invited by the defendant into his home to conduct a drug transaction. In Lopez v. United States, an Internal Revenue Agent feigned interest in receiving a bribe offered by the defendant and secretly recorded a conversation that took place in the defendant's office in which the defendant offered him a bribe. And in On Lee v. United States, Chin Poy, a supposed friend of On Lee, had entered the latter's business premises, surreptitiously wired with an electronic listening device, and had prompted him to make incriminating statements, which

29 Id. at 510–11.
30 Id. at 511.
31 See Kerr, supra note 6, at 82–83.
32 Silverman, 365 U.S. at 511.
33 Id.; see also Kerr, supra note 6, at 85.
34 Silverman, 365 U.S. at 512; see also id. at 513 (Douglas, J., concurring) ("Our concern should not be with the trivialities of the local law of trespass, as the opinion of the Court indicates.").
35 Hoffa v. United States, 385 U.S. 293, 296–98 (1966). It was unclear whether the informant acted on his own initiative after having befriended the defendants, or instead was inserted into the defendants' midst by the government for the purpose of gathering evidence. See id. at 298–99. Ultimately, the Court determined that it did not matter which of the two actually occurred. Id. at 299.
were overheard through the device, and later testified to, by a federal agent. Given the facts in these cases, one might expect that the Court would have relied upon one of two related trespass theories: either that entry into premises gained through deception constitutes a trespass, on the theory that deception vitiates whatever license the trespasser otherwise might have, or on the hoary "trespass ab initio" doctrine, that an unlawful act following a lawful entry renders the entry retroactively unlawful from its inception.

Yet, in none of these cases did the Court find a Fourth Amendment violation, much less on the basis of the common law of trespass. In *Hoffa*, the Court's characterization of the defendants' argument was that the informer's deception "vitiates the[ir] consent" to entry, but held, without reference to the law of trespass, that there was no Fourth Amendment violation. In *Lewis*, the Court characterized the defendant's argument similarly, rejecting his contention that consent to enter his home "was induced by fraud and deception." In *Lopez*, the Court rejected the defendant's argument that the agent was "guilty of an unlawful invasion of [defendant's] office simply because his apparent willingness to accept a bribe was not real," and held that surreptitious recording was not a search because it was not accomplished through a device "planted by an unlawful physical invasion of a constitutionally protected area."

Only in *On Lee* did the Court engage in any discussion of the law of trespass. On Lee invoked the trespass *ab initio* doctrine, claiming that Chin Poy's conduct in secretly transmitting their conversation "vitiated the consent and rendered his entry a trespass *ab initio*." He claimed also that the consent was invalid because it was "obtained by fraud." The Court rejected these claims. First, it wrote that it was unclear whether the purely passive deception, absent "any affirmative misrepresentation, would be a trespass under orthodox tort law." More fundamentally, however, the Court rejected the idea that "the niceties of tort law[,]" with its "fine-spun doctrines[,]" govern the Fourth Amendment search question. Indeed, the Court noted that it had already rejected the trespass *ab initio* doctrine twenty-five years earlier.
Thus, prior to 1967, the Court's methodology in determining the Fourth Amendment search question was less than clear. In some cases, such as Silverman, it relied on the fact of a physical intrusion into a constitutionally protected space to find a constitutional violation. But it also eschewed reliance in that case and in others on any "technical" or "fine spun" law of trespass. The formulation in Katz of the "reasonable expectation of privacy" test, then, in some sense clarified rather than revolutionized Fourth Amendment search doctrine. One thing that is clear about the pre-Katz era is that, to whatever extent the Court calibrated Fourth Amendment search doctrine to physical intrusion, it was applying a general trespass-like analysis, not the actual law of trespass.

B. Katz's "Reasonable Expectation of Privacy" Test

Modern Fourth Amendment search doctrine begins, of course, with Katz v. United States. Katz was convicted of several federal gambling offenses based in part on statements he made while making a phone call from a public telephone booth. The statements were overheard by federal agents via an electronic listening device they had attached to the outside of the booth. Were the Court to adhere to its prior decisions, it would have had to have held that no search had occurred. After all, if agents did not perform a search when they attached a listening device to the wall separating Goldman's office from one to which they had lawful access, a fortiori no search occurred where the device was attached to the outside of a public phone booth.

Instead, the Court overruled both Goldman and Olmstead, and forged a new path. The Court focused on the assumptions and expectations that people entertain regarding the retention or abandonment of privacy when they act in certain ways. As the Court put it: "One who occupies [a telephone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world." Or, as Justice Harlan put it in his concurrence, in a formulation that later assumed the status of controlling law: "[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation of privacy be one that society is prepared to recognize as 'reasonable.'" The first prong is virtually always satisfied

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49 See Kerr, supra note 6, at 84–85 (observing that, prior to Katz, "physical penetration into a protected space [w]as the primary test for a Fourth Amendment search," but that the Court distinguished between searches and trespass).


51 Id.

52 Id. at 353 ("The underpinnings of Olmstead and Goldman have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling.").

53 Id. at 352.

54 Id. at 361 (Harlan, J., concurring).
so that, for all intents and purposes, the test is whether the government breached a reasonable—sometimes characterized as a "justifiable" or "legitimate"—expectation of privacy.

In applying this standard across a variety of different contexts, the Court has established a number of guideposts. First, in keeping with the break with the past augured by Katz, a physical intrusion into private property is neither necessary nor sufficient for there to be a Fourth Amendment search. For example, in Kyllo v. United States, suspecting Kyllo of growing marijuana in his home with the use of "grow lights," police used a thermal-imaging device in order to detect the relative amounts of heat emanating from different parts of his home. Despite the absence of a physical intrusion, the Court held that the use of sense-enhancement technology to reveal details about the inside of a home that could otherwise not have been obtained absent a physical intrusion constitutes a search, at least as long as the technology "is not in general public use."

Conversely, in United States v. Dunn and Oliver v. United States, law enforcement agents discovered incriminating evidence by making a warrantless entry onto the defendants' extensive properties, in each case outside the curtilage of the houses. Despite the trespasses in each case, the Court held that there was no Fourth Amendment search, in part because a person has no reasonable expectation of privacy in activity taking place in "open fields." The Court specifically rejected the notion that a common-law trespass is a Fourth Amendment violation per se, adopting instead a more flexible approach that renders the trespass just one factor in making the "reasonable expectation of privacy" determination. This, presumably, is true of personal property as well as real property.

Second, as with common-law trespass, official non-compliance with positive law more generally is neither necessary nor sufficient for there to be a Fourth Amendment search. So, for example, in Kyllo, the Court held that there was a...
Fourth Amendment search despite the apparent absence of any positive law proscription on the use of thermal imaging devices. Conversely, the Court held in Dow Chemical Co. v. United States and California v. Greenwood that violation of positive law does not necessarily make out a Fourth Amendment search. In Dow Chem. Co., officials from the federal Environmental Protection Agency flew over a Dow manufacturing facility and took detailed photographs. State trade-secret and anti-surveillance laws arguably forbade such conduct. In Greenwood, police had rummaged through the defendant’s trash which he had placed in opaque plastic bags on the curb beyond the curtilage of his home for garbage pick-up. The constitution of California, where Greenwood lived, forbade government officials from searching through garbage under these circumstances. Nonetheless, in both cases, the Court held that there was no Fourth Amendment search, specifically rejecting the idea that positive law can by itself form the basis for a Fourth Amendment reasonable expectation of privacy.

Third, at the same time, the Court has referred to positive law, as well as to general notions of property, tort, and agency, to sketch out the boundaries of the Fourth Amendment. For example, in California v. Ciraolo and Florida v. Riley, the

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64 See Kyllo, 533 U.S. 27, 34 (2001). It may well be that the police in Kyllo committed the tort of intrusion upon seclusion under Oregon law. See Mauri v. Smith, 929 P.2d 307, 310 (Or. 1996) (describing Oregon’s application of the intrusion upon seclusion tort). It is questionable, however, whether any reasonable jury could find that determining the amount of heat escaping various parts of a home would be found “highly offensive to a reasonable person.” See John F. Preis, Constitutional Enforcement by Proxy, 95 Va. L. Rev. 1663, 1740 (2009) (concluding that it is “unclear . . . whether using thermal imaging to search a house will be an intrusion upon seclusion under state tort law”); cf. McLain v. Boise Cascade Corp., 533 P.2d 343, 346–347 (Or. 1975) (surveillance was, as a matter of law, not “highly offensive to a reasonable” person, where it was performed “during daylight hours and when plaintiff was exposed to public view by his neighbors and passersby”). The point here is that the Kyllo Court found that a Fourth Amendment search occurred irrespective of whether a state law tort had also occurred.

65 California v. Greenwood, 486 U.S. 35, 43–44 (1988) (holding that although seizure of garbage may be impermissible as a matter of California law, “concepts of privacy under the laws of each State” do not determine the reach of the Fourth Amendment); Dow Chem. Co. v. United States, 476 U.S. 227, 239 & n.6 (1986) (holding that despite a possible violation of trade secret laws, “the taking of aerial photographs of an industrial plant complex from navigable airspace is not a search prohibited by the Fourth Amendment”).

66 Dow, 476 U.S. at 229.

67 Id. at 248 n.10 (1986) (Powell, J., concurring in part and dissenting in part) (citing M.C.L.A. §§ 752.772, 750.539a–539b).


69 Id. at 43 (citing People v. Krivda, 486 P.2d 1262 (Cal. 1971)).


71 Greenwood, 486 U.S. at 43 (“We have never intimated . . . that whether or not a search is reasonable within the meaning of the Fourth Amendment depends on the law of the particular State in which the search occurs.”); Dow 476 U.S. at 232 (“State tort law governing unfair competition does not define the limits of the Fourth Amendment.”); see also Rooney, 483 U.S. at 325 (White, J., dissenting) (per curiam) (expressing doubt that a municipal ordinance forbidding all but authorized trash collectors from rummaging through another’s refuse could form the basis, by itself, for a reasonable expectation of privacy).
Court considered whether flying over a person's property in a fixed-wing aircraft or a helicopter, respectively, in order to view his curtilage constitutes a Fourth Amendment search. The Court held that there was no reasonable expectation of privacy in these cases, largely because in each case the aircraft was in legally navigable airspace and therefore any member of the flying public could have done what the police did.

The Court also emphasized general property law concepts in Rakas v. Illinois. The question there was whether the non-owner passengers of a car had a reasonable expectation of privacy in the car so that they could claim the benefit of the exclusionary rule as a result of an arguably unlawful search of the car. The question was whether they had "a legally sufficient interest" in the place searched "so that the Fourth Amendment protect[ed] [them] from unreasonable governmental intrusion into that place." The Court was careful to note that such "a legally sufficient interest" did not have to accord with technical property and tort law notions—"arcane distinctions developed in property and tort law between guests, licensees, invitees, and the like, ought not to control"—and a person might have a legitimate expectation of privacy despite the absence of a cognizable property interest at common law.

Yet the Court also nodded toward property law interests as being heavily indicative of whether the Fourth Amendment applied. It wrote that "[l]egitimation of expectations of privacy by law must have 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." Moreover, although an expectation of privacy sufficient to warrant Fourth Amendment protection "need not be based on a common-law interest in real or personal property . . . the Court has not altogether abandoned use of property concepts in determining" reasonable expectation of privacy. As Justice Powell put it in his concurrence, "property rights reflect society's explicit recognition of a person's

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73 Id. at 140. While the police conduct in Rakas was undoubtedly a search, the question was whether it was a search as to the defendants who sought to invoke the exclusionary rule. Id. Thus, although someone had a reasonable expectation of privacy in the car, the question was whether these passengers did as well. Id. at 140-41. As the Court has sometimes put it, the issue is whether the person claiming the benefit of the exclusionary rule has standing to complain about the allegedly unlawful search. See United States v. Leon, 468 U.S. 897, 910 (1984) ("Standing to invoke the [exclusionary] rule has . . . been limited to cases in which the prosecution seeks to use the fruits of an illegal search or seizure against the victim of police misconduct.").
74 Id. at 142.
75 Id. at 143.
76 Id. (discussing Jones v. United States, 362 U.S. 257 (1960), in which the Court held that the Fourth Amendment protected an overnight guest in a home in the absence of the homeowner).
77 Id. at 143 n.12.
authority to act as he wishes in certain areas.” Thus, while the dissent’s charge that the Court had improperly yoked the Fourth Amendment to property law was surely overblown, the Court did acknowledge the gravitational pull of property and tort law on the Fourth Amendment.

Finally, as the language in Rakas indicates, the Court must often look to social conventions and social norms—“understandings that are recognized and permitted by society” —in order to determine what expectations of privacy are reasonable, justifiable, or legitimate. As Justice Harlan, author of the “reasonable expectation of privacy” formulation, put it in a later case: “Our expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present.”

This relationship between social norms and expectations of privacy is clear from cases such as Bond v. United States. The issue there was whether a federal agent’s physical manipulation of soft luggage in the overhead compartment of a bus in order to examine its contents constituted a search. The Court held that it did. Chief Justice Rehnquist, writing for a seven-Member majority, reasoned that although bus passengers expect that their bags might be touched or even handled by others after placing them in an overhead bin, they do not expect that others will feel their bags “in an exploratory manner.” By contrast, Justice Breyer, writing in dissent for himself and Justice Scalia, concluded that the “tactile inspection” of the bag was little different from the treatment that one can expect “from strangers in a world of travel that is somewhat less gentle than it used to be.”

Another important example of the Court’s use of social conventions and social norms in determining the metes and bounds of the Fourth Amendment comes from the third-party consent cases. Although these cases indisputably involve Fourth Amendment searches—typically, they involve police entry into homes—they share a methodology in common with the search cases. The issue in these cases is whether a third party had authority to bind the defendant with her consent to search. But authority to render consent capable of binding others is just the flip side of the “standing” question: generally, one who has a sufficient expectation of

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81 Id. at 153 (Powell, J., concurring); see also Carpenter v. United States, 138 S.Ct. 2206, 2227 (2018) (Kennedy, J., dissenting) (“[P]roperty concepts are . . . fundamental in determining the presence or absence of the privacy interests protected by th[e] Amendment.”) (quoting Rakas, 439 U.S. at 143 n.12) (alterations added)).
82 Rakas, 439 U.S. at 156–57 (White, J., dissenting) (“[T]he Court . . . effectively ties the application of the Fourth Amendment and the exclusionary rule . . . to property law concepts.”).
83 Id. at 143 n.12 (majority opinion).
86 Id. at 335–36.
87 Id. at 338–39.
88 Id.
89 Id. at 340 (Breyer, J., dissenting).
91 Sometimes the issue is whether, even though the third party did not have such authority, the police reasonably believed that she did. See, e.g., Illinois v. Rodriguez, 497 U.S. 177, 186 (1990). These cases are not relevant to the search issue.
privacy in the place searched also has sufficient authority over that place as to bind with her consent others with whom she shares that authority; and one who lacks such an expectation of privacy also generally lacks the authority to bind others with her consent.92 As Justice O'Connor put it: "Standing to object to [a] search . . . and power to give effective consent to the search, should go hand in hand."93

In the consent cases, the Court has devised a rule that a third party sharing living quarters with another may generally issue valid consent, binding upon the co-occupant, to a search of those quarters.94 This rule applies even if the co-occupant has previously objected to the search but is no longer present.95 The rule is subject, it seems, to only one exception: if a co-occupant is present and objects to the search, the consent of another is not binding, at least as to him.96

In fashioning this rule and its narrow exception, the Court has again been careful to note that social expectations, not the law of property or tort, are paramount. In the formative case, United States v. Matlock, the Court wrote that authority to bind a co-occupant with one's consent "is . . . not to be implied from the mere property interest [one] has in the property," and such "authority . . . does not rest upon the law of property, with its attendant historical and legal refinements."97 Rather, such authority rests upon "mutual use of the property by persons generally having joint access or control for most purposes."98 In Georgia v. Randolph, the Court elaborated that divination of when such authority exists must be accomplished by examining "customary social usage."99 The touchstone is

92 United States v. Karo, 468 U.S. 705, 724 (1984) (O'Connor, J., concurring in part and concurring in the judgment) ("Surely a homeowner cannot simultaneously have so little interest in a container that his consent to its search is constitutionally ineffective, and have so great an interest in the container that its search violates his constitutional rights."); Rakas v. Illinois, 439 U.S. 128, 163 (1978) (White, J., dissenting) ("If a nonowner may consent to a search merely because he is a joint user or occupant of a 'premises,' . . . then that same nonowner must have a protected privacy interest. The scope of authority sufficient to grant a valid consent can hardly be broader than the contours of protected privacy." (citation omitted)); see also Randolph, 547 U.S. at 112-13 (observing that expectations of privacy that shape standing also help determine consent). But see id. at 130 (Roberts, C.J., dissenting) ("The Court has not looked to [social] expectations to decide questions of consent under the Fourth Amendment, but only to determine when a search has occurred and when a particular person has standing to object to a search.").


94 Matlock, 415 U.S. 164, 170 (1974) ("The consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared.").

95 Fernandez v. California, 134 S. Ct. 1126, 1135-36 (2014) (rejecting defendant's argument that his objection to police entry remained effective even after he was arrested and removed from the scene).

96 See Randolph, 547 U.S. at 120 (Kennedy, J., concurring) ("[A] warrantless search of a shared dwelling . . . over the express refusal of consent by a physically present resident [is not] reasonable as to him on the basis of consent given to the police by another resident.").

97 Matlock, 415 U.S. at 171 n.7.

98 Id.

99 Randolph, 547 U.S. at 120-21 ("The right to admit the police to which Matlock refers is not an enduring and enforceable ownership right as understood by the private law of property, but is instead the
constructed from the "widely shared social expectations," and "commonly held understanding[s]" about the mutual rights and obligations of co-inhabitants that constitute "social custom" and "social practice." But, acknowledging the relationship between customary social usage and positive law, the Court observed that the former could be shaped by "state-law property rights" and "contractual arrangements," as well as by "other source[s]." Indeed, the Court recognized the mutually constitutive nature of positive law and customary social usage, writing both that "social expectations . . . are naturally enough influenced by the law of property," and, conversely, that such "social custom" is itself "reflect[ed] in private law." Thus, customary social usage and positive law exist in a mutually reinforcing relationship: social expectations inform positive law and positive law, in turn, shapes social expectations.

C. The "Resurgence" of Trespass

So things stood until 2012, when the Court decided United States v. Jones. In that case, federal agents had attached to Jones's wife's car an electronic device to monitor its movements through a global positioning system ("GPS") for twenty-eight days, obtaining evidence that was later used to convict him of federal narcotics charges. Although agents had obtained a warrant, they did not comply with its terms in attaching the device, so the Government argued that the attachment and subsequent monitoring did not require a warrant at all because this conduct did not amount to a Fourth Amendment search.

The Court rejected this argument but did so in a surprising way. Rather than deem the government conduct a search on the ground that it breached Jones's reasonable expectation of privacy, the Court invoked its earlier cases by holding that the agents' conduct was a search because they "physically occupied private property for the purpose of obtaining information." This older "physical intrusion" test, the Court informed us, was not laid to rest by Katz but had merely lain dormant: "the Katz reasonable-expectation-of-privacy test has been added to, not substituted for, the common-law trespassory test." Thus, the Court

authority recognized by customary social usage . . . .

100 Id. at 111.
101 Id. at 120.
102 Id. at 114.
103 Id. at 112; see also id. at 114 (looking for "authority in law or social practice").
104 Id. at 111, 120.
106 Id. at 402–03.
107 Id. at 402–03 & n.1.
108 See id. at 430–31 (Alito, J., concurring in the judgment) (agreeing that there was a search based on the Katz reasonable expectation of privacy test as opposed to a physical trespass test).
109 Id. at 404–05 (majority opinion); see also id. at 406–07 n.3 (holding that a search occurs "[w]here . . . the Government obtains information by physically intruding on a constitutionally protected area"); id. at 414 (Sotomayor, J., concurrence) ("When the government physically invades personal property to gather information, a search occurs.").
110 Id. at 409 (majority opinion).
resurrected—or at least awoke from its long slumber—the physical intrusion test exemplified by Silverman.\textsuperscript{111}

The Court subsequently applied this reinvigorated physical intrusion test in Florida v. Jardines.\textsuperscript{112} There, two Florida police officers entered onto Jardines’s property with a drug-sniffing dog, and approached the front door of Jardines’s house via the driveway and a paved walkway.\textsuperscript{113} The dog alerted to the presence of illegal narcotics inside the house, leading to a search warrant and, ultimately, the filing of state drug charges against Jardines.\textsuperscript{114} Once again, the Court found that a Fourth Amendment search had occurred based on the “physical intrusion” theory advanced in Jones. The officers conducted a search when “they gathered . . . information by physically entering and occupying the [curtilage of Jardines’s home] to engage in conduct not explicitly or implicitly permitted by the homeowner.”\textsuperscript{115} Because there was undoubtedly a physical entry upon Jardines’s land without his express consent, the only question was whether his consent could be implied.\textsuperscript{116} The Court conceded that “background social norms” permit people to approach a front door, knock, and ask to speak to the occupant.\textsuperscript{117} Moreover, a police officer can do the same “because that is ‘no more than any private citizen might do.’”\textsuperscript{118} But those same “background social norms” do not invite a visitor or, therefore, a police officer, to approach the front door, fail to knock, and instead look for information about the premises.\textsuperscript{119} “There is no customary invitation to do that.”\textsuperscript{120}

In neither Jones nor Jardines did the Court hold, or even suggest, that the technical law of trespass determined whether an unlicensed physical intrusion had occurred. Indeed, its caginess was noteworthy. In response to Justice Alito’s charge in his separate opinion in Jones that the Court was applying “18th-century tort law,”\textsuperscript{121} the Court responded opaquely that, instead, it was applying “an 18th-century guarantee against unreasonable searches, which . . . must provide at a
minimum the degree of protection it afforded when it was adopted."122 And in response to Justice Alito's complaint that the Court's reliance on a "physical intrusion" test could lead to different results in different States,123 the Court's response was utter silence. Jardines was equally ambivalent as to what law it looked to in order to determine whether consent to entry could be implied. Indeed, one commentator, observing that the Court scrupulously avoided all use of the term "trespass," concluded that it did so because the Florida courts had already determined that there was no trespass under state law.124 Presumably, the Court, as in the pre-Katz cases, did not want to tie the Fourth Amendment to "local" tort and property law.

II. A POST-JONES SYNTHESIS: SOCIAL NORMS GOVERNING SECURITY AGAINST PRIVATE INTRUSIONS AS THE TOUCHSTONE

As Professor Orin Kerr has shown, the distinction between the pre-Katz and post-Katz eras has been overstated by both scholars and the courts.125 The conventional thinking is that pre-Katz Fourth Amendment law orbited around the positive law of trespass, while post-Katz law represented a sharp break with such property law concepts in informing the Fourth Amendment search inquiry. But pre-Katz cases did not rely solely upon positive property and tort law concepts—indeed, they often openly eschewed them—in formulating the metes and bounds of Fourth Amendment searches. And post-Katz cases did not completely jettison reliance on these concepts. The most that can be said is that pre-Katz cases focused upon the presence or absence of a physical intrusion, but generally declined to use positive property and tort law concepts to define what a physical intrusion was in close cases. And post-Katz cases use an amalgam of rationales, including but not limited to positive law, to discern reasonable expectations of privacy based on customary social usage. Katz was more evolutionary than revolutionary.

More fundamentally, however, what have been characterized as distinct touchstones, trespass and reasonable expectations of privacy, are not as distinct as they appear at first blush. It is more accurate to describe them as representing two separate stages in the development of the same root idea: established societal norms governing security against intrusions upon persons and property. Reasonable expectations of privacy depend largely, as the Randolph Court put it, on "customary social usage"126—social norms, understandings, and expectations governing how individuals conduct themselves vis-à-vis their fellow individuals' claims to security from intrusions. But the common law of trespass, as the framers

122 Id. at 411 (majority opinion).
123 Id. at 425 (Alito, J., concurring in the judgment) ("[U]nder the Court's theory, the coverage of the Fourth Amendment may vary from State to State.").
125 See Kerr, supra note 6, at 81–90.
and ratifiers of the Fourth Amendment understood it, developed from that selfsame “customary social usage.” Expectations of privacy, on the one hand, and trespass, on the other, while they may be two distinct species, derive from the same family of concepts. They represent different points on an evolutionary spectrum. What begins as social practice evolves into social understanding and expectation, which sometimes morphs into enforceable rights and interests, which often hardens into positive law. What we know as “expectations of privacy” merely constitute the precursor to a matrix of enforceable legal rights. What we know as trespass is simply the fully formed product of that evolutionary process. That evolutionary process continues to this day.

A. An Originalist Approach to the Fourth Amendment Search Question

Divining an understanding of what the framers and ratifiers of the Fourth Amendment saw as its scope is no easy task. At the time the Amendment was adopted, after all, investigative technology was barely in embryonic form. Thus, a search almost necessarily involved a physical intrusion into an area, a thing, or a person.\footnote{See Kerr, supra note 6, at 72–75.} Perhaps, then, the Fourth Amendment’s scope was understood in 1791 as being limited to physical intrusions of “persons, houses, papers, [or] effects.”\footnote{U.S. CONST. amend. IV.} Pre-\textit{Katz} case law suggests as much.\footnote{See supra Section I.A.}

It is not surprising, then, that an originalist such as Justice Scalia was a fierce critic of \textit{Katz} and at one time advocated a return to the trespass-centered, pre-\textit{Katz} case law. The flaws of the \textit{Katz} test, in his view, were essentially threefold. First, the test was divorced from the text and history of the Fourth Amendment.\footnote{Minnesota v. Carter, 525 U.S. 83, 97 (1998) (Scalia, J., concurring) (“That self-indulgent test . . . has no plausible foundation in the text of the Fourth Amendment.”); see also Carpenter v. United States, 138 S.Ct. 2206, 2236 (2018) (Thomas, J., dissenting) (“The \textit{Katz} test has no basis in the text or history of the Fourth Amendment.”).} Second, he viewed the test as circular, in that it extends constitutional protection to those expectations of privacy, and only those expectations of privacy, that we generally believe are protected.\footnote{Kyllo v. United States, 533 U.S. 27, 34 (2001) (Scalia, J.) (“The \textit{Katz} test . . . has often been criticized as circular, and hence subjective and unpredictable.”); see also Carpenter, 138 S.Ct. at 2245 (Thomas, J., dissenting) (observing that viewing the \textit{Katz} test as descriptive ‘risks circularity’”) (quoting \textit{Kyllo}, 533 U.S. at 34 (alteration in original))).} Finally, and perhaps worst of all, he viewed the test as anti-democratic because it allows unelected federal judges to import their policy preferences into law by declaring their own expectations of privacy to be those that are reasonable.\footnote{Carter, 525 U.S. at 97–98 (Scalia, J., concurring) (“The only thing the past three decades have established about the \textit{Katz} test . . . is that, unsurprisingly, those ‘actual (subjective) expectation[s] of privacy’ that society is prepared to recognize as ‘reasonable’ . . . bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable.” (citations omitted and alterations in original)); see also Carpenter, 138 S.Ct. at 2246 (Thomas, J., dissenting) (“This Court’s precedents . . . bear the hallmarks of subjective policymaking instead of neutral legal decisionmaking.”); id. at 2256.} As he put it, the Fourth Amendment:
[D]id not guarantee some generalized "right of privacy" and leave it to this Court to determine which particular manifestations of the value of privacy "society is prepared to recognize as 'reasonable.'" . . . Rather, . . . it left[ed] further expansion to the good judgment, not of this Court, but of the people through their representatives in the legislature.\(^133\)

A trespass-based approach, by contrast, supposedly has none of these flaws. First, it is consistent with the text and history of the Fourth Amendment, given that the Amendment speaks of "persons, houses, papers, and effects,"\(^134\) and given that the types of intrusions that gave rise to the Amendment were uniformly common-law trespasses to these interests. Second, a trespass-based approach is ostensibly not circular because it is determined exogenously. Whether government conduct is a search is contingent on whether such conduct by private persons would be considered a tortious interference with persons, chattels, or land. By tying the search question to some branch of positive law outside the Constitution itself, a trespass-based approach avoids circularity. Finally, such an approach ostensibly limits judicial discretion. By tying the meaning of the Fourth Amendment's terms to physical trespasses to tangible items, the argument goes, judges cannot smuggle into constitutional law their own subjective views of the proper balance between liberty and security. Moreover, the common law of trespass, having evolved over the centuries, has gained wide acceptance and legitimacy as law. Trespasses to persons, chattels, and land are clear, leaving little or no room for judges to insert their own policy preferences over those of the people who have formed and come to accept the law of trespass.

These arguments have some appeal to an originalist. The Fourth Amendment was understood in 1791, at least in part, as preserving common-law rights against federal government officials engaged in searching and seizing.\(^135\) One very useful weapon for keeping government officers in check was the common-law suit. Professor Jerry Mashaw explained: "Customs officers seized property, held goods in shore side warehouses, refused to return or release bonds, and held ships in port. A host of standard common law actions—trespass, trover, debt, detinue, assumpsit, or the like—were available to test the legality of these official actions."\(^136\) This remained true even after the Constitution was adopted. As Mashaw wrote: "Congress seems to have presumed that [federal] officers could and would be sued in state courts in common law actions . . . ."\(^137\)

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\(^133\) See Carter, 525 U.S. at 97–98 (Scalia, J., concurring) (citations omitted).
\(^134\) U.S. Const. amend IV.
\(^136\) JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 76 (2012); see also William Baude & James Y. Stern, The Positive Law Model of the Fourth Amendment, 129 Harv. L. Rev. 1821, 1840 (2016) ("At the time it was ratified, the only way to enforce rights against unlawful searches and seizures was through private law remedies, such as . . . trespass and false imprisonment actions . . . .").
\(^137\) MASHAW, supra note 136, at 66.
Prior to adoption of the Fourth Amendment, the Anti-Federalists—those who opposed the Constitution and were wary of the new, powerful central government—were not convinced that this would remain the case. The Federalists made assurances that state-law protections against unreasonable searches and seizures would remain in force. Roger Sherman said as much at the tail end of the Constitutional Convention, as did Edmund Randolph in the Virginia ratifying convention. But the Anti-Federalists wanted amendments, not assurances. Thus was born the Fourth Amendment, which was understood as expressly preserving the ability of "the people" to bring common-law suits against federal officials who too zealously interfere with their "secur[ity]" in their "persons, houses, papers, and effects."

But while it is true that in 1791 the common-law tort action that the Fourth Amendment preserved had as its touchstone some physical trespass to land, chattel, or person, the common law has evolved to encompass modern torts that do not involve physical trespass. Even Justice Scalia ultimately came to recognize this. Writing for the Court in Kyllo v. United States, he acknowledged that, in order to "assure[] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted," the Court must sometimes go beyond the notion of physical trespass. Accordingly, the Court held that use of a thermal imaging device to obtain details from within a home was a Fourth Amendment search, despite the absence of any trespass. As the Kyllo Court recognized implicitly, to say that the Fourth Amendment protects only against physical intrusions confounds the specific type of action the framers and ratifiers had in mind in 1791 with their more general understanding of what the Amendment accomplished. The Fourth Amendment preserves common-law protections against federal officials who undertake unreasonable searches and seizures of the people's persons, houses, papers, and effects. But the Fourth Amendment evolves as the common law upon which it is premised evolves. As Justice Scalia wrote: "There is nothing new or surprising in the proposition that our unchanging Constitution refers to other bodies of law that might themselves change."

139 See id. at 1285.
140 See id. at 1267.
141 See Akhil Reed Amar, Fourth Amendment First Principles, 107 HARV. L. REV. 757, 771–78 (1994) (discussing framers' and ratifiers' concern that too-loose standards for issuance of warrants would immunize federal officers from common-law tort actions); Baude & Stern, supra note 136, at 1841 (observing that the Fourth Amendment preserved the States' ability "to define positive law entitlements broadly in order to guard against abuses of their citizens by federal agents"); Michael J. Zydney Mannheimer, The Local-Control Model of the Fourth Amendment, 108 J. CRIM. L. & CRIMINOLOGY 253, 267–70 (2018) (arguing that common-law tort actions were one mechanism among others preserved by the Fourth Amendment of maintaining local control of search and seizure policy).
143 See id. at 40 ("Where . . . the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' . . . .").
While a Fourth Amendment that dynamically incorporates the underlying common law "presents no problem for the originalist," an originalist account of Fourth Amendment search doctrine must still use the framers' and ratifiers' view of the common law in 1791 as the jumping off point. For even if they understood the Fourth Amendment as dynamically incorporating the common law, a deeper exploration into how they viewed the nature of the common law is required. And in 1791, the common law was conceived of as consisting of, and having sprung from, custom.

B. The Common Law as Customary Social Usage

Given the contemporaneous understanding of the Fourth Amendment as a preservation of common law rights as against federal government officials, it is critical to examine precisely what the framers and ratifiers of the Fourth Amendment understood as the common law. For centuries before the framing period, English jurists understood the common law as encompassing—indeed, consisting of—custom. Custom was "grown law," arising organically from the people, who gave it their tacit consent by following and applying it, until it became standardized and uniform, and assumed the mantle of law. Critically, custom was seen as law even before it was ever adopted by statute or judicial decree.

i. The Traditional View of English Common Law as Custom

"[B]efore any clearly articulated system of law-making and law-dispensing has developed, the conduct of men in society is governed by customary rules." This had been recognized as far back as Justinian. As John Davies put it in the early seventeenth century: "[T]he [c]ommon [l]aw[,] of England is nothing else but the [c]ommon custom[,] of the [r]ealm . . . ." Glanvill and Bracton recognized this in the twelfth and thirteenth centuries, respectively, as seen in the titles of their respective treatises: The Laws and Customs of

145 Id.
146 See 1 FRIEDRICH A. HAYEK, LAW, LEGISLATION AND LIBERTY 88, 95, 105 (1973).
147 CARLTON K. ALLEN, LAW IN THE MAKING 28 (2d ed.1930).
149 JOHN DAVIES, 2 SIR JOHN DAVIES' COMPLETE WORKS, VERSE AND PROSE 251–52 (A. B. Grosart ed., 1869); accord Darrell A.H. Miller, The Thirteenth Amendment and the Regulation of Custom, 112 COLUM. L. REV. 1811, 1816 (2012); see also Helmbolz, supra note 148, at 138–39 ("In England . . . . [t]he common law was custom. It was all that existed.").
England and Treatise on the Laws and Customs of the Realm of England.¹⁵¹ Sixteenth-century jurist Christopher St. Germain treated “custom as a source of law” as a constantly recurring theme in his text Doctor and Student.¹⁵²

In the seventeenth and eighteenth centuries, English jurists built upon this view of English common law as having custom at its foundation. Sir Edward Coke reaffirmed and expanded upon this view of the common law through a historical lens as the accumulation of hundreds of years of custom and usage.¹⁵³ This view of the past was used “symbolically” and “metaphorically,” for no one really knew how the common law developed.¹⁵⁴ Still, the idea of “immemorial usage” as the foundation of custom was central to Coke’s view of the law.¹⁵⁵ Where Coke emphasized immemorial usage from a remote past, his pupil John Selden added greatly to this historical view of the law by emphasizing the law’s evolutionary nature.¹⁵⁶ Where Coke had stressed continuity, Selden emphasized change.¹⁵⁷ Selden’s own pupil, Matthew Hale, continued and built upon this conception of the law “as a manifestation of the historically developing ethos, the historical ideals and traditions, the evolving customs, of a people or society whose law it is.”¹⁵⁸ Hale wrote that the common law of England comprised “three ‘formal constituents’: ‘usage and custom, Acts of Parliament, and decisions of the courts


¹⁵² See Helmholtz, supra note 148, at 134 ("What St. German described as ‘general customs of old time used throughout all the realm, which have been accepted and approved by [the English Kings] and all their subjects’ were for him an immediate source of English law.") (quoting ST. GERMAN’S DOCTOR AND STUDENT 45 (T.F.T. Plucknett & J.L. Barton, eds., 1974)).

¹⁵³ See Harold J. Berman, The Origins of Historical Jurisprudence: Coke, Selden, Hale, 103 YALE L.J. 1651, 1686 (1994) (observing that Coke espoused “the theory that the common law [w]as a body of principles, concepts, rules, and procedures that originated in a remote past”); id. at 1681 (noting that Coke’s “historical jurisprudence” was at odds with “both legal positivism and natural law theory”).

¹⁵⁴ Id. at 1687; see also Gerard J. Postema, Classical Common Law Jurisprudence (Part II), 3 OXFORD U. COMMONWEALTH L.J. 1, 21 (2003) (“The history to which Coke and others like him appealed bordered on the mythological.”). For this reason, the (distinctly minority) dissenting view developed by Professor Braybrooke is almost beside the point. He disputed as a historical matter the extent to which law developed from the practices of the people and posited that policy decisions made by judges accounted for the development of the common law far more than custom. See generally Braybrooke, supra note 150. But an originalist account of the Fourth Amendment is concerned with how the framers and ratifiers viewed the relationship between custom and law, not whether their view was historically accurate.

¹⁵⁵ Postema, supra note 150, at 169 (observing that Coke, as well as Davies, “put the notion of immemorial usage at the centre of their conception of common law” (emphasis omitted)); see also Berman, supra note 153, at 1687–89 (“History for [Coke] was not a science but a faith.”).

¹⁵⁶ Berman, supra note 153, at 1695 (“[Selden] carried Coke’s historicism one giant step beyond the conception of an immemorial past and an unchangeable fundamental law to the conception of an evolutionary past and an evolving fundamental law.”).

¹⁵⁷ See id. at 1695–96 (“Selden... reaffirmed the continuity but also emphasized the changes. He stressed development, growth.”); Postema, supra note 150, at 173 (“Selden showed through painstaking historical research that English law had gone through vast changes...”)

¹⁵⁸ Berman, supra note 153, at 1708; see also Postema, supra note 154, at 22 (“[Hale]... maintained that the ‘strength and obligation and the formal nature of a law’ does not rest in any way on its antiquity.”).
of justice.”159 As for the first category, he wrote that “some of th[e] [l]aws have obtain[e]d their [f]orce by immemorial [u]sage or [c]ustom.”160

Even by the time of the framing period, the common law was seen as indistinguishable from custom. Coke, Selden, and Hale’s views of English common law, as the end product of centuries of custom and usage, was espoused during the framing period by William Blackstone.161 Blackstone, whose influence on the framers and ratifiers of the Constitution and Bill of Rights is well documented,162 essentially equated the common law with custom. He famously declared that the common law could be divided into three parts. First, “[g]eneral customs . . . are the universal rule of the whole kingdom, and form the common law, in its stricter and more usual signification.”163 Second, there are “[p]articular customs[] which, for the most part, affect only the inhabitants of particular districts.”164 Finally, there are “[c]ertain particular laws . . . used by some particular courts.”165 Thus, Blackstone equated “general customs” with “the common law, properly so called.”166 Modern scholars continue to equate custom and common law, as Plucknett did when he wrote that prior to the modern age of legislation “the principal element in most legal systems was custom.”167 According to Blackstone, the “general immemorial custom” was the “chief corner stone of the laws of England.”168

ii. The Democratic Foundations of Custom as Law

As Blackstone wrote, custom becomes transformed into law by a process of long social usage that culminates in its universal acceptance in the polity. He wrote that customs that become law properly so-called “receive their binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom.”169 A key requirement for custom to be considered law was its long usage. As Blackstone wrote, “the goodness of a custom depends upon its having been used time out of mind; or, in the solemnity of our legal phrase, time

159 Postema, supra note 154, at 11.
161 See Berman, supra note 153, at 1733.
162 Id. at 1734 n.227 ("Blackstone’s influence in America was perhaps even greater than in England. Edmund Burke stated in 1775 that as many copies of the Commentaries had been sold in the American colonies as in England.").
163 1 WILLIAM BLACKSTONE, COMMENTARIES *67.
164 Id.
165 Id.
166 Id. at *68; see also Carol Rose, The Comedy of the Commons: Custom, Commerce and Inherently Public Property, 53 U. CHI. L. REV. 711, 742 (1986) ("it was a commonplace among British jurispruders that a general custom, the ‘custom of the country,’ is none other than the common law itself.").
167 THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 307 (5th ed. 1956); see also FREDERICK POLLOCK, A FIRST BOOK OF JURISPRUDENCE FOR STUDENTS OF THE COMMON LAW 284 (5th ed. 1923) ("Another use of the term ‘custom’ is to denote rules that once formed an exceptional body of law, but have been adopted within historical times as part of the Common Law.").
168 1 BLACKSTONE, supra note 163, at *73.
169 Id. at *64.
whereof the memory of man runneth not to the contrary.” Its immemoriality, according to Blackstone, gives custom the force of law.171

One purpose served by the long usage requirement was to ensure that the resulting common law was good, true, and pure. For if a maxim or rule could survive for a lengthy period, one could be reasonably assured that it met the requirements for reason. On this view, most often associated with Coke, English law “by many successions of ages ... ha[s] been[] fined and refined by an infinite number of grave and learned men, and by long experience grown[] to such a perfection ... ”172 “[L]aw,” in Coke’s memorable aphorism, “is the perfection of reason.”173

The more practical, and less mystical, reason for a long usage benchmark had to do with consent. If a rule or maxim could survive to be handed down from generation to generation, that was a sign that it had gained the general assent of the community. This justified its nature as binding law.174 In this way, the process of custom attaining the force of law was profoundly democratic. While obviously no votes were taken by the people or their representatives, as with statutory law, the durability and longevity of a custom stood in as a surrogate for these more formal mechanisms.175 Indeed, one could argue that the formation of law out of custom was hyper-democratic. Given the inertia one must overcome to alter or repeal a statute, it might be able to claim only the support of a political moment in time. Custom, by contrast, maintains support across the decades, even generations.176

At the same time, custom was recognized as constantly evolving. Indeed, it appears that the requirement that custom be of “immemorial” vintage was not applied prior to the sixteenth century.177 To the contrary, custom could be
recognized as a constituent of common law even if not immemorially old. Quoting the twelfth-to-thirteenth-century Italian jurist, Azo of Bologna, Plucknett asserted: "A custom can be called long ... if it was introduced within ten or twenty years, very long if it dates from thirty years, and ancient if it dates from forty years." Thus, the custom of the Middle Ages was not unlike the common law of today in that it attempted to balance stability with adaptability to conditions that might change over the course of a few decades.

This recognition that the common law evolved with custom was also democratic in origin and consent-based. That people be ruled by their own hands and not the dead hand of the past, the law must change as custom does to fit the changing needs of the polity. Rules "are refined over time, softened to fit the contours of the community's daily life." In a continuing feedback loop, the rules themselves "shape[] the dispositions, beliefs and expectations of the people." In the balance between continuity and change lay the evolution of custom posing "solutions to the problems of social interaction." Thus, Selden and, particularly, Hale, who emphasized the evolutionary nature of the common law rather than its immemoriality, also rooted the moral force of the law in consent. By accommodating the consent implicit in generations of usage with the current needs of the polity, custom represents the highest value of English liberty: self-government.

iii. The Transformation from Practice to Law

Today's major four-lane thoroughfare might have begun thousands of years ago as a path trod through the woods by mammoths or buffalo in search of water and food. Pre-modern hunters of the large game cut the path ever more clearly and deeply with their footsteps and primitive tools. The path became an artery between native settlements or trading posts. When Europeans took the land, they adopted the path, clearing and smoothing it further for travel by horse and carriage. Finally, the path was paved for use by automobiles and widened to accommodate more traffic.

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178 Id. at 307 (dismissing as "historically inaccurate" the notion that "custom is or ought to be immemorially old").
179 Id. at 308 (emphasis omitted).
180 See id. (noting that in the Middle Ages, customs "develop[ed] and adapt[ed] themselves to constantly changing conditions").
181 Postema, supra note 150, at 175.
182 Id.; see also Postema, supra note 154, at 24 ("The laws are approved or accepted by the whole people in virtue of and manifested in that law's integration ... into their daily lives ... ").
183 Postema, supra note 150, at 175.
184 Postema, supra note 154, at 22.
185 See 1 BLACKSTONE, supra note 163, at *74 ("[T]he ultimate source of the legitimacy of human laws lies ... not only in their correspondence to the will of the legitimate lawmaking authority, but also in their conformity to the consent of the people.").
The transformative process by which custom becomes law is similar. It was summed up in this way by a late seventeenth-century treatise on customary law:

When a reasonable Act once done is found to be good, and beneficial to the People, and agreeable to their nature and disposition, then do they use it and practise it again and again, and so by often iteration and multiplication of the Act, it becomes a Custom; and being continued without interruption time out of mind, it obtaineth the force of a Law.  

Thus, the complex process began with individual practice, as persons living together in a society learn to balance their individual needs with those of the community. As some of these practices become repeated by others, social norms are slowly developed. These social norms, if further adopted and retained, become custom. And, as we have seen, customs that are agreeable across different generations become law. But these customs and norms can attain the force of law well before they are ever expressed in positive law as a statute or the outcome of a litigated case.

In the beginning, there was practice. Custom (and thus law) began not as abstract ideas, but as concrete actions. "The development of law . . . lies in human action." When humans repeatedly face the same or similar environmental stimuli, we start to offer the same response over and over again, as a way to save our time and energy for those more distinctive situations that sometimes arise. Custom thus evolves from practice, and custom is the "interface" between practice and law.

Practice led to imitation by others. The hydraulic pressure of conformity led to widespread adoption of a norm, at least "where no great principle [was]"
involved.”\textsuperscript{194} The impulse to conform one’s actions to the prevailing norms powerfully achieved something close to consensus.\textsuperscript{195} This consensus led to expectations that the norms would be adhered to—“interactional expectancies,” in Lon Fuller’s evocative term\textsuperscript{196}—along with pressures to abide by it and informal sanctions for non-compliance.\textsuperscript{197} In this way, practice became normative and not merely regular or habitual.\textsuperscript{198} This is “the compulsive force of custom.”

This process of practice and imitation was largely automatic. To a great extent, adoption of certain practices over others was not consciously driven.\textsuperscript{200} This makes sense given that these customs and norms were shaped at the societal level, not the personal level, and coordination problems would have hindered any conscious formation and spread of norms.\textsuperscript{201} “In its earliest manifestations, therefore, custom grows by the force of practical example far more than by the impulse of reasoned conviction.”\textsuperscript{202}

On the other hand, conscious choice did play a part in the formation and spread of some customs and social norms.\textsuperscript{203} Sometimes, a custom would “consist of a selection between two indifferent alternatives.”\textsuperscript{204} Once such a selection was made, however, it would be “followed and tend[ed] to become obligatory by repetition.”\textsuperscript{205} Additionally, imitation took place not just at the micro level, among denizens of the same area, but at the macro level, among different areas, as well. For instance, “[w]hen a prosperous village or a newly-founded town wished to secure the franchises of a free borough, or when a borough sought an extension of its liberties, it was natural for the community to look for a model among its more

\textsuperscript{194} Allen, supra note 147, at 60; see also id. at 60–61 (“To be singular in the ordinary matters of use and wont is worth neither the effort nor the discomfort.”).

\textsuperscript{195} Id. at 104 (“[A] force of imitation, quite outside logical and utilitarian factors, exerts a powerful influence over men’s minds . . . .”).

\textsuperscript{196} Fuller, supra note 186, at 9.

\textsuperscript{197} Thompson, supra note 187, at 102 (“Agrarian custom was . . . a lived environment comprised of practices, inherited expectations, rules which both determined limits to usages and disclosed possibilities, norms and sanctions both of law and neighbourhood pressures.”); see also Allen, supra note 147, at 57 (noting that sometimes “practice generates conviction”).


\textsuperscript{199} Allen, supra note 147, at 104.

\textsuperscript{200} Id. at 103 (“In an embryonic state of social life it is not always possible to suppose that the concrete practice of certain customs is inspired by any conscious abstract feeling or motive.”); see also Fuller, supra note 186, at 9 (“[T]he anticipations which most unequivocally shape our behavior and attitudes toward others are often precisely those that are operative without our being aware of their presence.”); Sachs, supra note 198 (manuscript at 25) (“[T]he most powerful rules are the ones we obey without even thinking . . . .”).

\textsuperscript{201} See Allen, supra note 147, at 103 (“The conduct embodied in custom is the corporate action of an aggregation of individuals.”) (emphasis omitted)).

\textsuperscript{202} Id.

\textsuperscript{203} See id. at 57 (“[C]ircumstances often arise in which it is necessary to choose between several equally desirable or undesirable alternatives.”).

\textsuperscript{204} Id. at 104.

\textsuperscript{205} Id.
privileged and flourishing neighbours." In this way, custom spread throughout England.

Critically, custom was treated as enforceable law. True, pressure to conform to custom originally came by way of morals and the imitative pressure noted above, "not from enforcement by a sovereign state." Yet, eventually, customary rules were cloaked with the mantle of law. For example, rules regarding land-holding grew from custom. Rules on security, alienability, and heritability of land all developed as customary rule. By 1135, there was significant enough "development and standardization of custom" in this field that it could properly be called law. These customary rules were fully enforceable in the local courts, further fortifying and perpetuating these customs.

However, affirmation of custom as law in the courts was the exception, not the rule. That is to say, custom generally existed as a form of law even without the imprimatur of a judicial ruling or jury verdict. This is because, then as now, disputes were common, but "only occasionally did [they] arise to the high visibility of legal action." Because custom arises primarily from "convention rather than conflict," custom grows primarily from the people, and only secondarily from the pronouncements of a lawgiver. And, as now, even where cases were brought, they often were disposed of without any legal ruling on the merits. Legal rights and interests, therefore, exist "even prior to . . . formal recognition by the

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206 Id. at 66 (quoting 1 CHARLES GROSS, THE GILD MERCHANT 242 (1890)); see also PLUCKNETT, supra note 167, at 308 ("It is a common sight to see a group of townspeople examine the customs of more advanced communities, choose the one they like best, and adopt it en bloc as their own."); Kiralfy, supra note 150, at 33 (observing that boroughs sometimes adopted new customs by imitating other polities).

207 ALLEN, supra note 147, at 66 ("[C]ustoms originally peculiar to one locality—often customs deeply affecting the citizen's rights of person and property—become widespread throughout the land.") (citation omitted).

208 JOHN HUDSON, THE FORMATION OF THE ENGLISH COMMON LAW: LAW AND SOCIETY IN ENGLAND FROM THE NORMAN CONQUEST TO MAGNA CARTA 20 (1996); see also THOMPSON, supra note 187, at 100 (asserting that custom begins as "unwritten beliefs, sociological norms, and usages asserted in practice but never enrolled in any by-law").

209 See THOMPSON, supra note 187, at 98 ("[C]ustom was sharply defined [and] enforceable at law."); see also ALLEN, supra note 147, at 28 ("[C]ustoms are 'legal' in this sense, that they are binding and obligatory, and the breach of them is a breach of duty."); Holmholz, supra note 148, at 132 ("Custom was not simply a 'background norm.' For many purposes it was treated as binding law.").

210 HUDSON, supra note 208, at 20.

211 Id. at 94–105.

212 Id. at 21.

213 Id. at 105.

214 THOMPSON, supra note 187, at 104.

215 ALLEN, supra note 147, at 30.

216 Id. at 29 ("[C]ustoms . . . are essentially non-litigious in origin. They arise not from any conflict of rights adjusted by a supreme arbiter . . . but from practices prompted by the convenience of society and of the individual . . . "); see also Postema, supra note 150, at 167 ("[L]aw lived in and evolved from the practical interactions of daily life as they surfaced in the common law courts.").

217 See Kiralfy, supra note 150, at 27 ("[M]ost cases, like cases today, were settled out of court, or dropped, or decided on technicalities of proof or procedure, so that there are few 'leading cases' to operate as a logical basis for the system.").
courts."218 Indeed, intercession by a judge was simply seen as an affirmation of customary norms that had already formed, for "it is precisely because judges were intimately familiar with the complex ‘texture of human affairs’... that they were best equipped to bring... disagreements to a reasonable resolution."219 Thus, notwithstanding the claims of Austin220 and Bentham,221 the generally accepted notion of custom in English law is that it “was constantly followed and obeyed before ever judicial authority had pronounced upon it.”222

Finally, the mass of custom throughout the realm was amalgamated and made more or less uniform. Although this did not occur in one fell swoop, and historians disagree on precise dates, all agree that this occurred by the twelfth and thirteenth centuries.223 Specifically, the ascension to the throne of Henry II in 1154 is typically viewed as the beginning of this amalgamation process.224 Prior to that time, “most criminal and civil matters were within local or feudal, and not royal, jurisdiction.”225 Henry II created a “central royal bench of judges,” which eventually evolved into the Court of Common Pleas and the Court of King’s Bench.226 By establishing jurisdiction in these central authorities, Henry II unified

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218 Schauer, supra note 198, at 524.
219 Postema, supra note 154, at 3 (quoting Matthew Hale, Reflections by the Lord Chief Justice Hale on Mr. Hobbes His Dialogue of the Law, in 5 WILLIAM HOLDsworth, A HISTORY OF ENGLISH LAW 503 (7th ed. 1956)).
220 See Schauer supra note 198, at 526 (observing that Austin argued that “[c]ustom is not law by itself. . . but becomes law only upon it being duly adopted by judges . . .” (citing JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 34–36, 141–42, 238–39 (Wilfrid E. Rumble, Cambridge Univ. Press, 5th ed. 1832))). Other positivists, notably H.L.A. Hart and Hans Kelsen, accepted the notion of custom as a source of law even prior to formal adoption by judges or legislators. See id. at 529 (“Hart insists that many norms and sources can have the status of law . . . .” (citing H.L.A. HART, THE CONCEPT OF LAW 97–98 (Penelope A. Bulloch & Joseph Raz eds., Claredon Press, 2d ed. 1994) (1961))); id. (“Kelsen . . . recognized that ‘norms created by custom do not differ radically from norms created by acts of will.’” (quoting Richard Tur, The Kelsenian Enterprise, in ESSAYS ON KELSEN 149, 153 (Richard Tur & William Twining eds., 1986))).
221 See LOUS, supra note 174, at 201–02 (“According to Bentham, spontaneous custom gives rise to legitimate expectations, but cannot create a binding legal obligation until it is legalized by a common law court.” (citing JEREMY BENTHAM, A COMMENT ON THE COMMENTARIES: A CRITICISM OF WILLIAM BLACKSTONE’S COMMENTARIES ON THE LAWS OF ENGLAND 221–23 (1928))).
222 ALLEN, supra note 147, at 28; accord id. at 28 n.1 (“The standard definitions of custom in English law never represent it as anything but fully valid and operative law in itself.”); id. at 85 (“[T]he Austinian doctrine[s] claim] that custom ‘is not law’ until it has been pronounced upon by a Court [is a fallacy]. The exact reverse is the truth. Custom is the first and most essential law... .”); Berman, supra note 153, at 1711 n.161 (“Law . . . is developed first by custom and by popular belief, and only then by juristic activity.” (citing FRIEDRICH CARL VON SAVIGNY, OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE (Abraham Hayward trans., 3d. ed. 1831) (1813))).
223 See HUDSON, supra note 208, at 18 (observing that common law, that is, law common to the entire realm of England, was recognized by the twelfth or thirteenth centuries).
224 See HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 438–41 (1983); HUDSON, supra note 208, at 19 (noting that the standard account is that Henry II centralized English common law (citing 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 137–38 (2nd ed. rev. 1968) (1895); Postema, supra note 150, at 158 (“Historians credit Henry II, in the last third of the 12th century, with introducing the institutional innovations that gave birth to the common law.”)).
225 Id. at 443–44; see also Postema, supra note 150, at 158 & n.7.
the general customs of the realm, essentially creating the concept of English common law. The final step in the process was the codification of some customs into statutory law.

Thus, common and statutory law is the end product of a long, slow, iterative evolutionary process centered around custom and usage. First, individual persons developed methods of accommodating the demands of society with the wants of the individual by adopting practices in certain recurring situations. Second, the most useful and attractive of these practices were imitated and adopted by others while less desirable or productive ones fell by the wayside. Third, through this process of imitation and adoption, practices became widespread and repeated enough to attain the status of custom. At this point, the recognition of custom established rights and interests that were legally enforceable. Finally, those legal rights and interests started to become expressed by courts and legislators. Modern law, then, still encompasses much ancient custom. Importantly, this process is still ongoing.

B. The Persistence of Social Norms as Primordial Law

This evolutionary process—from practice to usage to custom to law—is not just of historical concern. It continues to this day. True, we generally do not perceive it happening on a day-to-day basis. But neither do we perceive life forms evolving nor the earth getting warmer, though we know that these are occurring as well. Methods of addressing the interactions between individuals and society are continually practiced, adopted, repeated, and hardened into expectations that form the basis of legal interests. And, critically, legal interests begin to exist even before they are recognized in our positive law by statutes or judicial decrees.

Custom, of course, continues to exist. It continues as a system of social norms that are “not necessarily recognized by the law, but enforceable by third party sanction or by internal behavioral controls.” Beginning with Robert Ellickson’s
groundbreaking work over twenty-five years ago,234 a vast literature on social
norms has demonstrated the power of these norms as quasi-law.235 Whether readily
enforceable as law, such norms "can be as coercive as any positive law
promulgated by government agents."236 Such norms "can eventually harden into
what one might consider positive law."237 But, again, this hardening of norms into
law can occur well before any recognition by courts or legislatures.238

It is this last insight that is critical to understanding the deep connection
between the "trespass" and the "reasonable expectation of privacy" approaches.
That judges and academics have largely overlooked this connection stems in good
part from the judicial and academic obsession with reported appellate case law. For
most lawyers, if there is no reported case deciding an issue, the question is wide
open. While this is generally true from the standpoint of one contemplating a
course of action that might end up in litigation, it glosses over the extent to which
law exists even without reported appellate decisions. This is not to revive the long
discredited formalist notion that law somehow "exists" in some Platonic realm,
outside of what judges and legislators actually do. Far from it. It is to say, however,
that after custom finds wide enough acceptance through practice to become law,
but before that law ripens into legislation or reported cases, it exists in the practices
and experiences of people living together in a society. The law assigns rights and
responsibilities, authority and obligations, long before these interests and duties are
solidified in litigation and legislation.

To see how, observe how law is enforced on an everyday basis in situations
where black-letter law is clear. First, law is mostly self-executing. I refrain from
having a picnic lunch on my neighbor's front lawn uninvited not because I fear
being sued or prosecuted. Civil litigation, after all, is a time-consuming and costly
proposition. And, if I am otherwise on good terms with my neighbor, I very much
doubt that she will seek to have me prosecuted. I refrain from doing so because
I generally try to conform my behavior to what society expects of me, at least when
my failure to do so significantly infringes on other people's interests. In those
cases, failure to abide by generally accepted norms is met, not simply with a raised
eyebrow, but with opprobrium and ill will. I know that spreading out my blanket

234 See generally ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE
DISPUTES (1991) (exploring the interaction between social norms and legal rules to suggest that people
successfully achieve order by using informal rules to govern themselves).
235 See, e.g., RICHARD MCADAMS, THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS
63–67 (2015); Amitai Etzioni, Social Norms: Internalization, Persuasion, and History, 34 LAW & SOC'Y
REV. 157 (2000); Douglas Litowitz, A Critical Take on Shasta County and the "New Chicago School,"
15 YALE J.L. & HUMAN. 295 (2003); Lior Jacob Strahilevitz, Social Norms from Close-Knit Groups to
Loose-Knit Groups, 70 U. CHI. L. REV. 359 (2003); Cass R. Sunstein, Social Norms and Social Roles,
236 Miller, supra note 149, at 1831.
237 Id. at 1832 n.136; see also Gregory M. Duhl, Property and Custom: Allocating Space in Public
usefulness of custom as a source of law.").
238 Duhl, supra note 237, at 202 ("Members of communities abide by customs as normative and
binding, even though they are neither reflected in positive law . . . nor in the common law." (footnote
omitted)); Sachs, supra note 198 (manuscript at 11) ("Th[e] move from custom to law can happen
without any judge's ruling needed to make it so . . . .").
and pulling out a sandwich on my neighbor’s lawn adversely affects her right to
exclusive use of her property, which could lead to bad blood between us, in a way
that violation of other social norms, such as tending my garden in my pajamas,
does not.

Another reason I refrain from dining al fresco without permission in my
neighbor’s yard has much to do with my neighbor’s legal rights but still has little to
do with litigation. Legal rights can be enforced through self-help. Trespassing on
her lawn not only will give rise to bad blood but also gives her the right to use
ordinary physical force to remove me and I have no legal right to fight back. This
may cause bumps, cuts, and bruises, both to my body and my ego, and could well
harm my picnic blanket and destroy my sandwich.

These enforcement mechanisms of the law—self-execution and
self-help—operate alongside the traditional civil and criminal remedies my
neighbor has to address my incursion. However, these mechanisms operate even
when the law is less than clear and even when there may be no civil or criminal
remedies at all. As Professor Laurent Sacharoff has pointed out, for example, the
Restatement (Second) of Torts distinguishes between actionable and non-actionable
trespasses to chattels.239 While any intermeddling with another person’s property is
a trespass to chattel,240 only a smaller universe of such trespasses, those that
damage or destroy the property or deprive the owner of its use, give rise to a tort
action for damages.241 Yet the recognition of even non-actionable trespasses to
chattel confers significant rights and obligations, such as the right of the property
owner to use force to end such a trespass and the obligation of the trespasser not to
fight back.242 Tort and property law thus assign rights and responsibilities even
without providing for damage actions; rights can be created and respected even
without litigation and reported cases.

This is particularly true of the kinds of low-stakes events—otherwise trivial
trespasses to chattel and real property—that become high-stakes only under
unusual circumstances. Take, for example, ownership rights in balls batted into
the stands at baseball games. Imagine three spectators, Felipe, Jesus, and Matty, sitting
in the stands near each other at a baseball game. At bat is a mediocre player for the
visiting team, someone hitting just south of the “Mendoza Line.”243 The batter hits

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240 RESTATAMENT (SECOND) OF TORTS § 217(b) (AM. LAW INST. 1965) (“A trespass to chattel may
be committed by intentionally . . . intermeddling with a chattel in the possession of another.”).
241 Id. § 218 (positing that a trespasser to chattel is liable to its possessor only if the trespasser
“dispossesses the other of the chattel . . . impair[s] its condition, quality, or value,” deprives
the possessor “of the use of the chattel for a substantial time,” or the possessor suffers bodily harm “or harm
is caused to some person or thing in which the possessor has a legally protected interest”); see also
Sacharoff, supra note 239, at 906–07.
242 Sacharoff, supra note 239, at 907 (citing RESTATEMENT (SECOND) OF TORTS § 217 cmt. a (AM.
LAW INST. 1965)).
243 For those who are not baseball aficionados, the “Mendoza Line,” named for former major league
shortstop Mario Mendoza, is a .200 batting average, which is popularly thought to be the cutoff for any
player to remain in the major leagues. See Chris Landers, How Did Mario Mendoza Become a
Shorthand for Batting Futility?, MLB.COM (May 22, 2018, 8:19 AM), https://www.mlb.com/cut4/how-
did-the-mendoza-line-become-an-mlb-term/c-277392972 [https://perma.cc/9PA9-SKAQ]. Thus,
a lazy foul ball into the stands in the direction of our three fans, and they all go for the ball. Jesus, standing between the other two, grasps the ball and momentarily has it under his control, but just as he grasps it, Matty, in a bona fide effort to catch the ball, jostles Jesus enough so that the ball pops out of his hands. Felipe then grabs the ball and maintains control over it. Who owns the ball?

Prior to about fifteen years ago, one could search the case reports far and wide without finding an answer to this question. Is that because this issue just never arose? That seems highly unlikely. Well over 200,000 Major League Baseball games have been played. It has been estimated that between 2.44 and 2.7 foul balls enter the stands at a baseball game every inning. Assume that the average baseball game lasts 8.3 innings, to account both for games won by the home team before its last at-bat and for rain-shortened games. Based on a conservative estimate of 2.5 foul balls per inning and 200,000 games, about 4.15 million foul balls have been hit into the stands at Major League Baseball games. If a scenario similar to the one I have described occurs only once every thousand times a foul ball enters the stands, again a conservative estimate, there should have been about 4,150 disputes over foul balls that involve such a fact pattern. Where are the reports of all of these lawsuits?

The answer, of course, is that people do not generally sue over foul balls, particularly those hit by nonentities. While people will instinctively go for a ball that is hit in their direction, and will make reasonable efforts to snag a souvenir, most are unwilling to go to court when things do not break their way. Imagine, for example, what Jesus might do in the above scenario. He might just let it go. Or he might try to explain to Felipe that he first laid hands on the ball, so it is his. Felipe, for his part might accommodate Jesus in his contention that the ball is actually his, or he might firmly refuse to turn the ball over. Either way, the dispute, to the extent that there is one, is unlikely to go further than the grandstand.

Now, ramp up the stakes. Imagine that the ball is not a foul hit by some nonentity but Barry Bonds's record-breaking 73\textsuperscript{rd} home run ball, hit on Oct. 7, 2001, estimated at the time to be worth upwards of $1 million. That occurrence, someone hitting "just south of the Mendoza Line"—just below .200—may not last very long as a major league ballplayer.


\[ \text{See Bob Gorman, How Many Foul Balls Enter the Stands?, } \text{DEATH AT THE BALLPARK (Oct. 6, 2010), https://deathattheballpark.wordpress.com/2010/10/06/how-many-foul-balls-enter-the-stands/} \]

\[ \text{This, of course, is a conservative estimate because of the frequency of games that go into extra innings.} \]

\[ \text{See Eric A. Posner, Law and Social Norms 12 (2000) ("[L]egal proceedings are costly and clumsy, so people cannot rely on the law to solve day-to-day cooperative problems."). The definitive law review article on this topic, Paul Finkelman, Fugitive Baseballs and Abandoned Property: Who Owns the Home Run Ball?, 23 CARDOZO L. REV. 1609 (2002), does not cite a single case of any kind involving a dispute over a ball—foul or otherwise—hit into the stands.} \]

\[ \text{See Popov v. Hayashi, No. 400545, 2002 WL 31383731, at *1 & n.1 (Cal. Super. Ct. Dec. 18, 2002). Ultimately, the ball sold for $450,000. See Ira Berkow, 73rd Home Run Ball Sells for $450,000,} \]
which resulted in an incident not unlike the story of Jesus, Matty, and Felippe (though involving many more actors) famously generated a lawsuit, *Popov v. Hayashi*.249 The court initially had to decide an issue of first impression: when does a fan obtain possession of a ball hit into the stands?250 Plaintiff Popov, who momentarily had control of the ball and lost it when other fans besieged him, argued “that possession occurs when an individual intends to take control of [the] ball and manifests that intent by stopping the forward momentum of the ball whether or not complete control is achieved.”251 Defendant Hayashi, who ultimately obtained full control of the ball, predictably “argue[d] that possession does not occur until the fan has complete control of the ball.”252

Because there was no case law on this precise issue, one might think that the court was writing on a clean slate. However, this would be an error. There is, in fact, a “common law of baseball,” as it were,253 and it is based on custom. Although there have been cases involving contested claims of possession in other contexts,254 the court found these of limited utility because property rules “are influenced by the custom and practice of each industry.”255 In agreeing with the defendant’s position, the court focused on the norms of baseball fandom: “The custom and practice of the stands creates a reasonable expectation that a person will achieve full control of a ball before claiming possession.”256 It was only a short step from recognition of this norm to creation of a parallel legal rule.257

As with our baseball analogy, litigation is not the most likely byproduct of low-level intrusions upon security of persons or property by private citizens. This explains why Justice Alito’s dissent in *Jardines v. Florida*258 misses the mark. Again, in that case, the Court held that bringing a drug dog to the front door of a house violates the Fourth Amendment because it involved an unconsented-to, physical intrusion onto property.259 The court reasoned that license could not be implied because there is no accepted customary social practice of approaching the front door of a home to seek information other than by knocking and speaking to an occupant.260 Justice Alito complained that any prohibition on this practice was

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249 *Popov*, 2002 WL 31833731.

250 See id. at *3.

251 Id. at *5.

252 Id. at *4.

253 The phrase “common law of baseball” originates from *Finkelman*, supra note 247, at 1621–24. However, Professor Finkelman uses it to discuss the less controversial proposition that baseball fans may keep balls hit into the stands. Id.

254 See *Popov*, 2002 WL 31833731 at *5 (citing “cases involving the hunting or fishing of wild animals [and] the salvage of sunken vessels” (footnotes omitted)).

255 Id.

256 See id.

257 See id. (“There is no reason for the legal rule to be inconsistent with that expectation.”). The court went on, however, to find that the assault on Popov that arguably prevented him from maintaining possession of the ball also had to be taken into account. See id. at *6–7.


259 Id. at 11–12 (majority opinion).

260 Id. at 7–10.
wholly absent from "the annals of Anglo-American jurisprudence." As Justice Alito put it: "If bringing a tracking dog to the front door of a home constituted a trespass, one would expect at least one case to have arisen during the past 700 years. But the Court has found none." But this complaint proves too much. Justice Alito, after all, was unable to point to any decision within the last 700 years permitting the bringing of a tracking dog to the front door of a private home. One possibility, of course, is that the custom permitting this conduct has been so well established in every English-speaking jurisdiction for the past eight centuries that no one ever bothered to challenge it. Another possibility is that the custom forbidding such conduct is so clear that everyone abides by it. But neither seems likely. It seems far more likely that the conduct has been practiced sporadically since Magna Carta, it has likely been objected to on occasion, and these objections may have even ripened into litigation in a handful of cases, but no litigation resulted in any reported cases. Only the legal profession's obsession with reported appellate decision can explain Justice Alito's facile conclusion that, because neither side could find a reported case, not even "one case . . . has arisen during the past 700 years."

C. Everything Old is New Again: The Trespass Test As the Expectations Test

The Court's two recent cases in which it supposedly reintroduced the "old" trespass provide excellent examples of how that trespass test operates much like the Katz expectations test but in a different guise. In both United States v. Jones and Florida v. Jardines, there was a literal, physical intrusion onto private property for the purpose of seeking information: in Jones, a GPS transmitter was placed surreptitiously on an automobile; in Jardines, police took a drug-sniffing dog to the front door of a home to detect drugs within. Given these clear physical intrusions, the real question lay elsewhere. The main issue in Jones was, in essence, whether the placement of the device was de minimis, while Jardines came down to whether there was implicit consent to the intrusion.

But these issues of de minimis intrusion and implied license boil down to questions about social expectations, understandings, and norms. For instance, one could argue that the placing of the GPS device on the vehicle in Jones while it was parked in a public lot, although a technical physical intrusion, was no greater an intrusion than the common practice of placing a restaurant take-out menu under the car's windshield wiper. Whether the latter practice is acceptable can be answered only with respect to prevailing social norms. There might be a strongly held belief that such behavior is improper, which could stem from (1) the abridgement of

261 Id. at 16 (Alito, J., dissenting).
262 Id. at 23.
263 See Loux, supra note 174, at 184 ("Disputes over custom reached the common law courts when the property right at issue was of such a value that a party was willing, or able, to undertake the expense of litigation.").
264 Jardines, 569 U.S. at 23 (Alito, J., dissenting).
266 Jardines, 569 U.S. at 3-4.
people's rights to exclusive use of their chattels, (2) the annoyance people feel in having to remove the offending menus from their windshields before driving, (3) the increased littering that takes place when the removed menus are not properly disposed of, or (4) any combination of these.

It is unlikely that such a norm will have ever hardened into case law—what are the odds that an aggrieved driver will sue over a take-out menu, much less take the issue on appeal where it might result in a reported decision?—but it is recognizable as a norm nonetheless. For example, restaurants might abide by this informal norm for fear of losing business or simply out of a desire to abide by prevailing societal norms. Such a norm might even give rise to enforceable legal rights and obligations despite an absence of case law. For example, when a driver catches the restaurant worker in the act and demands that she desist, and she refuses, the car owner might be privileged to use reasonable force to end the intrusion, such as by grabbing the offender's arm. By contrast, absent such a cognizable right, one might have to wait until after the menu is placed and then remove it; grabbing the arm of the person placing the menu might be considered a battery in tort or even a minor form of criminal assault.

But whatever the reasons behind a norm opposing such a practice, and whatever form it takes—societal disapproval, cognizable right, or criminal or civil ordinance—car owners within such a regime would expect not to have strangers place objects on their cars without their consent. If so, the rule established by Jones was correct—even a de minimis interference with property violates societal norms and is therefore a search if undertaken in order to gather information. On the other hand, car owners might take a more laissez-faire approach, allowing de minimis interference with property that does not damage it or lessen its value. If so, then the rule established by Jones is more doubtful.267

Thus, the "trespass" question at the heart of Jones can be answered only in terms of societal norms, understandings, and expectations surrounding de minimis intrusions on personality. That is to say, the analysis in cases that, like Jones, involve physical intrusions to personal property devolve into a very Katz-like methodology. A court must determine to what extent individuals expect to have their property tampered with by other members of society. This question can be answered only by reference to prevailing social norms, whether or not reflected by positive law.

Seen in this light, Jones is virtually indistinguishable from Bond v. United States, despite the fact that Jones was decided under the "trespass" rubric268 and Bond under the "reasonable expectation of privacy" test.269 Recall that the Court in Bond held that bus passengers had a reasonable expectation that their soft luggage would not be physically manipulated in an exploratory manner by other passengers.

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267 Of course, the GPS device differs from the menu in that the former is placed surreptitiously, and one might object to secret, de minimis interferences with chattel even if one has no objection to de minimis interferences generally. The point is that whether placement of the GPS device was a Fourth Amendment search begins with societal norms about de minimis intrusions on personal property, though it may not end there.

268 Jones, 565 U.S. at 404–05.

so that when a police officer did so for the purpose of discovering information, he conducted a search.\textsuperscript{270} Like Jones, Bond involved what one might deem a de minimis intrusion on personal property, one that neither damaged it nor detracted from its value.\textsuperscript{271} And, as in Jones, the Bond Court held that even some de minimis intrusions violate widely shared social norms so that, when conducted to discover information, they constitute searches.\textsuperscript{272}

At the same time, Bond demonstrates how the societal norms that undergird the Katz test do not necessarily boil down to the subjective preferences of a majority of the Supreme Court.\textsuperscript{273} To see why, imagine that the duffel bag in that case had been massaged forensically by another bus passenger rather than a police officer, and that Bond had caught her in the act. One would suppose that our hypothetical Bond might have every right to demand that she stop, and that he further might have every right to use force if she persisted.\textsuperscript{274} One could reach this conclusion even if they could find no case on point declaring a right to have one’s luggage free from exploratory manhandling, whether in a civil or criminal litigation against the offending manhandler, or in a civil or criminal action against the owner for assault, on his defense of property claim.

Likewise, and perhaps more obviously, Jardines devolves into questions about societal expectations. What divided the Court was not whether there was a physical intrusion into a constitutionally protected area for the purpose of gathering information: all agreed that the police officer and his canine companion breached the curtilage of a private home in order to detect odors coming from within.\textsuperscript{275} The
only issue was whether the breach was implicitly consented to, given the fact that, by having a walkway leading up to his front door, Jardines implicitly licensed others, including strangers, to travel the route to his front door. Resolution of that issue hinged entirely on societal norms, customs, and understandings, the same touchstone of the Katz test.

The Court began its discussion by quoting language from its 1922 decision in *McKee v. Gratz* that “[a] license may be implied from the habits of the country.” It acknowledged that customarily there is an implicit license for strangers “to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave.” But, it continued, there is no customary license to approach the front door of a house via the front path and refrain from knocking, and instead “explore the area around the home in hopes of discovering incriminating evidence.” For his part, Justice Alito in dissent agreed that whether a license could be implied hinged on social customs and norms. He cited cases for the propositions that it is not customary to visit another’s home in the dead of night, and that “an invitation [can be] implied from . . . custom.” He merely disagreed that the police in *Jardines* went against the grain of these societal customs and norms. And he provided his own examples of such customs and norms permitting visitors to approach the door without knocking in order to seek information, such as the motorist approaching to discern a house number not easily observable from the roadway. Thus, what separated the majority from the dissent in *Jardines* was their respective discernment of prevailing social norms and customs relating to visiting a stranger’s home.

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276 Id. at 8 (“As it is undisputed that the detectives had all four of their feet and all four of their companion’s feet firmly planted on the constitutionally protected extension of Jardines’ home, the only question is whether he had given his leave (even implicitly) for them to do so.”).
277 See id. (“[T]he knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds.” (quoting Breard v. Alexandria, 341 U.S. 622, 626 (1951)) (alteration added)).
278 Id. (quoting *McKee v. Gratz*, 260 U.S. 127, 136 (1922) (alteration added)). *McKee* had involved whether there was an implicit license to trawl for mussels in a riverbed on another’s property. *McKee*, 260 U.S. at 134–36.
279 *Jardines*, 569 U.S. at 8.
280 Id. at 9. The use of the word “incriminating” here is unfortunate. Given that the touchstone is what we expect of private citizens, not just the police, it should not matter whether the information sought is incriminating, exculpating, or neutral. The Court seemed to make this clear in other passages from the critical portion of the opinion. See, e.g., id. at 9 n.3 (“We think a typical person would find it a cause for great alarm . . . to find a stranger snooping about his front porch with or without a dog.” (internal quotation marks and emphasis omitted)); id. at 9 n.4 (“[N]o one is impliedly invited to enter the protected premises of the home in order to do nothing but conduct a search.”); id. at 9 (opining that no implied license would include a “visitor exploring the front path with a metal detector”).
281 Id. at 20 (Alito, J., dissenting) (citing State v. Cada, 923 P.2d 469, 478 (Idaho App. 1996)).
282 Id. at 19 (quoting *Crown Cork & Seal Co. v. Kane*, 131 A.2d 470, 473–74 (Md. 1957) (alteration added)).
283 See id. at 20–21 (“As I understand the law of trespass and the scope of the implied license, a visitor . . . is not necessarily required to ring the doorbell, knock on the door, or attempt to speak with an occupant.”).
284 Id. at 21.
The third-party consent cases, and particularly *Georgia v. Randolph*, run directly parallel to this reasoning, despite the fact that they were decided pursuant to a Katzian methodology and *Jardines* is a "trespass" case. What separated the majority and the dissent in *Randolph* was their respective understanding of social norms and customs that govern when one of two co-occupants consents to entry by a third party and the other is present and objects. The majority held that the objecting occupant's refusal to consent trumped the putative consent provided by the other occupant, while the dissent would have held the other way around.

At its foundation, *Randolph*, like *Jardines*, is a case about license: does a third party have license to enter premises when one occupant consents and one objects? And as in *Jardines*, the question can be answered only in terms of prevailing social norms. The *Randolph* Court began with the observation that co-occupants typically operate under certain understandings "about their common authority when they share quarters." One of those understandings is that "any one of them may admit visitors, with the consequence that a guest obnoxious to one may nevertheless be admitted in his absence by another." However, the Court wrote, understandings change when the objector is present. Where one occupant has invited the guest inside but another is standing there and "saying, 'stay out' . . . no sensible person would go inside," absent "some very good reason." The "customary social understanding" under those circumstances, then, is that there is no license to enter. The point is not that the *Randolph* Court discerned that "customary social understanding" correctly. Maybe, maybe not. The point is that, wrong or right, the Court's use of social norms and customs to discern whether there was a license to enter the *Randolph* home is virtually indistinguishable from the use of social norms and customs to discern whether there was a license to approach the Jardines home. *Randolph* also appealed to the mutually constitutive nature of social norms and social practice when the majority surmised that "[w]ithout some very good reason, no sensible person would go inside under those conditions." The Court thus posited that guests would generally abide by the objecting occupant's wishes. This was reflective of the social norm in place. In turn, general acquiescence to this norm confirms and fortifies the norm to the point where it might have matured into a cognizable legal right.

Further, as with *Bond*, *Randolph* shows us that these prevailing social norms often harden into cognizable legal rights even without reported appellate decisions. Imagine, for example, that the person requesting entry in *Randolph* had not been a police officer but instead a friend of Mrs. Randolph's. Had Mrs. Randolph invited her friend inside the house, and had Mr. Randolph objected, and had the friend...

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286 Id. at 113–115; id. at 141–42 (Roberts, C.J., dissenting).
287 Id. at 113–115 (majority opinion); id. at 141–42 (Roberts, C.J., dissenting).
288 Id. at 111 (majority opinion).
289 Id.
290 Id. at 113.
291 Id. at 121.
292 Id. at 113.
293 Id. at 114.
entered, would the friend be civilly or criminally liable for trespass? And would Mr. Randolph have been within his rights to forcibly remove the guest? If the answer to either question is "yes," then the result in *Randolph* is probably correct. If the answer is "no," then the dissent in *Randolph* probably had the better view. Unfortunately, neither the majority nor the dissent cited any cases in which this issue arose, either in a civil or criminal case for trespass against the arguably encroaching guest or, more likely, a civil or criminal case against the objecting owner for the potentially unjustifiable assault. But just because there may not be any reported appellate decisions does not mean that there is no law.

In sum, what connects the "reasonable expectation of privacy" cases and the "trespass" cases is far stronger than what separates them. Under both rubrics, the Court has looked to prevailing social norms and customs to determine the scope of the Fourth Amendment. Each framework has as its touchstone customary social understandings governing individual interests in security from intrusions by other private individuals upon their persons and property.

III. TWO IMPLICATIONS OF THE POST-JONES SYNTHESIS: UNIFICATION AND DECENTRALIZATION

At least two implications flow from the central insight that customary social usage is really at the heart of both the "reasonable expectation of privacy" standard and the "trespass" test. First, one can articulate a unified approach to the Fourth Amendment search question: a Fourth Amendment search occurs when, for the purpose of gathering information, government agents act contrary to law, broadly conceived—that is, law in whatever stage of evolutionary development—protecting us from intrusion by private actors in our persons, houses, papers, and effects. Breach of positive law is thus sufficient but not necessary to make out a Fourth Amendment search under those circumstances. Second, the pursuit of uniform national rules on what constitutes a Fourth Amendment "search" is misguided. Societal norms regarding security from private intrusions will sometimes vary from place to place. Decentralizing Fourth Amendment search doctrine is also more consistent with the framers' and ratifiers' vision of the Fourth Amendment as a reservation of local control of federal search-and-seizure policy. In short, the Fourth Amendment search question should be unified rather than dichotomous, but decentralized rather than monolithic.

A. Unifying the Fourth Amendment Search Inquiry

Cases decided under either the "reasonable expectation of privacy" approach or the "trespass" approach come down to the same essential touchstone: social norms governing security from private intrusions. Accordingly, there is no reason for the courts to continue to pretend that these are two separate approaches. Instead, both are encompassed by a single, easily-stated standard noted above: a Fourth Amendment search occurs when, for the purpose of gathering information, government agents act contrary to law, broadly conceived—that is, law in whatever
stage of evolutionary development—protecting us from intrusion by private actors in our persons, houses, papers, and effects.

Pursuant to this approach, violation by government officials of positive law in their quest for information is sufficient but not necessary to make out a Fourth Amendment violation. It is sufficient because a violation of positive law could have formed the basis for a common-law tort suit in 1791. Thus, a positive-law-based approach is close to an originalist account of Fourth Amendment search doctrine, even one that is premised on the continuing evolution of tort law. But a violation of positive law is not necessary to make out a Fourth Amendment search because, as has been shown, custom and norms can attain the status of law even before they are engrained in what we might recognize as positive law. Thus, the “positive law model” of Fourth Amendment searches, comprehensively set forth recently by Professors Will Baude and James Stern, does not quite seem to capture all government conduct that should be considered searches.

Baude and Stern argue that a Fourth Amendment search has occurred when “government officials have engaged in an investigative act that would be unlawful for a similarly situated private actor to perform.” This could occur in either of two circumstances where governmental officials seek to obtain information: first, where they do so in violation of “a generally applicable law” governing private conduct; and second, where, in doing so, they take advantage of a special governmental exemption from such a law.

The “positive law model” is a good start, and superior to current law. It avoids much of the indeterminacy of the “reasonable expectation of privacy” approach. It also has the benefit of keeping easy cases easy. Take, for example, California v. Greenwood, in which police had rummaged through the defendant’s trash to find incriminating evidence. The Court presumed to discern the sensibilities of the average American in determining that he or she has no reasonable expectation of privacy in trash. But there was no need to take such a metaphysical journey. The people of the State of California had already determined, in their constitution, as interpreted by the state courts, that government officials were forbidden from engaging in this activity. Local ordinances extended that same prohibition to private citizens. In that case, the social norms of the community had hardened into positive law against the practice, and the

294 See generally Baude & Stern, supra note 136.
295 Id. at 1825; see also Note, The Fourth Amendment’s Third Way, 120 HARV. L. REV. 1627, 1632 (2007) (arguing that “what is reasonable” under the Fourth Amendment “is that which is lawful under state law,” and “inversely, what is unreasonable is that which is unlawful under state law”).
296 See Baude & Stern, supra note 136, at 1833 (clarifying that “[a] search requires an action generally likely to obtain information.”).
297 Id. at 1825–26, 1831.
298 See id. at 1852 (“Rather than divining social understandings . . . the positive law model calls for the bread and butter of the legal profession—doctrinal analysis.”).
300 See id. at 39–43.
301 Id. at 43 (citing People v. Krivda, 486 P.2d 1262 (Cal. 1971)).
government conduct would have been considered a search pursuant either to Baude and Stern’s approach,303 or to mine.304 But the “positive law” approach apparently would not cover violations of those social norms that have not yet solidified into legislation or common-law decisions. It is unclear, for example, what Baude and Stern would say about Bond v. United States.305 Recall that there the Supreme Court held that a search had occurred when a government agent physically manipulated Bond’s soft-sided luggage in an invasive manner to determine if it contained drugs.306 Under the approach advocated in this Article, this was a search if it would have violated an established societal norm for a private person to have done the same. Recall that the Restatement (Second) of Torts would likely consider this a non-actionable tort.307 Some language used by Baude and Stern suggests that their positive law model would hold this to be a search. For example, at one point, they write that the question is whether “the government actor [has] done something that would be tortious, criminal, or otherwise a violation of some legal duty?”308 However, they later define a legal duty in terms of some “prohibitory legal provision[, whether legislative, judicial, or administrative in origin.]”309 This language does not support the idea of leveraging a non-actionable tort, not otherwise recognized in law, into a Fourth Amendment search. That it is non-actionable means that few, if any, lawsuits would arise from it, so there might be no judicial decision for the object of the government conduct to point to. Thus, what the positive law model would do with a case like Bond hinges on what Baude and Stern mean by “positive law.” If they mean a strictly Austinian approach whereby positive law comes into being only with a decree by a sovereign entity,310 then there may well have been no search in Bond. If they contemplate a more generous, Hartian approach to positive law,311 then there likely was a search in Bond. By contrast, an approach that recognizes customs and social norms as potential sources of legal rights and interests generates no such ambiguity.

At the same time, the Baude & Stern approach can sweep too much conduct into the “search” column if the positive law at issue has no connection to security in our “persons, houses, papers, and effects.” As Professor Richard Re noted, “the positive law model is triggered . . . when a legal violation occurs ‘in the course’ of

303 See Baude & Stern, supra note 136, at 1881–82 (discussing Greenwood).
304 Or to Justice Gorsuch’s. He recently critiqued Greenwood as an example of how the Katz approach has failed, and argued in favor of an approach that more explicitly relies on positive law. See Carpenter v. United States, 138 S.Ct. 2206, 2266 (2018) (Gorsuch, J., dissenting) (observing that most people would not approve of “a neighbor rummaging through their garbage,” and that this expectation coalesced into positive law in California).
306 Id. at 335–36.
307 See supra text accompanying notes 239–242.
308 Baude & Stern, supra note 136, at 1825 (emphasis added).
309 See id. at 1833.
310 See AUSTIN, supra note 220, at 142 (equating positive law with the commands of the sovereign).
311 See Schauer, supra note 198, at 528 (“For Hart, a rule of recognition could, but need not, recognize custom as law, and more specifically as law existing prior to judicial application.”).
a search — but is that requirement temporal, causal, or purposive?" 312 Suppose, for example, that a police officer is carrying a through-the-wall imager, like those discussed in *Kyllo v. United States*, that can make out objects in the house through opaque walls. 313 Suppose further that possession of such a device has been banned by local law. Our officer walks up to someone’s front door in the middle of the day and knocks, and immediately smells the distinctive odor of burning marijuana. A literal understanding of the Baude & Stern approach would indicate that a search has occurred, since a positive law violation—possession of the imager—occurred “in the course of” the conduct. 314 But because there is no nexus between the illegal possession of the device and the security of the home, this violation of positive law should not be deemed sufficient to make the conduct a search. If, on the other hand, the officer were to use the illegal device to determine who or what was in the home, even if she did so from beyond the curtilage, a search has occurred: the officer has violated a law in a way that diminishes our security in our houses from intrusion by other private persons.

This is not to say that such an approach would not encounter difficult cases. If custom can become law even prior to judicial pronouncement, when exactly does that occur? Down the long road from practice to imitation to custom to law, enforceable legal interests come into being at some point. But that point will be hard to pin down with precision. For example, in *Florida v. Jardines*, the Court split 5-4 on whether there is an implied license to come to the front door of someone’s home, refrain from knocking, and search the porch for evidence for a brief period of time. 315 Recognizing that that issue is no different from those raised in most cases decided under the reasonable expectation of privacy test is an important step. However, that view, in and of itself, gets us no closer to an answer. But, then again, neither does the positive law model. Baude and Stern argue that the *Jardines* Court should have looked to “the law of Florida as of the time that [the drug dog] sniffed around the porch.” 316 Fair enough. But, if Justice Alito was correct that there was no case on point in Florida (or anywhere else), 317 the positive law model also gives us no answer.

There is, however, a solution for cases such as *Jardines*, where there is no statute or judicial pronouncement on point and the question of customary social usage is a close one. It is a solution that is entirely consistent with the view of common law as the culmination of custom. It is the same tried-and-true mechanism familiar to centuries of common-law development: jury-decision-making. Where

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313 *Kyllo v. United States*, 533 U.S. 27, 36 n.3 (2001) (“The ability to ‘see’ through walls and other opaque barriers is a clear, and scientifically feasible, goal of law enforcement research and development.”).

314 See Re, supra note 312, at 315 (providing similar examples).


316 Baude & Stern, supra note 136, at 1836.

317 See *Jardines*, 569 U.S. at 23 (Alito, J., dissenting).

318 In all fairness, Baude and Stern recognize this point. See Baude & Stern, supra note 136, at 1850 (“[The positive law model] is only as predictable as the underlying positive law . . . .”).
legal standards are stated in generalities, such as the negligence standard in tort, we have historically trusted juries to apply these abstract standards to the concrete facts of actual cases. It is entirely consistent with this history to ask juries to draw lines when it comes to contestable assertions of infringement of security in our "persons, houses, papers, and effects," and to separate mere annoyances that must be tolerated from true abridgments of incipient legal interests. Such a practice is also true to the original understanding of the Fourth Amendment, which largely depended on juries to enforce search-and-seizure constraints on federal agents.

B. Decentralizing the Fourth Amendment Search Inquiry

As shown above, the "reasonable expectation of privacy" test and the "trespass" test both use as their touchstone customary social understandings. Irrespective of whether those understandings have evolved into positive law or remain at the level of norms, those understandings sometimes differ by State, and even by locality. Incorporating this type of differentiation into the Fourth Amendment would be consistent both with the likely views of the framers and ratifiers of the Fourth Amendment that local law would continue to govern search-and-seizure policy and with the ancient English common law recognition of local custom as law. One might say that like all politics, all searches—or at least virtually all—are local.

While the "trespass" and the "reasonable expectation of privacy" cases come from different directions, they do agree on at least one point: they manifest a distinct aversion to having the Fourth Amendment search inquiry hinge on local conditions. The de-coupling of Fourth Amendment search doctrine from local positive law did not begin with Katz v. United States. It showed up no later than Olmstead v. United States, in which the Court cared not one whit about the fact that the federal agents there had committed a criminal wiretapping offense under the laws of Washington. Indeed, across decades of cases, we see an almost fetishistic obsession with national uniformity: the Silverman Court's caution—twice repeated in as many pages of the U.S. Reports—that it was not calibrating the Fourth Amendment search question to "local law", the Greenwood Court's back-of-the-hand rejection of the idea that the Fourth Amendment search question

319 U.S. CONST. amend IV.
320 Ronald J. Bacigal, Putting the People Back into the Fourth Amendment, 62 GEO. WASH. L. REV. 359, 360–61 (1994). This idea is explored more fully infra text accompanying notes 343 to 355.
321 See supra Section II.D.
322 See Baude & Stern, supra note 136, at 1858 ("The Supreme Court... has at times scoffed at the idea that Fourth Amendment protections would 'vary from place to place..." (quoting Virginia v. Moore, 553 U.S. 164, 176 (2008) (alteration added)).
323 See 389 U.S. 347, 370 (1967) (Black, J., dissenting) ("The majority's decision here relies heavily on the statement... that the Court "need not pause to consider whether or not there was a technical trespass under the local property law..." (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)).
might "depend[] on the law of the particular State";\(^{326}\) and the \textit{Jardines} Court's punctilious avoidance even of the use of the term "trespass."\(^{327}\)

But if the search question really boils down to social norms, then this obsession with national uniformity is misguided.\(^{328}\) First, at the time of the framing, custom was thought to sometimes differ by locale. The treatment of general custom as common law is a big part of the story of the development of the common law, but it is only a part. Some customs were strictly local in nature. Blackstone recognized this early on in the third section of his Commentaries, entitled "Of the Laws of England."\(^{329}\) He wrote that the unwritten law of England "includes not only general customs, or the common law properly so called; but also the particular customs of certain parts of the kingdom."\(^{330}\) According to Blackstone, even after the bulk of common law was aggregated and unified, "particular counties, cities, towns, manors, and lordships, were very early indulged with the privilege of abiding by their own customs."\(^{331}\) These local customs often spring from, and are preserved because of, local conditions not generally shared.\(^{332}\)

And even after custom matures into common law, common law in the United States turns out not to be so "common" at all. With fifty States, we potentially have at least as many versions of the common law. Proponents of a positive law model for Fourth Amendment searches embrace the idea that what is a search in one State might not be a search in another.\(^{333}\) After all, the social norms that are reflected in positive law will often differ by State.\(^{334}\) Baude and Stern tout this as a Brandeisian benefit\(^{335}\) of their positive law model: "The positive law model can . . . draw on the advantages of decentralization within a federal system. Different jurisdictions can experiment with different approaches to individual issues, learning from one


\(^{327}\) Florida v. Jardines, 569 U.S. 1, 9 (2013); see also Baude & Stern, supra note 136, at 1835 (observing that Jones and Jardines "treated the Fourth Amendment as borrowing the general look and feel of trespassory actions, not as formally incorporating the background law of property").

\(^{328}\) But see Wayne A. Logan, Fourth Amendment Localism, 93 IND. L.J. 369, 408-15 (2018) (critiquing the view that Fourth Amendment issues should be determined locally).

\(^{329}\) 1 BLACKSTONE, supra note 163, at *63.

\(^{330}\) Id. (emphasis omitted).

\(^{331}\) Id. at *74.

\(^{332}\) See ALLEN, supra note 147, at 56-57.

\(^{333}\) Baude & Stern, supra note 136, at 1874 ("[A]pplication of the positive law model will frequently be . . . jurisdiction-specific . . . ."); Note, supra note 295, at 1645 ("[I]f the goal is to reflect social convention accurately then the doctrinal test should recognize interstate differences."); see also Carpenter v. United States, 138 S.Ct. 2206, 2270 (2018) (Gorsuch, J., dissenting) (suggesting an approach whereby the Fourth Amendment search inquiry depends on part on "state-created rights"). But see Re, supra note 312, at 321 (criticizing the positive law model for making "Fourth Amendment rules . . . jurisdictionally variable").

\(^{334}\) See Note, supra note 295, at 1645 ("It is likely that commonly held understandings about privacy do indeed differ by state, and dynamic incorporation would allow the Fourth Amendment to reflect these nuances.").

\(^{335}\) See New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country.").
another or fashioning the legal practices best suited for their particular conditions.  

But more important than policy considerations is the fact that the framers and ratifiers of the Fourth Amendment, or at least the Anti-Federalists who demanded a Bill of Rights, understood the common law as differing by State. They saw the Fourth Amendment as a method of asserting local control of search-and-seizure policy as against the new central government by requiring that federal agents follow state law when searching and seizing. Among other methods of doing this, the Amendment preserves common-law tort actions against federal officials for violating local norms when they search and seize. These tort actions were based on state law and thus might vary by State.

Looking to state law, including state and local custom, will help courts decide difficult cases. While there might be easy cases where local variation is unlikely—it is doubtful that peeking through a bedroom window at 2 a.m. is acceptable anywhere—the law is built on the hard cases, not the easy ones. *Jardines* is one such case. The very fact that the Court split 5-4 in that case is perhaps a clue that the question is not amenable to a simple answer satisfactory to 320 million people spread across fifty States. After all, when the Court in *McKee v. Gratz* wrote that “[a] license may be implied from the habits of the country,” it surely used “country” in its more colloquial sense to mean “region,” the first definition provided in the Webster’s Dictionary in use at the time, rather than the Nation as a whole.

The first place to look in such cases is state positive law. In many cases, local police need only familiarize themselves with local law to determine whether their conduct will run afoul of the Fourth Amendment. Local judges and the lawyers who litigate before them will have an understanding of local positive law sufficient to determine an answer when there is one. But, as in *Jardines*, there sometimes will be no positive law on point. What to do in that situation?

The answer is to fall back on that centuries-old mechanism for deciding close cases: the jury. A local jury of twelve citizens is the best measure we have for determining local custom regarding the metes and bounds of our security against intrusion on our persons, houses, papers, and effects where positive law is unclear. This was true at common law. Where a local custom was alleged, it was treated as a question of fact to be determined by a jury like any other such question.

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336 See Baude & Stern, supra note 136, at 1854.
338 See Mannheimer, supra note 141, at 294–98; see also Mannheimer, supra note 138, at 1284–87.
339 See Amar, supra note 141, at 774.
342 See 1 BLACKSTONE, supra note 163, at *76 (observing that the existence of a particular custom and its applicability to the dispute must ordinarily be pleaded and proved to a jury). Even after such proof, however, the court had to make a determination as to the legal validity of the custom. See id. at *76–79.
This approach allows us to retain some of the benefits of the Katz reasonable expectation of privacy approach. First, it allows Fourth Amendment law to recognize interests that communities generally recognize but that, for whatever reason, have not adequately been expressed in positive law. Katz also allows Fourth Amendment search doctrine to keep pace with changes in technology. Often, these changes occur so rapidly that they outpace the ability of positive law to keep up. Where social expectations have formed, but positive law is still murky or nonexistent, Katz fills the gap.

At the same time, adding a jury mechanism to the Fourth Amendment search inquiry allows us to maintain these benefits while ameliorating Katz's worst flaws: its disregard of text and history, its circularity, and its undemocratic nature.344 First, as noted above, jury determination of the liability of government officials for unreasonable searches and seizures was contemplated by the framers, for the Fourth Amendment was originally understood as preserving state common-law tort actions against federal officials who violated state search-and-seizure rules.345 Moreover, unlike the Katz test, a model that utilizes juries in close cases avoids circularity by tying Fourth Amendment interests to the law outside the Fourth Amendment itself. Finally, and most importantly, engrafting the jury into the Fourth Amendment search inquiry helps resolve the counter-majoritarian difficulty by taking unelected federal judges out of the business of divining the reasonable expectations of privacy of ordinary people, and instead directly asks the people themselves. A system in which juries determine local custom that informs their privacy expectations would be profoundly democratic because it is bottom-up, not top-down.346

Entrusting the Fourth Amendment search inquiry to a jury where positive law provides no clear answer sounds like a novel approach. Yet this Article is hardly the first to suggest it. The last two decades have seen a surge of scholarship touting the jury's historic role as a populist and democratic organ of our criminal justice system.347 Some of this scholarship has specifically advocated involving the jury in

345 See supra text accompanying notes 337–339.
346 David J. Bodeman, The Bederman Lecture on Law and Jurisprudence: Public Law and Custom, 61 EMORY L.J. 949, 949–50 (2012) (“Custom . . . is a bottom-up dynamic, where legal rules are being made by the actual participants in the relevant legal community.”); see also Steven Hetcher, The Jury’s Out: Social Norms’ Misunderstood Role in Negligence Law, 91 GEO. L.J. 633, 634 (2003) (“Legal centralists wrongly focus on top-down, formal explanations of the source of entitlements at the expense of bottom-up explanations that would take into account the causal impacts of informal social norms, such as those that might flow from the deliberations of jurics.”); Rose, supra note 166, at 742 (“[C]ustom is the method through which an otherwise unorganized public can order its affairs authoritatively.”).
the determination of Fourth Amendment issues. Some have even advocated the creation of the “suppression jury,” a jury specially impaneled to determine suppression issues. Scholars have recognized that “the judiciary is poorly suited to determine rules of social convention” such as those involved in cases decided under Katz because “[s]ocial norms are fluid, constantly changing, and difficult to pin down.”

It turns out that the problem with Katz is not so much the test but the test-taker. In close cases at least, it should be juries, not judges. In Jardines, for example, the five Justice majority concluding that the dog sniff was a search and the four Justice bloc concluding that it was not were both wrong. Instead of telling us whether it was a search, the Court should have asked us by assigning that decision to a local jury.

Jury determination of the Fourth Amendment search question, at least in close cases, is also consistent with the way we determine what speech is protected by the First Amendment in obscenity cases. Both the determination of whether a work “appeals to the prurient interest” and is “patently offensive” must be made applying “contemporary community standards.” And the Court has recognized that those “community standards” will, of course, vary by community, and that it is perfectly acceptable for jurors to apply the standards of their respective communities. As a consequence, First Amendment protection can vary by state and even by locality.

But decentralizing Fourth Amendment search doctrine need not always be based on geographic boundaries. Our activity online, for example, has been around long enough for certain related norms to develop, but they have developed in an age when state borders have become less important. It may be, then, that the


349 Thomas & Pollack, supra note 348, at 182–87; see also Luna, supra note 348, at 865–70 (exploring but not advocating this idea).

350 Note, supra note 295, at 1635.

351 Justice Scalia, the author of the majority opinion in Jardines, said just about as much in a fit of extrajudicial candor: “I just hate Fourth Amendment cases. I think it’s almost a jury question—whether this variation is an unreasonable search and seizure; variation 3,542.” THE SUPREME COURT: A C-SPAN BOOK FEATURING THE JUSTICES IN THEIR OWN WORDS 64 (Brian Lamb, Susan Swain & Mark Farkas eds., 2010) (interview of Justice Scalia).


354 See Hamling v. United States, 418 U.S. 87, 105 (1974) (“The result of the Miller cases . . . as a matter of constitutional law . . . is to permit a juror sitting in obscenity cases to draw on knowledge of the community or vicinage from which he comes in deciding what conclusion ‘the average person, applying contemporary community standards’ would reach in a given case.”).

355 See Clay Calvert & Matthew D. Bunker, Know Your Audience: Risky Speech at the Intersection of Meaning and Value in First Amendment Jurisprudence, 35 LOY. L.A. ENT. L. REV. 141, 154–55 (2015) (“Juries in different regions of the country or a state may come to different conclusions on whether the same material is obscene.” (quoting Iowa v. Canal, 773 N.W.2d 528, 531 (Iowa 2009) (alteration added)).
guideposts we look to in determining the contours of computer searches are the general norms of online activity, rather than those of particular jurisdictions. While these norms have been influenced from above by national decision-makers, they have also been influenced from below, by private companies and individuals heavily involved in online activity. A measure of decentralization in this and perhaps similar contexts can take place by subject matter rather than by jurisdiction.

Again, there are analogues in the development of common-law doctrine. For example, the *lex mercatoria*, or law merchant, was historically seen as a “local” branch of common law developed by those involved in commercial activity. Blackstone described this system of customs as “different from the general rules of the common law . . . yet ingrafted into it.” In the middle ages, once trade began taking place beyond the borders of a borough and even across national boundaries, disputes could not be settled by reference to law and custom that had developed purely to address local issues like land ownership and use. Merchants, who best understood commercial activity and had a heightened interest in an efficient commercial system, developed their own laws and customs to govern such transactions. The development of norms in cyberspace seems directly analogous to the ostensible medieval development of this branch of law created by and applicable to merchants. While the conventional view of a uniform *lex mercatoria* has recently come under attack as a misreading of history, it still provides a useful model for the recognition of a set of norms that revolves around a particular subject matter rather than geography and that can inform Fourth Amendment search doctrine.

These preliminary thoughts comprise general brushstrokes, not detailed blueprints, on how the Fourth Amendment search inquiry might be conducted in the future. More fine-tuned proposals can be built upon this foundation. But

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356 See Hetcher, supra note 346, at 634–35 n.10 (“[E]merging website privacy norms have been extensively shaped by norm proselytizers from below and the Federal Trade Commission and Congress from above.”).

357 See 1 BLACKSTONE, supra note 163, at *75 (referring to the law merchant as “a particular system of customs used only among one set of the king’s subjects”).

358 Id.; see also PLUCKNETT, supra note 167, at 314 (observing that the law merchant “became the unified custom of a particular class, that of the merchants”).


360 See id.


whatever form the inquiry takes, the questions we have seen—how intensely a person's duffle bag can be fondled, how long one can linger at another's doorstep without knocking, whether one can enter a home at the invitation of one resident but over the objection of the other—seem to implicate spontaneous order, not central planning.

CONCLUSION

Custom forms a bridge between social norms and positive law. In much the same way, custom provides an accommodation between the reasonable expectation of privacy test and a trespass-based approach. At the very least, courts ought to see the deep connections between the two approaches and recognize that they are really just different manifestations of the same basic inquiry. More profoundly, this recognition could lead to significant changes in the way we conceive of the Fourth Amendment search inquiry: more heavily influenced by underlying law, variable by state, and determined in some cases by juries.