

# **In Celebration of Dissents (and Lengthy Textbooks): How Digital Became Different for the Fourth Amendment and Why It Is Time for a Real Warrant Default**

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*The last decade has brought tremendous change to the Fourth Amendment, finally resulting in a ‘digital is different’ norm. We stand at an inflection point between a monolithic, analog past and a murky future of yet-unarticulated constitutional digital policing rules. It is a good time, then, to reflect upon how we came to be here and where we ought to go. This Essay first looks back to a monumental, majestic dissent: that of Justice Louis Brandeis in the 1928 decision of *Olmstead v. United States*. Every American, and especially every law student, ought to know that opinion, and judges and scholars ought to appreciate how it charted the path we have now trod. The Essay then turns forward, considering whether we are finally ready for a longstanding Supreme Court assertion that has never been honestly applied: a Fourth Amendment warrant default. Given ubiquitous digital data, a warrant standard will often be required for searches to be reasonable. And, even when it is not—when the needs of effective investigation and resulting safety outweigh privacy and liberty concerns—the modern Fourth Amendment space is uniquely well situated to a ‘penalty default’ in which the State shoulders the burden of convincing legislators and then courts that such lesser standard is constitutionally correct.*

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## I. INTRODUCTION

*Will never told you? . . . Ah, probably just as well. He would have told it wrong anyway. All the facts and none of the flavor.*

– *Big Fish*<sup>1</sup>

*Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.*

– *Riley v. California*<sup>2</sup>

In *Carpenter v. United States*, by a slim five-to-four margin, our Constitution changed.<sup>3</sup> Before—at least in black letter law—there was a monolithic, privacy-annihilating Fourth Amendment third-party doctrine permitting police unrestricted constitutional access to all third-party records.<sup>4</sup> After, there was a warrant requirement for access to seven days of historic cell-site location information.<sup>5</sup> For those of us who had argued against the third-party doctrine for decades, the 22nd of June, 2018, is therefore a day to remember.<sup>6</sup>

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<sup>1</sup> *BIG FISH* (Columbia Pictures 2003).

<sup>2</sup> *Riley v. California*, 573 U.S. 373, 403 (2014).

<sup>3</sup> *Carpenter v. United States*, 138 S. Ct. 2206, 2211 (2018). Chief Justice Roberts wrote the opinion of the Court for five Justices: himself and Justices Ginsburg, Breyer, Sotomayor, and Kagan. *Id.* Justice Kennedy wrote a dissent for himself and Justices Thomas and Alito. *Id.* at 2223. Justice Gorsuch wrote his own dissent to articulate the law as only he can see it. *See id.* at 2261. (Not to be outdone, Justice Thomas added a dissent of his own to inveigh against the Fourth Amendment’s reasonable expectation of privacy criterion. *See id.* at 2235. And the same for Justice Alito, joined by Thomas, to urge that, in essence, ‘subpoenas ought to be exempt.’ *See id.* at 2246.)

<sup>4</sup> *See* Stephen E. Henderson, *Carpenter v. United States and the Fourth Amendment: The Best Way Forward*, 26 WM. & MARY BILL RTS. J. 495, 503–07 (2017) [hereinafter Henderson, *Best Way Forward*] (explaining the doctrine but also its lack of contemporary application).

<sup>5</sup> *Carpenter*, 138 S. Ct. at 2217 n.3 (“It is sufficient for our purposes today to hold that accessing seven days of CSLI [cell-site location information] constitutes a Fourth Amendment search.”); *id.* at 2221 (“Having found that the acquisition of Carpenter’s CSLI was a search, we also conclude that the Government must generally obtain a warrant supported by probable cause before acquiring such records.”). So, the same rule might apply to acquisition of fewer days’ worth of CSLI, or a lesser standard could apply.

<sup>6</sup> A number of scholars have argued against the doctrine; in the words of third-party apologist Orin Kerr, “The third-party doctrine is the Fourth Amendment rule scholars love to hate.” Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 563 (2009). My own criticism began in 2005 and continued up through the *Carpenter* litigation. *See generally* Stephen E. Henderson, *Nothing New Under the Sun? A Technologically Rational Doctrine of Fourth Amendment Search*, 56 MERCER L. REV. 507 (2005) (developing how the doctrine threatens to render the Fourth Amendment a practical nullity in the modern age); Stephen E. Henderson, *Learning from All Fifty States: How to Apply the Fourth*

Still, in our human drama, years and decades are chump change. And thus it was that even as the monolithic third-party doctrine was crystalizing, and then even as it seemed to reign triumphant for a quarter century, the seeds of its demise had already been long planted.<sup>7</sup> Part II of this Essay explores a key piece

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*Amendment and Its State Analogs to Protect Third Party Information from Unreasonable Search*, 55 CATH. U. L. REV. 373 (2006) (cataloging the constitutional jurisprudence of the fifty states to provide a more complete picture of existing protections and to urge Fourth Amendment change); Stephen E. Henderson, *Beyond the (Current) Fourth Amendment: Protecting Third-Party Information, Third Parties, and the Rest of Us Too*, 34 PEPP. L. REV. 975 (2007) (teasing relevant and irrelevant factors out of that state constitutional decision-making and defending such a multifaceted constitutional approach); Stephen E. Henderson, *The Timely Demise of the Fourth Amendment Third Party Doctrine*, 96 IOWA L. REV. BULL. 39 (2011) [hereinafter Henderson, *The Timely Demise*] (explaining my increasing optimism that the third-party doctrine would be rejected by the United States Supreme Court and refining what factors I would use in its place); Stephen E. Henderson, *Expectations of Privacy in Social Media*, 31 MISS. COLL. L. REV. 227 (2012) [hereinafter Henderson, *Expectations of Privacy*] (developing how the third-party doctrine conflicts with theories of information privacy and examining how it would and would not—and should and should not—apply to differing types of social media); Stephen E. Henderson, *After United States v. Jones, After the Fourth Amendment Third Party Doctrine*, 14 N.C. J.L. & TECH. 431 (2013) [hereinafter Henderson, *After Jones*] (developing how the Court’s rejection of warrantless, longer-term, physically intrusive GPS tracking of automobiles and the Court’s sustained quiescence in third-party doctrine application bode well for change); Stephen E. Henderson, *Real-Time and Historic Location Surveillance After United States v. Jones: An Administrable, Mildly Mosaic Approach*, 103 J. CRIM. L. & CRIMINOLOGY 803 (2013) (developing non-third-party doctrine rules to govern law enforcement visual surveillance, technologically enhanced location surveillance, and access to historic location records); Stephen E. Henderson, *Our Records Panopticon and the American Bar Association Standards for Criminal Justice*, 66 OKLA. L. REV. 699 (2014) [hereinafter Henderson, *Our Records Panopticon*] (explaining the beyond-third-party doctrine rules of the ABA Standards for Law Enforcement Access to Third Party Records, for which I served as Reporter); Andrew E. Taslitz & Stephen E. Henderson, *Reforming the Grand Jury to Protect Privacy in Third Party Records*, 64 AM. U. L. REV. 195 (2014) (arguing those different rules could benefit even the unique context of grand jury investigation); Marc Jonathan Blitz, James Grimsley, Stephen E. Henderson & Joseph Thai, *Regulating Drones Under the First and Fourth Amendments*, 57 WM. & MARY L. REV. 49 (2015) (explaining how the third-party doctrine would and would not—and should and should not—apply to law enforcement drone flight); Stephen E. Henderson, *A Rose by Any Other Name: Regulating Law Enforcement Bulk Metadata Collection*, 94 TEX. L. REV. ONLINE 28 (2016) (examining how the third-party doctrine and other law ought to regulate law enforcement access to bulk metadata, including cell-tower dumps); Stephen E. Henderson, *Fourth Amendment Time Machines (And What They Might Say About Police Body Cameras)*, 18 U. PA. J. CONST. L. 933 (2016) [hereinafter Henderson, *Fourth Amendment Time Machines*] (arguing that for certain modern technologies solely *ex post* access, use, and disclosure limitations might be ideal); Henderson, *Best Way Forward*, *supra* note 4 (developing why the Court ought to reject the monolithic third-party doctrine, which it then did).

<sup>7</sup> See Henderson, *Best Way Forward*, *supra* note 4, at 504–05 (“[T]he Court has not applied the doctrine in decades, seeming to purposely avoid at least its robust application.

of that history: the 1928 dissent of Justice Louis D. Brandeis in *Olmstead v. United States*.<sup>8</sup> Brandeis there penned something majestic and timeless, something that articulates the so-often inarticulable. It is the type of writing to which every writer aspires, but that most will never achieve. Soon it will have served as a clarion call to constitutionally protecting our privacy and human dignity for a century.<sup>9</sup> Every American, and certainly every law student and

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Thus, not a single current Justice participated in the last third party doctrine case . . . . Moreover, in a different context, the Supreme Court has—consistent with theories of information privacy—derided a third-party principle as a ‘cramped notion of personal privacy.’”) (footnotes omitted). Speaking of the third-party doctrine’s “demise” is not to say, of course, that most types of third-party records are not still without Fourth Amendment protection. *Carpenter* did not reverse existing precedents. *Carpenter*, 138 S. Ct. at 2220. But now that the doctrine is no longer monolithic—not applying to all types of records—courts will ultimately have to consider every unique record type, and it seems hard to imagine they will decide *only* seven days of historic cell-site location information is worthy of constitutional protection. Indeed, such a unitary claim borders on the bizarre. For more on what the Court has already implied, see *infra* note 69.

<sup>8</sup> *Olmstead v. United States*, 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting).

<sup>9</sup> Of some ten thousand citations to the Supreme Court’s *Olmstead* opinion (a Westlaw KeyCite run on March 3, 2022 identified 10,815), 1,686 are in case law, and, of those, 1,053 include the word “Brandeis” in the paragraph of citation. Ninety-two of those are Supreme Court opinions, and they range from:

- (1) the recent (*e.g.*, *Torres v. Madrid*, 141 S. Ct. 989, 994 (2021) (holding that police shooting a suspect seizes her for purposes of the Fourth Amendment)); to
- (2) the watershed (*e.g.*, *Carpenter*, 138 S. Ct. at 2219–20 (discussed herein and refusing to apply the permissive third-party doctrine to historic cell-site location information); *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015) (holding there is a fundamental right to marry for both heterosexual and homosexual couples); *United States v. Jones*, 565 U.S. 400, 421 (2012) (Alito, J., concurring) (a ‘shadow majority’ of four Justices plus Justice Sotomayor holding that longer-term GPS tracking of a vehicle infringes a Fourth Amendment’s reasonable expectation of privacy)); to
- (3) dissents arguing for a larger constitutional slice of liberty (*e.g.*, *Herring v. United States*, 555 U.S. 135, 152 (2009) (Ginsburg, J., dissenting) (arguing for a broader Fourth Amendment exclusionary remedy); *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 855 (2002) (Ginsburg, J., dissenting) (arguing the Fourth Amendment prohibits a program of school drug testing); *Harris v. Alabama*, 513 U.S. 504, 526 (1995) (Stevens, J., dissenting) (arguing against the constitutionality of Alabama’s system of judicially imposed capital punishment); *California v. Hodari D.*, 499 U.S. 621, 632–33 (1991) (Stevens, J., dissenting) (arguing for a broader conception of Fourth Amendment seizure); *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 330 (1990) (Brennan, J., dissenting) (arguing against a state being permitted to continue life-sustaining medical treatment contrary to family desires)).

As is evident from those examples, while the Court naturally often refers to Brandeis’ dissent in the Fourth Amendment context, its use is by no means limited to that context. *E.g.*, *Banks*

lawyer, ought to know it, including because—as Part II explains—it eventually led to *Carpenter* and our contemporary ‘digital is different’ Fourth Amendment.<sup>10</sup>

Part III then looks to the future. Now that we have a Fourth Amendment third-party doctrine for telephone and bank records, but not for historic cell-site records, where ought we to go from here? Much of that path has already been charted, at least in scholarly literature and in aspirational standards.<sup>11</sup> In part, then, we merely need the courts to pay heed. But, I argue, it is time for one step more. It is time to take some longstanding—but little meaning—Supreme Court words seriously: “[W]arrantless searches are presumptively unconstitutional.”<sup>12</sup> When it comes to government digital capture and access, the Court ought to apply a presumptive warrant default. Not only are those same digital technologies typically making it ever easier to satisfy a warrant requirement,<sup>13</sup>

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v. Dretke, 540 U.S. 668, 696 (2004) (finding a potential violation of the prosecutorial due process obligation to disclose material favorable evidence); Hill v. Colorado, 530 U.S. 703, 716–17 (2000) (upholding a restriction on abortion protests against First Amendment challenge); U.S. Dep’t of Def. v. Fed. Lab. Rels. Auth., 510 U.S. 487, 501 (1994) (restricting disclosure of home addresses under the federal Privacy Act).

<sup>10</sup> I am of course not the first to recognize the importance of Brandeis’ words. I aim to add garnish to the existing literature, especially to Melvin I. Urofsky, *Mr. Justice Brandeis and the Art of Judicial Dissent*, 39 PEPP. L. REV. 919 (2012), and to Carol S. Steiker, *Brandeis in Olmstead: “Our Government Is the Potent, the Omnipresent Teacher,”* 79 MISS. L.J. 149 (2009). The *Olmstead* opinions have also been subjected to the careful literary criticism of James Boyd White. See JAMES BOYD WHITE, JUSTICE AS TRANSLATION 141–59 (1990). Also worthy of note is Brian R. Gallini, *Justice Jackson’s Persistent Post-Nuremberg Legacy*, 105 JUDICATURE 18 (2021), [https://judicature-duke-edu.proxy.lib.ohio-state.edu/wp-content/uploads/2021/12/Gallini\\_Vol105\\_No3.pdf](https://judicature-duke-edu.proxy.lib.ohio-state.edu/wp-content/uploads/2021/12/Gallini_Vol105_No3.pdf) [<https://perma.cc/275G-TRDT>], which has an aim parallel to my own: celebrating the work of Justice Robert H. Jackson for pointing us toward *Carpenter*.

<sup>11</sup> Arguably that literature began with Christopher Slobogin’s pathbreaking *Let’s Not Bury Terry: A Call for Rejuvenation of the Proportionality Principle*, 72 ST. JOHN’S L. REV. 1053 (1998). It continued in other work such as Christopher Slobogin, *Transaction Surveillance by the Government*, 75 MISS. L.J. 139 (2005); my work of *supra* note 6; and other influential work too extensive to list by Andrew Ferguson, David Gray, Paul Ohm, Susan Freiwald, Kiel Brennan-Marquez, Matthew Tokson, and many others. In terms of Standards, I believe the only relevant set are AM. BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE: LAW ENFORCEMENT ACCESS TO THIRD PARTY RECORDS (3d ed. 2013).

<sup>12</sup> *Kyllo v. United States*, 533 U.S. 27, 32 (2001); cf. *Groh v. Ramirez*, 540 U.S. 551, 572–73 (2004) (Thomas, J., dissenting) (“[T]he Court has vacillated between imposing a categorical warrant requirement and applying a general reasonableness standard. The Court has most frequently held that warrantless searches are presumptively unreasonable but has also found a plethora of exceptions to presumptive unreasonableness. That is, our cases stand for the illuminating proposition that warrantless searches are per se unreasonable, except, of course, when they are not.” (citations omitted)).

<sup>13</sup> See Kiel Brennan-Marquez & Stephen E. Henderson, *Search and Seizure Budgets*, 13 U.C. IRVINE L. REV. (forthcoming 2023) (manuscript at 9–10), <https://ssrn.com/abstract=3910743> [<https://perma.cc/4CQ6-3L9N>] (making this argument and therefore

but the modern State ought to be well situated to explain in what instances that constitutional standard would unduly interfere with its legitimate needs. And if courts expect the State to make that argument before the legislature, rather than before the judiciary in the first instance, we can achieve more democratic law enforcement better in tune with America's intended separation of State powers. In short, it is time for a digital warrant default.

## II. THE ROAD TRAVELED—A TIMELESS DISSENT

Let's begin with a point of origin in understanding how we got here: Justice Brandeis in *Olmstead*.<sup>14</sup> And because I wish to make a particular pitch to law professors to teach his words, I will beg the reader's pardon as I set the stage with a brief personal narrative.

In the fall of 2021, I had two children in their final year of college. They had each, in a move reminiscent of my own 'course correction' decades before, decided to deviate from—at least for a time—the study of hard science in favor of the law.<sup>15</sup> And so they decided to take a course in the Fourth Amendment. It satisfied some graduation requirements for one of them. It would, surely, give them a 'leg up' on their next venture. And, besides, they already knew much of the material, having been forced to listen to it everywhere from the dinner table to the soccer pitch for much of their lives.

The course was taught by a faculty member who is a lawyer, and so she naturally adopted a prominent law school textbook.<sup>16</sup> That textbook was thus very expensive.<sup>17</sup> That textbook thus contained many edited court opinions and, being a casebook in the constitutional rules of criminal procedure, they were excerpts of decisions by the United States Supreme Court.

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arguing for quantitative limits on the number of law enforcement intrusions that may occur over a given period of time).

<sup>14</sup> See *Olmstead v. United States*, 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting).

<sup>15</sup> Not that it much matters, but so as not to leave things dangling—in my case it was from electrical engineering, and in theirs from the mathematics and computer science of quantum computing. The allure of the latter ultimately proved sufficient, however, for a delay: each has decided to temporarily put off law school in order to obtain a master's degree in math.

<sup>16</sup> If I were king, I would not identify the particular textbook. My purpose here is not increased by such citation. More importantly, I have no intention nor interest in insinuating that the text is not first rate. Its authors are sterling. But if there is one thing we must do in legal scholarship, it is provide citations. So, the text is ERWIN CHEMERINSKY & LAURIE L. LEVENSON, *CRIMINAL PROCEDURE* (3d ed. 2018).

<sup>17</sup> \$195.75, to be precise, for a printing without any binding (at the time of this writing). Such exorbitant cost remains a serious problem in our profession. A new hardcover copy of a current edition of their text might set a student back \$309.26. See *Purchasing Information of Criminal Procedure Textbook with Connected Casebook*, AMAZON, <https://www.amazon.com/Criminal-Procedure-Connected-Center-Casebook-dp-154384605X/dp/154384605X/> (on file with the *Ohio State Law Journal*). An electronic Kindle version costs \$219.00. *Id.*

But missing from those cases was the Prohibition era gem of *Olmstead v. United States*.<sup>18</sup> This is doctrinally defensible. *Olmstead*'s holding was reversed in 1967 by *Katz v. United States*.<sup>19</sup> And while the Court has since resurrected *Olmstead*'s rule as an *alternative*, second definition of Fourth Amendment search—a physical intrusion into a constitutionally protected area in order to obtain information—students need to read the case in which that happened, the much more recent GPS tracking case of *United States v. Jones*.<sup>20</sup> So, the authors could reason, you don't need *Olmstead* to learn the mechanics of Fourth Amendment search.

And if there is one thing every casebook author understands—myself certainly included—it is the need to avoid bloat.<sup>21</sup> Courts keep writing opinions. That isn't going to stop. So, if you are going to add any of them to your text, either the thing is going to keep growing (to the consternation of every law student subjected to it) or something—often enough something beloved—has to go. For these casebook authors, *Olmstead* had to go.

I get it. But it made me sad.

It made me sad because, without *Olmstead*, students miss the wonderful story of Roy Olmstead, Seattle cop turned Prohibition bootlegger.<sup>22</sup> In the words of one commentator,

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<sup>18</sup> See CHERMERINSKY & LEVENSON, *supra* note 16, at 32 (providing a single sentence summary of the holding in way of introduction to *Katz v. United States*, 389 U.S. 347 (1967)). The casebook authors provide some additional commentary on *Olmstead* in a much later subsection on Electronic Surveillance, *see id.* at 437–38, and that excerpt indeed includes some brief excerpts from Justice Brandeis' dissent that will be stressed herein.

<sup>19</sup> *Katz v. United States*, 389 U.S. 347, 353 (1967) (“We conclude that 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.”).

<sup>20</sup> *United States v. Jones*, 565 U.S. 400, 402, 407–08 (2012).

<sup>21</sup> I have written three textbooks in criminal law and procedure. *See Henderson's Criminal Law and Procedure*, AMAZON, <https://www.amazon.com/dp/B0B1X7CX8G?binding=paperback> [<https://perma.cc/Y89E-7RFV>]; STEPHEN E. HENDERSON, *THE CRIMINAL LAW* (2022 ed.); STEPHEN E. HENDERSON, *OUR CONSTITUTIONAL CONSTRAINTS: POLICING* (2022 ed.); STEPHEN E. HENDERSON, *OUR CONSTITUTIONAL CONSTRAINTS: ADJUDICATION* (2021 ed.).

<sup>22</sup> Many sources document Olmstead's story. *See generally, e.g., Roy Olmstead*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Roy\\_Olmstead](https://en.wikipedia.org/wiki/Roy_Olmstead) [<https://perma.cc/C4C2-6GAW>]; Daryl C. McClary, *Olmstead, Roy (1886–1966)*, HISTORYLINK.ORG (Nov. 13, 2002), <https://www.historylink.org/file/4015> [<https://perma.cc/R3B5-WELX>]; Norman H. Clark, *Roy Olmstead, A Rumrunning King on Puget Sound*, 54 PAC. NW. Q. 89 (1963). A great telling is included in the Prohibition documentary of Ken Burns and Lynn Novick. *See PBS Previews / Prohibition*, TWIN CITIES PBS, at 4:20–4:45 (2011), <https://www.tpt.org/prohibition/> [<https://perma.cc/V5NW-BPGX>]. Factual nuggets are contained within the Supreme Court's opinion. *E.g., Olmstead v. United States*, 277 U.S. 438, 457 (1928) (“[Intercepted conversations] showed the dealing by Olmstead, the chief conspirator, with members of the Seattle police, the messages to them which secured the release of arrested members of the conspiracy, and also direct promises to officers of payments as soon as opportunity offered.”).

Lt. Olmstead, although not a member of the [Seattle Police prohibition-enforcing] Dry Squad, had been involved in many raids and arrests of bootleggers. He noted their basic lack of organization and the mistakes they made. Mainly, he observed that bootleggers seemed to have a lot of money.<sup>23</sup>

*And how.* As the Supreme Court's own opinion tells it,

The evidence in the records discloses a conspiracy of amazing magnitude to import, possess, and sell liquor unlawfully. It involved the employment of not less than 50 persons, of two sea-going vessels for the transportation of liquor to British Columbia, of smaller vessels for coastwise transportation to the State of Washington, the purchase and use of a ranch beyond the suburban limits of Seattle, with a large underground cache for storage and a number of smaller caches in that city, the maintenance of a central office manned with operators, and the employment of executives, salesmen, deliverymen dispatchers, scouts, bookkeepers, collectors and an attorney. In a bad month sales amounted to \$176,000; the aggregate for a year must have exceeded two millions of dollars.<sup>24</sup>

Even the Supreme Court could scarcely describe Olmstead's bootlegging without making it sound rather the exciting business venture. What a difference then, with the modern 'war on drugs,' an entrée to conversation terribly worth having with our students.<sup>25</sup>

The omission of *Olmstead* made me sad because, without it, students might not read *any* opinion of Justice Brandeis. (My own policing textbook contains only one other, a bit of his dissent in *Burdeau v. McDowell*,<sup>26</sup> concerning the doctrine of private search.<sup>27</sup>)

But, primarily, the absence of *Olmstead* made me sad because Brandeis' dissent, which has forever-after influenced the law, is a masterpiece. Every year I try to convince students—and pretty much anybody else who will listen—that what in law school we rather misleadingly term “Criminal Procedure” is nothing less than the American civic religion. In that sense, the Supreme Court is not just developing constitutional law; it is developing a secular catechism, one that

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<sup>23</sup> McClary, *supra* note 22. More detail on Olmstead's 'criminal education' is included in Clark, *supra* note 22, at 89–90.

<sup>24</sup> *Olmstead*, 277 U.S. at 455–56. The Court continued: “Olmstead was the leading conspirator and the general manager of the business. He made a contribution of \$10,000 to the capital; eleven others contributed \$1,000 each. The profits were divided one-half to Olmstead and the remainder to the other eleven.” *Id.* at 456.

<sup>25</sup> See generally, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012) (developing how the war on drugs has been a social policy of systemic racial injustice).

<sup>26</sup> *Burdeau v. McDowell*, 256 U.S. 465, 476 (1921) (Brandeis, J., dissenting).

<sup>27</sup> See STEPHEN E. HENDERSON, *OUR CONSTITUTIONAL CONSTRAINTS: POLICING* 50 (2022 ed.).



should help to define us as a liberty- and dignity-loving people. And in an era in which social religiosity and other ‘group interests’ are in substantial decline,<sup>28</sup> and in which class divisions are sharp,<sup>29</sup> it provides something that all Americans—and more broadly all lovers of freedom, human dignity, and democracy—can share and celebrate. From where I sit in legal education and as an American citizen, we need this badly. Perhaps as much as a people ever have.

But reading the Bill of Rights . . . well, to many it is surely boring or rather unilluminating, if they attempt it at all. As important as those rights are, their expression is a ‘laundry list.’<sup>30</sup> Many probably would not, or do not, make it past the anachronistic Third Amendment.<sup>31</sup> Nor is that founding document alone in perhaps speaking poorly to the masses. Far too much legal writing reads like Chief Justice Taft’s opinion for the Court in *Olmstead*, a yawner that leads with page after page of shortish summaries of precedent before getting to anything like cogent analysis.<sup>32</sup>

Enter, then, the dissenting *Olmstead* opinion of Louis Brandeis, from which I will—given my purpose—heavily quote.<sup>33</sup> After deftly reciting the relevant facts,<sup>34</sup> Brandeis reminded the Court, and all of us, of its mission:

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<sup>28</sup> See ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 2 (rev. & updated ed. 2020) (chronicling declines in civic engagement and organizational involvement including church membership and attendance).

<sup>29</sup> See ROBERT D. PUTNAM, *OUR KIDS: THE AMERICAN DREAM IN CRISIS* 1 (2015) (“My hometown was, in the 1950s, a passable embodiment of the American dream, a place that offered decent opportunity for all the kids in town, whatever their background. A half century later, however, life in Port Clinton, Ohio, is a split-screen American nightmare, a community in which kids from the wrong side of the tracks that bisect the town can barely imagine the future that awaits the kids from the right side of the tracks. And the story of Port Clinton turns out to be sadly typical of America.”).

<sup>30</sup> See U.S. CONST. amends. I–X. By contrast might be the Declaration of Independence, which begins grandly before resorting to a laundry list of its own. See *THE DECLARATION OF INDEPENDENCE* para. 1–2 (U.S. 1776).

<sup>31</sup> U.S. CONST. amend. III (“No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.”).

<sup>32</sup> See *Olmstead v. United States*, 277 U.S. 438, 458–62 (1928). For literary criticism of Taft’s opinion, see WHITE, *supra* note 10, at 143–48. In a nutshell, Taft’s view can be described like this: “The Constitution is a document written in plain English making plain commands: if you think they are not plain, wait till I have spoken and I will make them plain.” *Id.* at 146.

<sup>33</sup> As I will shortly explain, I understand why legal academics tend to disdain block quotes. But my argument is that everyone—even, and perhaps especially, ‘already-know-that’ academics—ought to give these words of Brandeis another slow, careful read. And while I have attempted my own reading, any interested reader owes it to herself to consider that of James Boyd White. See WHITE, *supra* note 10, at 149–59.

<sup>34</sup> Brandeis’ skill is evident in cutting to the quick of how wiretapping dramatically impacts privacy:

“We must never forget,” said Mr. Chief Justice Marshall in *McCulloch v. Maryland*, “that it is a constitution we are expounding.” . . . [T]his Court has repeatedly sustained the exercise of power by Congress, under various clauses of that instrument, over objects of which the Fathers could not have dreamed. We have likewise held that general limitations on the powers of Government, like those embodied in the due process clauses of the Fifth and Fourteenth Amendments, do not forbid the United States or the States from meeting modern conditions by regulations which “a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive.” Clauses guaranteeing to the individual protection against specific abuses of power, must have a similar capacity of adaptation to a changing world.<sup>35</sup>

And rather than rely solely upon his own words for the point, Brandeis remembered and leveraged the beautiful words of an earlier, 1910 Court opinion:

Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of Constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, ‘designed to approach immortality as nearly as human institutions can approach it.’ The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be

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Before any of the persons now charged had been arrested or indicted, the telephones by means of which they habitually communicated with one another and with others had been tapped by federal officers. . . . [Those] operations extended over a period of nearly five months. The type-written record of the notes of conversations overheard occupies 775 typewritten pages.

*Olmstead*, 277 U.S. at 471 (Brandeis, J., dissenting); *cf.* *United States v. Jones*, 565 U.S. 400, 403 (2012) (holding physically-intrusive GPS tracking of a vehicle to constitute a search and noting that the device “relayed more than 2,000 pages of data over the 4-week period”); *Carpenter v. United States*, 138 S. Ct. 2206, 2212 (2018) (holding access to seven days of historic cell-site location to constitute a search and noting that “[a]ltogether the Government obtained 12,898 location points cataloging Carpenter’s movements—an average of 101 data points per day”).

<sup>35</sup> *Olmstead*, 277 U.S. at 472 (Brandeis, J., dissenting).

converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.<sup>36</sup>

Many law professors (and student law journal editors) recoil from block quotes, and—to be sure—such long quotes can be a horribly ineffective crutch in poor writing. (Did you, dear reader, just skip or skim the previous two?) But they can also be an appropriate nod to the wisdom and expression of our past, as they were for Justice Brandeis.

Having so ‘set the stage,’ Brandeis was ready to tackle the particular police surveillance at issue, the wiretapping of telephones located in offices and homes:<sup>37</sup>

When the Fourth and Fifth Amendments were adopted, “the form [surveillance] evil had theretofore taken,” had been necessarily simple. Force and violence were then the only means known to man by which a Government could directly effect self-incrimination. It could compel the individual to testify—a compulsion effected, if need be, by torture. It could secure possession of his papers and other articles incident to his private life—a seizure effected, if need be, by breaking and entry. Protection against such invasion of “the sanctities of a man’s home and the privacies of life” was provided in the Fourth and Fifth Amendments by specific language. But “time works changes, brings into existence new conditions and purposes.” Subtler and more far-reaching means of invading privacy have become available to the Government. Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.<sup>38</sup>

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<sup>36</sup> *Id.* at 472–73 (Brandeis, J. dissenting) (quoting *Weems v. United States*, 217 U.S. 349, 373 (1910)).

<sup>37</sup> As explained by the Court majority,

[Certiorari was] granted with the distinct limitation that the hearing should be confined to the single question whether the use of evidence of private telephone conversations between the defendants and others, intercepted by means of wire tapping, amounted to a violation of the Fourth and Fifth Amendments.

...

The information which led to the discovery of the conspiracy and its nature and extent was largely obtained by intercepting messages on the telephones of the conspirators by four federal prohibition officers. Small wires were inserted along the ordinary telephone wires from the residences of four of the petitioners and those leading from the chief office. The insertions were made without trespass upon any property of the defendants. They were made in the basement of the large office building. The taps from house lines were made in the streets near the houses.

*Olmstead*, 277 U.S. at 455–57.

<sup>38</sup> *Id.* at 473 (Brandeis, J., dissenting) (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

After Brandeis wrote in *Olmstead*, then, any court ought to consider the changes technological surveillance has wrought. If he was not the first to seriously consider the corrosive effects of technological advances on privacy, he was undeniably early and influential in that recognition. Additionally—and critically—Brandeis realized that such current-technology consideration is necessary but not sufficient:

Moreover, “in the application of a constitution, our contemplation cannot be only of what has been, but of what may be.” The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping. Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court [(think cloud computing and millimeter wave imaging)], and by which it will be enabled to expose to a jury the most intimate occurrences of the home [(think home security cameras and other “internet of things” connected devices)]. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions [(think brain neural mapping<sup>39</sup>)]. “That places the liberty of every man in the hands of every petty officer” was said by James Otis of much lesser intrusions than these.<sup>[40]</sup> To Lord Camden, a far slighter intrusion seemed “subversive of all the comforts of society.” Can it be that the Constitution affords no protection against such invasions of individual security?<sup>41</sup>

Thus, argued Brandeis, it is not enough to carefully consider the technology police used to snoop upon the defendants in the case at hand. It is necessary, if

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<sup>39</sup> If this sounds farfetched, science is eerily demonstrating otherwise:

During the past few decades, the state of neuroscientific mind reading has advanced substantially. Cognitive psychologists armed with an fMRI machine can tell whether a person is having depressive thoughts; they can see which concepts a student has mastered by comparing his brain patterns with those of his teacher. By analyzing brain scans, a computer system can edit together crude reconstructions of movie clips you’ve watched. One research group has used similar technology to accurately describe the dreams of sleeping subjects. In another lab, scientists have scanned the brains of people who are reading the J.D. Salinger short story “Pretty Mouth and Green My Eyes,” in which it is unclear until the end whether or not a character is having an affair. From brain scans alone, the researchers can tell which interpretation readers are leaning toward, and watch as they change their minds.

James Somers, *The Science of Mind Reading*, NEW YORKER, (Nov. 29, 2021), <https://www.newyorker.com/magazine/2021/12/06/the-science-of-mind-reading> [<https://perma.cc/8NF8-U9GS>].

<sup>40</sup> Otis was of course speaking of the colonial writs of assistance. See Brennan-Marquez & Henderson, *supra* note 13, at 12–26 (developing that history).

<sup>41</sup> *Olmstead*, 277 U.S. at 474 (Brandeis, J., dissenting) (footnote omitted). Ric Simmons put this language to important work in Ric Simmons, *From Katz to Kyllo: A Blueprint for Adapting the Fourth Amendment to Twenty-First Century Technologies*, 53 HASTINGS L.J. 1303, 1330 (2002).

the Fourth Amendment is to ensure what the Founders meant it to ensure, to consider the invasion that tomorrow's technology might bring. No proposition has been more critical in the Supreme Court ultimately deciding that 'digital is different' for purposes of Fourth Amendment law, a point to which I will return momentarily. But, first, let's read Brandeis' *Olmsteadian* crescendo, which is a masterstroke. (To the extent that portions sound 'off' to contemporary ears because of the gendered speech of his day, I have taken the liberty of removing that impediment.<sup>42</sup>)

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of [a human's] spiritual nature, of [her] feelings and of [her] intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized [people].<sup>[43]</sup> To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. . . .

. . . It is, of course, immaterial where the physical connection with the telephone wires leading into the defendants' premises was made. And it is also immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. [Persons] born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by [people] of zeal, well-meaning but without understanding.<sup>[44]</sup>

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<sup>42</sup> Here I also omit mention of several pages of Brandeis' dissent in which he compares the wiretapping at issue to other decisions by the Court, including that governing searches of postal mail. See *Olmstead*, 277 U.S. at 474–78 (Brandeis, J., dissenting). I skip these pages not because their analysis is unimportant, but because it is less important to the themes of this Essay.

<sup>43</sup> This "right to be let alone"—as against private threats thereto—was of course a key theme in Brandeis's (and Samuel Warren's) earlier, now-famous law review article, and language from that article is reflected in this opinion paragraph. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193, 195, 205 (1890).

<sup>44</sup> Here I again skip several pages of Brandeis dissent, these primarily concerning the relevance of the wiretapping having occurred in violation of Washington law. See *Olmstead*, 277 U.S. at 478–85 (Brandeis, J., dissenting). Their analysis is likewise far from generally unimportant; indeed, it includes this strong language:

The governing principle has long been settled. It is that a court will not redress a wrong when he who invokes its aid has unclean hands. The maxim of unclean hands comes from courts of equity. But the principle prevails also in courts of law. Its common application is in civil actions between private parties. Where the Government is the

Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled [sic] if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every [person] to become a law unto [herself]; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.<sup>45</sup>

That is what America is about.<sup>46</sup> That is why Americans, perhaps more than any other people, have a constitutional distrust of their governments. That is

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actor, the reasons for applying it are even more persuasive. Where the remedies invoked are those of the criminal law, the reasons are compelling.

The door of a court is not barred because the plaintiff has committed a crime. The confirmed criminal is as much entitled to redress as his most virtuous fellow citizen; no record of crime, however long, makes one an outlaw. The court's aid is denied only when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress. Then aid is denied despite the defendant's wrong. It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination. . . . A defense may be waived. It is waived when not pleaded. But the objection that the plaintiff comes with unclean hands will be taken by the court itself. It will be taken despite the wish to the contrary of all the parties to the litigation. The court protects itself.

*Id.* at 483–85 (Brandeis, J., dissenting) (footnotes omitted).

<sup>45</sup> *Id.* at 478–79, 485 (Brandeis, J., dissenting) (footnotes omitted). In the words of James Boyd White,

It is not only the government that is the teacher: Brandeis himself establishes his own voice as that of a teacher, a teacher who must first learn, and who by having learned may teach. This is in turn to define the law, legal education, the Constitution, and all that is involved in thinking about a case such as this, as challenging every intellectual and moral capacity.

WHITE, *supra* note 10, at 155.

<sup>46</sup> Carol Steiker has identified that final paragraph as the greatest aspect/portion of Brandeis' dissent. Steiker, *supra* note 10, at 167 ("My nomination for the 'greatest' aspect of Brandeis's *Olmstead* dissent is his at once lyrical and indignant call for the repudiation of government lawbreaking in the pursuit of its own law enforcement goals."). She goes on to chronicle, however, how it has not been well respected in subsequent Fourth Amendment law, *see id.* at 169–75, but how it has achieved prominence in social science, *see id.* at 175–

what Linus should have quoted, had Charlie Brown been perplexed by the meaning of America, rather than of Christmas.<sup>47</sup> And that is what law students ought to read. In the wonderful words of James Boyd White, “In the world defined by Brandeis, who would not be a lawyer?”<sup>48</sup>

And when it comes to the digital Fourth Amendment, it has made the difference. Brandeis’ *Olmstead* dissent may have been ringing in the Court’s ears when, in *Silverman v. United States*—in an opinion written by Justice Potter Stewart—the Court did away with one principle of its *Olmsteadian* Fourth Amendment, permitting the physical-intrusion-based capture of the *intangible* human voice to constitute a “search.”<sup>49</sup> The *Silverman* defense attorney—Edward Bennett Williams, later co-founder of Williams and Connolly<sup>50</sup>—certainly argued the relevance of advancing technologies not yet in police use,<sup>51</sup>

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77. Fortunately, as I next develop, it has recently received greater Fourth Amendment respect in the critical area of digital records access.

<sup>47</sup> See *A Charlie Brown Christmas* (CBS 1965). “That’s what Christmas is all about, Charlie Brown.” *Id.* I reference Charlie Brown *not* because, of course, everyone ought to recognize Christmas. Nothing of the sort. I urge the comic because it is the rare creation that everyone ought to read (and here watch) even if they want nothing to do with the holiday around which it centers. Such was the genius and humanity of Charles Schultz, reflected especially in the comic’s early, best years.

<sup>48</sup> WHITE, *supra* note 10, at 157.

<sup>49</sup> Compare *Silverman v. United States*, 365 U.S. 505, 510–12 (1961) (holding the use of a “spike mike” to capture conversation constituted a search), with *Olmstead*, 277 U.S. at 464–66 (declaring that “[t]he Amendment itself shows that the search is to be of material things—the person, the house, his papers or his effects,” and contrasting the capture of the human voice with previously held searches). The move was made explicit in *Katz*:

[A]lthough a closely divided Court supposed in *Olmstead* that surveillance without any trespass and without the seizure of any material object fell outside the ambit of the Constitution, we have since departed from the narrow view on which that decision rested. Indeed, we have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements, overheard without any “technical trespass under . . . local property law.”

*Katz v. United States*, 389 U.S. 347, 353 (1967) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)); see also *United States v. White*, 401 U.S. 745, 779 (1971) (Harlan, J., dissenting) (“There, the Court, following a path opened by Mr. Justice Brandeis’ dissent in *Olmstead* . . . expressed concern about scientific developments that have put within the reach of the Government the private communications of ‘anyone in almost any given situation’ . . .” (quoting *Berger v. New York*, 388 U.S. 41, 47 (1967))).

<sup>50</sup> J.Y. Smith, *Winning Was Williams’ Guiding Principle*, WASH. POST (Aug. 14, 1988), <https://www.washingtonpost.com/archive/politics/1988/08/14/winning-was-williams-guiding-principle/8ebae6f6-3061-40cf-846c-a632fcc21014/> [https://perma.cc/8SZE-8MT4]; *Williams & Connolly*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Williams\\_%26\\_Connolly](https://en.wikipedia.org/wiki/Williams_%26_Connolly) [https://perma.cc/A3C5-9QHE]; *Firm Overview*, WILLIAMS & CONNOLLY LLP, <https://www.wc.com/Firm> [https://perma.cc/GH24-SHQP].

<sup>51</sup> See *Silverman*, 365 U.S. at 508–09 (describing counsel’s urging of parabolic microphones and other advanced interception techniques).

and he was personally a strong advocate of the Brandeis dissent.<sup>52</sup> And of course that shoe would really drop in *Katz v. United States*, when Justice Stewart would again write for the Court, which was now ready to entirely repudiate *Olmstead*'s constitutionally permissive view of wiretapping.<sup>53</sup>

That was good. But work remained for the wisdom of Brandeis' dissent. When, decades later, the Court was called upon to decide whether the Fourth Amendment was implicated by police using a thermal imager, from the vantage point of a public place, to gather information regarding the heat leaving a home, Justice Antonin Scalia's opinion for the Court did not (alas) quote or cite Brandeis, but it applied his wisdom: "While the technology used in the present case was relatively crude, the rule we adopt must take account of more sophisticated systems that are already in use or in development."<sup>54</sup> And, again: "While it is certainly possible to conclude from the videotape of the thermal imaging that occurred in this case that no 'significant' compromise of the homeowner's privacy has occurred, we must take the long view, from the original meaning of the Fourth Amendment forward."<sup>55</sup>

The same wisdom-of-Brandeis reliance would ultimately imbue the Court's view of the privacy of modern records, although here it got off to quite the slow start. When the Court articulated its records third-party doctrine in *United States v. Miller*<sup>56</sup>—under which a person retains no reasonable expectation of privacy in information voluntarily conveyed to a third party as to government access

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<sup>52</sup>In his later-written memoir, Williams invokes Brandeis' dissent in describing his *Silverman* representation. See EDWARD BENNETT WILLIAMS, ONE MAN'S FREEDOM 98 (1962) ("[A]s recently as 1928 the Supreme Court was unwilling to extend the protection of the Fourth Amendment to the spoken word. . . . Four of the nine justices disagreed and, in a brilliant and often quoted dissent, Justice Brandeis said that listening in on conversations accomplishes exactly what the Fourth Amendment was designed to prevent—invasion of the citizen's privacy."). Williams there quotes language from Brandeis' dissent, see *id.* at 99, and he also references it elsewhere in the book, see *id.* at 120, 162.

<sup>53</sup>See *Katz*, 389 U.S. at 353 ("We conclude that the underpinnings of *Olmstead* . . . have been so eroded by our subsequent decisions that the . . . doctrine there enunciated can no longer be regarded as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.").

<sup>54</sup>*Kyllo v. United States*, 533 U.S. 27, 36 (2001). The four *Kyllo* dissenters wrongly critiqued this 'look forward' view: "While the Court 'take[s] the long view' and decides this case based largely on the potential of yet-to-be-developed technology that might allow 'through-the-wall surveillance,' this case involves nothing more than off-the-wall surveillance by law enforcement officers to gather information exposed to the general public from the outside of petitioner's home." *Id.* at 42 (Stevens, J., dissenting) (citations omitted).

<sup>55</sup>*Id.* at 40.

<sup>56</sup>*United States v. Miller*, 425 U.S. 435, 443–45 (1976).



from that third party<sup>57</sup>—it did so over the dissents of Justices William Brennan<sup>58</sup> and Thurgood Marshall.<sup>59</sup> Neither (alas, again) offered Brandeis’ *Olmstead* dissent, as Brennan was content quoting the reasoning of the California Supreme Court,<sup>60</sup> and Marshall reiterated a previous dissent of his own.<sup>61</sup> Now, Brennan and Marshall were not done. When the Court reiterated the doctrine a few years later in *Smith v. Maryland*, the two would join forces (as they so often did) in a dissent penned by Marshall.<sup>62</sup> Once again, however, they did not (alas, a final time for good measure) urge Brandeis’ *Olmstead* dissent. Still, they did articulate a critical theory of information privacy<sup>63</sup>—a theory upon which decades of privacy scholarship, including my own, would build.<sup>64</sup> And they did give an appropriate normative cast to the *Katz* reasonable expectation of privacy criterion, building on a previous dissent of Justice John Marshall Harlan.<sup>65</sup>

So, consistent with the theme of this Essay, the dissents of Brennan and Marshall in *Miller* and *Smith* clearly did some long-term good. Still, I cannot help but wonder if their victory took longer, and has been far less complete,<sup>66</sup>

<sup>57</sup> See generally Henderson, *After Jones*, *supra* note 6, at 434–48 (explaining the doctrine and its development). See Henderson, *The Timely Demise*, *supra* note 6, at 39–46 (describing its problems and predicting its demise).

<sup>58</sup> *Miller*, 425 U.S. at 447 (Brennan, J., dissenting).

<sup>59</sup> *Id.* at 455 (Marshall, J., dissenting).

<sup>60</sup> *Id.* at 447–55 (Brennan, J., dissenting) (quoting *Burrows v. Superior Court*, 529 P.2d 590, 593–96 (Cal. 1974)).

<sup>61</sup> *Id.* at 455–56 (Marshall, J., dissenting) (quoting *Cal. Bankers Ass’n v. Shultz*, 416 U.S. 21, 54, 97 (1974)).

<sup>62</sup> *Smith v. Maryland*, 442 U.S. 735, 748 (1979) (Marshall, J., dissenting).

<sup>63</sup> See *id.* at 749 (Marshall, J., dissenting) (“Privacy is not a discrete commodity, possessed absolutely or not at all. Those who disclose certain facts to a bank or phone company for a limited business purpose need not assume that this information will be released to other persons for other purposes.”).

<sup>64</sup> See, e.g., Henderson, *Expectations of Privacy*, *supra* note 6, at 229–34, 238 (articulating a control theory of information privacy); Henderson, *Fourth Amendment Time Machines*, *supra* note 6, at 954–60 (further developing the same).

<sup>65</sup> See *Smith*, 442 U.S. at 750 (Marshall, J., dissenting) (“[W]hether privacy expectations are legitimate within the meaning of *Katz* depends not on the risks an individual can be presumed to accept when imparting information to third parties, but on the risks he should be forced to assume in a free and open society. . . . As Mr. Justice Harlan, who formulated the standard the Court applies today, himself recognized: ‘[s]ince it is the task of the law to form and project, as well as mirror and reflect, we should not . . . merely recite . . . risks without examining the desirability of saddling them upon society.’” (quoting *United States v. White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting))).

<sup>66</sup> To recap: to date we have a critical, but extremely limited, exception, under which the Fourth Amendment grants protection to seven days or more of historic cell-site location information residing with mobile phone providers. See *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018) (“We decline to extend *Smith* and *Miller* to cover these novel circumstances. Given the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user’s claim to Fourth Amendment protection.”).

because those dissents entirely lack the majesty of Brandeis' in *Olmstead*. Thus, when forty years later the *Carpenter* Court would carve a critical exception to the until-then-monolithic third-party doctrine, the Court would channel not the dissents of Brennan and Marshall in the most directly relevant caselaw, but rather . . . that of Brandeis in *Olmstead*:

As Justice Brandeis explained in his famous dissent, the Court is obligated—as “[s]ubtler and more far-reaching means of invading privacy have become available to the Government”—to ensure that the “progress of science” does not erode Fourth Amendment protections. . . .

. . . In light of the deeply revealing nature of [cell-site location information], its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection, the fact that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection.<sup>67</sup>

Finally, ‘digital is different,’<sup>68</sup> the monolithic third-party doctrine is dead,<sup>69</sup> and we owe thanks to a 1928 dissent.<sup>70</sup> It seems small price to pay in pages

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<sup>67</sup> *Id.* at 2223. The third-party dissents of Brennan and Marshall were cited in a *Carpenter* dissent. *See id.* at 2232–33 (Kennedy, J., dissenting). The *Carpenter* Court also—albeit citing to *Kyllo* rather than Brandeis—adopted the Brandeisian concern with what will be: “At any rate, the rule the Court adopts ‘must take account of more sophisticated systems that are already in use or in development.’” *Id.* at 2218–19 (quoting *Kyllo v. United States*, 533 U.S. 27, 36 (2001)).

<sup>68</sup> *Id.* at 2219 (“The Government’s position fails to contend with the seismic shifts in digital technology.”); *id.* at 2222 (“When confronting new concerns wrought by digital technology, this Court has been careful not to uncritically extend existing precedents.”).

<sup>69</sup> *See id.* at 2219 (“*Smith* and *Miller*, after all, did not rely solely on the act of sharing. Instead, they considered ‘the nature of the particular documents sought’ to determine whether ‘there is a legitimate expectation of privacy concerning their contents.’” (quoting *United States v. Miller*, 425 U.S. 435, 442 (1976))). The *Carpenter* Court further considered the following “a sensible exception”: “the third-party doctrine does not apply to the ‘modern-day equivalents of an individual’s own papers or effects.’” *Id.* at 2222 (citations omitted). In dissenting Justice Kennedy’s words,

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

*Id.* at 2231–32 (Kennedy, J., dissenting) (citations omitted).

<sup>70</sup> For those who enjoy ‘life puns,’ Roy *Olmstead* became a carpenter in his later years, thus verbally connecting *Olmstead* to *Carpenter*. *See Roy Olmstead*, *supra* note 22.

printed (or electrons inconvenienced), then, to keep that dissent—and others like it—in our law school casebooks.<sup>71</sup>

Too often, when I read the contemporary Court’s criminal procedure dissents, something seems to be missing. When we look back to Brandeis in *Olmstead*, we can see what it is. To quote Edward Bloom from the movie *Big Fish*, they have “all the facts and none of the flavor.”<sup>72</sup> Brandeis’ teaching is not yet done.

### III. THE PATH FORWARD—A DIGITAL WARRANT DEFAULT

So, we’ve made it here: our contemporary day. Post-*Carpenter*. But enormous Fourth Amendment work remains.<sup>73</sup> Consider Justice Kennedy’s

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<sup>71</sup> Other examples surely exist, even if none may have been as persuasive as the words of Justice Brandeis in *Olmstead*. Several of Justice Brennan’s dissents reflect Brandeisian Fourth Amendment themes. *See, e.g.*, *United States v. Jacobsen*, 466 U.S. 109, 138 (1984) (“Or, if a device were developed that, when aimed at a person, would detect instantaneously whether the person is carrying cocaine, there would be no Fourth Amendment bar, under the Court’s approach, to the police setting up such a device on a street corner and scanning all passersby. In fact, the Court’s analysis is so unbounded that if a device were developed that could detect, from the outside of a building, the presence of cocaine inside, there would be no constitutional obstacle to the police cruising through a residential neighborhood and using the device to identify all homes in which the drug is present.”); *Florida v. Riley*, 488 U.S. 445, 462–63 (1989) (“Imagine a helicopter capable of hovering just above an enclosed courtyard or patio without generating any noise, wind, or dust at all—and, for good measure, without posing any threat of injury. Suppose the police employed this miraculous tool to discover not only what crops people were growing in their greenhouses, but also what books they were reading and who their dinner guests were. . . . Would today’s plurality continue to assert that ‘[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures’ was not infringed by such surveillance?”). The former surely influenced the Court in *Kyllo* and *Florida v. Jardines*, 569 U.S. 1, 11–12 (2013) (restricting drug-detecting canines from entering home curtilage), and the latter could influence a future Court considering drones. *See, e.g.*, *Long Lake Twp. v. Maxon*, 970 N.W.2d 893, 893 (Mich. Ct. App. 2021) (holding drone overflight to constitute a Fourth Amendment search).

<sup>72</sup> *BIG FISH* (Columbia Pictures 2003).

<sup>73</sup> This is not to say, of course, that no important work has been done, including by scholars post-*Carpenter*. I will not attempt to log anywhere near all worthy entries, nor to summarize their arguments, but any list should include, for example, Matthew Tokson, *The Aftermath of Carpenter: An Empirical Study of Fourth Amendment Law, 2018–2021*, 135 HARV. L. REV. 1790 (2022); Andrew Guthrie Ferguson, *Facial Recognition and the Fourth Amendment*, 105 MINN. L. REV. 1105 (2021); David Gray, *Collective Rights and the Fourth Amendment After Carpenter*, 79 MD. L. REV. 66 (2019); Paul Ohm, *The Many Revolutions of Carpenter*, 32 HARV. J.L. & TECH. 357 (2019); Evan Caminker, *Location Tracking and Digital Data: Can Carpenter Build a Stable Privacy Doctrine?*, 2018 SUP. CT. REV. 411; Susan Freiwald & Stephen Wm. Smith, *The Carpenter Chronicle: A Near-Perfect Surveillance*, 132 HARV. L. REV. 205 (2018); Elizabeth E. Joh, *Artificial Intelligence and Policing: Hints in the Carpenter Decision*, 16 OHIO ST. J. CRIM. L. 281 (2018).

*Carpenter* dissent, where he takes the Court—or, differently seen, the current law—to task for constitutionally protecting seven days (and nothing less?) of cell-site location information with a warrant requirement but (perhaps) providing no constitutional protection to much longer periods of at least equivalently private data.<sup>74</sup> “In short,” concludes Kennedy, “the Court’s new and uncharted course will . . . ‘keep defendants and judges guessing for years to come.’”<sup>75</sup> That’s true.

There might be no better contemporary example than *United States v. Tuggle*, in which the Seventh Circuit had to decide whether police installation and monitoring of three pole cameras recording the exterior of a home for nearly eighteen months constituted a search for purposes of the Fourth Amendment.<sup>76</sup> “The cameras,” explained the court in deadpan, “offered several advantages to the government’s investigation”:<sup>77</sup>

While in use, the cameras recorded around the clock. . . . Law enforcement agents could also remotely zoom, pan, and tilt the cameras . . . . [G]enerally, the cameras had the practical advantage of enabling the government to surveil Tuggle’s home [for eighteen months!] without conspicuously deploying agents to perform traditional visual or physical surveillance on the lightly traveled roads of Tuggle’s residential neighborhood.<sup>78</sup>

Several advantages indeed! Yet despite a lengthy opinion both reviewing constitutional law<sup>79</sup> and glimpsing a panoptic future,<sup>80</sup> the court came to the remarkable conclusion that there is no federal constitutional restraint on this

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<sup>74</sup> See *Carpenter*, 138 S. Ct. at 2232–34. Kennedy summarizes with this:

*First*, the Court’s holding is premised on cell-site records being a “distinct category of information” from other business records. But the Court does not explain what makes something a distinct category of information . . . .

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

*Third*, even if a distinct category of information is deemed to be more like cell-site records than financial records, courts and law enforcement officers will have to guess how much of that information can be requested before a warrant is required.

*Id.* at 2234 (Kennedy, J., dissenting) (citation omitted).

<sup>75</sup> *Id.* at 2234 (citation omitted).

<sup>76</sup> *United States v. Tuggle*, 4 F.4th 505, 510–11 (7th Cir. 2021).

<sup>77</sup> *Id.* at 511.

<sup>78</sup> *Id.*

<sup>79</sup> See *id.* at 512–26.

<sup>80</sup> See *id.* at 509–10.

terribly invasive technology<sup>81</sup>—a technology that no decent citizen would consider similarly targeting at another.<sup>82</sup> Other courts have held to the contrary,<sup>83</sup> and the *Tuggle* court “was not without unease”:<sup>84</sup>

How much pole camera surveillance is too much? Most might agree that eighteen months (roughly 554 days) is questionable, but what about 250 days? 100 days? 20 days? 1 day? Despite the inherent problems with drawing an arbitrary line, the status quo in which the government may freely observe citizens outside their homes for eighteen months [(says the Seventh Circuit!)] challenges the Fourth Amendment’s stated purpose of preserving people’s right to “be secure in their persons, houses, papers, and effects.” Drawing our own line, however, risks violating Supreme Court precedent and interfering with Congress’s policy-making function, which would exceed our mandate to apply the law. *United States v. Cuevas-Perez*, 640 F.3d 272, 276, 285 (7th Cir. 2011) (Flaum, J., concurring) (“The matter is, as they say, above our pay grade.”), *judgment vacated*, 565 U.S. 1189 (2012).<sup>85</sup>

Such “unease” sounds quite a lot like issuing the wrong holding and knowing it. But, whatever the case in that regard, Justice Kennedy was right in this one: defendants and judges are guessing—or, in the view of the *Tuggle* panel, refusing to guess—and neither such judicial supposition nor such judicial abdication is the best way to consider in the first instance how police ought to be (and ought not to be) using such technological marvels.

Who instead ought to do that work? In other words, who ought to begin (and ideally begin *yesterday*, as they say), classifying information types into differently restrictive access regimes? Surely not the United States Supreme Court. Indeed, surely not any court. The Fourth Amendment—all fifty-four words of it—is designedly ambiguous, forbidding only “unreasonable searches and seizures,” and then providing some critical limitations on the judicial warrant.<sup>86</sup> That ambiguity has allowed the right to withstand—more or less—two hundred-plus years of changing society and technology. Yet in our era so different from the founding, then—and different in part because we have tens of thousands of police departments employing around one million police

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<sup>81</sup> *See id.* at 513.

<sup>82</sup> That one might *incidentally* capture such video in, say, seeking to protect her own home is a different matter; the State surveillance of *Tuggle* was anything but incidental. *See Tuggle*, 4 F.4th at 511–12 (describing the investigation).

<sup>83</sup> *See, e.g.,* *People v. Tafoya*, 494 P.3d 613, 623 (Colo. 2021) (“[P]olice use of the pole camera under these specific facts constituted a warrantless search in violation of the Fourth Amendment.”); *see also Tuggle*, 4 F.4th at 511 (“The answer—and even how to reach it—is the subject of disagreement among our sister circuits and counterparts in state courts.”).

<sup>84</sup> *Tuggle*, 4 F.4th at 526.

<sup>85</sup> *Id.* at 526 (citation omitted).

<sup>86</sup> *See* U.S. CONST. amend. IV.

officers<sup>87</sup> gathering information in manners and on scales never before conceivable<sup>88</sup>—we need a better solution than judges considering each information type and amount in the first instance.<sup>89</sup> In the words of Justice Alito, “it would be very unfortunate if privacy protection in the 21st century were left primarily to the federal courts using the blunt instrument of the Fourth Amendment.”<sup>90</sup> And in the words of the *Carpenter* Court, responding to dissenting criticism, “Justice Gorsuch faults us for not promulgating a complete code addressing the manifold situations that may be presented by this new technology—under a constitutional provision turning on what is ‘reasonable,’ no less.”<sup>91</sup>

Instead of the courts, the work ought to be for our democratically elected representatives.<sup>92</sup> It is they who ought to decide—listening to their constituents’ particular concerns and to the thoughts of scholars and other interested parties<sup>93</sup>—when it is possible to provide ‘win-win’ rules promoting both safety and information privacy (security), and when a bit of one must be sacrificed in order for a critical bit of the other.<sup>94</sup> In a properly functioning democracy, surely that is a core part of their deliberative function.

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<sup>87</sup> See DUREN BANKS, JOSHUA HENDRIX, MATTHEW HICKMAN & TRACEY KYCKELHAHN, BUREAU OF JUST. STATS., NATIONAL SOURCES OF LAW ENFORCEMENT EMPLOYMENT DATA, <https://bjs.ojp.gov/content/pub/pdf/nsleed.pdf> [<https://perma.cc/EL2M-TVLC>] (Oct. 2016).

<sup>88</sup> See Henderson, *Our Records Panopticon*, *supra* note 6, at 700–09 (chronicling the massive amounts of data today available and law enforcement appetite for the same); see also Melvin M. Vopson, *The World’s Data Explained: How Much We’re Producing and Where It’s All Stored*, CONVERSATION (May 4, 2021), <https://theconversation.com/the-worlds-data-explained-how-much-were-producing-and-where-its-all-stored-159964> [<https://perma.cc/DR6B-RUQM>] (providing more recent updates and estimates).

<sup>89</sup> George Thomas has insightfully argued that the core of our Fourth Amendment has basically ‘worked’ because the common law provided it rules, whereas the Double Jeopardy Clause was left empty of such founding guidance and Court interpretation has suffered accordingly. See generally George C. Thomas III, *The Double Jeopardy Clause and the Failure of the Common Law*, 53 TEX. TECH L. REV. 7 (2020). When it comes to modern policing technology, things are fundamentally new, meaning we similarly lack common-law guidance.

<sup>90</sup> *Riley v. California*, 573 U.S. 373, 408 (2014) (Alito, J., concurring in part and concurring in judgment).

<sup>91</sup> *Carpenter v. United States*, 138 S. Ct. 2206, 2220 n.4 (2018).

<sup>92</sup> Where legislatures fail to be proactive and so police departments do the work on their own—or where police have to fill in details in a legislative scheme—of paramount importance should be Christopher Slobogin’s work on subjecting police to our ordinary rules of the administrative state. See generally Christopher Slobogin, *Policing as Administration*, 165 U. PA. L. REV. 91 (2016).

<sup>93</sup> E.g., AM. BAR ASS’N., ABA STANDARDS FOR CRIMINAL JUSTICE: LAW ENFORCEMENT ACCESS TO THIRD PARTY RECORDS (3d ed. 2013).

<sup>94</sup> Such balancing is the Fourth Amendment crux: “Absent more precise guidance from the founding era, we generally determine whether to exempt a given type of search from the warrant requirement ‘by assessing, on the one hand, the degree to which it intrudes upon an

Of course, courts cannot and should not duck their constitutional responsibility. So, when a police officer somewhere in America follows the legislative rules of investigation and the matter comes to a court in the context of a criminal proceeding, that court employs a constitutional backstop that no other entity can.<sup>95</sup> But what of when a manner of digital investigation comes before a court and no relevant legislature has spoken? The court still has no choice but to decide the constitutional issue, yet without the benefit of legislative branch information gathering, deliberation, and decision. That's not ideal.

The solution is to adopt a default rule that will encourage the contrary. In other words, what is wanted is a court rule—true to the federal Constitution, of course (and to state constitutional analogs when relevant)—but a rule that encourages the executive branch not to await criminal prosecution, but to instead take these matters before legislatures *ex ante* as technologies and investigative techniques are developed, considered, and adopted.<sup>96</sup>

Fortunately, the Supreme Court has long articulated just such a rule. Right under our noses, hiding in plain sight, we have a warrant default: “[I]t is a cardinal principle that ‘searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.’”<sup>97</sup> Now, as any student of the Fourth Amendment well knows, application of that “cardinal principle” has been anything but principled. Instead, those “specifically established and well-delineated exceptions” have tended to sprout and grow like weeds, leading Justice Thomas to fairly conclude that, “our cases stand for the illuminating proposition that warrantless searches are *per se* unreasonable, except, of course, when they are not.”<sup>98</sup>

What I am arguing is sterner stuff—more intellectually honest stuff. Presumptively, police *digital* information gathering and acquisition that is not

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individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.” *Riley*, 573 U.S. at 385 (citation omitted). Again, however, the most democratic branch ought to take first dibs on that calculus.

<sup>95</sup> This is classic *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803). Or, if one prefers, classic *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952).

<sup>96</sup> What is wanted might be analogized to a contractual “penalty default.” See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91 (1989) (“[P]enalty defaults are purposefully set at what the parties would not want—in order to encourage the parties to reveal information to each other or to third parties (especially the courts).”). But see Eric A. Posner, *There Are No Penalty Default Rules in Contract Law*, 33 FLA. ST. U. L. REV. 563, 563 (2006) (“The penalty default rule is a theoretical curiosity that has no existence in contract doctrine.”).

<sup>97</sup> *Mincey v. Arizona*, 437 U.S. 385, 390 (1978) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

<sup>98</sup> *Groh v. Ramirez*, 540 U.S. 551, 572–73 (2004) (Thomas, J., dissenting); see also *California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring in the judgment) (“Even before today’s decision, the ‘warrant requirement’ had become so riddled with exceptions that it was basically unrecognizable.”).

according to explicit, particular rules promulgated by the coordinate legislative branch ought to be considered unconstitutional absent a warrant supported by probable cause. It must be merely a default, of course—a *presumptive* unconstitutionality<sup>99</sup>—but it ought to be a *genuine, encompassing* sort of presumption, not mere window dressing before a court proceeds to actual analysis.

Perhaps the United States Supreme Court is tending towards just such a real rule. In recent years in digital cases, the Court has several times not only stressed—but genuinely applied—such a warrant default.<sup>100</sup> And one member—Justice Alito—has explicitly expressed a willingness to rethink that default result if a legislature afterwards speaks to the issue.<sup>101</sup>

So, rather than create novel exceptions for law enforcement agencies unwilling to take a matter before deliberative democratic institutions, when it comes to the digital Fourth Amendment, courts should toe a stern (or, differently stated, a *genuine*) constitutional line. The Supreme Court did just that in *Riley v. California*, not only unanimously exempting mobile phones from the generally permissive rules of search incident to arrest, but doing so unflinchingly: “Our answer to the question of what police must do before searching a cell phone seized incident to arrest is accordingly simple—get a

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<sup>99</sup> To cite an easy example, police are of course authorized to operate without a warrant in instances of exigency. *See* *Carpenter v. United States*, 138 S. Ct. 2206, 2222–23 (2018) (summarizing that doctrine).

<sup>100</sup> *See id.* at 2213 (“When an individual ‘seeks to preserve something as private,’ and his expectation of privacy is ‘one that society is prepared to recognize as reasonable,’ we have held that official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause.” (quoting *Smith v. Maryland*, 442 U.S. 735, 740 (1979))); *id.* at 2221 (“Although the ‘ultimate measure of the constitutionality of a governmental search is “reasonableness,”’ our cases establish that warrantless searches are typically unreasonable where ‘a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing.’ Thus, ‘[i]n the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement.’” (first quoting *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995); then quoting *Riley v. California*, 573 U.S. 373, 382 (2014))); *Riley*, 573 U.S. at 382 (“Our cases have determined that ‘where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, . . . reasonableness generally requires the obtaining of a judicial warrant.’ Such a warrant ensures that the inferences to support a search are ‘drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.’” (first quoting *Vernonia School Dist.*, 515 U.S. at 653; then quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948))).

<sup>101</sup> *See Riley*, 573 U.S. at 407–08 (Alito, J., concurring in part and concurring in the judgment) (“While I agree with the [warrant-requirement] holding of the Court, I would reconsider the question presented here if either Congress or state legislatures, after assessing the legitimate needs of law enforcement and the privacy interests of cell phone owners, enact legislation that draws reasonable distinctions based on categories of information or perhaps other variables.”).



warrant.”<sup>102</sup> The *Carpenter* Court just as unflinchingly exempted CSLI from the generally permissive third-party doctrine.<sup>103</sup>

Again, there is good reason for a warrant default in the digital domain. As Kiel Brennan-Marquez and I have developed elsewhere, modern, expansive crime-definition and modern, remarkably intrusive technology threaten a one-two punch, effectively returning us to the colonial general warrant regime that the Fourth Amendment was drafted to forbid.<sup>104</sup> In other words, even particularized warrants may no longer suffice:

[O]vercriminalization multiplies the ‘sites’ of individualized suspicion—whether probable cause or a ‘junior,’ such as reasonable suspicion—with more and more activities relating to potentially criminal behavior. Technology minimizes the burden of generating the required suspicion at any site, with ‘time machine’-like technologies threatening to asymptotically push it towards zero. In conjunction, then, these two developments threaten (1) probable cause in connection with almost all human activity and (2) probable cause that’s trivially easy to generate, a liberty-decimating ‘perfect storm’ in which the classic Fourth Amendment limitation places no meaningful restraint on government intrusion. What we face—or at least will face if we continue doing as we are—is the ‘neo-general warrant.’<sup>105</sup>

If that argument is even somewhat right, it provides all the more reason for a strong digital warrant default: the very ubiquity of digital data that makes it so privacy invasive pushes down the cost of obtaining a probable cause warrant.<sup>106</sup> Turning once more to the words of the *Carpenter* Court, “our cases have recognized . . . that the [Fourth] Amendment seeks to secure ‘the privacies of life’ against ‘arbitrary power.’ . . . [A] central aim of the Framers was ‘to place obstacles in the way of a too permeating police surveillance.’”<sup>107</sup>

Such arbitrary power and permeating surveillance are what digital technologies threaten, even more than the crude wiretapping that caused Louis Brandeis to peer into the future with the urgency of the present. Constitutional security is, after all, a concern of personal privacy. A rule that warrantless digital gathering or acquisition is presumptively unconstitutional therefore not only

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<sup>102</sup> *Id.* at 403 (Roberts, J., writing for eight Justices); *see also id.* at 404 (Alito, J., concurring in part and concurring in the judgment).

<sup>103</sup> *Carpenter*, 138 S. Ct. at 2221 (“Before compelling a wireless carrier to turn over a subscriber’s CSLI, the Government’s obligation is a familiar one—get a warrant.”).

<sup>104</sup> *See generally* Brennan-Marquez & Henderson, *supra* note 13.

<sup>105</sup> *Id.* at 28.

<sup>106</sup> The *Riley* Court not only took pains to distinguish, both quantitatively and qualitatively, the digital data of a mobile phone from its physical counterparts, *see Riley*, 573 U.S. at 393, but specifically noted the role of technology in easing warrant procedure, *see id.* at 401.

<sup>107</sup> *Carpenter*, 138 S. Ct. at 2214 (citations omitted).

resides on firm, long-stated constitutional ground;<sup>108</sup> its adoption could go a long way towards a safe *and secure* American future.

#### IV. CONCLUSION

Mark Twain once said something like this: “When I was a boy of fourteen, my father was so ignorant I could hardly stand to have the old man around. But when I got to be twenty-one, I was astonished at how much he had learned in seven years.”<sup>109</sup>

There is great wisdom and articulation in some high court opinions and, often enough, it was expressed in dissent because contemporaries did not yet see it clear. There may be no better example than the dissent of Justice Brandeis in *Olmstead*, and I hope I have furthered the case for its continued teaching and celebration. I am fortunate to read his words each time I teach Criminal Procedure: Investigation, and I know I am better off for this regular reminder of what sort of place America ought to be.

Heeding both that wisdom of Brandeis and the wit of Twain, I know to be hesitant to think too much of my contemporary beliefs. But at least for now—at least until we can get a better grip on what modern technologies and policing might bring—it seems wise for courts in the digital context to do what the Supreme Court has for so long claimed in words: apply a warrant default. When executive policing agencies choose to filter their work through our democratic deliberative regimes, it falls to the courts merely to preserve the constitutional backstop. But when such agencies cannot be bothered to seek legislative review, or when legislatures cannot be bothered to provide answers, that backstop needs to be more: a shield against arbitrary power and too-permeating surveillance with real, presumptive bite that strongly encourages democratic deliberation and debate. In other words, it is time for a digital warrant default.

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<sup>108</sup> Here my use of *Carpenter* could be criticized for conflating the question of whether there exists Fourth Amendment protection with the question of what protection that Amendment provides. The two are different questions. Nonetheless, in this instance I find the language of the *Carpenter* Court in articulating the Fourth Amendment’s aims helpful in both regards, and think that the best reading of the entire *Carpenter* opinion.

<sup>109</sup> *When I Was a Boy of Fourteen, My Father Was So Ignorant*, QUOTE INVESTIGATOR (Oct. 10, 2010), <https://quoteinvestigator.com/2010/10/10/twain-father/> [<https://perma.cc/Y86T-DHC8>]. Apparently, it is unclear whether the words are actually Twain’s. *Id.* Either way, they certainly sound in his wit.