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Order, Technology and the Constitutional Meanings of Criminal Procedure

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ORDER, TECHNOLOGY, AND THE CONSTITUTIONAL MEANINGS OF CRIMINAL PROCEDURE

THOMAS P. CROCKER*

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With new technologies accompanied by new roles for police in providing security and maintaining order, the Fourth Amendment's relevance to modern life is becoming increasingly tenuous. In fact, one federal appeals court judge recently announced the death of the Fourth Amendment.¹ Entrenched constitutional doctrine and technological advances have worked together to kill it. The Fourth Amendment protects only reasonable expectations of privacy, but the Supreme Court claims one cannot have an expectation of privacy in anything shared with another person—and we share practically everything. As a result, “the Fourth Amendment is all but obsolete.”² The third-party doctrine, which removes Fourth Amendment protection from information shared with another person or entity,³ and the circularity of expectations of privacy, which depend on both judicial and social interpretive practices,⁴ have all but interred it. A dead Amendment combined with robust police practices may not augur a robust constitutional future in light of new technological and social practices.⁵

Perhaps it is too soon to eulogize the Fourth Amendment as Judge Kozinski does, though it is indeed in dire health as it struggles to be relevant to the changing technological means by which government may conduct surveillance of everyday activities.⁶ Global-Positioning-System

¹ Alex Kozinski & Stephanie Grace, *Pulling Plug on Privacy: How Technology Helped Make the 4th Amendment Obsolete*, THE DAILY (June 22, 2011, 9:12 AM), <http://www.freerepublic.com/focus/f-chat/2738236/posts>.

² *Id.*

³ See *Smith v. Maryland*, 442 U.S. 735, 743–44 (1979) (“[The Supreme Court] consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.”); see also *United States v. Knotts*, 460 U.S. 276, 281–82 (1983) (holding persons have no expectation of privacy in their publicly viewable location on a road); *United States v. Miller*, 425 U.S. 435, 443 (1976) (holding persons have no expectation of privacy in information conveyed to a bank).

⁴ See *Kyllo v. United States*, 533 U.S. 27, 34 (2001) (“[A]n expectation of privacy that society is prepared to recognize as reasonable—has often been criticized as circular, and hence subjective and unpredictable.”); see also Michael Abramowicz, *Constitutional Circularity*, 49 UCLA L. REV. 1, 60–61 (2001) (“Fourth Amendment doctrine, moreover, is circular, for someone can have a reasonable expectation of privacy in an area if and only if the Court has held that a search in that area would be unreasonable.”).

⁵ The end of privacy need not be the end of the Fourth Amendment, as scholars have emphasized its other meanings, including privacy and liberty. See John D. Castiglione, *Human Dignity Under the Fourth Amendment*, 2008 WIS. L. REV. 655, 661 (arguing that “dignity captures a core Fourth Amendment value that privacy does not”); Thomas P. Crocker, *From Privacy to Liberty: The Fourth Amendment After Lawrence*, 57 UCLA L. REV. 1, 69 (2009) (arguing for a refocusing of Fourth Amendment doctrine to protect liberty); Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 104 (2008) (arguing that the Fourth Amendment “should stop trying to protect privacy”).

⁶ See, e.g., Paul Ohm, *The Fourth Amendment in a World Without Privacy*, 81 MISS. L.J.

(GPS) tracking enhances the power of police to monitor everyday movements and activities of persons at increasingly lower cost. This doctrinal and technological backdrop makes the Supreme Court's ruling in *United States v. Jones*⁷—that police placement of a GPS tracking device on a vehicle without a warrant violates the Fourth Amendment—all the more important. Even here, the holding in *Jones* is limited to occasions when police physically occupy “private property for the purpose of obtaining information”⁸ without a warrant, leaving many questions about future GPS use unanswered and, in the process, reviving the importance of physical intrusion, not simply “reasonable expectations of privacy,” for Fourth Amendment analysis.⁹ For example, in the absence of physical intrusion, how might the Constitution regulate GPS surveillance using cell phones or other devices already on a person or in an automobile? What constitutional values are at stake when police engage in temporally extended comprehensive monitoring of personal movements and transactions?

The problem surveillance techniques create for jurists and scholars alike is exacerbated by the fact that current Fourth Amendment doctrine has developed in the shadow of order-maintenance policing practices focused on visible social disorder in public space. Order-maintenance policing was inspired by James Q. Wilson and George Kelling's *Atlantic Monthly* article, *Broken Windows*, speculating that serious crime, as well as social decay, could be forestalled by more aggressive street-level police enforcement of minor criminal behavior such as vagrancy, panhandling, vandalism, and the like.¹⁰ Order-maintenance practices in turn pressure constitutional doctrine to authorize greater police discretion and to rely on citizen consent or self-assertion to define the constitutional boundaries of searches and seizures while narrowing the scope of social practices deemed private. Technologically enhanced police practices may be able to discern ever more subtle and hidden forms of disorder, extending order-maintenance priorities into new spaces, including the home. In turn, facilitative doctrine enables the growth of new police practices that illuminate forms of disorder lurking in these freshly transparent spaces.

1309, 1313–20 (2012) (detailing ways that technology complicates privacy).

⁷ *United States v. Jones*, 132 S. Ct. 945 (2012).

⁸ *Id.* at 949.

⁹ Under the privacy jurisprudence since *Katz v. United States*, 389 U.S. 347 (1967), the Court repeatedly claimed that “the Fourth Amendment protects people, not places.” *Id.* at 351. The approach taken by the majority in *Jones* does not reject *Katz*, even as it revives an approach that protects places from physical intrusion by police, dependent on preserving original understandings of the Fourth Amendment's scope. *Jones*, 132 S. Ct. at 949–50.

¹⁰ See James Q. Wilson & George L. Kelling, *Broken Windows*, *ATLANTIC MONTHLY*, Mar. 1982, at 29–30.

The problem technology creates for Fourth Amendment doctrine is therefore twofold. First, the problem is whether or how existing constitutional doctrines might apply to new technologies; but second, the problem is what conceptions of constitutional values, priorities, and policing practices will inform doctrinal development and choice. My claim is that no answer to the former issue will be adequate without tackling the latter. And to approach the conceptual issue, we must recognize that without fundamental revision of underlying values and purposes, future cases will be decided in light of the constitutional meanings of criminal procedure made available by the existing doctrinal frameworks that produced the Fourth Amendment's eulogy. Doctrinal tinkering will not suffice. Nor will the quietism produced by defending the status quo.¹¹ The stakes are high because social practices increasingly conflict with police expectations. And those expectations now encompass the ability of individual officials to acquire information and conduct surveillance by means once thought only possible for someone with a "god's eye view."¹²

To track an individual's movements in a car over a month would have once required considerable police resources, with officers conducting physical surveillance around the clock. Now, by simply attaching a tracking device to the underside of the bumper, a single police officer can sit comfortably in an office and accomplish the same end. What is the proper way to articulate the doctrinal issue and the constitutional values at stake in this technological advance? In *Jones*, the majority opinion looks no further than the fact that police conducted a "search" where they "physically occupied private property for the purpose of obtaining information."¹³ For the majority, common law trespass formed a sufficient basis to decide this case without reference to the expectations of privacy or other interests the Fourth Amendment might protect. By contrast, Justice Sotomayor's separate concurrence and Justice Alito's concurrence for four Justices each rely on broader constitutional values of privacy and political freedom. What is at stake is unavoidably interpretive. Whether a two-day monitoring of a person suspected of committing a minor offense or a six-month monitoring of a terrorism suspect will violate a potential rule that

¹¹ See Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311, 315–20 (2012) (defending the current sequential approach to the Fourth Amendment).

¹² Not only is the perspective qualitatively different, but also the sheer capacity for data storage of a person's movements and phone conversations is different. See JOHN VILLASENOR, CTR. FOR TECH. INNOVATION, BROOKINGS INST., RECORDING EVERYTHING: DIGITAL STORAGE AS AN ENABLER OF AUTHORITARIAN GOVERNMENTS (2011), available at http://www.brookings.edu/~media/research/files/papers/2011/12/14%20digital%20storage%20villasenor/1214_digital_storage_villasenor.

¹³ *Jones*, 132 S. Ct. at 949.

“longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy”¹⁴ requires construction of both the social and constitutional meanings of such police practices. Interpretation is not an abstract exercise of divining meaning from constitutional text isolated from the culture and practices that give it life.¹⁵ Rather, interpretation is possible only in light of background priorities, practices, and values the Supreme Court has in view. Thus, the question for the future of the Fourth Amendment is not simply what doctrinal rules the Court should adopt. Rather, the question is how, and on what normative basis, the Court will construct the social and constitutional meanings of technologically enabled policing practices.

This Article explores how current Fourth Amendment doctrine, whether construed in terms of property rights or expectations of privacy, facilitates background order-maintenance conceptions of police practice.¹⁶ Order maintenance becomes a more powerful, and an even more problematic, priority when it comes to electronic monitoring. The doctrinal model focuses on the personal interactions between citizens and police on the community street. Police officers are expected to respond to visible displays of social disorder. Visibility is therefore key to the broken windows approach. But technology alters what is visible. With more powerful tools that can make visible more subtle or hidden forms of disorder, the model of street-level police interaction changes as well. Since extended secret surveillance of a person’s movements on public streets or electronic monitoring of a person’s activities as revealed to third parties could each be conducted to ferret out the social disorder lurking beneath sequentially quotidian movements and activities, larger patterns of disorder indiscernible to the episodic street encounter can now be made visible. Only by looking at the bigger picture might the disorder become apparent to government officials, especially for more serious offenses requiring complex coordination. Government officials have already relied on this “mosaic theory”—that larger patterns of wrongdoing might lie hidden

¹⁴ *Id.* at 964 (Alito, J., concurring in the judgment).

¹⁵ *See, e.g.*, JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* 62 (2011) (emphasizing how constitutional meaning depends on the temporally contingent constitutional culture in which it is embedded); Thomas P. Crocker, *Envisioning the Constitution*, 57 *AM. U. L. REV.* 1, 57–70 (2007).

¹⁶ Under this conception, Fourth Amendment doctrine focuses on the needs of police rather than the liberties of citizens, as if by analogy the object of First Amendment doctrine were to provide clear rules to facilitate the censorship of speech, rather than to protect uninhibited public debate. *See* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (“[D]ebate on public issues should be uninhibited, robust, and wide-open . . .”). For more on the relation between the First and Fourth Amendments, see Thomas P. Crocker, *The Political Fourth Amendment*, 88 *WASH. U. L. REV.* 303, 332–45 (2010).

within everyday patterns—in other national security contexts.¹⁷ Federal interests in protecting national security require information sharing with state and local police in order to discern crime patterns and to anticipate security threats. Because pursuit of this “mosaic theory” has involved state and local police, there is no barrier to adopting similar routine policing practices that seek to make visible the indiscernible disorder concealed behind apparent patterns of everyday orderly behavior.¹⁸

Current constitutional doctrine provides scant barriers to such permeating police practices.¹⁹ Doctrine focuses on expectations of privacy—on information shared, searched, or withheld—not on how persons occupy physical spaces such as streets. As this Article argues, if courts extend the deference they afford everyday order-maintenance policing to the mosaic of electronic monitoring, then the Fourth Amendment will provide few protections against advancing search technologies. This order-maintenance deference is manifest through three doctrinal themes: increased reliance on individual constitutional responsibility, increased emphasis on consensual encounters, and expanded control over visible space. Each of these themes is on display in Justice Alito’s majority opinion in *Kentucky v. King*,²⁰ a case involving an everyday, low technology law enforcement setting. This Article argues that

¹⁷ See *United States v. Maynard*, 615 F.3d 544, 562 (D.C. Cir. 2010) (“As with the ‘mosaic theory’ often invoked by the Government in cases involving national security information, ‘What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene.’”) (quoting *CIA v. Sims*, 471 U.S. 159, 178 (1985)). Government officials have invoked the “mosaic theory” in other national security contexts. See *Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice*, 331 F.3d 918, 924 (D.C. Cir. 2003); *North Jersey Media Grp., Inc. v. Ashcroft*, 308 F.3d 198, 219 (3d Cir. 2002). Criticism of government reliance on the theory can be found in DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* 20–21 (2003) (criticizing reliance on mosaic theory in immigration proceedings), and in David E. Pozen, Note, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 *YALE L.J.* 628, 664 (2005) (“[C]ourts ought to review these claims with extra scrutiny and skepticism on account of their susceptibility to misuse.”).

¹⁸ See Danielle Keats Citron & Frank Pasquale, *Network Accountability for the Domestic Intelligence Apparatus*, 62 *HASTINGS L.J.* 1441, 1444 (2011) (“Fusion centers facilitate a domestic intelligence network that collapses traditional distinctions between law enforcement and foreign wars, between federal and state authorities, and between government surveillance and corporate data practices.”).

¹⁹ Current doctrine is focused on expectations and ignores the role that visible space plays in ordering our lives. See Julie E. Cohen, *Privacy, Visibility, Transparency, and Exposure*, 75 *U. CHI. L. REV.* 181, 191 (2008) (“[P]revailing legal understandings of spatial privacy do not recognize a harm that is distinctively spatial: that flows from the ways in which surveillance, whether visual or data-based, alters the spaces and places of everyday life.”).

²⁰ *Kentucky v. King*, 131 S. Ct. 1849 (2011).

the possible future of Fourth Amendment protections against electronic monitoring after *Jones* requires understanding the constitutional meanings developed in aid of order-maintenance policing as exemplified in *King*. So long as the Supreme Court emphasizes order-maintenance policing's priorities, then the meanings of constitutional criminal procedure will remain tethered to norms of visible order constructed by social and political practices that give scant consideration to the value of privacy. If Americans are to avoid continuing the same constitutional story that has produced a near moribund Amendment, then new conceptions of Fourth Amendment values are necessary before any new doctrinal tests regulating GPS monitoring are likely to succeed.²¹ These new conceptions require us to place the privacy and liberty rights of the people, not merely the investigatory needs of police, at the forefront of constitutional thought and practice.

In response to the challenge of technology, some scholars see Fourth Amendment doctrine adjusting over time to imbalances of power between criminals and police caused by the ways that technology facilitates criminal acts.²² Other scholars, and at least one Supreme Court Justice, see the need to refashion judicial doctrine for the digital age by recognizing that privacy can protect the complex ways that persons share information.²³ Still others focus on the role other institutions play in regulating policing practice outside the context of constitutional criminal procedure.²⁴ Each of these responses to changing technologies requires that we first have in view the meanings the Court provides to citizen-police interactions both through interpreting constitutional text or doctrine and by interpreting the policing practices themselves in light of the social expectations individuals might have. Are particular practices consensual conversations, voluntary third-party disclosures, assumed risks of revealed secrets, threshold colloquies, or

²¹ See, e.g., Christopher Slobogin, *Making the Most of United States v. Jones in a Surveillance Society: A Statutory Implementation of Mosaic Theory*, 8 DUKE J. CONST. L. & PUB. POL'Y 1, 4 (2012) (providing "a springboard for a much-needed codification of search-related doctrine").

²² See Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 480 (2011). For criticism of this view, see Christopher Slobogin, *An Original Take on Originalism*, 125 HARV. L. REV. FORUM 14, 14 (2011).

²³ Justice Sotomayor comments that "it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties" because such an "approach is ill suited to the digital age." *United States v. Jones*, 132 S. Ct. 945, 957 (2012) (Sotomayor, J., concurring). Scholars have called for abandoning the third-party doctrine. See, e.g., Daniel J. Solove, *Fourth Amendment Codification and Professor Kerr's Misguided Call for Judicial Deference*, 74 FORDHAM L. REV. 747, 753 (2005).

²⁴ See Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 764 (2012).

reasonable police observations? Or are these practices coerced interactions, violations of privacy expectations, intrusions on property rights, searches under the Fourth Amendment, suppressions of associational and expressive freedoms, or otherwise too permeating a police presence? Facts do not come prepackaged with interpretations already enclosed.²⁵

If constitutional rights deny police the flexibility to engage in discretionary stops and frisks, or if police are stymied in their judgments about enforceable misconduct, then constitutional meanings constrain police practice even as they construct the norms for police–citizen interactions.²⁶ Whatever form of judicial adjustment, institutional regulation, democratic involvement, or doctrinal developments might occur, at stake with changing technologies is that they “may alter the relationship between citizen and government in a way that is inimical to democratic society.”²⁷ How the Court constructs changing technologies in light of constitutional values will shape both future social and police practices and their constitutional meanings. When we authorize police surveillance that makes visible through technology what might have otherwise gone unnoticed to official eyes, we change the nature of the underlying conduct and its social meanings. It is no accident that Justice Sotomayor turns to the First Amendment in *Jones* to observe how “[a]wareness that the Government may be watching chills associational and expressive freedoms.”²⁸ Awareness of how far order-maintenance priorities extend into everyday doctrine is a necessary first step to reconsidering how the Constitution should protect political liberty and privacy.

This Article begins in Part I by considering the order-maintenance theory of policing and its influence in shaping constitutional meanings. Part II takes up the new kind of order challenged by complex crimes hidden

²⁵ Bernard Harcourt takes up the interpretive task to argue, “The social meaning of the proposed police practices does not simply change our behaviors; it may fundamentally alter the way we think about and judge other people, and the way we relate to others. These law enforcement techniques may form us” BERNARD E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* 218 (2001).

²⁶ Social norm theorists advocating order-maintenance policing criticize courts for using constitutional provisions to constrain police discretion. See Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 *YALE L.J.* 1165, 1247–48 (1996) (“Judges should refrain from using the generally worded clauses of the United States Constitution to create a national code that denies cities sufficient room to experiment with how to grapple with street disorder.”); Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 *GEO. L.J.* 1153, 1166 (1998) (criticizing the Court for striking down Chicago’s antigang loitering ordinance as a violation of the Fourth Amendment).

²⁷ *Jones*, 132 S. Ct. at 956 (Sotomayor, J., concurring) (quoting *United States v. Cuevas-Perez*, 640 F.3d 272, 285 (7th Cir. 2011) (Flaum, J., concurring)).

²⁸ *Id.* at 955.

in the mosaic of everyday life. Policing practices designed to render visible complex disorder require constitutional meanings that find no harms in comprehensive electronic monitoring. The future direction of the Fourth Amendment for electronic surveillance begins with *United States v. Jones*. But the future after *Jones*, Part III argues, relies on the constitutional meanings of criminal procedure on display in the Court's recent decision in *King*. Because *King* draws the support of eight members of the Court, it is an instructive place to see how order-maintenance priorities have shaped the constitutional meanings of police practices in addition to judicial constructions of privacy expectations even when the setting is the home. As Part IV argues, the meanings and judicial attitudes on display in *King* will in turn play an important role in constructing the constitutional meanings of criminal procedure for police practices using new electronic technologies. The Fourth Amendment's future as constitutional law, not merely as an increasingly moribund adjunct to policing practice, depends on how we attend to more comprehensive constitutional meanings of political liberty and personal privacy.

I. THE IMPLICATIONS OF PRIORITIZING ORDER-MAINTENANCE POLICING

By enforcing "public order" against vandalism, panhandling, or other minor street crime, police are said to play a role in altering the public meaning and social influence of crime.²⁹ According to the theory of order-maintenance policing, authorities can reduce overall crime rates by changing the degree of tolerance for public disorder.³⁰ Social norms of orderliness have meaning within practices that are open to influence and interpretation. When order gives way to disorder, social meanings change in ways that normalize conduct once thought unacceptable.³¹ Because of

²⁹ See Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 369 (1997) ("Visible disorder is a self-reinforcing cue about the community's attitude toward crime."). Social norms influence behavior because they often have pliable social meaning. See Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 961 (1995) ("Social meaning construction is about social meaning change."). It is important to understand not only how norms influence behavior, but also to understand how norms are formed. See Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 391 (1997). Academic attention on the relationship between norms and law owes much to ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

³⁰ The order-maintenance approach to crime relies on the broken windows theory advanced in Wilson & Kelling, *supra* note 10, at 29. See also WESLEY G. SKOGAN, *DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS* 65-84 (1990).

³¹ See Tracey L. Meares & Dan M. Kahan, *Law and (Norms of) Order in the Inner City*, 32 LAW & SOC'Y REV. 805, 806 (1998) ("By shaping preferences for crime, accentuating the perceived status of lawbreaking, and enfeebling the institutions that normally hold criminal

this dynamic, one way to change practices is to change meanings. When police cease to tolerate low-level street disorder, then the social acceptance, and thereby the social meaning, of disorder can be reconstructed to conform to new norms of orderliness. Order-maintenance policing, however, requires police discretion. To succeed, police officers require latitude “to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving,” constrained only by a standard of reasonableness the Supreme Court constructs.³²

In their famous article, *Broken Windows*, James Q. Wilson and George Kelling’s thesis is that visible disorder—broken windows, abandoned property, litter, and the like—produces decay in the commitment to norms of legal obedience.³³ Legal decay made visible by the community’s unattended broken windows produces social decay. According to Wilson and Kelling, disorder creates a causal sequence that begins when some people stop complying with legal and social norms and declines further as others follow suit. Once disorder begins to take root, those committed to living in a community that reflects law-abiding norms will abandon the neighborhood, leaving behind even greater social decline. “A stable neighborhood of families who care for their homes . . . can change, in a few years or even a few months, to an inhospitable and frightening jungle.”³⁴ The way to reverse this causal chain is to fight crime at the level of street disorder.

Appearance is, or can be, reality. Order-maintenance policing is designed to forestall this causal sequence, reinforcing norms of orderliness in a way that makes visible to the community a commitment to law enforcement and compliance.³⁵ More than enforcing compliance with legal norms, this approach aims to change social meanings by reinforcing compliant behaviors.³⁶ A community’s level of toleration for minor disorder can be a clue to the social meaning criminal behavior might have within the community. Toleration of crime reduces the stigma, and hence

propensities in check, disorderly norms create crime.”).

³² *Graham v. Connor*, 490 U.S. 386, 397 (1989).

³³ Wilson & Kelling, *supra* note 10, at 31. As they describe it: “A piece of property is abandoned, weeds grow up, a window is smashed. Adults stop scolding rowdy children; the children, emboldened, become more rowdy. Families move out, unattached adults move in. . . . Fights occur. Litter accumulates.” *Id.* at 32.

³⁴ *Id.* at 31–32.

³⁵ See SKOGAN, *supra* note 30, at 100; WESLEY G. SKOGAN & SUSAN M. HARTNETT, *COMMUNITY POLICING, CHICAGO STYLE* 110 (1997).

³⁶ See, e.g., Kahan, *supra* note 29, at 351 (“Cracking down on aggressive panhandling, prostitution, open gang activity and other visible signs of disorder may be justifiable on this ground, since disorderly behavior and the law’s response to it are cues about the community’s attitude toward more serious forms of criminal wrongdoing.”).

the individual cost, for additional persons to engage in criminal activity. Maintaining order, by contrast, is a way of expressing the positive social meaning of legal norms. Norms of orderliness increase the individual cost of crime in part by changing the visible meaning of criminal conduct.

Community and order-maintenance policing have proven popular in some American cities, producing in their wake, however, an increase in stops and frisks as well as arrests for misdemeanor offenses.³⁷ For example, in 2009 alone, the New York Police Department stopped and questioned more than half a million persons and, in 2011, more than 600,000.³⁸ The impact of these practices has fallen disproportionately on minority groups and on specific communities.³⁹ Accompanying these practices has been an increase in official disorder as the prevalence of official illegality has risen.⁴⁰

On Wilson and Kelling's own account, when police maintain public order, some persons were "roughed up, people were arrested 'on suspicion' or for vagrancy, and prostitutes and petty thieves were routed. 'Rights' were something enjoyed by decent folk, and perhaps also by the serious professional criminal, who avoided violence and could afford a lawyer."⁴¹ Notice that the order-maintenance approach acknowledges and contemplates that one form of illegality and disorder will displace another.⁴² It also assigns considerable discretion to the individual police officer; Wilson described in his other work, "The police are watchman-like not simply in emphasizing order over law enforcement but also in judging the seriousness of infractions less by what the law says about them than by their immediate and personal consequences"⁴³

³⁷ See GEORGE L. KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES* 155 (1996) (claiming this method greatly reduced crime in New York City). After considerable expansion of the practice, public outcry has had effects on the future of the current practice in New York. See Joseph Goldstein & Wendy Ruderman, *Police Stops in New York Drop by 34%*, N.Y. TIMES, Aug. 4, 2012, at A1.

³⁸ See, e.g., *Stop-and-Frisk Data*, N.Y. C.L. UNION, <http://www.nyclu.org/content/stop-and-frisk-data> (last visited May 20, 2013).

³⁹ See *id.*; Al Baker, *New York Police Release Data Showing Rise in Number of Stops on Streets*, N.Y. TIMES, May 13, 2012, at A19.

⁴⁰ See, e.g., Jon B. Gould & Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 CRIMINOLOGY & PUB. POL'Y 315, 343 tbl.6 (2004) (reporting findings of large numbers of unconstitutional searches in everyday police practice).

⁴¹ Wilson & Kelling, *supra* note 10, at 33.

⁴² The consequences of this view are explored in Charles A. Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L.J. 1161, 1165–66 (1966).

⁴³ JAMES Q. WILSON, *VARIETIES OF POLICE BEHAVIOR: THE MANAGEMENT OF LAW AND ORDER IN EIGHT COMMUNITIES* 141 (1968). Moreover, "[i]n any particular case, the

Transformations of criminal procedure are capable of making yesterday's menace today's method. Curtailing police discretion was once a key feature of constitutional criminal procedure. Even *Terry v. Ohio* sought to impose a standard applicable to street-level police discretion that balanced policing with privacy.⁴⁴ Moreover, past policing practices imposed disproportionate injustices on minority communities, particularly in the American South. The once emerging constitutional criminal procedure addressed racial injustice.⁴⁵ As criminal procedure moved from the realm of a due process standard that curbed the most egregious forms of police brutality and judicial process—for example, torture in Mississippi,⁴⁶ mob-dominated proceedings in Arkansas,⁴⁷ and farcical trials in Alabama⁴⁸—to the incorporation of Bill of Rights protections,⁴⁹ one of the dominant issues was racial injustice.

But times have changed, Dan Kahan and Tracey Meares argue, and the life cycle of criminal procedure must now give way to new policing methods backed by political support from minority communities.⁵⁰ Academic supporters emphasize the changed political context that gives new meaning and acknowledges less to fear from the discretion entailed by community and order-maintenance policing. Supreme Court opinions also reflect greater trust in police professionalism.⁵¹ Where one of the primary

patrolman may act improperly by abusing or exceeding his authority, making arrests or street stops on the basis of personal prejudice or ill-temper.” *Id.* at 278.

⁴⁴ *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

⁴⁵ See, e.g., MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 117–35 (2004); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 364–65 (1998).

⁴⁶ *Brown v. Mississippi*, 297 U.S. 278, 287 (1936).

⁴⁷ *Moore v. Dempsey*, 261 U.S. 86, 91–92 (1923).

⁴⁸ *Powell v. Alabama*, 287 U.S. 45, 67, 71–73 (1932).

⁴⁹ See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 161–62 (1968) (applying Sixth Amendment right to jury trial to states); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (applying the Fourth Amendment).

⁵⁰ Kahan & Meares, *supra* note 26, at 1154 (“The new doctrine must recognize the legitimate function of discretionary policing techniques in combating inner-city crime, and also the competence of inner-city communities to protect themselves from abusive police behavior.”). But discretionary stops and frisks continue to be disproportionately practiced. See Al Baker, *City Minorities More Likely to Be Frisked: Increase in Police Stops Fuels Intense Debate*, N.Y. TIMES, May 13, 2010, at A1.

⁵¹ See *Hudson v. Michigan*, 547 U.S. 586, 598–99 (2006) (“Another development over the past half-century that deters civil-rights violations is the increasing professionalism of police forces, including a new emphasis on internal police discipline.”). Professionalism, however, does not solve the problem of cognitive bias impacting police reasoning. See Andrew E. Taslitz, *Police Are People Too: Cognitive Obstacles to, and Opportunities for, Police Getting the Individualized Suspicion Judgment Right*, 8 OHIO ST. J. CRIM. L. 7, 25–27 (2010).

sources of police abuse was once the discretion police possessed over public spaces and public order,⁵² that same authority can be a virtue in the new political climate. Where before police discretion was used against minority communities, it can now be used at the behest of these communities to maintain order and reinforce social norms of orderliness.⁵³

These calls for changing social meaning through order-maintenance policing have produced a new criminal procedure with new constitutional meanings. The production of new constitutional meanings takes time and emerges from the interlacing web of many cases. Take the results in *Illinois v. Wardlow* as an example.⁵⁴ Not only do police have unfettered authority to stop and frisk individuals they find on the streets, so long as they can articulate reasonable suspicion,⁵⁵ but they also have interpretive authority to view individuals who might seek to avoid this procedure as suspicious. In this case, a man saw police vehicles driving slowly into the neighborhood. He began running from the area, causing police officers to give pursuit.⁵⁶ The Supreme Court applied a totality of the circumstances test to determine that flight from an area known for narcotics trafficking at the sight of a police officer constituted reasonable suspicion.⁵⁷ Although the Court intones in other contexts that an individual has a right to “decline to listen to the [police] questions at all and may go on his way,”⁵⁸ when police seek a consensual colloquy, that same individual who takes proactive action to avoid the police encounter altogether becomes a legitimate subject of police suspicion.⁵⁹

In such cases of police-initiated encounters, there is an acceptable script⁶⁰—in *Wardlow*, that one must not seek to avoid a police encounter—

⁵² See, e.g., *Papachristou v. City of Jacksonville*, 405 U.S. 156, 168–69 (1972); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969); *Bouie v. City of Columbia*, 378 U.S. 347, 362–63 (1964).

⁵³ Kahan & Meares, *supra* note 26, at 1160 (“Both the political and the litigation dynamics surrounding discretionary policing techniques have changed dramatically.”); see also Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71, 101 (2003) (arguing that community policing practices “suggest[] the importance of promoting trust, here between citizens and the police”).

⁵⁴ 528 U.S. 119 (2000).

⁵⁵ See *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

⁵⁶ *Wardlow*, 528 U.S. at 121–22.

⁵⁷ *Id.* at 124–25.

⁵⁸ *Florida v. Royer*, 460 U.S. 491, 497–98 (1983).

⁵⁹ Indeed, the Illinois Supreme Court used this reasoning to hold that the officers were not justified in searching the defendant. *Illinois v. Wardlow*, 701 N.E.2d 484, 485, 488–89 (Ill. Sup. Ct. 1998).

⁶⁰ The idea that social scripts play a role in organizing social interactions and practical knowledge comes from work in social psychology and related fields. See, e.g., ERVING GOFFMAN, *FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE* (1974);

deviation from which justifies an intrusive police response. “Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual’s right to go about his business or to stay put and remain silent in the face of police questioning.”⁶¹ Citizens are allowed to remain silent when questioned, but they are not free to avoid the questioning altogether. In so holding, the Court construes the social meaning of public space in a way that further enables police to maintain order, often under conditions officers have the discretion to define. Moreover, constitutional meaning creates social meaning, as the Court understands the Fourth Amendment to prefer the “more minimal intrusion” of a *Terry* stop as a means of police investigation⁶² but not to protect the individual’s ability to avoid the intrusion in the first place.

By construing constitutional meaning to prefer certain kinds of citizen–police encounters, the Court creates norms for police and citizens alike to internalize. These norms increasingly rely on self-regulation by both parties. That is, citizens must be aware of the constitutional limits of police practices and assert them against potential encroachment without support in the form of judicial enforcement. For example, citizens must make their own judgments about when a nonconsensual police stop for a traffic infraction transforms into a consensual colloquy that citizens are free to terminate.⁶³

Police self-regulate in the context of negligent record keeping,⁶⁴ hearing noises inside a residence,⁶⁵ or acting out of fear for public safety⁶⁶—behaviors unattached from limiting Fourth Amendment norms. These constitutionally enabled norms of citizen–police interactions construct the boundaries in which we can expect future policing practice to

ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959); ROGER C. SCHANK & ROBERT P. ABELSON, *SCRIPTS, PLANS, GOALS, AND UNDERSTANDING: AN INQUIRY INTO HUMAN KNOWLEDGE STRUCTURES* (1977); *see also* GEORGE LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* 68 (1987) (exploring related phenomenon of how “we organize our knowledge by means of structures called *idealized cognitive models*”).

⁶¹ *Wardlow*, 528 U.S. at 125.

⁶² *Terry v. Ohio*, 392 U.S. 1, 29–30 (1968).

⁶³ *See Ohio v. Robinette*, 519 U.S. 33, 35 (1996) (holding that police are not required to inform persons that they are “free to go” before seeking consent to search a vehicle).

⁶⁴ *See Herring v. United States*, 129 S. Ct. 695, 700–01 (2009) (holding that the exclusionary rule does not apply to negligent record keeping); *see also* Erin Murphy, *Databases, Doctrine & Constitutional Criminal Procedure*, 37 *FORDHAM URB. L.J.* 803, 817–21 (2010).

⁶⁵ *See Kentucky v. King*, 131 S. Ct. 1849, 1862 (2011) (holding that police may forcibly enter a residence without a warrant when they fear imminent destruction of evidence).

⁶⁶ *See Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (holding that home entry without a warrant is reasonable to protect public safety).

operate. Bernard Harcourt writes that “[s]ocially constructed meaning is at the heart of social norm theorizing. With regard to each and every policy recommendation, social meaning plays a pivotal, if not *the* pivotal, role.”⁶⁷ He goes on to claim that certain forms of community–police cooperation “change[] the social meaning of the police by casting them in a new light within the social fabric of the community, and change[] police officers’ perceptions of suspects.”⁶⁸ Taking this thought a step further, police practice can also change the constitutional meaning of the citizen–police interaction, which in turn can further construct the political nature of that interaction.

In a similar fashion, constitutional cases can change the political meaning of police practices by casting them in a new social role, changing police officers’ perceptions of their own obligations and priorities. Constitutional cases construct constitutional meaning, which does not hover above political practices like a “brooding omnipresence in the sky,”⁶⁹ but expresses the articulable views of particular constitutional visions. The cases order priorities by setting, or withdrawing, constraints on permissible policing practices in ways that change the meaning of those practices. So when it comes to questions of electronic surveillance, the doctrinal focus wants to know whether a particular practice is permitted under the Fourth Amendment. No doubt, a decision on this outcome is important. But it will be important for reasons that go beyond establishing rules of conduct. A constitutional decision on whether the Fourth Amendment prohibits, or fails to restrict, electronic monitoring of citizens at the discretion of police will give a political meaning to the relationship between citizen and state by establishing the particular terms of their interaction. In this way, a decision can never be simply about the effectiveness or propriety of regulating police surveillance. A decision about electronic monitoring will in part construct the political order.

When police practices use technology to make visible what would otherwise remain unnoticed, they can change the nature of the underlying conduct under surveillance. This insight is not new. Jeremy Bentham designed the panopticon around the expectation that individuals would conform their behavior in response to the possibility of being perpetually watched.⁷⁰ Michel Foucault found in this insight a broader model for the many ways that knowledge can be a form of visibility that is instrumental to

⁶⁷ HARCOURT, *supra* note 25, at 38.

⁶⁸ *Id.* at 39.

⁶⁹ *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

⁷⁰ See JEREMY BENTHAM, *THE PANOPTICON WRITINGS* 29–95 (Miran Božovič ed., Verso 1995) (1787).

the exercise of power.⁷¹ Technology that aggregates a person's movements, interpersonal interactions, or transactions is a way of making visible what had remained unseen and, in doing so, making it subject to norms of imposed order. Like the panopticon, these norms can function as internal constraints. What counts as disorder depends on what is visible. Broken windows can have a particular kind of public meaning because of the availability of visual cues. What is visually unavailable will lack social meaning under this dynamic. If the social decay were not visible, then the causal chain leading to more serious crime could not unfold. But visibility itself requires construction. If through technologically enabled surveillance police seek out and make visible what lies hidden, then the state is able to construct the meaning of the aggregated conduct it renders visible while simultaneously imposing its own norms of order.

Constitutional criminal procedure can constrain or enable constructions of visibility.⁷² Public perception of police legitimacy can also constrain or enable policing practices aimed at social meaning. When police engage in practices perceived to be discriminatory or unfair, citizens are less willing to cooperate with law enforcement or comply with legal norms.⁷³ Police need legitimacy to maintain order.⁷⁴ But what counts as legitimate practice depends not only on nonconstitutional matters of the

⁷¹ MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 207–08 (Alan Sheridan trans., 1977) (“The panoptic schema, without disappearing as such or losing any of its properties, was destined to spread throughout the social body; its vocation was to become a generalized function. . . . Panopticism is the general principle of a new ‘political anatomy’ whose object and end are . . . the relations of discipline.”).

⁷² See Harmon, *supra* note 24, at 786 (“Like courts, scholars since the Warren Court era consider the problem of preventing constitutional violations, not the problem of regulating the police.”); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781, 804 (2006) (focusing on the role of substantive criminal law in shaping procedure).

⁷³ See, e.g., Stephen J. Schulhofer et al., *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. CRIM. L. & CRIMINOLOGY 335, 349–56 (2011); Tom R. Tyler et al., *Legitimacy and Deterrence Effects in Counterterrorism Policing: A Study of Muslim Americans*, 44 LAW & SOC’Y REV. 365, 369–71 (2010); see also ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 126–31 (2009); Elizabeth E. Joh, *Breaking the Law to Enforce It: Undercover Police Participation in Crime*, 62 STAN. L. REV. 155, 191 (2009) (“[T]he knowledge that the police are permitted to participate in crime, even for justifiable ends, erodes public trust in the police.”).

⁷⁴ Fair practices administered out of respect and equality provide legitimacy, as Schulhofer and colleagues argue. Schulhofer et al., *supra* note 73, at 338. They write: “The procedural justice approach is grounded in empirical research demonstrating that compliance with the law and willingness to cooperate with enforcement efforts are primarily shaped not by the threat of force or the fear of consequences, but rather by the strength of citizens’ beliefs that law enforcement agencies are *legitimate*.” *Id.*

fairness, respect, and dignity citizens perceive in police actions, but also on the constitutional meanings police actions have. Expectations that rights protect citizens—that there are constitutional limits to policing practices—inform public perception, even apart from having specific knowledge of complex constitutional doctrine. Constitutional rules construct the available meanings of police–citizen encounters. There are many ways to regulate police practice—greater attention to empirical data, legislative guidance, local supervision, political pressure, as well as through constitutional rules and remedies. But all regulatory reform efforts and all problems of governing police practice occur against a background of constitutional meaning that has no less power to shape citizen and police behavior alike than the social meaning of order and legitimacy do. Legitimacy is in part a product of constitutional meaning.⁷⁵

Different conceptions of the relation between citizen and state mediated by everyday policing practices are possible under the Constitution. In the same way, different constitutional cultures can produce different understandings of constitutional priorities.⁷⁶ Divergent views on constitutional meaning can order alternative social and political practices by making available particular ways of exercising the role of citizen or police. And different views about constitutional criminal procedure will appeal to contrasting conceptions of what values the Fourth Amendment is expected to protect. So, for example, Justice Brandeis writing in dissent in *Olmstead* has a broader conception of Fourth Amendment values than animates the current order-maintenance orientation. He writes:

The makers of our Constitution . . . conferred, as against the Government, the right to be let alone—the most comprehensive of rights, and the right most valued by civilized

⁷⁵ Scholars often view constitutional decisions as a principal way of regulating policing activities, offering reform proposals to better accomplish regulatory goals. See, e.g., CHRISTOPHER SLOBOGIN, *PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT* (2007); Sherry F. Colb, *What Is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 STAN. L. REV. 119, 187 (2002); Scott E. Sundby, *“Everyman”’s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751, 1777 (1994).

⁷⁶ As Jack Balkin notes, “[a] constitutional culture consists of the beliefs of members of the political community about what their constitution means.” BALKIN, *supra* note 15, at 178; see also Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 76 (2003) (“Constitutional law draws inspiration, strength, and legitimacy from constitutional culture, which endows constitutional law with orientation and purpose.”); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1342 (2006) (“[P]opular confidence that the Constitution is the People’s is sustained by understandings and practices that draw citizenry into engagement with questions of constitutional meaning and enable communication between engaged citizens and officials charged with enforcing the Constitution.”).

men. 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.⁷⁷

If social meaning is at stake in how the police approach public disorder, social imaginaries play a role in shaping constitutional values and doctrines. What the philosopher Charles Taylor calls the “social imaginary”⁷⁸ gives salience to particular values and visions of constitutional relevance. For Justice Brandeis, giving articulation to “the right to be let alone” is central to the task of implementing the Fourth Amendment.⁷⁹ For Taylor, a social imaginary “is in fact that largely unstructured and inarticulate understanding of our whole situation, within which particular features of our world show up for us in the sense that they have. It can never be adequately expressed in the form of explicit doctrines because of its unlimited and indefinite nature.”⁸⁰ Narrow and explicit doctrine does not give us a sense, by itself, of the background situation in which it gives meaning to constitutional values. But doctrine must arise out of a background. Order-maintenance conceptions have played a significant role in shaping this background social imaginary and continue to shape available responses to changing technologies. But as Justice Brandeis’s dissent suggests, broader conceptions of the constitutional values at stake are possible.

Differing social imaginaries are always possible, as the following section explores. In contrast to Justice Brandeis’s approach, the majority opinion in *Jones* expresses no such broad values, focusing instead on the intrusion on property rights and deferring to a future case the need to articulate the constitutional meaning of technologically enhanced police surveillance.

II. *UNITED STATES V. JONES* ON PROPERTY AND TECHNOLOGY

Justice Kennedy opens his majority opinion in *Lawrence v. Texas* by declaring that both the “spatial and more transcendent dimensions” of the “liberty of the person”⁸¹ are matters of constitutional concern. Justice Scalia’s majority opinion in *United States v. Jones*, by contrast, focuses

⁷⁷ *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

⁷⁸ CHARLES TAYLOR, *MODERN SOCIAL IMAGINARIES* 23 (2004).

⁷⁹ See Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 57 (1997) (“A crucial mission of the Court is to *implement* the Constitution successfully.”); see also Neil M. Richards, *The Puzzle of Brandeis, Privacy, and Speech*, 63 VAND. L. REV. 1295, 1347 (2010) (arguing that Justice Brandeis’s dissent implements a broader conception of “intellectual privacy”).

⁸⁰ TAYLOR, *supra* note 78, at 25.

⁸¹ *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

only upon constitutional protections for the spatial aspects of liberty,⁸² even when the technology at issue has the power to affect greatly the more transcendent dimensions. These two aspects of liberty are mutually entailing. A decision to focus on physical space will have effects on other freedoms as well. As this section argues, by focusing on physical invasions of private property, the Court leaves in place order-maintenance constitutional meanings despite the power of the technology at issue to enable widespread intrusions upon the liberty and privacy of the individual.

A. THE MAJORITY OPINION: PERSONAL PROPERTY RIGHTS AS PROTECTION AGAINST POLICE SURVEILLANCE TECHNOLOGIES

As we have already seen, *United States v. Jones* establishes a Fourth Amendment limitation on police use of electronic surveillance that relies on a GPS device physically placed on a person's automobile.⁸³ The Court provides a narrow decision, focusing on the Fourth Amendment's protections against intrusions on property rights. The Court writes: "We hold that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.'"⁸⁴ The problem with the government's placing a GPS device on Jones's vehicle was that it "physically occupied private property for the purpose of obtaining information."⁸⁵ When *Olmstead* held that the Fourth Amendment did not apply to electronic eavesdropping absent a trespass, Fourth Amendment protections were thought to have a close connection to property.⁸⁶ After *Katz v. United States* overruled *Olmstead* and held that "the Fourth Amendment protects people, not places,"⁸⁷ Fourth Amendment protections swept more broadly to encompass reasonable expectations of privacy.⁸⁸ But even then, expectations of privacy were themselves often based on property interests possessed by individuals.⁸⁹

⁸² *United States v. Jones*, 132 S. Ct. 945 (2012).

⁸³ *Id.*

⁸⁴ *Id.* at 949.

⁸⁵ *Id.* at 950.

⁸⁶ *Olmstead v. United States*, 277 U.S. 438, 445, 457 (1928); *see also* *Goldman v. United States*, 316 U.S. 129, 134–36 (1942).

⁸⁷ *Katz v. United States*, 389 U.S. 347, 351 (1967).

⁸⁸ *Id.* at 360 (Harlan, J., concurring).

⁸⁹ *See* *California v. Greenwood*, 486 U.S. 35, 37 (1988) (holding that there is no expectation of privacy in trash "abandoned" in trash bags placed at the curb in front of one's home); *Oliver v. United States*, 466 U.S. 170, 177 (1984) (holding that there is no expectation of privacy in "open fields"); *United States v. White*, 401 U.S. 745, 750 (1971) (finding no Fourth Amendment violation when police transmit defendant's conversations); *see also* Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths*

According to Justice Scalia's opinion for the Court, "[t]he text of the Fourth Amendment reflects its close connection to property, since otherwise it would have referred simply to 'the right of the people to be secure'"⁹⁰ without reference to their "persons" or to particular places. Claiming that the Fourth Amendment is closely tied to common law trespass, Justice Scalia views the *Katz* expectations-of-privacy framework as supplementing, not replacing, a property-based approach.⁹¹ But as supplement, the *Katz* expectations-of-privacy framework need not be necessary to resolution of cases when physical trespass is present. In this way, by focusing on the intrusion on property rights, the Court is able to sidestep thornier issues of privacy expectations in personal movements in public. A search occurs when police derive information from a physical trespass.

Government use of technology, according to *Jones*, is limited by the property rights persons have to exclude others from invading their interests.⁹² What happens when no property right is infringed? Do police impermissibly search when monitoring a person's movements in a manner that does not involve a trespass?

Public visibility leads to police accessibility. The Supreme Court has emphasized the fact that when police conduct surveillance of a person's public movements, they do nothing more than any member of the public might do. In *United States v. Knotts*, the Court reasons that "[a] person traveling in an automobile on public thoroughfares . . . voluntarily conveyed to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction."⁹³ Without additional analysis, GPS monitoring of a person's public movements conveys no more information than a person conveys to anyone who happens to be looking, because as Justice Scalia notes in *Jones*, the Court has "not deviated from the understanding that mere visual observation does not constitute a

and the Case for Caution, 102 MICH. L. REV. 801, 815–27 (2004).

⁹⁰ *Jones*, 132 S. Ct. at 949.

⁹¹ But see David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1744 (2000) ("Neither the text nor the background of the Fourth Amendment suggests it aims merely to codify eighteenth-century rules of search and seizure.").

⁹² 132 S. Ct. at 951–52. See generally Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998) ("[T]he right to exclude others is more than just 'one of the most essential' constituents of property—it is the *sine qua non*.").

⁹³ *United States v. Knotts*, 460 U.S. 276, 281–82 (1983); see also *New York v. Class*, 475 U.S. 106, 114 (1986) ("The exterior of a car, of course, is thrust into the public eye, and thus to examine it does not constitute a 'search.'"). But see *United States v. Karo*, 468 U.S. 705, 717 (1984) (distinguishing information obtained about public locations from information obtained about the interior of the home when monitoring an electronic tracking device).

search.”⁹⁴ Strict application of prior cases would mean that nontrespassory electronic monitoring is a form of visual surveillance permitted by the Fourth Amendment.⁹⁵ And, to the extent that the analysis of privacy expectations might lead to a different conclusion, Americans will have to await a future decision.

B. THE CONCURRING OPINIONS: PROTECTING PRIVACY AGAINST A PERMEATING POLICE PRESENCE

Both concurrences in *Jones*, as well as the D.C. Circuit opinion below, concluded that the type of electronic monitoring implicated in the case violated Fourth Amendment prohibitions. Electronic GPS tracking raises the stakes for public surveillance, since police may now be the passive recipients of comprehensive information about a person’s movements. The totality of the information obtained by this means can be far greater than finite resources could make available to police in all but the most extraordinary case and can do so in the most surreptitious manner. The passive ability to obtain this information by using very few resources is a technologically accreted power that may in fact change the nature of the activity of public monitoring. As Judge Ginsburg wrote for the D.C. Circuit in *United States v. Maynard*: “[T]he whole of a person’s movements over the course of a month is not actually exposed to the public because the likelihood a stranger would observe all those movements is not just remote, it is essentially nil.”⁹⁶ In her *Jones* concurrence, Justice Sotomayor recognizes that “GPS monitoring generates a precise, comprehensive record of a person’s public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.”⁹⁷ Knowledge about such intimate details of a person’s interpersonal life can impact other constitutional liberties as well. If government officials can monitor attendance at certain events, they can chill the same associational rights the Court protected against state inquiry in a different era.⁹⁸

⁹⁴ *Jones*, 132 S. Ct. at 953.

⁹⁵ See Renée McDonald Hutchins, *Tied Up in Knots? GPS Technology and the Fourth Amendment*, 55 UCLA L. REV. 409, 460 (2007) (arguing that degree of intrusiveness itself leads to the conclusion that GPS tracking is a search).

⁹⁶ *United States v. Maynard*, 615 F.3d 544, 560 (D.C. Cir. 2010), *aff’d sub nom.* *United States v. Jones*, 132 S. Ct. 945 (2012). *But see* *United States v. Garcia*, 474 F.3d 994, 998 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 291 (2007) (“Should government someday decide to institute programs of mass surveillance of vehicular movements, it will be time enough to decide whether the Fourth Amendment should be interpreted to treat such surveillance as a search.”).

⁹⁷ *Jones*, 132 S. Ct. at 955 (Sotomayor, J., concurring).

⁹⁸ See *NAACP v. Alabama*, 357 U.S. 449, 460 (1958) (“It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of

The aggregate effect of electronic surveillance changes the meaning of searches. Aggregation provides a perspective otherwise unavailable to ordinary police investigation. Comprehensively tracking a person's movements over long periods and to all places provides police with what is in effect a panoptic view of a person's life and activities. Whether this gives rise to changes in the constitutional meaning of such activity depends on what principles and values the Court has in view.⁹⁹ By focusing on order and the needs of the police officer on the beat, or by employing doctrine to ask whether an invasion of property has occurred, liberty interests will remain largely invisible.

If the Court attends to those aspects of GPS monitoring that alter the nature of police investigations, then the aggregation and recording of a person's movements provide reasons to adjust the nature of the Fourth Amendment inquiry. The simplest inquiry is to ask "whether people reasonably expect that their movements will be recorded and aggregated"¹⁰⁰ by police investigations without judicial or legislative supervision. But when asking this question, attention to how recording and aggregating a person's movements allows government officials "to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on,"¹⁰¹ is necessary. More than questioning what people might reasonably expect, the Court must construct the meaning of policing practices that reveal and compile information about political, religious, and interpersonal aspects of people's lives. Do these practices interfere with the people's political liberties? What harms might arise from government officials compiling such information? How might such investigative activities chill speech and associational freedoms? What checks exist, absent constitutional constraints, on the prospect for governmental abuse? These and other questions highlight the possible impacts GPS monitoring might have on political liberties the Fourth Amendment can be construed to protect.¹⁰²

Existing Fourth Amendment doctrine, without expanded inquiry, is not well suited "to curb arbitrary exercises of police power and to prevent 'a too permeating police surveillance.'"¹⁰³ The same doctrines that gave rise to the early obituary for the Fourth Amendment with which this Article began

the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.").

⁹⁹ See *United States v. Karo*, 468 U.S. 705, 712 (1984) ("It is the exploitation of technological advances that implicates the Fourth Amendment, not their mere existence.").

¹⁰⁰ *Jones*, 132 S. Ct. at 956 (Sotomayor, J., concurring).

¹⁰¹ *Id.*

¹⁰² See Crocker, *supra* note 16, at 371–78.

¹⁰³ *Jones*, 132 S. Ct. at 956 (Sotomayor, J., concurring) (quoting *United States v. Di Re*, 332 U.S. 581, 595 (1948)).

are barriers to curbing police power. Foremost among these doctrines is the third-party doctrine, which holds that persons have no expectation of privacy in information they share with others or through transactions.¹⁰⁴ Once information is conveyed to another, a person loses the property-based interest in controlling access to that information. The third party is free to share the information with government officials independent of any Fourth Amendment limitations.¹⁰⁵ In a digital age, we share vast amounts of data with third parties. Our cell phone and Internet providers alone “know” a lot about our movements and interests. Thus, on a straightforward application of the third-party doctrine, the Fourth Amendment is no barrier to comprehensive electronic monitoring because persons are said to have no expectation of privacy in the location information they share with third parties as a condition of the services they enjoy. For this reason, Justice Sotomayor suggests a need to reconsider the doctrine because “[t]his approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks.”¹⁰⁶

Reconsideration of the Fourth Amendment’s scope requires the Court to recognize how disclosure of information functions within people’s lives and how constitutional meanings impact the interaction between citizen and state official. Justice Sotomayor recognizes that the doctrine asks the wrong questions. We cannot bring into view the privacy and liberty implications of pervasive and aggregated surveillance if public visibility is construed broadly and is defeasible of constitutional protections.

¹⁰⁴ See, e.g., *Smith v. Maryland*, 442 U.S. 735, 743–44 (1979); *United States v. Miller*, 425 U.S. 435, 443 (1976).

¹⁰⁵ As Chief Justice Roberts has described the principle: “If an individual shares information, papers, or places with another, he assumes the risk that the other person will in turn share access to that information or those papers or places with the government.” *Georgia v. Randolph*, 547 U.S. 103, 128 (2006) (Roberts, C.J., dissenting).

¹⁰⁶ *Jones*, 132 S. Ct. at 957 (Sotomayor, J., concurring). Many scholars criticize this doctrine, and have called for its reform. See Colb, *supra* note 75, at 123 (criticizing the Court for “equating risk-taking with inviting exposure and equating limited-audience with whole-world self-exposure”); Mary I. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 CALIF. L. REV. 1593, 1635 (1987) (“A view of the world that recognizes the essential interconnectedness of people and the importance of intimacy and sharing is foreign to the atomistic social theory underlying the Court’s present doctrine.”); Crocker, *supra* note 5, at 7; 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, 976–77 (2007); see also Marc Jonathan Blitz, *Video Surveillance and the Constitution of Public Space: Fitting the Fourth Amendment to a World that Tracks Image and Identity*, 82 TEX. L. REV. 1349, 1357–63 (2004). But see Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 600–01 (2009) (defending the third-party doctrine).

Such reconsideration goes beyond Justice Scalia's two-step inquiry, which first asks whether there is a physical intrusion and, if not, follows *Katz* and asks whether expectations of privacy have been violated. In the second step, privacy does not function as an independent concept of analysis. Applying privacy to the changing nature of electronic surveillance requires the Court to reexamine the constitutional meanings it has constructed. Supreme Court doctrine has construed privacy to extend no further than secrecy, a construction in significant tension with social practices in the digital age.¹⁰⁷ Because a given social practice is not discretely related to a single constitutional protection, Justice Sotomayor recognizes that the constitutional meaning of privacy exists in the interplay between the Fourth Amendment and other guaranteed freedoms citizens enjoy in concert, such as rights to expression and association.¹⁰⁸

In establishing the meanings of privacy, and thereby the social and political meanings of policing practices, the question of who should decide on the terms of these interactions arises as well. Should the executive, absent oversight by legislatures or courts, get to determine the nature and extent of police interactions with citizens, or is there a robust role for the Court to play in establishing constitutional limitations?¹⁰⁹ Under a Madisonian framework, the executive branch should not be entrusted to make unchecked decisions that can alter the nature of police investigations with the power derived from a comprehensive view of an individual's movements and interactions.¹¹⁰ Justice Sotomayor's concurrence recognizes that all of these considerations are before the Court.

By contrast, Justice Alito wrote a separate concurrence for four members of the Court, rejecting Justice Scalia's application of property principles. In so doing, Justice Alito does not argue that the scope of the Fourth Amendment needs reconsideration in light of how electronic surveillance changes the nature of police searches. Rather, Justice Alito simply suggests that "[t]he best that we can do in this case is apply existing Fourth Amendment doctrine and to ask whether the use of GPS tracking in a particular case involved a degree of intrusion that a reasonable person would not have anticipated."¹¹¹ In asking this question, Justice Alito

¹⁰⁷ See DANIEL J. SOLOVE, *THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE* 42–44 (2004).

¹⁰⁸ *Jones*, 132 S. Ct. at 956 (Sotomayor, J., concurring) ("Awareness that the Government may be watching chills associational and expressive freedoms.")

¹⁰⁹ See SCOTT J. SHAPIRO, *LEGALITY* 336–39 (2011) (explaining how economies of trust function to legitimate who decides the meaning of law).

¹¹⁰ For a defense of Madisonian checks, see BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 11 (2010).

¹¹¹ *Jones*, 132 S. Ct. at 964 (Alito, J., concurring in the judgment).

distinguishes between “relatively short-term monitoring,”¹¹² which is consistent with expectations of privacy, and “the use of longer term GPS monitoring,” which “impinges on expectations of privacy.”¹¹³ How to distinguish between the relatively short-term and the longer term monitoring that would trigger Fourth Amendment constraints remains indeterminate. Even then, long-term monitoring might not fall within Fourth Amendment restrictions “in the context of investigations involving extraordinary offenses.”¹¹⁴ It just so happened that the investigation into Jones’s activities, which included electronic monitoring for twenty-eight days, had “surely crossed”¹¹⁵ the line to become a search, and the nature of the crime under investigation—narcotics trafficking—did not constitute an “extraordinary offense.”¹¹⁶

On the one hand, Justice Alito’s approach leaves in place the *Katz* inquiry into reasonable expectations of privacy persons might have in their public movements. Without additional analysis, none of Justice Sotomayor’s concerns about the relation of privacy to expressive and associational freedoms fits within the traditional analysis. Nor does Justice Alito contemplate the need to reconsider existing doctrine. Rather, “the best we can do” is to apply the post-*Katz* doctrines as the Court has already construed them. Expectations of privacy, not property rights, will continue to control Fourth Amendment analysis.

On the other hand, by introducing two additional inquiries—the nature of the offense and the temporal duration of the electronic monitoring—Justice Alito proposes significant alterations to the *Katz* framework. Often, the Court’s analysis of whether a police activity constitutes a search depends on an all-or-nothing inquiry. Either looking into the container in the vehicle is or is not a search.¹¹⁷ Either entry into a place such as a home constitutes a search or not.¹¹⁸ But here, Justice Alito suggests that the nature of the activity is subject to variation by the duration of the surveillance and the seriousness of the offense. These considerations allow the Court to recognize that the quality and quantity of surveillance can change the constitutional meaning of police activity. As Justice Scalia notes in his majority opinion, however, such an approach yields several

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 965.

¹¹⁵ *Id.* at 964.

¹¹⁶ *Id.* at 965.

¹¹⁷ *California v. Acevedo*, 500 U.S. 565, 574–75 (1991); *United States v. Ross*, 456 U.S. 798, 822 (1982) (finding that search of any sealed container is a “search”).

¹¹⁸ *Silverman v. United States*, 365 U.S. 505, 511 (1961).

“particularly ‘vexing problems’” in applying the additional inquiries.¹¹⁹ How long does monitoring have to be to trigger the Fourth Amendment, and what kind of offense must be under investigation? Justice Alito’s approach does not provide grounds for making such determinations.¹²⁰ Instead, such grounds are possible under Justice Sotomayor’s concurrence, which finds additional support for Fourth Amendment prohibitions from overlapping First Amendment values.

If “the best we can do” is apply existing doctrines to technologies capable of changing the nature of the government’s power to conduct searches, Judge Kozinski’s challenge of a moribund Amendment remains salient.¹²¹ As Justice Scalia notes, the *Katz* framework leads to doctrines that “to date [have] not deviated from the understanding that mere visual observation does not constitute a search.”¹²² If electronic monitoring is simply an extended means of visual observation of a person’s movements, without any additional considerations, then existing doctrines will prevent the Constitution from applying to modern technological changes. To make the Fourth Amendment relevant to short-term monitoring, the third-party doctrine will have to be reconsidered as Justice Sotomayor suggests, not merely applied with durational limitations.

There are at least five Justices who see the importance of applying and extending the *Katz* framework in new directions. Justice Sotomayor agrees with Justice Scalia that the property intrusion is sufficient to decide the facts in *Jones*, but also agrees with Justice Alito’s concurrence that long-term GPS monitoring violates expectations of privacy. How much further expectations of privacy might extend is yet to be decided. A “too permeating police surveillance” can occur just as much with episodic short-term monitoring as it can with long-term surveillance. Of course, the quantity of data revealed over time will be much greater than in shorter durations, but the low-cost ability for police to discover many private facts about an individual remains a concern for the political rights of the people to be free from unfettered government discretion.¹²³

¹¹⁹ *Jones*, 132 S. Ct. at 953 (majority opinion) (quoting, with some disapprobation, the concurrence).

¹²⁰ See Kerr, *supra* note 11, at 330–31.

¹²¹ Dissenting in a case considering the constitutionality of electronic monitoring through GPS or cell signals, Judge Kozinski notes that “these two technologies alone can provide law enforcement with a swift, efficient, silent, invisible and *cheap* way of tracking the movements of virtually anyone and everyone they choose.” *United States v. Pineda-Moreno*, 617 F.3d 1120, 1126 (9th Cir. 2010) (Kozinski, J., dissenting).

¹²² *Jones*, 132 S. Ct. at 953; see also *Kyllo v. United States*, 533 U.S. 27, 31–32 (2001).

¹²³ In this regard, Justice Sotomayor argues that unfettered discretion “may ‘alter the relationship between citizen and government in a way that is inimical to democratic society.’” *Jones*, 132 S. Ct. at 956 (Sotomayor, J., concurring) (quoting *United States v.*

But there is an important difference that may apply to relatively short-term monitoring, which Justice Alito's approach seems to contemplate. Although he recognizes the "degree of circularity" that exists in judicial assessments of privacy expectations, he posits that "relatively short-term monitoring" is consistent with public expectations of privacy.¹²⁴ Only in the relatively extreme case of month-long warrantless monitoring does police activity upset the balance of privacy expectations under Justice Alito's approach. And rather than assert a robust role for the Court in shaping constitutional meaning, Justice Alito suggests that legislative solutions may be the best way to protect privacy.¹²⁵ By deferring to legislative protections, Justice Alito may be signaling that the result in *Jones* is based more on the long duration of monitoring than on recognition of any changes in the nature of police searches conducted through electronic means.¹²⁶ In contrast, the kinds of broader constitutional harms that Justice Sotomayor identifies can occur even during relatively short-term, yet pervasive, electronic monitoring. Because duration does no more than amplify problems that exist from the outset of electronic monitoring, we need more than mechanical and minor adjustments to existing Fourth Amendment doctrines.

C. ORDER-MAINTENANCE POLICING AND THE FUTURE OF *JONES*

Shorter duration monitoring fits more readily within the framework of order-maintenance policing. Such policing is premised in part on the fact that controlling street-level disorder requires that officers have discretion to respond to disorder's visual cues. What electronic monitoring provides is a different perspective—a god's eye view—enabling officers to see and address more complex patterns of disorder. So, even for a short duration, disorder might appear within the mosaic of everyday activities not otherwise readily discernible. Thus, if constitutional meanings contemplate police power and discretion to see and address forms of social disorder, then electronic monitoring is a technologically enhanced means of viewing publicly visible, complex disorder.

One objection to this extension of order-maintenance policing might be that by shifting the nature of visibility, police are changing the nature of

Cuevas-Perez, 640 F.3d 272, 285 (7th Cir. 2011) (Flaum, J., concurring)).

¹²⁴ *Id.* at 961, 964 (Alito, J., concurring in the judgment).

¹²⁵ *Id.*; see also Kerr, *supra* note 89, at 805 ("[S]tatutory rules rather than constitutional rules should provide the primary source of privacy protections . . .").

¹²⁶ Justice Alito's concurrence recognizes that "[f]or such offenses, society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period." *Jones*, 132 S. Ct. at 964 (Alito, J., concurring in the judgment).

order maintenance. Wilson and Kelling's hypothesis, extended into the realm of social norm theory by legal scholars,¹²⁷ was that readily visible disorder played a part in constructing the social meaning of crime. By signaling to a community that disorder will not be tolerated, police can change the meaning of social norms. For this looping effect to work, the disorder must initially be visible—the broken windows that every passerby can see.¹²⁸ But in the case of complex disorder, there are no such readily discernible cues. Because the disorder is hidden within the mosaic of everyday public patterns, police need to use more comprehensive electronic monitoring to aid their investigations. But if the complex disorder is not visible, then there is no threat from the influence of the social meaning of crime. If the law-abiding person cannot perceive the social disorder any more than the unaided police officer, then hidden broken windows cannot lead to changes in social norms.

The constitutional meanings of criminal procedure sweep broader than the norm-driven motivation of broken windows and social-deterrence theory.¹²⁹ Criminal procedure applies to investigation of both relatively minor offenses, such as panhandling, prostitution, and other forms of street disorder, and relatively more serious offenses, such as drug trafficking, conspiracy, and organized criminal activity. If the goal of particular constructions of the constitutional meaning of criminal procedure favors deference and discretion to police practices, then these meanings apply in both the ordinary and complex cases. Indeed, one aspect of the theory of broken windows is the claim that by intervening in incidents of minor disorder, police can forestall the development of more complex disorder.¹³⁰ On this account, street-level discretionary police practices are really in service of preventing complex forms of social disorder. But where complex forms of social disorder exist, they may still be known and visible to members of the community, who might perceive the social meaning of serious crime differently the less likely such crimes are to be investigated

¹²⁷ See, e.g., Kahan, *supra* note 29, at 369; Lessig, *supra* note 29, at 951–55.

¹²⁸ Wilson and Kelling also describe an experiment by Philip Zimbardo at Stanford of the disorder that arose from the visibility of an abandoned car with a smashed window. See Wilson & Kelling, *supra* note 10, at 31; see also Kahan, *supra* note 29, at 356.

¹²⁹ As Kahan describes the motivation: “Cracking down on . . . visible signs of disorder . . . may be justified on this ground, since disorderly behavior and the law’s response to it are cues about the community’s attitude toward more serious forms of criminal wrongdoing.” Kahan, *supra* note 29, at 351. These cues mean that “[w]hen citizens obey norms of orderliness—and when authorities visibly respond to those who don’t—onlookers see that the community is intolerant of criminality.” *Id.* at 371; see also SKOGAN, *supra* note 30, at 68–69.

¹³⁰ See Kahan, *supra* note 29, at 370–71.

and punished.¹³¹ Such a hypothesis would have to be empirically tested, but it is a consistent application of the social norm theory of criminal deterrence. On this theory, if communities are to signal intolerance for more socially corrosive—but more difficult to perceive—forms of criminal activity, police must be allowed to use the technological tools enabling their comprehensive surveillance of a suspect's daily movements.

The problem for criminal procedure is the mission creep of broken windows. With the technology to expand visibility, any crime, no matter how hidden, about which the community might have knowledge becomes socially corrosive. Knowledge is visibility. Technologically empowered to look, police must maintain order lest social norms reinforce disorder. Thus, police must be afforded the power to make visible what members of the community might already perceive.

In this way, broken windows policing favors pervasive electronic monitoring. With a proper vantage point, complex disorder can be just as visible as broken windows. And complex disorder can be even more corrosive to social norms and social meanings than low-level street disorder. Because of the social harms disorder wreaks, the constitutional meanings of criminal procedure impact police ability to investigate, and thereby influence, social disorder. Justifications for order-maintenance criminal procedures apply equally to the quotidian and complex case. In this way, there is a reciprocal relation between order-maintenance practices and the constitutional meanings of criminal procedure.

The Court's opinion in *United States v. Jones* could be cast as a five Justice majority for an approach to criminal procedure sensitive to the aggregate effects of electronic monitoring on constitutionally protected personal freedoms. *Jones* might also represent a majority view that pervasive, month-long electronic monitoring goes beyond what is necessary for order-maintenance policing focused on both everyday and complex disorder, but that relatively shorter periods are permissible. Future constitutional constructions of which facts are relevant and what constraints are required depend upon whose needs—police or citizen—the Court has primarily in view. They also depend on the social practices and priorities the Court envisions as necessary to privacy and liberty. A complex and never fully articulated social imaginary, currently motivated by order-maintenance conceptions, determines doctrinal construction of Fourth Amendment meaning. In order to see how order-maintenance theory is woven into the current meanings of criminal procedure, a detailed look at

¹³¹ See *id.* at 370 (arguing that when people perceive street disorder, “individuals understandably infer that the odds of being punished for more serious crimes are also low”).

Justice Alito's opinion for eight Justices in *Kentucky v. King*¹³² is instructive.

III. *KENTUCKY V. KING* AND THE CONSTITUTIONAL MEANINGS OF CRIMINAL PROCEDURE

Three primary themes emerge from constitutional meanings constructed to facilitate order-maintenance policing. One is that the Supreme Court deems citizens to be empowered to take constitutional responsibility for their interactions with police power. Because citizens have autonomous agency, the Court, adopting a robust image of the liberal self, constructs the citizen as being in control of her own responses, of the police interaction, and of the means to assert her constitutional rights. Second, the Court places consent at the heart of the person's engagement with police. If a person knowingly discloses information to another, then one is imputed to have consented to its further disclosure to the police. If a person deviates from scripts that construct the norms of interaction with the police, then she is construed to have consented to the search that follows. Third, constitutional rules must afford police ample discretion to control expanding conceptions of visibility. These are central elements of constitutional doctrine in service of order-maintenance policing. They are the constitutional meanings by which the Court will construe the future constitutional doctrine applicable in the world after *Jones*. These constitutional meanings are on display in *King*.

In *Kentucky v. King*,¹³³ eight Justices joined an opinion that expanded police authority to enter a private dwelling without a warrant when officers suspect the imminent destruction of evidence they seek to obtain. In this one case, many elements necessary to discretionary order-maintenance policing are on display, suggesting just how pervasive the police-centered perspective is in how the Supreme Court construes constitutional meaning. Among these elements are the importance of exceptions that enable police searches otherwise prohibited under ordinary constitutional rules, the extension of quasi-property interests of police into the interior of the home, the rigidity of conversational norms in the citizen-police encounter, and the responsibility of citizens to vindicate their own constitutional rights without assistance from courts or informed consent. A judicial outlook dedicated to these aspects of order-maintenance policing will struggle to find constitutional meanings that will forestall alteration of "the relationship between citizen and government in a way that is inimical to democratic

¹³² 131 S. Ct. 1849 (2011).

¹³³ *Id.*

society,”¹³⁴ as Justice Sotomayor suggests is necessary to face the impact of technology on police practice.

In *King*, police officers conducted a controlled purchase of crack cocaine outside a Lexington, Kentucky apartment building. But matters went awry. After the buy was completed, the nearby arresting officers lost sight of the suspect who was presumed to have entered an unspecified apartment.¹³⁵ In pursuit, officers focused on one apartment because they smelled burning marijuana emanating from it.¹³⁶ As the opinion relates, one officer testified that police banged loudly on the door and announced “Police, police, police,” “could hear people inside moving,” and decided to kick in the door.¹³⁷ Marijuana was present in the front room and the officers performed a “protective sweep” of the whole apartment, revealing further contraband and cash. After indictment, King moved to suppress the evidence obtained during the warrantless search of the apartment and eventually found a receptive hearing in the Kentucky Supreme Court. Assuming, without deciding, that exigent circumstances existed, the Kentucky Supreme Court suppressed the evidence, concluding “it was reasonably foreseeable that the investigative tactics employed by the police would create the exigent circumstances.”¹³⁸

The Supreme Court reversed, writing, “Where, as here, the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry to prevent the destruction of evidence is reasonable and thus allowed.”¹³⁹ To arrive at this conclusion, many of the elements of order-maintenance policing are in full view: the police have an interest in preserving evidence that cuts into the privacy of the home, the needs of law enforcement take priority over any discussion of privacy, and the discretion to pursue consensual encounters and to interpret citizens’ responses receives judicial deference. Because law enforcement objectives overwhelm all other concerns, the Court’s opinion provides both flexibility and deference to police practices, rejecting the idea that police should be restricted from bootstrapping exigent circumstances as a way of circumventing the warrant requirement.

¹³⁴ *United States v. Jones*, 132 S. Ct. 945, 956 (2012) (Sotomayor, J., concurring) (quoting *United States v. Cuevas-Perez*, 640 F.3d 272, 285 (7th Cir. 2011) (Flaum, J., concurring)).

¹³⁵ *King*, 131 S. Ct. at 1854.

¹³⁶ *Id.*

¹³⁷ *Id.* (quoting from the testimony of the officers as provided in the record from the lower court).

¹³⁸ *King v. Kentucky*, 302 S.W.3d 649, 655 (Ky. 2010) (quoting the analysis found in *Mann v. State*, 161 S.W.3d 826, 834 (Ark. 2004), and rejecting that court’s holding).

¹³⁹ *King*, 131 S. Ct. at 1858.

What is significant about Justice Alito's opinion is not just that it "arms the police with a way routinely to dishonor the Fourth Amendment's warrant requirement in drug cases"¹⁴⁰—the doctrinal takeaway as described by the dissent—but that the opinion represents a mature manifestation of the extent to which police exigency, in the home or elsewhere, dominates constitutional considerations. But exigency is not a fact to be discovered in the world independent of police conduct and objectives. Exigency is constructed in pursuit of order. Police have an expectation of maintaining order, even within the home, in pursuit of their preventative law enforcement objectives. Thus, even as the Court rejects the idea that a "police-created exigency" would be constitutionally deficient, the Court must construct the constitutional meaning "exigency" will have in analyzing the police–citizen encounter at the threshold of the home.

A. INVERTING *JOHNSON*: THE EXCEPTION AS RULE

Before defending these broad claims with a closer look at the opinion, it is helpful to see how the present opinion stands in explicit contrast to its historical forebears. Justice Jackson's opinion in *Johnson v. United States*¹⁴¹ applied to similar circumstances as those in *King*—law enforcement entered a dwelling without a warrant after smelling burning narcotics. In *Johnson*, the Court drew the distinction between entry by law and exercise of arbitrary authority. Justice Jackson's opinion emphatically asserted that "[w]hen the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."¹⁴² The alternative, the Court declared, was to live in a police state. "Any other rule would undermine 'the right of the people to be secure in their persons, houses, papers and effects,' and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law."¹⁴³

Ignoring the dilemma between being "under the law" and a state where police "are the law," the Court in *King* distinguished *Johnson* on the grounds that it did not address exigent circumstances. Despite the factual similarities of a warrantless entry after smelling burning narcotics, the Court emphasized that the Government in *Johnson* "did not contend that the officers entered the room in order to prevent the destruction of evidence."¹⁴⁴

¹⁴⁰ *Id.* at 1864 (Ginsburg, J., dissenting).

¹⁴¹ 333 U.S. 10 (1948).

¹⁴² *Id.* at 14.

¹⁴³ *Id.* at 17.

¹⁴⁴ *King*, 131 S. Ct. at 1861 n.5.

This factual distinction leaves in place the dilemma *Johnson* presents: either the Court upholds a rule that requires a judge's intervention or we will live in a police state. One way out of this dilemma is through exigent circumstances that permit dispensing with the warrant requirement. By accepting the rule in the form of its exception, the Court can avoid affirming the police state. The danger with this *tertium quid* is that the relation between rule and exception is a delicate balance. The exception must remain exceptional.

Under *Johnson*'s dilemma, a constitutional framework that denies the priority of the rule "would obliterate one of the most fundamental distinctions" between the police state and "our form of government."¹⁴⁵ Yet, the exception is not at all exceptional in *King*. Indeed, it is difficult to determine what is rule and what is exception, as the Court admonishes: "[A] rule that precludes the police from making a warrantless entry to prevent the destruction of evidence whenever their conduct causes the exigency would unreasonably shrink the reach of this well-established exception to the warrant requirement."¹⁴⁶ Ordinarily, exceptions to well-ordered rules must be justified. After all, the rule is supposed to be the norm, and the exception the abnormal. But in *King* the Court protects the exception against "unreasonable" applications of the rule. Such analysis inverts the priority of rule over exception.

There are two ways of understanding the relation between exception and rule in *King*. First, one might ask whether the rule and exception are now inversely related, i.e., whether the Court's claim could be rewritten as: "An exception that forces the police to obtain a warrant . . . would unreasonably shrink the reach of this well-established rule allowing police to make a warrantless entry to prevent the destruction of evidence." Such an inversion clarifies what is norm and exception based on priorities and expectations of what takes precedence over the other—the need for a warrant or the need for discretionary flexibility. Second, one might conclude that to "unreasonably shrink" an exception is another way of saying that the rule simply has a narrower scope of application. Exceptions narrow the application of a rule, and that is all the Court is expressing: a limitation on the application of the rule. Textual evidence suggests something more like the former option is correct, since the Court concludes that, "the exigent circumstances rule justifies a warrantless search when the conduct of the police preceding the exigency is reasonable in the same sense."¹⁴⁷ The presence of exigent circumstances is no longer an exception,

¹⁴⁵ *Johnson*, 333 U.S. at 17.

¹⁴⁶ *King*, 131 S. Ct. at 1857.

¹⁴⁷ *Id.* at 1858.

but a rule unto itself.

To make a rule of exigent circumstances is to have come a long way from *Johnson*, not simply as a matter of doctrine, but also as a matter of constitutional meaning. For one thing, the Court emphasizes that the basic rule is governed by a resurgent notion of “reasonableness” such that “warrantless searches are allowed when the circumstances make it reasonable.”¹⁴⁸ Appearing in a number of recent cases, “reasonableness” is increasingly becoming the touchstone of Fourth Amendment doctrine, shifting emphasis away from strict adherence to the warrant requirement.¹⁴⁹ Other shifts are perceptible as well.

The Court in *Johnson* had firmly in view the constitutional requirement of “balancing the need for effective law enforcement against the right of privacy.”¹⁵⁰ In *King*, by contrast, privacy remains almost invisible. The word “privacy” makes an appearance only once in the majority opinion, when the Court summarily concludes: “This holding provides ample protection for the privacy rights that the Amendment protects.”¹⁵¹ Justice Alito does not explain the content of these privacy rights that the Fourth Amendment protects. Indeed, the grammar of this sentence is striking. Referencing “the privacy rights that the Amendment protects”¹⁵² is consistent with those rights being a null set. Whatever privacy rights the Amendment protects—if indeed it protects any—Justice Alito is confident that a rule authorizing discretion and flexibility for police to enter a private residence without a warrant provides ample protection. Consistent with Justice Alito’s failure to mention the value of “privacy” in his forceful dissent in *Arizona v. Gant*,¹⁵³ privacy, and the balancing it requires, is demonstrably on the wane.¹⁵⁴

¹⁴⁸ *Id.*

¹⁴⁹ See *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (“[T]he ultimate touchstone of the Fourth Amendment is ‘reasonableness . . .’”).

¹⁵⁰ *Johnson*, 333 U.S. at 14. The Court also makes clear that: “The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance.” *Id.*

¹⁵¹ *King*, 131 S. Ct. at 1862.

¹⁵² *Id.*

¹⁵³ 129 S. Ct. 1710 (2009).

¹⁵⁴ Another Fourth Amendment opinion that has emphasized the need to provide police with clear rules in light of the split-second decisions they have to make in enforcing the law is *Thornton v. United States*. 541 U.S. 615, 622–23 (2004) (“The need for a clear rule, readily understood by police officers and not depending on differing estimates of what items were or were not within reach of an arrestee at any particular moment, justifies” authorizing law enforcement flexibility.). Justice Stevens’s 5-to-4 majority opinion in *Arizona v. Gant* may come to look increasingly like a constitutional outlier, emphasizing as it does the need to balance privacy interests in searches incident to arrest near an automobile by examining how the issue “implicates the central concern underlying the Fourth Amendment—the

Eight members of the Court in *King* adhere to some version of increased salience for reasonableness, decreased emphasis on privacy, and refined focus on law enforcement flexibility to have available exceptions to doctrinal rules. Deprived of the robust articulation of privacy, liberty, and security that populate its earlier articulations in cases like *Johnson*, the Fourth Amendment's meaning has shifted.¹⁵⁵

B. KNOCK, KNOCK: CONSENT AND DEVIANCE UNDER THE EXCEPTION

In moving from a constitution whose “whole point” is to avoid “the dangers of a police state,”¹⁵⁶ to one whose meaning is limited by concern that courts might “unjustifiably interfere[] with legitimate law enforcement strategies,”¹⁵⁷ a new image of police–citizen encounters emerges. Under the innovations of Warren Court criminal procedure, Courts and scholars alike viewed the power imbalance that exists between the citizen and the police officer as informing constitutional meaning.¹⁵⁸ For the person on the street, such encounters could be fraught with danger because a local police officer retains discretionary power unrivaled by any other governing authority. An unpleasant interaction with other government officials might mean the inconvenience of a delayed issuance of a permit, forestalled resolution of a problem, or an unwanted imposition of a tax or fee. But an unpleasant interaction with a police officer can lead to arrest, strip search, “rough treatment,” and time in jail on grounds no more robust than “failure to comply with an order.”¹⁵⁹ The arbitrary authority all too present in daily

concern about giving police officers unbridled discretion to rummage at will among a person's private effects.” 129 S. Ct. at 1720.

¹⁵⁵ Justice Jackson, who wrote the majority in *Johnson*, stressed elsewhere that Fourth Amendment rights are “indispensable freedoms,” and that “[a]mong deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart.” *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).

¹⁵⁶ *Harris v. United States*, 331 U.S. 145, 171 (1947) (Frankfurter, J., dissenting).

¹⁵⁷ *King*, 131 S. Ct. at 1860.

¹⁵⁸ The Warren Court “revolution” led to what might still be described as an ongoing counterrevolution designed to change constitutional meanings originally proffered by Warren Court innovations. See, e.g., CRAIG M. BRADLEY, *THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION* 6–36 (1993); Carol S. Steiker, *Counter-Revolution in Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2468–70 (1996).

¹⁵⁹ It does not take much effort to find an abundance of stories like the story of Mr. Tuma, who was arrested in Washington, D.C., for expressing his views of the police, see Pepin Andrew Tuma, Op-Ed, *My ‘Crime’ on U Street? Offending the Police*, WASH. POST, Aug. 9, 2009, at C7, or the high-profile incident involving Henry Louis Gates, arrested at his own home, Abby Goodnough, *Harvard Professor Jailed; Officer Is Accused of Bias*, N.Y. TIMES, July 21, 2009, at A13. Incidents in New York City are reported in ELIOT SPITZER, ATT’Y GEN. OF THE STATE OF N.Y., *THE NEW YORK CITY POLICE DEPARTMENT’S “STOP & FRISK” PRACTICES: A REPORT TO THE PEOPLE OF THE STATE OF NEW YORK FROM THE OFFICE*

police practice pervaded academic discussion and the emerging constitutional meaning of criminal procedure.¹⁶⁰ That meaning focused on human dignity and personality as reasons to be free from invasive and arbitrary police encounters.¹⁶¹

There was a time when the Supreme Court admonished through an opinion by Justice Frankfurter that:

The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents¹⁶²

That same knock at the door has acquired a new constitutional meaning in *King*:

Citizens who are startled by an unexpected knock on the door or by the sight of unknown persons in plain clothes on their doorstep may be relieved to learn that these persons are police officers. Others may appreciate the opportunity to make an informed decision about whether to answer the door to the police.¹⁶³

Justice Alito's conception of a citizen's encounter with the police could scarcely be more different than Justice Frankfurter's view expressed a half-century earlier. For Justice Alito, no caution urged by "commentary of recent history"¹⁶⁴ informs the view that citizens might appreciate the choice necessitated by unlooked-for police intrusion at their doors.

Paving the way for Justice Alito's view, prior cases characterized encounters with police as consensual when police sought permission to search the bags of passengers on a bus traveling interstate, explaining that:

Police officers act in full accord with the law when they ask citizens for consent. It reinforces the rule of law for the citizen to advise the police of his or her wishes and

OF THE ATTORNEY GENERAL (1999), and in Deborah Sontag & Dan Barry, *Disrespect as Catalyst for Brutality: Challenge to Authority*, N.Y. TIMES, Nov. 19, 1997, at A1. See also HARCOURT, *supra* note 25, at 175–80.

¹⁶⁰ As Charles Reich noted, "Police questioning carries with it the inherent danger of any unchecked, unreviewable authority." Reich, *supra* note 42, at 1168; see also JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 229 (1966).

¹⁶¹ See *Miranda v. Arizona*, 384 U.S. 436, 460 (1966) (recognizing constitutional foundations of "respect a government—state or federal—must accord to the dignity and integrity of its citizens"); see also *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (applying the exclusionary rule to states because "without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom 'implicit in the concept of ordered liberty'"); Castiglione, *supra* note 5, at 661.

¹⁶² *Wolf v. Colorado*, 338 U.S. 25, 28 (1949).

¹⁶³ *Kentucky v. King*, 131 S. Ct. 1849, 1861 (2011).

¹⁶⁴ *Wolf*, 338 U.S. at 28.

for the police to act in reliance on that understanding. When this exchange takes place, it dispels inferences of coercion.¹⁶⁵

The majority in *King* relies on this case for the additional claim that encounters with police may be “cause for assurance, not discomfort.”¹⁶⁶ On this view, the authority and danger inherent in interactions with police disappear as police become like any other private citizen. Indeed, Justice Alito makes this view explicit, commenting that “[w]hen law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do.”¹⁶⁷ Such “common sense” social imaginary belies empirical research.¹⁶⁸ The act of knocking on a door may be an act “any private citizen might do,” but its social meaning—the official authority manifested by the police, the potential negative consequences for the citizen, or the pressures and expectations to comply—is far from what a knock by any other mere citizen might entail.

Such “common sense” reasoning reveals how much the Court’s new criminal procedure as inhabited by a social imaginary of the individual person who is capable of standing her ground with informed knowledge about her constitutional rights to police officers presumed not to present any threat of arbitrary action or arrest for whatever discretionary charge they may choose to make. Studies have shown the social imaginary for many citizens to be very different.¹⁶⁹

It is not enough to say that the alternative constitutional meanings, by contrast, have some empirical basis. *Miranda v. Arizona*, for example, had before it the Wickersham Report, academic studies, police manuals, and real examples of police abuse to illustrate the problematic interrogation conditions populating the Court’s social imaginary.¹⁷⁰ *King* references no

¹⁶⁵ *United States v. Drayton*, 536 U.S. 194, 207 (2002).

¹⁶⁶ *King*, 131 S. Ct. at 1861 (quoting *Drayton*, 536 U.S. at 204) (internal quotation marks omitted).

¹⁶⁷ *Id.* at 1862.

¹⁶⁸ Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 205 (discussing psychological studies that find that “people who are targeted for a search by police and informed that they have a right to refuse nonetheless feel intense pressure to comply and feel that refusal is not a genuine option”); see also Terry A. Maroney, *Emotional Common Sense as Constitutional Law*, 62 VAND. L. REV. 851, 915 (2009) (criticizing judicial reliance on “common sense” projections of how persons might feel or respond to particular circumstances).

¹⁶⁹ See Gould & Mastrofski, *supra* note 40, at 343 tbl.6 (reporting findings of large numbers of unconstitutional searches in everyday police practice); Bernard E. Harcourt, *Unconstitutional Police Searches and Collective Responsibility*, 3 CRIMINOLOGY & PUB. POL’Y 363, 366–68 (2004).

¹⁷⁰ *Miranda v. Arizona*, 384 U.S. 436, 445–58 (1966).

such evidence of what “[c]itizens . . . may be relieved to learn”¹⁷¹ in confronting police at their doors. Instead, the social meaning of the citizen–police encounter is in part a product of constructed constitutional meaning, not of background social facts. What a police encounter can mean for individual experience is constructed in light of the Court’s view that the Fourth Amendment does not interpose restrictions on consensual exchanges. It would be nothing new to criticize the Court for failing to consider empirical research necessary to construct an accurate picture of how citizens understand their encounters with police.¹⁷² Facts are not the issue. Interpretive meaning is. So too are competing social imaginaries.¹⁷³

It is worth pausing to note that the constitutional meaning of consent informing this social imaginary is the product of cases addressing the voluntariness of citizen–police encounters. So long as a person has not been seized within the meaning of the Fourth Amendment and is not otherwise coerced, the encounter is consensual. Noncoerced consent is present “[i]f a reasonable person would feel free to terminate the encounter”¹⁷⁴ Police need not inform individuals of their right “to decline the officers’ requests or otherwise terminate the encounter,”¹⁷⁵ leaving persons to their own devices to vindicate constitutional meanings in complex interactive settings.¹⁷⁶ This understanding of consent sanctions

¹⁷¹ *King*, 131 S. Ct. at 1861.

¹⁷² Although greater attention to empirical evidence might improve judicial decisionmaking processes in criminal procedure cases, my point is to call attention to the gap that exists between constitutional meaning and social meaning, which empirical evidence cannot fill. See Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 51 (1998); Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 12 (1998).

¹⁷³ As Taylor explains, social imaginaries include “the ways people imagine their social existence, how they fit together with others, how things go on between them and their fellows, the expectations that are normally met, and the deeper normative notions and images that underlie these expectations.” TAYLOR, *supra* note 78, at 23.

¹⁷⁴ *United States v. Drayton*, 536 U.S. 194, 201 (2002).

¹⁷⁵ *Id.* at 202 (quoting *Florida v. Bostick*, 501 U.S. 429, 436 (1991)); see also *Bostick*, 501 U.S. at 434 (citing *California v. Hodari D.*, 499 U.S. 621, 628 (1991)) (“So long as a reasonable person would feel free ‘to disregard the police and go about his business,’ the encounter is consensual and no reasonable suspicion is required.”); *Florida v. Royer*, 460 U.S. 491, 506 (1983) (refusing to offer a bright-line rule for consent because of the “endless variations in the facts and circumstances” of searches).

¹⁷⁶ The Court has declined in other situations to require police to inform individuals they are free to go. *E.g.*, *Ohio v. Robinette*, 519 U.S. 33, 39–40 (1996); *INS v. Delgado*, 466 U.S. 210, 216 (1984) (“While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response.”); see also Illya Lichtenberg, *Miranda in Ohio: The Effects of Robinette on the “Voluntary” Waiver of Fourth Amendment Rights*, 44 HOWARD L.J. 349 (2001).

police practices meant to elicit cooperation from individuals traveling on buses or subject to traffic stops where the dynamics of the interaction remain ambiguous.¹⁷⁷ As a result, voluntariness becomes a way to strike a balance between the needs of law enforcement and personal liberties.¹⁷⁸ On the one hand, it would be unduly constraining to forbid police from approaching individuals to seek information relevant to a criminal investigation or maintaining order. On the other hand, the Court must adhere to the idea that individuals remain at liberty to decline interaction with the police.

In constructing this balance, the Court also produces the conditions for understanding an interaction as voluntary. Voluntariness, or consent to interact with police, is not a natural kind waiting to be applied to constitutional contexts, but is itself a product of those contexts. Constitutional meaning—the way that Fourth Amendment doctrine creates the terms to be balanced and the outcomes of that balancing—thus both relies on and produces the social meanings and practices it purports to govern.

It is the police request that occasions the possibility that the individual might “appreciate the opportunity to make an informed decision”¹⁷⁹ about whether to interact, or continue to interact, with law enforcement officials, as Justice Alito suggests. It is the Supreme Court that places that request within constitutional meanings that play a role in constructing the social meaning. In turn, the social meaning of the citizen–police interaction is legible for the Court only in terms of its constitutional meaning—the police have discretion to seek evidence and citizens are expected to comply or confront uncertain risks (e.g., does the individual have a right not to cooperate that the police officer will respect?).

Police officers on a doorstep may “have a very good reason to . . . knock on the door with some force,”¹⁸⁰ and alerting residents “who [are] at their doorstep[s]” may be “‘cause for assurance, not discomfort” to those inside, as the *King* majority instructs.¹⁸¹ Moreover, the reasonable person

¹⁷⁷ See *Robinette*, 519 U.S. at 39–40 (“[S]o too would it be unrealistic to require police officers to always inform detainees that they are free to go before a consent to search may be deemed voluntary.”).

¹⁷⁸ See *Schneekloth v. Bustamonte*, 412 U.S. 218, 227 (1973) (“[The court must balance] the legitimate need for such searches and the equally important requirement of assuring the absence of coercion.”); Tracey L. Meares & Bernard E. Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733, 738 (2000) (“[T]he Court made ‘voluntariness’ a placeholder for an analysis of the competing interests of order and liberty . . .”).

¹⁷⁹ *Kentucky v. King*, 131 S. Ct. 1849, 1861 (2011).

¹⁸⁰ *Id.*

¹⁸¹ *Id.* (quoting *United States v. Drayton*, 536 U.S. 194, 204 (2002)).

who may feel assured and free to decline the officer's request for a colloquy "presupposes an *innocent* person"¹⁸²—someone with nothing to hide.¹⁸³

Under Justice Frankfurter's very different conception in *Wolf v. Colorado*,¹⁸⁴ the innocent person had no more reason to feel assured than the guilty one. The knock at the door for either, without judicially authorized authority, meant something different. It imparted a political meaning that expressed the significance of unwelcomed police presence in everyday life. The image of the assured citizen comforted by that same knock also imparts a meaning, one that signifies belief in the benevolent discretion of law enforcement authority exercised on behalf of order and security. Constitutional law under the former conception is meant to interpose a limitation on police practice, shielding the individual from unwanted intrusion. Constitutional law under the new conception expects proliferation of police-citizen encounters as a principal means of law enforcement practice aimed at maintaining social order. The "unwanted" encounter is not to be avoided through law, but rather facilitated, for the innocent person will appreciate the opportunity to "reinforce[] the rule of law"¹⁸⁵ through her interaction with law enforcement officials. The very idea that the encounter may be an "unwanted" intrusion is excluded from the majority's construction of the interaction. In construing the encounter as a source of comfort or assurance, the Court does more than mark the bounds of civility. It constructs an ideal image of a cooperative endeavor in maintaining order and controlling crime.

Although community policing as a means of maintaining order in urban areas may have experienced a doctrinal setback when the Court construed the antigang ordinance in *Chicago v. Morales* as vague and overly broad,¹⁸⁶ it has succeeded in projecting the identification of community and police into criminal procedure.¹⁸⁷ Because there is alignment of interest in securing the community against disorder and decay, the citizen and the police inhabit a relation of reciprocal trust.¹⁸⁸ The police officer is free to knock on the door, while the citizen is free "to make an

¹⁸² *Florida v. Bostick*, 501 U.S. 429, 438 (1991).

¹⁸³ On the dangers of basing Fourth Amendment doctrine on the attitude that one "has nothing to hide," see DANIEL J. SOLOVE, *NOTHING TO HIDE: THE FALSE TRADEOFF BETWEEN PRIVACY AND SECURITY* 21–32 (2011).

¹⁸⁴ 338 U.S. 25, 27 (1949) ("The security of one's privacy against arbitrary intrusion by the police . . . is basic to a free society.").

¹⁸⁵ *Drayton*, 536 U.S. at 207.

¹⁸⁶ 527 U.S. 41, 51 (1999).

¹⁸⁷ See Kahan & Meares, *supra* note 26, at 1154.

¹⁸⁸ See Kahan, *supra* note 53, at 101–02.

informed decision about whether to answer the door to the police.”¹⁸⁹ Doing what any other member of the community might do, police knock on the door as bearers of shared, not antagonistic, interests. As the Court instructed in *Drayton*, “[i]n a society based on law, the concept of agreement and consent should be given a weight and dignity of its own,”¹⁹⁰ implicitly addressing the contrary view that dignity and liberty are protected only through Fourth Amendment restrictions on police–citizen interactions.

Asking for and receiving consent is an interlocutory practice that falls outside the boundaries of criminal procedure. According to the Court, whether social psychology reveals the actual exercise of freedom to be illusory in light of the social structures in which it must operate is not an issue that matters to the legal structure of the police–citizen relation. Through this construction of social meaning, consent removes Fourth Amendment restrictions from the interaction, granting a different kind of constitutional significance to police practice, not as a threat to the liberty or dignity of persons, as Justice Frankfurter warned, but as the occasion for “agreement,” as Justice Alito imagines. Should this occasion lead to discord instead, then the Court, having already placed the encounter within a social meaning that erases the inequality of power, admonishes that the residents would “have only themselves to blame for the warrantless exigent-circumstances search that may ensue.”¹⁹¹

C. THE CITIZEN-CREATED EXIGENCY

Contrary to the doctrinal framework lower courts had developed, there can be no “police-created exigency.”¹⁹² There can only be citizen-created exigencies to which police must respond. Police create the context in which citizens may choose whether to affirm or refuse the requests placed upon them. Citizens, however, are not free to alter the context by choosing different responses altogether. If they attempt to do so, they risk authorizing actions otherwise unavailable to police. A threshold conversation implicates no criminal procedure prohibition, even as the Fourth Amendment constrains other actions police may be tempted to take. Without a warrant, the home is ordinarily inviolate to police searches, at least so long as the individual stays within the prescribed script of the police–citizen colloquy. Justice Alito, aligning the police officer with the private person, acknowledges that “whether the person who knocks on the

¹⁸⁹ *Kentucky v. King*, 131 S. Ct. 1849, 1861 (2011).

¹⁹⁰ *Drayton*, 536 U.S. at 207.

¹⁹¹ *King*, 131 S. Ct. at 1862.

¹⁹² *See, e.g.*, *United States v. Gould*, 364 F.3d 578, 590–91 (5th Cir. 2004); *United States v. MacDonald*, 916 F.2d 766, 772 (2d Cir. 1990).

door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door or to speak.”¹⁹³ What is more, “even if an occupant chooses to open the door and speak with the officers, the occupant need not allow the officers to enter the premises and may refuse to answer any questions at any time.”¹⁹⁴

When persons deviate from the script, they are responsible for changing the context. By choosing to change the context, they in turn invite police to diverge from the script in ways that open up new possibilities for actions otherwise regulated by the Fourth Amendment. In this way, what the Court identifies as the “so-called ‘police-created exigency’ doctrine,”¹⁹⁵ which lower courts had used to prohibit searches made in response to citizens who deviated from the interlocutory script, is really a *citizen-created exigency*.

As the Court construes the social situation, when police invite residential occupants to converse at the door, they create a context in which citizens may choose to speak with police or may choose not to open the door or to speak. If in response to the knock at the door, the occupants instead attempt to destroy evidence, they create a new context rejecting the proffered reciprocity. With evidence being destroyed inside, police, who sought only to engage in conversation at the home’s threshold, now face a circumstance made exigent entirely by the choices of those inside. In light of the citizen-created exigency, the Court withdrew the Fourth Amendment’s prohibition against warrantless searches of homes. Armed with probable cause but no warrant, police respond reasonably in light of the altered circumstances by entering a home uninvited and conducting a warrantless search to prevent further destruction of evidence.¹⁹⁶ As the Court explains, “[o]ccupants who choose not to stand on their constitutional rights but instead elect to attempt to destroy evidence have only themselves to blame for the warrantless exigent-circumstances search that may ensue.”¹⁹⁷ Because the occupants created the exigency, they bear the blame for the subsequent police response.

By withdrawing Fourth Amendment protection, the Court inverts the constitutional analysis inherited from majority opinions written by Justices Frankfurter and Jackson employing a different social imaginary with different constitutional meanings. “The knock at the door . . . without

¹⁹³ *King*, 131 S. Ct. at 1862 (citing *Florida v. Royer*, 460 U.S. 491, 498 (1983) (“[H]e may decline to listen to the questions at all and may go on his way.”)).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 1857.

¹⁹⁶ *Id.* at 1858.

¹⁹⁷ *Id.* at 1862.

authority of law but solely on the authority of the police” is no longer “to be condemned as inconsistent with the conception of human rights enshrined”¹⁹⁸ in the American Constitution. Instead, the “knock on a door” creates an opportunity for private persons to participate in a judicially constructed script.

An occupant can stay perfectly silent, refusing to answer the door, or the occupant can answer the door, thereafter making further decisions about whether to answer questions or decline further interaction. Otherwise permissible household activities may deviate from the expected script and take on a new social meaning entirely dependent on the subjective fears of law enforcement officers left waiting at the threshold. No matter how mouse-like quiet occupants are, any noise (or none at all) could lead police to fear destruction of evidence (being quiet as mice is very difficult, after all). Regular noises might include quickly flushing the toilet because a denizen has to exit the bathroom, where she was otherwise engaged in private activity, in order to answer the door. Other household noises would most certainly include the water-related noises the lady of the house might make when taking her “daily sauna and bath” as Justice Scalia described the paradigm of household privacy.¹⁹⁹ Of course, the occupants might also make noises because they are busy draining and flushing their stash and the police enter to discover their worst fears realized. Yet, under none of these circumstances is a warrantless, forcible entry not exigent.

How police officers interpret sound in light of their fears and beliefs determines the constitutional standing of the occupants—“solely on the authority of the police.” Police may not “create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment.”²⁰⁰ But so long as they do not make threats of this nature, “warrantless entry to prevent the destruction of evidence is reasonable and thus allowed.”²⁰¹ Because the police have a “need ‘to prevent the imminent destruction of evidence,’”²⁰² and because it would be unreasonable to shrink the scope of the exigency exception to the warrant requirement for home entries, the

¹⁹⁸ *Wolf v. Colorado*, 338 U.S. 25, 28 (1949).

¹⁹⁹ *Kyllo v. United States*, 533 U.S. 27, 38 (2001) (discussing the privacy intrusion of a thermal imaging device used to monitor activities within the home that “might disclose, for example, at what hour each night the lady of the house takes her daily sauna and bath—a detail that many would consider ‘intimate’”); see also Jeannie Suk, *Is Privacy a Woman?*, 97 GEO. L.J. 485, 488 (2009) (“This far-fetched figure of the imagination [i.e., the lady of the house] is apparently intended to evoke private acts that people care to hide from public view.”).

²⁰⁰ *King*, 131 S. Ct. at 1858. It is unclear what practical significance this apparent limitation on police conduct would ever have.

²⁰¹ *Id.*

²⁰² *Id.* at 1856 (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)).

Court defers to police interpretations of all they see, smell, and hear in light of their fears and wants. Under this dynamic, as Justice Ginsburg notes in dissent, police may simply “knock, listen, then break the door down, nevermind that they had ample time to obtain a warrant.”²⁰³ The exception becomes the rule.

Under the circumstances police faced in *King*, however, a different rule in this case would be just as easy: police may seek consensual encounters on their own authority, but must assume the risk that in doing so evidence might be voluntarily destroyed by the occupants within. If police choose to forego acquiring a warrant, they may knock on the door to seek consent to search but must bear the responsibility for a lost investigative opportunity if the occupant asserts his or her constitutional right not to answer. Assumption of risk is a familiar Fourth Amendment rationale. When a person shares information or private spaces with another person, she assumes the risk that the other person will reveal to authorities what is shared. As the Court has admonished, “It is well settled that when an individual reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities”²⁰⁴ Although the doctrine places all the risk with the private person, there is no reason why the Fourth Amendment cannot assign similar risks to law enforcement officials. Moreover, a rule assigning risk to police officers would be more consistent with the Court’s often-repeated sentiment that “the Fourth Amendment draws ‘a firm line at the entrance to the house.’”²⁰⁵ We are offered no explanation for why this rule does not vindicate Fourth Amendment principles better than one that allows police to do precisely what earlier Courts sought to prohibit.²⁰⁶ An explanation must be found in

²⁰³ *Id.* at 1864 (Ginsburg, J., dissenting).

²⁰⁴ *United States v. Jacobsen*, 466 U.S. 109, 117 (1984); *see also Crocker, supra* note 5, at 32–48.

²⁰⁵ *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (quoting *Payton v. New York*, 445 U.S. 573, 590 (1980)).

²⁰⁶ The opinion considers a related possibility—that police should be prohibited from entering when it is reasonably foreseeable that their actions would lead to destruction of evidence. The opinion’s response is puzzling. First, the Court announces that a rule that would place the burden on police would “unjustifiably interfere[] with legitimate law enforcement strategies.” *King*, 131 S. Ct. at 1860. The Court considers some of these strategies as reasons why police officers might want to delay seeking a warrant—for example, they may want to see if they can get consent to search so they do not have to bother with the burdens of a warrant. *Id.* No explanation is offered for why, when consent is not forthcoming, a rule requiring a warrant before kicking in the door would “unjustifiably interfere” with law enforcement. The Court then concludes from these considerations something that can only be charitably described as a straw-man argument: “Faulting the police for failing to apply for a search warrant at the earliest possible time after obtaining probable cause imposes a duty that is nowhere to be found in the Constitution.” *Id.* at 1861.

the constitutional meanings and priorities the Court presents. These meanings are more about constructing a vision of orderliness in which the authority of police is no longer seen as a risk to the security of a free society.

These order-maintenance meanings of criminal procedure prioritize the needs of law enforcement over the liberty of citizens. They do so by first constructing the social meaning of police-initiated citizen encounters in terms of consent and then by giving that meaning constitutional status. So long as police appear to respect the right of the citizen to decline to answer, then the Fourth Amendment does not apply. Second, if the police–citizen interaction deviates from prescribed scripts, the citizen will be held responsible for creating the exigent circumstance given social meaning in terms of the beliefs and desires of the police. Because the police want to gather information and evidence, and because the police fear the loss of access to each, the Court construes deviant citizen responses to be outside the Fourth Amendment’s protections. By staying on the judicially constructed script, the citizen ensures that other Fourth Amendment rules apply, but when deviating, the citizen changes both the context and the applicable rules. The interpretive paradox for the liberty of citizens is that ordinary household activity can be deviant based solely on the interpretive authority of police at the door. In this way, the exigent circumstances rule authorizes police to enter homes without a warrant based on their fear that inhabitants will destroy evidence—whether they in fact sought to do so. To limit access to the home in this way might “unjustifiably interfere[] with legitimate law enforcement strategies,”²⁰⁷ the Court observes.

Far from a constitutional limitation on police-created exigency, the real problem that triggers legitimate police authority is the citizen-created exigency. Only by prioritizing the order-maintenance choices of police to seek the colloquy in the first place can we arrive at the conclusion that citizens create the exigency by deviating from expectations of orderliness in how they dispose of their property in their own homes.

Third, the Court construes the implications of the threshold colloquy in terms that erode the distinction between the home and street. Where the Fourth Amendment is sometimes said to “draw[] a . . . firm but also bright” line,²⁰⁸ under the new criminal procedure, the line’s meaning is no longer

Of course, the Constitution does not require police to seek a warrant at the earliest possible time—but the “earliest possible time” is not the issue. The issue is the reasonableness of expecting police officers to have acquired a warrant before breaking open the door of a private residence. For *that* proposition, one can find a constitutional requirement that police seek a warrant—if, that is, one is looking.

²⁰⁷ *Id.* at 1860.

²⁰⁸ *Kyllo*, 533 U.S. at 40 (internal quotation marks omitted).

clear. Public activity is mostly transparent to police surveillance under the Fourth Amendment, whether by physical or electronic eyes. Only when monitoring enters the home does the Fourth Amendment bring a degree of opacity to police activity. In an important case, the Court held that monitoring the movements of an object on city streets could not be maintained once it entered a house.²⁰⁹ The Court drew a line between the public street and the private home. This “bright” line, however, darkens in light of important exceptions that extend police interests inside the home. As Justice Ginsburg asks in her *King* dissent: “How ‘secure’ do our homes remain if police, armed with no warrant, can pound on doors at will and, on hearing sounds indicative of things moving, forcibly enter and search for evidence of unlawful activity?”²¹⁰

The constitutional meaning of the home shifts in the process, becoming more like the public spaces over which police maintain social order. Privacy depends on background constitutional rules that give meaning to particular social practices. For example, the overnight guest in a person’s home has privacy expectations the Court is willing to recognize.²¹¹ What is accessible or transparent to police inquiry depends on what the Court finds already exposed to others.²¹² What is publicly available and what is visually transparent to surveillance cannot be private; the Court has made clear, “What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”²¹³ Public exposure extends to roads,²¹⁴ curbsides,²¹⁵ fields,²¹⁶

²⁰⁹ See *United States v. Karo*, 468 U.S. 705, 716 (1984) (“Indiscriminate monitoring of property that has been withdrawn from public view would present far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight.”).

²¹⁰ *King*, 131 S. Ct. at 1865 (Ginsburg, J., dissenting).

²¹¹ See *Minnesota v. Carter*, 525 U.S. 83, 90–91 (1998) (holding a temporary houseguest had no expectation of privacy); *Minnesota v. Olson*, 495 U.S. 91, 99 (1990) (holding that an overnight guest has a protected expectation of privacy because “[t]he houseguest is there with the permission of his host, who is willing to share his house and his privacy with his guest”).

²¹² See, e.g., *United States v. Miller*, 425 U.S. 435, 443 (1976) (holding information found on loan applications publicly exposed for Fourth Amendment purposes).

²¹³ *Katz v. United States*, 389 U.S. 347, 351 (1967).

²¹⁴ See *United States v. Knotts*, 460 U.S. 276, 281–82 (1983) (holding that when a person traveled on “public streets he voluntarily conveyed to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction”).

²¹⁵ See *California v. Greenwood*, 486 U.S. 35, 44–45 (1988).

²¹⁶ See *United States v. Dunn*, 480 U.S. 294, 304–05 (1987); *Oliver v. United States*, 466 U.S. 170, 179 (1984) (“[O]pen fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the

backyard greenhouses as seen from the air above,²¹⁷ conversations,²¹⁸ and shared spaces including the home.²¹⁹ In each of these cases, privacy is defeated by either the actions of the individual or the location of the place.²²⁰ By construing the actions of individuals inside the home as creating the exigent circumstances to which police must respond, the Court in *King* expands the domain transparent to police practice to include intimate details available to “prying government eyes”²²¹—or ears.

What appears more pressing to the Court—the prevalence of police control over public space through stops and frisks or the constraints criminal procedure places on police—creates constitutional meaning in relation to everyday social meanings and practices. Very different constitutional cultures are possible depending on whether the Court focuses on protecting the privacy and liberty of persons under the Fourth Amendment, or focuses instead on ensuring police access to well-established exceptions to doctrinal rules.²²² One case does not make a trend, but the emphasis placed on policing practice in *Kentucky v. King* is the product of doctrines developed over time under a perspective that prioritizes providing bright-line rules to regulate police.²²³ Moreover, the fact that the exigency exception operates upon the privacy of the home suggests how expansive the priority of order maintenance has become—from the disorderly spaces of public parks and sidewalks to the doorstep of the home. Although the Court does not talk in *King* explicitly in terms of order and security, it is unmistakable how far the idea of order over public space has come in arriving at the doorstep of the private residence.

cultivation of crops, that occur in open fields.”).

²¹⁷ See *Florida v. Riley*, 488 U.S. 445, 452 (1989).

²¹⁸ See *Hoffa v. United States*, 385 U.S. 293, 303 (1966) (“The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak.”) (quoting *Lopez v. United States*, 373 U.S. 427, 465 (1963)).

²¹⁹ See *Georgia v. Randolph*, 547 U.S. 103, 134 (2006) (Roberts, C.J., dissenting); *United States v. Matlock*, 415 U.S. 164, 171 (1974).

²²⁰ But see SLOBOGIN, *supra* note 75, at 108 (arguing that the Supreme Court is misguided in equating “Fourth Amendment privacy with the assumption-of-risk and public-exposure concepts”).

²²¹ *Kyllo v. United States*, 533 U.S. 27, 37 (2001).

²²² See Crocker, *supra* note 16, at 312–45.

²²³ See *New York v. Belton*, 453 U.S. 454, 458 (1981) (“Fourth Amendment doctrine, given force and effect by the exclusionary rule, is primarily intended to regulate the police in their day-to-day activities.”) (internal citations omitted).

IV. THE CONSTITUTIONAL NORMS OF ORDERLINESS AND THE FUTURE OF TECHNOLOGY

Changing technology, not simply changing doctrines, may open up intimate details of the home or our relations with others to prying government investigation.²²⁴ Even when the home is protected from advancing technology, as it was in *Kyllo*, the Court held that use of a thermal imaging device was a search “at least where (as here) the technology in question is not in general public use,”²²⁵ leaving open the future possibility of a different result if social practices change. In the face of other technological changes, such as the use of text messaging, the Court has responded with minimalist holdings,²²⁶ leaving open the question of future protections. In *City of Ontario v. Quon*, the Court refrained from ruling on the Fourth Amendment implications of official searches of text messages, reasoning that “[t]he judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear.”²²⁷

The case for caution may be warranted,²²⁸ but as we have seen, the relation between citizens and police does not evolve in a natural laboratory. Policing practices develop, along with purported “expectations of privacy,” in the shadow of Fourth Amendment doctrine. To withhold judgment, however, entails conceding that constitutional meanings will, at least for a time, follow policing practices, not lead them.

Justice Scalia’s majority opinion in *Jones* was minimalist as well, leaving undecided all the difficult questions that arise when police do not intrude on property rights by attaching a GPS device to a vehicle.²²⁹ And although more capacious in its embrace of the *Katz* framework of reasonable expectations of privacy, Justice Alito’s concurrence was also largely minimalist, distinguishing the presumptive constitutionality of “relatively short-term monitoring” from the constitutionally impermissible

²²⁴ See Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1083, 1131 (2002) (“Electronic surveillance, one of the most powerful technological law enforcement tools developed during the twentieth century, has profoundly increased the government’s powers. The Fourth Amendment, however, has stood by silently as this new technology has developed.”).

²²⁵ *Kyllo*, 533 U.S. at 34. Orin Kerr notes that the technology has changed, casting into doubt the holding in *Kyllo*. See Kerr, *supra* note 22, at 541.

²²⁶ CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 3* (1999) (defining minimalism as “the phenomenon of saying no more than necessary to justify an outcome, and leaving as much as possible undecided”).

²²⁷ 130 S. Ct. 2619, 2629 (2010).

²²⁸ See Kerr, *supra* note 89, at 808–09.

²²⁹ *United States v. Jones*, 132 S. Ct. 945, 954 (2012).

long-term warrantless monitoring in this case.²³⁰ Deferring to a future case all of the “vexing problems” of creating doctrinal rules to implement constitutional guarantees, Justice Alito’s concurrence hews closely to the facts in *Jones*.

Neither approach questions any of the order-maintenance conceptions of police practice on display the prior term in *King*. Two contrary scenarios become possible. In the first scenario, order-maintenance concepts accommodate the many ways that technology changes both what is visible and the very nature of interpersonal visibility. In keeping with these new forms of visibility, police are permitted discretion to use technology to enhance their ability to see the patterns of disorder lurking within the mosaic of everyday life, relatively unconstrained by Fourth Amendment values or doctrines. As a consequence of this judicial decision, what is judged properly visible to police changes the meaning and terms by which individuals understand their relation to other people. It also alters how they perceive and relate to state power. Under this view, persons cannot claim the protection of privacy rights because the prior meaning of visibility entails that no such rights are recognized for what is publicly revealed. Nor can they conceptualize these police practices in constitutional terms as impacting protected liberties. Pervasive police surveillance becomes a fact of social and political life even while it shapes social practices and expectations.²³¹ Norms of orderliness as constructed by police practices become the facts of everyday social life.

In a second scenario, rights to privacy and liberty remain highly salient to how the Court constructs technologically enhanced police practice and that construction’s meaning for interpersonal relations. Visibility is not given independent and determinative meaning outside of constitutional discourse. Rather, the Court constructs what is visible in light of background understandings of interpersonal privacy and associational liberty. Under this approach, what can be made visible through technology is not construed as transparent to state authority—at least without a stronger showing of state need in light of the constitutional values at stake.²³²

²³⁰ *Id.* at 964 (Alito, J., concurring in the judgment).

²³¹ Pervasive surveillance normalizes behavior not only through the disciplinary mechanism of observation, but also through actual police interventions to enforce the order that Wilson and Kelling contemplate. See FOUCAULT, *supra* note 71, at 213 (“[The police are] an apparatus that must be coextensive with the entire social body Police power must bear ‘over everything’ . . . ‘everything that happens’; the police are concerned with ‘those things of every moment’”) (citation omitted); see also Cohen, *supra* note 19, at 186 (“Surveillance in the panoptic sense thus functions both descriptively and normatively.”).

²³² Such a demonstration of need can be manifested through warrant requirements or other proportionality tests. See SLOBOGIN, *supra* note 75, at 23–47; Slobogin, *supra* note 21,

Constitutional meanings given to criminal procedures shape everyday practices, establishing expectations of constitutional order that in turn facilitate perceptions of legitimacy.²³³

The first scenario follows from the majority's opinion in *King* and Justice Scalia's minimalist opinion in *Jones*. The second follows from Justice Sotomayor's separate concurrence in *Jones* and Justice Ginsburg's dissent in *King*. As with all constitutional law, the future in part remains contingent on the Supreme Court's choice to construe constitutional values as constraining or facilitating state authority.

A. FROM *KING* TO AFTER *JONES*

Drawing parallels across doctrinal settings is hazardous. After all, the doctrinal takeaway from *King* is that the Fourth Amendment does not prohibit officers from knocking, listening, and entering a home without a warrant when they have probable cause to fear imminent destruction of evidence. And the doctrinal takeaways from *Jones* are that the Fourth Amendment prohibits electronic monitoring involving a trespass and that month-long electronic monitoring violates reasonable expectations of privacy. If one focuses on doctrine alone, these are unrelated cases. What makes *King* relevant to what happens after *Jones* is the background order-maintenance orientation to monitoring—whether at the door or from the police station. In each case, a particular conception of the appropriateness of monitoring private activities is at stake, even in the purported sanctity of the home. What is evident in *King* is a set of attitudes about the availability of policing practices, even if they are exceptions to doctrinal rules, that render the privacy and liberty interests of individuals invisible. In deferring to the discretionary needs and perspectives of police, the Court conceptualizes social practices as matters of consent or exercises of autonomy without regard to how the imposition of state authority changes the meaning of such encounters. These specific constitutional doctrines in *King* are ways of implementing background constitutional values, beliefs, and attitudes about constitutional priorities and meanings that have broader implications for the future of the Fourth Amendment's regulation of technologically-enhanced police surveillance.

The boundaries between public and private, like the conceptions of visibility and transparency, are fluid in light of the salience that order-

at 35–37.

²³³ Legitimacy scholars focus on what motivates individuals to comply with the law or to defer to police and focus less on how constitutional meanings shape background social imaginaries for both citizens and officials. See TOM R. TYLER, WHY PEOPLE OBEY THE LAW 3–5 (2006); Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231 (2008).

maintenance conceptions have in constructing constitutional doctrine. The primary difference between the two forms of monitoring at stake in *King* and *Jones* are time and distance. The appearance at the door in *King* is relatively short-term but close-up, strengthening the distinction that Justice Alito draws in his separate *Jones* concurrence between prohibited and permitted monitoring.²³⁴ Electronic monitoring will be from a distance, with varying duration. If the Court follows the policing perspective it takes in *King*, then only the most egregious forms of warrantless electronic monitoring will fail under the order-maintenance Fourth Amendment.

As we have seen from analyzing the order-maintenance orientation of *King*, three themes emerge, each realizing a relative absence of robust consideration of the constitutional values of privacy and liberty. The Court reinforces policing practices that depend on individual consent, relies on individual constitutional responsibility in asserting and vindicating constitutional values, and legitimizes police authority to control expanded conceptions of visible space. These doctrines facilitate order maintenance because they together afford police greater deference and discretion, prioritizing the policing perspective necessary to maintain order and define social meaning. They do not adopt, if it is even considered, the constitutional rights perspective of individuals subject to such practices.

First, the constitutional values and principles through which Fourth Amendment meaning is often expressed are completely absent. There is no announcement of the need to preserve privacy or promote the liberty of citizens to be free from intrusive government interference. Instead, the Court's construction of the issues is saturated by order-maintenance emphases on discretion for and deference to police priorities. As a consequence, the Court considers the practical implications of its doctrinal rule for everyday police practice, evincing impatience with judicial meddling that might "unreasonably shrink the reach of this well-established exception."²³⁵

Emphasizing reasonableness in police behavior over the formal warrant requirement,²³⁶ the Court's analysis depends on the perspective of police practice, not personal privacy. The *King* majority notes, "The

²³⁴ Recall that Justice Alito thinks "relatively short-term monitoring" is not a search under the Fourth Amendment, but long-term monitoring for one month is. *Jones*, 132 S. Ct. at 964 (Alito, J., concurring in the judgment).

²³⁵ *Kentucky v. King*, 131 S. Ct. 1849, 1857 (2011).

²³⁶ By emphasizing "reasonableness," the Court follows a view Akhil Amar has long advocated: "The words of the Fourth Amendment really do mean what they say." AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 3 (1997); see also Akhil Reed Amar, *Terry and Fourth Amendment First Principles*, 72 ST. JOHN'S L. REV. 1097, 1101 (1998).

calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving.”²³⁷ The constitutional meaning of reasonableness is itself determined by “allowance for” facts of contemporary police practice. Under order-maintenance priorities, what might be “unreasonable” is for courts to interfere with well-established discretionary police practices—an inversion of the issues that motivated earlier Courts to protect privacy against what they saw as an encroaching “police state.”²³⁸ Without considering how constitutional liberty and privacy might be impacted, the Court concludes that its decision in *King* “provides ample protection for the privacy rights that the Amendment protects.”²³⁹ When privacy appears in *Jones*, by contrast, it is Justice Sotomayor’s concurrence that explores how those values are connected to freedoms of expression and association necessary for democratic society.

When applied to emerging technologies, a constitutional analysis that omits constitutional values will cede control over the meanings of privacy and liberty to policing practice. What role technologies will play and what kinds of practices will be construed as transparently visible will be defined without the benefit of background articulations of the liberty and privacy at issue. Because technology enhances the quality and quantity of police surveillance at increasingly lower cost, absent constitutional oversight, many more practices of everyday life will become visible to police. Individuals will have the freedom from surveillance achievable through legislative process, but without the normative guidance of judicial constructions of constitutional values.

Second, the Court construes the central meaning of citizen–police interactions in terms of voluntary consent. Policing practice is therefore channeled into informal interactions designed to achieve its ends through means otherwise formally regulated. Obtaining consent, after all, “is simpler, faster, and less burdensome than applying for a warrant,”²⁴⁰ as the *King* Court explains. Relying on consent appears to respect individual autonomy. The individual chooses to disclose information or not. The individual chooses to answer the door or not. As Justice Alito surmises, sometimes individuals might appreciate the opportunity to make a choice whether to consent to police intrusion into their personal and private lives or not.²⁴¹ The autonomous, liberal self, on this account, is constitutionally

²³⁷ *King*, 131 S. Ct. at 1860 (quoting *Graham v. Connor*, 490 U.S. 386, 396–97 (1989)).

²³⁸ *Johnson v. United States*, 333 U.S. 10, 17 (1948).

²³⁹ *King*, 131 S. Ct. at 1862.

²⁴⁰ *Id.* at 1860.

²⁴¹ *Id.* at 1862.

protected so long as the constitutionally constructed and police-implemented social script is followed.

The meaning of the liberal self's choice, and the context and conditions of the choice, depend on how the occasion for choosing is construed both *ex ante* and *ex post* by the Court's constitutional doctrine—before by channeling police practices through doctrines that encourage low-cost investigative mechanisms such as stop and frisk or knock and talk, and after by construing a person's choice in light of the suspicions and justifications as seen from the police officer's perspective. The choices not to answer the door or to attempt to avoid a scene where the unwanted necessity of choice might be foisted upon an individual²⁴² are subject to police interpretation backed by judicial deference. Thus, autonomous choice does not arise from some idealized condition for liberal subjectivity, but emerges from contexts already suffused with constitutional and social meaning.

When applied to technology, engaging in consensual transactions with others renders a person vulnerable to pervasive surveillance. Under the logic of autonomous consent, when leaving a digital trace of these transactions and connections, persons cannot later complain that state officials collect and compile the available information. Technology leads to transparency. Moreover, consent becomes transitive. Individual transactional consent is easily transferred by third parties to state officials. Aided by new technologies, law enforcement can aggregate third-party information to create new informational assemblages that render greater patterns of an individual's everyday life transparent to observation.²⁴³

Third, the practice of individual constitutional responsibility is closely related to consent. Just as the Court relies on individual autonomy to define citizen-police encounters, constitutional responsibility and self-assertion defines how and when individuals realize constitutional liberties. Under a constitutional responsibility model, individuals are thought capable of asserting and vindicating their own constitutional rights without interposing doctrinal rules in the midst of the citizen-police colloquy. For example, police are not required to inform individuals that they are free to leave at the close of a traffic stop before engaging in further conversation that might require individuals to make further choices in light of police requests.²⁴⁴

²⁴² See, e.g., *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000) (“Allowing officers confronted with such [unprovoked] flight to stop the fugitive and investigate further is quite consistent with the individual's right to go about his business or to stay put and remain silent in the face of police questioning.”).

²⁴³ Police aggregation of data is often justified as necessary to assemble the mosaic pattern of underlying disorder. See COLE, *supra* note 17, at 20–21.

²⁴⁴ See *Ohio v. Robinette*, 519 U.S. 33, 39–40 (1996) (“[It would] be unrealistic to

When it comes to third-party transitivity, individuals have the power to keep information to themselves to avoid assuming the risk of further exposure. If individuals fail to take proactive self-help to withhold information or withdraw from commerce with others, then constitutional constraints do not afford them protection against subsequent police access. Or when police knock on the door, individuals need not answer or proffer assistance to police entreaties but, as Justice Alito claims, “have only themselves to blame for the warrantless exigent-circumstances search that might ensue.”²⁴⁵ By claiming that consent can be voluntary, even when there is an informational gap between what the individual knows and what criminal procedure permits, the Court places the burden of constitutional protection on the individual. As a conceptual, not an empirical, matter, the Court relies on the individual to know when it is appropriate under the Constitution to decline a police officer’s request to conduct a search or to obtain information.²⁴⁶

The problem technology creates is that the gap between personal knowledge and constitutional rule may recede ever further, such that self-help mechanisms become futile. Whether subject to four-pawed sense-enhancing technology²⁴⁷ or the more paradigmatic digital kind,²⁴⁸ the ability of individuals to assert constitutional rights depends first on there being a social encounter. Technology empowers police to obtain information from prior disclosures or through other means of visibility and transparency, obviating the need for interpersonal encounters. Thus, the occasion for constitutional self-assertion, even for the well-informed individual, may not arise. And even when one might attempt to take constitutional responsibility for shaping interactions with police, whether actual conditions for the exercise of autonomy exist depends on the shared background social and constitutional meanings that are at issue in the very

require police officers to always inform detainees that they are free to go before a consent to search may be deemed voluntary.”).

²⁴⁵ *King*, 131 S. Ct. at 1862.

²⁴⁶ *See, e.g.*, *Florida v. Bostick*, 501 U.S. 429, 434 (1991) (“So long as a reasonable person would feel free ‘to disregard the police and go about his business,’ . . . the encounter is consensual and no reasonable suspicion is required.”) (quoting *California v. Hodari D.*, 499 U.S. 621, 628 (1991)).

²⁴⁷ *See Florida v. Harris*, 133 S. Ct. 1050, 1058–59 (2013) (holding that training records can establish a dog’s reliability for purposes of probable cause); *Illinois v. Caballes*, 543 U.S. 405, 409 (2005) (“[T]he use of a well-trained narcotics-detection dog—one that ‘does not expose noncontraband items that otherwise would remain hidden from public view,’ . . . during a lawful traffic stop generally does not implicate legitimate privacy interests.”); *United States v. Place*, 462 U.S. 696, 707 (1983) (“[T]he canine sniff is *sui generis*.”).

²⁴⁸ *See United States v. Miller*, 425 U.S. 435, 443 (1976) (finding no expectation of privacy in bank records).

framing of the question of consent. As technology changes, the nature of encounters with law enforcement officials—up close or at a distance—might not reveal their constitutional status until any opportunity for self-help has already passed.

In addition to these three doctrinal foci, the future meanings of criminal procedure, as constructed by order maintenance and technology, will develop against a broader background of national security surveillance. Though not always discussed in post-9/11 criminal procedure cases, national security considerations may never be very far in the background.²⁴⁹ In *Jones*, Justice Alito's concurrence alludes to investigations of "extraordinary offenses" to which the Fourth Amendment would not apply,²⁵⁰ and Justice Scalia's majority opinion explicitly asks whether electronic monitoring would be forbidden in a six-month-long terrorism investigation.²⁵¹ Emphasizing flexibility, uncertainty, and the need for split-second judgments in situations not contemplated by either "emergency assistance" or "hot pursuit" allows police room to maneuver when security-related matters are at issue. Whether responding to the extraordinary or the unexceptional situation, order maintenance enables police to have expanded control over visible space.

Because order maintenance fits well with national security surveillance, the two policing perspectives will be mutually reinforcing. Order maintenance builds connections from the quotidian examples of disorder to the prospects of protean social relations. If we can control the minor, we might forestall the major manifestations of social disorder. Likewise, the strategy of the new national surveillance state is to find the threatening pattern amidst incidental details of everyday life. Somewhere in the vast mosaic of the everyday movements that people make are clues to the next terrorist attack. Just as order maintenance does more than punish minor offenders, sweeping into its reach vast numbers of innocent incidents of everyday life, national surveillance requires developing digital dossiers on millions of people who will never become terrorists, though they may cheat on their taxes. In this way, national surveillance becomes the mirror for order maintenance. Looking to prevent the next major terrorist attack, national surveillance empowers government with knowledge about many

²⁴⁹ See William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2160 (2002) ("Like the war on drugs before it, the war on terrorism is likely to leave us with a different law of criminal procedure than we had before."). The meanings of consent and voluntariness have shifted in terrorism prosecutions as well. See Wadie E. Said, *Coercing Voluntariness*, 85 IND. L.J. 1, 2–3 (2010).

²⁵⁰ *United States v. Jones*, 132 S. Ct. 945, 964 (2012) (Alito, J., concurring in the judgment).

²⁵¹ *Id.* at 957.

other, and much less significant, potential legal violations. Similarly, looking to prevent more socially disruptive violent crime, order maintenance focuses on attacking the development of such crime at its purported source—in the everyday life of communities subject to minor disorder.²⁵² A transformation in constitutional meaning was well underway prior to the onset of the “war on terror,” but the emphasis on the ordinary incidents of public order matches well the widely dispersed surveillance imperative to “report anything suspicious to your local law enforcement official.”²⁵³

B. ORDER AND CONSTITUTIONAL VALUES

Because the aim of policing complex disorder is to aggregate information from the mosaic of everyday life, future application of constitutional constraints will have to address the nature of this new kind of policing and its new technological tools. The challenge is to reconsider the doctrines that make it difficult to analyze the aggregate social harm perpetrated by pervasive and comprehensive electronic monitoring.²⁵⁴ To do this, the Supreme Court will have to attend to the constitutional harms unchecked electronic monitoring imposes on the political liberties protected by both the First and the Fourth Amendments. As Justice Sotomayor’s *Jones* concurrence recognizes, the power to monitor personal movements secretly is the power to use a panoptic perspective to acquire comprehensive knowledge about personal beliefs and associations. Such knowledge becomes power to chill the enjoyment of these constitutional freedoms.

Justice Alito’s *Jones* concurrence recognizes that “society’s expectation has been that law enforcement agents and others would not—

²⁵² Balkin and Levinson make a similar point about the potential cooperation between national security agencies pursuing data collection and local law enforcement. If such information were shared, “criminal law enforcement will be transformed into increasing surveillance of ordinary Americans to prevent not only the most serious threats to national security, but also to everyday crimes, including perhaps misdemeanors and administrative infractions.” Jack M. Balkin & Sanford Levinson, *The Rehnquist Court and Beyond: Revolution, Counter-Revolution, or Mere Chastening of Constitutional Aspirations? The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 *FORDHAM L. REV.* 489, 525–26 (2006).

²⁵³ After 9/11, the Court provided even greater deference to police interpretations of otherwise innocent conduct, indicating awareness that policing practice requires flexibility if police are to find suspicion in the innocuous. See *United States v. Arvizu*, 534 U.S. 266 (2002); see also Stuntz, *supra* note 249, at 2157.

²⁵⁴ See Priscilla J. Smith et al., *When Machines Are Watching: How Warrantless Use of GPS Surveillance Technology Violates the Fourth Amendment Right Against Unreasonable Searches*, 121 *YALE L.J. ONLINE* 177, 201 (2011).

and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual’s car for a very long period.”²⁵⁵ Coming, as it does, after Justice Alito has already diagnosed the problem of circularity in protecting expectations of privacy, this recognition does not connect the problems of the duration and substance of the monitoring to any constitutional values beyond social expectations. To be sure, recognizing the privacy limitations to aggregation and recording of all a person’s movements is a necessary first step. But one step is not enough. To take the second will require further inquiry into the constitutional meanings that connect the Fourth Amendment to broader constitutional values.²⁵⁶ As Justice Sotomayor recognizes, if privacy is construed to mean secret, then privacy protections will not apply to the political liberties protected by the Constitution.

In light of the conceptual and attitudinal hurdles *King* presents to the Fourth Amendment after *Jones*, the question is whether the sheer volume of information available through means of electronic surveillance will reorient judicial understandings to restrict police discretion in the name of those constitutional norms “basic to our free society.”²⁵⁷ Such oversight will require reaffirmation of constitutional norms readily apparent in a criminal procedure focused on protecting constitutionally guaranteed personal freedoms.²⁵⁸ Justice Sotomayor goes further in her separate concurrence in *Jones*, indicating that the Court might have to reconsider its third-party doctrine.²⁵⁹ Having in focus the liberties “basic to a free society” will lead to different outcomes than decisions that focus on the order-maintenance and security interests of policing practice.²⁶⁰ Such a judicial vision will do so because, rather than the harms to policing practice that might occur from imposing constitutional constraints, the Court would have in view the harms of electronic monitoring to a democratic society.

If knowledge of the state one occupies is the first step to change, then awareness of how far the Court has come in affirming a constitutional culture premised on the order-maintenance needs of police may itself

²⁵⁵ *Jones*, 132 S. Ct. at 964 (Alito, J., concurring in the judgment).

²⁵⁶ See Crocker, *supra* note 16, at 371–78.

²⁵⁷ *Wolf v. Colorado*, 338 U.S. 25, 27 (1949).

²⁵⁸ To this end, Justice Sotomayor’s separate concurrence in *Jones* is significant because it recognizes that “unfettered discretion” can “alter the relationship between citizen and government in a way that is inimical to democratic society.” 132 S. Ct. at 956 (Sotomayor, J., concurring) (citation omitted).

²⁵⁹ *Id.* at 957. Many scholars have called for abandoning the third-party doctrine. See, e.g., Solove, *supra* note 23, at 753.

²⁶⁰ See generally SOLOVE, *supra* note 183, at 207 (“Security and privacy often clash, but there need not be a zero-sum tradeoff. There is a way to reconcile privacy and security . . .”).

provide cause to reconsider further intrusion of “a too permeating police surveillance.”²⁶¹ But reconsideration can only occur by seeing the Fourth Amendment as protecting values of privacy and liberty that are given robust consideration despite the constant pressure to facilitate police practices.

An implicit premise of this Article is the claim that the Fourth Amendment should be understood to do more than facilitate the order-maintenance practices of local police. It should regulate all electronic monitoring, even if it does so permissively. The Fourth Amendment should be read alongside the First Amendment and the Due Process Clause as having a primary aim of protecting political liberty.²⁶² The aim here has been to engage critically the Court’s doctrinal positions as displayed in *King* in order to understand better the conceptual and normative hurdles to be overcome after *Jones*. The primary question is one of constitutional orientation and availability. A constitutional order focused on police practices aimed at protecting the public order will not lead to greater protections against pervasive police surveillance. By contrast, a constitutional order that acknowledges that privacy means more than secrecy, that liberty protects interactions with others from unwarranted monitoring, and that the interactions between citizens and police shape political practices in a democratic society, will lead to renewed application of constitutional meanings of criminal procedure in people’s everyday lives.

V. CONCLUSION

A constitutional order is a form of social order as well. It is one derived from constitutional meanings implemented in the everyday lives of the governed and governing alike. These meanings help organize our politics.²⁶³ They also organize the interactions between citizen and police. Whether police practices will have a permeating presence in American lives is a question the Constitution must be construed to answer. It may turn out that the duration and intensity of electronic surveillance will remain unconstrained by the Supreme Court’s construction of constitutional criminal procedure. The vexing problems of interposing constitutional constraints on everyday police practices may prove too daunting.²⁶⁴

By focusing on the order-maintenance priorities of police, as *King* illustrates, the future after *Jones* may depend more on the political involvement of citizens in the legislative process. But it may turn out that

²⁶¹ *United States v. Di Re*, 332 U.S. 581, 595 (1948).

²⁶² *See Crocker, supra* note 16, at 371–78.

²⁶³ For versions of this claim, see BALKIN, *supra* note 15, at 61–72, 177–79, 243–47; MARK TUSHNET, *WHY THE CONSTITUTION MATTERS* 17 (2010).

²⁶⁴ Or as Professor Kerr argues, a “Pandora’s Box.” *See Kerr, supra* note 11, at 353.

Justice Ginsburg's dissent in *King* and Justice Sotomayor's concurrence in *Jones* draw further support for viewing Fourth Amendment protections in the context of the Constitution's pervasive protections for political liberty. By focusing on how electronic searches for complex disorder amongst the mosaic of everyday life impact expressive and associational freedoms in addition to "the right to be let alone"²⁶⁵ under the Fourth Amendment, as Justice Brandeis suggested, the future after *Jones* may unfold in light of new constitutional meanings of criminal procedure the Court develops.

As we have seen, the doctrinal standpoint of *King* stands in stark contrast to the view of *Johnson*, which warned of the excesses of the police state more than a half-century earlier. Where once the idea of the police state was something to be avoided, many of the elements of policing practice that comprise such a state have been embraced within the meaning of the Fourth Amendment, motivated in part by the prevalence of the theory and practice of order-maintenance policing. Such a transformation is remarkable and attests to the power of two ideas—intolerance of public disorder and the importance of maintaining everyday security. The current meanings of criminal procedure are not simply a matter of constitutional doctrine, but are products of social and political practices that prioritize the role of police in everyday life. In this way, the Constitution can come to mean what the doctrines of criminal procedure say it means with respect to policing practices and priorities.²⁶⁶ What counsels caution in how far we embrace an extension of order-maintenance constitutional meanings and the practices they enable is that retrenchment is difficult if Americans find they no longer support the doctrines that impact their everyday and political lives.²⁶⁷ The constitutional meanings of criminal procedure speak to the values of ordinary Americans no less than the priorities of their police.

²⁶⁵ *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

²⁶⁶ This claim differs from the claim that criminal procedure doctrines accurately reflect what the Constitution actually means, or should mean. On the separation between doctrine and constitutional meaning, see Kermit Roosevelt, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1655 (2005) ("[T]he rules courts apply in deciding constitutional cases do not necessarily reflect the underlying meaning of the Constitution."). See also Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 27 (2000); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978).

²⁶⁷ Justice Jackson has issued similar warnings about the entrenchment of constitutional meaning for governing practice: "But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image." *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

